

CAMBODIA LAW AND POLICY JOURNAL

ISSUE I, JANUARY 2014

Achieving Justice for the Survivors of Acid Violence in Cambodia

—*Sharon Beijer*

Bringing Domestic Cambodian Cases into Compliance with International Standards

—*Michael G. Karnavas*

Sign Up or Sign Off — Asia's Reluctant Engagement with the International Criminal Court

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Avenues to Improving Workers' Rights and Labor-Standards Compliance in a Globalized Economy

—*Matthew E. Silverman*

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THE CAMBODIA LAW AND POLICY JOURNAL

Eternal (2013). Painting by Asasax

The Documentation Center of Cambodia (DC-Cam) is pleased to announce Cambodia's first bi-annual academic journal published in English and Khmer: *The Cambodia Law and Policy Journal* (CLPJ). DC-Cam strongly believes that empowering Cambodians to make informed demands for change will strengthen the rule of law in Cambodia and other Southeast Asian countries. As empowerment for change requires awareness and dialogue, *CLPJ's* mission is to promote scholarship and discussion of urgent legal, social, and development issues facing the Southeast Asian region. *CLPJ* welcomes article submissions on these topics as well as more general discussion and commentary on human rights and transitional justice issues in post-conflict settings.

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ACHIEVING JUSTICE FOR THE SURVIVORS OF ACID VIOLENCE IN CAMBODIA

“Maybe if I had the whole money, the court would have followed up by law and keep her in prison.”¹

SHARON BEIJER²

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1 Acid burn survivor DR. In this article acid burn survivors are identified by their initials to maintain their privacy and safety.

2 The author previously worked for the Cambodian Acid Survivors Charity and has relied heavily on experiences, data and research acquired and provided by that organisation. However, any opinions expressed in this article are solely those of the author and do not necessarily represent the views of the Cambodian Acid Survivor’s Charity.

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I. INTRODUCTION

On August 5, 2012, three months after their divorce, after repeated requests to take him back and threats to take away their children, 49-year old BS waited for his former wife, NS, to leave the home of a friend she was visiting. The moment NS came out, BS threw battery acid over her, causing severe burns to her face, neck, chest, back, shoulder and right eye. She will have to live with the scars of this attack for the rest of her life. BS was arrested the next day and held in pre-trial detention until the start of his trial. In January 2013, the Phnom Penh Municipal Court sentenced BS to five years imprisonment and the payment of a 10 million riel (\$2,500) fine to the State for using intentional violence with acid. The sentence imposed on BS is the maximum allowed for the crime he was charged with, “intentional violence” under article 20 of the Law on the Management of Strong Acid (the “Acid Law”).

Two years ago on January 11, 2012,³ the Acid Law entered into force. It was designed to justly cope with a recurring phenomenon that has had a disastrous effect on many lives in Cambodia: attacking people by throwing acid on them. Acid attacks are a pre-meditated form of violence that leaves victims physically, socially and emotionally scarred.⁴ Acid attacks usually don’t kill, but always lead to severe

3 The law was passed on November 4, 2011 and promulgated by King Norodom Sihamoni on December 21, 2011.

4 See generally Cambodian Acid Survivors Charity (“CASC”) website, at www.thecasc.org.

injuries and suffering from continuous physical pain, economic struggle, social isolation and depression.⁵

The BS prosecution can be described as remarkable for several reasons. First, the fact that the perpetrator was arrested was in itself quite exceptional. The time span of the entire process from attack until verdict took place was also relatively short. Finally, this was the first case of acid violence in which the suspect was charged and prosecuted under the new law.

In Cambodia, the survivors of acid violence usually don't see the prompt trial, sentencing, and imprisonment of their attacker. In most cases the suspect is never arrested, let alone convicted. Survivors are left with permanent physical and mental scars and no hope for justice and legal redress. A report published in 2010 by the Cambodian Acid Survivors Charity ("CASC"), in cooperation with the Cambodian Center for Human Rights ("CCHR"), highlights four major problems contributing to the prevalence of acid violence in Cambodia: access to acid, impunity for perpetrators, lack of post-emergency services and public perception.⁶ This article will explain all four issues, but will focus primarily on the "culture of impunity" surrounding acid violence in Cambodia. Data from CASC indicates that perpetrators are rarely brought to justice. Of the 41 legal cases CASC has been involved in during the last three years, only 11 have reached a final court verdict.⁷ Reasons can be found at all levels of the criminal justice process why perpetrators are not held accountable. As a consequence, survivors of acid violence are unlikely to have their attackers prosecuted and to obtain redress in the Cambodian courts. The quest for justice is difficult, sometimes even impossible.

This article focuses on the challenges acid-burn survivors face when trying to find justice. It looks into the phenomenon of acid violence, including its causes and possible consequences. Furthermore, it examines the current state of the legal system in Cambodia and its effect on acid-attack survivors' search for justice. Specific attention is given to the new Acid Law, an Acid Sub-decree⁸ that entered into force at the end of January 2013, and their impact to date.

5 See J. Welsh, *It Was Like Burning in Hell: A Comparative Exploration of Acid Attack Violence*, 32 CAROLINA PAPERS ON INT'L HEALTH, UNC GLOBAL 3 (Fall 2009), available at http://cgi.unc.edu/uploads/media_items/it-was-like-burning-in-hell-a-comparative-exploration-of-acid-attack-violence.original.pdf.

6 See CASC & CCHR, *Breaking the Silence: Addressing Acid Attacks in Cambodia*, at 36 (May 2010).

7 Data from CASC's legal unit. A final verdict means that a case cannot be further appealed (either because the time for appeal has passed or because the highest court in Cambodia, the Supreme Court, has issued a verdict).

8 Sub-decree on the Formalities and Conditions for Strong Acid Control, 13 OFFICIAL GAZETTE 1487 (Feb. 19, 2013) [hereinafter "Acid Sub-decree"]. An unofficial translation from Khmer to English was used for the analysis of this Sub-decree.

2. ACID VIOLENCE — A HISTORICAL SUMMARY

Acid violence is not a problem unique to Cambodia. Acid attacks against individuals are frequently reported in countries including India, Pakistan, Bangladesh, Nepal, Iran, Iraq, Uganda and Colombia.⁹ There have also been reports of individual incidents in the United States (“U.S.”), United Kingdom (“U.K.”), Germany, Russia, Belgium and Canada.¹⁰ Judging from the increasing number of reports of acid violence, it may seem this is a recent or new phenomenon. However, reports detailing the use of acid in a violent manner date back to at least the 18th century.¹¹ First manufactured on an industrial scale in England around 1750 when sulphuric acid became easily available in Europe and the U.S., people soon began using it for violent purposes.¹² There is a quote from a Glasgow periodical from the 1830s saying: “*The crime of throwing vitriol [sulphuric acid] has, we grieve to say, become so common in this part of the country, as to become almost a stain on the national character.*”¹³ However, by the mid-twentieth century acid attacks in Europe and the U.S. had almost completely disappeared. In contrast, reports of acid violence in other parts of the world, such as Asia and the Middle East, have increased since the late twentieth century.¹⁴

Acid violence and acid attacks are deliberate assaults on individuals or groups, often committed with the intention to maim, permanently disfigure, hurt, torture or kill the intended victim(s) and to cause extreme physical and mental suffering. The effects of acid violence can be devastating. Acid attacks usually do not lead to the death of the victim but always lead to immediate injury and excruciating pain, while longer-term consequences can include permanent disfigurement, scarring,

9 See Arturo Wallace, *Colombia Acid Victims Seek Justice As Attacks Spread*, BBC, May 30, 2012, available at <http://www.bbc.co.uk/news/world-latin-america-18246717>.

10 Chris Boyette, *Police: NY Man Attacks Daughter with Acid*, CNN, Sept. 2, 2012, available at <http://edition.cnn.com/2012/09/02/us/new-york-acid-attack>; Ciara Leeming, *Salford Acid Attack May Be Racially Motivated*, THE GUARDIAN, 26 Mar. 26, 2012, available at <http://www.guardian.co.uk/uk/2012/mar/26/salford-acid-attack-racially-motivated>; AFP, *Two Arrested in Rhineland Acid Attack*, Dec. 31, 2012, available at [http://www.thelocal.de/national/20121231-47057.html#](http://www.thelocal.de/national/20121231-47057.html#.URiOWPL74zk).URiOWPL74zk; CNN staff, *Russia's Bolshoi Ballet Director May Lose Sight after Acid Attack*, CNN, Jan. 23, 2013, available at <http://edition.cnn.com/2013/01/18/world/europe/russia-ballet-acid-attack>; Peter Allen, *Acid Victim Testifies Against Married Lover*, DAILY MAIL, Mar. 12, 2012, available at <http://www.dailymail.co.uk/news/article-2113939/Patricia-Lefranc-Acid-attack-victim-arrives-testify-married-lover.html#axzz2KZPWgunl>; David Trifunov, *Acid Attack in Canada Puts Woman into Coma*, GLOBAL POST, Aug. 29, 2012, available at <http://www.globalpost.com/dispatch/news/regions/americas/canada/120829/acid-attack-canada-tanya-st-arnaud-coma>.

11 See Welsh, *supra* note 5, at 21-25 (providing further information on acid violence in the past).

12 See L.V. Anderson, *Throwing Vitriol: When Did People Start Using Acid as a Weapon?*, SLATE, Feb. 4, 2013, available at http://www.slate.com/articles/news_and_politics/explainer/2013/02/history_of_acid_violence_when_did_people_start_throwing_vitriol.html.

13 *Execution of Hugh Kennedy*, 3-4 THE REFORMER'S GAZETTE 332 (Muir, Rowan & Co. 1831), available at http://books.google.com.kh/books?id=jDrhIzL3v2wC&pg=RA1-PA332&redir_esc=y#v=onepage&q=vitriol&f=false.

14 See Anderson, *supra* note 12.

pain and medical complications. In addition to medical and physical consequences, survivors and their family can be affected by a lifetime of social and mental problems and suffering.¹⁵ Attacks are usually committed as “a revenge attack for a perceived wrong doing.”¹⁶ Welsh states that there can be several explanations for acid attacks, including easy and cheap availability of acid, traditional perceptions of women, changing gender roles, media influences, feelings of shame or loss of face or honour, and the desire for revenge or retribution.¹⁷

Acid attacks are committed in both public and private places by throwing, spraying or pouring acid on victims’ faces and/or bodies. Examples include perpetrators throwing acid through open windows, breaking into houses at night and pouring it over their sleeping victims, and throwing it from moving motorbikes or at crowded places like markets. The face is usually targeted, with acid then dripping or running down the victim’s neck and chest to the rest of the body. Attacks are easily committed in public places such as markets and restaurants as acid does not necessarily look like a weapon; it is transparent like water and can seem harmless in a plastic bottle, making it inconspicuous to approach a victim while holding it. Also, acid attacks are “easy” to commit as the actual throwing of the acid does not make a sound and victims often do not immediately register what happened. Victims often initially think that hot water was poured on them before they come to the horrible realisation that it is acid. Furthermore, when an attack is committed in a public place it is easy for perpetrators to quickly disappear in the crowd or on a waiting motorbike.

2.1. Medical Consequences

When acid first makes contact with skin it gives a warm sensation similar to being in contact with hot water, but this soon turns into an increasingly painful burning feeling. If acid is not washed off with water immediately it will burn through the skin; melt away flesh, muscles and nerves; dissolve bone; and eventually lead to organ failure. Because of the soft tissues in the face, acid will quickly destroy eyes, eyelids, ears, lips, noses and mouths. Victims will be in agony until acid is washed away. After about 5 seconds of contact superficial burns will appear and 30 seconds of contact will result in full-thickness burns. Victims will actually suffer the most physical pain from superficial wounds rather than deeper burns, as deeper burns destroy the nerve cells. The more diluted or less concentrated the acid that is used in the attack, the less severe the damage will be to the skin and body.¹⁸

15 See *Breaking the Silence*, *supra* note 6, at 6.

16 Interview with Mr. Ziad Samman, CASC Project Manager.

17 See Welsh, *supra* note 5, at 2. Motivations behind acid violence are further explained below.

18 See *Breaking the Silence*, *supra* note 6, at 5.

In the immediate aftermath of an attack, victims are at risk of a multitude of medical conditions. Inhalation of acid vapours may cause breathing failure due to a reaction to the poison or the swelling of the lungs and airways. For weeks after an incident victims are at risk of infection from the open wounds, which can result in death if not treated with proper cleaning techniques and antibiotics. Furthermore, burned skin will die and turn black, resulting in severe scarring.

A major threat for victims of acid burns is the lack of quality and accessible medical care. In many developing countries victims of acid attacks do not have access to adequate healthcare and need to travel great distances to reach the nearest hospital or health centre, whereas acid burn treatment must commence without delay.¹⁹ Most government hospitals and private clinics in Cambodia do not offer the treatment acid burn survivors need, or provide the wrong treatment due to limited training and knowledge of burns, sometimes worsening the condition of the patient and the wounds. In Cambodia, there are only three hospitals that have a burn unit, all of which are located in Phnom Penh.²⁰ Due to the lack of nearby medical facilities in Cambodia, survivors travel to Vietnam to receive proper treatment — if they have the financial means. Another problem is the lack of long-term specialised follow-up care. At the moment CASC, in cooperation with the Children's Surgical Centre²¹ (“CSC”), is the only facility in Cambodia providing specialised medical follow-up for acid burns.²² CASC has heard of people turning to traditional healers for treatment (possibly because they cannot afford proper medical care), applying rubber on wounds, and covering wounds with banana leaves, leading to severe infection. The lack of required medical knowledge, expertise and equipment can result in a worsening of victims' condition and even death.

Acid burns can have serious long-term or even lifelong health consequences for survivors. These can include permanent blindness, partial visual impairment, hearing problems, loss of facial features, permanent scarring, contractions and deformities, mental suffering and handicaps.²³ According to the World Health Organisation (“WHO”), most burn injuries result in long and expensive hospital stays.²⁴ According to Dr. Ronald Hiles — a leading surgeon with more than twenty-five years of experience operating on acid burns — dead, burned skin should be removed within four or five days of an attack or new skin growth could cause

19 See P. Chatterjee, *Campaigns Against Acid Violence Spur Change*, 89 BULL. WORLD HEALTH ORG. 8 (2011).

20 These are Preah Kossamak, Calmette Hospital and the Sihanouk Hospital Centre of Hope.

21 See www.csc.org for more information on the Children's Surgical Centre.

22 See Interview with Dr. Vanna, doctor at the Children's Surgical Centre.

23 See *Breaking the Silence*, *supra* note 6, at 5.

24 See M. Peck, J. Molnar & D. Swart, *A Global Plan for Burn Prevention and Care*, 87 BULL. WORLD HEALTH ORG. 802 (2009).

lumps and deformities. In cases where the skin around the neck and armpit areas is burned, it must be removed to make movement possible in those areas. These types of physical impairments and lumps could hamper mobility and function and lead to handicaps.²⁵

Survivors of acid burns may require several staged surgical procedures over an extended period of months or years to prevent further damage and disabilities and to increase normal function.²⁶ Moreover, survivors often need on-going physical therapy to keep scar tissue flexible and elastic and improve movement. Survivors will also need skin grafts and pressure garments specifically tailored to their bodies. If the victim is a child, the consequences are even more severe. Because children are still growing they will need more staged operations than adults. Scars and skin grafts don't grow with the child — leading to problems with movement.²⁷ These necessary long-term operations cause survivors to pay high costs for medical care for years. Unfortunately, as Dr. Hiles explains, “*even with the best medical care, operations and post-surgery care the full restoration of facial features and movement is almost impossible.*”²⁸

Acid violence can also lead to nonphysical consequences, such as severe mental problems and psychological trauma.²⁹ Some survivors will need psychological help to cope with the trauma they have suffered. Survivors can suffer from post-traumatic stress, resulting in nightmares, anxiety, stress and depression.³⁰ Other symptoms include phobias or panic disorders, eating disorders, low self-esteem and substance abuse or neglect.³¹ These all require appropriate care provided by trained social workers and psychologists.

2.2. Non-Medical Consequences

Acid burns also affect survivors financially — particularly those from a lower-economic status. Survivors could become disabled to a degree where they are no longer capable of performing labour or are unable to find employment, as some employers refuse to hire people with disabilities. This will then affect their economic and financial situation.³² In cases where the main breadwinner (often the husband/father) is attacked, a whole family could suddenly be without anyone to provide for it. This could lead to the wife/mother being forced to take over the supporting role. According to a WHO report, when people of a lower-economic

25 See *id.*

26 See *Breaking the Silence*, *supra* note 6, at 5.

27 Interview with Dr. Ronald Hiles.

28 *Id.*

29 See *Breaking the Silence*, *supra* note 6, at 5.

30 See Peck, *supra* note 24, at 802.

31 See Welsh, *supra* note 5, at 20.

32 See *Breaking the Silence*, *supra* note 6, at 7; H. Shah, *Brutality by Acid: Utilizing Bangladesh as a Model to Fight Acid Violence in Pakistan*, 26 *Wis. INT'L L.J.* 1172, 1174 (2008-09).

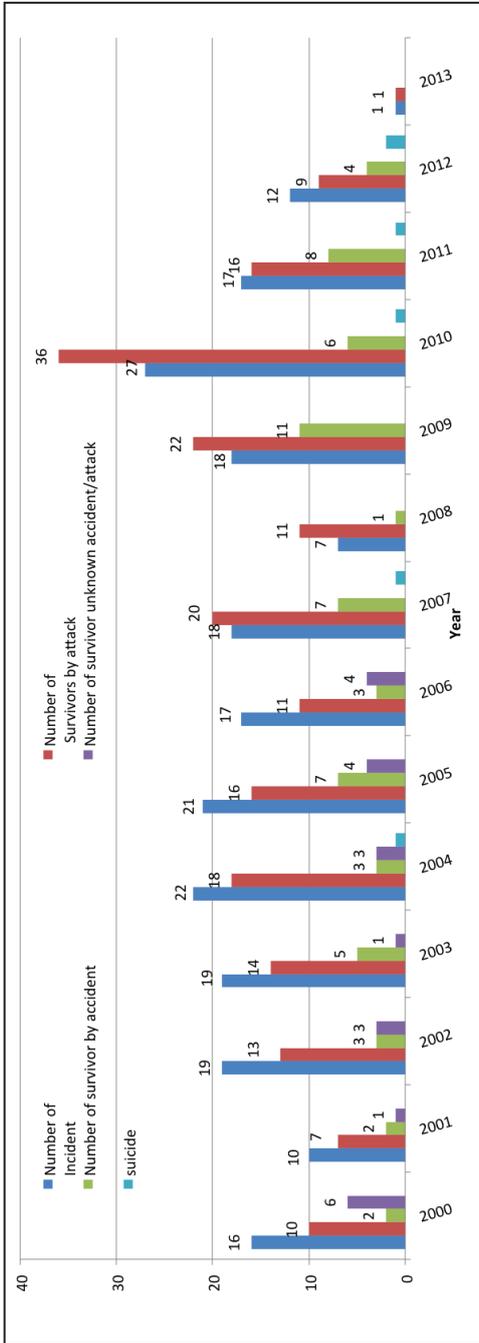


Figure 1. Number of incidents and survivors between 2000 and present. Courtesy of the CASC.

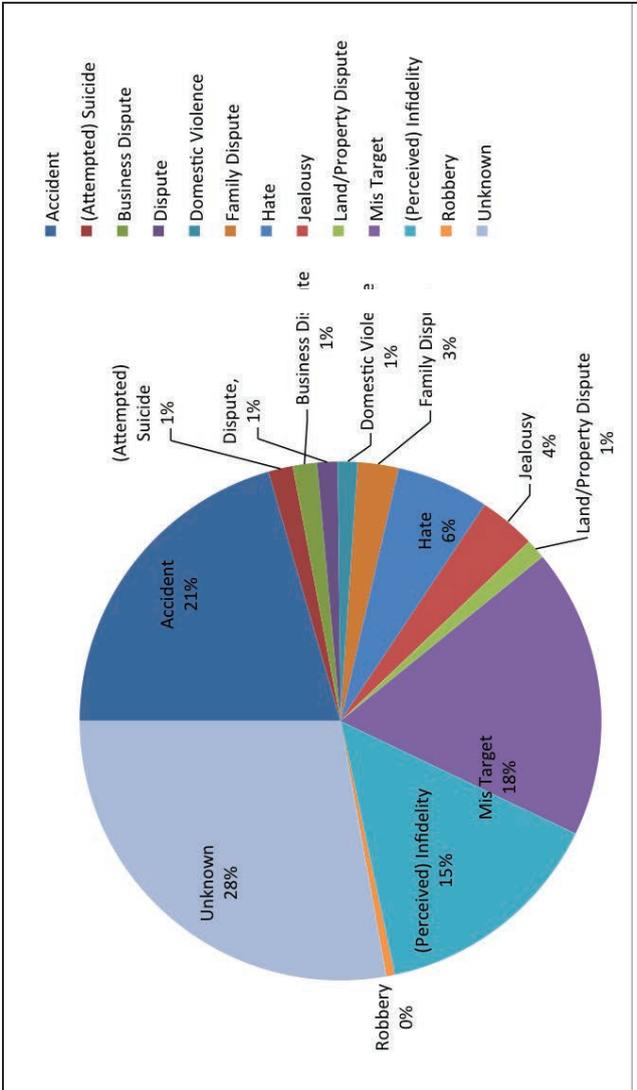


Figure 2. Motivations behind acid-related incidents. Courtesy of the CASC.

status receive burn injuries, their economic status deteriorates after recovery.³³

Disfigurement causes more than economic ramifications. It can also lead to social rejection, stigmatisation and exclusion from communities — even the survivor’s family network.³⁴ In some cases, communities reject the victim due to the physical disfigurements and handicaps, increasing his or her suffering, and leading to further social and economic marginalisation.³⁵ One example is CC, a Cambodian who was attacked with acid in 2008, leaving her blind and severely disfigured. Her neighbours don’t talk to her and call her “ghost.”³⁶ Likewise, in Bangladesh the scared faces of acid burn survivors are seen as a bad omen. As Bangladeshi society bases the “value” of a girl on her ability to “marry well,”³⁷ when an acid attack disfigures girls’ face and body, reducing their chance to marry, they become worthless in society’s opinion — and sometimes even to their family.

According to Ziad Samman, CASC Project Manager, family is the primary support network for acid burn survivors in Cambodia. A family’s willing to help will make a crucial difference for the recovery of a survivor. Unfortunately, in some cases survivors are seen as a burden to the family, either financially or socially, and the support system will fail, negatively impacting the survivor’s future. One female survivor wanted to have a restorative operation provided by CASC and CSC to improve her mobility. However, her family refused to give its permission out of fear that it would have to take care of her during the rehabilitation process. The mental suffering and social stigma of survivors may be two of the reasons perpetrators choose acid to wound their victims.

2.3. NGO Involvement

In many developing countries NGOs play a central role in supporting victims and combating acid violence, especially when governments are unable or unwilling to do so.³⁸ CASC, for example, is the only organisation in Cambodia that is specifically dedicated to assisting victims of acid violence and their relatives. CASC was established to respond to the lack of services and medical care available

33 See Peck, *supra* note 24, at 802.

34 See *id.*

35 See Shah, *supra* note 32, at 1187; D. Otis, *Healing Burns, Treating Physical and Mental Scars at the Cambodian Acid Survivors Charity*, SOUTHEAST ASIA GLOBE, Mar. 2013, at 44.

36 Interview with acid burn survivor CC.

37 Sital Kalantry & Jocelyn Getgen Kestenbaum, *Combating Acid Violence in Bangladesh, India and Cambodia*, Avon Global Center for Women and Justice and Dorothea S. Clarke Program in Feminist Jurisprudence. Paper 1 at 22, available at http://scholarship.law.cornell.edu/avon_clarke/1 (Jan. 2011).

38 See Welsh, *supra* note 5, at 43.

for acid burn survivors.³⁹ CASC provides four services: medical and psychological treatment; vocational training and social reintegration; legal assistance and advocacy for legal reform; and awareness raising, research, education and advocacy to eliminate acid violence.⁴⁰ All services provided to survivors of acid attacks and accidents are free of charge.

Worldwide, only a handful of national organisations exist that are dedicated to preventing acid violence and supporting the survivors of acid-related incidents. The most prominent ones are the Acid Survivors Foundation (“ASF”) Bangladesh, ASF Pakistan, ASF Uganda, ASF India, and Burns Violence Survivors Nepal (“BVS”).⁴¹ Globally, there is only one organisation that focuses specifically on acid violence: the Acid Survivors Trust International (“ASTI”).⁴² The fact that there are only a few national organizations and only one international organisation specifically working on this issue illustrates the lack of attention that is given to the phenomenon of acid violence. According to Chatterjee, before 1999 there was little attention paid to acid violence, but since the establishment of the ASF acid violence is increasingly featured on the political agenda.⁴³ Nevertheless, not much research has been done on this topic. Articles mostly focus on individual attacks, neglecting the underlying reasons behind acid violence and the difficult legal process acid burn survivors face.⁴⁴

3. ACID VIOLENCE IN CAMBODIA — FOUR CONTRIBUTORY FACTORS

A variety of factors contribute to the occurrence of acid-related incidents in Cambodia. Social, cultural, situational and even practical reasons may lead to acid being selected for an attack. However, not every incident is an attack and a significant number of acid-related injuries are caused by accidents. This section examines the scope of the problem and discusses factors leading to accidental or deliberate incidents with acid.

39 CASC was created by CSC, a health care facility providing free medical care to acid burn survivors. However, as a centre for general rehabilitative surgery, CSC was not able to meet the non-medical needs of acid burn survivors. Recognizing the need to assist acid burn survivors' efforts to recover and reintegrate into society, CSC created CASC to address the long-term physical, emotional social and economic needs of acid burn survivors.

40 For more information on CASC's work, see <http://www.thecasc.org>

41 For more information about these organisations, see <http://www.acidsurvivors.org> (Bangladesh); <http://acidsurvivorspakistan.org> (Pakistan); <http://www.acidsurvivorsug.org> (Uganda); <http://www.asfi.in> (India); <http://www.bvsnepal.org.np> (Nepal).

42 For more information on ASTI, see <http://www.acidviolence.org>

43 See Chatterjee, *supra* note 19, at 7.

44 See Welsh, *supra* note 5, at 5-6.

3.1. Statistics

CASC keeps a database of all recorded incidents in Cambodia involving acid that is updated with new cases and new information about older incidents. The first registered attack occurred in 1964 in Phnom Penh. At the time of writing, a total of 318 incidents and 401 individuals have been registered. This number includes 14 victims whose injuries were fatal and six (attempted) suicides. Of the adult victims, 160 are male and 176 are female. In addition, there are 29 boys and 32 girls under 13 known to CASC who have been injured by acid.⁴⁵

Most registered incidents — 224 — happened in the 2000s.⁴⁶ It has been difficult for CASC to obtain data from previous decades. There is no government department or organisation that has been consistently recording acid-related incidents. In fact, the Royal Government of Cambodia (RGC) approaches CASC with requests for information and statistics regarding acid violence and accidents.

CASC has classified acid-related incidents into 13 specific categories: “accident,” “(attempted) suicide,” “business dispute,” “dispute,” “domestic violence,” “family dispute” “hate,” “jealousy,” “land/property dispute,” “miss target,” “(perceived) infidelity,” “robbery,” and “unknown.”⁴⁷

As the data shows, there is a considerable group of incidents (27%) in which the motive (and in many cases the perpetrator) is “unknown.” Moreover, in 42% of the “unknown” cases it has not been possible to determine if the incident was an attack or an accident due to insufficient information obtained through third parties, newspapers or officials and the impossibility of contacting the survivor or his/her relatives.

A considerable percentage of incidents have been accidents. Of all survivors registered at CASC, 20.7%, obtained their injuries because of an accident. The high number of accidents and their causes show that acid is not only commonly present in households and many workplaces, but also that many people do not know how to handle this substance in a safe and appropriate manner. Acid is often transported improperly, placed within easy reach of children, and not properly labelled. As Samman states: “[P]eople need to know how to handle this dangerous substance. People do not recognize the extent of what this substance is capable of.”⁴⁸

Poor storage and transportation is a leading cause of accidents. Of the 61

45 All data mentioned comes from CASC records. In the CASC database, only people of 13 years and under are classified as children. Although the legal age of adulthood in Cambodia is 18, due to local customs, traditions and culture, it was decided to define as children those who have not yet entered puberty. To ensure correspondence with CASC data, this article also classifies persons under 13 as children and those above 13 as adults.

46 In 16 incidents it is unclear in which year the incident happened.

47 These are the categories used by CASC in the Acid Burn Survivors Database.

48 Interview with Mr. Ziad Samman, CASC Project Manager.

survivors who were injured in a private setting, 26% obtained injuries as a result of poor acid storage or transportation. Acid is stored in public places, in defective containers, in plastic bags or plastic water bottles. In at least seven cases someone mistakenly thought a bottle contained water and drank it, causing severe internal burns. There have been incidents of parents storing acid in plastic water bottles and children mistaking it for drinking water, people disposing acid with garbage where a child found it and obtained burns while playing with it, people transporting acid in plastic bags and getting involved in traffic accidents causing the bag to burst open on them, and people placing acid next to their bed and knocking it over while sleeping. Of all the accidents reported, 74% happened in a private setting and 25% happened during work activities or in a work environment. Most accidents, and the lifelong consequences of it, could have been prevented if proper safety and health standards had been followed.

In addition to attacks and accidents there are two more categories of incidents involving acid. Although the number is low in comparison with the two other categories, (attempted) suicides with acid also occur. According to available data, four people have committed suicide by drinking acid, while two others attempted to commit suicide but survived their attempt.

Acid is a liquid, leading it to splash around uncontrollably when thrown, injuring everyone in the near vicinity. As a result, a percentage of acid violence survivors are represented by so-called “miss targets.” Although miss targets occur during attacks they are examined in this section because the victims were not deliberately attacked. Regarding adult survivors, the percentage of miss targets is almost 20%, the highest percentage after the “unknown” category. The number of miss targets is high because acid does not discriminate. As discussed above, acid attacks are sometimes carried out in public and crowded places such as markets, which can result in multiple individuals being hit. When multiple people are driving on the same motorbike, a common sight in Cambodia, if acid is thrown at one person the other passengers will most likely be splashed with acid as well. There are several examples of attacks that led to a high number of miss targets. In March 2007 in Kampong Chhnang, a woman was the intended victim, but an additional five people who were nearby were also injured. In another case, a man tried to help when his mother was attacked with acid and his daughters suffered burns because they were sleeping next to her. By carrying the victims to the hospital the man also came in contact with acid and received burns to his neck, arms and torso. Tragically, despite his immediate response, his mother and one of his daughters died shortly after the attack as a result of their extensive injuries.

Adults do not account for all victims. Children are also victimised by acid

violence and acid-related incidents. The height number of children known to have sustained injuries because of acid — 61 — does not necessarily mean that children are being deliberately attacked. A considerable amount of children have obtained their injuries as a result of a miss target. In fact, miss targets disproportionately affect children. Acid splashes on them when it is thrown towards the intended victim, leaks on them when they are being held by a target, or falls on them when they are sleeping in the same bed as a target.

Of the 61 child victims, only one child was purposely doused with acid. All other children who have acid burns were either injured in an accident (41%), as a miss target (44.3%) and or for unknown reasons (13.1%). The only child who was deliberately attacked is 3-year old PRU. The perpetrator, his mother's former partner, ambushed his mother in their house, doused her with acid, then grabbed the boy and poured the remaining acid over his legs, scarring both of them for the rest of their lives.

There are also examples where a child was being held by an intended victim or was sitting on the same motorbike as an intended victim and the child's presence did not prevent the perpetrators from carrying out their crime. One example is now seven-year-old BC, who was three years old and sitting in front of her mother when her mother was doused with acid by two perpetrators. BC sustained severe injuries and burns to her head, face, neck and back, and will have to undergo many operations as she continues to grow.

An important point regarding the statistics of acid-related incidents is the high number of incidents that go unreported. According to Samman, it is difficult to speculate about the accurate nature and scope of acid-related incidents, but based on the experiences of an outreach missions, the currently registered cases could make up only 20% of the real number of incidents a year.⁴⁹ There are several reasons why incidents, both accidents and attacks, go unreported: people do not know who or what organisation to contact, they live in remote areas with little or no access to medical help and officials, they are ashamed and feel that they deserved what happened to them, they fear reprisals by the perpetrator, they lack the financial resources to seek medical care or they believe that they can treat the injuries themselves. Furthermore, because there is no official acid burn recording system in place, health providers will record burn injuries, but neglect to indicate the cause of these burns, thereby making it difficult to compile complete data.⁵⁰ Underreporting of incidents does not only happen in Cambodia; researchers estimate that in all countries where acid violence occurs its true extent is far greater

49 Interview with Mr. Ziad Samman, CASC Project Manager.

50 *Id.*

than what is currently documented.⁵¹ Underreporting not only leads to a false understanding of the scope of the problem; it also means that many survivors are not receiving suitable care.

3.2. Access to Acid and Its Consequences

The ease of access to acid in Cambodia undeniably has an impact on the number of acid attacks that occur.⁵² Acid is widely available and commonly used. Sulphuric acid is used in motorcycle batteries and in homes to produce electricity, hydrochloric acid is used at rubber plantations, and nitric acid is used for jewellery fabrication.⁵³ Acid is also used to dye garments and tan leather. One litre of acid costs approximately one dollar and is sold at markets and motor repair shops, making it not only easy to obtain, but also an inexpensive material that is legal to possess.⁵⁴ As the CCHR states, acid is something that people can acquire without attracting any attention.⁵⁵ Due to the wide availability and the many uses for acid in Cambodia, there are many families who have acid present in their homes or at their workplaces, making it an accessible and “easy” choice of weapon when one wants to harm another person.

Although acid is easily accessible, there is a major lack of awareness of its harms. Samman explains that in some cases perpetrators do not necessarily understand the consequences of acid, especially in cases of acid violence within the family unit.⁵⁶ One example is a woman who threw acid on her husband, thereby permanently blinding him. EK threw acid on her husband because he had a girlfriend. In an interview she explained that someone had told her that “acid will destroy the beauty”; she thought that meant he would become less attractive, but didn’t realise that it would happen because of extensive burns and scarring. EK stated that she did not realise the acid would burn, because “*when held [it] is not hot, hot water feels hot.*” She said that had known the effects of acid on a person’s face and eyes she would have never used it.

On the other hand, a large number of people do understand the effects of acid on skin — severe burns and deformities, immense pain and a lifetime of suffering — and select it as a weapon to achieve a desired effect. In a society where status is mostly still decided by appearance, and where peoples’ worth may depend on their

51 See Chatterjee, *supra* note 19, at 7; Welsh, *supra* note 5, at 31-32; S. Shackle, *Acid Attacks: “I Couldn’t Look at Myself, Let Alone Let Others Look at Me,”* NEW STATESMEN, Apr. 15, 2013, available at, <http://www.newstatesman.com/samira-shackle/2013/04/acid-attacks-i-couldnt-look-myself-let-alone-let-others-look-me>.

52 See *Breaking the Silence*, *supra* note 6, at 8. Email interview with CCHR staff.

53 See *id.* at 5.

54 See *id.* at 8.

55 Email interview with CCHR staff.

56 Interview with Mr. Ziad Samman, CASC Project Manager.

beauty, having deformities can be a death-sentence. As discussed above, individuals are judged and sometimes rejected by their families due to their acid injuries. In most countries, disfigurement can lead to a life as a social outcast. Several authors point out that acid is used precisely because it usually does not kill but disfigures.⁵⁷ It has been determined that in Bangladesh, Pakistan, and India men will attack women or girls with acid due to the social stigma survivors acquire after being burned.⁵⁸ Cohan draws a comparison between acid violence targeting women and honour killings, stating that acid attacks, like honour killings, are premeditated acts intended to “devalue” the victim. He claims that destroying someone’s appearance is used to disgrace the victim and family.⁵⁹

Although acid violence is usually seen as a premeditated act that is carefully planned and executed because someone has to buy the acid and then approach the intended victim, there are cases in which acid has been used in a fit of anger or passion. For example, a woman who threw acid on her husband told CASC’s legal staff: “*We were fighting and I was holding acid to change the battery, I got so mad at him that I threw it, but I didn’t do it because it was acid. If I was holding a knife I would have chopped [stabbed or hit] him with it.*”⁶⁰ Although this is likely a less common incident, the possibility that acid is not always purposely used, but becomes a weapon because it is readily available, must be acknowledged.

3.3. Perpetrator Impunity

Awareness that perpetrators of acid violence are seldom arrested and/or punished could also be a reason for the prevalence of attacks. This is not only the case in Cambodia. Other countries and authors note that in many cases perpetrators go unpunished.⁶¹ Reasons for this impunity include a lack of laws that provide for the possibility of prosecution and punishment, corruption, and lack of resources. Welsh states that impunity for perpetrators and instigators can teach others that some people deserve to be attacked with acid, and that perpetrators are not punished because their conduct is an appropriate reaction.⁶² According to Gollogly, due to the lack of serious repercussions in the past, acid violence is perceived as an acceptable means to solve disputes.⁶³ This leads to social acceptance of acid violence and perpetuates a culture of impunity.

57 See Chatterjee, *supra* note 19, at 7.

58 See Kalantry & Kestenbaum, *supra* note 37, at 3.

59 See J. A. Cohan, *Honour Killings and the Cultural Defense*, 40 CAL. W. INT’L L.J. 177, 198 (2010).

60 Interview with EK and CC, 333 (Aug. 2008), *supra* note 4.

61 See Kalantry & Kestenbaum, *supra* note 37, at 4; Shah, *supra* note 32, at I174.

62 See Welsh, *supra* note 5, at 53.

63 See J. Gollogly, S. Von Vath & A. Malmberg, *Acid Attacks in Cambodia: Serious Reminders of Personal Conflicts*, 2:4 ASIAN BIOMEDICINE 329, 333 (Aug. 2008), available at <http://abm.digitaljournals.org/index.php/abm/article/viewFile/197/116>.

Although in most countries acid violence is a type of gender violence,⁶⁴ I am of the opinion that acid violence in Cambodia is in fact not gender violence but “another” form of violence. This view is shared by Samman, who states that attacks are “*another shape and form of violence*[.]”⁶⁵ Acid violence in Cambodia cannot be associated exclusively with gender-based violence because women are not the only victims. A large number of acid burn survivors in Cambodia are in fact male. Men make up around 40% of all acid violence victims in Cambodia — demonstrating a marked difference between Cambodia and other countries where mostly women are attacked.⁶⁶ Moreover, when compared to other countries, there appears to be more motivations behind acid attacks than gender violence, for instance business disputes, property disputes and family problems. The CCHR agrees that Cambodia differs from most other countries based on the fact that the number of victims are almost evenly divided between males and females.⁶⁷

To partially explain the cause of acid violence in Cambodia towards both men and women, attention must be paid to Cambodia’s history and cultural and social norms. Cambodia is a country that has suffered from three decades of war, which has left not one family unaffected. In April 1974 the Communist Party of Kampuchea (CKP, commonly known as the Khmer Rouge) took power, renamed the country Democratic Kampuchea, and in their attempts to establish a complete agrarian society adopted policies that cost the lives of millions of Cambodians — either by execution or due to extensive forced manual labour combined with food shortages.⁶⁸ In January 1979, Vietnamese forces ousted the Khmer Rouge, leading to a period of occupancy by Vietnam and ongoing hostilities, especially along the Thai border regions. After the signing of the Paris Peace Agreements in 1991, the United Nations, through the United Nations Transitional Authority in Cambodia (UNTAC) mission, administered the first elections in decades, but the Khmer Rouge refused to disarm leading to tensions and renewed attacks.⁶⁹ Although the FUNCINPEC Party of Prince Ranariddh won the May 1993 election, it did not have a strong majority and was forced to form a coalition with the Cambodian People’s Party (“CPP”) headed by Hun Sen.⁷⁰ The new government did not bring

64 See, e.g., Welsh, *supra* note 5, at 54; Shah, *supra* note 32, at 1182, 1195; Kalantry & Kestenbaum, *supra* note 37, at 1-3, 16-17.

65 Interview with Mr. Ziad Samman, CASC Project Manager.

66 See CASC database. The fact that in most cases women are the victims of acid attacks has resulted in literature almost exclusively focusing on female victims while disregarding male victims of acid violence.

67 Email interview with CCHR staff.

68 See S. HEDER, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE, 3 (Documentation Center of Cambodia, Phnom Penh 2004).

69 See J. BRINKLEY, CAMBODIA’S CURSE, THE MODERN HISTORY OF A TROUBLED LAND 73 (Black Ink 2011).

70 See *id.* at 79-85.

immediate peace to Cambodia, with Khmer Rouge members continuing to commit attacks and the two ruling parties fighting among themselves. This situation cumulated in a “coup d’état” by Hun Sen in July 1997, through which he took full control of the government.⁷¹ He has remained Prime Minister since that time.⁷²

These wars and periods of conflict have not only reduced the number of men in comparison with the number of women,⁷³ but also resulted in a considerable number of Cambodians experiencing violence and death — possibly contributing to a society in which violence is perceived as acceptable.⁷⁴ A report on domestic violence in Cambodia identifies childhood experiences with violence as a significant risk factor for experiencing more violence later in life.⁷⁵ Interview evidence indicates that there are many Cambodians who as children were taught that violence should be used to resolve conflicts and later have a more tolerant attitude toward using violence to resolve conflicts.⁷⁶ According to this report, 30% of men and 26% of women say that acts like acid throwing can sometimes be acceptable.⁷⁷ Such childhood experiences could thus be part of the reason why people sometimes choose to attack with acid instead of using a less violent manner of conflict resolution.

The general view in Cambodia seems to be that if someone has wronged you, you may retaliate or take revenge in some form.⁷⁸ When combined with a lenient view toward the acceptability of violence to resolve conflict, acid becomes an easily obtained, affordable weapon that works very effectively if the goal is to “win” a fight or destroy someone’s life. From this perspective, acid is used primarily to take revenge on rivals or to settle scores, and not as a form of violence intended to hurt women specifically.⁷⁹

In conclusion, it is my opinion that in Cambodia acid attacks are not general committed as a form of gender violence, but due to a combination of factors that result in both female and male victims. These factors include the availability and accessibility of acid, (lack of) awareness of the effects of acid, and social and psychological issues.

71 See *id.* at 122-29.

72 The CPP prevailed electorally in 1998, 2003, 2008, and (controversially) in 2013.

73 See D. de Walqui, *Selective Mortality During the Khmer Rouge Period in Cambodia*, 31 *POPULATION & DEV. REV.* 351, 358 (June 2005).

74 See Welsh, *supra* note 5, at 13.

75 See Partners for Prevention (P4P) (an interagency initiative of UNDP, UNFPA, UN Women and UNV in Asia and the Pacific), *Deoum Troung Pram Hath in Modern Cambodia: A Qualitative Exploration of Gender Norms, Masculinity and Domestic Violence*, at 11, 30-31 (Phnom Penh 2010).

76 See *id.* at 39.

77 See *id.* at 78.

78 See Welsh, *supra* note 5, at 60.

79 See *Breaking the Silence*, *supra* note 6, at 1.

3.4. Public Perceptions

As discussed above, of all registered acid incidents, almost 63% were confirmed attacks, and the other incidents were accidents, suicides, or it is unknown whether they were deliberate attacks or accidents. A confirmed attack means that CASC was able to confirm (through survivor and witness statements, evidence and other documents) that the survivor was deliberately attacked with acid, either directly by a perpetrator or through an ordered assault.

The general perception among Cambodians appears to be that when someone is attacked with acid it must have something to do with infidelity or jealousy, such as extra-marital affairs, lovers' quarrels or romantic rejection. Another perception is that when a woman is attacked she must have been someone's mistress or extra-marital girlfriend.⁸⁰ Although it is true that these issues make up a portion of the attacks, the CASC has been able to distinguish seven additional motivations, showing that infidelity and jealousy are certainly not the only reasons for acid violence. In fact, for at least 26% of survivors, CASC's data confirms that they were not attacked due to jealousy or infidelity. Other reasons for attacks include disputes about ownership or land borders, rivalling families, competition between businesses, and burglaries. In one reported case, a man attacked his sister-in-law after she criticised him for selling his daughter. Thus, although jealousy and infidelity-related reasons make up a considerable portion of all acid attacks in Cambodia, they are not the only motives for this crime.

Another common perception in most countries where acid violence occurs is that victims must have done something wrong to deserve such a fate, for example because of faults in a previous life.⁸¹ The victim is blamed for what has happened to them. An example is a case where a 42-year old man and his 19-year old girlfriend were doused with acid while they were sleeping. The man's wounds were so severe that he succumbed to them. According to a report, the village chief commented that perpetrator was supposedly abused by the man, which could be seen as justifying the act.⁸²

There is another interesting difference between Cambodia and other countries where acid violence occurs: In a majority of registered cases in Cambodia the perpetrator is female. According to the data, at least 141 of all survivors (including intended victims and miss targets) were attacked by a woman or a woman ordered the attack.⁸³ Comparatively, at least 67 survivors were attacked by men or the attack was ordered by a man. Not counting the unknown cases, this means that in 67.8%

80 See *id.* at 4.

81 See Welsh, *supra* note 5, at 60, *Breaking the Silence*, *supra* note 6, at 4.

82 See CCHR, *Ending the Cycle of Impunity for Acid Crimes in Cambodia*, at 13 (May 2012).

83 Due to the way the statistics have been kept this number also includes "miss targets."

of cases the perpetrator or instigator behind an attack is female. This is interesting because in other countries the overall majority of perpetrators is male.⁸⁴ It is difficult to make solid statements accounting for this difference as there has never been a formal study on female perpetrators. Explanations can only be speculations. Samman affirms this, but says that in (perceived) infidelity cases one motivation for a female attacker wounding her partner may be to make him dependant as a means of gaining power and forcing him to stay with her.⁸⁵

In cases where women are the perpetrators or instigators behind an attack, revenge for (perceived) infidelity or jealousy is not necessarily the only motivation. Although romantic revenge might be the trigger, there can be other root causes. An important issue to note is that in Cambodian society many women are economically and socially dependant on their husbands.⁸⁶ Not having a partner can mean financial insecurity. If a wife finds out that her husband has a girlfriend whom he might be financially supporting, disfiguring the girlfriend with acid to break up the relationship could be seen a means to secure the wife's and her children's financial situation and social position. In this way, gender inequality could be a factor in acid attacks. An example from May 2005 illustrates this. A woman discovered that her husband had a girlfriend of eight years, and after repeatedly warning him to break off the relationship she decided to buy acid. One night the husband visited his girlfriend and when he came back home, he and his wife got into an argument and she threw the acid at him. Her explanation during an interview is interesting: "*It is not ok to have girlfriends. It would be ok if he went to prostitutes, but having a girlfriend is not ok.*"⁸⁷

Thus, compared to other countries in which acid attacks occur, in Cambodia there are differences both in the gender of victims and the gender of perpetrators. Not only is the number of male victims of acid violence higher in Cambodia than it is in other countries, but also there are more female perpetrators.

84 See Chatterjee, *supra* note 19, at 7.

85 Interview with Mr. Ziad Samman, CASC Project Manager.

86 This is due to attitudes and social and gender structures. Men have a higher social status than women, influencing gender relations and structures. Men are seen as the primary financial caretakers and supporters of the family while women are responsible for taking care of the children and the household. From an early age, Cambodian women and girls are taught to be obedient to the family and husbands, and that women's main task in life is to be a good wife and mother. This is especially the case in the rural and more remote provinces. This perception of the role of women often results in girls having less access to education, and therefore less access to opportunities that will allow them to provide for their own livelihoods. This results in women being dependant on their husbands to provide for them and their children.

87 Interview with and acid-violence perpetrator, November 2012.

4. CAMBODIA'S LEGAL SYSTEM: PROSPECT OF ACHIEVING JUSTICE FOR ACID VIOLENCE SURVIVORS

The following section examines Cambodia's legal system, the specific laws and regulations addressing acid violence, and the specific problems acid burn survivors face in their search for redress.

There are many acid burn survivors who have had to wait years for their case to reach even the trial stage or are still waiting for their case to be prosecuted. When KS discovered that her brother-in-law had sold her three-year old niece, she confronted him and demanded that he ensure the child be returned to her mother—KS's sister. Her brother-in-law responded by throwing acid in her face, permanently and severely disfiguring her. KS was attacked in early 2009, but as of yet no trial has been held. In fact, although KS filed a complaint in November 2009, not until August 2010 was the case sent to the competent court in Siem Reap.⁸⁸ With the help of CASC, KS met with the President of the Court in September 2012 and CASC's legal unit was informed in November 2012 that the trial would start shortly. This is the last heard from the court regarding KS's case, and it is not clear what further action the court has taken.

Sadly, this example is not an exception. Data from CASC indicates that of the 41 cases it has been working on during the last three years, only 11 cases have reached a final verdict. Why does it take relatively long for acid burn survivors to have their cases prosecuted and tried? Can the Acid Law make a difference in that regard, or is more needed to guarantee that justice is served to the victims of acid violence? These questions are addressed below.

4.1. Legal Process in Cambodia

Many human rights organisations, legal professionals and international organisations have long commented on the state of the legal system in Cambodia.⁸⁹ For example Human Rights Watch (“HRW”) has been very critical of the Cambodian justice system, calling it “partisan” and comprised of “politically controlled judges.”⁹⁰ HRW has also said that Cambodia's politics and government are “plagued with endemic corruption and politically motivated application of laws[,]” and

88 Victims of crimes can file complaints. Cambodian Code of Criminal Procedure (*as adopted* Aug. 10, 2007), art. 6. However, filing a complaint does not mean that a criminal prosecution will be started — the prosecutor makes this decision.

89 See, e.g., CCHR, *Briefing Note: Judicial Reform* (Feb. 2013); Bridget Di Certo, *Justice in the Dock*, SOUTHEAST ASIA GLOBE, Feb. 2013, at 25.

90 See Human Rights Watch, *Cambodia: Obama Should Publicly Denounce Rights Abuses* (Nov. 18, 2012), available at <http://www.hrw.org/news/2012/11/18/cambodia-obama-should-publicly-denounce-rights-abuses>.

highlighted an “absence of judicial independence[.]”⁹¹

In 1992, the UN created the UNTAC mission as a transitional authority in Cambodia to supervise and control the first democratic elections in decades. UNTAC enacted several laws intended to develop a framework for Cambodia’s judicial system in conformity with international standards.⁹² The hope was that this would encourage change in Cambodian institutions, in particular those institutions responsible for the administration of justice. However, judicial reform has been slow in Cambodia. For years NGOs, state donors, and international organisations have asked for increased effort from the RGC. The Cambodian government has agreed, yet no major changes to the prevailing culture have taken place. Reform is required to professionalize the police force, ensure the independence of prosecutors and judges, stop far-reaching corruption, and end the culture of impunity.⁹³

4.2. The Law on the Management of Strong Acid (2012)

In theory the criminal justice system in Cambodia works as follows. After a crime has been committed, the police are notified. The police then launch a thorough investigation. After their investigation is finalised the police inform the prosecutor from the competent court. The prosecutor then starts an investigation and presents his or her findings to the court.⁹⁴ A chief judge then appoints an investigative judge and a trial judge.⁹⁵ The investigative judge conducts a judicial investigation, which consists of interviewing victim(s), witness(es), and the perpetrator if possible, as well as collecting evidence. After the closure of the investigation, the investigative judge composes a report including a recommendation to either prosecute or dismiss the case. This report is send back to the prosecutor and to the trial judge.⁹⁶ The case will then either be closed or the trial judge will set a date for a trial to commence.⁹⁷ Notably, after a criminal verdict only the prosecutor and the convicted person are allowed to file an appeal; victims acting as civil parties can only appeal the civil matter of the case (i.e. reparations awards).⁹⁸ An appeal of the verdict must be lodged within one month.⁹⁹ After an appeal, cassation can be

91 Human Rights Watch, *Statement to the UN Human Rights Council on Cambodia* (Sept. 28, 2011), available at <http://www.hrw.org/news/2011/09/28/statement-un-human-rights-council-cambodia>.

92 See Di Certo, *supra* note 89, at 25.

93 See generally Human Rights Watch, *Tell Them That I Want To Kill Them* (Nov. 13, 2012), available at <http://www.hrw.org/node/111246/section/5>.

94 Cambodian Code of Criminal Procedure, *supra* note 88, arts. 43-44.

95 *Id.* art. 51.

96 *Id.* arts. 246-47; Asia Regional Cooperation to Prevent People Trafficking, *Gender, Human Trafficking and the Criminal Justice System in Cambodia*, at 47-48 (Dec. 2003).

97 Cambodian Code of Criminal Proceedings, *supra* note 88, art. 250.

98 *Id.* art. 375.

99 *Id.* arts. 381-82.

requested from the Supreme Court.¹⁰⁰

In January 2012 the Acid Law entered into force. This law criminalised acid violence and established regulations governing the criminal liability of individuals and legal entities. In January 2013 the RGC adopted the Sub-decree on the Formalities and Conditions for Strong Acid Control (the “Acid Sub-decree”), further detailing regulations on the transport, sale, purchase and storage of strong acid.

Until the entry into force of the Acid Law, criminal legislation in Cambodia failed to include provisions specifically criminalising incidents in which acid is used as a deliberate weapon. Before its adoption, acid-related crimes were prosecuted under general provisions of the Cambodian Criminal Code. Moreover, no regulations concerning the sale, purchase, storage or transportation of acid were in place. Existing laws did not recognize the specific needs of acid burn survivors, the seriousness of the crime committed, or include adequate provisions regarding punishment for crimes in which acid is used. According to Gollogly, when cases of acid violence were prosecuted they were assigned to the family law courts instead of criminal courts, because acid violence was primarily associated with family issues¹⁰¹ — thereby denying this conduct’s criminal aspect. The NGO community believed that a law regulating acid might discourage perpetrators from resorting to acid violence. As a result, several NGOs, most notably CASC and the CCHR, lobbied the RGC to create this law. According to the CCHR, “[O]ne of the key ways to address acid violence is by enacting strong legislation that includes appropriate sentences and fines for perpetrators of acid violence.”¹⁰²

The Acid Law makes the intentional killing another human being with acid punishable by 15 to 30 years imprisonment, which can be increased to life if the attack was an ambush or the perpetrator tortured the victim before or during the killing.¹⁰³ Torture and other cruel acts while using acid is punishable by 10 to 20 years, increased to 15 to 25 years if the act leads to permanent disability, and 20 to 30 years if the torture leads to the unintentional death or suicide of the victim.¹⁰⁴ Intentional violence using acid is punishable by two to five years, increased to five to 10 years if the intentional violence leads to permanent disability, and 15 to 25 years if the intentional violence leads to the unintentional death or suicide of the victim.¹⁰⁵ The Acid Law also stipulates that the government will provide for acid

100 *Id.* arts. 417-20.

101 *See* Gollogly et al., *supra* note 63, at 333.

102 Email interview with CCHR staff.

103 Law on the Management of Strong Acid (*as adopted* Jan. 11, 2012) [hereinafter Acid Law], art. 16.

104 *Id.* art. 19.

105 *Id.* art. 20.

victims' medical care, legal support and protection.¹⁰⁶ It is, however, not clear how this will take place in practice. Although the Acid Law was enacted in December 2011, Cambodians have little awareness of its existence, and even less awareness of its provisions. According to the CCHR, a large-scale awareness program must be created to ensure that the public is well informed.¹⁰⁷

The creation of this law and its formal recognition of the phenomenon of acid violence is a positive step. In theory, people can now be held criminally accountable specifically for acid violence. Samman notes that the Acid Law is in fact quite progressive, as there are not many countries with such specific legislation.¹⁰⁸ Nevertheless, implementation of the law will be a struggle. For the law to have any effect, prosecutors, judges, and government officials must actively apply the law and enforce it by consistently sentencing perpetrators, thus showing that there will be no impunity for acid violence. However the Cambodian legal system is malfunctioning, not only with regard to acid-related laws — consistent implementation of any law is a problem in Cambodia.¹⁰⁹

4.2.1. *The Sub-decree on the Formalities and Conditions for Strong Acid*

Control.

The Acid Sub-decree was created to support the implementation of the Acid Law and to provide specific regulations on topics it addresses. According to the decree, it “*aims to determine the formalities and conditions for sale, purchase, storage, transportation, package, bringing along and use of strong acid of all types.*”¹¹⁰ Provisions include the following: sellers and distributors must have a location to sell strong acid that is authorized by administrative authorities and can only sell to customers who provide appropriate documentation. They are required record all information on purchases and customers, and must correctly pack and store acid in safe bottles or containers with warning labels in Khmer, and a certificate of origin.¹¹¹

Purchasers of acid must be at least 18 years old and have documents stating the professional occupation that requires the use of acid and the purpose of buying acid, and keep the invoice ready to be inspected during transport.¹¹² Warehouses where acid is stored must be far from downtown, have a safety system, have a fire prevention and extinguishing system, record all acid present, and fully comply with

106 *Id.* arts. 10-12.

107 Email interview with CCHR staff.

108 Interview with Mr. Ziad Samman, CASC Project Manager.

109 See *Asia Regional Cooperation to Prevent People Trafficking*, *supra* note 96, at 43.

110 Acid Sub-decree, *supra* note 8, at 1488.

111 *Id.* arts. 6, 10 at 1489-90.

112 *Id.* art. 7 at 1489.

technical standards on storage of chemicals.¹¹³ Transportation of acid must occur in accordance with specific technical standards, only strong acid that is properly packed may be transported, and transport of acid of 1,000 or more kilogram strength is not allowed through populated areas.¹¹⁴

Although the Acid Sub-decree is a step towards reducing the number of acid-related incidents, the text is vague on certain points and more clarification is needed. For instance, Article 8 states that warehouses should be “far” away from downtown, but in practice how “far away” is far enough? Moreover, it is stated that an “expert police unit” will verify the compulsory fire prevention and extinguishing system, however no such unit currently exists. Who will establish this unit and how will it be trained?

The Acid Sub-decree states that the safety protection system, the means of transport, and disposal of acid should be in accordance with “technical standards,” but does not specify these standards or what is expected of sellers and purchasers of acid. Moreover, it is unclear how this provision will impact the likely high number of small vendors in the provinces, especially the most rural areas of Cambodia. Is it realistic to expect local vendors to know about these regulations? Will they be capable of adhering to the new safety standards, for instance the installation of a fire prevention and extinguishing system? If not, what are the consequences? Laws are only strong if they are implemented and enforced consistently. For the Acid Sub-decree to have any real effect, authorities must deal appropriately with persons who do not comply with the regulations. Due to these open questions, although the Acid Sub-decree is an improvement, it has flaws that could jeopardize its effect in practice.

Remarkably, the Acid Law and the Acid Sub-decree regulate only substances deemed “strong” acid, excluding sulphuric acid with a density below 33%. However, sulphuric acid is one of the most common acid substances because it is used in batteries.¹¹⁵ Even though it is a diluted acid it can still cause burns. Excluding a commonly available type of acid creates a risk that the problem will shift and the use of battery acid in attacks will increase. Moreover, as battery acid is commonly used, excluding it from storage and transport safety regulations will reduce their effectiveness in preventing accidents.

4.3. The General Obstacles Preventing Victim Justice

Cambodia’s criminal justice system has many problems, but impunity is at the forefront. According to journalist David Brinkley, the word that describes

113 *Id.* art. 8 at 1489-90.

114 *Id.* art. 9 at 1490.

115 *See Breaking the Silence*, *supra* note 6, at 5.

Cambodia's legal system is "impunity."¹¹⁶ Violators of the law, including human rights protections, more often than not walk free in Cambodia, frequently without ever being arrested or a trial being held. Brad Adams of HRW notes that this is the case "no matter how egregious their acts.". He asserts that Cambodians find it difficult to have faith in the justice system because "instead of protecting rights, Cambodia's judiciary is used to suppress dissent and undermine justice."¹¹⁷ Several problems contributed to this dysfunctional legal system.

4.3.1. Lack of Judicial Autonomy.

One cause of impunity is the apparent lack of independence of the judiciary. This is a serious concern. Many NGOs indicate that the Cambodian judiciary is not an independent institution, but in fact a "puppet" of the Cambodian government because there is no real separation of powers. The government has a major influence on the judiciary and uses this power to persecute government critics and human rights defenders.¹¹⁸

One example of the lack of a separation of powers between the RGC and the Cambodian justice system is the fact that Dith Munthy, the chief justice of the Cambodian Supreme Court, is a member of the ruling CPP's Permanent Committee of the Central Committee and the party's six-person Standing Committee.¹¹⁹ This can be seen as a breach of the *trias politica*. According to Transparency International, an international organization that tracks corruption, in 2011/2012 the independence of the Cambodian judiciary from outside influences was ranked 96 out of 142 countries assessed.¹²⁰ According to Transparency International's Global Barometer 2013, 60% of people in Cambodia think that the judiciary is affected by corruption,¹²¹ a worrying result. The judiciary is influenced by external powers instead of being an impartial and neutral institution. Political leaders use their position and power to compel judges and prosecutors to make decisions favourable

116 See Brinkley, *supra* note 69, at 112-13.

117 Human Rights Watch, *Cambodia, 15 Years On, No Justice in Grenade Attack* (Mar. 29, 2012), available at <http://www.hrw.org/news/2012/03/29/cambodia-15-years-no-justice-grenade-attack>; Human Rights Watch, *Cambodia: Shame Courts Undermine Rights* (Dec. 27, 2012), available at <http://www.hrw.org/news/2012/12/27/cambodia-sham-court-cases-undermine-rights>.

118 See Frontline Defenders, *2013 Annual Report, Global Trends in 2012 for Human Rights Defenders*, at 10 (2013); Human Rights Watch, *Cambodia: Escalating Violence, Misuse of Courts* (Feb. 2013), available at <http://www.hrw.org/news/2013/02/01/cambodia-escalating-violence-misuse-courts>.

119 See Human Rights Watch, *Country Summary: Cambodia* (Jan. 2012), available at http://www.hrw.org/sites/default/files/related_material/cambodia_2012.pdf.

120 Transparency International, *Judicial Independence Index (2011-2012)*, available at <http://www.transparency.org/country#KHM>

121 Transparency International Global Barometer 2013, available at <http://www.transparency.org/gcb2013/country/?country=cambodia>

to their interests.¹²² Political interference in judicial matters makes it problematic for judges and prosecutors to properly perform their duties. As HRW states “it would take a brave judge to defy the ruler of a *de facto* one party state.”¹²³

A notorious recent example of political interference in the judiciary was the prosecution of radio station owner Mam Sonando, an outspoken human rights defender and activist. During the eviction of villagers from their land at the behest of a rubber company, authorities opened fire on a group of villagers who refused to leave their homes, resulting in the death of a young girl. In the aftermath, Sonando, who was not present during the eviction, as well as a few villagers who were, were arrested for alleged participation in a secessionist movement seeking independence from Cambodia.¹²⁴ At trial, Sonando was convicted and sentenced to 20-years imprisonment; on appeal this was turned into a suspended sentence and he was released — most likely due to strong criticism by international organisations. Yet no one has been investigated or held accountable for the death of the girl.¹²⁵ According to the CCHR this demonstrates that laws in Cambodia are not applied equally and how the Cambodian government will use its power to achieve politically convenient results in court.¹²⁶ Using the courts to intimidate and threaten human rights defenders with prosecutions and imprisonment is a serious form of juridical harassment.¹²⁷

One reason for the lack of judicial independence is the lack of security of tenure for judges and prosecutors. The government can remove judges or decide to keep them in service, as judges are governed by civil service rules. As a result, judges whose decisions do not conform to government wishes could possibly have a shorter judicial career than those who comply.¹²⁸ The Cambodian government, however, insists that the judiciary is fully independent and impartial.¹²⁹

With help from the UN and foreign donors, three draft laws intended to increase judicial independence were drafted but have yet to enter into force.¹³⁰

122 See Cambodian League for the Promotion and Defense of Human Rights, *Human Rights 2012: The Year in Review*, at 11 (Feb. 2013); World Justice Project, *Rule of Law Index 2012-2013*, at 73 (2012).

123 Human Rights Watch, *Khmer Rouge Trial is Failing Cambodian Victims of Pol Pot's Regime* (Nov. 23, 2011), available at <http://www.hrw.org/news/2011/11/23/khmer-rouge-trial-failing-cambodian-victims-pol-pots-regime>.

124 See CCHR, *Briefing Note*, *supra* note 89, at 3-4.

125 See K. Hodal, *Cambodian Activist Mam Sonando to Be Freed in Days*, *GUARDIAN*, Mar. 14, 2013, available at <http://www.guardian.co.uk/world/2013/mar/14/cambodian-activist-mam-sonando-freed>.

126 See CCHR, *Briefing Note*, *supra* note 89, at 3-4.

127 See Frontline Defenders, *supra* note 118, at 4.

128 See CCHR, *Briefing Note*, *supra* note 89, at 4.

129 See Di Certo, *supra* note 89, at 25.

130 See *id.* In September 2013, Prime Minister Hun Sen made a new pledge to pass the three long-awaited laws in early 2014. Kevin Ponniah, *Judicial Reform Pledged by PM*, *PHNOM PENH POST*, Sept. 26, 2013, available at <http://www.phnompenhpost.com/national/judicial-reform-pledged-pm>.

These fundamental laws would regulate the status of judges and prosecutors, the organization of the court system, and the membership of the Supreme Council of Magistracy, which appoints and disciplines judges.¹³¹ It is hoped that the enactment of these laws would bring positive change to the Cambodian judiciary by establishing more boundaries between executive and judicial powers.

4.3.2. *Corruption and Lack of Resources and Knowledge.*

Closely related to the lack of judicial independence in Cambodia is the high level of corruption. It is a widely accepted fact that corruption has roots in every layer of the Cambodian society and Cambodian institutions. In the legal system the widespread corruption manifests itself in perpetrators paying off judicial or police officers to escape prosecution or a non-guilty verdict and thus enjoy impunity for crimes committed. In 2013, 65% of respondents in a Transparency International survey indicate that they had paid bribes to the judiciary; 65% also reported that they had paid bribes to the police.¹³² Police officials, judges and prosecutors are seen as corrupt, willing to accept bribes and instructions from those with executive power.¹³³

Individuals with links to political figures often enjoy impunity, even those accused of serious offences, due to their connections or their own position of authority.¹³⁴ Every year Transparency International publishes the Corruption Perception List. The 2013 edition places Cambodia at the bottom of that list at number 160 of 177 countries, meaning that Cambodia's public service is seen as one of the most corrupt in the world — and the most corrupt among Association of Southeast Asian Nations (ASEAN) members.¹³⁵ Examples of corruption can include asking victims to pay fines before their case will be prosecuted or accepting bribes to acquit suspects. HRW states that “for too long, prosecutors and judges have been used as an instrument for protecting those enjoying the patronage of powerful Cambodian authorities,”¹³⁶ and calls for an end to this impunity.

Another challenge facing the Cambodian judicial system is the lack of experience and training of the Cambodian police force and the judiciary. For a

131 See CCHR, *Briefing Note*, *supra* note 89, at 3; *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia*, Surya P. Subedi, ¶ 15, U.N. Doc. A/HRC/24/36 (Aug. 5, 2013); *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia* Surya P. Subedi, ¶¶ 19-29, U.N. Doc. A/HRC/15/46 (Sept. 16, 2010).

132 Transparency International Global Barometer 2013, available at <http://www.transparency.org/gcb2013/country/?country=cambodia>.

133 See Di Certo, *supra* note 89, at 25.

134 See CCHR, *Briefing Note*, *supra* note 89, at 2.

135 Transparency International Corruption Perception Index 2013, available at <http://www.transparency.org/country#KHM>.

136 Human Rights Watch, *Cambodia: Investigate Government Cover-Up* (Dec. 22 2012), available at <http://www.hrw.org/news/2012/12/22/cambodia-investigate-government-cover>.

case be successful in court (i.e. lead to a conviction), strong evidence is necessary. However, this is not always available due to a lack of resources and knowledge. This manifests itself both during the investigation phase as well as during judicial proceedings. Knowledge and investigative skills of police officers are limited as there is inadequate training. Moreover, there is a lack of materials and equipment needed to properly conduct police investigations. For example there is a lack of interview rooms to conduct interviews with victims and witnesses in a private and comfortable setting.¹³⁷ Not having a private place to conduct interviews can prevent victims and survivors from feeling comfortable enough to tell their stories and provide complete testimonies. Lack of knowledge of investigative techniques and training in investigative skills also contributes to incomplete investigations.¹³⁸

The judiciary also lacks legal and human rights knowledge, is insufficiently trained, and has a limited caseload capacity. In its Trial Monitoring Project, the CCHR discovered that hearings are rushed in part due to a heavy caseload, verdicts have little or no legal reasoning, and the quality of legal arguments overall is poor.¹³⁹ An example of a positive achievement is the creation of the Royal Academy for Judicial Professions, which could provide training and education and result in more skilled and capable legal professionals. However the Academy's reputation is tainted with accounts of corruption.¹⁴⁰ The CCHR reports that although efforts have been made in the development of the legal and judicial sectors, this development falls behind progress in other areas."¹⁴¹

Yet it must not be forgotten that Cambodia is still rebuilding itself after decades of war and continuous human rights violations. During the rule of the Khmer Rouge almost the entire intellectual elite of Cambodia either left the country, was executed, or died due to disease or starvation. Only a small number of those who remained survived. Teachers, doctors and legal professionals were systematically eliminated as the regime believed that a thinking elite would be a threat to the agrarian utopia Pol Pot and his accomplices envisioned.¹⁴² Without a doubt this has had an enormously negative effect on the knowledge base and ability to administrate justice in Cambodia. Over the past three decades numerous efforts have been made by the international community to help establish a professional

137 See Asia Regional Cooperation to Prevent People Trafficking, *supra* note 96, at 44.

138 See *id.* Investigations into acid violence in other countries are also hampered by lacking investigation skills and motivation. See Shah, *supra* note 32, at I182.

139 See CCHR, *supra* note 92, at 2.

140 See Unnamed author, *CAMBODIA: To Be a Judge, Be Ready to Bribe: Students* (May 12, 2009), available at <http://www.humanrights.asia/news/forwarded-news/AHRC-FAT-004-2009/?searchterm%3E>.

141 Email interview with CCHR staff.

142 See Di Certo, *supra* note 89, at 25.

legal framework based on the rule of law.¹⁴³ However, reform and change cannot be achieved without political will and support. Thus far the RGC has appeared to be more interested in economic development than a well-functioning legal framework.¹⁴⁴ The absence of such a system could thus be partially attributed to the RGC and the ruling Party and leaders.¹⁴⁵

In conclusion, wide-spread corruption and an averse government attitude combined with the legacy of decades of war has led to a fragile legal system in Cambodia where the rights of civilians are not properly protected and there is little or no legal recourse for rights violations or crimes. Those whose rights have been violated are effectively denied access to justice due to the lack of an efficient, reliable and independent judiciary.

4.3.3. *Prejudice and Perception.*

Problems in the overall justice system act as obstructions to justice for acid burn survivors seeking redress. Samman traces the challenges acid burn survivors face in their search for justice to the same challenges faced by every Cambodian when dealing with the justice system.¹⁴⁶

Like other Cambodians, many acid survivors have had to struggle to have their case prosecuted and the perpetrators brought to justice. For example, in 2004 TS was attacked by her partner's wife while almost nine months pregnant. The wife instigated her then 11-year-old son throw the acid. The attack left TS with severe burns on her face, chest and back; she lost one of her eyes; and her then eight-year-old nephew was burned in the face leading to eye infections and vision impairments. For personal reasons TS waited until 2011 to file a complaint, but the investigative judge in Kampot did not open the judicial investigation until late 2012. It was expected that the investigation would be completed in a few months, with a trial to start some time after June 2013. Thus far, the court has provided no more information regarding the status of this case.

Nevertheless, acid burn survivors must also confront a problem related exclusively to their injuries — perception. As previously discussed, Cambodian society sometimes views acid burn survivors in a negative manner, as if they must have done something wrong and deserved their fate because, for example, they were

143 See M. Montesano, *Current International Efforts in Cambodia: Developing a Court System to Protect Human Rights*, 11 J.L. & SOC. CHALLENGES 71, 72 (Spring 2009).

144 See Di Certo, *supra* note 89, at 25.

145 See Montesano, *supra* note 143, at 92.

146 Nevertheless, there are also examples where survivors said they lost interest in pursuing legal action and asked for their case to be closed. This remark is not meant as critique of that decision; readers should be aware that not all instances when cases of acid violence are ended before a court has issued a verdict are due to problems or "faults" by the judiciary or authorities. Sometimes ending legal proceedings is the survivor's voluntary choice.

someone's mistress. This view is not only common among the Cambodian civilian population; prosecutors and judges perceive acid burn survivors in the same way.¹⁴⁷ As a result, prosecutors and judges can be reluctant to put much effort into an acid attack case and even halt further proceedings. Importantly, Samman indicates that when prosecutors and judges have been in contact with acid burn survivors this negative perception changes and they are more willing to make an effort toward a successful prosecution.¹⁴⁸

4.4. The Survivor's Perspective

Impunity for acid violence results from problems at all stages of the criminal process: failure to investigate, failure to prosecute or bring to trial, provision of relatively mild sentences in comparison to the crime committed and harm suffered, and lax execution of sentences. For example, many acid violence cases never make it to the trial stage, or trials "stop" at a certain point either because the survivor decides not to start or continue with legal steps, or due to reasons outside the survivor's control.

4.4.1. Fear and Distrust in the Legal System.

The most important reason preventing the prosecution of perpetrators is the decision of survivors not to file a complaint after they have been attacked.¹⁴⁹ Survivors' reasons for not filing a complaint include fear of reprisals by the perpetrator, fear of costs related to court proceedings and legal aid, a lack of confidence in the legal system and not wanting to "waste" time on it, and agreements to settle the matter out of court.¹⁵⁰

For example, survivors ID and IS, two sisters who were hurt in the same attack in 2009, indicate that they did not file a complaint because they had to work in their shop and did not have time to go to the police or attend court proceedings. The same reason was given by survivors CSRith, CSPhon and CSPhat,¹⁵¹ who were injured in an attack in 2010.¹⁵² Because these survivors feared loss of income if they could not work for several days, they decided to not file a complaint

147 Interview with Mr. Ziad Samman, CASC Project Manager.

148 *Id.*

149 See CCHR, *Ending the Cycle of Impunity for Acid Crimes in Cambodia*, at 9 (May 2012).

150 Interviews with several survivors supported by CASC, March 2013.

151 In Cambodia, many family members have similar names that, as is the case here, can lead to identical initials. To avoid confusion the last part of each survivor's name was added.

152 Note that in some cases survivors will choose not to tell the full story of what happened during an attack or what might have precipitated it. Moreover, the reasons survivors express for not filing a complaint are not necessarily the only reasons they have. They are however, what they choose to share.

and thereby prevented any further proceedings. Chatterjee states that in most countries finding legal redress for victims of acid violence is time-consuming and expensive, placing an unbearably heavy burden on victims and families.¹⁵³ Financial constraints are therefore an important reason victims may choose to not file a complaint. In Cambodia, CASC has a legal team to support the survivor during legal proceedings and CASC will pay court related costs; however, survivors often still think that going to court will be a financially costly decision, and therefore do not file complaints.

The fact that survivors are unable to seek justice due to possible loss of livelihood and other financial constraints is worrying as it suggests that one's social-economic position plays a significant role in access to justice. Smith and Castleman argue that poverty can increase someone's vulnerability to denial of their basic human rights.¹⁵⁴ They mention acid violence against women in Bangladesh as an example, and state that the poverty level of women victims hampers them in their ability to respond to human rights violations due to a lack of knowledge of legal procedures and access to legal aid.¹⁵⁵ In this way, practical access to public services is denied to those who lack resources and knowledge. Poverty acts as a barrier for survivors seeking justice and redress.

Another factor limiting the number of acid attack prosecutions can be the relationship between the survivor and the perpetrator. When there are family ties — for example when a spouse is the perpetrator — the victim can be more reluctant to file a complaint, especially if the victim is dependent on the perpetrator for care and support. In fact, several survivors (all male, attacked with acid by their wife and blind as a result of the attack) have indicated in interviews that if they did not rely on their wife to take care of them or were not married any more, they would have filed a complaint and pursued legal steps.¹⁵⁶ One of the respondents said that because he is blind he did not file a complaint, as “*there would be nobody to take care of the children,*” and that if his wife had been prosecuted and arrested “*by law there would be a good result, but not good result in the family.*”¹⁵⁷ Another survivor gave the following reason for not filing a complaint: “*I want my wife to take care of me, so if she stays in the marriage and does her responsibilities I do not file a complaint. If she does not live with me any more I would file a complaint.*”¹⁵⁸ Another example comes from TShal,¹⁵⁹ who decided to not

153 See Chatterjee, *supra* note 19, at 7.

154 See S. Smith & T. Castleman, *Ending Extreme Poverty*, LETRAS LIBRES 2 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1570167.

155 See *id.* at 3-4.

156 Interviews with 5 male survivors conducted in February 2013.

157 Interview with RB, attacked in 2009

158 Interview with KK, attacked in 2009.

159 Note that TS, who was mentioned earlier, and TShal are two different acid burn survivors.

file a complaint when she discovered that her partner's first wife was the instigator of her attack for fear that her partner would leave her.

Fear of reprisals is also a reason to not file a complaint. Perpetrators commonly threaten the survivors of their attack, both before and after they file a complaint with the police. There are examples of survivors who have received threatening phone calls from unidentified males. If survivors fear retaliation by the perpetrator or the perpetrator's family they will be hesitant to file a complaint.

There are also cases where survivors choose to not file a complaint or seek justice because they feel that they deserve what happened to them. In some instances people think that they were attacked because they did something wrong in this or a previous life. This manner of thinking can lead to acceptance of what has happened and the belief that they do not need or deserve legal redress. A similar view is reported by Welsh.¹⁶⁰ Tat Marina, a well-known survivor of acid violence,¹⁶¹ has for example said, “*I don't know what I did in a past life [to deserve this], but I think I might have done some bad things.*”¹⁶² To change this attitude, a survivors' views of themselves must be changed and survivors must be supported in this process. Survivors should be helped to realise that acid violence cannot be justified, no matter the reasons for it.

It happens on a regular basis that survivors decide to not file a complaint. In 2012 in two attacks the survivors decided to not file a complaint and to not pursue legal action, and in the first attack of 2013, the survivor indicated that he did not wish to file a complaint and will not proceed with further legal action. This creates a significant difficulty when trying to increase the number of prosecutions and convictions. Without an official complaint by a victim, in practice the police will not investigate the case and the responsible prosecutor will not proceed with further legal actions.¹⁶³ This means that without a complaint the prosecutor will not open an investigation, will not inform the competent court, the investigative judge will not examine the case, and no trial will ever be held.

According to Cohan, many survivors of acid violence do not take legal steps, but agree to the payment of money as a form of compensation.¹⁶⁴ Although such out-of-court settlements have advantages — it is quicker than court proceedings and survivors have immediate access to the funds — the negative side of settling is

160 See Welsh, *supra* note 5, at 60.

161 Tat Marina was a famous karaoke-singer in Phnom Penh who was attacked with acid in 1999 when she was 16 years old. The attack attracted much publicity as she was the mistress of a high-ranking government official, whose wife had ordered the attack. In 2009, a documentary about Tat Marina, “Finding Face,” was released. She now lives in the U.S. Due to her many public appearances she is mentioned here with her full name rather than initials.

162 Welsh, *supra* note 5, at 60.

163 See Asia Regional Cooperation to Prevent People Trafficking, *supra* note 96, at 44.

164 See Cohan, *supra* note 59, at 218.

that the perpetrator will not be held criminally accountable for his or her conduct. In Cambodia survivors occasionally accept an out-of-court settlement.¹⁶⁵ However, there is not much available data on this as no records are kept, so it is not possible to make any accurate statements about the frequency of settlement or the amounts agreed upon. CASC knows that in some cases survivors have received one lump sum, whereas in other cases perpetrators have agreed to pay a monthly amount.

Montesano argues that in general Cambodians think it is better to avoid confrontation and strive for conciliation — i.e. not seeking justice or demanding reparations after an attack and just moving on. She states that (re)conciliation is the culturally driven norm in Cambodia.¹⁶⁶ Although this may be partially true, as discussed above, there are also indications that perhaps due to the violent history of Cambodia some individuals have a tendency to violent behaviour. They thus do not strive to reconciliation, but actively engage in confrontations.

Moreover, from interviews with survivors it appears that the majority desires justice but feels incapable of achieving it. In fact, in a survey that CASC conducted with a group of 40 acid burn survivors, 85% of the questioned survivors indicated that they would pursue a legal case if they had greater access to justice. This leads supports the conclusion that some survivors do not pursue a legal case because they do not feel they have the resources to do so.¹⁶⁷ Although a “common cultural thinking” could explain why some acid burn survivors prefer to not seek justice and strive for conciliation, it is my opinion that this does not apply for the majority of the group.

4.4.2. *Lack of Trials.*

When survivors do file a complaint, which is in the majority of the cases, this does not automatically mean an investigation or trial will be held or completed. The second major reason why acid violence is not always prosecuted involves factors unrelated to the decisions or will of the survivor.

First, cases can “disappear.” It happens quite frequently that the legal process suddenly stops and legal cases unofficially end. This means the court or prosecutor does not contact the survivor anymore and the case never makes it to the trial stage. For example in KS was attacked in early 2010 and met with the investigative judge in late 2010, but was not informed until July 2012 that the trial would start “shortly.” Nevertheless, she has not heard from the court since. Another example is PN, who was attacked in March 2010 and immediately

165 In cases that CASC has worked on, two survivors have accepted out-of-court settlements since late 2010.

166 See Montesano, *supra* note 143, at 75.

167 See CASC Legislation Survey (Oct. 2011).

filed a complaint. Even though numerous attempts have been made to contact the relevant prosecutor and court, no actions were taken or progress made and CASC considers this case to be dormant. CB was attacked in 1997, and states that he filed a complaint, but neither the police nor the prosecutor ever started an investigation and eventually he “*just moved on.*”¹⁶⁸ When courts and prosecutors remain effectively silent in cases of acid violence this sends a strong message that acid violence can be carried out with impunity.

Perpetrators are also often not arrested because they flee after committing their crime and remain at large, or their identity is not known. Without a perpetrator or a suspect prosecutors and investigative judges sometimes decide to not continue an investigation and prosecution. This has happened in at least three cases in the last two years.

Another important factor is prosecutorial discretion. In Cambodia, prosecutors can decide which crimes or incidents they will investigate and will prosecute.¹⁶⁹ Prosecutors are not legally obligated to start a prosecution for every alleged crime, and due to corruption or the perception that individuals attacked with acid “deserved” it, it is not inconceivable that prosecutors decide to not prosecute cases of acid violence for extra-legal reasons.¹⁷⁰

There are also occasions when witnesses declined to provide testimony, either to the investigative judge or at trial. This can lead to incomplete investigations, to the investigative judge deciding not to continue with proceedings due to a lack of evidence, or to an acquittal. When witnesses decline to testify or do not appear in court this has a major impact on the trial. Many trials in Cambodia are almost exclusively based on witness statements, and testimony may thus be the only evidence.¹⁷¹ This is partially because, as discussed above, investigation skills and procedures are not as advanced in Cambodia as in other countries. Moreover, after acid violence the actual weapon disappears and thus witness statements are very important.

One of the reasons why witnesses and survivors are sometimes hesitant to cooperate is because there is no established witness protection system in place in Cambodia.¹⁷² In fact, newspapers and other media are known to publish full names of survivors and witnesses (and perpetrators), making it very easy to identify someone. Fear of reprisal could lead to unwillingness to testify. Witnesses have previously refused to testify, not only citing fear of reprisals, but also a lack of

168 Interview with acid burn survivor CB.

169 Cambodian Code of Criminal Procedure *supra* note 88, arts. 40-41.

170 Interview with Mr. Ziad Samman, CASC Project Manager.

171 Interview with Ms. Theany Phal Chalm, CASC Legal Unit Manager; Asia Regional Cooperation to Prevent People Trafficking, *supra* note 96, at 47.

172 See Asia Regional Cooperation to Prevent People Trafficking, *supra* note 96, at 46.

confidence in and trust of the legal system, or — like some survivors — their need to work in their shops.¹⁷³ To overcome this lack of faith and unwillingness to devote working hours to attend a trial and testify, a shift is needed in the attitude of witnesses. If even persons that are close to acid burn survivors do not take the initiative to testify, it will be very difficult to achieve justice as crucial evidence will be absent. Even in a fully functioning legal system, evidence — including witness testimonies — is essential for a conviction.

4.4.3. *Low Sentencing Rate.*

In several cases where there have been trials of alleged attackers, the end result was still disappointing when perpetrators were found guilty but the repercussions were relatively mild. When an individual is found guilty of committing acid violence it is a positive statement that increases understanding that acid violence is unacceptable. However, if sentences are disproportionate to the crime and its lifelong consequences for the survivor, this positive step forward is nullified. Gollogly reports that sentences for acid violence tend to be short, from a few months for an attack to a few years in case of a death.¹⁷⁴

A striking example is the story of CT, a woman who was attacked in 2010 by another woman. Both CT and her two young children (PSR, one year old at the time and PM, six years old at the time) were injured in the attack. Encouragingly, the perpetrator was quickly arrested and a trial was held, however, the outcome was less positive. The judge decided to impose a two-year suspended prison sentence with a three-year probation period. The reasoning behind this decision was that the perpetrator had a baby to care for.¹⁷⁵ Although it is commendable that the judge considered the personal situation of the perpetrator, this verdict shows a complete lack of understanding of the seriousness of the crime and the consequences it has had for CT and her two young children. The perpetrator was allowed to walk free because the judge did not recognize the suffering and trauma inflicted by the acid violence.

Another example comes from a male survivor of acid violence, and reflects both the sometimes disproportionately mild sentences imposed for acid violence and also the impact of corruption by court officials. In 2005 DR was attacked by his first wife out of jealousy.¹⁷⁶ He states that he filed a complaint and that

173 The last example happened in the case of TS. Her family members who witnessed the attack failed to appear on two occasions for an interview with the investigative judge in Kampot, stating they had to work in their shop. Eventually the investigative judge summoned the witnesses to appear and CASC staff personally went to pick them up and bring them to the court.

174 See Gollogly *et al.*, *supra* note 63, at 333.

175 Court of Kampong Cham, 06/08/2011.

176 DR and his first wife, the perpetrator of the acid attack, divorced after the attack.

his wife was in fact arrested and sentenced to prison. This seemed like a victory; however, the court in Kampong Cham asked him to pay a “fee” of 30,000 riel (\$7.50),¹⁷⁷ whereas he was only able to pay 5,000 riel (\$1.25). After paying this amount his former wife was sentenced to seven months imprisonment, and was released while DR was still hospitalised due to the severe burns he sustained. DR feels that if he could have paid more, her sentence would have been higher.¹⁷⁸ The fact that the court asked DR to pay this fee contravenes the rules for court fees. According to Article 3 of the Law on Court Fees, only in civil, commercial, labour or administrative disputes shall a court fee be paid.¹⁷⁹ DR’s case was criminal. Moreover, as his former wife was found guilty, according to the law she should be responsible for all court fees.¹⁸⁰ Notably, in Article 20 it is even stated that if a person does not have sufficient resources to pay the fees, the court can exempt the payment of any fees.¹⁸¹ In any case, whether or not the request and the amount requested are legally correct, a victim’s inability to pay a fee should never be a justification for sentencing a perpetrator to a shorter sentence. DR’s case is significant because it not only shows how courts and judges will try to gain extra income by forcing acid burn survivors to pay fees, thereby not protecting those they are obligated to protect, but also how routinely low sentences indicate a lack of understanding of the impact and consequences of acid violence.

When potential attackers hear that perpetrators receive only mild sentences for acid violence, this knowledge could function as a stimulant to commit the crime. Several women who attacked their husbands indicated in interviews that they would have never done it if they had known the physical consequences of throwing acid at someone.¹⁸² Others might be discouraged from committing acid violence if they understood it was a serious crime for which they would be sentenced to long a imprisonment and to pay a large amount of compensation.

It is telling that in the CASC survey with survivors, 70% (28/40) said that the perpetrator behind their attack did not receive any form of punishment. Only 27.5% (11/40) stated that their perpetrator had received some form of punishment.¹⁸³ The survey also asked about the survivors’ feelings towards the punishment that perpetrators received. A full 72.5% (29/40) believed the punishment was too lenient or unfair; only 20% (8/40) thought it was fair. None of those interviewed

177 4,000 riel is worth approximately one U.S. dollar.

178 Interview with survivor DR.

179 Cambodian Code of Criminal Procedure, *supra* note 88, art. 553; Krama on Court Fees, art. 3 (Feb. 8, 1993).

180 Krama on Court Fees, *supra* note 179.

181 *Id.* art. 20.

182 Interview with three female perpetrators of acid violence (Mar. 2013).

183 One survivor interviewed, who is also a perpetrator, declined to answer this question.

stated that the punishment was too severe.¹⁸⁴ From the answers provided it may be concluded that most victims felt the punishment was not severe enough due to either a complete lack of punishment or a punishment that did not reflect the seriousness of the crime.¹⁸⁵

When asked if two to five years' imprisonment for perpetrators who intentionally cause injury — as provided in Article 20, paragraph I of the Acid Law — is acceptable, all victim respondents said no. All felt that this sentence does not reflect the nature of the crime and that longer prison sentences should be imposed. Asked whether five to ten years' imprisonment is a satisfactory sentence under the Acid Law for an acid attack causing permanent disability, all respondents answered no. The majority of victims (72.5%) indicated that a life sentence would be appropriate, and some suggested as possible punishments the death penalty or the victim throwing acid on the perpetrator.

Concerning compensation after acid violence, almost all respondents said that compensation should be paid.¹⁸⁶ The highest percentage, 44.74%, felt that an amount between \$1,000-\$5,000 was appropriate, followed by 28.95% who thought that \$5,000-10,000 would be reasonable.

4.4.4. *Lack of Enforcement.*

Even when a court has sentenced a perpetrator of acid violence to imprisonment and/or a monetary fine, it is common that these sentences are never executed. According to the law the prosecutor is responsible for the execution of sentences; however, there are serious problems with the enforcement and execution of sentences in Cambodia.¹⁸⁷ This is problematic as it leaves a victim with a formal acknowledgement that a crime was committed against him or her, but without the “benefits” of it. This is true both if a perpetrator never serves his or her prison sentence, and when compensation (if awarded) is never paid.

Prison sentences are commonly not executed because many perpetrators flee after their act. If they are not found and arrested the trial will be held *in absentia*. If the perpetrator remains at large the verdict will be impossible to execute. This results in prison sentences not being served and no compensation being paid to the survivor.

In three attacks CASC confirmed that the perpetrators were found guilty *in*

184 Three interviewees declined to answer this question.

185 Forty-five percent indicated that the perpetrator received no punishment or escaped. Twenty-two and a half percent indicated that the punishment does not reflect the seriousness of the crime.

186 Thirty-eight respondents answered positively. One respondent was a perpetrator and therefore declined to answer, and one survivor responded that he did not want money but just wanted the perpetrator to go to prison. CASC Survey (Oct. 2011).

187 Cambodian Code of Criminal Procedure, *supra* note 88, art. 496.

absentia but the prison sentences had not been executed because their whereabouts are unknown. CASC data shows that of eight cases in which it was partially involved and compensation was awarded by the Court, only in one case was compensation actually paid — and only after intervention by high-level officials. This is a disturbing discovery, as it suggests that only when top officials are involved on the side of the survivor will sentences be executed. The survivor, MC, was attacked in 1995 and a verdict was pronounced in 1996. However, not until 2010 did she receive the \$1,500 compensation she was awarded by the court. This only happened after the Royal Prosecutor intervened in 2008 and a complaint was sent to the National Assembly in January 2010, followed by ultimately a letter from the Minister of Justice in February 2010 to the Court of Kandal province. MC was lucky enough to have powerful connections. Survivors who do not have these connections are likely to be left empty handed.

It should be noted that in many instances the perpetrators themselves are also poor and cannot afford to pay part or all of the awarded compensation. However, imprisonment in lieu of payment is possible by law without the necessity of a special court order.¹⁸⁸

4.5. Influence of Acid Laws on Survivors

The goal of the Acid Law and the Acid Subdecree was to fill a gap in Cambodia's legislation by criminalizing acid attacks specifically and regulating the sale, storage and purchase of strong acid, as easy access to acid contributes both to attacks and accidents. NGOs had been pushing for the creation of this law for some time both to acknowledge the problem of acid violence in Cambodia, and to help victims find the justice they deserve and end the impunity long enjoyed by perpetrators. It is hoped that the implementation of these laws will decrease acid violence by acting as a deterrent.

It appears that this is happening in Bangladesh, where in 2002 the Acid Control Act entered into force. Bangladesh was the first country in which legislation was established to help prevent and punish acid violence.¹⁸⁹ After a comprehensive law criminalising acid violence was enacted, there was a remarkable drop in the number of acid attacks — from 500 to 60 a year.¹⁹⁰ The experience of Bangladesh has shown that one of the first steps for addressing and successfully preventing acid violence is having legislation in place targeting acid violence. Similarly, although in the 18th century there were many reports of acid violence in North America and Europe, those very quickly disappeared after legislation was put in place,

188 *Id.* arts. 523-24.

189 See Chatterjee, *supra* note 19, at 7

190 See Shackle, *supra* note 51.

implemented and enforced.¹⁹¹

Positive developments can also be seen in Pakistan after the introduction of a law criminalising acid violence in 2010. Since then, the number of reported incidents has tripled. The number of convictions after acid violence has risen as well, from 7% in 2007 to 18% in 2011. Shackle notes that this is still a low number and attributes it to poor enforcement of the law, weak overall governance, poor access to justice and female unfriendly attitudes by police officers and judges.¹⁹²

The Pakistani experience has lessons for Cambodia. While legislation is now in place in Cambodia, it will take more than laws alone to fight acid violence and ensure that acid burn survivors not only have access to justice but also that perpetrators no longer enjoy impunity. Since the entry into force of the Acid Law in early 2012, nine deliberate attacks resulted in eight survivors and three deaths.¹⁹³ Of these crimes, only BS's attack against NS, the case mentioned in the introduction, has gone to trial and a verdict has been issued under the Acid Law. What is needed now is effective implementation of laws and regulations, a task for the Cambodian judiciary in cooperation with the Cambodian government.

There has, however, been one another case of acid violence in which the Acid Law has been applied. This case concerns a woman, KT, who was attacked in September 2011 by a member of a rival family. The attack left her face severely disfigured and led to the loss of her left eye. The trial commenced in June 2012 and resulted in a guilty verdict — a 10-year prison sentence and the payment of \$5,000 compensation. This verdict was upheld by the Court of Appeal.¹⁹⁴ However, the judges applied the Acid Law in this case (Article 20(2) “Intentional violence using Acid, leading to permanent disability”) even though the attack was committed before its entry into force. This can possibly be seen as a violation of the *nullem crimen sine lege nulla poena sine lege* principle, which prohibits punishment of a crime without a pre-existing law.¹⁹⁵ The CCHR stated that the verdict demonstrates the Court’s “dedication to fighting acid violence.” The CCHR, however, also sees it as “problematic that the Court decided to make a judgment based on a law that was not yet on the books and decision could set a dangerous precedent.”¹⁹⁶ I agree with this. It is a

191 See Welsh, *supra* note 5, at 39.

192 *Id.*

193 One of these was in fact a criminal offence. NS was driving on his motorbike while carrying a bucket with acid when he was hit from behind by another moto. The victim was splashed with acid when the bucket broke. The man on the moto that cause the accident fled the scene and the police made no attempt to find the man.

194 Lieng Sarith & Mom Kunthear, *10-year sentence upheld in acid case*, PHNOM PENH POST, June 12, 2013, available at, <http://www.phnompenhpost.com/2013061266222/National/10-year-sentence-upheld-in-acid-case.html>.

195 This principle determines that no crime, nor a punishment for it, unless there was a pre-existing law prohibiting the conduct when the conduct took place.

196 Email interview with CCHR staff.

positive signal from the court that it decided to implement the Acid Law to fight acid violence, but doing so by “breaking” other rules cannot be the way forward. For real justice to be achieved all regulations and safeguards of the criminal justice process must be adhered to.

Regarding NS’s case, it is a positive sign that the trial was held rapidly and the perpetrator, BS, was convicted. Moreover, BS was sentenced to five years’ imprisonment, the maximum penalty allowed for the crime with which he was charged (“Intentional violence using acid,” Article 20). Through this verdict the judges acknowledged the brutality of the crime that was committed and correctly applied the law. This is encouraging. Samman stated in an interview with the Southeast Asia Globe, “[T]his case is a first step and it’s a small step — but it’s also an important step. I think it gives us room to be optimistic.”¹⁹⁷

It is questionable, however, if BS was charged with the appropriate crime and under the correct article of the Acid Law. Were the full extent of NS’s injuries reflected in the severity of the charges? This depends on an assessment if NS is “permanently disabled,” which according to Article 20 is an aggravating circumstance leading to a higher maximum sentence. The charges applied are based on the level of injury, and the level of injury must be determined through the so-called “medical expertise” of a doctor who is licensed to make the assessment. According to CASC, measuring the level of injury can be problematic, and I have witnessed assessments where the doctors did not touch survivor and did not perform a real examination. Samman furthermore states that in addition to physical disabilities, perhaps the effect the injuries have and will have on the victim’s opportunity to find employment should be factored in the decision.

Because the Acid Law has only been implemented in two cases so far, it is difficult to make any conclusions on its effect. The fact that in both cases the suspect was convicted and sentenced to the maximum penalty possible under the charged provision is encouraging. Moreover, the fact that the judges choose to use the Acid Law in KT’s case indicates a willingness to move ahead and penalize those who are guilty of committing acid violence. This is a positive indication that prosecutors and judges are becoming aware of the phenomenon of acid violence and are willing to do their duty in ending the impunity of perpetrators.

Although it is certainly progress that there are now specific laws and regulations in place that criminalise acid violence and regulate its sale, storage and transport, and that these laws are being applied, for a lasting impact all prosecutors and judges must know about these provisions and implement them. As only a small number of acid attacks has been prosecuted so far it is too soon to say if the

197 Otis, *supra* note 35, at 44-45.

Acid Law has had an effect on the occurrence of acid violence or legal redress for the survivors of acid violence. Further research after a longer period is needed to properly assess this.

For now, the creation of the Acid Law and the Acid Sub-decree can be seen as steps toward a Cambodia in which the survivors of acid violence have full access to justice, perpetrators of acid violence are prosecuted and strictly punished, and acid violence completely disappears.

5. CONCLUSION AND RECOMMENDATIONS

Too often the victims of acid violence are left empty-handed, their lives destroyed with no means of obtaining legal redress and justice. Currently victims' social-economic status and the flawed legal system in Cambodia do not permit proper and effective access to justice. The Law on the Management of Strong Acid was partially created to put an end to that, to put an end to the impunity the perpetrators of this crime often enjoy.

However, justice can only be obtained if a fully effective, functioning, independent and impartial judiciary and legal system based on the rule of law is in place. As the system is currently malfunctioning in Cambodia, the Acid Law and the Acid Sub-decree alone will not be enough to ensure that the survivors of acid violence find the justice they are looking for.

The RGC should make adequate efforts to ensure that proper investigations of acid attacks are conducted, survivors are protected from threats, and dispel misperceptions and that perpetrators of acid violence are prosecuted and punished. However, this is prevented by a lack of political will, corruption and inadequate law enforcement due to insufficient knowledge and resources.

Recommendations that would lead to greater justice include:

- The Cambodian people should be made aware of their rights and encouraged to understand that being attacked with acid is never justified. This realisation could make them more motivated to proceed with legal action.
- Services should be affordable and the survivors of acid violence should not be prevented from seeking legal aid out of fear of the financial costs. One's economic position cannot be an obstruction to access to justice.
- A survivor and witness protection system should be in place to prevent witnesses from refusing to testify out of fear of reprisals. Furthermore, witnesses should be encouraged to testify.
- Prosecutors and judges can have a negative view of acid burn survivors,

thinking that these individuals deserved what happened to them. Perception is based on access to information about, and awareness of, the issue. The enactment of the Acid Law should lead to more awareness by judicial officers and increased motivation to actively prosecute acid violence.

- The more examples there are of successful prosecutions, the greater the faith in the legal system will be. Hearing the positive judicial experiences of fellow acid burn survivors could make other victims more confident to also pursue this route.

- Awareness that punishment for acid violence is unlikely perpetuates this crime. Consequently, enforcement of the Acid Law could discourage to those who are considering acid violence from committing this crime.

- Legal practitioners should be adequately trained, fully skilled and knowledgeable to be appointed as a member of the judiciary.

The effectiveness of the Acid Law and the Acid Sub-decree will depend on the judiciary and government. If the law is properly implemented it will ensure that perpetrators of acid violence no longer enjoy impunity for their crime. However, this can only happen when all steps in the criminal justice system are working as intended. For this to happen it is necessary that there is a proper investigation, prosecution and trial. This can only be achieved if all actors in the criminal justice system and the government collaborate to achieve this goal.

BRINGING DOMESTIC CAMBODIAN CASES INTO COMPLIANCE WITH INTERNATIONAL STANDARDS

Applicability of ECCC Jurisprudence and Procedural Mechanisms at the Domestic Level

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Although the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) deviates from national practice in terms of its adopted procedures and its jurisdiction to prosecute international crimes occurring between 1975 and 1979, it is nevertheless a domestic court grounded in the Cambodian Constitution (“Constitution”) and judicial structure. As such, the jurisprudence and procedural mechanisms emerging from the ECCC lend themselves to application by domestic courts. Cambodia has ratified a number of the major international human rights conventions pertaining to fair trial rights, expressly incorporating them into its domestic system through the Constitution. With the ECCC being uniquely woven into the fabric of the Cambodian court structure, it can assist the judiciary to realize those obligations by setting an example as to how domestic courts should be applying international principles in their day-to-day consideration of domestic law. Bringing domestic cases into compliance with international standards by applying ECCC jurisprudence, in conjunction with additional measures, can enhance Cambodia’s judicial system and promote respect for the rule of law.

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I. INTRODUCTION

The ECCC is an extraordinary chamber within the existing Cambodian court structure. It was established with the cooperation of the United Nations (“UN”) to try senior leaders of Democratic Kampuchea and those who were alleged to be most responsible for both international and national crimes committed in Cambodia during the period 17 April 1975 to 6 January 1979. A number of features governing the ECCC’s establishment and its function within the Cambodian domestic system support the conclusion that its jurisprudence is part and parcel of Cambodian law and, therefore, applicable in domestic courts. These features include: a. the status of the ECCC as a domestic court; b. the role of the Constitution,² which specifically requires courts to consider international legal principles when applying domestic law; c. the interplay between domestic and

2 CONSTITUTION OF THE KINGDOM OF CAMBODIA (1993), as amended 15 February 2008.

international law in Cambodia; d. the impact of other instruments that govern the operation and procedure of the ECCC,³ which are grounded in domestic procedure and supplemented by international principles; and e. the aspiration of the ECCC to serve as a “model” court for Cambodia in enhancing judicial capacity and fostering the rule of law.

With these unique features, the ECCC provides an exquisite opportunity for Cambodians to witness the functioning of a Cambodian court that aims to achieve both substantive and procedural justice through the application of international standards and principles. Though fairly endeavoring to respect the rights and dignity of all parties, the ECCC has not lived up to its promise, let alone potential, to consistently apply these standards and procedures. Many of its decisions—both substantive and procedural—are open to unwelcome challenge and criticism.⁴ Of greater concern, however, are the allegations of corruption,⁵ political interference,⁶ revelations of significant deficiencies in its investigative processes in Case 0027; and implications of misconduct, incompetence, and lack of

3 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 (“Agreement”); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (“Establishment Law”); ECCC Internal Rules, Rev. 8 (as revised on 3 August 2011) (“Internal Rules”).

4 *See, e.g.*, Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/TC, Order to IENG Sary Defence on Filing of Preliminary Objections (Feb. 25, 2011) (requiring the Ieng Sary Defense to consolidate all of its preliminary objections on jurisdiction into a single 35-page summary); Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/TC, Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity (Oct. 26, 2011).

5 *See, e.g.*, Michael Saliba, *Allegations of Corruption at ECCC: Overview*, Cambodia Tribunal Monitor Blog (Sept. 28, 2009) (on file with author); Alex Bates, *Transitional Justice in Cambodia: Analytical Report*, ATLAS Project/British Institute of International and Comparative Law, at 58-60 (Oct. 2010) (“Bates Report”).

6 *See, e.g.*, Bates Report, *supra* note 5, at 52-58.

7 *See, e.g.*, Anne Heindel, “Critical” Irregularities in Interview Procedures Highlighted During Witness Testimony (Aug. 30, 2012), available at <http://www.cambodiatribunal.org/sites/default/files/CTM%20Heindel%2012-08-30.pdf> (last visited Dec. 2, 2013).

independence in the judicial investigations of Cases 003 and 004.⁸ The Trial Chamber's claim that the ECCC is "a model court"⁹ is more aspirational than actual. Certain decisions made by the Office of Co-Prosecutors ("OCP"), the Office of the Co-Investigating Judges ("OCIJ") and the Chambers (Pre-Trial, Trial and Supreme Court) are seemingly politically driven, fostering (or *perpetuating*, as it were, in the currently existing prosecutorial and judicial context) a culture of circumvention and/or concealment.

Considering, however, that courts throughout Cambodia are at best haphazardly applying the international human rights principles incorporated in the Constitution,¹⁰ the ECCC, imperfect as it may be, is best poised to guide the Cambodian judicial system. It is no exaggeration to say that for the first time in modern Cambodian history (or at any time for that matter), through the ECCC Cambodians are seeing how a court of law ought to function: parties are afforded the right to be heard; defense lawyers are openly and aggressively challenging the

8 Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers of the Courts of Cambodia*, at 5, 20-30 (Feb. 2012) ("OSJI 2012 Report"), available at <http://www.soros.org/sites/default/files/cambodia-eccc-20120233.pdf> (last visited Oct. 1, 2012). Judges of the Pre-Trial Chamber have also referred to certain irregularities that occurred during the investigative process in Case 003 and 004 regarding the admissibility of civil parties. In relation to Case 004, Judges Lahuis and Downing observed that "[w]here the lack of transparency in the proceedings has seriously impaired the right of the Appellant to present the best case possible...we are additionally compelled to address the specific issue of the notification of the Order in Case 004 to the Appellant and his Co-Lawyers." Case No. 004/07-09-2009-ECCC/OCIJ (PTC 02), Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Application Robert Hamill, Dissenting Opinion of Judges Lahuis and Downing ¶ 7 (Feb. 14, 2012). See also Case No. 003/07-09-2009-ECCC/OCIJ (PTC 02), Appeal Against Order on the Admissibility of Civil Party Application Robert Hamill, Dissenting Opinion of Judges Lahuis and Downing ¶ 2 (Oct. 24, 2011).

9 The Trial Chamber has stated that, while the ECCC lacks the mandate to directly address alleged deficiencies in national mechanisms designed to uphold the independence of the judiciary, "[i]t may, as a model court, nonetheless serve to encourage and underscore the significance of institutional safeguards of judicial independence and integrity." Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/TC, Decision on IENG Sary's Application to Disqualify Judge Nil Nonn and Related Requests, ¶ 14 (Jan. 28, 2011) ("Decision on IENG Sary's Application to Disqualify Judge Nil Nonn") (emphasis added).

10 See, e.g., Cambodian Center for Human Rights ("CCHR"), *Fourth Bi-Annual Report: Fair Trial Rights 2009-2011* (2012), available at http://www.cchrcambodia.org/index_old.php?url=media/media.php&p=report_detail.php&reid=81&tid=5 (last visited Oct. 22, 2012), identifying a number of fair trial rights that are not consistently upheld by domestic courts, including the presumption of innocence, the right to legal representation and the rights not to be compelled to confess or be subjected to lengthy pre-trial detention. See also Center for Social Development, 3:15 *Court Watch Bulletin* (Oct 2006) ("Court Watch Bulletin 2006") (copy on file with author), finding that between June and September 2006 a number of violations of fair trial rights were observed in Cambodian courts, including violations of the presumption of innocence, the right to trial within a reasonable time, and the right to assistance of counsel.

prosecution while also demanding to be heard by the judges; and rulings and decisions are for the most part transparently reasoned and subject to actual review.

Any action by the Cambodian judiciary to ensure greater application of Constitutional fair trial rights will depend almost exclusively on the Cambodian Government (“Government”), which effectively controls the judiciary.¹¹ This article offers some thoughts on how Cambodia can seize this extraordinary opportunity to harvest the positive fruits of the ECCC’s jurisprudence and procedural mechanisms to strengthen domestic judicial capacity.

2. FEATURES SUPPORTING THE CONCLUSION THAT ECCC JURISPRUDENCE IS APPLICABLE IN DOMESTIC CAMBODIAN COURTS

2.1. The Role of the ECCC As a Domestic Court

The ECCC was established as a Cambodian domestic court.¹² The Cambodian Government explicitly rejected creating the ECCC as an international tribunal, as was suggested by the international community during negotiations between the Government and the UN concerning the ECCC’s establishment.¹³ The clear intention of the Government was to establish a domestic court with international elements. Though often characterized as “internationalized” (a label of dubious substance), the ECCC is a court embedded in the domestic court system. This intention is reflected in the documents that establish and define the jurisdiction of the ECCC: the Agreement between Cambodia and the United Nations and the Cambodian Establishment Law, each of which refer to the creation of “Extraordinary Chambers” within the existing court structure.

During the protracted negotiations leading up to the Agreement, the UN had expressed “concern with continued problems related to the rule of law and the functioning of the judiciary [in Cambodia] resulting from, inter alia, corruption and interference by the executive with the independence of the judiciary.”¹⁴ The UN proposed changes to the draft Agreement, including provisions for the

11 See, e.g., *Report of the Special Rapporteur on the situation of human rights in Cambodia*, delivered to the General Assembly, 15th Session, U.N. Doc. A/HRC/15/46, ¶ 41 (Sept. 16, 2010) (“Special Rapporteur 2010 Report”); *Report of the Special Rapporteur on the situation of human rights in Cambodia*, U.N. Doc. A/HRC/18/46, ¶ 23 (Aug. 2, 2011) (“Special Rapporteur 2011 Report”). See also Press Release, CCHR, *Blurred Separation of Powers Serves the Political Objectives of the Executive* (Mar. 16, 2011) (copy on file with author).

12 See, e.g., Case of Kaing Guek Eav alias “Duch,” Case No. 001/18-07-2007-ECCC/PTC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias “Duch,” ¶ 19 (Dec. 3, 2007) (“*Duch* Appeal Against Provisional Detention Judgment”).

13 See *Report of the Secretary-General on Khmer Rouge Trials*, delivered to the General Assembly, 57th Session, ¶ 6, U.N. Doc. A/57/769 (Mar. 31, 2003).

14 *Id.* ¶ 13.

majority of the judges on the Trial and Supreme Court Chambers to be international, for decisions of the Chambers to be resolved by simple majority vote rather than a “supermajority,” and for only one prosecutor and one investigating judge, each of whom would be international (rather than two co-prosecutors and two co-investigating judges, national and international, as had been envisioned in the original draft).¹⁵ The proposals to bolster the international elements of the court were intended to remedy perceived weaknesses in the Cambodian system, with the UN Secretary-General stating that these adjustments were necessary to “ensure that the impartiality and independence of the Extraordinary Chambers and the integrity and accessibility of the proceedings were fully protected.”¹⁶ The Government rejected these proposed amendments, making it clear that it wanted a domestic, as opposed to an international or internationally controlled, court.¹⁷ Despite the involvement of the UN, and the ECCC’s jurisdiction to try international crimes,¹⁸ it is clear that the ECCC was established as a *sui generis* court within the domestic court system bound by the Constitution and other

15 See *id.* ¶ 16.

16 *Id.*

17 The UN Secretary-General stated that “it became apparent to me, during my team’s visit to Phnom Penh, that the Government of Cambodia was not prepared to contemplate proposals that would require it to make any changes to those provisions of its national law that specified how the Extraordinary Chambers were to be structured and organized.” *Id.* ¶ 20. On the negotiations leading to the establishment of the ECCC, see generally Suzannah Linton, *Putting Cambodia’s Extraordinary Chambers in Context*, 11 SING. Y.B. INT’L L. 195, 223-225 (2007) (“Linton 2007”).

18 As Professor Schabas has observed: “The fact that a national judicial institution only deals with international crimes is not enough to make it an international court...The test should be whether the tribunal can be dissolved by the law of a single country. If that is the case, as it is in Cambodia, then the tribunal is national. Cambodia has an agreement with the United Nations by which it pledges cooperation. The agreement has been endorsed by a General Assembly resolution. Nevertheless, the legal framework of the Extraordinary Chambers is profoundly national. What the Cambodian legislator can do it can also undo.” WILLIAM A. SCHABAS, *UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS* 19 (OUP 2012).

Cambodian law.¹⁹ Put differently, there is a strong institutional link between the ECCC and the courts of Cambodia justifying an expectation that the jurisprudence of the ECCC will be heeded by the domestic courts, despite the fact that the decisions of the ECCC do not explicitly create law for the domestic courts.

2.2. The Cambodian Constitution

The Constitution, as the “supreme law” of Cambodia,²⁰ governs the operation of both the ECCC and domestic courts. The Constitution explicitly incorporates international human rights standards into the domestic framework, providing that “the Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.”²¹

Cambodia has ratified the major international human rights conventions,²²

19 Although a number of decisions from both the Pre-Trial and Trial Chambers have described the ECCC as an “internationalized” court, the author maintains that this characterization is a fiction, not grounded in any particular jurisprudence. Whatever the term “internationalized” may denote, the ECCC is not an international court. The features relied upon by the Chambers in characterizing the ECCC as an “internationalized” court include, *inter alia*, the fact that its judiciary includes Cambodian and international judges who take separate and distinct judicial oaths from judges of domestic courts, its decisions are not reviewable by courts outside its structure and it has no jurisdiction to judge the activities of other bodies. See Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on IENG Sary’s Appeal Against the Closing Order, ¶ (¶ 215-16 (Apr. 11, 2011) (“Decision on IENG Sary’s Appeal Against the Closing Order”); Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/TC, Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), ¶ 32 (Nov. 3, 2011). These features do not displace the ECCC’s status as a court embedded within the domestic judicial system. As the Pre-Trial Chamber has acknowledged, the ECCC is “part of the Cambodian court system,” Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 01), Public Decision on the Co-Lawyers’ Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of NUON Chea, ¶ 30 (Feb. 4, 2008). The Trial Chamber has also noted that the ECCC was established “within the existing Cambodian court structure,” Case of Kaing Guek Eav *alias* “Duch,” Case No. 001/18-07-2007-ECCC/TC, Decision on Request for Release, ¶ 10 (June 15, 2009).

20 Constitutional Council Decision 092/003/2007, 10 July 2007 (“Constitutional Council 2007 Decision”), available at http://www.ccc.gov.kh/english/cont_dec_2007.php (last visited Sept. 27, 2012).

21 CAMBODIAN CONST., *supra* note 2, art. 31.

22 See, e.g., International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 171 (signed on 17 October 1980, accession 26 May 1992); Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85 (accession 14 October 1990); Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3 (accession 15 October 1992); Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 U.N.T.S. 13 (signed on 17 October 1980, accession 15 October 1992). According to the UN Treaty Collection Database, Cambodia has signed, ratified or acceded to 65 treaties, covenants and protocols. See UN Treaty Collection Database website, available at <http://treaties.un.org/pages/CNs.aspx> (last accessed Oct. 24, 2012).

including the International Covenant on Civil and Political Rights (“ICCPR”).²³ The ICCPR is the primary international instrument recognizing the obligation of States under the UN Charter to promote “universal respect for, and observance of, human rights and freedoms.”²⁴ The ICCPR sets out the “equal and inalienable rights”²⁵ and minimum guarantees which apply to all individuals’ civil and political participation, including fair trial rights. Since Cambodia has ratified these instruments and chosen to unambiguously incorporate them into its Constitution,²⁶ it is beyond cavil that meaningful adherence to the rule of law in Cambodia requires that all domestic courts apply and uphold these overarching human rights provisions.²⁷ Because the ECCC is a domestic court, it follows that the laws and instruments adopted to establish and govern the ECCC are also subject to the Constitution and the human rights protections enumerated within it.²⁸ ECCC jurisprudence interpreting constitutionally required human rights protections can therefore provide an authoritative example for domestic courts.

2.3. Interplay of Domestic and International Law in Cambodia

The interplay between international law incorporated into the Constitution and domestic law in Cambodia supports the conclusion that the ECCC’s jurispru-

23 16 December 1966, 999 U.N.T.S. 171 (signed on 17 October 1980, accession 26 May 1992).

24 *Id.* p.mbl.

25 *Id.*

26 Articles 31(2) to 50 of the Cambodian Constitution expressly mirror a number of rights contained in these international human rights treaties, including fair trial rights under Article 38 such as: the requirement that the prosecution, arrest or detention of any person shall not be done except in accordance with the law; the right to defense and legal recourse; the right to be considered innocent until the court has finally judged on the case; and that any case of doubt shall be resolved in favor of the accused. CAMBODIAN CONST., *supra* note 2.

27 See, e.g., Elinor Fry, *Between Show Trials and Sham Prosecutions: The Rome Statute’s Potential Effect on Domestic Due Process Protections*, 23 CRIM. L. FORUM 35 (2012) (arguing that ratifying states — such as Cambodia — are compelled to strengthen fair trial rights as part of their obligations under the Rome Statute, by reason of the express reference in the articles relating to the principle of complementarity and *ne bis in idem* to the conduct of domestic trials in accordance with international due process standards). See Rome Statute of the International Criminal Court, *opened for signature* 17 July 1998, 2187 U.N.T.S. 90, arts. 17, 20(3) (“Rome Statute”). Cambodia signed the Rome Statute on 23 October 2000 and ratified it on 11 April 2002. See Coalition for the International Criminal Court, *available at* <http://www.iccnw.org/?mod=country&iduct=29> (last accessed on Oct. 24, 2012).

28 For example, the Constitutional Council, which is comprised of nine members appointed by the King, the National Assembly and the Supreme Council of the Magistracy and is entrusted with the duty “to safeguard respect of the Constitution, interpret the Constitution and laws adopted by the National Assembly and reviewed completely by the Senate” (see CAMBODIAN CONST., arts. 136-38), has been required to consider whether the Establishment Law is consistent with the Constitution. It found that the original Establishment Law approved by the Senate in 2001 was not in accordance with the Constitution to the extent that it allowed for the death penalty. See Constitutional Council Decision No 040/002/2001 KBTh Ch (Feb. 12, 2001), *available at* <http://www.eccc.gov.kh/en/document/legal/cambodia> (last visited Sept. 27, 2012). The 2001 Establishment Law was subsequently amended to create the 2004 Establishment Law.

dence is applicable in domestic courts because international law incorporated through the Constitution is also domestic law. Cambodia appears to adhere to a dualist (as opposed to a monist) system in its approach to implementing international law in its domestic legal order.²⁹ As distinct from a monist system, where international law exists alongside the domestic law as equally applicable by courts, a dualist system considers international law to be separate from domestic law and only applies international law if it is directly incorporated into domestic law through a State's constitution or through implementing legislation.³⁰ In Cambodia, international human rights principles have been explicitly incorporated into the domestic framework by the Constitution and are thus, at least in theory, applicable in domestic courts.³¹

The Constitutional Council has recognized that, although a law may not violate the Constitution, a court must consider whether its application in a particular case would be incompatible with either provisions in the Constitution, other Cambodian law or international conventions recognized by Cambodia. In finding that a proposed amendment to the Law on the Aggravating Circumstances of Felonies³² was consistent with the Constitution, the Constitutional Council noted that the trial judge should rely not only on the proposed amended Article for

29 The Pre-Trial Chamber declined to comment on the characterization of Cambodia as a dualist legal system as asserted by IENG Sary and NUON Chea in their appeals against decisions of the OCJ, except to say that it had no bearing on the issues raised on appeal. Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 145 and 146), Decision on Appeal by NUON Chea and IENG Thirith against the Closing Order, ¶ 98 (Feb. 15, 2011); Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 35, 37, 38 and 39), Decision on Appeals Against the Co-Investigative Judges' Order on Joint Criminal Enterprise (JCE), ¶ 48 (May 20, 2010). The Constitution does not directly state whether Cambodia follows a monist or dualist approach to international law. However, as Professor Linton observes, "[Cambodian] courts refuse to entertain claims that are, in the absence of enabling legislation, directly based on international laws, or even for that matter, on the Constitution." Linton 2007, *supra* note 17, at 203. The Government has certainly indicated its preference for dualism as evidenced by its report to the Committee on the Elimination of Racial Discrimination, referring to the fact that eight conventions ratified by Cambodia were not to be directly invoked before Cambodian courts or administrative authorities, although they "provide a basis for the development of national legislation, such as that pertaining to the observance and protection of human rights..." Committee on the Elimination of Racial Discrimination, *Seventh Periodic Reports of States Parties Due in 1996: Cambodia*, 05/05/97, ¶ 19, U.N. Doc. CERD/C/292/Add.2 (May 5, 1997).

30 See, e.g., Gabriele Olivi, *The Role of International Courts in Prosecuting International Crimes: New Perspectives*, 18 SRI LANKA J. INT'L L. 83, 86-87 (2006).

31 While crimes under international and customary law are not *directly* punishable in domestic courts in Cambodia, they can be implemented by legislation into the domestic framework, as has occurred in relation to international crimes penalized in the Cambodian Criminal Code. See Kingdom of Cambodia, Criminal Code (Nov. 30 2009) ("Cambodian Criminal Code") English-Khmer Translation by Bunleng CHEUNG, arts. 138, 188, 193. For further discussion on the applicability of international criminal law in domestic systems, see generally WARD N. FERDINANDUSSE, *DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS* (T.M.C. Asser Press 2006).

32 The amended Article 8 provides that a judge must not consider any attenuating circumstances for punishment, or suspend or reduce a sentence below the mandatory minimum for felonies punishable with forced labor.

a conviction, but also on “the laws.”³³ The term “laws” refers to “the national laws, including the Constitution which is the supreme law, all the laws that remain in force, and the international laws already recognized by the Kingdom of Cambodia...”³⁴ Thus, despite the fact that international law does not appear to be directly enforceable in domestic courts, local judges, like ECCC judges, are constitutionally obliged to consider international human rights conventions and fair trial rights in applying and interpreting domestic law.³⁵

Notwithstanding the Constitutional requirement to consider international legal instruments and human rights protections, these international legal principles have rarely, if ever, been applied in practice by the domestic courts in Cambodia. A recent report from the UN Special Rapporteur on the situation of human rights in Cambodia raised concerns about the independence and competence of the judiciary, observing that “in spite of the Constitutional guarantees and the existence of various institutions to enhance and safeguard its independence, the Special Rapporteur is of the view that the judiciary has not been working as effectively, independently and impartially as possible.”³⁶ Areas of major concern in domestic criminal proceedings include limited legal argument in the courtroom;³⁷ the absence of any rigorous analysis of law or publication of reasoned decisions;³⁸ corruption and political interference within the judiciary;³⁹ excessive reliance on confessions extracted in police custody, often under duress;⁴⁰ lengthy detention

33 Constitutional Council 2007 Decision, *supra* note 20, at 1.

34 *Id.*

35 Similarly, the Justices of the United States Supreme Court have considered international law in their judgments; for example, in determining whether the imposition of a sentence of life without parole for a juvenile in a non-homicide case violated the United States Constitution's Eighth Amendment prohibition against cruel and unusual punishment. See *Graham v. Florida*, 130 S. Ct. 2011, 2033-34 (2010): “The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But “[t]he climate of international opinion concerning the acceptability of a particular punishment” is also “not irrelevant.” . . . The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it.” (Citations omitted).

36 Special Rapporteur 2010 Report, *supra* note 11, ¶ 30. Bates also refers to the “self-avowedly poor state” of the Cambodian judiciary, citing Consultant's interviews with Judge Nil Nonn. Bates Report, *supra* note 5, at 5, 50-51.

37 See Special Rapporteur 2010 Report, *supra* note 11, ¶ 42.

38 See *id.* Judge Nil Nonn has expressly lamented that Cambodian judges fail to explain their arguments specifically and has stated that, in the future, he would explain his judgments more carefully, appreciating the “reasoning culture” of the international judges on the bench. Bates Report, *supra* note 5, at 50, *citing* Consultant's interviews with Judge Nil Nonn.

39 See Special Rapporteur 2010 Report, *supra* note 11, ¶¶ 44, 51-52; Bates Report, *supra* note 5, at 52-60.

40 See Special Rapporteur 2010 Report, *supra* note 11, ¶ 51.

without charge;⁴¹ and a lack of trust by the public that the courts will deliver impartial justice.⁴²

Many of these deficiencies have been exposed in the recent controversy surrounding the 20-year jail term handed down by the Phnom Penh Municipal Court to independent radio station owner Mam Sonando for allegedly inciting insurrection activities in Kratie's Broma village.⁴³ The sentence was imposed after a three-and-a-half day trial, which was held two months after Mam Sonando's arrest on 15 July 2012, and during which the prosecution presented little evidence of his involvement in the alleged insurrection activities in Broma village.⁴⁴ The case has been described as "one of the most blatantly politically motivated trials in recent years,"⁴⁵ with human rights groups claiming that the Government fabricated the alleged plot to silence the owner of one of the few independent radio stations in Cambodia and to cover up its eviction of 600 Broma villagers who were involved in a land dispute with a rubber plantation.⁴⁶ United States State Department spokeswoman Victoria Nuland has called on the Government to "release Mam Sonando immediately to ensure that its court system is free from political influence, and to reaffirm its commitment to guaranteeing its citizens' basic rights."⁴⁷ ECCC fair trial rights jurisprudence can provide judges a tool for fulfilling their constitutional obligation to address these systematic concerns.

41 This problem has also been expressly highlighted by Judge Nil Nonn. See Bates Report, *supra* note 5, at 51, *citing* Consultant's interviews with Judge Nil Nonn.

42 Special Rapporteur 2010 Report, *supra* note 11, ¶ 42.

43 Criminal Case no. 206 dated 18 May 2012 of the Prosecution Department attached to the Kratie Court, later transferred to Criminal Case no. 2207 dated 16 July 2012 of the Prosecution Department attached to the Phnom Penh Municipal Court.

44 On 28 June 2012, two days after the Cambodian Prime Minister publicly named Mam Sonando, the Investigating Judge of Kratie First Instance Court decided to expand the investigation of Criminal Case no. 206 to include Mam Sonando (Order number 1373 PPS 12, dated 28 June 2012 of the Investigating Judge of Kratie First Instance Court). On 29 June 2012, Mam Sonando was summoned for an interview but was not in Cambodia at that time. An arrest warrant was issued that same day. Mam Sonando was arrested in Phnom Penh on 15 July 2012. The Kratie First Instance Court transferred the case to the Prosecution Department attached to the Phnom Penh First Instance Court, where the latter was seized with the criminal case no. 2207. The judicial investigation concluded on 7 August 2012. Mam Sonando was charged under the Criminal Code with: Plotting against a public civil servant (Articles 29 and 504); Insurrection (Article 29, 456 and 457); Interference in the fulfillment of public duties (Articles 609 and 29); and Inciting people to use weapons against public authorities (Articles 464 and 29). Cambodian Criminal Code, *supra* note 31. The trial was held from 11-14 September 2012. On 1 October 2012, the Court announced its verdict.

45 Peter Zsombor, *Sonando Verdict a Tough Test for KRT Legacy*, CAMBODIA DAILY, Oct. 4, 2012, at 1.

46 See Peter Zsombor, *Donors Criticize Sonando Sentence*, CAMBODIA DAILY, Oct. 3, 2012, at 20.

47 *Id.* CCHR also recently raised concerns about the "undisguised political interference" that led a Cambodian provincial court to drop its investigation into the murder of a high-profile environmental activist, Chut Wutty, as he accompanied journalists investigating alleged illegal logging. Press Release, CCHR, *CCHR Says Dropping of Chut Wutty Case Is Indicative of Political Interference* (Oct. 7, 2012) (on file with the author).

2.4. Instruments Governing the Practice and Operation of the ECCC

The instruments governing the practice and operation of the ECCC provide that the ECCC must apply Cambodian fair trial principles and rules of procedure, but may look to procedural rules established at the international level where there is a *lacuna* in the Cambodian rules. This interplay between Cambodian and international law mirrors the requirement that domestic laws must be consistent with the principles enshrined in the Constitution, which include the provisions of the ICCPR and international human rights instruments.

2.4.1. *The Agreement.*

The Agreement signed on 6 June 2003 between the Cambodian Government and the UN was intended to formalize the cooperation between them for the establishment of the ECCC and to provide, *inter alia*, the legal basis, principles and modalities for that cooperation. According to Article 12 of the Agreement, the procedure applicable at the ECCC shall be “in accordance with Cambodian law.” However, the Agreement provides that “guidance may also be sought in procedural rules established at the international level” where there is a deficiency or uncertainty or where Cambodian law is inconsistent with international standards.⁴⁸

Article 12(2) explicitly provides that the ECCC shall exercise its jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the ICCPR. Article 14 of the ICCPR sets out the fundamental fair trial rights that attach to all persons charged with criminal offenses including: the right to a fair and public hearing by a competent, independent and impartial tribunal; the right to be presumed innocent until proven guilty; the right to be informed of the nature of the charges; the right to adequate time and resources for preparation of a defense and to communicate with legal counsel; the right to be tried without undue delay; and the right to be tried in one’s presence. Article 15 embodies the principle of legality, requiring that “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”

2.4.2. *The Establishment Law.*

The Cambodian Establishment Law was created “to bring to trial senior leaders of the Democratic Kampuchea and those who were most responsible for

48 Agreement, *supra* note 3, art. 12(1).

the crimes and serious violations of Cambodian penal law,⁴⁹ international humanitarian law and custom, and international conventions recognized by Cambodia.”⁵⁰ The original version of the Establishment Law was passed in 2001 (prior to the signing of the Agreement in 2003), and later amended in 2004. While the purpose of the Agreement was to establish cooperation between the UN and the Government, the role of the Establishment Law was to put into practice exactly how this would be done, while also specifying the ECCC’s subject matter, temporal and personal jurisdiction. Simply, the Agreement must be implemented “through” the Establishment Law.⁵¹ Mirroring Article 12(2) of the Agreement, Article 33 new of the Establishment Law also provides that the ECCC shall exercise its jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the ICCPR.

Although the Establishment Law was adopted to apply specifically to the ECCC and its provisions cannot be directly applied by other courts, it is nevertheless grounded within Cambodian law supplemented by international fair trial standards, including the ICCPR. Given that Cambodian courts are obliged to consider the same international standards as imported by the Constitution in their application of domestic law, the jurisprudence of the ECCC applying the Establishment Law can be instructive to domestic courts interpreting similar provisions. For example, the recently enacted Cambodian Criminal Code, which criminalizes the same international offenses of genocide, crimes against humanity and grave breaches of the Geneva Conventions⁵² punishable by the ECCC under the Establishment Law,⁵³ already illustrates both a jurisprudential and legislative impact by the ECCC, providing an opportunity for domestic courts to apply ECCC jurisprudence.

2.4.3. *The Internal Rules.*

The Internal Rules of the ECCC were adopted in June 2007⁵⁴ by the Plenary Session of national and international judges. As observed by the Pre-Trial Chamber, the Internal Rules “form a self-contained regime of procedural law

49 Though it is expected that the Accused appearing before the ECCC will enjoy the presumption of innocence throughout the proceedings (see CAMBODIA CONST., *supra* note 2, art. 38; Establishment Law, *supra* note 3, art. 35 new), it is galling that the ECCC’s founding document contains language implying a presumption of guilt.

50 Establishment Law, *supra* note 3, art. 1.

51 Agreement, *supra* note 3, art. 12(2) (providing that “[t]he present Agreement shall be implemented in Cambodia through the Law on the Establishment of the Extraordinary Chambers as adopted and amended”).

52 Cambodian Criminal Code, *supra* note 31, arts. 183, 188, 193.

53 Establishment Law, *supra* note 3, arts. 4, 5, 6.

54 The Internal Rules were amended twice every year from February 2008 until the most recent version (Revision 8), adopted in August 2011.

related to the unique circumstances of the ECCC.”⁵⁵ Although the Internal Rules do not stand in opposition to the Cambodian Criminal Procedure Code (“Criminal Procedure Code”), the Pre-Trial Chamber has held that reference should be made to the Internal Rules as the “primary instrument”⁵⁶ where there is a difference between the Internal Rules and the Criminal Procedure Code. The provisions of the Criminal Procedure Code should only be applied where a question arises which is not addressed by the Internal Rules.⁵⁷

The legal authority to adopt the Internal Rules is given to the ECCC through the National Assembly by means of Article 33 new of the Establishment Law, but only to the extent that the existing procedures in force “do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards.”⁵⁸ This practice of creating procedural rules specific to the ECCC is consistent with the procedure employed at the International Criminal Court (“ICC”) and some of the *ad hoc* tribunals, whose governing statutes allow for the adoption of specific rules of procedure, although without the limitation which exists at the ECCC that such rules can be established only when there is a *lacuna* in the domestic law.⁵⁹

Notwithstanding Article 33 new of the Establishment Law, an argument can be made that the legal framework of the ECCC does not provide the Judges any power to legislate on procedural issues, particularly where judge-adopted rules could conflict with or deviate from procedural legislation adopted by the National

55 Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC06), Decision on Appeal Against the Order Refusing Request for Annulment, ¶ 14 (Aug. 26, 2008) (“Decision on Appeal Against Order Refusing Request for Annulment”).

56 *Id.* The Trial Chamber also supports this view. See Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/TC, Decision on Nuon Chea’s Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, ¶ 78 (Aug. 8, 2011). The Supreme Court Chamber advocates a more nuanced, if not dissimilar, approach, holding that “Cambodian law remains the controlling procedural law for proceedings before the ECCC, save where that law is inadequate according to the criteria specified in these provisions.” Case of Kaing Guek Eav *alias* “Duch,” Case No. 001/18-07-2007-ECCC/SC, Appeal Judgement, ¶ 409 (Feb. 3, 2012) (“*Duch* Appeal Judgement”).

57 See Decision on Appeal Against Order Refusing Request for Annulment, *supra* note 55, ¶ 15.

58 Establishment Law, *supra* note 3, art. 33.

59 See Rome Statute, *supra* note 27, art. 51, which provides for “Rules of Procedure and Evidence” to be adopted upon a two-thirds majority of the members of the Assembly of States Parties. The Rules and any amendments must be consistent with the Rome Statute. See also Statute of the International Criminal Tribunal for the former Yugoslavia, art. 15, U.N. Doc. S/RES/827 (May 25, 1993), which provides for judges to adopt “rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.” This provision is mirrored in the Statute of the International Criminal Tribunal for Rwanda, art. 14, U.N. Doc. S/Res/955 (Nov. 8, 1994), which also provides for rules relating to “other appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.” Each of these bodies has enacted rules of procedure pursuant to these provisions.

Assembly. Perhaps the better practice would have been for the Plenary to have adopted an interpretative declaration of Article I2(I) of the Agreement, as one legal scholar noted, by identifying which elements of Cambodian criminal procedure were certain and consistent with international standards and which were uncertain or inconsistent with international standards.⁶⁰ This practice would have clearly articulated how the ECCC would determine which rules of international criminal procedure should act as “gap-filling” or serve the “corrective function” envisaged by Article I2(I) of the Agreement.⁶¹ However, despite the availability of this prudent and more transparent approach in reconciling any *lacunae* or ambiguities, the Trial Chamber has held that the Judges of the Plenary acted within their discretionary parameters in drafting and adopting the Internal Rules,⁶² which to this day continue to evolve.⁶³ Of course, allowing the judges of the ECCC or the other international tribunals the unfettered ability to create procedural rules, then declare the creation of those rules to be within their own broad discretion, presents the danger that procedural rules founded in expediency and economy will impinge upon substantive rights.

While the Internal Rules specifically apply to the ECCC, for the most part they are based on and grounded within Cambodian procedure. The Internal Rules complement principles of domestic procedure, incorporating the international fair trial rights, standards and principles set out in the Constitution, which, indubitably, all Cambodian courts should be applying. Thus, ECCC decisions made pursuant to the Internal Rules should be considered and, when appropriate, applied by domestic courts. The Internal Rules cannot, and in fact should not, supplant applicable Cambodian procedures insofar as those procedures are consistent with international standards. Such an approach would be inconsistent with the ECCC’s power to adopt the Internal Rules and would undermine its ability to leave a jurisprudential fair trial legacy that is relevant and applicable to domestic courts.

2.4.4. International and Internationalized Tribunal Precedent.

There is nothing in the Establishment Law, the Agreement or the Internal

60 See Goran Sluiter, *Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers*, 4:2 J. INT’L CRIM. JUST. 314, 320 (2006).

61 See *id.*

62 Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/TC, Decision on NUON Chea’s Preliminary Objections Alleging the Unconstitutional Character of the ECCC Internal Rules, ¶ 9 (Aug. 8, 2011).

63 The fact that the Internal Rules have been revised every year since their operation has, according to some, “undoubtedly caused uncertainty.” Bates Report, *supra* note 5, at 47.

Rules that *requires* ECCC judges to follow the jurisprudence or rules of procedure of international or internationalized tribunals.⁶⁴ This precedent is not binding on the ECCC, nor is it binding in other Cambodian domestic courts. However, given that the Constitution, the Establishment Law and the Internal Rules explicitly incorporate the protections of international human rights instruments, including the ICCPR, the jurisprudence and rules of procedure of international and internationalized tribunals can be used for guidance in interpreting relevant provisions of international law and procedure, both at the ECCC and in domestic courts.

The ECCC has cited jurisprudence from the ICC, the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), the Special Court for Sierra Leone (“SCSL”) and the Special Panels for Serious Crimes in Timor Leste (“Special Panels”) as well as international human rights bodies including the European Court of Human Rights (“ECtHR”), Human Rights Committee (“HRC”) and Inter-American Court of Human Rights (“IACtHR”), particularly in situations where there is no pertinent Cambodian law or practice. In relation to fair trial rights, the ECCC cited jurisprudence from these bodies when considering, for example, the principle of legality under Article 15 of the ICCPR and customary international law,⁶⁵ the interpretation of Article 14(7) of the ICCPR and the *ne bis in idem* principle⁶⁶ and the impact of public statements condemning an accused on the right to be presumed innocent under Article 14(2) of the ICCPR.⁶⁷

Predictably, there will be reluctance if not outright resistance to apply any ECCC jurisprudence or procedural practices that make reference to jurisprudence or practices from the *ad hoc* international tribunals, the ICC or human rights courts.

64 Cf. Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed on 16 January 2002, at pmb. (explicitly providing that its jurisprudence may be “linked” to that of the international tribunals).

65 See, e.g., Decision on Ieng Sary’s Appeal Against the Closing Order, *supra* note 19, ¶ 214, in which the Pre-Trial Chamber applied jurisprudence from the ECtHR and the ICTY in holding that the international standard of legality applies to proceedings before the ECCC.

66 See *id.* ¶¶ 127-60, where the Pre-Trial Chamber referred to the practice and jurisprudence of the ICTY, ICC, ICTR, SCSL, the ECtHR, and the IACtHR in holding that the principle of *ne bis in idem* had not been violated.

67 See Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC-TC/SC(15), Decision on Nuon Chea’s Appeal Against the Trial Chamber’s Decision on Rule 35 Applications for Summary Action (Sept. 14, 2012) (“Decision on Nuon Chea Rule 35 Appeal”). When considering the presumption of innocence in light of statements made by the Prime Minister that publicly referred to NUON Chea as a “killer” and a “perpetrator of genocide,” the Supreme Court Chamber noted that “[g]iven the lack of pertinent Cambodian jurisprudence, guidance was sought on the international level.” *Id.* ¶ 52. The Supreme Court Chamber referred to jurisprudence from the ICC, HRC, ECtHR, IACtHR, and various domestic courts including the United Kingdom’s Privy Council and the United States Supreme Court. While dismissing the appeal on the merits, it emphasized: “State interference with a pending criminal case through the public speech of a government official in the course of their official duties is a violation of the presumption of innocence in the jurisprudence of both human rights bodies and national systems.” *Id.*

The refrain from the judges and prosecutors (and perhaps even defense lawyers) no doubt will be that Cambodian law cannot be based on non-domestic jurisprudence and, therefore, ECCC jurisprudence should be disregarded. In other words, they will seek to maintain the *status quo* in the domestic courts; business as usual. It is worth re-emphasizing, however, that since domestic courts are mandated to consider and apply the same international legal instruments incorporated by the Constitution, an ECCC decision or procedural practice predicated on the ICCPR fair trial rights incorporated in the Constitution is, at a minimum, persuasive authority in domestic courts. Any claim to the contrary, especially if based on the excuse that a decision cites jurisprudence from one of these international bodies, is meritless.⁶⁸

2.5. The ECCC As a “Model” Court

With the realization that the Cambodian judicial system as it currently exists has certain weaknesses, the ECCC was intended to serve as a model for the domestic courts and to have a long-term impact on enhancing and building the domestic judiciary’s capacity. Arguably, the ECCC would establish and demonstrate best practices to be subsequently emulated by domestic courts, and would allow for the transfer of knowledge and expertise of the international community. As the UN Secretary-General stated during the establishment of the ECCC:

It is hoped that the establishment of a transparent process that complies with international standards will have an educational effect on existing formal institutions and create better awareness amongst the general population of the facts about Cambodia’s tragic past and further demand for a well functioning judicial system.⁶⁹

The UN Special Rapporteur on the situation of human rights in Cambodia

68 International law can also be a useful tool for interpreting State constitutions through a common language and dialogue and offers a range of jurisprudential models and precedents through which State courts can learn and participate in a global exchange of ideas. See Martha Davis, *Human Rights, Social Justice and State Law: A Manual for Creative Lawyering*, chap. 1, at 2 (Spring 2008), available at http://nlginternational.org/hrdocs/NESRI%20legal_training%20_manual.pdf (last visited Oct. 3, 2012).

69 Special Representative of the Secretary-General for Human Rights in Cambodia, *Situation of Human Rights in Cambodia*, ¶ 19, U.N. Doc. E/CN.4/2005/116 (Dec. 20, 2004).

has repeatedly acknowledged the importance of the ECCC as a model court in remedying deficiencies in the domestic court system, observing that “[t]he Court’s activities in this regard continue to set an important example for the national sector of the administration of justice in accordance with international fair trial standards.”⁷⁰ In December 2010, the Special Rapporteur wrote to the Cambodian Prime Minister about the importance of the ECCC for “setting an example to the international community of the country’s commitment to ensuring accountability for past atrocities, to protecting human rights, and to upholding the independence of the judiciary and the rule of law.”⁷¹ The Trial Chamber has also acknowledged the significance of the ECCC in this regard, observing that “[i]t may, as a model court, . . . serve to encourage and underscore the significance of institutional safeguards of judicial independence and integrity.”⁷² Likewise, Government officials have repeatedly identified the ECCC a model court.⁷³ The ECCC is therefore intended to have the ability to improve the domestic judiciary’s understanding of international standards and the conduct of trials according to these principles.

3. RECOGNIZING THE ECCC’S DEFICIENCIES

Despite the seemingly good intentions of judges, prosecutors and administrative staff at the ECCC, all is not well. Decisions and practices, even those that have passed judicial scrutiny by the Supreme Court Chamber, are not necessarily beyond criticism or challenge, nor should they be applied with reckless abandon by domestic courts. Circumspection is required to ensure that contrived legal decisions or unfair procedural practices from the ECCC are identified and rejected. Consider, for example, the Supreme Court Chamber’s majority decision on appeal in Case 00I, finding that the ECCC had no authority to order a reduction in Duch’s sentence for his eight years of unlawful detention by the

70 Special Rapporteur 2011 Report, *supra* note 11, ¶ 34. See also Special Rapporteur 2010 Report, *supra* note 11, ¶ 59, in which the Special Rapporteur observed:

There is much expectation that the ECCC will function as a model court in Cambodia, so that good practices can be shared with the wider judiciary and gradually help to uplift its practice. The place of the ECCC within the Cambodian court system potentially enables judges, prosecutors and other court officials of the ECCC to transfer knowledge to their colleagues in the judiciary.

71 Special Rapporteur 2011 Report, *supra* note 11, ¶ 35.

72 Decision on IENG Sary’s Application to Disqualify Judge Nil Nonn, *supra* note 9, ¶ 14.

73 See, e.g., Deputy Prime Minister H.E. Sok An, Remarks at the Swearing-In Ceremony of National and International Judicial Officers for the Extraordinary Chambers in the Courts of Cambodia, July 3, 2006, at http://www.eccc.gov.kh/sites/default/files/media/Sok_An_speech_for_reception_3_July_2006.pdf (“We earnestly hope and expect that the ECCC will be a model court for Cambodia”).

Military Tribunal.⁷⁴ Given that the problem of lengthy detention without trial in Cambodia has been expressly acknowledged by the President of the Trial Chamber,⁷⁵ the Supreme Court Chamber's holding on this point sets a worrying precedent, sending "a message to the Cambodian justice system, and the Cambodian citizens who are subject to inappropriate and excessive pre-trial detention by the national court system, that due process and human rights standards can be ignored."⁷⁶

Domestic courts should also be circumspect in adopting many of the procedures employed by the OCIJ, the body charged with undertaking "investigative action conducive to ascertaining the truth"⁷⁷ and examining both inculpatory and exculpatory evidence. A practice appears to have emerged whereby OCIJ investigators would, in violation of the Internal Rules,⁷⁸ conduct unrecorded interviews with witnesses, sometimes showing the witnesses documents, and would afterwards conduct recorded interviews which would be summarized by the OCIJ and signed or thumb printed by the witnesses. The summaries of the recorded interviews make no reference to the prior unrecorded interviews, deceptively suggesting that the summaries faithfully reflect the interviews and the

74 *Duch* Appeal Judgement, *supra* note 56, ¶ 395. The Supreme Court Chamber held that the international jurisprudence relied upon by the Trial Chamber was not applicable to the ECCC and that the ECCC had no authority to grant such a remedy in the absence of either attribution of the violations to the ECCC or the existence of an abuse of process (¶¶ 389-99). The Supreme Court Chamber increased the sentence of 35 years imposed by the Trial Chamber to a sentence of life imprisonment. Two of the international judges disagreed, observing that the prejudice to Duch's liberty was "extreme" and that the ECCC was "uniquely positioned to grant a remedy." *Id.* Partially Dissenting Joint Opinion of Judges Klonowiecka-Milart and Jayasinghe ¶¶ 14-15.

75 *See* Bates Report, *supra* note 5, at 51, citing Consultant's interviews with Judge Nil Nonn.

76 OSJI 2012 Report, *supra* note 8, at 12.

77 Internal Rules, *supra* note 3, r.55(5).

78 *See id.* r.21(1), r.25, r.51(8), r.55(7) and r.62(3). These Rules define the procedures that OCIJ investigators must follow when interviewing witnesses, including making a written record of every interview, which must provide information on the duration of the interview, and explicitly stating the reasons why an interview was not audio recorded.

manner in which they were conducted.⁷⁹ On at least one occasion, the investigators facilitated what appeared to be a “staged” interview where the OCIJ prepared questions and answers based on a previous unrecorded interview, which were then read by the witness into a recording device.⁸⁰ The written summaries are frequently used to “refresh” a witness’s memory in court,⁸¹ with the Trial Chamber seemingly accepting the contents of the summaries as “faithful and accurate” reflections of the *actual* interviews.⁸² More worryingly, the Prosecution has sought to rely exclusively on a number of these summary statements in lieu of witness testimony,⁸³

79 During the questioning of witness Meas Voeun by the IENG Sary Defense team, the witness testified that investigators came to his home to interview him prior to the recorded interview and that he was “read out some documents to brief me on this.” The witness also testified that “[m]y wife was close to me and she would just be there to listen to the questions and at times would remind me of my recollection of the events.” The written summary made no mention of this prior interview. Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC, Transcript, at 35-36 (Oct. 9, 2012). *See also* Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC-TC, IENG Sary’s Request that the Trial Chamber Seek Clarification from the OCIJ as to the Existence of Any Record Relating to the Questioning of Witness Oeun Tan on 8 October 2008 (Aug. 29, 2012); Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC-TC, IENG Sary’s Request to Hear Evidence From the Interpreter Concerning Witness Phy Phuon’s Second OCIJ Interview Whereby Irregularities Occurred Amounting to Subterfuge (Aug. 23, 2012) (“Phy Phuon Request”); Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC-TC, IENG Sary’s Request that the Trial Chamber Seek Clarification from the OCIJ as to the Questioning of Witness Norng Sophang on 17 February 2009 and Summon the OCIJ Investigators to Give Evidence Regarding This Interview (Sept. 27, 2012). Similarly, there are material discrepancies between some OCIJ summaries of witness statements and the audio recordings of those statements. *See, e.g.*, Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC-TC, Request for Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews (Nov. 17, 2011).

80 *See* Phy Phuon Request, *supra* note 79, intro, ¶ 8.

81 For example, during the testimony of telecommunications witness Norng Sophang, the witness testified that he did not know clearly who came to the Centre to collect telegrams. He was then referred by the Prosecution to a copy of his OCIJ summary statement and was asked to “see if that statement might refresh your memory.” To this, the witness responded: “I stand by that statement . . . sometimes it was communicated through a person who would come to the Centre.” Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/TC, Transcript, at 16-183 (Sept. 3, 2002).

82 *See, e.g.*, Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/TC, Transcript, at 21-24 (Dec. 15, 2011) (during questioning by Judge Lavergne).

83 *See* Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC-TC, Co-Prosecutors’ Request to Admit Witness Statements Relevant to Phase I of the Population Movement (June 15, 2012); Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC-TC, Co-Prosecutors’ Request to Admit Witness Statements Relevant to Phase 2 of the Population Movement and Other Evidentiary Issues with confidential Annexes I, II, III and Public Annex IV, (July, 5 2012); Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC-TC, Co-Prosecutors’ Further Request to Put Before the Chamber Written Statements and Transcripts with Confidential Annexes I to I6 (July 27, 2012).

despite the lack of transparency in how the summaries were prepared,⁸⁴ and the uncertainty of discerning whether the summaries reflect the witnesses' actual memories as opposed to memories aided or created by the OCIJ investigators during the unrecorded interviews.⁸⁵

Another example of conduct that should not be emulated by domestic courts is the occasional disparate treatment of the parties by the Trial Chamber, giving rise to the perception that it has a less than full commitment to upholding fair trial rights, in particular the rights of the accused.⁸⁶ Examples include the Trial

84 This has also been noted by Judges of the Pre-Trial Chamber in relation to Case 003, who noted that "the Co-Investigating Judges' approach in conducting this judicial investigation is on the whole unclear" and "very little information has been provided to permit an understanding in respect of the focus of this investigation." Case No. 003/07-09-2009-ECCC/OCIJ (PTC 02), Appeal Against Order on the Admissibility of Civil Party Application Robert Hamill, Dissenting Opinion of Judges Lhuis and Downing, ¶ 2 (Oct. 24, 2011).

85 The Trial Chamber has indicated a reluctance to remedy these deficiencies, characterizing Defense questions put to the witnesses on these issues as an improper attempt to question the integrity of the investigative process, rather than a legitimate exercise of the fundamental right to test and challenge evidence. For example, in response to Defense questioning of a witness on these matters, the Trial Chamber orally noted that "there is a presumption of the integrity of the judicial investigation" and that "the investigation is treated as the starting point and can be rebutted only in exceptional circumstances." The Trial Chamber ruled that the Defense should simply ask the questions that they have of the witness. Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/TC, Transcript, at 43-44 (Sept. 6, 2012) (ruling announced by Judge Cartwright). However, the Trial Chamber previously ruled that witnesses may be confronted with discrepancies in the investigative process "where necessary to assess the probative value of their testimony or to safeguard the fairness of trial proceedings." Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/TC, Decision on NUON Chea's Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, ¶ 7 (Mar. 13, 2012).

86 Disparate treatment of the parties does not accord with international fair trial standards. As explained by the ICCPR Human Rights Committee, the right to a fair trial requires that "[t]he right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant." ICCPR Human Rights Committee, CCPR/C/GC/32, General Comment No. 32, art. 14: Right to equality before courts and tribunals and to a fair trial, ¶ 13 (Aug. 23, 2007). Further, "[t]he requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial." *Id.* ¶ 21.

Chamber frequently switching off defense counsels' microphones, preventing them from responding to objections or exercising their right to make the necessary record,⁸⁷ allowing witnesses to determine for themselves whether to respond to questions put to them by the Defense⁸⁸ and ostensibly ruling on the same grounds of an objection differently depending on whether the objection was raised by the Prosecution or the Defense.⁸⁹ These practices undermine the impartiality and integrity of the ECCC, casting doubt on its proclaimed commitment to upholding fair trial rights for all parties.

4. HARNESSING THE POSITIVE FROM THE ECCC

The ECCC has yet to positively impact domestic courts. Indeed, its potential to do so has recently been called into question in response to the controversy surrounding the highly politicized Mam Sonando trial. International human rights

87 See, e.g., Stuart White, *Cambodia's Leaders Called out at Khmer Rouge Court*, PHNOM PENH POST, Aug. 1, 2012, available at <http://www.phnompenhpost.com/index.php/KRTalk/cambodias-leaders-called-out-at-khmer-rouge-court.html> (last visited Sept. 28, 2012), reporting that the International Co-Lawyer for the Accused Nuon Chea had his microphone turned off by the Trial Chamber three times during the examination of a witness. There are numerous other instances where the Trial Chamber has employed this practice. See, e.g., Case of NUON Chea et al., Case No. 002/19-09-2007-ECCC/TC, Transcript, at 75-76 (July 23, 2012) (preventing Defense counsel from responding to objections); Case of NUON Chea et al., Case No. 002/19-09-2007-ECCC/TC, Transcript, at 30-31 (May 30, 2012) (preventing Defense counsel from explaining lines of questioning); Case of NUON Chea et al., Case No. 002/19-09-2007-ECCC/TC, Transcript, at 87 (Feb. 15, 2012) (preventing Defense counsel from making submissions on international case law); Case of NUON Chea et al., Case No. 002/19-09-2007-ECCC/TC, Transcript, at 84-86 (Mar. 20, 2003) (preventing Defense counsel from responding to allegations of interference with their clients' medical assessments).

88 See, e.g., President Nil Nonn's directions to the witness Suong Sikoeun during questioning by counsel for Mr. IENG Sary, Case of NUON Chea et al., Case No. 002/19-09-2007-ECCC-TC, Transcript, at 53 (Aug. 15, 2012):

If you believe that the question is repetitive you can reserve your right not to respond, or you can ask question to the Chamber to see whether you should respond to the question...if you know that the question is leading; then you can reserve your right not to respond to the question.

89 For example, a number of objections raised by the Prosecution during the testimony of Mr. Suong Sikoeun on 16 August 2012 were sustained by the Trial Chamber on the grounds that the questions put by the Defense invited the witness to speculate. See Case of NUON Chea et al., Case No. 002/19-09-2007-ECCC-TC, Transcript, at 36, 58 (Aug. 16, 2012). The witness was directed not to respond to any questions put by the Defense starting with "if." *Id.* at 51. When the Defense has raised objections on the same grounds, they have been almost invariably overruled, although in many instances accompanied by a direction from the Trial Chamber again advising the witness not to speculate. This has occurred, for example, in relation to an objection raised by counsel for Nuon Chea during the Prosecution's examination of witness Em Oeun (Case of NUON Chea et al., Case No. 002/19-09-2007-ECCC-TC, Transcript, at 36-37 (Aug. 27, 2012)) and in relation to an objection raised by counsel for Mr. Ieng Sary during the examination of Norng Sophang, where the Trial Chamber ruled that the objection was "ungrounded" although it noted that some of the witness's previous responses had been "presumptuous" and reminded the witness of his obligation not to speculate (Case of NUON Chea et al., Case No. 002/19-09-2007-ECCC-TC, Transcript, at 39-40 (Sept. 4, 2012)). The Trial Chamber has also sustained an objection raised by the Prosecution, finding that it was inappropriate for the Defense to try to "destabilize" a Civil Party witness during questioning, Case of NUON Chea et al., Case No. 002/19-09-2007-ECCC-TC, Transcript, at 72-73 (Aug. 28, 2012).

organizations have voiced concern that the verdict sets a worrying precedent for the legacy value of the ECCC in improving domestic fair trial protections, with Amnesty International observing that “far from setting a good example, the Khmer Rouge tribunal may have done just the opposite.”⁹⁰ Similarly, Clair Duffy from the Open Society Justice Initiative stated, “While the Tribunal has already helped improve the skills of some local judges and lawyers, the court system remains unchanged.”⁹¹ However, notwithstanding its many deficiencies and criticisms, the ECCC remains the best promise for meaningful judicial and court administration reform in Cambodia.

A number of significant ECCC decisions and practices can be applied to enhance the integrity of the domestic criminal justice system and strengthen fair trial rights. The right to a fair trial is a “cardinal requirement” of the rule of law,⁹² encompassing the principle that all people are equal before the law and that all are equally subject to, and must abide by, the law.⁹³ The ECCC’s demonstrated capacity to interpret and apply international fair trial standards, particularly as related to the ICCPR, is perhaps the most important aspect of its legacy value.⁹⁴

At the pre-trial stage, decisions of the ECCC on the issue of bail and the criteria necessary to justify provisional detention in light of the right to liberty under Article 9 of the ICCPR are instructive to domestic courts. For example, in Case 00I, the Pre-Trial Chamber confirmed on appeal that provisional detention of the Accused Kaing Guek Eav (“Duch”) was “necessary” having regard to Article

90 Peter Zsombor, *Sonando Verdict a Tough Test for KRT Legacy*, CAMBODIA DAILY, Oct. 4, 2012, at 1-2 (quoting Rupert Abbott, Amnesty International’s Asia Researcher for Cambodia, referring to the example of Prime Minister Hun Sen telling visiting UN Secretary-General Ban Ki-moon that he would not allow Cases 003 and 004 to go forward).

91 *Id.* at 2.

92 As described by eminent jurist Lord Bingham in his enlightening text, *THE RULE OF LAW* 90 (Penguin Books 2011).

93 Lord Bingham defines the principle of the “rule of law” as requiring “that all persons and authorities within the state, whether public or private should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered by the courts.” *Id.* at 8.

94 The UN Office of the High Commissioner for Human Rights has described legacy as an important aspect of a hybrid court’s capacity to strengthen “the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening judicial capacity.” See United Nations Office of the High Commissioner for Human Rights (OHCHR), *Rule of Law Tools in Post Conflict States: Maximizing the Legacy of Hybrid Courts*, 4-5 (2008), available at www.ohchr.org/Documents/Publications/HybridCourts.pdf (last visited Sept. 28, 2012).

9 of the ICCPR and the Internal Rules, after considering in detail the justifications put forward as the basis for detention.⁹⁵ Despite the fact that a presumption of release on bail exists in domestic law,⁹⁶ the Cambodian criminal justice system continues to rely on incarceration as the default position for accused who are awaiting trial and applications for release on bail are rarely made or granted.⁹⁷ Bail hearings at the ECCC provide useful examples for national courts of a dynamic process where the prosecution must establish concrete justifications for detention, the defense has the ability (and the obligation) to present arguments and rigorously challenge the basis for detention and judges must comprehensively examine those arguments and issue reasoned decisions, taking the presumption of liberty as a starting point.

The ECCC has also produced some valuable jurisprudence on the conditions under which an accused may be detained, including the restrictions that a court

95 *Duch Appeal Against Provisional Detention Judgement*, *supra* note 12, ¶ 57. The Pre-Trial Chamber found that the provisional detention by the OCIJ was a necessary measure to prevent the accused from exerting pressure on witnesses or victims; to prevent the destruction of evidence; to ensure his presence during the proceedings; to protect his security; and to preserve public order. Addressing the grounds for provisional detention under Internal Rule 63(3), the Pre-Trial Chamber found the grounds were met because: if released, the accused could intimidate witnesses (*id.* ¶ 34); it was essential that the witnesses not be afraid or pressured against testifying (*id.* ¶ 36); there was a risk that the accused would disappear (*id.* ¶ 39); if he were to be released, there would be a risk to the accused's safety from victims, their relatives and former S-21 staff (*id.* ¶ 43); and the impact of the Democratic Kampuchean regime, the interest of Cambodians and the press in the ECCC proceedings, and public knowledge of the accused's identity meant that his release would impact the public order (*id.* ¶¶ 50, 52, 55).

96 Art. 203 of the Criminal Procedure Code provides that “[i]n principle, the charged person shall remain at liberty” but “[e]xceptionally” they may be provisionally detained under the conditions of the Criminal Procedure Code. Article 204 provides that provisional detention may be ordered only for a felony or for misdemeanors involving a punishment of imprisonment of one year or more. Article 205 provides that provisional detention may be ordered where it is “necessary” to prevent the offense from happening again, to protect witnesses or preserve evidence or exhibits, to guarantee the presence of the accused at trial, or to protect the charged person's security or public order. Cambodian Criminal Procedure Code, *as adopted* Aug. 10, 2007.

97 See *Joint Cambodian NGO Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the Kingdom of Cambodia*, delivered to the UN Committee Against Torture, 45th session, at 4-5, U.N. Doc. CAT/C/45/1 (Nov. 1, 2010), available at http://tpocambodia.org/uploads/media/Joint_Cambodian_NGO_CAT_Report_06-10-10_English.pdf (last visited Oct. 10, 2012); Cambodian Center for Human Rights, *Fourth Bi-Annual Report: Fair Trial Rights 2009-2011*, at 17-20 (2012), available at http://www.cchr.combodia.org/index_old.php?url=media/media.php&p=report_detail.php&treid=81&tid=5 (last visited Oct. 22, 2012). The Center for Social Development's Court Watch Project (“CWP”) has reported that in the cases observed by the CWP the courts rarely released defendants following the initial appearance, even in cases involving relatively minor offenses. Court Watch Bulletin 2006, *supra* note 10, at 8.

may impose regarding contact between an accused person and his wife,⁹⁸ and the right of a detained accused to access material on the case file in accordance with his right to participate in his defense and to ensure equality of arms with the prosecution.⁹⁹ The latter decision is of particular importance given that the Criminal Procedure Code forbids lawyers to provide copies or parts of the case file to their clients,¹⁰⁰ raising serious concerns about the right of accused, particularly those who are unrepresented, to a fair trial and to participate in their defense.¹⁰¹

The requirement at the ECCC for judges to produce reasoned decisions, which has been emphasized by the Supreme Court Chamber as “a corollary of the accused’s fundamental fair trial rights,”¹⁰² is also an important precedent for domestic courts, where judicial reasoning is often deficient or nonexistent. Many of the ECCC’s decisions demonstrate its ability to conduct independent, rigorous and comprehensive analysis of complex international legal principles, rather than simply accepting at face value the way that these provisions have been interpreted in

98 See Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/PCOJ (PTC05), Decision on Appeal Concerning Contact Between the Charged Person and his Wife, ¶ 18 (Apr. 30, 2008) (finding that the decisions of the Co-Investigating Judges preventing contact between the accused IENG Sary and his wife, co-accused IENG Thirith, were not adequately reasoned and, in particular, did not explain how the limitation of contact was a necessary and proportional measure to protect the interests of the investigation). The Pre-Trial Chamber also found that the charged persons should be allowed to meet in accordance with the rules applicable at the Provisional Detention Facility. *Id.* ¶ 21.

99 See Case of Kaing Guek Eav *alias* “Duch,” Case No. 001/18-07-2007-ECCC-OCIJ, Co-Investigating Judges Order on access to the case file by detainees (Jan. 23, 2009). The OCIJ, applying jurisprudence from the ECtHR, recognized that “there has been an increasing tendency for the Court to recognize that the right of the accused to participate in his or her own defense and equality of arms with the prosecution requires a certain level of ‘direct, satisfactory’ access to the evidence by the accused in person.” *Id.* ¶ 11. It granted the Defense’s request, setting out a general principle allowing the accused to access documents on the case file, while taking into account practical constraints at the detention facility. *Id.* ¶ 15.

100 See Criminal Procedure Code, *supra* note 96, art. 149 (providing that the lawyer may read out part of the case file to his client, but may not give copies of part of the case file to his client).

101 In Cambodia, not every indigent accused has the right to a lawyer appointed by the court. Article 203 of the Criminal Procedure Code provides that the assistance of a lawyer is compulsory only if the case involves a felony, or the accused is a minor. Criminal Procedure Code, *supra* note 96. In the majority of cases observed by the CWP in 2006, defendants were not represented by defense counsel at any time during the investigative stage and only 46% were represented at trial. Even in cases where a defense lawyer was assigned during the investigation, they were often assigned “on the spot” and were not able to adequately prepare for the investigative proceeding. Court Watch Bulletin 2006, *supra* note 10, at 4.

102 See, e.g., Decision on Nuon Chea Rule 35 Appeal, *supra* note 67, ¶ 25. In response to an appeal filed by the NUON Chea Defense team against the Trial Chamber’s Decision refusing a Rule 35 request for sanctions to be imposed for statements made by the Prime Minister against the accused, the Supreme Court Chamber found that the oral decision of the Trial Chamber rejecting the Defense’s request was a “non-authoritative declaration, devoid of reasoning” (*id.* ¶ 26) and that the Trial Chamber erred in holding the request inadmissible, “as it unduly bars the Defence’s access to the appellate process” (*id.* ¶ 29).

the past by international criminal tribunals. For example, in consideration of the controversial extended form of Joint Criminal Enterprise (“JCE III”) as a mode of liability, the Pre-Trial Chamber conducted an extensive critical analysis of the authorities that had previously been relied upon to support JCE III’s existence in customary international law, rather than simply adopting the entrenched position of the ICTY Appeals Chamber on this issue.¹⁰³ It reversed the holding of the OCIJ that this mode of liability could be applied at the ECCC, concluding that JCE III was not reflective of customary international law during the period 1975-1979.¹⁰⁴ The Trial Chamber affirmed the Pre-Trial Chamber’s decision.¹⁰⁵

Decisions of the ECCC that comprehensively interpret fair trial rights under the ICCPR by reference to international jurisprudence can also be instructive to domestic courts. For example, in considering the right to adequate time and facilities for the preparation of a defense and the right to communicate with counsel of one’s choosing pursuant to Article 14 of the ICCPR, the Pre-Trial Chamber held that an order of the OCIJ refusing a Defense request for audio-visual recording of meetings between an accused and his lawyer at the detention facility violated the accused’s fair trial rights.¹⁰⁶ Referring to jurisprudence from the ECtHR, the Pre-Trial Chamber adopted a broad interpretation of Article 14, finding that the way in which this right was narrowly applied by the OCIJ was “not compatible with the object or purpose of fair trial guarantees.”¹⁰⁷ Similarly, the ECCC has delivered significant decisions on the fitness of an accused to stand trial¹⁰⁸ and the

103 See Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC35), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE) (May 20, 2010). Having reviewed the authorities relied upon by the ICTY Appeals Chamber in *Prosecutor v. Tadić* in relation to JCE III, the Pre-Trial Chamber was of the view that they do not provide sufficient evidence of consistent State practice or *opinio juris* at the time relevant to Case 002. *Id.* ¶ 77.

104 See *id.* ¶ 88.

105 See Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/TC, Decision on the Applicability of Joint Criminal Enterprise (Sept. 12, 2011).

106 See Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC64), Decision on IENG Sary’s Appeal Against Co-Investigating Judges’ Order Denying Request to Allow Audio/Video Recording of Meeting with IENG Sary at the Detention Facility (June 4, 2010).

107 *Id.* ¶ 31.

108 See Case of NUON Chea *et al.*, Case No. 002/19-09-2007-ECCC/TC, Reassessment of Accused’s Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011, ¶¶ 18-21 (Sept. 13, 2012). Relying on jurisprudence from the ICTY and the Special Panels, the Trial Chamber re-affirmed its findings that the Accused IENG Thirith is unfit to stand trial.

legality of continued detention without trial,¹⁰⁹ which could be applied by domestic courts to strengthen the fair trial rights of the accused.

Many of the practices employed during trial at the ECCC can also be adopted for use by domestic courts to remedy ways in which domestic trials fail to be conducted in accordance with international standards incorporated into the Constitution. These practices include the ability of parties to object to questions,¹¹⁰ the application of rules of evidence¹¹¹ and the adoption of mechanisms that allow for the testing and exclusion of evidence.¹¹² Given that the domestic Criminal Procedure Code provides merely that domestic courts will consider the evidence submitted for its examination based on the judge's "intimate conviction,"¹¹³ these practices provide an important example of restricting the use of evidence to safeguard fair trial rights.

5. WHERE TO FROM HERE?

The time has come to think about *how* domestic courts can harness the positive jurisprudence and procedural mechanisms emerging from the ECCC, and de-

109 See *id.* ¶¶ 19-23, in which the Trial Chamber considered jurisprudence from the ICC, ECtHR and the United States Supreme Court in considering the legality of IENG Thirith's continued detention in light of the internationally proscribed protections against indefinite detention and the right to be tried without undue delay. The Trial Chamber ordered IENG Thirith's immediate release on the grounds that there was no basis for her continued detention. *Id.* ¶ 30. The Supreme Court Chamber upheld her immediate release from detention subject to judicial supervision. See Case of NUON Chea *et al.*, Case No. 002/19-09-2007/ECCC-TC/SC(16), Decision on Co-Prosecutors' Request for Stay of Release Order of Ieng Thirith (Sept. 16, 2012); Case of NUON Chea *et al.*, Case No. 002/19-09-2007/ECCC-TC/SC(16), Decision on Immediate Appeal Against the Trial Chamber's Order to Unconditionally Release the Accused Ieng Thirith (Dec. 14, 2012).

110 While the Internal Rules do not include a right to raise objections, it has become standard practice at the ECCC since its operation commenced.

111 Rule 87(2) of the Internal Rules provides that "[a]ny decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination." Under Rule 87(3), the Trial Chamber also has the discretion to reject a request for evidence when specific criteria are met, including where the evidence is irrelevant or repetitious, unsuitable to prove the facts it purports to prove or not allowed under the law. The opportunity for parties to object to any document pursuant to these criteria is also a precondition for the admission of all new documents before the Trial Chamber. Case of NUON Chea *et al.*, Case No. 002/19-09-2007/ECCC/TC, Decision Concerning New Documents and Other Related Issues (Apr. 30, 2012). Once material that satisfies these minimum standards for admissibility has been put before the Trial Chamber, the Trial Chamber will then consider the probative value of the evidence and the weight to be accorded to it. Case of Kaing Guek Eav *alias* "Duch," Case No. 001/18-07-2007-ECCC/TC, Decision on Admissibility of Material on the Case File as Evidence, ¶ 7 (May 27, 2009).

112 For example, the Pre-Trial Chamber has found that documents obtained through torture cannot be relied upon for the truth of their contents. Case of NUON Chea *et al.*, Case No. 002/19-09-2007/OCIJ(PTC31), Decision on Admissibility of IENG Sary's Appeal Against the OCIJ's Constructive Denial of IENG Sary's Requests Concerning Identification of and Reliance on Evidence Obtained Through Torture, ¶ 38 (May 10, 2010).

113 Criminal Procedure Code, *supra* note 96, art. 321.

velop the means through which to incorporate these practices. This will require Government engagement as well as commitment to meaningful and sustainable reform of the entire judicial system, with the overriding objective of advancing the rule of law in Cambodia.

Consideration should be given to holding a symposium with input and cooperation from all levels of the judicial system, including representatives of the Council for Legal and Judicial Reform, Ministry of Justice, national judges, prosecutors and lawyers, representatives of non-governmental organizations and international experts, including those from all organs and sections of the ECCC (judges, defense lawyers and prosecutors). The purpose of the symposium would be to identify the problems within the current judicial system;¹¹⁴ to devise modalities and solutions to address those problems; to identify general, positive aspects of the ECCC for domestic application;¹¹⁵ and to formulate an action plan for how the positive and transferable jurisprudence and procedural mechanisms from the ECCC could be applied uniformly and consistently throughout domestic courts.

From the symposium, working groups should be formed, comprised of a smaller constituent of national and international lawyers, judges and prosecutors. These working groups should carefully sift through the positive and negative aspects emerging from the ECCC and identify those aspects that advance fair trial rights and are appropriate and able to be applied by domestic courts, to remedy known and widely documented weaknesses in the current judicial system. A working session or plenary of the working groups should be convened to identify the legislative and procedural changes that are required to enable domestic courts to consistently apply international standards, with the assistance of ECCC jurisprudence and practice. This task should be approached by reviewing all laws relating to the criminal justice sector as a whole, rather than one piece of legislation at a time, to ensure that any proposed changes fit within the overall legal context and are consistent with, and complementary to, changes made in each law

114 It is important to note that these weaknesses in the Cambodian context are well-known and obvious (as detailed earlier in this article) and have been publicized by numerous monitoring agencies and non-governmental organizations working in the area of criminal justice. Further resources do not need to be devoted to re-identifying these problems. Rather, the focus should be on building upon this knowledge to identify areas in which ECCC jurisprudence could assist in remedying these deficiencies.

115 Some positive aspects of the ECCC that can be domestically adopted were identified at the September 2012 ECCC Legacy Conference, which hosted a number of working groups on a variety of topics, such as, the jurisprudential legacy of the ECCC, lessons learned from trial monitoring, and archiving and documenting the work of the ECCC.

individually.¹¹⁶ This group should then forward its recommendations to the Government and relevant stakeholders for review and comment, with concrete deadlines set for providing responses and strategies for future action.

The Council for Legal and Judicial Reform, the Ministry of Justice and national stakeholders must assist and be engaged in all stages of the symposium and working groups to instill a sense of ownership in the proposed measures for a self-sustaining reform process. The final stage will require the Government, through the Ministry of Justice, to facilitate implementation of the recommended measures. The ultimate goal of this process is to ensure that the positive aspects of ECCC jurisprudence and procedural mechanisms can be applied uniformly, consistently and predictably throughout domestic courts to strengthen fair trial rights and judicial capacity. These legal principles must also be implemented throughout law schools and judicial and legal training institutions, to train domestic lawyers, judges and prosecutors on the use of ECCC jurisprudence and procedure.

6. CLARION CALL TO DEFENSE LAWYERS

There is no reason for defense lawyers practicing in the domestic courts to wait for the Government to take action. They must act as the vanguard for fair trial rights and lead the way in this reform process by consistently invoking international legal principles and provisions of the ICCPR before domestic courts. Whenever possible, arguments concerning these rights should be anchored by ECCC jurisprudence and procedure. If the ECCC has interpreted a particular right emanating from the Constitution, then reference should be made to it while highlighting that the ECCC is a domestic court, bound by and adhering to the Constitution. If a practice is applied at the ECCC, such as the requirement to provide legal reasoning for a decision, why should defense lawyers shy away from demanding that domestic judges be obliged to do the same? If the prosecutor is privately engaging in conversations with the trial judge about the case, whether it is on the merits or for administrative matters, the defense lawyer should point out that the ECCC Supreme Court Chamber noted that *ex parte* communications between a sitting judge and the prosecutor should be avoided because they “may

116 The benefits of a holistic approach to legislative reform have been identified during the democratic reform processes of other post-conflict countries, for example through the work of the Br ko Law Revision Commission (“BLRC”) in Bosnia and Herzegovina. Determining that the entire judicial and criminal justice system needed to be overhauled, the BLRC adopted a strategy of reviewing all laws related to a particular sector as a whole, rather than each law individually, to ensure the proposed changes were consistent and fit within the legal framework as a whole. See Michael G. Karnavas, *Creating the Legal Framework of the Br ko District of Bosnia and Herzegovina: A Model for the Region and Other Postconflict Countries*, 97 AM. J. INT’L L. 111, 116 (2003).

create the appearance of asymmetrical access enjoyed by the prosecutor to the trial judge.”¹¹⁷

Defense lawyers should begin to sift through the decisions and practices of the ECCC to identify those that can be applied in furtherance of their clients’ fair trial rights. Considering that not all ECCC jurisprudence or procedural mechanisms are readily accessible, the Bar Association of the Kingdom of Cambodia (“BAKC”) can and should commit to assist in this process. The BAKC should select a panel of lawyers to work with the various court monitoring groups and identify the most essential decisions and procedural practices to be advocated by defense lawyers in their cases.

By fearlessly and zealously advocating for domestic courts to conduct trials in accordance with Constitutionally enshrined fair trial principles as applied and interpreted by the ECCC in selected jurisprudence and procedural practices, defense lawyers can play a leading role in “internationalizing” domestic cases throughout the courts of Cambodia, not merely in their Extraordinary Chambers.

117 Case of NUON Chea *et al.*, Case No. 002/19-09-2007/ECCC-TC/SC(12), Decision on IENG Sary’s Appeal Against the Trial Chamber’s Decision on Motions for Disqualification of Judge Silvia Cartwright, ¶ 24 (Apr. 17, 2012).

SIGN UP OR SIGN OFF— ASIA’S RELUCTANT ENGAGEMENT WITH THE INTERNATIONAL CRIMINAL COURT

MARK FINDLAY¹

International Criminal Court (ICC) supporters argue that there is a need to achieve universal ratification so that the majority of mankind will no longer remain outside the protection of the ICC. In the Asia/Pacific region there is a relatively low accession rate of nation states to the Rome Statute. This paper proposes a taxonomy of resistance to ratification in the region, recognizing that in speculating on the reasons for resistance to the ratification of international criminal justice mechanisms—from the local to the global—across Asia and the Pacific, there is a risk in both over emphasizing cultural and political difference and at the same time seeking universal themes at the expense of real jurisdictional peculiarities. After sketching this taxonomy, the paper in part meets the paradox that in Africa and South America, where similar features of possible resistance exist, the ratification process has been much more widespread.

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I. INTRODUCTION

The permanent International Criminal Court (ICC) was created in 1998,² but for it to grow into a credible global justice institution capable of enforcing international criminal law (ICL) and manifesting international criminal justice (ICJ), ratification of the Rome Statute needs to approach a universal international commitment. Aspirations for the court to act as a deterrent and ensure an end to impunity cannot even be seriously argued for unless both widespread ratification and active cooperation are achieved. Without these foundations the formal aims are not available for evaluation beyond the terms of politicized process initiation and selective prosecution.³

This article examines the reasons for reluctance to ratify the Rome Statute in specific politico-cultural contexts. The discussion begins at the general level by looking at issues that determine the initiation of ICC procedures: the activation

2 Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998) [“Rome Statute”].

3 For a discussion of both these issues, see MARK FINDLAY, *INTERNATIONAL AND COMPARATIVE CRIMINAL JUSTICE: A CRITICAL INTRODUCTION*, ch. 3 (Routledge 2013).

of an investigation and thereafter prosecution at the ICC level and its politicized nature because of the United Nations (UN) Security Council's (UNSC) sectarian influence. The paper then sets forth how the UN and Member States themselves have firewalled exceptions for those involved in peacekeeping operations, UN-sanctioned or otherwise, from effective ICC accountability. The analysis then takes its regional/cultural (rather than hegemonic/political) location in the Asia-Pacific region where there is marked resistance to ratification. This enables a general sketching of resistance variables in specific contextual conditions, which might be countered by those who advance the essential nexus between universal ratification and achieving the deterrent aims of the ICC.

In “un-signing”⁴ the United States (US) from the ICC's Rome Statute, former President George W. Bush referred to “a bunch of fellas over there who want to try our boys.”⁵ Against the fantasy of the US's military personnel being indicted before the ICC, the US Senate passed the *American Service-Members Protection Act*⁶ in part as a reassertion of autonomy and sovereignty in the face of the ICC's jurisdiction. Since then the American position has moved from hostility to selective co-operation.

It could be convincingly argued that world powers with wide international exposure, entanglements and presence at many levels that might cut across the ICC's mandate would be wary of a politicized international court.⁷ And there can be little doubt that the refusal of the US, China, India and Russia to accept the ICC's jurisdiction has had a heavy negative influence on less powerful states already uncertain of the extending impact of international law and its institutions.

It is recognized even by its detractors that today the ICC has an urgent role to play in rescuing citizens who are being brutalized by their own governments.⁸ Further, religious and cultural diasporas across regions such as Asia are at risk that their critical cultural essence and legal traditions may be sidelined through an international court and its legal process developing without their influence.

I have argued that it is critical for criminal justice paradigms other than those in civil or common law systems—particularly the hybrid traditions across Asia and

4 In 2000 former US President Bill Clinton signed the treaty in terms that the US should have the chance to observe and assess the functioning of the court over time before choosing to become subject to its jurisdiction; he nevertheless indicated he would not send it to the Senate for ratification. His successor George W. Bush “unsigned” the treaty in 2002 by informing the UN that the US did not intend to become a party and did not recognize any legal obligations arising from its earlier signature.

5 Referenced in James Carroll, Op Ed: *Much to Gain for US in World Court*, BOSTON GLOBE, Mar. 26, 2012, available at <http://www.bostonglobe.com/opinion/2012/03/25/much-gain-for-world-court/o5RSzho03iGpSfnC8tNYUI/story.html>.

6 American Service-Members' Protection Act of 2002 (H.R. 4775), Public Law No. 107-206.

7 See generally FINDLAY, *supra* note 3, ch. 3.

8 Carroll, *supra* note 5.

the Pacific—to engage with the ICC so that otherwise absent procedural influences on the development of ICL and process can authenticate the aim of a holistic global criminal law.⁹ With greater and more representative procedural integration comes increased legitimacy and diminished potential for hegemonic capture. The Coalition for the ICC¹⁰ and its Asian branch¹¹ declare that it is only through the widest ratification¹² of the Rome Statute that an independent court will be ensured and the end to impunity prevails.¹³

The analysis to follow does not propose either the negative influence of reluctant and self-interested global superpowers or national and regional ambivalence as the reason for why Asia and the Pacific are so poorly represented among the ICC Member States. The explanations are much more localized and specific, ranging from incapacities to enact empowering legislation to profound political misgivings that go back to pre-independence and through colonial foundations. This paper suggests that for any successful policy to be sustained ensuring a wider regional inclusion in the ICC mission, it first must confront and address the specific national motivations to decline, and then by drawing out common themes of reluctance that span the region, meet these reservations with legitimacy rather than promise.¹⁴ Having achieved this understanding it is then possible to craft arguments in favor of ratification that will make inclusion in the ICC more relevant for the region and more beneficial for the development of holistic and inclusive ICJ and jurisprudence. The push for ratification from the ICC and the Coalition must not appear to be another phase of western colonization but as an opportunity for Asian and Pacific traditions to reach their appropriate level of

9 See generally Mark Findlay, *The Challenges for Asian Jurisdictions in the Development of International Criminal Justice*, 32 SYDNEY L. REV. 215 (2010).

10 Coalition for the International Criminal Court website, at <http://www.iccnw.org/>.

11 Coalition for the International Criminal Court website, Asia and the Pacific region, at <http://coalitionfortheicc.org/?mod=region&idureg=7>.

12 Out of the 24 countries in Asia, only 9 (Afghanistan, Bangladesh, Cambodia, Maldives, Mongolia, the Philippines, the Republic of Korea, Timor-Leste and Japan) have ratified the Rome Statute. The Asian region remains significantly under-represented at the Court, although civil society has been strong in advocating for international justice and the rule of law across the continent. Of the ICC States Parties, only the Republic of Korea has enacted implementing legislation. Afghanistan is taking appropriate steps in coordination with civil society groups to initiate their implementing legislation process, and Mongolia set up a working group on the ICC to discuss and follow up on ICC implementation some years ago, but the process has been stalled for some time. Cambodia and Timor-Leste have similarly moved slowly in effectively carrying out their emergent obligations under the Rome Statute. In the region, only the Republic of Korea has ratified the Agreement on the Privileges and Immunities of the Court (APIC). Although Mongolia is a signatory, it still needs to move forward and ratify this crucial instrument.

13 Coalition for the International Criminal Court Asia Pacific Regional Strategy Meeting, Quezon City, The Philippines (Apr. 11-12, 2011), at http://www.iccnw.org/documents/CICC_Asia_RSM_April_2011_Final_Recommendations.pdf.

14 MARK FINDLAY & RALPH HENHAM, *BEYOND PUNISHMENT: ACHIEVING INTERNATIONAL CRIMINAL JUSTICE*, ch. 8 (Palgrave Macmillan 2009).

recognition in a new global justice ordering.

2. VIEW FROM THE TOP—WHY SIGN UP?

In his recent delivery of the Wallace Wurth Memorial Lecture,¹⁵ the President of the ICC Judge Sang-Hyun Song quite consciously laid out the pitch for joining the Member States. In the audience there were representatives of Asian and Pacific governments that have yet to ratify the Rome Statute and many aspects of the argument were addressed to them.

The President's case was as follows:

- The preventive influence of the ICC is a most attractive capacity for justice and peacemaking.
- In particular, deterrence, timely intervention, the independence of preliminary investigation, contributing to medium term stabilization and longer term equitable development,¹⁶ victim empowerment through participating in trial justice in their own right, and victim assistance to recognize non-retributive victim needs,¹⁷ each advance this preventive capacity.
- The role of the court in norm setting embodies its greatest potential influence for peacemaking. In this role the court recognizes the distance between international treaties and local norms that needs to be bridged.
- Complementarity¹⁸ supports the peace and justice efforts of civil society emerging from post-conflict struggles by conceding to the nation state the right and the primary duty to investigate and prosecute crimes that are within the jurisdiction of the ICC. Complementarity also links into the deterrent function by facilitating the local prosecution of such crimes with the capacity building consequences that this offers, thereby carrying through the expressive function of the ICC when the international legal norms of the Rome

15 Judge Sang-Hyun Song, *From Punishment to Prevention: Reflections on the Future of International Criminal Justice*, Wallace Wurth Memorial Lecture, Univ. of New South Wales, Sydney (Feb. 14, 2012), available at <http://www.icc-cpi.int/NR/rdonlyres/29D0B2A7-71D4-457A-B9A3-9AC4E78DD968/284266/120214ICCPresidentUNSWWallaceWurthmemoriallecture.pdf>.

16 See *World Bank Development Report: Conflict, Security and Development*, The International Bank for Reconstruction and Development / The World Bank (2011) (identifying transitional justice as forestalling cycles of violence in post conflict contexts), available at http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011_Full_Text.pdf.

17 The judge referred to 40,000 direct beneficiaries of the reparation process of the ICC in association with initiatives of governments such as the US, targeting victims of sexual violence in the Central African Republic.

18 For a detailed discussion of this concept, see FINDLAY, *supra* note 3, ch. 3.

Statute are translated into domestic norms of that state.

- Even with the domestic justice systems of states carrying out the investigation and prosecution of crimes within the purview of the ICC, the ICC provides a safety net ensuring accountability of states in terms of their criminal justice capacity and service delivery.
- The ICC recognizes the need for state co-operation to give the ICC the power to arrest, the ability to collect evidence and to encourage witness testimony.
- In addition, there is a need to achieve universality so that the majority of mankind presently outside the Rome Statute's protection will not remain outside the protection of the ICC.

In his closing remarks, the President reiterated his realistic understanding that the on-the-ground potentials and the stakeholder legitimacy of ICJ are critical to its success. For this reason how the potential and legitimacy of global justice institutions and processes are viewed in different cultural and political settings and histories may explain the erratic take-up of ICC membership. As such, a bottom-up analysis of resistance to ratification is necessary if the ICC is to construct a more effective and convincing push for universal ratification.

However, the forces waged against the nature and jurisdiction of the ICC cannot be presumed to be equally, consistently or universally opposed to the intervention of ICJ for the maintenance of global ordering. A brief consideration of the UNSC's powers as they relate to international criminal justice (referring matters to the ICC, authorizing peacekeeping missions, and controlling the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)), taken together with the ongoing cases relating to Darfur, Sudan, reveals just how complex can be the contradictory tensions between the appearance of non-engagement projected through non-ratification, and the national or hegemonic self-interest behind the activation of international crime control on a case-by-case basis for invoking the process otherwise reviled. In introducing these considerations it is also important to understand what motivates international criminal prosecutions, and alternatively what brands them and the justice process they initiate politicized and partial.

3. INTERNATIONAL CRIMINAL JUSTICE PROSECUTION TRIGGERS

ICL operates in a complex reality of international relations. Decisions to prosecute provide a telling example of how ICL (and its rules and procedures) manifests

itself as part of international relations power balancing.¹⁹ For example, the trigger for initiating prosecution before the ICC occurs via a referral by the UNSC, or from a State Party, as provided for in the Rome Statute, representing a countermeasure to the Prosecutor's otherwise independent exercise discretion.²⁰ The UNSC can also request that the Prosecutor not commence an investigation or prosecution for a period of 12 months (a delaying or prohibition tactic which can be renewed).²¹ As such the UNSC is *politically* connected with the ICC through its initiation and sponsorship power, by referring matters for investigation and prosecution,²² and deferring the investigation or prosecution of a matter for a set or ongoing period.²³ This powerful dominion exercised by the UNSC Members and exacerbated through the self-interest behind the veto power, potentially has the consequence of investing in the permanent members of the UNSC—in particular the US and China—the power to control referrals (through a resolution referring a case to the ICC, vetoing any such resolutions against their interests, or should an investigation or prosecution be initiated by any means, deferring the commencement or process at their pleasure).²⁴

The inextricable link between the ICC and the UNSC identifies the inevitable nexus between the formal operations of ICJ and sectarian global political hegemony.²⁵ The power of referral or deferral emanating from the UNSC in particular justifies suspicion about the extent of prosecutorial independence to evaluate and determine these referrals.²⁶ Such reservations have grounding in the political expedience of UNSC power constellations, demonstrated by the UNSC's resolve to make peacekeepers in the former Yugoslavia immune from ICC prosecution.²⁷ UNSC resolutions excluding the ICC's jurisdiction over peacekeepers from

19 See generally Mark Findlay & Clare McLean, *Emerging International Criminal Justice*, 18:3 CURRENT ISSUES CRIM. J. 457 (2007).

20 Rome Statute, *supra* note 2, art. 13(b).

21 *Id.* art. 16.

22 *Id.* art. 13(b). Note as well that State parties (arts. 13(a), 14(1)), and the Prosecutor (art. 15(1)) can also refer matters to trigger the ICC jurisdiction.

23 The UNSC is empowered to do this under UN Charter, Ch. VII. United Nations, *Charter of the United Nations*, 24 October 1945, I UNTS XVI. The ICC requirement to abide by such Security Council Resolution arises from the Rome Statute art. 16.

24 See generally David Scheffer, *The United States and the International Criminal Court*, 93:1 AM. J. INT'L L. 12 (1999).

25 FINDLAY, *supra* note 3, ch. 3.

26 See generally Chris Gallavin, *Prosecutorial Discretion within the ICC: Under the Pressure of Justice*, 17:1 CRIM. L.F. 43 (2006).

27 See generally Neha Jain, *A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court*, 16:2 EUR. J. INT'L L. 239 (2005).

non-party states in Bosnia and Herzegovina²⁸ were made in response to the US threatening to veto the renewal of the UNSC's mission in Bosnia and Herzegovina if the resolution was not made.²⁹ Similar UNSC resolutions provided immunity to peacekeepers in the conflict in Liberia, deployed to secure the country for humanitarian assistance and prepare for future UN forces with stabilization duties.³⁰ So evidenced, the UNSC potentially holds the power to determine whose actions are included or excluded from accountability before the ICC, through authorizing those operating with immunity for UN intervention purposes.³¹

The influence of the UNSC is even more pronounced over the *ad hoc* tribunals, established as a subsidiary of the UNSC, which can disband them at any time. Ultimately, the UNSC's determination of the scope of a tribunal's investigation and prosecution mandate and its capacity to define its temporal jurisdiction and terminate its hearings (for the ICTY and ICTR, in respect of new cases, as of 2012) mean that the very exercise of ICJ is hegemonically dependent.³²

4. NON-RATIFICATION BUT STANDING AND UTILITY?

The UNSC adopted a similar resolution as that indemnifying troops in the former Yugoslavia conflict, covering non-Sudanese officials in the operations in Darfur (originally authorized by the UNSC and the African Union). The resolution provided that those personnel would be (if at all) subject to the exclusive jurisdiction of their home state, and thus protected from ICC prosecution.³³ In practice, however, the reality of politically selective prosecution and specific offence and proof limitations governing the ICC's jurisdiction at large, might make these UNSC resolutions less than necessary. That being so, the resolutions still represent attempts to circumscribe the jurisdiction of international courts and tribunals in a manner that suggests primary motivation by

28 Security Council Resolution 1422 requested the ICC exercise its discretion under Art 16 to refrain from the commencing investigation or prosecution of any case involving actions related to operations authorised by the United Nations for a 12-month period. This period was subsequently renewed in Security Council Resolution 1487. See *United Nations Peacekeeping*, UN Doc. S/RES/1422 (2002); *United Nations Peacekeeping*, UN Doc. S/RES/1487 (2003).

29 Jain, *supra* note 27.

30 Security Council Resolution 1497 however was stronger than that of 1422. It provides exclusive jurisdiction of the contributing sovereign states over their staff, for an indefinite period. See UN Doc. S/RES/1497 (2003).

31 Megan Bastick, Karin Grimm & Rahel Kunz, *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector*, Geneva Centre for the Democratic Control of Armed Forces (2007), available at http://www.essex.ac.uk/armedcon/story_id/sexualviolence_conflict_full%5BI%5D.pdf.

32 See generally Vesselin Popovski, *International Criminal Court: A Necessary Step Towards Global Justice*, 31:4 SECURITY DIALOGUE 405 (2000).

33 United Nations Security Council Resolution 1593, UN Doc. S/RES/1593 (2005). For more detail see Gallavin, *supra* note 26.

the hegemonic politics of international relations, specifically, the conditions and negotiation strategies adopted by Member States including the US for their contributions to humanitarian aid and peacekeeping, as they seek to protect their personnel from prosecution by the ICC. In the future, this feature of security trade-off at the UNSC level either may not be quite as blatant or intractable, as the UN moves away from its military intervention model for peacekeeping in preference for broader-based justice resolutions.³⁴

The question of standing for accused persons in the international criminal tribunals and permanent court is also dependent on the way in which they become identified and produced as part of the investigation and prosecution process. In domestic criminal justice, the institutionalization of complex policing arrangements means that a suspect goes through a standardized and detailed process of investigation before being arrested and charged. However, at the international level, the pathway of suspect identification and processing is less formalized and predictable because of difficulties with policing (heavily reliant as it is on nation states and mutual assistance) and with countervailing tensions associated with jurisdictional autonomy that militate against cooperation. Accused persons can be offered up by a Member State to the ICC, identified by a UNSC referral, or the independent prosecutor can issue an arrest warrant that requires the accused to be presented for the investigation and trial process. Yet, as certain recent celebrated instances indicate, if accused persons can use their political status or their domestic and regional authority to resist the process of indictment at the national and international levels, then the production of that accused before an international tribunal or court is much more complicated and deeply problematic.³⁵

The reasoning behind a UNSC referral can also be revealing when reflected against national interest and international relations alignments. Despite its rejection of the jurisdiction of the ICC over its citizens, the US pushed through the UNSC a referral to the ICC for the prosecution of the President of Sudan. As a result, the ICC has sought the indictment of Sudan's President Omar Bashir since 2005 for his involvement in alleged war crimes and crimes against humanity in the Darfur region.³⁶ However, in July 2008 the African Union, in a meeting of heads of African states, resolved to call for the ICC to suspend its action and instead permit an African-led investigation. Since then, numerous African States—Chad, Kenya, Djibouti, and Malawi—have refused to comply with their ICC Member

34 John Boonstra, *Tension Between Peace and Justice*, UN DISPATCH, Feb. 28, 2008, at <http://www.undispatch.com/tension-between-peace-and-justice>.

35 See, e.g., Bernard Momanyi, *Kenya Seeks Delay to ICC Trials*, ACR Issue 366, IWPR, Oct. 17, 2013, available at <http://iwpr.net/report-news/kenya-seeks-delay-icc-trials>.

36 President Bashir was referred to the ICC by the United Nations Security Council, as Sudan is not a Member State.

State obligations such as arrest requests for Bashir when he was present in their country. The ICC judges have reported these countries to the UNSC and the ICC Assembly of State Parties, but no action has since been taken.³⁷ Most recently in December 2011, the ICC reminded Malawi of the International Court of Justice *Arrest Warrant Case* that confirmed that the principle in international law providing immunity for former or sitting Heads of State does not apply to prevent criminal prosecution by an international court regardless of whether the alleged offending state is a Member State to the ICC.³⁸

5. NATIONAL V. GLOBAL INTERESTS — STORIES OF POLITICAL EXPEDIENCY

As indicated above, when an offence within the subject matter jurisdiction of the ICC is committed in a territory or by a State Party, that State Party can refer the accused for prosecution by the ICC,³⁹ or the Prosecutor may initiate her own investigation of that crime which may commence, provided the Pre-Trial Chamber grants authorization.⁴⁰ In addition, the UNSC can refer the matters to the ICC,⁴¹ and non-state parties can accept the jurisdiction of the ICC on a case-by-case basis.⁴² One of the foundational concerns held by those states that have resisted the ICC jurisdiction is that the independent Prosecutor may use her discretion to charge military personnel who have been involved in UN peacekeeping missions or in a military intervention designed to secure the regional and international interests.

Obviously, the US has a large exposure in these areas. As well as not being a State Party to the Rome Statute, under the Bush Administration the US also struck a raft of bi-lateral agreements requiring that signatory states promise not to surrender US citizens or employees to the ICC, and thereby restricting the ICC jurisdiction and indemnifying US military forces.⁴³ The US sought these agreements to avail

37 ICC judges *Dismiss Legality of African Union Decision on Bashir, Refer Malawi's Non-Compliance to UNSC*, SUDAN TRIBUNE, Dec. 13, 2011, at http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=40980.

38 Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09 (PTC I, Dec. 12, 2011); Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002 I.C.J. 3 (Feb. 14, 2002).

39 Rome Statute, *supra* note 2, arts. 13(a), 14.

40 *Id.* arts. 13(c), 15.

41 *Id.* art. 13(b); Charter of the United Nations, ch. VII.

42 Rome Statute, *supra* note 2, art. 12(3).

43 See generally Scheffer, *supra* note 24; Markus Benzing, *US Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties*, 8:1 MAX PLANCK YEAR BOOK UN L. 181 (2004), available at http://www.mpil.de/files/pdf/mpunybenzing_8.pdf; Judith G. Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Non-surrender Agreements*, 3:101 AM. POLI SCI REV. 573 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=943711.

itself of the exemption from jurisdiction, set out in the Rome Statute at Article 98(2), which provides that the ICC “may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”⁴⁴ These agreements were fortified by the US’s offer of military assistance and other forms of financial aid, and conversely the US’s threatened withdrawal of military aid from recipient states that refused to sign non-surrender agreements.⁴⁵

More particularly, the UNSC also expressed its concern about the protection of states involved in UN peacekeeping operations. Crucial to this concern about autonomy and the protection of military personnel was the fear that the independent Prosecutor would proceed against powerful states without recognition of the UN’s political interests in military intervention.

In the ways discussed above, the dominant world powers treat ICJ as secondary to their own national interests, and this is not only witnessed in the autonomy arguments of those states that refuse to accept ICC jurisdiction.⁴⁶ Co sequentially, pressure transfers onto international organizations and the non-governmental organization (NGO) community to genuinely contribute to ICJ beyond the limitations of domestic and regional considerations.⁴⁷ This has already been particularly the case with the ICC Prosecutor’s constant and sometimes controversial reliance on NGO field intelligence and intervention to critically facilitate the identification of witnesses and the supply of testimony.⁴⁸ From the foundation of the ICC at the Rome Conference, “the relationship between the ICC and NGOs has probably been closer, more consistent, and more vital to the ICC than have analogous relations between NGOs and any other international organization,” with all the problems this can entail.⁴⁹

44 Rome Statute, *supra* note 2, art. 98(2).

45 See Kelley, *supra* note 43, at 573. Note however, due to security concerns, the US did not withdraw military aid from all those states that refused to sign agreements not to surrender US citizens to ICC jurisdiction.

46 See generally JASON RALPH, *DEFENDING THE SOCIETY OF STATES: WHY AMERICA OPPOSES THE INTERNATIONAL CRIMINAL COURT AND ITS VISION OF WORLD SOCIETY* (New York: Oxford Univ. Press 2007).

47 See the International Center for Transitional Justice website, <http://ictj.org/about>.

48 Article 54(3)(c) of the Rome Statute gives the Prosecutor the power to seek the cooperation of any State or intergovernmental organisation or arrangement in accordance with its respective competence and/or mandate. Rome Statute, *supra* note 2.

49 See generally BENJAMIN SCHIFF, *BUILDING THE INTERNATIONAL CRIMINAL COURT* (Cambridge Univ. Press 2008). For a discussion of the problematic consequences of this dependency for the production of truthful witness testimony, see generally Mark Findlay & Sylvia Ngane, *The Sham of the Moral Court: Testimony Sold as the Spoils of War*, 1:I GLOBAL J. COMP. L. 73 (2013).

Justifications for the conclusion that ICJ is politically expedient in its inception, activation and renunciation include:

- That commonly purported justifications, such as the end to impunity, disguise less altruistic motivations. This duplicity is demonstrated by the intensely selective nature of prosecutions determined by and on behalf of ICJ. Such selectivity was evident from the early days of ICJ in its present epoch. In the Tokyo war crimes trials for instance, Emperor Hirohito, known to be the inspiration behind terrible crimes, was not charged, as it was feared to do so would delay the cessation of war in the Pacific.⁵⁰
- The circumspection surrounding purported altruistic motivations as to why states would create national and international prosecution institutions that might end up turning against them. The US, for instance, has withheld its formal involvement in the ICC in part out of concern that the ICC acts on the mandate and interests of the UNSC, and due to the contrary application of the UNSC veto powers by contesting superpowers,⁵¹ US interests may not always accord with ICC indictments. The strange flipside of this concern is that as a permanent member of the UNSC itself, the US can also apply the veto at least to protect its interests against indictment. Despite such partiality in reservations, one might say that many of those nation states that support the ICC do so as they believe that the ICC will never be turned against the interests of the powerful.

The temptation lies to extrapolate from the political nature of the ICC and the associated reservations of superpowers, and formulate some similar reasoning as to why nation states in the Asia/Pacific region are reluctant to accede to the court's jurisdiction. I suggest below that there are more interesting and convincing historical, cultural, anthropological and social conditions that might provide a more persuasive explanation.

6. REASONS FOR NON-RATIFICATION IN THE REGION — STATE SENSITIVITIES AND REGIONAL RELUCTANCE

Throughout Asia and the Pacific the contemporary face of criminal justice is etched by:

50 See generally ARNOLD BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* (1987).

51 The UNSC operates with the capacity for permanent Member States to veto Council resolutions. This sometimes leads to a "stand-off" between members trying to utilise referral powers, and those resisting the referral.

- European colonial traditions;
- indigenous and migratory cultural influences;
- the pressures of subsistence and trade economies;
- the clash of home-grown and introduced religions;
- the obligations of tribal loyalty and filial piety; and
- the relentless advance of modernization and materialism.⁵²

The impact of these forces has been neither even nor consistent. What remains constant is the dislocation between the institutions of state-based criminal justice and the processes of traditional dispute resolution and decision-making. Endeavor to overlay this with the “one-size-fits-all” package of global justice and it is not difficult to see how the fissures of resistance would open wide.⁵³

In identifying the reasons for resistance to the ratification of ICJ mechanisms—local to the global—across Asia and the Pacific, there is a risk in both over emphasizing cultural and political differences while at the same time seeking universal themes at the expense of real jurisdictional peculiarities. A way around this is to suggest a *taxonomy of reluctance* that recognizes critical influences over modern criminal justice in the region. In putting together this skeleton, it is necessary to reflect in passing, even if only for the purposes of summary, on the disconnect between formalized justice processes (as exhibited in the ICC) and indigenous or embedded manners of resolving conflict in the cultures of this region. Such dissonance in the way justice is determined, adjudicated and resolved might even be enough to suggest why some states and cultures are disinterested in the global alternative especially when it is so foreign to the experience of their people.

6.I. Relevance?

Particularly in the Pacific there are perceived many greater global crises than those revealed through the crimes in the ICC jurisdiction, which small nation states would prioritize against their limited capacity for international engagement. Small Pacific Island states have identified global warming and rising sea levels as the main issue for social “justice” that they consider requiring urgent action by institutions of the international community. Political leaders and their people in the Pacific are perplexed that the environmental degra-

52 See generally Mark Findlay, *Decolonising Restoration and Justice: Restoration in Transitional Cultures*, in *RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE* 185 (Heather Strang & John Braithwaite, eds., William Morrow & Co. 2000).

53 *PEACE OPERATIONS AND ORGANIZED CRIME: ENEMIES OR ALLIES?* (James Cockayne & Adam Lupel eds., Routledge 2011).

dation that threatens the displacement of nations and cultures is not seen as a “crime against humanity” or that such displacement, through no fault of island inhabitants, does not qualify as cultural “genocide.”⁵⁴

In a region where “aid dependency” features to support many fragile economies and political regimes, relations beyond the nation state are fostered by bilateralism rather than multilateralism. Internationalism is not necessarily complementary with the economic interactions that benefit the North World in terms of trade and resources and obligate the South World through debt slavery and aid reliance.

Another relevant issue, particularly as it relates to small Pacific Island States and to under resourced or emerging Asian jurisdictions, is limited legislative capacity. Many administrations have very restricted legislative services that—when it comes to UN convention ratification—need to be rationed against state priorities for international engagement.

ICC ratification advocates need to substantiate a global criminal justice system that helps rather than burdens these small states with their concerns.

6.2. Global Reach

The “dead hand” of differential superpower influence (economically and diplomatically) in the region is commonly represented by international organizations and agencies in the pursuit of modernization as socio-economic development.⁵⁵ Due to the nature of this development policy, cultures of dependency have replaced colonial administration and obligation, advancing the culturally destructive impacts of aid allocation, trade exploitation, and exchange capitalism in subsistence economies. Rather than socio-economic development promoting inclusion within the positive dimensions of globalization across the region, colonial histories of bilateralism pervade foreign and commercial relations within and outside Asia and the Pacific. Particularly when nation states are weak or disaggregated, bilateral dependencies and obligations can stand in the way of ICJ whereby powerful North World states can bargain to require the endorsement of their own autonomy and national interest in return for economic or military favors.

What makes the absence of global reach a particular problem in the Asia-Pacific region is a significant number of micro political units, or macro states with enormous domestic challenges (e.g. food sustainability, cultural cohesion, environmental depletions), coupled with a distinct absence of regional political or economic

54 See generally Clement Tisdell, *Global Warming and the Future of Pacific Island Countries*, 35:12 INT’L J. SOC. ECON. 889 (Oct. 2008).

55 MARK FINDLAY, *THE GLOBALISATION OF CRIME: UNDERSTANDING THE TRANSITIONAL RELATIONSHIPS OF CRIME IN A GLOBAL CONTEXT*, Ch. 2 (Cambridge Univ. Press 1999).

solidarity that might argue for global inclusion, or at least collectively counter the risk from North World exploitation. Particularly when it comes to the commercial depletion of natural resources, the region has suffered the negative impact of globalization while at the same time being largely excluded from its material benefits. In such a situation there is little popular taste for internationalism, or any prevailing and genuine faith in international justice paradigms.

This reluctance is compounded by an inadequate understanding of how the ICC operates, and more specifically the principle of complementarity. Even when a state has ratified the Rome Statute, its national courts will still have the jurisdiction to investigate and prosecute the crimes that are within the purview of the ICC. It is only if its own domestic justice mechanisms are unable or unwilling to perform such functions will the ICC step in to initiate its own investigations and processes.⁵⁶ Therefore, the ICC still has to communicate with that state and make a determination on a case-by-case basis notwithstanding ratification. ICC membership will also not derogate from the autonomy of functioning national legal systems in that citizens have no standing to bring cases directly to the ICC.⁵⁷

Ramification advocates, therefore, should endeavor to clarify the practical circumscription of ICC jurisdiction, or have the circumstances necessary for the activation of its jurisdiction more clearly defined. Such specification would have the effect of mollifying the misconception on the part of suspicious states that membership in the ICC would add another set of external obligations over which they have no administrative as well as political influence.

6.3. Post-Colonial Hangover

It would be fair to say that, as with most post-colonial regions, in recently independent states in Asia and the Pacific region there is reflected a residual fear of “westernization.” Tensions are obvious between the resilience of strong indigenous cultures, and the demands of cash economies. The spread of religious fundamentalism across the region has also tended to vilify western culture.

To particularize this post-colonial resentment, the relatively recent memory of the colonial excesses exacted through the mechanisms of criminal justice, resonate throughout the independence histories of the region. State-sponsored criminal justice institutions and processes have come to

⁵⁶ See Rome Statute, *supra* note 2, art. 17.

⁵⁷ Usman Hamid, *Why Indonesia, Asia Must Ratify the Rome Statute*, JAKARTA POST, Nov. 15, 2011, available at <http://www.thejakartapost.com/news/2011/11/15/why-indonesia-asia-must-ratify-rome-statute.html>.

represent, and perpetuate through elitist post-colonial administrations, the discriminatory dominion of the powerful over the populous rather than any system of universal justice.

In Asia and the Pacific ancient routes of migration meant that indigenous cultures were exposed to a constant transition of colonization. Add to this the unique treasures of trade that attracted the West to the East and it is not hard to understand why, when the bonds of colonial rule are released, there is no eagerness to compromise hard-fought-for autonomy in return for a notion of westernized justice that could represent just another layer of imperial influence.

Because Asian cultures in particular have been suspicious about, and therefore misunderstanding of internationalization or polarity that is interpreted as westernization, transitional or developing Asian economies have adapted western administration and commercial organization to suit their own priorities. Despite the language of constitutional legality, in many Asian political and social frameworks individualized rights that are said to underpin principled western criminal justice models may not be valued above communitarian cohesion. Pacific Island tribalism has similar priorities.

Pacific Island states usually retain the trappings of Westminster parliamentary government. However, as these frameworks are so often ill suited to social organizations with intricate bonds of obligation and clan duty, traditional ties of community cohesion have become perverted through corruption and exploitation.⁵⁸ Corrupt political elites have a vested interest in distancing any intrusive institutions of international governance and accountability, such as ICJ claims to be.⁵⁹

If the institutions of ICJ and the international governance mechanisms that sponsor them are viewed by the small Asia Pacific States in particular as the representatives of global political and economic hegemony, then they will be avoided as such. For post-colonial states in Africa and in South America that might share the same reservations, those torn by internal military and political struggle or ravaged by secessionist movements may be willing even to engage hegemonic dominion in the hope of political preferment or conflict resolution through the criminalization of their enemies.

It is only through communication and consultations with Member States that organic developments of ICJ occur through its institutions, and as the ICC is to some extent subordinated to the interests of powerful states such as the permanent members of the UN, it also needs to be open to influences from small or less hegemonic

58 See generally Mark Findlay, *Misunderstanding Corruption and Community: Comparative Cultural Politics of Corruption Regulation in the Pacific*, 2:1 ASIAN J. CRIMINOLOGY 47 (June 2007).

59 See generally MARK FINDLAY, *GOVERNING THROUGH GLOBALISED CRIME* (Willian Publishing 2008).

states and their procedural traditions.⁶⁰ The ICC can take the UN's intimated transition towards broader-based justice paradigms as a cue to situate ICJ in the most culturally inclusive (rather than politically selective) processes of justice delivery. The new inclusivity approach complements the need for developments in substantive ICL and procedure that recognize collective liability, criminal organizations, and the resultant responsibilities of offender communities to communities of victims.⁶¹

6.4. Normative Identity

The terms “Asian values” or the “Pacific way” are commonly employed when explaining the determination of political autonomy and regional engagement across the region. In a governance sense, this attempt to link the conceptualization of nationhood with fundamental traditions is more than cultural relativity. For instance, if one examines the development of hybrid criminal justice traditions in Asia and the Pacific, these are explained at least in part by different notions of justice and of citizen responsibility than those that may prevail in North World or westernized justice paradigms, which are the predominant models for ICJ. Again, normative distinction as an explanation for reluctance to engage with ICJ might be countered by the many examples in Africa and South America where nation states equally jealous of their post-colonial sovereignty and autonomy have signed up to the Rome Statute. What else influences the Asian and Pacific normative exceptionalism?

Digging deeper into normative identity at a nation state level presents the danger in generalizing normative enunciation across such a culturally and developmentally diverse region. Recognizing this, and looking at the constitution of those states in the region that remain outside the ICC, post-colonial cultural and political stability is not uncommon. The embedding of an independent political identity within long established cultural foundations, even in the more volatile post-colonial states in Asia and the Pacific, is regularly endorsed through strong centralist or paternalist political frameworks that celebrate sovereignty. The relatively weak regional political and economic alliances in Asia and the Pacific are a further evidence of resilient and prevailing nation state autonomy.

To meet such concerns, the ICC can do more to demonstrate how ratification of the Rome Statute underscores and not subverts nation state autonomy by paying attention to the aspects and peculiarities of the until-now unrepresented justice paradigms. Engagement with the ICC is an opportunity for Asian and Pacific Island states to assert their normative identity by influencing the development of a global criminal jurisprudence.

60 See generally Findlay, *supra* note 9.

61 See generally *id.*

In the case of China, the Confucian and communist ascription to social order above the individual, as recognized in their system of criminal law (imperial and modern), has provided fertile soil from which communitarian resolution practices such as victim participation in both mediation and the trial process, and victims' right to compensation, have grown.⁶² Therefore, entry of China into the ICC debate, bringing with it collective and communitarian rights consideration, holds enormous potential for collective crime prevention and aggregated social order to assume a greater place in ICJ.

6.5. Constitutional Legality

Another frame of reference that might explain the reluctance to engage with ICJ across the region is constitutional legality. Asian and Pacific Island states recurrently demonstrate dismal human rights records by UN standards, despite the proliferation of sophisticated constitutions with human rights charters and leadership codes that appear "rights focused." This paradox might be explained by both the problematic application of Westminster parliamentarianism, and the underdeveloped or corrupted stages of representative democracy. Another explanation, in states such as China, is a disconnect between the discourse of constitutionalism and the perseverance of administrative traditions that rely on non-accountable and expansive individualized discretion.

The heavy emphasis on humanitarian rights principles that underpins the formal institutions of ICJ does not sit well with political frameworks that do not respect rights protection in practice, and instead rely on cultural and political informalities (such as clan loyalties), which frustrate accountability for rights violations. Again, what might distinguish any such regional reluctance based on the rights dilemma from other regions where states have signed the Rome Statute while also devaluing rights and political accountability, is the marked absence of any Asian regional rights superstructure, combined with recent history of political regimes that operated (and some continue to operate) systematic rights repression.

It is anticipated that the intervention of the ICC will be both more likely and more attractive for states when their domestic criminal justice capacity—and more particularly the place of the trial process within constitutional legality—is fragile, strained or compromised and dependent. Interestingly, despite the varied levels of economic development and political competence, nation states across the Pacific and Asia (perhaps as a consequence of colonial control policies) often exhibit relatively well-resourced, centralized and

62 See generally *id.*

resilient criminal juridical institutions and traditions. It may provide some comfort for states reluctant to concede to international jurisdiction that the state's formal justice processes possess the capacity to manage their own affairs for crimes within the ICC's jurisdiction.

6.6. Executive Discretion

Aligned with the final observation above, many nation states in Asia and the Pacific region have suffered under recent dictatorships or military governance, and a history of coups. Centralist governance frameworks in China, India, Pakistan and Indonesia have meant that the majority of the world's population has been administered with a tight hand of centralist government.

In such regimes a residually powerful security sector in the military and police proliferates. Governance through fear of the consequences of opposition or dissent for the individual citizen has meant that a healthy adversarialism is scarce in civil society. Freedom of expression, independent media, and alte native political organization are restricted. Communities become compliant. In such governance environments, administrative discretion is centralized, pervasive, and largely not responsible to the people but to the powerful. Therefore practices of impunity are tolerated because the leadership of such states are often themselves perpetrators of serious crimes, whether through action or omission. The invitation to participate in a justice process that has the potential to require international accountability above the interests of the nation state is, not surprisingly, unlikely to be attractive for governments dedicated to the denial of domestic accountability obligations.

6.7. Civil Society

Throughout the Asia Pacific region, the immaturity of civil society as a political force has meant that grassroots support for ICJ is difficult to muster.⁶³ Tribalism, caste and cultural hierarchies have tended to mechanically stratify civil society and prevent organic movements of victims that would pressure for ICJ engagement. In this political environment, NGOs have been frequently restricted, and the fracture of oppositional political movements has made the growth of domestic agitation for ICJ difficult.

A unique feature of civil society in the region has been its complacency. This is not always a consequence of fear through repression. In the case of Singapore, for instance, authoritarian governance has been imposed and maintained through ma-

63 Coalition for the International Criminal Court website, A Universal Court with Global Support, at <http://www.iccnw.org/?mod=ratimp>.

terialist and economic advancement. Society in such circumstances complies with government as it perceives in non-compliance a risk to socio-economic benefit. In addition, although the wealth gap in Singapore is one of the starkest world-wide, the doctrine of meritocracy transposes responsibility for wealth creation onto the individual within society, dispossessing the state of any duty to redress the balance and to become the obvious focus for the dissent of the disadvantaged.

The complex webs of obligation and patronage are another characteristic of compliant civil society. Stimulated by commodity and cash economy development models, these relationships may also foster corruption that in turn controls civil society through the giving and receiving of advantage.

Common to both centralist and paternalist states in the region is the manner in which they effectively exclude civil society from participatory governance or fail to activate inclusion beyond the obligations that the state identifies.⁶⁴ These obligations are designed to complement core cultural beliefs that necessitate compliance and that, when required, enforce conservative adherence to the established order.

Ratification advocates should work through civil society in oppressive state regimes to exploit the accountability and governance potential of ICJ, embodied in institutions such as the ICC.⁶⁵ Such a push can also come from academia and the media, which play a role in cultivating the potential of civil society activism.

7. CONCLUSION

In endeavoring to understand the relatively low accession rate to ICC Member State standing across the Asia Pacific region, this paper has located a range of explanations in social and cultural contexts, rather than essentially focusing on political determinations. The hypothesis is that the social conditions resistant to engagement with ICJ, prevailing in the nations states across the region, can be identified, distinguished and, if possible, addressed by the forces promoting ICC membership. However some of these conditions, such as relevance and capacity, require much more developmental and political adjustment than mere promotion of the values of ICJ can attain. Such adjustment would be necessary within states, and from the formal institutions of ICJ as well, if engagement in the region is to be made more viable and more attractive.

The development of nation state receptivity to the benefits of global governance that institutions like the ICC can and should offer, holds out an associated

64 Elizabeth Kamaldin, *Singapore Needs to Change Its Filial-piety Mindset*, ASIAONE, Oct. 10, 2012, at <http://www.asiaone.com/News/Latest%2BNews/Singapore/Story/A1Story20121010-376608.html>.

65 See generally FINDLAY, *supra* note 59, ch. 9.

challenge for public international law. Due to the determination to individualize international criminal liability, the fundamental bonds (and essential purposes) of public international law can be envisaged beyond state-to-state relationships. The individualization of liability through international criminal prosecution also goes beyond the individualized rights paradigms of international humanitarian law. Developments in ICL and ICJ (as modes of global governance) have increased the utility of public international law to address many of the “big issue” divergent concerns of states in the Asia Pacific region that are multi-polar and not only bilateral. International law can be reinvigorated for these states as a medium for individualizing and aggregating responsibility, and seeking out redress where responsibility has too long been denied by the hegemonic interests behind the limited interpretation of public international law and its potential outreach. Membership in international justice alliances can now be argued to bring with it the more inclusive benefits of global governance.

MEMORY AND THE KHMER ROUGE TRIBUNAL

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I. INTRODUCTION

This article comprises three essays by young Cambodian women reflecting on their family members' experiences under the Khmer Rouge regime and reactions to the Khmer Rouge Tribunal's efforts to bring to justice the surviving senior leaders and those most responsible for the crimes of that era. To date, the ECCC has held two trials and sentenced Kaing Guek Eav *alias* Duch, the chief of the S-21 security center, to life imprisonment for the murder and torture of over 12,000 people. The Court's second—and likely last—verdict in the case against two surviving senior Khmer Rouge leaders is expected in the first half of 2014.

The authors and their families come from different segments of Cambodian society and offer a range of perspectives on the Khmer Rouge era and the capacity of the ECCC to offer survivors a measure of justice. The first author, Faily Sa, is a member of Cambodia's Cham Muslim community—an ethnic and religious minority who were allegedly targeted by the Khmer Rouge as part of a genocidal policy.¹ For many years she has worked for a Cambodian organization committed to preserving Khmer Rouge-era documents and survivor accounts, and to promoting Khmer Rouge criminal accountability.

The second author, Sreyneath Poole, has lived in the United States since she was 14 and recently returned to Cambodia to reconnect with her homeland before pursuing graduate studies. Her family, like Faily Sa's, includes officials of the overthrown Lon Nol regime, a political group also allegedly targeted by the Khmer

1 See Case 002 Closing Order, Case No. 002/19-2007-ECCC-OCIJ, ¶¶ 745-70, 1336-42 (Sept. 15, 2010).

Rouge for execution.²

The third author, Huy Senghul, is a daughter of Him Huy, the head of a unit responsible for transporting S-21 prisoners to the Choeng Ek killing fields for execution,³ who for many years has volunteered to speak publicly about his experiences. He says that he “recorded the names of the prisoners in a register before they were taken to the pits for summary execution,”⁴ and admits to personally killing only five of the tens of thousands of victims, and only under duress.⁵ His testimony helped convict Duch, whom he claims had paramount responsibility for the crimes that took place at S-21. Him Huy has said that due to his involvement in the killing, he lost his dignity and value, and lived under “suspicion and hatred from his community.” In his view, the trial and conviction of Duch has helped his neighbors to understand that he was not in charge of the prison and that, as a lower-level cadre, he also lived in fear during the Khmer Rouge era.⁶ Like the other authors, Huy Senghul’s views are a reflection of her family’s memories of the regime.

2. MEMORY REMAINS BEYOND THE KHMER ROUGE TRIAL

FAMILY SA⁷

Everyone has his or her own bitter and sweet memories. The ones that are most memorable are those that have scared us the most. In the hearts of people who have suffered from Cambodia’s tragic history by living through the three years, eight months and 20 days of the Khmer Rouge regime, horrific memories still haunt them to this very day. Each day under the brutal regime they prayed for it to pass quickly and hoped to see sunlight the next day.

Such bitter memories bring victims to tears and cause them trauma and psychological disorders. Some people are finding ways to forget their past memories under the Khmer Rouge regime, but I doubt that they can ever do so—forgetting the past doesn’t mean they can run away from it.

From my perspective, survivors are not likely to forget memories from the Khmer Rouge regime. As part of my job at the Documentation Center of Cambodia (DC-Cam), one of my many tasks is to document the trial proceedings at the Khmer Rouge Tribunal—formally known as the Extraordinary Chambers in the

2 See, e.g., *id.* ¶¶ 234-35, 243, 254, 309, 479, 695, 707, 977.

3 See Duch Trial Judgment, Case No. 001/18-07-2007/ECCC/TC, ¶ 158 (July 26, 2010).

4 See *id.* ¶ 48 n.224; Case 002 Closing Order, ¶ 464.

5 See Savina Sirik, *Duch Final Judgment: Justice and Humanity*, Documentation Center of Cambodia, at 5-6 (Feb. 2-3, 2012), at http://www.dccam.org/Projects/Living_Doc/ECCC_Tour_and_Field_Trip_Reports.htm

6 *Id.*

7 Faily Sa is a film archivist with the Cham Identity Project at the Documentation Center of Cambodia.

Courts of Cambodia (ECCC)—dating back to 2007. I have captured trial video footage and photos of the parties in the courtroom, and produced video clips of people's reactions to the trials. From people's reactions I can tell they can never forget the past. The loss of their loved ones and the time they spent together are rooted very deeply in their hearts.

My father, Sa Math, once told me that he cannot forget the memory of his parents who were brutally killed under the Khmer Rouge. Every time my father sees pickled cucumber, it reminds him of his mother, who always packed one in his school lunch. The regime separated people from their families and removed my father from his parents. The regime took at least one life from each Cambodian family, and mine was no exception. It took the lives of a number of our immediate and extended family who were accused of participating in a Cham rebellion in late 1975. In the village where my family resided, almost 100 families were killed. They killed my grandfather and his younger brother by binding their bodies and dropping them into water, drowning them. My grandmother died because there was no medicine to treat her illness. My father survived because he worked hard to hide his identity as soldier of the overthrown Lon Nol regime.

One day, my father was accused of being a Lon Nol soldier. He tried to convince the cadres that he was only a farmer who could not read or write, but five cadres came to his house at night and took him away with some other villagers. They got on a boat and crossed the river to an island. My father thought his identity had been discovered and he was going to be killed. While walking, the Khmer Rouge cadres clubbed the head of a villager and he fell down. When my father saw that, he fell down on his knees and, in shock, was unable to move. The cadres told my father to get up and keep moving. My father was afraid as if his soul was no longer with him. The cadres threatened to kill my father if he told anyone. And he did not tell anyone.

Eight years after the collapse of the Khmer Rouge regime, I was born and grew up unaware of the history of my family and country. Through my work, I began to learn about the atrocities that had befallen us. After two years with DC-Cam, I was selected for an internship with the Shoah Foundation Institute at the University of Southern California. I met many Holocaust survivors who came to share their experiences. I also interviewed many Khmer-American survivors who would never return to the country they love, fearing the emotional trauma of facing the memories of lost family and friends.

After my return, I was determined to interview my father for his stories, starting on June 30, 2009. Now it has been over four years and I still don't have the whole story. He could not hold back his tears talking about his family under the brutal re-

gime. Now he is sick and hospitalized. I always keep him up-to-date on the Khmer Rouge Tribunal because he is interested. My father told me that the survivors and the accused are getting too old and are dying one after another. He hopes that the verdict will come before the survivors and the accused all die. One day in prison for the Khmer Rouge leaders before their deaths would be adequate for him and his loved ones.

Since it is impossible to forget the past, memorialization of their memories can give survivors the strength to move on and contribute to preventing brutal acts in the future. Survivors have been passing their memories to their children and grandchildren, allowing young people to become aware of their families' and the country's history. Younger generations can benefit from the experience of their elders and use these lessons to move to a better future. I believe that memory plays a very important role in uniting people and helping Cambodians to move beyond being victims of their tragic history.

3. A CROSS-GENERATIONAL REFLECTION ON THE KHMER ROUGE TRIBUNAL

SREYNEATH POOLE⁸

When discussing the Khmer Rouge Tribunal, the questions that always come up are “what is the significance of the Tribunal to the regime survivors, the people of Cambodia, and the nation as a whole?” and “can justice be served?” Different people have different answers. No matter what their opinion, from a historical point of view, what happened and will happen at the Tribunal plays a significant role in Cambodia's contemporary history.

The Khmer Rouge Tribunal is important because it allows the nation to find the truth, and allows the victims and perpetrators to come to terms with the past, to reconcile, and to heal. This is what the Tribunal represents. The Court's first trial, Case 001, ended with a life imprisonment sentence for Kaing Guek Eav, *alias* Duch, who oversaw the infamous Toul Sleng or S-21 detention center. This sentence opened up a path by which the nation can seek justice from the regime that destroyed every facet of life. Case 002 is even more significant because the accused are the people who had direct involvement in implementing the disastrous Dem-

⁸ Sreyneath Poole received a BA from the University of Redlands in California in “The Nature of Imbalance: East Asian Politics and Media,” graduating with honors in international relations. She is currently volunteering with DC-Cam in Phnom Penh.

ocratic Kampuchea regime policies that killed approximately 1.7 million people.⁹ The amount of money that has been spent since the inception of the Tribunal also shows its importance. Since 2006, the entire operation has cost \$208.7 million,¹⁰ showing all the willingness of those involved to fund the trials so that justice can be achieved.

However, not everyone shares this opinion. My mother's view of the Khmer Rouge Tribunal is not one that the people working at the ECCC would like to hear. My mother was a victim of the regime. She was only a child, around the age of six or seven, and she was lucky that she was not separated from my grandmother, like many children were from their parents.

In my conversations with her about the Tribunal, she tells me that she does not know about the Khmer Rouge Tribunal, so she does not pay too much attention or care about it. Part of me is not convinced, because my mother follows domestic Cambodian news all the time. Although she admits that she does not religiously follow the trial hearings, she says that she does not believe the trials will produce any meaningful results. She says the trials have taken too long, and too much money has been spent with no significant outcome. When I asked her if she thought justice could be served from the trials, she gave me a straightforward “no” without further elaboration.

My great-aunty, my grandmother's youngest sister, has a different opinion than my mother. Now in her early 50s, because she was older during the Khmer Rouge regime, her experience left a deeper impression on her. Not much different from many stories that have already been told, my great-aunty was relocated to Kratie province and was forced to work in the fields, dig dykes, and build dams. Life was horrible for her and it undoubtedly shaped her life today.

She is an incredibly admirable woman. She is politically active and a strong advocate for social justice. Since day one of the first trial she has followed closely the Tribunal's development. She believes that the Tribunal is important for her, as well as for the nation. To her, the Tribunal serves a role in helping the nation find ways come to terms with the past and seek justice.

Still, like my mother, she thinks the Tribunal operates too slowly and the accused in Case 002 are getting too old and dying off. She expressed her disappointment with the death of accused Ieng Sary and the dismissal of Ieng Thirith due to her deteriorating mental condition, but said that the trial could not be rushed because it is part of a legal process. She is adamant that the Tribunal cannot give her and the people of Cambodia “one hundred percent justice,” but believes that the vic-

9 Professor Ben Kiernan's estimate.

10 See ECCC at a Glance (Oct. 2013), available at http://www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance_ENG_Oct_2013.pdf.

tims can find some peace and be satisfied if the final ruling decision reflects the gravity of the crimes that the accused have committed. She hopes to see life-imprisonment for those responsible for the crimes that happened.

The trial of the two ex-Khmer Rouge leaders remaining in Case 002 is important to her, but it is not enough. She would like the Tribunal to investigate those who had direct involvement in the killing of the people at the regional and commune level. She has also hinted at bringing those who are currently in positions of power to trial. For her, this will prevent key perpetrators from getting away with murder, and serve as a warning for future leaders not to commit atrocities because there will be mechanisms to punish them for their crimes.

My grandfather shares the same opinion as my great-aunty. When I asked his views, he told me that he fully supports the Khmer Rouge Tribunal. Like many of the regime's victims, he wants to see the people who caused him suffering held accountable for their crimes.

In my opinion, my grandfather's story is one that should be shared with the public. He was born in Svay Rieng province and moved to Phnom Penh in the early 1950s to follow his parents who were seeking employment. My grandfather was a well-educated man. Despite coming from a modest-income family, he completed all levels of schooling that were offered at the time. He then worked at the US embassy as an office secretary until Prince Norodom Sihanouk ended Cambodia's relations with the US. He returned to work at the embassy as a military radio operator when relations were re-established. He once told me that he had to inspect a US arms warehouse in Anlong Veng, which was part of the US Military Assistance Advisory Group (MAAG) operation.

My grandfather was smart and lucky to out-live the Khmer Rouge regime. Given his intellectual capacity and his connection with the US, he should have been one of the first people to be executed. At one point during the regime, he was imprisoned and forced to do hard labor. He was released about a month later because, from what he told me, *Angkar* [the Khmer Rouge organization] could not prove that he was guilty of whatever crime they suspected of him. He was taken away a second time by the Khmer Rouge cadres when Vietnamese forces entered Cambodia in 1979. They needed extra hands to cook and carry the injured and dead off the battlefields.

Everyday, my grandfather watches foreign television news to keep updated on what is happening around the world. He also reads anything that relates to the Khmer Rouge to try and learn what happened and discover new information. In our brief conversation on the topic, he told me that the Khmer Rouge trials are a just way of holding the ex-Khmer Rouge leaders accountable and punishing them

for their crimes in a legal manner. Like my great-aunty, he said that the ECCC's operations are slow and he wished that the process moved quicker because the ex-Khmer Rouge leaders are getting too old. My grandfather wants to see the ex-Khmer Rouge leaders given a sentence of life imprisonment even if they do not live long. To him, it is a symbolic gesture, which gives him a feeling that justice has been achieved. He believes that the trials are a way to teach the younger generation and future leaders to understand the horror of what happened and its legacy so that future generations will not follow the same path.

As for me, I am of the generation that was born around the signing of the Paris Peace Agreement. When I was living in Cambodia, I knew next to nothing about the Khmer Rouge. All I knew was that Pol Pot was bad, but I was not sure if Pol Pot was a person or something else. It was not until I moved to the US that I learned about what happened to Cambodia. At first, it was overwhelming to learn about the atrocities. It did not make sense to me. I am still learning and trying to figure out what happened and some things still do not make sense.

After learning so much about the suffering and destruction that the Khmer Rouge regime inflicted in Cambodia, and more specifically to my family, I believe that the Khmer Rouge Tribunal is important. It helps the nation learn and understand about our past and foster dialogue as a way to reconcile with the past, heal, and grow. Nevertheless, I share a similar sentiment to my mother. I think the ECCC is operating too slowly. I feel frustrated by the ECCC's speed of operation because I am worried that the ex-Khmer Rouge leaders will be dead before they can be properly punished for their crimes.

I am also frustrated with the political sensitivity that the ECCC faces operating as a UN-backed Cambodian tribunal, which further slows down the process. However, these are not the main reasons for my weariness. I wish for the Tribunal to expand its investigation and not be limited to addressing what happened between 1975-1979. My wish is for the Tribunal to examine the issue from a global perspective and also hold external actors accountable. I do not believe that the ex-Khmer Rouge leaders should be the only ones to stand trial. There are external actors who are just as guilty of allowing the rise of the Khmer Rouge regime.

Right now the nation is waiting for the final verdict in Case 002 and has a variety of expectations. As for me, I know that my wish cannot be fulfilled in the foreseeable future, and that my weariness with the ECCC—and feeling that justice cannot be served—will continue.

4. MY FATHER AND THE PROSECUTION OF DUCH AT THE ECCC

HUY SENGHUL¹¹

I was born in 1992 in Koh Thom District, Kandal Province. I am the fourth child among my six siblings. My father's name is Him Huy, a well-known former guard at S-21 security prison, under chief of command of Kaing Guek Eav *alias* Duch. Under the Khmer Rouge rules, many were arrested and detained at S-21, and later executed. I knew very little of what exactly happened under the Khmer Rouge regime although my parents had lived through it. It was not until people started talking about their stories and until I became a volunteer at the Documentation Center of Cambodia (DC-Cam) that I found out more about Khmer Rouge history.

On April 17, 1975, the Khmer Rouge cleared people out of Phnom Penh city to the rural areas to work in the rice fields. Parents and children were separated and forced to labor with scarce food supply. For instance, they received only one or two scoops of gruel a day. Furthermore, children were not permitted to go to school, and their job was to collect animal excrement and guard oxen.

I learned about the Khmer Rouge history from my father and my work at DC-Cam. My father felt regretful, and his personal stories remained unforgotten. He often told me that he thought he could never have survived the regime. For him, this remains painful, particularly his recollections of Tuol Sleng Prison [S-21]. He told me that during the regime he sometimes thought of committing suicide as he could hardly bear the harsh situation. However, he was fully aware that if decided to do it, his family would meet a similar fate. Like many other lower-ranking cadres, my father had no choice. He had to follow orders from the top leaders. Duch was his leader, and thus, Duch shall be the only person responsible for the crimes committed at S-21 known as Tuol Sleng Prison.

After the collapse of the regime, my father was imprisoned for one year at Koh Thom District Security Office for crimes he committed during the Khmer Rouge reign of terror. Finally, our family was reunited upon his release. My father often recalled, "What I did in the past was to survive." If he denied an order, he would be killed. I observe that he bears remorse from horrific events that occurred.

Nonetheless, he strives to come to terms with it for the sake of our family's survival. He is a hard-working father. He works vigorously in the rice paddies to

11 Huy Senghul is a member of the Book of Memory Project, DC-Cam, and a third year student of law at Asia Europe University.

earn a living for our family. After the Khmer Rouge regime, we were poor farmers. However, because of his hard work, we are able to lead normal lives like others. For instance, some of my brothers and sisters were married, and make their livings running their own businesses, while I am now continuing my studies at a university in Phnom Penh.

My father loves his children. He never hits any one of us. He is determined not to let his children meet the same fate as he did under the Khmer Rouge regime. In addition, every one of our neighbors has a friendly relationship with him. He is never involved in conflict with anyone. Because he is a good role model for us, we as his children follow in his footsteps.

I hate Duch. I despise what he did under the Khmer Rouge regime. I am happy that Duch was sentenced to life imprisonment, and that the gravity of his crimes will never be mitigated. I thought to myself that if the regime had never existed, our family's condition would have been much improved because we would not have had to start from scratch. Duch was not only the former chief of S-21 and my father's supervisor, but he is also the one who was responsible for operations at S-21, the Prey Sar security office [a nearby reeducation/work camp], and the Choeng Ek killing fields. Duch was a cruel revolutionist. He is responsible for the deaths of more than 12,000 souls, including children.

I traveled to witness the reading of Duch's appeal verdict at the Khmer Rouge Tribunal with my father in February 2012. Initially, I was anxious and worried that Duch would not be sentenced to life in prison. However, I was pleased to hear the Tribunal's Supreme Court Chamber sentence Duch to serve in detention for the rest of his life. I was delighted, and so was my father. Finally, Duch received a sentence that he deserved for what he had done.

AVENUES TO IMPROVING WORKERS’ RIGHTS AND LABOR-STANDARDS COMPLIANCE IN A GLOBALIZED ECONOMY

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I. INTRODUCTION

The April 2013 collapse of the Rena Plaza factory building near Dhaka, Bangladesh, that killed more than 1,100 workers—the highest fatality count in the history of garment factory disasters—has brought the issue of poor working conditions and low labor standards in developing countries again into the spotlight.² According to Kimberly Elliott, an expert on global trade and labor standards, the root of this problem lies in both the nature of the industry and the consumer:

This is an industry that’s very low wage, very low skill, highly mobile, and highly competitive, so the incentives are for factory managers to cut costs as much as they can. . . . Buyers are looking around the world for the lowest prices they can find, and unfortunately we as consumers are complicit, because we’re looking for the cheapest clothing we can find.³

Bangladesh’s garment industry has steadily grown since the early 1980s.⁴ The industry has been characterized by low wages and generally low compliance with international labor standards and the country’s own labor laws, helping to account for very low labor costs.⁵ Bangladesh continues to experience strong pressures to cut labor costs and improve the price competitiveness of its textile and garment exports.⁶

Recent studies have shown consistent violations of working conditions and labor-compliance failures, under both domestic laws and international standards, throughout the Bangladesh garment industry.⁷ Such studies found violations of labor standards related to wages, hours of work, union rights, employment

2 See, e.g., Lawrence MacDonald, *How to Avoid Another Bangladesh Factory Disaster*—Kimberly Elliott, Center for Global Development (May 7, 2013), available at <http://www.cgdev.org/blog/how-avoid-another-bangladesh-factory-disaster-kimberly-elliott>.

3 *Id.* (quoting Kimberly Elliott, a senior fellow at the Center for Global Development).

4 See Günseli Berik & Yana van der Meulen Rodgers, *The Debate on Labor Standards and International Trade: Lessons from Cambodia and Bangladesh*, Working Paper Series, The International Working Group on Gender, Macroeconomics, and International Economics, at 8-9 (June 2007).

5 See *id.* at 8. See *id.* at I2-I3 for a more extensive description of the characteristics of the Bangladesh garment production industry and labor standards within the industry.

6 See *id.* at 8.

7 See *id.* at 17. See *id.* at 17-21 for a detailed account of these studies.

discrimination, and worker abuse.⁸ Unannounced factory inspections by the Fair Labor Association (FLA) in 2004 also found severe violations of health and safety regulations, including poor fire safety equipment; inadequate and unsanitary toilet facilities; non-use of protective gear; poor ventilation and maintenance of equipment; and excessive heat.⁹ In its 2004 study, the FLA determined that many factories were operating in residential buildings that were not equipped for factory production, putting workers at great risk of injury or death from fires and collapsed buildings.¹⁰

It should come as no surprise, then, that the Dhaka factory collapse on April 24, 2013, that killed 1,127 people was preceded five months earlier by a factory fire near Dhaka that killed more than 100 people, and that the Dhaka disaster was followed by a factory fire on May 9, 2013, that killed eight workers. With global competition in the garment industry expected to become even more intense with the eventual adoption of the Trans-Pacific Partnership Agreement, a free trade agreement that will include Vietnam—one of the top-ten garment-exporting countries worldwide¹¹—labor standards and workers' rights will be at even greater risk of being violated.

Globalization, in the form of foreign direct investment and global supply chains, has allowed developing countries to take advantage of employment opportunities for their citizens, have access to capital and international markets, and enjoy overall economic growth.¹² At the same time, however, globalization has arguably allowed retailers in the United States and other developed countries to exploit low wages and weak regulations in order to make higher profits.¹³ An important question is whether exporting countries can protect jobs and stay competitive in the garment industry while also ensuring the safety, welfare and rights of workers.¹⁴ This paper provides an analysis of some of the mechanisms that have been suggested or implemented by academics, governments, retailers, non-governmental organizations (NGOs), and consumers to enforce workers' rights and compliance with labor standards in an increasingly globalized economy.

8 See *id.* at 17-20.

9 See *id.*

10 See *id.* at 19.

11 See *id.* at 10.

12 See Richard M. Locke, Fei Qin & Alberto Brause, *Does Monitoring Improve Labor Standards? Lessons from Nike*, 61:1 ILR Review 1, 3 (Oct. 2007), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1310&context=ilrreview>.

13 See *id.* at 4.

14 See Berik & Rodgers, *supra* note 4, at 1.

2. LABOR STANDARDS IN MULTILATERAL AND BILATERAL TRADE AGREEMENTS

Historically, labor provisions have not been a part of multilateral trade agreements, because the regulation of labor was generally considered a domestic issue and not applicable to trade. The responsibility for monitoring labor protections fell to the International Labor Organization (ILO), which was founded in 1919 and is now an arm of the United Nations. The ILO has been working to create conventions that set international labor standards for nearly 90 years.¹⁵

Eight current ILO conventions reflect four areas that have come to be considered “core labor standards”: (1) freedom of association and collective bargaining; (2) the elimination of forced labor; (3) the elimination of child labor; and (4) the elimination of discrimination in employment and occupation. In 1998, these four core labor standards were included in the *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*, which commits all ILO member countries to comply with and enforce labor standards.¹⁶

More recently, the United States and other countries have negotiated numerous bilateral trade agreements that go beyond the very limited scope of labor protections in the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), and often reference ILO convention standards. The United States has included labor provisions in all bilateral trade agreements since 1993.¹⁷

The inclusion of labor provisions in bilateral trade agreements has evolved slowly.¹⁸ The first two U.S. free trade agreements, with Israel (1985) and Canada (1988), did not include labor provisions. This changed after 1993, when three factors helped make labor standards a priority. First, the United States began to negotiate with less-developed countries. Second, it became increasingly accepted that trade and labor standards were connected—specifically, that in developing countries pressures to become low-cost producers potentially led to diminished working conditions and workers’ rights. And third, corporations became more willing to make “some concessions to labor groups in order to promote trade agreements and pave the way for greater trade and investment in developing countries.”¹⁹

In early 2007, Democratic members of Congress indicated that some labor provisions in pending U.S. free trade agreements would have to be strengthened

15 See Mary Jane Bolle, *Overview of Labor Enforcement Issues in Free Trade Agreements*, Congressional Research Service, at I (Feb. 29, 2008).

16 See *id.*

17 See Sandra Polaski, *Protecting Labor Rights Through Trade Agreements: An Analytical Guide*, 10:13 J. INT’L L. & POL’Y (Davis California) 13, 14 (July 19, 2004).

18 See Bolle, *supra* note 15, at I.

19 See *id.* at 2-3.

to gain their approval. On May 10, 2007, bipartisan congressional leaders and the Bush administration reached a consensus on a new trade framework titled *The New Trade Policy for America*, which called for the inclusion and enforcement of internationally recognized labor rights, including the four “core labor standards,” in pending free trade agreements.²⁰ *The New Trade Policy for America* changed the model for labor chapters in U.S. free trade agreements and is most recently reflected in U.S. free trade agreements with Panama, Colombia, and South Korea that were executed under the Obama Administration.²¹

In constructing labor provisions in any trade agreement, the parties must determine which obligations they will undertake with respect to labor standards, including what types of labor rights will be covered and whether existing national laws and/or international standards will be incorporated within the agreement.²² When international standards were included in U.S. trade agreements in the past, they were often aspirational rather than actual commitments.²³ However, language in the Panama, Colombia, and South Korea trade agreements requires the incorporation of *enforceable* international labor standards into each country’s domestic laws.²⁴ A country’s failure to adopt and maintain its statutes, regulations, and practices “consistent with the rights stated in the *ILO Declaration*” constitutes a violation of the agreements.²⁵ Enforcement mechanisms include dispute settlement procedures and penalties (including the withdrawal of trade benefits).²⁶

Proponents of the international enforcement of labor standards through free trade agreements present two main arguments: (1) low labor standards and conditions exist in many developing countries that the United States trades with and invests in, and enforceable labor standards in U.S. trade agreements are an effective trade policy measure by which to “level the playing field” and prevent job loss in competing U.S. industries, and (2) workers in developing countries are subject to suppressed wages and exploitative working conditions in the name of market competition, and enforceable labor standards within U.S. trade agreements can help to alleviate these problems and avoid a “race to the bottom” among

20 M. Angeles Villarreal, *The U.S.-Colombia Free Trade Agreement: Background and Issues*, Congressional Research Service, at 8 (Nov. 9, 2012).

21 They were also incorporated into the labor chapter for the U.S.-Peru FTA, which was implemented during the George W. Bush Administration.

22 See Polaski, *supra* note 17, at 16.

23 See, e.g., the U.S.-Chile FTA.

24 This language was also included in the U.S.-Peru FTA under the Bush administration, as part of *The New Trade Policy for America*.

25 See David A. Gantz, Discussion Paper No. 11-13, *Labor Rights and Environmental Protection under NAFTA and Other U.S. Free Trade Agreements*, UNIV. MIAMI INTER-AM. L. REV., 2011; ARIZONA LEGAL STUDIES Discussion Paper No. 11-13, at 43 (Mar. 21, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1791839.

26 See Polaski, *supra* note 17, at 18.

developing nations.²⁷

Despite the incorporation of stronger, enforceable language in these recent U.S. free trade agreements, critics question whether *The New Trade Policy for America* will actually improve compliance with labor standards and protect workers' rights. The first and only labor case that the United States has brought to dispute settlement under a trade agreement occurred in 2011, under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) regarding the government of Guatemala's apparent failure to effectively enforce its labor laws.²⁸ The result was an 18-point plan including concrete actions that Guatemala must implement within specific timeframes to improve its labor law enforcement. In this way, more enforceable labor provisions may encourage trade partners "to negotiate reasonable solutions."²⁹ However, as noted by professor David A. Gantz, the effectiveness of *The New Trade Policy* in current and future trade agreements will depend primarily on the U.S. Administration's willingness to commit sufficient funds and technical assistance, as well as political will, to enforce labor provisions.³⁰

3. ARGUMENTS AGAINST LABOR STANDARDS IN TRADE AGREEMENTS

Opponents of labor provisions in trade agreements argue that if developing nations are forced to set higher standards than what the current level of productivity allows, their workers will eventually be penalized in the world market. The price of labor "will be higher than what that labor is worth, which will drive out foreign investors, leading to increased unemployment."³¹ There is statistical and anecdotal evidence to support this premise. Numerous empirical studies have measured the degree to which workers were displaced when mandated minimum wages were raised by different amounts. Similarly, protective labor legislation has been known to backfire when the measures are too costly for the employer. There is anecdotal evidence of companies being driven out of a sector when unions made very costly demands (e.g., United Fruit in Costa Rica).³²

Further, as noted by professors Robert M. Stern and Katherine Terrell, pol-

27 See Robert M. Stern & Katherine Terrell, *Labor Standards and the World Trade Organization*, Discussion Paper No. 499, Gerald R. Ford School of Public Policy, Univ. of Michigan, at 2 (Aug. 2003), available at <http://fordschool.umich.edu/rsie/workingpapers/Papers476-500/r499.pdf>.

28 See <http://www.ustr.gov/trade-topics/labor/bilateral-and-regional-trade-agreements/guatemala-submissionunder-cafta-dr>.

29 See Gantz, *supra* note 25, at 43.

30 See *id.* at 44.

31 Gabriel H. Sahlgren, Issue Analysis No. 10, *The United States-South Korea Free Trade Agreement: An Economic and Political Analysis*, Competitive Enterprise Institute, at 1 (Oct. 2007), available at <http://cei.org/pdf/6189.pdf>.

32 See Stern & Terrell, *supra* note 27, at 7.

icies or regulations imposed on countries that do not have the infrastructure, human resources, or proper training to support and enforce them will be unsustainable.³³ Opponents of enforceable labor standards, like many economists, generally view trade liberalization and globalization as tools that promote improved social and economic conditions over the long run; efforts to mandate more extensive and stricter labor standards in trade agreements only impede trade liberalization and in turn economic development.

The arguments presented above are not specific to the inclusion of stronger labor standards within free trade agreements under the framework of *The New Trade Policy for America*. Opponents of stricter, enforceable labor provisions within U.S. trade agreements are generally opposed to *any* form of trade-linked enforcement of labor standards.³⁴ Such opponents argue that global enforcement of labor standards, especially through employers who compete on the basis of labor costs, may result in production being relocated to countries with weaker worker protections, thereby leading to job losses in those countries with higher labor standards and costs.³⁵

4. ARGUMENTS FOR LABOR STANDARDS IN TRADE AGREEMENTS

While some statistical and anecdotal evidence supports the argument that the enforcement of labor standards through trade mechanisms may result in lost jobs, less foreign direct investment (FDI), and/or slower economic growth in certain sectors—especially in countries that lack the infrastructure, training, and internal programs in place to properly comply with and enforce such standards—the overwhelming evidence suggests just the opposite. Improving labor standards may in fact increase a country’s competitiveness and economic growth.³⁶ However, competition to attract FDI, especially among developing countries, tends to lead to a “race to the bottom” with regard to labor standards and workers’ rights.³⁷

A study in 2002 determined that FDI tends to be greater in countries with *stronger* workers’ rights.³⁸ This may be due to multiple factors, primarily evidence that higher labor standards and stronger workers’ rights contribute to greater political and social stability, which in turn leads to more rapid economic growth—and

33 *Id.* at 8.

34 *See* Berik & Rodgers, *supra* note 4, at 2.

35 *See id.* at 3.

36 *See id.*

37 David Kucera, *Core Labour Standards and Foreign Direct Investment*, 141: 1-2 INT’L LAB. REV. 31, 31 (2002).

38 *See id.* at 33.

more economic growth attracts FDI.³⁹ Corporate surveys have suggested that even if stronger labor standards are associated with higher labor costs, these costs are outweighed by the greater political/social stability and potential for economic growth that result from such labor standards.⁴⁰

Still, the inclusion of strict and enforceable labor standards in trade agreements is not enough to ensure enforcement. As stated above, the United States has only once sought to enforce labor standards under a free trade agreement. And if the United States does not seek to enforce such provisions, developing countries certainly cannot be expected to voluntarily comply with domestic labor standards or international labor regulations—especially if they do not have the motivation, finances, or infrastructure to do so.⁴¹ Three different approaches have been either suggested by academics or implemented by governments, NGOs, and corporations in an effort to address the problems of non-compliance with labor standards and inadequate protection of workers' rights in the developing world.

5. THREE APPROACHES FOR ADDRESSING NON-COMPLIANCE WITH LABOR STANDARDS

5.1. Trade-Incentives Programs

While Bangladesh has experienced its share of poor working conditions and labor law violations in recent history, Cambodia — which has a similarly poor economy and a growing garment export industry — saw improved compliance with labor standards after it signed a trade agreement with the United States that linked positive trade incentives with labor-standards enforcement.⁴² The different directions taken by these two similar countries can possibly be explained by an innovative labor standards program in Cambodia that not only helped labor conditions but also increased exports.⁴³ The *Better Factories Cambodia* program, which developed out of the U.S.-Cambodia Bilateral Textile Trade Agreement negotiated in 1999, achieved its goals in three ways:

39 See *id.* at 34-35.

40 See *id.* at 35-36.

41 Numerous developing countries, including Cambodia and Bangladesh, have constitutions and labor laws that encompass comprehensive labor regulations and workers' rights provisions that reflect their ratification of the ILO's core labor standards. However, the fact that such domestic labor regulations exist within a given country does not guarantee enforcement. For example, Cambodia has ratified all eight of the ILO's conventions representing the ILO's core labor standards, yet enforcement of the country's Labor Code has been difficult due to rampant corruption within the industry. Bangladesh has extensive domestic labor laws to protect workers and has ratified seven out of eight of the core ILO conventions, yet there is weak enforcement of trade union rights and anti-discrimination legislation. See Berik & Rodgers, *supra* note 4, at 10-13.

42 See *id.* at 7.

43 See *id.* at 2.

- 1) Linking the expansion of Cambodia's access to the U.S. market to labor standards improvements;
- 2) Relying on the ILO to serve as the monitoring agent; and
- 3) Adopting rigorous transparency measures when reporting the results of factory inspections.⁴⁴

The U.S.-Cambodia Bilateral Textile Trade Agreement conditioned increased garment exports to the United States on Cambodia's compliance with national labor laws and internationally recognized labor standards.⁴⁵ The agreement, therefore, used trade incentives (rather than sanctions) to enforce labor-standards compliance, and relied on the ILO to monitor the Cambodian factories to ensure such compliance.⁴⁶ Although the agreement has expired, the monitoring program has continued and has even been expanded in scope since 2004.⁴⁷

The *Better Factories Cambodia* program includes technical assistance and capacity building for strengthening the enforcement capability of the Cambodian government, as well as the direct monitoring and inspections of garment factories by ILO personnel.⁴⁸ *Better Factories Cambodia* also includes training programs to help new workers understand their rights, to help employers improve their training methods, and to educate human relations personnel and union leaders on employment contracts, working conditions, and worker recruitment.⁴⁹ Because transparency is a significant characteristic of the program, reports from factory inspections are posted online (www.betterfactories.org).⁵⁰ As its website states, "Better Factories Cambodia monitors factories, trains management and workers, and provides guidance and advice on factory improvements that help enterprises preserve profits

44 *See id.*

45 *See id.* at 8.

46 *See id.*

47 *See id.*

48 *See id.* at 14.

49 *See id.* at 14-15.

50 *See id.* at 15.

while respecting workers' rights."⁵¹

Better Factories Cambodia promotes and facilitates compliance with labor standards rather than simply punishing factories with fines or sanctions for labor violations.⁵² In this regard, the program has the potential to (1) offer greater protection to workers' rights and job security; (2) create the potential for economic growth within the industry; and (3) appeal to companies seeking to invest in countries with a reputation for greater compliance with labor standards.⁵³

Nevertheless, the program has faced criticism with regard to its continued effectiveness in promoting workers' rights and job security. A 2013 independent study determined that during the eleven years of the program's operations, wages and basic job security declined, and "genuine collective bargaining between employers and workers and basic elements of occupational safety and health continue to be elusive."⁵⁴ *Better Factories Cambodia's* own most recent semi-annual assessment of working conditions notes "a decline in compliance and increase in strikes starting in 2011 after impressive gains in the decade after the signing of the U.S.-Cambodian garment trade agreement."⁵⁵ Highlighting the Rena Plaza collapse in Bangla-

51 A statement which finds support in the 30 reports that have been issued by the ILO from November 2001, through July 2013. See www.betterfactories.org. While the ILO continues to express its commitment in support of the *Better Factories Cambodia* program and the progress that has been made, it is obvious from reading many of the reports provided on the website that there are still significant problems with labor compliance at Cambodian factories. In its April 2013 report the ILO cited failures in compliance relating to fire safety, meal allowances, heat levels, access to clean drinking water and soap, and limiting overtime work. *Better Factories Cambodia, Twenty Ninth Synthesis Report on Working Conditions in Cambodia's Garment Sector and Statement of the Project Advisory Committee*, ILO (Apr. 11, 2013), available at <http://betterwork.com/cambodia/wp-content/uploads/2013/04/Synthesis-Report-29th-EN-Final.pdf>. At the time of publication there were nationwide garment factory workers' strikes for increased wages. See, e.g., Sean Teehan & Amelia Woodside, *Violent Clash as Garment Strike Intensifies*, PHNOM PENH POST, Dec. 28, 2013, available at <http://www.phnompenhpost.com/national/violent-clash-garment-strike-intensifies>.

52 In examining state labor regulation practices in Latin America, Michael Piore and Andrew Schrank argue that labor inspectors are most effective when they act as advisors and consultants, rather than as policeman. In other words, when violations are detected that result from suppliers attempting to remain competitive, state labor inspectors serve an important role in disseminating advice and plans on how to reconcile competitiveness with labor compliance, rather than simply imposing sanctions or fines for violations. Mark Anner, Jennifer Bair & Jeremy Blasi, *Buyer Power, Pricing Practices, and Labor Outcomes in Global Supply Chains*, Univ. of Colorado at Boulder, Institutions Program Working Paper Series: INST2012-11, at 4 (Aug. 2012).

53 Berik & Rodgers, *supra* note 4, at 21.

54 *Monitoring in the Dark: An Evaluation of the International Labour Organization's Better Factories Cambodia Monitoring and Reporting Program*, International Human Rights and Conflict Resolution Clinic, Mills Legal Clinic, Stanford Law School and Worker Rights Consortium, at ii (Feb. 2013), available at <http://humanrightsclinic.law.stanford.edu/project/monitoring-in-the-dark/>. The study goes on to suggest reforms to make the program more effective in protecting workers' rights and safety in Cambodian factories, including methods to increase transparency of the program's monitoring and reporting. *Id.* at 56-72.

55 *Statement of the Project Advisory Committee of Better Factories Cambodia*, International Labor Organization (July 18, 2013), available at <http://betterfactories.org/wp-content/uploads/2013/07/Final-PAC-statement-SR-30-EN.pdf>.

desh — and a May 2013 factory collapse in Cambodia that killed two footwear employees⁵⁶ — the report says “global buyers are demanding that Cambodia’s industry make good on its commitment to decent work.”⁵⁷

The deterioration of working conditions after *Better Factories Cambodia’s* apparent initial success suggests that although the development and implementation of trade-incentives programs globally could be an effective tool for improving and enforcing labor standards and workers’ rights,⁵⁸ this approach must be coupled with regular monitoring and encouragement of strong domestic policies in order to support and enhance its effectiveness.⁵⁹ Moreover, trade-incentives programs may not do enough on their own. The *Better Factories Cambodia* assessment notes that many recent problems stem not only from national labor policies but also from “relationships and pressures in the global supply chain,”⁶⁰ discussed in § 5.3, below.

5.2. Corporate Codes of Conduct and Monitoring

In the wake of well-publicized scandals in the mid-1990s involving the exploitation and mistreatment of workers in developing countries, multinational corporations have developed codes of conduct along with monitoring mechanisms to enforce compliance with such codes.⁶¹ Given the limited ability of many developing countries to enforce their own labor laws, monitoring for compliance with corporate codes of conduct has become the primary way corporations and NGOs currently seek to address subpar working conditions and unenforced labor rights in supply-chain factories.⁶²

Corporate codes of conduct establish a “set of guidelines under which a factory must operate and is administered by company-employed inspectors or by in-

56 See, e.g., Leang Phannar, Shane Worrell & May Titthara, *Company Admits “Negligence in Factory Disaster,”* PHNOM PENH POST, May 17, 2013, available at <http://www.phnompenhpost.com/national/company-admits-%E2%80%98negligence%E2%80%99-factory-disaster>. A second collapse occurred a few days later. See Shane Worrell & Chhay Channyda, *Accident Rocks Garment Industry Again,* PHNOM PENH POST, May 20, 2013, available at <http://www.phnompenhpost.com/national/accident-rocks-garment-industry-again>.

57 *Better Factories Cambodia, Thirtieth Synthesis Report on Working Conditions in Cambodia’s Garment Sector*, ILO, at 1 (July 18-2013), available at <http://betterfactories.org/wp-content/uploads/2013/07/30th-Synthesis-Report-Final-EN.pdf> (noting deterioration in the areas of “fire safety, child labour, and worker safety and health,” which “may be attributed to rapid growth of the industry”).

58 See Berik & Rodgers, *supra* note 4, at 22.

59 See *id.* at 23-24.

60 BFC, *Thirtieth Synthesis Report*, *supra* note 57, at 8. Independent monitors have emphasized that *Better Factories Cambodia’s* effectiveness is constrained because “it does not address buying practices by brands and retailers that strongly contribute to [labor rights violations].” *Monitoring in the Dark*, *supra* note 54, at ii.

61 See Locke, Qin & Brause, *supra* note 12, at 4.

62 See *id.* at 4.

dependent audit companies.”⁶³ Such codes are self-regulating formal policies which shape corporate behavior toward employees in certain ways, including with respect to labor standards.⁶⁴ Proponents argue that this form of corporate self-governance, which usually entails the public disclosure of factory audits, allows consumers to reward good firms with more purchases and punish bad firms by taking their business elsewhere.⁶⁵

Firms may establish corporate codes of conduct for various reasons, including the need to develop a framework for consistent managerial conduct from site to site; the belief that using codes of conduct will ensure proper application of fair labor practices and in turn economically benefit the firm; the desire to be a “good corporate citizen”; or the desire to enhance/protect its reputation.⁶⁶

According to the ILO, a number of elements should be present before a corporate code of conduct can operate “equitably and efficiently,” including:

- The code is written, developed, and implemented in a manner that involves and empowers workers;
- The code reflects the local needs of workers and at an absolute minimum guarantees the core standards of the ILO;
- The code is not just a piece of paper issued by a head office, with no real impact on actual company operations, policies, or people;
- The company’s labor practices are open to external audit.⁶⁷

Critics of codes of conduct and monitoring argue that they are not designed to actually protect workers or improve labor conditions but rather are implemented in order to “limit the legal liability of global brands and prevent damage to their reputation.”⁶⁸ Critics further argue that these codes and private monitoring programs often undermine state regulation and union intervention.⁶⁹

Another criticism of monitoring is the potential for untrustworthy or inaccurate auditing where the factory inspectors have a conflict of interest or inadequate knowledge.⁷⁰ Because corporations may have an interest in hiding labor violations,

63 Berik & Rodgers, *supra* note 4, at 6.

64 See Jill Murray, *Corporate Codes of Conduct and Labor Standards*, Working Paper, Corporate Codes of Conduct, Cornell Univ. ILR School (Mar. 5, 1998), at 3, available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1007&context=codes>.

65 See Anner, Bair & Blasi, *supra* note 52, at 3.

66 See Murray, *supra* note 64, at 18.

67 See *id.* at 4-5.

68 Locke, Qin & Brause, *supra* note 12, at 5.

69 See *id.*

70 See *id.*

internal auditing mechanisms may be viewed with understandable skepticism.⁷¹ Hiring an “independent” private auditing firm may ease this skepticism and reduce the risk of corruption; however, auditing firms still want to please their clients in order to retain future business.⁷² A not-for-profit NGO may provide the most trustworthy and unbiased audit but may also lack the technical expertise of a private monitoring firm.⁷³

A final critique of the corporate code and monitoring system is that there are a multitude of codes of conduct for different corporations with different goals, inspection protocols, and monitoring systems, leading to an uneven quality of audits being performed.⁷⁴ Furthermore, a supplier attempting to implement and monitor multiple codes of conduct for different corporations operating within a single factory leads to inefficiency, confusion, “monitoring fatigue,” and “monitoring limbo.”⁷⁵

Regardless of one’s view toward the effectiveness of corporate codes and monitoring, compliance auditing *alone* is insufficient to achieve sustainable improvements in labor conditions and other workplace variables. While monitoring can serve as an important tool for identifying gaps in the system, what happens after the audit matters more.⁷⁶ For this reason, firms have begun to shift the emphasis away from compliance auditing to more collaborative approaches, working with suppliers to “assess gaps, build capacity, and incentivize sustainable improvements.”⁷⁷

71 *See id.*

72 *See id.*

73 *See id.*

74 *See id.* at 5-6.

75 *Id.* at 6. As an example, suppliers may be required to rearrange fire extinguishers or adjust the ratio of toilets to employees as different auditors for different brands perform plant inspections. *Id.* *See also Respecting Human Rights Through Global Supply Chains*, Shift Workshop Report No. 2, at 13 (Oct. 2012), available at <http://shiftproject.org/sites/default/files/%20Respecting%20Human%20Rights%20Through%20Global%20Supply%20Chains%20Report.pdf>.

76 *See id.* As the Asian proverb states, “You don’t fatten a pig by continually weighing it.” *Id.* at 13.

77 *Id.* Using data based on factory audits of working conditions in over 800 Nike suppliers across 51 countries from 1998-2005, a study found that monitoring for compliance with corporate codes of conduct alone produced only limited results, but when monitoring is combined with action taken on the part of suppliers to better schedule their work and improve quality and efficiency, labor conditions are shown to improve. Locke, Qin & Brause, *supra* note 12, at 3-23. According to Locke, Qin and Brause, what is needed to effectively improve working conditions and enforce global labor rights is “a more systematic approach, one combining external (countervailing) pressure (be it from the state, or unions, or labor-rights NGOs) with comprehensive, transparent monitoring systems and a variety of ‘management systems’ interventions aimed at eliminating the root causes of poor working conditions.” *Id.* at 4.

5.3. Adjusting Pricing Mechanisms in Global Supply Chains—“Jobbers Agreements”

According to Mark Anner, Jennifer Bair, and Jeremy Blasi, a principal cause of the persistent violation of workers’ rights in the global apparel supply chain is the pricing mechanism between buyers and their suppliers.⁷⁸ Any initiative to rein in sweatshop conditions in clothing factories globally must recognize the systematic cost pressures on suppliers that are conducive to violations of workers’ rights.⁷⁹ In a recent study, data was collected on trends in the price paid by American importers for apparel from 1989 to 2010, as well as the status of workers’ rights in the top twenty apparel-exporting countries to the United States during the same period.⁸⁰ The data suggested that (1) the average price per square meter of imported apparel is declining; and (2) countries that are increasing their share of apparel exports to the United States are becoming more likely to violate core labor standards, while in contrast, those countries that have increased respect for workers’ rights are finding their share of exports to the United States in decline.⁸¹

Anner, Bair, and Blasi argue that these correlations are consistent with their theory that “any sustained effort to address workers’ rights abuses in the apparel global supply chain must address the pricing dynamics between suppliers and buyers, as well as the broad need for buyers to take greater responsibility for the terms and conditions of labor at supplier factories.”⁸² Corporate codes and monitoring will not achieve much if the trend continues toward retailers buying apparel at lower and lower prices.⁸³ Both the buyers and the suppliers will have to share the costs of compliance with more stringent international labor standards, domestic labor laws, and corporate codes of conduct.⁸⁴ But how does one share these costs? Anner, Bair, and Blasi say the answer lies in “jobbers agreements,” which are negotiated between labor, suppliers, and buyers. Such agreements have “brought stability to subcontracting relations within the domestic apparel industry and went a long way towards eradicating sweatshop conditions in those regions where workers were organized.”⁸⁵

Throughout much of the twentieth century, jobbers agreements were the driving force behind dramatic improvements in wages and working conditions for

78 See Anner, Bair & Blasi, *supra* note 52, at 5.

79 See *id.* at 1.

80 See *id.* at 5-10.

81 See *id.*

82 *Id.* at 10.

83 See *id.*

84 See *id.*

85 *Id.*

domestic garment workers in the United States.⁸⁶ The International Ladies Garment Workers Union (ILGWU) created these collective bargaining agreements to address sweatshop conditions in New York’s garment industry that had become notorious in the wake of the 1911 Triangle Shirtwaist Factory Fire, when 146 workers were killed.

Prior to jobbers agreements, the “jobbers” (a category of apparel firms that designed and sold, but did not manufacture, clothing) subcontracted production work to independent shops that would produce the apparel that the jobbers designed and marketed.⁸⁷ By subcontracting out production work, the jobbers were able to avoid dealing directly with the worker.⁸⁸ However, the ILGWU insisted that the responsibility for labor conditions in independent shops resided with the jobbers and not solely with the contractors who employed the garment workers.⁸⁹ In order to force the jobbers to accept this responsibility, the ILGWU instituted a jobbers agreement. The parties who contracted were the union (representing the interests of the garment workers) and the jobber.⁹⁰ According to Anner, Bair, and Blasi, jobbers agreements “brought stability to subcontracting relations within the domestic apparel industry and went a long way towards eradicating sweatshop conditions in those regions where workers were organized.”⁹¹

Jobbers agreements became the norm in the garment industry and “served as the lynchpin of a system that was sometimes called triangular collective bargaining”—triangular because there were technically three sides: the workers represented by unions; the contractors, who employed the workers; and the jobbers, who were the most powerful industry actor.⁹² Jobbers agreements and “triangular bargaining” helped to stabilize and eradicate abuses in the garment industry for decades, and their validity was preserved in federal legislation as an effective tool against sweatshops.⁹³ These agreements constrained buyer power by (1) insuring that lead firms paid the contractors a fair price; (2) stabilizing and regulating subcontracting relationships; and (3) making lead firms directly liable for some labor costs.⁹⁴

Competition among contractors on the basis of labor costs was prevented because the agreements were negotiated between the workers’ unions and the job-

86 *See id.*

87 *See id.* at 11.

88 *See id.*

89 *See id.*

90 *See id.* at 12.

91 *Id.* at 10.

92 *See id.* at 13-14.

93 *See id.* at 14-15.

94 *See id.* at 1.

bers directly.⁹⁵ The workers were guaranteed certain wages and worked only the number of hours stipulated in these agreements, regardless of which contractor hired them.⁹⁶ Therefore, contractors could not compete for a jobber's business by offering lower prices as a result of lower wages or working conditions. Rather, such competition would be "driven by differences among contractors on the basis of quality and efficiency."⁹⁷

The same principles that made jobbers agreements effective in the United States could be applied in the context of today's global supply chains.⁹⁸ However, there would be many challenges to doing so. Within the last 30 or so years, increased globalization of the industry has changed the system dramatically.⁹⁹ Today, jobbers in the United States place orders with independent factories in developing countries, allowing them to circumvent both U.S. labor standards and the triangular collective bargaining process that had historically forced them to be more accountable and responsible for working conditions in global supply chains.¹⁰⁰ While there are examples of retailers that have tried to implement programs that require their contractors to provide a living wage and adequate working conditions for workers (and pay a sufficient price to their contractors to allow this to occur),¹⁰¹ those firms that implement such programs often find it difficult to stay competitive and achieve profitability, since they are competing against other retail brands that are not voluntarily following the same business practices.¹⁰² Jobbers agreements once ensured that buyers bore at least some of the costs of ensuring decent wages and working conditions throughout their supply chain.¹⁰³ However, in the modern day, such costs are not built into contractual agreements between buyers and suppliers in the apparel industry.¹⁰⁴ Implementing jobbers agreements for workers in Bangladesh and other undeveloped countries would require, on an industry-wide level, a departure from current pricing practices.¹⁰⁵

Jobbers agreements regulated and stabilized the buyer-contractor relationship by including detailed clauses that promoted long-term relationships between the buyer and contractor and precluded buyers from switching between contractors to

95 *See id.* at 17.

96 *See id.* at 18.

97 *Id.*

98 *See id.* at 1.

99 *See id.* at 16.

100 *See id.*

101 *See id.* at 18-20, for a discussion of Knights Apparel implementing key elements of the Designated Suppliers Program.

102 *See id.* at 20.

103 *See id.* at 22.

104 *See id.*

105 *See id.*

secure short-term gains.¹⁰⁶ Contemporary sourcing practices in the apparel industry are drastically different, as buyers today spread their production across multiple locations worldwide, and a buyer's commitment to a supplier generally is only short-term.¹⁰⁷ Why is this bad for labor compliance? In the words of Anner, Bair and Blasi:

When a buyer's commitment to a supplier does not extend beyond the most recent order that is placed, and when buyers can choose among a virtually limitless supply of factories in making the next sourcing decision, the likely result is insecurity on the part of the supplier, which the buyer may attempt to leverage into concessions, such as shorter lead times or lower prices, that result in a deterioration of working conditions and/or violations of labor rights.¹⁰⁸

Longer-term production agreements, coupled with fair pricing and wage standards, would provide contemporary contractors with both the incentive and the capacity to ensure compliance with labor standards.¹⁰⁹

Finally, in the past, jobbers agreements made buyers (not just contractors) liable for labor costs. In the modern developing world, it is not atypical for contractors to suddenly shut down while still owing workers up to a year in terminal compensation, leaving the workers with no means of income.¹¹⁰ Under jobbers agreements, this was not a problem, as the union managed benefit accounts funded by the jobbers for workers' pensions, health care, vacations, etc.¹¹¹ The accounts remained portable and fully funded in the event that a contractor went out of business and a worker lost his or her job or had to switch to another contractor.¹¹² Labor advocates have suggested creating similar funds in today's major apparel exporting countries as a form of corporate social responsibility, but no retailers or governments have agreed to implement them.¹¹³ The creation of such funds would lead to higher production cost for buyers, which they are currently unwilling to absorb.¹¹⁴

Addressing the lack of labor compliance in contemporary global supply chains requires a system that recognizes the significant role buyers play in setting the stan-

106 *See id.* at 24; *see id.* at 23-24, for examples of such provisions.

107 *See id.* at 25-26.

108 *Id.* at 26.

109 *See id.* at 27.

110 *See id.*

111 *See id.* at 27-28.

112 *See id.* at 28.

113 *See id.* (regarding comparable systems, such as the FGTS system in Brazil).

114 *See id.*

dards and labor conditions for workers at the bottom of the chain.¹¹⁵ At one time in history, jobbers agreements were critical in not only recognizing the significant role of buyers but also forcing buyers to absorb the higher costs of production required to ensure fair wages and labor standards.¹¹⁶ Although the changing nature and globalization of the apparel industry may prevent traditional jobbers agreements from existing in the modern-day developing world, characteristics of such agreements—specifically the increased role and responsibility that buyers ought to play in setting labor standards and absorbing associated labor costs—should be taken into account when attempting to determine how best to regulate and enforce labor compliance throughout global supply chains.

6. CONCLUSION

In response to the vocal anti-sweatshop movement that emerged in the mid-1990s, economist Paul Krugman offered the following opinion over 15 years ago:

The lofty moral tone of the opponents of globalization is possible only because they have chosen not to think their position through. While fat-cat capitalists might benefit from globalization, the biggest beneficiaries are, yes, Third World workers. [...] You might say that the wretched of the earth should not be forced to serve as the hewers of wood, drawers of water, and sewers of sneakers for the affluent. But what is the alternative? Should they be helped with foreign aid? Maybe—although the historical record of regions like southern Italy suggests that such aid has a tendency to promote perpetual dependence. Anyway, there isn't the slightest prospect of significant aid materializing. Should their own governments provide more social justice? Of course—but they won't, or at least not because we tell them to. And as long as you have no realistic alternative to industrialization based on low wages, to oppose it means you are willing to deny desperately poor people the best chance they have of progress for the sake of what amounts to an aesthetic standard—that is, the fact that you don't like the idea of workers being paid a pittance to supply rich Westerners with fashion items.¹¹⁷

115 See *id.* at 30.

116 See *id.*

117 Paul Krugman, *In Praise of Cheap Labor: Bad Jobs at Bad Wages Are Better Than No Jobs At All*, SLATE, Mar. 21, 1997, available at http://www.slate.com/articles/business/the_dismal_science/1997/03/in_praise_of_cheap_labor.html.

This still-relevant statement by Krugman—whether interpreted by the reader as economically sound or morally deficient—leaves open the possibility for a “realistic alternative to industrialization based on low wages” in the developing world. There may not yet be a realistic solution to the problem of unsafe and unfair working conditions—not without a drastic shift in thinking and action by governments, corporations, and consumers worldwide. But the approaches discussed in this paper offer examples of how labor-standards compliance and workers’ rights can at the least be better enforced and protected throughout the developing world. The entire nature of the industry is not likely to change based on trade agreements or corporate codes, but they have a role to play in ensuring that the rights and safety of workers in the developing world are protected in an increasingly globalized and competitive economy.

To ensure that globalization and labor standards progress together requires a multifaceted approach.¹¹⁸ Trade-based approaches will help to focus attention on labor issues and help encourage trading partners to reform, especially where trade-based incentives are offered in exchange for compliance. The roles of NGOs and the ILO are crucial in providing training, monitoring, technical assistance, and capacity building through programs that governments and firms are unable or unwilling to take on. Corporate accountability and self-regulation through codes and monitoring can continue to be effective if done transparently and collaboratively with the suppliers, and if retailers come to understand that having compliant labor standards are in the best economic interests of those at the bottom *and at the top* of global supply chains.¹¹⁹ A realistic solution to the problem may only come when and if a dramatic shift occurs in the nature of supply-chain dynamics, and cost pressures are moved from suppliers to buyers so that buyers take responsibility for the terms and conditions of their workforce and absorb the associated labor costs. While an increasingly globalized and competitive economy may provide benefits to workers in the developing world, it also exposes such workers to dangers and exploitation that first-world governments, retailers, and consumers have an obligation to protect against, through these and other avenues of relief.

118 See Kimberly Ann Elliott, *Trading Up: Labor Standards, Development, and CAFTA*, 3:2 Center for Global Development 7 (May 2004), available at http://www.cgdev.org/sites/default/files/2849_file_CGD_brief_May04_CRABlue2.pdf.

119 See Richard Feinberg, Tamar Benzaken Koosed, Carlued Leon & Terry Nelidov, *Creating an Enabling Environment for Responsible Labor Practices: Experiences in Costa Rica and El Salvador*, Better Work Research Conference, at 2 (June 2011), available at <http://betterwork.com/global/wp-content/uploads/Session-9-Creating-an-Enabling-Environment-for-Responsible-Labor-Practices1.pdf>.

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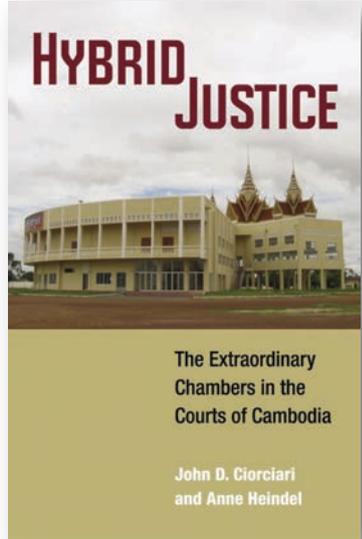
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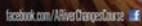


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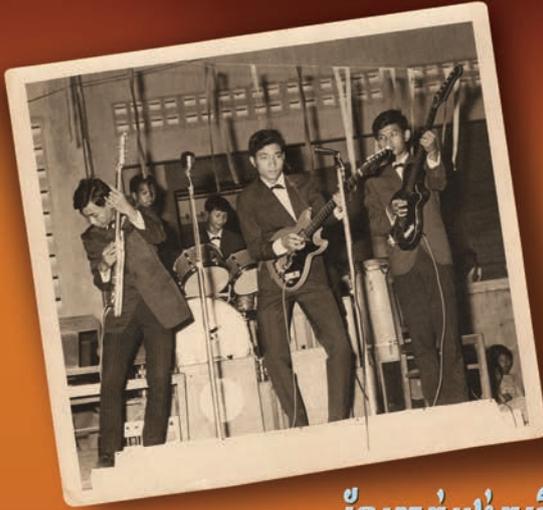
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Don't Think
I've Forgotten



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Cambodia's
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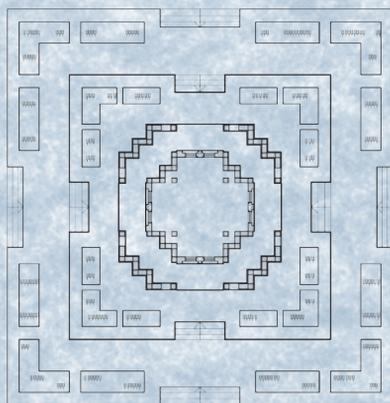
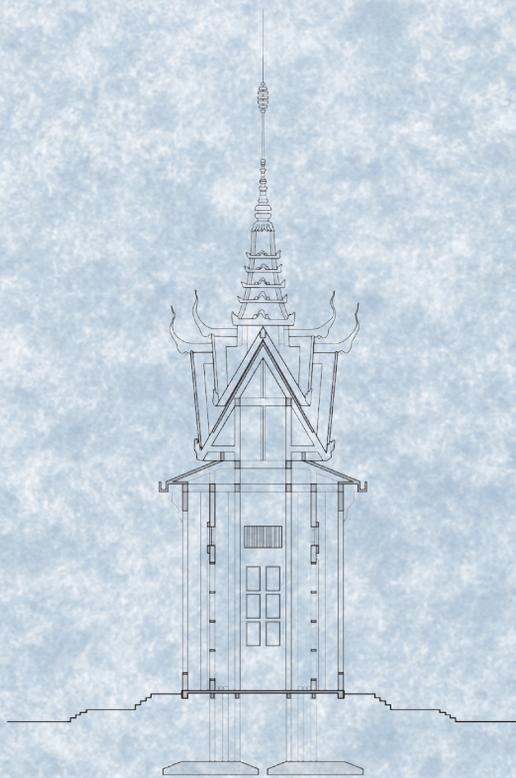


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