

# Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia

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## I. INTRODUCTION

¶1 The time for justice is running out. Over thirty years have passed since the Khmer Rouge took over Cambodia's capital, Phnom Penh, and overthrew the Khmer Republic in order to carry out their violent plan to transform Cambodia into an agrarian, communist society.<sup>1</sup> From April 1975 until January 1979, the Khmer Rouge subjected citizens to forced labor, torture and genocide.<sup>2</sup> Two to three million Cambodians were forced to evacuate their urban homes and ordered into slave labor in the countryside.<sup>3</sup> By the close of 1979, nearly one-fifth of the Cambodian population had been decimated by the Khmer Rouge.<sup>4</sup>

¶2 The Khmer Rouge leaders are responsible for the deaths of 1.7 million<sup>5</sup> of their own countrymen and to the present day have not been held accountable.<sup>6</sup> The debate over the appropriate mechanism by which to try the Khmer Rouge leaders for their crimes was so protracted that members of the Khmer Rouge have been aging and some dying; leaving victims and their families without hope of bringing the Khmer Rouge leaders to justice.<sup>7</sup> Pol Pot, the highest ranking Khmer Rouge leader known as "Brother

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<sup>1</sup> Rachel S. Taylor, *Better Late Than Never*, in INTERNATIONAL AND COMPARATIVE CRIMINAL LAW SERIES, ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 237, 238-39 (Jane E. Stromseth ed., Transnational Publishers 2003).

<sup>2</sup> *Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council*, 53rd Sess., Agenda Item 110(b), U.N. Doc. A/53/850 at 2 (1999).

<sup>3</sup> TAYLOR, *supra* note 1, at 239.

<sup>4</sup> *The Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135*, 53rd Sess., Agenda Item 110(b), U.N. Doc. A/53/850, at 5 (1999). [hereinafter GROUP OF EXPERTS REPORT].

<sup>5</sup> *Cf. id.*, at 13. This source notes: "Scholars and Governments have offered differing totals for the number of Cambodians killed by the Khmer Rouge. Scholars have separately arrived at figures of 1.5 million and nearly 1.7 million. There was a sharp disparity among victim groups. One study posits close to a 100 per cent death rate for rural and urban ethnic Vietnamese, 25 per cent for urban and rural Khmer "new people", and 15 per cent for rural Khmer 'base people.' Overall, the various estimates point to a death rate of approximately 20 per cent of the April 1975 population of 7.3 to 7.9 million people. Historians of Cambodia have rejected the figure of 2 to 3 million that has often been used by the Governments in Cambodia since 1979, as well as in some popular accounts."

<sup>6</sup> Scott Luftglass, *Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge*, 90 VA. L. REV. 893, 895 (2004).

<sup>7</sup> TAYLOR, *supra* note 1, at 237-38.

Number One,” died in 1998 and four years later Ke Pauk, another former Khmer Rouge leader, also died.<sup>8</sup> Both men died with their freedom, never having to face accountability for their brutal crimes.

¶3 On May 13, 2003, after years of negotiations regarding the judicial mechanism through which the Khmer Rouge should be brought to justice, the United Nations and Cambodian Government approved the “Draft Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution of Crimes Committed during the Period of Democratic Kampuchea” (March Agreement).<sup>9</sup> The March Agreement consists of thirty-two articles and establishes the special chambers within the Cambodian court structure to prosecute former members of the Khmer Rouge.<sup>10</sup> The tribunal, which will follow Cambodian law and utilize a combination of Cambodian and international judges,<sup>11</sup> represents a new and untested approach to the prosecution of war crimes.<sup>12</sup> In contrast to the completely international tribunals established in Yugoslavia and Rwanda, the Khmer Rouge tribunal combines a minority of international judges and a majority of Cambodian judges to form a joint tribunal located in Cambodia.<sup>13</sup> Article 3 of the March Agreement establishes that the Trial Chambers shall be composed of three Cambodian judges and two international judges, while the Supreme Court Chamber, which will serve as the appellate chamber and chamber of final instance, shall consist of four Cambodian judges and three international judges.<sup>14</sup>

¶4 The establishment of the joint tribunal as the accountability mechanism for trying former members of the Khmer Rouge is controversial, largely due to concerns that its structure is flawed and is, therefore, unlikely to effectively administer justice.<sup>15</sup> The features of the tribunal, which present risks to its success, include: (1) lack of judicial independence due to interference by political manipulation of the Cambodian government,<sup>16</sup> (2) no independent, international prosecutor,<sup>17</sup> (3) the limited number of competent Cambodian judges<sup>18</sup> and (4) a flawed supermajority formula.<sup>19</sup> On March 31, 2003, United Nations Secretary-General Kofi Annan expressed concern over these risks in his report to the General Assembly on the March Agreement.<sup>20</sup>

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

<sup>9</sup> *Draft Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, U.N. GAOR 3D Comm., 57<sup>th</sup> Sess., Annex, Agenda Item 109(b), U.N. Doc. A/57/806 (2003) [hereinafter MARCH AGREEMENT].

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at Arts. 3, 12. Article 12 further states that “Where Cambodia law does not deal with a particular matter, or where there is uncertainty regarding the application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such rule with international standards, guidance may also be sought in procedural rules established at the international level.”

<sup>12</sup> Gerald V. May III, *An Unlikely Culprit: Examining the U.N.’s Counterproductive Role in the Negotiations Over a Khmer Rouge Tribunal*, 27 B.C. INT’L & COMP. L. REV. 147, 149 (2004).

<sup>13</sup> *Id.* at 150.

<sup>14</sup> MARCH AGREEMENT, *supra* note 9, at Art. 3.

<sup>15</sup> Human Rights Watch, *Serious Flaw: Why the U.N. General Assembly Should require Changes to the Draft Khmer Rouge Tribunal Agreement*, <http://hrw.org/backgrounder/asia/cambodia043003-bck.pdf> [hereinafter HUMAN RIGHTS WATCH, *Serious Flaw*].

<sup>16</sup> *Id.* at 3-4.

<sup>17</sup> *Id.* at 4-5.

<sup>18</sup> LUFTGLASS, *supra* note 6, at 897.

<sup>19</sup> HUMAN RIGHTS WATCH, *Serious Flaw*, *supra* note 15, at 5-6.

<sup>20</sup> *Id.* at 1-2.

I cannot but recall the reports of my Special Representative for human rights in Cambodia, who has consistently found there to be little respect on the part of Cambodian courts for the most elementary features of the right to a fair trial. I consequently remain concerned that these important provisions of the draft agreement might not be fully respected by the Extraordinary Chambers and that established standards of international justice, fairness and due process might therefore not be ensured.

Furthermore in view of the clear finding of the General Assembly in resolution 57/225 that there are continued problems related to the rule of law and the functioning of the judiciary in Cambodia resulting in interference by the executive and with the independence of the judiciary, I would very much have preferred that the draft agreement provide for both of the Extraordinary Chambers to be composed of a majority of international judges . . . .<sup>21</sup>

The Security Council approved the March Agreement over the objections of the Secretariat and Kofi Annan.<sup>22</sup> Each of the concerns mentioned by Secretary-General Annan indicate that the structure of the joint tribunal, as devised in the March Agreement, may be flawed and collectively could result in the failure to provide justice for the victims of the Khmer Rouge.

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This Note will argue that the March Agreement fails to address the formidable risks involved in the establishment of a joint tribunal in Cambodia. The Cambodian government still exercises control over the Cambodian judiciary and the presence of a majority of Cambodian judges likely will cause the tribunal to lack credibility in the eyes of Cambodians and the international community.<sup>23</sup> Furthermore, the presence of international judges may prove to be an illusory safeguard, if they are unaware of governmental interference with the Cambodian judges. Part II of this Note will provide historical background on Cambodia during the Khmer Rouge regime and specifically focus on the misguided utopian philosophies of the Khmer Rouge and the human rights violations they committed in an effort to achieve their goals. Part III will trace the history of negotiations between Cambodia and the United Nations regarding the establishment of the joint tribunal and illustrate the lack of good faith exercised by the Cambodian government, which greatly prolonged the process. Part IV will address the structure of the tribunal and analyze the risks facing the joint tribunal. In closing, Part V contains a case study of the Special Court established in Sierra Leone and asserts that a Cambodian tribunal modeled after the Special Court may achieve several of the goals of the joint tribunal with substantially fewer risks.

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<sup>21</sup> *Report of the Secretary General on Khmer Rouge Trials*, 57th Sess., Agenda Item 109(b), at 11, U.N. Doc. A/57/769 (2003).

<sup>22</sup> Press release, *United Nations, General Assembly Approves Draft Agreement Between UN, Cambodia on Khmer Rouge Trials*, GA/10135 (May 13, 2003).

<sup>23</sup> HUMAN RIGHTS WATCH, *Serious Flaw*, *supra* note 15, at 1.

## II. HISTORICAL OVERVIEW

¶6 April 17, 1975 signified the end of a decade-long struggle for power in Cambodia and the beginning of one of the worst human rights tragedies of the twentieth century.<sup>24</sup> On that day, the Communist Party of the Kampuchea or Khmer Rouge took over Cambodia's capital, Phnom Penh, and overthrew the hereditary monarch, Prince Norodom Sihanouk, who ruled the Kingdom of Cambodia from independence in 1953 until 1970.<sup>25</sup> The events leading up to the fall of Phnom Penh weakened Cambodia's political structure paving the way for the Khmer Rouge takeover. Despite Sihanouk's efforts to marginalize the Khmer Rouge, support from Vietnamese Communist leaders enabled the Khmer Rouge to persist as a powerful political force.<sup>26</sup> Exactly one month before April 17, 1975, Prime Minister Lon Nol and Prince Sisowath Sirik Matak, Sihanouk's cousin, overthrew Prince Sihanouk in a bloodless coup, while Sihanouk was visiting the Soviet Union and China.<sup>27</sup> Prime Minister Lon Nol and Prince Sisowath Sirik Matak established the Khmer Republic, which was supported by the United States.<sup>28</sup> The allegiance between the Khmer Republic and the United States during the Vietnam War further fueled the fires of the Khmer Rouge.<sup>29</sup> The Khmer Rouge also had the support of North Vietnam and China.<sup>30</sup> Ironically, after being overthrown, Sihanouk established an opposition government and allied with the Khmer Rouge, the very group he had attempted to marginalize during his monarchy.<sup>31</sup> North Vietnam and China's support of the Khmer Rouge, coupled with the withdrawal of United States assistance in 1975, enabled the Khmer Rouge to secure power easily.<sup>32</sup>

A. *The Philosophy of the Khmer Rouge: The Push for Self-Reliance*

¶7 The misguided, utopian philosophies of the Khmer Rouge focused on the creation of a pure Khmer nation, "one completely sovereign and self-reliant, free from subjugation by foreign and class enemies."<sup>33</sup> The Khmer Rouge ideology has its roots in Marxism with the vision of creating a dictatorship of the proletariat.<sup>34</sup> The Khmer Rouge was, in large part, motivated by the fear that countries surrounding Cambodia, in particular Vietnam, were threatening to take over Cambodia.<sup>35</sup> In its quest for self-reliance, the Khmer Rouge sought to bring Cambodia to what it labeled "Year Zero," through the

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<sup>24</sup> JASON S. ABRAMS, STEVEN RATNER, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 267, (2<sup>nd</sup> ed., Oxford University Press 2001); SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 87 (Basic Books 2002); Yale University, *Cambodian Genocide Program, Introduction*, <http://www.yale.edu/cgp/cgpintro.html> (last visited January 20, 2006).

<sup>25</sup> ABRAMS & RATNER, *supra* note 24, at 267.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> ABRAMS & RATNER, *supra* note 24, at 267.

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

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> GROUP OF EXPERTS REPORT, *supra* note 4 at 8; ABRAMS & RATNER, *supra* note 24, at 267.

<sup>33</sup> ABRAMS & RATNER, *supra* note 24, at 267.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

creation of an agrarian utopia lacking any traces of modernity.<sup>36</sup> The regime launched a revolution in which “all pre-existing economic, social and cultural institutions were abolished, all foreign influences were expunged and the entire population was transformed into a collective work force.”<sup>37</sup> The Khmer Rouge set out to kill anyone who could possibly thwart its goal of creating a new society, including those among its own ranks whom were viewed as potential dissidents.<sup>38</sup> It perceived “intellectuals” such as doctors, teachers, lawyers, students and those capable of speaking a foreign language as particularly threatening.<sup>39</sup> The Khmer Rouge was also highly suspicious of former members of the Khmer Republic as well as religious figures and ethnic minorities.<sup>40</sup> The Khmer Rouge’s push toward a self-reliant system, driven by fear and paranoia, “eradicated money and markets, did away with private property, abolished formal education, shut hospitals, took children away from their parents, forced cultural minorities to abandon their customs, and destroyed organized religion.”<sup>41</sup>

*B. Implementation of the Khmer Rouge Vision of Society through Fear and Cruelty*

¶8 The first major step towards achieving this agrarian utopia involved the massive reorganization of the Cambodian population in 1978.<sup>42</sup> The Khmer Rouge divided the country into zones that were each further divided into sectors to effectively exert control over the population.<sup>43</sup> The Cambodian people were organized into agricultural cooperatives in the countryside that were supervised by committees appointed by the Khmer Rouge.<sup>44</sup> Phnom Penh served as the administrative center, through which the Khmer Rouge gave orders to regional and local officials.<sup>45</sup>

¶9 The Khmer Rouge efficiently implemented its plan to concentrate the population, forcing between two and three million people to evacuate the cities and march into the countryside within a week of overthrowing the Khmer Republic.<sup>46</sup> The merciless marches were indiscriminate and included the young, the elderly and the sick. Witnesses report horrifying images of patients in Phnom Penh hospitals being dragged from their beds and made to march, many dying en route.<sup>47</sup> Numerous people, who were healthy before the march, died during the journey, due to starvation, dehydration, disease and

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<sup>36</sup> MAY, *supra* note 12, at 149.

<sup>37</sup> GROUP OF EXPERTS REPORT, *supra* note 4 at 9.

<sup>38</sup> TAYLOR, *supra* note 1, at 239; See Theresa Klosterman, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?* 15 ARIZ. J. INT’L & COMP. LAW 803, 849 (1998).

<sup>39</sup> TAYLOR, *supra* note 1, at 239.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 240.

<sup>42</sup> GROUP OF EXPERTS REPORT, *supra* note 4, at 9.

<sup>43</sup> *Id.* By 1978, there were seven zones, which were further divided into 32 sectors. The sectors were then broken down into sub-districts and cooperatives.

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

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

lack of medicine.<sup>48</sup> Corpses rotted in the streets and disease was rampant.<sup>49</sup> Phnom Penh, once a busy capital, was transformed into an eerie ghost town of twenty thousand.<sup>50</sup>

¶10 The survivors of these marches were placed into communal labor teams and kept on grueling schedules in the rice fields, often being made to work seven days a week under the supervision of the Khmer Rouge overseers.<sup>51</sup> The unending labor was particularly traumatic for city dwellers unfamiliar with working in the fields.<sup>52</sup> Anyone who was too weak to work or refused to work was murdered, often within the presence of family members.<sup>53</sup>

¶11 After four torturous years, countless human rights violations and the deaths of nearly one-fifth of the population, the Khmer Rouge was finally deposed when Vietnamese troops invaded Cambodia in 1979.<sup>54</sup> The Vietnamese replaced the Khmer Rouge with the People's Republic of Kampuchea, ironically composed of some former Khmer Rouge members who had defected to Vietnam.<sup>55</sup> Hun Sen, a former Khmer Rouge soldier who was installed as the party's Foreign Minister, is currently the Prime Minister of Cambodia.<sup>56</sup> Hun Sen has proved to be uncooperative in the negotiations regarding the establishment of the joint tribunal, most likely in an effort to shield himself and his Khmer Rouge cadres from prosecution.<sup>57</sup>

### III. THE NEGOTIATIONS BETWEEN THE UNITED NATIONS AND CAMBODIA

¶12 Hun Sen's vehement opposition to an international tribunal coupled with his status as a former member of the Khmer Rouge casts a questionable light on his sincerity with regard to bringing the former leaders of the Khmer Rouge to justice. Hun Sen's comments that the Khmer Rouge were murderers lacks some effect due to the fact that he only defected as a soldier of the party when one of the many purges of the Khmer Rouge began to focus on his own ranks.<sup>58</sup> Additionally, there is evidence that Hun Sen's requests for international assistance with establishing a tribunal may have been strategic ploys to divert attention from the bloody military coup he staged in 1997 to overthrow the then First Prime Minister Norodom Ranariddh.<sup>59</sup> Hun Sen's motives, which appear to lack good faith, combined with his power as the Prime Minister and ability to interfere in the future trials, casts considerable doubt as to the appropriateness of a joint tribunal.

¶13 On June 21, 1997 former First Prime Minister Norodom Ranariddh and then Second Prime Minister Hun Sen wrote a letter to United Nations Secretary-General Kofi Annan requesting the

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<sup>48</sup> *Id.*

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

<sup>50</sup> *Id.*

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

<sup>52</sup> ABRAMS & RATNER, *supra* note 24, at 267.

<sup>53</sup> TAYLOR, *supra* note 1, at 240.

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

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

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Philip Shenon, *UN Plans Joint War Crimes Tribunal for Khmer Rouge*, N.Y. TIMES, Aug. 12, 1999, available at <http://www.globalpolicy.org/security/issues/cambodia/99-08-12.htm>.

<sup>59</sup> Seth Mydans, *Cambodia Purge Said to Claim 40 Victims*, N.Y. TIMES, July 16, 1997, at A8.

assistance of the United Nations and international community in bringing to justice those persons responsible for the genocide and/or crimes against humanity during the rule of the Khmer Rouge from 1975-1979 . . . .

. . . .

. . . We are aware of similar efforts to respond to the genocide and crimes against humanity in Rwanda and the former Yugoslavia, and ask that similar assistance be given to Cambodia. Cambodia does not have the resources or expertise to conduct this very important procedure

We believe that crimes of this magnitude are of concern to all persons in the world, as they greatly diminish respect for the most basic human right, the right to life. We hope that the United Nations and the international community can assist the Cambodian people in establishing the truth about this period and bringing those responsible to justice. Only in this way can this tragedy be brought to a full and final conclusion. . . .<sup>60</sup>

The letter appeared to be a promising invitation to create an international tribunal sponsored by the United Nations.<sup>61</sup> The specific request for assistance similar to that provided by the United Nations in establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were particularly misleading.<sup>62</sup> Cambodia's request did not reflect its true intentions, as it never intended to acquiesce to a predominantly international tribunal.<sup>63</sup> Furthermore, Hun Sen's motive for requesting assistance was also highly questionable. On July 5, 1997, Hun Sen overthrew Norodom Ranariddh and took power with a bloody military coup, killing more than forty political opponents.<sup>64</sup> The timing of Hun Sen's pursuit for international prosecution of the Khmer Rouge evokes suspicion that his motives were disingenuous. Hun Sen was extremely concerned with gaining international credibility and may have advocated international prosecution as a means of garnering credibility and diverting attention from the coup.<sup>65</sup>

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In response to Ranariddh and Sen's letter, the United Nations General Assembly adopted a December 12, 1997 resolution entitled "Situation of Human Rights in Cambodia."<sup>66</sup> This resolution was significant as it represented the United Nations' commitment to assisting the Cambodian government with the Khmer Rouge trials and gave the mandate to a United Nations group of experts to investigate possible means of

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<sup>60</sup> See Letter from Norodom Ranariddh, Cambodian First Prime Minister, and Hun Sen, Cambodian Second Prime Minister, to Secretary General Annan (June 21, 1997) [hereinafter LETTER FROM NORODOM RANARIDDH AND HUN SEN].

<sup>61</sup> LUFTGLASS, *supra* note 6, at 906.

<sup>62</sup> See LETTER FROM NORODOM RANARIDDH AND HUN SEN, *supra* note 60.

<sup>63</sup> LUFTGLASS, *supra* note 6, at 906.

<sup>64</sup> *Id.* at 907.

<sup>65</sup> LUFTGLASS, *supra* note 6, at 907.

<sup>66</sup> *Situation of Human Rights in Cambodia*, G.A. Res. 52/135, U.N. GAOR, 52nd Sess., 70th plen.mtg., Agenda Item 112(b), P 16, U.N. Doc. A/RES/52/135 (1998).

holding the Khmer Rouge accountable.<sup>67</sup> Paragraph 15 of the resolution acknowledges that

the most serious human rights violations in recent history have been committed by the Khmer Rouge and that their crimes, including the taking and killing of hostages, have continued to the present, and notes with concern that no Khmer Rouge leader has been brought to account for his crimes.<sup>68</sup>

Paragraph 16 of the resolution requests

the Secretary-General to examine the request by the Cambodian authorities for assistance in responding to past serious violations of Cambodian and international law, including the possibility of the appointment, by the Secretary-General, of a group of experts to evaluate the existing evidence and propose further measures, as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability.<sup>69</sup>

Pursuant to paragraph 16 of resolution 52/135, Secretary-General Kofi Annan established a “Group of Experts” with three main goals: “(1) to evaluate the existing evidence and determine the nature of the crimes committed; (2) to assess the feasibility of bringing Khmer Rouge leaders to justice; and (3) to explore options for trials before international or domestic courts.”<sup>70</sup> The United Nations Group of Experts (the Experts) traveled through Cambodia from July 1998 until February 1999, interviewing government and non-governmental officials, current Cambodian citizens and some survivors of the Khmer Rouge regime.<sup>71</sup> The Experts concluded that the Khmer Rouge had committed, *inter alia*, the international crime of genocide, crimes against humanity and war crimes.<sup>72</sup> Despite the difficulty with finding surviving witnesses, who could recall the events of over twenty years past and the problem of decaying physical evidence, the Experts found ample evidence to proceed with the prosecution of Khmer Rouge leaders.<sup>73</sup>

¶15 The Experts focused the bulk of their report on analyzing the various options for bringing the Khmer Rouge to justice.<sup>74</sup> In total, the Experts examined five tribunal options including: (1) a tribunal established under Cambodian Law, (2) a United Nations tribunal, (3) a Cambodian tribunal under United Nations administration (through a bilateral agreement between the United Nations and Cambodia), (4) an international tribunal established by multilateral treaty and (5) trials in states other than Cambodia.<sup>75</sup>

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<sup>67</sup> GROUP OF EXPERTS REPORT, *supra* note 4, at 5-8.

<sup>68</sup> G.A. RES. 52/135, *supra* note 66, at para.15.

<sup>69</sup> *Id.* at para. 16.

<sup>70</sup> Steven R. Ratner, *The United Nations Group of Experts for Cambodia*, 93 AM. J. INT’L L. 948, 949 (1999).

<sup>71</sup> *Id.*

<sup>72</sup> GROUP OF EXPERTS REPORT, *supra* note 4, at 16.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

The Experts cautioned that “the precarious state of the Cambodian domestic judicial system, the risk of political influence on the domestic courts, and the contentious international law issues involved,” indicate that the “establishment of an ad hoc United Nations tribunal seated in an Asia-Pacific nation-state other than Cambodia” would be the most prudent tribunal option.<sup>76</sup> The Experts also recommended an independent prosecutor, appointed by the United Nations, and even suggested that the Prosecutor from the International Criminal Tribunal for the Former Yugoslavia and International Tribunal for Rwanda assume this role.<sup>77</sup> In contrast to his request for United Nations assistance with the prosecutions, Hun Sen’s government dismissed the Experts’ conclusions and refused to consider a predominately international tribunal as a viable option.<sup>78</sup>

¶16 The United Nations devised a proposal for a tribunal with a majority of foreign personnel, hoping that the Cambodian government would accept the concept of a joint tribunal. The joint tribunal as proposed by United Nations Special Representative for Human Rights in Cambodia, Thomas Hammarberg, would contain a majority of international judges and an international prosecutor. Hun Sen rejected this proposal and the United Nations responded with a second proposal.<sup>79</sup> Under the second proposal the tribunal was to have one trial chamber and one appeals chamber to prosecute genocide and crimes against humanity.<sup>80</sup> This proposal struck a balance in that Cambodian personnel would be active participants in the trial alongside a majority of international personnel and the tribunal would function under the jurisdiction of Cambodian law with implementing legislation, before commencement of the trials.<sup>81</sup> Provided that they were appropriately qualified, the Cambodians would be able to nominate their own candidates for personnel positions and all tribunal personnel, international and domestic, would be appointed by the Secretary-General.<sup>82</sup> Hun Sen’s government rejected this second proposal.

¶17 After Cambodia rejected the second proposal, the United States entered into the negotiations.<sup>83</sup> In October 1999, the Cambodian government endorsed the United States’ proposal for a joint tribunal, however this agreement fell apart when the Cambodian government rejected it and replaced it with its own proposal for a domestic tribunal that would allow limited participation by foreign judges.<sup>84</sup> The Cambodian proposal was for a joint tribunal, but one that was fundamentally national in character.<sup>85</sup> The tribunal would have one trial chamber and two appeals chambers, with a majority of Cambodian personnel.<sup>86</sup> Another problematic aspect of the proposal is that it included a new definition of genocide, which violated the international law against retroactivity. This proposal serves as a prime example of the Cambodian government’s refusal to comply

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<sup>76</sup> LUFTGLASS, *supra* note 6, at 909.

<sup>77</sup> *Id.*; Craig Etcheson, International Law Weekend Proceedings: Accountability Beckons During a Year of Worries for the Khmer Rouge Leadership, 6 ILSA J. INT’L & COMP. L. 507, 510 (2000).

<sup>78</sup> LUFTGLASS, *supra* note 6, at 909.

<sup>79</sup> *Id.* at 910

<sup>80</sup> ETCHESON, *supra* note 77, at 511.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> LUFTGLASS, *supra* note 6, at 911.

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

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

<sup>86</sup> *Id.* at 911-12.

with United Nations' requests that Cambodia compromise on basic issues of international law.<sup>87</sup>

¶18 In an effort to avoid halting the negotiations, the United States and Cambodia agreed on a Draft Memorandum of Understanding, which included a modern definition of genocide and a domestic tribunal with co-prosecutors and "supermajority" requirements. Under this proposal, the tribunal would have three Cambodian and two international judges on the trial level and four Cambodian and three international judges on the appeals level. However, the agreement of at least one international judge would be required for all decisions.<sup>88</sup> Cambodia did not sign the Memorandum of Understanding and insisted that the tribunal would not be established, unless both parties signed the document.<sup>89</sup> Although there appeared to be some progress, Cambodia then took a counterproductive and rash unilateral action without any regard for the international community, creating yet another delay in the negotiations process. "On August 10, 2001, the Cambodian government passed legislation approving Hun Sen's legally unsound proposal for a joint tribunal by a Cambodian National Assembly vote of 86-2 and Senate vote of 51-0."<sup>90</sup> Shortly thereafter, on February 8, 2002, the Office of Legal Affairs of the United Nations Secretariat officially ended negotiations with Cambodia.<sup>91</sup>

¶19 The impasse continued until June 2002 when Hun Sen finally wrote the Secretary-General requesting United Nations assistance.<sup>92</sup> On December 18, 2002, the United Nations General Assembly passed resolution 57/228 requesting that Secretary-General Annan renew talks with Cambodia.<sup>93</sup> The United Nations effectively endorsed the creation of the controversial joint tribunal with a majority of Cambodian judges.<sup>94</sup> The resolution made a series of recommendations to the United Nations negotiating team.<sup>95</sup>

First, the resolution directed that the Extraordinary Chambers have subject matter jurisdiction consistent with the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia and personal jurisdiction over the former leaders of the Khmer Rouge. Second, the resolution called for the exercise of this jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in articles 14 and 15 of the International Covenant on Civil and

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<sup>87</sup> *Id.* at 912.

<sup>88</sup> See *Tribunal Memorandum of Understanding Between the United Nations and the Royal Government of Cambodia*, PHNOM PENH POST, Issue 9/22, Oct. 27 – Nov. 9, 2000, available at [http://www.yale.edu/cgp/mou\\_v3.htm](http://www.yale.edu/cgp/mou_v3.htm); See also The Secretary-General, Press Release, *Secretary-General Clarifies Position on Cambodian Government Responsibility for Trials of Former Khmer Rouge Leaders*, U.N. Doc. SG/SM/7868 (June 27, 2001).

<sup>89</sup> Daniel Kemper Donovan, *Recent Development: Joint U.N. – Cambodia Efforts to Establish a Khmer Rouge Tribunal*, 44 HARV. INT'L L.J. 551, 564 (2003).

<sup>90</sup> Mann Buyanunda, *The Khmer Rouge on Trial: Whither the Defense?*, 74 S. CAL. L. REV. 1581, 1619 (2001).

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

<sup>92</sup> LUFTGLASS, *supra* note 6, at 911.

<sup>93</sup> G.A. Res. 57/228, U.N. GAOR 3d Comm., 57th Sess., U.N. Doc. A/RES/57/228 (2002).

<sup>94</sup> G.A. Res. 57/228, *supra* note 93; LUFTGLASS, *supra* note 6, at 914-15.

<sup>95</sup> G.A. Res. 57/228, *supra* note 93; LUFTGLASS, *supra* note 6, at 914-15.

Political Rights. Third, the resolution called for the independence and impartiality of judges and prosecutors . . . .<sup>96</sup>

¶20 After Hans Corell, the United Nations legal counsel, met with Cambodian officials in Phnom Penh on March 17, 2003, he announced that they had reached a draft agreement<sup>97</sup> with Cambodia on the status of a court.<sup>98</sup> It took five years and eleven rounds of negotiations before Om Yentieng, an advisor to Prime Minister Hun Sen, stated, “We have agreed on a draft cooperation agreement in which the United Nations will assist Cambodia in the proceedings of a special tribunal.”<sup>99</sup> On May 13, 2003, a consensus of the United Nations General Assembly approved the March Agreement, which was officially adopted by the Cambodian National Assembly in October 2004.<sup>100</sup>

¶21 Though the March Agreement may appear to signify progress towards bringing the Khmer Rouge to justice, it could turn out to be a Pyrrhic victory. Hun Sen’s refusal to accept any suggestions for an international tribunal, despite his specific call for United Nations assistance, indicates that he may be acting in bad faith and for his own self-interest. For instance, Hun Sen’s assurances to the Cambodian public that low-ranking members of the Khmer Rouge will not be subject to trial may be prompted by the fact that as a former Khmer Rouge soldier Hun Sen fears that if all officials of the Khmer Rouge are subject to trial, he may be called before the court.<sup>101</sup> Regardless, the fact that Hun Sen, who has a significant conflict of interest, is capable of dictating who will be called before the court clearly defies the basis of impartiality that is a cornerstone of the judiciary.<sup>102</sup> Furthermore, the structure of the March Agreement fails to safeguard against potential interference of the Cambodian government or to address the concerns regarding a lack of judicial independence and the limited number of competent Cambodian judges.<sup>103</sup>

#### IV. THE MARCH AGREEMENT: THE STRUCTURE OF THE JOINT TRIBUNAL LEAVES THE TRIALS VULNERABLE TO POLITICAL INTERFERENCE

¶22 The March Agreement’s ambitious attempt to employ Cambodian and international judges in the Extraordinary Chambers in the courts of Cambodia is an untested and highly risky approach to war crimes prosecution.<sup>104</sup> In contrast to the Yugoslavia and Rwanda ad hoc tribunals, which had the neutrality of a strictly international tribunal, the joint tribunal mixes foreign judicial participation with the domestic judicial establishment in a manner that lacks the safeguards of a strictly international tribunal.<sup>105</sup> Specifically, the structure of the joint tribunal, as delineated by the March Agreement, places too

<sup>96</sup> G.A. Res. 57/228, *supra* note 93; LUFTGLASS, *supra* note 6, at 914-15.

<sup>97</sup> See MARCH AGREEMENT, *supra* note 9.

<sup>98</sup> LUFTGLASS, *supra* note 6, at 915.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Talitha Gray, *To Keep You is No Gain, to Kill You is no Loss – Securing Justice through the International Criminal Court*, 20 ARIZ. J. INT’L & COMP. LAW 645, 682 (2003).

<sup>102</sup> *Id.*

<sup>103</sup> HUMAN RIGHTS WATCH, *Serious Flaw*, *supra* note 15, at 3-4.

<sup>104</sup> MAY, *supra* note 12, at 150.

<sup>105</sup> *Id.*

heavy a burden on Cambodia's underdeveloped judicial system and relinquishes too much power to the Cambodian government, which suffers from a history of systematic corruption.

A. *The Lack of Competent Judges and Their Vulnerability to Manipulation*

¶23

The tribunal's lack of a majority of international judges could lead to unjust trials, as a result of governmental manipulation of Cambodian judges. The composition of judges is established in Article 3 of the March Agreement, which stipulates that there will be three Cambodian judges and two international judges in the Trial Chamber and four Cambodian judges and three international judges in the Supreme Court Chamber.<sup>106</sup> A fair and just executive as well as an independent judiciary are essential to the integrity of a joint tribunal.<sup>107</sup> Cambodia's political structure is characterized by a corrupt executive with a long history of interfering with its weak judicial system, which suffers from a dearth of competent judges.<sup>108</sup> The Cambodian Government itself has acknowledged these problems in the reports it has filed as a party to the International Convention on Civil and Political Rights (ICCPR).<sup>109</sup> In its report on compliance with the ICCPR, Cambodia states, "The independence of the judiciary is guaranteed by law. However, practice has shown that, owing to interference and pressure from other branches, the courts are not fully independent."<sup>110</sup> The government further noted that

Given that the Supreme Council of Justice has not yet been established, the trial courts, the Court of Appeal and the Supreme Court do not yet function well, because of the lack of competent staff and documents available for consultation. Some judges are obliged to seek the opinion of the Ministry of Justice on the interpretation of articles and the determination of offenses; the Minister of Justice makes recommendations and issues guidelines to enable the judges to apply laws and procedures correctly. Such actions might weaken the independence of the judiciary to some extent, but under the present circumstances, in which judges are not sufficiently experienced, they need guidance in order to perform their work.<sup>111</sup>

¶24

Judges in Cambodia have little to no physical security or professional independence.<sup>112</sup> High political officials instruct Cambodian judges to rule a certain way

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<sup>106</sup> See MARCH AGREEMENT, *supra* note 9, at Art. 3.

<sup>107</sup> HUMAN RIGHTS WATCH, *Serious Flaw*, *supra* note 15, at 3-4.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*; Report on the Application of Civil and Political Rights in Conformance with Article 40 of the ICCPR, KINGDOM OF CAMBODIA, (1997) [hereinafter ICCPR REPORT]. The report was submitted to the U.N. Human Rights Committee for its March 30, 1999 meeting in New York.

<sup>110</sup> See ICCPR REPORT, *supra* note 109, at para. 209; Human Rights Watch, *Causes of Impunity in Cambodia*, [http://www.hrw.org/reports/1999/cambo2/Cambo996-02.htm#P404\\_76924](http://www.hrw.org/reports/1999/cambo2/Cambo996-02.htm#P404_76924) [Hereinafter HUMAN RIGHTS WATCH, *Causes of Impunity*].

<sup>111</sup> ICCPR REPORT, *supra* note 109, at para. 211; HUMAN RIGHTS WATCH, *Causes of Impunity*, *supra* note 110.

<sup>112</sup> HUMAN RIGHTS WATCH, *Serious Flaw*, *supra* note 15, at 3-4.

on cases and threaten their safety if they do not rule as instructed.<sup>113</sup> Since 1993, physical attacks on courts have occurred frequently and in April of 2003, a prominent judge was assassinated in the middle of the day as he drove to work in Phnom Penh.<sup>114</sup> In highly politicized cases, it is not uncommon for the executive to negotiate prearranged pardons to demonstrate its power over the judiciary.<sup>115</sup>

¶25 In addition to the judiciary's susceptibility to political influence, there is also the logistical challenge of finding Cambodian judges who have experience in international law, international humanitarian law and international human rights. During the Khmer Rouge Rule, the court system was completely abandoned and numerous members of the judiciary were killed in an attempt to create a classless, homogenous society.<sup>116</sup> The Khmer Rouge viewed lawyers and judges as intellectuals capable of threatening their rule.<sup>117</sup> Some legal professionals were fortunate enough merely to be stripped of their positions, while those less fortunate were systematically murdered.<sup>118</sup> Even today, Cambodian society suffers from a deficit of qualified and competent personnel to staff the judiciary.<sup>119</sup>

¶26 The lack of confidence among the Cambodian citizenry in the abilities of judges and lawyers is yet another critical factor that may undermine the Khmer Rouge trials. In a study funded by the Cambodian Genocide Project at Yale University, every single person out of twenty five survivors of the Khmer Rouge regime stated that a trial could not be held in Cambodia because the judiciary is too weak and corrupt.<sup>120</sup>

#### B. *No Independent, International Prosecutor*

¶27 The Cambodian government's insistence upon hiring one international and one Cambodian prosecutor, instead of just one independent, international prosecutor, subjects the trials to yet another avenue of political interference.<sup>121</sup> The prosecutor is responsible for conducting pre-indictment investigations, analyzing evidence and interviewing potential witness.<sup>122</sup> It is essential that all of these tasks are carried out by an objective and independent prosecutor and, given Cambodia's track record, it seems unlikely that the Cambodian prosecutor will be able to act independently.<sup>123</sup> In the past, prosecutors in Cambodia have had to seek approval from politicians before determining who to indict. Furthermore, the presence of the Cambodian prosecutor can be used to delay the trials.<sup>124</sup> Article 7 of the March Agreement provides for the use of a special panel when the

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Amnesty International, *Kingdom of Cambodia, Amnesty International's Position and Concerns Regarding the Proposed "Khmer Rouge" Tribunal*, ASA 23/005/2003 (2003).

<sup>116</sup> *Id.*

<sup>117</sup> LUFTGLASS, *supra* note 6, at 935.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*; See Jaya Ramji, *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 FLETCHER F. WORLD AFF. 137, 139 (2000).

<sup>121</sup> HUMAN RIGHTS WATCH, *Serious Flaw*, *supra* note 15, at 4-5.

<sup>122</sup> *Id.*

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

<sup>124</sup> *Id.*

Cambodian and international prosecutor disagree.<sup>125</sup> The special panel is to consist of three judges selected by Cambodia's Supreme Council of Magistracy and two by the Secretary-General and decisions are made by reaching a supermajority.<sup>126</sup> Each prosecutor or investigating judge has to submit a written statement giving the reasons for their differing opinions.<sup>127</sup> Thus, the Cambodian government can bring the trials to a slow crawl by instructing the Cambodian members of the tribunal to challenge all of the decisions of the international prosecutors and investigating judges.<sup>128</sup>

### C. Cambodia's Poor Track Record in Adhering to International Standards of Justice

¶28 In addition to Hun Sen's lack of cooperation and his effort to stall progression towards the establishment of the tribunal, the illegitimate "show" trials of Pol Pot and Ieng Sary provide more direct evidence of the long-standing lack of respect for the standards of justice in Cambodia.<sup>129</sup> In 1979, the Vietnamese-installed regime established a tribunal and claimed to try the Khmer Rouge for their crimes.<sup>130</sup> The proceedings however, were at best an attempt to appease Cambodians and the international community and at worst a deceptive plan to gloss over the massive human rights violations and allow numerous former Khmer Rouge members to remain unaccountable.<sup>131</sup> The trials focused only on Pol Pot, the Khmer Rouge's Prime Minister, and Ieng Sary, the regime's Deputy Prime Minister, holding them responsible for all crimes of the Khmer Rouge.<sup>132</sup> Despite the trials conference of blame of all Khmer Rouge atrocities on these two men, they remained unpunished.<sup>133</sup> Neither Pol Pot, nor Ieng Sary were at the trials and they were sentenced to death in absentia. There was no effort made to capture these men, both of whom were supposedly hiding at the time.<sup>134</sup>

¶29 These trials lacked legitimacy in the eyes of the international community for several reasons.<sup>135</sup> "First, the two leaders were tried in absentia, a violation of the [ICCPR]."<sup>136</sup> Article 14(d) states that all people have the right "[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing."<sup>137</sup> "Second, the Decree Law establishing the 'People's Revolutionary Tribunal' contained language denouncing the two defendants, functionally assuming their guilt, a violation of the international norm of the 'presumption of innocence.'<sup>138</sup> Third, the definition of genocide used at the trial did not comport with the internationally

<sup>125</sup> See MARCH AGREEMENT, *supra* note 9, at Art. 3; HUMAN RIGHTS WATCH, *Serious Flaw*, *supra* note 15, at 4-5.

<sup>126</sup> HUMAN RIGHTS WATCH, *Serious Flaw*, *supra* note 15, at 4-5.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> GROUP OF EXPERTS REPORT, *supra* note 4, at 15.

<sup>130</sup> TAYLOR, *supra* note 1, at 242.

<sup>131</sup> *Id.*

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

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*; GROUP OF EXPERTS REPORT, *supra* note 4 at 16; LUFTGLASS, *supra* note 6, at 902-03.

<sup>136</sup> International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 17, Art. 14(2)(d), (1966) [hereinafter ICCPR]; LUFTGLASS, *supra* note 6, at 902.

<sup>137</sup> ICCPR, *supra* note 136 at Art. 14 (d).; LUFTGLASS, *supra* note 6, at 902.

<sup>138</sup> ICCPR, *supra* note 136 at 14 (2); LUFTGLASS, *supra* note 6, at 902.

accepted definition.”<sup>139</sup> The Decree Law defined genocide to include “planned massacres of groups of innocent people; expulsion of inhabitants of cities and villages in order to concentrate them and force them to do hard labor in conditions leading to their physical and mental destruction; wiping out religion; destroying political, cultural and social structures and family and social relations.”<sup>140</sup> This law, which deviates from the internationally accepted definition of genocide in the Convention on the Punishment of and Prevention of the Crime of Genocide (Genocide Convention) was created to ensure the guilt of the defendants.<sup>141</sup> The Genocide Convention defines genocide as

acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious groups as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.<sup>142</sup>

¶30 The Cambodian government’s blatant disregard for the prevailing standards of international law in its establishment of the People’s Revolutionary Tribunal raises significant concerns regarding whether it will comply with international law during the Khmer Rouge trials held by the joint tribunal.

*D. The Supermajority Formula of the Tribunal is Flawed.*

¶31 The Cambodian Government’s refusal to clarify the supermajority formula with the United Nations may be motivated by the desire to keep the decision-making process ambiguous in an effort to exert control over the outcomes of the trials. The unprecedented supermajority formula, which is codified in Article 4 of the March Agreement, is fraught with ambiguities that could render the trials completely ineffective.<sup>143</sup> The United States was an ardent supporter of an international tribunal and it devised the supermajority formula as a compromise to appease Hun Sen.<sup>144</sup> The supermajority offers some protection from political interference by requiring that if decisions are not made unanimously, “a decision by the Trial Chamber shall require the affirmative vote of at least four judges [and a] decision by the Supreme Court Chamber shall require the affirmative vote of at least five judges.”<sup>145</sup> However, there is a potentially dangerous flaw in the supermajority provision of the March Agreement regarding the process for reaching a verdict.<sup>146</sup> The procedure delineated for decision-

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<sup>139</sup> *Id.*; LUFTGLASS, *supra* note 6, at 902-03.

<sup>140</sup> *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary* (Howard J. De Nike et al. eds. University of Pennsylvania Press 2000).

<sup>141</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, Art. III, 102 Stat. 3045, 3045, 78 U.N.T.S. 277, 280 [hereinafter GENOCIDE CONVENTION].

<sup>142</sup> *Id.* at Art. 2.

<sup>143</sup> HUMAN RIGHTS WATCH, *Serious Flaw*, *supra* note 15, at 5-6.

<sup>144</sup> AMNESTY INTERNATIONAL, *supra* note 115.

<sup>145</sup> See MARCH AGREEMENT, *supra* note 9, at Art. 3.

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

making in Article 4 of the March Agreement does not specify in which circumstances a supermajority is necessary to reach a decision.<sup>147</sup> Furthermore, the March Agreement provides no directive as to how to proceed if a supermajority is not reached.<sup>148</sup> The United States, looking to its own legal practices, has suggested that the result would be a “hung jury” and there would be a retrial.<sup>149</sup> However, Cambodian law does not contain the hung jury procedure.<sup>150</sup> Thus, this process risks a split decision between Cambodian and international judges that could render the court incapable of reaching a decision and, even worse, result in inappropriate acquittals.<sup>151</sup>

¶32 The United Nations recognized the potential problems that could arise out of the supermajority formula and repeatedly discussed the issue with Cambodia in an effort to agree upon a solution.<sup>152</sup> Cambodia’s insistence on keeping the supermajority formula vague could stem from its intent to leave itself a judicial loophole through which to influence the Khmer Rouge trials.

## V. THE SPECIAL COURT IN SIERRA LEONE

¶33 A tribunal fashioned after the Special Court seated in Sierra Leone may have been a more effective accountability mechanism for bringing the Khmer Rouge to justice than the joint tribunal. The structure of Sierra Leone’s Special Court could potentially fulfill several of the goals cited by supporters of the joint tribunal, while avoiding substantial risks. The joint tribunal as it was created by the March Agreement places too heavy of a burden on the underdeveloped Cambodian judiciary, which has long been manipulated by the Cambodian Government.

¶34 Supporters of Cambodia’s joint tribunal envision that in addition to bringing justice to the victims of the Khmer Rouge, the tribunal will create a legal framework for Cambodian courts to follow in the future. Additionally, they hope that the effective administration of justice through the joint tribunal will enable the Cambodian people to witness the “first successful domestic operation of the rule of law” and begin developing confidence in their judicial system.<sup>153</sup> Proponents of the joint tribunal also argue that the insistence that the international community is the only entity capable of conducting the trials of the Khmer Rouge is paternalistic and may be resented by the Cambodian citizenry.<sup>154</sup> This argument is reinforced by the fact that the international community as a whole remained silent for years with regard to Khmer Rouge accountability and provided political support to the Khmer Rouge, which was allowed to occupy Cambodia’s seat at the United Nations throughout the 1980s.<sup>155</sup>

¶35 Unfortunately, the weakness of Cambodia’s judiciary combined with systematic political corruption yields dim prospects for the success of the joint tribunal. However, Cambodia need not have a purely international tribunal. The model provided by the

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> AMNESTY INTERNATIONAL, *Kingdom of Cambodia*, *supra* note 115.

<sup>152</sup> See HUMAN RIGHTS WATCH, *Serious Flaw*, *supra* note 15.

<sup>153</sup> TAYLOR, *supra* note 1, at 265.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 241.

Special Court would allow Cambodians to participate and have a stake in the Khmer Rouge trials, while providing safeguards against governmental interference. The Special Court in Sierra Leone is divided into one trial and one appellate chamber with the possibility that a second trial chamber may be set up upon the request of the President of the Court or the Secretary-General of the United Nations.<sup>156</sup> Article 2 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court called for Sierra Leone to appoint one judge to the trial chamber and two judges to the appeals chamber and provided that the Secretary-General appoint the remainder of the judges.<sup>157</sup>

¶36 The format of the Special Court avoids the supermajority problem of the joint tribunal because rulings are made on a majority basis and at least one international judge must agree with the decision in order to make it stand.<sup>158</sup> This structure is, therefore, more likely to yield consistent rulings. Furthermore, in the Special Court, the international judges provide a safeguard against governmental interference. This would not only facilitate the process of fair trials in Cambodia, but it would also give citizens some assurance that the courts will work in an unbiased manner. Cambodian judges while working alongside international counterparts could potentially experience trying cases free of political coercion and interference for the first time in their careers.

## VI. CONCLUSION

¶37 There is no ideal template for holding trials after gross human rights violations and, thus, the selection of an appropriate accountability mechanism involves a complex calculus of numerous factors. The primary goal of the Cambodian tribunal is to conduct fair trials that will hold perpetrators responsible for their crimes and formally acknowledge the wrongs committed against victims. In addition to this primary goal, the tribunal may also be established in an effort to rehabilitate the country's judicial system, restore the citizenry's confidence in its domestic judicial system and deter potential future perpetrators. All of these goals must be considered in light of Cambodia's political stability and judicial system.

¶38 In the case of Cambodia, a country characterized by political corruption and a weak judiciary, the trials of the Khmer Rouge will require a high level of international guidance to shelter the trials from executive interference. The United Nations' approval of the March Agreement over the objections of Secretary-General Annan is surprising due to its former insistence upon an international tribunal, the report of the Group of Experts and Hun Sen's obvious lack of good faith throughout the negotiations. Furthermore, Hun Sen's extreme conflict of interest in the trials due to his status as a former Khmer Rouge member who could face prosecution if the tribunal were to expand

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<sup>156</sup> Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Art. 2 (Jan. 16, 2002), *available at* <http://www.specialcourt.org/documents/Agreement.htm> [hereinafter Court Agreement 2002] ; UNIVERSITY OF CALIFORNIA AT BERKELEY, WAR CRIMES STUDIES CENTER, INTERIM REPORT ON THE SPECIAL COURT FOR SIERRA LEONE 3 (2005), *available at* [http://www.hrcberkeley.org/download/BWCSC\\_Interim\\_Report.pdf](http://www.hrcberkeley.org/download/BWCSC_Interim_Report.pdf).

<sup>157</sup> Court Agreement 2002, *supra* note 156, Art. 2.

<sup>158</sup> *Id.*

its reach to low ranking officials, provides him with a strong incentive to interfere with the trials.

¶39 Proponents of the joint tribunal, who argue that the trials will help Cambodia establish a domestic legal framework, fail to recognize that the present judicial system is too weak to undergo a massive rehabilitation without substantial international assistance. The March Agreement does not provide adequate safeguards against the manipulation of government officials interested in engineering the outcome of the Khmer Rouge trials. Without a majority of international judges to ensure fair trials, the joint tribunal runs a high risk of being ineffective at bringing justice to victims of the Khmer Rouge. If the tribunal fails to achieve this primary goal, the secondary goals of rehabilitating the judiciary and restoring confidence in the judicial system will not come to fruition.

¶40 A more prudent approach to the Cambodian trials would have been to create a court similar to Sierra Leone's Special Court. This alternative model may have resulted in a beneficial balance of allowing Cambodian judges to participate in the Khmer Rouge trials while a majority of international judges served as protectors of judicial independence. A system resembling the Special Court possesses far fewer risks than the joint tribunal and would have enhanced Cambodia's prospects for achieving both the primary goal of bringing the Khmer Rouge to justice and the secondary goal of creating a foundation for a strong and independent judiciary in Cambodia.