

# Justice Initiatives

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## The Extraordinary Chambers

Thirty years after the Khmer Rouge took power—and following years of negotiations between the UN and the Cambodian government—the Extraordinary Chambers are finally preparing to try the remaining Khmer Rouge leaders. This issue of *Justice Initiatives* examines the Extraordinary Chambers and the challenges of securing justice for the victims of the Khmer Rouge.

## FOREWORD

# An Extraordinary Experiment in Transitional Justice

James A. Goldston

The Extraordinary Chambers in the Courts of Cambodia (EC)—the focus of this issue of *Justice Initiatives*—is an unusual experiment in transitional justice that stands at the juncture of two distinct, if overlapping, historical narratives. At one level, the EC marks a milestone in Cambodia's tortured experience of violence and suffering—the first serious effort to bring the law to bear, however incompletely, on the crimes wrought by the Khmer Rouge more than a quarter century ago. At the same time, the EC is the latest in a series of tribunals—starting with Nuremberg and culminating most recently with the International Criminal Court—intended to secure legal accountability for mass atrocities.

It is not yet known how the EC will respond to the many demands of its varied constituencies. But one thing is clear: the EC's performance will have a major impact on both Cambodia and the future of international justice.

On the one hand, things may go well. The EC may produce effective, thorough, and fair investigations and trials of a small group of persons who the evidence convincingly demonstrates were most responsible, in a manner which transparently engages victims, the media, and the general public. In such a case, the EC would contribute to a sense of justice for the Khmer Rouge crimes, support broader

**One thing is clear: the EC's performance will have a major impact on both Cambodia and the future of international justice.**

legal reform efforts in Cambodia, and help confirm mixed national/international courts as a model for the future.

Alternatively, if things go poorly, the investigations may be marred by incompetence or political interference; the trials may fail to comply with international due process standards; and the proceedings may not be open to monitoring and participation by civil society. These shortcomings would almost certainly set back the cause of justice for Khmer Rouge victims, hinder other efforts to improve Cambodia's legal capacity, and place a question mark across the trajectory of further attempts to root international justice principles in domestic legal systems.

The creation of a court to try Khmer Rouge crimes has been a long time coming. As recounted in

greater detail by several contributors to this volume, Cold War politics and the competing interests of several states impeded progress throughout the 1980s. Painstaking negotiations among the UN, various member states, and Phnom Penh over much of the ensuing decade reflected a mixture of—depending on the government in question—ambivalence, conflicting priorities, and/or active hostility to a tribunal.

The result is a court that is saddled with a number of structural impediments. These provide ample basis for reasoned skepticism, if not downright pessimism, about how it will ultimately function. The “Extraordinary Chambers” is extraordinary in several respects. Although a number of factors distinguish the EC from its principal hybrid predecessors, three stand out in underscoring the challenges ahead.

Perhaps most significantly, the EC is the first hybrid tribunal in which international judges and prosecutors do not constitute a majority. Notwithstanding the institutional contortions that have been devised to accommodate this anomaly, it has enormous implications for the EC's operation—many of them potentially negative. To a greater extent than with the other principal hybrid courts (in East Timor, Kosovo, and Sierra Leone), the Cambodian government has repeatedly demonstrated its determination that the EC remain a domestic tribunal staffed primarily by Cambodians. There are, of course, good reasons why mixed tribunals should have substantial national components. But where, as in Cambodia,

both the quality and impartiality of judicial decision making have long been in question, ceding too much authority to the national system risks compromising the entire process.

Second, the length of time that has transpired since the crimes at issue—longer than three decades, in some cases—far exceeds that for any comparable proceeding. The other hybrid tribunals have all taken place in the immediate aftermath of the conflicts which gave rise to them. For obvious reasons, Cambodia’s long delay complicates the challenge of evidence preservation—from human memory to chain of custody—so essential to proving guilt. It also threatens to deprive the court of its most likely, and consequential, defendants. Pol Pot died in 1998. His former colleagues are aging fast.

Third, unlike analogous mechanisms in other countries, the EC is for now the only official venue in Cambodia where claims for truth and justice about Khmer Rouge crimes may be mediated. Apart from a limited exception in the early 1980s, no serious attempt has been made to establish a truth commission or similar process of structured, fact-based dialogue involving both government and civil society. Nor have there been any purely domestic prosecutions or trials, beyond the clearly substandard proceedings convened in the immediate aftermath of the Khmer Rouge’s fall. Thus, with all its deficiencies, the EC will for the foreseeable future be the exclusive vehicle for addressing the weighty and numerous expectations of Khmer Rouge victims and their loved ones.

In light of these obstacles, it perhaps bears emphasis that both the Cambodian government and the international community share responsibility to see that the EC succeeds. Having fought tenaciously to ensure that the EC would be part of the Cambodian courts, the government in Phnom Penh now must demonstrate its *bona fides*—from the quality of its appointments to its support for judicial decisions based on facts and law rather

**Both the Cambodian government and the international community share responsibility to see that the EC succeeds**

than political whim. And while the crimes to be judged are those of the Khmer Rouge, the international community as a whole has an interest in seeing to it that genocide does not go unpunished. Moreover, the role of the world’s major powers in, first, helping foster the conditions for Khmer Rouge rule in Cambodia, then sustaining a Khmer Rouge seat at the UN, impels meaningful international involvement.

To date, no government has fulfilled this responsibility. In recent months, the Cambodian government has offered contradictory signals about the EC’s funding and timing even as it has lashed out against the very bodies—independent courts and human rights NGOs—so crucial to the EC’s efforts. In January 2006, foreign governments, UN officials, and inter-

national observers condemned what some termed “the harshest political crackdown in years.”<sup>1</sup>

At the same time, on the whole, international donor governments have adopted a posture of acquiescence to official ineptitude, powergrabbing, and duplicitousness with respect to the EC that has consistently undermined broader judicial reform in

As we embark upon a new stage in the life of the EC, the Justice Initiative remains committed to its effective operation.

Cambodia. The Group of Interested States (GIS)—a body representing those governments with financial and/or policy interests in the EC—has done remarkably little to ensure that its members’ money is well spent. To date, the GIS has not established a monitoring mechanism, published benchmarks of performance it expects the EC to meet, or even declared publicly its commitment to ensure that the EC adhere to fundamental standards of international human rights and humanitarian law. To take one example, the Cambodian government’s failure to disclose the criteria for EC judicial selection, despite its pledge to be developing them as long ago as May 2005, has met with deadening silence from the GIS.

By consistently refusing to assume responsibility for its success, all parties to the EC risk condemning it to failure. This is as unfortunate

as it is unnecessary. To the contrary, it is possible for the EC to perform credibly. But it will take strong, vigilant backing from the GIS as well as the Cambodian government. As detailed in this volume, many issues require immediate attention. Among the highest priorities are the following:

- *Clear Rules of Procedure and Evidence.* The EC must develop rules of procedure and evidence in a timely and transparent fashion that benefits from the input of concerned NGOs and independent legal experts.
- *Code of Ethics.* The EC must adopt and enforce a code of ethics regulating the conduct of judges, prosecutors, and other staff.
- *Transcription.* The proceedings should be recorded and preserved in complete and accurate, word-for-word transcripts, to facilitate appellate review and public debate.
- *Interpretation/Translation.* Quality interpreters and translators must be identified and adequately trained in legal and other relevant terminology, as well as in the principles and techniques of translation, and employed by an EC language service that has a well-defined, autonomous position in the tribunal’s structure.
- *Investigative Resources.* Adequate provision must be made to ensure that EC co-prosecutors

and co-investigating judges have sufficient and skilled investigative staff and resources to investigate complex historical crimes.

- *Public Outreach.* The EC must keep tribunal operations strictly separate from military operations, facilitate access by Cambodian and international media, undertake public education programs commencing well before the trials begin, and establish off-site media offices to provide reliable information including via audio and/or video broadcast.
- *Training.* Once selected, Cambodian and international judges, prosecutors, and other staff will require training in Cambodian and international legal procedures on a continuing basis.
- *Defense.* The EC must clarify that each accused person has the right to competent counsel of choice, including a qualified international attorney. In addition, defense counsel must enjoy the capacity and resources to carry out effective investigations, conduct effective cross-examinations of witnesses, and mount a meaningful defense. A code of ethics is needed for defense counsel.
- *Victims and Witnesses.* The EC must establish and implement procedures to ensure that witnesses may testify voluntarily and without undue concern for their well-being. A separate victim/witness unit should oversee the provision of information, services, and protection to victims and witnesses.
- *Accounting.* An effective accounting system must be put in place to ensure that EC funds are properly used, tracked, and accounted for. Once the tribunal is up and running, and on a continuing basis, the EC budget should be re-examined in light of its evolving needs and progress in the investigations and trials.
- *Legacy.* The EC should develop and carry out a plan to maximize the positive impact of its operation on the national court system, the bar, and the general public. The plan should address physical legacy, professional development, and legal reform.
- *Management and Oversight.* In order to carry out meaningful oversight with respect to each of these important matters, the GIS must establish a coordinating mechanism, together with the Cambodian government and the United Nations, to oversee the non-judicial policy, financial, and administrative issues confronting the EC. The GIS coordinating mechanism should have capacity to act both in Phnom Penh and in New York. The experience of the management committee for the Special Court for Sierra Leone (SCSL) should be considered in developing a model appropriate to Cambodia.

\* \* \* \* \*

Since its inception, the Justice Initiative has devoted substantial time and resources to helping the EC secure funding and become established as an institution. We have done so for several reasons: the scale of the crimes, the absence of accountability to date, the unusual detachment of traditional international justice allies, and the rapidly receding timeline for possible action. Throughout, we have remained keenly aware of the EC's flaws and of the distinct possibility that its primary sponsors might ultimately fail to provide adequate political, economic, or administrative support. As we embark upon a new stage in the life of the EC, the Justice

Initiative remains committed to its effective operation. The months to come will require critical, intelligent engagement with this fragile, problematic, yet important institution by a broad range of actors in government and civil society.

The repeated failure of governments over the past century to halt genocide wherever it has emerged, even though they have had it within their power to act, has been rightly condemned. It would be no less shameful—and damning to the cause of legal accountability for mass crimes—to allow the principal architects of Cambodia's genocide to walk free, when the possibility of justice is within reach.

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### Notes

James A. Goldston is executive director of the Open Society Justice Initiative.

1. Seth Mydans, "Cambodian Leader Cracks Down in Bid to Solidify Power," *International Herald Tribune*, Jan. 9, 2006, A3.

## HISTORY

# A “Fair and Public Trial”: A Political History of the Extraordinary Chambers

The Extraordinary Chambers are the result of years of complex and tendentious negotiations between the UN and the Cambodian government. Craig Etcheson reviews their history.

The many unique aspects of the Khmer Rouge Tribunal—its unusual mix of local and international staff at every level, including co-prosecutors and co-investigating judges, and a majority of Cambodian judges, as well as its “supermajority” decision-making mechanism—can only be understood through its political history. The Extraordinary Chambers (EC) in the Courts of Cambodia, as the Khmer Rouge Tribunal is now officially known, was arrived at following seven long years of difficult negotiation between the Cambodian government and the United Nations.

On December 25, 1978, Hun Sen commanded exiled Cambodian armed forces invading Cambodia from Vietnam to overthrow the Khmer Rouge regime.<sup>1</sup> Exactly 20 years later to the day, on December 25, 1998, the two remaining senior Khmer Rouge political leaders, Nuon Chea and Khieu Samphan, formally surrendered to Hun Sen, by then prime minister of Cambodia. This event, following on the 1998 death of Pol Pot,

struck many as signaling the end of the Khmer Rouge. After 30 years of war, the political leadership of the Khmer Rouge appeared finally vanquished. The surrender of the movement’s top political leaders launched a new round of dialogue about Khmer Rouge accountability for war crimes, genocide, and other crimes against humanity.

By this time, the ruling Cambodian People’s Party had demonstrated a long-standing rhetorical commitment to holding the perpetrators of the Khmer Rouge genocide accountable. In 1995, an international conference on genocide justice was held in Phnom Penh, Cambodia’s capital. Hun Sen participated, and publicly declared support for trying the leaders, arguing that “this is not about politics, it is about justice.”<sup>2</sup> On June 21, 1997, the then co-prime ministers of Cambodia, First Prime Minister Prince Norodom Ranariddh and Second Prime Minister Hun Sen, sent a letter to the UN Secretary-General requesting international assistance in bringing the Khmer Rouge to justice.<sup>3</sup>

Just before the leaders’ surrender, a UN Group of Experts, appointed by Secretary-General Kofi Annan in response to the Cambodian request, had visited Cambodia to investigate

Khmer Rouge culpability for war crimes, genocide, and other crimes against humanity. However, the prime minister appeared to have had a change of heart the moment the UN experts left. Hun Sen greeted the fallen rebel leaders by declaring that Cambodia should “dig a hole and bury the past.”<sup>4</sup>

**Before the Group of Experts’ report was presented to Kofi Annan, the Cambodian government had already decided against its likely recommendations.**

### **The tribunal’s origins: a tale of two plans**

Before the Group of Experts’ report was presented to UN Secretary-General Kofi Annan on February 18, 1999, the Cambodian government had already decided against its likely recommendations.<sup>5</sup> They instead initiated a series of confusing and apparently contradictory changes in position. First, the government publicly discussed the possibility of establishing some form of truth commission as an alternative to a tribunal for the Khmer Rouge. Foreign Minister Hor Nam Hong sent an inquiry to Bishop Desmond Tutu in South Africa to ask about possible assistance in creating an institution for Cambodia modeled on South Africa’s Truth and Reconciliation Commission.<sup>6</sup> Almost immediately, however, on March 6, 1999, Khmer Rouge military chief Ta Mok was captured, and the government once

again changed course, now declaring that Cambodia would hold a domestic trial for Ta Mok alone. As Hor Nam Hong expressed it, “When you try Ta Mok, it will not be only him, but the whole Khmer Rouge system, the whole top leadership.”<sup>7</sup>

In their report, meanwhile, the Group of Experts recommended that the United Nations model a tribunal for Cambodia on the existing ad hoc international tribunals for the former Yugoslavia and Rwanda, situating it near, but not in, Cambodia, and limiting personal jurisdiction to those “most responsible” for serious violations of international humanitarian law, and temporal jurisdiction to the period of the Khmer Rouge regime from April 17, 1975, to January 7, 1979.<sup>8</sup> They also recommended a trust fund for reparations to victims of the Khmer Rouge, broadcasts of the tribunal sessions to the Cambodian people, and consideration of some form of truth commission as an adjunct to, but not a replacement for, the judicial process.

When he transmitted the Report of the UN Group of Experts to the UN Security Council and General Assembly, along with news of the Cambodian government’s newest plan to try only Ta Mok, the Secretary-General wrote that in his view “the trial of a single Khmer Rouge military leader which would leave the entire political leadership unpunished would not serve the cause of justice and accountability.”<sup>9</sup> With prodding from the Secretary-General’s special representative for human rights in Cambodia, Thomas Hammarberg,



the Cambodian government agreed to entertain a new initiative from the United Nations. The UN's Office of Legal Affairs labored through the spring of 1999 to define a new model of "international" justice: a "mixed" tribunal which would be established under Cambodian domestic law and be seated in Phnom Penh, but which would still be dominated by international personnel in order to ensure that impartial justice would be done.

Yet when negotiations began in August 1999, Sok An, Cambodia's minister in charge of the Office of Council of Ministers, presented the UN delegation with Cambodia's own draft charter for a Khmer Rouge tribunal.<sup>10</sup> The plan presented by Sok An proposed a fundamentally national, rather than international, tribunal. Under the draft charter, the court of first instance for prosecution of the Khmer Rouge would be the existing Phnom Penh Municipal Court. There would be two levels of appeals, also within existing Cambodian judicial structures. A majority of personnel at all levels of the judicial process would be Cambodians, with the rest "internationals." All legal personnel, international as well as domestic, would be appointed by the Cambodian Supreme Council of the Magistracy. Not everyone was happy with this formula, as the independence of both the Phnom Penh Municipal Court and the Supreme Council is questionable—both have been accused of political taint.<sup>11</sup> In addition to the proposed institutional structures, Sok An's draft incorporated the Genocide Convention into Cambodian domestic

law, but with the crime of genocide redefined to fit precisely the crimes of the Khmer Rouge (mainly by extending it to include crimes against political and economic groups). The draft further specified that this new definition would be retroactive.

In response, the UN delegation noted that the Secretary-General's requirement that any Khmer Rouge tribunal should be "international in character"<sup>12</sup> could not be met simply by arbitrarily grafting a few foreign

**The UN labored to define a new model of "international" justice: a "mixed" tribunal established under Cambodian domestic law, but able to ensure impartial justice.**

lawyers onto existing Cambodian judicial institutions. UN Assistant Secretary for Legal Affairs Ralph Zacklin also objected to the retroactive definition of genocide. He argued that any Khmer Rouge perpetrators who might evade conviction on charges of genocide due to the Genocide Convention's narrow wording could be convicted of crimes against humanity for the same acts.<sup>13</sup> The UN presented the Cambodians with its own draft charter for a Khmer Rouge tribunal.<sup>14</sup> The UN plan called for one trial chamber and one appeals chamber, with a majority of international personnel in both.

The significant gap between these two positions was not bridged in the August negotiations,<sup>15</sup> during which Cambodian Tribunal Task Force Chairman Sok An suggested to Ralph

Zacklin that the two sides work from a single text, rather than from differing UN and Cambodian versions, in order to avoid possible confusion. Zacklin ignored this request, as did the UN's next negotiator, Legal Counsel Hans Corell, after him.<sup>16</sup> As a result, during the coming years of negotiations, the two sides were rarely talking about the same text.

**U.S. mediation managed to achieve a compromise that would permit the international community to endorse Cambodia's tribunal plans.**

### **The case for a Cambodia-based tribunal**

In a September 1999 meeting with UN Secretary-General Kofi Annan, Prime Minister Hun Sen offered two reasons for Cambodia's attachment to a primarily national court. The first was legal: under the Genocide Convention, Cambodia had the primary obligation to try crimes within its jurisdiction.<sup>17</sup> The second was the long-standing tolerance of the UN and its members toward the Khmer Rouge. The international community had "allowed [the Khmer Rouge] to sit at the UN while they committed genocide from 1975-1979. This group continued to occupy the seat until 1982 and from 1982 to 1993 was part of a tripartite coalition government and legal party of the Supreme Council of Cambodia under the Paris Peace Accord."<sup>18</sup> Prime Minister Hun Sen then described

three "options of participation or non-participation" for the UN in a Cambodian tribunal: to provide legal personnel, including nominating international judges and prosecutors; to provide legal expertise, but no personnel; or to end its involvement altogether.<sup>19</sup> After this terse meeting,<sup>20</sup> a long waiting period ensued.

The Cambodian government's willingness to go it alone appears to have been bolstered also by a desire for a national process to generate reconciliation and unity. On September 20, after meeting with Kofi Annan, Hun Sen addressed the UN General Assembly:<sup>21</sup>

We are firmly resolved to do whatever is needed to provide an open trial of those responsible for genocidal crimes in the country in the past. In holding this trial we will carefully balance, on the one hand, the need for providing justice to our people who were victims of this genocidal regime and to finally put behind us the dark chapter of our national history with, on the other hand, the paramount need for continued national reconciliation and safeguarding the hard-won peace, as well as national independence and sovereignty, which we value the most.

Ominously, the Cambodian government position also received the support of high-level Khmer Rouge. On September 2, Ieng Sary released a statement from his quasi-autonomous zone in western Cambodia, declaring that he "supports resolutely the [Royal Government's] idea and stance on

defending national sovereignty by taking for priority the existing national tribunal in collaboration with foreign judges and prosecutors whose number is lesser than those from Cambodia.”<sup>22</sup> Ieng Sary had been the Khmer Rouge deputy prime minister and foreign minister, and significant evidence has been amassed suggesting that he fed victims into the Khmer Rouge killing machine.<sup>23</sup> Thus, Ieng Sary would be a prime target of any independent genocide prosecutor and his endorsement of the government plan raised questions about Hun Sen’s good faith in his negotiations with the UN.

One observer described the situation at this point as a “lose-lose” scenario for Cambodia.<sup>24</sup> On the one hand, any step back from the strong stand on Cambodia’s sovereignty and capacity to conduct the trials would constitute a serious loss of face. The opposition Sam Rainsy party had been arguing all along that an internationally controlled tribunal alone would suffice. On the other hand, if the Cambodian government were to proceed with a national tribunal for the Khmer Rouge, little or no international funding or expertise would be forthcoming, and the outcomes would be vulnerable to criticism. Cambodia’s judicial underdevelopment had created a general presumption that fair trials on this politically fraught issue would be impossible.<sup>25</sup>

### United States mediation

When negotiations between Cambodia and the UN stalled in September 1999, the United States attempted to bridge the gap.<sup>26</sup> U.S. mediation with the

Cambodian government managed to achieve a compromise that would permit the international community to endorse Cambodia’s tribunal plans. In December 1999, the Cambodian government delivered a dramatically revised new draft of the proposed tribunal law to the UN. The new draft incorporated both the suggestions of the UN’s Legal Affairs Office and

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the compromises reached with the United States’ mediators. References were eliminated to retroactive application of law, and a proper definition of genocide was incorporated.<sup>27</sup> Basic due process protections for defendants, previously absent, were now included.

The proposed “special” tribunal would consist of a court of first instance and an appeals chamber, both situated outside existing Cambodian judicial institutions. Cambodian jurists would comprise a majority of the personnel at all levels of the court, but at least one international jurist would have to concur with the decision of the majority in order for any decision to stand—a system known as “supermajority.” The prosecution would include investigating magistrates and prosecutors, with one Cambodian and one international cooperating in each institution.

The UN responded positively to the proposal, but continued to seek some

mechanism to ensure that judicial independence would be obtained in the proceedings. The new draft addressed the issue through rhetorical fiat, rather than proposing concrete institutional arrangements. Article 12 of the new draft law stated, “The judges shall be independent in performance of their functions and shall not accept or seek instructions from any government or any other source.”

**A compromise was proposed by U.S. Senator John Kerry, who had taken a long interest in Cambodia’s national reconciliation.**

But merely asserting that the judges shall be independent does not make them independent in fact. It is possible that, having had little or no experience of judicial independence, the Cambodian government did not fully appreciate the issue or the importance attached to it by the UN and other observers. Concerns about political interference in the tribunal were only increased every time the prime minister made peremptory declarations about how many and which suspects would be vulnerable to prosecution.<sup>28</sup>

Early in January 2000, the United Nations responded to the latest Cambodian draft with a “non-paper” of legal concerns.<sup>29</sup> UN Under-Secretary-General for Legal Affairs Hans Corell led a team of negotiators to Phnom Penh in March to ensure the judicial mechanism would “reach

international standards.”<sup>30</sup> Corell insisted the UN could accept a Cambodian majority in a court operating by “supermajority,” but only if the international prosecutor was fully independent and did not require agreement with a Cambodian co-prosecutor. The Cambodians refused point blank. Requiring agreement between the Cambodian and international prosecutor could potentially allow the government to thwart prosecution of certain former members of the Khmer Rouge, a case in point being Ieng Sary, the former foreign minister and deputy prime minister of Democratic Kampuchea. Prime Minister Hun Sen has repeatedly and publicly declared that Ieng Sary should be protected from prosecution by the Extraordinary Chambers.<sup>31</sup> Again, American intervention broke the impasse.

A compromise formula was proposed by U.S. Senator John Kerry, who knew Hun Sen personally and had taken a long interest in Cambodia’s national reconciliation.<sup>32</sup> His compromise reapplied the so-called supermajority principle to potential disputes between co-investigating magistrates or co-prosecutors. Where the Cambodians and internationals disagreed over whether to investigate or prosecute a particular person, the dispute would be referred to a specially constituted panel of three Cambodian and two foreign judges drawn from tribunal chambers, who would decide the issue based on the supermajority voting principle. Unless four of five judges disagreed,

the disputed investigation or prosecution would go forward. The Cambodian negotiators had proposed a similar special panel of three foreign judges and two Cambodians, except that supermajority agreement would be needed for a prosecution to go ahead—which would allow any two Cambodian members of the panel to block a prosecution. Kerry eventually persuaded Hun Sen to abandon this transparent attempt at political control over prosecutions.

By the end of the July 2000 negotiations, there seemed to be some confusion as to what exactly had been agreed. The UN laid out the arrangements on the prosecution and judiciary in a Memorandum of Understanding, that also included the agreed terms of the tribunal's temporal jurisdiction (April 17, 1975, to January 7, 1979) and potential indictees (senior Khmer Rouge and those “responsible for the most serious violations”). However, Sok An insisted that the government could not formally agree to any arrangement with the UN until the relevant text had been passed by parliament and adopted as law. Correll argued that it was standard international practice for a government first to agree with the UN and then submit the agreement to parliament.<sup>33</sup> But, as one member of the Sok An's Task Force put it, the Cambodians were “adamant that the National Assembly [would] not just rubber-stamp something the government has signed off on with the UN.”<sup>34</sup> The UN laid down a marker giving the Cambodian government

a deadline of the autumn convening of the UN General Assembly to pass the draft law in precisely the form “agreed” in the July negotiations.<sup>35</sup>

### The Cambodian parliament acts

The Cambodian government missed the UN's deadline, finally moving the draft legislation to the parliament on

To put Cambodian defense lawyers—the great majority of whom have limited legal knowledge of international crimes—up against an experienced international prosecutor would be manifestly unfair.

November 20, 2000. The parliamentary Legislative Commission reviewed the proposed legislation, and made a few changes. One of these was significant. On the grounds that only members of the Cambodian Bar Association have the right to practice law in Cambodia, the commission modified the text in such a way that foreign defense attorneys would be prohibited from directly addressing the tribunal; they would be limited to advising Cambodian attorneys. This change did not account for the role of foreign prosecutors and judges, and violated the UN's requirement that defendants in the tribunal must be permitted to select defense counsel of their choice. To put Cambodian defense lawyers—the great majority of whom have limited legal knowledge of international crimes—up against

an experienced international prosecutor would be manifestly unfair, and a violation of defendants' rights under the International Covenant on Civil and Political Rights, to which Cambodia is a party.

Once vetted by the Legislative Commission, the draft law was sent to the full National Assembly for debate on December 29, 2000. Tribunal Task Force Chairman Sok An briefed the

### The Cambodian government had not in fact provided a copy of their final draft to the UN.

assembly at great length, discussing the history of international tribunals, the principles which guided the government during the drafting of the law (emphasizing the search for justice, the importance of maintaining peace, political stability, and national unity, and respect for Cambodia's national sovereignty), the history of the international negotiations leading up to the draft law, and the "major compromises" that, he asserted, the government had made in (purportedly) reaching agreement with the UN.<sup>36</sup> Minister Sok An told the members of parliament that the government had made five major concessions or compromises in the course of the negotiations. These were the agreements 1) to include foreign jurists in the Cambodian court system; 2) to permit what the minister called a "blocking

minority" on the bench of the court (otherwise designated as the "super-majority"); 3) to allow a foreign co-prosecutor and a foreign co-investigating magistrate; 4) to implement a "Pre-Trial Chamber" mechanism, by which disputes between co-prosecutors or co-investigating magistrates would be resolved; and 5) not to request any amnesties or pardons.

The assembly debate was long and lively.<sup>37</sup> Finance Minister Keat Chhon, a member of the government team defending the proposed law (and former ranking advisor to Pol Pot), succinctly summarized the case for the law by answering his own rhetorical question, as someone who had lived near the heart of the terror. "For what?" he asked. "For the next day, [that] there will be no terror of killing, on the land of this country or other countries . . ." He argued for unanimous approval of the measure on the grounds that "This is for memory and justice. In practice, we are strengthening peace, national agreement and national reconciliation, transforming and developing our country . . ." On January 2, 2001, the draft was unanimously passed with all 92 members present signifying approval; 30 members were absent from parliament that day, including the president of the National Assembly, Prince Norodom Ranariddh.

Although the Cambodian government was shepherding through parliament a bill which had supposedly been carefully negotiated with the United Nations, the government had not in fact provided a copy of their

final draft to the UN. The United Nations did not obtain a copy until January 3, the day *after* it was passed by the National Assembly. Six days later, Hans Corell wrote to Sok An to raise a number of “matters of concern” in the law as passed, arguing that these concerns should “be taken into account at the Senate stage of the discussion of the law, since this may be the last opportunity to make adjustments to the law before it is finally adopted and promulgated.”<sup>38</sup>

Serious issues raised by Corell concerned the power to appoint foreign personnel to the tribunal, amnesty, defense counsel, and the rules of procedure for the tribunal.<sup>39</sup> Language requiring UN input or control over the appointment and replacement of international personnel, including judges, had disappeared from the adopted law. Corell insisted it must be reinserted. A second area of contention was amnesties. The UN’s July 7 proposed draft of the tribunal law stated that the government would not request an amnesty or pardon from Cambodia’s king for any person indicted by the tribunal, and that previous amnesties would be no bar to prosecution. The law as passed by the Cambodian parliament dropped the second half of this formulation. This question, which was deemed absolutely central by the UN, primarily concerned Ieng Sary, who had been granted an amnesty.<sup>40</sup> The accused right to counsel of their choice was a third issue. A fourth concerned the rules of procedure to be adopted for the conduct of the tribunal. The UN’s July 7 draft tribunal law stated

that the court would proceed under “existing procedures in force,” meaning Cambodian criminal procedure, but that these could be modified, “if necessary,” by reference to international rules of procedure. However, the version of the law passed by the parliament added the phrase, “if there are lacunae in these existing procedures,” to that formulation. This change seemed to suggest that

**The draft tribunal law the UN believed had been agreed upon was not the one that the Cambodians were pushing through parliament.**

the tribunal might proceed contrary to international judicial standards, so long as procedures contrary to international practices were enshrined in domestic legislation or existed on the books as administrative regulations. This provision gave rise to a fear at the UN that “adherence to international standards” would not be a feature of the Khmer Rouge tribunal.

The consequences of the early failure to agree on a single working text were increasingly clear. The draft tribunal law the UN *believed* had been agreed upon was not the same as the one that the Cambodians were pushing through parliament. The UN had neglected to assign a responsible UN officer to remain in Phnom Penh for the duration of the process to stay closely engaged with



Sok An's Tribunal Task Force. The resulting confusion about divergent versions of the draft law was creating suspicions at the UN that the Cambodians were acting in bad faith, further poisoning the process. Sok An, however, argued that these concerns should be dealt with not in the draft to be discussed by the Senate, but in the context of the yet-to-be-agreed Memorandum of Understanding

**Divergent versions of the draft law were creating suspicions at the UN that the Cambodians were acting in bad faith.**

between the UN and the government.<sup>41</sup> The Senate debated the version passed by the National Assembly, and in another animated and often poignant debate, passed it unanimously on January 15, 2001.<sup>42</sup> It still took seven more months for the law to complete the final stages of ratification: review by the Constitutional Council (which recommended an amendment);<sup>43</sup> amendment;<sup>44</sup> second passage through both houses of parliament and the Constitutional Council;<sup>45</sup> and finally approval, on August 10, 2001, by the king, His Majesty Norodom Sihanouk.<sup>46</sup>

Throughout this time, the UN was not supplied with a full translation of the final law, and contact with the government continued to be acrimonious.<sup>47</sup> A delay ensued while the

United Nations awaited translations of the law,<sup>48</sup> and it was another month before the UN's Office of Legal Affairs could respond substantively (the small office was tied up with the final negotiations for the Special Court for Sierra Leone). The UN response finally came on October 10, in another letter from Hans Corell to Sok An, detailing 11 problematic issues in the law, mostly those already raised in the previous letter of January 7.<sup>49</sup> In late January, Sok An replied that most of the issues raised by Corell reflected misunderstandings on the part of the UN that could be addressed in the promised Memorandum of Understanding between the UN and the Royal Government.<sup>50</sup> Two weeks later, the UN pulled out of the process.

### February 2002: the UN balks

On February 8, 2002, Hans Corell convened a press conference in New York to inform the world that the Secretary-General had instructed him to end the affair. "The United Nations has come to the conclusion," Corell announced, "that the Extraordinary Chambers, as currently envisaged, would not guarantee the independence, impartiality, and objectivity that a court established with the support the United Nations must have."<sup>51</sup> It had been 18 months since any face-to-face encounter between the UN and Cambodian negotiating teams.

The Cambodian government was shocked, as were others.<sup>52</sup> Condemnation of the UN decision poured in from all corners of the international community. U.S.



Ambassador to Cambodia Kent Wiedemann said his government was “extremely disappointed” by the decision, and urged the Cambodians to remain open to a resumption of talks with the UN.<sup>53</sup> France, Japan, and a chorus of other nations also registered unhappiness with the move, calling on the Secretary-General to reconsider his action.<sup>54</sup>

The Secretary-General was unmoved. Human rights groups applauded his stand as “principled,” and urged him to hold fast. “Participating in trial procedures which are not fair would serve only to undermine UN human rights standards, and sell the Cambodian people short,” Amnesty International declared.<sup>55</sup> Human Rights Watch said that, “Given the failure of the Cambodian government to address the concerns about the tribunal raised more than a year ago, we feel the UN acted appropriately.”<sup>56</sup> The most poignant voice in support of the UN’s withdrawal from the tribunal process came from domestic human rights groups in Cambodia. The Cambodian Human Rights Action Committee, a coalition of 18 Cambodian human rights groups, expressed sorrow at the turn of events, but reluctantly endorsed the UN decision.<sup>57</sup> The Action Committee said,

We also ask the UN to refuse participation or support for any process which does not meet international standards. With regard to individual member states of the UN, CHRAC urges them not to consider participating

in any tribunal unless it is held under the auspices of the UN.

There the matter rested through the winter, spring, and summer of 2002, with more precious time lost to the quest of achieving accountability for the crimes of the Khmer Rouge. As if to underline the urgency, on February 15, exactly one week after the UN withdrew from the negotiations,

**Somehow, the two sides completed the negotiating sessions, culminating in a January 13 meeting between the Cambodian delegation and Kofi Annan.**

senior Khmer Rouge military commander Ke Pauk died peacefully of natural causes at age 68.<sup>58</sup> He was one of the handful of remaining Khmer Rouge leaders who met the criterion, “those most responsible for the most serious violations.” The others were old, as well, so it would only be a matter of time before they too might escape justice through death.

### **The “group of interested states” intervenes**

During 2002, international opinion slowly coalesced around an action plan to reverse the UN withdrawal. A group of some three dozen interested countries, led by Japan, France, Australia, and the United States, worked quietly in the background to restart negotiations. Success came when Annan told Hun Sen that the UN would return

to the tribunal negotiations—if, and only if—the UN Security Council or General Assembly issued a “clear mandate” for negotiations. The informal group of countries now set about drafting such a mandate in the form of a UN General Assembly resolution. A first draft was withdrawn by its main sponsor, Australia, after the Cambodian government refused to co-sponsor it. A next draft, spearheaded by Japan and France in close consultation with Sok An’s Tribunal Task Force, received the backing of 150 votes and none against in the UN General Assembly on December 18, 2002.<sup>60</sup> Thirty countries abstained, however, including most of the European Community nations, a group that had been at the forefront of the push for a renewed negotiating mandate. The Swedish delegate summarized their reservations: “to require the Secretary-General to resume negotiations based on a text which did not address the failings of the last negotiations risked leaving the perpetrators of crimes during the Khmer Rouge period with impunity and did not guarantee international legal standards.”<sup>61</sup>

Soon afterward, Hans Corell opened the new talks in New York by suggesting that Cambodia’s Khmer Rouge tribunal law was so deeply flawed that the only sensible course was for Cambodia to abandon the law, and for negotiations to begin from scratch, using the original proposals laid on the table by the UN in August 1999.<sup>62</sup> Sok An protested that this did not reflect the intent of the General Assembly. Somehow, howev-

er, the two sides completed a series of substantive negotiating sessions, culminating in a January 13 meeting between the Cambodian delegation and Kofi Annan. The Secretary-General was uncharacteristically cold and unyielding. There was no point in holding further discussions, he informed Sok An, unless Hun Sen first agreed to the UN’s conditions in writing. The Cambodians departed New York empty handed.

Then on February 13, 2003, three weeks after Sok An had returned to Phnom Penh, a delegation of diplomats from the United States, France, India, Japan, the Philippines, and Australia met with Kofi Annan and Hans Corell to express their displeasure over the Secretariat’s interpretation of the December 18 resolution.<sup>63</sup> They insisted that Cambodia’s Khmer Rouge tribunal law be taken as the basis of negotiation for a tribunal agreement. The UN Secretariat finally caved in. On March 13, Corell arrived in Phnom Penh at the head of a UN delegation, and the UN and Cambodian teams hammered out a final draft Memorandum of Understanding. Sok An seemed pleased, telling reporters, “We have traveled a long road.”<sup>64</sup> Under-Secretary Corell, by contrast, said, “My hands are tied.”<sup>65</sup> When asked directly if the agreement would provide for judicial independence, the UN’s chief legal counsel demurred: “As an international civil servant I have been given the task to negotiate this text and I have done so to the best of my ability. My personal opinion is a different matter.”<sup>66</sup> Nevertheless, he insisted that the draft agreement was “designed

to ensure a fair and public trial by an independent and impartial court.”<sup>67</sup>

On May 1, 2003, the UN General Assembly’s Third Committee convened to debate the draft agreement between the UN and Cambodia on the Khmer Rouge tribunal. Cambodian Ambassador Ouch Borith spoke passionately in favor of the measure.<sup>68</sup> “I’ll never forget the days when 12 members of my family and more than 2 million of the Cambodian people were executed and buried in mass graves,” Borith told the gathered members of the Third Committee.<sup>69</sup> What happened under the Khmer Rouge regime, he continued, “still haunts me and my people, and I cannot wipe out this nightmare either. One must listen to what the Cambodian holocaust survivors have to say.” He added:

It is also very important to understand that the Law adopted by our legislature was the outcome of the complex negotiations between Cambodia and the UN, and contains within it a number of significant compromises made by both parties. We have requested not only international assistance but also international participation

in the trials and we have agreed to share with the international community the heavy task of judging the serious crimes committed in our own country by our own people.

The next day, May 2, the agreement was passed by consensus, despite significant misgivings in statements from the Dutch and Swedish delegations, and U.S. abstention. It was formally adopted on May 13.<sup>71</sup> Cambodia’s Council of Ministers had by then approved the draft agreement.<sup>72</sup> The next step was for Cambodia to adopt appropriate amendments to its existing 2001 tribunal law in order to bring that statute into conformity with the UN Agreement. This process was completed in October 2004, marking the finalization of the statute of the Khmer Rouge tribunal in its present form.

Hun Sen and his chief negotiator, Sok An, had out-negotiated two of the UN’s most senior civil servants, Kofi Annan and Hans Corell. Whether the outcome of this long struggle will indeed be “a fair and public trial,” as Hans Corell promised in the wake of his defeat, is the next test.

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## Notes

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1. Samdech Hun Sen, Cambodia’s present prime minister, defected from the Khmer Rouge to Vietnam in 1977. He became foreign minister in the Cambodian government that followed the Vietnamese overthrow of the Khmer Rouge in 1979 and prime minister in 1985. Following UN-run elections in 1993, Hun Sen was co-prime minister together with Norodom Ranariddh. A coup in July 1997 returned him as sole prime minister.

2. Author's notes from the "International Conference on Striving for Justice: International Criminal Law in the Cambodian Context," Phnom Penh, August 21, 1995.
3. Letter from Cambodian co-prime ministers Norodom Ranariddh and Hun Sen to UN Secretary-General Kofi Annan, June 21, 1997; distributed on the Internet via the Camnews news group, June 25, 1997.
4. Chris Fontaine, "Cambodia Premier Says No to Trial," Associated Press, December 28, 1998.
5. A senior minister of the Royal Government outlined this chronology privately for the author in March 1999.
6. Author's interview with Hor Nam Hong, March 13, 1999, New York.
7. Author's interview with Hor Nam Hong, March 13, 1999, New York.
8. The *Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135*, by Ninian Stephen, chairman, Rajsoomer Lallah, and Steven R. Ratner, dated February 18, 1999, is presented as an annex to the United Nations document, *Identical Letters Dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council*, A/53/850 and S/1999/231, March 16, 1999.
9. *Identical Letters*.
10. "Projet: Loi relative à la répression des crimes de génocide et des crimes contre l'humanité," typescript, n.d., n.p. (August 26, 1999, Council of Ministers, Phnom Penh, Cambodia).
11. Amnesty International has said of the Supreme Council of the Magistracy, "Serious questions remain about its independence. . . . The Supreme Council of Magistracy has yet to demonstrate that it has either the will or the ability to protect the independence of the judiciary." See *Law and Order—without the Law*, Amnesty International, March 1, 2000 [ASA 23/001/2000]. For more on questions of judicial independence and corruption at the Phnom Penh Municipal Court, see, for example, Lee Berthiaume and Park Chan Thul, "'Iron Fist' Court Reform Seizes One of Its Own," *The Cambodia Daily*, August 19, 2005.
12. UN A/53/850, *Identical Letters*, 3.
13. These comments were made both in writing ("Comments on the Draft Law Concerning the Punishment of the Crime of Genocide and Crimes Against Humanity," August 27, 1999, annex to a letter from Assistant Secretary-General Ralph Zacklin to His Excellency Sok An, minister of state, Royal Government of Cambodia) and verbally ("Aide Memoire: Second Meeting between the Cambodian Task Force on the Khmer Rouge Tribunal and the visiting UN Delegation," Council of Ministers, Phnom Penh, Cambodia, August 28, 1999).
14. "Draft: Law on the Establishment of a Tribunal for the Prosecution of Khmer Rouge Leaders Responsible for the Most Serious Violations of Human Rights," annex to a letter from Assistant Secretary-General Ralph Zacklin to His Excellency Sok An, minister of state, Royal Government of Cambodia, August 27, 1999.
15. For more details on the political maneuvering that animated these twists and turns in the negotiations, see Craig Etcheson, "The Politics of Genocide Justice in Cambodia," 178-202 in Cesare P.R. Romano, André Nollkaemper, and Jann Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia*, London: Oxford University Press, 2004.
16. For Zacklin's rebuff of Sok An's request, see "Aide Memoire: Second Meeting between the Cambodian Task Force on the Khmer Rouge Tribunal and the Visiting UN Delegation," Council of Ministers, Phnom Penh, Cambodia, August 28, 1999.
17. See Article VI, Convention on the Prevention and Punishment of the Crime of Genocide, UN General Assembly, December 9, 1948.
18. "Aide Memoire on the Conversation between Hun Sen, Prime Minister of the Royal Government of Cambodia, and H.E. Kofi Annan, Secretary-General of the United Nations," September 17, 1999, New York [unofficial translation].

19. Aide Memoire, September 1999. The Cambodian need for legal expertise was and remains widely recognized. In their June 21, 1997, letter to the UN Secretary-General requesting assistance in establishing a genocide tribunal, for example, co-premiers Norodom Ranariddh and Hun Sen observed that “Cambodia does not have the resources or expertise” necessary to conduct such a complex procedure. Letter on file with the author.

20. A UN spokesman described the discussions between Hun Sen and Kofi Annan as “frank.” United Nations, “Read-out of the Secretary-General’s Meeting with Hun Sen, the Prime Minister of Cambodia,” September 16, 1999.

21. Remarks of Hun Sen before the United Nations General Assembly on September 20, 1999, as excerpted in the *New York Times*; see “U.N. Oratory: Pleas for Help, Pride in Democracy,” September 21, 1999.

22. “Statement of the Democratic National Union Movement on the so-called ‘UN Plan,’” September 2, 1999, Pailin, Cambodia; signed by Ieng Sary.

23. For some of the documentary evidence of Ieng Sary’s culpability in the mass killing, see Craig Etcheson, *After the Killing Fields: Lessons from the Cambodian Genocide*, Westport, CT: Praeger Publishers, (2005), Chapter 5, “Centralized Terror,” 210, fn 12.

24. See Tony Kevin, “Cambodia vs the UN,” *Far Eastern Economic Review*, November 11, 1999.

25. See Evan Gottesman, *Cambodia After the Khmer Rouge: Inside the Politics of Nation Building*, New Haven: Yale University Press, 2003, Chapter 11, for background on the politicized nature of the Cambodian judicial system.

26. Some in the UN found the nature of U.S. diplomacy unnecessarily secretive. See, for example, “Efforts to Establish a Tribunal against the Khmer Rouge Leaders: Discussions between the Cambodian Government and the UN,” paper presented by Ambassador Thomas Hammarberg at a seminar organized by the Swedish Institute of International Affairs and the Swedish Committee for Vietnam, Laos and Cambodia, Stockholm, May 29, 2001. On page 23, Hammarberg notes, “Though the U.S. intervention in some respects was helpful, it would have been more useful if there had been better coordination with the UN efforts or with other governments.”

27. Unofficial translations of two different December 1999 Cambodian drafts of the proposed “Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for Prosecution of Crimes Committed during the Period of Democratic Kampuchea” are on file with the author.

28. See, for example, “Cambodian PM Stands behind Pol Pot Lieutenant as Trial Debate Looms,” Agence France-Presse, November 30, 1999.

29. United Nations, “Non-Paper on Khmer Rouge Trial,” January 5, 2000.

30. Kofi Annan after the February 12 meeting with Hun Sen, quoted in Hammarberg, “Efforts to Establish,” 27.

31. Examples of Hun Sen defending the impunity of Ieng Sary abound. At one juncture, for instance, Hun Sen alluded to double jeopardy protections for Ieng Sary, asking, “How can a person be convicted twice for the same crime?” See “Hun Sen Reiterates Preference Not to Try Ieng Sary,” *Kyodo*, September 24, 2000. Nine weeks later, in reference to a proposal to annul the 1996 royal decree granting Ieng Sary amnesty, Hun Sen flatly said, “I will not do that.” See “Cambodian PM Stands behind Pol Pot Lieutenant as Trial Debate Looms,” Agence France-Presse, November 30, 2000.

32. This paragraph is based on the following sources: “Hun Sen Welcomes Trial Suggestions from U.S. Sen. Kerry,” Associated Press, April 18, 2000; “Hun Sen Withdraws Acceptance of U.S. Formula on Trial,” Associated Press, April 25, 2000, *Kyodo*; and Ker Munthit, “Deal Reached on Cambodia Tribunal,” Associated Press, April 29, 2000.

33. Private communication with the author from a member of the UN tribunal negotiating team, August 17, 2000.

34. Private communication with the author from a member of the Cambodian Task Force, March 22, 2000.
35. Reflecting both the growing frustration at the UN with the lengthy negotiations and the decision to set a deadline for a positive Cambodian response, Under-Secretary Corell told reporters “The Secretary-General has indicated that there is a time limit. . . we can’t continue in this way.” Quoted in “U.N. Urges Swift Action on Khmer Rouge Trial,” Reuters, Friday, July 7, 2000. And despite the national/international mix of this new model of justice, Corell also observed, “This is not a United Nations operation. It is a national court with international presence.” Puy Kea, “U.N. Legal Team Leaves Cambodia,” *Kyodo*, July 7, 2000.
36. “Presentation and Comments on the Draft Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for Prosecution of Crimes Committed during the Period of Democratic Kampuchea, by His Excellency Sok An, minister in charge of the Office of the Council of Ministers, President of the Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders,” 5th Session of the 2nd Legislature, National Assembly, December 29, 2000, and January 2, 2001. (Unofficial translation by the Documentation Center of Cambodia).
37. “A Minute on the Session of the National Assembly of the Kingdom of Cambodia, A Draft Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for Prosecution of Crimes Committed during the Period of Democratic Kampuchea,” December 29, 2000, and January 2, 2001. (Unofficial translation by Sorya Sim and Vichea Sopheak Tieng, Documentation Center of Cambodia.)
38. Letter from UN Under Secretary-General Hans Corell to Minister of the Council of Ministers Sok An, January 9, 2001. Letter on file with the author.
39. The following paragraph is based on a letter from UN Under Secretary-General Hans Corell to Minister of the Council of Ministers Sok An, January 9, 2001. Letter on file with the author.
40. Ieng Sary’s 1996 Royal Pardon, granted by King Norodom Sihanouk at the request of co-prime ministers Norodom Ranariddh and Hun Sen, was a matter of consistent contention over the course of the tribunal negotiations. See Etcheson, *After the Killing Fields*, 130-1.
41. “UN Unhappy with Cambodia’s Proposed Treatment of Ieng Sary,” *Kyodo*, January 13, 2001.
42. “Cambodia Passes Khmer Rouge Law,” Associated Press, January 15, 2001. In the course of the debate, Senator Keo Bunthouk highlighted the political complexity of the situation by questioning whether or not Foreign Minister Hor Nam Hong, a close ally of Prime Minister Hun Sen, should be subject to an investigation by the tribunal, asserting that Hong had sent victims to their deaths at the infamous S-21 extermination center. See Kay Kimsong, “Senate Continues Spirited Debate on KR Bill,” *The Cambodia Daily*, January 12, 2001. Another senior senator directly challenged Prime Minister Hun Sen’s frequent comments to the effect that Ieng Sary should be held harmless by the tribunal. The chairman of the Senate Legislative Committee, Ouk Bun Thhoeun, argued that it was not for Hun Sen to decide who would and who would not be prosecuted. “In fact no one can prohibit the activities of the court. His (Hun Sen’s) comment is his own opinion, but according to the law it’s up to the court prosecutors to determine who will be prosecuted.” “Cambodia Khmer Rouge Tribunal Should Start In ’01 - Hun Sen,” Associated Press, January 11, 2001.
43. “Cambodia Constitutional Council OKs Khmer Rouge Trial Bill,” *Kyodo*, February 12, 2001. See, for example, Ray Johansen, “Article for ‘Searching for the Truth’ Concerning Allegation by the Government that the Khmer Rouge Trial Law Refers to a Death Penalty,” distributed by the Documentation Center of Cambodia, June 6, 2001. The Constitutional Council said that a reference to the 1956 Penal Code, which included the death penalty, should be eliminated as the death penalty was no longer constitutional in Cambodia.
44. Personal communication from Sorya Sim of the Documentation Center of Cambodia, June 22, 2001.

45. “Draft Law For Khmer Rouge Trial Amended; No Death Penalty,” Associated Press, June 22, 2001; “No Obstacles To Adoption of KR Tribunal Law,” Associated Press, July 11, 2001. “Cambodia Senate Passes Khmer Rouge Trial Law,” Reuters, July 23, 2001. “Khmer Rouge Atrocities Trial Law Clears Hurdle,” Reuters, August 7, 2001. “King Norodom Sihanouk Signs Khmer Rouge Legislation,” Agence France-Presse, August 10, 2001.
46. “King Norodom Sihanouk Signs Khmer Rouge Legislation,” Agence France-Presse, August 10, 2001.
47. Barbara Crossette, “Pact Sought on Khmer Rouge Trials,” *New York Times*, June 28, 2001. See also United Nations, “Secretary-General Clarifies Position on Cambodian Government Responsibility For Trials of Former Khmer Rouge Leaders,” SG/SM/7868, June 27, 2001. “Cambodia PM Comments Raise Doubts On Khmer Rouge Tribunal,” Associated Press, June 29, 2001. Gary Thomas, “Cambodian Leader Criticizes UN Over Tribunal,” Voice of America, June 29, 2001.
48. United Nations, “UN Looks Forward to Receiving New Cambodian Law on Khmer Rouge Trials, Secretary-General’s Spokesman States,” SG/SM/7911, August 10, 2001. “English Translation of Cambodia’s Tribunal Law Delayed,” *Kyodo*, August 22, 2001.
49. Private communication with the author from a senior official of the UN Office of Legal Affairs, October 28, 2001.
50. Thet Sambath and Matt Reed, “Letter to UN Details Government Stand on Tribunal,” *The Cambodia Daily*, January 23, 2002.
51. United Nations, “Daily Press Briefing by the Office of the Spokesman for the Secretary-General,” February 8, 2002.
52. “Cambodia Stunned by UN Withdrawal from Khmer Rouge Trial,” Agence France-Presse, February 9, 2002.
53. Chhay Sophal, “Cambodia Says Keeping Door Open for U.N. on Trial,” Reuters, February 10, 2002.
54. See, for example, Matt Reed and Thet Sambath, “UN-Backed KR Trial Still a Possibility,” *The Cambodia Daily*, February 11, 2002.
55. *Cambodia: Flawed Trials in No One’s Best Interests*, Amnesty International, February 11, 2002.
56. *Cambodia: Tribunal Must Meet International Standards*, Human Rights Watch, February 12, 2002.
57. Cambodian Human Rights Action Committee, press release, February 21, 2002.
58. See, for example, Seth Mydans, “As Trials Lag, Death May Save Khmer Rouge From Justice,” *New York Times*, February 19, 2002.
59. “Cambodia ‘May Compromise’ on Genocide Trial,” BBC News, July 2, 2002; “UN Rejects Cambodia’s Bid to Revive Khmer Rouge Trial,” Reuters, July 3, 2002; “Mandate from Key UN Bodies Needed to Restart Talks on Khmer Rouge Trials—Annan,” UN News Centre, August 20, 2002.
60. United Nations, General Assembly, *France and Japan: Draft Resolution, Khmer Rouge Trials*, A/C.3/57/L.70, November 13, 2002; United Nations, General Assembly, *Khmer Rouge Trials*, A/RES/57/228, December 18, 2002.
61. United Nations, press release, GA/SHC/3728, November 20, 2002.
62. The following account is based on the author’s private conversations with UN and Cambodian government officials in January 2003.
63. Tom Fawthrop, “Khmer Rouge: ‘Last Chance’ for Justice,” *Asia Times Online*, February 19, 2003.

64. “Cambodia: Draft Agreed for KR Genocide Tribunal,” *Bangkok Post*, March 18, 2003; Reach Sambath, “UN Team Arrives in Cambodia for ‘Last Chance’ Talks on Khmer Rouge Tribunal,” Agence France-Presse, March 13, 2003.

65. Personal communication from Tom Fawthrop, March 18, 2003.

66. Transcript, “Hans Corell interview,” BBC East Asia Today, March 17, 2003.

67. “UN and Cambodia Reach Draft Agreement for Prosecuting Khmer Rouge Crimes,” UN News Centre, March 17, 2003.

68. United Nations, General Assembly, Third Committee, GA/SHC/3733, May 1, 2003.

69. Statement by His Excellency Ouch Borith ambassador, permanent representative of the Kingdom of Cambodia to the United Nations at the Third Committee of the 57th Session of the United Nations General Assembly, New York, May 1, 2003.

70. “Netherlands Statement on the Khmer Rouge Trials,” UN General Assembly, May 2, 2003; “Swedish Statement on Khmer Rouge Tribunal,” UN General Assembly, May 2, 2003; United Nations, General Assembly, *Third Committee Approves Draft Resolution on Khmer Rouge Trials*, GA/SHC/3734, May 2, 2003.

71. United Nations, General Assembly, *General Assembly Approves Draft Agreement between UN, Cambodia on Khmer Rouge Trials*, GA/10135, May 13, 2003.

72. “Cambodian Cabinet Approves Khmer Rouge Trial Draft,” Agence France-Presse, March 28, 2003.



## PERSPECTIVES

# The Khmer Rouge Tribunal: What it Means for Cambodia

Deputy Prime Minister of Cambodia **Sok An** looks at Cambodia's long road to justice—and what lies ahead.

Thirty years ago we had special cause to celebrate when the bitter and tragic war in our country finally ended: a war in which we suffered bombing on a greater scale even than that suffered by Japan during the Second World War, and that displaced over a third of our people and destroyed almost all our infrastructure.

On April 17, 1975, our people flooded the streets of Phnom Penh to welcome the liberating troops, known as the Khmer Rouge. But our happiness at the end of the war was short-lived. We entered into a nightmare lasting three years, eight months, and twenty days, during which time we lost a quarter of our population—up to three million of our people perished in miserable circumstances of starvation and untreated illness, as well as from torture and execution.

It has taken a whole generation to arrive at this moment, when we are able to establish an appropriate mechanism to reach accountability for these crimes, but now we are finally standing on the brink of doing so. On April 29, 2005, Cambodia reached a milestone in its history with the entry into force of the Agreement between the United Nations and the Royal

Government of Cambodia concerning the Establishment of the Extraordinary Chambers for Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea.

It has been a long road indeed. After we managed to overthrow the Khmer Rouge in January 1979, unfortunately very few members of the international community helped us to

**It has taken a whole generation to establish an appropriate mechanism to reach accountability for these crimes.**

rebuild the country. I wish today to reaffirm our eternal gratitude to those who did assist our efforts. But to our great amazement and distress, those Khmer Rouge leaders who had carried out horrendous crimes in the recent past—two of whom, Pol Pot and Ieng Sary, had actually been convicted in the world's first genocide trial held in the Cambodian capital, Phnom Penh, in August 1979—continued to be accorded the right to represent Cambodia in the United Nations General Assembly throughout the 1980s, and were given political, economic, and even military assistance

in their efforts to overthrow the actual government of the day.

As a result of this support, a civil war ensued in which hundreds of thousands more Cambodians lost their lives, despite the fact that they had been liberated from the Khmer Rouge genocidal regime. Ideology and the interests of certain powerful countries caused the international community to forget truth, justice, and human rights, and to ignore the tragedy and deaths of millions of Cambodians. Instead of justice, the prize awarded to Cambodia was a life in a situation swinging between peace and war, of stunted economic development, and the laying of millions of landmines that to this day threaten our poor people in remote rural areas of the country.

As signatories to the Paris Peace Agreements of 1991, the Khmer Rouge were accorded fresh political legitimacy, and following the departure of the United Nations Transitional Authority in Cambodia (UNTAC), which governed Cambodia between 1992 and 1993, the Khmer Rouge began a renewed campaign of destabilization and civil war against the new government. That government, of which I was a member, then launched a multifaceted strategy involving political, legal, economic, and military campaigns, including legislation to outlaw the Khmer Rouge in 1994, and efforts to encourage its members to defect. What Prime Minister Hun Sen has described as a “win-win” policy has formed the bedrock of the political platform of the Royal Government of Cambodia ever since. It involved five facets: “divide,

isolate, finish, integrate, and develop.” The Khmer Rouge political and military structure was thereby ended, but those Khmer Rouge who had defected were assured of their physical safety and survival, the right to work and to carry out their professions, and the security of their property.

By the end of December 1998, we had managed to put an end to the Khmer Rouge’s political and military structure, and were faced with the twin tasks of national reconciliation and justice. Cambodia can perhaps offer lessons for other post-conflict countries, drawn from our experience of the long and complex process of reconciliation. Today, former Khmer Rouge have put down their guns and recommenced their lives within the general community, and the former factions have taken up the challenge of working together to develop the country.

In Cambodia, reconciliation has not meant amnesia. Important efforts to uncover and document the truth of what happened under the Khmer Rouge have been initiated since the very first days after their overthrow. In early 1979, the notorious S-21 prison in central Phnom Penh was turned into the Tuol Sleng Genocide Museum, and the killing field on the outskirts of the capital, where over 15,000 inmates of S-21 were slaughtered, became the Choeng Ek Memorial, where their remains are respected and honored in memorial *stupa*. Significant oral and physical evidence of the crimes committed (including exhumations and forensic analysis) was gathered as a basis for the 1979 genocide trials. In the early

1980s, a massive research effort compiled testimony in petitions from over one million Cambodians from almost every province in the country. Valuable work has been carried out by the Cambodian Genocide Program, based at Yale University in the United States, and by the Documentation Center of Cambodia in Phnom Penh, which has painstakingly assembled and analyzed documents and mapped genocide sites throughout Cambodia.

We must acknowledge, however, that Cambodia's achievements in the fields of truth and reconciliation have not been paralleled by comparable advances in achieving justice for the victims of that genocidal regime. It is a task that has been on our minds since 1979, when we established the People's Revolutionary Tribunal to try Pol Pot and Ieng Sary. Unfortunately, due in part to weaknesses in that process, but above all to the political isolation of our government at that time, the testimony and the verdicts were simply ignored outside Cambodia. The task of trying the Khmer Rouge leaders therefore remains, and is one we have had to engage in again over the past years. Now, as we throw our efforts into this quest for justice, we are concerned not to damage the process of reconciliation that has already taken place. In Cambodia, we seek justice to heal the wounds of our society.

In June 1997, the then co-prime ministers of Cambodia requested United Nations assistance in organizing a Khmer Rouge trial.<sup>1</sup> This led to the adoption of a resolution in the UN General Assembly in December

that year, and to the years of research, negotiations between the United Nations and the Royal Government of Cambodia, and legislative action that followed.

In August 1999, the Prime Minister of Cambodia, Samdech Hun Sen, established a Task Force for Cooperation with Foreign Legal

**Today, former Khmer Rouge have put down their guns and recommenced their lives within the general community.**

Experts for the Preparation of the Proceedings for the Trial of Khmer Rouge Criminals. I was given the privilege of acting as Chairman of the Task Force, which consists mainly of senior jurists supplemented by representatives of the ministries of economy and finance, of the interior, and of land management, urban planning and construction.<sup>2</sup> The full Task Force has met as required to decide policy issues, to draft legislation, and to engage in negotiations with the United Nations. Its day-to-day work is carried out by a small but active Secretariat within the Office of the Council of Ministers.<sup>3</sup>

### Three guiding principles

Since we sought the assistance of the United Nations in July 1997, and even before that time, our government has consistently held to the following three principles as its guiding lights:

*Respect and search for justice.* We condemn the crimes of the Khmer Rouge as crimes of genocide and crimes against humanity. We seek justice for the victims and for the entire Cambodian people, and we wish also to contribute to the development of international humanitarian principles condemning genocidal crimes and seeking to prevent their recurrence.

**We seek justice for the victims and for the entire Cambodian people, and to prevent the recurrence of genocide.**

*Maintain peace, political stability, and national unity.* Cambodia has just achieved peace, stability, and unity. We do not yet have perfect law and order or perfect security—but that would be impossible in light of the recent traumatic past. We are proud of moving forward in the process of strengthening political stability, peace, and security—and this is a valuable achievement for our beloved motherland. Whatever we do must not damage our peace and stability—indeed throughout the process over the past four years of designing the Khmer Rouge trials, we have always sought to gain consensus based on respect for the highest national interests.

Some have criticized the slow pace of the process, but to achieve national consensus is a difficult task, one whose success was demonstrated by the unanimous vote achieved in both houses of our legislature every time the Law and Agreement with the UN,

which together provide the basis for the Khmer Rouge tribunal in our national legal system, were presented for a vote.<sup>4</sup>

*Respect national sovereignty.* Sovereignty is enshrined as a fundamental principle in the Charter of the United Nations.<sup>5</sup> We have struggled hard to consolidate this principle in Cambodia. The Royal Government of Cambodia did not accept the recommendation of the Group of Experts, proposing a trial held entirely outside the country, with no Cambodians participating except as defenders or spectators. As Prime Minister Samdech Hun Sen remarked at the time, the only jobs the Secretary General would like to give to Cambodians would be to “go into the jungle to capture the tiger” and to be “the watchdog for the UN.”

It has been our consistent view that, under Article 6 of the Genocide Convention, Cambodia has the primary obligation to prosecute the Khmer Rouge and could proceed within domestic courts. Let me remind critics of this approach that the principle of complementarity is fundamental to the International Criminal Court, which Cambodia is proud to have ratified, one of the first 60 member states to do so.<sup>6</sup>

However, despite the fact that we were fully entitled to prosecute the Khmer Rouge in a national court, we sought international involvement in the process, preferably through the United Nations. Why? On the one hand, because we were all too acutely aware of the weaknesses of our judiciary, and wanted help to make certain

that the trial will meet internationally accepted standards. On the other hand—and let me be frank here—we felt it important for the international community to share in this task, in order to clear its own record of previous support for the Khmer Rouge. This was our reasoning in 1997 when we asked for assistance, in 1999 when we reached a decision in principle with the UN to hold a national trial with international participation, and it is still our reasoning today.

These three principles are reflected in the Law, adopted in 2001 and amended in 2004, and also in the Agreement between Cambodia and the United Nations, signed on June 6, 2003, at the Chaktomuk Theater, between His Excellency Hans Corell (then legal counsel and under-secretary general of the UN) and myself.

### Costs and benefits

The cost of the Khmer Rouge tribunal is estimated at around U.S. \$61.5 million in total. That includes an in-kind contribution from Cambodia of U.S. \$5.2 million, which does not figure in the official budget of U.S. \$56.3 million. On December 17, 2004, UN Secretary-General Kofi Annan issued an appeal to interested members states for contributions to the international share of this budget, set at U.S. \$43 million, and in the first half of 2005, this was essentially fully subscribed. I wish to mention our appreciation for the generosity of the fifteen countries that have pledged, and above all to Japan's contribution of U.S. \$21 million—fully 50 percent of the total international share of the budget.

In addition to the Secretary-General's appeal for the international share, we also asked interested states to assist Cambodia in meeting its allocated share of the budget, amounting to U.S. \$13.3 million. The Royal Government will contribute U.S. \$6.7 million—consisting of U.S. \$1.5 million in cash to supplement our estimated U.S. \$5.2 million in-

All too aware of the weaknesses of our judiciary, we wanted help to ensure the trial will meet internationally accepted standards.

kind contribution. This pledge from Cambodia amounts to over 10 percent of the total costs of the Khmer Rouge tribunal.

I would like to emphasize that from the beginning of the budget negotiations we stated clearly that we would need to request bilateral contributions to help us meet the total allocated as the Cambodian share, because the full amount was beyond Cambodia's capacity. It goes without saying that both sides of the budget are of equal importance to the challenging task of establishing a sound process that meets international standards.

We are confident that the formula we have agreed to establish will not only meet our country's needs for justice in this egregious case, but will also assist the wider process of legal and judicial reform in our country, by providing a model court meeting

international standards. Furthermore, we are hopeful that the Cambodian model may also serve as an inspiration for other countries in their search for justice. We are now coming to the end of a very, very long road. Over a quarter of a century ago, the Khmer Rouge leadership was ousted from its cruel control of our country.

**We are confident that the EC will not only meet our country's needs for justice, but will also assist the wider process of legal and judicial reform.**

As Prime Minister Samdech Hun Sen recently stated: “Not a single one of our people has been spared from the ravages brought upon our country during the three years, eight months, and twenty days that the Khmer Rouge held power under the regime known as Democratic Kampuchea. Those born after 1979, who did not directly experience these crimes, nevertheless still bear a heavy burden. They see their parents and older brothers and sisters in pain and grief. They have shared in the difficulties of rebuilding our society from Year Zero without the benefit of the wisdom and experience of those who were lost. It continues to be a long, hard struggle and we all know that Cambodia today lags far behind our neighbors in health, education, and income levels.”

The Khmer Rouge crimes were committed not just against the people of Cambodia but against humanity as

a whole. It is therefore fitting that both Cambodian and international judges, prosecutors, and lawyers will work together in the task of trying those most responsible and, in so doing, helping to build a culture that will prevent the recurrence of such crimes anywhere in the world.

I have no doubt that the road ahead will also not be easy, as we move from the negotiating phase to the implementation phase. We expect that later this year we will be in a position to commence the Extraordinary Chambers, which will have the heavy responsibility of meting out justice for the most serious crimes against international humanitarian law and Cambodian domestic law.

We appeal to all who have encouraged us along the way now to translate their expressions of support into material terms, including making pledges to the United Nations Trust Fund, nominating judges and other personnel of the highest caliber, and making other contributions in kind. We want to ensure that the Khmer Rouge tribunal is established as soon as possible, and that it functions at a level that meets international standards.

Now, as we stand at last on the brink of trying the Khmer Rouge leaders, it is a time for all Cambodians—and all fair-minded people around the world—to do our utmost to make the Khmer Rouge trials a successful process, despite any past differences of opinion as to what form of court, tribunal, or commission, is most appropriate. Let us pledge to work together toward this end.

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**Notes**

His Excellency Mr. Sok An is deputy prime minister of Cambodia, minister in charge of the Office of the Council of Ministers, and chairman of the Government Task Force for the Khmer Rouge Trials.

1. For more on the background to the negotiations, see Craig Etcheson's article in the present issue of *Justice Initiatives*.

2. The Task Force, appointed by a decision of the prime minister on August 9, 1999, consisted of: Sok An (chairman); Ouk Vithun, then minister of justice; Om Yentieng, chairman of the Cambodian Human Rights Commission and advisor to the prime minister; and Heng Vong Bunchhat, supreme advisor to the government (three deputy chairmen); with members Ly Vouch Leang, then secretary of state for justice; Suy Nou, then secretary of state for justice; Chan Tany, then advisor to the prime minister; Ang Vong Wattana, then adviser to Deputy Prime Minister Sar Kheng; and Leng Peng Long, then president of the Expert Group of the Council of Jurists.

3. The Secretariat of the Task Force consists of Sean Visoth as executive secretary, Tony Kranh as legal secretary, and Helen Jarvis as advisor, with a support team comprising Nau Soursdey (administration), Sun Rapid (IT), and Orn Panhha (legal). It has benefited from pro bono legal support from Gregory Stanton, Tara Gutman, Helen Brady, David Scheffer, and Payam Akhavan.

4. The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of Amendments as promulgated on October 27, 2004 (NS/RKM/1004/006) ("EC Law"); and the 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, June 6, 2003 ("UN Agreement").

5. Charter of the United Nations (1945), Article 2(1).

6. According to Article 17(1)(a) of the Rome Statute of the International Criminal Court (U.N. Doc. A/CONF.183/9, entered into force July 1, 2002) a crime is only admissible to the International Criminal Court if the relevant state is "unwilling or unable genuinely to carry out the investigation or prosecution." This is known as the principle of complementarity. The status of ratification of the Rome Statute of the International Criminal Court is available at: <http://www.un.org/law/icc/statute/romefra.htm>.



## The Khmer Rouge Tribunal: Criticisms and Concerns

**Dinah PoKempner** examines the many potential pitfalls that could derail the Extraordinary Chambers.

Cambodia's Extraordinary Chambers in the Courts of Cambodia (EC) will labor under a burden of popular suspicion, whenever it actually commences its labors. This itself is tragic, for so many have for so long hoped to see the Khmer Rouge called to

**Negotiations over the tribunal have been fraught with such delay, objection, and compromise that hope for justice is again flickering.**

account for their monumental crimes. Numerous hurdles that stood in the way of a tribunal have fallen, including the key shift from international recognition of the Khmer Rouge<sup>1</sup> to international condemnation, and the joint request in 1997 of Cambodia's political leaders for international assistance in prosecuting the Khmer Rouge. But since that high-water mark, the negotiations over the tribunal and its establishment have been fraught with such delay, objection, and compromise that hope for justice is again flickering. The tribunal that is emerging is a domestic institution, vulnerable to the political manipulation that degrades Cambodia's legal

system at large, under-funded by the international community, and lacking even the unequivocal commitment of Cambodia's government. Indeed, expectations of the tribunal are so low in some quarters that it may be judged a success so long as it is perceived as doing no actual harm.

That it might do actual harm is a possibility generally discounted by its main foreign proponents, who tend to argue that late is better than never, and an imperfect tribunal is better than none at all. But while skeptics—who include many ordinary Cambodians, as well as a good deal of the domestic and international human rights and humanitarian community—support bringing the Khmer Rouge to justice, they are acutely aware of the damage a bungled or perverted process may wreak.

The subject of the Khmer Rouge past has been largely repressed in Cambodia, where a combination of political pressure to keep the topic closed and the desire of survivors to get on with life keep it largely out of public discourse.<sup>2</sup> Some fear that opening a window on that past without providing a scrupulously fair judicial process might revive resentments and violence, although there is little possibility of the trials reviving the intermittent civil war that followed the ouster of the Khmer Rouge from power. There is also a sense of incomplete transition, of the radically



inhuman and lawless past segueing into the relatively inhumane and lawless present, with social recovery incomplete and personal security still rather precarious. Mental health professionals in Cambodia worry about a tribunal's potential to re-traumatize individual survivors. But others also fear the demoralizing effect on society and Cambodia's development if the EC are seen as politically directed or compromised. A UN-endorsed tribunal is widely expected to work a demonstration of transition from atrocity to rule of law. If the tribunal instead reaffirms the grip of political elites on the public memory, it will be seen as yet another betrayal of Cambodia by the international community.

The tribunal will certainly reawaken memory, and with it pain, resentment, and moral anguish. But whether it will promote insight, justice, and any sense of repair is still in question. To have a positive impact, it must do more than convict a small handful of leaders of the Khmer Rouge. No one questions the ability of the Cambodian government to obtain convictions when it is in its interests to do so. This was accomplished by the widely discredited 1979 show trials in Phnom Penh, organized with the help of the Vietnamese government. This time, the government must demonstrate through the tribunal's operation a shift to norms of legality, rights, and fairness in a political culture that up to now has been characterized by impunity, patronage, and corruption. To fail in this regard will be to inflict serious

damage on Cambodians, their sense of dignity, their effort to restore their country as part of the international community, and their search for an understanding of the past that can lead them to a better future. Cambodian civil society is already hard at work to facilitate the success of the tribunal. But its effort may be doomed unless the government, and the international community, assumes responsibility for making the bargain they struck over the tribunal actually work.

### The context

Cambodia in the early twenty-first century is an odd case in the lexicon of "transitional justice," as the country has experienced relatively little of either political transition or justice. The political organization now known as the Cambodian Peoples Party (CPP) and led by Hun Sen was initially composed of Khmer Rouge deserters and has continued to incorporate them as a way to consolidate its power. The party has effectively retained administrative and legislative power since the Vietnamese ouster of the Khmer Rouge in 1979, thanks to its social control at every level and the many challenges to electoral democracy in Cambodia. Among such challenges were a threatened coup after the 1993 UN-administered election, which forced the election winner, Prince Ranariddh's FUNCINPEC party, to share power with the CPP; political violence against independent politicians including a March 1997 grenade attack against opposition party leader Sam Rainsy and the bloody July 1997 coup by Hun Sen

against Ranariddh; and systematic efforts to co-opt or legally derail the CPP's political rivals.

Impunity is an element of the Cambodian environment almost as common as water, and it flows at many levels.<sup>3</sup> Since the 1991 Paris Accords, the Khmer Rouge have largely enjoyed impunity through amnesties—legal and *de facto*—that

**The tribunal will certainly reawaken memory, and with it pain, resentment, and moral anguish. But whether it will promote justice is still in question.**

effectively destroyed the group as a resistance force. Many Khmer Rouge have been incorporated into the administration and military. Members of the government have enjoyed impunity through formal operation of law as well as practice.<sup>4</sup> Instances where officials or those with powerful patrons literally get away with murder are commonplace, from the 1977 grenade attack on opposition politician Sam Rainsy, which killed a number of his supporters, to the slaughter of villagers in an exceptionally violent forced eviction in the village of Kbal Spean near the Thai-Cambodian border in March 2005. Indeed, the two largest Cambodian human rights groups published a report in 1999 tabulating hundreds of serious instances of unpunished violence (mostly extrajudicial executions by officials) over a period of twenty

months, remarking that the term “culture of impunity” had become a cliché as applied to Cambodia.<sup>5</sup>

The legal profession in Cambodia was almost entirely exterminated by the Khmer Rouge. To the extent that courts were re-established by the new government, with Vietnam's assistance, they were conceived as instrumental to political needs. When the United Nations Transitional Authority in Cambodia (UNTAC) set up in 1992, it found the legal system a complete shambles, with court personnel not only ignorant of law but sometimes barely literate, and basic supplies, like pencils and paper, lacking. UNTAC oversaw Cambodian accession to basic human rights treaties and the creation of a rudimentary criminal law. Since then, there has been a slow development of a bar, a legal curriculum, and an accreditation process, but judges and prosecutors remain for the most part apparatchiks, selected for loyalty and entirely manipulated by the executive in cases with any political or patronage dimension. Like the rest of the government, the justice system is notorious for corruption.

Taking into account this context of political violence, entrenched impunity, and the absence of anything resembling a legal culture much less the rule of law, the Group of Experts appointed by the UN Secretary-General recommended in 1997 that a tribunal entirely under international auspices be established to try the Khmer Rouge. This recommendation was rejected that same year by the Cambodian government, which stated its preference for a Cambodian

court with some participation by international legal experts.<sup>6</sup>

Opinion surveys in Cambodia, however, have found that even in rural areas people consistently favored international prosecution and trial of the Khmer Rouge because of mistrust of the legal system and the intentions of the political leadership.<sup>7</sup> In December 1998, a coalition of over 60 Cambodian non-governmental organizations released a statement calling for an international, UN sponsored tribunal. In January 1999, a coalition of 18 human rights groups collected 80,000 signatures on a petition in favor of a UN tribunal, and this coalition, in February 1999, reiterated its belief that “only the United Nations has the power and credibility needed for justice.”<sup>8</sup> The notion of a domestic tribunal is not a point of pride to many Cambodians, but to the contrary, a humiliating reminder that the world community somehow was unwilling or unable to provide the same level of resources and assurances of fairness to them as to the peoples of former Yugoslavia or Rwanda.

#### *The negotiations and their outcome*

The negotiations over a national tribunal with international participation were protracted and rocky. In May 1999, UN Special Representative for Human Rights in Cambodia Thomas Hammarberg responded to Hun Sen's rejection of an entirely international tribunal with a proposal for a “mixed tribunal” that would utilize a majority of international judges and an international prosecutor. This formulation would have both ensured the

tribunal's independence from the Cambodian government and also exposed a significant number of Cambodian jurists to training and trials of international quality, thereby enabling them to raise standards upon their return to the ranks of the Cambodian judiciary.

Hun Sen rejected this proposal in September 1999. Between Cambodia's initial appeal to the UN for help in establishing a tribunal to try the Khmer Rouge on June 21,

**The legal profession in Cambodia was almost entirely exterminated by the Khmer Rouge.**

1997, and Hun Sen's rejection of the 1999 UN proposal, several developments threw into even greater doubt the already equivocal interest of the Cambodian government in an independent tribunal. China, a past supporter of the Khmer Rouge, publicly stated its opposition to an international tribunal, thereby raising the prospect of a Security Council veto. On June 15, 1997, Son Sen, the Khmer Rouge deputy prime minister and minister of defense had already been killed on Pol Pot's orders for showing interest in negotiating with Hun Sen. On July 5-6, 1997, the CPP mounted a coup against co-premier Ranariddh. Pol Pot, “Brother Number One,” died in Khmer Rouge captivity in 1998. In December 1998, Hun Sen accepted the surrender of Nuon Chea and Khieu Samphan, the second highest Khmer Rouge

leader and Khmer Rouge head of state respectively, treating them as dignitaries and announcing that Cambodians should “dig a hole and bury the past and look to the future.”<sup>9</sup> And in March 1999, the last Khmer Rouge leader capable of mounting a significant resistance (Chhit Chhoeun, better known as Ta Mok)

**Opinion surveys in Cambodia have found that people consistently favored international prosecution and trial of the Khmer Rouge because of mistrust of the legal system and the political leadership.**

was delivered to Cambodia by Thailand, effectively ending the civil war. All the while, Ieng Sary, the former deputy prime minister of Democratic Kampuchea, lived openly and comfortably pursuing business affairs, having been pardoned in 1996 by King Sihanouk for his 1979 *in absentia* conviction on charges of genocide.

Faced with Hun Sen’s opposition to an international tribunal, in October 1999, the United States proposed a tribunal with a majority of Cambodian judges and co-prosecutors. A supermajority voting formula was part of the deal, whereby decisions would require a majority plus the vote of at least one foreign judge. The UN, which had not been consulted about the U.S. proposal, rejected this arrangement, fearing it was an invitation to deadlock and a poor precedent

for future mixed tribunal arrangements. In February 2000, Secretary-General Annan wrote to the Cambodian government that the UN could only collaborate in a tribunal if there were a majority of international judges, an independent international prosecutor, guarantees that the Cambodian government would arrest all indictees on its soil, and that pardons, such as that of Ieng Sary, would not be a bar to prosecutions. The Cambodian government, however, incorporated the supermajority proposal into a law it passed in 2001 to create the “Extraordinary Chambers” for the trial of “senior leaders and those most responsible for the most serious violations of human rights” during the Khmer Rouge years. The government insisted that this law would take precedence over any agreement on cooperation with the UN.

Citing concerns that the tribunal would not have guarantees of “independence, impartiality and objectivity,” Secretary-General Kofi Annan announced the UN’s withdrawal from negotiations with Cambodia on February 8, 2002. An informal coalition of states, including the United States, France, Japan, and Australia, worked to overturn the UN position over the next two years, beginning with a General Assembly resolution in 2002 requesting the UN to resume talks based on prior negotiations. Although the UN interpreted this mandate to continue to press for a majority of international judges and an independent international prosecutor, France, Japan, Australia, the United States, India,

and the Philippines insisted that the UN meet Cambodia's terms and undercut the UN position in bilateral dealings with the Cambodian government. Under political pressure, the UN ultimately agreed to the supermajority formula in March 2003.

### The terms

#### *The "supermajority"*

In a strikingly blunt March 2003 report to the General Assembly, Secretary-General Annan outlined the deficiencies of the tribunal agreement ultimately forced on the UN.<sup>10</sup> After enumerating the few points in which the agreement represented progress on previous drafts,<sup>11</sup> he noted:

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

I would very much have preferred that the draft agreement provide for both of the Extraordinary Chambers to be composed of a majority of international judges. (...)

Doubts might therefore still remain as to whether the provisions of the draft agreement

relating to the structure and organization of the Extraordinary Chambers would fully ensure their credibility, given the precarious state of the judiciary in Cambodia.<sup>12</sup>

The supermajority arrangement at the heart of the agreement anticipates, and indeed now virtually guarantees, bloc voting by the Cambodian judges,

**Under political pressure, the UN ultimately agreed to the supermajority formula.**

and consequently places a great deal of pressure on international judges who are to be picked off a list approved by the Cambodian government. A supermajority is also needed to block a prosecution at the pre-trial stage: absent an international vote to resolve disputes between the Cambodian and international co-prosecutors or co-investigating judges, prosecutions will go ahead. But of course, should the Cambodian government endeavor to press a spurious investigation or prosecution, even unanimous resistance by the international judges of the Pre-Trial Chamber cannot stop it from going ahead.

#### *Criminal procedures*

There is great confusion regarding criminal procedural law in Cambodia. The United Nations Transitional Authority in Cambodia drafted a very

basic criminal code that was adopted by Cambodia's then-sovereign body, but the CPP unilaterally adopted a somewhat inconsistent criminal procedure law. While this code's status as binding law enacted by the sovereign power of Cambodia is dubious, it has been treated as such by each successive CPP-dominated government. A new draft criminal procedure

**The supermajority arrangement anticipates, and indeed virtually guarantees, bloc voting by the Cambodian judges.**

law is currently under review, and should it be adopted by the Cambodian government, it is unclear whether that would become the procedural law for the tribunal, thereby changing the rules midstream.<sup>13</sup>

The EC Law stipulates that in cases of uncertainty, "guidance may also be sought in procedural rules established at the international level."<sup>14</sup> But despite this effort to provide an alternate source, untangling the applicable procedural law will not be easy. For example, it is unclear whether under Cambodian law, the EC, as a Cambodian court, would be empowered to create new rules itself based on international precedent, or just what "guidance" would consist of. In practice, creating new procedural law from international precedents may be difficult for the majority of the Cambodian judges

who will have little experience of international law or even rudimentary due process norms. Nor is it clear whether the tribunal could decide claims based on the Cambodian constitution, given that Cambodia's Constitutional Council (a body with virtually no track record) is the sole venue for such decisions under domestic law. Litigants may wish to challenge current features of Cambodian procedural law and practice for inconsistency with international standards to which Cambodia is a party—however, it is unclear where such a challenge would be heard or how it would be resolved.<sup>15</sup> Any one of these issues could ensnare proceedings in lengthy delay.

### *Witnesses and victims*

Finally, the UN-Cambodia agreement has minimal provisions on witness and victim protection. This is especially regrettable given Cambodia's recent history of acute political violence and intimidation. The investigating judges, prosecutors, and Extraordinary Chambers "shall provide" such measures, which "shall include" but not be limited to *in camera* proceedings and protection of the identity of a victim or witness.<sup>16</sup>

A significant provision, both for its substance and for the fact it had to be included, is that witnesses and experts appearing at the summons of judges or prosecutors "shall not be prosecuted, detained, or subjected to any other restriction on their liberty by the Cambodian authorities" or subjected by the authorities "to any measure which may affect the free and independent exercise of their func-

tions.”<sup>17</sup> Voluntary witnesses solicited by defense counsel appear not to share this protection. Defense counsel, however, do enjoy this protection, and the judges, prosecutors, and other personnel of the EC enjoy immunity from legal process with respect to their acts and statements in an official capacity, even after the termination of their employment with the EC.

### What could go wrong?

The tribunal agreement is predicated on the goodwill and commitment of both the UN and the Cambodian government. Without these, even the best-designed tribunal would founder. But given the range of flaws in the tribunal’s structure, it is especially important that both the government and its international supporters be particularly attentive to a number of possible undesirable outcomes.

#### *Failure to apprehend and prosecute*

Assuming that funds and staff and materials are eventually assembled for the tribunal, a question central to the negotiations lingers: whether the government is actually committed in the end to prosecute the remaining leaders of the Khmer Rouge. Only Ta Mok and Duch, the warden of the notorious Tuol Sleng prison, are in custody; the legal effect of Ieng Sary’s 1996 pardon is still undetermined; and it is still unclear whether the government will move effectively against Nuon Chea and Khieu Samphan, who currently enjoy their liberty.

An equally important question is how the tribunal will interpret the ambit of personal jurisdiction in the term “those most responsible.” Both the Cambodian government and foreign states would prefer to keep the number of defendants low, to minimize expenses and political tension.<sup>18</sup> There are political disincentives to holding any significant portion of the

**Both the government and its international supporters must be particularly attentive to a number of possible undesirable outcomes.**

former Khmer Rouge responsible now for past atrocities or upsetting expectations as to who the likely suspects are by reaching too far down the ranks for defendants, threatening members or supporters of the CPP, or imperiling former Khmer Rouge who have cut deals with the leadership. The bottom line is that the alternative to prosecution by the EC is likely to be impunity, not domestic prosecution. Lower-ranking defendants may nevertheless share culpability for mass atrocities; moreover, their indictment and investigation may be needed to assist in building cases against their superiors. The question of how low to go has plagued other international and mixed tribunals, which are designed to produce exemplary rather than comprehensive justice. Circumscribing investigations 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>19</sup>

### *Gridlock and delay*

Assuming that the political will to apprehend, investigate, and prosecute a credible range of defendants is found, there is also the question of whether the mix of foreign and local

An equally important question is how the tribunal will interpret the term “those most responsible.”

personnel can function effectively. The supermajority provisions, as described above, have the potential to snarl each part of the tribunal in dispute and appeal, bringing any case to a grinding halt. There is also a danger that the international and Cambodian components of the procuracy, investigating judges, and chambers will operate in a disconnected fashion, further delaying and diminishing their work. A visibly polarized court will compromise its own credibility, to both international and Cambodian observers. The need to avoid this sort of discredit may reinforce the reluctance of other states to openly criticize the tribunal. There may even be pressure on foreign judges not to be “spoilers” and to vote with the Cambodian majority. Although Kofi Annan has warned of the need to speak out and even with-

draw UN support should the agreement not be honored, in reality the pressures on the UN to put the best face on a bad situation will be high. No member state that pays for the tribunal will be happy to see it collapse.

Delay is a problem for many courts, and generally works in favor of defendants. Although the Cambodian government blames the UN for the delay in arriving at an agreement, the UN has reacted promptly (if not favorably) to most of the Cambodian initiatives. Delay has worked to the CPP's benefit, allowing it to consolidate its power, and mitigate and attenuate the political consequences of allowing a tribunal to go forward. Delay may be a way to minimize prosecution, as witnesses and evidence become scarcer, memories fade, and potential defendants die or become unable to stand trial. The determination of international donors to hold the tribunal to a strict three-year schedule will also keep up the pressure to minimize prosecutions.

Even once the tribunal is ready to operate, dilatory actions—deliberate or incidental—will need to be controlled by firm leadership if the tribunal is to work. The uncertainty in the EC Law governing the tribunal, the potential for appeal of every dispute between foreign and Cambodian co-prosecutors and co-investigating magistrates, the uncertainties concerning the handling of failures to reach a supermajority vote may all generate numerous opportunities for delay and ultimately frustrate the operation of the tribunal.



*The potential to further weaken the rule of law*

There is little doubt that if the Cambodian government had wished to constitute a tribunal on its own to try Ta Mok and Duch, and even a few others, it could have done so without any delay. But it could not have done so in a way that would be perceived either domestically or internationally as credible in terms of basic justice.

If prosecutors and magistrates fail to competently investigate cases, or if judges fail to scrupulously and transparently uphold procedural fairness, the rights of the accused or the law, the tribunal will be perceived as just another Cambodian show trial. All too common features of pretrial process in Cambodia include forced confessions, maltreatment and even torture of detainees, fabrication of evidence, denying defendants competent counsel of choice and denying counsel full and prompt access to their clients. The public is sometimes barred from the courtroom, and often barred from knowing the evidence in the case. There is little tradition of robust defense, and little judicial patience with defense arguments or critical judicial scrutiny of the prosecution's case. Judges are often ignorant of the relevant law or indifferent to it, and sometimes pre-formulated judgments are read immediately upon a case's conclusion.<sup>20</sup> Avoiding such abuses in the EC will take both education—of judges, the government more generally, and the public—and resolve.

A failure to enforce the judgments and rulings of the tribunal would also

undermine the rule of law, as would the Cambodian judiciary's failure to incorporate its findings and judgments into domestic law more generally. For the tribunal to accomplish its purpose of realigning Cambodian law with fundamental norms shared by all nations, the EC will need to produce jurisprudence that draws on international precedent, a practice that must not only be permitted but encouraged.

**The determination of international donors to hold the tribunal to a strict three-year schedule will keep up the pressure to minimize prosecutions.**

*Intimidation and obstruction*

If the EC's Cambodian personnel do not have the personal security to exercise some degree of independence, it will be difficult to ensure even a basic level of fairness and respect for rights. In the prevailing environment of political violence and control, the authorities need not act overtly to convey a threat. There may be further risk from persons or parties affected by the trials. The personnel of the EC will need protection not only for themselves but for their families, including secure living quarters, freedom of movement, reasonable salaries, access to secure communications, and possibly other measures. The tribunal must also have cooperation, not only in arresting suspects, but in securing evidence and sites from interference,

and gaining access to officials and documentation both in Cambodia and abroad.

Trials can also be severely compromised if victims and witnesses refuse to testify. In the EC, there has so far been little planning for their protection, which needs to extend long

**Should it become clear that the Extraordinary Chambers are failing to ensure fairness and due process, the UN should act on Kofi Annan's promise to disengage.**

before and after trial. The practice of other international and mixed tribunals and truth commissions has attested to the importance of attention to basic issues, such as providing a secure and neutral location for the court, separate entrances for victims and witnesses (so they may control how they encounter defendants or their supporters), counselors during the course of the trial, monitoring and social services afterwards, and options for relocation. In this regard, it is not reassuring that the Cambodian government has fixed the location of the tribunal on a military base outside Phnom Penh, given that the military enjoys unparalleled impunity for abuses and has often been the instrument of political retaliation.

### *Under-resourcing*

So far the issue receiving the most attention has been whether the inter-

national community will find adequate funds to simply open the doors of the tribunal and attract the best-qualified personnel. But equally important is where those funds are deployed, and reallocated to correct emerging problems in the course of the EC's life. So far, five international staff have been allocated to the international co-investigating judge, but none to the international co-prosecutor, possibly because of the limited role of prosecutors under current Cambodian practice. But as the prosecutor will be the initial mechanism for referral of cases for investigation, this practice may undermine any serious effort to identify those most responsible or look beyond the handful of likely suspects.

### *Failing to address the needs of survivors*

Even if the tribunal operates in accordance with the best principles of legality and fundamental fairness, within the terms of the agreement and statute that delineate its powers, it will need additional support for its work to be meaningful to survivors.

The most common response of Cambodians to the prospect of a tribunal is the expectation that it should tell them why they have suffered the horrors of the Khmer Rouge years. This is an urgent desire, as almost all open discussion of responsibility for the Khmer Rouge's rise and actions is avoided or suppressed. In the wake of open discussion, far-fetched and conspiratorial theories of history thrive, including skepticism of the younger generation that these horrors transpired or were as bad as their parents

describe, or ideas that somehow Vietnam inflicted the Khmer Rouge on Cambodia.

But any given trial is a partial narrative, centered on the responsibility of a particular individual, and cannot present the whole picture. Indeed, in the EC, the necessary foreshortening of a complex historical picture to the particular stories of a small number of perpetrators is likely to increase suspicions that key parts of the narrative are being concealed. Moreover, the events and decisions that occur in the course of a trial are often difficult for non-lawyers to understand. Even a positive development, such as the tribunal recognizing a defendant's rights, could easily be misinterpreted by a public unused to the concept that defendants should have legally respected rights.

This points to the need for a public outreach program that can contextualize and explain the tribunal to the Cambodian public. Ideally, the tribunal itself would perform some of this function, but it is more likely that NGOs and the media will. To do this effectively, they must have both resources and access to popular media, and particularly broadcast media and video, given the relatively low literacy rates and the unavailability of most newspapers outside of Phnom Penh. The rulings and findings of the tribunal should also be publicized through the national education system—from the lowest grades to the highest. The national curricula currently skirt the entire issue of how the Khmer Rouge came to power, who was responsible for the policies that

brought such devastation to Cambodia, and what happened to them.

The operations of the Extraordinary Chambers, even if characterized by integrity, are likely to provoke extremely painful memories among both participants in the trials and the greater population of survivors. Some recurrence of trauma is likely, as well as a resurgence of resentment, guilt, mourning, depression, and even a desire for revenge. Social work and mental health programs will be necessary, not only at the level of participants in the trials, but also aimed at society more generally, again through programs that can reach survivors both directly and through popular media. To make such outreach successful at ameliorating the negative reactions trials may generate, the government will have to find ways to tolerate and protect the popular expression of divergent and even hostile reactions, while protecting people from discrimination, violence, or vigilantism.

### **Maximizing the possibility of success**

What are the responsibilities of the various actors in assuring that these harmful outcomes are avoided and maximizing the tribunal's chances of success? On the part of the Cambodian government, the great challenge will be curbing potential interference with the EC, both by its own members and by others. Interference can be subtle or gross, embodied in public criticism intended to convey a threat, or in private

directive. The other responsibility of the Cambodian government is cooperation with the tribunal, the international community, and civil society institutions. This cooperation will entail facilitating the tribunal through arrests, enforcement orders, protection of evidence, protection of victims and witnesses, and opening space for public discussion, outreach and debate. The Cambodian government should continue to invite the International Committee of the Red Cross, but also local human rights monitors, to visit detainees. It should also welcome and facilitate the efforts of non-governmental groups to provide public education and support services to the tribunal.

The UN should commit itself to the greatest possible transparency to increase public confidence in the tribunal. The accounts of the tribunal, resource allocations, contracts, background of nominees to official position, and details of operations should be as open to public scrutiny as possible, taking into account the need for security. The UN should facilitate the exposure of EC personnel to other UN-sponsored tribunals and their decisions and operations.

Should it become clear that the Extraordinary Chambers are failing in their basic duty to ensure fairness and due process, the UN should act on Kofi Annan's promise to disengage. In his report, he warned: "It is worthwhile noting that, under the terms of the draft agreement, any deviation by the Government from its obligations could lead to the United Nations

withdrawing its cooperation and assistance from the process."<sup>21</sup> Before such a point is reached, the UN should attempt to resolve problems through negotiation, but not through political compromise.

The international community, having forced this structure on the UN, bears a tremendous responsibility for making it work. Of necessity, states will have to bear the greatest burden in ensuring the tribunal has the resources it needs and that support programs are in place to maximize its public impact. Donor governments will have to exercise keen scrutiny of the entire process, beginning now with the selection and allocation of personnel, to ensure the Tribunal has integrity and can deliver on fundamental fairness. States that played a role in the history of the Khmer Rouge should not use their influence to distort or curtail the inquiry of the tribunal, but rather should cooperate in providing access to witnesses and evidence. The international community should work to support UN efforts to guarantee the integrity and high standards of the process, and not undermine these by pressuring the UN to silently tolerate further compromises.

Even with its slow birth and flawed structure, the EC could yet overcome low expectations and provide the long-absent transition to justice that Cambodians await. But to do so, it will need the best efforts of the Cambodian government, Cambodian and international civil society, and the international community working together.

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Notes

Dinah PoKempner is general counsel of Human Rights Watch.

1. After the Vietnamese invasion of Cambodia in 1979, the Khmer Rouge were routed. However in the succeeding years, the Khmer Rouge continued to be viewed as the legitimate government of Cambodia, rather than the Vietnamese-backed regime actually in power.
2. Condemnation of the Khmer Rouge, on the other hand, has been a staple of political discourse since Democratic Kampuchea's overthrow in 1979. Every member of the resistance or political opposition, regardless of political affiliation, was described as "KR" and the practice continued somewhat after the Paris Accords, with the accusation, for example, that FUNCINPEC was supporting the KR. In more recent years, some nongovernmental groups and scholars have tried to jump-start community discussion over what Cambodians should do about the Khmer Rouge past, and have included former members of the Khmer Rouge in these dialogues.
3. For a discussion of the tribunal as a means of combating impunity, see Dinah PoKempner, "The Tribunal and Cambodia's Transition to a Culture of Accountability," forthcoming.
4. In October 1994, the Law on Co-Statute for Civil Servants of the Kingdom of Cambodia was enacted. Under article 51, judges wishing to prosecute civil servants were required to obtain permission from either the Council of Ministers if a senior official was in question, or from the head of the relevant ministry for lower ranking civil servants. The principle of immunity was in practice extended to military personnel as well, although they are not included under the terms of the law. In the law's application, ministerial officials blocked a significant number of prosecution requests, caused others to languish or fail because of extensive delay in approval, and the requirement of approval simply inhibited going forward with other possible cases. In 1999, the law was amended to merely require advance ministerial notification, but problems in prosecuting officials persist. See ADHOC, LICADHO, and Human Rights Watch, "Impunity in Cambodia: How Human Rights Offenders Escape Justice," *A Human Rights Watch Short Report* Vol. 11, No. 3(C), HRW: New York, (May 1999) 25-26.
5. "Impunity in Cambodia," 7.
6. For more on the history of negotiation of the EC, see Craig Etcheson's article in the present issue of *Justice Initiatives*.
7. See Laura McGrew, *Truth, Justice, Reconciliation and Peace in Cambodia: 20 Years after the Khmer Rouge* (February 2000), full report available from the author, [lmcgrew@igc.org](mailto:lmcgrew@igc.org).
8. Cambodian Human Rights Action Committee, Press release, February 21, 2002, copy on file with author.
9. Chris Fontaine, "Cambodia Premier Says No to Trial," *Associated Press*, December 28, 1998.
10. 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, June 6, 2003 ("UN Agreement").
11. These were the acknowledgment that the agreement between the U.N. and Cambodia would have the status of a treaty and thus trump domestic law provisions enacted prior or subsequently; that a simpler two-tier system had been substituted for a cumbersome three-tier appellate structure, and that certain measures to improve procedural fairness would be implemented, including the requirement that the tribunal respect international standards of justice, fairness and due process of law, as set out in articles 14 and 15 of the International Covenant on Civil and Political Rights. Report of the Secretary-General on Khmer Rouge trials, paras. 24-27, A/57/769, 31 March 2003 [ "Annan Report"].
12. Annan Report, paras. 28-30.
13. The appellate chamber of the tribunal, for example, is to "apply existing procedures in force," which may change as the law does. Art. 36 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period

of Democratic Kampuchea, 10 August 2001, NS/RKM/0801/12 [translation by Council of Jurists] available at [http://www.yale.edu/cgp/KR\\_Law\\_trans.06.09.2001.html](http://www.yale.edu/cgp/KR_Law_trans.06.09.2001.html).

14. EC Law, Art. 12.

15. For example, reports of the judiciary police are deemed to be true and accurate in the absence of directly contradictory evidence, and judges often question defendants before hearing the prosecution's case, both matters that would contravene the presumption of innocence. For a discussion of these and other procedural issues that should be addressed with respect to the Extraordinary Chambers, see Sok Sam Oeun, Soeun Visal and Scott Worden, "Memorandum: Key Issues Relating to Rules and Procedures of the Extraordinary Chamber," May 6, 2004, on file with author.

16. UN Agreement, Art. 23. For more on victim protections in the EC, see Susana SáCouto's article in the present issue of *Justice Initiatives*.

17. UN Agreement, Art. 22.

18. For an excellent analysis of the political interests in artificially limiting the scope of prosecutions, see Steve Heder, "Politics, Diplomacy, and Accountability in Cambodia: Severely Limiting Personal Jurisdiction in Prosecution of Perpetrators of Crimes Against Humanity," Draft on file with author.

19. Steve Heder has pointed to the complex nature of responsibility for atrocities under the Khmer Rouge, and the considerable degree of lower-level discretion in implementing fairly general directives from the top to execute various categories of "enemies," defined in elastic terms. See Steve Heder, "Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Accountability in Comparative Perspective," in Jaya Ramji and Beth Van Schaack (eds.), *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence before the Cambodian Courts*, Lewiston: Edwin Mellen Press, (in press, 2005). See also Steve Heder's article in the present issue of *Justice Initiatives*.

20. Brad Adams, "Cambodia's Judiciary: Up to the Task?" in Jaya Ramji and Beth Van Schaack (eds.), *Bringing the Khmer Rouge to Justice*.

21. Annan report, para. 30.

# Memory, Justice and Pardon: What Does it Take to Heal?

Filmmaker **Socheata Poouv** takes a personal look at the nature of forgiveness and the role of the Extraordinary Chambers in facilitating it.

“I have nothing to say to the Khmer Rouge,” my father said. I didn’t know what to say to them either, but I was interested in hearing their position. I had contacted the Documentation Center of Cambodia almost a year ago, asking for the names of former cadres who presided in Pursat province where the Khmer Rouge held my family.

On the long drive to their village, I didn’t tell my father where we were going. He thought we were headed to the site of the Khmer Rouge camp where he lost four years of his life. I had yet to tell him we were going to make a detour.

To be honest, I was scared to tell him. How would he react? Would he feel entrapped? Would he stay in the car and refuse to meet them?

When the car slowed to a stop, I had to end my procrastination.

“Pa, I have something to tell you. When we get out of the car, we’re going to meet two ex-Khmer Rouge and interview them. Will you meet them with me?”

He paused for a moment.

“Yes, let’s go. I want to see their faces.”

I was nervous about meeting them and I knew that my emotions paled

in comparison to my father’s turmoil. The Khmer Rouge affected my life (they were the reason my parents married), but I am not a victim. While I wondered if the encounter with the ex-Khmer Rouge Son Soeum and Mom Tep would be useful for me at all, I saw in my father’s face a lifetime of hurt and anger as we approached Soeum.

Soeum was a Khmer Rouge deputy chief, in charge of 200-300 families. Though he says he never killed with his own hands, he had the authority to decide who was killed outright and who was starved. His neighbor, Mom Tep, was in charge of the local “hospital.” The Khmer Rouge believed modern science corrupted society. They killed nearly all of the doctors and scientists in the country and peasants like Tep replaced them. She invented and manufactured “medicine” out of various roots and powders, and she buried victims herself. Thousands died. When I asked her if it was easier to bury a child or an adult, she said children were easier to bury because you only have to dig a small grave.

I asked each of them if they were sorry, if they were haunted by the memory of what they had done. I asked them about what they do to assuage their consciences. They expressed pity for the dead, but neither took responsibility for their



actions. They explained that if they did not obey orders from above, they also would be killed.

Before the interview, I had wondered if these cadres, who agreed to talk about their crimes, would seek forgiveness. But they never did.

The work of healing a country really happens inside each Cambodian. As the Cambodian government and the international community struggle to find justice and healing, individual

**As the Cambodian government and the international community struggle to find justice and healing, individual Cambodians must do the same.**

Cambodians, like those in my family, must do the same. For each of us, it is a different journey. For a very long time, I was stuck on the question: “What does it mean for my family or me to forgive the Khmer Rouge?”

My entire family lives in Dallas now. They have waited their lifetimes to see justice brought to the Khmer Rouge. Although my life did not begin until after the Khmer Rouge fell in 1979, I also wait for justice. I have been waiting for the authority of governments to say unequivocally that the Khmer Rouge will be punished and that the world cannot let such inhumanity go undisturbed.

What is the best way for an entire country victimized by its own countrymen to move on? Is it enough to remember or must we punish?

If we punish, can we forgive? What will forgiveness achieve? What does it look like?

My family’s Khmer Rouge experience is both remarkable and common. My parents left their homes 31 years ago. It was April 17, 1975 when the Khmer Rouge toppled the Cambodian government. The Khmer Rouge forced every urban dweller out of his or her home.

That day, my parents were still strangers to one another and both happened to be in Phnom Penh. My mother and her young family were in their sewing shop. She was a rich Chinese-Cambodian who married another rich Chinese-Cambodian. They had a comfortable life in lovely French colonial Phnom Penh. My father had just deserted from the newly defeated Lon Nol army. The Khmer Rouge army had pushed my father’s army toward Phnom Penh where soldiers like him abandoned their posts in defeat and tried to blend in with the city dwellers. He assumed a new identity as a pond spinach seller.

My mother and father, along with millions of other Cambodians, poured out of the city and walked toward an unknown destination. Even though they didn’t know each other, I wonder if they passed one another or exchanged glances on the long walk that began that day. My father walked alone with the clothes on his back. My mother walked with two small children, a husband and all the possessions she could carry.

They, like every Cambodian who was not summarily executed, were assigned to a labor camp. The Khmer

Rouge believed they could restore Cambodia to its preeminence during the Angkor period 800 years earlier by destroying everything modern. They made everyone a slave to the land and executed anyone deemed an enemy. My parents toiled from dawn to dusk in the rice fields or digging ditches. They ate two communally served meals a day. In the dry season there was less and less food. When there was no food, the Khmer Rouge served a rock of salt.

When I asked my father what was the worst thing about living under the Khmer Rouge, he told me it was not being allowed to talk. The Khmer Rouge controlled every aspect of his life—where he lived, what he did, what he ate, whom he lived with, and what he said. The Khmer Rouge banned books, watches, calendars and dogs. They were arguably the most controlling government in recorded history.

My mother's parents died, followed by her husband, her daughter and a slew of brothers, sisters, nieces and nephews. Because they came from the elite class, the Khmer Rouge treated them considerably worse than others.

The two little girls who would be raised as my sisters were actually my mother's nieces. Their beloved mother died of starvation and their father was taken away for execution. The Khmer Rouge destroyed their family and tried to replace it with *comrades*. They told Mala and Leakhena that they no longer belonged to their parents. My two sisters were sent to a distant children's camp where they were indoctrinated in commu-

nism. Other children became soldiers, forced to spy on their parents and in some cases execute them.

When their mother died, my mother pledged that she would care for the girls. "No matter what they tell you," she said, "remember who your family is. I am your family and I will always take care of you."

Around this time, the Khmer Rouge forced my parents, two strangers, to marry. This was a common Khmer

**Around this time, the Khmer Rouge forced my parents, two strangers, to marry.**

Rouge practice to dissolve class distinction. They even forced female members of the Royal family to marry handicapped Khmer Rouge cadres. In my parents' case, my father was a dark-skinned Cambodian from a rice-farming family and my mother was a light-skinned Chinese Cambodian from an entrepreneurial family.

Ma told me, "I knew whatever happened, I would leave my country." Because her first husband and daughter died in the early years of the Khmer Rouge regime, she was certain her toddler son Bros would die of malnutrition like the others. When the Vietnamese invaded and ousted the Khmer Rouge, my mother knew she would need help for her mission.

My parents then stayed together even after the Khmer Rouge fell. Pa agreed to find her adopted daughters and be a father to her dying son.

In return, my father, an orphan, got the family he had always wanted.

After the Khmer Rouge fell, the labor camps were emptied and people poured into the countryside looking for other survivors. My parents searched town to town for months for my two sisters. My father found them, by chance, in a field picking potatoes.

**Most Cambodians don't want to remember the Khmer Rouge years. It is too painful.**

At night, he smuggled them and an aunt around landmines, gunmen and the bodies of the dead. The journey took three days, eventually ending in the safety of a Thai refugee camp.

My father then turned around and made the trip not once, but three more times: a second trip to carry my sick brother and lead my pregnant mother, a third trip for a sewing machine, and a fourth trip for more of my mother's family. My father led eight people across the border to Thailand, nine if you count me in my mother's womb.

I am making a documentary called *New Year Baby* about my family's heroism. For decades, they kept many secrets surrounding their story. They are still torn about talking now for the first time. Their experience is important and I want to memorialize their story to honor their sacrifice and survival.

Most Cambodians don't want to remember the Khmer Rouge years. It is too painful. The average Cambodian is too poor and too busy trying to feed his family to think about their legacy. In fact, I am learning that the outside world is more fascinated by the Khmer Rouge past than Cambodians are.

Within Cambodia, there seems to be no broad movement to remember the genocide. While the Jewish community proclaims, "we must not forget," Cambodian Prime Minister Hun Sen said, "we should dig a hole to bury the past." My cousin in Cambodia told me that when she told her children what she survived, they could hardly believe her. There are even rumors throughout the country that the Vietnamese are responsible for the deaths of nearly 2 million Cambodians. Last year—for the first time ever, and more than 25 years after the fall of the Khmer Rouge—the Cambodian government observed a moment of silence to commemorate the dead.

However painful it is to remember, I never want to forget what happened. After interviewing the two Khmer Rouge cadres, my father and I set out to find the Khmer Rouge camp where my parents were held.

Our 4x4 turned off of the paved highway on to a country road, kicking up red dust that coated our windows. My 66 year-old father was physically and emotionally spent after the interviews earlier that day. I was asking him to remember. "Pa, we'll just keep driving. Tell us if you recognize anything."

“No, nothing looks familiar.” he was telling me. “I don’t remember anything.”

The sun was setting and I was worried that we wouldn’t have enough time to shoot before dark. Just relax and try to remember, I pressed him.

The top of a white concrete structure appeared over the trees. Wait, my father said, that’s the Buddhist temple. We turned toward it.

We exited the car and walked toward a pleasant little grove of flowering trees. The land was empty save for the single Buddhist temple, or *wat*. During the Khmer Rouge, Buddhism was banned and many monks were executed. The rest were defrocked. The Khmer Rouge turned temples into shelters, hospitals, or storage depots.

This particular *wat* had been restored as a working temple. There were no buildings, no signs, and no houses from the Khmer Rouge years. Everything the Khmer Rouge built was wiped away. Someone didn’t want any reminders left of that era.

My father suddenly remembered where my aunt, Mala and Leakhena’s mother, was buried. We made our way toward a wrecked concrete platform with two holes in it. She is laid near an old latrine. My first thought was, “what an undignified place to bury a her.” Then I realized someone buried her there because they intended to find her one day. What a gift it was to be buried there instead of a mass grave. How many forgotten graves must lie around us? My aunt is now found, visited and remembered.

“We thought about moving her remains to rebury her,” my father said. “But seeing her now, she seems at peace. There’s no need to disturb her.”

When I returned to the America, I asked my entire family if they considered forgiving the Khmer Rouge. My sister Mala says that as a Christian, she knows that she should forgive, but isn’t sure *who* to forgive. My mother said, “I’ve learned how to forgive. I can’t stay angry for the rest of my life.”

In talking with a producer of my documentary recently, I asked out loud: “I want to know what it means for me to forgive the Khmer Rouge.” He said to me, “You make the meaning. What does it mean to you?”

Suddenly, I saw that a number of reasons were stopping me from forgiving the Khmer Rouge and the cadres I had met.

First, I did not understand that I needed to forgive. I believed they harmed my family and not me. But the truth is that every Cambodian carries the legacy of the genocide. My life has been strongly affected by its horrors. Every Cambodian must confront the Khmer Rouge past.

Second, I did not believe that these two Khmer Rouge cadres deserved forgiveness. They never sought forgiveness from me. Yet I can offer forgiveness whether I think they deserve it or not. Who am I to decide who in the world deserves it and who doesn’t? Forgiveness is a gift.

Third, I was reluctant to forgive because I thought it would mean that in some way I was condoning their

acts. But I now realize that one does not follow from the other. In fact, by bringing attention to the Khmer Rouge atrocities through my documentary and other media, I hope to move a critical mass of people to support the trials.

I choose to forgive them. I will write a letter to those two cadres I met in January. I will tell them that I forgive them and I am no longer their victim. I will have it translated into good Khmer and send it to them.

I recognize that it must be easier for me to forgive than it is for other Cambodians. I benefited from my family's sacrifices. America has offered us a wonderful life while most

Cambodians are very poor and lead much harder lives. Some live in the same town or even the on the same road as their perpetrators. Each person must come to his or her own conclusion.

I am committed to keeping the memory of the Khmer Rouge atrocities alive through my documentary and by spreading my family's story of love, joy and pardon. I hope the world knows the horror men can create so that we may avoid it. It may be the most important story I will ever tell.

In addition, as long as hope for the Khmer Rouge trial is alive, forgiveness is possible. As long as I cling to memory and press for justice, I can forgive.

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### Notes

Soucheata Poouv was born in Thailand after her family fled the Khmer Rouge. She is director and producer of the documentary film "New Year Baby."

1. Chris Fontaine, "Cambodia Premier Says No to Trial," Associated Press, Dec. 28, 1998.

## PLAYERS

# The Senior Leaders and Those Most Responsible

**Steve Heder** examines the challenges facing the Extraordinary Chambers, including the question of who should be tried.

Two reasons are generally given for proceeding with the Khmer Rouge tribunal, despite its flaws. The first is that if it does not go ahead, the surviving men and women responsible for the crimes committed under Communist Party of Kampuchea (CPK or Khmer Rouge) rule will either go unpunished, remain indefinitely in detention without trial, or be summarily convicted in domestic trials: all unacceptable outcomes. The second is that although there is a vast—albeit largely lost—potential for improvement in both the law and the agreement establishing the court, there is nothing fundamentally wrong with either, on paper, in terms of human rights protections or truth-seeking objectives.<sup>1</sup> There are, however, four problems that advocates of going forward with the court must recognize.

## Political influence

The first problem is that the tribunal will probably conduct only approximations of fair trials, given the very real potential for illegal interference by politicians, including Cambodian government officials and diplomats representing other governments. I say

“probably” based on past experience of the Cambodian judiciary, which is so lacking in impartiality and independence that a fair trial in politically charged cases has been virtually impossible. In only one instance in the past decade was a court trying a politically sensitive case allowed to do the right thing—to weigh the evidence and make judgments based on evidence alone.<sup>2</sup>

For most observers, this historically-based concern is buttressed by a conviction—also borne of experience—that the dominance of politicians over the courts is beyond short- or mid-term correction through “capacity-building” programs. These have been attempted in Cambodia for more than a decade, with so far negligible results, as most donors now increasingly realize and publicly state.<sup>3</sup> The fundamental problem is not a lack of knowledge or training within the judiciary—although more of both is sorely needed—but rather the determination of key political players to prevent training and knowledge from being put to use against their fundamental political and economic interests.

Two recent incidents indicate things have not changed in this regard, and may indeed be getting worse. The absurd judicial shenanigans revolving around the murder trial of anti-government union leader

Chea Vichea in 2004, resulted in the August 2005 conviction of two men who—by all available evidence—were far from proven guilty and are widely seen as framed and imprisoned to protect the real assassins.<sup>4</sup> The second was the judicial reversal of the Bar Association's October 2004 election of human rights defender Suon Visal as president, which, when it was over-

**The tribunal will probably conduct only approximations of fair trials, given the very real potential for illegal interference by politicians.**

turned by the Supreme Court in June 2005, was immediately followed by criminal prosecution against Visal.<sup>5</sup> This attempt to keep the previous incumbent, Ky Tech—the government's preferred candidate—in place almost caused the Bar Association to collapse. At the same time, there is every reason to believe that, left to do their jobs in peace, many Cambodian judges and lawyers are perfectly capable of weighing up evidence and of exercising independence, and indeed some are eager to do so, given the chance.<sup>6</sup>

### **The candidates for prosecution**

The second problem is that there is good reason to believe that some in Cambodia wish to ensure that the list of suspects tried in the Extraordinary Chambers in the Courts of Cambodia

(EC) is politically predetermined—with the intention of shielding individuals now in positions of authority, not so much from prosecution, as from embarrassing scrutiny in the testimony of their former associates should the latter be prosecuted. The texts of both the EC Law and the UN Agreement are acceptable, if not unproblematic, in their formal restriction of jurisdiction to “senior leaders... and those who were most responsible” for Khmer Rouge crimes.<sup>7</sup> The focus on senior leaders is defensible, especially as the law also makes possible prosecution of the second category of suspects. The problem is that negotiations on the court have been accompanied by the intention (both stated and unstated) to limit prosecutions to a handful of senior Khmer Rouge leaders and a few other notorious perpetrators of crimes, most notably the leading cadre of the CPK central security office, the Phnom Penh torture center known as S-21, or Tuol Sleng. The evidence suggests, however, that “those most responsible” could include other Khmer Rouge cadre who should, according to a literal interpretation of the law, be candidates for prosecution.

A first question is: how many? A glance at the history of the Khmer Rouge may help find the answer. When the CPK was in power, its senior leadership comprised some 20-30 members of the formal decision-making and policy-setting Central Committee, based in the capital, Phnom Penh. In addition, a corps of powerful cadre at both the central and local level numbered



perhaps 1,000 persons. Of the original 1975 leaders and corps of cadre, maybe fewer than half survived the purges that began to devastate the Party in 1976 and proceeded in waves through 1977 and 1978, and quite a few of those who made it through to the end of the regime have since died. Even if the notional jurisdiction of the EC were to extend down to the most important local level, the district, it is likely that no more than a few hundred responsible individuals are still alive. 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, i.e., those local leaders against whom there is specific evidence of individual responsibility for large-scale crimes.<sup>8</sup>

A perhaps more important question is: who will be prosecuted? The Documentation Center of Cambodia recently republished a slightly revised version of a paper I authored in June 2001 together with the lawyer Brian Tittmore, entitled *Seven Candidates for Prosecution*,<sup>9</sup> which named seven senior leaders—all alive at the time—against whom there was evidence of culpability in the Documentation Center’s archives of Khmer Rouge documents. Six of those seven are still alive today (the seventh, Kae Pok, a member of the Central Committee, died in

2002), and evidence to support their prosecution continues to build. They are:

*Nuon Chea*, deputy secretary of the CPK Central Committee, now living in the old Khmer Rouge stronghold of Pailin, on the Thai-Cambodian border.

*Ieng Sary*, deputy prime minister for Foreign Affairs and Central and Standing Committee, now living in Phnom Penh.

Left to do their jobs in peace, many  
Cambodian judges and lawyers are perfectly  
capable of exercising independence.

*Khieu Samphan*, State Presidium chairman of Democratic Kampuchea and Central Committee member, now with a home in Pailin.

*Ta Mok*, zone secretary and Central and Standing Committee member, currently in custody in Cambodia, charged with crimes against humanity and other crimes.

*Sou Met* and *Meas Mut*, CPK Military Division chairmen, now with residences in Batdambang province, northwestern Cambodia.

The report also spoke of the massive evidence against another candidate for prosecution, *Kaing Guek Iev*, known as “Duch,” who is in custody with Ta Mok and charged with similar offenses.

These are the clearest candidates for prosecution. The others, including

less notorious central leaders and local cadre, are probably best not named at this time, as doing so might prompt them to go into hiding or take other steps to avoid arrest and trial.

There are also a number of individuals who are unlikely to be candidates, regardless of how expansively the tribunal's jurisdiction is interpreted. In 1998, fellow Cambodia scholar Craig Etcheson and I issued a state-

**The idea that there might be highly powerful suspects holding senior posts in the present government is a myth.**

ment declaring that we were aware of no evidence implicating Hun Sen in serious Khmer Rouge crimes, a statement still to be found on various Cambodian government websites.<sup>10</sup> Several years on and after tens of thousands of pages of documents and several thousand interviews, this statement is still true. Indeed, to my knowledge, there is no one in the famously huge 2004 Cambodian cabinet who belongs in the category of “those most responsible” for Khmer Rouge-era crimes. In addition to Hun Sen, those against whom no such evidence has been adduced include Economy and Finance Minister Keat Chhon and Foreign Minister Hor Nam Hong, long the target of spurious allegations. Thus, the idea that there might be highly powerful suspects holding senior posts in the present government, army or security forces—voiced both

within and outside Cambodia—is a myth and a red herring. It appears to be perverse wishful thinking on the part of some Cambodians and foreigners whose opposition to the current regime on other grounds clouds their judgment and tempts them to engage in a witch-hunt.<sup>11</sup> Even if the truth, the whole truth, and nothing but the truth about “those most responsible” were to be exposed, it is extremely unlikely to bring the government tumbling down or tear society apart, the doomsayers notwithstanding. Again, the possibility of following the letter of the law and spirit of the agreement exists.

### Clarifying the past

A third problem concerns the much broader issue regarding the truth about the Khmer Rouge period. If the EC prosecutions *are* limited by political factors, rather than impartial application of the text of the EC Law—and if the trials are not conducted fairly and independently<sup>12</sup>—they are unlikely to add very much to our knowledge and understanding of what happened under Khmer Rouge rule and why. Above all, they are not likely to grapple well with one of the main historical questions surrounding Khmer Rouge crimes, namely, the extent to which the crimes were either the result of: a) a conspiracy hatched by certain or all senior leaders, in which they gave orders to subordinates who carried them out; or b) abuse of delegated authority by subordinates, acting without or even contrary to orders from above, without knowledge of their

superiors. The evidence so far indicates that both kinds of responsibility contributed to these crimes—but whether or not this is so, the record needs to be revealed, analyzed, and understood to set the legal, historical, and moral record of the crimes straight.<sup>13</sup>

Beyond the pressing need to allocate responsibility, better understanding of this issue may also help resolve the most common debate about the deep causes of Khmer Rouge crimes: were they primarily the result of the influence of a foreign ideology or of local cultural proclivities.<sup>14</sup> Yet even the fairest and most comprehensive trials wouldn't give us the answer to this question. Similar or analogous debates continue among those trying to explain the Holocaust, the genocide in Rwanda, and mass murder in the Soviet Union, regardless of whether there have been fair accountability trials or not. Nevertheless, the fairer and more comprehensive the EC trials are, the more likely they are to contribute something new and useful to answering such fundamental questions.

It is for this reason that a predetermined focus on senior leaders is problematic. The narrow emphasis inevitably gives an impression that all, or the great majority, of crimes were the result of a top-down conspiracy, even if, in fact, that was not the case. Conversely, dealing squarely with such issues may result in embarrassing a handful of powerful government leaders, who would have to face facts they would very much rather remained unknown. The same applies

to many other former CPK members who are not powerful figures—but whose crimes may be key to understanding why lower-downs killed many fellow Cambodians in such large numbers in so many places. Unless Cambodians and others get to the heart of this issue honestly and introspectively, the legacy of

**If the trials demonstrate that it is possible for the judiciary in Cambodia to act independently, impartially, and fairly, then they will have a positive impact.**

Khmer Rouge crimes will remain very heavy. Again, the tribunal is unlikely to take us very far down this road, even in the best case scenario—but at the least it should not be misused to preclude further honest introspection.

### **The demonstration effect**

The fourth problem is that unless the trials are fair and are allowed to follow the evidence where it leads, regardless of political considerations, they will probably have little or no immediate positive impact on the human rights situation in Cambodia, including judicial and legal reform. Simply put, if the trials demonstrate that it is possible for the judiciary in Cambodia to act independently, impartially, and fairly, then they will have a positive impact; but if they do not, the impact will be negative, precisely to the extent

that they demonstrate the power of politicians to sabotage and subvert even the most closely watched trials, and override the knowledge, training, and desires of those in the court system who favor truth and justice. The most negative outcome would be

if unfair proceedings take place but are declared to be fair: such an outcome would be deeply demoralizing for Cambodia's dedicated fair trial advocates, some of whom regard the EC as offering the possibility of generating reform.

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### Notes

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1. These are: the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of Amendments as promulgated on October 27, 2004 (NS/RKM/1004/006) ("EC Law"); and the 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, June 6, 2003 ("UN Agreement").

2. This 1999 trial—observed for Amnesty International by the author—resulted in the acquittal of two human rights activists wrongly accused of fomenting violent unrest. For further details, see Amnesty International, "Cambodia: Freedom for Human Rights Activists: Court Finally Faces Facts," AI Index ASA 23/013/1999, (July 21, 1999).

3. See, for example, Henrik Alffram's report for the Swedish International Development Agency, "An Analysis of the Cambodian Programme for Legal and Judicial Reform" (May 2004).

4. The finale of this trial was observed by the author. It was characterized by gross procedural irregularities. For further details, see "Pair Convicted of Killing Vichea Appeal to King," *Phnom Penh Post*, August 12-25, 2005. In another unfair trial—also observed by the author—opposition member of parliament Cheam Channy was imprisoned on false allegations of forming a secret army. See Human Rights Watch, "Cambodia: Opposition MP Jailed After Sham Trial" (August 9, 2005); and "Channy a 'Prisoner of Conscience,'" *Phnom Penh Post*, August 12-15, 2005.

5. For recent reports and critical assessments, see International Bar Association, "IBA Concerned at Crisis in the Cambodian Legal Profession" (July 18, 2005); and "Bar Association Head Reinstated Amid Conflict," *Cambodia Daily*, July 27, 2005.

6. Based on author's conversations with various jurists and lawyers since 1989.

7. EC Law, Article 1.

8. For further discussion, see Steve Heder, "Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Accountability in Comparative Perspective," in Jaya Ramji and Beth Van Schaack, eds., *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence before the Cambodian Courts* (Lewiston: Edwin Mellen Press, 2005).

9. Stephen Heder and Brian Tittlemore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge* (Phnom Penh: Documentation Center of Cambodia, 2001).

10. We declared that "calls to indict Hun Sen of Cambodia for genocide, war crimes and crimes against humanity have no basis in fact or law," adding that "it is a disservice to the rule of law and the truth to make baseless or grossly exaggerated allegations to achieve a political end." See: <http://www.embassy.org/cambodia/newsletter/nloctober98.htm>.

11. Credible allegations against two symbolic leaders of Hun Sen's Cambodian People's Party, Heng Samrin and Chea Sim, do exist. However, neither is truly powerful, and whether they might be deemed "most responsible" is an open question.

12. See Brad Adams, "Cambodia's Judiciary: Up to the Task?"; Scott Worden, "An Anatomy of the Extraordinary Chambers"; and Dinah PoKempner, "The Tribunal and Cambodia's Transition to a Culture of Accountability," all in Ramji and Van Schaack.

13. Again, see "Reassessing the Role of Senior Leaders and Local Officials." See also Michelle Vachon's interview of Ea Meng-Try in her review of his book *Breaking the Chains* (Phnom Penh: Documentation Center of Cambodia, 2005), in *Cambodia Daily*, November 5-6, 2005.

14. For contrasting views, see Alexander Laban Hinton, *Why Did They Kill: Cambodia in the Shadow of Genocide* (Berkeley: University of California Press, 2004) and Steve Heder, *Cambodian Communism and the Vietnamese Model: Imitation and Independence, 1930-1975* (Bangkok: White Lotus, 2004). See also the exchange of letters between Hinton and Henri Locard, in the letters section of the *Phnom Penh Post*, October 7-20, 2005.

## The Role of Victims in Bringing Former Khmer Rouge Leaders to Justice in Cambodia

**Susana SáCouto** looks at the challenges and benefits of involving victims in the work of the Extraordinary Chambers.

The role of victims in bringing to justice perpetrators of crimes committed by the Khmer Rouge in Cambodia has remained largely unexplored. Yet there may be good reason to pay closer attention to the ways in which popular participation in the trials of former Khmer Rouge leaders might help the Extraordinary Chambers in the Courts of Cambodia (EC)—the United Nations-assisted Cambodian tribunal set up to try these leaders—achieve its goals. As a coalition of Cambodian nongovernmental organizations recently noted, the EC represents “the last best chance for justice for the victims of the atrocities committed [by the Khmer Rouge].”<sup>1</sup> If delivering justice for victims lies at the heart of the effort to hold perpetrators of Khmer Rouge-era atrocities accountable, then giving victims an option to participate in proceedings may help the tribunal succeed. Indeed, victims’ advocates have argued that giving those affected by atrocities a role to play and a sense of empowerment may bring them a step closer to healing and rehabilitation.<sup>2</sup> As one commentator has noted,

“direct popular participation” in the EC trials may “help many victims come to terms with the past, and contribute to a process of national reconciliation.”<sup>3</sup> 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.<sup>4</sup>

Until recently, victim participation in international criminal proceedings has been limited. Victims played only a minor role in proceedings before the International Military Tribunal at Nuremberg, where prosecutors relied heavily on the paper trail left behind by the perpetrators of World War II crimes.<sup>5</sup> Victims played a more significant role in proceedings before the *ad hoc* international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and the internationalized courts in Sierra Leone, East Timor, and Kosovo, but their involvement has largely been restricted to appearing as witnesses.

In the last couple of decades, however, there has been increasing recognition of the importance of victim participation in both the design and implementation of national and international justice mechanisms. As early as 1985, a United Nations Declaration

of Basic Principles of Justice for Victims of Crime and Abuse of Power called on states to ensure that judicial and administrative processes were responsive to the needs of victims by, *inter alia*, “[a]llowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings.”<sup>6</sup> Since that time, there has been an increasing interest in exploring “restorative-based models [of justice] which emphasize [victim] reparation and participation in addition, or in contrast, to the traditional focus on punishment.”<sup>7</sup> Consequently, 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>8</sup>

The concept of “participation” is somewhat abstract. One commentator has suggested that it can “be perceived as stemming from the broader concept of citizenship, and may include ‘being in control, having a say, being listened to, or being treated with dignity and respect.’”<sup>9</sup> This characterization of the concept comports with the recent findings of the United Nations independent expert tasked with updating the UN Set of Principles to combat impunity (originally submitted to the UN Commission on Human Rights in 1997). In the introduction to her report, the independent expert notes that “[victim] participation helps ensure that policies for combating impunity effectively respond to victims’ actual needs and, in itself, ‘can help reconstitute the full civic membership of those who were denied the protection of the law in the past.’”<sup>10</sup>

Yet the extent to which victims have been entitled to “participate” in proceedings has varied. In some civil law systems, for instance, a victim may join a criminal action initiated by the state as a “subsidiary prosecutor.”<sup>11</sup> Participation in this capacity includes the right to be present at all stages of the proceedings, to question witnesses, to provide additional evidence, and to present a claim for compensation.<sup>12</sup> In others, victims have been granted a right not only to intervene in an existing prosecution, but also to be heard as independent parties and to initiate separate prosecutions.<sup>13</sup> Although victims’ participation has been less extensive in common law systems, due in part to the perception that the adversarial nature of such systems is incompatible with the participation of third parties,<sup>14</sup> even these systems have seen a shift in favor of giving victims an expanded role at certain stages or in specific types of criminal proceedings. For instance, some adversarial systems permit victims to intervene at trial when specific issues are raised.<sup>15</sup> Others allow victims to institute and prosecute a criminal contempt of a civil order.<sup>16</sup>

Several surveys have found that, where domestic criminal law allows victims to “participate” in proceedings, such as in Germany and Poland, those who have exercised this right expressed greater satisfaction with the criminal justice process generally than those who chose not to.<sup>17</sup> This suggests that “offering victims some form of acknowledged and formal role at the trial” might not only “enhance [victims’] sense of satisfaction with



the criminal justice system,” but also “serve to combat the sense of powerlessness that many have reported during criminal proceedings.”<sup>18</sup> More importantly, victim involvement in the proceedings could serve to enhance their overall legitimacy. Indeed, “injection of the victims’ perspective” into the trial can “lend additional transparency to the outcome of the case.”<sup>19</sup>

### Giving victims an option to participate in proceedings may help the tribunal succeed.

This seems particularly significant in the context of postconflict societies struggling to consolidate peace and achieve some sense of national reconciliation.

The critical question appears to be how to afford victims a meaningful role in the prosecution of serious international crimes without offending the rights of the accused to a fair and impartial trial, and without significantly delaying the proceedings. In light of the large number of potential victims in cases involving mass crimes, opening the door to victim participation could lead to protracted proceedings, which, in turn, could infringe on the trial rights of the accused, particularly the right to be tried without undue delay.<sup>20</sup> The potential for delay is of particular concern in the context of the EC, where those expected to be tried are aging, with some in or approaching their eighties.

### Scope of victims’ role under the law establishing the Extraordinary Chambers

The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (the “EC Law”),<sup>21</sup> which gives Cambodia jurisdiction to try senior leaders and “those most responsible” in the Khmer Rouge, seems to envision a new role for victims. The Law’s Article 36 suggests that in addition to being allowed to testify before the Extraordinary Chambers, victims may also be able to lodge appeals against trial chamber decisions.<sup>22</sup> Furthermore, several provisions of the EC Law direct the trial chambers, as well as the co-prosecutors and co-investigating judges, to follow “existing procedures in force”<sup>23</sup> in Cambodia, relevant provisions of which allow victims to join criminal proceedings as civil parties seeking compensation.<sup>24</sup>

However, the EC Law’s jurisdictional clause, which only mentions criminal charges,<sup>25</sup> and Article 38, which clearly states that penalties “shall be limited to imprisonment,”<sup>26</sup> seem to exclude the possibility of companion civil proceedings. Indeed, nothing in the law explicitly provides for victim compensation. Moreover, there is ambiguity regarding the content of Cambodia’s “existing procedures in force.”<sup>27</sup> Some commentators have suggested, for instance, that while victims may join criminal proceedings to seek compensation, Cambodian criminal procedures do not permit the

type of victim-initiated prosecutions possible in some civil law systems.<sup>28</sup> Even if these rules were entirely clear, it is doubtful that the drafters of the procedures permitting victims to join criminal proceedings as civil parties had in mind their application to cases of mass crimes, where an extraordinary number of victims could potentially be involved.

Nevertheless, given the recent trend toward recognizing the importance of victim participation in efforts to combat impunity, it seems worthwhile to explore the question of what role victims might actually be able to play in proceedings before the EC. The International Criminal Court (ICC), which explicitly empowers victims to take an active part in proceedings, might provide some useful guidance. The measures developed by the ICC to ensure effective participation of victims in ICC proceedings, although still largely untested, may be particularly helpful given the similarity in purpose underlying both the EC and the ICC—namely to bring to justice perpetrators of international crimes affecting large numbers of victims. Significantly, the EC Law itself permits the EC to seek guidance “in procedural rules established at the international level” when, as in this case, there is uncertainty regarding the interpretation or application of existing procedures.<sup>29</sup>

### **Victim participation in proceedings before the ICC**

Under the 1998 Rome Statute of the International Criminal Court (Rome

Statute) and the ICC Rules of Procedure and Evidence (ICC Rules), victims of crimes within the jurisdiction of the Court have unprecedented rights. Where their personal interests are affected, victims may take part in proceedings by making submissions to the court at various stages of the proceedings.<sup>30</sup> However, both the

**There has been increasing recognition of the importance of victim participation in international justice mechanisms.**

Rome Statute and ICC Rules go to great lengths to ensure defendants’ right to a fair and speedy trial, by giving the court broad discretion to limit when and how victims may intervene. Article 68(3) of the Rome Statute permits victims’ views and concerns to be presented and considered, but only at “stages of the proceedings determined to be appropriate by the court and in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.” Significantly (and unlike certain civil law jurisdictions that allow victims to be joined in the criminal proceedings as civil parties), neither the Rome Statute nor the ICC Rules give victims a right to demand the prosecution of particular individuals or to file an appeal against a decision of the trial chambers.

### *Limits on who can participate*

Under the ICC Rules, victims wishing to participate in proceedings, or persons acting with their consent, must make a written application to the court.<sup>31</sup> The court can reject the application if it finds that the applicant is not a “victim,” defined in the Rules as a natural person who suffered harm as a result of the commission of a crime within the jurisdiction of the court, or an organization or institution that sustained direct harm to

**Victim involvement in the proceedings could serve to enhance their overall legitimacy.**

certain types of property.<sup>32</sup> It is not yet clear how close a connection a victim needs to establish to a case or situation under review by the court, but an application can be rejected if the court finds that the victim’s “personal interests” are not affected.<sup>33</sup>

Moreover, the ICC Rules give the court the flexibility to consider applications as a group.<sup>34</sup> Yet, even at this initial stage of the process, the rules suggest that a delicate balance is required between ensuring victims’ rights to participate and the need to “ensure the effectiveness of the proceedings.”<sup>35</sup> Given the large number of potential victims in cases involving mass crimes, the absence of such a rule could easily lead to long delays in the proceedings.

### *Limits on how victims can participate*

Victims whose applications to the ICC are accepted have the right to a legal representative of their choice.<sup>36</sup> However, as with the application process, the ICC Rules recognize that “[w]here there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims... to choose a common legal representative or representatives.”<sup>37</sup> Furthermore, if victims are unable to choose a common representative, the court may impose one upon them,<sup>38</sup> though the ICC Rules explicitly permit the court to provide financial assistance to victims who lack the means to pay for representation.<sup>39</sup>

Once selected, legal representatives may attend and participate in proceedings, including hearings.<sup>40</sup> However, the court may confine their participation to written observations or submissions,<sup>41</sup> and representatives must make an application to the court if they wish to question a witness, an expert, or the accused.<sup>42</sup> In issuing its ruling, the court is required to take into account, among other things, “the stage of the proceedings, the rights of the accused... and the need for a fair, impartial and expeditious trial.”<sup>43</sup> Upon consideration of these factors, the court may specify the manner and order of questions, or itself conduct the questioning on behalf of the victim’s legal representative.<sup>44</sup>

Again, these rules demonstrate that the fair administration of cases involving a large number of victims

may require the imposition of certain measures that limit the manner in which individual victims participate in the proceedings.

*Limits on stages during which victims might intervene*

In an exceptional departure from previous international criminal tribunals, the Rome Statute permits victims to have a potential role at almost all stages of proceedings. Even before proceedings begin, victims may submit information to the ICC Prosecutor in an effort to persuade him to initiate an investigation.<sup>45</sup> Under Article 15(3), victims may intervene when the prosecutor has decided to seek permission from the court to proceed with an investigation; under Article 19(3), victims can express their views to the court on matters of jurisdiction and admissibility; and under Article 68(3), victims may take part, under certain circumstances, in the actual trial proceedings. In addition, Article 75 recognizes victims' right to reparations (including restitution, compensation, and rehabilitation) and permits the court to invite submissions from victims before a ruling on reparations is issued. Significantly, intervention by victims or their legal representatives is not limited to these specific issues; as the ICC Rules elaborate, "[a] Chamber may seek the views of victims or their legal representatives . . . on any issue . . ." <sup>46</sup>

Nevertheless, both the Rome Statute and the ICC Rules make clear that there are limitations to victims'

access to and influence over the proceedings. While victims may present their views and concerns to the court at various stages of the proceedings, it always remains up to the court to determine when such intervention is "appropriate."<sup>47</sup> Moreover, the court may limit participation at any stage in order to ensure proceedings are conducted "in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and

The critical question appears to be how to afford victims a meaningful role in the prosecution of serious international crimes.

impartial trial."<sup>48</sup> Providing a safeguard against the potential for major delays as a result of victim participation, the Rome Statute also explicitly permits both the prosecutor and the person being tried to appeal a decision of the court that might "significantly affect the fair and expeditious conduct of the proceedings . . ." <sup>49</sup>

The balancing of interests between encouraging victim participation on the one hand and the fair and expeditious administration of justice on the other is evident throughout the Rome Statute and ICC Rules. For instance, the rules require the court to notify victims of a decision by the prosecutor *not* to initiate an investigation or prosecute a case in order to allow victims to meaningfully exercise their right to participate,<sup>50</sup> but nothing in the statute

or the rules permits victims to require the prosecutor to reverse such a decision. Although victims might be able to share their views with the court even before the prosecutor decides to initiate an investigation, neither the statute nor the rules expressly require the prosecutor to abide by victims' perceptions of who should be investigated or tried. In other words, unlike some civil law jurisdictions where

### Nothing in the EC Law explicitly provides for victim compensation.

criminal investigations are triggered by victim complaints,<sup>51</sup> the ICC appears to encourage input from victims while at the same time limiting their influence on the selection of persons investigated or tried by the court. Similarly, although victims may participate in post-conviction proceedings, such as the reparations phase, they are not entitled to file an appeal against a decision of the court, with the exception of a decision relating to reparations.<sup>52</sup>

### Lessons from the ICC?

The Rome Statute and ICC Rules, although still untested, provide much greater detail than the EC Law on whether and how victims might participate in proceedings, and suggest that if victims are to have a role at all, certain considerations are necessary in order to ensure that the trials are conducted fairly and that proceed-

ings do not grind to a halt. Indeed, given the massive scale of victimization in cases involving serious international crimes, the absence of clear guidelines limiting who, how, and at what stages victims may participate may lead to significant delays in the proceedings.<sup>53</sup> This would be a particularly troubling result in trials before the EC, as those expected to be subject to prosecution are ageing and may not survive long delays in the process.

For instance, whereas the ICC Rules limit victim participation to persons who suffered harm as a result of the commission of a crime within the jurisdiction of the court, this definition would likely yield an unmanageable number of potential victims in the context of Cambodia, where nearly everyone over the age of 25 has at least one family member who suffered harm, if not death, under the regime of the Khmer Rouge. Clear guidelines giving the EC broad discretion to limit how and when victims may intervene in its proceedings are therefore all the more important. At the very least, the EC should have the flexibility to: 1) consider applications from similarly situated victims as a group, 2) request groups of victims to choose a common legal representative, 3) limit the manner in which such representatives participate in trial and pre-trial proceedings, and 4) determine at what stage of the proceedings intervention is appropriate.

Although such guidelines would provide an initial framework for incorporating victims' voices into the process of holding perpetrators accountable, the limited experience

of the ICC thus far—the prosecutor opened his first investigation in June of 2004—means that the practical challenges associated with implementing these standards are not yet clear. Indeed, some commentators have expressed skepticism about the ability of the ICC to adequately give effect to the Rome Statute’s victim participation provisions.<sup>54</sup>

Nevertheless, exploring this question in the context of the EC presents a unique opportunity. Unlike the ICC, the structural framework of the inquisitorial system, on which the Cambodian legal system (and the EC) is largely based, may make it easier to accommodate direct input from victims. As one commentator notes, “[t]he fact that inquisitorial proceedings are judge-led, as opposed to party-led, indicates that the participation of a third-party would be much less problematic, and would be much less likely to be seen as a factor that could potentially endanger the equality of arms.”<sup>55</sup>

### Prospects for victim participation in proceedings before the EC

Cambodia is in the process of adopting a new penal code and a new code of criminal procedure. However, it is still unclear whether these new codes will be in force before EC proceedings begin and whether they will address the specific challenges surrounding victim participation in trials of mass crimes.

Another significant challenge concerns the budgetary implications of allowing victims to participate. As the ICC Rules suggest, permitting

large numbers of victims to participate in hearings without offending the trial rights of the accused or unduly disrupting or delaying the proceedings may require victims to be represented, even if, as is likely to be the case in many instances, they are unable to afford their own counsel. The ICC has created an Office of Public Counsel for Victims to provide those representing their interests with legal research and

**If victims are to have a role, certain considerations are necessary to ensure that the trials are conducted fairly and do not grind to a halt.**

other assistance.<sup>56</sup> Still, victims’ rights advocates have suggested that not enough resources have been allotted in the court’s budget to ensure that victims are adequately able to exercise their rights under the Statute, despite the ICC’s explicit provision for victim participation.<sup>57</sup> If victims are to have a meaningful role in the EC’s proceedings, resources must be allocated, if not added, to the budget of the Office of Administration<sup>58</sup> and any other office likely to have responsibility over the implementation of victim participation guidelines. Indeed, in light of the scant resources apparently allotted in the EC budget for basic victim-related needs, such as protection and mental health services, it seems clear that new resources will be needed to effectively implement any level of victim participation.

Finally, even the limited experience of the ICC demonstrates the importance of providing victims with accurate and full information, not only about the possible role that they might play in proceedings but also about the limits to such participation. Without this, misinformation and, with it, unmanageable expectations are likely to develop.<sup>59</sup> Thus, if the EC is to contribute to victims' access to justice and

help them move toward healing and rehabilitation, the ambiguities inherent in the EC Law with respect to victim participation must be resolved and information regarding victims' role in the trials of former Khmer Rouge leaders must be communicated in clear and understandable terms to the many Cambodians still struggling to recover from the legacy of the Khmer Rouge.

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### Notes

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1. Press release of the Cambodian Human Rights Action Committee, "Judge Selection for Khmer Rouge Tribunal," August 24, 2005, *available at*: <http://www.licadho.org/press/files/97PRCHRACJudgeKRT05.pdf>. Significantly, Deputy Prime Minister Sok An expressed a similar sentiment when bringing to the floor of the Cambodian National Assembly the draft law on the ratification of the agreement between Cambodia and the United Nations on the Extraordinary Chambers in October 2004. In his remarks, he noted that "provid[ing] justice in the memory of the millions of Cambodians who lost their lives" was one of the key principles that had guided the Cambodian government throughout its negotiations with the United Nations. Deputy Prime Minister Sok An, presentation to the National Assembly on the Ratification of the Agreement between Cambodia and the United Nations and Amendments to the 2001 Law Concerning the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (October 2004), *available at*: [http://www.dccam.org/Tribunal/Analysis/Sok\\_An\\_Speech.htm](http://www.dccam.org/Tribunal/Analysis/Sok_An_Speech.htm).

2. See, for example, Fiona McKay, *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes Against Humanity, Torture and Genocide* (REDRESS, 1999), *available at*: <http://www.redress.org/documents/unijeur.html> (arguing that involving victims of crimes in the judicial process "can be an essential part of the process of healing and rehabilitation for victims, creating a sense of empowerment and closure").

3. David Boyle, "Ending the Impunity of the Khmer Rouge: a Possible Role for the Victims?" Réseau Internet pour le Droit International, November 16, 2004, *available at*: <http://www.ridi.org/boyle/>.

4. Characterizing the "atmosphere of violence—domestic, mob and political" in which Cambodians live today as a "legacy of the culture of violence imposed by the Khmer Rouge," one Cambodian historian suggests that without bringing Khmer Rouge leaders to trial the "full healing of Cambodian wounds" will not occur. Huy Vannak, "Stalling KR Trial Will Only Harm Already Fragile Cambodia," *The Cambodia Daily*, September 9, 2005.

5. See Patricia M. Wald, "To 'Establish Incredible Events by Credible Evidence': The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings," 24 *Harv. Int'l L.J.* 535 (2001), 538.

6. U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by G.A. Res. 40/34, (November 29, 1985). A similar view was reflected in a 1985 Recommendation by the Committee of Ministers of the Council of Europe, which urged European states to take into account the needs of victims throughout all stages of the criminal justice process. Council of Europe, Committee of Ministers Recommendation No. 85(11) (June 28, 1985).



7. Jonathan Doak, “Victims’ Rights in Criminal Trials: Prospects for Participation,” 32 *J. of Law & Society* 294 (2005), 315 (noting that “[r]estitution and rehabilitation are increasingly being mainstreamed as values that ought to be safeguarded by the criminal process”). See also Adam Crawford and Jo Goodey, eds., *Integrating a Victim Perspective within Criminal Justice: International Debates*, Aldershot: Dartmouth Publishing Company Ltd. (2000), 25-28.
8. Doak, 294.
9. Doak, 295 (citing I. Edwards, “An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making,” 44 *Brit. J. of Crim.* 967 (2004), 973).
10. Diane Orentlicher, “Report of the Independent Expert to Update the Set of Principles to Combat Impunity,” U.N. Doc. E/CN.4/2005/102 (2005), para. 7 (internal citations omitted).
11. Doak, 308. This approach is common to Germany and Poland.
12. Doak, 308.
13. Doak, 310-11. This model, which is commonplace in France and Belgium, is often referred to as the *partie civile* procedure.
14. Doak, 297.
15. Doak cites Ireland as an example. There, victims are permitted to be represented by counsel in a *voir dire* “where the defence has applied to introduce previous sexual history evidence.” Doak, 296.
16. In some jurisdictions in the United States, for example, victims of domestic violence are permitted to initiate and prosecute a criminal contempt action against a perpetrator who violates certain provisions of a civil protection order. See, e.g., *Green v. Green*, 642 A.2d 1275 (D.C. 1994) (holding that husband had no constitutional right to public prosecutor in intrafamily contempt proceeding and affirming right of wife to prosecute criminal contempt of the existing protection order). See also David M. Zlotnick, “Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders,” 56 *Ohio St. L.J.* 1153 (1995), 1196.
17. Doak, 308-10 (discussing surveys of the use of the “subsidiary prosecutor” procedure in Germany and Poland). See also Doak, 312 (discussing study of victim participation in Dutch criminal justice system which suggested that “many victims feel that procedures which even allow *passive* participation in the criminal trial carry a certain symbolic importance for many victims which, in turn, can reduce feelings of exclusion and unfairness”) (internal citation omitted).
18. Doak, 312. This proposition is not without controversy, however. Some commentators have maintained that victims who have participated as witnesses in international criminal tribunals have found the process neither healing nor rehabilitative. See, e.g. “Developments in the Law—International Criminal Law: II. The Promises of International Prosecution,” 114 *Harv. L. Rev.* 1957 (2001), 1972 (contending that the conditions in which victims were asked to testify at the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)—including the fact that testimony was shaped by legal needs rather than victims’ needs—were “unlikely to further restorative justice effectively”). Notably, the statutes of these tribunals make “no provision for victim participation.” “Developments in the Law—International Criminal Law,” 1972, n. 91. Thus, the criticism begs the question of whether victims would feel differently if progressive and sensitive victim-focused provisions were adopted and implemented in practice.
19. Doak, 312.
20. The right to be tried without undue delay is protected not only in Article 9(3) of the International Covenant on Civil and Political Rights (ICCPR), adopted Dec. 16, 1966, entered into force Mar. 23, 1976, U.N. Doc. A/6316 (1966) (“[a]nyone arrested or detained on a criminal charge shall be . . . entitled to trial within a reasonable time”), but also in the requirements for a fair hearing contained in Article 14(3)(b) of the ICCPR, General Comment 13, Article 14 (Administration of Justice), U.N. Doc. CCPR/C/21/Rev.1, ¶ 10 (1984).
21. Law NS/KRM/1004/006, Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (October 27, 2004).

22. Law on the Establishment of the Extraordinary, Art. 36 (“The Extraordinary Chamber of the Supreme Court shall decide appeals made by the accused, *the victims*, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court . . .”) (emphasis added).
23. Law on the Establishment of the Extraordinary Chambers, Arts. 20, 23 and 33.
24. Law on Criminal Procedure passed by the National Assembly of the State of Cambodia (January 28, 1993), Arts. 15-16; (translated by the Legal Assistance Unit of the Cambodia Office of the High Commissioner for Human Rights); Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period (September 10, 1992), Art. 27.
25. Law on the Establishment of the Extraordinary Chambers, Art. 2.
26. Law on the Establishment of the Extraordinary Chambers, Art. 38.
27. See David Boyle, “A Possible Role for the Victims,” Réseau Internet pour le Droit International (1999), available at: <http://www.ridi.org/boyle/victims.htm> (“It should be noted, from the outset, that the exact content of Cambodian criminal legislation in this area is difficult to evaluate due to the existence of a plethora of legislative provisions adopted by successive governments, the relative legal value of which is not clear. The main problem results from the fact that between the Vietnamese invasion of Cambodia in 1979 and the election of a representative government in 1993, two or more rival ‘governments’ co-existed in the country.”)
28. Boyle, “A Possible Role for the Victims.”
29. Law on the Establishment of the Extraordinary Chambers, Art. 33.
30. Rome Statute of the International Criminal Court, adopted July 17, 1998, by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, entered into force July 1, 2002, Art 68(3), U.N. Doc. A/CONF.183/9 (1998).
31. ICC Rules of Procedure and Evidence, R. 89, ICC-ASP/1/3 (2002).
32. ICC Rules, R. 85.
33. ICC Rules, R. 89(2).
34. ICC Rules, R. 89(4) (permitting the court to consider “a number of applications” in a manner that ensures “the effectiveness of the proceedings” and to issue “one decision”). See also ICC Regulations of the court, R. 86(6), ICC-BD/01-01-04 (2004).
35. ICC Rules, R. 89(4). See also ICC Regulations, R. 86(6).
36. ICC Rules, R. 90.
37. ICC Rules, R. 90.
38. ICC Rules, R. 90(3). See also ICC Regulations, R. 80(1).
39. ICC Rules, R. 90(5).
40. ICC Rules, R. 91(2).
41. ICC Rules, R. 91(2).
42. ICC Rules, R. 91(3). Exceptionally, representatives do not need to request permission to question participants in reparations hearings.
43. ICC Rules, R. 91(3).
44. ICC Rules, R. 91(3).
45. Rome Statute, Article 15(1).
46. ICC Rules, R. 93 (emphasis added).

47. Rome Statute, Art. 68(3).
48. Rome Statute, Art. 68(3).
49. Rome Statute, Art. 82(d)(1).
50. ICC Rules, R. 92(2).
51. See Doak, 310-11 (describing the right to initiate a prosecution as one of the victims' rights accompanying the *partie civile* procedure). See also Richard S. Frase, "Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care," 78 *Cal. L. Rev.* 539 (1990), 669-70 (discussing French Criminal Procedure Code).
52. Rome Statute, Arts. 81-82. Victims may also request review of the registrar's choice of a common legal representative to represent their interests. ICC Regulations, R. 79(3).
53. In Ethiopia, for instance, where victims were allowed to intervene in the criminal proceedings initiated against persons accused of committing crimes under the Marxist regime from 1974-1991, "proceedings were significantly delayed to allow all complainants to be heard." Boyle, "A Possible Role for the Victims."
54. C. Jorda and J. de Hemptinne, "The Status and Role of the Victim," in *The Rome Statute of the International Criminal Court*, A. Cassesse, P. Gaeta and J. Jones, eds. (2002), 1401.
55. Doak, 314.
56. ICC Regulations, R. 81.
57. Victims Rights Working Group, *Victim Participation at the International Criminal Court: Summary of Issues and Recommendations* (2003), 13 ("[t]he low allotment for legal representation for victims in the budget for the 2nd financial year of the Court is of serious concern").
58. See Law on the Establishment of the Extraordinary Chambers, Art. 30.
59. Victims Rights Working Group, 4 (maintaining that a clear message regarding the court's mandate vis-à-vis victims will "leave it less vulnerable to misinformation or even negative propaganda").

## Prosecuting Senior Leaders of Khmer Rouge Crimes

Over thirty years have passed since the Khmer Rouge took power. Kelly Dawn Askin explains how and why those most responsible can be prosecuted now.

The crimes committed by the Khmer Rouge from 1975-1979 represent one of the greatest mass murder sprees of the 20th century. At least 1.7 million

**Khmer Rouge leaders are still alive and have eluded justice for their crimes.**

Cambodians were killed or died as a result of the oppressive policies imposed by the Khmer Rouge, with execution, starvation, exhaustion from slave labor, malnutrition, and torture the leading causes of death. Privileged, professional, and educated persons, especially teachers, intellectuals, doctors, police, former government officials, and businesspersons were singled out to be killed. Religious figures, ethnic minorities, and foreigners were also targeted for persecution. Torture at the Tuol Sleng (S-21) prison in Phnom Penh was routine, and forced confessions resulted in further victims being purged or sent for re-education. Throughout Cambodia, anyone who questioned the extreme policies or

committed the slightest infraction was subject to abuse, including summary execution, and this included Khmer Rouge cadre suspected of being disloyal to the regime.<sup>1</sup> Indeed, the evidence suggests that fully one quarter of the Cambodian population perished and that young children were not only among the casualties, but were intentionally executed. The senselessness, as well as the ruthlessness, of the crimes remains mind-boggling. Even today, it is difficult to comprehend the violence that the Khmer Rouge, founded and led by Pol Pot, committed without provocation against their fellow citizens.

Pol Pot (Saloth Sar) was born into an upper-middle class Cambodian farming family in 1925, in an area that was then part of French Indochina. In 1949, he traveled to France for education where he became heavily influenced by Marxism and Maoism. Pol Pot returned to Cambodia in 1953 and subsequently became leader of the Communist Party. After escalating disputes with the government of King Sihanouk put him at risk, Pol Pot retreated into the jungle in 1962, where he formed a peasant guerrilla group to resist Sihanouk and, following a 1970 coup, the U.S.-supported Lon Nol government. His army, which became known as the Khmer Rouge (Red Cambodians), seized control of a destabilized Cambodia on April

17, 1975.<sup>2</sup> Cambodia was renamed Democratic Kampuchea, and under Pol Pot's leadership, the Communist Party of Kampuchea and its Central Committee purportedly attempted to build a classless Communist agrarian utopia by creating a new self-reliant Cambodia through extreme agricultural reform:

All foreigners were thus expelled, embassies closed, and any foreign economic or medical assistance was refused. The use of foreign languages was banned. Newspapers and television stations were shut down, radios and bicycles confiscated, and mail and telephone usage curtailed. Money was forbidden. All businesses were shuttered, religion banned, education halted, health care eliminated, and parental authority revoked. Thus Cambodia was sealed off from the outside world. . . . In the villages, unsupervised gatherings of more than two persons were forbidden. Young people were taken from their parents and placed in communals. They were later married in collective ceremonies involving hundreds of often-unwilling couples.<sup>3</sup>

Schools, banks, stores, businesses, media and religious institutions were closed, families separated and family relationships banned, private property was confiscated and all personal rights eliminated. People were evacuated from the cities and forced into the countryside to work in what became known as the "killing fields" for 12-18 hours per day, with deadly purges

used to weed out foreigners and suspected traitors of the regime. Many women and girls were raped before being killed.<sup>4</sup>

For four years, unimpeded by the international community, including the UN, a reign of death, terror, and persecution flourished throughout Democratic Kampuchea. Finally, at the end of December 1978, after years of violent border incidents, the Vietnamese army marched into

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Cambodia and in less than two weeks captured Phnom Penh and deposed Pol Pot. He again fled into the jungle to launch a guerrilla war against successive Cambodian governments for the next 17 years. Pol Pot died, reportedly of heart failure, in April 1998, but several other political, military, and regional Khmer Rouge leaders are still alive and have eluded justice for their crimes.<sup>5</sup>

After several years of negotiation between the UN and the current Royal Cambodian Government, and more years of trying to secure adequate international and Cambodian funding, it appears that the Extraordinary Chambers in the Courts of Cambodia

(EC) are finally going to be established to prosecute the senior surviving leaders of the Khmer Rouge and others most responsible for the heinous crimes committed during the period of Democratic Kampuchea.

### Why now, 30 years later?

Despite the mass murder and other atrocities committed by the Khmer Rouge, there would almost certainly

**The prosecution will focus on indicting perhaps only 10-15 survivors holding high level responsibility for Khmer Rouge crimes.**

be no trials to prosecute the architects of the carnage were it not for a twist of fate in 1993 that changed the course of history, challenging impunity for atrocity crimes. After World War II, the Allied victors of the war rejected the accepted practice of summarily executing their vanquished foes, and instead held international trials in Nuremberg and Tokyo to prosecute high level Nazi and Japanese war criminals.<sup>6</sup> Also in 1945, the newly established United Nations gave its Security Council the task of maintaining international peace and security,<sup>7</sup> prompting promises that the mass slaughter of innocent civilians would “never again” be allowed to occur. Yet between 1945 and the early 1990s, countless mass atrocities were perpetrated throughout the world in vicious

wars or by oppressive regimes, with little or no consequence. It was of course during this period that the Cambodian people were victimized by the murderous Khmer Rouge regime. That the perpetrators were other Cambodians was reminiscent of the Nazi extermination of German Jews during the Holocaust. Still, there was little international response until the Vietnamese army intervened and with relative ease brought an end to the rule of Pol Pot and the Khmer Rouge. Yet no one was held formally accountable for the atrocities.

After the World War II trials, there were five decades of widespread impunity for atrocity crimes committed during armed conflicts or dictatorships. Finally, in the 1990s, a new practice of accountability began to emerge. When images of emaciated detainees behind barbed wire fences and reports of concentration-type camps in Yugoslavia were broadcast around the world, the attention of the international community—particularly powerful Western nations—was awakened with the realization that war and unspeakable crimes were again occurring on European soil. In 1993, the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY or Yugoslav Tribunal) to prosecute war crimes, crimes against humanity, and genocide, in response to credible reports of ethnic cleansing, mass rape, murder, forced deportation, and other crimes committed in that territory of the Balkans.<sup>8</sup> A year later, as over 700,000 innocent Tutsi civilians were systematically raped and slaughtered during

a 100-day genocidal campaign in Rwanda, the UN responded again by setting up the International Criminal Tribunal for Rwanda (ICTR or Rwanda Tribunal) in 1994.<sup>9</sup> As other armed conflicts ravaged continents and targeted particular groups for persecution and eradication, a permanent International Criminal Court was negotiated in 1998 to prosecute war crimes, crimes against humanity, and genocide occurring after the Statute entered into force on July 1, 2002.<sup>10</sup>

Thus in the 1990s, a culture of accountability, rather than impunity, began slowly to take hold. As a result, efforts were made to improve upon the mandate and functioning of the Yugoslav and Rwanda Tribunals so as to make future ad hoc courts more efficient, effective, and responsive to victimized communities. Internationalized efforts to redress atrocity crimes in Sierra Leone, East Timor, and Kosovo resulted in “hybrid” tribunals—involving a mix of national and international judges—being established.<sup>11</sup> Other regional or state initiatives for redressing mass crimes—such as efforts to secure the arrest and trial of former dictators General Pinochet of Chile and Hissène Habré of Chad—were also undertaken during this period.<sup>12</sup> The possibility and urgency of holding trials for the aging Khmer Rouge leaders began growing and gaining momentum, and pressure was put on the UN to secure an agreement with the Cambodian government to establish a court, which it did after several false starts.<sup>13</sup> However, while calls for a Khmer Rouge Tribunal

were near universal, the efficacy of having a majority of Cambodian judges on the court—a non-negotiable condition of the Cambodian government—has caused grave concern in the UN and among Cambodian citizens and others knowledgeable about the corrupt and non-independent Cambodian judicial system.<sup>14</sup>

**The EC will be the first hybrid tribunal to use investigating judges and a primarily civil law system.**

### **EC investigations and prosecutions**

Myriad books, reports, and articles have been written about the crimes committed during the Khmer Rouge campaign of terror, death, and devastation.<sup>15</sup> But one organization has systematically gone about documenting the crimes for the past 10 years. The Cambodian Documentation Center (DC-Cam), is an independent organization established in 1995 to collect evidence of war crimes, crimes against humanity, and genocide, and to preserve the historical record on these crimes. Promoting memory and justice are its primary purposes. DC-Cam has conducted thousands of interviews with Khmer Rouge victims, witnesses, and perpetrators.<sup>16</sup> Because many victims and witnesses have died in the intervening years, the documentary and other evidence gathered by DC-Cam over the past 10 years will



prove indispensable in directing the course of the investigations and providing crucial supporting materials for the trials.

The vast majority of interviews and evidence will need to be collected by the EC prosecution and investigation teams directly. These teams, made up of internationals and Cambodians, will be responsible for developing an

**Counts will likely be limited to less than a dozen per indictee, since additional counts may add significant time to the trial phase.**

investigation and prosecution strategy, gathering evidence (through such means as exhuming graves, conducting detailed interviews, reviewing documents, analyzing data, securing intelligence communications, and examining photographic and other material), establishing chains of command and control, translating documents, drafting indictments, and conducting trials and appeals.

The Law on the Establishment of the Extraordinary Chambers, along with the Agreement between the United Nations and the Royal Government of Cambodia, are the primary documents governing the trials.<sup>17</sup> The EC is located within the Cambodian domestic courts, in the trial and supreme courts (Art. 2new). The facilities are separate from the regular courts, however, and will be located just outside Phnom Penh.<sup>18</sup> It is anticipated that the prosecution

will focus on indicting perhaps only 10-15 survivors holding high level responsibility for Khmer Rouge crimes, namely members of the Central Committee who were the architects of the policies, the most feared physical perpetrators, and the military and regional leaders who communicated and enforced the policies. Additional prosecutions or accountability mechanisms, such as truth commissions, will need to be handled by domestic courts or in other fora.

More specifically, the EC has authority to prosecute “senior leaders of Democratic Kampuchea” and “those who were most responsible for the crimes and serious violations of” Cambodian penal law, international humanitarian laws, and relevant international treaties (Art. 2new). These terms can be interpreted broadly to allow some flexibility to prosecute both persons near the top of the hierarchy and also the most brutal or notorious physical perpetrators, as well as the indispensable mid-level actors, who provided direct lines of communication between the Central Committee and the ordinary cadre. It will be especially important to be able to indict and arrest mid-level persons who could potentially plead guilty to crimes in return for receiving a benefit for agreeing to testify or give evidence against higher level actors. Plea agreements, if allowed, should be used cautiously as leverage to force culpable individuals who bear responsibility for crimes—even if not at the highest levels—to provide command/control and other relevant

information to the EC about the highest level actors. Although not senior leaders themselves, these persons may nevertheless have been among those most responsible for ensuring that the extreme policies and crimes were carried out fully, faithfully, and swiftly.

The crimes within the jurisdiction of the EC include certain domestic and international crimes committed between April 27, 1975, and January 6, 1979 (Art. 1). Thus, the temporal jurisdiction of the tribunal is limited, despite the fact that serious crimes were also committed in Cambodia outside the parameters of the specified dates. Domestic crimes include homicide, torture, and religious persecution (under the 1956 Penal Code, Art. 3new). International crimes include genocide (Art. 4), crimes against humanity (including murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts) (Art. 5), grave breaches of the 1949 Geneva Conventions (i.e., the war crimes of willful killing, torture, or inhumane treatment, willfully causing great suffering, wanton destruction of property, compelling one to serve in hostile forces, willfully depriving one of a fair trial, unlawful deportation or confinement of civilians, and taking civilians as hostages) (Art. 6), unlawful destruction of cultural property (Art. 7), and crimes against internationally protected persons (Art. 8).

Cambodian and international co-prosecutors and co-investigating judges will share responsibility for investigating, indicting, and prosecut-

ing the crimes. Procedures are put into place for disagreements which may arise and for responsibilities and coordination among and between the two offices (Arts. 16-28). The EC will be the first hybrid tribunal to use investigating judges and a primarily civil law system, as well as dual partnerships between locals and internationals, so unanticipated challenges

**Prosecutors are limited by logistical and practical obstacles, including time limitations, financial constraints, and language considerations.**

and benefits will almost surely arise.

The prosecution team (which as used here includes co-prosecutors, co-investigating judges and their staff) may issue indictments against individuals suspected of committing, planning, instigating, ordering, or otherwise aiding and abetting a justiciable crime. They may also indict, under the theory of command responsibility or superior authority, civilian or military leaders who failed to exercise effective authority and control over a subordinate who committed such crimes. Acting pursuant to an order of a superior does not relieve a suspect of individual criminal responsibility (Art. 29). If the EC follows jurisprudence established by the ICTY, participation in a joint criminal enterprise is also a viable form of establishing criminal responsibility, as it is a form of “commission” of a crime.<sup>19</sup>

Under the Joint Criminal Enterprise (JCE) theory of liability, used in the post-World War II Nuremberg trials and further developed by the ICTY, all who knowingly participate in a joint criminal endeavor or can be held responsible for all planned or foreseeable crimes committed during the period of their participation. This mode of liability, as well as that of co-perpetration, seems well suited to prosecutions in the EC.

**Most victims want the person who they know killed their family held accountable, but internationalized courts do not have the capacity to prosecute every crime committed.**

JCE is considered a form of individual criminal responsibility (not superior responsibility). A JCE is composed of more than one person participating in some way (through assistance or other contribution) in a common plan/design/purpose which amounts to or involves a justifiable crime. The common plan can be agreed upon in advance or can materialize extemporaneously and it can be inferred from the facts. There are three recognized forms of JCE. JCE I is the basic form, in which all co-defendants share the same criminal intent/goal. They knowingly participate in some way and intend the result. JCE II is the systemic form. It is a subset of JCE I and typically

applies to concentration camp type situations or systems of mass persecution or oppression. In JCE II, there is an organized system of ill-treatment, and defendants have awareness of the nature of the system and an intent to further that system. There is some form of participation in the system. JCE III is the extended form, where responsibility for crimes committed beyond the common plan can be incurred. This happens when someone—not necessarily the defendant—commits a crime outside the common purpose, but the act is a natural or foreseeable consequence of the criminal endeavor. Participants willingly take a risk that additional predictable crimes will be committed. The various forms may, and often do, overlap or occur parallel to each other, and thus they are not mutually exclusive.<sup>20</sup>

The prosecution may indict suspects separately or jointly, thus for example joint trials of Central Committee members, Zone leaders, or prison camp leaders are possible. Counts in the indictments will likely be limited to less than a dozen per indictee, since each crime must be proved beyond a reasonable doubt and additional counts may add significant time to the trial phase. It would be useful for the prosecution to consider using persecution as a crime against humanity as one of the leading charges. The crime of persecution has been extensively developed by the ICTY in particular, and is a valuable means of taking a series of violent, discriminatory, or repressive acts—such as murder, torture, rape, forced displacement, and inhumane treatment

and conditions—and wrapping them into one crime to tell a larger story of abuse committed against a specified target group. It is a practical way to reduce the number of counts in an indictment without distorting the historical record by ignoring other criminal activity. The primary disadvantages of using persecution to capture a broad array of crimes are threefold. One is that the term “persecution” does not necessarily indicate a particular nature of a crime that may be important to highlight. Thus, for example, a conviction of persecution for a system of mistreatment—for example, slave labor, rape, sexual slavery, torture, and starvation—may not carry the same outrage as rape or sexual slavery and obscures the sexual nature of some of the crimes committed. Secondly, judges tend to fail to treat persecution with the seriousness it deserves at sentencing, by ignoring the fact that it encompasses not only many serious crimes, but also crimes committed repeatedly over a long period of time. Thirdly, it may be difficult to establish that some of the persecutorial acts were committed on political, racial, or religious grounds, although the fact that a majority of Cambodians targeted at the time were reportedly Buddhist or non-Communist may reduce some of these evidentiary burdens.

The maximum punishment allowed to be imposed by the EC is life imprisonment, in conformity with international human rights standards. The minimum sentence is five years imprisonment. In addition,

personal property, money, and real property unlawfully acquired may also be confiscated by the tribunal and returned to the state (Arts. 38-39). Ideally, a mechanism will be established to place such proceeds into a fund for victims.

Several legal issues will have to be dealt with early on through interlocutory decisions. For example, defen-

**If the EC allows plea agreements, they must be treated sensitively and granted sparingly.**

dants in virtually every other internationalized court have challenged the legitimacy of the courts. Two likely EC indictees, Ta Mok and Duch, have been held in detention since 1999 without trial, raising very serious human rights concerns and pre-trial detention issues. In 1979, a “people’s revolutionary tribunal” held an *in absentia* trial against Pol Pot and Ieng Sary, convicting them of genocide and sentencing them to death. Although considered little more than a show trial, Ieng Sary’s defense team will likely raise the issue of double jeopardy. And in the 1990s, Ieng Sary and Nuon Chea were reportedly granted pardons after defecting from the Khmer Rouge, yet the Cambodian government has more recently pledged not to give pardons or amnesties to any persons convicted by the EC.<sup>21</sup>

### Managing expectations of the prosecutions

It is vital that ordinary Cambodians appreciate the real limitations the EC—like other international/hybrid tribunals—is likely to face, including restrictions on its prosecutorial scope, mandate, and jurisdiction. The prosecutors are limited not only by the applicable laws and statutes, but also by logistical and practical obstacles, including time limitations, financial

**Imperfect as these trials are likely to be, they stand as the last chance to provide judicial accountability for Khmer Rouge era crimes.**

constraints, and language considerations. Memories fade, destroyed homes and communities are rebuilt, witnesses die, injuries heal, evidence is misplaced, fears and suspicions impede cooperation, people go on with their lives and choose not to reopen past wounds, and so on. Evidence, particularly documentary, medical, and forensic evidence, is often intentionally destroyed or simply becomes lost or contaminated over time. Many other impediments to full and satisfactory prosecutions remain ever present. For example: investigations into crimes against humanity and genocide tend to take many months, even years; trials for mass atrocities are inevitably long and complex; only a handful of individuals can be prosecuted in the three years allocated for Khmer Rouge trials (for example, in the past 12 years, the

ICTY has only convicted 55 persons through the appeals stage, and of these, 14 were the result of guilty pleas); if prosecutors fail to prove their case beyond a reasonable doubt, the accused will be acquitted; suspects are entitled to fair trial guarantees and minimum standards of treatment which may conflict with rights of victims and witnesses; and many victims who want to tell their stories to the court may not be able to, particularly if the crime they suffered has already been adequately covered by other evidence or cannot be linked to a particular accused on trial. Nonetheless, there are many more positives than negatives in prosecuting mass atrocities and holding high level culprits accountable for their crimes. Further, the fact that the proceedings will primarily follow civil law practices indicates that the trial processes may not be as onerous, lengthy, and detailed as in other tribunals (a fact which is likely to have both positive and negative consequences).

One of the most contentious issues to anticipate concerns the number and level of indictees tried by the EC. Most victims want the person who they know killed their family or raped their daughter held accountable, but internationalized courts do not have the capacity to prosecute every crime committed during mass atrocity situations. Rarely are the people who carried out orders or policies on the ground prosecuted in internationalized tribunals, and if they are, such prosecutions tend to be limited to those who were especially notorious for their brutality or sadism or individuals physically

responsible for the deaths or abuse of large numbers of innocent people.

Some Cambodians will undoubtedly be dissatisfied that the jurisdiction of the tribunal is limited to the period of April 17, 1975, to January 6, 1979, as many serious crimes were committed outside these dates. Many will also be rightly disgruntled that those culpable from other countries will not be held accountable for complicity they may have had in destabilizing Cambodia, allowing the crimes to occur, or causing mayhem themselves.

Additionally, trials can give perpetrators a platform to present their views, their defenses, and their rationalizations/excuses, and they may defiantly deny or express no remorse for their crimes, thus pouring salt into wounds and deepening the pain and hostility. As all the defendants will be elderly and perhaps frail or sickly, there will be some natural tendency to show them compassion, particularly by the younger generation who do not remember the atrocities. Some youth may even believe them, refusing to accept that Cambodians committed atrocities against other Cambodians for largely incomprehensible reasons. This will likely generate resentment among survivors who still remember the ruthlessness and cruelty attributable to the Khmer Rouge leadership. Further, defendants will try all sorts of medical excuses (physical and mental) to avoid prosecution or delay trials. (Milosevic, for example, uses his high blood pressure to cause extensive trial delays in the ICTY; the chamber only sits for half-days three days a week to minimize the stress on him.)

Plea agreements are another very sensitive topic. Plea agreements were gradually accepted at the ICTY, but the angry reaction on the ground in Bosnia-Herzegovina and Croatia was palpable, with victims regularly denouncing such actions. Survivors reacted viscerally to any discussion of “plea bargaining” or “plea negotiations,” a concept foreign to their judicial system, as it was viewed as a means to bargain away responsibility for their crimes. Initially, indictees would agree to plead guilty to one count, such as persecution as a crime against humanity, in return for having other counts dropped. Responding in part to the fury these plea agreements generated, however, the tribunal has often ceased to drop *all* other charges, insisting instead that the defendant plead guilty to most charges, recite in detail the crimes he or she is admitting to in open court, demonstrate genuine remorse, and agree to give evidence against other accused. While this often results in a reduced sentence, it saves millions of dollars, avoids a long trial, and may serve to convict higher level accused and establish a factual record of the crimes. Although many victims in the former Yugoslavia are still dissatisfied with plea agreements, there is some grudging recognition that it is useful for an indictee to admit that a crime was committed, and that they are responsible, as opposed to continuing to assert their innocence and to plead not guilty. If the EC allows plea agreements, they must be treated sensitively and granted sparingly, and used as a tool to require less culpable actors

to testify against those surviving leaders most responsible for the crimes. The Rules of Procedure and Evidence, EC internal regulations, or other Cambodian laws will need to provide some mechanism allowing and governing such agreements. For example, the EC does not have the authority to grant full immunity/amnesty from prosecution by other courts to persons who may share responsibility for war crimes, crimes against humanity, or genocide, but the EC prosecution section can agree not to prosecute or it can agree to recommend a low or suspended sentence for persons cooperating with the tribunal.

There is widespread consensus that, imperfect as these trials are likely to be, they stand as the last chance to provide judicial accountability for Khmer Rouge era crimes. Consequently, it will be important for governments to share intelligence information on the crimes with the tribunal, to provide adequate funding

and other logistical support (such as security, translation, training, counseling, technology, computers, transportation) and for UN agencies, NGOs, and other organizations to do what they can to improve the judicial process and provide outreach and other services throughout Cambodia (through court monitoring, victim-witness support services, media support, etc). When the trials are completed, it is hoped that they will have provided some measure of justice to victims of the Khmer Rouge crimes, that they will have positively affected Cambodia's domestic justice system, and that they will have created space and opportunity within Cambodia to begin broader justice and accountability initiatives, including perhaps domestic trials of lower level accused, truth commission-type mechanisms to officially recognize the full scope of the Khmer Rouge crimes and who shares responsibility for them, and some form of reparation.

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### Notes

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1. See, for example, Philip Short, *Pol Pot: Anatomy of a Nightmare* (Henry Holt and Company, 2005); David P. Chandler, *A History of Cambodia* (Westview Press, 2000); Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-1979* (Yale University Press, 2nd ed., 2002); David P. Chandler, *Brother Number 1: A Political Biography* (Westview Press, 1999).

2. Most historians note that Pol Pot would likely not have been able to rise to power in Cambodia had it not been for U.S. economic and military destabilization of Cambodia. See, for example, Ben Kiernan, *The Pol Pot Regime*, 16. By 1975, Sihanouk was nominal head of the Khmer Rouge, a position he retained until 1979.

3. The History Place, "Genocide in the 20th Century, Pol Pot in Cambodia 1975-1979 2,000,000 Deaths" (undated), available at: <http://www.historyplace.com/worldhistory/genocide/pol-pot.htm>.

4. See especially *The Khmer Rouge Rice Fields: The Story of Rape Survivor Tang Kim*, film directed by Rachana Phat and Youk Chhang, DC-Cam (2004); Katrina Anderson, "Turning Reconciliation on Its Head: Responding to Sexual Violence Under the Khmer Rouge," Vol. 3(2) *Seattle Journal for Social Justice*, 785-832 (2005).



5. The Standing Committee of the Khmer Rouge Central Committee or Communist Party of Kampuchea (CPK) consisted of: Pol Pot (Brother No. 1) as general secretary, Nuon Chea (Brother No. 2) as prime minister and deputy secretary of the CPK, Ieng Sary (Brother No. 3) as deputy prime minister for Foreign Affairs (and Pol Pot's brother-in-law), Khieu Samphan as president of the Khmer Rouge, Ta Mok (Brother No. 7, a.k.a. Ung Choeun) a Khmer Rouge leader and Zone Secretary, and Ieng Thirith, wife of Ieng Sary. Other important surviving leaders include Duch (Kaing Guek Iev) who operated the S-21 torture center, and Sou Met and Meah Mut, CPK Military Division chairmen. See, for example, Khmer Rouge, from Wikipedia, the free encyclopedia, available at: [http://en.wikipedia.org/wiki/Khmer\\_Rouge](http://en.wikipedia.org/wiki/Khmer_Rouge); Steve Heder with Brian D. Tittlemore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*, Documentation Center of Cambodia (2004).
6. Charter of the International Military Tribunal, Annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), August 8, 1945, 82 U.N.T.S. 59; 279 Stat. 1544; Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20. The Annex to the Special Proclamation contains the Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, 4 Bevans 21, as amended Apr. 26, 1946, 4 Bevans 27.
7. Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, at Chap. VII.
8. See Resolution 808, U.N. Security Council, U.N. Doc. S/RES/808 (1993) (establishing the International Criminal Tribunal for the former Yugoslavia—the “ICTY Statute”).
9. See Resolution 955, U.N. Security Council, U.N. Doc. S/RES/955 (1994) (establishing the International Criminal Tribunal for Rwanda—the “ICTR Statute”).
10. Rome Statute of the International Criminal Court, 1998 Sess., U.N. Doc. A/CONF.183/9 (1998), entered into force July 1, 2002 (ICC Statute).
11. Hybrid or international courts generally have both international and domestic prosecutors, judges, and defense counsel, and are typically located in the countries where the crimes were committed. See e.g., Statute of the Special Court for Sierra Leone, pursuant to S.C. Res. 1315 (2000) of August 14, 2000, available at [www.sc-sl.org](http://www.sc-sl.org). See also Regulation 2000/15 “On the Establishment of Panels [in East Timor] with Exclusive Jurisdiction over Serious Criminal Offences,” UNTAET/Reg/2000/15, of June 6, 2000; and Regulation 2000/64, “Assignment of International Judges and Prosecutors [in Kosovo] and Change of Venue,” of December 15, 2000, available at: [www.unmikonline.org](http://www.unmikonline.org).
12. See for example, Amnesty International, “Pinochet Case: One Step Closer to Justice,” October 8, 1999, available at <http://web.amnesty.org/library/Index/ENGEUR450371999?open&of=ENG-2U3>; Derechos Human Rights, “Chile: Criminal Procedures against Pinochet in Spain,” (undated), available at: <http://www.derechos.org/nizkor/chile/juicio/eng.html>; Human Rights Watch, “The Case against Hissene Habre,” September 2005, available at: <http://www.hrw.org/justice/habre/>; Amnesty International, “The Habre Legacy,” October 16, 2001, available at: <http://web.amnesty.org/library/Index/ENGAFR200042001?open&of=ENG-TC.D>.
13. See articles by Craig Etcheson and H.E. Sok An in the present issue of *Justice Initiatives*.
14. See Amnesty International, “Kingdom of Cambodia: Amnesty International’s Positions and Concerns Regarding the Proposed ‘Khmer Rouge’ Tribunal,” April 25, 2003, available at <http://web.amnesty.org/library/Index/ENGASA230052003?open&of=ENG-KHM>.
15. See, for example, Craig Etcheson, *After the Killing Fields: Lessons from the Cambodian Genocide* (Praeger, 2005); Peter Maguire, *Facing Death in Cambodia* (Columbia University Press, 2005); Tom Fawthrop and Helen Jarvis, *Getting Away With Genocide: Cambodia’s Long Struggle against the Khmer Rouge* (Pluto Press, 2004); Suzannah Linton, *Reconciliation in Cambodia* (2004); Loung Ung, *First They Killed My Father: A Daughter of Cambodia Remembers* (HarperCollins, 2000); Heder and Tittlemore, *Seven Candidates for Prosecution*; Dith Pran and Kim DePaul, eds., *Children of Cambodia’s Killing Fields: Memoirs by Survivors* (Yale University Press, 1999); David Chandler, *Voices from S-21: Terror and History in Pol Pot’s Secret Prison* (University of California Press, 1999); Ben Kiernan, *The Pol Pot Regime*. See also “The Report of the Group of Experts for Cambodia Pursuant to General

Assembly Resolution 52/135,” by Ninian Stephen, chairman, Rajsoomer Lallah, and Steven R. Ratner, February 18, 1999, annexed to Identical Letters Dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, UN Docs. A/53/850 and S/1999/231, March 16, 1999.

16. See [www.dccam.org](http://www.dccam.org).

17. Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on October 27, 2004 (NS/RKM/1004/006), amending the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Passed by National Assembly on October 4 and by Senate on October 8, 2004, Phnom Penh Cambodia; and 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, October 19, 2004, both available at: [www.cambodia.gov.kh/krt/](http://www.cambodia.gov.kh/krt/).

18. See [www.cambodia.gov/kh/krt/english/index.htm](http://www.cambodia.gov/kh/krt/english/index.htm).

19. See especially *Prosecutor v. Tadic*, Judgement, IT-94-I-A, 15 July 1999 [Tadic Appeals Chamber Judgement]; *Prosecutor v. Krstic*, Judgement, IT-98-33-T, 19 April 2004 [Krstic Trial Chamber Judgement]; *Prosecutor v. Kvocka*, Judgement, IT-98-30-T, 2 Nov. 2001 [Kvocka Trial Chamber Judgement]. The JCE theory of liability is now explicitly included in other international and hybrid tribunal statutes, including that of the ICC and the Special Court for Sierra Leone. See [www.icc-cpi.int](http://www.icc-cpi.int); [www.sc-sl.org](http://www.sc-sl.org).

20. See, for example, *Prosecutor v. Tadic*, Judgement, IT-94-I-A, 15 July 1999 [Tadic Appeals Chamber Judgement], at paras. 195-229; *Prosecutor v. Kvocka*, Judgement, IT-98-30-T, 2 Nov. 2001, at paras. 77-119 [Kvocka Trial Chamber Judgement]; *Prosecutor v. Kvocka*, Judgement, IT-98-30-A, 28 Feb. 2005, at paras. 77-119 [Kvocka Appeals Chamber Judgement]; *Prosecutor v. Ntakirutimana*, Judgement, ICTR-96-10A and ICTR-96-17A, 13 Dec. 2004, at paras. 461-468; *Prosecutor v. Milutinovic et al.*, Decision on Dragoljub Odjanic’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, IT-99-37-AR72, 21 May 2003 [Ojdanic Joint Criminal Enterprise Appeal Decision]; *Prosecutor v. Stakic*, Judgement, IT-97-24-T, 31 July 2003, paras. 438-442 [Stakic Trial Chamber Judgement]; *Prosecutor v. Krnojelac*, Judgement, IT-97-25-A, 17 Sept 2003, paras. 64-124 [Krnojelac Appeals Chamber Judgement]; *Prosecutor v. Vasiljevic*, Judgement, IT-98-32-A, 25 Feb. 2004, paras. 94-111 [Vasiljevic Appeals Chamber Judgement]; *Prosecutor v. Brdjanin*, Decision on Interlocutory Appeal, IT-99-36-A, 19 March 2004 [Brdjanin Interlocutory Appeal Decision]; *Rwamakuba v. Prosecutor*, ICTR-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 Oct. 2004 [Rwamakuba Interlocutory Appeal Decision on JCE and Genocide].

21. See, for example, BBC News, “Key Figures in the Khmer Rouge,” October 4, 2004, available at: <http://news.bbc.co.uk/1/hi/world/asia-pacific/2856771.stm>; Youk Chhang, Dith Pran, and Ben Kiernan, “Bloody Tourists in a Land of Skulls,” January 2, 1999, available at: <http://www.dithpran.org/guardian.htm>; Kur Munthit, “Cambodia’s Legislature Bars Government from Pardoning Khmer Rouge,” October 5, 2004, available at: <http://www.genocidewatch.org/CambodiapassesamendedKRTribunallaw5October2004.htm>; Richard Woodd, “Price of Justice for Khmer Rouge up \$10m,” June 17, 2004, available at <http://www.globalpolicy.org/intljustice/tribunals/cambodia/2004/0617price.htm>.

## CHALLENGES

## Judging Genocide

Genocide was recognized as a legal concept only fairly recently. **Patricia M. Wald** considers the complexities of genocide jurisprudence.

Genocide is generally considered the most serious of the international or universal crimes. Although many genocides have taken place in history, genocide was defined as a separate and distinct crime only after World War II—it did not appear in the indictments or the judgments at Nuremberg. The terrible crimes involved in the Holocaust were charged as crimes against humanity or as part of Germany's preparations for a war of aggression. Within months of the end of World War II, however, the United Nations General Assembly passed a resolution recognizing genocide as a separate crime and the Convention Against Genocide was adopted by the UN in 1948.<sup>1</sup> Still, for nearly 50 years thereafter, the charge of genocide was legally confined to situations arising out of the Holocaust such as Adolph Eichmann's trial in Jerusalem. That is, until the ad hoc tribunals for war crimes committed in Rwanda and Bosnia came along in the mid-nineties.<sup>2</sup>

At the same time, the term “genocide” took on a life of its own in the popular press and even in political and some diplomatic circles. Virtually every massacre or mass execution

across the globe was called genocide by some groups, often calculatedly, for its emotional effect: Vietnam, the Democratic Republic of Congo, Sierra Leone, as well as Bosnia, Rwanda and Cambodia. One writer describes the prevalent attitude as, “If this is awful, it must be genocide.”<sup>3</sup> In other cases the opposite has been true: diplomats were forbidden to use the “G” word for fear it would bring unwelcome pressure to do something positive by way of dramatic intervention in the beleaguered country.<sup>4</sup> Thus, the most important job for an international tribunal is to give precision and predictability to a concept like genocide that has been used often indiscriminately and even recklessly. To a significant degree, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) have done this, though some important questions of interpretation in the law of genocide remain unanswered. But the two Tribunals have done something else even more important—they have applied the legal definition of genocide in the Convention to situations very different factually and politically from the Holocaust, and in so doing they have liberated the crime from its historical origins. No longer do scholars decide if a mass atrocity is genocide by

comparing it in scope and method of destruction to the Nazi extermination of Jews, Roma, or Poles, but rather they must look carefully to see if the facts in the specific case fit the legal definition as interpreted by the court. And that, of course, is exactly what judging genocide is about. Genocide is, in one author's words, "a genuine legal norm of general application rather than a symbol of a unique historical phenomenon."<sup>5</sup>

**The most important job for an international tribunal is to give precision and predictability to a concept like genocide that has been used indiscriminately and even recklessly.**

At the same time there is a concern among international commentators and jurists that the currency of genocide not be diluted, that it be saved for the worst and most atrocious attempts to wipe out vulnerable groups. Judges sitting on genocide cases have said this explicitly.<sup>6</sup> Courts have been warned against interpreting the Genocide Convention's requirements too expansively to include too much.<sup>7</sup> The more conservative scholars point out that just because an atrocity is not labeled genocide doesn't mean it will go unpunished; it will likely still be punishable as a crime against humanity or even a war crime.<sup>8</sup> But genocide has its own unique stigma and should not lightly

be invoked. This exclusivity notion is one that judges called on to decide genocide charges must keep in mind. The laconic text of the genocide definition of the Convention, as we will see, is frequently susceptible to different interpretations, and, indeed, different courts have interpreted parts of that definition differently. As time goes by, some of those differences may be reconciled, but as of now a tribunal may be faced with definite choices as to what the law means.

One other caution bears noting before embarking on a discussion of the legal requirements of genocide: all genocides—crimes against humanity, too—have complex historical, social, and political roots. Some courts have involved themselves in searching out these roots, and both prosecution and defense parties are prone to offer them up as proof of guilt or justification. Generally, I believe it is a mistake for courts to go down that road too far. Judges are not competent historians and they must be aware they are getting polarized versions of history handed to them by the parties' chosen experts. Unless the history has some direct relationship to the intent or knowledge of the accused in the context in which he or she committed the alleged crime or to an element of the crime itself—as for example in the case of a crime against humanity, where it must be proved that the specific crime was part of a widespread and systematic campaign against civilians, or, in genocide, that a particular type of group has been targeted—the court should forget the history or

merits of the conflict, and concentrate on the specific act of genocide that is charged.

With reference to Cambodia, it should be noted that the Law on the Establishment of the Extraordinary Chambers specifically includes genocide within the court's jurisdiction (Article 4). Experts and commentators over the years have differed as to whether the horrendous events between 1975-1979 meet the rigorous definition in the Genocide Convention, the same one adopted and restated in the Extraordinary Chamber's law. Those events have been characterized as genocide by the United States Congress, labeled "auto-genocide" by a UN Rapporteur, and their status left to be decided by the courts in the Report of the Group of Experts for Cambodia created by the UN.<sup>9</sup> It seems likely that if genocide is charged by the Extraordinary Chamber's prosecutors, the strict legal definition will be the essential lens through which the terrible facts must be viewed.

### Defining genocide

As to the definition of genocide that will govern a court's decision-making, there are minor variations—but only minor—between that used in the statutes of the two ad hoc tribunals and the more comprehensive definition provided in the Rome Statute establishing the International Criminal Court (ICC).<sup>10</sup> The definition, in essence, comes straight out of the Genocide Convention. Genocide involves the commission of one or more of five acts "with the intent to

destroy in whole or in part a national, ethnical, racial, or religious group as such." The five acts are: killing members of the group; causing serious physical or mental harm to group members; deliberately inflicting on the group conditions calculated to bring about their physical destruction; imposing measures intended to prevent births within the group; and forcibly transferring children from

Experts and commentators have differed on whether the horrendous events of 1975-1979 meet the rigorous definition in the Genocide Convention.

one group to another. The hardest part to prove in most genocide cases is the very specific intent "to destroy in whole or in part [the group] as such." It is not enough to want to destroy some or even a majority of members of the group—a perpetrator of genocide must set out to destroy the group (or a distinct part of it) "as such." This goal of group destruction is why genocide is at the apex of contemptible crimes—it involves the extinction of a distinct set of people from the world community, not just varied individuals, no matter how many.

### *Intent*

Over time, genocide has come to be distinguished from "crimes against humanity." Many of the underlying

prohibited acts that give rise to genocide and to a crime against humanity are the same. But the perpetrator of a crime against humanity must have knowledge that his or her act is part of a widespread and systematic campaign against civilians. The perpetrator need not be shown to share any intent as to the success of the bigger campaign.<sup>11</sup> Genocide, on the other

**Defendants are likely to argue that the killings were motivated by massive programs of social and economic change, with no intent to destroy any particular group.**

hand, does not require either knowledge of or even the existence of a wider attack in the background. The ICTY has held that a single person without affiliation with anyone else or any plan or policy could commit genocide if he or she had the statutory intent to destroy the group.<sup>12</sup> The ICC, however, has added a requirement in its definition of the elements of the crime that the perpetrator's act be "in the context of a manifest pattern of similar conduct directed against that group or was conduct that could effect such destruction."<sup>13</sup>

Thus, genocide can be committed by an individual, of high or low position; it need not be done pursuant to an overall policy or plan; and genocide does not even require a racist or hate motive based on religious or ethnic grounds. This latter difference between intent and motive has

plagued and confused courts. It comes down to the notion that the accused may have intended to destroy the group for several reasons—he may, for example, have been motivated to get rid of it in order to grab land, or even to promote himself in the eyes of his superiors. But, to reiterate, he must, *inter alia*, have the intent to destroy the group "as such"—he cannot be acting just out of greed against his neighbors who happen to be members of the group, or mechanically following orders to kill on an ad hoc basis just to get the promotion. It is clear that discerning the precise intent of the perpetrator may be difficult, especially when it must be gleaned from circumstances, and no tell-tale memoranda (such as the Nazis left behind) exist.

On a practical level, it is unlikely that most prosecutors would bring a genocide charge against a low-level single defendant even if the required intent could be proved. Nonetheless, we did have one such prosecution while I was at the ICTY—a camp shift commander who called himself "Adolph" after Hitler, shot a "quota" of Muslim prisoners every day and proudly announced that in the new Serbia, all Muslims would be killed or enslaved. The Appeals Chamber found that there was evidence enough of genocidal intent to go forward to trial but in its discretion decided it was not worth the court's resources since the accused had already pled guilty to lesser crimes that would keep him in prison for the rest of his natural life.<sup>14</sup> I doubt if many "lone wolf" prosecutions for genocide will be brought against low-level perpetrators in the

future, but rather the focus will be on a Milosevic or other highly-positioned civic or military officials.

Among several obvious areas of contention in any Extraordinary Chambers trial on genocide charges would be proof of the specific intent to destroy a protected group in whole or in part “as such.”<sup>15</sup> It has been pointed out that Khmer Rouge defendants are not apt to have left the Nazi-like paper trail of intent behind them but rather that any genocidal intent may have to be gleaned in large part from circumstances and the nature of their acts. This assumes, of course, that the prosecution would be able to surmount an earlier obstacle of demonstrating the alleged genocidal acts were targeted at a group that fell within the definition’s protective orbit, a matter discussed subsequently. The Khmer Rouge defendants, if they admit to acts within the definition, are likely to argue that killings, maltreatment, and forcible transfers were motivated by massive programs of social and economic change, with no concurrent intent to destroy any particular protected group within the population.<sup>16</sup>

#### *Destruction of a group*

The genocidal intent has to be to “destroy” a group. That means—and here there is a wide consensus though not absolute unanimity—to physically or biologically destroy the group (or part of it), not just to humiliate or even to make the group suffer physically, but to wipe it off the face of the earth.

The major dispute here has been whether genocide includes destroying the culture rather than the physical existence of a group, i.e., destroying its places of worship, forbidding its language, destroying all the indicia that make the group distinct. Although the latter may be evidence of a broader intent to destroy the group physically, most courts have said the more limited intent to destroy the group culturally is not by itself enough to constitute

#### The intent must be to destroy a group—in whole or in part.

genocide. Thus, the Yugoslav Tribunal has held that imprisoning Bosnian Muslims in a concentration-like camp with horrible food, low medical care, and random killing and torture was not genocide because it lasted only a few months and not everyone was targeted for killing. On the other hand, everyone seems to agree that the infamous expulsion of Armenians in World War I in which they were forced by the Turks to march with hands tied behind them, privy to assaults and robbery without food or care, was a kind of genocide though it happened before the crime was legally defined.<sup>17</sup>

One case on which I sat at The Hague illustrates the complexity of applying the definition. It involved the Srebrenica massacres. After that town—a U.N. enclave—was taken militarily by the Bosnian Serbs, all the 8,000 young men, civilians and



military, were captured and subjected to mass executions and secret burials in one week. The Serbs, however, bused the women and children out of the territory. The ICTY held that by killing all the men, the Serbs intended to—and did—ensure that the women and children would not return to Srebrenica because of the patriarchal nature of the society; and, indeed, that

The greatest obstacle prosecutors might encounter would be defining the victims of Khmer Rouge atrocities as a “national, racial, ethnical or religious group.”

is what has happened.<sup>18</sup> The Muslims in Srebrenica had been destroyed as a group. But if the Serbs had merely deported everyone—as they did in some other areas—it would probably have been a crime against humanity but not genocide.

Intent to destroy has often to be inferred from circumstances; most genocidal actors, unlike the camp commander I referred to, do not put their real intent on paper or even talk of it (they learned their lessons from the Nazis at Nuremberg who were convicted on their voluminous paper trails).<sup>19</sup> Some of the circumstances from which tribunals have inferred genocidal intent include (apart from explicit oral and written statements): the scale and systematic nature of assaults on a group; whether other groups are spared such conduct; or

the absence of alternative explanations for the alleged genocidal acts. The Bosnian Serbs in the Srebrenica massacre, for example, originally claimed they had executed only soldiers in the course of combat; recent massacres in Darfur were explained as attempts to flush out rebel soldiers from villages harboring them.<sup>20</sup> Perhaps the deepest division among genocide commentators and judges is the issue of whether an accused can ever be convicted of genocide—or participation therein—if he lacks the personal intent to destroy the group but has knowledge of the fact that his act will have that consequence. Some believe that there is and should be a trend toward interpreting genocide as requiring only that the perpetrator know his act will work to destroy the group, especially when the actor is in a high enough position to be able to do something effectively to stop the genocide. When he fails to do anything in such circumstances and especially when he actively contributes to the genocide going forward, should that not be enough to satisfy the intent requirement?<sup>21</sup> The Appeals Chamber at The Hague said, in the *Krstic* case, that in such a case the accused is aiding and abetting genocide but he or she cannot be found guilty of directly perpetrating genocide.

In *Krstic*, the commander of the Drina Corps knew what was happening in the genocidal killings and he neither acted to stop them nor refused to contribute his battalion assets to help carry them out. He had, however, not initiated the genocide, nor was he or his troops the prime mover in its

execution (the evidence showed that General Ratko Mladic spearheaded the genocide.)<sup>22</sup>

There is a political tension here between genocide's special intent requirements and the doctrine of command responsibility, so critical in many international tribunal prosecutions. There is no question that with crimes of war or crimes against humanity, the doctrine of command responsibility says that if a leader knows or should have known his troops are about to or have committed crimes, and does nothing to prevent or punish them, he is criminally responsible.<sup>23</sup> The critical issue in genocide is whether that doctrine applies similarly with genocide or whether, as many argue, genocide is so special that every person convicted of either being a principle or aider and abettor must still have the personal intent to destroy the group. That question is still basically undecided in genocide jurisprudence. There is little doubt, however, that if a strict interpretation—requiring personal intent to destroy a group on the part of every person who may not have desired the extinction of the group on his own but is willing to go along and actively and substantially contribute to the genocide enterprise with full knowledge of its consequences and an ability to do something about it—becomes the norm, we will have fewer genocide convictions even though many genocides may occur. This is ultimately a policy question but one which, unfortunately, lands in the laps of judges who must decide individual cases.

#### *"In whole or in part"*

Finally, there is another difficult decision that faces a judge trying a genocide case. The intent must be to destroy a group—in whole or in part. How to define the group is an undertaking which is very fact-specific to each case. The genocide definition says it applies only to a "national, ethnical, racial, or religious group." Courts have agreed that the identification of such groups need not be scientifically-based (there is little basis for distinguishing the Tutsis and Hutus in Rwanda on any such objective grounds).<sup>24</sup> Roughly, the categories can be bound to the following elements: "national" means citizenship; "ethnical" a common culture; "racial," inherited physical traits; and "religious," sharing a mode of worship. These are not tightly defined characteristics: the real criterion is whether objectively the "group" has been recognized and identified by the rest of society—and especially the perpetrators of the alleged genocide—as distinct from the rest of society. Usually it encompasses vulnerable minorities that fit loosely into the enumerated categories as perceived by the majority. Additionally, the ICTY has held that a "group" can be defined in exclusionary terms, i.e., non-Serbs, including Muslims or Croats or others have been held to constitute a targeted "group."<sup>25</sup> The Rwanda Tribunal has gone further and said that any stable and permanent group could be included in the "group" definition,<sup>26</sup> although again the more conservative interpretation is that a court cannot go beyond a reasonable definition of

racial, religious, ethnical or national—as say, for instance, gender or political, which are key candidates for any expansion of the definition but not recognized as being in the Convention definition. The “as such” wording adds to the requirement of the intent to destroy the group—“as such” is generally interpreted as an accentuation of the requirement that the acts be done to destroy the group, not its individual members.<sup>27</sup>

But, here again, let me provide an example of the complexity facing a court in defining the relevant group—a decision which can be critical in deciding if the proof shows that the group has in fact been targeted for killing. In the Holocaust paradigm it was relatively easy—European Jewry was the group under siege and it was a distinct one; the design need not have been to destroy Jews all over the world.<sup>28</sup> The Tutsis in the Rwanda genocide were similarly readily identified as the “group.”<sup>29</sup> On the other hand, what was the “group” in Srebrenica? The prosecution argued it was the Srebrenica Muslims—the Trial Chamber in *Krstic* said no; Srebrenica Muslims were not so distinct from Muslims throughout Bosnia as to be a separate ethnic or religious group.<sup>30</sup> The trial court settled for a definition of the “group” as Bosnian Muslims, who had been recognized as a distinct group in the Yugoslavian constitution—there were 250,000 Muslims in Bosnia.

The next issue became: was it enough to show an intent to destroy

“part” of the Bosnian Muslims, and, if so, on what basis should that “part” be defined? There were about 37,000 Muslims in Srebrenica. The “in part” language was construed to include both quantitative and qualitative ingredients. That is, the size of the “part” must ordinarily be substantial in respect to the number of the whole group (not a neighborhood or a county). But more important, qualitatively the destruction of the “part” must have a considerable impact on the survival of the whole group. In the Srebrenica case, the Appeals Chamber found that the destruction of a Muslim community in an otherwise overwhelmingly Serbian territory was of great strategic importance because it impeded Serbia’s drive for a contiguous piece of territory from sea to sea. The Srebrenican Muslim community was also emblematic because in the world’s eyes it had become a proxy for the fate of all Bosnian Muslims, and if it went down, the impact on other Bosnian Muslims fighting for their survival would likely be disastrous.<sup>31</sup> Another ICTY panel has held that the Muslim citizens imprisoned and executed in 1992 in the Prijedor corridor—a strip of Bosnian territory between Serbia and Serb-occupied Croatian Krajina—were a cognizable “part” of a group under the same definition. Thus, a part of a group living in a geographical sector can be a legitimate “part” of a larger group for purposes of prosecuting genocide, but only if it has some distinguishing characteristics in view of its importance to the rest of the group so that

its destruction would not be a matter of numbers only. There has also been some discussion in the literature, and in courts, suggesting that a “part” could be a segment of a population—usually “leaders”—or military, or police, whose functioning is so vital to the whole group, that if they are destroyed the whole group might perish.<sup>32</sup> This language throws up extremely difficult concepts to deal with given the interdependence of many communities today.

Undoubtedly the greatest obstacle the Extraordinary Chambers’ prosecutors might encounter in a genocide charge would be the qualifications of the victims of Khmer Rouge atrocities as a “national, racial, ethnic or religious group.” Reportedly (though it is always risky to predict what evidence may actually surface in a trial) the alleged atrocities were committed by national leaders principally against their own populace, not specific racial, religious, or ethnic (sic) segments thereof—although it is always possible that smaller traditionally defined genocides might have been committed within the context of larger campaigns against the more general populace.<sup>33</sup> Indeed Cambodian leaders proposed in 1989 to include in the legislation a much wider definition of groups eligible for genocide inclusion that covered “wealth, level of education, sociological environment . . . allegiance to a political system or regime, social class or social category,” but were dissuaded by UN negotiators and eventually accepted the Convention definition.<sup>34</sup>

One theory has been put forth that when a majority national group

sets out to destroy a part of its own membership, it fits the requirement of destroying a national group “in part”—hence the term “auto-genocide.” This is not however a widely accepted theory.<sup>35</sup> Thus far only the Rwandan Tribunal among the international courts has departed from the groups listed in the Convention to declare that any “stable and permanent group” may qualify, but its decision<sup>36</sup> has been criticized and has yet to be followed: it would be surprising if the Cambodian court broke new ground in this respect.

Judging genocide is a difficult and very fact-specific exercise. The statutory definition is demanding and few of its elements are crystal clear. It has not been changed for almost 60 years and perhaps in view of its accelerated judicial use in the last decade, some aspects of the definition might merit reconsideration. Genocide has many faces and guises, as we have learned from the ad hoc tribunals and will likely learn again from some of the national courts like Cambodia and Iraq. And while it is the wickedest of terrible crimes, judges must impartially—to the best of their ability—apply its terse but sometimes ambiguous definition to myriad varied fact situations not anticipated by the 1948 Convention’s drafters. Cambodia’s embryonic tribunal may have the opportunity to contribute to this development.

At the same time, the Cambodian court must be aware of the lively debate over whether any of the nefarious activities of the Khmer Rouge actually were carried out with an intent to physically destroy a discrete

racial, religious or ethnic group among its wide swath of victims, or whether the unfortunate victims instead just paid the price for a “bizarre” social and cultural revolution that pitted old versus young, intellec-

tuals versus peasants, urban versus rural, rich versus poor. Even if the latter is true, recourse for inhumane treatment can be found in the category of crimes against humanity, but genocide may be impossible to prove.

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### Notes

Patricia M. Wald served as a judge on the U.S. Court of Appeals for the D.C. Circuit (1979-1999) and as its chief judge (1986-1991). Additionally, she was a judge on the International Criminal Tribunal for the former Yugoslavia (1998-2001). She is a board member of the Open Society Justice Initiative.

1. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Jan. 12, 1951, 78 U.N.T.S. 277 (“Genocide Convention”).
2. See, e.g., Resolution 808, U.N. Security Council, U.N. Doc. S/RES/808 (1993) establishing the International Criminal Tribunal for the former Yugoslavia (“ICTY Statute”); Resolution 955, U.N. Security Council, U.N. Doc. S/RES/955 (1994) establishing the International Criminal Tribunal for Rwanda (“ICTR Statute”).
3. Helen Fein, “Genocide, Terror, Life Integrity, and War Crimes: The Case for Discrimination,” in George J. Andreopoulos (ed.), *Genocide: Conceptual and Historical Dimensions*, Philadelphia: University of Pennsylvania Press (1994), 95.
4. Samantha Power, “Bystanders to Genocide,” *Atlantic Monthly* (September 2001), 763.
5. Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals*, London: Oxford University Press (2005), 199-200.
6. *Prosecutor v. Jelisić*, IT-95-10-A (Appeal Judgment), 5 July 2001 (Separate Opinion of Judge Wald); *Prosecutor v. Stakić*, IT-97-24-T (Trial Judgment) 31 July 2003, para. 502.
7. See, e.g., William A. Schabas, *Genocide in International Law*, Cambridge: Cambridge University Press (2000), 9 (noting that “[i]t has become apparent that there are undesirable consequences to enlarging or diluting the definition of genocide” because it “weakens the terrible stigma associated with the crime and demeans the suffering of its victims” and “is also likely to enfeeble whatever commitment States may believe they have to prevent the crime.”)
8. Schabas, *Genocide in International Law*, 10.
9. For more details on these conclusions see Schabas, *Genocide in International Law*, 118-119.
10. The definition of genocide in the statutes of the ICTY, ICTR and ICC, repeats that of the Genocide Convention: “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.” See Article 4(2), ICTY Statute; Article 2(2), ICTR Statute; Article 2, Genocide Convention; Article 6, Rome Statute of the International Criminal Court (“Rome Statute”). Notably, however, the Rome Statute defines attempts and conspiracy more broadly than previous tribunals. For example, while the ICTY and ICTR Statutes and the Genocide Convention prohibit genocide, “conspiracy to commit genocide,” “direct and public incitement to commit genocide,” “attempt to commit genocide,” and “complicity in genocide” (ICTY Statute, Art. 4(3); ICTR Statute, Art. 2(3); Genocide Convention, Art. 3), Article 25(3) of the Rome Statute

provides that “[i]n accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
  - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
  - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.”

11. Mettraux, *International Crimes*, 173. See also *Prosecutor v. Kunarac et al*, IT-96-23 & 23/1 (Appeal Judgment), 12 June 2002, para. 103.

12. *Jelisić* (Appeal Judgment), para. 48.

13. Compare International Criminal Court, *Elements of Crime and Rules of Procedure*, Article 6(a) with Rome Statute, Article 6.

14. *Jelisić* (Appeal Judgment), paras. 73-77.

15. I note that the translation of the Extraordinary Chambers' statute transposes the Convention definition of “as such” to “such as.” I assume this is a technical error, but it could have consequences if not corrected; meaning could be attributed to the omission of the traditional phrase.

16. Schabas, *Genocide in International Law*, 145 and note 296.

17. Mettraux, *International Law*, 239.

18. *Prosecutor v. Krstić*, IT-92-33-T, 2 Aug. 2001 (Trial Judgment), paras. 48-52, 90-94, 720.

19. See, e.g., Eugene Davidson, *The Trial of the Germans*, Columbia: University of Missouri Press (1997), 33 (noting that the “truckloads of documents,” including “those of the SS alone [which] filled six freight cars” proved “so detailed and in such quantity that all the prosecution and defense lawyers together could scarcely master them”).

20. For a more comprehensive list of factors considered by courts in assessing the existence of genocidal intent, see Mettraux, *International Law*, 283-4.

21. Alexander K.A. Greenawalt, “Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation,” 99 *Columbia L. Rev.* 2259 (1999).

22. *Prosecutor v. Krstić*, IT-98-33-A, 19 April 2004 (Appeals Judgment), paras. 140-143.

23. See, for example, ICTY Statute, Art. 7(3); ICTR Statute, Art. 6(3); Rome Statute, Art. 28.

24. See *Prosecutor v. Akayesu*, ICTR-96-4-T (Trial Judgment), 2 Sept. 1998, paras. 513, 702, Mettraux, 227-228, notes 97-101 (Tutsis found to be an ethnic group for genocidal purposes).
25. *Prosecutor v. Jelacic*, IT-95-10-T (Trial Judgment), 14 Dec. 1999, para. 71.
26. *Prosecutor v. Bagilishema*, ICTR-95-1A-T (Trial Judgment), 7 June 2001, para. 65.
27. See, for example, Mettraux, *International Law*, 230-232.
28. Hitler himself “prophesied” that the Holocaust would bring about “the annihilation of the Jewish race in Europe.” See Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, New York: Penguin Books (1994), 78.
29. See, for example, *Prosecutor v. Akayesu*, ICTR-96-4-T (Trial Judgment), para. 701 (noting that “[a]lthough the Prosecutor did not specifically state so in the Indictment, it is obvious, in the light of the context in which the alleged acts were committed, the testimonies presented and the Prosecutor’s closing statement, that the genocide was committed against the Tutsi group.”)
30. *Prosecutor v. Krstic*, IT-98-33-T (Trial Judgment), para. 559 (holding that “no national, ethnic, racial or religious characteristic makes it possible to differentiate the Bosnian Muslims residing in Srebrenica, at the time of the 1995 offensive, from the other Bosnian Muslims. The only distinctive criterion would be their geographical location, not a criterion contemplated by the Convention.”).
31. *Krstic* (Appeal Judgment), paras. 21, 26 *et seq.*
32. *Sikirica*, para. 77; *Krstic* (Appeal Judgment), paras. 12, 16, 21, 37.
33. Schabas writes that the UN Expert Group on Cambodia opined that persecution by the Khmer Rouge of the Buddhist monkhood might qualify as genocide of a religious group. Similarly, the Muslim Cham was cited as a potential “group.” Schabas dismisses such persecution, if proven, as amounting to cultural rather than physical destruction and so not within the concept of genocide. Schabas, *Genocide in International Law*, 129.
34. Schabas, *Genocide in International Law*, 145-46. A “People’s Revolutionary Tribunal” tried Pol Pot and others for genocide under a much wider definition in 1979 in what was called a “show trial.” Schabas, 391-92.
35. Schabas, *Genocide in International Law*, 150.
36. *Akayesu*, para. 515.
37. See William A. Schabas, “Problems of International Codification—Were the Atrocities in Cambodia and Kosovo Genocide?” 35 *New England Law Review* 287 (2001).



# Marrying International and Local Justice: Practical Challenges Facing the Khmer Rouge Tribunal

The Extraordinary Chambers will include both Cambodian and international personnel. Caitlin Reiger considers how this hybrid structure will function.

In 1999, when the Cambodian government and the United Nations were still deciding on the structure of a tribunal to try members of the Khmer Rouge leadership, the notion of a court combining both national and international judges was being tried out in Kosovo. Similar “hybrid” tribunals would be established in East Timor in 2000 and Sierra Leone in 2002. In each of these countries, international judges formed the majority on the respective court, and this was the UN’s preference for Cambodia too. Ultimately, however, the Cambodian government successfully negotiated a structure in which Cambodian judges are to constitute the majority in each Tribunal forum.<sup>1</sup> Cambodian judges will occupy three of the five seats on the Pre-Trial and Trial Chambers and four of the seven seats on the Appeals Chamber (Supreme Court).

Similar compromises were reached on decision-making and non-judicial personnel. All judicial decisions require an increased majority—four of the five votes on the Pre-Trial and Trial Chambers, five of seven on the

Supreme Court—which will thus necessarily include the affirmative vote of at least one international judge.<sup>2</sup> This mechanism is known as the “supermajority,” a solution that has become one of the defining—and most controversial—elements of the

The “supermajority” has become one of the defining—and most controversial—elements of the Extraordinary Chambers.

Extraordinary Chambers in the Courts of Cambodia (EC) even before their establishment. In addition to the supermajority required for decisions, the EC will have two co-prosecutors and two co-investigating judges—comprising in each case one Cambodian and one international person. Each of these offices will be supported by both Cambodian and international staff. At an administrative level, there will be a Cambodian director and an international deputy director.

These unique and creative mechanisms attempt to balance the UN’s concern that international standards of justice prevail with the Cambodian government’s determination that

the tribunal remains an essentially Cambodian institution. They recognize the limitations of the national judicial system's technical capacity to deal with serious human rights violations committed during a prior regime, particularly in terms of legal expertise or resources. The participation of international personnel is intended to ensure that the trials

### Running an institution of mixed composition presents particular operational challenges.

meet international standards of fairness and due process, and to share relevant expertise with Cambodian judges. In particular, international personnel, through the medium of the UN, may bring an appearance of impartiality and independence that may not be possible for national judicial officers. These benefits do presume, of course, recruitment of appropriate international personnel.

At the same time, the court is intended to retain a measure of national ownership, credibility, and relevance for the society that experienced the crimes. Where an internationalized court remains part of the national court system, as was also the case in East Timor and Kosovo, there is the further potential of longer term benefits for the national judicial system.<sup>3</sup> However, it is important to recognize that the reality of creating

and running an institution of mixed composition in the form envisaged for the EC presents particular operational challenges, especially given the historical and political delicacy of the national-international balance that has been struck.<sup>4</sup> These challenges should not be underestimated. Dedicated attention will be needed to ensure that national and international judges, prosecutors, lawyers and all other EC staff are able to function effectively as a cohesive institution with a unified vision. This is particularly significant in light of the short—three-year—timeframe within which the EC is expected to complete its work.<sup>5</sup> Some operational challenges will be common across the tribunal as a whole. Others will be specific to the judges, prosecutors, and defense lawyers.

### General administrative challenges

The administration will be shared between officers from the Cambodian civil service and UN appointees. The UN Secretary-General has stated that “[t]he Chambers’ unique mode of operation and needs call for a largely integrated staffing structure,” in which most national and international staff would work “side by side in the same chain of command.”<sup>6</sup> The exceptions to this would be in those areas relating to financial control and the application of UN rules, which would necessarily be administered differently. However, the reality is that there will not be a single administrative authority on such critical issues as recruitment and personnel management, and much will depend in practice on the division of tasks

and responsibilities between the Cambodian administrator and the UN-appointed deputy administrator. Even without this structural complication, experience in other hybrid tribunals has shown that various challenges are likely to arise at an operational level that will require careful management.

#### *Terms and conditions*

In other tribunals of mixed composition, notably the Special Panels for Serious Crimes in East Timor and the Special Court for Sierra Leone, the differing level of benefits and resources available to UN/international staff (as against national staff) has often become a source of contention.<sup>7</sup> Aside from a vast disparity in salaries, international staff are usually provided with additional leave benefits, security, and daily living allowances, and enjoy exemptions from national taxation and import duty requirements.<sup>8</sup> The Cambodian government has already made public reference to the need to develop an “esprit de corps”<sup>9</sup> to avoid polarization regarding conditions of work and remuneration. Perhaps to that end, it has already announced that the budget discussions now underway assume Cambodian judges, prosecutors, and other staff will receive half the remuneration of their international counterparts, which would make the differential much less than in other tribunals—and considerably more than comparable Cambodian judicial or civil service salaries.<sup>10</sup> If met, this dispensation may go some way towards addressing the challenge of disparate salaries. Also, despite

the fact that they will not be appointed directly by the UN, the UN Secretary-General has requested that the international judges, co-prosecutor and co-investigating judge be deemed to be UN officials for the purposes of terms and conditions—including benefits, tax liability, and allowances.<sup>11</sup>

Additionally, a common source of resentment in other contexts relates to access to official court vehicles,

**Experience in other hybrid tribunals has shown that various challenges are likely to arise that will require careful management.**

which may be of particular resonance in Cambodia since the proposed location for the EC is approximately 11 miles from the center of Phnom Penh. Access to transport resources, if determined on the basis of nationality, may be particularly sensitive.<sup>12</sup>

#### *Language and translation*

The proceedings before the EC will be conducted in Khmer, English, and French and require simultaneous interpretation.<sup>13</sup> It will be essential that interpreters receive adequate training in technical legal terminology as well as the fundamental principles of an impartial and fair judicial process, to ensure, for example, that confidentiality of witness statements and investigations, together with the presumption of innocence of the accused, are preserved during both investigation

and trial phases. In the context of Cambodia, such knowledge should not be assumed as many interpreters and translators may never have experienced a properly functioning judicial system themselves.

Language issues will affect the interaction between Cambodians and international personnel throughout the EC, not least in the daily communication among staff, unless there is

### The supermajority system raises issues of how the Cambodian and international judges will work together.

a requirement that both international and Cambodian staff have a working knowledge of either English or French. There is currently no indication that such knowledge will be a criterion for recruitment. For international judges, prosecutors, and lawyers, access to translations of documentary evidence from Khmer will be critical. For their Cambodian counterparts—if they are not fluent in English or French—access to legal materials such as international jurisprudence will be equally important.<sup>14</sup>

### Judges

#### *The supermajority mechanism in practice*

Both the UN Agreement and the Cambodian domestic law establishing the Extraordinary Chambers (the “EC Law”)<sup>15</sup> state that “decisions” of the

Chambers will be decided by four out of five (at Pre-Trial and Trial), or five out of seven votes (on Appeal)—i.e. by supermajority. It is clear in the case of the Pre-Trial Chamber, constituted to decide disputes between co-investigators or co-prosecutors, that if no supermajority is reached, the prosecution or investigation shall proceed.<sup>16</sup> However, in the case of decisions by the Trial and Supreme Court Chambers, no guidance is provided as to how to proceed if no supermajority is reached, other than that where there is no unanimity, the decision of the Chamber shall contain the views of the majority and the minority.<sup>17</sup> While the supermajority system raises issues of how the Cambodian and international judges will work together, the mechanism was clearly intended to prevent control of decisions by Cambodian judges alone, particularly in relation to final verdicts. If, as envisaged, the bench sometimes splits along national/international lines without a positive decision, there is likely to be considerable confusion.<sup>18</sup> For example, if no supermajority decides for either conviction or acquittal in a given case, it is unclear whether the next step would be retrial before a different Chamber. As Human Rights Watch observed in 2003, such a procedure is unknown in Cambodia’s domestic system; the dominant Cambodian interpretation might be an effective acquittal.<sup>19</sup> This mechanism will also affect the dozens of pre-trial and interlocutory decisions that the Trial and Supreme Court Chambers will be required to make prior to final judgment, particularly in

the context of a new jurisdiction in which the parties will seek rulings to clarify unfamiliar procedures. Unless the judges are able to reach a common understanding quickly on the application of the supermajority mechanism in cases of no positive decision, trials may be considerably delayed, with serious implications for the EC's proposed lifespan.

#### *Selection and appointment of judges*

Due to widespread public criticism and allegations of political interference in the normal operations of the Cambodian judiciary, the selection and appointment of judges may also pose operational challenges if not conducted in a transparent and merit-based manner.<sup>20</sup> With any court it is essential that there be a collegial atmosphere among the judges if they are to efficiently and professionally discharge their judicial responsibilities. While dissent on legal issues is a healthy part of the judicial process, this should still be founded upon a basis of mutual and professional respect and trust. The international judges will be appointed by the Supreme Council of the Magistracy, a Cambodian government body, upon nomination by the UN Secretary-General. The Cambodian judges will be appointed by the Supreme Council of the Magistracy "in accordance with the existing procedures for appointment of judges."<sup>21</sup> There has been much public speculation, within Cambodia and outside, about the appointment process of the Cambodian judges.<sup>22</sup> In order to nurture good working relationships

between Cambodian and non-Cambodian judges, it is important that all judges trust in the appointment process of their colleagues. One possible way to address this challenge would be to have all judges develop and adopt a code of judicial conduct that applies equally to all.

Furthermore, the transparency and credibility of the appointment process will have the potential to either diffuse or exacerbate tensions among those Cambodian legal professionals who are not selected for the tribunal. This in turn may affect the extent to which the EC can positively influence the domestic judiciary more broadly.

#### *Differences in legal and judicial cultures*

Bringing together judges from different national backgrounds raises the likelihood that their legal cultural backgrounds will also differ. Each jurisdiction has its own particularities. The International Criminal Tribunals for the former Yugoslavia and Rwanda, as well as the mixed courts in Sierra Leone, Kosovo and East Timor have demonstrated that it takes time for judges to learn to work together and accommodate their differing experiences and preferences.<sup>23</sup> This can affect not just the substantive and procedural law that is applied, but a wide range of judicial practices within chambers that the tribunal may need to address.

Probably the most relevant difference in legal cultures is that between judges from civil law and common law jurisdictions. While the Cambodian legal system is based on the civil law

model, there is no requirement that the international judges will be nominated from civil law jurisdictions alone. As has occurred in other international and mixed courts, judges from the different systems will be used to varying rules of procedure and evidence, and differing approaches to trial management and to the conduct of proceedings. Once the EC's applica-

**The EC's model of co-prosecutors and co-investigating judges is unprecedented—no other international or hybrid tribunals use this structure.**

ble Rules of Procedure and Evidence are determined—be they modeled on the existing Cambodian criminal procedure, a customized special set of rules or some combination of both—judicial disagreements over interpretation and application may paralyze decision-making (particularly, in combination with the supermajority mechanism), and cause delays and appeals.

This particular operational challenge could be addressed to some extent by providing joint training for both international and national judges on the application of the relevant laws. Such training should focus not just on the EC Law and the relevant international law and jurisprudence. The international judges, regardless of whether they are from civil or common law backgrounds, will need to understand the multiple sources of currently applicable rules of Cambodian criminal procedure,

including the UNTAC Transitional Provisions relating to the Judiciary, and Criminal Law and Procedure applicable in Cambodia of 1992 and the Cambodian Law on Criminal Procedure of 1993. For both national and international judges, of whom few if any are likely to have had direct experience trying cases involving international crimes, familiarization with the particular procedural challenges of these cases will be valuable, as will an exploration of the international criminal procedural and evidentiary rules that have developed in response to these challenges.<sup>24</sup>

The level of support available to judges also forms part of their judicial “cultural” behavior and expectations. In jurisdictions—including Cambodia—where there is only limited administrative support available to judges in court, judges may have developed particular ways of operating that may lead to misunderstandings with international colleagues. For example, in some common law jurisdictions, such as Canada, South Africa, the U.S. and Australia, the existence of legally qualified law clerks or legal officers is standard practice. In many European civil law jurisdictions a similar role is provided by judicial trainees. They provide the judges with confidential research assistance and advice, and may even assist with drafting of decisions. However, in other jurisdictions—due to either lack of resources or different practices—such participation is entirely unknown and may initially be perceived as encroachment on the judicial role. Yet in courts exercising jurisdiction over international crimes, the usefulness of legal officers

has been found to be particularly helpful, given both the specialized and developing nature of the law and the vast amount of evidence to be managed, in comparison with ordinary national criminal trials. To this end, provision has been made in the EC budget for a limited number of law clerks (both national and international) to support the judges.<sup>25</sup>

Other legal cultural differences may include vastly differing styles of judicial drafting. In civil law jurisdictions, the length and detail contained in orders, decisions, and judgments is often considerably briefer than in common law jurisdictions. Some differences do not necessarily follow the common law/civil law distinction, such as between those jurisdictions where plain language dominates in judicial drafting as against those in which more formal or legalistic drafting is the norm.<sup>26</sup> Another example relates to the judicial practice of deliberation—whether judges are in the habit of discussing matters together with their colleagues, or coming to their own conclusions separately before discussion. While these matters may not individually seem significant, cumulatively they comprise a set of practical challenges judges may experience, and they can have the potential to disrupt or delay the smooth operation of proceedings. The Cambodian judges will have the advantage of familiarity amongst themselves with their national practices, but time and patience is likely to be required for adjustment in their relationships with the international judges, as, indeed, it is among the

international judges themselves, given their own differing national practices.

Cambodian judges are likely to have personal experience of the Khmer Rouge period and its aftermath, and this will inevitably give them a different perspective than their international counterparts, and an insight into the cases brought before them. Individual experiences shape every judge's outlook, and do not

**Cambodian judges are likely to have personal experience of the Khmer Rouge period and thus a different perspective than their international counterparts.**

amount to a lack of impartiality. What is important is that no judge pre-judges the particular cases that come before the EC or be perceived to do so.

However, public perception also plays a role. Some Cambodian judges were trained in countries that took well-known positions vis-à-vis the Khmer Rouge (such as the former Soviet Union and Vietnam), and may be perceived within Cambodia as lacking impartiality as a result (although a greater danger is likely to be the inadequacy of their judicial training). Furthermore, international judges too are not immune from negative public perceptions.<sup>27</sup> Therefore the critical needs are for both public education about genuine issues of judicial impartiality and competence and rigorous screening of all judicial appointments to ensure that there is no basis



for concerns of impartiality, whatever their provenance.

### **Prosecutors and investigating judges**

The EC's model of co-prosecutors and co-investigating judges is unprecedented—no other international or hybrid tribunals tasked with trying similar crimes use this structure. Neither the UN Agreement nor the EC Law offer guidance on the roles of these officers other than stating that investigating judges are “responsible for the conduct of investigations” and prosecutors are “responsible for the conduct of prosecutions.”<sup>28</sup> Given that one member of each will be international, if these appointments are not from civil law jurisdictions that use a similar mechanism (and not all civil law jurisdictions do) their required cooperation has the potential to lead to misunderstandings and confusion. The inclusion of a dispute-resolution mechanism by way of a specially constituted Pre-Trial Chamber—for which there is no precedent in other hybrid tribunals—presupposes that the national and international prosecutor or investigating judge may disagree. However, the Pre-Trial Chamber is only envisaged to rule upon disputes as to whether to proceed in a particular investigation or prosecution. It is not intended to mediate the great many other differences of opinion on daily operational questions that may arise and are not regulated clearly by existing Cambodian procedure. Possible examples may include the disclosure of

evidence to the defense during the investigative phase, pre-trial applications for witness protection, or procedures for *partie civile* applications.

Furthermore, and presenting a possibly greater challenge, is the question of whether the mixed structure will allow for the development of a coherent prosecutorial and investigative strategy. An important lesson from existing international criminal justice processes is that the widespread and/or systematic nature of the international crimes, including for example the need to examine command structures and the policy behind various specific incidents, warns against approaching individual cases in isolation from each other without an overarching strategy. Independent prosecutorial discretion, which is more familiar to common law practitioners and has become the norm in other international and hybrid courts, is arguably more suited to this specific task and yet will be unfamiliar to at least the Cambodian prosecutor and investigating judge. For similar reasons, interpreting the limited guidance provided in the Agreement through the lens of a classic civil law or inquisitorial-style investigative process, where the pre-trial actions of the prosecutor are directed by an investigating judge without specific expertise in international crimes or analysis of the broader command structures, is unlikely to succeed in establishing a full picture of the Khmer Rouge regime's crimes.<sup>29</sup> It may also prove to be a further point of contention between the international and Cambodian actors.

Another major operational challenge facing both the international prosecutor and investigating judge is that they will be dependent on the Cambodian police force to carry out investigations and bring witnesses to Phnom Penh to testify. Unlike in other hybrid and international jurisdictions, there does not appear to be any provision in the EC Law to ensure staff within the prosecutors' office are responsible for witness security and protection during these phases. Contacting witnesses who may be scattered throughout the country and gathering evidence of mass crimes that are almost thirty years old will not be easy tasks and yet they are essential for the success of the trials.<sup>30</sup> Aside from the reported problems of endemic corruption in the national police force, it is unlikely that there will be national expertise for work of this kind and magnitude.

### Defense lawyers

Unlike the prosecution and the judiciary, no mechanisms are envisaged mandating nationals and internationals to work together in the defense—which might thereby avoid some of the practical difficulties likely to be faced by the mixed prosecution and judicial arms. However, there may be substantial risk of compromising the rights of the accused to a competent defense and equality of arms.

Although the UN Agreement makes note of the right of the accused to choose their own counsel, current Cambodian law does not allow foreign lawyers audience rights in court.<sup>31</sup> The lack of experience in international

criminal law among the Cambodian legal profession will at a minimum require international lawyers as advisors on defense teams. But it is not clear whether they will have an opportunity to bring that expertise directly into the courtroom. Similar situations have arisen before the hybrid courts in both East Timor and Kosovo: the lack of suitably experienced counsel operated to the overall detriment of those trials.<sup>32</sup> Furthermore, unless the Tribunal's office of administration provides adequate institutional support for the defense, a perception may arise that the defense has been denied not only the benefits of international expertise, but also the material resources necessary to do its job.

The practical difficulties of creating a court that blends national and international staff, cultures, and procedures extend well beyond those outlined here. Yet these operational challenges are often underestimated in discussions about the benefits of combining local and international justice.<sup>33</sup> The EC may yet achieve an international standard of justice for Cambodians that is seen and experienced neither as a purely international imposition nor as controlled by domestic political imperatives. However, it is important to be realistic about how the particular mixture of international and national elements is likely to work in practice. While many of the challenges are not insurmountable, if not acknowledged and addressed they have the potential to disrupt the important and difficult task facing the EC in fulfilling its mandate.

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### Notes

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1. For historical and political background to the negotiations, see Craig Etcheson's article in the present issue of *Justice Initiatives*. For further detail on this period see: Thomas Hammarberg, "Efforts to Establish a Tribunal against Khmer Rouge Leaders: Discussion between the Cambodian Government and the UN," paper presented on May 29, 2001, at a seminar in Stockholm organized by the Swedish Institute of International Affairs and the Swedish Committee for Vietnam, Laos, and Cambodia, reprinted as a special supplement to the *Phnom Penh Post*, September 14-27, 2001. See also Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide: Elusive Justice and the Khmer Rouge Tribunal*, Pluto Press (2004), Chapter 7.
2. Article 4, 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, June 6, 2003 ("UN Agreement").
3. For a discussion of these cases and the expectations of mixed national and international courts, see Laura A. Dickinson, "The Promise of Hybrid Courts," (2003) 97 *American Journal of International Law* 295.
4. See Craig Etcheson's article in the present issue of *Justice Initiatives*.
5. The Secretary-General has assumed that all operations, from the commencement of the work of the Prosecutor's Office to finalizing all trials and appeals, will be three years: "Report of the Secretary-General on Khmer Rouge Trials, October 12, 2004," UN Doc A/59/432, para 15.
6. Report of the Secretary-General, para. 28.
7. In East Timor this discord even led to early strikes by East Timorese judges and public defenders: Suzannah Linton, "Rising from the Ashes: the Creation of a Viable Criminal Justice System in East Timor," (2001) 25 *Melbourne University Law Review* 122 at 135. In the Special Court for Sierra Leone the disparity in benefits was raised with the Registrar by a group of national staff on several occasions: author's discussions with Special Court staff in 2004 and 2005.
8. These privileges and immunities are reflected in Articles 19 and 20 of the EC Agreement.
9. Statement of the Cambodian Government Task Force to the States Members of the United Nations regarding the Draft Agreement on Khmer Rouge Trials, April 17, 2003, annexed to UN Doc A/57/808, at 6.
10. In November 2002 Cambodian judges' salaries were increased from just \$25 to \$300 per month: *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia*, December 18, 2002, UN Doc E/CN.4/2003/114, para. 14. According to Cambodian government statements reported in the local press, the Cambodian judges are expected to earn \$65,000 per year, half of the salary of their international counterparts: Lee Berthiaume "KR Trial Judges, Prosecutors to Earn \$65,000," *The Cambodia Daily*, September 2, 2005.
11. Report of the Secretary-General.
12. At the Special Court for Sierra Leone, national staff were paid an additional transport allowance, whereas international staff had after-hours access to court vehicles.
13. Report of the Secretary-General, para. 18.
14. Advice received from the Cambodian Government Taskforce indicates that it has begun a project of translating key international criminal cases for this purpose.
15. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with Inclusion of Amendments as Promulgated on October 27, 2004 (NS/RKM/1004/006) ("EC Law").
16. UN Agreement, Article 7(4).

17. UN Agreement, Article 4(2).
18. Amnesty International has noted that the Report of the Secretary-General of March 31, 2003 and the Agreement itself “indicates that the potential for disagreement between judges, prosecutors and administrative staff is substantial, with differing opinions forming along ‘Cambodian’ against ‘international’ lines.” *Amnesty International’s Position and Concerns Regarding the Proposed “Khmer Rouge” Tribunal*, April 25, 2003, AI INDEX: ASA 23/005/2003. Amnesty International was commenting on the Draft Agreement, but the relevant provisions were retained in the final version adopted.
19. See Human Rights Watch, “Serious Flaws: Why the U.N. General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement,” April 3, 2003, 5.
20. For discussion of the problems facing the Cambodian judicial system and the lack of judicial independence in particular, see Report of the UN Special Representative, paras. 20-27; Amnesty International, *Kingdom of Cambodia: Urgent Need for Judicial Reform*, June 19, 2002, AI Index: ASA 23/004/2002; Human Rights Watch, *World Report 2004*.
21. EC Law, Articles 10-11.
22. See for example the advocacy documents put out by the International Working Group on the Extraordinary Chambers and Open Society Justice Initiative, “International Standards For The Nomination Of Judges To The Extraordinary Chambers,” February 2004; Cambodian Human Rights Action Committee, Press Release “Civil Society Calls for International Standards for the Khmer Rouge Tribunal,” 9 August 2004. See also Cesare Romano, “Judges and Prosecutors of Internationalized Criminal Courts,” Romano, Nollkaempe and Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia*, Oxford University Press (2004), 235, 245.
23. See Cassese, 7. For further detailed discussion of this issue see International Center for Transitional Justice, *Hybrid Tribunals – a Comparative Study of East Timor, Sierra Leone and Kosovo*, forthcoming 2006.
24. The UN Secretary-General foresees using a training program planned by UNDP for this purpose: Report of the Secretary-General, paras. 32-34.
25. Author’s interview with Michelle Lee, Deputy Director of the Office of Administration of the Extraordinary Chambers in the Courts of Cambodia.
26. Similar issues arose within the Special Court for Sierra Leone.
27. For example, in the Special Court for Sierra Leone motions for disqualification were filed against two international judges, one of which was partially successful, leading to the disqualification of Justice Geoffrey Robertson from sitting on one case due to comments he had made in a book published prior to his appointment.
28. See Articles 5 and 6 of the UN Agreement, and Articles 16 and 23 of the Amended EC Law.
29. The only other international or hybrid tribunal that has used investigating judges was the Special Panels for Serious Crimes in East Timor, where their formal role, unlike in the Cambodian system, was limited to ensuring that the rights of suspects and victims were respected during the investigative phase, and issuing warrants and pretrial orders. See UNTAET Regulation 2000/30 on the Transitional Rules of Criminal Procedure, as amended by UNTAET Regulation 2001/25, September 14, 2001, Article 9.
30. On the treatment of victims and witnesses in the Tribunal, see the article by Susana SáCouto in the present issue of *Justice Initiatives*.
31. Article 5 of the 1995 Law on the Cambodian Bar.
32. Regarding Kosovo, see OSCE Legal Systems Monitoring System, *Kosovo’s War Crimes Trials: A Review*, September 2002, 37; regarding East Timor, see International Center for Transitional Justice (Varney and Hirst), *Justice Abandoned? An Assessment of the Serious Crimes Process in Timor Leste*, June 2005, 20.

33. See for example Romano, "Judges and Prosecutors of Internationalized Criminal Courts;" see also the recommendations currently under discussion in relation to a special mixed national/international chamber for Burundi, contained in Letter Dated March 11, 2005 from the Secretary-General Addressed to the President of the Security Council (Report of the assessment mission on the establishment of an international judicial commission of inquiry for Burundi), March 11, 2005, UN Doc S/2005

## “No Perfect Justice”: Interviews with Thun Saray, Son Chhay, and Ouk Vannath

### **Thun Saray, President of the Cambodian Human Rights and Development Association (ADHOC):**

When finally it seemed likely that a tribunal to try the key leaders of the Khmer Rouge would in fact be constructed, a French sociologist friend asked me what the point was. Why only try the Khmer Rouge leaders? Why restrict the Court’s scope to crimes committed between April 17, 1975 and January 6, 1979? Why not also try those involved in the many crimes committed in Cambodia before and after those dates? What about the mass bombings by the United States inside the Cambodian border from 1969 to 1973 that killed an estimated 600,000 Cambodians in total? What about trying Henry Kissinger, who orchestrated those bombings? What about the Vietnamese who took control of the government in the period after the Khmer Rouge left power in 1979, and proceeded to commit mass human rights violations? What about the Russians who underwrote the Vietnamese? What about those in the UN, the United States and China who kept the Khmer Rouge nominally in power through to 1993—these supporters of the criminals are themselves accomplices to their crimes, according to most interpretations of criminal law.

And what about punishing those hundreds and thousands within the Khmer Rouge, apart from the handful of leaders now to be tried? What about the many who executed orders and committed murder? Should not they too be tried and punished?

My friend is not alone in viewing the whole exercise as a textbook case of victor’s justice: justice for the loser alone, the winners not tried, but even rewarded for similar behavior. Winston Churchill, for example, ordered the bombing of Dresden in 1944 for no reason other than to demoralize the Germans—to intimidate them. Thousands of innocents died for a military strike that had no military necessity. Yet far from being punished for war crimes, Churchill was viewed as a hero and still is today. As Dostoevsky put it, if you are an ordinary person and you kill one or two people, you will be punished, but if you are an extraordinary person and you kill 10,000, you will not.

To my friend, I replied there is no perfect justice. We still live in a world dominated by balance-of-power politics. Injustices throughout history have rarely been addressed. What justice was there for the African slaves brought to the Americas, for example? None to date. Progress is step by step.

If we want justice for the victims of human rights violations, the best we can hope for is imperfect justice. But if we can do something, we should do it. We cannot wait for perfect justice. The International Criminal Court is a big step forward. So are the ad hoc tribunals set up to try those responsible for crimes against humanity in the former Yugoslavia, in Rwanda, and Sierra Leone. These too are imperfect, but they are important. They are an attempt to make people equal before the law. They are an attempt to achieve a basic level of justice for victims.

The leaders of the Khmer Rouge are responsible for an enormous amount of deaths more than twenty years ago. There are two excellent reasons to try the Khmer Rouge, even if the process is best described as only “relative justice.” The first is to achieve that limited justice for the victims. Even though we cannot find justice for all the victims of the Khmer Rouge years, we can yet find justice for some, and we can also attempt to ensure that the atrocities of the past will not happen again. This is the second reason to support the tribunal: the dissuasive effect of the trials. To try these people tells our present and future leaders that they cannot commit crimes such as these; that they will not be allowed to. Even twenty years later, they will be hunted down, they will be caught, they will be tried. We cannot try all the people in the region—we cannot punish all the thousands who committed crimes in that period. If we tried everyone, they would fight again, and we would not have peace.

We must try to find a balance between justice and peace. This is important, because we can only find justice in times of peace. We cannot find justice during times of conflict, of war.

***You have talked [earlier in this interview] about other major problems facing Cambodia—increasing poverty and unemployment, landlessness, massive migration to Thailand, and increasing hostility with your regional neighbors. Are you convinced that the time, money, and effort the court will require are justified, given the many other pressing problems facing the country?***

Poverty reduction is not only economic growth. We need to connect growth with other factors—such as justice and transparency. If we cannot have justice in society, how can we reduce poverty? The judiciary is a cross-cutting issue. Transparency, good governance, both rely to some extent on a strong and independent judiciary. And the Khmer Rouge tribunal is one important event to provide justice and to strengthen the judicial system in Cambodia. The question is how to link up this tribunal to the reform of the judiciary.

The tribunal is also important because it consolidates peace, and will prevent the violation of infrastructure and lives of Cambodians, and the natural resources of the people. During the 1960s, Cambodia had an economy equivalent to that of Thailand or Malaysia. But after wars over the last 20 or 30 years, we have fallen far behind both. That’s why I think that combating poverty is not achieved by growth alone. Today 79 percent of Cambodians live under the



poverty line of \$2 per day. In Thailand only 30 percent do. Even in Vietnam, only 50 percent do. We have to prevent conflict and strengthen the judiciary in Cambodia.

***Can the tribunal help strengthen the judiciary?***

In Cambodia, the judiciary takes bribes. So when poor people have a conflict with the rich, and take it to the courts, they lose the case. If a poor person loses a case in court, he or she loses everything. The poor remain poor—and become even poorer. The Khmer Rouge tribunal can allow Cambodian society, now and in the future, to make the judiciary more effective and more fair. The poor will benefit from this. Not immediately—but once they start winning cases. Now the poor lose 100 percent of cases. In future if it falls to 80 percent, 50 percent, that is progress. Even though we don't yet have a clear program or strategy to channel the Khmer Rouge tribunal into reforming Cambodia's judiciary, the beneficial effects are already apparent. There is a process already underway that Cambodian judges and people are learning from, bringing international actors into Cambodia, talking about what makes for a fair trial.

Judges here can learn a lot from the international process—from international judges and their codes of conduct. People may have the opportunity to watch a fair trial and compare it with the trials they have seen in the past, and in the future. If there is a good strategy as to how to introduce

the lessons from the tribunal into the Cambodian judiciary, it is to record it, to transcribe it, and to have lawyers and judges review this process and examine the records, to train them. So they can learn what a fair trial looks like. Concern about the process is due to the fear of political manipulation—that the big bosses will not be pun-

**Even though we cannot find justice for all the victims of the Khmer Rouge years, we can yet find justice for some.**

ished. But if the big fish are brought to account, if they are punished, that in itself will demonstrate justice in operation. In this country at this time, that will provide evidence of a fair trial. Everyone knows who ordered the killing fields. It was not the small fish, the small Khmer Rouge officers, who made the decisions. People may not know who was the killer of their brother or sister, but they know who ordered the killers. It was the guys at the top. We should try all the leaders of that time with no exceptions—no exceptions. If we see these people brought to justice that will be good. We may never get to punish those culprits above the Khmer Rouge leaders, but if we punish the Khmer Rouge, that is something. People will be satisfied with that.

The court can also be beneficial if reparations are introduced. Those tried are unlikely to have funds that will match the enormity of their crimes. But victims' damages can be collected by opening a trust fund based on voluntary donations. The money could be used for so many things—for example, to provide mental health treatment for survivors of the Khmer Rouge period. We could create a treatment center. Victims and

**Judges here can learn a lot from the international process—from international judges and their codes of conduct.**

survivors of those years of terror still have nightmares from time to time—even those who fled far away, those living in the United States for example. It is likely that the trials themselves will trigger or unleash pent up trauma in many people, some of whom will be for the first time hearing the truth about experiences they themselves witnessed, hearing events related that they remember but have never spoken about. Cambodia does not have the resources to deal with the possible outpouring of grief. A reparations fund could help. But sometimes the fact of trial and punishment of the perpetrators of crimes—can itself satisfy the sense that “my brother died” or “my father was tortured.” Sometimes the spirit is satisfied by the fact of justice.

**Son Chhay, Member of Parliament, Sam Rainsy Party:**

I remain skeptical about this tribunal. The question is still “why are we doing this?” The trial will be so limited, it cannot bring justice to the people. Will it uplift the justice system as a whole, as people are now saying? I never knew that justice can result from bargaining. Every step of the way, the government has resisted all appeals to loosen its control over the court. And that will continue at each next step: in the selection of judges and in any disputes between foreign and local judges.

By restricting the international presence in these trials, the government has tried to guarantee that they won't function. Take investigation, for example. It never happens. There was no investigation into the events surrounding the killing of the deputy minister of the interior in 1997.<sup>1</sup> Or into the riots when mobs destroyed the Thai embassy in January 2003.<sup>2</sup> Investigators don't study the evidence. They don't interview witnesses. They don't involve themselves deeply in the situation.

The first criterion for a good court is good judges. And for good judges we need good selection criteria. So far there is little cause for hope. For example, I have seen the list of 29 judges that I understand are under consideration for nomination by Cambodia. Some of these are known to have been involved in corruption. Others are barely out of high school—they are in their mid to late twenties, early thirties. They have degrees from Kazakhstan, Russia,

Vietnam—countries not known for judicial excellence.

It is not the case that the simple fact of working with foreigners will lead to improvements among judicial actors. There have been numerous examples in the past of foreigners working with Cambodians, such as the foreign experts brought in to help preserve Cambodian forests. What happens is either the foreigners are corrupted or they are blocked from doing their job. Today, the forests are disappearing even faster than before.

And a lot depends on the kinds of environment the judges have practiced in. If they have experience of abuse and intimidation—and many Cambodian judges do—they are unlikely to have developed independent ways of thinking and working.

The government will not let the trials go too far. Some members of the government themselves were in the Khmer Rouge, generally in minor roles, as is well known (look at the files of DC-CAM or the research carried out by Steve Heder). The trial might lead to some witnesses implicating a number of them. Ta Mok, a leading Commander in the Khmer Rouge army knows everything about everybody involved with the Khmer Rouge. If tried, he could implicate a lot of people. Take Mr. Chea Sim, for example, the current speaker of the senate. He was a district chief under the Khmer Rouge at a time when thousands of people were killed in his district. Their skeletons were found. There has never been an investigation. Why not? Also the Chinese and

Vietnamese authorities—individuals active then who are in power today—have much to fear from the witness box. The government is in constant contact with the authorities in China and does not want to offend them.

***What do you see as the main purpose of the court?***

Cambodians want to know why the Khmer Rouge killed their own people. We will be fortunate if that is what

**There is a real concern that some of the main perpetrators might be acquitted due to lack of evidence. If this happens, Cambodians will lose faith in the possibility of justice.**

the Court achieves. Will the trial generate guilt among the actual killers—those lower than the top tier? It seems unlikely. There are so many people free in Cambodia today with blood on their hands—people who were district commanders and oversaw the deaths of hundreds, who feel no shame today. Will the trial lead to public apologies? It is hard to say. It is not clear what the government sees as the court's purpose.

The national assembly was not consulted about the tribunal. We were not officially involved in the drafting of the Law [on the Establishment of the Extraordinary Chambers for Prosecution under Cambodian Law of Crimes Committed during the Period

of Democratic Kampuchea]. Nor was the parliament involved in negotiating the Agreement with the UN that led to the amendment of the Law and decided the structure of the Court. People have been too quick to reach the conclusion that there will be a free debate, without fear. Or that the hearings will be broadcast. Not even parliament is broadcast today.

Most of those of us who fought for international standards in the Court have resigned ourselves to the present court. Some are pessimistic, [saying] “forget about justice, a fair trial, international standards: let’s just get it over with and out of the way.” The decisive question is rather how much longer the government can delay the Court. Above all, most of us just want the government to take its hands off the Court.

***If the Court goes ahead, as seems likely, how will you approach it?***

My opposition to the court is well known. When it was clear that the court would not reach international standards I tried to block it. That effort failed and it is too late to change the court now. So I wish it all the best. I only hope it goes well. I hope we can be satisfied enough. Enough that we can go to bed at night and fall asleep.

Otherwise the court will just drag up all our horror again, and we will have to live through it all again. It will be like a rape victim who has to go through the indignity of describing in detail to a room full of strangers how she has been violated. To undergo that humiliation and then to see the

perpetrators set free. This is my fear if the court does not convict the top leaders. It will be just another punishment. It will bring back all these terrible memories, all that bad blood.

I hope instead that the sacrifice we are making will bring justice. If not, what will it mean to go through the horror one more time? I hope every person involved in the trial will take this into account. If you are not serious, don’t play with us.

**Ouk Vandeth, Legal Aid Cambodia:**

I should say first of all that I am happy for the establishment of the EC. If the tribunal is just, we will have much to learn from it. But if the EC is not just and fails to meet the people’s imperative of justice, we will not trust it. In Cambodia, people do not trust the existing court system. They believe the system is both corrupt and unjust. They think the courts generally serve the government. So we are happy that the EC will be set up to meet international standards. This will allow us to compare an international tribunal in operation within the Cambodian system—and so see the differences. We expect an international tribunal to be better than the Cambodian courts, both in its procedures and decision making.

The first issue is the selection of judges and prosecutors for the tribunal. We will soon be able to see whether the judges and prosecutors are selected in a transparent manner.

Second, we can see whether the decisions of the EC will be transparent

or not. We will be in a position to compare the differences in how decisions are reached by international and by national judges. Will decisions be made according to the law? Or according to the judges' own will? Or in response to a threat from outside?

It will also be helpful to observe the trial process—to see how evidence is collected—because all of this happened 30 years ago. We will see the process of collection and admission of evidence today. This may also benefit those working in law enforcement—not just the police involved directly in the EC, compiling evidence and conducting investigations, but law enforcement as a whole throughout the country.

Nevertheless, we have many concerns.

We worry that the EC does not have its own procedures—it will rely on existing Cambodian procedures—which are grounded in civil law rather than common law norms. The question is in part whether international judges with a background in common law procedures will be comfortable with this system. But also, more importantly, Cambodian procedures are full of gaps. There are no rules and procedures available for the EC at this time. We and other civil society groups have worked to introduce a basic set of rules and procedures—but we have no expectation that these will be accepted by the government.

Another challenge is how the court will deal with the problem of time. These crimes happened more than 20 years ago. Today there is only

circumstantial evidence left. Other evidence has disappeared. Witnesses have died. So the question is how to gather evidence and make a case? There is a real concern that some of the main perpetrators might be acquitted due to lack of evidence. If this happens, Cambodians will lose faith in the possibility of justice.

Another problem is that the government of Cambodia is not willing to have the EC become a reality. First they said they did not have enough money to cover more than a small part of the Court's costs. But then when the international community says it can cover the rest, the government claims it cannot even afford its share. Negotiations have dragged on for years. The issue of procedures for example—the government is unlikely to accept our recommendations, but it may use the process to further delay things. And while the government delays, witnesses and perpetrators are getting old and dying. The government has also moved the venue from a central independent location in Phnom Penh, near the Royal Palace, to a military venue about 30 km outside the city. There will be fewer witnesses to testify as a result—some of them won't enter a government building.

The imbalance between Cambodian and international judges in the court is a matter for concern. We are worried that national investigators and the Khmer personnel on the Tribunal are unlikely to behave in an independent manner. There are no formal criteria about the selection of judges. Behind the scenes, Cambodian judges may be

following political direction. We have confidence in the international judges but little experience on which to trust Cambodian judges.

Finally, investigations are likely to be problematic. There is no tradition of investigation in Cambodia. Under normal conditions, achieving prosecutions has never been a problem where the accused have no influence. Investigating judges do not have the money to conduct thorough investigations, so they rely on police testimony. The police habitually use unlawful interrogation techniques. There are no clear rules governing the use of evidence—any evidence can be presented in court. And neither investigators nor police are willing to prosecute friends or relatives of ranking government officials, regardless of the crime. So how will these crimes be investigated?

Under Cambodian law there are no procedures to protect victims and witnesses. Potential witnesses are often afraid to testify and so are frustrated in their wish to participate. They prefer to say they know nothing and stay uninvolved. There is documentary evidence and the skulls and other material evidence from the

killing fields. But evidence can disappear, if for example, a court official is related to the perpetrator in any way.

Most people today have mixed feelings about the court. They lack education and are not well informed. The government has not made a serious effort to inform people—and they have no interest in doing so. The opposition asks why the government has not fundraised for the court.

It is not too late for the government to increase public trust in this process. First we would like to see that the selection of Cambodian judges and prosecutors is more transparent and accountable. Second, the government should ensure there is enough substantive law before the court is established. We want to see the will of the government to make the process work. We want to see that the government is committed and serious before starting the process. If the EC functions according to basic standards of justice, that can lift our faith in the court system as a whole. If the EC fails, we will lose faith in courts. “Like father like son.”

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### Notes

Interviews conducted by Stephen Humphreys, September 2005, Phnom Penh, Cambodia.

1. Deputy Minister of the Interior Ho Sok was killed during a 1997 coup. In 1998 a team was established to investigate his death, but no report was ever published.

2. In early January 2003, a Cambodian newspaper reported a Thai actress as claiming that Angkor Wat belonged to Thailand. In retaliation for her comment, Prime Minister Hun Sen asked Cambodian television stations not to broadcast any Thai movies. This was subsequently followed by riots against Thai businesses and the Thai Embassy in Phnom Penh, which were never investigated.

# Outreach in Cambodia: An Opportunity Too Good to Miss

Helping ordinary Cambodians to understand the workings of the EC is one of the tribunal's many challenges. Tracey Gurd recommends an outreach strategy.

The Village Chief<sup>1</sup> absentmindedly swatted a fly from his face as he recounted his torments. It was the rainy season in Cambodia and we sat, cross-legged, on the wooden floor boards in his home. His eyes lowered as he described life under the Khmer Rouge in the 1970s. “I was put in prison—actually it was more like a toilet, like in S-21<sup>2</sup>—where they put me in shackles tied to an iron bar.” After a week, his captors released one leg and fed him porridge in a coconut shell. It was then, in the prison, that the humiliation and the ill-treatment overwhelmed him. At that point, he said, he started to cry. “It wasn’t even rice in a bowl,” he explained.

His experience occurred in 1972 in Kampong Thom province, over which the Khmer Rouge had effective control years before it had extended its grip over the entire country. This Village Chief was again victimized by the Khmer Rouge after Phnom Penh fell on April 17, 1975. He wants to see the Khmer Rouge leaders tried. Yet, as we talked to him, it was not clear whether he knew that the Extraordinary Chambers in the Courts of Cambodia (EC),<sup>3</sup> set up to deal with the atrocities committed by the

Khmer Rouge, only had the authority to look at crimes committed between April 17, 1975 and January 6, 1979—and that all crimes falling outside those dates, however appalling, would also fall outside the court’s purview. Nor was it clear if he realized that his specific abuses were unlikely to be prosecuted. Making sure that he understands, and engages with, these issues needs to be priority for future outreach programs set up by the EC and civil society. Apart from anything else, the Chief needs to know what to expect from the trial process.

‘Outreach’ for international and hybrid tribunals is “aimed at ensuring accurate and reliable information is disseminated as widely as possible to as many target groups as possible, in a way designed to maximize participation and understanding.”<sup>4</sup> The dangers of failing to implement early and effective outreach strategies are striking. Other courts set up to deal with international crimes—including the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC)—have each faced serious problems precisely because they paid too little attention to early outreach activities. The ICC and the ICTY faced misinformation campaigns perpetuated by hostile opponents. The ICTR’s impact on



the local population remains limited. Not much has changed since local Rwandans, surveyed eight years into the Tribunal's existence, indicated they had little or no knowledge about the court's mandate and operations. Yet the Special Court for Sierra Leone (SCSL) has been applauded as more effective than others, thanks to the

**Cambodians need to know what they can realistically expect from the trial process.**

way it engaged the local population. It entered into a sustained dialogue with local people about the Court's work early in its lifespan. This approach risked criticism of the Court, but judging by the accolades the SCSL has received, the advantages of a participatory approach to outreach in which the population feels a sense of ownership over the Court's work are worth the gamble.

The UN Secretary-General has identified outreach as an "integral part" of the Extraordinary Chambers' work. He sees it as a means of meeting the broader expectations of the Cambodian government and international community that the EC's operations "will contribute substantially to national reconciliation in Cambodia."<sup>5</sup> This is an ambitious task for any outreach program, and some scholars have questioned more generally the extent to which any international or

hybrid court can contribute to national reconciliation in post-war societies.<sup>6</sup> Yet the experience of other tribunals demonstrates that a successful outreach effort provides a greater opportunity for a national dialogue to be created about issues of accountability, even if the court itself cannot be seen as a sole vehicle through which reconciliation can be achieved.

This article explores the outreach pitfalls encountered by international and hybrid courts, and makes recommendations for the Extraordinary Chambers and civil society. Hallmarks of a successful outreach effort will include a multifaceted approach which is tailored to suit the audience to whom the information is directed.<sup>7</sup> It should also contain "enough flexibility to be able to respond to the needs of different groups within society [and] it should be devised to develop in parallel with the Court."<sup>8</sup> In short, implementers of outreach programs need to talk with—and more importantly listen to—people like the Village Chief. Local information needs will change over time as the trials progress, and with them, so might people's perceptions of the Extraordinary Chambers.

### **Outreach in other international and hybrid tribunals**

The two international tribunals set up in the early-mid 1990s—the ICTY and the ICTR—demonstrate the dangers of inadequate attention to early outreach efforts. Though the outreach programs in each tribunal have improved in recent years, both provide

cautionary tales of allowing misinformation and negative stereotypes to fester unchallenged.

The ICTY set up an outreach program six years after the Tribunal was established. By that time, negative images of the court in former Yugoslavian communities were rife and outreach needs were enormous. As the Tribunal itself pointed out in its 1999 Annual Report to the Security Council:

The Tribunal is viewed negatively by large segments of the population of the former Yugoslavia. Its work is frequently politicized and used for propaganda purposes by its opponents, who portray the Tribunal as persecuting one or other ethnic groups and mistreating persons detained under its authority. Throughout the region, the Tribunal is often viewed as remote and disconnected from the population and that there is little information available about it. Such views are exploited by authorities that do not recognize or co-operate with the Tribunal, thereby damaging efforts to foster reconciliation and impeding the work of the Office of the Prosecutor. This is particularly detrimental to the success of the Tribunal.<sup>9</sup>

In response to this, the ICTY set up outreach offices in Sarejevo, Zagreb, Pristina and Belgrade. It published and distributed key court documents (including indictments, judgments, rules of procedure, press releases) in Bosnian/Croatian/Serbian and in

Albanian using print and CD-Roms, as well as posting them on the internet.<sup>10</sup> To address damaging negative perceptions of the Tribunal, the outreach program started to engage with civil society organizations in 1999—the same year as grassroots NGOs reported that they did not know how to access basic information about the

**The dangers of failing to implement early and effective outreach strategies are striking.**

Tribunal.<sup>11</sup> It brought ICTY judges to the region to meet with fellow legal professionals and to discuss the issues faced by the Tribunal. Individuals and groups from the region traveled to The Hague to meet with the court staff and watch the court in action.<sup>12</sup> In 2004, the Tribunal started holding community events in areas most affected by the crimes prosecuted by the ICTY. In May 2004, ICTY investigators, prosecutors and court staff directly involved in cases relevant to the northern Bosnian town of Brcko met with local leaders and victims' associations to "provide a comprehensive and candid first-hand review of the investigation process, as well as the subsequent indictment and prosecution of persons most responsible for crimes."<sup>13</sup> These are welcome developments, but took longer than a decade to take shape. This is too long for victimized local populations to remain removed from the workings of the Tribunal.

Yet as Weinstein and Fletcher have pointed out, the fact that the ICTY struggled to set up appropriate outreach mechanisms is not surprising given the lack of previous examples.<sup>14</sup> Still, as the Tribunal continues to confront negative images in the victimized former Yugoslavian communities, the question remains: would the damage to the Tribunal have been less if the outreach effort had been more pro-active from the start?

**A participatory approach to outreach in which the population feels a sense of ownership over the court's work is worth the gamble.**

The same question continues to be asked about the ICTR. Rwanda experts Alison Des Forges and Timothy Longman have criticized the performance of the Tribunal's outreach program. In 2004 they argued that the "Arusha Tribunal has remained detached from Rwandan society, focusing more on legal processes and contributions to international law than on its potential impact within Rwanda."<sup>15</sup> Their assessment was, in part, based on Longman's study undertaken in 2002, in which his research team interviewed more than 2,000 Rwandans on their attitudes and understanding of the ICTR, set up eight years earlier. He found that 87.2 percent of respondents said they were either not well informed, or not informed at all about the ICTR.<sup>16</sup> Longman and Des Forges

further chastised the Tribunal for devoting few resources to outreach, noting that the resources it did devote, such as the establishment in 2002 of an outreach center in Kigali to disseminate information about the trials, were largely ineffective. "Attractive to a tiny part of the urban elite, the center offers little to the majority of Rwandans, who are illiterate and live in rural areas."<sup>17</sup>

The fact that the Tribunal left much of the outreach work to civil society organizations, such as Internews, (an American-based organization which produced regular newsreels from the ICTR trials and traveled to the countryside to show them in local town halls and football fields),<sup>18</sup> also raised the ire of Longman and Des Forges.<sup>19</sup> Yet the Tribunal has made some active efforts of its own to inform and engage the population. In 1998, the court established a Radio Rwanda seat at the ICTR, enabling broadcast of the proceedings and judgments from Arusha back into Rwanda.<sup>20</sup> Rwandan journalists are regularly brought to the Tribunal to report on trial progress and in 1998 a website was set up as an information dissemination tool.<sup>21</sup> Meanwhile, active outreach by court officials started off well, albeit late. After the court delivered its first decision in 1998,<sup>22</sup> convicting Taba mayor Jean-Paul Akayesu of genocide and crimes against humanity, the ICTR's then lead prosecutor, Pierre Prosper, traveled to Taba to talk with local residents about the judgment.<sup>23</sup> This type of effort does not appear to have been regularly repeated.

Despite these efforts, many commentators agree the Tribunal's outreach has failed.<sup>24</sup> Last year, scholar Victor Peskin wrote of the ICTR's outreach efforts: "Despite some progress with limited resources, the Tribunal's outreach efforts have been sorely lacking, with the result that most Rwandans still know little if anything about the trials."<sup>25</sup>

Peskin argues that the ICTR has pursued the wrong type of outreach strategy. By relying too much on a "more arm's-length transparency model"—a model he describes as dominated by traditional information dissemination activities, such as distributing leaflets, facilitating media access to the trials, and translating judgments into local languages—the ICTR has missed an opportunity to actively engage the population, as well as the local Rwandan judiciary, so that the Tribunal could have a "direct and lasting impact on the rule of law in Rwanda."<sup>26</sup> According to Peskin, the Tribunal should have made greater use of the "engagement model" of outreach, in which the Tribunal moves beyond information dissemination activities and frequently interacts with the local population to create dialogue about the Tribunal's work. It would also actively work with the local judiciary and other legal professionals to enhance legal capacity. According to Peskin:

Engagement is key to bringing the reality of the Tribunal closer to the country because interaction between Tribunal personnel and Rwandans gives a human face

to an otherwise abstract and intimidating institution. The engagement approach moves beyond public relations and information dissemination toward contact and dialogue with Rwandans about the Tribunal's shortcomings as well as achievements.<sup>27</sup>

Peskin draws on the SCSL for inspiration. He notes that the Special Court, set up in 2002 in Sierra Leone's capital city, Freetown, has ensured that its outreach efforts responded to information needs of rural people.<sup>28</sup> Indeed, the SCSL outreach program (the strategy for which is firmly rooted in the engagement model), has been applauded by other major international onlookers. Human Rights Watch, for example, praised the Court in October 2005 for developing "one of the most successful outreach programs of any international or hybrid court to date" which "may be considered a model for other such courts."<sup>29</sup> Despite being hampered by lack of funding in its early years, the Special Court has tried to make the most of its limited resources: it hired a respected Sierra Leonean national with a grassroots NGO background to head its outreach team; it brought high level Court personnel—including the Registrar, the Prosecutor and the Principal Defender—to the countryside to participate in town hall meetings, community gatherings and school lessons with the local population (which extended internationally to Liberia in 2004); it has held regular seminars and conferences with academics, students and victims; it

produced television shows, distributed information booklets, organized radio call-in shows and participated in radio information panels; and it engaged specific groups—including the military, the police, the local judiciary, prison officers and religious leaders—with an outreach strategy targeted to each group’s particular information needs.<sup>30</sup> Notably, its work included an outreach strategy for the disabled, which, among other things, involved the production of more than 300 court

**In the “engagement model” of outreach, the Tribunal moves beyond information dissemination activities and interacts with the local population.**

documents in Braille.<sup>31</sup> This project was undertaken with a local partner, the Blind Youth Movement, as one of a series of efforts the Court made to engage NGOs with grassroots networks in the outreach process.

Other courts, particularly the ICC, would do well to draw on this example—at least where it can. Just in the past year, the ICC—which officially came into existence in July 2002—has been plagued by criticisms in at least two of the countries in which it works. In Sudan, “tens of thousands” of protesters hit the streets of Khartoum in a government-backed demonstration after news emerged of the referral of the Darfur situation to the ICC by the UN Security Council.<sup>32</sup> The Sudanese government has since

blocked ICC investigators from entering the war-torn region.<sup>33</sup> In northern Uganda, community leaders did not see ICC efforts as complementary to local ones, questioning whether ICC investigations threatened Uganda’s fragile peace process. They argued that the Court’s investigations should stop and local justice processes should be given a chance to work.<sup>34</sup> In both cases, the ICC’s outreach response has been disappointing. Human Rights Watch noted in November 2005 that “[i]n Sudan, the news of the ICC referral generated a great deal of hope and expectations among civil society groups in Darfur, but the lack of outreach since then has left many victims feeling disillusioned about the prospects for justice.”<sup>35</sup> In Uganda, the ICC has made more of an effort. In 2005, it held a workshop for local council delegations, seminars for local judicial authorities, and information meetings for lawyers and journalists. While these efforts mark an important start, as Human Rights Watch notes again, “they have not been enough to provide basic knowledge to the affected communities about the ICC.”<sup>36</sup> The fact that the efforts are directed towards the educated, the elite and community leaders, means that the majority of the local population is not being directly and meaningfully engaged by the ICC. Much more still needs to be done, in both Darfur and Uganda, if the Court’s outreach efforts are to be effective.

The Extraordinary Chambers should also use the Special Court for Sierra Leone’s outreach program as a model, and avoid the pitfalls encoun-

tered by the other tribunals. This can help to ensure that people like the Village Chief from Kampong Thom understands and engages with its operations and mandate.

### **Outreach in Cambodia: three recommendations**

In Cambodia, outreach efforts are already underway. The Khmer Rouge Trial Task Force (the government body designated to take the lead in preparing for the trials) has produced an information booklet which it has started to distribute throughout the country.<sup>37</sup> In the coming year, high-level Task Force officials—who are also high-level Cambodian government officials and EC personnel—will make visits to the countryside in an effort to engage the rural community with the EC. Meanwhile, civil society has been gearing up with its own outreach efforts. DC-Cam, an independent institution set up initially for the collection of documents relating to Khmer Rouge atrocities, for example, has sent 200 students into the countryside to spread information about the trials.<sup>38</sup> The Khmer Institute for Democracy (KID) has undertaken the most recent survey of local people’s attitudes towards the Khmer Rouge Tribunal.<sup>39</sup> Although the survey itself recognizes its own methodological flaws,<sup>40</sup> it still contains some significant insights which can provide a basis for future projects, both by KID and other institutions. KID has also undertaken a unique outreach initiative, developing a film which features a famous Cambodian folk-singer whose songs explain the struc-

ture and aims of the EC. This film is currently being shown in pagodas and other communal spaces around the country. In 2005, the Open Society Justice Initiative recruited a research team (comprised of one international law graduate, a local law student and a local anthropologist) to analyze outreach needs in rural Cambodia. Findings will be used to develop a specialized outreach program, to be undertaken in collaboration with a local NGO, in 2006.

### **The Extraordinary Chambers should use the Special Court for Sierra Leone’s outreach program as a model.**

This is an impressive start. But more needs to be done to ensure that outreach in Cambodia is successful. Given the experiences of the other tribunals, three major recommendations seem particularly relevant for the EC and civil society.

*Start Early:* The EC needs to start an outreach program as a matter of urgency. Early efforts between NGOs themselves, and between NGOs and the Court, need to be coordinated to make sure all segments of the Cambodian community are reached. The ICC, the ICTY and the ICTR’s experiences all point to the dangers of failing to address outreach early, thoughtfully and in a coordinated way.

*Employ an ‘Engagement Model’ of Outreach:* The EC and civil society

should aim to move beyond a ‘transparency model’ of outreach aimed simply at information dissemination. The EC needs to engage the local population in a regular, meaningful dialogue about the Court and its proceedings. This means:

**Tools which do not rely on people’s ability to read should be integrated into any outreach strategy.**

*Identifying and engaging grassroots networks with links to local communities.* The ICTY failed to do this at an early stage of the Tribunal’s operations and had to start from scratch six years into its lifespan. The EC cannot afford to do the same. It should look toward the SCSL’s example, which began identifying, and working with, grassroots groups relatively early in its operations, greatly increasing its reach across the country. Yet in doing so, the EC must understand how existing community structures and grassroots networks operate, and how they link with the community to which they belong. The system of hierarchy within Cambodia, particularly in rural areas, is well settled. If an engagement strategy is to be successful, these structures and networks will need to be researched, understood and

respected before they are tapped into. Misunderstanding them—or failing to recognize the disruptive impact that an outside entity could have on community structures and the information flows they facilitate—could undermine harmony within communities. This in turn could diminish the effectiveness of any local discussion generated about the Extraordinary Chambers.

*Making regular and repeated trips to the countryside to promote a dialogue with rural communities.* For the EC, this should be done, as currently planned by the Khmer Rouge Trial Task Force, with high-level court officials to demonstrate (as the SCSL did) the Court’s seriousness in making the process meaningful for locals. For civil society, NGOs should meet regularly to divvy up tasks to avoid overlap and to fill outreach gaps (both geographic and demographic). Follow up outreach activities are crucial. The examples provided by the ICTY in Brcko, and the ICTR in Taba, where court officials traveled to an area in which atrocities prosecuted by the court actually took place and explained the outcomes and processes of the trial, are sound precedents. These efforts could be further enhanced in Cambodia if the outreach program took steps throughout the trials to visit the communities affected by crimes and provide updates on developments.



*Using relevant, targeted materials and strategies that respond to the particular information needs of the targeted community.* The local population in Cambodia is largely rural (approximately 84 percent of Cambodians live outside the main cities)<sup>41</sup> and poverty-stricken,<sup>42</sup> and levels of functional illiteracy in the provinces are high.<sup>43</sup> According to a recent UNDP study analyzing access to Cambodia's justice system, most people outside Phnom Penh have had little or no experience with the formal court-based justice system.<sup>44</sup> This means that outreach tools which do not rely on people's ability to read (films, for example, or flip charts) should be integrated into any outreach strategy. Efforts engaging rural communities should not assume knowledge. Even basic concepts, like information about what a court is, should be explained fully. Room needs to be provided for people to freely engage with these, and more complex, ideas.

*Developing a culturally- and linguistically-sensitive policy for affected minority groups.* In Cambodia, ethnic and religious minorities were often singled out for abuse. Outreach strategies should incorporate specifically targeted efforts for these groups. This may mean adopting culturally sensitive approaches, including the use of languages other than Khmer. Interpreters and materials that are relevant and accessi-

ble to these communities are needed to help facilitate their engagement with the court.

*Engaging with local legal professionals to strengthen the national justice system.* The EC outreach program should ensure that local and international judges and

**The engagement model of outreach is likely to be more effective in Cambodia than the transparency model.**

legal professionals, both within the Extraordinary Chambers and outside, work effectively together and learn from each other. International staff will bring different experiences and knowledge to the Chambers, which could be relevant for local judges and legal professionals. Working side by side, the interactions of the two sets of professionals may have a lasting and positive impact on the national court system. This is particularly likely if international staff recognize they too have much to learn from their Cambodian counterparts about local laws, customs and culture. Experiences in other countries show that this two-way interaction is not always prioritized, with detrimental results. In Bosnia, for example, judges and other legal professionals surveyed about their interactions with ICTY staff indicated

that the way in which international staff treated Bosnian professionals was “condescending, ignorant, and disrespectful.”<sup>45</sup> Internationals in Cambodia should not make the same mistake. To do so risks diminishing the chances that the EC processes will leave a positive legacy on the local legal culture.

Based on the experiences of the ICTY, the ICTR and the SCSL, the engagement model of outreach is likely to be more effective in Cambodia than the transparency model.

*Secure Adequate Funding:* The EC must devote sufficient resources to its outreach program to allow meaningful outreach campaigns to be implemented. International donors should also support civil society efforts to engage the local population on the Court. Though outreach has been billed as a “core” activity for the other tribunals, there has rarely been adequate funding set aside for these activities from the Courts’ core budgets. In each case, the programs had to search elsewhere for state and non-state funding. This is where pro-active high level officials will be important. Robin Vincent, the former Registrar for the Special Court for Sierra Leone,

was assertive in fighting for funds and other resources for that Court’s outreach. High level officials in the Extraordinary Chambers will need to do the same. Similarly, civil society groups will need to seek out potential donors to help them undertake their own outreach activities.

If the EC and civil society model their approach largely on the example of the Special Court for Sierra Leone, the chances of engaging the population in a meaningful way with the EC process will be greatly enhanced. At the most basic level, this means engaging with people like the Village Chief as soon as possible, and devoting enough resources to create a regular meaningful dialogue with him. In October 2005, the Village Chief told us he was skeptical about the Khmer Rouge trials. Those senior Khmer Rouge leaders still alive (and most likely to be prosecuted) had powerful political allies, making arrests unlikely, he said. This outcome, he said, would make the Extraordinary Chambers’ process “unsatisfying.” Engaging him on this issue will at least create a personal dialogue about the things that matter most to him about the Court. This is an opportunity too good for the Court, and NGOs, to miss.

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### Notes

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1. To ensure confidentiality is maintained, this man’s real name has been omitted and his title changed. For reference, the title of “village chief” in Cambodia is given to a person who typically oversees up to 300 families, and is charged with handling disputes between the villagers, dealing with safety and security issues and overseeing small scale economic development projects in the

area. Usually the village chief holds this title for a long time, is not elected, and is well known to the local community. This man held a similar type of title which required a degree of responsibility for, and toward, his community. He was interviewed by the Justice Initiative outreach research team, with which the author traveled, in October 2005.

2. “S-21,” or Toul Sleng, is an infamous prison and torture center used by the Khmer Rouge. Situated in Phnom Penh, it contained cells the size of a toilet in which prisoners were locked and chained up for long periods. Toul Sleng is now a museum open to the public.
3. The full legal title of this entity is the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea. It is usually referred to as the “Extraordinary Chambers” or “EC” (as it will be in this article) or the “Khmer Rouge Tribunal.”
4. No Peace Without Justice (NPWJ), “Outreach and the International Criminal Court,” *NPWJ International Criminal Justice Policy Series No. 2*, September 2004, available at <http://www.iccnw.org/documents/asp/papersonaspissues/3rdASP/NPWJOutreachPolicyICCSep04.pdf>.
5. *Report of the Secretary General on the Khmer Rouge Trials*, UN General Assembly, 59th Session, U.N. doc A/59/43, October 12, 2004, para 22.
6. See, for example, Harvey M. Weinstein and Eric Stover, “Introduction: Conflict, Justice and Reclamation,” in Eric Stover and Harvey M. Weinstein (eds.) *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press, 2004) at 4-5.
7. NPWJ, above n. 5, p.7.
8. Ibid.
9. 1999 ICTY Annual Report, para 148, available at <http://www.un.org/icty/rappannu-e/1999/AR99e.pdf>.
10. 2001 ICTY Annual Report, para 227, available at <http://www.un.org/icty/rappannu-e/2001/AR01e.pdf>.
11. See Kristen Cibelli and Tamy Guberek, *Justice Unknown, Justice Unsatisfied? Bosnian NGOs Speak about the International Criminal Tribunal for the Former Yugoslavia*, published in the Education and Public Inquiry and International Citizenship series of Tufts University, 2001, p.17. Available at <http://www.epiic.com/archives/2001/justicereport.pdf>.
12. 2001 ICTY Annual Report , para 229, above n. 10.
13. 2004 ICTY Annual Report para. 320, available at <http://www.un.org/icty/rappannu-e/2004/AR04.pdf>.
14. See Laurel E. Fletcher and Harvey M. Weinstein, “A World unto Itself? The Application of International Justice in the Former Yugoslavia,” in Eric Stover and Harvey M. Weinstein (eds.), above n.6, at p.39.
15. See Alison Des Forges and Timothy Longman, “Legal Responses to Genocide in Rwanda,” in Eric Stover and Harvey M. Weinstein (eds.), above n.6, p.49.
16. Ibid., p.56. For more information about this study, see Chapter 8 (Timothy Longman and Théoneste Rutagengwa, “Memory, Identity, and Community in Rwanda”) and Chapter 10 (Timothy Longman, Phuong Pham and Harvey M. Weinstein, “Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda”) in Eric Stover and Harvey M. Weinstein (eds.), above n.6.
17. Ibid.
18. For more information on Internews’ outreach activities in Rwanda, see its website, <http://www.internews.org.rw>.

19. Des Forges and Longman, above n. 15 at p.56.
20. 1999 *ICTR Annual Report*, para 108 and 109, available at <http://www.ictt.org/ENGLISH/annual-reports/a54/9925571e.htm>.
21. *Ibid.*
22. See the *Prosecutor v Jean-Paul Akayesu*, Case No ICTR-96-4-T (Trial Chamber decision), delivered September 2, 1998. Available at [www.ictt.org](http://www.ictt.org).
23. This example was noted in Victor Peskin, "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Program," (2005) 3 *Journal of International Criminal Justice* 955, footnote 11.
24. *Ibid.*, p.955. See also the International Center for Transitional Justice, "The Special Court for Sierra Leone: The First Eighteen Months," March 2004, available at <http://www.ictj.org/africa/sierra.asp>, which notes on page 8 that "Rwandans have no sense of ownership of the ICTR and do not necessarily perceive the tribunal to be for them. This is exacerbated by the fact that many ICTR staff members have not even visited Rwanda." See also Samantha Powers, "Rwanda: The Two Faces of Justice," (50)1 *The New York Review of Books*, January 16, 2003.
25. *Ibid.*, p.955.
26. *Ibid.*, p.957. But see more generally his discussion of this issue on pp.955-957.
27. *Ibid.* at p.954.
28. *Ibid.*, at p.952.
29. Human Rights Watch, *Justice In Motion: The Trial Phase of the Special Court for Sierra Leone*, October 2005, p.28, available at <http://hrw.org/reports/2005/sierraleone1105/sierraleone1105.pdf>
30. For more information about the outreach program's work, see the SCSL outreach page of its website, at <http://www.sc-sl.org/outreach.htm>.
31. *Ibid.* For more information on this and other SCSL outreach activities, see U.C. Berkeley War Crimes Studies Center, *From Mandate to Legacy: The Special Court for Sierra Leone as a Model for 'Hybrid Justice'*, Interim Report on the Special Court for Sierra Leone, April 2005, p.33. Available at <http://ist-socrates.berkeley.edu/~warcrime/Papers/BWCSC%20Interim%20Report%20on%20the%20Special%20Court%20for%20Sierra%20Leone.pdf>.
32. "UN Sets Darfur Trials in Motion," BBC News, April 5, 2005, available at <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/africa/4411497.stm>.
33. "Sudan Bars ICC Investigators From Darfur," *Sudan Tribune*, December 14, 2005, available at [http://www.sudantribune.com/article\\_impr.php3?id\\_article=13032](http://www.sudantribune.com/article_impr.php3?id_article=13032).
34. See, for example, Waldimar Pelsler, "Will ICC Prosecutions Threaten Ugandan Peace Process?" Institute for War and Peace Reporting, November 16, 2005, available at <http://www.reliefweb.int/rw/RWB.NSF/db900SID/SODA-6J848C?OpenDocument>.
35. Human Rights Watch, *Human Rights Watch Memorandum for the Fourth ICC Assembly of States Parties*, November 2005, available at <http://hrw.org/backgrounder/ij/memo1105/index.htm>.
36. *ibid.*
37. See the Khmer Rouge Trial Task Force, *An Introduction to the Khmer Rouge Trials*, available at [http://www.cambodia.gov.kh/krt/english/introduction\\_eng/index.htm](http://www.cambodia.gov.kh/krt/english/introduction_eng/index.htm)
38. DC-Cam, Third Quarterly Report: July – September 2005, available at [http://www.dccam.org/Abouts/Annual/Third\\_Quarterly\\_Report\\_July\\_September\\_2005.htm](http://www.dccam.org/Abouts/Annual/Third_Quarterly_Report_July_September_2005.htm)
39. Khmer Institute for Democracy, "Survey on the Khmer Rouge Regime and the Khmer Rouge Tribunal 2004," available at <http://www.bigpond.com.kh/users/kid/KRG-Tribunal.htm>

40. The survey recognizes that it was not conducted by interview experts, nor did it employ professional scientific methods, and so should not be taken as representative of the views of the Cambodian population as a whole. See *ibid* at p.1.

41. UNDP, *Pathways to Justice*, (UNDP, Phnom Penh, 2005), p. 60.

42. In 2004, approximately 40 percent of Cambodia's population were estimated as living below the poverty line – 2004 World Fact Book – Cambodia, CIA website, available at <http://www.cia.gov/cia/publications/factbook/geos/cb.html#People>.

43. Recent figures suggest 71 percent of rural women and 50 percent of rural men living in rural areas are functionally illiterate, while 25 percent of men and 45 percent of women are completely illiterate: See *A Fair Share for Women: Cambodia Gender Assessment*, April 2004 (a report resulting from a collaboration between UNIFEM, the World Bank, ADB, UNDP and DFID/UK, in cooperation with the Ministry of Women's and Veterans' Affairs) at 81.

44. Local disputes are largely settled by village or district chiefs. See UNDP, above n. 41.

45. Laurel E. Fletcher and Harvey M. Weinstein, above n. 14, pp.33-34.

# The Importance of Monitoring the Trials at the Extraordinary Chambers

**Richard J. Rogers** considers the role of court monitors and states the case for independent monitoring of the EC trials.

The independent monitoring of criminal trials is not a new concept, but it has become more popular in recent years. Trial monitors have long been sent by inter-governmental organizations, NGOs, or international organizations to cover specific trials. Until recently, these have tended to include three categories of trial: politically charged trials, such as those following the presidential elections in Azerbaijan in 2003;<sup>1</sup> trials in which judicial actors are threatened, pressured, or at risk, which are monitored by the International Commission of Jurists (ICJ) throughout the world;<sup>2</sup> or unique high profile trials, such as the trial of those charged with blowing up the Pan Am flight over Lockerbie in 1988.<sup>3</sup> But within the last decade, trial monitoring has been used in the broader context of transitional justice and longer term programs have been established in numerous domestic jurisdictions such as Bosnia and Herzegovina, Croatia, Kosovo, Liberia, Macedonia, and Serbia and Montenegro, or in hybrid tribunals such as those in East Timor and Sierra Leone. Indeed, the Secretary-General of the United Nations has noted

the importance of the UN's trial monitoring in the context of transitional justice.<sup>4</sup>

Some trial monitoring programs have been administered by NGOs—an example is the Judicial System Monitoring Program in East Timor—while others function as part of international organizations—examples include the OSCE's Legal System Monitoring Section in Kosovo and the UN's Legal System Monitoring Program in Liberia. Although trial monitoring programs may have different structures and mandates, they all share one or more of the following goals:

1. To help ensure fair trial and due process, according to international standards.
2. To build capacity in the legal system, including the judiciary.
3. To disseminate information about the trials to the public.

This article will look at the arguments for including a trial monitoring presence at the Extraordinary Chambers in the Courts of Cambodia (EC), with particular emphasis on the three aims enumerated above.

### The basic functioning and principles of trial monitoring

How do trial monitoring programs function? For the most part, monitoring programs go through a two- or three-step process. The first step is observing the trials from the public gallery and obtaining public documents. Thus, the trial monitors attend court, observe the substantive and procedural aspects of the day's hearing and note any irregularities or concerns with respect to fair trial or due process. Depending on the program's mandate and the issue under consideration, the monitors may attend all sessions of a particular case or just specific hearings. Because additional information may be required to fully assess the issues in the case, monitors also collect copies of public court documents—such as motions, responses, and decisions—from the court registry. Depending on the level of access granted to the program, monitors may also make copies of evidence, including witness statements and transcripts of hearings. This process forms the basis for identifying fair trial violations and for obtaining accurate case information to disseminate to the public.

The second step is the issuance of reports, which contain analyses of the trials or of certain aspects of the trials. Generally, the analysis is done by assessing whether the procedures applied by the court conformed to the applicable domestic law and to international human rights provisions. Trial monitors are less likely to analyze the substantive aspects of the decisions for the purpose of raising concerns, unless a decision (or a

verdict) is clearly unreasonable in light of the facts and evidence presented.<sup>5</sup> However, the substantive aspects of the case may form the basis of reports that are aimed at providing general case information to the public. The reports may be public or confidential and vary in terms of style and content, depending on the type of trial monitoring program, the intended audience, and the desired effect.<sup>6</sup> Most reports contain recommenda-

**Monitoring reports may include suggestions aimed at improving the functioning of the courts, particularly with respect to international standards.**

tions which are addressed to the governmental organs that administer the justice sector, court officials (judges, prosecutors, defense counsel), or other judicial actors. These recommendations may include a variety of suggestions aimed at improving the functioning of the courts, particularly with respect to international standards of fair trial and due process. Specifically, these may include recommendations for legislative reform, amendments to court procedural rules, changes in certain aspects of court practice, and training for judicial actors.<sup>7</sup>

Some trial monitoring programs also incorporate a third step, which involves following up on recommendations in order to build judicial capacity. This has been particularly



relevant to the programs administered by bodies involved in state building exercises, such as the OSCE Mission in Kosovo or the UN Mission in Liberia. Typically, follow-up involves holding conferences or seminars to discuss concerns with the relevant judicial actors, particularly judges, prosecutors and defense counsel;

### The mere presence of trial monitors may mean that judges perform their functions more carefully.

designing or taking part in formal training sessions; and advising legislative bodies or court administrators on amendments to legislation or rules of court procedure. Whether or not a trial monitoring program becomes directly involved in judicial capacity building depends primarily on its relationship with the judicial authorities and available resources.

When administering a trial monitoring program it is crucial that the trial monitors observe a few basic principles. Firstly, they must act impartially and independently when assessing the trials. The trial monitors should not be influenced by political considerations or interested actors. Secondly, the trial monitoring programs should not directly interfere in the proceedings or attempt to influence the decisions in ongoing trials. Thirdly, if trial monitors receive confidential information, either through official or unofficial channels, they should respect the confidentiality

of the information if its publication could adversely affect the administration of justice.

### Helping to ensure fair trials—the “independent watchdog”

One may question why a trial monitoring program is necessary to help ensure respect for fair trial and due process at the EC, whose inclusion of international staff and incorporation of fair trial provisions is designed to ensure that international standards of fair trials are met. It may be noted that, after painstaking negotiations between the United Nations and the Royal Government of Cambodia, a structure has been agreed whereby neutral and experienced international co-prosecutors, co-investigating judges and panel judges will work alongside their local counterparts. Further, a so-called “supermajority” vote, intended to ensure that at least one of the two international judges on the five judge trial panel forms the majority with his local counterparts, will be required for a conviction. In addition, fair trial provisions contained in the International Covenant on Civil and Political Rights, Articles 14 and 15, have been specifically incorporated into both the Agreement between the UN and the government<sup>8</sup> and the law establishing the EC.<sup>9</sup> In these circumstances, it is not unreasonable to expect the system itself to ensure that the trials meet international standards of fairness.

It is not unreasonable, but probably naive. Despite these safeguards, the EC will be a novel and imperfect judicial animal with a huge and complex

task. Even if all the relevant actors performed impeccably, which is far from guaranteed (and some would argue far from likely)<sup>10</sup>, procedural provisions may be breached, fair trial rights may be disregarded, and due process may be compromised.<sup>11</sup> That has been the experience of all the other trial monitoring programs that, among them, have covered a wide variety of courts in different jurisdictions, many of which have had far less complex cases to hear and, arguably, have functioned in political environments more conducive to fair trial norms. Trial monitoring programs have rarely been short of concerns or violations upon which to report.<sup>12</sup>

How can trial monitors help to ensure fair trials? Firstly, the mere presence of trial monitors may mean that judges or other actors perform their functions more carefully since they are aware of being assessed. In Kosovo for example, defense counsel regularly informed the Legal System Monitoring Section (LSMS) that judges were noticeably more careful to respect the rights of the accused persons when LSMS trial monitors were present. Secondly, by issuing reports that highlight fair trial concerns or violations, the trial monitoring program provides the judicial actors with objective legal analyses, which can initiate a positive change in court practice.<sup>13</sup> In addition to their objectivity, trial monitors have the advantage of being able to observe how similar issues are addressed in different trials or by different courts. Thus the trial monitors can assess

whether a particular violation is an isolated example or part of a more systemic problem, which may require additional training or even an amendment to the procedural rules.<sup>14</sup>

Providing that trial monitors are qualified, properly trained, and act impartially and independently, they can serve as effective independent legal watchdogs helping to ensure

**Trial monitors can serve as effective independent legal watchdogs, helping to ensure that fair trial norms are respected.**

that fair trial norms are respected. Thus, the trial monitors can complement the other actors (judges, prosecutors, defense counsel, investigators, and court administrators) in working to ensure that the EC functions according to international standards.

### **Building capacity amongst the judiciary and judicial institutions**

Some trial monitoring programs are placed within organizations whose mandate is to “modernize” the justice system and build capacity within the local judiciary—the capacity building function tends to be more important in those programs that are part of an intra-governmental body involved in state building, such as the UN or the OSCE. In these set-ups, the trial monitoring programs feed information about the functioning of the courts into the capacity building apparatus, which administers projects

focused on improving the legal system such as training judges, prosecutors and defense counsel, amending laws, creating judicial institutions, or reallocating resources to maximize efficiency.

The reports and recommendations by an EC monitor could be used to similar effect. For example, trial monitors may observe that investigators are not giving the appropriate warning to witnesses before taking statements, and may recommend that immediate training be given to investigators; or that a domestic procedural rule is contrary to the provisions of the International Covenant on Civil and Political Rights, and may recommend that the rule is amended; or that there is inadequate accommodation for protected witnesses, and may recommend that a safe house is established. Thus, the reports and recommendations relating to observed fair trial concerns need not be seen merely as negative assessments, but may also be used in a constructive way to build a better system of justice.

### **Disseminating information about the trials to the public**

In order for the EC process to be a full success, it will need to show not only that it has fairly tried those most responsible for the crimes under the Khmer Rouge regime, but also that it has assisted the process of reconciliation and “closure” for the Cambodian people generally. To do this, accurate information about the trials will need to be disseminated, including on the successes as well as the shortcomings.

Considering the high level of illiteracy amongst the population, this will need to be done not just through reports, but also through regional discussion forums or other media such as film.

The EC alone will not be in a position to do this as it will be too busy prosecuting and trying defendants and is unlikely to advertise its own failings. Media outlets will undoubtedly play an important role—at least one NGO has already expressed interest in covering the EC and providing information to the rural areas through films and discussions—but they are likely to provide the facts without legal analysis. Information provided through a trial monitoring program will complement the media by injecting legal analysis. In other words, the trial monitors will be able to explain procedures, such as why the defense counsel is allowed to ask the witness so many questions, or why the judges refused to admit certain pieces of evidence; clarify substantive issues, such as what is the difference between genocide and a crime against humanity, or why the prosecutor has decided to drop charges against Mr. X; or provide a legal assessment of the fairness of the trial. Such explanations will be particularly pertinent in Cambodia where there appears to be a low level of trust in the organs of justice.<sup>15</sup>

The provision of case information by media outlets, in conjunction with trial monitoring programs, will play a significant role in keeping the population informed about the evidence presented at trial, the decisions taken, and the reasons behind those decisions. This should ultimately assist

the population in understanding their own history under the Khmer Rouge regime. More generally, it may also help to build trust in the Cambodian courts as a valid system for truth telling and dispute resolution.

### **Who may benefit from a trial monitoring program at the EC?**

It is misguided to see trial monitors as protecting the rights of the defendant and no more. A well functioning trial monitoring program at the EC could produce benefits for a whole range of interested parties including witnesses, victims, judges, prosecutors, the Royal Government of Cambodia, the UN, and donor governments.

In relation to witnesses and victims, trial monitors can comment on the court's treatment of witnesses and highlight where additional witness assistance is required. This is particularly important when dealing with sensitive witnesses, such as rape victims, or witnesses who are subject to intimidation or threats. Further, by disseminating information to the public, victims who are unable to attend court can obtain information on trials in which they are interested.

Judges and prosecutors, at least initially, tend to be suspicious of trial monitors. This is not surprising. However, if the experience of other programs is anything to go by, judges and prosecutors at the EC will soon appreciate that a well functioning trial monitoring program can be to their benefit. For example, a respected program can add legitimacy to the EC. It is no secret that political manipula-

tion of the trials at the EC has been, and remains, a serious concern. Some detractors will find it hard to believe that the trials are fair, absent objective evidence to the contrary. A positive, independent assessment from a well-respected monitoring program can help reassure the outside world that the trials have been administered properly (if indeed they have), thus adding legitimacy to the entire

**A monitoring program could benefit the general legal and judicial reform program in Cambodia.**

process. The additional scrutiny provided by trial monitors may also encourage the defendants to cooperate with the EC—as they know that breaches of their fair trial rights would be noted—and, by highlighting inconsistencies, can help the courts reach consistency, thus benefiting the judges and prosecutors involved.

The government of Cambodia and the UN have the responsibility to ensure that the EC functions according to international standards. If the EC trials are administered fairly, both bodies will be grateful to have objective trial monitoring reports to rely on when facing detractors. Conversely, if problems do arise, it is better for the administrators to be aware of these problems at the earliest opportunity.<sup>16</sup> Further, by helping to identify the strengths and weaknesses of the EC, a monitoring

program could complement efforts to use the lessons learned through the EC process to benefit the general legal and judicial reform program in Cambodia.<sup>17</sup>

The \$57 million budget is being paid mainly by voluntary contributions by member states, primarily Japan. Donor governments will want to know that their money is being spent wisely and will likely welcome independent reports by programs that have no vested interest in the success or failure of the EC.

The potential advantages enumerated above presuppose that the trial monitoring programs set up to cover the EC function effectively and report

responsibly; a poorly administered program is likely to do more harm than good. Each monitoring program must: define clearly its objectives; ensure that its monitoring and reporting style suit those objectives; remain objective, independent, and impartial; and, so far as possible, establish good working relationships with the relevant actors in the EC. While trial monitors will never be a panacea for all the potential ills of any court or tribunal, they have made a significant, positive contribution to the administration of justice in many jurisdictions. Such an outcome is highly desirable in Cambodia.

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### Notes

Richard J. Rogers was chief of the Organization for Security and Co-operation in Europe (OSCE)'s Legal System Monitoring Section from 2002 to 2005. He is currently a consultant in international and transitional justice, based in Phnom Penh.

1. These trials were monitored by a consultant hired by the OSCE office in Baku, Azerbaijan, and the OSCE's Office for Democratic Institutions and Human Rights (ODIHR). The trial monitoring program followed the October 2003 presidential election, which sparked violent clashes in Baku between security forces and demonstrators protesting against election fraud. The violence led to 600 detentions, and 125 people, including prominent leaders of opposition parties, were eventually brought to trial. All of the trials were observed under the program in order to assess their compliance with international obligations. The report concluded that the trials were not always conducted in a manner that guaranteed the full implementation of international fair trial standards. See OSCE Office in Baku, "Report on the Trial Monitoring Project in Azerbaijan 2003-2004" (2004), available at: [http://www.osce.org/publications/odhr/2005/04/13762\\_209\\_en.pdf](http://www.osce.org/publications/odhr/2005/04/13762_209_en.pdf).

2. The ICJ's Centre for the Independence of Judges and Lawyers aims to promote and protect judicial independence and impartiality. As part of its program, it monitors trials and issues public reports. See for example, ICJ, "Attacks on Justice: The Harassment and Persecution of Judges and Lawyers: 2002" (2003).

3. United Nations Secretary-General Kofi Annan appointed Dr. Hans Koechler of the Vienna-based International Progress Organisation to monitor the trial at Camp Zeist in the Netherlands, in 2000 and 2001. Koechler strongly criticized the conduct of the trials and the verdict. See "Report on and evaluation of the Lockerbie Trial conducted by the special Scottish Court in the Netherlands at Camp van Zeist by Dr. Hans Köchler, University Professor, international observer of the International Progress Organization nominated by United Nations Secretary-General Kofi Annan on the basis of Security Council resolution 1192 (1998)" (February 3, 2001) and "Report on the appeal proceedings at the Scottish Court in the Netherlands (Lockerbie Court) in the case of Abdelbaset Ali Mohamed Al Megrahi v. H. M. Advocate by Professor Hans Köchler, international observer of the International Progress Organization nominated by UN Secretary-General Kofi Annan on the basis of Security

Council resolution 1192 (1998),” (March 26, 2002), both available at: [http://i-p-o.org/lockerbie\\_observer\\_mission.htm](http://i-p-o.org/lockerbie_observer_mission.htm).

4. “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,” Report of the Secretary-General, U.N. Doc. S/2004/616, August 23, 2004, para. 12.

5. The report by Dr. Hans Koechler on the Lockerbie trials is an example of where the substantive findings (i.e. the assessment of the evidence) were criticized.

6. Trial monitoring reports tend to follow a similar layout to legal motions or court decisions. Therefore, for each issue, the report may include: an introduction stating which fair trial norm may have been violated and in which court; an outline of the relevant domestic and international applicable law; a summary of the facts of the case, which led to the concern; an analysis in which the facts are applied to the law; and, a recommendation of suggested action. The types of reports typically issued by trial monitoring programs include:

Reports highlighting a particular decision issued by a court, which is considered to be in violation of fair trial norms; for example, when a court issues a decision excluding the public from the court without valid justification. These single issue / single court reports tend to be comparatively brief (one to two pages).

Reports analyzing a procedural concern observed in numerous cases (i.e., a problem which appears to be systemic within the legal system); for example, the failure of courts to justify properly their decisions on pre-trial detention. These reports are likely to cite numerous examples from different courts, but are unlikely to be longer than five pages.

Reports summarizing the evidence and outlining the concerns observed in a particular case; for example, the overall assessment of a completed war crimes case. These “case-reports” generally include background information, such as the charges, procedural history and verdict, as well as the fair trial concerns and analysis. Thus, they are likely to be longer reports of 10 – 40 pages. See e.g. the East Timor-based Judicial Systems Monitoring Program’s (JSMP) report “The Lolotoe Case: A Small Step Forward,” July 2004 (available at: <http://www.jsmp.minihub.org/reports.htm>); or the Kosovo-based OSCE Legal System Monitoring Section’s (LSMS) report “The Llapi Case,” December 17, 2003 (available at: <http://www.osce.org/kosovo/documents.html>).

Reports analyzing the courts’ treatment of specific types of cases or issues; for example, how the courts have dealt with cases involving witness intimidation (see the LSMS report “The Protection of Witnesses in the Criminal Justice System” April 2003), or war crimes cases (see the OSCE Mission in Croatia’s “Background Report: Domestic War Crimes Trials 2004,” April 26, 2005, available at <http://www.osce.org/croatia/publications.html>).

Reports providing information and an overall assessment of the problems in the legal system. This may include a number of categories of concerns, statistical information, and an outline of the positive developments. These reports tend to range between 20 and 70 pages. See, for example, the JSMP report “Overview of the Justice Sector, March 2005.”

7. Examples of each of these may be found in the LSMS and JSMP and OSCE Croatia reports cited in the above footnote.

8. 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, Articles 12 and 13.

9. 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 promulgated on 27 October 2004, Articles 33 and 35.

10. The EC structure is a compromise, which the UN begrudgingly accepted after the Cambodian government refused to allow the cases to be heard by a majority of international judges. Some human rights organizations and experts fear that the trials may be subject to political interference by the Royal Government of Cambodia, because the UN failed to secure full control over the functioning of the EC. Violations may also occur because the judicial actors are unfamiliar with the legal

territory—the international judges will be applying foreign procedural rules and the Cambodian judges will likely be applying international criminal law and human rights provisions for the first time. See articles in the present issue of *Justice Initiatives* by Dinah PoKempner, Sok An, and Craig Etcheson.

11. Individual breaches of fair trial provisions do not necessarily result in an “unfair trial” *per se*; minor breaches may not be enough to render the entire process unfair and even major breaches can be rectified during the course of the trial. Whether or not the individual breaches render the trial itself unfair must be assessed on the totality of facts and circumstances at the end of the trial.

12. See, for example, the reports issued by the Humanitarian Law Centre, Belgrade, regarding war crimes trials held in Croatia, Bosnia, Kosovo, and Serbia and Montenegro, available at: <http://www.hlc.org.yu/english/index.php>.

13. For example, in response to an OSCE LSMS report which criticized the courts for failing to display court trial schedules in public view (in breach of the accused’s right to a public trial), the Department of Justice in Kosovo issued a circular reminding the court presidents of their obligation to do so. The court practice has since improved.

14. For example, in its report “Crime Detention and Punishment,” the OSCE’s LSMS highlighted that, throughout the province and at all levels of courts, the judges were failing to properly justify their decisions on detention and on punishment. In subsequent meetings between LSMS and the presidents of the courts, the presidents acknowledged the problem and assured LSMS that they would endeavor to improve the standard of their decisions. See OSCE LSMS, “Review of the Criminal Justice System: Crime Detention and Punishment” (December 2004), available at: <http://www.osce.org/kosovo/documents.html>.

15. Trial monitoring programs have fed information to the media, or even collaborated with the media, in a variety of ways. For example, the Humanitarian Law Centre in Belgrade issues newsletters and has held public forums in which issues relating to war crimes trials are discussed by journalists and other actors, including trial monitors. On the other hand, LSMS in Kosovo holds press conferences following the release of its reports in which it takes questions from the media and the public. How a monitoring program chooses to disseminate information will depend largely on its purpose and mandate.

16. A trial monitoring program may also provide an additional benefit for the UN: by highlighting human rights concerns, the monitoring reports can help the UN identify the strengths and weaknesses of the EC model, which will assist in the establishment of future international tribunals.

17. A number of organizations (e.g. UNDP, the Open Society Justice Initiative, and the Documentation Center of Cambodia) have run programs to help Cambodian judges, prosecutors, defense lawyers, politicians, journalists, NGOs and other actors prepare for the EC. The knowledge and skills gained through this training, along with the experience at the EC itself, could ultimately feed into the wider justice system in Cambodia and help the government implement its “Action Plan” on legal and judicial reform.



## ALTERNATIVES

# Transitional Justice Approaches in Cambodia

Looking beyond the EC trials, **Laura McGrew** assesses what means are available to help Cambodians address their past.

Justice for the 1.7 million Cambodians who died under Khmer Rouge rule from April 17, 1975 to January 7, 1979 has proved elusive. Finally, after years of negotiations between the government of Cambodia and the United Nations, it appears that the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (EC),<sup>1</sup> may begin operations in early 2006. The purposes of the EC, as stated by the secretariat of the government's Task Force on the Khmer Rouge Trials, are to hold the senior leaders and those most responsible accountable and to set straight the historical record about their crimes, to provide justice to the Cambodian people (those who died and the survivors), to educate the younger generation about the Khmer Rouge period, to strengthen the rule of law, and to contribute to the reconstruction of society.<sup>2</sup>

For budgetary and planning purposes, the Cambodian government and the UN have estimated that from five to ten indictments would be made, and approximately five trials held.<sup>3</sup> A research study using recently

available archival sources, *Seven Candidates for Prosecution*, authored by Cambodia expert Steve Heder and Brian Tittmore of The War Crimes Research Office at American University, analyzes evidence of international crimes related to the responsibility of seven senior officials for their roles in developing and implementing the policies of the Communist Party of Kampuchea (CPK), known as the "Khmer Rouge."<sup>4</sup> The authors conclude that there is significant evidence of individual criminal responsibility against these leaders. The EC prosecutor's indictments may include at least the six surviving of those seven persons, plus former Khmer Rouge military chief Ta Mok, who is already in detention. An additional suspect, Kaing Guek Iev (known as "Duch") the former commander of the Khmer Rouge prison and torture center S-21, is also in prison. Both Ta Mok and Duch have been detained for more than six years, but as yet no real investigation has taken place.

Beyond these perpetrators, who fall under the court's jurisdiction of "senior leaders and those most responsible" for Khmer Rouge crimes, there are hundreds of mid-level leaders, and thousands of others who committed crimes during the Khmer Rouge period. Seeking accountability is a hugely

important goal for both Cambodians and the broader international community. But equally important is to assist the Cambodian survivors in building a better future for Cambodia. Other mechanisms, in addition to the EC, should be available for Cambodian society to deal with this legacy of past human rights abuse and mass violence.

**Seeking accountability is a hugely important goal. But equally important is to assist the Cambodian survivors in building a better future for Cambodia.**

### **Beyond retributive justice**

As countries emerge from periods of armed conflict and mass violence they seek a balance between truth, justice, peace, and reconciliation. Justice is balanced with political realities and international human rights standards with national realities. Judicial mechanisms such as trials can serve the following purposes: challenging a culture of impunity; individualizing guilt, to avoid assigning guilt collectively to an entire group; averting unbridled private revenge; fulfilling an obligation to the victims to publicly acknowledge guilt and innocence; and deterring or punishing.<sup>5</sup> All of these arguments have been made at various times in support of the EC.

The victims' need for justice must be balanced with the overall goals of reconciliation—but these goals may be contradictory and are certainly

understudied. According to one scholar, “There is a lack of discussion in policy circles and the international relations literature of the relationship between mechanisms and desired outcomes in terms of justice and reconciliation.”<sup>6</sup>

The EC uses a retributive (state-centered) justice model. Today, many authors suggest that restorative (victim-centered) justice may also have an important role to play in countries in transition from war and violence, to peace and reconciliation.<sup>7</sup> The EC process may help survivors know more about their past, but is unlikely to meet their need to know the truth, gain a full historical accounting, and have the crimes acknowledged by the perpetrators. For individual and societal healing to occur, other complementary processes are needed. However, as one author writes, “while justice is necessary for sowing the seeds of reconciliation between former enemies, it is clearly insufficient in itself.”<sup>8</sup> The quest for vengeance must be balanced with forgiveness. Remembrance must be balanced with forgetting, so that loved ones can be honored, but memories of the past don't overwhelm the present and the future. The issues of punishment, reparations, amnesties, and pardons must be examined. The various types of transitional justice approaches may focus on accountability, and can include both judicial and non-judicial responses.

Scholar Martha Minow notes that victims of massive human rights violations often have difficulties setting priorities between retribution,

public acknowledgement, financial redress, psychological or spiritual healing, building trust, establishing or strengthening democratic institutions, or focusing on deterrence.<sup>9</sup> Cambodian survivors, who were dehumanized during the great hardships of the Khmer Rouge regime, deserve an opportunity to restore their feelings of dignity and worth—and former Khmer Rouge should ideally play a role in this process. The potential healing such a process can eventually provide is immense, but the trauma that will invariably result from old memories must be considered as well through adequate and widespread mental health services.

Many Cambodians and observers, including the government and the UN, have said that national reconciliation is also a goal of the EC. The UN Secretary-General has addressed these concerns in his latest report on the EC: “I am aware of the expectation of the Government of Cambodia and the international community that the Extraordinary Chambers will contribute substantially to national reconciliation in Cambodia.” The report then goes on to describe the importance of outreach programs and media attention.<sup>10</sup> The premise is that only by finding justice can a society then move towards reconciliation. However, some fear the tribunal process may damage national reconciliation, as old memories are stirred, resentments raised and vengeance reconsidered. In any case, there is an urgent need for consultations within Cambodian civil society to help determine how best the EC could lead

towards truth, justice, and reconciliation. Consultations should include how mental health, education, and outreach programs can be devised to best support the EC process, as well as any other complementary transitional justice mechanisms that may be applicable.

**As countries emerge from periods of armed conflict and mass violence they seek a balance between truth, justice, peace, and reconciliation.**

For a full accounting and a holistic, societal approach, the different perspectives of victims, survivors, perpetrators, and bystanders must be considered. To maximize the impact of the EC, needs that are not met in that process should be addressed simultaneously elsewhere, to the maximum degree possible. The government states that prosecutions have been limited to senior leaders and those most responsible “in the spirit of achieving justice, truth, and national reconciliation.”<sup>11</sup> However, in the words of Judy Barsalou, “[p]erceptions of the desirability of pursuing truth, justice, and reconciliation, as well as the appropriate means of doing so, vary considerably among victims . . . and are shaped by time, group identity, location, and other factors.”<sup>12</sup> Thus a process involving a broad cross section of society is needed to explore the various views and aspects so that

the processes work towards reconciliation and societal healing.

### What do Cambodians want?<sup>13</sup>

The views of ordinary Cambodians have been remarkable for their absence throughout the negotiations over the EC, except through some incomplete and non-representative surveys done by a handful individuals and organizations. Although during the negotiation period between 1997 and 2004, the UN did consult certain members of civil society for short meetings, this process was neither inclusive nor transparent. Ideally, once the process of setting up the EC begins, a more open environment will exist where such discussions become more prevalent and ordinary Cambodians may have a chance to share their views. In June and July 2005, there were several public meetings about the EC, where members of civil society and the government all presented. These are encouraging signs that the process is finally beginning—and many believe that once the EC starts it will take on a life of its own and spark discussions in communities.

In brief, according to existing surveys, most Cambodians want *trials* for the Khmer Rouge leaders, and most prefer international trials. While most want to try the leaders, some want to try others besides the leaders, either the regional authorities, or the specific perpetrators who killed their individual family members.

Almost 100 percent of those surveyed want to know the *truth*, why Khmer killed Khmer and how did this

happen. Oftentimes they ask who was behind the Khmer Rouge, implying that China and/or Vietnam were the masterminds who manipulated the Khmer Rouge leaders into killing their own people.<sup>14</sup> However, probably due to lack of exposure, few suggested a *truth commission*—if such a process were to be tried, intensive public education would be needed.

Few (and fewer as time passes) have been concerned that the *peace* would be disturbed as a result of transitional justice mechanisms. However, notable exceptions to this occur in towns such as Pailin, in Northwest Cambodia, which were controlled by the Khmer Rouge until well into the 1990s.

*Amnesty* was seen by the majority as unacceptable. *Civil sanctions*, though incompletely explored in surveys, were found to be highly desirable. *Reparations* had been initially seen as unlikely, but as plans for the EC develop, and meetings have been held by human rights organizations to promote this concept, positive public opinion is growing. Views on *confessions*, *apologies* and *forgiveness* remain mixed, with more research needed.

Cambodians are not pleased with the weak apologies offered by some of the Khmer Rouge leaders, and are even outraged by the blanket denials or blaming of others. The concept of *reconciliation*, especially “national reconciliation” has often been cited as a reason (especially by some government authorities) to forgive and sometimes forget. But most Cambodians are not willing to forget, though some felt they could forgive. Many still suffer from nightmares. Cambodians

feel that reconciliation is an important goal for Cambodia, and some feel that the trials or other mechanisms can help the process.

Rebuilding trust in Cambodian society, whose social fabric was torn apart during the Khmer Rouge years, is seen as an important goal. Other surveys are needed, ideally a nationwide consultation. As the EC's time approaches, more researchers are conducting limited surveys, the results of which will ideally become available in the near future.

### Judicial and quasi-judicial mechanisms

In the thirty years since the end of Khmer Rouge rule, a number of transitional justice mechanisms have been established. Beyond national and international tribunals, these include: truth commissions, civil sanctions or vetting, reparations, and community reconciliation mechanisms.<sup>15</sup> All of these mechanisms have been discussed by various actors in reference to Cambodia, but some—in particular a truth commission—seem unlikely at present, especially while the EC has still not begun.

#### *Truth commissions*

“Truth commission” is the acquired name of official truth-seeking bodies that document a pattern of past human rights abuses. Four primary elements distinguish them. They are: 1) focused on the past; 2) not focused on a particular event; they attempt to paint an overall picture of certain human rights abuses or violations of

international law over a period of time; 3) temporary, for a predefined period of time; they cease to exist with the submission of the report of findings; 4) officially sanctioned by the government to investigate the past; their authority allows for greater access to information, for security and protection, and for inquiry into sensitive

**“Truth” is more likely to be examined more completely in a truth commission than in trials.**

issues.<sup>16</sup> During the negotiations for the EC, the topic of a truth commission was raised, including by Prime Minister Hun Sen. A Group of Experts appointed by the UN in 1998, recommended that “in addition to an ad hoc international tribunal, “the United Nations, in cooperation with the Cambodian Government and non-governmental sector, encourage a process of reflection among Cambodians to determine the desirability and, if appropriate, the modalities of a truth-telling mechanism to provide a fuller picture of the atrocities of the period of Democratic Kampuchea.”<sup>17</sup> However, due to political exigencies, this recommendation has never been pursued, nor has a truth commission or public process ever truly been an option. Too many people in power fear that such a process could either embarrass or implicate them, and the competition for power between the various political parties and for economic benefit takes precedence over any

potentially disruptive process. The United Nations has also not followed through with their recommendation.

Truth commissions were addressed specifically in two of the surveys noted above.<sup>18</sup> In both cases, Cambodian respondents did not seem interested in the idea. However, this is probably because those asked were unfamiliar with the concept—the same respondents in many cases stated the goal

**Other examples of non-judicial activities to deal with the legacy of the past are based on Cambodian culture and tradition.**

of discovering the truth about what happened and why.<sup>19</sup> “Truth” is more likely to be examined more completely in a truth commission than in trials. In the broad public consultations proposed, more education is needed about various transitional justice mechanisms, including truth commissions, so Cambodians can decide the most appropriate processes themselves.

### *Reparations*

“Reparations provide compensation to victims of human rights abuses, usually in the form of money, but also as material, medical, or educational benefits . . . Reparations are intended to repair the past damage to improve a victim’s or survivor’s lot in a material way.”<sup>20</sup> There are no specific provisions for reparations in the EC law. Property or money may be confiscated

from defendants who have acquired it unlawfully or by criminal conduct, but it should then be turned over to the state.<sup>21</sup> Under Cambodian law, victims can seek reparations only through simultaneous civil suits brought in criminal cases. Although reparations were not flagged as a priority in surveys, in Justice Initiative meetings carried out in summer 2005, Cambodians have more often asked if they may receive reparations through the EC. On the other hand, others realize that individual payments for family members who died, or those who otherwise suffered are unlikely, as there were so many victims. Neither the Cambodian government nor other governments are seen as having funds to pay reparations. However, some recent movements may bring more attention to this issue. In March 2005, the Fédération internationale des ligues des droits de l’homme (FIDH) held a conference with Cambodian human rights NGOs ADHOC and LICADHO, focusing on victims’ rights. The recommendations included: “Consultations with civil society [are] also essential, notably on the appropriate forms of reparation for victims, particularly collective and symbolic forms of reparation.”<sup>22</sup> A new “Collective for the Victims of the Khmer Rouge” (CVIC-KR) has been established in France as an open coalition of various organizations and individuals. Their purpose is to coordinate efforts to assist victims wishing to be represented and exercise their rights during the trials.<sup>23</sup>

### *Vetting*

The question of vetting—which would involve removing convicted individuals from their current positions—is problematic in Cambodia. Some former Khmer Rouge leaders still hold positions in successor groups to the Khmer Rouge’s banned Communist Party of Kampuchea. Removal from positions in these parties barely constitutes a sanction as they have no real public authority to begin with. However, many of these leaders are still treated with respect, and are addressed by diplomatic titles—in particular Ieng Sary, who maintains a home in Phnom Penh. Although most of the surveys of Cambodians did not ask directly about lustration: “Even among those participants who didn’t want former Khmer Rouge leaders to go to prison, many felt strongly that [they] should not be treated like high officials and given titles. Several mentioned they should not be allowed to live in fancy houses and that they should not be called ‘your Excellency’.”<sup>24</sup>

### **Non-judicial mechanisms**

Other complementary means to assist societies in recovering from mass violence have already been undertaken in Cambodia, most importantly by the Documentation Center of Cambodia (DC-Cam).<sup>25</sup> DC-Cam’s mission is captured in their monthly publication title: “Searching for the Truth.” Their many projects include documenting written, photographic, and other materials; gathering histories; interviewing victims and perpetrators; researching

various topics, such as crimes against particular minority groups and the roles and memories of various ranks of the former Khmer Rouge military; planning public memorials; undertaking public opinion surveys, writing competitions, and the translation of materials. Their public information room opened in 2005 and includes a library, an education center to show films, a café and welcome center, and a tribunal response team to provide research assistance to the public.<sup>26</sup>

### **History curriculum in schools still lacks an explanation of the Khmer Rouge period.**

Other examples of non-judicial activities to deal with the legacy of the past are ongoing and based on Cambodian culture and tradition (the yearly ceremonies to honor the ancestors or *Pchum Bun*, and other ceremonies to honor those who have died) while others are more recent additions to Cambodian society (the public “Day of Hate” holiday, community reintegration projects, and conflict resolution training).<sup>27</sup>

### *Memorials and traditional ceremonies*

In 1982, the then Cambodian Government’s<sup>28</sup> “Salvation Front” created a “Research committee into the Crimes of the Pol Pot Regime,” which produced a report in 1983.<sup>29</sup> The report had gathered petitions from 1,166,307 Cambodians and recommended that May 20 be established as a “Day to commemorate the



sufferings inflicted by the crimes of the regime led by Pol Pot, Ieng Sary, and Khieu Samphan.”<sup>30</sup> This day is still a public holiday in Cambodia, known in English as the “Day of Hate.” Some suggest a better translation would be “Day of Maintaining Rage” for *T’veer Chong Kamhaeng*—literally the “Day for Tying Anger.”<sup>31</sup> The event is sometimes seen as a vestige of the former Vietnam-backed Peoples Republic of Kampuchea.

The 1982 Research Committee also recommended that memorials and inscriptions to the genocide be erected in Phnom Penh and the provinces. Many of these still exist, but unfortunately they do not always reflect Cambodian tradition. Instead of cremated remains ceremoniously placed in traditional *stupas*, or Buddhist temples, existing memorials are often little more than piles of skulls and bones. There have been efforts over the years to conduct ceremonies to cremate the remains of the killing fields properly, in order to allow the wandering souls of victims to rest.

### *Historical projects and writing*

More and more Cambodians have written about the EC—especially those working at DC-Cam, and a handful of others, most of whom were refugees or have studied overseas. Although many of these documents are written in English or French, they are increasingly translated into Khmer. There are few history books in Khmer, and the history curriculum in schools still lacks an explanation of the Khmer Rouge period. During the 1980s, there was extensive education and propaganda

about the former regime, but with the peace accords in 1991 this curriculum was revised due to the presence of the Khmer Rouge in the coalition and has not yet been updated.<sup>32</sup>

### *Community level*

Community level projects may include trauma healing and counseling, village development, and conflict resolution training, including discussions on the Khmer Rouge past. Research on these activities remains sparse but much reconciliation has undoubtedly already occurred in communities where victims and perpetrators live together on a day to day basis. The Center for Social Development (CSD) 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 EC in Phnom Penh, Battambang and Kampong Som.<sup>33</sup> A brief survey was conducted after each meeting, eliciting opinions on the EC. Because former Khmer Rouge cadre attended the meetings there were many fears that there would be violence or vengeance, but these were not realized—at least on the days of the forums themselves.

The Cambodian premiere of the film “Deacon of Death: Looking for Justice in Today’s Cambodia” was held on July 19, 2005.<sup>34</sup> In the film, a Cambodian woman, Sok Chea, is assisted by an NGO worker in visiting the village where she had lived and where her father was killed during the Khmer Rouge regime. The woman confronts the man she accuses of

causing her father's death, saying she wants to hear him acknowledge his acts. This film was the first public event showing Cambodians dealing with the past, and interviews a variety of villagers, some of whom still feel angry and are seeking revenge, while others want to forget. It also focuses on the accused man's current activities as a traditional healer and other "good" acts that indicate he is apparently trying to make up for his past. After the film's screening, Sok Chea stood up and emotionally called for justice for her father's death. According to one of the film-makers, Willem Van de Put, who has lived in Cambodia for three years and directs the mental health NGO Transcultural Psychosocial Organization (TPO), the film is intended to assist Cambodians to start a dialogue: "this could help thousands to address their pasts earlier than if they hadn't seen the film. But you must be with the group, find the right time, the right way talk about it. After two to three times, you can go away and people will figure it out themselves... The film can be used, but you have to know how to use it; we will be working on this, it is only the beginning."<sup>35</sup> The response to the film was mixed. Some observers thought such an open confrontational approach was not "Cambodian" and that the results might be negative. But this and other films<sup>36</sup> have been and probably will be increasingly used in communities.

Although it is hoped that the EC will shed light on Cambodia's tragic history, a broadly representative dialogue is needed within Cambodian

society about appropriate transitional justice mechanisms. To meet the needs of Cambodians—to know "why Khmer killed Khmer,"—some sort of national or community-based truth-telling mechanism is needed, given that a truth commission is unlikely. In any case, Cambodian scholars and

**To meet the needs of Cambodians—to know "why Khmer killed Khmer,"—some sort of national or community-based truth-telling mechanism is needed.**

others should be supported to write more books with information that is then made accessible to the public. Since literacy is low, particularly in the countryside, films addressing the past and other non-text public information projects, such as the museum sponsored by DC-Cam, will be important. For successful reconciliation and healing of society, these activities and their effects on individual Cambodians as well as on Cambodian society at large, need much more study and funding.

*"I heard from many people, from radio, or direct, etc, they want to know why. Their family and the relatives that died during the Pol Pot regime, and all of us we don't know what happened, and what are the relations between Khmer Rouge, and China and US and also with... [former Cambodian King] Sihanouk... What was the goal, to kill many people from hunger? Why send people to the border and countryside, and*

why [did] they want to abolish the city? . . . All of that is in the darkness. If we try the Khmer Rouge, we would like to learn from that regime, and to share with the young generation so they do not do the same. And we should try to improve the situation rather than killing each other. And also from the other part of the people who were the victims, they still cry when they talk about it, when we hear it on the radio. Me too, if I talk about this, I cry . . . We must do the trial, so that

we know. I am sometimes crazy. . . crazy because we don't know what happened, why they wanted to kill people. [If we can] bring them to the trial, this is one thought that makes the people hope. We should think about this. If we do wrong, maybe now nobody can kill us or put us in jail, or blame us or sanction us, but later there will be others who can make sanctions for others who do something wrong. This could make the people happy, make them confident, make them trust law.<sup>7</sup>

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### Notes

Laura McGrew is a former project coordinator with the Open Society Justice Initiative.

1. Khmer Rouge rule lasted from April 17, 1975 to January 6, 1979.
2. Secretariat of the Royal Government Task Force on the KR Trials, *An Introduction to the Khmer Rouge Tribunals*, Secretariat of the Royal Government Task Force (August 2004), 5.
3. See for example, Fred Eckard, "Agreement Reached for Khmer Rouge Trials in Cambodia," United Nations, Highlights of the Noon Briefing, UN Headquarters, New York, December 17, 2003: "For the purpose of drafting a budget proposal, a range of five to ten indictees was assumed by both parties, but this figure could change depending on the investigative and prosecutorial strategy that the future court may wish to adopt."
4. Steve Heder and Brian D. Tittmore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*, Phnom Penh, Documentation Center of Cambodia (2004), 1. (Originally published by the War Crimes Research Office, American University, and the Center for International Justice in 2001.)
5. Meng-Try Ea, "Justice and Reconciliation: Case Study Cambodia," a dissertation submitted in partial fulfillment of the University's requirements for the degree of Master of Arts, Centre for the Study of Forgiveness and Reconciliation, Coventry University (September 2003), 11.
6. Wendy Lambourne, "Post-Conflict Peacebuilding: Meeting Human Needs for Justice and Reconciliation," *Peace, Conflict and Development*, 6 (April 2004).
7. Mica Estrada-Hollenbeck, "The Attainment of Justice through Restoration, not Litigation: The Subjective Road to Reconciliation," in Mohammed Abu-Nimer, *Reconciliation, Justice and Coexistence: Theory and Practice*, Lexington Books (2001); Luc Huse, "Justice" in David Bloomfield, Teresa Barnes and Luc Huyse (eds.), *Reconciliation After Violent Conflict: A Handbook*, International Institute for Democracy and Electoral Assistance (2003); Neil Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vols. I-III, United States Institute of Peace Press (1995); Eric Stover and Harvey M. Weinstein, *My Neighbor, My Enemy*, Cambridge University Press (2004).
8. See generally Meng-Try Ea, "Justice and Reconciliation."
9. Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, Beacon Press (1998), 4.
10. United Nations General Assembly, *Report of the Secretary General on the Khmer Rouge Trials*, UNGA, A/59/432, October 12, 2004, 5.

11. Secretariat of the Royal Government Task Force on the KR Trials, *An Introduction to the Khmer Rouge Tribunals*, 6.
12. Judy Barsalou, "Trauma and Transitional Justice in Divided Societies," United States Institute of Peace Special Report 135 (April 2005), 10, available at: [www.usip.org](http://www.usip.org).
13. Information in the following section is taken from the following survey sources: Documentation Center of Cambodia survey of 35 Cambodians, June 1997, described in Jaya Ramji, "Reclaiming Cambodian history: The case for a truth commission," 24 *Fletcher Forum of World Affairs* 137 (2000); Laura McGrew, *Truth, Justice, Reconciliation and Peace in Cambodia: 20 years after the Khmer Rouge* (February 2000), available at: [www.advocacynet.org](http://www.advocacynet.org), full report available from the author, [lmcgrew@igc.org](mailto:lmcgrew@igc.org) (written survey of 48 Cambodians and focus groups and individual interviews of 50 additional Cambodians); Suzannah Linton, *Reconciliation in Cambodia*, Documentation Center of Cambodia, Documentation Series No. 5, (2004). Reports on DC-Cam nationwide survey distributed through monthly magazine, between January and September 2002 (712 respondents), available at: [www.dccam.org](http://www.dccam.org); Khmer Institute of Democracy, "Survey on the Khmer Rouge Regime and the Khmer Rouge Trial.," KID (October 2004), available at: [www.online.com.kh/users/kid/](http://www.online.com.kh/users/kid/), (536 interviews). Additional informal sources include IFFRASORC (Institute Français de la Statistique, de Sondage d'Opinion de Recherche sur le Cambodge), unpublished national survey of 1,503 Cambodians, 1998; Cambodian Human Rights Action Committee, petition calling for EC signed by more than 100,000 Cambodians; *Cambodia Daily*, informal survey of 24 rural Cambodians, January 12-13, 2000; and three public forums undertaken by the Center for Social Development in 2000 to discuss the EC.
14. This desire is echoed in the numerous meetings the Open Society Justice Initiative has held in 2004 and 2005. People are often heard to say "Khmer couldn't kill Khmer."
15. See generally Minow, *Between Vengeance and Forgiveness*.
16. Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenges of Truth Commissions*, Routledge Press (2002); Priscilla B. Hayner, "In Pursuit of Justice and Reconciliation: Contributions of Truth Telling," in Arnsion, Cynthia J., *Comparative Peace Processes in Latin America*, Woodrow Wilson Center Press (1999); and Priscilla B. Hayner, "Commissioning the Truth: Further Research Questions," 1 *Third World Quarterly*, 17 (1996), 20-21.
17. United Nations General Assembly and Security Council, "Identical Letters Dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council," United Nations, A/53/850, S/1999/231, March 16, 1999, 2.
18. See surveys by Ramji and McGrew.
19. Linton, *Reconciliation in Cambodia*, 219; McGrew, *Truth, Justice, Reconciliation*, 17-19.
20. Patrick J. Pierce, *Transitional Justice Basics*, Human Rights Education Institute of Burma (2003), 8.
21. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Passed by National Assembly on October 4 and by Senate on October 8, 2004, Phnom Penh Cambodia. Available at: [www.cambodia.gov.kh/krt/](http://www.cambodia.gov.kh/krt/).
22. FIDH Press Release, Recommendations Concerning the Khmer Rouge Tribunal and Its Articulation with the International Criminal Court," Report of the March 2-3, 2005 Conference, [www.fidh.org](http://www.fidh.org).
23. See [www.justicepourleCambodge.org](http://www.justicepourleCambodge.org) or email [contact@justicepourleCambodge.org](mailto:contact@justicepourleCambodge.org).
24. McGrew, *Truth, Justice, Reconciliation*, 34.
25. See Documentation Center of Cambodia website: [www.dcccam.org](http://www.dcccam.org)
26. "Public Information Room," *Searching for the Truth*, 42 (First Quarter 2005).
27. Craig Etcheson, "Reconciliation in Cambodia: Theory and Practice" (Study Guide), 2005.

28. Known as the People's Republic of Kampuchea, or PRK.
29. Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide? Elusive Justice and the Khmer Rouge Tribunal*, Pluto Press (2004), 72.
30. Fawthrop and Jarvis, *Getting Away with Genocide?*, 73.
31. Fawthrop and Jarvis, *Getting Away with Genocide?*, 74.
32. In 2004, Khmer Rouge leader Khieu Samphan (or his lawyer Jacques Verges) published a history of the Khmer Rouge, essentially denying his responsibility in the structure and knowledge of the atrocities. This book, now available in Khmer, French and English, was an instant hit and thousands of copies sold in a matter of days at Cambodian markets. This reaction showed the strong interest of Cambodians to read about former Khmer Rouge leaders. See Khieu Samphan, *Cambodia's Recent History: And the Reasons Behind the Decisions I Made*, Puy Kea, Ponleu Khmer Printing & Publishing House (2004).
33. Center for Social Development, "National Issues Forum Report: Khmer Rouge and National Reconciliation, 30 March 2000," [www.online.com.kh/users/csd/reports](http://www.online.com.kh/users/csd/reports).
34. "Deacon of Death: Looking for Justice in Today's Cambodia," A Film by Jan van den Berg and Willem van de Put, a co-production of drsFILM and the Buddhist Broadcasting Foundation, [www.drsfilm.nl](http://www.drsfilm.nl).
35. Closing speech of Willem van de Put, General Director, Healthnet International, at film showing of "Deacon of Death: Looking for Justice in Today's Cambodia," July 19, 2005.
36. Other films include "S-21" by award winning filmmaker Rithy Panh, in which a Tuol Sleng survivor confronts his former jailers, and "The Khmer Rouge Rice Fields: The Story of Rape Survivor Tang Kim" by Rachana Phat and DC-Cam, in which Tang Kim talks about her feelings towards her assailants.
37. Interview in Phnom Penh with NGO staff, April 18, 2005.

# Reconciliation in International Justice: Lessons from Other Tribunals

**Kek Galabru considers if there is a place for restorative justice in the Extraordinary Chambers.**

Thirty years after the Pol Pot regime systematically slaughtered almost one third of Cambodia's population, the majority of those responsible have yet to be tried. War crimes tribunals provide a means of confronting the crimes of the past, but if they are to further peace and reconciliation in countries emerging from violent conflicts, like Cambodia, they must ensure a role for victims in addition to bringing justice to the perpetrators of atrocities. This means not only assuring victims' participation, but also their protection.

The Cambodian government has now agreed, with the United Nations, on the creation of the Extraordinary Chambers in the Courts of Cambodia (EC) to prosecute senior Khmer Rouge officials, but serious concerns have been raised about the court's reconciliatory role and the mechanisms for victim and witness protection and participation.

The Cambodian people generally continue to believe in the power of justice to provide some closure for this terrible period in Cambodian history. However, people remain wary of the EC. Most surviving victims and

other potential witnesses do not trust the current government, given that many officials, including top leaders, were themselves junior members of the Khmer Rouge. There are no mechanisms in place to ensure public recording of the history of the geno-

**For Cambodia, it is still necessary to balance two ideals of justice: retribution and restoration.**

cide as experienced by witnesses and victims. And many fear reprisals if they testify, as no protection mechanisms have been initiated to date. Witness protection units composed purely of Cambodian police officials with direct links to government authorities, as currently proposed, will provide little comfort.

## The search for justice in post-conflict societies

Following a period of political rule characterized by violence, oppression, and poverty, postconflict countries are often faced with serious economic, social, and political instability. For Cambodia, it is still necessary to balance two ideals of justice: retribution and restoration.<sup>1</sup> Retributive justice,

the goal at the heart of the criminal justice process, is important in preventing impunity and deterring potential future criminals. By determining individual responsibility, criminal tribunals prevent the collective assignment of guilt to entire groups, thereby assisting in rebuilding society by discouraging further social division and alienation.

Restorative justice focuses on reconciliation, rehabilitation, and the rebuilding of society. A restorative approach to justice considers the impact of justice on a society's future. As victims and perpetrators must often co-exist in close proximity with one another, they must ultimately learn to live with deep-seated animosity and the painful memories of the past. Civil conflicts often begin as internal domestic ethnic, religious, or national divisions, later erupting into military confrontations, massacres, or even genocide. They can involve thousands, even millions, of victims and perpetrators. For a country to transit from a state of war to one of prosperity and stability, participants in past conflicts must be reconciled. Without reconciliation, divided sectors of society will not overcome their hostility. Without specific mechanisms to articulate and address the grievances of victims of atrocities, they can feel forgotten by the peace process and further alienated instead of reintegrated.

The restorative emphasis on rehabilitation and reconstruction is particularly crucial where there are large numbers of victims and perpetrators. It is impossible, in such circum-

stances, for all victims and witnesses to testify in court and for all offenders to be prosecuted. Recognizing the challenge of involving victims in public proceedings, and the impact of reliving a painful past, many postconflict societies opt to create truth and reconciliation commissions (TRCs). TRCs seek to rehabilitate societies by balancing accountability with forgiveness. TRCs ask offenders to recount their crimes and take responsibility for them. At the same time, victims and their families can listen, ask questions, and recount their own victimization and suffering. TRCs may even encourage former perpetrators and victims to meet. Through this process, individual histories are recorded. The historical accounting created through TRCs is thus both broader and more detailed than that generated by retributive mechanisms of justice such as international criminal tribunals.

In Cambodia, the EC's role is likely to be entirely retributive. Some speculate that Cambodia's current government, many of whom were themselves former low to medium level Khmer Rouge officials, have opposed attempts to establish a TRC. But even if the Cambodian government were to organize a TRC, it would likely be ineffective, given that events took place 30 years ago and many perpetrators and victims alike are dead. However, experience from other tribunals shows that TRCs are neither the only nor necessarily the best means to achieve restorative justice. At a minimum, mechanisms can be established to ensure public trust in the judicial process and the capacity



for witnesses and victims to participate without fear of retaliation. To date, however, the EC has not included such mechanisms.

### Public concerns about the EC

Most Cambodians are skeptical that the EC will deliver meaningful justice for past atrocities, citing structural and procedural inadequacies.<sup>2</sup> While the vast majority of Cambodians still want high-level officials to be prosecuted, most also emphasize the need for an impartial and objective tribunal. Some would prefer that no trial be conducted at all rather than having the country undergo a substandard judicial process. Such preferences stem from concerns that government agents will manipulate the proceedings to serve their own political ends.

#### *Public trust in the prosecutions*

There is a common misconception among Cambodians that the EC will prosecute all persons responsible for crimes committed under the Khmer Rouge, including low-level agents. Cambodians are particularly concerned about the ongoing survival and empowerment of these agents in society today. Indeed, the individuals who actually carried out, planned, or directed atrocities during the Khmer Rouge period were mostly low-ranking officials, operating in districts remote from the capital, Phnom Penh. While many officials received direct orders from the central Khmer Rouge leadership, numerous murders were committed without orders, on the

initiative of these local commanders. As a result, there is some support among Cambodians for the prosecution of low-level officials too.

However, the law creating the Extraordinary Chambers (the “EC Law”) limits its jurisdiction to “senior leaders and those most responsible”

**Experience from other tribunals shows that truth and reconciliation commissions are neither the only nor necessarily the best means to achieve restorative justice.**

for the Khmer Rouge atrocities.<sup>3</sup> Although the EC’s mandate does not explicitly limit the number of indictees, most observers believe that only five to seven individuals within the Khmer Rouge leadership are likely to be prosecuted. Many of the senior leaders are dead. Only two leaders, Kaing Guek Iev (a.k.a. Duch) and Ta Mok, are currently in custody.<sup>4</sup> Other senior leaders—notably Ieng Sary, Khieu Samphan, and Nuon Chea—live comfortably in Cambodia’s capital, Phnom Penh and in provincial towns.<sup>5</sup> Many Khmer Rouge leaders, including the movement’s supreme leader Pol Pot and senior cadres such as Son Sen, Yun Yat, and Ke Pauk have died since the 1975-1979 genocide.<sup>6</sup>

The number of potential defendants is therefore likely to be extremely limited: the vast majority of perpetrators will not face justice for their crimes. The prosecution of so few lead-

ers means that individual historical accounts are unlikely to be recorded, thus restricting the creation of a comprehensive historical account of the Cambodian genocide. Such an outcome is unlikely to signify justice for most victims and witnesses to the genocide.

**The number of potential defendants is likely to be extremely limited: the vast majority of perpetrators will not face justice for their crimes.**

### *Involvement of victims*

It is unclear what role victims and witnesses will be allowed in the judicial proceedings. Currently, Article 36 of the EC Law allows victims to make appeals.<sup>7</sup> In addition, Articles 20, 23, and 33 require the co-prosecutors to prosecute “in accordance with existing procedures in force.” To what extent the co-prosecutors will use existing Cambodian criminal procedure code is unclear and not addressed directly by the EC law. Existing criminal procedures allow victims to file companion civil complaints to criminal charges to obtain compensation.<sup>8</sup> Victims would possess the same rights as the defendant and prosecutor to appeal, call and examine witnesses, and testify.<sup>9</sup> Whether these provisions will inform the Tribunal’s proceedings is not known.

The EC Law also fails to ensure witness and victim protection. Article 33 requires the court to provide measures

to protect the security and confidentiality of victims and witnesses. As yet, no independent witness protection programs have been initiated along the lines of the International Criminal Court’s (ICC) proposed Victim and Witness Protection Unit. Under the EC Law, the witness protection unit would be staffed jointly by Cambodian officials, leaving security to Cambodian police. The failure to implement an independent security unit is likely to deter witnesses from testifying. Witness protection units similar to those created for the International Criminal Tribunal of the former Yugoslavia (ICTY) and envisaged for the ICC, composed of international observers and workers, would go a long way towards easing fears.

### **The experience of past tribunals**

Can Cambodia learn anything from previous efforts to address genocide? The 1994 Rwandan genocide left approximately one million people dead. It is estimated that tens of thousands of people participated in the genocide.<sup>10</sup> The conflict in the former Yugoslavia left almost 200,000 Muslims dead and created approximately 2 million refugees. It is also estimated that hundreds of thousands of civilians and soldiers were responsible for that ethnic cleansing campaign.

Following these conflicts, the United Nations Security Council established two special tribunals, “convinced that . . . the prosecution of persons responsible for such acts and violations . . . would contribute to the process of national reconciliation

and to the restoration and maintenance of peace.”<sup>11</sup> The tribunals were modeled after the military courts created following World War Two.<sup>12</sup> The ICTY and the International Criminal Tribunal for Rwanda (ICTR) were developed primarily to promote retributive justice. “National reconciliation” was a secondary purpose, envisaged as an indirect result of the tribunal.<sup>13</sup> The ICTR and ICTY aimed to provide reconciliation by giving victims a sense of justice that the main perpetrators of the crimes would be punished.<sup>14</sup>

The role of witnesses and victims in the ICTY and ICTR was strictly curtailed to testimony of clear application to specific prosecutions. Many witnesses were mystified when directed by judges not to tell their stories, or when much of their personal experience was dismissed as irrelevant. The tribunals focused only on facts relevant to the charges against the respective defendants, leaving victims and witnesses feeling neglected and undermined.<sup>15</sup> That exclusion has since fueled significant criticism by both victims and witnesses.<sup>16</sup>

In both Rwanda and the former Yugoslavia, affected populations describe a disconnection from the international tribunal proceedings and judgments.<sup>17</sup> In the words of one commentator, “international and foreign tribunals are far less likely to promote reconciliation insofar as the trials are not of and do not speak directly to the troubled society.”<sup>18</sup> The tribunals do not publish individualized accounts of victims’ suffering. As a number of scholars have noted, however, where

accounts are accurate and comprehensive, victims and witnesses feel that their victimization has been acknowledged.<sup>19</sup> Through acknowledgement of their injuries, victims are often more capable of recovering from their injuries in order to lead more productive lives in society.<sup>20</sup>

Partly as a response to the Rwandan and Yugoslav experiences, the Rome Statute establishing the ICC includes extensive measures to ensure the participation of victims and witnesses. Article 15 of the Statute allows victims to be represented in pretrial procedural hearings and to submit challenges to the Court. Although the ICC has not held any hearings to date, it may be expected that these mechanisms will effectively allow victims to share their personal perspective and history with the court.

Additionally, in both Rwanda and the former Yugoslavia, supplementary mechanisms were created to provide for victim involvement and some measure of restorative justice. However, the results in the two countries hold sharply different lessons.

#### *Rwanda’s Gacaca courts*

Although TRCs are the paradigmatic mechanism for restorative justice, they are not the only ones. In Rwanda, a restorative role is played out through the state-run “Gacaca” courts, community-based systems of dispute resolution with precolonial roots.<sup>21</sup> In Gacaca courts, offenders are required to recount their wrongdoing in the presence of their victims and other affected parties. The victim has the

right to challenge the perpetrator's story and in some circumstances can receive monetary compensation. By bringing the two parties together, the offender is required to seek forgiveness.<sup>22</sup> Gacaca courts also allow victims to hear the perpetrators' confession first-hand. Non-governmental organizations work closely with the Gacaca courts to ensure that more Rwandans participate and that their rights are protected.

**Misunderstandings about the EC are likely to fuel a sense of injustice among ordinary Cambodians unless victims and witnesses are actively engaged.**

### *The Yugoslav TRC*

The Yugoslav Truth and Reconciliation Commission was established by President Vojislav Kostunica as a supplement to the ICTY. However, by the time it closed its doors three years later, the Yugoslav TRC was widely condemned as a failure, for a variety of reasons.

First, it was established without public consultation or debate.<sup>23</sup> The Gacaca courts, by contrast, were formulated only after significant community and public involvement. By not engaging NGOs and victims before and during the TRC's operation, the Commission lacked credibility. Second, without the support of NGOs and civil society, the Commission was unable to reach out to victims and witnesses. The Gacaca courts depend

on NGOs to communicate between and integrate victims and witnesses. The ICC takes a similar approach. Lastly, the Commission was handicapped by a mandate that provided no investigative powers and strictly limited its duration to three years. These operational limitations rendered the Commission irrelevant to witnesses, victims, and perpetrators alike.

### *Protecting victims and witnesses*

To the extent that criminal tribunals can contribute to reconciliation, it is critical that they ensure the protection of victims and witnesses from reprisal. Without personal security, witnesses are less likely to appear in court and the proceedings are further distanced from the victimized community.

In the ICC, for example, a Victim and Witnesses Unit has been created to ensure that victims and witnesses feel comfortable addressing the Court. The Unit is responsible for protecting the security and well being of victims and witnesses by providing for their protection, and medical and psychological needs. The Court can prohibit public disclosure of the victim or witness's name or location. The Court can also ensure that testimony is given in closed sessions and that the victim or witness is known by a pseudonym, or that their voice or image is altered. Most importantly, the Court will rely on local and international NGOs to protect the confidentiality of witnesses' identities and ensure that the Court itself respects its own rules.

### Supplementary mechanism needed

Concerns and misunderstandings about the EC are likely to fuel continuing discontent and a sense of injustice among ordinary Cambodians unless victims and witnesses are actively engaged, protected, and integrated. Unless the EC is adjusted to meet Cambodian perceptions of justice and their fear of continuing impunity, the tribunal will carry the stigma of politicizing the genocide rather than accounting for it.

The record of accomplishment of the ICTR, ICTY, and ICC indicate that the participation and protection of witnesses and victims serve as a fundamental, if insufficient, component of reconciliation. As currently envisaged, the EC fails to assure the protection and participation of victims and witnesses. Without institutions focused explicitly on restorative justice, it is unlikely that individual accounts of victimization and offenses—the building blocks of reconciliation—will be documented.

Rather than repeating the mistakes of past tribunals, the following steps should be considered for the EC to satisfy the need for a reconciliatory role:

1. Involve NGOs to ensure the full participation and protection of victims and witnesses in the trials, if they wish, pursuant to Cambodian law.
2. Create additional legislative measures guaranteeing the secu-

rity of witnesses and victims before, during, and after trial.

3. Create a separate witness and victim unit using international monitors and domestic police agents in order to prevent acts of reprisal.
4. Develop a comprehensive history, which includes individual accounts of victimization.
5. Draft legislation clarifying explicitly that victims have the right to fully participate in trials.

A TRC is not considered viable in Cambodia, and the Gacaca courts, specific to Rwanda, do not provide a model. Yet serious thought needs to be given to a restorative justice mechanism for Cambodia to supplement the EC.

Failure to take these or similar measures may prevent the EC from emerging as an independent judicial body capable of bringing justice and reconciliation to Cambodia. An ineffective tribunal would only encourage past and would-be perpetrators of genocide to think that impunity accompanies mass atrocity. The EC's success will depend on its ability to adapt to the needs and hopes of the Cambodian people. Absent meaningful steps to promote the protection and integration of victims and witnesses, the EC will serve as little more than a \$56 million dollar exercise to appease the international conscience.

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### Notes

Kek Galabru is the founder and president of the Cambodian human rights NGO LICADHO. Nema Milaninia and Justin Joe Flurschein provided extensive assistance on this paper.

1. For a general understanding of principles of transitional justice, including a more specific explanation of retributive and restorative forms of justice, see Miriam J. Aukerman, “Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice,” 15 *Harv. Hum. Rts. J.* 39 (2002).
2. For an overview of the main criticisms leveled at the EC, see Dinah PoKempner’s article in the present issue of *Justice Initiatives*. For more on Cambodian public opinion concerning the Tribunal, see Laura McGrew’s article.
3. See the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of Amendments as promulgated on October 27, 2004 (NS/RKM/1004/006) (“EC Law”).
4. Kaing Guek Iev was the former chief of the Khmer Rouge torture center at Toul Sleng in Phnom Penh. Ta Mok, also known as the “Butcher” controlled the northern area of the Khmer Rouge territory and referred to himself as supreme commander.
5. Ieng Sary was the deputy prime minister under Pol Pot and led a guerrilla war against the Cambodian government after the Vietnamese pushed the Khmer Rouge out. He was convicted in absentia and sentenced to death but was later granted amnesty in 1996. The amnesty is not thought to extend to crimes other than genocide, and is not seen as an obstacle to prosecution. Khieu Samphan was the president of the Khmer Rouge. Nuon Chea was Pol Pot’s chief lieutenant and deputy general secretary of the Communist Party.
6. Son Sen was the Khmer Rouge defense minister and Pol Pot’s chief advisor. Yun Yat was Son Sen’s wife and in charge of information and education. Ke Pauk was party secretary of the northern zone and responsible for massacring hundreds of people.
7. This follows Article 35 of Agreement Between the Royal Government of Cambodia and the United Nations Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea: “The Extraordinary Chamber of the Supreme Court shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court.” For more on the role of victims in the EC, see Susana SáCouto’s article in the present issue of *Justice Initiatives*.
8. See Criminal Code Article 27. See also Cambodia’s Law on Criminal Procedure Article 131.
9. See Law on Criminal Procedure Article 79, 133 and Criminal Code Article 14.3, 24.
10. The number of people who participated in Rwanda’s genocide is debatable. Some studies have even held that approximately 200,000 people were directly or indirectly involved in the genocide in some way. See Scott Straus, “How many perpetrators were there in the Rwandan genocide? An estimate,” 6 *Journal of Genocide Research* 85 (2004).
11. UN document S/RES/955 of 8 November 1994; see also Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. SCOR, 49th Sess., at 12, U.N. Doc. A/49/342 (1994) where ICTY President, Antonio Cassese specifically stated that “the Yugoslav Tribunal is a tool for promoting reconciliation.”
12. See Ruti Teitel, *Transitional Justice*, Oxford: OUP (2001), 31-39.
13. See Antonio Cassese, *International Criminal Law*, Oxford: OUP (2003), 6. As Jaya Ramji similarly notes, international trials are intended to deter future crimes and provide retribution for victims. However, reconstruction, rehabilitation, and reconciliation are ancillary effects which may indirectly result. Alternatively, many scholars also argue that there is a duty to prosecute human rights offenders, regardless of how it effects political and social transition. Jaya Ramji, “Reclaiming

Cambodian History: The Case for a Truth Commission,” 24 *Fletcher F. World Aff.* 137 (2000). See also M. Cherif Bassiouni, “Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights,” in Bassiouni, M. Cherif (ed.), *Post-Conflict Justice*, Ardsley, NY: Transnational Publishers (2002), 26; Diane F. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” 100 *Yale L.J.* 2537, 2548 (1991).

14. As the first President of the Yugoslav Tribunal, Antonio Cassese, explained “Far from being a vehicle for revenge,” the ICTY individualizes guilt by prosecuting leaders that bear collective responsibility, such that the “Yugoslav Tribunal is a tool for promoting reconciliation.” See *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. SCOR, 49th Sess., at 12, U.N. Doc. A/49/342 (1994).

15. See Michael P. Scharf and Paul R. Williams, “‘The Role of Justice in Building Peace’: The Functions of Justice and Anti-justice in the Peace-Building Process,” 35 *Case W. Res. J. Int’l L.* 161, 175 (2003).

16. See Neil Kritz, “Progress and Humility: The Ongoing Search for Post-Conflict Justice,” in Bassiouni (2002), 59.

17. International IDEA, “South East Europe Public Agenda Survey” (2002). According to the survey, only 24 percent of people in Montenegro and 6 percent of those in Serbia trust the ICTY. Available at <http://www.idea.int/press/pr20020404.htm>.

18. Jeremy Sarkin and Erin Daly, “Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies,” 35 *Colum. Human Rights L. Rev.* 66, 718 (2004); see also Todd Howland & William Calathes, “The International Criminal Tribunal, Is It Justice or Jingoism for Rwanda? A Call for Transformation,” 39 *Va. J. Int’l L.* 135 (1998).

19. See Harry James Cargas and Bonny V. Fetterman, (eds.) *The Sunflower: With a Symposium On the Possibilities and Limits of Forgiveness*. New York: Schocken (1997), 103; Michael P. Sharf and Nigel Rodley, “International Law Principles on Accountability,” in Bassiouni (2002), 90.

20. Many have argued that retributive mechanisms are dominated by judges and lawyers and neglect the individualized history of victims and witnesses. Therefore, instead of contributing to reconciliation by compiling a history of abuse, the tribunals could contribute to greater resentment and a sense of injustice by neglecting individual experiences. See Erin Daly, “Transformative Justice: Charting a Path to Reconciliation,” 12 *Int’l Legal Persp.* 73, 103 (2002); Donald W. Shriver, “Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?” 16 *J.L. & Religion* 1, 8-9 (2001).

21. See generally Maya Goldstein-Bolocan, “Rwandan Gacaca: An Experiment in Transitional Justice,” *J. Disp. Resol.* 355 (2004).

22. Pernille Ironside, “Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation,” 15 *N.Y. Int’l L. Rev.* 31 (2002), 49.

23. See for example, Aryeh Neier, “The Truth About the Yugoslav Truth Commission,” *Project Syndicate*.



# Justice Initiatives

The Open Society Justice Initiative, an operational program of the Open Society Institute, pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies worldwide. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in the following priority areas: national criminal justice, international justice, freedom of information and expression, and equality and citizenship. Its offices are in Abuja, Budapest, and New York.

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