

## REASSESSING THE RULE OF LAW LEGACY OF THE KHMER ROUGE TRIBUNAL

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### ABSTRACT

The focal point of transitional justice efforts in Cambodia have been recently-completed criminal prosecutions at the Extraordinary Chambers in the Courts of Cambodia (“ECCC”). Like other international criminal justice institutions, the ECCC has been framed as not only a criminal court, but also as an institution capable of helping achieve various transitional justice goals such as improving the rule of law and respect for human rights domestically in Cambodia. This Article identifies troubling connections between the ECCC experience and the Cambodian government’s increasing use of rule by law tactics in recent years. The Article identifies two related ways in which the ECCC experience may have further damaged, rather than helped mend, the rule of law in Cambodia. First, by providing training to Cambodian legal actors beholden to the autocratic government, the ECCC has engaged in a form of “negative capacity-building” by enhancing the abilities of such actors to weaponize Cambodia’s legal system against perceived threats to the dominant Cambodia People’s Party (“CPP”). Second, by playing into the dominant social perception in Cambodia that powerful CPP-aligned actors remain the ultimate arbiters of

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contentious legal cases, even when producing inconsistent, incompatible outcomes, the Court's social messaging has lent some legitimacy to rule by law tactics in Cambodia. These negative rule of law outcomes are especially troubling given the authoritarian backsliding Cambodia has recently experienced. Moreover, the potential negative rule of law legacy of the ECCC should serve as a cautionary tale against the notion that international criminal law prosecutions solely produce positive rule of law effects in post-atrocity States.

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## INTRODUCTION

In 2022, Cambodia held local elections for the first time since 2017.<sup>1</sup> As noted by many observers, these elections were less of an actual political contest and more of a process of further legitimating and entrenching the Cambodia People's Party ("CPP") and its longtime leader, Prime Minister Hun Sen, in power.<sup>2</sup> The CPP received 5.3 million total votes, while the main two opposition parties, the Candlelight and Funcinpec parties, received approximately 1.6 million and 900,000 votes respectively.<sup>3</sup> These were near-ideal numbers for the CPP regime, allowing the Cambodian government to maintain a democratic pretense without meaningfully threatening prevailing power arrangements.<sup>4</sup> In the lead-up to the elections, the CPP continued its longstanding practice of utilizing its power over the legislature and courts to persecute and eliminate political opponents. The CPP's most successful political opponent, the Cambodia National Rescue Party ("CNRP") was dissolved in 2017 after nearly winning a majority of contests in that

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<sup>1</sup> Sreang Chheat, *Why Cambodia's Next Elections May Be Anything but Democratic*, E. ASIA F. (June 3, 2022), <https://www.eastasiaforum.org/2022/06/03/why-cambodias-next-elections-may-be-anything-but-democratic/> [<https://perma.cc/ZNC3-559A>].

<sup>2</sup> See, e.g., *id.* (explaining how the 2017 dissolution of the main opposition party prevents the 2022 election from being understood as entirely democratic); Cheang Sopheng, *Cambodians Vote in Local Election Amid Intimidation, Threats*, AP NEWS (June 4, 2022), <https://apnews.com/article/hun-sen-cambodia-elections-government-and-politics-local-d9769a5f066fe14c986f22908b812a1c> [<https://perma.cc/S36G-52TX>]; Office of the United Nations High Commissioner for Human Rights, *Comment by UN Human Rights Office Spokesperson Liz Throssell on Human Rights Concerns Ahead of Local Elections in Cambodia on Sunday* (June 2, 2022), <https://www.ohchr.org/en/news/2022/06/comment-un-human-rights-office-spokesperson-liz-throssell-human-rights-concerns-ahead> [<https://perma.cc/3AQH-6TNS>].

<sup>3</sup> *Cambodian Ruling Party Scores Big Win in Local Elections*, AP NEWS (June 6, 2022), <https://apnews.com/article/hun-sen-cambodia-elections-government-and-politics-local-891854f5162cde23756003fd4fbc7f6b> [<https://perma.cc/B3GS-RBXR>].

<sup>4</sup> For example, in previous elections the CPP has been accused of helping to create and fund a host of new opposition parties in advance of elections to maintain an illusion of a multiparty democracy. These "firefly" parties never win a significant share of votes and often disappear shortly after the election cycle. Julia Wallace, *"Fireflies" and "Ghosts" in Cambodia Prop Up Facade of Real Election*, N.Y. TIMES (July 11, 2018), <https://www.nytimes.com/2018/07/11/world/asia/cambodia-election-hun-sen.html> [<https://perma.cc/W7RN-H7KP>].

year's local elections.<sup>5</sup> Since then, hundreds of people associated with the CNRP or other opposition movements, including key opposition leaders such as Khem Sokha<sup>6</sup> and Mu Sochua,<sup>7</sup> have been arrested and charged with vague criminal offenses. Many of those targeted have also been convicted, often *in absentia*, based on extremely weak evidentiary foundations.<sup>8</sup>

Little changed during the run-up to Cambodia's most recent national elections in July 2023, which were, again, unsurprisingly dominated by the CPP.<sup>9</sup> Political opponents of the CPP continued to be systematically stifled and attacked in advance of the elections, with law often the regime's preferred weapon.<sup>10</sup> In early 2023, the Candlelight Party, made up largely of former CNRP politicians, was barred from participating in the upcoming election for failing to provide original copies of its registration papers to Cambodia's National Election Commission, a body dominated by the CPP.<sup>11</sup> According to Candlelight Party officials, the papers in question are not in their possession because they were seized during a police raid years prior.<sup>12</sup> Predictably, an appeal to Cambodia's Constitutional

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<sup>5</sup> Julia Wallace, *Democracy Fades as Cambodian Court Dissolves Main Opposition Party*, N.Y. TIMES, Nov. 17, 2017, at A7.

<sup>6</sup> Prak Chan Thul, *Cambodia Resumes Treason Trial of Opposition Leader Kem Sokha*, REUTERS (Jan. 18, 2022), <https://www.reuters.com/world/asia-pacific/cambodia-resume-treason-trial-opposition-leader-2022-01-18/> [<https://perma.cc/XAA2-R7VE>].

<sup>7</sup> *Cambodia: 51 Opposition Politicians Convicted in Mass Trial*, HUM. RTS. WATCH (June 14, 2022), <https://www.hrw.org/news/2022/06/14/cambodia-51-opposition-politicians-convicted-mass-trial> [<https://perma.cc/MY7D-BGF5>].

<sup>8</sup> See, e.g., *Cambodia: Opposition Politicians Convicted in Mass Trial*, HUM. RTS. WATCH (Mar. 17, 2022), <https://www.hrw.org/news/2022/03/17/cambodia-opposition-politicians-convicted-mass-trial> [<https://perma.cc/BXM7-SWMD>] (describing the conviction of twenty opposition activists and politicians after an "unfair trial" with "no credible evidence" against the accused). For a list of political prisoners in Cambodia, see *Political Prisoners Cambodia*, HUM. RTS. WATCH (Mar. 10, 2022), <https://www.hrw.org/video-photos/interactive/political-prisoners-cambodia> [<https://perma.cc/9DUC-L2A5>].

<sup>9</sup> Jonathan Head, *Cambodia Election: "This Was More of a Coronation Than an Election"*, BBC NEWS (Jul. 23, 2023), <https://www.bbc.com/news/world-asia-66283745> [<https://perma.cc/5ZDB-5LCN>].

<sup>10</sup> Abby Seiff, *Cambodia 2023: An Election in Name Only*, RADIO FREE ASIA (July 19, 2023), <https://www.rfa.org/english/news/cambodia/hun-sen-national-election-07182023080300.html> [<https://perma.cc/S2J6-6KDF>].

<sup>11</sup> Cheang Sopheng, *Top Cambodian Opposition Party Denied Registration for July Elections, Will Appeal Ruling*, AP NEWS (May 15, 2023), <https://apnews.com/article/cambodia-election-candlelight-party-deny-registration-7436b0572eefb9b5be3fa724d3cb2fcb> [<https://perma.cc/DF9J-JXVT>].

<sup>12</sup> *Id.*

Council against the Commission's decision to deregister the Candlelight Party, preventing its members from running in the recent election, was unsuccessful, with the Council simply declaring the reinstatement request "unlawful."<sup>13</sup>

Shortly after this legal attack against the Candlelight Party, Hun Sen announced a pending amendment to electoral laws that will bar anyone who fails to vote from thereafter running for office, thereby deterring potential electoral boycotts and further weakening political opponents of the CPP, many of whom are already living in exile and unable to vote.<sup>14</sup> New laws criminalizing ballot spoiling were also pushed through, further pushing Cambodians to the polls in an environment without a credible opposition party.<sup>15</sup> Several Candlelight Party politicians were also arrested in the run-up to the election on allegations of inciting ballot spoiling as a form of protest.<sup>16</sup> The CPP took these extra measures, despite already being sure of electoral victory, as the regime plans for a widely anticipated replacement of Hun Sen and other key CPP powerbrokers with their chosen successors, mostly children or other family members, in efforts to build a durable dynamistic autocracy while maintaining at least some of the pretenses of democratic governance.<sup>17</sup>

These tactics, described by Mu Sochua and others as a "weaponization" of Cambodia's legal system,<sup>18</sup> are not entirely new.

<sup>13</sup> Cheang Sopheng, *Cambodia's Top Opposition Party Barred from July Elections, Leaving Hun Sen's Party Unchallenged*, AP NEWS (May 25, 2023), <https://apnews.com/article/cambodia-opposition-party-election-hun-sen-63659ff8f2de992d84d2be748afb8b> [<https://perma.cc/4ENX-DNWJ>].

<sup>14</sup> Cheang Sopheng & Grant Peck, *Cambodian Leader Says People Who Don't Vote Will Be Barred from Being Candidates in Future Elections*, AP NEWS (June 13, 2023), <https://apnews.com/article/cambodia-election-hun-sen-opposition-2d10cfed2e772cea6d768ed6d3d0c7fe> [<https://perma.cc/945Q-VUY4>].

<sup>15</sup> Head, *supra* note 9.

<sup>16</sup> Sopheng Cheang & Grant Peck, *Cambodian Opposition Party Officials Arrested for Allegedly Encouraging Casting of Spoiled Ballots*, AP NEWS (July 15, 2023), <https://apnews.com/article/cambodia-hun-sen-candlelight-election-3582508c22ab11e441b54598d0fd03ee> [<https://perma.cc/UK9L-8BN5>].

<sup>17</sup> Shortly after the election, longtime Cambodian Prime Minister Hun Sen, who has held power since 1985, announced he would step down from office after ensuring his eldest son, Hun Manet, will succeed him. Mike Ives, *Hun Sen, One of World's Longest-Serving Rulers, To Step Down Next Month*, N.Y. TIMES (July 26, 2023), <https://www.nytimes.com/2023/07/26/world/asia/cambodia-pm-resigns-hun-sen.html> [<https://perma.cc/8BGS-CHPJ>]. For more on Hun Sen's longstanding domination of power in Cambodia, see SEBASTIAN STRANGIO, *HUN SEN'S CAMBODIA* (2014).

<sup>18</sup> Mu Sochua, *The Weaponisation of the Cambodian Justice System Must Stop*, AL JAZEERA (Jan. 27, 2021), <https://www.aljazeera.com/opinions/2021/1/27/the-weaponisation-of-the-cambodian-justice-system-must-stop>

Cambodia is a country that, by all usual measures, has suffered from a longstanding rule of law deficit.<sup>19</sup> The authoritarian CPP regime, led for nearly four decades by strongman Prime Minister Hun Sen prior to his recent announcement of resignation in favor of his eldest son, Hun Manet, exerts near complete control over the executive, legislative, and judicial branches of government.<sup>20</sup> What is arguably new, however, is the CPP's increasing reliance on "rule by law" tactics involving "the instrumental use of law as a tool of political

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[<https://perma.cc/6EN7-F6UT>]; INT'L. COMM. OF JURISTS, ACHIEVING JUSTICE FOR GROSS HUMAN RIGHTS VIOLATIONS IN CAMBODIA: A BASELINE STUDY 11-12, 32-33 (2017).

<sup>19</sup> See generally DAVID CHANDLER, A HISTORY OF CAMBODIA (4th ed. 2018) (giving a historical context of democracy, governance and the rule of law in Cambodia). Moreover, the World Justice Project ("WJP"), which issues a yearly rule of law index, has consistently ranked Cambodia at the extreme low end of countries analyzed. In 2022, WJP ranked Cambodia 139th out of 140 countries assessed in terms of the rule of law. *WJP Rule of Law Index: Cambodia*, WORLD JUST. PROJECT (2022), <https://worldjusticeproject.org/rule-of-law-index/country/2022/Cambodia/> [<https://perma.cc/KRM4-MPLZ>]. It is important to note that these indicators are subject to many compelling critiques, as is the way in which the concept of the rule of law is often deployed globally to foist exploitive legal systems and relationships on less powerful nations in the Global South, and as part of a broader problematic framing of Global South nations as less "civilized" than those in the Global North. See, e.g., Carmen Gonzalez, *Environmental Justice, Human Rights, and the Global South*, 13 SANTA CLARA J. INT'L L. 151, 167-68 (2015) (conceptually connecting the World Bank-backed expansion of interventions in the Global South beginning in the 1990s, including through rule of law programs, to the "thwart[ing]" of Global South "aspirations for a more equitable international order" and a perpetuation of a "civilized/uncivilized . . . dichotomy" rooted in Eurocentrism); see also Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law"*, 101 MICH. L. REV. 2275 (2003) (arguing that interventions by Global North powers into the domestic affairs of Global South nations is both "neo-imperialist" and often ineffective in terms of achieving overall harm reduction due to a failure to recognize that in some scenarios formal rule of law improvements may have little positive effect, but rather "cultural change" is what is necessary to reduce violence and suffering); B.S. Chimni, *A Just World Under Law: A View from the South*, 22 AM. U. INT'L L. REV. 199, 202 (2007) (citing Anthony Pagden, *The Empire's New Clothes: From Empire to Federation, Yesterday and Today*, 12 COMMON KNOWLEDGE 36, 41 (2006)) (noting that, despite the ostensible goal of international law to subject all international relations to the rule of law, from the very inception of this body of law the sovereignty of non-European nations was viewed as being weaker and more subject to legally permissible forms of external interference).

<sup>20</sup> For an overview of Hun Sen's rise to power and prevailing power arrangements in Cambodia, see STRANGIO, *supra* note 17.

power"<sup>21</sup> in its calculated management of political, economic, and social control in recent years.<sup>22</sup>

One institution rarely discussed within the context of the CPP's increasing use of rule by law tactics is the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), a hybrid United Nations-Cambodian court tasked with prosecuting domestic and international crimes committed in Cambodia during the Khmer Rouge regime's relatively brief, yet spectacularly violent reign from April 17, 1975 to January 9, 1979.<sup>23</sup> Despite the Court only winding down operations in late 2022,<sup>24</sup> and the fact that its backers, including organizations such as the U.N. Office of the High Commissioner for Human Rights ("OHCHR"), having consistently touted its ability to help improve the rule of law and respect for human rights in contemporary Cambodia,<sup>25</sup> discussions of recent

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<sup>21</sup> Jeremy Waldron, *The Rule of Law*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2020).

<sup>22</sup> Previously, in the 1980s and 1990s, Cambodia suffered from a simpler lack of established legal institutions and laws in the wake of decades of foreign intervention, civil war, and mass atrocity. During this time, the CPP was no less ruthless in its tactics, with political killings and other violent forms of direct oppression occurring with regularity. See, e.g., "Tell Them That I Want to Kill Them:" *Two Decades of Impunity in Hun Sen's Cambodia*, HUM. RTS. WATCH (Nov. 13, 2012), <https://www.hrw.org/report/2012/11/13/tell-them-i-want-kill-them/two-decades-impunity-hun-sens-cambodia> [<https://perma.cc/RKN9-CLVR>] (noting that in a 1993 report, the U.N. Transitional Authority in Cambodia listed hundreds of cases of abuses by the State of Cambodia ("SOC"), which included "enforced disappearances and torture." The report also stated that the SOC was responsible for the killings of numerous political opponents, "the primary purpose of which [was] to intimidate the civilian population."). What has changed however, is the CPP government's increasing tendency to wield power through ostensibly legal means: the crafting of new laws and the manipulation of existing ones. INT'L COMM. OF JURISTS, *supra* note 18, at 10 ("[T]here has been significant concern [among Cambodian civil society members] in recent years regarding the 'weaponization' of legislation in the country.").

<sup>23</sup> 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, Cambodia-U.N., June 6, 2003, 2329 U.N.T.S. 117.

<sup>24</sup> See *Reports of ECCC's End Prove Premature, Officials Confirm*, PHNOM PENH POST (Oct. 26, 2021), <https://www.phnompenhpost.com/national-kr-tribunal/reports-ecccs-end-prove-premature-officials-confirm> [<https://perma.cc/W7JP-QPSE>]. See generally JOHN D. CIORCIARI & ANNE HEINDEL, *HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* (2014) (explaining in great detail the structure and governing legal documents of the ECCC).

<sup>25</sup> See, e.g., *Promotion of ECCC Legacy*, U.N. OFF. HIGH COMM'R. FOR HUM. RTS. IN CAMBODIA (Sep. 28, 2015), <https://cambodia.ohchr.org/en/rule-of-law/promotion-eccc-legacy> [<https://perma.cc/Y5AU-XBBU>] [hereinafter



events in the country raising serious rule of law concerns rarely mention the ECCC.<sup>26</sup>

This Article considers the possibility that the ECCC experience in Cambodia and the CPP's increasing reliance on rule by law tactics may be related. This assessment builds on the author's previous scholarship questioning the assumption that international criminal law ("ICL") institutions such as the ECCC produce solely positive effects on the rule of law in post-atrocity States such as Cambodia.<sup>27</sup> That scholarship highlighted the possibility "that ICL prosecutions may actually have a mix of positive, nil, and negative effects on the domestic rule of law[.]"<sup>28</sup> It concluded that in the specific Cambodian context, the risk of the ECCC having a net negative effect on the rule of law is "quite real and, arguably, in the process of being realized."<sup>29</sup> This Article revisits the issue of the relationships between the ECCC and the rule of law in Cambodia in light of troubling developments both at the ECCC and in Cambodia more generally since the 2017 elections and their immediate fallout. In doing so, it challenges the claim that the ECCC served as a positive rule of law "role model" for Cambodia.<sup>30</sup>

This Article challenges this claim by identifying two interrelated ways in which the ECCC experience has arguably helped further undermine the rule of law in Cambodia. First, the ECCC has enhanced the skill of Cambodian legal actors in utilizing rule by law tactics to create new mechanisms through which the CPP can exert power while maintaining a façade of legality. Second and perhaps more importantly, the Court has expressed to the Cambodian

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OHCHR, *Promotion of ECCC Legacy*] (explaining the dedication of the OHCHR to the ECCC "in its efforts to promote the rule of law").

<sup>26</sup> For example, in a 2017 report focusing heavily on rule of law deficits in Cambodia contributing to pervasive failures to respect basic human rights, the ECCC is mentioned several times, but primarily in passing and while focusing on either missed opportunities for the Court to *positively* impact the rule of law or expressing concern that domestic rule of law shortcomings may undermine the ECCC's perceived legitimacy. INT'L COMM. OF JURISTS, *supra* note 18, at 28 ("Perhaps the most cynical refrain is this: rather than the ECCC somehow elevating the national justice system to a level of international compliance, as envisaged by the UN and donors, Cambodian 'judicial politics' have instead degraded the tribunal.").

<sup>27</sup> Randle C. DeFalco, *The Uncertain Relationship Between International Criminal Law Accountability and the Rule of Law in Post-Atrocity States: Lessons from Cambodia*, 43 FORDHAM J. INT'L L. 1, 23 (2018) [hereinafter DeFalco, *Uncertain Relationship*].

<sup>28</sup> *Id.* at 59 (emphasis in original).

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

<sup>30</sup> OHCHR, *Promotion of ECCC Legacy*, *supra* note 25.

population that the subjugation of the law to the will of the CPP regime is tolerable in terms of basic rule of law principles, and perhaps even appropriate, even when involving inconsistent and incompatible reasoning and results. Ultimately, this Article raises the troubling possibility that the ECCC's ultimate legacy may be one of not only failing to improve common transitional justice goals of democratization and improvement of the rule of law and human rights in Cambodia, but producing a net negative effect on these areas, especially the rule of law.

The Article outlines these concerns in two parts. Part I describes the CPP's increasing use of rule by law tactics to maintain its authoritarian grip on power and identifies certain common tactics utilized by the regime. To do so, it provides an overview of various examples of ways the CPP has utilized its control over Cambodia's legislature and judiciary to grant itself new powers, stifle dissent, and persecute troublesome activists and political opponents. This overview demonstrates how the CPP has become increasingly sophisticated in how it undermines the rule of law in service of its desired goals. Controversial laws, such as those regulating non-governmental organizations ("NGOs"), telecommunications, elections, free speech, and public health and safety have all been used both offensively against opponents of the regime, and defensively to provide cover for government action (or inaction in some instances) when convenient for the CPP. The increasing reliance on these tactics demonstrates an increasingly sophisticated use of legal jargon and procedural and interpretive technicalities to create façades of legality aimed at obscuring the reality that such actions fly in the face of basic rule of law principles, such as those of generality, clarity, and consistency in enforcement.<sup>31</sup>

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<sup>31</sup> A fulsome discussion of the rule of law as a concept and its basic requirements is outside the scope of the present inquiry. This Article relies on a basic notion of the rule of law as a set of largely procedural requirements. It focuses on three core components of most rule of law descriptions: those requiring law to be general in terms of their applicability, relatively clear in terms of their substance and requirements, and usually enforced in an evenhanded, rather than overly selective manner. I have argued elsewhere that this thin conception of the rule of law frames the concept as a "set of procedural requirements infused with minimal human rights substantive values[.]" DeFalco, *Uncertain Relationship*, *supra* note 27, at 10. For a more sustained discussion of this basic procedural account of minimal rule of law requirements, which are drawn from the work of Lon Fuller, *see id.* at 10-18. *See also generally* LON L. FULLER, *THE MORALITY OF LAW* 106 (rev. ed. 1969) (famously proposing eight, largely procedural criteria that can be used to assess the degree to which a relevant rule or system of rules can be properly labelled "law," which Fuller in turn defines as "the enterprise of subjecting human conduct to the governance of rules" in a what has become a widely-cited basic rule of law model);

Moreover, emanating from these tactics is consistent social messaging suggesting to the Cambodian populace that CPP-aligned power brokers are the ultimate arbiters of the law in Cambodia. These intertwined tactics tend to involve three dynamics harmful to the rule of law: ambiguity in key areas of laws, conferral of excessive discretionary powers in enforcement, and inconsistency and selectivity in application. Key ambiguous provisions are inserted in legislation, typically conferring broad discretionary powers on those tasked with enforcement, who are invariably loyal CPP members. These individuals then interpret and apply such provisions based on the perceived wishes of those in power, rather than with an eye to the supposed purposes of the law in question, fairness, evenhandedness, and consistency in application. The net result is that the CPP wields laws as malleable tools that can be selectively deployed and manipulated to suit its interests.

After introducing this standard CPP rule by law playbook and the themes of ambiguity, discretion, and inconsistency, Part II turns to the ECCC experience in Cambodia, with an emphasis on highly controversial Cases 003 and 004. This Part demonstrates how the Court's treatment of these controversial and ultimately shuttered cases aligned with prevailing CPP rule by law tactics, and perhaps even tended to normatively legitimate such tactics to the Cambodian populace. This Part identifies two troubling rule of law-related dynamics in relation to these cases.

The first such dynamic, termed "negative capacity-building," refers to the possibility that, by demonstrating how to produce more convincing legal cover for outcome-determined decision-making processes failing to abide by basic rule of law requirements, the Court's supposed legal capacity-building effect has, in actuality, further undermined the rule of law domestically in Cambodia.

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JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT (2010) (adapting Fuller's legality criteria, which Fuller developed primarily in relation assessing domestic legal regimes, to the international level, and arguing that a broad spectrum of actors, including, but not limited to, institutions such as courts and individual actors such as lawyers and judges, continually develop law through iterative interactive processes). For an example of a framing of the rule of law as a set of thin procedural requirements infused with basic human rights principles, see, e.g., U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. DOC. S/2004/616 (Aug. 23, 2004) (defining the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards").

Rather than merely increasing the technocratic proficiencies of Cambodian legal professionals, the ECCC has instead modeled how to leverage such expertise to construct more convincing legal façades to provide cover for decision-making processes wholly determined by power and political interests. Importantly, key Cambodian lawyers and judges at the ECCC have done so by seizing on the ambiguous term “most responsible” in the Court’s constitutive documents, interpreting it in an inconsistent manner that conveniently conforms to the publicly stated views of the CPP, thereby borrowing a page from the CPP’s playbook of manipulating vague legal provisions. Not only has this produced incongruent outcomes in cases against similarly-situated accused, but participating in this process has enhanced the capacity of relevant Cambodian legal actors who worked at the Court to more artfully engage in similar tactics domestically.

Alongside this negative capacity-building dynamic, this Article identifies a second, related troubling rule of law ramification of the ECCC experience in Cambodia, referred to as “negative expressivism.” This term is used to emphasize the importance of the ECCC as a widely proclaimed rule of law role model institution for Cambodia. Independent of whether the decision to shutter Cases 003 and 004 prior to trial is technically legally defensible or not (this Article argues that it is not), one troubling normative message emanating from the ECCC has been that if the CPP desires a particular legal outcome—be it trials and convictions, or a dismissal of all charges—this desire will determine judicial decisions.

The CPP consistently expressed a desire for Cases 003 and 004 to be ended without trials.<sup>32</sup> Meanwhile, for the most part, prosecutors and judges at the ECCC have been sharply split, with Cambodian prosecutors and judges uniformly opposing Cases 003 and 004, and international prosecutors and judges (almost) uniformly viewing them as legitimately initiated and legally mandated to proceed to trial.<sup>33</sup> Ultimately, those opposing the Cases won the day, with the proceedings against all of the Case 003 and 004 accused being permanently halted without trials.<sup>34</sup> Consequently, one major social message emanating from the Court is that, regardless of what legal

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<sup>32</sup> DeFalco, *Uncertain Relationship*, *supra* note 27, at 40.

<sup>33</sup> *See id.* at 37-41.

<sup>34</sup> Heather Ryan, *And Then, Finally, a Judge Wrote the Shameful End of the Khmer Rouge Tribunal*, JUSTICEINFO.NET: FOUND. HIRONDELLE (Feb. 4, 2022), <https://www.justiceinfo.net/en/87248-finally-judge-wrote-shameful-end-khmer-rouge-tribunal.html> [<https://perma.cc/N8RZ-FSX4>].

experts say a relevant legal provision dictates or how it has previously been interpreted and applied, the CPP remains the ultimate arbiter of how the law is to be interpreted and applied within Cambodia, even when this produces inconsistent and seemingly contradictory results. This troubling social messaging is especially concerning given the recent support for expressivist theories of ICL<sup>35</sup> and related calls for greater efforts to amplify the expressivist messaging of transitional justice institutions, including criminal courts such as the ECCC.<sup>36</sup>

This Article concludes by offering some thoughts on possible relationships between risks of negative capacity-building and negative expressivism in the ECCC context and the escalation of rule by law tactics by the Cambodian government. No direct causal relationship can be established between the highly questionable legal practices engaged in at the Court, the troubling normative messaging emanating from it, and the CPP's increasing use of rule by law tactics. Nevertheless, it appears plausible, perhaps even probable, that rather than improving the already dire situation in contemporary Cambodia when it comes to respect for human rights, the rule of law, and democratic governance, the legacy of the ECCC may prove to be a negative one. As such, among other things, one of the lessons learned from the ECCC experience may be that the basic recipe of criminal prosecutions plus international legal expertise and knowledge transfer does not necessarily produce a rule of law salve in transitional post-atrocity States. Nor is such a recipe at worst an ineffectual placebo. Rather, in light of how the ECCC experience has played out, there is a real risk that beyond having no discernable *positive* impact on the rule of law in Cambodia, the Court may ultimately have a legacy of *negatively* impacting the rule of law by enhancing the sophistication and perceived legitimacy of CPP rule

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<sup>35</sup> See, e.g., Barrie Sander, *The Expressive Turn of International Criminal Justice: A Field in Search of Meaning*, 32 LEIDEN J. INT'L L. 851 (2019) [hereinafter Sander, *The Expressive Turn*] (describing the general rise of expressivist-based approaches to understanding and justifying ICL institutions); Barrie Sander, *The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law*, 19 INT'L CRIM. L. REV. 1014 (2019) (explaining the limits of this expressivist "turn" within ICL).

<sup>36</sup> Jamie O'Connell, *Transitional Justice as Communication: Why Truth Commissions and International Criminal Tribunals Need to Persuade and Inform Citizens and Leaders, and How They Can*, 73 S.C. L. REV. 101 (2021) (arguing that transitional justice institutions, including criminal courts, can best achieve their most important goals, such as those of reconciliation and deterrence, by changing local perceptions of relevant events of mass violence and their aftermaths through effective communication strategies).

by law tactics. More generally, the ECCC debacle demonstrates that when ICL institutions, especially those engaging local actors in post-atrocity States, engage in dubious decision-making that outwardly appears inconsistent and wholly results-driven, the possibility that such institutions will further entrench problematic existing practices, or even produce new ones, should not be discounted or altogether ignored.

### I. RULE BY LAW TACTICS IN CONTEMPORARY CAMBODIA

There is a problematic tendency to singularly blame Cambodia's current rule of law and human rights deficits on the mass atrocities committed by the Khmer Rouge regime from 1975-1979. Undoubtedly the devastation wrought by the regime – the killing of 1.7-2.2 million Cambodians out of a total population of less than seven million and the severe abuse and traumatization of the remainder of the population – has played a major role in the country's struggles to construct a functioning legal system respectful of basic rule of law and human rights principles.<sup>37</sup> It is, however, important to place the Khmer Rouge experience within a broader context in order to understand Cambodia's inability to develop a working legal system, let alone one appropriately reflective of Cambodian cultural norms and values.

Well before the Khmer Rouge swept into power in 1975, Cambodia was the subject of colonial occupation and various other forms of foreign intervention that, among other things, prevented the nation from developing a functioning indigenous legal system. Following the decline of the mighty Khmer empire made famous by the construction of Angkor Wat and other massive city and temple complexes, Cambodia became vulnerable to incursions by both Thai and Vietnamese forces along its borders. Facing increasing territorial losses, Cambodian monarch King Norodom Prohmbarirak signed a treaty with French naval officers in 1863 whereby Cambodia agreed to provide the French with timber and mineral exploration rights in exchange for protection against foreign incursions.<sup>38</sup> This agreement made Cambodia a French protectorate,

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<sup>37</sup> See, e.g., AMNESTY INT'L, KINGDOM OF CAMBODIA: URGENT NEED FOR JUDICIAL REFORM 2 (2002) (claiming that in 1979 only ten qualified lawyers remained alive in Cambodia).

<sup>38</sup> CHANDLER, *supra* note 19, at 172.

and the French seized on this initial agreement to leverage further ones, incrementally increasing its control in the region and thereby gradually absorbing Cambodia into its Southeast Asian “Indochinese” colonial holdings.

The French gradually imposed a foreign civil law system on Cambodia, one that focused primarily on enriching the French through the collection of taxes, while leaving other laws largely ignored, underdeveloped, and unenforced.<sup>39</sup> This colonial period, which lasted until 1953 when then-King Norodom Sihanouk<sup>40</sup> secured independence, prevented the evolution of Cambodian indigenous legal practices while also failing to provide even an externally-imposed organized and functioning legal system as an alternative.<sup>41</sup> The tumultuous period between independence and the overthrow of the Sihanouk regime in a 1970 coup, which triggered a five-year civil war, similarly lacked in terms of the incremental development of a functioning legal system.<sup>42</sup>

By the time the Khmer Rouge regime swept into power in 1975, Cambodia had already endured a sustained rupture in the evolution of its legal structures and practices. Of course, the devastation wrought by the Khmer Rouge only made matters worse. Few lawyers or judges survived the regime, and most, if not all, Khmer-language legal records and texts had been destroyed by the time the Khmer Rouge were ousted from power by the Vietnamese military in 1979.<sup>43</sup> The Vietnamese-installed Peoples Republic of Kampuchea (“PRK”) government, which succeeded the ousted Khmer Rouge regime, did little to build up Cambodia’s legal institutions. Instead, the PRK adhered to a Soviet-based notion of socialism wherein the “judiciary functioned as an instrument to serve the interests of the party-state and to uphold the policies of the government.”<sup>44</sup> While

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<sup>39</sup> *Id.* at 171-210.

<sup>40</sup> Sihanouk abdicated the throne, officially becoming a prince, rather than the king, in order to run for political office. Sihanouk was Cambodia’s political leader from 1955 to 1970, when he was deposed in a military coup by General Lon Nol, a close ally of the United States.

<sup>41</sup> See generally CHANDLER, *supra* note 19 (giving an overview of Cambodia’s history and discussing the development of political and legal systems after independence). Lucy West, *Governance, Rule of Law and Judicial Reform Challenges in Contemporary Cambodia*, in GOVERNANCE AND DEMOCRACY IN THE ASIA-PACIFIC: POLITICAL AND CIVIL SOCIETY 125, 131 (Stephen McCarthy & Mark R. Thompson eds., 2020).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 132.

the U.N. Transitional Authority of Cambodia (“UNTAC”) period (1992-1993) brought with it attempts to, among other things, construct a functioning independent judiciary through reforms of the country’s entire judicial system,<sup>45</sup> the results were less than stellar.<sup>46</sup> Since 1993, various efforts have been made by international donors and foreign governments to improve the rule of law in Cambodia, including assistance in drafting new legislation, trainings, and creation of the ECCC, without producing much in the way of substantial improvement.<sup>47</sup> Cambodian civil society efforts have been similarly frustrated.

Despite Cambodia’s longstanding rule of law stagnation, the methods through which dominant political actors in Cambodia—currently the Hun Sen-led CPP—subvert the rule of law to serve their own ends has continued to change and evolve. Up until the end of the UNTAC era and the promulgation of Cambodia’s current constitution in 1993, Cambodia largely lacked in terms of the basic formalist components of the rule of law, such as an organized system of laws and a nominally independent judiciary. The 1993 Constitution formally established an independent judiciary in Cambodia.<sup>48</sup> Building on this Western rule of law-based constitution, various legal reforms, such as the overhaul of Cambodia’s criminal laws through the adoption of new codes of criminal procedure and law in 2007 and 2010 respectively,<sup>49</sup> were touted as pathways toward rule of law improvement.<sup>50</sup>

Hun Sen and the CPP have had a complicated relationship with foreign donors and governments seeking to contribute to legal reforms in Cambodia. The CPP-dominated government has often

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<sup>45</sup> See Melissa Curley, *Governing Civil Society in Cambodia: Implications of the NGO Law for the “Rule of Law”*, 42 ASIAN STUD. REV. 247, 251 (2018) (“[The] entire judicial system of Cambodia was reformed after the UNTAC intervention.”).

<sup>46</sup> See West, *supra* note 41, at 132-35.

<sup>47</sup> See *id.* at 135-36; see also Curley, *supra* note 45, at 249 (discussing an extensive literature aiming to understand “why establishing the rule of law and consolidating democracy has been challenging in post-conflict states such as Cambodia”) (internal citations omitted).

<sup>48</sup> See CONSTITUTION OF THE KINGDOM OF CAMBODIA Sep. 21, 1993, art. 128.

<sup>49</sup> CRIMINAL PROCEDURE CODE (2007) (Cambodia); ក្រមព្រហ្មទណ្ឌ [CRIMINAL CODE] (Bunleng Cheung trans., 2008) (Cambodia).

<sup>50</sup> See, e.g., Konrad-Adenauer-Stiftung, *Rule of Law*, 5 OCCASIONAL PAPERS ON DEMOCRATIC DEV. 26 (2009) (discussing that, among other positive rule of law developments, “Cambodia has also established a Criminal Procedure Code and Civil Procedure Code in accordance with international standards. These Codes are important to ensure the respect of human rights, freedom and benefits of individuals.”).



expressed an outward desire for legal reforms and improvements to the rule of law, while carefully avoiding measures that could threaten the CPP's stranglehold on power.<sup>51</sup> Recently, the CPP has shifted gears in foreign policy to rely more heavily on China and less so on Western powers,<sup>52</sup> resulting in greater leeway when it comes to scrutiny of domestic government action in areas such as the judiciary and rule of law. However, Cambodia continues to have strong incentives to maintain a working relationship with Western nations. For example, Cambodia benefits from a favorable "everything but arms" trade status with the European Union.<sup>53</sup> The CPP also would prefer to avoid becoming too beholden to regional and global superpower China.<sup>54</sup>

The net result of these fluctuating relationships between the CPP, Western donor nations, China, and rule of law reform pressures has been various starts, stops, and changes in direction when it comes to legal and judicial reforms in Cambodia. While not

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<sup>51</sup> For example, the Cambodian government has pursued its "rectangular strategy" in various phases since 2004. In a 2004 address, Prime Minister Hun Sen described "the core of the Rectangular Strategy [as] good governance focused at four reform areas: (1) anti-corruption, (2) legal and judicial reform, (3) public administration reform including decentralization and deconcentration, and (4) reform of the armed forces, especially demobilization." Samdech Hun Sen, Prime Minister, Royal Gov't of Cambodia, Address at the First Cabinet Meeting of the Third Legislature of the National Assembly: The Rectangular Strategy for Growth, Employment, Equity, and Efficiency in Cambodia (July 2004), in JMU SCHOLARLY COMMONS, GLOBAL CWD REPOSITORY: CTR. FOR INT'L STABILIZATION & RECOVERY, at 5, <https://commons.lib.jmu.edu/cisr-globalcwd/1135/> [<https://perma.cc/S7HP-VH43>].

<sup>52</sup> See generally Cheng Meng Chou & Joshua Lipes, *China-Cambodia Relations: A History Part Two*, RADIO FREE ASIA, <https://www.rfa.org/english/news/special/chinacambodia/relation2.html> [<https://perma.cc/AP4H-MSWC>] (last visited Mar. 30, 2024) (explaining the recent increase in aid to Cambodia by China fostering friendly relations).

<sup>53</sup> Martin Russell, "Everything but Arms": The Case of Cambodia, EUR. PARLIAMENTARY RSCH. SERV. (Apr. 2019), [https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/637931/EPRS\\_ATA\(2019\)637931\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/637931/EPRS_ATA(2019)637931_EN.pdf) [<https://perma.cc/55AA-SXMH>].

<sup>54</sup> Sebastian Strangio, *What's Behind Cambodia's Cancellation of Military Exercises with China?*, DIPLOMAT (Feb. 15, 2021), <https://thediplomat.com/2021/02/whats-behind-cambodias-cancellation-of-military-exercises-with-china/> [<https://perma.cc/ZZ7V-6DNT>] (suggesting that Cambodian-Chinese military exercises planned to take place in Cambodia in 2021 were cancelled at least partially to serve "as a subtle signal [by Hun Sen and the CPP] to the new U.S. administration that the Cambodian government is no mere lackey of Beijing, and that it is ready for a reset in its relations with Washington. Such would certainly be Hun Sen's interests, given his current heavy reliance on China, and the risk that the country will be once again find itself a subject of superpower tensions.").

in any way beholden to wealthy Western donor States, the CPP government benefits from avoiding jeopardizing the flow of aid and favorable trade agreements. Thus, it behooves Hun Sen and the CPP to avoid being perceived as flagrantly violating the rule of law when possible.

To thread this needle, the CPP has increasingly obscured exercises of raw power behind more or less transparent façades of legality. The standard CPP playbook in this regard has been to either seize on vague provisions in existing laws, create new laws that are vague and/or confer significant discretion in enforcement, or to insert carefully crafted new provisions granting the government new powers into existing laws through amendment processes. Through these rule by law tactics, the CPP has successfully turned the Cambodian legal system into an additional mechanism through which it can exert power and stifle dissent.

Cambodia and the CPP are far from alone when it comes to this leveraging of legislative power to hollow out constitutional and democratic governance structures. Kim Lane Scheppele identifies a global rise in situations wherein aspiring autocrats who initially secure power democratically “use their democratic mandates to launch legal reforms that remove the checks on executive power, limit the challenges to their rule, and undermine the crucial accountability institutions of a democratic state.”<sup>55</sup> Referring to this phenomenon as “autocratic legalism,” Scheppele expresses concern of a global democratic backsliding at the hands of “legally clever autocrats.”<sup>56</sup> While Cambodia may not fit as neatly into this category as some nations, as whether Cambodia ever reached the status of a functioning constitutional democracy in the first place is doubtful, Scheppele’s insights help contextualize the CPP’s increasing use of rule by law tactics as one instantiation of a broader global attack on constitutional and democratic legal protections by actors using the law itself as a preferred weapon.

The following Section provides examples of this increasing utilization of rule by law tactics by the CPP government. Each such example may be seen as a clever use of legal tools in the service of consolidating Hun Sen and the CPP’s stranglehold on power and moving Cambodia further toward fully autocratic governance encased in the hollowed-out shell of a constitutional democracy.

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<sup>55</sup> Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 547 (2018).

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

*a. Criminal Law: Defamation, Public Insult, and Treason*

An early example of CPP rule by law tactics is the use of vague language in Cambodia's Criminal Code defining the offenses of defamation and public insult to selectively attack political opponents and troublesome activists. The offense of defamation is currently defined in Cambodia as "any allegation or charge made in bad faith which tends to injure the hono[ur] or reputation of a person or an institution."<sup>57</sup> The offense of public insult meanwhile, is defined as an "outrageous expression, term of contempt or any invective that does not involve any imputation of fact."<sup>58</sup> The CPP has repeatedly made use of these offenses to criminalize dissent, attack political opponents and generally stifle free speech.

While the relatively sparse UNTAC Criminal Code in place from 1992 until the entry into force in 2010 of Cambodia's current Criminal Code did contain defamation as an offense, it was more limited in its scope, and the offense of "public insult" was nowhere to be found.<sup>59</sup> The UNTAC Criminal Code defamation offense required proof of *actual* harm to the "honor or reputation" of a victim and was limited to individuals, whereas the current provision allows for an "institution" as well as an individual to be a victim and only requires that an alleged defamatory statement "*tends* to injure the honour or reputation" of a victim (be they an individual or institution).<sup>60</sup> Moreover, as noted by David Hutt, while the specific Criminal Code-based penalties for defamation and public insult are limited to monetary fines topping out at approximately 2,500 USD, not only is this sum a massive amount for most Cambodians, but it can be increased by presiding judges, who can also impose restitution orders based on their subjective evaluation of the damages resulting from defamatory conduct, creating a risk of the imposition of effectively unpayable fines.<sup>61</sup> For those who cannot (or

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<sup>57</sup> CRIMINAL CODE art. 30 (Bunleng Cheung trans., 2008) (Cambodia).

<sup>58</sup> *Id.* art. 307.

<sup>59</sup> See CRIMINAL LAW & PROCEDURE OF 1992 OF U.N. TRANSITIONAL AUTHORITY FOR CAMBODIA art. 63, Sep. 10, 1992 (Cambodia), <https://wipolex.wipo.int/en/text/223215> [<https://perma.cc/ZQU9-QYZY>].

<sup>60</sup> *Id.* art. 305; see also David Hutt, *The Real Price of Cambodia's Defamation Charges*, DIPLOMAT (Jan. 20, 2017), <https://thediplomat.com/2017/01/the-real-price-of-cambodias-defamation-charges/> [<https://perma.cc/N4UJ-2PYX>] (emphasis added).

<sup>61</sup> See Hutt, *supra* note 60. This potential exponential escalation of fines remains separate from potential costly civil suits and damage awards.

refuse to) pay, there is the added threat of imprisonment, as Cambodia's current Criminal Procedure Code creates the possibility of imprisonment for failure to pay fines stemming from criminal convictions.<sup>62</sup>

The CPP regime has repeatedly made use of these provisions to quell free speech and punish political opponents, including prominent figures such as Mu Sochua and Ho Vann, opposition politicians who were prosecuted for defamation after speaking out against CPP actions.<sup>63</sup> More recently, in the wake of the CPP's 2017 election scare, prominent opposition leader Sam Rainsy was convicted of defamation and ordered to pay 1 million USD in damages based on statements he made claiming that Hun Sen "bribed an activist to break up the CNRP."<sup>64</sup>

The CPP has also wielded dubious treason allegations as part of its arsenal of vague criminal offenses selectively wielded against its opponents. Most notably, former CNRP leader Kem Sokha was charged with treason in 2017 in the wake of CNRP successes in that year's local elections.<sup>65</sup> He was held largely incommunicado at a remote prison near the Vietnamese border for nearly a year before being transferred to house arrest and then ultimately released from pretrial detention in 2019.<sup>66</sup> The charges, however, remained pending, and the CPP was accused of manipulating the courts to temporarily halt proceedings in order to maintain political leverage over Kem Sokha before resuming proceedings in early 2022.<sup>67</sup> In

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<sup>62</sup> CRIMINAL PROCEDURE CODE arts. 525-26 (2007) (Cambodia).

<sup>63</sup> See Guy Delauney, *Cambodia Upholds Opposition MP Defamation Case*, BBC NEWS (June 2, 2010), <https://www.bbc.com/news/10215597> [<https://perma.cc/8KKB-STEL>]. The CPP also maneuvered to strip opposition political officer holders, including Mu Sochua and Ho Vann of immunity in order to prosecute them in another example of rule by law tactics. See *Cambodia Strips MPs of Immunity*, BBC NEWS (June 22, 2009), <http://news.bbc.co.uk/2/hi/asia-pacific/8112353.stm> [<https://perma.cc/G3PG-BQJA>].

<sup>64</sup> Chansy Chhorn, *Cambodia's Sam Rainsy Found Guilty of Defamation, Ordered to Pay \$1 Million*, REUTERS (Dec. 29, 2017), <https://www.reuters.com/article/us-cambodia-politics-idUSKBN1EN0H7> [<https://perma.cc/B3NM-QYYY>].

<sup>65</sup> Richard C. Paddock & Julia Wallace, *Cambodia Arrests Opposition Leader, Accusing Him of Treason*, N.Y. TIMES (Sep. 2, 2017), <https://www.nytimes.com/2017/09/02/world/asia/cambodia-kem-sokha-arrest-hun-sen.html> [<https://perma.cc/HUU6-QRKT>].

<sup>66</sup> *Kem Sokha: Cambodian Opposition Leader Freed from House Arrest*, BBC NEWS (Nov. 10, 2019), <https://www.bbc.com/news/world-asia-50367724> [<https://perma.cc/6E6K-AZW3>].

<sup>67</sup> Sebastian Strangio, *Cambodia Resumes Treason Trial of Opposition Leader Kem Sokha*, DIPLOMAT (Jan. 19, 2022), <https://thediplomat.com/2022/01/cambodia->

early 2023, Kem Sokha was convicted and sentenced to a twenty-seven year term of house arrest.<sup>68</sup> The conviction now precludes Kem Sokha from running for political office, effectively neutralizing him as a political opponent of the CPP.<sup>69</sup>

The targeting of Kem Sokha was part of a larger legal and political attack against opposition figures, especially those believed to be aligned with the disbanded CNRP and had broader effects. Indeed, the prosecution of Kem Sokha occurred after the CPP had charged a woman who allegedly had an affair with Kem Sokha with criminal prostitution offenses and, later, for “providing false testimony” when she denied the affair while being interrogated by Cambodia’s Counter-Terrorism Directorate.<sup>70</sup> Prominent civil society activist and political commentator Ou Virak was then charged with public defamation for pointing out the obvious fact that the CPP was using Kem Sokha’s alleged affair to undermine the political opposition.<sup>71</sup>

The manipulation of criminal law and procedure in Cambodia is not limited to the offenses of defamation, public insult, and treason. Criminal laws are selectively enforced against CPP opponents on a regular basis, ranging from the persecution of activists participating in marches or rallies using public order offenses, to the failure to prosecute CPP-aligned security forces for serious assaults of activists and protestors.<sup>72</sup> In the run-up to the 2022 local elections,

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resumes-treason-trial-of-opposition-leader-kem-sokha/ [https://perma.cc/5PAP-C96C].

<sup>68</sup> Prak Chan Thul, *Cambodian Opposition Figure Kem Sokha Sentenced to 27 Years of House Arrest*, REUTERS (Mar. 3, 2023), <https://www.reuters.com/world/asia-pacific/cambodian-opposition-figure-kem-sokha-sentenced-27-years-treason-2023-03-03/> [https://perma.cc/WU9T-4FC5].

<sup>69</sup> *Id.*

<sup>70</sup> Curley, *supra* note 45, at 259.

<sup>71</sup> *Id.* at 259-60.

<sup>72</sup> See, e.g., *Cambodia: Joint Letter Regarding Boeung Kak Lake Activists*, HUM. RTS. WATCH (May 29, 2012), <https://www.hrw.org/news/2012/05/29/cambodia-joint-letter-regarding-boeung-kak-lake-activists> [https://perma.cc/82SV-Q4M9] (detailing the “arbitrary arrest and mistreatment” of human rights activists); Alexandra Kent, *Conflict Continues: Transitioning into a Battle for Property in Cambodia Today*, 47 J. SE. ASIAN STUD. 3 (2016) (arguing that transitional justice in Cambodia has not enhanced fairness within the democratic processes of Cambodia); *Cambodia: Hun Sen Threatens Families of Activists*, HUM. RTS. WATCH (Oct. 28, 2020), <https://www.hrw.org/news/2020/10/28/cambodia-hun-sen-threatens-families-activists> [https://perma.cc/V5SA-5WJV] (noting the threats from Prime Minister Hun Sen against the family of former opposition politician); *Cambodia: Free Activist Held in Forestry Case*, HUM. RTS. WATCH (Oct. 14, 2020), <https://www.hrw.org/news/2020/10/14/cambodia-free-activist-held-forestry->

numerous political opponents of the CPP were convicted of vague charges of “conspiracy,” “incitement,” and “inciting military personnel to disobedience” in mass trials, some of which have been conducted *in absentia*.<sup>73</sup> In some instances, even the children of opposition politicians and activists are targeted. For example, Kak Sovannchhay, the sixteen-year-old autistic son of already-imprisoned opposition politician Kak Komphear, has been charged with criminal “incitement.”<sup>74</sup> These most recent trials again take advantage of vague language in Cambodia’s Criminal Code to target CPP opponents.<sup>75</sup>

*b. Controlling Civil Society: Regulatory Laws*

Vague regulatory laws form another key part of the CPP’s rule by law arsenal. Examples of such regulatory suppression are laws regulating NGOs, tax laws, labor laws, and telecommunications.

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case [<https://perma.cc/3B7Z-7N3S>] (reporting on the arrest of a former opposition activist); *Cambodia: Opposition Politicians Convicted in Mass Trial*, HUM. RTS. WATCH (Mar. 17, 2022), <https://www.hrw.org/news/2022/03/17/cambodia-opposition-politicians-convicted-mass-trial> [<https://perma.cc/5N3G-CY68>] (discussing the conviction of 20 opposition activists after an “unfair trial” with “no credible evidence”).

<sup>73</sup> See, e.g., *Cambodia: 51 Opposition Politicians Convicted in Mass Trial*, HUM. RTS. WATCH (June 14, 2022), <https://www.hrw.org/news/2022/06/14/cambodia-51-opposition-politicians-convicted-mass-trial> [<https://perma.cc/9XY9-UAJZ>] (reporting on the mass conviction of 51 opposition politicians and activists “in yet another mass trial on politically motivated charges” as “part of the government’s wider crackdown on Prime Minister Hun Sen’s political opponents”).

<sup>74</sup> Alex Conte & Am. Bar Ass’n Ctr. for Hum. Rts., *Cambodia v. Kak Sovannchhay*, A.B.A. CTR. FOR HUM. RTS. (May 2022), [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/trialwatch/cambodia-sovannchhay-trialwatch-report.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/trialwatch/cambodia-sovannchhay-trialwatch-report.pdf) [<https://perma.cc/H3J4-RN99>].

<sup>75</sup> For example, “incitement” is itself undefined, except being “punishable when it is committed: (1) by speech of any kind, made in a public place or meeting; (2) by writing or picture of any kind, either displayed or distributed to the public; (3) by any audio-visual communication to the public.” CRIMINAL CODE art. 494 (Bunleng Cheung trans., 2008) (Cambodia). Meanwhile, the “direct incitement to commit a felony or to disturb social security by employing one of the means defined in Article 494” is punishable by fines and up to two years in prison. *Id.* art. 495. See also vague provisions related to incitement and conspiracy. *Id.* arts. 471 (inciting military personnel to disobedience), 468 (inciting soldiers to serve foreign power), 464 (inciting people to arms against state authority), 465 (inciting people to arms against part of population), 505 (incitement to obstruct a public official), 497 (incitement through the print media), 443 (conspiracy with a foreign power), 499 (participation in criminal association).

These and other seemingly banal regulatory laws include key provisions designed to provide the CPP with new powers to crack down on troublesome civil society activists, journalists, and political opponents.

The Law on Associations and Non-Governmental Organizations (“LANGO”) was passed in 2015 by the National Assembly following years of controversy and opposition.<sup>76</sup> The LANGO followed repeated claims by Hun Sen and the CPP that NGOs, which frequently critique governmental conduct, “are out of control and . . . insult the government just to ensure their financial survival.”<sup>77</sup> Despite criminal and other anti-corruption legal provisions already regulating NGO conduct, the LANGO placed new, onerous registration and reporting obligations on NGOs operating in Cambodia.<sup>78</sup> The Law was widely viewed as created to exert control over certain troublesome NGOs, many of them human, labor, and/or environmental rights organizations, that critiqued the government and lodged allegations of serious rights abuses.<sup>79</sup> Following the usual CPP playbook, key provisions in the LANGO, most notably those concerning registration and financial reporting requirements, were left vague, allowing them to be selectively utilized to de-register and effectively disband NGOs at the whim of the CPP.<sup>80</sup>

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<sup>76</sup> See ច្បាប់ស្តីពីសមាគម និងអង្គការមិនមែនរដ្ឋាភិបាល [LANGO] JULY 13, 2015 (Cambodia), translated in LAW ON ASSOCIATIONS AND NON-GOVERNMENTAL ORGANIZATIONS (U.N. Food & Agriculture Org. ed., 2015); see also U.N. Off. of the High Comm’r. for Hum. Rts. in Cambodia, A Human Rights Analysis of the Law on Associations and Non-Governmental Organizations, (Aug. 4, 2015) [hereinafter *Analysis of the Law on Associations and Non-Governmental Organizations*] (analyzing the NGO law and its effects on civil society and free speech in Cambodia).

<sup>77</sup> Bunthoeum Ke, *Legal Framework of NGOs in Cambodia*, 13 INT’L J. NOT-FOR-PROFIT L. (Apr. 2011).

<sup>78</sup> LANGO, JULY 13, 2015 (Cambodia), translated in LAW ON ASSOCIATIONS AND NON-GOVERNMENTAL ORGANIZATIONS (U.N. Food & Agriculture Org. ed., 2015).

<sup>79</sup> See, e.g., Ke, *supra* note 77; *Analysis of the Law on Associations and Non-Governmental Organizations*, *supra* note 76; Bibi van der Zee, *NGO Alert: Cambodia Legislation Gives Government New Powers to Monitor, Fine or Disband*, GUARDIAN (July 13, 2015), <https://www.theguardian.com/global-development-professionals-network/2015/jul/13/ngo-alert-cambodia-legislation-gives-government-new-powers-to-monitor-fine-or-disband> [https://perma.cc/5ZJD-R96P]; Curley, *supra* note 45.

<sup>80</sup> See *Analysis of the Law on Associations and Non-Governmental Organizations*, *supra* note 76 (analyzing the LANGO and reaching this same conclusion); *Cambodia: Repeal of Abusive Associations Rule*, HUM. RTS. WATCH (Dec. 7, 2018), <https://www.hrw.org/news/2018/12/07/cambodia-repeal-abusive-associations-rule> [https://perma.cc/8W55-TBAR].

For example, the LANGO's definitions concerning exactly what forms of organizations or associations it even applies to are vague, essentially conferring on the government the power to selectively conclude that troublesome local associations must comply with its requirements, thereby placing a burden on targeted groups that is functionally impossible for them to comply with.<sup>81</sup> Similarly, the term "public interest," which forms part of the criteria used to define what groups or associations the LANGO applies to, is left undefined, compounding this vagueness.<sup>82</sup> Since passage of the LANGO, less than half of the 339 international NGOs operating in Cambodia, let alone the estimated 6,000 smaller local NGOs, have fulfilled its registration and financial reporting obligations.<sup>83</sup> The LANGO has also been deployed by the CPP to target and, in some cases, disband NGOs working on politically sensitive topics such as electoral fairness and transparency, and land and environmental rights issues.<sup>84</sup> Calls for the repeal, or at least revisions to the LANGO have thus far gone unheeded.<sup>85</sup>

The LANGO is but one of various examples of the CPP weaponizing regulatory laws to further entrench itself in power. Tax laws were wielded against the Cambodia Daily, the country's most prominent independent newspaper, published in both Khmer and English-language editions. The government conjured up a tax bill of 6.3 million USD against the Daily, forcing it to close down in 2017 in the wake of continued coverage critiquing the CPP.<sup>86</sup> The country's

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<sup>81</sup> *Analysis of the Law on Associations and Non-Governmental Organizations*, *supra* note 76, at 5.

<sup>82</sup> *Id.* at 5.

<sup>83</sup> See Sokhean Ben, *LANGO Discussions End in Stalemate*, KHMER TIMES (July 7, 2020), <https://www.khmertimeskh.com/50741970/lango-discussions-end-in-stalemate/> [<https://perma.cc/P7W8-A7S2>].

<sup>84</sup> See, e.g., Leonie Kijewski & Kong Meta, *Land Rights Organisation in Lango Limbo*, PHNOM PENH POST (Nov. 17, 2017), <https://www.phnompenhpost.com/national/land-rights-organisation-lango-limbo> [<https://perma.cc/S4EZ-CJTM>]; Mark S. Cogan, *What's Behind the Recent Arrests of Cambodian Activists?*, GEOPOLITICAL MONITOR (Sep. 18, 2020), <https://www.geopoliticalmonitor.com/whats-behind-the-recent-arrests-of-cambodian-activists/> [<https://perma.cc/BL5X-ELEP>]; *Human Rights Watch Submission to the UN Human Rights Committee in Advance of Its Review of Cambodia*, HUM. RTS. WATCH (Feb. 1, 2022), <https://www.hrw.org/news/2022/02/01/human-rights-watch-submission-un-human-rights-committee-advance-its-review-cambodia> [<https://perma.cc/B5C8-EKJ3>].

<sup>85</sup> Ben, *supra* note 83.

<sup>86</sup> *Cambodia Daily Shuts with "Dictatorship" Parting Shot at Prime Minister Hun Sen*, GUARDIAN (Sep. 4, 2017),



other highest-profile newspaper, the Phnom Penh Post, was then sold to a Malaysian investor with alleged political and economic ties to the CPP and the core of its staff gutted and replaced.<sup>87</sup> Other independent news outlets, such as the Voice of Democracy, have been punished or shut down altogether using similar regulatory tactics.<sup>88</sup>

Other examples of the many ways the CPP leverages regulatory powers to further empower itself are a 2015 Telecommunications Law and recent amendments to trade union regulatory laws. The Telecommunications Law permits the CPP to engage in undeclared monitoring of private speech without any significant procedural safeguards.<sup>89</sup> The troubling effects of this law could be exacerbated by a draft cybercrime law currently being fast-tracked by the CPP.<sup>90</sup> The CPP has also expanded its arsenal of laws it can use to attack trade unionists. While the CPP has used criminal laws, such as the vague incitement provisions discussed *supra*, to persecute trade union activists,<sup>91</sup> it has also adopted new regulatory laws expanding

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<https://www.theguardian.com/world/2017/sep/04/cambodia-daily-shuts-with-dictatorship-parting-shot-at-prime-minister-hun-sen> [https://perma.cc/9QRE-4JLW].

<sup>87</sup> Sophal Sek, *Why Did a Malaysian Buy "The Phnom Penh Post"?*, BANGKOK POST (May 19, 2018), <https://www.bangkokpost.com/opinion/opinion/1468550/why-did-a-malaysian-buy-the-phnom-penh-post> [https://perma.cc/N3E6-8ZKF]; Laura Oliver, *As Cambodia Approaches a Crucial Election, Journalists Suffer Shutdowns and Abuse*, REUTERS INST. FOR STUDY JOURNALISM (July 6, 2023), <https://reutersinstitute.politics.ox.ac.uk/news/cambodia-approaches-crucial-election-journalists-suffer-shutdowns-and-abuse> [https://perma.cc/J4JK-H3MM] (last visited Mar. 30, 2024).

<sup>88</sup> Kelly Ng, *Cambodia's Hun Sen Shuts Down Independent Media Outlet Voice of Democracy*, BBC NEWS (Feb. 13, 2023), <https://www.bbc.com/news/world-asia-64621595> [https://perma.cc/58QP-HT6N]; Oliver, *supra* note 87.

<sup>89</sup> *Cambodia: Internet Censorship, Control Expanded*, HUM. RTS. WATCH (Feb. 18, 2021), <https://www.hrw.org/news/2021/02/18/cambodia-internet-censorship-control-expanded> [https://perma.cc/8X2H-N7H8].

<sup>90</sup> *Cambodia: Scrap Draft Cybercrime Law*, HUM. RTS. WATCH (Nov. 13, 2020), <https://www.hrw.org/news/2020/11/13/cambodia-scrap-draft-cybercrime-law> [https://perma.cc/R2M7-693A] (quoting Human Rights Watch Asia Director, Brad Adams, as stating that "[t]he draft cybercrime law's terms are incredibly broad and vague, and would give an already authoritarian government even more power to arbitrarily prosecute critics and political opponents").

<sup>91</sup> See, e.g., Press Release, U.N. Off. of the High Comm'r. for Hum. Rts., Cambodia: UN Experts Condemn Conviction of Trade Union Leader, Systematic Crackdown on Human Rights Defenders (Aug. 24, 2021), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27401&LangID=E> [https://perma.cc/H6NE-CDZU]; *Only "Instant Noodle" Unions Survive*, HUM. RTS. WATCH (Nov. 21, 2022),

and diversifying its control over unions in recent years. According to a report by Human Rights Watch, “[s]ince 2015, the Cambodian government has adopted an array of laws that restrict the rights to freedom of expression, peaceful assembly, and association” including the “Trade Union Law . . . which imposes restrictive and burdensome requirements around registering unions, and restrictions on independent unions on the right to strike and collectively bargain.”<sup>92</sup> The CPP-dominated Ministry of Labor and Vocational Training also “frequently rejects applications for registering independent unions based on small errors or misspellings to obstruct collective worker action.”<sup>93</sup>

*c. Taking Advantage of the Pandemic: The Emergency Powers Law*

The CPP also opportunistically took advantage of the COVID-19 global pandemic to grant itself new, largely unchecked powers. The Cambodian government responded to the pandemic by arresting individuals who publicly critiqued the government’s response to the pandemic,<sup>94</sup> and enacting a new Emergency Powers Law in 2020, which included open grants of power and key areas of vagueness and discretion.<sup>95</sup> The arrests were made pursuant to familiar vague offenses, such as incitement, or in some cases arrestees were not charged with anything specific beyond allegedly spreading “fake

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<https://www.hrw.org/report/2022/11/21/only-instant-noodle-unions-survive/union-busting-cambodias-garment-and-tourism> [https://perma.cc/XH6B-SGDC].

<sup>92</sup> Only “Instant Noodle” Unions Survive, *supra* note 91, at 4.

<sup>93</sup> *Id.*

<sup>94</sup> Hun Sirivadh, *Dozens Arrested Over Covid-19 ‘Fake News’ This Year, Police Say*, VOD (Apr. 16, 2020), <https://vodenglish.news/dozens-arrested-over-covid-19-fake-news-this-year-police-say/> [https://perma.cc/22TB-V6DP].

<sup>95</sup> See ច្បាប់ស្តីពីការគ្រប់គ្រងប្រទេសជាតិក្នុងគ្រាអាសន្ន [Law on the Management of the Nation on in Emergencies] Apr. 10, 2020 (Cambodia), translated in FULL TEXT OF APPROVED STATE OF EMERGENCY DRAFT LAW (AGENCE KAMPUCHEA PRESSE ed., 2020), [https://perma.cc/Q5UB-TRHN] [hereinafter FULL TEXT OF APPROVED STATE OF EMERGENCY DRAFT LAW]. For overviews of the law, see Heng Kimkong, *Cambodia’s State of Emergency Law and Its Social and Political Implications*, EAST-WEST CTR. (Aug. 6, 2020), <https://www.eastwestcenter.org/publications/cambodia%E2%80%99s-state-emergency-law-and-its-social-and-political-implications> [https://perma.cc/29QR-2VVD]; Randle DeFalco, *Opportunism, COVID-19, and Cambodia’s State of Emergency Law*, JUST SEC. (Aug. 3, 2020), <https://www.justsecurity.org/71194> [https://perma.cc/VH5G-TV3S].

news” regarding the pandemic, with many of those detained being known political opponents of the CPP.<sup>96</sup>

As these arrests continued, the CPP took advantage of language in Cambodia’s Constitution permitting the King, in agreement with the Prime Minister, President of the National Assembly, and President of the Senate, to place the country in a state of emergency when “the nation faces danger”<sup>97</sup> in order to push through a new Emergency Powers Law. The government can now invoke this law to impose various far-reaching, vaguely defined powers whenever “the nation is jeopardized by war, invasion by foreign forces, public health emergencies from pandemics and national chaos that threatens security and public order as well as national disasters that threaten or seriously jeopardize the entire nation.”<sup>98</sup> The law confers sweeping powers, such as those to ban travel or gatherings, seize businesses, fix prices, and the like.<sup>99</sup> The Emergency Powers Law, following the CPP rule by law playbook, also confers broad, vaguely defined powers during declared states of emergency, permitting the government to engage in “surveillance measures by any means for digital information[,]” to ban the public broadcasting of “information that can cause public panic or turmoil, damage to national security or confusion about the situation[,]” and take “other appropriate and necessary measures.”<sup>100</sup>

To date, the CPP government has not invoked the Emergency Powers Law by declaring a state of emergency. Instead, the CPP opted to rely on existing levers of power, such as arrests and vague criminal charges, to silence critics of its response to the pandemic or to use the pandemic as a pretext to attack political enemies. The Emergency Powers Law, however, remains on the books for a time of CPP need. The CPP leveraged the pandemic to grant itself new, sweeping legal powers it can wield almost whenever it wants. All the CPP must do is convince the monarch, who is now largely a figurehead beholden to the CPP, to declare that the “nation is jeopardized by . . . national chaos that threatens security and public order” in order to grant itself sweeping, largely undefined powers

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<sup>96</sup> Sirivadh, *supra* note 94.

<sup>97</sup> CONSTITUTION OF THE KINGDOM OF CAMBODIA Sep. 21, 1993, art. 22 *new* (as amended Mar. 1999).

<sup>98</sup> FULL TEXT OF APPROVED STATE OF EMERGENCY DRAFT LAW, *supra* note 95, art. 4.

<sup>99</sup> *Id.* art. 5.

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

to surveil and control the populace.<sup>101</sup> It is not difficult to imagine the CPP declaring events such as mass peaceful protests or other large-scale expressions of dissent as situations producing “national chaos” or otherwise “threatening security and public order.” As there have been no meaningful threats to the CPP chokehold on power in Cambodia since the law’s passage, there has been no need for the CPP to use this tool. However, the law remains on the books for a time of CPP need, such as in the event another political opponent gains sufficient support to threaten the status quo.

*d. The CPP Rule by Law Playbook: Common Themes*

As demonstrated in the foregoing analysis, the rule of law in Cambodia has been subverted by the CPP through the strategic passing of laws which seemingly appear to be facially neutral, but include key vague provisions. In some cases such laws have been passed ostensibly as components of rule of law reform efforts. The vague provisions are then interpreted by executive and judicial actors in such a way so as to serve the perceived interests of the CPP and Cambodia’s ruling elites. These interests most often involve the stifling of any political opposition, and silencing activists who are critical of the CPP. Examples of such laws include various provisions within Cambodia’s codes of criminal law and procedure, laws regulating NGOs, taxation, telecommunications and labor unions, and most recently, the Emergency Powers Law ostensibly passed in response to the COVID-19 pandemic.

One central CPP rule by law tactic is the insertion of key ambiguous language, especially language conferring discretion on those given enforcement powers, into laws that otherwise appear facially neutral. The CPP then instrumentalizes such provisions to serve its ends by wielding power over those tasked with enforcing or interpreting such laws, individuals who most often are themselves longstanding CPP members. Notably, while some such efforts have been relatively transparent in terms of the CPP government granting itself troubling new legal powers, in other instances the CPP has cleverly framed certain problematic legal practices and alterations as being carried out in service of enhancing the rule of law and human rights protections. For example, shortly after engineering the dissolution of all of Cambodia’s viable

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<sup>101</sup> *Id.* arts. 1, 3, 4.

opposition parties and in the runup to national elections Hun Sen was asked what he would do to address the glaring lack of opposition parties. His answer was that not only would he not take any action to address this glaring problem, but that he *could not* take any action, noting that governance of elections is wholly under the authority of the Council on Elections and thus separation of powers principles prevented him from taking any action.<sup>102</sup>

## II. THE ECCC EXPERIENCE IN CAMBODIA

Against the backdrop of Cambodia's authoritarian governance and severe rule of law deficit, the Cambodian government and the United Nations agreed in 2003 to create the ECCC following protracted negotiations.<sup>103</sup> The Court, tasked with adjudicating specified domestic and international crimes occurring within Cambodia during the Khmer Rouge period (April 17, 1979 to January 9, 1979), began operations in 2006 and recently wound down operations.<sup>104</sup> Ultimately, the ECCC opened investigations against ten individuals, spanning four total cases. Three individuals have been convicted of various crimes: Kaing Guek Eav (better known by his revolutionary alias "Duch"), Nuon Chea, and Khieu Samphan. Cases against three individuals, Ieng Sary, Ieng Thirith, and Sou Met, were dismissed following their deaths. The remaining four suspects in controversial Cases 003 and 004—Meas Muth, Im Chaem, Ao An, and Yim Tith—all eventually had proceedings against them formally terminated.<sup>105</sup>

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<sup>102</sup> Ananth Baliga & Chheng Niem, *CPP Set to Sweep Senate, National, Politics*, PHNOM PENH POST (Dec. 27, 2017), <https://www.phnompenhpost.com/national-politics/cpp-set-sweep-senate> [<https://perma.cc/8HGS-JNCU>].

<sup>103</sup> See DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* 341-405 (2012) (providing an overview of the protracted negotiations leading up to the creation of the ECCC).

<sup>104</sup> Voun Dara, *ECCC Closing Final Case by Year's End*, PHNOM PENH POST (July 7, 2022), <https://www.phnompenhpost.com/national-kr-tribunal/eccc-closing-final-case-years-end> [<https://perma.cc/4ESC-3UF4>].

<sup>105</sup> Co-Prosecutors v. Im, Case No. 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), (June 29, 2018), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/D308\\_3\\_1\\_20\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/D308_3_1_20_EN.pdf) [<https://perma.cc/JD2A-MJEE>] (decision effectively dismissing the case against Im Chaem); International Co-Prosecutor v. Meas, Case No. 003/08-10-2021-ECCC/SC(05), Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 003 to Trial as Required by

As noted previously, like other ICL institutions, the ECCC has been touted by its supporters as much more than just an institution tasked with adjudicating the criminal culpability of individuals falling within its narrow jurisdictional mandate. The Court has been touted as a vehicle for achieving other transitional justice goals, ranging from establishing an authoritative historical record, to fostering social dialogue, to improving the rule of law and respect for human rights in contemporary Cambodia. As Lucy West explains, when it comes to the rule of law: “[i]n the context of the ECCC, it is widely expected that legal standards, norms and best practices demonstrated through the tribunal will be transferred into Cambodia’s domestic judiciary [thereby] foster[ing] a liberal rule of law culture in Cambodia.”<sup>106</sup> The OHCHR puts it similarly, stating that:

Although the primary aim of the ECCC is to provide Cambodians with a measure of justice for the suffering experienced during the Khmer Rouge era, a secondary and equally significant aim is for the [C]ourt to act as a role model for Cambodia’s domestic courts. The ECCC can do so both through creating a “demonstration effect” – by evincing the independence and impartiality of proceedings and the credibility of its process – as well as by actively engaging in programs that ensure the effective transfer of knowledge, skills and practices from the ECCC to the national legal sector.<sup>107</sup>

This general “role model” claim can be subdivided into two distinct, yet related, subsidiary claims. First, that the Court will have a positive “demonstration effect” whereby the ECCC models how a legitimate legal institution, one that respects the rule of law by abiding scrupulously by foundational rule of law tenets:

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the ECCC Legal Framework, ¶ 44 (Dec. 20, 2021), [https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/3\\_1\\_1\\_1\\_EN.pdf](https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/3_1_1_1_EN.pdf) [https://perma.cc/KP84-SHKP] (terminating proceedings against surviving Case 003 suspect Meas Muth); International Co-Prosecutor v. Yim, Case No. 004/23-09-2021-ECCC/SC(06), Decision on International Co-Prosecutor’s Appeal of the Pre-Trial Chamber’s Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework, ¶ 32 (Dec. 28, 2021), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/2\\_1\\_1\\_1\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/2_1_1_1_EN.PDF) [https://perma.cc/KP84-SHKP] (terminating proceedings against Yim Tith).

<sup>106</sup> West, *supra* note 41, at 138.

<sup>107</sup> OHCHR, *Promotion of ECCC Legacy*, *supra* note 25.

independence, impartiality, and procedural credibility. This first claim is essentially expressive in nature, averring that the Court can serve as a model for domestic courts. Presumably the target audience for this model is not only Cambodian legal professionals, but more generally Cambodian citizens, many of whom have arguably never been exposed to any court or judicial body abiding by these principles. The second claim focuses on what is often referred to as rule of law “capacity building.” That is, the idea that “[b]y giving local lawyers and judges the opportunity to work within the international legal system, ostensibly free from corruption and subject to the rule of law, it is hoped that a culture of the rule of law may be fostered in Cambodia.”<sup>108</sup>

In previous scholarship I questioned such assumptions regarding the rule of law and ICL prosecutions in places such as Cambodia.<sup>109</sup> Written in 2017, this piece raised concerns about the ECCC’s rule of law legacy in Cambodia in light of the probable shuttering of Cases 003 and 004 based on inconsistent legal reasoning.<sup>110</sup> My concern at the time was that the ECCC would ultimately contribute to the “further erosion of the rule of law” by being “pulled into the empty cycles of legality that . . . abound in Cambodia, whereby the rule of law is subverted through pretenses of legality.”<sup>111</sup>

The remainder of this Article argues that this risk of the ECCC having a net negative impact on the rule of law in Cambodia appears to be in the process of being realized through the Court’s construction of a thin façade of legality used in attempts to legitimate the shuttering of Cases 003 and 004. In making this argument, I identify two interrelated dynamics emanating from the dubious attempts to legally justify the shuttering of these cases. These dynamics are the inverse of the positive “demonstration effect” and “capacity building” effects forecasted by proponents of the ECCC.

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<sup>108</sup> See Seeta Scully, *Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia*, 13 *ASIAN-PAC. L. & POL’Y J.* 300, 341 (2011) (providing an overview of the claim that the ECCC will help improve the rule of law in Cambodia by “giving local lawyers and judges the opportunity to work within the international legal system, ostensibly free from corruption and subject to the rule of law”).

<sup>109</sup> DeFalco, *Uncertain Relationship*, *supra* note 27.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 58.

The first, which I refer to as “negative capacity building,” refers to the way in which the ECCC has provided trainings and skills transfers to Cambodian legal actors regarding how to more artfully and hence, less transparently, engage in outcome-determined decision-making while maintaining a pretense of adherence to rule of law principles. This negative capacity building problem stems from the fact that the reasons provided in decisions terminating Case 003 and 004 proceedings fundamentally fail to adhere to basic rule of law principles of generality and consistency in application.

The second, which I refer to as a negative expressivism, focuses on the normative social messaging emanating from the Court and public perception in Cambodia. Regardless of whether one agrees Cases 003 and 004 were shuttered for reasons that flagrantly violate rule of law principles, the arguably larger rule of law problem stemming from the Court and these cases is that dominant public perception remains that the two cases have been discontinued primarily *because* of the CPP’s opposition to them. The risk of this dominant perception is that among other things, one major normative message emanating from the overall ECCC experience in Cambodia may be that CPP-aligned powerbrokers remain the ultimate arbiters of what the law is and how it will be applied (or not) in any given instance and that all the rule of law requires is some effort to provide a legal gloss to otherwise ad hoc, outcome-determined decisions.

To substantiate the assertion that these two risks appear to be well along the way to becoming realized, this section provides an overview of the shuttering of Cases 003 and 004, followed by a description of how this process has rendered the ECCC a negative rule of law role model for Cambodia.

*a. The Case 003 and 004 Controversy: A Brief Overview*

From the very inception of the ECCC, the question of how many cases the Court would hear was highly controversial. The CPP-dominated Cambodian government consistently opposed Cases 003 and 004. Perhaps more importantly, prominent individual CPP members, most notably Hun Sen, have consistently indicated the CPP’s staunch stance against any trials in the two cases, with Hun Sen on multiple occasions stating bluntly that these cases “will not



be allowed” to move forward.<sup>112</sup> Clearly taking their cue from these statements, key Cambodian actors at the ECCC, including all Cambodian judges and Cambodian Co-Prosecutor Chea Leang, have uniformly opposed any of the cases moving forward to trials.<sup>113</sup>

Although the two cases have been opposed by the ECCC’s Cambodian judges and Co-Prosecutor, the ECCC’s Internal Rules clearly provide that, absent a supermajority decision by the Pre-Trial Chamber, decisions by one of the two Co-Prosecutors or Co-Investigating Judges are to be effectuated.<sup>114</sup> The reason offered by National Co-Prosecutor Chea Leang, Co-Investigating Judge You Bunleng, and other Cambodian ECCC judges for opposing Cases 003 and 004 has consistently been that none of the suspects in either case qualify as former Khmer Rouge “senior leaders” or other “most responsible” individuals, vis-à-vis crimes under the Court’s jurisdiction.<sup>115</sup>

The problem with this position is primarily the conviction of Duch, former commandant of the notorious S-21 *Tuol Sleng* prison in Phnom Penh. Duch was convicted of various war crimes and crimes against humanity and found responsible for “at least 12,273”

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<sup>112</sup> See, e.g., Kuch Naren, *Hun Sen Warns of Civil War if ECCC Goes Beyond “Limit”*, CAMBODIA DAILY (Feb. 7, 2015), <https://english.cambodiadaily.com/news/hun-sen-warns-of-civil-war-if-eccc-goes-beyond-limit-78757/#:~:text=Reviving%20one%20of%20his%20most,continued%20to%20pursu e%20additional%20cases> [https://perma.cc/8A83-HHS6].

<sup>113</sup> See DeFalco, *Uncertain Relationship*, *supra* note 27; see also Randle DeFalco, *Cases 003 and 004 at the Khmer Rouge Tribunal: The Definition of “Most Responsible” Individuals According to International Criminal Law*, 8 GENOCIDE STUD. & PREVENTION 45 (2014) [hereinafter DeFalco, *Cases 003 and 004 at the Khmer Rouge Tribunal*] (both discussing this opposition in greater detail).

<sup>114</sup> EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA. INTERNAL RULES (REV. 10), Rule 71(4)(c) (Oct. 27, 2022), <http://www.eccc.gov.kh/sites/default/files/legal-documents/Internal%20Rules%20-%20EN.pdf> [https://perma.cc/4MGR-8LDH] (mandating that in a situation involving a disagreement between the Co-Prosecutors regarding the initiation of a case via an introductory submission to the Co-Investigating Judges, if no consensus can be reached and no supermajority decision of the Pre-Trial Chamber settles the dispute, “the action or decision done by one Co-Prosecutor shall be executed”); see *id.* Rule 72 (mandating a similar process to govern disagreements between the two Co-Investigating Judges. Notably, Rule 72(4)(d) states that “the default decision shall be that the order or investigative act done by one Co-Investigating Judge shall stand, or that the order or investigative act proposed to be done by one Co-Investigating Judge shall be executed.”).

<sup>115</sup> DeFalco, *Uncertain Relationship*, *supra* note 27, at 40.

deaths.<sup>116</sup> The Supreme Court Chamber dismissed Duch's argument that he fell outside the personal jurisdiction of the ECCC because he was neither a Khmer Rouge "senior leader" nor a "most responsible" person.<sup>117</sup> Duch's prosecution and the failure of his argument that he does *not* fall under the Court's jurisdiction makes it exceedingly difficult to defend any decision finding any of the suspects in Cases 003 and 004 as not also among those "most responsible" for the crimes of the Khmer Rouge era. For example, as noted by ECCC Supreme Court Chamber Judge Maureen Harding Clark in her scathing dissent against the termination of proceedings in Cases 003 and 004, the harms that would have been addressed had the relevant suspects been sent to trial far exceeded those addressed in Case 001 based on any metric of comparison.<sup>118</sup>

Nonetheless, Cases 003 and 004 were incrementally shut down. First, in the sole substantive decision finding a suspect in Case 003 or 004 outside the personal jurisdiction of the ECCC by both Co-Investigating Judges, a Closing Order dismissing the charges against Case 004 suspect Im Chaem was issued in 2017.<sup>119</sup> The order was upheld on appeal by the Pre-Trial Chamber in 2018.<sup>120</sup>

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<sup>116</sup> Co-Prosecutors v. Kaing, Case No. 001/18-07-2007/ECCC/TC, Judgement, ¶ 630 (July 26, 2010), <https://www.eccc.gov.kh/en/document/court/judgement-case-001> [<https://perma.cc/UQH5-2BGR>]. This number represents only documented killings of identified victims, with the actual death toll more likely to be in excess of 20,000 lives.

<sup>117</sup> Co-Prosecutors v. Kaing, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgement, ¶ 42 (Feb. 3, 2012), <https://www.eccc.gov.kh/en/document/court/case-001-appeal-judgement> [<https://perma.cc/V5XL-K7WA>] ("The terms "senior leaders" and "most responsible" are not jurisdictional requirements . . . but operate exclusively as investigational and prosecutorial policy to guide the independent discretion of the Co-Investigating Judges and Co-Prosecutors as to how best to target their finite resources."); see DeFalco, *Cases 003 and 004 at the Khmer Rouge Tribunal*, *supra* note 113, at 47-48 (providing an overview of this finding).

<sup>118</sup> See International Co-Prosecutor v. Meas, Case No. 003/08-10-2021-ECCC/SC(05), Dissenting Opinion of Judge Clark (Dec. 17, 2021), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/3\\_1\\_1\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/3_1_1_EN.pdf) [<https://perma.cc/8NMQ-42ES>]; see Sara L. Ochs, *In Need of Prosecution: The Role of Personal Jurisdiction in the Khmer Rouge Tribunal*, 55 STAN. J. INT'L L. 117 (2019); see also DeFalco, *Cases 003 and 004 at the Khmer Rouge Tribunal*, *supra* note 113 (both discussing these cases).

<sup>119</sup> See Prosecutor v. Im, Case No. 004/1/07-09-2009-ECCC-OCIJ, Closing Order (Reasons), ¶ 325 (July 10, 2017), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/D308\\_3\\_Redacted\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/D308_3_Redacted_EN.pdf) [<https://perma.cc/2DWQ-UPP7>].

<sup>120</sup> See Prosecutor v. Im, Case No. 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor's Appeal of Closing Order

International Pre-Trial Chamber Judges Kang Jin Baik and Olivier Beauvallet, however, strongly disagreed with the finding that Im Chaem did not fall under the ECCC's jurisdiction as a "most responsible" person, outlining strong evidence implicating her in crimes involving many thousands of deaths.<sup>121</sup> Due to the unanimity of the Co-Investigating Judges, the failure of the Pre-Trial Chamber to arrive at a supermajority decision overturning the dismissal of the charges effectively ended the case against Im Chaem as it exhausted the appeals process, despite the substantive misgivings of Judges Baik and Beauvallet.

The case against fellow Case 004 suspect Ao An was the next to be terminated in 2020, this time by the Supreme Court Chamber following disagreements between the national and international Co-Investigating and Pre-Trial Chamber judges.<sup>122</sup> Finally, proceedings against the final two surviving Case 003 and 004 suspects, Meas Muth and Yim Tith, were terminated by the Supreme Court

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(Reasons), ¶ 81 (June 28, 2018), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/D308\\_3\\_1\\_20\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/D308_3_1_20_EN.pdf) [https://perma.cc/F5UA-GGHW].

<sup>121</sup> Prosecutor v. Im, Case No. 004/1/07-09-2009-ECCC/OCIJ (PTC50), Opinion of Judges Baik and Beauvallet, ¶ 339 (June 28, 2018), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/D308\\_3\\_1\\_20\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/D308_3_1_20_EN.pdf) [https://perma.cc/F5UA-GGHW] ("[T]hat the Co-Investigating Judges failed to take into account the full magnitude of the gravity of the crimes alleged or charged against IM Chaem and of her full role and responsibilities [and finding that available evidence is sufficient to conclude that Im Chaem is] amongst the most responsible and thus to fall under the ECCC's personal jurisdiction.").

<sup>122</sup> International Co-Prosecutor v. Ao, Case No. 004/2/07-09-2009-ECCC/TC/SC, Decision on International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, ¶ 71 (Aug. 10, 2020), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/E004\\_2\\_1\\_2\\_20\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/E004_2_1_2_20_EN.pdf) [https://perma.cc/7N2K-EC52].

Chamber in December, 2021.<sup>123</sup> Both of these decisions were subject to scathing dissents by Judge Clark.<sup>124</sup>

Overall, only one international judge, in relation to one suspect—Co-Investigating Judge Michael Bohlander in proceedings against Im Chaem—ever issued a substantive decision finding a suspect in Case 003 or 004 to *not* qualify as a senior leader or most responsible person.<sup>125</sup> Prior to Bohlander, the ECCC cycled through a revolving door of International Co-Investigating Judges. These prior International Co-Investigating Judges: Marcel Lemonde, Laurent Kasper-Ansermet, Siegfried Blunk, and Mark Harmon, all resigned. All but Harmon, who claimed “strictly personal reasons” as motivating his decision to leave the Court,<sup>126</sup> cited problems tied to the investigations of Cases 003 and 004 as motivating their decision to resign.<sup>127</sup> No international judge sitting on any of the

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<sup>123</sup> See *International Co-Prosecutor v. Meas*, Case No. 003/08-10-2021-ECCC/SC(05), Decision on International Co-Prosecutor’s Appeal of the Pre-Trial Chamber’s Failure to Send Case 003 to Trial as Required by the ECCC Legal Framework, ¶ 44 (Dec. 20, 2021), [https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/3\\_1\\_1\\_1\\_EN.pdf](https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/3_1_1_1_EN.pdf) [<https://perma.cc/KP84-SHKP>]; *International Co-Prosecutor v. Yim*, Case No. 004/23-09-2021-ECCC/SC(06), Decision on International Co-Prosecutor’s Appeal of the Pre-Trial Chamber’s Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework, ¶ 32 (Dec. 28, 2021), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/2\\_1\\_1\\_1\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/2_1_1_1_EN.PDF) [<https://perma.cc/KP84-SHKP>].

<sup>124</sup> See *International Co-Prosecutor v. Meas*, Case No. 003/08-10-2021-ECCC/SC(05), Dissenting Opinion of Judge Clark (Dec. 20, 2021), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/3\\_1\\_1\\_1\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/3_1_1_1_EN.pdf) [<https://perma.cc/D6WK-Z7DZ>]; see also *International Co-Prosecutor v. Yim*, 004/23-09-2021-ECCC/SC(06), Dissenting Opinion of Judge Clark (Dec. 28, 2021), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/2\\_1\\_1\\_1\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/2_1_1_1_EN.PDF) [<https://perma.cc/T563-RLCS>].

<sup>125</sup> See *Prosecutor v. Im*, Case No. 004/1/07-09-2009-ECCC-OCIJ, Closing Order (Reasons), ¶ 325 (July 10, 2017), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/D308\\_3\\_Redacted\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-intz%5D/D308_3_Redacted_EN.pdf) [<https://perma.cc/2DWQ-UPP7>].

<sup>126</sup> Press Release, Extraordinary Chambers in the Cts. of Cambodia, Judge Harmon Announces His Resignation (July 7, 2015), <https://www.eccc.gov.kh/en/articles/judge-harmon-announces-his-resignation> [<https://perma.cc/4E2R-3S33>].

<sup>127</sup> See Bridget Di Certo, *Judge Decries 003, 004 “Sabotage”*, PHNOM PENH POST, Mar. 22, 2012, at 2 (reporting that Lemonde referred to “egregious dysfunctions” at the Court in relation to the two investigations); see also Note of the International Reserve Co-Investigating Judge to the Parties on the Egregious Dysfunctions Within the ECCC Impeding the Proper Conduct of Investigations in Cases 003 and 004, Case Nos. 003/07-09-2009-ECCC-OCIJ, 004/07-09-2009-ECCC-OCIJ, Judge Kasper-Ansermet (Mar. 21, 2012),

Court's Chambers, has ever affirmatively found any Case 003 or 004 suspect other than Im Chaem to fall outside the jurisdiction of the ECCC. Consequently, the unified front presented by the Cambodian judges and Co-Prosecutor at the Court eventually won the day, as the procedural logjam created by their continuous opposition to the two cases left them in legal limbo, eventually leading to their termination out of a desire for certainty and closure.

*b. Negative Capacity-Building*

As mentioned previously, the notion that ICL prosecutions, especially those engaging local legal professionals in the process, can improve the rule of law locally by building the capacity of judges, lawyers, and other justice sector actors is a well-tread claim within transitional justice.<sup>128</sup> Such "justice sector capacity building"<sup>129</sup> is premised on the notion that by improving the skillset of local actors and demonstrating best practices, including rigorous adherence to foundational rule of law principles, such actors will be left better equipped to address flaws in local justice systems. These claims have also been made in relation to the ECCC process in Cambodia.<sup>130</sup>

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[http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D114\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D114_EN.PDF) [<https://perma.cc/4YWF-46T8>] (making similar comments on the two investigations); see also Kong Sothanarith, *Citing "Interference," UN Investigating Judge Quits Court*, VOA (Oct. 10, 2011), <https://www.voacambodia.com/a/citing-interference-un-investigating-judge-quits-court-131461238/1354106.html> [<https://perma.cc/7AFJ-VU2Z>] (reporting on Blunk citing the appearance of government interference in Cases 003 and 004 as his motivation for resigning).

<sup>128</sup> See, e.g., Rep. of U.N. Dev. Programme, *From Justice for the Past to Peace and Inclusion for the Future: A Development Approach to Transitional Justice*, at 39 (2020).

<sup>129</sup> *Id.*

<sup>130</sup> This potential positive effect on the rule of law was often cited as a selling point for the Court's creation in the first place. See generally, e.g., CIORCIARI & HEINDEL, *supra* note 24, at 14-103 (providing a detailed overview of the creation and structure of the ECCC and in so doing, noting hopes among various stakeholders that the Court would ultimately contribute to improving the rule of law in Cambodia). Olga Martin-Ortega & Johanna Herman, *Hybrid Tribunals and the Rule of Law: Notes from Bosnia and Herzegovina and Cambodia* 14 (JAD-PbP, Working Paper No. 7, 2010), [https://ciaotest.cc.columbia.edu/wps/chrc%20/0019630/f\\_0019630\\_16753.pdf](https://ciaotest.cc.columbia.edu/wps/chrc%20/0019630/f_0019630_16753.pdf) [<https://perma.cc/8FCB-LWSY>] (providing an overview of Cambodia's rule of law deficit and noting that "most donors justify their financial support to the ECCC by claiming that it will improve the rule of law in Cambodia").

The ECCC, however, has had no demonstrable effect in improving the rule of law in Cambodia. On one level, domestic legal actors have been slow to implement changes to local practices modelled on systems and practices established at the ECCC. The best a 2017 report found was that “according to some domestic justice actors, the national courts are attempting to replicate some aspects of the ECCC’s case management and court administration systems.”<sup>131</sup> Otherwise, national legal actors have not shown much interest in looking to the ECCC, with one Cambodian lawyer describing the ECCC and Cambodian judicial system as being “like ‘oil and water’” with “legal and procedural lessons learned” at the ECCC “not being applied at the domestic level.”<sup>132</sup> For example, when efforts are made by litigants to “introduce ECCC case law, judges largely dismiss it as inapplicable.”<sup>133</sup>

This rather minimal actual transfer of skills and best practices from the ECCC to Cambodian courts at first glance suggests that the Court has simply failed to have much of any effect on legal practices and the rule of law in Cambodia. However, if one considers developments such as amendments to Cambodia’s election laws, or the more recent Emergency Powers Law, and how they have subsequently been utilized to cater to the wishes of the CPP, a more troubling picture emerges. The ECCC, including its international judges and backers, have stood by powerless as the CPP has taken advantage of the ambiguity of the terms “senior leaders” and “most responsible” to shape the Court’s activities. In particular the CPP, with the assistance of the Court’s national judges and lawyers, stymied Cases 003 and 004 until the resulting impasse led to their termination after over a decade of investigations.

Unable to push the cases forward, the United Nations and the Court’s international backers have, from all outward appearances, elected to prioritize the protection of the judgements in Cases 001 and 002 over maintaining adherence to evenhandedness and consistency in the application of the law governing the ECCC.<sup>134</sup> With each controversy and instance of apparent interference with

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<sup>131</sup> INT’L COMM. OF JURISTS, *supra* note 18, at 4.

<sup>132</sup> *Id.* at 28.

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

<sup>134</sup> See, e.g., CIORCIARI & HEINDEL, *supra* note 24, at 255-56; Amanda Mortwedt Oh, *A House Divided Against Itself Cannot Stand: The Case for Ending the Extraordinary Chambers in the Courts of Cambodia*, 10 U. ST. THOMAS L.J. 502, 515 (2012) (discussing the desire to ensure finality of the judgments in Cases 001 and 002 as a core imperative of the U.N. and most of the ECCC’s international donors and backers).

the Court's legal processes by external actors, the question of whether basic fair trial standards are being met and if not, whether the United Nations and international backers reached a point where withdrawal of support for the Court resurfaced.<sup>135</sup> By drawing out the process of stymying and eventually shuttering Cases 003 and 004, the Cambodian government, the United Nations, and the Court's international backers avoided the negative press and other potential ramifications of the ECCC itself being shut down because of its inability to operate in a manner according with basic rule of law principles.

This apparent prioritization of outcomes over processes at the ECCC is a major impediment to the Court leaving behind a positive rule of law legacy.<sup>136</sup> However, the ECCC experience may have helped build the capacity of the CPP and judges, lawyers, and other professionals who have participated in the Court's work, to undermine the rule of law. In the words of one national ECCC staffer "[w]hen you give them a knife, they can use it," referring to the CPP's instrumentalization of legal and other processes as weapons against its opponents.<sup>137</sup> These sentiments were echoed by two former international ECCC staffers in confidential correspondence with the author. Both former staffers are of the view that working at the Court was merely an opportunity for Cambodian lawyers and judges to learn how to more effectively wield law as a weapon in the service of the CPP.<sup>138</sup>

Over time, events have lent further support to these sentiments. Former Cambodian ECCC employees have recently played key roles in CPP rule by law practices. For example, Ly Chantola, a longtime CPP-affiliated lawyer who is the current president of the

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<sup>135</sup> For an example of this sentiment, see Oh, *supra* note 134, at 515 (quoting Rupert Abbot, then Amnesty International Researcher for Cambodia, as saying that "Amnesty International has not got to the point of asking for the U[nited N[ations] to withdraw from the ECCC. Obviously there are a lot of people—including us—who want the tribunal to succeed, for the victims of the Khmer Rouge. But there could come a point—if the trials were clearly not meeting international fair trial standards—when we would consider making that call").

<sup>136</sup> See PÁDRAIG MCAULIFFE, *TRANSITIONAL JUSTICE AND RULE OF LAW RECONSTRUCTION: A CONTENTIOUS RELATIONSHIP* 180-223 (2013) (offering a general critique of this emphasis).

<sup>137</sup> CIORCIARI & HEINDEL, *supra* note 24, at 256.

<sup>138</sup> E-mail correspondence between Randle C. DeFalco and former international ECCC staffers (on file with author; anonymity requested due to potential danger to both international staffers and Cambodian activists, some of whom have already been targeted with spurious criminal charges and all of whom have family still living in Cambodia).

Cambodian Bar Association<sup>139</sup> and Chair of the Cambodian section of the ASEAN Law Association,<sup>140</sup> previously served at the ECCC as a greffier in the office of the Co-Investigating Judges.<sup>141</sup> Ly Chantola has been a key player in orchestrating CPP rule by law tactics, including legal attacks such as the disbandment of the CNRP, litigating civil defamation suits on behalf of CPP powerbrokers, including one of Hun Sen's sons, and the prosecution of Kem Sokha, to name but a few examples.<sup>142</sup>

The professional ascension of CPP-aligned former ECCC staffers such as Ly Chantola can be contrasted with far less successful efforts by former staffers who have sought to leverage their skills and familiarity with ECCC jurisprudence to improve the rule of law domestically. For example, former ECCC defense counsel Ang Udom, who represented Case 002 accused Ieng Sary and Case 003 suspect Meas Muth, now represents recently-convicted former CNRP leader Kem Sokha and has been unable to protect his client from a string of politically-motivated legal attacks.<sup>143</sup> Kem was convicted on spurious treason charges after languishing in pretrial detention for over a year and now faces a twenty-seven year home-detention sentence.<sup>144</sup> In a move widely viewed as part of efforts to warn against any appeal, the CPP-dominated Ministry of Justice has warned Kem's lawyers that they must "seek permission" with local

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<sup>139</sup> Mech Dara, *Lawyer for Hun Many, Thy Sovantha Elected Bar Association President*, VOD (Oct. 16, 2020), <https://vodenglish.news/lawyer-for-hun-many-thy-sovantha-elected-bar-association-president/> [<https://perma.cc/MHJ2-X46K>]; Richard Finney, *Hun Sen Supporter Wins Election as Head of Cambodian Bar Association*, RADIO FREE ASIA (Oct. 16, 2020), <https://www.rfa.org/english/news/cambodia/election-10162020190738.html> [<https://perma.cc/8Z8N-YUYP>].

<sup>140</sup> *Chair-ALA Cambodia*, ASEAN L. ASS'N (Sep. 3, 2021), <https://www.aseanlawassociation.org/chairman-ala-cambodia/> [<https://perma.cc/V69X-R9HP>].

<sup>141</sup> See, e.g., *International Co-Prosecutor v. Meas*, Case No. 003/07-09-2009-ECCC-OCIJ, Confirmation of Receipt of Notice of Appeal (June 3, 2014), [https://eccc.gov.kh/sites/default/files/documents/courtdoc/2015-06-22%2012:07/D103\\_EN.PDF](https://eccc.gov.kh/sites/default/files/documents/courtdoc/2015-06-22%2012:07/D103_EN.PDF) [<https://perma.cc/NA24-9AXC>] (notice of receipt of filing received by Co-Investigating Judges and signed by Ly Chantola as greffier of the ECCC Office of the Co-Investigating Judges).

<sup>142</sup> Dara, *supra* note 139; Finney, *supra* note 139.

<sup>143</sup> *Mr. Ang Udom (Cambodian Co-Lawyer)*, EXTRAORDINARY CHAMBERS CTS. CAMBODIA, <https://www.eccc.gov.kh/en/person/mr-ang-udom-cambodian-co-lawyer> [<https://perma.cc/2WET-ZPXY>]; Thul, *supra* note 68.

<sup>144</sup> Thul, *supra* note 68.



prosecutors before even visiting their client as he serves his house arrest sentence.<sup>145</sup>

The growing complexity and sophistication of the CPP's rule by law tactics increasingly fits the model of "autocratic legalism," whereby democratically elected aspiring autocrats entrench themselves in power through a variety of means including granting themselves expansive new legal powers.<sup>146</sup> For example, to push through the Emergency Powers Law in 2020, Cambodian legislators took advantage of constitutional language permitting the declaration of a state of emergency when "the nation faces danger."<sup>147</sup> The resulting law expanded the scope and power of this vague language, to explicitly permit the declaration of a state of emergency in a situation involving "national chaos that threatens security and public order."<sup>148</sup> The Law grants the government sweeping, vaguely-defined powers, including those to engage in essentially unchecked surveillance and suspend freedom of association rights, along with undefined "other appropriate and necessary measures."<sup>149</sup> While the world is slowly emerging from the pandemic era of the new COVID-19 reality, the Emergency Powers Law remains part of Cambodian law, lying dormant until such time as the CPP feels the need to activate it.

Like the shutdown of Cases 003 and 004, to grant itself sweeping new powers, the CPP government seized on the rather vague provision in the Cambodian Constitution to grant itself new sweeping powers through the passage of the Emergency Powers Law. A single vague provision in the Constitution permitting the declaration of a national state of emergency when the nation faces "danger" was interpreted in accord with the desires of the CPP. Again, this process was quite similar to that of Cambodian lawyers, judges and staffers at the ECCC uniformly interpreting the vague terms "senior leaders" and "most responsible" in accord with the perceived wishes of the CPP, despite such interpretations flying in the face of both applicable ECCC and international precedent. Both

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<sup>145</sup> *Kem Sokha's Lawyers Told to Seek Prosecutors' Permission Before Seeing Him*, RADIO FREE ASIA (Mar. 15, 2023), <https://www.rfa.org/english/news/cambodia/kem-sokha-lawyers-03152023163952.html> [<https://perma.cc/LB57-VNE2>].

<sup>146</sup> Scheppele, *supra* note 55.

<sup>147</sup> CONSTITUTION OF THE KINGDOM OF CAMBODIA Sep. 21, 1993, art. 22.

<sup>148</sup> FULL TEXT OF APPROVED STATE OF EMERGENCY DRAFT LAW, *supra* note 95, art. 4.

<sup>149</sup> *Id.* art. 5.

instances ultimately produced outcomes catering to the openly expressed wishes of those who already dominate Cambodian society. Both instances also arguably involve rule by law tactics, whereby a façade of legality is constructed in efforts to obscure what, in reality, are exercises of raw social and political power.

The same can be said for other recent troubling legal developments in Cambodia. Indeed, arguably the CPP simply applied its standard playbook at the ECCC. What made efforts to subvert the rule of law at the ECCC more visible was not that such efforts were unusual or more egregious in nature than other similar tactics in the purely domestic sphere. Rather, the presence of international actors at the ECCC, acting with the privilege of not being subject to the same intense pressures of their national counterparts, helped raise the visibility of such tactics, including by resisting them – albeit unsuccessfully – at various points.

*c. The ECCC as Bad Role Model: Negative Expressivism*

In a 2020 analysis of widely criticized decision of the ECCC Pre-Trial Chamber in Case 004, David Scheffer observed that the decision “exemplified, and brought to a head, the longstanding conflict within the ECCC between the national and international co-prosecutors and . . . judges on the parameters of personal jurisdiction and the interpretation of relevant provisions of the ECCC’s constitutional documents.”<sup>150</sup> Critical of the failure of the Chamber to address the full array of legal effects flowing from the issuance of separate Closing Orders by the disagreeing Co-Investigating Judges in the case, Scheffer claimed that with the “fate of the ECCC” hanging in the balance, absent resolution of these issues, “[s]peculation about the possible influence of political considerations on the deliberations of the Cambodian judges will continue to threaten the integrity of the ECCC’s record.”<sup>151</sup>

These strong words, coming from one of the ECCC’s staunchest longtime supporters,<sup>152</sup> underscore the importance of the expressive,

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<sup>150</sup> David J. Scheffer, *Case 004/2 Involving Ao An: Considerations on Appeals Against Closing Orders (Extraordinary Chambers Cts. Cambodia)*, 59 INT’L LEG. MATERIALS 563, 563 (2020).

<sup>151</sup> *Id.* at 563, 566.

<sup>152</sup> Scheffer was a longtime advocate for the creation of the ECCC and deeply involved in the negotiations leading to the Court’s creation. See SCHEFFER, *supra* note 103, at 341-405.

“role model” function of the ECCC. Scheffer’s emphasis of the corrosive nature of “speculation” regarding external “influence . . . on the deliberations of Cambodian judges” to the overall “integrity” of the Court is distinctly expressivist in orientation.<sup>153</sup> As noted by Barrie Sander, in a basic sense, “the animating assumption shared by most strands of expressivist thought is simple: social practices carry meanings and transmit messages quite apart from their consequences.”<sup>154</sup> As Sander observes, expressivist accounts of ICL have been on the rise for some time.<sup>155</sup> Within the context of ICL, “rather than focusing narrowly on the effects that flow from verdicts and punishment, expressivism is concerned with the symbolic and aesthetic meanings generated by the broader range of social practices that comprise and surround international criminal proceedings.”<sup>156</sup> The fostering of communal rule of law values is a central facet of expressivist justifications of ICL prosecutions, including at the ECCC.<sup>157</sup>

Moreover, importantly in the context of the ECCC and its social function within Cambodia, expressivist approaches are “interested not only in the *construction* of messages within international criminal courts, but also with their *reception* amongst different audiences beyond the courtroom.”<sup>158</sup> Thus, from this expressivist perspective, how the actions of the ECCC, including the shuttering of Cases 003 and 004, both transmit social messages to different audiences, including Cambodian observers, and are *actually received* by such observers, are important and worth paying attention to.

Although the ECCC’s backers have worked hard to shape the social messaging emanating from the Court, to emphasize traditional expressivist messaging focusing on “the value of the rule of law that strengthen community attachments,”<sup>159</sup> the actual social messaging emanating from the Court has been much more of a mixed bag. Aside from the specific controversies limited to Cases 003 and 004, the ECCC faced repeated crises and controversies, ranging from corruption and financial malfeasance scandals, to

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<sup>153</sup> Scheffer, *supra* note 150, at 566.

<sup>154</sup> Sander, *The Expressive Turn*, *supra* note 35, at 852.

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

<sup>156</sup> *Id.*

<sup>157</sup> See, e.g., Maria Elander, *The Victim’s Address: Expressivism and the Victim at the Extraordinary Chambers in the Courts of Cambodia*, 7 INT’L J. TRANSITIONAL JUST. 95, 112 (2013) (internal citation omitted).

<sup>158</sup> Sander, *The Expressive Turn*, *supra* note 35, at 852 (emphasis in original).

<sup>159</sup> Elander, *supra* note 157, at 95.

broader allegations of interference and investigatory irregularities.<sup>160</sup> Meanwhile, the Court and supporting organizations made sustained efforts to publicize the ECCC's work as broadly as possible within Cambodia through a variety of outreach modalities, including physically bringing thousands of people to the Court to witness proceedings in person.<sup>161</sup>

The effective termination of proceedings against all Case 003 and 004 suspects has arguably now, to paraphrase Scheffer, irrevocably damaged the integrity of the ECCC's record.<sup>162</sup> Without any substantive final decision regarding the ECCC's jurisdictional competence over suspects Ao An, Meas Muth, and Yim Tith, and an extremely dubious decision by the Co-Investigating Judges finding Im Chaem outside the Court's jurisdiction, observers are left with a series of conflicting decisions along national/international lines, and confusing, seemingly inconsistent procedural findings. Ultimately, the impasse, clearly constructed at the behest of the Cambodian government, ossified into an insurmountable obstacle, ending all of the cases following thirteen largely wasted years of sputtering investigation and litigation.

As Scheffer alludes to in his commentary in mentioning "speculation" of extra-judicial meddling in the cases,<sup>163</sup> perception remains expressively important, regardless of whether it strictly coincides with reality. While many, including myself, view the shuttering of Cases 003 and 004 as a clear result of compromising basic rule of law procedural requirements for the sake of preferred outcomes,<sup>164</sup> whether or not one agrees with this assessment is beside the point when it comes to the expressivist messaging emanating from the Court in terms of how it is received by the Cambodian population. What is important from an expressivist vantage point is how the work of the Court is interpreted and received, especially by Cambodian citizens.

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<sup>160</sup> See generally CIORCIARI & HEINDEL, *supra* note 24 (providing an overview of some of the controversies that have dogged the ECCC since its inception).

<sup>161</sup> See *id.* at 231-60; Alexandra Kent, *Outsourcing Outreach: "Counter-Translation" of Outreach Activities at the Extraordinary Chambers in the Courts of Cambodia*, 41 J. CURRENT SE. ASIAN AFFS. 106, 112-14 (2022).

<sup>162</sup> Scheffer, *supra* note 150, at 566.

<sup>163</sup> *Id.*

<sup>164</sup> See MCAULIFFE, *supra* note 136, at 180-223 (providing a critique of the overemphasis on "outcomes" over "processes" at ICL and other transitional justice institutions as undermining rule of law reconstruction efforts).

On this front, the Court's messaging is much less clear and unidirectional in terms of emphasizing accountability and strict adherence to fundamental rule of law tenets than its backers might hope.<sup>165</sup> Instead, to the casual Cambodian observer, the story of the ECCC and the shuttering of Cases 003 and 004 is all too familiar. A legitimate legal process was initiated. Hun Sen and the CPP voiced opposition to the cases proceeding. Cambodian ECCC staffers, widely believed to be beholden to the CPP, then effectuated these perceived desires by stymying the progression of the cases and eventually forcing their endings without trials. These staffers did so by seizing on vague language defining the Court's jurisdictional parameters. Indeed, as international interest in the ECCC waned, so too did funding for outreach activities, creating a gap the CPP cleverly exploited to further shape the narrative around the Court to serve its interests. Alexandra Kent describes how the CPP cleverly co-opted ECCC outreach tours when international funding dried up and refashioned them to conform to the regime's carefully manicured historical narrative, which situates Hun Sen and the CPP as the country's saviors who rescued the nation from the Khmer Rouge and finally brought about peace and stability.<sup>166</sup>

Alongside the general cooption of ECCC outreach by the CPP described by Kent, the shuttering of Cases 003 and 004 sends a powerful and deeply troubling message to Cambodian observers of the Court. Regardless of one's view of the real reasons why the cases were ultimately shuttered, and the legitimacy thereof, it is hard to imagine that their closure is not generally viewed by Cambodians as overwhelmingly attributable to the CPP's quite public opposition to them. From their inception, Hun Sen publicly stated that the cases would not be permitted to proceed, going so far in 2015 as to suggest that a civil war might break out if the cases went to trial.<sup>167</sup> Of course, left unstated by Hun Sen at the time was the fact that a conflict on the scale of a civil war could only break out in Cambodia if it was intentionally concocted by the CPP itself. As observed by Kent:

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<sup>165</sup> See Elander, *supra* note 157. See generally Savina Sirik, *Memory Construction of Former Khmer Rouge Cadres: Resistance to Dominant Discourses of Genocide in Cambodia*, 13 J. POL. POWER 233 (2020) (describing the complex, often problematic expressivist messaging emanating from the ECCC generally).

<sup>166</sup> Kent, *supra* note 161, at 119-26; see Kirsten Ainley, *Transitional Justice in Cambodia*, in TRANSITIONAL JUSTICE IN THE ASIA-PACIFIC 125, 125-56 (Renée Jeffery & Hun Joon Kim eds., 2013) (providing greater detail on this "rescue" narrative propagated by the CPP).

<sup>167</sup> Naren, *supra* note 112.

[Once coopted by the CPP], outreach has evolved from a didactic tool for the dissemination of a set of [W]estern values about rule-based governance—including the abstract nature of the [r]ule of [l]aw, equality of human rights, the right of the whole population to enhanced understanding about “proper” judicial processes and more—into a political and economic strategy that plays upon well-established, patronage-based forms of governance.<sup>168</sup>

When it comes specifically to the rule of law, a similar dynamic of cooption has played out at the ECCC. Early promises of strict adherence to rule of law principles were quickly compromised, especially in relation to the Case 003 and 004 investigations. The CPP used its power and influence over the ECCC’s Cambodian staffers, including judges and lawyers, to obstruct the progression of the investigations and concoct a counterfactual theory in relation to the scope of the Court’s personal jurisdiction that flew in the face of both international law<sup>169</sup> and the foundational rule of law principle of consistency of interpretation and application. The ultimate story of these two cases has proven to be one quite familiar to most Cambodians. The CPP made its desired outcome—cessation of the cases prior to trial—clear, and the ECC staffers and judges with the power to effectuate such desires did so by compromising the investigation and opportunistically interpreting somewhat vague legal language in a way that, while inconsistent and incompatible with prior decisions, nonetheless achieved the required outcome through ostensibly legitimate legal means.

### III. CONCLUSION

The ECCC has been subject to so many controversies, critiques, and shortcomings that it appears poised to join the largely forgotten pantheon of disfavored ICL institutions. While a wholesale dismissal and rejection of the ECCC as being a completely failed institution in every sense itself fails to recognize areas where the Court may have had positive contributions, such as by fostering greater discussion of Cambodia’s recent history, in other ways, a

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<sup>168</sup> Kent, *supra* note 161, at 127-28.

<sup>169</sup> See, e.g., DeFalco, *Cases 003 and 004 at the Khmer Rouge Tribunal*, *supra* note 113; DeFalco, *Uncertain Relationship*, *supra* note 27 (analyzing the mixed effect of ECCC prosecutions on the rule of law in Cambodia).

simple conclusion that the Court simply “did nothing” is also a gross oversimplification. This is especially true in relation to the Court’s effects on the rule of law in Cambodia. At this juncture, with the CPP having just further embedded itself in power through a deeply compromised election process marred by, among other things, the use of rule by law tactics to persecute political opponents and stifle dissent, it would be difficult to argue that the ECCC has improved the rule of law in Cambodia in any meaningful way. This Article has pushed this argument further, by suggesting that the ECCC’s ultimate rule of law legacy for Cambodia may be a negative one.

Ultimately, the ECCC has acted in a similar fashion as the CPP has in recent years: engaging in inconsistent, outcome-driven decision-making that, while covered by a legal gloss, remains fundamentally at odds with basic rule of law principles of generality, clarity, and consistency. This cooption of the Court’s functioning, especially in relation to the shuttering of Cases 003 and 004, not only fails to provide a positive rule of law model for Cambodian legal actors, or to produce a positive capacity-building effect within Cambodia’s legal sector, but also troublingly risks expressively legitimating CPP rule by law practices to Cambodian observers. In doing so, the Court, as well as its partner, the United Nations, and its various well-intentioned backers, may ultimately have a legacy of helping further entrench the CPP as an autocratic legalist regime. One can only hope that whatever positive effects the Court may have produced are worth these rather steep rule of law costs.