

# Washington International Law Journal

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Volume 17 | Number 1

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1-1-2008

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### Recommended Citation

Tessa V. Capeloto, Comment, *Reconciliation in the Wake of Tragedy: Cambodia's Extraordinary Chambers Undermines the Cambodian Constitution*, 17 Pac. Rim L & Pol'y J. 103 (2008).

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# RECONCILIATION IN THE WAKE OF TRAGEDY: CAMBODIA'S EXTRAORDINARY CHAMBERS UNDERMINES THE CAMBODIAN CONSTITUTION

Tessa V. Capeloto<sup>†</sup>

*Abstract:* Between 1975 and 1979, the Khmer Rouge regime was responsible for approximately 1.7 million deaths caused by deportation, starvation, murder, and torture. In 2001, Cambodia established the Extraordinary Chambers, an internationalized domestic tribunal, or “hybrid court,” to prosecute the perpetrators most responsible for these atrocities. As the Cambodian government’s primary legal response to the Khmer Rouge, the tribunal conflicts with the requirements of Article 52 of the Cambodian Constitution, an article that requires a policy of national reconciliation to ensure national unity. Cultural conceptions of national reconciliation coupled with the legislative history and purpose of the constitution strongly suggest that this provision disallows the Cambodian government from pursuing laws and policies that undermine truth or national healing. However, because of the Extraordinary Chambers’ questionable impartiality, limited public involvement, and constrained personal jurisdiction, this tribunal undermines the very truth and healing that are essential to national reconciliation. Cambodia should therefore look to other mechanisms of transitional justice to supplement its tribunal. Given the political and economic infeasibility of a “truth and reconciliation commission,” Cambodia should establish informal mechanisms of transitional justice to supplement its tribunal and further national reconciliation.

## I. INTRODUCTION

As one of thousands of killing fields sprinkled throughout Cambodia, Choeng Ek was a burial ground for Cambodians arrested and tortured at the Tuol Sleng prison in Phnom Penh.<sup>1</sup> After prison guards tortured their victims, these innocent Cambodians “were usually forced to kneel at the edge of the mass graves while guards clubbed them on the back of the neck or head with a hoe or spade.”<sup>2</sup> Researchers believe that the Khmer Rouge executed over 20,000 Cambodians at this site alone.<sup>3</sup> With countless killing fields now a permanent part of the Cambodian landscape, the human rights abuses perpetrated by the Khmer Rouge are considered among the worst in human history.<sup>4</sup>

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<sup>†</sup> The author would like to thank her family, Professor Kristen Stilt, and her wonderful editors at the *Pacific Rim Law & Policy Journal* to whom she owes enormous gratitude.

<sup>1</sup> See Wynne Cougill, Documentation Center of Cambodia, *Buddhist Cremation Traditions for the Dead and the Need to Preserve Forensic Evidence in Cambodia*, [http://www.dccam.org/Projects/Maps/Buddhist\\_Cremation\\_Traditions.htm](http://www.dccam.org/Projects/Maps/Buddhist_Cremation_Traditions.htm) (last visited Apr. 1, 2007).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

Almost three decades after these mass killings, Cambodia established the Extraordinary Chambers (“CEC”) to prosecute those most responsible for this terror. Neither an international nor a domestic court, Cambodia’s CEC belongs to a new category of tribunals referred to as “hybrid courts.”<sup>5</sup> Hybrid courts, or internationalized domestic courts,<sup>6</sup> are a unique blend of international tribunals and domestic courts.<sup>7</sup> Though based in the domestic legal system, hybrid courts maintain the international support, legal guidance, and expertise of an international tribunal.<sup>8</sup>

Both Cambodian and international officials have emphasized the potential for Cambodia’s hybrid court to promote national reconciliation.<sup>9</sup> However, as the government’s primary legal response to the Khmer Rouge, Cambodia’s CEC undermines Article 52 of the Cambodian Constitution, which requires Cambodia to “adopt the policy of national reconciliation to ensure national unity . . . .”<sup>10</sup> As it currently functions, the CEC is characterized by questionable impartiality, limited public involvement, and restricted personal jurisdiction. These shortcomings weaken the very truth and healing that are essential to the policy of national reconciliation.

With the Khmer Rouge trials anticipated to begin in 2008,<sup>11</sup> an examination of the relationship between the CEC and Article 52 is of timely importance. Part II of this comment provides a brief background of the Cambodian genocide, the prosecution of the worst Khmer Rouge offenders, and the CEC. Part III examines Article 52 of the Cambodian Constitution, including the cultural meaning of national reconciliation and the constitution’s legislative history in order to explain “the policy of national

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<sup>5</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT’L & COMP. L. 347, 353 (2006).

<sup>6</sup> Though this comment will focus exclusively on Cambodia’s hybrid tribunal, Sierra Leone and East Timor are two countries in which hybrid courts have been recently established. See Suzannah Linton, *Cambodia, East Timor, and Sierra Leone: Experiments in International Justice*, 12 CRIM. L.F. 185, 185 (2001).

<sup>7</sup> See YVES BEIGBEDER, *INTERNATIONAL JUSTICE AGAINST IMPUNITY: PROGRESS AND NEW CHALLENGES* 113 (2005) (tracing the historical, political, and legal development of various international and domestic tribunals as well as hybrid courts such as the Extraordinary Chambers).

<sup>8</sup> William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT’L L. 1, 3 (2002).

<sup>9</sup> Such officials include the Cambodian Commissioner General to the National Police. Hok Lundy, *Thoughts on the Khmer Rouge Regime and Trial*, PHNOM PENH POST (Cambodia), Apr. 8, 2005, available at <http://www.phnompenhpost.com/TXT/comments/c1407-6.htm>. The former United Nations Chief Negotiator between the U.N. and Cambodia has also expressed optimism in the tribunal’s ability to promote reconciliation. Ed Cropley, *UN, Cambodia Sign Deal on Khmer Rouge Trial*, REUTERS, June 6, 2003.

<sup>10</sup> KINGDOM OF CAMBODIA CONSTITUTION, art. 52 (1993) reprinted in RAOUL M. JENNAR, *THE CAMBODIAN CONSTITUTIONS (1953-1993)*, at 8 (1995).

<sup>11</sup> *Khmer Rouge Trials Ready to Start*, BBC NEWS, June 13, 2007, available at <http://news.bbc.co.uk/2/hi/world/asia-pacific/6747143.stm>.

reconciliation to ensure national unity . . . .”<sup>12</sup> It concludes that Article 52 prevents Cambodia from enacting policies that undermine truth and national healing. Part IV evaluates the legal and political limitations of the CEC, including an uncertain guarantee of impartiality, limited public involvement, and constrained personal jurisdiction. Part V argues that as a result of these limitations, the CEC conflicts with Article 52 by undermining both truth and healing. Finally, Part VI recommends that Cambodia should supplement its CEC with informal mechanisms of transitional justice that can adequately address the CEC’s weaknesses,<sup>13</sup> rather than implement an economically and politically unfeasible “truth and reconciliation commission” (“TRC”).<sup>14</sup> Cambodia’s implementation of these supplemental mechanisms can help address the tension between the CEC and Article 52 and bring Cambodians closer to reconciliation in the wake of their tragedy.

## II. CAMBODIA’S MODERN HISTORY IS CHARACTERIZED BY WAR, DEATH, DESTRUCTION, AND DELAYED ACCOUNTABILITY

Cambodia’s post-colonial history has been anything but calm and stable. War, death, destruction, and delayed accountability have traumatized Cambodia since its independence from France in 1953.<sup>15</sup> Because Cambodia’s history is essential to understanding its current response to the Khmer Rouge, a brief introduction to the atrocities committed by the Khmer Rouge and the events leading up to the creation of the CEC is essential.

### A. *The Khmer Rouge Terrorized Cambodia Between 1975 and 1979*

In 1963, the United States launched massive air bombing campaigns in Cambodia, campaigns that produced mass Cambodian casualties.<sup>16</sup> Angered by the death and destruction caused by the United States, many Cambodians shifted their political support to Cambodia’s communist Khmer Rouge forces, thus enabling the Khmer Rouge leader, Pol Pot, to topple the American-supported Lon Nol government.<sup>17</sup> Any potential for peace and

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

<sup>13</sup> Transitional justice refers to a wide a range of approaches that societies adopt in response to mass human rights atrocities as these societies move from a state of violence to one of peace and stability. International Center for Transitional Justice, What Is Transitional Justice?, <http://www.ictj.org/en/tj/> (last visited Nov. 30, 2007).

<sup>14</sup> “Truth and reconciliation commission” is a term of art that denotes a particular institution of transitional justice. *See infra* Part VI.B.

<sup>15</sup> JENNAR, *supra* note 10, at 35.

<sup>16</sup> BEIGBEDER, *supra* note 7, at 129.

<sup>17</sup> *Id.*

stability after Lon Nol's departure, however, quickly dissipated with the Khmer Rouge's rise to power.<sup>18</sup>

Under the Khmer Rouge regime, Cambodia suffered the worst mass murder of the twentieth century in terms of the percentage of its population killed.<sup>19</sup> The Khmer Rouge tortured and killed many individuals perceived as having dangerous ethnic, political, and social identities.<sup>20</sup> Persecuted peoples included the Cham (a Muslim sect), teachers, students, and religious leaders and institutions.<sup>21</sup> In order to purge society of traitors within the Communist Party, the Khmer Rouge arrested and executed "suspected individuals within the leadership of each unit" as well as "all of the Party cadres in a unit considered treacherous."<sup>22</sup>

In addition to murder, the Khmer Rouge pursued policies of torture, slave labor, and forced evacuations while in power.<sup>23</sup> With urban centers perceived as breeding grounds for dissidents, during its first week in power alone, the Khmer Rouge Government expelled two to three million people from its cities.<sup>24</sup> The Khmer Rouge terrorized Cambodian society until approximately 1979.<sup>25</sup>

In response to a full-scale invasion by the Vietnamese in December 1978,<sup>26</sup> the Khmer Rouge fled to the forests. During this period, the United States, China, and Thailand, all enemies of Vietnam, provided continuous arms and support to the Khmer Rouge.<sup>27</sup> Despite this assistance to the Khmer Rouge, a pro-Vietnamese government successfully installed itself in Cambodia shortly after Vietnam's invasion.<sup>28</sup> In 1991, the Agreements on a Comprehensive Political Settlement of the Cambodian Conflict, signed by Cambodia during the Paris Conference on Cambodia, established the U.N.

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<sup>18</sup> WILFRED P. DEAC, *ROAD TO THE KILLING FIELDS: THE CAMBODIAN WAR OF 1970-1975* 215 (1997).

<sup>19</sup> Craig Etcheson, *The Politics of Genocide Justice in Cambodia*, in *INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA* 181, 182 (Cesare P. R. Romano et al. eds., 2004).

<sup>20</sup> *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, U.N. GAOR, 53d Sess., Annex, Agenda Item 110(b), ¶¶ 24-28, U.N. Doc. A/53/850, S/1999/231 (1999) [hereinafter *Report of the Group of U.N. Experts*].

<sup>21</sup> *Id.* ¶ 26.

<sup>22</sup> *Id.* ¶ 29.

<sup>23</sup> *Id.* ¶¶ 19-45.

<sup>24</sup> *Id.* ¶ 19.

<sup>25</sup> See BEIGBEDER, *supra* note 7, at 129.

<sup>26</sup> Scholars have advanced two competing explanations for Vietnam's invasion of Cambodia: 1) Vietnam wished to liberate Cambodians from the Khmer Rouge and 2) Vietnam wished to annex Khmer territory for purposes of Vietnamese expansion. Ronnie Yimsut, *Vietnam: Was It Liberation or Invasion*, <http://www.mekong.net/cambodia/jan7.htm> (last visited Nov. 30, 2007).

<sup>27</sup> *Report of the Group of U.N. Experts*, *supra* note 20, ¶ 29.

<sup>28</sup> BEIGBEDER, *supra* note 7, at 129-30.

Transitional Authority in Cambodia (“UNTAC”).<sup>29</sup> The U.N. entrusted the UNTAC with organizing the elections of Cambodia’s Constituent Assembly, the institution that ultimately adopted Cambodia’s Constitution in 1993.<sup>30</sup> Only with the initiation of peace talks and the subsequent creation of Cambodia’s 1993 Constitution did Cambodia attain relative calm and stability in the years following the defeat of the Khmer Rouge.<sup>31</sup>

*B. Holding the Khmer Rouge Legally Accountable for Their Crimes Encountered Significant Delay*

In the decades following the genocide,<sup>32</sup> neither Cambodia nor the international community took significant steps towards bringing the Khmer Rouge to justice.<sup>33</sup> In 1997, the U.N. received a letter from then Second Prime Minister Hun Sen seeking assistance in bringing the Khmer Rouge to justice.<sup>34</sup> In 1998, U.N. Secretary General (“U.N. SG”) Kofi Annan appointed a group of experts (“U.N. Experts”) to explore various legal avenues for holding the Khmer Rouge accountable.<sup>35</sup> The U.N. Experts primarily considered two options: 1) an international tribunal and 2) a Cambodian tribunal established under Cambodian law.<sup>36</sup>

In 1999, the U.N. Experts recommended that the Security Council or the General Assembly establish an *ad hoc*,<sup>37</sup> purely international tribunal.<sup>38</sup> They argued that an international tribunal would hold the Khmer Rouge

<sup>29</sup> JENNAR, *supra* note 10, at 7.

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

<sup>31</sup> BEIGBEDER, *supra* note 7, at 129-30.

<sup>32</sup> Between 1979 and 1997, the only Khmer Rouge political trials were Vietnamese show trials conducted of Khmer Rouge leaders Pol Pot and Ieng Sary. They were both condemned to death *in absentia*. BEIGBEDER, *supra* note 7, at 130. Further, in 1997, a “surreal trial” of Pol Pot was conducted by the Cambodians. *Id.* Though condemned to life imprisonment, Pol Pot died on April 16, 1998. *Id.* at 130-31.

<sup>33</sup> Initial delay resulted from the disinclination of China and the United States to reveal Khmer Rouge atrocities because of their prior support for the Khmer Rouge regime. Later delay, however, resulted from the conflict between the U.N.’s insistence on an international tribunal and Cambodia’s push for a domestic court. *Id.* at 138.

<sup>34</sup> *Id.* at 131.

<sup>35</sup> *Id.* at 132.

<sup>36</sup> *Identical Letters Dated 99/03/03 from the Permanent Representative of Cambodia to the United Nations Addressed to the Secretary-General and to the President of the Security Council*, 53d. Sess., Agenda Item 110 (b), U.N. Doc., A/53/850, S/1999/231 (March 16, 1999) [hereinafter *Security Council Letter*]. The U.N. Experts most strongly considered an international or domestic tribunal for Cambodia; however, five possible options were technically on the table: a tribunal established under Cambodian law; an *ad hoc* international tribunal; a hybrid option of a Cambodian tribunal under U.N. administration; an international tribunal established by multilateral treaty; and trials conducted in neutral states. *Id.* The other three options were neither strongly considered nor ultimately recommended. *Id.*

<sup>37</sup> BEIGBEDER, *supra* note 7, at 132.

<sup>38</sup> *Security Council Letter*, *supra* note 36.

accountable for their crimes and discounted the possibility that a tribunal would incite renewed violence.<sup>39</sup> The U.N. Experts also articulated several reasons for their opposition to a Cambodian court. First, Cambodians would perceive purely domestic tribunals as biased.<sup>40</sup> Based on evidence from government representatives, non-governmental organizations, and independent observers, the U.N. Experts concluded that Cambodians were insufficiently confident in their judiciary.<sup>41</sup> Second, independent of the public's perception, the Cambodian judiciary would not be institutionally capable of effectively administering justice because of internal corruption and judicial vulnerability to political influences.<sup>42</sup> Additionally, the U.N. Experts expressed concern over insufficient resources and the absence of a competently staffed Cambodian judiciary.<sup>43</sup>

The U.N. Experts also considered and rejected the immediate establishment of a TRC. They expressed concern over whether the government would support a TRC,<sup>44</sup> and whether a TRC could successfully operate with a Cambodian criminal tribunal.<sup>45</sup> Although they acknowledged that a TRC could satisfy important societal interests, the U.N. Experts left open the idea of establishing a Cambodian TRC for future discussion.<sup>46</sup>

Prime Minister Hun Sen vehemently opposed the U.N.'s suggestion that an international tribunal try the Khmer Rouge.<sup>47</sup> Although Hun Sen conceded that the top leaders of the Khmer Rouge should face criminal prosecution, he maintained that a Cambodian tribunal was the appropriate forum for judging these perpetrators.<sup>48</sup> A former Khmer Rouge member himself,<sup>49</sup> Hun Sen warned, "[I]f improperly and heedlessly conducted, the trials of Khmer Rouge leaders would panic other former Khmer Rouge officers and rank and file, who have already surrendered, into turning back to the jungle and renewing the guerilla war in Cambodia."<sup>50</sup>

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<sup>39</sup> *Report of the Group of U.N. Experts, supra* note 20, ¶ 108.

<sup>40</sup> *Id.* ¶ 134.

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

<sup>42</sup> *Id.* ¶¶ 133-34.

<sup>43</sup> *Id.* ¶ 127.

<sup>44</sup> The U.N. Experts noted that they were "not sure whether the Cambodian polity has yet achieved the level of national reconciliation needed to permit the establishment of a commission." *Id.* ¶ 204.

<sup>45</sup> As the U.N. Experts stated, "if the two were carried out simultaneously and were focusing on the same specific episodes, considerable difficulties might result for the fair conduct of trials, including the tainting of evidence and the risk of inconsistent statements to the two bodies." *Id.* ¶ 205.

<sup>46</sup> *Id.* ¶¶ 203-08.

<sup>47</sup> Hun Sen became Prime Minister of Cambodia in July 1998. Welcome to the Kingdom of Cambodia: Premier's Biography, <http://www.cambodia.gov.kh/unisql1/egov/english/premier.biography.html> (last visited Feb. 12, 2007).

<sup>48</sup> BEIGBEDER, *supra* note 7, at 133.

<sup>49</sup> *Report of the Group of U.N. Experts, supra* note 20, ¶ 96.

<sup>50</sup> *Security Council Letter, supra* note 36.

Given Hun Sen's staunch opposition to a purely international tribunal, the U.N. ultimately abandoned this idea in 1999.<sup>51</sup> Instead, the U.N. reconsidered and subsequently recommended a joint tribunal composed of a majority of international judges as a second-best alternative.<sup>52</sup> In 2001,<sup>53</sup> the Cambodian government enacted the Law on the Establishment of the Extraordinary Chambers ("CEC Law").<sup>54</sup> Instead of adopting the judicial composition endorsed by the U.N., the CEC Law provides for a joint tribunal with a majority of Cambodian judges.<sup>55</sup> Though concerned with the composition of this tribunal, in May 2003, the General Assembly agreed to its establishment by approving the Draft Agreement between the U.N. and the Royal Government of Cambodia ("Draft Agreement").<sup>56</sup> Though similar to the CEC Law of 2001, the Draft Agreement was not identical.<sup>57</sup> As a result, in 2004, the Cambodian government amended the CEC Law to conform to the Draft Agreement.<sup>58</sup>

C. *The Extraordinary Chambers Is a Compromise Institution Designed to Address the Atrocities Committed by the Khmer Rouge*

Cambodia's recently amended CEC Law provides for a criminal tribunal that will prosecute "suspects," a term defined as senior Khmer Rouge leaders and those most responsible for the mass killings committed by the Khmer Rouge between 1975 and 1979.<sup>59</sup> The CEC is a hybrid tribunal established within Cambodia's existing judicial system.<sup>60</sup> The

<sup>51</sup> See BEIGBEDER, *supra* note 7, at 133-34.

<sup>52</sup> See *id.* at 134.

<sup>53</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Reach Kram No. NS/RKM/0801/12, July 23, 2001, (Cambodia), (amended 2004), available at <http://www.cambodia.gov.kh/krt/> (follow law title hyperlink; then follow "2001 Law—English Translation by the Council of Jurists" hyperlink).

<sup>54</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, *as amended*, Reach Kram No. NS/RKM/1004/006, Oct. 27, 2004, (Cambodia), available at <http://www.cambodia.gov.kh/krt/> (follow law title hyperlink; then follow "as amended 27 Oct. 2004" hyperlink) [hereinafter CEC Law].

<sup>55</sup> See *id.* ch. 3, art. 9.

<sup>56</sup> *Human Rights Questions: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, G.A. Res. 57/228, U.N. GAOR, 57th Sess., Annex, Agenda Item 109(b), U.N. Doc. A/57/806 (June 5, 2003).

<sup>57</sup> For example, these laws contained different provisions on amnesty and witness protection. See *id.*; see also CEC Law, *supra* note 54.

<sup>58</sup> *Id.* The Cambodian government also ratified the Draft Agreement in 2004. See The Khmer Rouge Trial Task Force, Chronology of Developments Relating to the KR Trial, <http://www.cambodia.gov.kh/krt/english/chrono.htm> (last visited Nov. 30, 2007).

<sup>59</sup> Throughout the CEC Law, "suspect" is used as shorthand for senior Cambodian leaders and those who were most responsible for the Cambodian genocide. CEC Law, *supra* note 54, ch. 2, art. 2.

<sup>60</sup> See *id.*



tribunal will have one trial chamber, the Trial Chamber, and one appellate chamber of final instance, the Supreme Court Chamber.<sup>61</sup> Both chambers will apply domestic and international law in their proceedings.<sup>62</sup> In the CEC, Cambodian and foreign judges, prosecutors, and investigating judges will share center-stage.<sup>63</sup> The Trial Chamber will include three Cambodian and two foreign judges and the Supreme Court Chamber will house four Cambodian judges and three international judges.<sup>64</sup> One Cambodian and foreign prosecutor will prepare indictments for the court and one Cambodian and foreign investigating judge will collect evidence, hear witnesses, and question suspects and victims.<sup>65</sup> In order to secure a conviction, the CEC Law requires, at the very least, a supermajority vote: an affirmative vote of at least four judges in the lower chamber and the affirmative vote of at least five judges in the appellate chamber.<sup>66</sup> For those convicted, the CEC imposes prison terms of five years to life imprisonment and permits the confiscation of private property.<sup>67</sup>

Cambodians have suffered tremendously at the hands of the Khmer Rouge. After decades of delay in holding the Khmer Rouge legally accountable for their crimes, the CEC promises to bring justice to a country ravaged by war. However, as this Comment argues, there is considerable tension between the CEC and Article 52 of the Cambodian Constitution.

### III. ARTICLE 52 OF CAMBODIA'S CONSTITUTION FORBIDS CAMBODIAN LAWS AND POLICIES THAT UNDERMINE TRUTH OR NATIONAL HEALING

Article 52 of the Cambodian Constitution provides that Cambodia shall "adopt the policy of national reconciliation to ensure national unity . . . ." <sup>68</sup> The meaning of this provision is vague and ambiguous.<sup>69</sup>

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<sup>61</sup> *Id.* ch. 3, art. 9.

<sup>62</sup> The tribunal will apply international law where crimes are charged under international agreements, such as the Convention on the Prevention and Punishment of the Crime of Genocide. *See id.* ch. 2, art. 6. Where crimes are charged under Cambodian penal law, the tribunal will apply Cambodia's 1956 Penal Code. *Id.* ch. 2, art. 3. In terms of procedure, the tribunal is to resort to Cambodian law. *See id.* ch. 6, art. 20; ch. 7, art. 23; ch. 10, art. 33. However, where "there is uncertainty regarding their interpretation or application or if there is a question regarding" the consistency between domestic and international standards, international standards can be consulted. *Id.* ch. 10, art. 33.

<sup>63</sup> *Id.* ch. 3, art. 10; ch. 6, art. 16; ch. 7, art. 23.

<sup>64</sup> *Id.* ch. 3, art. 9.

<sup>65</sup> *Id.* ch. 6, art. 16; ch. 7, art. 23.

<sup>66</sup> *Id.* ch. 5, art. 14.

<sup>67</sup> *Id.* ch. 11, arts. 38-39.

<sup>68</sup> In its entirety, Article 52 of the Cambodian Constitution states, "The Royal Government of Cambodia shall protect the independence, sovereignty, territorial integrity of the Kingdom of Cambodia, adopt the policy of national reconciliation to ensure national unity, and preserve the good national traditions of the country. The Royal Government of Cambodia shall preserve and protect the law and

Cultural conceptions of national reconciliation strongly suggest that truth and national healing are necessary principles implicit in the policy of national reconciliation. More generally, Article 52's legislative history and intent support the proposition that truth and national healing are important principles underlying the constitution. When viewed in light of the constitution and related international agreements, "the policy of national reconciliation" requires truth and national healing. As a result, Cambodian laws and policies that undermine truth and national healing are in tension with this constitutional provision.

A. *Buddhist Conceptions of Reconciliation Emphasize the Central Role of "Truth" and "National Healing" in the Policy of National Reconciliation*

Political and social realities are essential for explaining Cambodia's use of customs and traditions in drafting and interpreting laws. First, many judges in Cambodia are inadequately trained in the law.<sup>70</sup> Accordingly, judges often look to familiar traditions and customs when confronted with legal interpretations.<sup>71</sup> Second, Cambodian society is characterized by "the weakness of the written word."<sup>72</sup> Instead of abiding by written rules, Cambodians frequently revert to customary practices.<sup>73</sup> Third, Theravada Buddhism is the religion and culture of almost every Khmer, nearly ninety percent of the Cambodian population.<sup>74</sup> As a result of this religious

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ensure public order and security. The State shall give priority to endeavours which improve the welfare and standard of living of citizens." KINGDOM OF CAMBODIA CONSTITUTION, *supra* note 10, art. 52. Analysis of Article 52 is virtually non-existent. Legal scholars have yet to interpret the meaning of Article 52's requirement that the Cambodian government "adopt the policy of national reconciliation to ensure national unity . . . ." Further, the Constitutional Council, the body entrusted with interpreting the Cambodian Constitution, has yet to rule on this issue. Nonetheless, until Cambodian legal scholars or the Cambodian Constitutional Council dictate otherwise, cultural and religious conceptions of national reconciliation coupled with the constitution's legislative history provide important insight and guidance.

<sup>69</sup> Article 52 illustrates the general proposition that the Cambodian Constitution suffers from ambiguous statements that are subject to conflicting interpretations. See THE COMPENDIUM OF CAMBODIAN LAWS: VOLUME III LAWS AND REGULATIONS ADOPTED IN 1997-2000 i-25 (Sok Siphana ed., 2000) [hereinafter CAMBODIAN LAWS].

<sup>70</sup> See generally Ministry of Commerce: Chapter III Publication of Laws, [http://www.moc.gov.kh/laws\\_regulation/legal\\_reform\\_strategy-fnal\\_draft4.htm](http://www.moc.gov.kh/laws_regulation/legal_reform_strategy-fnal_draft4.htm) (last visited Mar. 14, 2007).

<sup>71</sup> See CAMBODIAN LAWS, *supra* note 69, at i-26.

<sup>72</sup> JENNAR, *supra* note 10, at 2. For example, "an agreement made in customary form is more binding than a contract enumerating the obligations of the parties in writing." *Id.*

<sup>73</sup> See CAMBODIAN LAWS, *supra* note 69, at i-26.

<sup>74</sup> Richard Kollodge et al., Country Studies: Cambodia—Buddhism, <http://www.country-studies.com/cambodia/buddhism.html> (last visited Mar. 20, 2007); see also KINGDOM OF CAMBODIA CONSTITUTION, *supra* note 10, art. 4 (declaring "Nation, Religion, King" as the motto of the Kingdom of Cambodia).

homogeneity, Cambodians share many common traditions that are integrated into Cambodia's legal framework without inciting social tension.<sup>75</sup> Because Cambodian judges often try cases "based on customs, traditions, conscience and equity,"<sup>76</sup> analyzing "the policy of national reconciliation to ensure national unity . . ." in light of Buddhist principles is essential for understanding Article 52.<sup>77</sup>

Buddhist teachings reveal that the truth is an essential component of reconciliation.<sup>78</sup> Truth is learning "why things were as they were and to learn who [Cambodians] should blame."<sup>79</sup> Truth is fact.<sup>80</sup> Buddhism teaches Cambodians to see the truth through the truth.<sup>81</sup> Though the truth cannot change the past, it can provide lessons for the future.<sup>82</sup>

Healing also plays a significant role in the Buddhist conception of reconciliation.<sup>83</sup> For example, revered Buddhist monk Yos Hut Khemacaro emphasizes a "middle path" to reconciliation.<sup>84</sup> It is a model that advocates compassion and non-violence to advance political processes, a model that reflects the Buddhist way: "neither joining the fight nor hiding from it."<sup>85</sup> Rather than preclude social action, the "middle path" provides for the resolution of political problems beyond "the adversarial framework implicit in partisanship" and by doing so, "can help the Cambodian people to find their own peace."<sup>86</sup>

Finally, Buddhism also supports the notion that the principles of truth and healing are consistent with ensuring national unity. According to Yos Hut Khemacaro, Cambodians cannot begin to "befriend one another, have pity on each other, and rebuild the country toward prosperity" until national healing occurs and Cambodians find happiness.<sup>87</sup> By allowing Cambodians

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<sup>75</sup> See CAMBODIAN LAWS, *supra* note 69, at i-26.

<sup>76</sup> For example, although Article 47 provides that children have a duty to take good care of their aging parents in accord with Khmer tradition, "the meaning of 'good care' is defined by Buddhist and Khmer tradition and not by the Constitution." *Id.*

<sup>77</sup> KINGDOM OF CAMBODIA CONSTITUTION, *supra* note 10, art. 52.

<sup>78</sup> Jaya Ramji, *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 FLETCHER F. WORLD AFF. 137, 143 (2000).

<sup>79</sup> Kayalan Sann & Kannitha Kim Keo, *Interview with the Venerable Yos Hut Khemacaro*, in SEARCHING FOR THE TRUTH 32, 36 (Youk Chhang & Wynne Cougill eds., 2002).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 35.

<sup>82</sup> *See id.*

<sup>83</sup> See Vannath Chea, *Reconciliation in Cambodia: Politics, Culture, and Religion*, in RECONCILIATION AFTER VIOLENT CONFLICT 49, 49-53 (David Bloomfield et al. eds., 2003), available at [http://www.idea.int/publications/reconciliation/upload/reconciliation\\_full.pdf](http://www.idea.int/publications/reconciliation/upload/reconciliation_full.pdf).

<sup>84</sup> *Id.* at 52.

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

<sup>86</sup> *Id.*

<sup>87</sup> *See Sann & Keo, supra* note 79, at 32.

to learn how and why the genocide occurred, the truth will end arguments arising from ignorance of the past.<sup>88</sup> Once truth is learned, Cambodians can calm themselves and grow closer as a nation.<sup>89</sup> Thus, Buddhism not only supports that truth and national healing are principles implicit in the policy of national reconciliation, it also teaches that such principles are essential “to ensure national unity . . . .”<sup>90</sup>

*B. Traditional Methods of Constitutional Interpretation Support That “Truth” and “National Healing” Are Important Principles Underlying the Cambodian Constitution*

Cambodian courts have yet to explicitly endorse the use of legislative history and intent to interpret ambiguous Cambodian legal provisions. Nonetheless, an analysis of recent opinions rendered by the Cambodian Constitutional Council,<sup>91</sup> the body entrusted with interpreting the Cambodian Constitution,<sup>92</sup> reveals that Cambodian courts commonly use legislative history and intent to interpret ambiguous legal provisions. In one 2003 opinion, the Constitutional Council used legislative intent and National Assembly minutes to interpret a legal provision in dispute.<sup>93</sup> In yet another opinion, the Constitutional Council used “the spirit of the text for guidance” rather than the literal text itself.<sup>94</sup>

The preamble to the Cambodian Constitution sheds significant light on the intent<sup>95</sup> of its framers<sup>96</sup> and in doing so, supports the conclusion that

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<sup>88</sup> *See id.*

<sup>89</sup> *See id.*

<sup>90</sup> KINGDOM OF CAMBODIA CONSTITUTION, *supra* note 10, art. 52.

<sup>91</sup> Opinions published by the Constitutional Council have thus far been extremely limited. CAMBODIAN LAWS, *supra* note 69, at i-27.

<sup>92</sup> *See* Constitutional Council of Cambodia, <http://www.ccc.gov.kh/english/index.php> (last visited Mar. 21, 2007).

<sup>93</sup> In interpreting the meaning of paragraph 1 of Article 124 N of the Law on the Amendment of the Law on the Elections of the Members of the National Assembly, the court stated, “[F]ollowing the precisions of the Ministry of Interior, the drafter of the bill on the Elections of the Members of the National Assembly, the idea is to empower the National Electoral Committee (NEC) to impose fine.” Constitutional Council of Cambodia, *N 058/009/2003 CC.D.* (Oct. 16, 2003), available at [http://www.ccc.gov.kh/english/dec/2003/dec\\_009.html](http://www.ccc.gov.kh/english/dec/2003/dec_009.html). Additionally, the court noted, “[F]ollowing the minutes of the debates at the National Assembly . . . , there were [sic] no proposal to modify the initial idea concerning the draft articles 124 N and 124 old on this issue.” *Id.*

<sup>94</sup> The Council looked to the “spirit” of the text, or purpose, in rendering its ruling on the constitutionality of the ordinary or extraordinary plenary session of the National Assembly, paragraph 1 of Article 76 and Article 95 of Chapter 7 of the Cambodian Constitution. Constitutional Council of Cambodia, *N 054/005/2003 CC.D.* (July 22, 2003), available at [http://www.ccc.gov.kp/dec/2003/dec\\_005.html](http://www.ccc.gov.kp/dec/2003/dec_005.html).

<sup>95</sup> “The Preamble is a key to opening the collective mind of the Constitution’s makers that may reveal the general purposes for which they made several provisions in the Constitution. The Preamble contains, in a nutshell, the ideals and aspirations of the people as identified by the founding fathers of the

truth and national healing are important principles underlying the constitution. It states, “We the people of Cambodia, . . . having been weakened terribly, . . . determined to unite for . . . the restoration of Cambodia into an Island of Peace . . . and having high responsibility for the nation’s future destiny of moving toward perpetual progress, development, prosperity, and glory, . . . inscribe the following as the Constitution of the Kingdom of Cambodia[.]”<sup>97</sup> The preamble reveals that the constitution was written with the intent of helping Cambodians move forward from their tragic past. A country that has been “weakened terribly” can only attain progress, prosperity, and glory with healing;<sup>98</sup> thus, the preamble’s reference to these goals suggests that the constitution was intended to encourage such emotional reparation. Additionally, scholars recognize that trauma produces “corrosive enduring effects,” which can only disappear once the truth of what occurred, how it occurred, and why it occurred emerges.<sup>99</sup>

The history of the Cambodian Constitution also supports the conclusion that a desire to uncover the truth influenced its drafting. Cambodia’s modern constitution is a product of the 1991 Paris Agreements<sup>100</sup> and the subsequent deployment of the UNTAC.<sup>101</sup> Among the Paris Agreements, the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict (“Political Agreement”)<sup>102</sup> advanced many principles that were later incorporated into Cambodia’s 1993 Constitution.<sup>103</sup>

Article 15 of the Political Agreement explicitly states, “Cambodia undertakes to take effective measures to ensure that the policies and practices of the past shall never be allowed to return . . . .”<sup>104</sup> The preamble

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Constitution.” Asian Human Rights Commission, Cambodia Human Rights: Preamble, [http://cambodia.ahrchk.net/mainfile.php/legal\\_reforms/462](http://cambodia.ahrchk.net/mainfile.php/legal_reforms/462) (last visited Mar. 31, 2007).

<sup>96</sup> The Constituent Assembly is the body that drafted and adopted the New Constitution of the Kingdom of Cambodia in 1993. JENAR, *supra* note 10, at 7.

<sup>97</sup> KINGDOM OF CAMBODIA CONSTITUTION, *supra* note 10, at pmb1.

<sup>98</sup> *Id.*

<sup>99</sup> Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, in TRUTH V. JUSTICE 3, 3 (Robert I. Rotberg & Dennis Thompson eds., 2000).

<sup>100</sup> The 1991 Paris Agreements include the following four documents: the Final Act of the Paris Conference on Cambodia; the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict; the Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia; and the Declaration on the Rehabilitation and Reconstruction of Cambodia. Steven R. Ratner, *The Cambodian Settlement Agreements*, 87 AM. J. INT’L L. 1, 8 (1993).

<sup>101</sup> JENAR, *supra* note 10, at 7.

<sup>102</sup> Agreement on a Comprehensive Political Settlement of the Conflict in Cambodia, Oct. 23, 1991, available at [http://www.usip.org/library/pa/cambodia/agree\\_comppo1\\_10231991.html#part3](http://www.usip.org/library/pa/cambodia/agree_comppo1_10231991.html#part3) [hereinafter Cambodia Paris Agreement].

<sup>103</sup> Ratner, *supra* note 100, at 9.

<sup>104</sup> Cambodia Paris Agreement, *supra* note 102, art. 15.

to the Political Agreement parallels this language.<sup>105</sup> Though not prescribing particular measures for addressing the Khmer Rouge atrocities, the text of Article 15 and the preamble of the Political Agreement indicate that the constitution was drafted by individuals who recognized the need for effective measures to deter the reemergence of genocide. Given the difficulty of deterring future abuses without first understanding past abuses,<sup>106</sup> Article 15 suggests that uncovering the truth must be an essential element of such a measure. As one scholar emphasizes, “[I]f societies are to prevent recurrences of past atrocities . . . societies must understand—at the deepest possible levels—what occurred and why.”<sup>107</sup>

Cultural conceptions of national reconciliation coupled with the Cambodian Constitution’s legislative history and intent suggest that Article 52 prohibits the Cambodian government from pursuing laws and policies that undermine truth and healing. However, limitations on the CEC’s power to hold the Khmer Rouge responsible for its crimes place this tribunal in tension with the requirements of Article 52.

#### IV. LIMITATIONS ON THE CEC WEAKEN ITS ABILITY TO HOLD THE KHMER ROUGE ACCOUNTABLE

The CEC suffers from several limitations that challenge its ability to hold the Khmer Rouge fully accountable for its crimes and as a result, hinder the tribunal’s capacity to bring justice to Cambodia.<sup>108</sup> First, the CEC Law fails to ensure the impartiality and the independence of the CEC. Second, public participation in CEC proceedings is severely limited. Finally, the CEC’s restrictive personal jurisdiction undermines its purpose.

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<sup>105</sup> The preamble to the Political Agreement provides, in part, “Recognizing that Cambodia’s tragic recent history requires special measures to assure protection of human rights, and the non-return to the policies and practices of the past . . .” *Id.*

<sup>106</sup> As scholar Robert I. Rotberg argues, “[I]f societies are to prevent recurrences of past atrocities . . . societies must understand—at the deepest possible levels—what occurred and why.” Rotberg, *supra* note 99, at 3.

<sup>107</sup> *Id.*

<sup>108</sup> Though the tribunal suffers from many legal and political limitations, this section will only focus on those CEC limitations that are relevant to the relationship between the tribunal and Article 52. For the purposes of this Comment, the CEC’s limitations are those characteristics that undermine truth and/or national healing, principles that are implicit in the principle of national reconciliation under Article 52.

A. *The Law Establishing the Extraordinary Chambers Fails to Adequately Guarantee the Impartiality and Independence of the Tribunal*

The CEC Law's failure to ensure the independence and impartiality of Cambodia's criminal tribunal undermines its legitimacy and ultimately its constitutionality. The CEC Law's provisions on the composition and selection of tribunal officials have garnered sharp criticism emphasizing the CEC's vulnerability to political influence and corruption.<sup>109</sup>

The composition of the CEC reflects the CEC Law's failure to ensure impartiality. Rather than possess a majority of international judges, the CEC consists of a majority of Cambodian judges in both the trial and appellate chambers.<sup>110</sup> Given that the Khmer Rouge atrocities were committed by Cambodians, against Cambodians, and on Cambodian soil, the ideal composition for ensuring judicial impartiality requires that the CEC possess a majority of international judges. In countries where the rule of law is weak and judges are highly susceptible to political bias, it is not unusual for hybrid courts to have a majority of international judges.<sup>111</sup> This judicial composition prevents inexperienced or politically influenced domestic judges from hijacking judicial processes.<sup>112</sup>

By possessing a majority of Cambodian judges, the CEC "fails to mitigate the risks of utilizing Cambodian judges by allowing these judges to exercise stranglehold control over the tribunal's decisions."<sup>113</sup> According to the U.N. SG, "There still remains doubt . . . regarding the credibility of the Extraordinary Chambers, given the precarious state of the judiciary in Cambodia."<sup>114</sup> Reports on the dire state of the Cambodian legal and judicial system are abundant.<sup>115</sup> As the U.N. Experts noted in their report, "given the

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<sup>109</sup> Michael Lieberman, *Salvaging the Remains: The Khmer Rouge Tribunal on Trial*, 186 MIL. L. REV. 164, 173 (2005).

<sup>110</sup> Article 9 states, "The Trial Chamber shall be an Extraordinary Chamber composed of five professional judges, of whom three are Cambodian judges with one as president, and two foreign Judges." CEC Law, *supra* note 54, ch. 2, art. 9. This article further provides that the "[t]he Supreme Court Chamber, which shall be an Extraordinary Chamber composed of seven judges, of whom four are Cambodian judges with one as president, and three as foreign judges." *Id.*

<sup>111</sup> In part, the hybrid courts of East Timor and Sierra Leone possessed a majority of international judges for this very reason. See Linton, *supra* note 6, at 204, 234.

<sup>112</sup> See Scott Luftgass, *Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge*, 90 VA. L. REV. 893, 936 (2004).

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

<sup>114</sup> The Secretary-General, *Report of the Secretary General on Khmer Rouge Trials*, 1, delivered to the General Assembly, U.N. Doc. A/57/769 (Mar. 31, 2003).

<sup>115</sup> Suzannah Linton, *Safeguarding the Independence and the Impartiality of the Cambodian Extraordinary Chambers*, 4 J. INT'L CRIM. JUST. 327, 329 (2006). She further explains that the "reasons for

ravages experienced by the Cambodian legal system over the last generation, it might be difficult for the United Nations to locate a sufficiently trained jurist who would have the expertise necessary to participate on such a panel.”<sup>116</sup> Even if such a person was found, he or she would likely encounter significant political pressure to rule a particular way.<sup>117</sup> In the worst case scenario for the CEC, three international judges would find a former Khmer Rouge leader guilty of genocide and four Cambodian judges presiding over the Supreme Court Chamber of the CEC would find this “suspect” not guilty despite the existence of substantial evidence of guilt.<sup>118</sup> With no supermajority to convict in the Supreme Court Chamber,<sup>119</sup> the CEC’s appellate chamber of final review,<sup>120</sup> the Khmer Rouge leader would be set free.<sup>121</sup>

Similarly, the process of selecting the CEC’s most important officials has been criticized for effectively placing power in the hands of biased political actors.<sup>122</sup> The CEC Law provides that the Supreme Council of the Magistracy (“Council”)<sup>123</sup> shall select the CEC’s judges,<sup>124</sup> prosecutors,<sup>125</sup> and investigating judges.<sup>126</sup> Under Article 11 of the CEC Law, the Council must appoint the CEC’s seven Cambodian judges to the tribunal (three to the trial chamber and four to the appellate chamber).<sup>127</sup> Whereas the U.N. SG nominates and the Council appoints the foreign prosecutor, the Council selects the Cambodian prosecutors from a pool of professional Cambodian judges.<sup>128</sup> Article 26 provides that the Council will also select the

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the abysmal state of Cambodia’s legal and judicial system are highly complex, and derive from history, culture, socio-political conditions and basic human and infrastructural capacity.” *Id.*

<sup>116</sup> *Report of the Group of U.N. Experts*, *supra* note 20, ¶ 157.

<sup>117</sup> *Id.* ¶ 158.

<sup>118</sup> Ernestine E. Meijer, *The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal*, in *INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA*, *supra* note 19, at 207, 220. CEC Law employs the term “suspect” to refer to senior Cambodian leaders and those who were most responsible for the Cambodian genocide. CEC Law, *supra* note 54, ch. 2, art. 2.

<sup>119</sup> *Id.* ch. 5, art. 14.

<sup>120</sup> *Id.* ch. 2, art. 9.

<sup>121</sup> *See* Meijer, *supra* note 118, at 220.

<sup>122</sup> *See* Linton, *supra* note 115, at 332.

<sup>123</sup> The Supreme Council of the Magistracy is the Cambodian body that is constitutionally entrusted with the task of ensuring the independence of Cambodia’s judiciary as well as disciplining delinquent judges where necessary. It is a body that is chaired by the king. KINGDOM OF CAMBODIA CONSTITUTION, *supra* note 10, arts. 113-15.

<sup>124</sup> CEC Law, *supra* note 54, ch. 4, art. 11.

<sup>125</sup> *Id.* ch. 6, art. 18.

<sup>126</sup> *Id.* ch. 7, art. 26.

<sup>127</sup> *Id.* ch. 4, art. 11.

<sup>128</sup> *Id.* ch. 6, art. 18.



Cambodian co-investigating judges “from among Cambodian professional judges.”<sup>129</sup>

The constitution entrusts the Council with ensuring the impartiality of Cambodia’s judiciary.<sup>130</sup> At odds with this ideal is the Council’s strong connection to Cambodia’s ruling political party, the People’s Party.<sup>131</sup> Perceived as heavily biased, the Council is more likely to be concerned with protecting party lines than with maintaining the integrity of Cambodia’s judiciary.<sup>132</sup> Although the CEC Law requires that judges, co-prosecutors, and co-investigators “be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source,”<sup>133</sup> this result is doubtful.<sup>134</sup>

The political will to alter the judicial composition of the CEC or reform the Council is notably absent in Cambodia. Despite the U.N.’s insistence that the CEC possess a majority of international judges, Prime Minister Hun Sen consistently refused and was ultimately successful in securing U.N. approval for a tribunal with a majority of Cambodian judges.<sup>135</sup> As a result, the CEC currently possesses a judicial composition that undermines the impartiality of the CEC.<sup>136</sup>

#### B. *Cambodian Participation and Involvement in the Extraordinary Chambers Is Limited*

The CEC Law severely limits the scope of the Cambodian public’s participation in the Khmer Rouge trials. First, although many Cambodians have suffered severely at the hands of the Khmer Rouge, the CEC Law provides victims only a minimal role in the trials.<sup>137</sup> The only role reserved for victims is an opportunity to appeal an unfavorable decision to the

<sup>129</sup> *Id.* ch. 11, art. 26.

<sup>130</sup> KINGDOM OF CAMBODIA CONSTITUTION, *supra* note 10, art. 113.

<sup>131</sup> HUMAN RIGHTS WATCH, WORLD REPORT 2001: CAMBODIA 176 (2001), available at <http://www.hrw.org/wr2k1/print/full/asia.pdf>.

<sup>132</sup> See Linton, *supra* note 115, at 332. “Major reform is required of this body . . . It must be depoliticized and its membership must reflect the separation of powers (specifically, the Minister of Justice must not be a member).” *Id.*

<sup>133</sup> CEC Law, *supra* note 54, ch. 4, art. 10.

<sup>134</sup> Its current composition does not reflect the principle of separation of powers. Provisions providing for clear, transparent, fair, and internationally-accepted criteria for appointing judges are currently lacking. See Linton, *supra* note 115, at 329.

<sup>135</sup> See BEIGBEDER, *supra* note 7, at 133-35.

<sup>136</sup> See *supra*, Part IV.A.

<sup>137</sup> For example, the CEC Law gives the co-prosecutors the exclusive role of determining who should face prosecution. This means that a Cambodian victim cannot bring a criminal action against his or her Khmer Rouge aggressor. See CEC Law, *supra* note 54, ch. 6, art. 16. Additionally, the CEC Law provides no formal avenue for victims to participate in the trials. See CEC Law, *supra* note 54.

Supreme Court Chamber.<sup>138</sup> Allowing excessive victim participation in CEC proceedings could prove destabilizing. Enabling victims to determine subjects for prosecution could result in revenge prosecutions, and providing victims a greater role in the proceedings, could produce significant structural and normative problems.<sup>139</sup> Nonetheless, as it currently stands, the CEC Law provides insufficient victim participation. The CEC Law allows victims only a minor role in the trial process: the power to appeal a decision to the CEC's court of final instance. Victims are not offered a formal role of intervention at particular stages in an existing prosecution.<sup>140</sup>

Second, the Cambodian public has no democratic control over the selection of the prosecuting attorney. Under the CEC Law, the Council, not the public, is responsible for appointing the seven<sup>141</sup> Cambodian judges,<sup>142</sup> the Cambodian prosecutor,<sup>143</sup> and the Cambodian co-investigating judge who will preside over the tribunal.<sup>144</sup> However, the Council, a body established to help the King satisfy his constitutional duty of ensuring the impartiality of the Cambodian judiciary, serves at the will of the King, not at the the will of the people.<sup>145</sup> Additionally, because members of the Council are not elected in a public or transparent manner, the process for selecting Cambodian officials for the CEC is even further removed from the people.<sup>146</sup>

Any attempt to provide greater public involvement in the CEC faces significant political and institutional barriers. Continued calls to reform the Council remain unanswered.<sup>147</sup> Additionally, limited public involvement and participation is not unique to the CEC. As one scholar notes, “[t]rials focus on perpetrators, not victims” and they “afford no role in their process

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<sup>138</sup> *Id.* ch. 10, art. 36.

<sup>139</sup> Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32 J.L. & SOC'Y 294, 297 (2005).

<sup>140</sup> Participation in criminal prosecutions varies among legal systems and countries. For example, “Many continental jurisdictions permit victims to join the criminal action instituted by the state as ‘subsidiary prosecutors’ or through an ‘adhesion’ procedure.” *Id.* at 297-98. In contrast, victim participation has been less substantial in common law countries. *Id.* at 296. *See also* United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex, U.N. Doc A/RES/40/34 (Nov. 29, 1985) (establishing that “the views and concerns of victims . . . be presented and considered at appropriate stages of the proceedings”).

<sup>141</sup> Of the seven Cambodian judges, three preside at the trial court level and four preside at the appellate level. CEC Law, *supra* note 54, ch. 3, art. 9.

<sup>142</sup> *Id.* ch. 4, art. 11.

<sup>143</sup> *Id.* ch. 6, art. 18.

<sup>144</sup> *Id.* ch. 7, art. 26.

<sup>145</sup> KINGDOM OF CAMBODIA CONSTITUTION, *supra* note 10, arts. 113, 115.

<sup>146</sup> *See* Linton, *supra* note 115, at 332-33 (noting that there is “a complete absence of transparency” in the selection of local judges).

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

or content for bystanders . . . .”<sup>148</sup> To some extent, all criminal tribunals, including the CEC, suffer from this limitation. Accordingly, Cambodia must look beyond criminal prosecutions to address this limitation of the CEC.

*C. The Personal Jurisdiction of the Tribunal Only Allows for Limited Prosecutions*

The personal jurisdiction of the CEC is unduly limited to “suspects,” “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations” of the relevant laws.<sup>149</sup> As a result of the CEC Law’s failure to clearly and narrowly define “senior leaders” and “most responsible,” the jurisdiction of the tribunal is not only constrained by a literal interpretation of these terms; it is also constrained by the restrictive meanings to which the tribunal has accorded them.<sup>150</sup>

The literal interpretation of “senior leaders” and “most responsible” limits the jurisdiction of the CEC to a few individuals, those most responsible for the atrocities committed at the hands of the Khmer Rouge.<sup>151</sup> As one scholar postulates:

The definitions “senior leaders” and “most responsible” together with the available evidence, would determine how many of these could be legally targeted for serious investigation, but my (very rough) guess is that no more than 60 cases would fit into these categories, including perhaps 10 senior leaders and 50 of their most responsible subordinates . . . .<sup>152</sup>

Given available evidence, sixty individuals could conceivably face investigation under these definitions.<sup>153</sup> Nonetheless, not all of them would necessarily face prosecution.<sup>154</sup> Limiting prosecutions to the most responsible senior Khmer Rouge leaders allows hundreds of local Khmer Rouge who played a lesser, though significant, role in the atrocities to escape punishment.<sup>155</sup>

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<sup>148</sup> Martha Minow, *The Hope for Healing: What Can Truth Commissions Do?*, in TRUTH V. JUSTICE, *supra* note 99, at 235, 238.

<sup>149</sup> CEC Law, *supra* note 54, ch. 2, art. 2.

<sup>150</sup> See Steve Heder, *The Senior Leader and Those Most Responsible*, in JUSTICE INITIATIVES: THE EXTRAORDINARY CHAMBERS 53, 54 (Steven Humphreys & David Berry eds., 2006).

<sup>151</sup> *Id.* at 55.

<sup>152</sup> *Id.*

<sup>153</sup> *See id.*

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

<sup>155</sup> *See id.* at 54-55.

As a result of its failure to more precisely define “senior leaders” and “most responsible,”<sup>156</sup> the CEC Law leaves the scope of personal jurisdiction vulnerable to the tribunal’s overly restrictive readings of these terms.<sup>157</sup> Heder argues that the tribunal has already explicitly articulated an intention to limit its prosecutions to only a handful of Khmer Rouge members.<sup>158</sup> Additionally, the tribunal has made such intentions implicitly known.<sup>159</sup> To illustrate, as of October 2007, the CEC has charged only five Khmer Rouge leaders.<sup>160</sup> Additionally, estimates do not anticipate more than seven Khmer Rouge leaders facing trial, though a broader reading of “senior leaders” could encompass more.<sup>161</sup> Though “senior leaders” and “those who were most responsible” could include other Khmer Rouge members “who should, according to a literal interpretation of the law, be candidates for prosecution,” the court will likely limit prosecutions to “the leading cadre of the [Communist Party of Kampuchea] central security office” and “the Phnom Penh torture center.”<sup>162</sup>

Although the most immediate response to the CEC’s limited personal jurisdiction could be to broaden those subject to prosecution, this reform faces several obstacles. The tribunal has already articulated a preference to limit CEC prosecutions.<sup>163</sup> Additionally, limited prosecutions are inherent in the very structure of criminal trials.<sup>164</sup> Where the charge is systematic human rights violations, prosecutors can only prosecute a limited number of defendants and crimes due to time and budget constraints.<sup>165</sup>

The CEC is an institution that suffers from limitations that challenge its ability to promote justice and ensure accountability. Although many of its limitations are shared by criminal tribunals in general, the CEC’s limitations

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<sup>156</sup> For example, to prevent the tribunal’s overly restrictive interpretation of these terms, the CEC Law could more precisely define “senior leaders” in terms of rank and Khmer Rouge position, or the CEC Law could define “most responsible” in terms of the number of crimes committed.

<sup>157</sup> See Heder, *supra* note 150, at 54.

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

<sup>159</sup> *Id.*

<sup>160</sup> Seth Mydans, *Khmer Rouge Hearing Ends*, N.Y. TIMES, Nov. 21, 2007, available at [http://www.nytimes.com/2007/11/21/world/asia/22cambo.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/11/21/world/asia/22cambo.html?_r=1&oref=slogin).

<sup>161</sup> See Heder, *supra* note 150, at 55-56.

<sup>162</sup> *Id.* at 54.

<sup>163</sup> See *id.* at 54.

<sup>164</sup> To illustrate, as of January 2004, ninety-one accused have appeared in proceedings before the International Criminal Tribunal for the Former Yugoslavia and forty-six accused individuals have been tried since the tribunal’s inception. BEIGBEDER, *supra* note 7, at 76. As of November 2007, the Special Court for Sierra Leone indicted eleven perpetrators since the tribunal’s inception. However, one case was dropped after the perpetrator’s death. About the Special Court for Sierra Leone, <http://www.sc-sl.org/about.html> (last visited Nov. 30, 2007).

<sup>165</sup> See Minow, *supra* note 148, at 238.

are particularly troublesome given Cambodia's obligations under Article 52.<sup>166</sup>

V. THE LEGAL AND POLITICAL LIMITATIONS OF THE CEC CONFLICT WITH ARTICLE 52 BY UNDERMINING TRUTH AND NATIONAL HEALING

Scholars have referred to the CEC as an institution of transitional justice intended to bring national reconciliation to the people of Cambodia.<sup>167</sup> Nonetheless, as the Cambodian government's primary legal response to the Khmer Rouge genocide, the CEC undermines Article 52 of the constitution by weakening truth and healing, principles that are implicit in the "policy of reconciliation to ensure national unity . . . ."<sup>168</sup> Not only will the CEC Law's failure to guarantee the impartiality of the CEC undermine truth, this limitation will also inspire "a resurgence of resentment, guilt, mourning, depression, and even a desire for revenge" among Cambodians.<sup>169</sup> Additionally, because of limited public involvement and constrained personal jurisdiction, these trials will open old wounds without providing closure.

A. *The CEC Law's Failure to Guarantee the Legitimacy and Impartiality of the Trials Will Taint the Truth and Generate Dissatisfaction*

Legitimacy and impartiality are essential to fostering the truth and justice that will help provide constitutionally mandated national reconciliation in Cambodia. However, as discussed above, the CEC Law's provisions on judicial composition and selection of tribunal officials call into question the independence and objectivity of the CEC.<sup>170</sup> The CEC's questionable impartiality undermines both truth and healing.

If prosecutions are conducted in an unfair and biased manner or perceived as such, they are unlikely to uncover the truth, the reality of what happened, and why it happened.<sup>171</sup> Instead, any truth that is revealed will be tainted by perceptions of the tribunal as dishonest, biased, or highly politicized.

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<sup>166</sup> KINGDOM OF CAMBODIA CONSTITUTION, *supra* note 10, art. 52.

<sup>167</sup> Laura McGrew, *Transitional Justice Approaches in Cambodia*, in JUSTICE INITIATIVES: EXTRAORDINARY CHAMBERS, *supra* note 150, at 139, 141.

<sup>168</sup> KINGDOM OF CAMBODIA CONSTITUTION, *supra* note 10, art. 52.

<sup>169</sup> Dinah PoKempner, *The Khmer Rouge Tribunal: Criticisms and Concerns*, in JUSTICE INITIATIVES: EXTRAORDINARY CHAMBERS, *supra* note 150, at 32, 43.

<sup>170</sup> See *supra* Part IV.A.

<sup>171</sup> Heder, *supra* note 150, at 56.

Additionally, the political manipulation of CEC proceedings has led many Cambodians to question whether the CEC can deliver “meaningful justice for past atrocities.”<sup>172</sup> Without confidence that the judicial process will provide justice, Cambodians cannot move forward by making amends with the past.<sup>173</sup> The CEC will leave Cambodian society in a state of dissatisfaction and distrust, the very elements that run contrary to national healing. Unless the CEC satisfies Cambodian perceptions of justice, the tribunal will carry the stigma of politicizing the genocide rather than accounting for it.<sup>174</sup>

*B. Limited Cambodian Involvement Will Undermine Healing by Alienating Victims*

By not actively involving victims in the process,<sup>175</sup> the CEC will only alienate them.<sup>176</sup> Providing victims a role in the process gives them a “sense of empowerment” and “may bring them a step closer to healing and rehabilitation.”<sup>177</sup> Victim participation is essential for combating “the sense of powerlessness” that victims inevitably feel during proceedings.<sup>178</sup> In addition, the CEC Law’s failure to provide victims a more formal role in the trials will undoubtedly fail to enhance their satisfaction with the process.<sup>179</sup>

The lack of democratic control over the selection of the CEC prosecutor will also weaken Cambodian healing. To some extent, all Cambodians are victims of the Khmer Rouge atrocities.<sup>180</sup> The fact that the CEC Law entrusts the Council, an unelected body that is responsible to the King,<sup>181</sup> with selecting the CEC prosecutor will result in Cambodians feeling as though they have no say or control over the process.<sup>182</sup> Providing victims a greater role in selecting the CEC prosecutor is also important for bringing greater legitimacy to the criminal trials.<sup>183</sup> As discussed above, public

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<sup>172</sup> Kek Galabru, *Reconciliation in International Justice: Lessons from Other Tribunals*, in JUSTICE INITIATIVES: EXTRAORDINARY CHAMBERS, *supra* note 150, at 151, 153.

<sup>173</sup> *See id.* at 157.

<sup>174</sup> *Id.*

<sup>175</sup> As Susan SaCouto argues, this goal is “particularly significant in the context of Cambodia, where justice for the families of an estimated 1.7 million people who perished under the leadership of the Khmer Rouge has effectively been put on hold for over 25 years.” SaCouto, *Victims and Witnesses*, in JUSTICE INITIATIVES: EXTRAORDINARY CHAMBERS, *supra* note 150, at 60, 60.

<sup>176</sup> Galabru, *supra* note 172, at 152.

<sup>177</sup> SaCouto, *supra* note 175, at 60-62.

<sup>178</sup> Doak, *supra* note 139, at 312.

<sup>179</sup> *See id.*

<sup>180</sup> *See* SaCouto, *supra* note 175, at 60.

<sup>181</sup> Linton, *supra* note 115, at 332.

<sup>182</sup> *Id.* at 60-61.

<sup>183</sup> *Id.*

perceptions of the CEC proceedings as illegitimate will only result in distrust and dissatisfaction with the process.<sup>184</sup>

As a result of the detrimental impact that victim non-involvement plays in emotional rehabilitation, in recent years, a trend towards increased victim participation in criminal proceedings has emerged.<sup>185</sup> Since the mid-1980s, “the interests of victims have come to play a more prominent role in the formulation of policy in both domestic and international criminal justice systems.”<sup>186</sup> Recognizing the need for greater victim participation, in 1985, the United Nations called on states to allow “the views and concerns of victims to be presented and considered at appropriate stages of the proceedings.”<sup>187</sup> This emerging trend reinforces the importance of victim participation and involvement in criminal proceedings.

### C. *Limited Prosecutions Will Undermine National Healing by Restricting Truth and Justice*

The limited and imprecisely defined scope of the CEC’s personal jurisdiction also undermines national reconciliation. Read narrowly, the CEC law essentially grants lower-level leaders of the Khmer Rouge *de facto* amnesty for their crimes.<sup>188</sup> In reality, these were the individuals who carried out, planned, or directed the the Khmer Rouge atrocities.<sup>189</sup> Accordingly, this effective grant of amnesty destroys the possibility of full reconciliation.

If the tribunal’s restrictive interpretations of personal jurisdiction are motivated “by political factors, rather than impartial application of the text of the [CEC] Law,” the trials are unlikely to add to the truth.<sup>190</sup> Rather, improperly conducted, the Khmer Rouge trials will undermine healing.<sup>191</sup>

Additionally, the CEC’s limited prosecutions are likely to produce dissatisfaction and discontent with the process, results that run contrary to the requirements of Article 52 of the constitution. Truth-telling is one of the most important moral virtues in Buddhist cultures.<sup>192</sup> Almost all of the Cambodians surveyed in a recent study revealed a desire to know the truth of

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<sup>184</sup> See *supra* Part V.A.

<sup>185</sup> SaCouto, *supra* note 175, at 60.

<sup>186</sup> Doak, *supra* note 139, at 294.

<sup>187</sup> United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex, U.N. Doc A/RES/40/34 (Nov. 29, 1985).

<sup>188</sup> BEIGBEDER, *supra* note 7, at 138.

<sup>189</sup> Galabru, *supra* note 172, at 153.

<sup>190</sup> Heder, *supra* note 150, at 56.

<sup>191</sup> See Sann & Keo, *supra* note 79, at 33.

<sup>192</sup> Ramji, *supra* note 78, at 144.

what happened during the Khmer Rouge's reign.<sup>193</sup> Many victims want to know who killed their family members.<sup>194</sup> They have an expectation that the trials will bring them truth and justice.<sup>195</sup> Many Cambodians also have the expectation that the lower-level Khmer Rouge members who killed their mother or brother will face prosecution.<sup>196</sup> Nonetheless, because of the CEC's limited personal jurisdiction, the tribunal will unlikely satisfy Cambodian expectations for comprehensive truth and justice. Accordingly, the CEC's limited prosecutions will likely result in disappointment and despair.

Despite arguments to the contrary, the limited personal jurisdiction of the CEC will not facilitate national reconciliation. In their report, the U.N. Experts argued that "a reopening of the events through criminal trials on a massive scale would impede the national reconciliation so important for Cambodia."<sup>197</sup> Though unwilling to set a minimum or maximum, they estimated that twenty to thirty Khmer Rouge would face prosecution for their crimes.<sup>198</sup> This number is far greater than the handful of perpetrators likely to be prosecuted.<sup>199</sup> Expanding the scope of the tribunal's jurisdiction to hundreds or thousands of Cambodians could prove socially destabilizing. Yet, limiting prosecutions to only a handful of "senior" Khmer Rouge leaders and those "most responsible" for the atrocities may prove far more detrimental to reconciliation. Unduly restrictive personal jurisdiction cannot establish a foundation for reconciliation. Additionally, though excessive prosecutions can prove harmful to social stability and reconciliation, "[c]ircumscribing investigation and prosecutions to an excessive degree could undermine the tribunal's credibility with the public and *reinforce* a sense of impunity rather than dismantling it."<sup>200</sup>

The CEC possesses limitations that are in tension with Article 52 of the Cambodian Constitution. These include questionable impartiality, limited public participation, and restricted personal jurisdiction. However, Cambodia should not eliminate its criminal tribunal. Not only will prosecuting several senior Khmer Rouge leaders bring some sense of justice to Cambodia, the CEC will also help bring Cambodia into compliance with

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<sup>193</sup> McGrew, *supra* note 167, at 142.

<sup>194</sup> Kelly Dawn Askin, *Prosecuting Senior Leaders of Khmer Rouge Crimes*, in JUSTICE INITIATIVES: EXTRAORDINARY CHAMBERS, *supra* note 150, at 72, 80.

<sup>195</sup> *See id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Report of the Group of U.N. Experts*, *supra* note 20, ¶ 110.

<sup>198</sup> *Id.*

<sup>199</sup> Heder, *supra* note 150, at 54-55.

<sup>200</sup> PoKempner, *supra* note 169, at 39 (emphasis added).



the Convention on the Prevention and Punishment of Genocide (“Genocide Convention”).<sup>201</sup> Rather than replace the CEC, Cambodia should supplement its tribunal with informal mechanisms of transitional justice.

#### VI. CAMBODIA SHOULD IMPLEMENT INFORMAL INSTITUTIONAL RESPONSES TO SUPPLEMENT THE CEC RATHER THAN ESTABLISH A TRC

Supplementing the CEC with informal institutional responses will help satisfy Cambodia’s obligations under the Genocide Convention as well as bring the CEC into greater compliance with Article 52.<sup>202</sup>

“It is generally accepted that ‘[a] single institution on its own is unlikely to bring about a peaceful, stable, and restored nation.’”<sup>203</sup> Supplementing the CEC with a Truth and Reconciliation Commission (“TRC”) could help address the weaknesses of Cambodia’s tribunal. However, not only is a TRC prohibitively expensive, Cambodia lacks the necessary political will for such a commission. Thus, the Cambodian government should promote more economically and politically feasible programs such as town meetings and mental health counseling to supplement the CEC.

##### A. *Given Its Accession to the Genocide Convention, Cambodia Should Supplement Rather than Replace the CEC*

Cambodia should not eliminate its criminal prosecutions given its duty to prosecute perpetrators charged with genocide under the Genocide Convention.<sup>204</sup> Cambodia acceded to the Genocide Convention on October 14, 1950.<sup>205</sup> The Genocide Convention explicitly requires Cambodia to prosecute criminal perpetrators charged with genocide.<sup>206</sup> As the convention

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<sup>201</sup> Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A (III) (Jan. 12, 1951) available at [http://www.unhcr.ch/html/menu3/b/p\\_genoci.htm](http://www.unhcr.ch/html/menu3/b/p_genoci.htm) [hereinafter Genocide Convention].

<sup>202</sup> *Id.*

<sup>203</sup> Recognizing the limitations of their own criminal tribunals, several countries such as Sierra Leone and East Timor have implemented truth and reconciliation commissions in addition to their hybrid courts. As the Sierra Leone and East Timor experience reveal, countries are no longer restricting themselves to only one institution. See Linton, *supra* note 6, at 223, 237.

<sup>204</sup> See generally Gregory H. Stanton, *The Cambodian Genocide and International Law*, in GENOCIDE AND DEMOCRACY IN CAMBODIA 141 (Ben Kiernan ed., 1993).

<sup>205</sup> The Convention entered into force on January 12, 1951. University of Minnesota Human Rights Library: Ratification of International Human Rights Treaties-Cambodia, <http://www1.umn.edu/humanrts/research/ratification-cambodia.html> (follow “Convention on the Prevention and Punishment of the Crime of Genocide” hyperlink) (last visited Nov. 30, 2007).

<sup>206</sup> See Craig Etcheson, *Accountability Beckons During a Year of Worries for the Khmer Rouge Leadership*, 6 ILSA J. INT’L & COMP. L. 507, 514 (2000).

states, "Persons charged with genocide or any of the other acts," such as conspiracy to commit genocide, attempt to commit genocide, and complicity in genocide, "shall be punished."<sup>207</sup> This provision further provides that such persons shall be tried in a domestic or international court.<sup>208</sup>

To the extent that it is a tribunal that prosecutes "suspects" charged with genocide, the CEC helps satisfy Cambodia's obligations under the Genocide Convention.<sup>209</sup> Even though the CEC suffers from limitations that undermine national reconciliation, the appropriate response is not abandoning Cambodia's criminal prosecutions. Rather, the appropriate response is supplementing the CEC.

*B. A TRC Is an Institution That Has the Potential to Promote National Reconciliation*

A TRC is an institution established to investigate past human rights violations.<sup>210</sup> TRCs differ greatly from criminal tribunals such as the CEC in both purpose and design. They provide a forum in which victims can tell their stories, share their traumas, and confront those who have wronged them.<sup>211</sup> These proceedings frequently conclude with published reports that provide guidance for preventing future abuses.<sup>212</sup> Together, the purposes and features of a TRC support its potential to promote national reconciliation.

The primary purpose of the TRC is to establish the truth by resolving unanswered questions about past human rights violations.<sup>213</sup> TRCs allow societies to learn what was previously unknown.<sup>214</sup> In a TRC, criminals are brought to light and victims learn what happened to them and to their loved ones.

A TRC possesses institutional features that give victims their "civil and human dignity by providing them with an opportunity to tell their own stories of victimhood."<sup>215</sup> It provides a forum for victims and their families to discuss the abuses suffered, thus creating a cathartic environment in

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<sup>207</sup> Genocide Convention, *supra* note 201, arts. 3 and 6.

<sup>208</sup> *Id.* art. 6.

<sup>209</sup> CEC Law, *supra* note 54, ch. 2, art. 4.

<sup>210</sup> See Theresa Klosterman, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?*, 15 ARIZ. J. INT'L & COMP. L. 833, 835 (1998) (discussing the propriety of a TRC for Cambodia as a substitute, rather than as a supplement, to criminal prosecutions).

<sup>211</sup> *Id.* at 839.

<sup>212</sup> *Id.* at 835.

<sup>213</sup> Rotberg, *supra* note 99, at 3.

<sup>214</sup> *Id.* at 7.

<sup>215</sup> Dumisa B. Ntsebeza, *The Uses of Truth Commissions: Lessons for the World*, in TRUTH V. JUSTICE, *supra* note 99, at 158, 160.

which decades of anguish, grief, fear, and hate are released.<sup>216</sup> As opposed to a criminal trial, the primary focus of a TRC is on victims and their stories.<sup>217</sup>

C. *Significant Political and Economic Barriers Hinder the Establishment of a TRC for Cambodia*

Though a TRC is designed to promote national reconciliation, the establishment of a TRC is not appropriate for all countries. Rather, to be successful in realizing the goal of truth and reconciliation, a TRC requires government support and proper funding.<sup>218</sup> Given the absence of these important factors, a Cambodian TRC is impractical.

Cambodian Prime Minister Hun Sen has expressed clear disapproval of a Cambodian TRC.<sup>219</sup> Hun Sen has also refused to accept a truth commission for lesser members of the Khmer Rouge.<sup>220</sup> While not explicit, Hun Sen's opposition to a TRC likely stems from his fear that a TRC will instill panic in former Khmer Rouge officers and produce further societal tensions.<sup>221</sup> Hun Sen's concerns could be addressed by providing perpetrators conditional amnesty—truth in exchange for freedom from prosecution—as was implemented by South Africa's TRC. Nonetheless, the fact that Hun Sen rejected a TRC for Cambodia after studying South Africa's TRC makes this possibility unlikely.<sup>222</sup>

A TRC also comes with significant cost. For example, whereas the TRC in East Timor required approximately 3.8 million dollars to subsidize its two year mandate,<sup>223</sup> Sierra Leone's TRC cost 5 million.<sup>224</sup> Cambodia's

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<sup>216</sup> *See id.*

<sup>217</sup> *Id.*

<sup>218</sup> Without adequate government support or funding, a TRC for Cambodia cannot promote national reconciliation effectively. Though TRCs may be established or funded by the international community, TRCs are "officially sanctioned, authorized, or empowered by the state." Eric Brahm, Truth Commissions, June 2004, [http://www.beyondintractability.org/essay/truth\\_commissions](http://www.beyondintractability.org/essay/truth_commissions). Absent state support, a TRC cannot perform the work that is necessary to promote national reconciliation. *See id.*

<sup>219</sup> *See Ramji, supra note 78, at 139.*

<sup>220</sup> *Id.*

<sup>221</sup> *See BEIGBEDER, supra note 7, at 133.* This was much of the same reasoning for Hun Sen's initial opposition to a criminal tribunal for the Khmer Rouge. *Id.* Nonetheless, fear that a criminal tribunal would cause civil unrest and inspire the Khmer Rouge to retreat to the forests was strongly discounted by the U.N. Experts. *See Report of the Group of U.N. Experts, supra note 20, ¶ 101.*

<sup>222</sup> *See Tutu to Be Called Upon to Help with Khmer Rouge Leaders Trial, SOUTH AFRICAN PRESS ASSOCIATION, Jan. 17, 1999.*

<sup>223</sup> Commission for Reception, Truth and Reconciliation, in East Timor, *Funding, available at* <http://www.easttimor-reconciliation.org/Funding.htm> (last visited Nov. 30, 2007) (cached webpage, on file with the *Pacific Rim Law & Policy Journal*).

<sup>224</sup> Beth K. Dougherty, *Searching for Answers: Sierra Leone's Truth and Reconciliation Commission*, 8 AFR. STUD. Q. 43 (2004).

ability to fund a TRC is doubtful given that Cambodia has yet to secure full funding for its CEC. Although the U.N. will pay the expenses of the CEC's international staff and personnel, Cambodia is responsible for the expenses and salaries of all Cambodian personnel.<sup>225</sup> The CEC is expected to cost approximately 56.3 million dollars for three years of operation.<sup>226</sup> However, as of March 2006, Cambodia still lacked millions in tribunal funds.<sup>227</sup>

*D. Cambodia Should Look to Informal Mechanisms of Transitional Justice to Address the Tension Between the CEC and Article 52*

Rather than establish a TRC that is neither politically nor economically feasible, Cambodia should sponsor more feasible programs that can promote national reconciliation. These programs should include town meetings and greater access to mental health services to aid victims of the Khmer Rouge.<sup>228</sup>

Because town meetings serve different purposes and take different forms, Cambodian town meetings could be structured to provide truth and healing without the high costs and political opposition of a TRC. The purpose of these meetings would be for victims and perpetrators to share their experiences during the reign of the Khmer Rouge and help paint a broader picture of the past. To secure greater political support, such town meetings could be voluntary and request, though not require, perpetrators to disclose their crimes. As noted above, one of the main reasons Hun Sen opposed the creation of a TRC was fear that a TRC would instill panic in former Khmer Rouge.<sup>229</sup> To reduce costs as well as ensure greater legitimacy, well-respected leaders in the community could volunteer to preside over these meetings. Additionally, these meetings could be held in public spaces instead of requiring that they be housed in lavish courthouses.

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<sup>225</sup> CEC Law, *supra* note 54, ch. 15, art. 44.

<sup>226</sup> *Ieng Sary Wife Said Hiding in Cuba at Khmer Rouge Trial's Approach*, MONEAKSEKAR KHMER NEWSPAPER, Feb. 21, 2006, available at <http://ki-media.blogspot.com/2006/03/ieng-sary-wife-said-hiding-in-cuba-at.html>.

<sup>227</sup> *Id.*

<sup>228</sup> The concept of a town meeting is not foreign to Cambodia. Though the government has yet to sponsor town meetings to address the Khmer Rouge atrocities, they have been employed by non-governmental organizations to discuss the CEC. For example, Cambodia's Center for Social Development ("CSD"), a non-profit, non-governmental association, "has well-established formats for public forums, where key stakeholders are invited to large public meetings to discuss particular topics. In 2000, CSD held three such forums on the topic of the [CEC]..." McGrew, *supra* note 167, at 139, 146.

<sup>229</sup> *Id.*

As a supplement to the CEC,<sup>230</sup> town meetings could help resolve the tension between the CEC and Article 52. Like TRCs, town meetings can provide victims a forum to share their stories without the inhibiting rigors of criminal prosecutions. In contrast to criminal prosecutions, town meetings can provide far greater freedom on who can speak and how they can speak; thus, they can provide a far more comprehensive picture of the truth.<sup>231</sup> Additionally, in a society in which the independence of the judiciary is highly questionable, town meetings can provide a greater guarantee of impartiality than a criminal tribunal. Although one could argue that victims would never attend such meetings for fear of retribution, it is promising that Cambodians have been willing to attend town meetings to discuss the CEC despite the presence of former Khmer Rouge at these gatherings.<sup>232</sup>

The Cambodian government should also provide greater access to mental health services.<sup>233</sup> The Cambodian people continue to suffer from severe emotional and mental trauma as a result of the Khmer Rouge atrocities.<sup>234</sup> The Transcultural Psychosocial Organisation (“TPO”), an independent non-profit agency based in Amsterdam, currently provides mental health services and counseling throughout Cambodia; however, its centers have limited resources that reach few Cambodians.<sup>235</sup> Thus, providing greater access to mental health services to Cambodia’s urban and rural populations would allow for Cambodians to receive the healing and emotional reparation that the CEC does not provide. Although such services are not without cost, the government could provide such services on a sliding scale fee to minimize expenditures.

These informal mechanisms may not provide the same level of national reconciliation that a TRC could provide, nor may they constitute the perfect solution to addressing the tension between Article 52 and the CEC.

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<sup>230</sup> See Tracey Gurd, *Outreach in Cambodia: An Opportunity Too Good to Miss*, in JUSTICE INITIATIVES: EXTRAORDINARY CHAMBERS, *supra* note 150, at 117, 121 (discussing Sierra Leone’s use of town meetings to supplement its Special Court for Sierra Leone).

<sup>231</sup> Declan Roche, *Truth Commission Amnesties and the International Criminal Court*, 45 B. J. CRIMINOLOGY 565, 570 (2005).

<sup>232</sup> McGrew, *supra* note 167, at 146.

<sup>233</sup> See PoKempner, *supra* note 169, at 43.

<sup>234</sup> A recent 2005 epidemiological report revealed the extent to which trauma is embedded in Cambodian society. As this report noted, 81% of Cambodians experienced violence, 40% suffer from anxiety disorders, 28.4% suffer from post traumatic stress disorder, and 11.5% suffer from mood disorders. Alex Hinton, Nela Navarro, & Tom La Pointe, *Truth, Trauma, and the Victims of Torture Project: Helping the Victims of the Khmer Rouge*, Documentation Center of Cambodia, Apr. 5, 2006, available at [http://www.dccam.org/Projects/VOT/DCCAM\\_VOT\\_EVALUATION\\_FINAL.pdf](http://www.dccam.org/Projects/VOT/DCCAM_VOT_EVALUATION_FINAL.pdf).

<sup>235</sup> See HealthNet TPO, *Cambodia Country Programme*, Jan. 2006, [http://www.tpopom.org/HealthnetTPO\(EN\)/](http://www.tpopom.org/HealthnetTPO(EN)/) (follow “Projects” hyperlink; then follow “Country Programmes” hyperlink, then follow “Cambodia” hyperlink).

Nonetheless, given the infeasibility of a TRC for Cambodia, town meetings and greater mental health care access are more practical supplements.

## VII. CONCLUSION

The upcoming Khmer Rouge trials promise to provide national reconciliation to a population that has suffered years of terror and trauma at the hands of the Khmer Rouge. Though national reconciliation is an important policy generally, Cambodia's Constitution mandates the "policy of national reconciliation."<sup>236</sup> Article 52 requires that Cambodia not pursue policies that undermine truth or healing. However, the CEC's failure to safeguard the impartiality and legitimacy of the tribunal and its limited public participation and personal jurisdiction will undermine these essential principles. Though criminal prosecutions are necessary to the extent that they satisfy Cambodia's obligations under the Genocide Convention, the Cambodian government should supplement its tribunal with mechanisms to promote the very reconciliation that the tribunal undermines. Given Cambodia's political and economic realities, the Cambodian government should look to less politically contentious and more economically feasible mechanisms than a TRC in order to supplement the CEC.

Absent meaningful steps to supplement the CEC with mechanisms that address the tension between Article 52 of the Cambodian Constitution and the CEC, the Khmer Rouge trials will fail to appease the hearts and minds of the real victims of these atrocities, the Cambodian people.

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<sup>236</sup> KINGDOM OF CAMBODIA CONSTITUTION, *supra* note 10, art. 52.