

CAMBODIA'S SEARCH FOR JUSTICE
Opportunities and Challenges for the Extraordinary
Chambers in the Courts of Cambodia

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Over 1.5 million people died as a result of the Khmer Rouge's rise to power and subsequent rule. The Extraordinary Chambers in the Courts of Cambodia (ECCC) represents an unprecedented opportunity in international jurisprudence for victims of crimes against humanity and genocide to participate actively in the trial of surviving leaders of the Khmer Rouge regime. International observers and many Cambodians hope the trials will provide a measure of justice for the most serious crimes committed by the Khmer Rouge from 1975 to 1979. However, the Tribunal's evolution and structure pose numerous challenges to the administration of justice. This paper reviews the development of the tribunal and identifies some of the barriers that must be overcome if the ECCC will achieve its mission.

Cambodia under the Khmer Rouge

Cambodia, seeking French protection from encroachments by Thailand and Vietnam, became a French protectorate in 1863.² Almost a century later, in 1954, Cambodia

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² GARY KLINTWORTH, VIETNAM'S INTERVENTION IN CAMBODIA IN INTERNATIONAL LAW 2 (Australian Government Publishing Co. 1989); DAVID CHANDLER, A HISTORY OF CAMBODIA 141 (Westview Press

achieved full independence from France and was ruled by a royal monarchy, led by Prince Sihanouk.³ In an attempt to preserve national sovereignty, Sihanouk kept Cambodia neutral in the struggle between communist and American forces in Vietnam.⁴ In doing so, he turned a blind eye to the use of Cambodia's border regions by North Vietnamese forces.⁵

Pol Pot was active in the Cambodian Communist Party and, by 1962, was forced to operate his armed resistance movement from the jungle. Known as the Khmer Rouge (Red Cambodians),⁶ the group initially received little support from North Vietnam or China. However, U.S efforts to oust Vietnamese communists from their encampments at the Cambodian border drove them deeper inside Cambodia where they allied themselves with the Khmer Rouge.⁷ The Khmer Rouge capitalized on the economic and military destabilization of Cambodia to mobilize a broad peasant base.⁸

In 1970, while Cambodian King Sihanouk was abroad, his top ministers usurped control of Cambodia and began openly cooperating with the United States military to

1996). Becoming a protectorate prevented the outright annexation of Cambodia by neighboring Vietnam; however, the French government redrew the national boundary lines, and Vietnam gained territory historically considered part of Cambodia. See KLINTWORTH, *supra*, at 2. See also EVAN GOTTESMAN, *CAMBODIA AFTER THE KHMER ROUGE: INSIDE THE POLITICS OF NATION BUILDING 15* (Yale University Press 2003).

³ CHANDLER, *supra* note 2, at 187.

⁴ KLINTWORTH, *supra* note 2, at 4 n.25. See also CHANDLER, *supra* note 2, at 193–94; CRAIG ETCHESON, *AFTER THE KILLING FIELDS: LESSONS FROM THE CAMBODIAN GENOCIDE 5* (Praeger Publishers 2005).

⁵ ETCHESON, *supra* note 4, at 5; CHANDLER, *supra* note 2, at 204.

⁶ The History Place, *Genocide in the 20th Century*, <http://www.historyplace.com/worldhistory/genocide/pol-pot.htm> (last visited March 4, 2009).

⁷ A four-year bombing campaign by the U.S. from 1969 until 1973 on North Vietnamese sanctuaries inside Cambodia resulted in mass civilian casualties and peasants fleeing their rural homes for the cities. KLINTWORTH, *supra* note 2, at 4 n.29. Deaths from the bombing raids are hard to estimate, but figures range anywhere from 30,000 to 500,000. LIBRARY OF CONGRESS, *CAMBODIA: A COUNTRY STUDY 49* (Government Printing Office for the Library of Congress 1990).

⁸ LIBRARY OF CONGRESS, *supra* note 7, at 9.

expel the North Vietnamese and Viet Cong from Cambodia.⁹ Chinese and Vietnamese communist regimes in turn backed the Khmer Rouge forces.¹⁰ The ousted King Sihanouk also threw his support behind the Khmer Rouge.¹¹ The resulting civil war caused massive population displacement and a shortfall in food production.¹²

By 1975, the U.S. had withdrawn its troops from Vietnam. Cambodia's government, plagued by corruption and incompetence, also lost its American military support.¹³ Taking advantage of the opportunity, the Khmer Rouge, consisting largely of teenage peasant guerrillas, seized control of Cambodia.¹⁴ The new government renamed the country the Democratic Kampuchea and, in March 1976, Pol Pot became Prime Minister.¹⁵

The new Cambodian government set out to alter Khmer society radically by remaking it into a nation of peasants.¹⁶ Cities were viewed as western-influenced centers of decadence and conspicuous consumption, and impediments to change.¹⁷ Thus, the regime ordered the capital and other major cities evacuated, and sent the urban population into the countryside to work in agriculture.¹⁸ From Phnom Penh, two million inhabitants were evacuated at gunpoint on foot into the countryside. As many as 20,000 died along

⁹ KLINTWORTH, *supra* note 2, at 4. *See also* CHANDLER, *supra* note 2, at 204–06; GOTTESMAN, *supra* note 2, at 22–23.

¹⁰ KLINTWORTH, *supra* note 2, at 4; ETCHESON, *supra* note 2, at 6–7.

¹¹ KLINTWORTH, *supra* note 2, at 4 n.27; CHANDLER, *supra* note 2, at 204–06; GOTTESMAN, *supra* note 2, at 22.

¹² KLINTWORTH, *supra* note 2, at 4 n.29.

¹³ ETCHESON, *supra* note 4, at 5; GOTTESMAN, *supra* note 2, at 22–24.

¹⁴ GOTTESMAN, *supra* note 2, at 24.

¹⁵ LIBRARY OF CONGRESS, *supra* note 7, at 49.

¹⁶ KLINTWORTH, *supra* note 2, at 64 n.43; CHANDLER, *supra* note 2, at 209.

¹⁷ KLINTWORTH, *supra* note 2, at 64 n.42; GOTTESMAN, *supra* note 2, at 24–25.

¹⁸ LIBRARY OF CONGRESS, *supra* note 7. *See also* CHANDLER, *supra* note 2, at 210; GOTTESMAN, *supra* note 2, at 24–25.

the way.¹⁹ Millions of Cambodians were forced into slave labor in Pol Pot's "killing fields" where they soon began dying from overwork, disease, and malnutrition precipitated from a diet of one tin of rice (180 grams) per person every two days.²⁰

Cambodia was effectively sealed off from the outside world.²¹ The Khmer Rouge expelled all foreigners, closed embassies, banned the use of foreign languages, and refused any foreign economic or medical assistance.²² After the Khmer Rouge seized power, they began conducting deadly purges to eliminate remnants of the "old society"—the educated, Buddhist monks, police, doctors,²³ lawyers, civil servants, former military personnel, and former government officials and their families.²⁴ The Khmer Rouge was indifferent to the casualties of this transformation. The new government's view was: "In the new Kampuchea, one million people will suffice to continue the Revolution. One million good revolutionaries will be enough for the society that we are building. The rest we don't need."²⁵

¹⁹ The History Place, *supra* note 6. No exceptions were granted; even seriously ill or injured hospital patients were forced to leave. CHANDLER, *supra* note 2, at 209–11; LIBRARY OF CONGRESS, *supra* note 7, at 49.

²⁰ LIBRARY OF CONGRESS, *supra* note 7, at 58, 75; CHANDLER, *supra* note 2, at 209–11; GOTTESMAN, *supra* note 2, at 27 (discussing reasons for the food shortages). About 97% of the population was forced into collective farms and communal economic groupings. LIBRARY OF CONGRESS, *supra* note 7, at 58, 75. *See also* CHANDLER, *supra* note 2, at 209–11; GOTTESMAN, *supra* note 2, at 24–25.

²¹ LIBRARY OF CONGRESS, *supra* note 7, at 58, 75; CHANDLER, *supra* note 2, at 209–11; GOTTESMAN, *supra* note 2, at 24–25.

²² LIBRARY OF CONGRESS, *supra* note 7; GOTTESMAN, *supra* note 2, at 25.

²³ The party and the armed forces elite had access to Western medicine and hospitals but ordinary people were expected to use traditional plant and herbal remedies. LIBRARY OF CONGRESS, *supra* note 7, at 58. Of the more than 500 physicians practicing in Cambodia before 1975, only 45 remained by 1979. *Id.* at 134. *See also* GOTTESMAN, *supra* note 2, at 25 (explaining that evacuees were instructed to produce biographies. Those that identified an educated profession were shot.).

²⁴ GOTTESMAN, *supra* note 2, at 25; ETCHESON, *supra* note 4, at 7. Even the wives and children of people with government backgrounds were killed, probably to eliminate people who might seek revenge on the regime. LIBRARY OF CONGRESS, *supra* note 7, at 50.

²⁵ KLINTWORTH, *supra* note 2, at 64 n.44.

During the Khmer Rouge period between 1975 and 1979, at least 1.5 million Cambodians died from execution, forced hardships, or starvation.²⁶ Thousands of people were reportedly tortured into giving false confessions at Tuol Sleng, a school in Phnom Penh, which had been converted into a “central interrogation, torture and death chamber.”²⁷

Ethnic groups were systematically targeted.²⁸ According to one party member, “there was no policy of allowing minority nationalities. Everyone was mixed together. There was one race—the Khmer ... from liberation in 1975.”²⁹ Although the Khmer Rouge allied with China politically, Chinese ethnic groups inside Cambodia were not spared.³⁰ The Khmer Rouge carried out a “brutal [and]....aggressive” campaign of

²⁶ CIA, *Cambodia*, THE WORLD FACT BOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html> (last updated Nov. 6, 2008). See also CHANDLER, *supra* note 2, at 212 (estimating that over one million people—or one person in seven—died as a result of the Khmer Rouge policies). For a debate on the numbers see multiple reports catalogued at <http://www.mekong.net/cambodia/demcat.htm>. In 1962, the year of the last census before Cambodia was engulfed by war, the population of the country was cited at 5.7 million. Ten years later, the population was estimated to have reached 7.1 million. By the end of the Khmer Rouge period, Amnesty International estimated that 1.4 million people had died, while the U.S. State Department placed the number at about 1.2 million dead. LIBRARY OF CONGRESS, *supra* note 7, at 51.

²⁷ KLINTWORTH, *supra* note 2, at 65 n.56–57. Duch’s meticulous records showed that between 1975–76, 2,404 “anti-party elements” were tortured and executed there. The numbers rose to 6,330 in 1977. During the first six months of 1978, records show that 5,765 people were killed. LIBRARY OF CONGRESS, *supra* note 7. Other similar institutions were set up throughout the provinces. *Id.* at 66.

²⁸ Some debate exists as to whether minority groups were targeted based on race and ethnicity. Historian David Chandler admits that the CKP targeted minority groups but argues that this was politically motivated action against unsympathetic groups. “By and large, the regime discriminated against enemies of the revolution rather than against specific ethnic or religious groups.” DAVID CHANDLER, THE TRAGEDY OF CAMBODIAN HISTORY 263–65, 85 (Yale University Press 1993). He rejects any notion of genocide. *Id.* at 3; CHANDLER, BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY OF POL POT 4 (Westview 1992). Other scholars such as Ben Kiernan and Evan Gottesman disagree emphatically, pointing to the systematic targeting of ethnic and racial minorities as evidence of genocidal intent on the part of the Khmer Rouge. See BEN KIERNAN, THE POL POT REGIME: RACE, POWER AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE (1975–1979) 252–312 (Yale University, 1996); GOTTESMAN, *supra* note 2, at 28.

²⁹ KIERNAN, *supra* note 28, at 265 (citing his interview with Ouch Bun Chhoeun, Phnom Penh, 30 September 1980).

³⁰ Kiernan argues that the Chinese were not singled out because of their race like the Cham or the Vietnamese but rather suffered the same fate as the general population, extermination at will and starvation.

liquidation against the one million Vietnamese in Cambodia and the 500,000 Khmer Vietnamese civilians living along the border region with Vietnam.³¹ The Muslim Cham, many of who had fought as members of the Khmer Rouge, were forced to integrate into Khmer villages and to adopt the Khmer language and customs.³² Forty thousand Cham were killed in two districts alone.³³

The Khmer Rouge was particularly intolerant of religion, which they abolished outright in 1975.³⁴ The country's 40,000 to 60,000 Buddhist monks were defrocked and forced into labor brigades.³⁵ Many religious leaders, Buddhist, Muslim and Christian were simply executed.³⁶ People discovered praying or expressing religious belief faced summary execution.³⁷

The Khmer Rouge perceived Cambodia as being in an armed struggle with Vietnam and repeatedly initiated hostile action against targets, many civilian villages, inside Vietnam.³⁸ Vietnam signed an alliance with the Soviet Union to neutralize the threat from communist China and formed the Kampuchean National United Front for National Salvation (KNUFNS) made up of communist and noncommunist Cambodian

Id. at 295. Gottesman, however, argues that Chinese ethnicity was equated to bourgeois class background and therefore the Chinese were singled out for more aggressive treatment because of their ethnicity. GOTTESMAN, *supra* note 2, at 28. Fifty percent of the estimated 425,000 Chinese living in Cambodia in 1975 perished. *Id.*

³¹ LIBRARY OF CONGRESS, *supra* note 7, at 55; KLINTWORTH, *supra* note 2, at 37 n.33; GOTTESMAN, *supra* note 2, at 28. *See also* KIERNAN, *supra* note 28, at 295–98. Kiernan offers the same rate of mortality but different figures.

³² LIBRARY OF CONGRESS, *supra* note 7, at 56; GOTTESMAN, *supra* note 2, at 28. *See generally* KIERNAN, *supra* note 28, at 260–70.

³³ LIBRARY OF CONGRESS, *supra* note 7, at 56.

³⁴ KIERNAN, *supra* note 28, at 266.

³⁵ *Id.* at 266; GOTTESMAN, *supra* note 2, at 27.

³⁶ LIBRARY OF CONGRESS, *supra* note 7, at 55.

³⁷ KIERNAN, *supra* note 28, at 263.

³⁸ ETCHESON, *supra* note 4, at 12; GOTTESMAN, *supra* note 2, at 30.

exiles to challenge Khmer Rouge control.³⁹ Backed by the Vietnamese army, the KNUFNS invaded Cambodia in December of 1978 and, within two weeks, seized the capital city of Phnom Penh, forcing the Khmer Rouge to flee to the jungles along the Thai border.⁴⁰ Heng Samrin, head of the new government called the People's Republic of Kampuchea (PRK),⁴¹ became Cambodia's new president.⁴²

The Vietnamese occupation lasted ten years, and sparked a civil war that lasted nearly thirteen.⁴³ The Vietnamese finally withdrew their forces in September of 1989.⁴⁴ A ceasefire and agreement to hold democratic elections was finally reached under the 1991 Paris Peace Accords.⁴⁵

Cambodia Re-emerges

The UN peacekeeping mission in Cambodia from 1991 to 1993 did not end the fighting.⁴⁶ The Khmer Rouge reneged on the Peace Accords and resumed armed conflict, attacking UN forces.⁴⁷ Nevertheless, following the supervised election, the other factions were consolidated, leaving the Khmer Rouge alone in its opposition to the new Cambodian government.⁴⁸

³⁹ CHANDLER, *supra* note 2, at 222; ETCHESON, *supra* note 4, at 8–12; GOTTESMAN, *supra* note 2, at 31–32.

⁴⁰ ETCHESON, *supra* note 4, at 8; CHANDLER, *supra* note 2, at 223.

⁴¹ KLINTWORTH, *supra* note 2, at 7; CHANDLER, *supra* note 2, at 227–28; GOTTESMAN, *supra* note 2, at 45–52.

⁴² ETCHESON, *supra* note 4, at 8; CHANDLER, *supra* note 2, at 223.

⁴³ KLINTWORTH, *supra* note 2, at 91.

⁴⁴ ETCHESON, *supra* note 4, at 28–29; CHANDLER, *supra* note 2, at 308–09.

⁴⁵ KLINTWORTH, *supra* note 2, at 91.

⁴⁶ ETCHESON, *supra* note 4, at 4.

⁴⁷ *Id.* at 9, 17; CHANDLER, *supra* note 2, at 239.

⁴⁸ CHANDLER, *supra* note 2, at 239; ETCHESON, *supra* note 4, at 9.

The Cambodian social, legal, economic, and political infrastructure was devastated under the Khmer Rouge.⁴⁹ The new government struggled to rebuild. Because initial humanitarian aid was diverted to support the Khmer Rouge resistance, the Cambodian government was suspicious of additional international aid.⁵⁰ The Red Cross and UNICEF were initially denied entry into Phnom Penh and, even when they gained access, were met with indifference from the government.⁵¹

Despite this frustrating start, beginning in the 1980s hundreds of international and national nongovernmental organizations were operating in Cambodia.⁵² They continue to play a major role in providing basic social services, often in remote areas and communities. NGOs have advocated for national reforms in health, education, human rights, the legal system, social services, environmental rights, and women and children's rights.⁵³

Activities undertaken by international NGOs in Cambodia can be broadly classified into four main categories:

1. Large-scale service delivery dependent on bilateral and multilateral funding and implemented by large experienced NGOs.

⁴⁹ ETCHESON, *supra* note 4, at 9–17; CHANDLER, *supra* note 2, at 227–30.

⁵⁰ GOTTESMAN, *supra* note 2, at 82–84.

⁵¹ *Id.* Nguyen Con, the chief economic advisor of the PRK, assessed the International Aid Organizations in the following manner:

We should consider the intentions of the international organizations that are providing us assistance. Most of them are imperialists who seize everything. Providing assistance to Cambodia is just one part [of what they are doing]; a second portion [of their assistance] goes to Thailand and to Pol Pot. The provision of assistance [to our regime] is a pretext. Their goal is to impose their influence [on our government]...helping Cambodia is a pretext for helping Pol Pot.

Id. at 84–85.

⁵² CHANDLER, *supra* note 2, at 230.

⁵³ The NGO Forum on Cambodia, *General NGO Information*, http://www.ngoforum.org.kh/Development/Docs/ngo_2002/38.htm (last updated April 30, 2004).

2. Service delivery in conjunction with government institutions working through local structures and providing institutional capacity building.
3. Community development activities carried out by well-established and experienced NGOs.
4. Development of local NGOs and community-based organizations, encouraged and directly supported by international NGOs.⁵⁴

Local NGO activities in Cambodia can be broadly classified into four main categories:

1. Democracy and human rights organizations promoting democratic principles and human rights through policy, training and advocacy work.
2. Development organizations involved in education, health, credit, income-generation and other rural and urban development activities.
3. Support-service organizations focusing on human resource and organizational development training, networking and advocacy-related activities.
4. Community-based organizations and associations taking an active role in participating in and directly managing their own development processes.⁵⁵

⁵⁴ *Id.*

⁵⁵ *Id.* The Cooperation Committee for Cambodia Online NGO Database provides contact details and a summary of activities of over 450 NGOs operating in Cambodia, over a hundred of which are human rights organizations. The database is available at http://www.ccc-cambodia.org/SearchPage/search_page.html (last updated May 6, 2008).

Historical Structure of Cambodian Courts

As a newly independent state, Cambodia based its legal system on the French colonial system.⁵⁶ However, the civil war, from 1970 to 1975, largely disrupted Cambodian civil society.⁵⁷ Further, under the Khmer Rouge, purges directed at ridding the country of foreign influence, including the educated, devastated the legal profession.⁵⁸ According to Gottesman, only eight jurists actually survived the Khmer Rouge “revolution.”⁵⁹ From April 1975 to January 1979, there was essentially no judicial system in Cambodia.⁶⁰

The legal system re-established during the Vietnamese-controlled People’s Republic of Kampuchea followed the socialist model of Vietnam. This system replicated the procedures used in the notorious Moscow trials staged by Stalin against his opponents.⁶¹ Indeed, the trials for Pol Pot and Ieng Sery, held in absentia in 1979, were run by officials from the Ministry of Propaganda, with the minister himself acting as president of the court.⁶² Both defendants were convicted and sentenced to death.⁶³

⁵⁶ *Report of the CIJL Seminar on Judicial Functions and Independence in Cambodia*, Phnom Penh, Cambodia July 5–23, 1993, contained in Appendix 2 of PROBLEMS FACING THE CAMBODIAN LEGAL SYSTEM 128 (Asian Human Rights Commission 1998) [hereinafter *Report of the CIJL*].

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ GOTTESMAN, *supra* note 2, at 4.

⁶⁰ *Report of the CIJL*, *supra* note 56, at 128–29. *See also* GOTTESMAN, *supra* note 2, at 26 (describing the provision in the communist constitution for courts as an empty one. The courts never convened.), and at 63 (no courts existed in Cambodia to try Pol Pot and Ieng Sery until the Vietnamese helped create a court).

⁶¹ Basil Fernando, *Cambodia. The Court finds the Constitution: A Point of View*, contained in CIJL YEARBOOK, GENEVA: CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS 60–63 (1993). *See also* AMNESTY INTERNATIONAL, KAMPUCHEA: POLITICAL IMPRISONMENT AND TORTURE (1987).

⁶² GOTTESMAN, *supra* note 2, at 63. One of the judges was selected from the Ministry of Propaganda; other members of the judicial panel included former Khmer Rouge cadres, a classical dance instructor and a pediatrician. The defense attorney was also selected from the Ministry of Propaganda and was reassured, after protesting his assignment to the defense of Khmer Rouge responsible for murdering his own family members, that he would not be required to assert his client’s innocence. *Id.*

Until 1988, the Ministry of Justice oversaw the administration of justice and was responsible for “reviewing all judgments rendered by the courts of first instance for factual and legal correctness, and for equity in sentencing.”⁶⁴ In 1988, the newly created Supreme Court was assigned the function of review of judicial judgments but this transfer of appellate power was merely a technical matter; in practice, the judiciary remained subordinate to the ministry of Justice.⁶⁵ The courts did not have the power to interpret laws and executive decrees or the power to review them for constitutionality.⁶⁶

In 1991, the Paris Peace Accords provided that “an independent judiciary will be established, empowered to enforce the rights provided for under the Constitution.”⁶⁷ Similarly, the 1993 Cambodian Constitution guaranteed an independent judiciary.⁶⁸ But in practice the judiciary remains dominated by judges who lack professional training, were appointed by the Communist Party, and are controlled by the minister of justice.⁶⁹ Judgments are routinely decided prior to the actual trials.⁷⁰ Under provisions on civil administration, the Paris Agreements empowered UNTAC to supervise the judicial

⁶³ *Id.* at 65.

⁶⁴ Dolores A. Donovan, *The Cambodian Legal System: An Overview*, contained in *REBUILDING CAMBODIA: HUMAN RESOURCES, HUMAN RIGHTS AND LAW: THREE ESSAYS* 84 (F.Z. Brown ed., Johns Hopkins Foreign Policy Institute 1993); GOTTESMAN, *supra* note 2, at 243-247.

⁶⁵ Donovan, *supra* note 64, at 243-47.

⁶⁶ *Id.*

⁶⁷ *Id.* at 84.

⁶⁸ *Id.* at 93. *See* CAMBODIA CONST. art. 109, 111.

⁶⁹ *Seminar on Cambodian Judiciary, March 14-20, 1998*, contained in *PROBLEMS FACING THE CAMBODIAN LEGAL SYSTEM* 8 (Asian Human Rights Commission 1998).

⁷⁰ *Id.*

processes throughout Cambodia.⁷¹ But UNTAC did not exercise this supervisory authority and its efforts to implement a transitional law failed miserably.⁷²

Article 38 of the new Cambodian Constitution guarantees the right to fair trial and prohibits evidence obtained by physical or mental force.⁷³ Yet problems within the Cambodian legal system include: “summary executions and administrative detentions; the inability to prosecute offences committed by the police or military, and to summon police and military personnel as witnesses; ... a lack of a system of fair trial and trained lawyers;”⁷⁴ and a lack of necessary laws and procedures.⁷⁵ As Minister of Justice Chem Snguon explained during an interview with the Phnom Penh Post in November of 1997, the judge “prepares his decision before the trial opens; actual evidence “may modify” but does not inform the judge’s pre-trial decision.”⁷⁶

Political History of ECCC

Cambodia’s Desire for Justice

The ECCC is the product of a long and tumultuous journey beginning more than a decade ago. In 1995, at the International Conference on Genocide, Cambodian Prime Minister

⁷¹ Paris Agreements—Annexure 1—Section –B Article 5(B); *The System of Trial Under the Vietnamese—Khmer Model (1981-1993)*, contained in PROBLEMS FACING THE CAMBODIAN LEGAL SYSTEM, *supra* note 69, at 59, 61.

⁷² Fernando, *supra* note 61, at 59, 61–66.

⁷³ *Seminar on Cambodian Judiciary*, *supra* note 69, at 7.

⁷⁴ Fernando, *supra* note 61, at 84–85. *See also* AMNESTY INTERNATIONAL, *supra* note 61.

⁷⁵ *Report of the CIJL*, *supra* note 56, at 130. Further, confession continues to be the main technique of proof—of guilt of an accused—in Cambodian Courts. This practice continues to be followed even after new procedural laws and a new article to the Constitution were adopted making confessions obtained through coercion inadmissible. Terrence Wicremasinghe, *Confession as a Technique of Proof in Criminal Proceedings*, contained in PROBLEMS FACING THE CAMBODIAN LEGAL SYSTEM, *supra* note 69, at 71.

⁷⁶ *Justice in Name Only—No Genuine Courts*, contained in PROBLEMS FACING THE CAMBODIAN LEGAL SYSTEM, *supra* note 69, at 89.

Hun Sen publicly declared the government's support for prosecuting Khmer Rouge leaders.⁷⁷ And in 1997, the Cambodian authorities called for help from the UN to hold accountable those "responsible for the genocide and crimes against humanity" during the Khmer Rouge regime.⁷⁸ Following a UN resolution calling for action,⁷⁹ shortly after the death of Pol Pot in 1998, UN Secretary General Kofi Annan appointed a "Group of Experts for Cambodia" to evaluate evidence and assess feasibility of options for bringing Khmer Rouge leaders to justice before an international or national court.⁸⁰

In December 1998, upon the defection to the government of Khmer Rouge leaders, Nuon Chea and Khieu Samphan, Hun Sen instead emphasized reconciliation, stating, "the time had come to dig a hole and bury the past."⁸¹ In response to the report from the Group of Experts recommending an international tribunal,⁸² in March 1999, the Cambodian government stated: "[We want] to caution that any decision to bring the Khmer Rouge leaders to justice must also take into full account Cambodia's need for

⁷⁷ Craig Etcheson, A "Fair and Public Trial": A Political History of the Extraordinary Chambers, contained in Open Society Justice Initiative, JUSTICE INITIATIVES (April 18, 2006).

⁷⁸ Identical letters dated 97/06/23 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, U.N. Doc. A/51/930-S/1997/488 (June 24, 1997).

⁷⁹ G.A. Res. 52/135, U.N. GAOR, 52d Sess. (1997).

⁸⁰ Kofi A. Annan, Letter dated 98/07/31 from the Secretary-General addressed to the President of the General Assembly, 52d Sess., U.N. Doc. A/52/1007 (August 7, 1998).

⁸¹ Youk Chhang, *The Thief of History – Cambodia and the Special Court*, INT'L J. OF TRANSITIONAL JUSTICE 157–172 (2007); Ambassador Thomas Hammarburg, *How the Khmer Rouge Tribunal was Agreed: Discussions between the Cambodian Government and the UN*, SEARCHING FOR THE TRUTH: MAGAZINE FOR THE DOCUMENTATION CENTER FOR CAMBODIA (2001) [hereinafter "Hammarburg Report"], available at http://www.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm.

⁸² *The Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135*, U.N. Doc. A/53/850 - S/1999/23/1 (March 3, 1999). In addition, Cambodia's powerful neighbor, China, voiced opposition to an international tribunal, saying it was an internal matter for Cambodia and an international tribunal should not be established even if the Cambodian Government requested it.

peace, national reconciliation, rehabilitation and economic development for poverty reduction."⁸³

Three days later Ta Mok, former Khmer Rouge secretary of the south-west zone and second deputy-secretary of the Communist Party of Kampuchea, was arrested.⁸⁴ Following the arrest, the Cambodian government shifted its position again; this time their focus was on the possibility of a National Tribunal.⁸⁵

Struggle over Control of the Tribunal

On March 15, 1999, the report of the Group of Experts concluded that evidence showed serious crimes, including crimes against humanity, genocide, war crimes, forced labor, torture, crimes against internationally protected persons, as well as crimes under Cambodian law, had been committed. Sufficient evidence existed to justify legal proceedings against Khmer Rouge leaders for these crimes. The Group of Experts recommended the establishment of an ad hoc international tribunal with restricted jurisdiction. The report placed special emphasis on the need to ensure the support of the Cambodian people in the formation and execution of the tribunal.

⁸³ See Documentation Center of Cambodia, *Chronology of the Khmer Rouge Tribunal* [hereinafter DC-Cam Chronology], available at <http://www.dccam.org/Archives/Chronology/Chronology.htm>; Hammarburg Report, *supra* note 81. One possible reason for this opposition is China's embarrassment over its previous support of the Khmer Rouge and the scrutiny the trial would bring to that period of history. See also Phelim Kyne, *Jiang pressed for Chinese apology*, PHNOM PENH POST, Nov. 10, 2000.

⁸⁴ BANGKOK POST, March 7, 1999 (cited in DC-Cam Chronology, *supra* note 83).

⁸⁵ See Hammarburg Report, *supra* note 81. As discussed in the Report, Hun Sen may have initially seen the international tribunal more as an instrument to defeat the Khmer Rouge than as a means of establishing justice. When Ieng Sary, Noun Chea and Khieu Samphan surrendered and Ta Mok was under arrest, the tribunal became less important to him politically and militarily. The government put forward two legal arguments for a national tribunal. First, they noted that the Genocide Convention did not require that the crime of genocide be tried in an international court. Second, Article 33 of the Cambodian Constitution prohibited the government from arresting and extraditing any Cambodian national to a foreign country. *Id.*

On July 29, 1999, the UN offered a compromise, proposing the establishment of a mixed tribunal for the prosecution of the Khmer Rouge leaders.⁸⁶ On August 13, the Cambodian government stated it wanted to maintain control of any UN-backed international-style tribunal. The Cambodian Royal Government subsequently created its “Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders.”⁸⁷ The Task Force presented a draft law to the United Nations delegation.⁸⁸ The UN delegation studied the first draft law and presented its own draft. The two laws were differed in several respects, including questions of jurisdiction, the appointment of judges and prosecutors, and the structure of the court.⁸⁹ On August 31, after a week of negotiations without reaching an agreement on how to set up a genocide tribunal, UN Assistant Secretary for Legal Affairs Ralph Zacklin said that if the Cambodian government did not meet conditions the UN believes necessary for a tribunal, “the UN will simply cease to follow this process.”⁹⁰

⁸⁶ United Nations Office of Legal Affairs, *History of the Negotiations on the Khmer Rouge Tribunal Between the United Nations and Cambodia*, Feb. 8, 2002 [hereinafter UN Chronology].

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See Hammarburg Report, *supra* note 81. With respect to jurisdiction, the Cambodian draft proposed that the court be part of the existing court system in Cambodia. However, the UN wanted a special tribunal. The Cambodian draft sought only a small minority of international judges to supplement an otherwise Cambodian tribunal. On the other hand, the UN wanted all of the judges and prosecutors to be nominated by the Secretary General. Where the Cambodian draft wanted to use the extant Cambodian court system, the UN proposed the creation of a Trial and Appeals Chamber as well as a Prosecutor and a Registry.

⁹⁰ *See id.* The UN delegation issued a statement:

If the trial of the Khmer Rouge leaders is to meet international standards of justice, fairness and due process of law, and gain the support and legitimacy of the international community, it is vital that the international component of the tribunal be substantial and that it be seen to be effective on the international as well as the national plane. This cannot be achieved by merely adding a number of foreign judges to the composition of the existing court system. Only a special, sui-generis tribunal, separate from the existing court system, in which Cambodians and non-Cambodians would serve as judges, prosecutors and registry staff accomplish this.

Id.

Shortly after this announcement, the Cambodian government moved ahead with a national prosecution of Ta Mok and Duch, the head of the S-21 prison, charging both with “genocide.”⁹¹ The hand of the UN was strengthened when the U.S. stepped in to negotiate the stalemate. Hun Sen finally endorsed a U.S. proposal for a tribunal with three Cambodian judges and two UN-appointed judges. Decisions would require a “supermajority,” in which at least one of the UN-appointed judges would have to agree with any verdict handed down by the tribunal.⁹² Cambodia and the UN were left to work out the details for the tribunal. It took seven years of often fractious debate and stalled negotiations, however in 2003, an agreement was finally reached between Cambodia and the United Nations to create a tribunal.⁹³ The Law on the Establishment of the ECCC lays out the jurisdictional scope of the tribunal. On June 6th, the UN and Cambodian government signed the Agreement.⁹⁴

⁹¹ Cambodian Prosecutor’s Order No. 044/99, Military Court (Sept. 6, 1999), translated copy available at <http://209.85.173.132/search?q=cache:Wv1W4v08shsJ:www.cambodia.gov.kh/krt/pdfs/Mok%2520%26%2520Duch%25202nd%2520indictment.pdf+Cambodian+Prosecutor’s+Order+No.+044/99&hl=en&ct=clnk&cd=1&gl=us> (last visited March 4, 2009).

⁹² THE CAMBODIA DAILY, Oct. 20, 1999 (cited in DC-Cam Chronology, *supra* note 83).

⁹³ On January 6, 2003, a Cambodian delegation led by Sok An met with the Secretary-General and representatives of the UN Secretariat in New York to resume negotiations. The agreement had to be approved separately by the Cambodian government and the United Nations. The UN legal team and Cambodia’s chief negotiator adopted and supported the Articles of the Agreement. On March 28, 2003, Cambodia’s Cabinet approved the draft agreement with the UN. The Third Committee of the UN General Assembly adopted the resolution approving the Agreement between the Royal Government of Cambodia and the UN concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea. The 85th Plenary Session of the 57th General Assembly adopted Resolution 57/228B approving the Draft Agreement and voluntary contributions. THE HINDU INTERNATIONAL, March 29, 2003 (cited in DC-Cam Chronology, *supra* note 83).

⁹⁴ RAKSMEI KAMPUCHEA DAILY, June 6, 2003 (cited in DC-Cam Chronology, *supra* note 83).

The Tribunal Moves Forward

Despite conflict regarding who would pay for the tribunal,⁹⁵ over the course of 2004, the parties made progress to establish a court. On May 24, 2004 the Ministry of the Interior Sar Kheng approved the establishment of a special committee to ensure security for participants in the tribunal.⁹⁶ The draft laws establishing the tribunal and an agreement between the Cambodian government and the UN were signed over the summer.⁹⁷ Judges and prosecutors began training in the area of international humanitarian law.⁹⁸ On October 4, the National Assembly voted to ratify the Agreement between the UN and Royal Government of Cambodia.⁹⁹ The trial's site was moved to the newly constructed Royal Cambodian Armed Forces (RCAF) headquarters on the outskirts of the capital.¹⁰⁰ On April 29, 2005, the agreement between the UN and Cambodia to set up the Extraordinary Chambers took effect after extensive negotiations over nominations for international and Cambodian judges as well as the set up of the defense offices.¹⁰¹

⁹⁵ On September 16, Hun Sen stated Cambodia would not pay its share for the tribunal. "I would like to say that Cambodia can offer only the meeting hall and to pay for the water and electricity and security guards.... There is no way they can ask Cambodia to pay for the trial.... If you want a trial, you have to pay. We have to be clear on this." AGENCE FRANCE PRESS, Sept. 16, 2004 (cited in DC-Cam Chronology, *supra* note 83). On December 10th, the final working budget for a three-year tribunal was set at \$56.272 million. Sean Visoth, secretary of the government's Tribunal Task Force, said Cambodia would shoulder about \$13 million of the budget.

⁹⁶ DC-Cam Chronology, *supra* note 83.

⁹⁷ *Id.*

⁹⁸ THE CAMBODIA DAILY, Aug. 25, 2004 (cited in DC-Cam Chronology, *supra* note 83).

⁹⁹ Documentation Center of Cambodia, SEARCHING FOR THE TRUTH, English Edition, Issue 58, October 2004.

¹⁰⁰ THE CAMBODIA DAILY, Dec. 11–12, 2004 (cited in DC-Cam Chronology, *supra* note 83).

¹⁰¹ DC-Cam Chronology.

Structure of the Court

The ECCC is modeled on the civil law tradition in Cambodia, a byproduct of French occupation. It is the first international court to use this system.¹⁰² As a hybrid international-domestic mechanism, the tribunal includes “duplicates” of the traditional roles in the civil system.¹⁰³ At the investigation and prosecution stages, there are two each of Co-Investigating Judges and Co-Prosecutors.¹⁰⁴ One in each position is Cambodian and one international.

The Co-Prosecutors receive complaints from victims and conduct a preliminary investigation. They accumulate factual allegations constituting crimes and suspects and submit an Introductory Submission to the Co-Investigating judges for investigation.¹⁰⁵ During the investigation stage, any party to the proceedings may request “to gather evidence, question witnesses or retain experts to the Co-Investigating Judges, who then rule on whether to grant the request, subject to appeal by the parties.”¹⁰⁶ The “parties” include the Prosecution, Defense, and Civil Parties. After the investigation concludes, the Co-Investigating judges issue a closing order, which stops further inquiries and paves the way for an indictment and proceedings before the Trial Chamber of the court.¹⁰⁷

The Trial Chamber is presided over by three Cambodian judges and two international judges. In order to render a verdict, four of the five judges must agree,

¹⁰² James P. Bair, *Shifting the Focus from the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia* 13 (forthcoming) (copy on file with the authors).

¹⁰³ *Id.* at 13–14.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 15.

¹⁰⁶ *Id.* at 17–18.

¹⁰⁷ ECCC INTERNAL R. 79.

though the Internal Rules urge the judges to make their verdict unanimous.¹⁰⁸ Rulings from the Trial Chamber may be appealed to the Supreme Court Chamber.¹⁰⁹ Rulings from the Supreme Court Chamber are final.¹¹⁰

Dispute over the Internal Rules

One of the most significant disputes in the new institution occurred over the formation of the rules of procedure called the Tribunals' Internal Rules. The Internal Rules establish the administration of cases before the tribunal from the pre-trial stage through the appeal process. The first Plenary Session of the Tribunal to formulate the rules took place on 20–25 November 2006. The ECCC solicited and received public comments on the draft rules.¹¹¹ The draft rules were based primarily on Cambodian law, with international law only serving a limited role.¹¹² Unfortunately, at the end of the weeklong meeting, members of the joint tribunal announced their inability to reach consensus on the rules.

Some of the criticisms leveled against the draft rules from the Documentation Center of Cambodia (“DC-Cam”), a leading NGO documenting Khmer Rouge abuses, included a failure to clarify a statute of limitations on civil claims, provide for reparations to individuals, establish adequate protection measures for victims, and create adequate

¹⁰⁸ *Id.* R. 98.

¹⁰⁹ *Id.* R. 108.

¹¹⁰ *Id.* R. 104.

¹¹¹ Thierry Cruvellier and Anne-Laure Porée, *What rules for the Cambodian ‘model’?*, INT’L JUSTICE TRIBUNE, Nov. 20, 2006.

¹¹² *Id.* Though the rules are similar to Cambodian rules, they also include provisions for support for the defense, protection of victims and witnesses, and provisions for counsel which are more similar to international rules.

measures to ensure a fair defense.¹¹³ Additional criticisms from other NGOs included the need for greater accessibility to the Tribunal by the public,¹¹⁴ the independence of the defense office,¹¹⁵ protection of victims from libel actions, and procedures for more accurate translations.¹¹⁶

At least one source laid the blame for the November meeting's failure to iron out rules for the ECCC at the feet of the Cambodian delegation.¹¹⁷ According to Human Rights Watch, "Cambodian judges, who appeared to be taking instructions from elsewhere, reportedly complained that there was not enough time to get through the 113 articles in the draft rules, and that they paid too much heed to international, not national, law."¹¹⁸ "Obstructionist tactics" were reportedly led by one of the ECCC prosecutors, Kong Srim, a man with close ties to the administration of Hun Sen.¹¹⁹ Human Rights Watch also accused the Cambodian Bar Association of bias in their opposition to the

¹¹³ Documentation Center of Cambodia, *Comments on ECCC Draft Internal Rules (1)*, Nov. 16, 2006, available at <http://www.dccam.org/Tribunal/Documents/DCCam%20Comments%20on%20ECCC%20Draft%20Internal%20Rules.pdf>; Documentation Center of Cambodia, *Comments on ECCC Draft Internal Rules (2)*, Nov. 17, 2006, available at <http://www.dccam.org/Tribunal/Documents/DCCam%20Comments%20on%20ECCC%20Draft%20Internal%20Rules%20of%202.pdf>.

¹¹⁴ International Center for Transitional Justice, *Comments On Draft Internal Rules For The Extraordinary Chambers In The Courts Of Cambodia*, Nov. 17, 2006, available at <http://www.dccam.org/Tribunal/Documents/ICTJ%20Comment%20on%20ECCC%20Internal%20Rules%20FINAL.pdf>.

¹¹⁵ Human Rights Watch, *Secretariat of the Rules and Procedure Committee Extraordinary Chambers of the Courts of Cambodia*, Nov. 17, 2006, available at <http://www.dccam.org/Tribunal/Documents/HRW-ECCCRules.pdf>.

¹¹⁶ International Federation for Human Rights, ADHOC, LICADHO & The Collective for Khmer Rouge Victims, *Key Comments And Proposals On ECCC Draft Internal Rules*, Nov. 17, 2006, available at http://www.dccam.org/Tribunal/Documents/Key%20Comments%20FIDH_ADHOC_LICADHO.pdf.

¹¹⁷ Human Rights Watch, *Cambodia: Government Interferes in Khmer Rouge Tribunal*, Dec. 5, 2006, available at <http://www.hrw.org/english/docs/2006/12/05/cambod14752.htm>; *No Justice in This World*, THE ECONOMIST, Dec. 23, 2006.

¹¹⁸ Human Rights Watch, *supra* note 117.

¹¹⁹ *Id.*

ECCC defense office and the training of Cambodian lawyers by members of the International Bar.¹²⁰

Due to the failure of the Plenary Session, the ECCC began a review process of the rules, to be conducted by the Rules Committee, comprised of five national and four international judges.¹²¹ The Rules Committee negotiated a new set of draft rules, meeting twice in January and March of 2007.¹²² In February, the Committee announced that it would likely convene another Plenary Session in April, 2007.¹²³

The March meeting was largely successful, with the agreement between Cambodian and international judges on most major issues. However, one sticking point remained at the end of the meeting: the exorbitant fees that the Bar Association of the Kingdom of Cambodia (BAKC) sought to levy on foreign lawyers practicing at the ECCC.¹²⁴ When the BAKC failed to lower the fees, the international judges from the ECCC issued a unanimous statement indicating that an April plenary session would not

¹²⁰ *Id.*

¹²¹ Press Release, ECCC, ECCC Review Committee on Internal Rules concludes meeting (Jan. 26, 2007), available at <http://www.eccc.gov.kh/english/cabinet/press/16/26Jan-ECCCPressRelease-ReviewCommitteeConcludes.pdf>.

¹²² *See id.*

¹²³ *See id.*

¹²⁴ Press Release, ECCC, Statement from the Review Committee of the Extraordinary Chambers in the Courts of Cambodia (March 16, 2007), available at http://www.eccc.gov.kh/english/cabinet/press/21/16_Mar-Review_Committee_Statement.pdf. The BAKC would have leveled a registration fee of US\$4900 on those international lawyers hoping to practice law in Cambodia. The BAKC registration fees, objected the Tribunal's international judges, would create a barrier to victims seeking representation by raising the cost of practicing law in Cambodia for international lawyers. Press Statement, UNAKRT, International Judges of ECCC say April plenary not possible (April 3, 2007), available at http://www.eccc.gov.kh/english/cabinet/press/23/2007-04-03_Plenary_Announcement_EN.pdf.

be possible.¹²⁵ In April, 2007, the BAKC agreed to lower the fee for international lawyers arguing before the ECCC to US\$500.¹²⁶

During the subsequent Plenary Session, on 12 June 2007, the ECCC announced that the judges unanimously adopted the Internal Rules.¹²⁷ The statement noted one important decision in particular, namely that victims would be allowed to participate in the tribunal as civil parties.¹²⁸ The ECCC clarified that while civil participation would be allowed, it also noted that the only reparations allowed would be collective and non-financial.¹²⁹

One division of the tribunal with mixed views about the new rules was the Defense Support section (DSS). The DSS expressed its confidence in the tribunal's new rules, but noted that the rules with respect to the rights of the accused were not "as progressive" as the protections in some tribunals.¹³⁰ The DSS also registered concern that DSS lawyers would not be allowed to represent defendants in hearings, as had been the

¹²⁵ UNAKRT, *supra* note 124. The judges made two arguments with respect to the exorbitant fee. First they argued that it would create a deterrent to those interested in providing free representation to victims interested in becoming civil parties. Second, they argued that it would create a loophole for defendants as it would erect a barrier to them getting their counsels of choice, which would subsequently violate the ICCPR. The Cambodian judges released a statement in response criticizing the linkage of bar fees to the internal rules, which they indicated were two separate issues.

¹²⁶ Press Release, ECCC, Statement from the International Judges of the Extraordinary Chambers in the Courts of Cambodia (April 30, 2007), *available at* http://www.eccc.gov.kh/english/cabinet/press/25/2007-04-30_Judges_Statement.pdf.

¹²⁷ ECCC Joint Statement by Judicial Officers, *ECCC Plenary Session Unanimously Adopts Internal Rules* (June 13, 2007), *available at* http://www.eccc.gov.kh/english/cabinet/press/29/Joint_Press_Statement__on_internal_rules_eng_fr_13_june_2007.pdf

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Statement from Rupert Skilbeck Head of the Defence Support Section (June 13, 2007), *available at* http://www.eccc.gov.kh/english/cabinet/press/28/DSS_Statement_13_June.pdf. For example, the witness protection provisions might prevent a defendant from confronting his or her accuser.

practice in other international tribunals, thus, saving the time and money required to recruit additional international lawyers to handle more minor matters.¹³¹

Recent Developments

In February 2009, the ECCC will begin its first trial. Five former Khmer Rouge leaders are now in prison awaiting trial. In addition to Duch, Nuon Chea, Khieu Samphan, Ieng Sary and his wife, Ieng Thirith, were arrested in 2007. Duch, one of the most notorious figures in the Khmer Rouge regime who had been in detention for eight years, was denied bail in a hearing before the pre-trial chamber. The chamber refused to acknowledge objections based upon his right to a timely trial.¹³² The trial of Duch is currently slated to begin in February 2009.¹³³

Challenges Facing the Tribunal

Among the most pressing challenges that continue to plague the Court are the ability of the ECCC to integrate victims as civil parties into the trials, perennial funding shortfalls, the specter of corruption, divisions between the national and international sides of the court, delays, and failures in the area of public relations and outreach. These problems

¹³¹ *Id.*

¹³² Human Rights Council, *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Yash Ghai*, 7th Sess., at 20, U.N. Doc. A/HRC/7/42 (Feb. 29, 2008), available at <http://www.unhcr.org/refworld/docid/47e0db072.html>. “The defence’s arguments on the issue of bail were therefore tied to such issues as arbitrary detention and the right to be tried within a reasonable time frame. On 3 December 2007 the Pre-Trial Chamber upheld the validity of the detention order on the ground that the conditions for detention, as stipulated in the Internal Rules, are met, and declined, unfortunately, to enter into a discussion into whether or not there was a violation of the right of the accused to be tried within a reasonable time.” *Id.*

¹³³ It was supposed to begin in September 2008, but the Prosecutors elected to appeal a closing order, which would have ended the addition of new charges against him.

often interact in a manner to amplify their negative effects—corruption increases both the day-to-day costs and decreases the chance that donors will give more money to the ECCC. Additionally, each challenge threatens to undermine the potential for the success of the ECCC’s experiment with victim participation. The ability of the Court, NGOs, and donor nations to live up to the expectations of the people of Cambodia and the ideals embodied in the Internal Rules will determine the legacy of the ECCC.

Civil Party Participation

Several of the Internal Rules provide rights to victims to participate in the Khmer Rouge trials as Civil Parties (“CP”). A victim, according to Rule 23(2), is someone with an injury that is: “(a) physical, material or psychological; and (b) the direct consequence of the offence, personal and have actually come into being.” A victim may become a CP through an application process laid out in the Practice Direction on Victim Participation.¹³⁴ A victim need not be a Cambodian national, and, indeed, many of the applications already filed are from Cambodians living abroad.¹³⁵ The defendant and prosecutors must be notified of the joining of CPs, subject to the rules protecting victims.¹³⁶ Victims who join as CPs have the right to an attorney, either a national lawyer or a national lawyer in conjunction with a foreign lawyer.¹³⁷ Victims are also encouraged

¹³⁴ ECCC INTERNAL R. 23(4).

¹³⁵ Bair, *supra* note 102, at 17.

¹³⁶ ECCC INTERNAL R. 23(3).

¹³⁷ *Id.* R. 23(7), 12 (pertaining to the Victim’s Unit, which facilitates victim participation in the proceedings).

to become part of “Victims’ Organizations” which would facilitate collective representation.¹³⁸

For compensation, CPs are limited to “collective and moral reparations.”¹³⁹ These reparations are permitted to take the following forms for example: “(a) An order to publish the judgment in any appropriate news or other media at the convicted person’s expense; (b) An order to fund any non-profit activity or service that is intended for the benefit of Victims; or (c) Other appropriate and comparable forms of reparation.”¹⁴⁰

Lawyers of CPs are entitled to make closing statements at the close of evidence during the trial phase.¹⁴¹ The participation of Civil Parties in all parts of the proceedings was confirmed by a decision by the Pre-Trial Chamber that the Internal Rules mandate the allowance of such participation.¹⁴²

The ECCC “Practice Directive on Victim Participation” expands upon the Internal Rules and gives slightly more detail on how a victim may participate in the

¹³⁸ *Id.* R. 23(9).

¹³⁹ *Id.* R. 23(11). *See generally* THE HANDBOOK OF REPARATIONS (Pablo De Greiff ed., Oxford University Press 2006); Jaya Ramji-Nogales and Beth Van Schaack, *A Collective Response to Mass Violence: Reparations and Healing in Cambodia*, in BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS (Aug. 2006) (Santa Clara Univ. Legal Studies Research Paper No. 06-02).

¹⁴⁰ ECCC INTERNAL R. 23(12).

¹⁴¹ *Id.* R. 94.

¹⁴² Pre Trial Chamber, Criminal Case File #002/19-09-2007-ECCC/OCIJ (PTC01). One test, however, of this broad participation envisioned by the rules has tested the limits of the tribunal’s ability to fulfill its mandate. In June 2008, one victim, acting without representation, attempted to participate during a proceeding in the Pre-Trial Chamber. When a Civil Party victim attempted to address the Chamber, the Chamber ruled that she must speak through her attorney. Later, when she dismissed her attorney and attempted to speak for herself, the Chamber issued another ruling stating that Civil Parties must be represented by attorneys in order to address the Chambers. Also see Internal Rule 23(7), stating that victims have a right to a lawyer, but not mandating that the party seek a lawyer. *See also* Sarah Thomas, *Civil Party’s Repeated Attempts to Address Bench and Poor Management of Proceedings Force Worrying Precedent for Victim Participation Before the ECCC* (July 3, 2008), available at http://www.genocidewatch.org/images/Cambodia_08_07_03_Civil_Party_s_Repeated_Attempts_to_Address_Bench_and_Poor_Management_of_Participation_Before_the_ECCC.doc; Pre-Trial Chamber, Criminal Case File No. 002/19-09-2007-ECCC/OCIJ (PTC03), July 3, 2008.

proceedings.¹⁴³ The directive does not specify how victims' participation can be managed during the trial. While it allows for the formation of Victims' Associations, it does not specify any manner in which such associations would be encouraged or mandated by the tribunal.

The expansive role given to victims in the Cambodian tribunal simultaneously presents an opportunity to achieve unprecedented access to justice by victims as well as poses considerable risks to the integrity of the tribunal. One commentator noted: "While many legal commentators and civil society groups in Cambodia are supportive of the inclusion of civil parties in the court's proceedings, there are concerns it could bog down or even derail the tribunal."¹⁴⁴ This risk may be exacerbated by some NGOs who are scouring the countryside to encourage victims to fill out the ECCC's civil party application.

Several local NGOs—DC-Cam, ADHOC, and KID—are working to recruit DC-victims to apply as civil parties.¹⁴⁵ It's DC-Cam's Victim Participation Project (VPP) "aims to track down as many of the signatories of these petitions as possible, confirm their stories, and encourage them to participate in the tribunal."¹⁴⁶ Similar projects have been undertaken by other NGOs.¹⁴⁷ The goal of the VPP is to create a historical record.¹⁴⁸

¹⁴³ ECCC, *Practice Direction on Victim Participation*, February 2007.

¹⁴⁴ Andrew Nette, *CAMBODIA: Locus Standi for Victims at Khmer Rouge Trials?*, INTER-PRESS SERVICE, March 3, 2008.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Documentation Center of Cambodia, *Project Design Evaluation: Victim Participation Project*, Feb. 4, 2008, available at

http://www.dccam.org/Projects/Tribunal_Response_Team/Victim_Participation/Victim_Participation.htm.

¹⁴⁸ *Id.*

Indeed, the VPP has set the goal of collecting 10,000 applications for submission to the Victim's Unit.

Even those NGOs recruiting parties admit that recruiting large numbers of civil parties is a potential problem for the tribunal. Youk Chhang, DC-Cam's director noted:

I am in favour of victims participating but it must be controlled or it will do more harm than good. ...It must be clear for example what proportion of the court's time will be taken up by victims otherwise you could have a thousand people in there all wanting to participate and express an opinion.¹⁴⁹

Already, there is a serious backlog of applications, with thousands of applications pending as of September 2008.¹⁵⁰ In November 2008, the ECCC Victims Unit received 1.5 million Euros from the German Government to facilitate the process of reviewing applications.¹⁵¹

Funding

Funding is a recurring problem for the ECCC and has threatened every aspect of the tribunal, including the Victims' Unit. The price tag for other post-conflict tribunals, such as Rwanda and Yugoslavia, dwarf that of the Cambodian court, yet donors continue to balk at the cost of the ECCC. In addition, though the ECCC is cheaper than its counterparts, unexpected needs and delays have caused budgetary shortfalls. The lengthy conflict over the content of the Internal Rules, for example, caused an unexpected

¹⁴⁹ Nette, *supra* note 144.

¹⁵⁰ See Georgia Wilkins, *Victims in emotional, legal limbo over participation at the KR Trial*, PHNOM PENH POST, Sept. 10, 2008.

¹⁵¹ *Germany pledges US\$2.4 million for cash-strapped Cambodian genocide tribunal*, INT'L HERALD TRIBUNE, July 11, 2008.

increase in cost for the tribunal.¹⁵² Both sides of the court have experienced difficulty working within their original budgets.

Some donor countries have consistently supported the ECCC, including Germany, France, and recently Japan. The United States has expressed some willingness to provide financial support to the tribunal, but wants the Court first to demonstrate a stronger stance on anti-corruption.¹⁵³ The U.S. Ambassador to Cambodia, Joseph A. Mussomeli stated “I think we need to find from the Cambodian side a clear, firm commitment to get rid of corruption on the administrative side. ...I think in Washington everybody now is very much looking forward to finding funding to help directly assist the tribunal, if we could just work this last thing out.”¹⁵⁴ Secretary of State Condoleeza Rice also noted US frustration with the slow pace of the tribunal.¹⁵⁵ In order to prompt more American support for the tribunal, the UN appointed David Tolbert, former prosecutor at the ad hoc International Criminal Tribunal for former Yugoslavia, to conduct a review of the operations of the court and lead anti-corruption efforts.¹⁵⁶

¹⁵² *Report of the Secretary-General on the Khmer Rouge Trials*, U.N. GAOR, 62d Sess., at 10, U.N. Doc. A/62/304 (Aug. 27, 2007).

¹⁵³ Chuob Braha, *Funding Shortfall Causes Tension within Corruption-Ravaged KRT*, MONEAKSEKAR KHMER, available at http://www.genocidewatch.org/images/Cambodia_08_08_27_Funding_Shortfall_Causes_Tension_within_Corruption-Ravaged_KRT.pdf (last visited March 5, 2009).

¹⁵⁴ Sok Khemara, *Tribunal Kickbacks Still a Hurdle for U.S.*, VOICE OF AMERICA, Aug. 26, 2008.

¹⁵⁵ *Rice says US disappointed by the pace of change in Cambodia*, ASSOCIATED PRESS, Feb. 14, 2008.

¹⁵⁶ John A. Hall, *A Tribunal Worth Paying For*, WALL STREET J., July 7, 2008. This appointment, according to one scholar, was the “direct result of U.S. pressure.” *Id.*

Corruption

Lack of judicial independence and official accountability have been endemic to Cambodian governance for decades and have at times spilled over from the domestic system into the day-to-day workings of the hybrid tribunal. Allegations of government intrusion into the ECCC have plagued the tribunal. A 2007 report by the UN Secretary-General noted instances of potential interference, including admission to the bar of “unqualified” Cambodian government officials and an appointment of a co-investigating tribunal judge to a position on the Cambodian Court of Appeal.¹⁵⁷

The most recent corruption scandal involved allegations of unethical behavior against the Cambodian side of the court. The Open Society Justice Initiative, an international monitoring organization, accused Cambodian supervisors of forcing their employees to “kickback” part of their salaries.¹⁵⁸ This allegation prompted the international judges to call for an internal investigation by the court.¹⁵⁹ OSJI released another report in October 2008 in which it called upon donors to the tribunal to condition funding on the tribunal’s increasing anti-corruption efforts.¹⁶⁰ Though OSJI commended the tribunal for creating a role for ethic monitors and for formalizing a complaint process, it urged vigilance on the part of donors.¹⁶¹

¹⁵⁷ *Report of the Secretary-General, supra* note 152, at 4.

¹⁵⁸ Cat Barton, *K Rouge tribunal shakeup*, PHNOM PENH POST, Aug. 12, 2008.

¹⁵⁹ *Id.*

¹⁶⁰ Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, Oct. 2008.

¹⁶¹ *Id.*

Hybrid Nature of the Tribunal

The division of the tribunal into an international and a Cambodian side has created conflicts and administrative gaps between the two divisions. The UN has referred to the coordination between the two sides as “poor.”¹⁶² Each has a separate administration and budget allocation that increases tensions and results in a lack of communication. Among the conflicts has been the dispute over the internal rules¹⁶³ and calls for investigation of the Cambodian side of the tribunal by the international side. Finally, lack of translators and translated versions of vital documents hampers coordination and thousands of documents remain un-translated from Khmer.¹⁶⁴

Delays

Delays in starting the trials constitute another challenge to the tribunal. Legal strictures of ensuring a fair trial also cause delay. Most recently, the trial date for Duch was pushed back several months because prosecutors opposed a closing order that would have prevented them from adding charges. Future delays are likely as the tribunal continues to determine how to manage participation of civil parties.

Delays, regardless of the cause, are a threat to the success of the tribunal. First, as the defendant’s age, the risk increases that will they die before the conclusion of trial.

¹⁶² *Report of the Secretary-General, supra* note 152, at 3.

¹⁶³ *Id.* at 8–9.

¹⁶⁴ *Id.* at 3. The failure to have translated documents was used by the defense to delay further the trial of Khieu Samphan. *K Samphan’s Lawyers Request Hearing Delay*, MONEAKSEKAR KHMER, Sept. 13, 2008.

Both Samphan and Sary experienced serious health problems in summer, 2008.¹⁶⁵ Indeed, Ta Mok died from old age and tuberculosis while in custody.¹⁶⁶

Outreach

Informing the public about its work is a vital part of the tribunal. Some steps have been taken toward developing outreach, but the court faces demographic challenges. A demographic study conducted by the CIA in 1980 indicated that between 29 percent and 31 percent of the population perished under the Khmer Rouge.¹⁶⁷ Those born after the Khmer Rouge fell from power in 1979 now constitute a majority of the Cambodian population.¹⁶⁸ Most of the young people have no personal experience or knowledge of the Khmer Rouge atrocities.¹⁶⁹ Thus, targeting youth for outreach activities has been a particular priority of the tribunal and NGOs.¹⁷⁰

The internal rules create a Public Affairs Section (PAS), charged with “ensuring that the Cambodian population is informed about the judicial process.”¹⁷¹ The PAS has taken part in public forums in which a member of the chambers fields questions from the audience. They have also expanded the program in an attempt to ensure rural

¹⁶⁵ Daniel Ten Kate, *Cambodian Court Fights Time in Trying Aging Khmer Rouge Leaders*, BLOOMBERG, Aug. 5, 2008. Sary’s lawyers revealed that he has a “heart condition.” Samphan was hospitalized in summer 2008 for high blood pressure.

¹⁶⁶ Ta Mok had been in custody since 1999, originally arrested on tax charges but subsequently charged in 2002 with crimes against humanity. He was in solitary confinement, only allowed to leave for visits to the hospital. He eventually fell into a coma and died.

¹⁶⁷ ETCHESON, *supra* note 4, at 117–18.

¹⁶⁸ *Id.* at 1.

¹⁶⁹ *Id.*

¹⁷⁰ One NGO, Youth for Peace, does exclusive outreach at schools where it holds workshops with children to educate them about life under the Khmer Rouge and the ECCC. Other NGOs also have activities geared toward youth.

¹⁷¹ *Report of the Secretary-General*, *supra* note 152, at 4.

participation. In addition, the PAS has issue fliers, Public Service Announcements on television and radio, and information on the Internet.¹⁷² The UN identifies the primary remaining hurdle to a better outreach campaign as the lack of funding for the programs.

The UN recognized several NGOs as facilitating outreach.¹⁷³ These groups are wholly independent of the ECCC but have helped educate Cambodians about the tribunal through a variety of activities. In addition to DC-Cam, other groups, including the Khmer Institute for Democracy (KID), ADHOC, and the Center for Social Development (CSD), have begun collecting victims' Civil Parties applications.

Conclusion

The success of the ECCC experiment will be determined largely by how the Cambodian people and Cambodian institutions respond to the tribunal. Failure to integrate victims' voices into the upcoming trials or interminable delay in bringing the defendants to justice will undermine the legitimacy of the ECCC. At the same time, should the Tribunal devise a strategy for meaningful and streamlined participation by victims, the ECCC could become an example for other tribunals attempting to bring the perpetrators of mass crimes to justice.

¹⁷² *Id.* at 4.

¹⁷³ *Id.*