ANNEX 3: MECHANISMS IN ASIA

BANGLADESH: INTERNATIONAL CRIMINAL TRIBUNAL

Conflict Background and Political Context

Bangladesh's independence from Pakistan came at great cost. In 1971, the Pakistani army invaded what was then East Pakistan to quell the Bengali independence movement. Although there is no reliable data, estimates are that up to three million people were killed between March and December 1971, accompanied by widespread torture and the rape of hundreds of thousands of women. The minority Hindu population also paid a huge price in the conflict. Millions of people were displaced to India, which eventually intervened militarily to end the Bangladesh Liberation War. Soon after the conflict, calls for justice arose, but an agreement among India, Pakistan, and Bangladesh essentially granted a general amnesty for all Pakistani participants in the violence.[1569] However, some domestic prosecutions took place, pursuant to a 1973 international crimes statute.[1570] In 1975, a military coup overthrew the postwar Awami League government and assassinated Prime Minister Sheikh Mujibur Rahman. A successor government, led by General Ziaur Rahman, halted all trials.

Military rule continued in the 1980s, and democracy was only restored in 1991. In 2009, Prime Minister Sheikh Hasina—daughter of Sheikh Rahman—was elected in a landslide victory, bringing to supermajority power the long-term opposition party, the Bangladesh Awami League. The new government quickly lived up to its election promise to prosecute serious crimes committed in 1971, dusting off and amending the 1973 International Criminal (Tribunals) Act and establishing a domestic tribunal for the prosecution of war crimes. The International Crimes Tribunal (ICT) operates in a polarized political environment and has "deepened already considerable divisions within the Bangladeshi political elite."[1571] While perceived as a welcome accountability tool among the general population, the political opposition and international observers have widely criticized the tribunal for its lack of international fair trial standards and of judicial independence, as well as its one-sided application of justice.

Existing Justice-Sector Capacity

At the time of the ICT's creation in 2010, the justice sector in Bangladesh faced several constraints in delivering timely and effective justice to its citizens, even beyond the immense challenge for investigators and prosecutors in assembling evidence of crimes four decades after the fact. The United Nations Development Program (UNDP) assessed in 2012 that problems included a backlog of approximately two million cases, outdated laws, the absence of sufficient infrastructure and facilities, lack of access to justice for the majority of the population, and a lack of coordination and cooperation among the key justice delivery agencies as well as (international) nongovernmental organizations involved in the justice sector.[1572]

In the 39 years following the war, Bangladeshi governments and the international community showed very little interest in bringing to justice the perpetrators of grave crimes during the independence war. Neither the military leaders in the 1980s nor the Bangladesh Nationalist Party (BNP) elected in 1991 sought to prosecute wartime crimes, undoubtedly because of the involvement of several of their leaders. In a 2009 report, Human Rights Watch concluded that "there has been a lack of political will under successive governments to hold accountable those responsible for human rights violations. Of the thousands of killings of individuals in the custody of the security forces since independence in 1971 ... very few cases have resulted in a criminal conviction."[1573]

Existing Civil Society Capacity

Bangladesh has one of the world's largest civil society sectors and has a tradition of civil society advocacy and activism dating back to Pakistani rule. In a country that has been battered by natural disasters throughout its history, NGOs have traditionally focused on rural development, relief, and rehabilitation. In 1972, the Bangladesh Rural Advancement Committee (BRAC) formed with the goal of resettling returning wartime refugees. Since the end of the war, civil society has increasingly focused its attention on social and economic development, and has increasingly become involved in addressing legal and political issues, including judicial and legal reforms.[1574] NGOs playing an important role in the advancement of human rights and the development of the justice sector include Odhikar ("rights" in Bengali), Ain o Salish Kendra (ASK), and Hotline Bangladesh.

Since the country's return to civilian rule in 1991, domestic civil society groups have led an unrelenting struggle for accountability for crimes committed during the 1971 war.[1575] A Peoples' Tribunal for war crimes trials was held in 1992 in Dhaka, symbolically prosecuting both Pakistani and Bangladeshi perpetrators for crimes against humanity. A People's Inquiry Commission, which investigated war crimes, and a National Coordinating Committee for Realization of Bangladesh Liberation War Ideals and Trial of Bangladesh War Criminals of 1971—a civil society–led movement that has worked on gathering evidence, collecting witness statements, and advocating for war crimes trials—were also created during that time.[1576]

The creation of the ICT saw increased government repression of voices critical of the tribunal's functioning amid a general shrinking space for civil society groups. ICT prosecutors have brought contempt cases against critics of the tribunal. (For further examination, see the *Prosecutions* section, below.) In an environment of growing hostility to criticism of government of any kind,[1577] some NGOs nevertheless remain involved in monitoring the tribunal's work.

Creation

Almost immediately after the end of the War of Independence, the Sheik Mujibur Rahman government passed the 1972 Collaborators Order,[1578] which led to the arrest of thousands of Bengali war crimes suspects. Proceedings were initiated against 2,849 individuals, and some 750 people were eventually convicted. In 1973 the government additionally passed an Indemnity Order,[1579] granting immunity from prosecution to anyone who had fought "in the service of the Republic" and for any acts committed during the independence struggle, thereby effectively sparing Awami League affiliates from prosecution.[1580] In December 1973, on the celebration of the second "Victory Day" of the war, a presidential order limited further trials by declaring a general amnesty for wartime collaborators against whom proceedings had not yet been initiated, with the exception of rape, murder, and arson cases. Between 1972 and 1974, a total of 37,400 persons were arrested and investigated, and about 11,000 perpetrators faced trial under the Collaborators Order.[1581]

In 1972, the International Commission of Jurists (ICJ) published a legal study on wartime events and concluded that "it would be preferable if those considered principally responsible for these offences were tried under international law before an international tribunal."[1582] It argued that a United Nations hybrid tribunal with international judges would be better able to ensure fair trials. However, the

international community showed little interest, and the Awami League government opposed the idea, so an international tribunal was never created. Instead, the ICJ consulted with the Bangladeshi government on the creation of a domestic mechanism for the prosecution of international crimes, which resulted in the adoption of the International Crimes (Tribunals) Act in 1973. At the time, no war crimes trials were held under the ICT Act.[1583]

After the 1975 assassination of Sheikh Rahman and overthrow of the Awami League government, the new military government repealed the Collaborators Order, ended all war crimes proceedings, annulled several judgments, and released all suspects. The new administration even installed some of those previously convicted in high-level government positions. When military rule ended in 1991, the interest in accountability reemerged, and the National Committee for the Realization of the Bangladesh Liberation War Ideals and Trials of Bangladeshi War Criminals of 1971 was set up and started gathering evidence, conducting interviews with witnesses of war crimes, and advocating for prosecutions.[1584] Other initiatives included the Peoples' Tribunal established in 1992, which held mock trials of several high-level suspects (including some who would later stand accused before the ICT), and a People's Inquiry Commission, which investigated war crimes. The Bangladesh Liberation War Museum, established in 1996, contributed to the push to deal with the past by organizing two Genocide and Justice Conferences in the 2000s.[1585]

The Awami League won the 2008 elections, following a campaign in which it promised to hold war crimes trials. The new government amended the 1973 ICT Act in 2009,[1586] and the International Crimes Tribunal of Bangladesh (ICT) was established on March 25, 2010, on the anniversary of the war's beginning in 1971. A second war crimes chamber—the International Crimes Tribunal of Bangladesh-2 (ICT-2)—started operations in March 2012, but was later shuttered. While they coexisted, both tribunals operated under the 1973 act and shared the same prosecutorial and investigative teams, but the ICT-2 developed its own Rules of Procedure and Evidence.[1587]

Legal Framework and Mandate

The ICT Act was adopted in 1973 "to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law."[1588] The ICT's founding statute was one of the first attempts at international law prosecutions since the Nuremberg and Tokyo trials,

and many legal experts regard it as a progressive piece of legislation for its time. However, by the time of the ICT's creation, 39 years after the commission of the crimes and 37 years after the law's adoption, the field of international criminal law had advanced immensely and the 1973 law had become outdated.[1589] In 2009 and 2012, the government adopted minimal amendments to the statute, while rejecting recommendations from many outside experts. According to many observers, the amendments were insufficient to bring the law in line with basic international standards.[1590]

The ICT's mandate covers three core international crimes—genocide, war crimes, crimes against humanity—as well as crimes against peace, committed in Bangladesh "before or after the commencement" of the 1973 act.[1591] The elements of the crimes are defined as follows:

(a) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated;

(b) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(c) Genocide: meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as: (i) killing members of the group; (ii) causing serious bodily or mental harm to members of the group; (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (iv) imposing measures intended to prevent Births within the group; (v) forcibly transferring children of the group to another group;

(d) War Crimes: namely, violation of laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages and detenues, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(e) violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949;

(f) any other crimes under international law.[1592]

The three core international crimes in the statute are largely based on the Nuremberg International Military Tribunal (IMT) Charter and on customary international law at the time of its writing. As such, they do not reflect developments in modern international criminal law through the creation and jurisprudence of the ad hoc international tribunals for Yugoslavia and Rwanda (ICTY and ICTR, respectively), the Special Court for Sierra Leone (SCSC), or the International Criminal Court (ICC). This includes contemporary Rules of Procedure and Evidence, and international standards of fairness.[1593] There are several other problems arising from the application of an outdated legal framework relating to the legality and retroactivity principles in international law. Namely, Bangladesh is applying the Genocide Convention although it was not signatory to the 1949 Convention at the time;[1594] it has defined war crimes based on the IMT Charter, which concerned an armed conflict of international character, while the independence war was an internal conflict; and it includes the vague term "other crimes under international law."[1595]

The ICT Act was originally designed foremost for the prosecution of members of the Pakistan Armed Forces, affiliated Bengali militias, and other forces that had collaborated with the Pakistani army during the conflict. Initially, the personal jurisdiction of the ICT was limited to individuals or groups of individuals who were members of the armed or defense forces, including paramilitary groups, who committed crimes on the territory of Bangladesh; this was later amended to include non-military personnel.[1596] After the 1974 Delhi agreement among India, Pakistan, and Bangladesh, it became technically impossible for the ICT to prosecute Pakistanis because the statute only allows the ICT to hear cases related to persons on the territory of Bangladesh. Beyond individual criminal responsibility, the ICT Act recognizes command responsibility for crimes under the statute, which is by now a customary norm of international law, but wasn't established as such at the time of its adoption. Article 5(1) of the ICT Act sets out that official capacity is no bar to prosecution or the mitigation of punishment before the tribunal, meaning that state officials do not necessarily enjoy immunity from criminal proceedings for crimes they committed during their time in office.[1597]

Beyond the prosecution of international crimes, the ICT may bring contempt charges against "any person, who obstructs or abuses its process or disobeys any of

its orders or directions, or does anything which tends to prejudice the case of a party before it, or tends to bring it or any of its members into hatred or contempt, or does anything which constitutes contempt of the Tribunal, with simple imprisonment which may extend to one year, or with fine[s] which may extend to Taka five thousand [about US$60 in 2017], or with both."[1598] The tribunal has convicted several local and international media and civil society representatives under this provision, with no right to appeal.

International observers decry several provisions of the ICT Statute as being inadequate and resulting in unfair trials. This includes an article stating that the Criminal Procedure Code and Evidence Act are not applicable to any proceedings of the tribunal, the approval of trials in absentia with a final judgment, the removal of the right against self-incrimination, and the absence of a provision requiring adequate time for preparation of the defense case.[1599] The application of the death penalty under Article 20(2) is perhaps the most controversial aspect of the ICT Statute, especially because its use has become the standard rather than the exception and because the application of death sentences has not been done in accordance with international law.[1600] The International Covenant on Civil and Political Rights (ICCPR), to which Bangladesh is a signatory, determines that the death penalty may only be applied in limited circumstances and that the convicted must be given a right to appeal and an opportunity to ask for mercy. Despite a theoretical right to appeal death sentences, neither of the ICCPR's conditions have been followed in practice before the ICT.[1601]

In 1972, the government amended Article 47 and 47(A) of the Constitution of Bangladesh to allow for the speedy prosecution of Pakistani army generals, and critics argue that this contributes to unfairness. Article 47 states: "Notwithstanding anything contained in this Constitution, no law nor any provision thereof providing for detention, prosecution or punishment of any person, who is a member of any armed or defence or auxiliary forces … or who is a prisoner of war, for genocide, crimes against humanity or war crimes and other crimes under international law shall be deemed void or unlawful."[1602] Additionally Article 47(A) further denies war crimes suspects the right to appeal to the Supreme Court in case of violations of their rights under the Constitution. This results in a complete absence of constitutional protections for the accused before the ICT, as well as an absence of the ability to enforce their fundamental constitutional rights in court."[1603]

In addition to the ICT Act, in 2010 the ICT adopted the International Crimes Tribunal Rules of Procedure. These set out the powers and functions of the tribunal,

the Investigating Authority (a designated agency for investigations into crimes under the statute created under Article 8 of the ICT Act), the prosecutor, and the registrar. They also define the rights of the accused and rules of evidence.[1604]

Location

The ICT is located in Dhaka, Bangladesh's capital, and is composed of two separate tribunals: ICT-1 and ICT-2. According to the in 2012 amended Article 11(A) of the ICT Act, "At any stage of a case, a Tribunal may, on its own motion or on the application of the Chief Prosecutor, by an order in writing, transfer the case to another Tribunal, whenever it considers such transfer to be just, expedient and convenient for the proper dispensation of justice and expeditious disposal of such cases."[1605] Thus far, the tribunal has not made use of this provision. The tribunal is housed in a historic building, formerly used as the premises of the East Pakistan High Court. Upon its creation, the building was completely refurbished, and a public gallery and designated media area were created, as well as rooms with large video screens to allow overflow audiences to view the proceedings.[1606]

Structure and Composition

The ICT is comprised of one chamber (previously two), an Investigation Agency, and a Registry. Apart from the involvement of international defense counsel (who have been prevented from appearing in court), the ICT's judges, prosecutors, and court staff are Bangladeshi nationals.

Chambers

The ICT is comprised of one three-judge chamber, the ICT-1, which started operations in 2010. A second chamber, ICT-2, was created in March 2012 but has not been active since September 2015.[1607] The Appellate Division of the Bangladesh Supreme Court hears appeals from the ICT.[1608] Under the 2010 amendment of the ICT Act, all judges must be civilian, and military judges are not eligible for appointment. Any person who is a judge, is qualified to be a judge, or has been a judge of the Supreme Court of Bangladesh is eligible for appointment as a chairman or member of a tribunal. The government of Bangladesh appoints ICT judges and may at any time in the proceedings, whether due to illness of a judge or "any other reason," declare a judge's seat vacant and appoint another.[1609] Judicial replacements have been a much-used practice before the tribunal, leading to criticism of political

interference and unfair trials. In some cases, the government replaced the full bench of judges over the course of the trial, resulting in a verdict rendered by judges who had only heard part of the evidence.[1610]

Investigative Authority

The ICT Act sets out as follows: "The Government may establish an Agency for the purposes of investigation into crimes [under the jurisdiction of the Tribunal]; and any officer belonging to the Agency shall have the right to assist the prosecution during the trial."[1611] The staff of the Investigative Agency is appointed by the government and is tasked with the investigation of cases; when there is sufficient reason to believe that a crime under the statute has been committed, the agency may take steps to arrest the accused.[1612] After completion of an investigation, the Investigative Authority submits a report and all evidence to the chief prosecutor, who brings formal charges against the accused.[1613] The Investigative Authority's reports are not provided to the defense.[1614] The government of Bangladesh also appoints the chief prosecutor and other prosecutors.[1615]

Office of the Tribunal

The Office of the Tribunal, which is equal to the Registry in other courts, is responsible for all administrative and secretarial services of the ICT, maintaining external relations, and serving as its channel of communication.[1616] The office is composed of a registrar and a deputy registrar.[1617] The office may control the entry of persons to the public gallery of the courtrooms, and the Rules of Procedure specifically state that "for ensuring orderly and disciplined state of affairs inside the court-room of the Tribunal, no counsel, journalist, media person or other people shall be allowed to enter the court room without having an 'entry pass' issued by the Registrar."[1618]

Structural Limitations of the ICT

According to international observers, flaws in the composition and structure of the ICT include: the lack of an internal Appeals Chamber, the prohibition of any challenge to the composition of the tribunal or the appointment of judges, the absence of offices dedicated to ensuring defense rights, the absence of structures for the protection and support of victims and witnesses, and the absence of an outreach office.[1619] Under the Rules of Procedure and Evidence, the tribunal "may pass necessary orders directing the concerned authorities of the government to ensure protection, privacy and well-being of the witnesses and or victims. This process will be confidential and the other side will not be notified."[1620] However, to date,

the protective and security measures in place remain limited, and there have been reports of witness intimidation, interference, and disappearance.[1621]

Prosecutions

The ICT arrested its first suspects in June and July 2010,[1622] and the first trial commenced in October 2011.[1623] As of 2017, the ICT-1 and ICT-2 Chambers combined have delivered 28 judgments against a total of 56 accused.[1624] The majority of the defendants are senior leaders in Bangladesh's main opposition parties, the Jamaat-e-Islami (JI) and the Bangladeshi National Party (BNP). As of October 2017, there have been no ICT defendants who have been acquitted of all charges brought against them. At least 20 suspects have been tried in absentia, several in group trials.[1625] Most defendants are charged with crimes against humanity, while some are also charged with political crimes.[1626] While there was hope that proceedings at the ICT would shed light on the widespread rape and other sexual violence targeting Bengali women during the conflict, there have been only a few cases resulting in judgments for rape and other crimes of sexual violence.[1627]

In addition to grave crimes cases, the tribunal has been involved in a range of contempt proceedings against national and international media and human rights organizations, cases which may be brought to the court under Article 11(4) of the statute. *The Economist*, the local newspaper *Amar Desh,* Human Rights Watch, and British journalist David Bergman have all been subject to such proceedings in relation to critical reporting on the tribunal.[1628] This included reporting based on hacked correspondence that exposed clear evidence of judges being under political influence.[1629] Within Bangladesh, room for debate about the effectiveness and functioning of the ICT is severely limited.[1630]

Many observers regard the trials conducted before the ICT as fundamentally unfair, not in accordance with Bangladeshi or international law standards, and as a political instrument for the current Awami League government to exact revenge on opponents. Critics have also noted that Bangladesh lacks the legal infrastructure and technical capacity on the prosecution and defense sides to deal with complex international crimes trials.[1631] English barrister Geoffrey Robertson, who wrote an extensive report on the ICT's functioning in 2015, has stated: "I am sorry to say this, for I think the exercise itself laudable and necessary, and many of its participants have been doing their best to make it work, but the evidence set out in this report drives me to the conclusion that this trial process is calibrated to send defendants—all from the Jamaat or the BNP—to the gallows."[1632]

The arrest, detention, and charging of defendants has been murky, with defendants alleging they were held without being informed of the charges against them; some defendants were not initially held under ICT warrants. In December 2011 and November 2012, the UN Working Group on Arbitrary Detention concluded that the ICT breached international law by detaining defendants without charge.[1633]

ICT judgments have on occasion led to violent protests between opposing political groups, instead of the long-sought reconciliation. In February 2013, the death sentence against a popular Jamaat leader, Delwar Hossain Sayeedi, led to mass demonstrations by supporters, while a life sentence judgment delivered in the same month against Abdul Quader Molla caused the "the biggest mass demonstration in the country ... in 20 years" by opponents calling for the application of the death penalty.[1634] During riots against the eventual execution of Molla in December 2013, about 200 people were killed.[1635] By the beginning of 2015, about 500 people had been killed in demonstrations following the declaration or execution of death penalties.[1636]

Legacy

The 1973 ICT Act intended to hold accountable the individuals responsible for genocide, war crimes, crimes against humanity, and other crimes under international law committed during the Bangladesh Liberation War. While the tribunal may be said to have held to account several perpetrators of the 1971 war, shoddy trials taint the credibility of its findings, and it has completely ignored atrocities by the pro-independence movement. There have been no prosecutions for crimes committed against the Bihari minority, which was extensively targeted during and after the war. The tribunal could have been an important opportunity for justice and reconciliation 40 years after the end of the independence war, but concerns over the fairness and independence of the proceedings have marred its legitimacy.[1637]

Beth Van Schaack, scholar and former deputy ambassador to the U.S. Office for Global Criminal Justice, has described the legacy of the ICT as follows:

> Proceedings underway before the [B]ICT pervert the values and goals of transitional justice, insult the victims who deserve a more legitimate accountability process, and threaten to leave a lasting stain on both the Bangladeshi legal system and the system of international justice writ large. Many of the defendants may in fact be guilty of the crimes of which they are charged. But because the proceedings are so profoundly unfair, and the defendants are subject to the death penalty, we will never

> know for certain. Once hailed as a courageous and important exercise in historical justice, the BICT has become an object lesson for how international criminal law can be manipulated for political ends.[1638]

Impact on Society

Despite international criticism, the tribunal has undoubtedly engaged the Bangladeshi population and has generally received public support. An April 2013 opinion poll by a global marketing research firm showed that although almost two-thirds of the population thought that the war crimes trials are unfair, the ICT is seen by 86 percent of the population as a positive step made by the government.[1639] However, widespread demonstrations by both ICT opponents and supporters have often followed the tribunal's sentencing decisions, strongly suggesting that this flawed form of domestic justice has exacerbated existing social division.

Dealing with the Past

Upon its creation, supporters touted the ICT as an opportunity to deal with the legacy of the war and repair some of the harm done to society. ICT proceedings held out the prospect of ending a culture of impunity that had persisted since the end of the war and of establishing the truth about what happened. The tribunal has doubtless shed some light on the "scale and the bestiality of the murders and rapes in East Pakistan in 1971."[1640] However, due to the unfairness of proceedings and the one-sided application of justice, Bangladeshis remain unable to openly debate the events of 1971, and the Awami League government appears to be using the ICT as tool for vengeance rather than national reconciliation, "while denying others the right to challenge its account for fear of retribution."[1641]

Financing

In 2011, the International Center for Transitional Justice reported that a budget of about US$1.44 million had been set aside for the ICT by the government of Bangladesh for the entirety of its proceedings.[1642] Although the ICT is a completely domestic mechanism financed through the regular state budget, the Ministry of Law, Justice and Parliamentary Affairs does not report on its annual budget. International financial support for the tribunal has been almost completely absent, because of the possibility for the application of the death penalty in the ICT's sentencing.[1643]

Oversight and Accountability

The ICT lacks an internal independent monitoring mechanism to assess the quality of proceedings and appointment of judges and prosecutors. Because the government is responsible for appointments, and may replace judges at any point in the proceedings, the absence of objective criteria for judicial performance creates greater space for arbitrary decisions.

Due to the severe restrictions on domestic criticism of the ICT, informal forms of oversight have mostly been international. International human rights organizations and international law bodies initially welcomed the creation of the ICT and offered assistance and advice. The Office of Global Criminal Justice at the U.S. State Department has furnished technical and legal advice on the structure and jurisdiction of the ICT, and former U.S. Ambassador-at-Large for War Crimes Issues Stephen Rapp visited Bangladesh on multiple occasions while in that position.[1644] Upon the ICT's creation, Human Rights Watch and the International Bar Association conducted substantive legal reviews and offered suggestions for amending the ICT's rules of procedure. While international observers continue to monitor and comment on the ICT's proceedings, their involvement and interaction with the Tribunal has diminished over the years. Those who have been critical of the ICT's functioning, including *The Economist*, Human Rights Watch, and journalist David Bergman, have found themselves charged with "scandalization" offenses.

Sustained and cohesive international and civil society involvement in the ICT is lacking, which is partially due to the limited space for criticism of the tribunal. A public, unbiased clearinghouse of information about the ICT is unavailable, making it difficult to collect basic information.[1645] Until the end of 2013, the Bangladesh Trial Observer, an initiative by the Asian International Justice Initiative in cooperation with the Berkeley War Crimes Studies Center and East-West Center, offered "independent, objective coverage of trial proceedings at the International Crimes Tribunal in Bangladesh," by producing daily trial monitoring reports.[1646]

CAMBODIA: EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Conflict Background and Political Context

The Khmer Rouge, formally known as the Communist Party of Kampuchea, assumed power in Cambodia in April 1975. Led by Pol Pot, the Khmer Rouge ruled until January 1979 and implemented ruinous and brutal policies that led to deaths on a massive scale, with estimates ranging from 1.7 to 3 million dead. The Khmer Rouge's policy of forced migration from cities into the countryside led to countless deaths, and a campaign of political oppression against the Cambodian population included the curtailment of nearly all basic rights, campaigns of forced labor, executions of hundreds of thousands, and the establishment of vast prison systems. In the most notorious prison in Cambodia, known as S-21, only about 12 prisoners out of 14,000 reportedly survived.[1647] In 1979, Vietnamese troops captured Phnom Penh, Cambodia's capital, and the Khmer Rouge leaders fled to Thailand, where they continued to carry out military campaigns. Until 1990, the United Nations recognized the Khmer Rouge as the legitimate representative government of Cambodia. The Paris Agreement of October 1991 achieved a comprehensive settlement with the Khmer Rouge, which continued to exist until 1999, when nearly all of the former leaders had "defected to the Royal Government of Cambodia, been arrested, or had died."[1648]

Although the country has democratic institutions on paper, longtime Prime Minister Hun Sen's Cambodia is an authoritarian state with a reputation for widespread corruption. The government was party to the creation of the Extraordinary Chambers in the Courts of Cambodia (ECCC) but has demonstrated limited tolerance for letting it operate independently in a way that could raise popular expectations for accountability more generally. Beyond broad criticism of corruption within the judicial system, there have been accusations of executive interference by the Cambodian government in the selection and appointment of national judges at the ECCC.[1649] National investigative judges may also have been politically motivated in blocking investigations in two of the court's four cases.[1650]

Existing Justice-Sector Capacity

The Khmer Rouge reign left few legal practitioners and scholars remaining in Cambodia; most were killed or fled the country. At the time the ECCC was

negotiated and created, beginning in the late 1990s, there was no culture of judicial independence; practitioners lacked basic competencies; the system had poor infrastructure, including courthouses and jails; and exceedingly low pay fueled widespread corruption. Trials targeting security-sector officials were also routinely prone to disruption or termination by government entities.[1651]

Existing Civil Society Capacity

The targeting of intellectuals under the Khmer Rouge meant that civil society organizations were decimated under its rule. Civil society organizations, heavily dependent on foreign assistance and thus prone to government attack, only began to re-emerge after the 1991 signing of the Paris Peace Accords.[1652] The Documentation Center of Cambodia (DC-Cam), which spun off from a Yale University research project in 1997, has been the leading organization documenting the atrocities of the Khmer Rouge era. Especially for a court challenged to scrutinize events now decades in the past, DC-Cam's massive catalogue of information has proved invaluable to the ECCC's work. As the court has spurred national conversations about the past, various civil society organizations have become more involved. For example, the court's refusal to reopen investigations into Case 003 led to vocal protests by Cambodian civil society in May 2011.[1653]

Creation

The initiative for the creation of a mechanism to prosecute atrocity crimes committed by the Khmer Rouge regime stretches back to the early 1980s. Cold war politics and geopolitical maneuverings by the United States blocked initiatives for accountability measures. The United States opposed an early proposal for an international tribunal put forward by Australian Foreign Minister Bill Hayden in 1986. Although a UN Special Rapporteur labeled the regime's acts as genocide in 1986, the UN General Assembly avoided use of the term. In 1990, DC-Cam called for an international court to be established, with little traction. In 1997, the co-prime ministers of Cambodia requested the assistance of the UN and the international community in instituting an accountability mechanism. However, the Cambodian government's desire for accountability was not unqualified or consistent; in September 1996, it granted amnesty to Ieng Sary (who later became a defendant before the ECCC).

For the United Nations, the challenge was to gain agreement on a mechanism that would be able to operate with Cambodian participation, but with sufficient independence. Specifically, the UN and others in the international community were concerned about a lack of judicial independence and capacity in Cambodia, as well as suspicion that the Hun Sen government would try to control who would be investigated, prosecuted, and tried.

The Cambodian government, which includes some former members of the Khmer Rouge, steadfastly opposed any court that would be composed of a majority of international judges or an international prosecutor, and in 2001 the Cambodian legislature passed a domestic law providing for the creation of specialized domestic chambers.[1654] During the negotiations to establish this judicial body, the UN General Assembly passed resolution 57/228,[1655] which essentially requested that UN negotiators accept the creation of a national court that would receive international assistance.[1656] Despite this resolution, the UN Secretary-General sent a draft "Framework Agreement" to the UN General Assembly. This Framework Agreement proposed the establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (ECCC), but also included a strong warning about serious flaws in the ECCC's proposed design. The General Assembly approved the draft with no changes on May 13, 2003, and it was signed on June 6, 2003.[1657] The ECCC had a weakened structure from the start, watered down after extensive negotiations and compromise between the international community and the Cambodian government. Although the agreement was finalized in 2003, the ECCC did not officially start work until February 2006[1658] and has since issued indictments in only two cases against five individuals (one defendant, Ieng Thirith, was found mentally unfit for trial; another, Ieng Sary, died).

The UN Group of Experts for Cambodia and Proposals for an *Ad Hoc* International Criminal Tribunal

In 1998, the UN Secretary-General empanelled a "Group of Experts" to explore prosecution options and to assess Cambodian judicial capacity. After a 10-day visit to Cambodia in November 1998, that included little evidence-gathering or fact-finding, the Group of Experts issued a brief report surveying and evaluating politically feasible options for prosecutions.[1659] The Group of Experts recommended that prosecutions be conducted for those most responsible for serious crimes, but found severe deficiencies in Cambodia's judicial system. The group considered

and rejected proposals for a "mixed or foreign court established by Cambodia," concerned that "such a process would be subject to manipulation by political forces in Cambodia."[1660] In a prescient passage, given ongoing political difficulties in establishing such a tribunal, the group noted: "Possibilities for undue influence are manifold, including in the content of the organic statute of the court and its subsequent implementation, and the role of Cambodians in positions on the bench and on prosecutorial, defense and investigative staffs. A Cambodian court and prosecutorial system, even with significant international personnel, would still need the Government's permission to undertake most of its tasks and could lose independence at critical junctures."[1661]

Instead, the Group of Experts recommended the UN Security Council exercise Chapter VII powers to create an ad hoc international tribunal, with a single international prosecutor.[1662] This proposal was rejected by the Cambodian government, and the UN balked. Intense negotiations between the UN and Cambodia began in the spring of 1999 on the design of a mixed international criminal tribunal, with the Cambodian government at times proposing fully domestic trials with international technical assistance.

Legal Framework and Mandate

The ECCC is an independent institution within the Cambodian judiciary, created by a statute that incorporates the Framework Agreement between the Cambodian government and the UN. The ECCC, which is staffed by both Cambodian and international employees, has adopted internal rules and practice directions within the framework of domestic law, noting that international rules of procedure may be taken into account to fill gaps or to ensure that international standards are met.

The ECCC has jurisdiction over "senior leaders of Democratic Kampuchea ... [or] those most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia ... committed during the period April 17, 1975[,] to January 6, 1979."[1663] ECCC prosecutors are obligated under the internal rules to investigate any crimes they have "reason to believe" fall within the jurisdiction of the ECCC.[1664] With respect to two cases before the ECCC (known as Cases 003 and 004), the national (Cambodian) co-investigating judge and one international co-investigating judge—as well as the government of Cambodia—have been accused of manipulating the case files and investigations to "create the illusion of ... genuine investigation[s]"

so that cases that the government wishes to prevent from going forward are dismissed.[1665]

The ECCC uses an amalgam of civil and common law. Civil party victims are represented by counsel as civil parties and have limited rights to reparations. The co-prosecutors undertake preliminary investigations and trigger judicial investigations by filing submissions with the Office of Co-Investigating Judges (OCIJ, comprising one national and one international judge). The co-investigating judges, or one of them acting alone, conducts judicial investigations and issues closing orders with the decision to indict the charged person or dismiss the charges.[1666]

The Super Majority Rule

The negotiated compromise between the UN and Cambodia produced a court with a majority of Cambodian judges in each chamber and a dual administrative system run by domestic authorities and the United Nations.[1667] Chambers consist of joint panels of international and Cambodian judges, which make decisions by a "super majority" vote: four out of five judges at the Pre-Trial and Trial Chambers, and five out of seven judges at the Supreme Court Chamber. The super-majority rule is designed to check and guard the independence of the court by "ensuring no significant decision is made without the concurrence of at least one international judge."[1668] For example, when the co-investigative judges or co-prosecutors disagree about whether to proceed with an investigation or the submission of charges, the Pre-Trial Chamber resolves the dispute. A supermajority decision is required to block the legal proceedings from continuing. This procedure was invoked in Cases 003 and 004 (discussed in detail, below), when the international prosecutor sought to send the cases to the co-investigating judges for investigations, in disagreement with the national prosecutor. The dispute was submitted to the Pre-Trial Chamber, which split along international and national lines as to whether the investigations should proceed (three national judges against; two in favor). However, because the supermajority rule requires four judges to quash an investigation, the case proceeded to the investigation stage.

Victims can participate formally at the ECCC in two ways: submit complaints to the co-prosecutor, or petition to participate as civil parties, thus recognized as parties to the proceedings and allowed to claim collective and moral reparations.[1669]

This structure appeared to open a groundbreaking opportunity for legal participation of victims. However, the jurisprudence developed in the first trial and subsequent changes in the internal rules significantly diminished the rights of victims' civil

lawyers to participate in proceedings, and the balance may have shifted so that there is minimal difference between the rights of victims at the ECCC and other international or hybrid tribunals.[1670] This jurisprudential narrowing of the role of victims-complainants and civil parties may reflect, in part, an understanding by the ECCC that the court could not logistically or financially handle the full number of civil party applicants. In Case 001, there were a total of 94 applicants; while for Case 002, about 3,850 were admitted.

The ECCC, in theory, wields a novel power allowing civil parties to seek "collective and moral reparations," which prior generations of international hybrid criminal courts did not have.[1671] Of the 36 forms of reparations requested by civil parties in the *Duch* trial, only two were granted: the inclusion of immediate victims and civil party names in the final judgment, and the compilation and publication of apologetic statements made by Duch during the trial. Among other reparations requests denied by the court were the establishment of a victims' trust fund to finance temples and memorials, the preservation of atrocity crimes sites, and the declaration of a national memorial day.[1672] The Trial Chamber refused to allow symbolic or moral repartitions that required funding or involved ordering the government of Cambodia to take any actions. Following the *Duch* case, it was clear that reparations would have to be funded from the assets of convicted persons (who claimed indigence) or from donor funds.

Location

The ECCC is located in the Cambodian capital of Phnom Penh. It was not always clear that the mechanism created to deal with the crimes of the Khmer Rouge would be located in-country. The UN Group of Experts for Cambodia (see text box, below), which in 1999 proposed the creation of an ad hoc tribunal along the lines of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), weighed three potential locations for a court: Cambodia, The Hague, or elsewhere.[1673] Although recognizing the advantages of a court accessible to witnesses, Cambodian media, and the general public, the group recommended against locating the mechanism in-country because it felt that this would jeopardize security and make the institution too prone to political pressures. It rejected the option of The Hague (including possible co-location with the ICTY) as too distant and recommended a location "somewhere in the Asia-Pacific region."[1674] From the Cambodian government's response to that report and throughout the ensuing negotiations, it was clear that any mechanism brought into existence would have to be located in Phnom Penh.

Structure and Composition

The ECCC is comprised of the Office of the Co-Investigating Judges, headed by one Cambodian and one international judge; Chambers (composed of the Pre-Trial, Trial, and Supreme Court divisions); the Office of the Co-Prosecutors (OCP) headed by one Cambodian and one international prosecutor; and the Office of Administration (with a Cambodian director, and an international deputy). Reserve national and international judges and a reserve national and international prosecutor are appointed in each of these offices. Effectively, the court is split into national and international sides, with the idea that those sides cooperate (though as discussed below, this idea has remained unrealized for a certain portion of the court's caseload).

While the ECCC's framework is intended to include domestic and international members equally, "overall personnel changes continue to reinforce the court's national representation while failing to fill gaps on the court's international side in administration, victims' support and defense."[1675] The hybrid staffing structure was intended, in part, to facilitate capacity building and skills exchanges between national and international judicial personnel. Without formalized programs, however, such exchanges have been left to occur organically and depend on the particular unit and personalities involved.[1676]

Chambers

The ECCC is the only hybrid tribunal with a majority of national judges at both the trial and appellate levels. The UN Secretary-General nominates international judges to the tribunal. The Supreme Council of the Magistracy, a national body that appoints Cambodian judges to the ECCC, also determines whether international judges will sit in a reserve or full capacity. This has effectively given the Cambodian government an unintended authority over the appointment of international judges. In the Pre-Trial Chamber and the Trial Chamber, two international judges sit alongside three national judges. The Supreme Court Chamber is comprised of four Cambodian and three international judges.[1677]

The Office of Administration

The Office of Administration handles functions most associated with the Office of the Registry at other international tribunals, including defense support, victim support, court management, public affairs, outreach, and general staffing issues.

Defense Support Section

Each accused is entitled to both a Cambodian and international lawyer who can be selected from a roster of lawyers maintained by the Defense Support Section. Defense teams are provided with full office facilities as well as legal and administrative support, including legal research.

Outreach: Public Affairs Section and Victim Support Services

A 2011 population-based survey found that the main vehicles for disseminating information about the ECCC were media-based.[1678] The ECCC's Public Affairs Section (PAS) usually executes the outreach function. Outreach has at times been unevenly implemented because of the ECCC's dual (national and international) administrative offices. The unit has not been immune to politics: key national staff have shown little interest in conducting outreach on controversial Cases 003 and 004. Due to underfunding, the ECCC strongly relies on NGOs to implement outreach activities. Approximately "15 different NGOs have been directly involved in outreach activities in connection with the court since its inception, implementing a wide range of programs and contributing significantly to reaching out to rural communities."[1679] Along with producing media broadcasts and disseminating written information, NGOs have implemented interactive activities, including "community meetings, public forums, visits to the court, attendance at the first trial hearings and community screenings of the first trial hearings."[1680] The reliance on NGOs to conduct outreach has led to criticisms about lack of consistent messaging and concerns that NGOs "often produce their own messages," creating a risk that "understandings of victims' participation differ in the community."[1681]

PAS outreach activities during the *Duch* trial included "organizing public visits, live video feeds, assisting in production of weekly TV shows, uploading transcripts of the daily proceedings on the ECCC website, and holding weekly press briefings."[1682] The PAS facilitated over 27,000 individuals to attend the trial.[1683] PAS also produced general informational materials, and developed a one-day "Study Tour" program bringing Cambodians to the ECCC and the Tuol Sleng Museum. Over 30,000 individuals participated in this program in 2010.[1684] Cambodian television broadcast the *Duch* trial live, and it was widely watched, but this was not repeated for the Case 002 trials.

The Victim Support Section (VSS) coordinates assistance to civil parties at the court, which in practice means it undertakes many tasks normally handled by an outreach unit.[1685] The overlapping roles of the PAS and the VSS has "contributed to a broad

differentiation of audiences in terms of outreach," with PAS having a broader focus on the general public, and the VSS having a more targeted focus on "one-to-one support to complainants and civil parties."[1686] By 2012, the VSS was "all but entirely nationalized."[1687] The VSS initially faced a "difficult start due to lack of funding and resources,"[1688] but increased its outreach activities during the *Duch* trial, organizing regional forums with civil party applicants and civil parties.

UN Special Envoy

The ECCC does not have a registrar or president, unlike other international tribunals; this has at times led to organizational difficulties because a registrar or president is usually the person designated to gather the principals of a court's various offices to meet and discuss administrative matters.[1689] Following a corruption scandal at the court, the UN Secretary-General appointed a special envoy in April 2008 to fill some of the ambassadorial functions of a court president, including raising funds and representing the court's interests to the international community. The special envoy's position reflects the need for attention to the troubled political relationship between the UN and the Cambodian government. David Scheffer, the Special Expert to the Secretary-General on the United Nations Assistance to the Khmer Rouge Tribunal, assumed the position in January 2012, succeeding Clint Williamson and David Tolbert.

Prosecutions

As of late 2017, the ECCC had fully completed two trials through final appeal, and a judgment was pending in a third case.

The first trial, known as Case 001, was against one accused person, Kaing Guek Eav, alias Duch. Duch, the former head of the infamous S-21 Prison, was convicted in July 2010 of crimes against humanity and grave breaches of the 1949 Geneva Conventions (he did not face genocide charges). The trial lasted 17 months, and an appeal was heard by the Supreme Court Chamber in 2011. In February 2012, the ECCC's Supreme Court Chambers issued a final verdict in the *Duch* case, increasing the 30-year sentence imposed by the Trial Chamber to life imprisonment.[1690]

Case 002 began in November 2011 against four accused (Nuon Chea, known as "Brother Number Two," Ieng Sary, Ieng Thirith, and Khieu Samphan). Ieng Thirith was found unfit to stand trial before the actual trial began.[1691] Ieng Sary died in

March 2013, 16 months after the trial began. Given concerns about the defendants' advanced ages, the ECCC issued a severance order so that the case would be sequenced in multiple segments.[1692] The defendants were charged with genocide, crimes against humanity, and grave breaches of the Geneva Conventions.

A September 2011 order by the Trial Chamber directed that the first stage of the trial (Case 002/1) would handle allegations of "population movement" (forced transfer of population) and crimes against humanity.[1693] Other parts of the original Closing Order (synonymous with "indictment"), including allegations of genocide and war crimes, were deferred to later phases of the case (Case 002/2). In Case 002/1, the Trial Chamber issued guilty verdicts against Nuon Chea and Khieu Samphan in August 2014. In November 2016, the Supreme Court Chamber upheld this ruling and the life sentences for the two convicted men, but was sharply critical of some of the Trial Chamber's legal reasoning.[1694] The parties in Case 002/2 against Nuon Chea and Khieu Samphan concluded their closing arguments in June 2017,[1695] and Trial Chamber judges were still deliberating as of October 2017.

As of late 2017, Cases 003 and 004 were underway, with charges against one accused (Im Chaem) dismissed. Investigations regarding three further accused—Meas Muth (Case 003), and Ao An and Yim Tith (Case 004)—were awaiting a decision by the international co-prosecutor on whether to refer the accused for trial. The Cambodian government, the Cambodian co-prosecutor, and the Cambodian co-investigating judge all opposed the prosecution of Cases 003 and 004.[1696] As the Pre-Trial Chamber could not reach a supermajority decision when the dispute between the co-prosecutors was raised, the rules dictated an outcome favoring the forwarding of the allegations to the co-investigating judges for judicial investigation in September 2009. However, the international co-investigating judge handled the subsequent judicial investigation with no assistance or cooperation from the national co-investigating judge. It remained uncertain how the standoff between the national and international officials on these cases would ultimately be resolved.

Legacy

Ordinary Cambodians closely followed the initial trial and indictment of former high-ranking officials. While perceptions of the court are difficult to measure, indications are encouraging.[1697] Surveys show that a large majority of the Cambodian population are aware of the trials and support the ECCC.[1698] Civil party representation and well-attended hearings provided victims and the broader

population with extensive information about past events that had been disputed, or more often, taboo. Beyond the court's legal proceedings, memorialization projects and documentation centers have carried out activities related to the proceedings, including genocide education programs and the construction of victim memorials. The court's biggest success has arguably been its ability to foster discussions among Cambodians about the crimes of the past and their causes.

The ECCC's impact on the legal system has been more doubtful. On the positive side, many Cambodian staff at the court gained capacity by working on complex cases, often alongside experienced international experts. The UN's Office of the High Commissioner for Human Rights and the Cambodian Human Rights Action Committee have facilitated meetings between judicial personnel of the ECCC and national judges in the ordinary Cambodian courts to share experiences and transfer knowledge and skills.[1699] However, concerns about the integrity, capacity, and independence of the domestic judicial sector have increased during the court's tenure, and despite the mixed structure of the court, it has contributed little in terms of capacity development of the broader domestic judicial system. The justice sector, obliterated during Khmer Rouge rule, remains prone to political influence and corruption, is largely staffed by judges and lawyers of limited technical capacity, and above all, is resistant to change due to the political leadership's lack of political will to embrace the rule of law, including the concepts of judicial independence and fair trial rights.[1700] Against this backdrop, it would always be a challenge for the ECCC to influence domestic judicial capacity and culture absent broader political change.[1701]

Given concerns about the lack of independence in the Cambodian judiciary, international donors and UN officials recommended that the ECCC complete all four cases rather than transferring any of them to fully domestic Trial Chambers. Indeed, because the ECCC Agreement, law, and internal rules have no equivalent to the Rule 11*bis* of the ICTY and the ICTR, any devolution of cases to national jurisdiction would likely require amendments to the statutory framework.

Financing

Under the ECCC Agreement, Cambodia is to provide—at its expense—the premises for the co-investigating judges, the Prosecutor's Office, the Extraordinary Chambers, the Pre-Trial Chamber, and the Office of Administration (Art. 14). It is also to cover the salaries of Cambodian judges and personnel (Art. 15). Meanwhile, the UN is to cover the salaries of personnel recruited by it, including international judges and the international co-prosecutor (Art. 16). Article 17 of the Agreement outlines

other forms of UN financial assistance to the ECCC, including the remuneration of defense counsel. Additionally, the Agreement stipulates a "phased-in approach" for the purposes of ensuring "efficiency and cost-effectiveness" (Art. 27). These provisions are reinforced by the relevant provisions in the ECCC Law (Art. 44, new).[1702]

The cost of the ECCC, compared to its small number of prosecutions and political difficulties, has drawn criticism, which has intensified with the court's political gridlock. Between 2006 and 2014, ECCC expenditures were in excess of US$200 million (of which approximately 25 percent was spent by the Cambodian side of the court).[1703] While the ECCC's annual budget was smaller in its early years (until the court became fully operational), annual operational costs in the years 2010–2015 ranged from US$27 to 35 million.[1704] As of 2015, the ECCC's largest donor was Japan, contributing 35 percent of the total operating costs for the court, followed by the United States (11 percent), Australia (10 percent), and Cambodia (8 percent).[1705] The European Union (4 percent), and various EU countries (Germany [6 percent], the United Kingdom [5 percent], France, Sweden and Norway [3 percent each]) have collectively contributed about 25 percent of the court's funding. Some states "fund both international and national sides, while others earmark funding for either the national or international side … [and] … some states prefer to mark funding for particular sections of the court's operations."[1706]

During its lifespan, the ECCC has faced a number of funding crises.[1707] The court entered into a deepening crisis in 2012–2013, when shortfalls in national funding led to Cambodian staff going for months without pay and striking in protest. The funding crises at the ECCC have had a disproportionate effect on national staff.[1708] Although the ECCC Agreement stipulates that the expenses and salaries of Cambodia officials, staff, and judges be borne by the "Cambodian national budget," it has contributed only 31 percent of these monies, much of which has been obtained by seeking voluntary contributions from the court's main donors. The Open Society Justice Initiative has noted that the voluntary contribution model—and significant budget shortfalls—raise the danger that financial concerns at the court could drive judicial decision-making.[1709]

Oversight and Accountability

The ECCC operates formally as an independent institution within the Cambodian justice system, but by nature of its hybrid staffing, elements of oversight and accountability are bifurcated, with nationals accountable to the national system

and internationals accountable to the United Nations. The Agreement between Cambodia and the United Nations establishes privileges and immunities for national and international staff and counsel.[1710]

Persistent allegations of corruption at the ECCC led to the Agreement to Establish an Independent Counselor at the ECCC in August 2009. The independent counselor (IC), required to be independent of the UN, ECCC, and the Cambodian government, was tasked with investigating corruption allegations within the ECCC.[1711] However, the IC's reports on corruption at the ECCC have not been publicly disclosed.[1712]

Beyond issues of corruption, the handling of the investigations of Cases 003 and 004 has led to questions over whether agreed lines of authority have been respected in practice. Judge Laurent Kasper-Ansermet was appointed as international reserve co-investigating judge in February 2011 and assumed his duties as full co-investigating judge in December 2011, following the resignation of Judge Siegfried Blunk. The Cambodian government failed to provide formal approval for the appointment. The United Nations considered this failure a breach of the Agreement between the Cambodian government and the UN. Under the Agreement, the Supreme Council of Magistracy (SCM) in Cambodia was "required to replace a resigning international CIJ [co-investigating judge] with the reserve international CIJ, and leaves no room for deliberation."[1713] Despite this, the SCM rejected Judge Kasper-Ansermet in January 2012. After several months in limbo, Judge Kasper-Ansermet resigned in March, and the Secretary-General called on the Cambodian government to "promptly appoint" new international judges. Beyond the accusations of personal conflicts of interest in judicial appointments—national CIJ Bunleng was staunchly opposed to Kasper-Ansermet's appointment and also sits on the SCM—the appointment gridlock points to the "UN's apparent inability to effectively influence a decision regarding an agreement to which it is a party," and the "fundamental lack of any internal mechanism [at the ECCC] to resolve disputes concerning judicial appointments."[1714] These structural deficiencies have led to several proposed remedies, including the call by the former UN Special Expert on the Khmer Rouge Trials, David Tolbert, for a judicial review mechanism as well as calls by the Open Society Justice Initiative for an independent, international panel of expert judges to conduct an inquiry into the stalled investigations in cases 003 and 004. In the wake of the scandal over Judge Kasper-Ansermet's failed appointment, Cambodian human rights activist Theary Seng "called upon the UN to invoke Article 28 of the Agreement and withdraw cooperation" and cease to provide assistance.[1715] Thus, the scandal came to threaten the very existence of the ECCC itself.

Civil society has provided a measure of informal accountability. In addition to the domestic work of the Documentation Center of Cambodia, two main international NGOs have been heavily involved in monitoring and reporting on the ECCC: the Open Society Justice Initiative and the Asian International Justice Initiative.

EAST TIMOR / TIMOR LESTE

Conflict Background and Political Context

In 1999, after 24 years of Indonesian military occupation, the people of East Timor[1716] voted for independence in a UN-sponsored referendum. The referendum process was met by widespread human rights abuses and widespread violence carried out by the Indonesian military and military-supported irregular armed groups against the civilian population. A national truth and reconciliation commission, the Commission for Reception, Truth and Reconciliation (CAVR), later estimated that over 100,000 civilians died as a result of the conflict, and the physical infrastructure of the country lay in ruins, with nearly 70 percent of all buildings, homes, and schools destroyed. An estimated 75 percent of the population was displaced.[1717]

An international peacekeeping force, INTERFET, arrived to restore order, and the UN assumed administration and sovereignty beginning in October 1999, through the United Nations Transitional Administration in East Timor (UNTAET), until 2002. Under the UNTAET mandate, the UN established special panels in district courts, called Special Panels for Serious Crimes in East Timor (SPSC). The SPSC, staffed by a mix of internationals and nationals, was tasked with investigating and prosecuting atrocity crimes. Following the UN transference of sovereignty in 2002, this international investigations unit closed in May 2005. The transfer of sovereignty back to Timorese authorities in 2002 left UN-appointed personnel largely in place but complicated issues of shared authority over the process between the UN and the East Timorese. An agreement by the UN to provide international assistance to the Office of the Prosecutor General on atrocity crimes investigations and pretrial legal drafting led to the creation of Special Crimes Investigation Teams (SCIT, see text box) under the UNMIT (UN Integrated Mission in Timor-Leste) mandate in 2006. SCIT did not begin its work until early 2008, when a formal agreement took effect between the UN and the government of East Timor. The SCIT was shut down in 2012 when the UNMIT mandate ended before it could complete its investigations. Incomplete investigations were handed over to the Timor-Leste prosecutor general.[1718]

Through late 2017, the serious crimes process has been beset by a series of internal and external political obstacles. Externally, Indonesia's lack of cooperation has been a consistent obstacle. Many of the high-level perpetrators of atrocity crimes in Indonesia were out of the territorial jurisdiction of the Special Panels, having fled

either to Indonesia or Indonesian-controlled West Timor. Indonesia has consistently refused to cooperate with arrest warrants or to hand over indicted suspects, despite having signed an agreement with the UNTAET on a range of mutual assistance measures, including arrest warrant enforcement and transfer of indicted persons for prosecutions.[1719] Indonesian ad hoc trials of atrocity crimes and human rights violations have been largely denounced as a sham.[1720]

Internally, serious crimes proceedings suffered from poor organization and a lack of commitment by the United Nations, including a failure to support demands for cooperation from Indonesia. Following the transfer of sovereignty in 2002, the governments of Timor-Leste have increasingly sought to "move beyond the past," and thus signal an intention to close down serious crimes prosecutions in order to pursue friendly relations with their powerful neighbor.

Existing Justice-Sector Capacity

The scorched-earth campaign by Indonesian forces devastated East Timor, nearly destroying all political and institutional capacity. Physical judicial infrastructure, which was minimal even before the conflict, was looted and reduced to rubble. The systematic exclusion of East Timorese from government and judicial posts during the years of Indonesian rule and occupation led to a severe shortage of qualified judges and trained lawyers. Only a small number of Timorese were allowed to obtain legal qualifications during the Indonesian occupation, and most Indonesian justice-sector professionals left East Timor in the post-conflict period. While advances have been made since 1999, the Timorese judicial sector is still marked by an absence of qualified judicial personnel and a considerable criminal case backlog.[1721] Even after Timor-Leste gained sovereignty in 2002, some foreign judges and judicial officers, mostly from Portuguese-speaking countries, remained embedded in the system. This remained the case until the Timor-Leste Parliament voted to expel all foreigners from the justice sector in 2014, in response to a series of tax cases brought against foreign oil companies operating in the Timor Sea.[1722] Although not the explicit target of the parliament's actions, grave crimes proceedings also suffered following the dismissal of all foreign judicial personnel.[1723]

Existing Civil Society Capacity

Civil and political freedoms in East Timor during Indonesian rule were severely curtailed. The country emerged in 1999 with a weak and politicized civil society.

Catholic Church organizations such as Caritas Dili and the Justice and Peace Commission maintained their longstanding presence even during the occupation and have focused on reconciliation initiatives in the post-conflict era. The post-conflict period saw the proliferation of local nongovernmental organizations (NGOs, over 300 registered with an umbrella NGO Forum by 2006), clustered around issues of peacebuilding, youth, humanitarian assistance, gender justice, and voter education. During the period of UN-led transitional government, these NGOs raised concerns about their lack of participation in governance and exclusion. Involvement by NGOs in the CAVR provided a platform and catalyst for many NGOs to gain knowledge and proficiency in transitional justice issues.[1724]

Creation

The United Nations created the Special Panels and associated special units not through a planned and integrated process, but through a series of ad hoc responses to East Timor's crisis. Shortly after the Indonesian military withdrew in 1999, a UN fact-finding mission and a subsequent International Commission of Inquiry established by the UN Human Rights Commission recommended the establishment of an international criminal tribunal. However, the UN Security Council was unwilling to mount such a direct challenge to the Indonesian military regime, and donor countries were wary of the costs and duration of trials associated with the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.[1725]

UNTAET established the Special Panels in accordance with its general mandate to re-establish law and order, based on the initiative of international staff who considered it to be a "moral imperative" for the UN to create an accountability mechanism.[1726] Because the UN had assumed sovereignty in East Timor in 1999, it was not possible for the Special Panels to be created through a bilateral agreement between the UN and the national government (as with the Special Court for Sierra Leone), or to be fully located within the domestic judicial system. The resulting structure was a complicated and shifting collection of units, with varying and shifting degrees of subordination to international and national institutions. Due to a lack of substantial consultations before the establishment of the Special Panels in 2000, Timorese judges (who were initially expected to handle the cases themselves) and civil society reacted negatively.[1727]

Legal Framework and Mandate

The Special Panels of the Dili District Court had jurisdiction over genocide, war crimes, crimes against humanity committed at any time, and murder, sexual offenses, and torture committed between January 1 and October 25, 1999. Under the UNTAET Regulation, the Special Panels were empowered to apply Timorese and international law.[1728] All the charges before the Special Panels involved crimes against humanity or serious offenses under domestic law; genocide and war crimes were not charged. While the temporal jurisdiction included the pre-1999 period, the large number of crimes committed during Indonesian occupation between 1975 and 1998 were not investigated or prosecuted. There were multiple reasons for this: a Timorese government still wary of its former occupier lacked the political will to pursue these cases, the Prosecutor's Office interpreted the applicable law narrowly, the case-selection strategy targeted high-level perpetrators, and there were resource constraints. The Special Panels were granted primary jurisdiction over national courts for the serious offenses within their jurisdiction. The definitions of international crimes, modes of liability, and defenses were drawn nearly verbatim from the Rome Statue of the International Criminal Court (ICC). Definitions for national crimes were drawn from the Indonesian Penal Code, and the criminal procedure code was promulgated by UNTAET, combining civil law, common law, and elements from the ICC's statute and rules of procedure. The "application of these relatively complex and unfamiliar procedures caused major difficulties in practice,"[1729] and were ill-fitted to the local criminal justice system. Timor-Leste's government promulgated a new criminal procedure code in January 2006.

Location

The Special Panels within the Dili District Court and a Court of Appeal to deal with serious crimes were located in Dili, the capital of East Timor/Timor-Leste.

Structure and Composition

The constituent parts of the Special Panels process included internationalized Special Panels (courts) at the district, appeals, and superior court levels; the Serious Crimes Unit (SCU) of investigators and prosecutors; the Deputy General Prosecutor for Serious Crimes (DGPSC), housed within the UN-created Office of the General Prosecutor (OGP), broadly under the Public Prosecution Service for East Timor; and the Defense Lawyers Unit (DLU).

UNTAET created Special Panels of the District Courts and the Court of Appeals in June 2000, with each panel composed of one national and two international judges. The UN transitional government made these appointments with little to no local involvement. The Dili District Court was granted exclusive jurisdiction over serious criminal offenses. Difficulties and delays in the recruitment and appointment of international judges caused the Court of Appeals to be non-operational for more than a year and a half during 2001–2003. A severe shortage of judicial and administrative support staff hampered the work of the Special Panels; judges often "had to do their own research, drafting, editing, and administration."[1730]

For its part, the DGPSC office was severely hampered by high staff turnover, short-term staff contracts, and nearly a year without a head. The unit only became fully functional by the end of 2003, a few months before it began the process of downsizing and closing.

The SCU operated from 2000 until May 2005 and was staffed predominantly by UN-appointed internationals. By the time the unit was fully staffed, it began downsizing in anticipation of closeout. In 2003, the unit had 124 staff members made up of 33 UN prosecutors, investigators, forensic specialists, and support staff; 32 UN police investigators; 40 national staff; and five national police investigators. By its closure in May 2005, the unit had 88 staff members (split about evenly among national and internationals). During the handover process in 2005, the unit hired 37 translators and 13 trainees embedded within prosecution and informational technology sections. Between 2001 and 2005, five individuals held the position of head international prosecutor. Recruitment and appointments were carried out by UNTAET, but the office reported to the Timorese general prosecutor and attorney general. When the DGPSC's office issued a high-profile arrest warrant against General Wiranto, this weak institutional arrangement provided cover for both UN and Timorese authorities to disavow ownership of the prosecutor's efforts.

No provisions were made for defense of accused persons before the Special Panels until September 2002. The UN Mission of Support in East Timor (UNMISET; replacing UNTAET) created the DLU, composed of international staff who provided defense services to defendants before the Special Panels. This early gap marked a serious deficiency within the special crimes process. One analyst observed: "In the first fourteen trials ... not a single defense witness appeared."[1731] Because the DLU employed only international staff, it did not improve the capacity of local defense attorneys. At its conclusion, the DLU employed seven international defense lawyers, in addition to three assistants, and approximately seven interpreters and administrative and logistical staff.

The special crimes process lacked witness protection and support structures. The SCU had a small witness management unit to organize witness testimony, and it managed to obtain a few protective measures for a small number of witnesses in rape cases, but all other witnesses were left to care for their own security.[1732] The panels and the DLU had no witness protection system at all.

Prosecutions

A prosecutorial strategy emerged in the Special Panels in late 2001, focusing on 10 priority cases and indictments for crimes against humanity. This early strategy was criticized for under-utilizing mapping exercises and commissions of inquiry (national and international) that had laid out the systematic nature of the violations.

In February 2003, the SCU issued its most high-profile indictments to date against General Wiranto, six senior Indonesian military members, and the former governor of East Timor. At the time, General Wiranto was a candidate for the presidency of Indonesia. Observers wrote that "the Wiranto case proved to be the breaking point in the relationship between the Timorese political leadership and the serious crimes regime. To the discredit of the UN and the Timor-Leste government, both bodies disassociated themselves from the Wiranto arrest warrant. In so doing, they signaled to senior perpetrators that the serious crimes process did not enjoy the committed support of the international community or the national authorities."[1733]

By the time the Special Panels closed in May 2005, they had tried 87 defendants in 55 trials, 85 of whom were found guilty.[1734] A significant number of the indictees were officers in the Indonesian military, and all were low-level perpetrators. More than 300 remained at large, most in Indonesia, and incomplete cases were left for the SCIT, which was not in place until 2008.[1735]

Links between Truth-Telling and Criminal Prosecutions in East Timor

The Commission for Reception, Truth and Reconciliation (CAVR) was set up in 2001 by a UNTAET regulation to address non-atrocity crimes such as theft, arson, and killing of livestock through a Community Reconciliation Process (CRP).[1736] An UNTAET regulation[1737] and an agreement with the OGP[1738] required the CAVR to refer cases involving serious crimes to the Serious Crimes Unit.

The intersection of CAVR's mandate with the Special Crimes process yielded important examples of linking transitional justice mechanisms, and it has been cited as an example where "serious thought was given to the relationship between the disclosure process and prosecutions."[1739] The legal agreements and arrangements between the CAVR and the serious crimes prosecution process are an unusual example of a codified institutional arrangement between punitive and reconciliatory mechanisms. While the execution of the policy underlying the arrangement was problematic, the provisions of the UNTAET regulation were interpreted by CAVR to reflect "a policy decision that the work of the prosecution service should not be compromised by the truth-seeking function of the Commission."[1740]

However, because the SCU did not have the resources to prosecute large numbers of alleged serious crime offenders, the referral arrangement resulted in an impunity gap, with certain offenders ineligible either for participation in the reconciliation procedures or for prosecution. Amendment of UNTAET directives in 2002 increased prosecutorial discretion on CRP eligibility, but did not fully resolve the situation. Delayed sequencing of the initiatives—CAVR was established a year after the Special Crimes Prosecutions and Investigation Unit—caused difficulties in the planning and execution of their respective mandates.

Because CAVR was required to refer cases involving possible grave crimes to prosecutors, some lower-level offenders may have avoided the reconciliation process altogether. This was compounded during the early stages of the proceedings, when the prosecution strategy was less clearly formed and communicated. The legal arrangement between the CAVR and the OGP allowed testifying witnesses privileges against self-incrimination. While the OGP was allowed access to any statements recorded by the CAVR (compelling the CAVR to release information received confidentially), the OGP undertook not to initiate an investigation based solely on CAVR evidence. One study estimated that about eight percent of cases handled by the CAVR were vetted by the SCU or suspended during proceedings as possible serious crimes.[1741]

Legacy

At least in theory, locating the special crimes prosecutions in situ intended to make justice accessible and meaningful. This impact has been hard to measure and has had mixed results. The inability to prosecute high-level Indonesian perpetrators who fled to Indonesia, coupled with prosecutions of lower-level perpetrators and East Timorese, may actually have contributed to cynicism about the process among the

local population. Further, the Timorese government and general prosecutor proved unwilling to proceed with investigations against former East Timorese independence fighters.

Throughout its existence, the prosecution and investigation unit faced criticism for a number of weaknesses, including: lack of a coherent prosecutorial strategy; lack of basic facilities; weak jurisprudence and quality of judgments; inadequate legal defense representation; inadequate outreach; lack of political support from the UN transitional government and the Timorese government; a difficult and bureaucratic recruitment, appointment, and staffing process; and frequent changes of leadership.

The Special Panels have also been criticized for failing to have a substantive, positive effect on the domestic judicial system. There was limited interaction between judges of the Special Panels and judges of the ordinary national court. Training programs, skills transfer, and capacity development were uneven, poorly coordinated, and delayed. Local observers complained that international judges were not properly trained on the intricacies of the national legal system and unqualified on international criminal and humanitarian law (judges were appointed under standard UN peacekeeping mission rules, which did not call for targeted advertising of vacancy notices). Not until 2002 was a training program initiated and funding secured for the salaries of trainees.

The arrival of international defense lawyers in 2003 improved some of the glaring fair trial deficiencies, but the DLU had "little or no collaboration or interaction with Timorese defense lawyers,"[1742] and Timorese defense attorneys gradually and nearly completely withdrew from serious crimes cases. Poor-quality jurisprudence, lack of standardization, and long gaps in the functioning of the Appeals Court minimized the long-term effect of the Special Panels process on East Timorese jurisprudence and the domestic judicial system. During the premature closeout phase in early 2005, the SCU spent much of its time archiving files into a searchable database and working to close unfinished investigations and draft transfer documents to national prosecutors, in the hopes that the process would be resumed. These files and cases lay largely untouched until the resumption of serious crimes investigations in 2008 with the support of the SCIT.

The SPSC appears to have created little momentum for continued pursuit of grave crimes cases related to the conflict. Beyond the clear shortcomings of the model and its implementation, this can be explained by Timor-Leste's dependence on Indonesia for investment, educational opportunities, communications, affordable

goods and services, as well their military and other forms of cooperation. This dependence has caused the government to seek to move "beyond accountability" and prioritize good relations with Jakarta.[1743] In 2005, the two countries created a Commission of Truth and Friendship (CTF), widely interpreted as a political signal to end the accountability process. Political interference in the serious crimes process has taken multiple forms, including the 2008 presidential commutation of sentences for those convicted by the Special Panels. In 2009, the president of Timor-Leste called for the closure of serious crimes investigations, and in 2014, all foreign judges, prosecutors, and other judicial officers were expelled from the country, further threatening the prosecution of atrocity crimes.[1744]

As of late 2017, the recommendations of the CAVR and the CTF for justice and reparations had still not been implemented. Bills establishing a Commission for Disappeared Persons, a national reparation program, and a public memory institute were submitted to parliament in 2010, but debate of the draft laws had been continually postponed.[1745]

Special Crimes Investigation Team (SCIT) (2008–2012)

In 2008, the UN Integrated Mission in Timor-Leste (UNMIT) mandated a Special Crimes Investigation Team (SCIT) to resume the investigative functions of the SCU and assist the Office of the Prosecutor General (OPG) with outstanding cases of serious human rights violations.[1746] The SCIT's role was to investigate cases and submit the file to the OPG with a recommendation to either close the case or proceed with prosecution. SCIT had no prosecutorial powers itself and, unlike the Special Panels, its temporal mandate did not cover crimes committed before 1999. SCIT lacked outreach and public information staff, and outreach activities were mostly conducted under broader UNMIT transitional justice programs. A team of international investigators, legal coordination officers (including gender specialists), and forensics and administrative staff assisted the OPG in investigations and also prepared drafts of legal documents, indictments, and arrest warrants. A shortage of national legal officers caused communications difficulties with victims and witnesses. SCIT was funded by assessed contributions[1747] through a special account maintained for UNMIT by the UN Department of Peacekeeping Operations.

Because SCIT lacked the power to initiate prosecutions, reliance on a reluctant and underresourced OPG made it unlikely that many cases would be brought to trial. While SCIT was an international mechanism, the agreement leading to its creation made it formally and operationally subordinate to the OPG. The arrangement has

been described as an unusual “role reversal” where “prosecutors [have a] lack of involvement in serious crimes investigations, [while] investigators develop the strategy and framework for the inquiry, as well as conducting the investigation, with the OPG provid[ing] approval for procedural steps as required.”[1748] Cooperation between the SCIT and the OPG was minimal, seriously undermining the impact of the team on capacity building within the OPG. However, cooperation improved when a new prosecutor general assumed office in March 2009, for instance through weekly meetings and operational contacts. Institutional cooperation could have better been ensured through stronger agreements and a stronger mandate. SCIT’s physical location—offices were housed in the UN building in Dili, with three small regional outposts—contributed to a lack of integration with the OPG’s separate office and minimized the ability of the SCIT process to sustainably benefit the domestic justice sector.

The nearly three-year gap between the closure of the SCU and the operationalization of SCIT in early 2008 caused a lack of continuity and a loss of institutional knowledge and staff, as well as reflected a lack of sustained focus on the part of the UN on accountability measures in East Timor. From the time of the SCU’s closure, at least three cases of atrocity crimes were brought to trial. These include: the *Mau Buti* case, with a verdict by the Appeals Court issued in June 2010;[1749] the conviction of three former Nesi Merah Putih militia members for crimes against humanity in December 2012; and the sentence on appeal of a former AHI militia member in August 2014.[1750] When the SCIT closed in 2012, it had completed 311 investigations and handed over 60 incomplete investigations to the prosecutor general.[1751] The 2014 expulsion of foreign judges called into question the continuation of grave crimes trials, as the UNTAET regulation stipulating that trials for serious crimes of 1999 require two international judges and one Timorese judge remained applicable.[1752]

Financing

UNMISET funded both the SCU and the Special Panels through assessed and voluntary contributions. The total operating cost of the serious crimes process for the period 2003–2005 was US$14,358,600, which was around five percent of the overall assessed contributions to UNMISET. Voluntary contributions during this period amounted to approximately US$120,000.[1753] There was a significant overall underinvestment in the system, as well as poor resource allocation between the two, with an “overemphasis on only the investigatory and prosecutorial arm of the process.”[1754] The SCU resource problems were eventually addressed. However, the Special Panels were severely underfunded throughout. In 2002, for example,

only US$600,000 was spent on the Special Panels, whereas the SCU spent almost US$6 million—out of a total budget for UNMISET of more than US$200 million.[1755] The SCU also benefited from the support of governments including Australia and Norway, as well as the U.S.-funded work of such international NGOs as the Coalition for International Justice.[1756] Special Panels (with the exception of salaries for international judges) benefited from legal capacity assistance on international criminal law in 2002–2003 by the American University's Washington College of Law, which covered its own expenditure.[1757]

An assessment by the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste in 1999 concluded that "the level of funding provided to the judicial process in Timor-Leste has been insufficient to meet the minimum requirements of the mandates of the above-mentioned institutions [SPSC, SCU, and DLU]"[1758] and was "a major impediment to their work."[1759]

Oversight and Accountability

An independent organization created in 2001, the Judicial System Monitoring Program (JSMP), monitored trials before the Special Panels. Composed of national and international staff, JSMP also conducted outreach efforts in response to popular demands for information on the panels' work.[1760] The organization generated a detailed record of the decisions of the Special Panels and published monitoring reports analyzing their work.[1761] When the panels closed, JSMP became a nonprofit organization working to improve the judicial and legislative systems in Timor-Leste.[1762]

Notes

1569. The Delhi Agreement was signed in 1974 by India, Pakistan, and Bangladesh. Under political pressure from its allies, Bangladesh agreed upon the release and repatriation of 195 Pakistani army officials who had been held in Indian custody since the end of the war. See A. Dirk Moses, "The United Nations, Humanitarianism & Human Rights: War Crimes/Genocide Trials for Pakistani Soldiers in Bangladesh, 1971–4," in *Human Rights in the Twentieth Century*, ed. SL Hoffman, (Cambridge: Cambridge University Press, 2013).
1570. The International Crimes (Tribunals) Act, Act No. 19 of 1973, July 20, 1973, available at: bdlaws.minlaw.gov.bd/print_sections_all.php?id=435 (hereinafter: The ICT Act).
1571. See Briefing Paper to the British House of Commons, prepared by Jon Lunn and Arabella Thorp, *Bangladesh: The International Crimes Tribunal*, May 3, 2012, available

at: parliament.uk/briefing-papers/SN06318. See also Human Rights Watch, *Letter to the Bangladesh Prime Minister Regarding the International Crimes (Tribunals) Act*, May 18, 2011, available at: hrw.org/node/98995; Human Rights Watch, *Bangladesh: Guarantee Fair Trials for Independence-Era Crimes*, July 11, 2011, available at: hrw.org/news/2011/07/11/bangladesh-guarantee-fair-trials-independence-era-crimes; International Bar Association-War Crimes Committee, *Legislative Review of the ICT Act for the United Kingdom Parliament Human Rights Group*, December 29, 2009, available at: corporateaccountability.org/dl/1971/standards/ibareportdec09.pdf.

1572. See UNDP, *Justice Sector Facility Project Document*, 2012, available at: bd.undp.org/content/bangladesh/en/home/operations/projects/democratic_governance/justice-sector-facility/what-we-do.html.

1573. Human Rights Watch, *Ignoring Executions and Torture: Impunity for Bangladesh's Security Forces*, May 2009, 2, available at: hrw.org/sites/default/files/reports/bangladesh0509web.pdf.

1574. Asian Development Bank, *Overview of NGOs and Civil Society: Bangladesh*, August 2008, available at: adb.org/publications/overview-ngos-and-civil-society-bangladesh; and David Lewis, *Is Civil Society in Trouble in Bangladesh*, London School of Economics, July 13, 2015, available at: blogs.lse.ac.uk/southasia/2015/07/13/is-civil-society-in-trouble-in-bangladesh/.

1575. Bina D'Costa and Sara Hossain, "Redress for Sexual Violence before the International Crimes Tribunal in Bangladesh: Lessons from History, and Hopes for the Future," *Criminal Law Forum* 21, no. 2 (2010): 338; and Human Rights Committee of England and Wales, *Independent Report by Geoffrey Robertson QC into the Proceedings of the International Crimes Tribunal in Bangladesh*, February 6, 2015, 51, available at: barhumanrights.org.uk/independent-report-by-geoffrey-robertson-qc-into-the-proceedings-of-the-international-crimes-tribunal-in-bangladesh/ (hereinafter: Robertson Report).

1576. Ibid., 355.

1577. International Crisis Group, *Political Conflict, Extremism and Criminal Justice in Bangladesh*, April 11, 2016, available at: d2071andvip0wj.cloudfront.net/277-political-conflict-extremism-and-criminal-justice-in-bangladesh.pdf.

1578. *Bangladesh Collaborators (Special Tribunals) Order*, January 24, 1972, available at: icrfoundation.org/home/bangladesh-collaborators-special-tribunals-order-1972/.

1579. *Bangladesh National Liberation Struggle (Indemnity) Order*, February 28, 1973), available at: bdlaws.minlaw.gov.bd/pdf_part.php?id=450.

1580. Robertson Report.

1581. International Center for Transitional Justice, "Fighting Past Impunity in Bangladesh: A National Tribunal for the Crimes of 1971," ICTJ Briefing Paper, May 2011, 3, available at: .ictj.org/publication/fighting-past-impunity-bangladesh-national-tribunal-crimes-1971 (hereinafter: ICTJ Briefing Paper).

1582. See International Commission of Jurists, *The Events in East Pakistan, 1971: A Legal Study*, June 1, 1972, icj.org/the-events-in-east-pakistan-1971-a-legal-study/.

1583. Suzannah Linton, "Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation, *Int. Criminal Law Forum* 21, no. 2 (2010): 208.

1584. Robertson Report, 51.

1585. ICTJ Briefing Paper, 4.

1586. The International Crimes (Tribunals) (Amendment) Act, Act No. 55 of 2009, July 24, 2009, available at: parliament.gov.bd/14%20July%202009(5699-5701)(2).pdf (hereinafter: ICT Act). For an analysis of the revisions, see International Review of the Red Cross, *National Implementation of International Humanitarian Law: Biannual Update, January–June 2010*, 92, no. 879 (September 2010).

1587. International Crimes Tribunal-1, *Bangladesh*, available at: ict-bd.org/ict1/indexdetails.php (assessed October 4, 2017). See "Second War Tribunal by This Month," *Daily Star*, March 18, 2012, available at: thedailystar.net/newDesign/news-details.php?nid=226766. The second chamber shared one judge, Justice ATM Fazle Kabir, who heard the case against Delewar Hossain Sayedee in the ICT first chamber. See Steven Kay, *The Moving Judge and the Replacement Judge: Bangladesh International Crimes Tribunal and Interference by the Government with the Legal Process*, blog post, April 23, 2012, available at: internationallawbureau.com/blog/?p=4616.

1588. ICT Act, Preamble.

1589. Linton, "Completing the Circle," 209.

1590. Ibid., 210.

1591. ICT Act, Article 3(1).

1592. ICT Act, Article 3(2).

1593. Robertson Report, 54.

1594. For a discussion on the crime of genocide before the ICT, see Sarmila Bose, "The Question of Genocide and the Quest for Justice in the 1971 War," *Journal of Genocide Research* 13, no. 4 (2011): 393–419; Morten Bergsmo and Elisa Novic. "Justice after Decades in Bangladesh: National Trials for International Crimes," *Journal of Genocide Research* 13, no. 4 (2011): 503–10.

1595. For an extensive discussion on the Subject Matter Jurisdiction of the ICT, see Linton, "Completing the Circle," 191–311.

1596. ICT Act, Article 3(1).

1597. ICT Act, Article 5(1).

1598. ICT Act, Article 4.

1599. Robertson Report, 55–58.

1600. Article 20 (2) of the ICT Act states, "Upon conviction of an accused person, the tribunal shall award sentence of death, or such other punishment proportionate to the gravity of the crime as appears to the Tribunal to be just and proper." Article 6 of the ICCPR regarding the right to life states, "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court," and also, "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases."

1601. Robertson Report, 71–80; also see Amnesty International, *Bangladesh Must Overturn All Death Sentences*, October 1, 2013, available at: amnesty.org/en/latest/news/2013/10/bangladesh-mp-war-crimes-death-penalty.

1602. Constitution of the People's Repbulic of Bangladesh, December 16, 1972, available at: bdlaws.minlaw.gov.bd/pdf_part.php?id=367.

1603. Surabhi Chopra, "The International Crimes Tribunal in Bangladesh: Silencing Fair Comment," *Journal of Genocide Research* 17, no. 2015) 2).

1604. Rules of Procedure for International Crimes Tribunal, Bangladesh, June 28, 2011, available at: ictbdwatch.files.wordpress.com/2011/12/final_consolidated_ictbd_rop_28_june_2011.docx (hereinafter: ICT Rules of Procedure).

1605. ICT Act, Article 11(A).

1606. ICTJ Briefing Paper, 5.

1607. See International Crimes Tribunal-2, *Bangladesh*, available at: ict-bd.org/ict2/judgments.php.

1608. ICT Act, Article 21. For example, judicial replacements occurred in the Delowar Hossain Sayeedi case, the Motiur Rahman Nizami case, and the Ghulam Azam case.

1609. ICT Act, Article 6.

1610. Robertson Report, 57.

1611. ICT Act, Article 8(1).

1612. ICT Rules of Procedure, Chapter 2, "Powers and Functions of the Investigation Agency."

1613. Ibid., Article 17.

1614. Open Society Justice Initiative correspondence with former counsel before the ICT, November 2017.

1615. ICT ACT, Article 7.

1616. ICT Rules of Procedure, Article 60.

1617. ICT Rules of Procedure, Article 59.

1618. ICT Rules of Procedure, Article 62.

1619. See Human Rights Watch, *Letter to the Bangladesh Prime Minister regarding the International Crimes (Tribunals) Act,* May 18, 2011; also see self-published article by British defense counsel Steven Kay, QC, *Bangladesh: Its Constitution and The International Crimes (Tribunals) (Amendment) Act 2009*, October 2013, available at: internationallawbureau.com/blog/wp-content/.../Bangladesh_ICTAA_2009.pdf.

1620. ICT Rules of Procedure, Article 58(A).

1621. Human Rights Watch, *Bangladesh: Investigate Killing of Witness. Need to Protect Participants in War Crimes Court*, December 23, 2016, available at: hrw.org/news/2013/12/23/bangladesh-investigate-killing-witness; and International Forum for Democracy and Human Rights, *Defence Statement to the Media on the International Crimes Tribunal, Bangladesh*, July 13, 2013, available at: ifdhr.org/2013/07/defence-statement-to-the-media-on-the-international-crimes-tribunal-bangladesh/.

1622. The arrestees were Motiur Rahman Nizami, Abdul Quader Molla, Mohammad Kamaruzzaman, Ali Ahsan Mohammad Mujahid, and Delewar Hossain Sayedee. Most of the defendants were not initially held under warrants issued by the ICT.

1623. "Bangladesh War Crimes: First Charges Filed," *BBC*, October 3, 2011, available at: bbc.com/news/world-south-asia-15147098 and "Bangladesh Profile Timeline," *BBC*, available at: bbc.com/news/world-south-asia-12651483.

1624. International Crimes Tribunal-1, *Bangladesh, Judgments*, available at: ict-bd.org/ict1/judgments.php and International Crimes Tribunal-2, *Bangladesh, Judgments*, available at: ict-bd.org/ict2/judgments.php. Note that the ICT-2 only operated within the period from March 2013 until October 2015.

1625. ICT-1 and ICT-2, *Bangladesh, Judgments*.

1626. *Letter from US Ambassador-at-Large for War Crimes Issues Stephen Rapp to the Government of Bangladesh*, March 11, 2011.

1627. See D'Costa and Hossain, "Redress for Sexual Violence."

1628. Robertson Report, 65–68.

1629. "Trying War Crimes in Bangladesh: The Trial of the Birth of a Nation," *The Economist*, December 15, 2012, available at: economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain.

1630. Chopra, "The International Crimes Tribunal in Bangladesh: Silencing Fair Comment."

1631. Human Rights Watch, *Bangladesh: Guarantee Fair Trials for Independence-Era Crimes. Amendments to Tribunal's Rules Fall Short of International Standards*, July 11, 2016.

1632. Robertson Report, 124.

1633. UN Working Group on Arbitrary Detention, Opinion No. 66/2011 (Bangladesh) December 26, 2011; and UN Working Group on Arbitrary Detention, Opinion No. 66/2012 (Bangladesh) November 23, 2012, available at: ap.ohchr.org/documents/alldocs.aspx?doc_id=22020.

1634. International Crisis Group, *Mapping Bangladesh's Political Crisis*, Asia Report No. 264 (February 9, 2015), available at: crisisgroup.org/asia/south-asia/bangladesh/mapping-bangladesh-s-political-crisis; and Asian Centre for Human Rights, *Bangladesh: Polarisation, Political Violence and an Undeclared Civil War* (New Delhi: Asian Centre for Human Rights, 2015), available at: achrweb.org/reports/bangla/Bangladesh2015-01.pdf.

1635. Robertson Report, 13.

1636. Ibid., 107.

1637. ICG, *Mapping Bangladesh's Political Crisis*, 17.

1638. Beth van Schaak, *The Bangladesh International Crimes Tribunal (BICT): Complementarity Gone Bad*, October 8, 2014, available at: ilg2.org/2014/10/08/the-bangladesh-international-crimes-tribunal-bict-complementarity-gone-bad/.

1639. "Bangladesh's War-crimes Trials: Final Sentence," *The Economist*, September 17, 2013, available at: economist.com/blogs/banyan/2013/09/bangladesh-s-war-crimes-trials.

1640. Robertson Report, 121.

1641. International Crisis Group, *Mapping Bangladesh's Political Crisis*, 19.

1642. ICTJ Briefing Paper, 4. Also see Richard Rogers, "International Crimes and the Tribunal in Bangladesh," *Forum*, 6, no. 2 (May 2012), available at: archive.thedailystar.net/forum/2012/May/international.htm.

1643. Robertson Report, 118.

1644. The Ambassador-at-Large for War Crimes Issues of the U.S. State Department, Stephen Rapp, visited Bangladesh in January 2011, meeting with ICT and government officials. A March 2011 letter from Ambassador Rapp to the Bangladeshi justice authorities, with detailed recommendations for remedying procedural and structural deficiencies of the ICT, was leaked to the press and is widely quoted by human rights organizations and

court monitors. See *Letter from US Ambassador-at-Large for War Crimes Issues Stephen Rapp to the Government of Bangladesh*, March 21, 2011 (on file).

1645. A blog maintained by David Bergman is the best source of information about the ICT, but is not comprehensive or always up-to-date. See *Bangladesh War Crimes Tribunal*, available at: bangladeshwarcrimes.blogspot.co.uk/.
1646. See *The Bangladesh Trial Observer*, available at: bangladeshtrialobserver.org/category/daily-summaries/.
1647. See Cambodia Tribunal Monitor, *Historical Overview of the Khmer Rouge*, available at: cambodiatribunal.org/history/khmer-rouge-history. The history is drawn upon contributions from the Documentation Center of Cambodia (DC-Cam), including *A History of Democratic Kampuchea (1975–1979)*, by Khamboly Dy.
1648. See Cambodia Tribunal Monitor, *Historical Overview of the Khmer Rouge*.
1649. Mark Ellis, *The ECCC: A Failure of Credibility*, International Bar Association, February 2012.
1650. The Open Society Justice Initiative has called for an international Commission of Inquiry to investigate allegations of judicial misconduct against the OCIJ for failing to properly investigate Cases 003 and 004. In October 2011, international co-investigating Judge Siegfried Blunk left the ECCC amidst "allegations of misconduct, centered on the lack of independence, judicial misconduct and incompetence in failure … to properly investigate the cases of five former Khmer Rouge figures in the tribunal's Cases 003 and 004." Judge Blunk's resignation followed the June 2011 resignation of several of the judge's international staff, in protest over the closure of Case 003 investigations. See Open Society Justice Initiative, *Recent Developments at the ECCC*, November 2011. The international judges of the PTC, writing a minority opinion in a decision split along national and international lines, criticized the Case 003 investigations and suggested that the co-investigating judges engaged in judicial misconduct. See *Considerations of the Pre-Trial Chamber* regarding the appeal against order on the admissibility of civil party application, Robert Hamill, Document Number: D11/2/4/4, Opinion of Judges Lahuis and Downing, October 25, 2011, available at: www.eccc.gov.kh/sites/default/files/documents/courtdoc/D11_2_4_4_Redacted_EN.PDF.
1651. *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, paras. 126–30, UN Doc. S/1999/231, A/53/850.
1652. See Kaustuv Kanti Bandyopadhyay and Thida Khus, *Changing Civil Society in Cambodia: In Search of Relevance*," Society for Participatory Research in Asia, 2013, available at: pria.org/docs/Changing-Civil-Society_Cambodia.pdf.
1653. See Asian Human Rights Commission, *Cambodia: Civil Society Expresses Concern over Recent Developments in the Extraordinary Chambers in the Courts of Cambodia, and Urges the International Community to Speak Out*, May 20, 2011, available at: www.humanrights.asia/news/forwarded-news/AHRC-FPR-025-2011.
1654. The law was amended in 2004, following the Framework Agreement with the UN. See, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea Article 1, NS/RKM/1004/006, as amended October 27, 2004 (hereinafter: ECCC Law).
1655. Resolution Adopted by the General Assembly, February 27, 2003, A/RES/57/228.
1656. Mark Ellis of the International Bar Association writes that "the deficiencies of the ECCC began with a failure of leadership on the part of the international community, best exemplified by the General Assembly's Resolution favoring a quicker conclusion of

the Khmer Rouge court negotiations over the principles of fair and independent trials. In the Cambodia negotiations the Secretary-General specifically noted that rather than a mandate to pursue international standards, there was a mandate to quickly establish a court under the framework of the ECCC Law passed by the Cambodian government in 2001. The problems associated with the ECCC did not arise from a failure of ideas. Rather these problems are a result of a failure of the international community to ensure that the Court meets international standards of fairness." Mark Ellis, *Safeguarding Judicial Independence in Mixed Tribunals: Lessons from the ECCC and Best Practices for the Future*, International Bar Association, September 2011, 45, available at: http://www.cambodiatribunal.org/sites/default/files/reports/Cambodia%20report%20%28Sept%202011%29.pdf.

1657. 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, U.N.-Cambodia, Article 2, June 6, 2003, available at: eccc.gov.kh/en/documents/legal/agreement-between-united-nations-and-royal-government-cambodia-concerning-prosecutio (hereinafter: Framework Agreement).

1658. The interim period involved the drafting of the Internal Rules. The first Introductory Submissions from the co-prosecutors were forwarded in July, 2007, at which point the defendants were considered to be "charged" in the parlance of international criminal law.

1659. See Christopher M. Rassi, "Lessons Learned from the Iraqi High Tribunal: The Need for an International Independent Investigation," Case W. Res. J. *Int'l L. 39 (2006)*: 215.

1660. Report of the Group of Experts for Cambodia *Established Pursuant to General Assembly Resolution 52/135, para. 137,* UN Doc. S/1999/231, A/53/850.

1661. Ibid.

1662. Alternately, the Group of Experts recommended the UN Security Council use authority under Chapter VI and IV to create an ad hoc tribunal. The proposed tribunal would have a majority of international judges, with at least one Cambodian judge. See ibid.

1663. ECCC Law.

1664. Internal Rules of the ECCC (Rev. 9, August 2011), Article 53(1).

1665. Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: November 2011*, 13, available at: opensocietyfoundations.org/sites/default/files/eccc-developments-20111114.pdf.

1666. Internal Rules of the ECCC (Rev. 9, January 2015), Rule 67.

1667. The international component is administered by the United Nations Assistance to the Khmer Rouge Tribunal.

1668. Open Society Justice Initiative, *The Duch Trial at the Extraordinary Chambers in the Courts of Cambodia,* March 2009.

1669. See ECCC, Victims Support UNIT, available at: eccc.gov.kh/en/victims-support.

1670. See Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, noting that the judges, for determinations in civil party applications in Cases 003 and 004, used erroneous standards that are at times inconsistent with their own prior rulings on who qualifies to be represented as a victim and granted civil party status: "The judges' erroneous decision-making led them to question the credibility of victim complaints without any justification and advance new theories of victimhood that have no precedent in international criminal law or

in the civil law tradition. … If applied to the *Duch* case, these new "theories" would [have]result[ed] in the exclusion of up to 95% of those granted civil party status by the trial chamber. … The co-investigating judges also neglected to recognize lawyers representing civil party applicants, and either refused to grant the lawyers access to the case files, or systematically ignored their requests for same." Ibid., 17.

1671. See Internal Rule 23 *quniquies* in the *Duch* trial, the ECCC used a March 2009 version of the Internal Rules. Reparations provisions were broadened in a September 2010 revision and have since been revised again in August 2011. For more on reparations at the ECCC, see also Ruben Carranza, *Practical, Feasible and Meaningful: How the Khmer Rouge Tribunal Can Fulfill Its Reparations Mandate*, International Center for Transitional Justice, November 10, 2009.

1672. See *Duch* Judgment (Trial Chamber), Case No. 001/18-07-2007/ECCC/TC, Judgment, paras. 667–75, July 26, 2010, available at: eccc.gov.kh/english/cabinet/courtDoc/635/20100726_Judgement_Case_001_ENG_PUBLIC.pdf.

1673. *Report of the Group of Experts for Cambodia*, paras. 165–75.

1674. Ibid., para. 171.

1675. Open Society Justice Initiative, *Recent Developments at the ECCC,* June 2011, 37.

1676. See Olga Martin-Ortega and Johanna Herman, "Hybrid Tribunals & the Rule of Law: Notes from Bosnia & Herzegovina & Cambodia," 13, JAD-PbP Working Paper Series No. 7, May 2010; published as "The Impact of Hybrid Tribunals: Current Practice in Bosnia and Herzegovina and Cambodia," in *Contested Transitions: Dilemmas of Transitional Justice in Colombia and Comparative Experience, ed.* Michael Reed and Amanda Lyons, 230–59 (Bogota: International Center for Transitional Justice, 2011).

1677. Under the super-majority rule, four judges must sign off on each decision for it to be valid.

1678. UC Berkeley Human Rights Center, *After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the ECCC*, June 2011, finding that "of those who had heard about the ECCC at least occasionally, the main sources of information were television … and radio."

1679. ICTJ, *Report of the ICTJ-ECCC Workshop on Outreach Strategies in International and Hybrid Courts*, Phnom Pen, April 2010.

1680. UC Berkeley Human Rights Center, *After the First Trial*.

1681. ICTJ, *Report of the ICTJ-ECCC Workshop on Outreach Strategies*.

1682. Ibid.

1683. UC Berkeley Human Rights Center, *After the First Trial*.

1684. Ibid.

1685. Such tasks include providing information to victims and explaining the legal structure of the court to public audiences.

1686. ICTJ, *Report of the ICTJ-ECCC Workshop on Outreach Strategies*.

1687. Open Society Justice Initiative, *Recent Developments at the ECCC,* February 2012.

1688. UC Berkeley Human Rights Center, *After the First Trial*.

1689. Interview with Clair Duffy, trial monitor for the Open Society Justice Initiative. Meetings between the international coprosecutor, the head international judge, and the deputy director of administration to coordinate administrative matters were alleged to be improper (or appear improper) by the defense, which filed a motion for the disqualification of the judge. The motion was rejected, but highlighted the gap

in the legal framework of the ECCC—a gap normally filled in the statutes of other international criminal tribunals, through the roles of a president or registrar.

1690. The full appeal judgment is available on the ECCC website, available at: eccc.gov.kh.

1691. In response to an appeal from that finding, the Trial Chamber ordered Ieng Thirith to be placed on a treatment plan, pending review to determine whether her fitness to stand trial has improved.

1692. Under Internal Rule 89*ter*, adopted in February 2011, the ECCC allowed for the "separation of proceedings in relation to one or several accused and concerning part of the entirety of the charges contained in an Indictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate."

1693. Severance Order Pursuant to Internal Rule 89*ter*, September 22, 2011, available at: eccc.gov.kh/sites/default/files/documents/courtdoc/E124_EN.PDF. See also "Press Release: Severance of Proceedings Ordered in Case 002," September 22, 2011, available at: eccc.gov.kh/sites/default/files/media/ECCC%2022%20September%202011-Eng.pdf. See also Open Society Justice Initiative, *Recent Developments at the ECCC*, February 2012.

1694. Open Society Justice Initiative, *Recent Developments at the ECCC: A Critical Supreme Court Affirms Life Sentences*, November 2016, available at: opensocietyfoundations.org/sites/default/files/recent-developments-eccc-december-2016-20161201.pdf.

1695. "Closing Statements in Case 002/2 Conclude," ECCC press release, June 23, 2017, available at: eccc.gov.kh/en/articles/closing-statements-case-00202-conclude.

1696. Top Cambodian government officials, including Prime Minister Hun Sen, a former Khmer Rouge official, have publicly stated that Cases 003 and 004 will not proceed. In October 2010, Prime Minister Hun Sen said that "Case 003 will not be allowed. … The Court will try the four senior leaders successfully and then finish with Case 002. "Hun Sen to Ban Ki-Moon: Case 002 Last Trial at ECCC," *The Phnom Penh Post*, October 27, 2010.

1697. See Open Society Justice Initiative, *Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia*, 2016.

1698. See UC Berkeley Human Rights Center, *After the First Trial*; see also UC Berkeley Human Rights Center, *So We Will Never Forget: A Population-Based Survey on Attitudes about Social Reconstruction and the ECCC* (January 2009). See also *International Republican Institute: Survey on Cambodian Public Opinion*, July 31–August 26, 2009. The 2011 report found that "attitudes toward the ECCC remained positive and had become more favorable [since 2009] on certain indicators. A vast majority of respondents believed the Court would respond to the crimes committed by the Khmer Rouge (84%); help rebuild trust in Cambodia (82%); help promote national reconciliation (81%); and bring justice to the victims of the Khmer Rouge regime (76%)."

1699. See United Nations Office of the High Commissioner for Human Rights, *International Justice and Human Rights: Supporting the Legacy of Cambodia's Extraordinary Chambers*, available at: cambodia.ohchr.org/EN/PagesFiles/ECCC_legacy_program.htm. For an incomplete overview of legacy initiatives at the ECCC, see Tessa Bialek, *Legacy at the Extraordinary Chambers in the Courts of Cambodia*, DC-CAM, Summer 2011, available at: d.dccam.org/Abouts/Intern/Tessa_Bialek_Legacy_FINAL.pdf. A handbook for legal practitioners, intended to transfer knowledge of ECCC law and practice to national courts, is under development by the East-West Management Institute Legacy Project on Cambodian Criminal Procedure.

1700. See S. Linton, "Putting Cambodia's Extraordinary Chambers into Context," *Singapore Year Book of International Law* 11, no. 195 (2007): 205–7, for the view that training has not successfully developed capacity of the national system, available at: law.nus.edu.sg/sybil/downloads/articles/SYBIL-2007/SYBIL-2007-195.pdf.

1701. Open Society Justice Initiative, *Performance and Perception*, 101.

1702. "The expenses and salaries of the Extraordinary Chambers shall be as follows:

    1. The expenses and salaries of the Cambodian administrative officials and staff, the Cambodian judges and reserve judges [etc.] shall be borne by the Cambodian national budget;
    2. The expenses of the foreign [officials, staff, and judges] ... shall be borne by the United Nations;
    3. The defence counsel may receive fees for mounting the defence;
    4. The Extraordinary Chambers may receive additional assistance for their expenses from other voluntary funds contributed by foreign governments, international institutions, non-governmental organizations, and other persons wishing to assist the proceedings."

1703. *ECCC Financial Outlook as at 31 January 2015*, available at: eccc.gov.kh/sites/default/files/Financial_Outlook_31%20_January_%202015.pdf.

1704. 2010—US$30.7 million; 2011—US$32 million; 2012—US$34.3 million; 2013—US$35.4 million; 2014—US$27.8 million; 2015—US$33.7 million. See *ECCC Expenditures as at 30 September 2013*, available at: eccc.gov.kh/sites/default/files/Financial%20Outlook%20-%2030%20Sept%202013%20FINAL.pdf.

1705. *ECCC Financial Outlook as at 31 January 2015*.

1706. Open Society Justice Initiative, *Recent Developments at the ECCC*, February 2012. For example, Japan has made significant contributions to both national and international sides of the court, but the United States has only provided funding to the international side. In addition, Germany has earmarked funding, for example, to support the Victims' Support Section. See *ECCC Financial Outlook as at 31 January 2015*, available at: eccc.gov.kh/sites/default/files/Financial_Outlook_31%20_January_%202015.pdf.

1707. See, for example, FIDH, *The ECCC Funding Crisis Must Be Swiftly Resolved*, September 20, 2013, available at: fidh.org/International-Federation-for-Human-Rights/asia/cambodia/eccc/the-eccc-funding-crisis-must-be-swiftly-resolved-13961.

1708. See UN Deputy Secretary-General, "Cambodia, Partners Must Address Chronic Financial Crisis Affecting Extraordinary Chambers, Deputy Secretary-General Tells Pledging Conference," press release, November 7, 2013, available at: un.org/press/en/2013/dsgsm723.doc.htm. See, for example, David Scheffer, "No Way to Fund a War Crimes Tribunal," *New York Times*, August 28, 2012, "This is no way to fund a major war-crimes tribunal with a historic mandate to achieve accountability, finally, for one of the 20th century's worst slaughters of innocent civilians. Voluntary government assistance for war crimes tribunals is a speculative venture at best, and depends on so many unpredictable variables as years roll by that the original objective is sometimes forgotten."

1709. Open Society Justice Initiative, *Recent Developments at the ECCC*, June 2011.

1710. Framework Agreement, Articles 19–21.

1711. Ellis, *The ECCC: A Failure of Credibility*.

1712. Ibid.

1713. Ibid.

1714. Ibid.

1715. Open Society Justice Initiative, *Recent Developments at the ECCC,* February 2012, 25.

1716. This report uses the term "East Timor," to refer to the country prior to sovereign independence in 2002, and "Timor-Leste" when referencing events clearly occurring after this time.

1717. World Bank, *Timor-Leste Overview*, available at: web.worldbank.org.

1718. Amnesty International, *Timor-Leste: Submission to the UN Committee on the Elimination of Discrimination against Women*, 2015.

1719. Memorandum of Understanding between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial, and Human Rights Related Matters, April 5–6, 2000, Section. 1.2, s. 2 (c) and s. 9.

1720. Megan Hirst and Howard Varney, *Justice Abandoned: An Assessment of the Serious Crimes Process in East Timor*, 11–12, ICTJ, 2005.

1721. See *Freedom House: Freedom in the World Report, East Timor 2011*, available at: freedomhouse.org/report/freedom-world/2011/east-timor.

1722. Michael Leach, "Concerns over Judicial Independence in Timor-Leste," *East Asia Forum*, October 31, 2014, available at: eastasiaforum.org/2014/10/31/concerns-over-judicial-independence-in-timor-leste/.

1723. Amnesty International, *Timor-Leste: Still No Justice for Past Human Rights Violations. Amnesty Interational Submission to the UN Universal Periodic Review*, November 2016, 4.

1724. See UNDP, *Situation Analysis of Civil Society Organizations in East Timor*, 2002; Helder Da Costa, *East Timor: The Role of Civil Society in Conflict Prevent and Peacebuilding*, European Center for Conflict Prevention, 2005, available at: conflict-prevention.net; Janet Hunt, "Building a New Society: NGOs in East Timor," *New Community Quarterly*, 2, no. 1 (2004).

1725. See Caitlin Reiger, "Hybrid Attempts at Accountability for Serious Crimes in Timor-Leste," in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, ed. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge, Cambridge University Press, 2006), 146. Reiger writes, "Indonesia's fragile democratic development after the fall of the Suharto regime was still dependent on the support of the powerful military, whose actions would have been directly challenged by the establishment of an international tribunal, a risk that the Security Council was not prepared to take." It should be noted that UN Regulation 2000/15 explicitly noted that the creation of the Dili Panels would "not preclude the jurisdiction of an international tribunal for East Timor … once such a tribunal is established."

1726. Caitlin Reiger and Marieke Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect*, ICTJ, March 2006, 12.

1727. Ibid.

1728. UNTAET Regulation No. 2000/15.

1729. Reiger and Wierda, *The Serious Crimes Process in Timor-Leste*, 24.

1730. Hirst and Varney, *Justice Abandoned*, 21.

1731. Reiger, *Hybrid Attempts at Accountability*, 158.

1732. Reiger and Wierda, *The Serious Crimes Process in Timor-Leste*, 39.

1733. Hirst and Varney, *Justice Abandoned*, 10.

1734. UN Security Council, *Report of the Secretary-General on Justice and Reconciliation for Timor-Leste*, S/2006/580, July 26, 2006, 3.

1735. One hundred and eighty-six cases had been investigated but no one had been indicted, and over 400 murder cases had yet to be investigated. See Amnesty International, *Timor-Leste: Submission to the UN Committee on the Elimination of Discrimination Against Women*, 7.

1736. UNTAET Regulation 2001/10 of 13 July 2001.

1737. Ibid.

1738. Memorandum of Understanding between the Office of the General Prosecutor (OGP) and the Commission for Reception, Truth and Reconciliation (CAVR) Regarding the Working Relationship and Exchange of Information between the Two Institutions, signed by Longuinhos Monteiro, the general prosecutor, and Aniceto Guterres Lopes, chairperson of the Commission for Reception, Truth and Reconciliation, on June 4, 2002.

1739. No Peace Without Justice, Closing the G*ap: The Role of Non-Judicial Mechanisms in Addressing Impunity, 2010,* 81.

1740. Chega: The Report o*f the Commission for Reception, Truth and Reconciliation in Timor-Leste. Part 2: The Mandate of the Commission, 6, available at:* www.cavr-timorleste.org/en/chegaReport.htm.

1741. No Peace Without Justice, Closing *the Gap*, 169.

1742. Reiger and Wierda, *The Serious Crimes Process in Timor-Leste*, 27.

1743. International Center for Transitional Justice, *After 10 Years, CAVR Report Still Resonates in Timor-Leste and around the World*, February 23, 2016, available at: ictj.org/news/10-years-cavr-report-timor-leste-truth.

1744. Amnesty International, *Timor-Leste: Still No Justice for Past Human Rights Violations*, November 2016, 6.

1745. Ibid., 3.

1746. SCIT was created by Security Council Resolution 1704 (2006), extending the UN Integrated Mission in Timor-Leste (UNMIT), ahead of 2007 elections. Para 4(i) requested UNMIT "to assist the Office of the Prosecutor-General of Timor-Leste, through the provision of a team of experienced investigative personnel, to resume investigative functions of the former Serious Crimes Unit, with a view to completing investigations into outstanding cases of serious human rights violations committed in the country in 1999."

1747. As opposed to voluntary contributions made at the discretion of member states, assessed contributions are payments made as part of obligations that members undertake when signing treaties. At the UN, the scale of assessment is determined every third year. See betterworldcampaign.org/issues/funding/the-un-budget-process.html and also globalpolicy.org/un-finance/tables-and-charts-on-un-finance/member-states-assessed-share-of-the-un-budget.html.

1748. James Kirk and Carlito da Costa Boba, Impunity in T*imor-Leste: Can the Serious Crimes Investigation Team Make a Difference?,* ICTJ, 2010, 20.

1749. ICTJ, Prosecutions *of Crimes against Humanity in Timor-Leste: A Case Analysis, June 2011.*

1750. Amnesty International, Timor-*Leste: Still No Justice for Past Human Rights Violations, 6.*

1751. Ibid.

1752. Ibid.

1753. *Report to the Secretary-General of the Commissions of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste in 1999*, May 26, 2005, 23, para. 99.

1754. Reiger and Wierda, *The Serious Crimes Process in Timor-Leste*, 30.

1755. David Cohen, "Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?" *Asia Pacific Issues* 61, no. 1 (2002).

1756. See Reiger and Wierda, *The Serious Crimes Process in Timor-Leste*, 30, see also ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf.

1757. Ibid.

1758. *Report to the Secretary-General of the Commissions of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste in 1999*, May 26, 2005, para. 104.

1759. Ibid., para. 93.

1760. Reiger and Wierda, *The Serious Crimes Process in Timor-Leste*, 31.

1761. International Bar Association, "Special Panel for Serious Crimes (East Timor)," available at: ibanet.org/Committees/WCC_EastTimor.aspx.

1762. See JSMP website, jsmp.tl/en/about-jsmp/.