

PUTTING CAMBODIA'S EXTRAORDINARY CHAMBERS INTO CONTEXT

by SUZANNAH LINTON*

Things are moving swiftly in Cambodia these days, and this paper seeks to provide a timely and in-depth contextual analysis of the country's foray into Khmer Rouge accountability. The author takes the view that the Extraordinary Chambers must not be viewed in isolation, but must be examined as part of a domestic system of adjudication that was forged in the aftermath of the Khmer Rouge, and Cambodia's journey into socialism. The author takes issue, *inter alia*, with the many exuberant claims that the Extraordinary Chambers will be the vehicle to fix the multitude of wrongs in Cambodia, and that never before have the Khmer Rouge been subject to a process of accountability. Before engaging in close scrutiny of the Chambers, the substantial international law issues arising or likely to arise, as well as the procedural rules by which the criminal process is to be conducted, this paper examines the criminal proceedings brought against the top two Khmer Rouge leaders and the rank-and-file during the Vietnam-backed People's Republic of Kampuchea, as well as three high-profile Khmer Rouge trials that took place in the 1990s and 2000/2001. This comprehensive study concludes with a realistic assessment of what Cambodians and the world can reasonably expect of these Chambers.

I. INTRODUCTION

Life is incomparably better in Cambodia today than under the Khmer Rouge.¹ The economy is healthier than it has ever been² and there is now a tribunal set up for the purpose of bringing the movement's leaders to account for crimes committed between 1975-1979. But the reports on the state of human rights in Cambodia regularly confirm that Cambodians continue to endure serious and persistent violations of their basic rights.³ The challenges

* Associate Professor in the Department of Law, Director of the LL.M Programme in Human Rights, The University of Hong Kong. This article was first written when the author was a Visiting Fellow at the Lauterpacht Research Centre for International Law at the University of Cambridge and updated in June 2007. It was written before changes to Cambodia's Criminal Procedure were introduced. Thanks to Youk Chhang for his constant support, Bora Touch who provided very helpful review and comments, and Terith Chy for his assistance with research. All references to Cambodian documents are to English translations and because there are rarely 'official translations' and inaccurate translations abound, I have attempted to state the translator's identity where possible.

¹ There has been academic dispute about the correctness of the term in describing a more complex phenomenon, and the linkage of Khmer Rouge with the Communist Party of Kampuchea. I use this term in a non-technical layman's sense to mean the group of revolutionaries who governed Cambodia from 1975-1979 under the auspices of Democratic Kampuchea.

² "Cambodia's robust economic performance continued in 2006. Real GDP growth is estimated at about 10.5%, a third consecutive year of double-digit growth", World Bank, East-Asia Update, April 2007. Also see World Bank, Cambodia Poverty Assessment Report 2006.

³ See State Department Country Reports on Human Rights Practices 2006 (Cambodia), 6 March 2007; Yash Ghai, *Report of the Special Representative of the Secretary-General for human rights in Cambodia*, UN HRC, 4th Sess., UN Doc.A/4/36, it was in 2007; 30 Jan (hereafter "SRSG Cambodia Report 2007 check document electronically"); Peter Leuprecht, Commission on Human Rights, *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia*, UN CHR, 61st Sess., Agenda Item 19, UN Doc.E/CN.4/2005/116 (2004) (hereafter "SRSG Cambodia Report 2004"); Human Rights Situation Report 2004, ADHOC, January 2005 (hereafter "ADHOC Human Rights Report 2004"); Conclusions and Recommendations of the Committee against Torture: Cambodia, 5 February 2004, CAT Report CAT/C/CR/31/7. The state of the judicial system is examined in more detail later in this paper.

facing this nation are ongoing and immense; they include extreme poverty and grossly imbalanced distribution of wealth, under-development and its associated problems, land-grabbing with forced evictions, political violence and harassment, serious environmental degradation arising from plundering of natural resources, entrenched corruption,⁴ child prostitution, human trafficking, a growing HIV-AIDs problem, authoritarian government and abuse of power with impunity. Added to this is the public's understandable lack of faith in public institutions and political leaders, a situation that derives from the deeply ingrained practices of impunity. In fact, the last Special Representative of the UN Secretary-General to Cambodia, Peter Leuprecht, considered impunity for gross violations of human rights to be one of Cambodia's greatest problems.⁵

However, unlike other countries such as Indonesia which faces a 'where do we begin' challenge, the issue of accountability for atrocity in Cambodia has been focused on the unique and grotesque actions of the Khmer Rouge. What happened in the space of 3 years, 8 months and 20 days has certainly had a profound impact on what Cambodia is and what Cambodians are today. This fixation is understandable, but takes a highly complex situation out of context and any understanding of what happened therefore risks being distorted. As the current Special Representative of the Secretary-General to Cambodia rightly points out, human rights continue to be violated on a systemic scale, and this cannot be explained away by poverty or massive violations of human rights during the period of Democratic Kampuchea.⁶ Those claiming that the narrow process of accountability at the Extraordinary Chambers⁷ which have been created to try the Khmer Rouge in a domestic process with United Nations assistance will provide 'truth' and the 'answers' to the overwhelming whys of that period need to be more realistic. Any genuine investigation into the Khmer Rouge will need also to look at the conditions that bred the Khmer Rouge ideology, including the geopolitical situation in the late 1960s and early 1970s. Not to be overlooked are the factors that sustained their influence, in and out of power. Those who believe that trying a few geriatrics is the elixir that is going to transform Cambodia need to remove their rose-tinted glasses. The war that lasted almost twenty years from 1970 and the periods of socialism in Cambodia under the successor regime of the People's Republic of Kampuchea (1979-1989), and the State of Cambodia (1989-1993), have also deeply influenced society and the nature of life in Cambodia. One cannot pretend that the Khmer Rouge and the failure to hold them accountable are solely responsible for all that is wrong in Cambodia today.

There are many ways of understanding the 'accountability' that victims of human rights violations around the world cry out for. For some, it means having perpetrators held responsible in a court of law, and the punishment serves as 'justice' for what they did. For others it can mean acknowledgement of the harm done, revealing the whole story of what happened and genuine remorse by the perpetrator. For some, it is about pure and simple revenge. Others see accountability in a broader sense that goes beyond victim and perpetrator, holding States and other entities responsible for their role in the violations. Surveys have shown that over a quarter of a century on, Cambodians overwhelmingly want to see justice for the crimes of the Khmer Rouge, and that means a legal process in a court of law.⁸ They are more divided (55.9% for, 44.1% against) on their preparedness to endure a sub-standard judicial process if that is all that can be provided.⁹ The true significance of

⁴ Cambodia was ranked 151 out of 163 countries in Transparency International's 2006 corruption index.

⁵ See SRSG Cambodia Report 2004, *supra* note 3, para. 10.

⁶ *Ibid.*, para. 9.

⁷ On 10 August 2001, King Sihanouk of Cambodia signed legislation approving the creation of Extraordinary Chambers for the prosecution of crimes committed during the reign of the Khmer Rouge from 1975 to 1979. This has now been replaced by an amended law. This is discussed in detail below.

⁸ See Suzannah Linton, *Reconciliation In Cambodia*, (Phnom Penh: Documentation Center of Cambodia, 2004), 162-169, 185-191, 216-219, 229-231 (hereafter "Linton, 'Reconciliation In Cambodia'").

⁹ Khmer Institute of Democracy, *Survey on the Khmer Rouge Regime and the Khmer Rouge Tribunal*, 2004.

holding persons responsible for atrocities that are 32-36 years old may be the opportunity that the symbolism of the legal process affords to realign a still devastated society that continues to thirst for justice. Yet, accountability in Cambodia cannot be seen as being just about the forthcoming Extraordinary Chambers. Preceding this a has been a complex story of failed accountability, impunity and pragmatic uses of amnesty and pardon that have coloured policy and the practical decisions that have been taken by the Royal Government of Cambodia (hereafter 'RGC') and the United Nations. These factors are likely to continue to play a role as the process unfolds. Also relevant is the fact that the struggle to ensure the basic integrity of these chambers and their compatibility with fair trial and due process standards runs parallel to long-standing efforts at judicial and legal reform in Cambodia. They are already rubbing against each other as the proceedings at the chambers get underway.

With the Extraordinary Chambers project crawling into the 2nd of its 3 year lifespan, the Internal Rules having just been adopted, and the court looking increasingly likely to be able to produce at least a trial or two, a comprehensive and informed study is timely. It is my position that consideration of accountability in Cambodia through the lens of the forthcoming Extraordinary Chambers alone is convenient but inaccurate for taking a highly complex situation out of context. Too much emphasis on an unusual mechanism dealing with a deliberately restricted period out of a 29 year long armed conflict runs the danger of failing to comprehend key issues and overlooks the realities of life in Cambodia that will invariably impact upon the project. My purpose in this study of accountability in Cambodia is therefore not just to conduct a close examination of the Extraordinary Chambers and what can realistically be expected, but to do so with sufficient consideration of the context, allowing for a more complete understanding.

The structure of this paper is as follows. I begin with a brief historical introduction, moving into closer examination of the evolution of the Cambodian legal system onto which the Extraordinary Chambers have been grafted. I then consider how atrocities of the Khmer Rouge have been dealt with prior to the current project, a matter that is almost invariably ignored in the legal literature. Next, I briefly examine the process leading to the adoption of the original and then the Law on Extraordinary Chambers. This sets the context for an informed and detailed consideration of the Law on Extraordinary Chambers and the mechanism that has emerged, and of course the procedures that will regulate the proceedings before the court. I draw on all of that to consider what the Extraordinary Chambers project can realistically bring to Cambodia, 32 years after the Khmer Rouge swept to power.

II. HOW THE CAMBODIAN LEGAL SYSTEM GOT TO BE WHAT IT IS

As a former French colony, Cambodia's legal system is rooted in the French civil law model. The 1921 L'Ordinance Royale established the formal authority and structure of the criminal courts of Cambodia: ranging from justices of the peace (Sala Lohuc) hearing minor cases to a first instance tribunal (Sala Dambaung) to an Appeal Court (Sala Outor) to a Supreme Court (Sala Vinichhay).¹⁰ The basic system was retained after independence in 1954, subject to the Law on the Amendment to the Organisation of Courts of 1959, with French-based legislation including the Constitution, the Civil Codes of 1954 and 1963, the Civil Procedure Code of 1963 and the Penal Code of 1956.¹¹

¹⁰ UNDP and Ministry of Justice, Royal Government of Cambodia, *Pathways to Justice: Access to Justice with a Focus on the Poor, Women and Indigenous Peoples*, Phnom Penh, 2005, Annex I, Legal and Institutional Framework and Caseload by Institutions.

¹¹ *Ibid.*

The entire legal system was overthrown in 1975. The basic facts of the Khmer Rouge era are generally well known¹² and can be simply summarised. After a five year civil war, on 17 April 1975, Cambodia's capital Phnom Penh fell to the forces of the Communist Party of Kampuchea (CPK), popularly known as the Khmer Rouge. It needs to be underlined that at the time of the fall of Phnom Penh, Cambodia was already a ravaged, devastated nation that had been at war for over five years, and the end of the war was welcomed by many.¹³ According to the assessment of the United Nations:

As many tons of explosives were dropped on Cambodia [by US B-52 aircraft in an effort to destroy Communist North Vietnamese forces and their vital supply lines] in the early 1970s as had fallen on Germany during the Second World War. More than 700,000 people were killed, and some 2 million peasants abandoned their homes and rice fields to become internal refugees in Phnom Penh and other urban centres.¹⁴

Cambodia was cut off from the outside world and its urban population forcibly displaced across the countryside. This ushered in one of the world's most radical political, social and economic experiments in communist revolution. The Khmer Rouge vision of a better Cambodia, free of perceived enemies and completely self-reliant, led to extraordinary horrors and suffering inflicted upon its people. The radical transformation required the racial, social, ideological and political purification of the Cambodian nation, through the sociological and physical liquidation of a variety of groups considered to be irremediably tainted by their association with the old social order or otherwise unsuited to the intended new order.¹⁵ Cambodians, already weakened by years of war, had to endure forcible displacement, virtual imprisonment in collectives, starvation, unlawful killings, enslavement, forced labour, torture, cruel inhuman and degrading treatment and persecution on a massive scale.¹⁶ The death toll has been, and continues to be, very acrimoniously debated, but for the purposes of this paper, it suffices to say that there was very significant loss of life as a result of extensive and gross violations of the most fundamental human rights.

The existing laws and framework were dismantled. Yet, Democratic Kampuchea functioned not in anarchy but in a highly organised and regulated manner, with all organs of State unified under a single institution—the secretive Central Committee (*Angkar loeu*)

¹² The regime has been closely studied, although amid much contentious debate that continues to this day. The following are some of the more widely read materials: Ben Kiernan, *The Pol Pot Regime* (New Haven: Yale University Press, 1996); David P. Chandler, *The Tragedy of Cambodian History: Politics, War, and Revolution Since 1945* (New Haven: Yale University Press, 1991); Ben Kiernan, *How Pol Pot Came to Power: A History of Communism in Kampuchea* (London: Verso, 1985); Elizabeth Becker, *When The War Was Over* (New York: Public Affairs, 1998); David Chandler, *Voices From S-21* (Bangkok: Silkworm Books, 1999); Alexander Laban Hinton, *Why Did They Kill? Cambodia in The Shadow of Genocide* (California: University of California Press, 2004) (hereafter "Hinton 'Why Did They Kill'"); Tom Fawthrop & Helen Jarvis, *Getting Away With Genocide? Elusive Justice & The Khmer Rouge Tribunal* (Michigan: University of Michigan Press, 2004); Philip Short, *Pol Pot: Anatomy of A Nightmare* (New York: Henry Holt, 2005).

¹³ Interestingly, the judgment in the *in absentia* trial of Pol Pot and Ieng Sary declares that "On 17 April 1975, our dear Kampuchea was completely liberated" of "French colonialist invaders", "American imperialists and their stooges, the Lon Nol clique", before going on to decry the ensuing betrayal of the Cambodian people by the 'Pol Pot-Ieng Sary clique'.

¹⁴ Mr. Michael Kirby, *Report of the Special Representative of the Secretary-General on the situation of human rights in Cambodia*, UN CN.4. UN Doc. E/1994/73 (1994), citing data from the United Nations Research Institute for Development, November 1993 (submitted in accordance with Commission resolution 1993/6).

¹⁵ Hurst Hannum, "International Law and Cambodian Genocide: The Sounds of Silence" (1989) 11 Hum. Rts. Q. 82-138, 85.

¹⁶ See Steven R. Ratner & Jason S. Abrams, *Accountability For Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Clarendon Press, 1997), 232-236 (hereafter "Ratner and Abrams 'Accountability for Human Rights Atrocities'"); Stephen Heder & Brian D. Tittmore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge* (Washington: War Crimes Office of the Washington College of Law, American University and the Coalition for International Justice, 2001) (hereafter "Heder and Tittmore 'Seven Candidates for Prosecution'").

comprising eight individuals under the leadership of Pol Pot. They ran the day-to-day affairs of State and issued instructions on how the nation would be governed, for example instructions forbidding freedom of movement,¹⁷ and others setting out courses of action.¹⁸ The regime's 1976 Constitution spoke of courts that were never established and in practice, the *Angkar* ruled through uncodified party policies and decrees, as interpreted by local officials.¹⁹ The regulative framework ranged from the Constitution to directives and orders to codes of conduct, such as the 'Twelve Codes of Conduct of the Combatants', which emphasised norms of sexual conduct. None of this sufficed to create a functioning legal system to replace what had been abolished. The political system allowed much discretion at the bottom resulting in arbitrary justice meted out by revolutionary cadre.

The very particular atrocities of this era came to an end when neighbouring Vietnam sent in its army to oust its one-time allies in late 1978, and reached Phnom Penh by 7 January 1979. It established a satellite regime, the People's Republic of Kampuchea ('PRK'), and its army remained until 1989. All executive, legislative and judicial functions vested in the Khmer People's Revolutionary Council. Despite the mounting evidence of Khmer Rouge atrocities, the United Nations, reflecting hostile world opinion toward the Vietnamese action in Cambodia, continued to recognise the government in exile of Democratic Kampuchea as the lawful representatives of the people of Cambodia and permitted them to represent Cambodia at the General Assembly until 1991.

A significant part of the PRK's leadership comprised former Khmer Rouge cadre such as Heng Samrin, Chea Sim and Hun Sen, who have held positions of influence in Cambodia ever since and whose influence over the accountability issue has been immense. They were closely advised by Vietnamese experts, in part through necessity because the Khmer Rouge's "*extermination of civil servants had nearly erased a national memory of how government worked*".²⁰ As already noted, the pre-existing legal system had been deliberately destroyed under the Khmer Rouge and Cambodia was purged of its educated class (only 10 law graduates, including five judges, survived and remained in the country).²¹ That constellation of circumstances opened the door for the evolution of a Vietnamese-Soviet style of governance and law in Cambodia.

Lawyers in the Ministry of Justice produced some legal texts that were used, which emphasised suppression of political offences. There seems to have been no comprehensive criminal procedure code in force until a decree-law creating procedural rules in 1986.²² The first PRK courts were set up in 1980, along the lines of the Vietnamese oriented (Soviet Socialist) legal model of people's courts, rather than the pre-Khmer Rouge French colonial system.²³ There were later military courts. These People's Revolutionary Courts can be seen as instruments of the State whose function was to uphold policies of government. The often blatant political control over the Cambodian judiciary and prosecution that has existed to

¹⁷ See for example, "Document 2.5.21: Instructions by Party Standing Committee of Region 203, November 26, 1975", in Howard J. De Nike, John Quigley and Kenneth J. Robinson eds., *Genocide in Cambodia Documents From The Trial of Pol Pot and Ieng Sary* (Philadelphia: University of Pennsylvania Press, 2000), 396 (hereafter "de Nike, Quigley and Robinson, 'Genocide in Cambodia: Documents From the Trial of Pol Pot'").

¹⁸ See "Document 2.5.22: Materials of the Fifth Congress of the Pol Pot-Ieng Sary Party, November 1978 (From a Pol Pot Agent's notebook)", *Ibid.*, 396.

¹⁹ See James D Ross, *Cambodia: The Justice System and Violations of Human Rights* (New York: Lawyers Committee for Human Rights, 1992), 24 (hereafter "Ross 'Cambodia: The Justice System and Violations of Human Rights'").

²⁰ *Ibid.*, 50-51.

²¹ Also see Koy Neam, *Cambodian Judicial Process* (Phnom Penh: The Asia Foundation, 1998), 25 (hereafter "Koy Neam, 'Cambodian Judicial Process'"). The figure of 10 surviving lawyers is also cited in Ross 'Cambodia: The Justice System and Violations of Human Rights', *supra* note 19, 25.

²² See *supra* note 19, 3.

²³ *Ibid.*, 23-28; also see Floyd Abrams, Diane Orentlicher & Stephen R Heder, *Kampuchea: After The Worst*, (New York: Lawyers Committee for Human Rights, 1990) (hereafter "Abrams, Orentlicher and Heder, 'Kampuchea: After the worst'").

this day seems to have roots in this period (remnants of the system survive in Cambodian law today; for example, Article 55 of the State of Cambodia's Law on Criminal Procedure requires the prosecutor to inform, then follow instructions of the General Prosecutor at the Appeal Court and the Minister of Justice in serious cases).

The courts were handmaidens to the single ruling party, and notions of justice were tied to ideology. For example, the PRK's Ministry of Justice supervised all facets of the administration of justice and was responsible for reviewing the judgements rendered by the courts of first instance for factual and legal correctness, and for equity in sentencing.²⁴ One of the few laws then in use instructed courts to rely on the "*meaning of the constitution and the political line of the revolution*".²⁵ Also, in "*all of its activities, the court must push citizens forward to be loyally honest vis-à-vis the motherland and vis-à-vis the People's Republic of Kampuchea regime*".²⁶ We see a socialist justice system at work in the Supreme Court's 1989 Report to the National Assembly: "*the work of receiving and resolving suits is a matter of ideology. It is not only a matter of expanding and strengthening socialist legacy, but it is inseparably involved with political problems*".²⁷ Court personnel were recruited from amongst survivors and those with some basic education—a significant number of these judges and prosecutors remain in service today and retain the mindset of this era.²⁸ The judicial officers had little training and minimal resources, and their tenure was determined by local party and government committees in consultation with the Minister of Justice; they were poorly paid and susceptible to financial corruption.²⁹ There was no pretence that court officials, including judges and prosecutors, were not political appointees. The Ministry of Justice and local committees routinely intervened in how courts dealt with their cases.³⁰ In fact, the courts seem to have been wholly subservient, not just to the Ministry of Justice, but also to the security forces who had power to arrest, detain and interrogate prisoners without due process or appeal to a court of law.³¹ They were simply to rubber stamp any recommendations by the authorities.

On 23 October 1991, when the Paris Peace accords were finally signed after 22 years of fighting,³² facing the horrors of the past and accountability for the crimes of the Khmer Rouge were sidelined in favour of peace. While human rights concerns permeated the Paris Accords, all that was said about accountability for the Khmer Rouge atrocities was the pledge that "*Cambodia undertakes... to take effective measures to ensure that the policies*

²⁴ Dolores Donovan, "The Cambodian Legal System: An Overview" in Frederick Brown, ed., *Rebuilding Cambodia: Human Resources, Human Rights and Law* (Washington DC: John Hopkins University, Foreign Policy Institute, the Paul H. Nitze School of Advanced International studies, 1993), 84; Koy Neam, "Cambodian Judicial Process", *supra* note 21, 3 & 9.

²⁵ *Supra* note 19, 27.

²⁶ 1982 Law Concerning the Organization of Courts and Prosecutors.

²⁷ See Russell R Ross, ed., *Cambodia: A Country Study* (Washington DC: Federal Research Division Library of Congress, 1990), 61 cited in Kathryn E. Neilson Q.C. "They Killed All The Lawyers: Rebuilding the Judicial System in Cambodia", Occasional Paper #13, October 1996, Center for Asia Pacific Initiatives, 3 (hereafter "Neilson 'They Killed All the Lawyers'").

²⁸ This is studied more in Basil Fernando, *Problems Facing The Cambodian Legal System*, 1998, Asian Human Rights Commission (hereafter "Fernando 'Problems Facing the Cambodian Legal System'"); also see Basil Fernando and Terrence Wickremasinghe, "Cambodia: An Absence of Genuine Courts—A Fundamental Absence to Democracy in Cambodia" (1997) 7 Asian Human Rights Commission (hereafter "Fernando and Wickremasinghe 'Cambodia: An Absence of Genuine Courts'"); Kelly McEvers and Phann Ana, "Disorder in the Court", *Cambodia Daily* (4 March 2000).

²⁹ *Supra* note 27.

³⁰ Michael Kirby, *Report of the Special Representative of the Secretary-General on the Situation of Human Rights in Cambodia*, UN Doc. E/CN.4/1994/73 (1994), 63.

³¹ For example, see *supra* note 19.

³² Agreements on a Comprehensive Political Settlement of the Cambodia Conflict signed in Paris, 23 October 1991, comprising the Final Act of the Paris Conference; the Agreement on a Comprehensive Political Settlement of the Cambodian Conflict, with five annexes; the Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia and the Declaration on the Rehabilitation and Construction of Cambodia, 23 October 1991, (hereafter "Paris Peace Accords").

and practices of the past shall never be allowed to return".³³ This remarkable abandonment of the Nuremberg principles has been explained as being because the parties at Paris preferred to place the responsibility for prosecuting the leaders of the Khmer Rouge upon a future Cambodian government.³⁴ The parties would have been fully aware of the devastated state of Cambodia's judiciary and its abysmal legal infrastructure and criminal justice system, which after all had produced the much criticised trial and conviction of Pol Pot and Ieng Sary in 1979 (see later). One can only interpret this to mean that they never wanted or expected a legitimate prosecution of the Khmer Rouge to take place. As the Khmer Rouge, repackaged as the Democratic National United Movement, put it in 1999, the spirit and essence of the Accords was about peace and national reconciliation, not a trial of anybody.³⁵ For ordinary Cambodians, more complex questions of justice and reintegration were yet to become apparent.³⁶

The accords led to the establishment via the Security Council of a United Nations Transitional Administration in Cambodia (UNTAC)³⁷ with a mission, *inter alia*, to organise elections to enable elected representatives to govern; these were held in May 1993.³⁸ UNTAC failed to document, let alone investigate and prosecute the exceptional violations of human rights of the Khmer Rouge era.³⁹ It did not have a specific mandate to do so, it being clear that the parties to the Paris Peace Accords had no stomach for such a task.⁴⁰ But it has also to be noted that it did have a mandate to foster an environment in which respect for human rights and fundamental freedoms were ensured, secure the maintenance of law and order, as well as the rehabilitation of essential Cambodian infrastructure such as courts, and as such could have done much more within that had it had the appetite.

In 1992, the Lawyers Committee for Human Rights described the Cambodian legal system in the following terms, which resonate to this day:

By law and in practice, the system functions to guard the interests of the state and the party at the expense of individual rights. At all levels of the legal system, criminal

³³ Article 15(2)(a), Paris Peace Accords. US Assistant Secretary of State Richard H. Solomon spoke of the realpolitik behind the failure to mention the crimes of the Khmer Rouge/CPK when testifying before the US House of Representatives Foreign Affairs Subcommittee on Asian and Pacific Affairs: "The bottom line is that the peace process is the one promising way of bringing security and justice to the Cambodian people. Its successful completion cannot be held back over the issue of including or not including the word 'genocide'. The Khmer Rouge would be the only beneficiary if discord on this issue blocks moving forward to conclude a political settlement". Cited by Stephen P. Marks, "Forgetting 'The Policies and Practices of the Past': Impunity in Cambodia" (1994) 19 *Fletcher Forum of World Affairs* 22-43 (hereafter "Marks 'The Policies and Practices of the Past'"). US Secretary of State James Baker had in fact made a unilateral intervention at the Paris conference supporting a post-election genocide trial should the Cambodian government wish it; the US would have liked to have gone further but was constrained by France and Prince Sihanouk. A balance had to be struck between satisfying the concerns of numerous States that the Khmer Rouge should not regain power, and allies of the Democratic Kampuchea regime such as China, which did not wish to have any mention of genocide or the Khmer Rouge or the legal consequences of what occurred, see Steven R. Ratner, "The Cambodia Settlement Agreements" (1993) 87 *A.J.I.L.* 1-42 (hereafter "Ratner 'The Cambodia Settlement Agreements'").

³⁴ Ratner "The Cambodia Settlement Agreements", *Ibid.*

³⁵ Unofficial translation by the Documentation Center, Statement of the General Assembly, Session 2 Of The Democratic National United Movement, 25 January 1999, Signed by Ieng Sary on behalf of the General Assembly.

³⁶ Vannath Chea, "Case Study: Reconciliation in Cambodia: Politics, Culture and Religion", in David Bloomfield *et al.* ed., *Reconciliation After Violent Conflict: A Handbook* (Stockholm: International Institute for Democracy and Electoral Assistance, 2003), 50.

³⁷ See Security Council Resolutions 718 (1991) of 31 October 1991 and 745 of 28 February 1992.

³⁸ "An Exchange on Human Rights and Peacekeeping in Cambodia", *Human Rights Watch* (1 September 1993), online: <http://hrw.org>.

³⁹ See Michael Vickery & Naomi Roht-Ariazza, "Human Rights in Cambodia", in Naomi Roht-Ariazza ed., *Impunity and Human Rights in International Law* (Oxford: Oxford University Press, 1995), 243-251; Ratner "The Cambodian Settlement Agreements", *supra* note 33. David Hawk and the Cambodian Documentation Commission did initiate the collection of materials.

⁴⁰ An illuminating description of the realities of the situation that UNTAC found itself in, explaining the reasons for this contradiction, can be found in Marks, "The Policies and Practices of the Past", *supra* note 33, 30-35.

and political defendants are at the mercy of a largely unrestrained state apparatus. The concept of an independent judiciary is not recognised in Cambodia today: judges are state-approved officials neither trained nor expected to support ideals beyond the dictates of the party. The nation's lawyers are state-appointed and also must act consistently with party demands.⁴¹

UNTAC did assist the interim government in drafting the 1992 Supreme National Council Law Relating to the Judiciary and Criminal Law and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period (hereafter 'UNTAC Law'). This law was never designed for long-term use, but continues to be applied today. It is an amalgam of essentially French substantive and procedural criminal laws, but it also introduces some international human rights norms, including certain UN soft laws (e.g. Basic Principles on the Independence of the Judiciary) that are not meant to be applied in that form.⁴² Articles 73 and 74 provide that "*any text, any practice, any rule written or not written which goes against the letter or spirit of the present text is purely and simply annulled*" and that the United Nations instruments it refers to become applicable in Cambodia as soon as they are proclaimed by UNTAC, which was done shortly after. The law contains no provisions for prosecution of any of the international crimes that have haunted Cambodia, thus necessitating the adoption of specialised legislation in later years. In practice, UNTAC Law is supplemented, for example with the 1996 Kram on Suppression of the Kidnapping, Trafficking and Exploitation of Human Persons. Some more arcane provisions are still in use from previous eras, such as the 1979 Decree No. 1 on the Revolutionary Tribunal and the 1980 Decree Law No. 2 Against Betraying the Revolution and other Offences.

Shortly after the adoption of the UNTAC Law, the State of Cambodia Law on Criminal Procedure (hereafter 'SOC Law on Criminal Procedure') was adopted. Human Rights Watch describes this as an attempt to reverse the UNTAC Law's effort to establish international norms of fair trial and due process in Cambodia.⁴³ Technically, the SOC Law on Criminal Procedure is not valid law as it was passed by a body that had no authority to pass, amend or repeal laws—under the 1991 Paris Peace Accords, only the Supreme National Council (which promulgated the UNTAC Law) had executive and legislative powers in the transitional period. Nevertheless, the SOC Law on Criminal Procedure is in fact applied in Cambodia as law, on the grounds that it was passed after the UNTAC Law and thus meant to supersede certain of its procedural provisions (in truth, the fact that this is a law approved by the ruling CPP movement probably has more to do with it).⁴⁴ It is in fact the SOC Law

⁴¹ *Supra* note 19, 2-3.

⁴² For more on the drafting of the UNTAC Law, especially its strong French influence, see Bora Touch, "Law of Breach of Trust, the French connection", March 2005, unpublished paper; also Basil Fernando, "The System of Trial under the Vietnamese-Khmer Model (1991-1993)", Fernando "Problems Facing the Cambodian Legal System" *supra* note 28.

⁴³ "Serious Flaws: Why the UN General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement" *Human Rights Watch* (April 2003).

⁴⁴ Note also that Article 237 of the SOC Law on Criminal Procedure provides that the provisions of any law which contradict with its provisions are abrogated. Thus *if* the SOC Law on Criminal Procedure is to be treated as law, and there is a clash with UNTAC Law, the former will prevail. Article 158 (previously Article 139) of the Constitution provides that laws and standards that safeguard, *inter alia*, rights and freedoms in conformity with national interests, shall continue to be effective unless altered or abrogated by new texts, to the extent that such provisions are not contrary to the Constitution. Pursuant to this, the UNTAC Law, which is designed to safeguard rights and freedoms in the criminal justice process and was never repealed, should still be valid law. Yet Article 158 is controversial, for it is either viewed as limited in effect to laws and regulations actually in force at the time of its coming into force in 1993, or as allowing the continued applicability of laws prior to its adoption. The bottom line is that there remains uncertainty over whether pre-1993 laws are actually applicable in Cambodia. In practice, legal practitioners continue to use pre-1993 laws to 'fill in gaps'. The UNTAC Law is one such law that predates the Constitution, and it is regularly used in the courts of Cambodia (in Article 73, it abrogated any inconsistent legal rules).

and not UNTAC Law that has been relied upon by the drafters of the Internal Rules of the Extraordinary Chambers.

Given the circumstances of Cambodia, a startlingly liberal Constitution was eventually adopted, based on the French Constitution and provisions of the Paris Peace Accords which envisaged the transformation of socialist Cambodia to a western style liberal democracy. As Professor Ghai, now the UN Secretary-General's Special Representative to Cambodia, pointed out even before the Constitution was settled, the situation in Cambodia was not propitious for establishing a liberal democratic constitution, let alone one that had little relationship to recent legal and political practices and traditions.⁴⁵ On the other hand, he also pointed out that there did not seem to be much left of traditional principles and institutions on which to build a different kind of constitution, and revolutionary constitutions of such a kind sometimes do take root and flourish in alien soil.⁴⁶ It is hard to argue that the Constitution is representative of Cambodia past or present; it can be seen as having resulted in a 'surrealist scenario' of a legislative framework imposed by external forces and devoted to the rule of law, thrust on a country with few resources and neither the historical nor contemporary motivation or experience to implement it.

Enforcement of the law in the manner expected of liberal democracies proved to be almost impossible in the light of the catastrophic conditions in Cambodia, exacerbated by the existing legal system and its practitioners, steeped in the socialist school of law and thought. This was particularly clear as political violence surrounding the UNTAC-organised elections increased: "*The Cambodian prosecutors and judiciary, all of whom had been appointed by SOC or its PDK predecessor, were unwilling to take action against CPP suspects, the CPP being the party representative of SOC/PRK interests*".⁴⁷ The international Special Prosecutor closely involved with the courts bitterly decried how "*The judges here are a bunch of party hacks and flunkies and they simply refuse even to issue warrants if the accused is of their ilk or connected to any of the dangerous politicians*".⁴⁸

Torture illustrates some of the complications of the Cambodian legal system. It is prohibited under Article 31 of the Constitution⁴⁹ and through Cambodia's obligations as a party under the Torture Convention, but there is no legislation permitting the crime to be prosecuted. While Article 31 appears to introduce international human rights norms directly into Cambodian law, the Constitution does not declare if Cambodia follows a monist or dualist approach.⁵⁰ The courts refuse to entertain claims that are, in the absence of enabling legislation, directly based on international laws, or even for that matter, the Constitution.⁵¹

⁴⁵ Yash Ghai, "Some Thoughts on the Cambodian Constitution", University of Hong Kong Faculty of Law, Law Working Paper Series, Paper No. 10, July 1993, 4-5.

⁴⁶ *Ibid.*

⁴⁷ Neilson "They Killed All the Lawyers", supra note 27, 7.

⁴⁸ Special Prosecutor Mark Plunkett in an interview with the Canberra Times 25 May 1993, cited in Neilson "They Killed All the Lawyers", *ibid.*, 7. According to Plunkett "*we went about investigating major human rights breaches, most of which were mass murders, and arresting people and bringing them before the courts. We endeavoured to use the local courts, but this system broke down when the courts in Phnom Penh refused to hear our cases when we were actually accusing people of the Phnom Penh regime of grievous human rights violations*", see Transcript, "Making Law Out Of Chaos", Radio National Australia, *The Law Report* (19 September 2000).

⁴⁹ The present Constitution was adopted in 1993, and amended in 1999 and 2004. References to the Constitution, unless stated otherwise, are to the most recent version.

⁵⁰ Monist systems view international and domestic law as a unified legal system, although international norms may be of higher status. Dualist systems view the two bodies as separate, each operating in its own domain. Monist systems allow for the direct applicability of international law in municipal courts, dualist systems require implementing legislation. Note that France, from whom Cambodia gained independence, follows a monist system.

⁵¹ Judicial officials insist that issues concerning the Constitution are the responsibility of the Constitutional Council. Under the Law on the Organisation and Functioning of the Constitutional Council 1998, litigants may directly approach the Constitutional Council for redress.

This is in line with the government's stated preference for dualism, as expressed in its 1997 Report to the Committee on the Elimination of Racial Discrimination: "*These covenants and conventions may not be directly invoked before the courts or administrative authorities. However, they provide a basis for the development of national legislation, such as that pertaining to the observance and protection of human rights*".⁵² Torture has therefore not been prosecuted in Cambodia as such even though there remains the option to revert, as has the Law on Extraordinary Chambers, to prosecute torture under the 1956 Penal Code.

One often hears claims that the Extraordinary Chambers are an opportunity for the international community to introduce international standards of fair trial and due process to Cambodia, which will end impunity and pave the way for respect for human rights in Cambodia. Such claims do not appreciate the realities of Cambodia or that from the start of its involvement in the Cambodia situation through the Paris Peace Accords and the establishment of UNTAC in 1991, the international community has invested what must be hundreds of millions of dollars on trying to establish Rule of Law through creation of a strong legal system backed up by independent courts staffed by skilled professionals working to international standards. In the 16 years since 1991, there have been countless legal training programmes on human rights and the like, including a specialised judicial mentoring programme administered by the United Nations Office of the High Commissioner for Human Rights, and trainings on judicial independence and impartiality. Recently, there has been a three year Criminal Justice Assistance Programme funded by the Australian government, working with the Ministries of Interior and Justice. Many experts have advised the Ministry of Justice and related branches of the RGC, scores of international specialists have been assisting with legal and judicial reform and drafting legislation. Foreign funding has reconstructed the physical structures of the courts and allowed for dissemination of laws to the public. There is now even a Magistrates School, created in 2002, with extensive encouragement and support from France. The realisation of the Extraordinary Chambers project has ushered in the latest wave of externally provided legal training, this time in international criminal law. A former UNTAC human rights official has complained how:

all the attempts taken by ambitious judges training programs to establish an independent judiciary with independent judges have been frustrated because of a lack of any real judges in the first place. The court system with its 'judges' alien to the notions of a free and fair trial and to the general principles of the law of evidence (and other laws) which functioned during the pre-UNTAC period has continued to function up to now within the same framework of rule by an unfettered executive.⁵³

For sure, what is needed is not fly-by-night 'human rights training' but sustained and strategic investment in human capacity and systemic reform, both of which are costly, multi-generational projects. The reality is that the legal and judicial situation in Cambodia continues to be dangerously substandard structurally and in terms of basic international requirements of fair trial and due process.⁵⁴ In 1998, the Group of Experts commissioned by the United Nations to advise on accountability for the crimes of the Khmer Rouge found that "*the Cambodian judiciary presently lacks three key criteria for a fair and effective*

⁵² UN Doc. CERD/C/292/Add.2, 5 May 1997.

⁵³ See Fernando and Wickremasinghe 'Cambodia: An Absence of Genuine Courts, *supra* note 28, 11.

⁵⁴ See *Initial Reports of States Parties due in 1993: Cambodia*, UN Doc.CCPR/C/81/Add.12 (1998), where the RGC itself conceded to the Human Rights Committee that "*As the independence of the judiciary and the equality of all before the law are not fully guaranteed, the impartiality of the courts also cannot be fully guaranteed*".

judiciary: a trained cadre of judges, lawyers and investigators; adequate infrastructure; and a culture of respect for the process".⁵⁵ World Bank data from 2004 alleged that 1 in 6 of Cambodia's 117 judges had a law degree, 1 in 9 of the Supreme Court judges, 10% of prosecutors had law degrees.⁵⁶ The reasons for this can be traced directly back to the devastation of the Khmer Rouge period and the mutations of the PRK—as early as 1992, Amnesty International had rung alarm bells about the kind of 'justice' that was evolving in Cambodia.

It would be hard to find an informed observer of international affairs who has not already heard such reports about the disastrous state of Cambodia's legal and judicial system. But for a number of reasons, I would like to spend some time looking at exactly what it is that is wrong with Cambodia's justice system today. One motivation is that too many others take the easy way out and just condemn Cambodia without putting together what is actually wrong and why it is that way. A comprehensive study does need to state for the record the evidence that exists; it is particularly important here in light of the complaints already coming in about the Extraordinary Chambers,⁵⁷ to underscore that the situation in Cambodia was no secret when the member States of the United Nations forced the Secretariat into a partnership with Cambodia in 2002 (see later). Another reason for looking at some of the evidence is to demonstrate the extent of the malaise, and how silly it is to claim that a 3 year spectacle of trying a few elderly Khmer Rouge at the bargain-basement Extraordinary Chambers is what is needed to transform Cambodia and finally introduce justice, rule of law, fair trial and due process.

One would have thought that after 16 years of international assistance, there would already be some decent return on that investment. For sure, there are laws and structures and a 'system' put in place. But the following informed observations reveal that there is not all the way to the core of the structure. Strangely enough, these comments sound just like what the Lawyers Committee for Human Rights depicted in 1992.

- Cambodia's justice system is "*in a disastrous state...riddled with flaws, political interference and corruption*".⁵⁸
- "*Torture is frequently employed as a method to produce a confession and courts do not stringently ensure that evidence forthcoming as a result of torture is not invoked*".⁵⁹
- "*A police statement is to be believed until evidence is produced to show that this is not the case*".⁶⁰
- "*The judge prepares his decision before the trial opens. Before the case opens, the already has a model. During the trial, issues may be brought up that modify the judge's decision. If the response to questioning or testimony are slightly different than expected, the judge will modify the decision for 10 to 15 minutes at the end of the trial. If the events during*

⁵⁵ Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135 (hereafter "Group of Experts Report") of 22 February 1999, transmitted by the Secretary General along with his own report, UN Doc. A/53/850, S/199/231, 16 March 1999, by way of identical letters dated 15 March 1999 from the Secretary General to the President of the General Assembly and the President of the Security Council, para 126.

⁵⁶ World Bank, "Cambodia at the Crossroads", Report No.30636-KH, November 2004.

⁵⁷ Open Society Justice Initiative, "Corruption allegations at Khmer Rouge Court must be investigated thoroughly", press release, New York (14 February 2007), online:<http://www.justiceinitiative.org/db/resource2?res_id=103627>.

⁵⁸ Amnesty International, "Cambodia: Getting Away With Murder", 22 December 2004.

⁵⁹ Amnesty International, "Kingdom of Cambodia: A human rights review based on the Convention against Torture", ASA 23/007/2003, 26 June 2003.

⁶⁰ Para. 176 of Cambodia's Report to the Committee against Torture, where it deals with statements taken by the judicial police, which under Article 42 of SOC Law is to be believed until the evidence proves the contrary: "*Statements are refused only when the judge has enough evidence that it is unlawful or obtained by coercive means*".

the trial are very different, he must suspend the trial until a later date. At that time, he will look at additional evidence and write a decision".⁶¹

- "Basic safeguards to ensure fair procedures are simply non-existent in most cases, and ignored in others. At present, it is almost impossible to obtain a fair trial in Cambodia's courts, even on common criminal charges, with no political elements involved".⁶²
- "Judges reported frequent interference by government or high-ranking officials in their cases, particularly those involving sensitive political issues or nepotism".⁶³
- "The problem in Cambodia is one of implementation and the political will to implement laws and respect the spirit behind international treaties...In Amnesty International's opinion, the most serious human rights problem in Cambodia remains impunity for the perpetrators of human rights violations, including those accused of torture. Members of the police and military are able to impose their will on civilian population and commit violations, safe in the knowledge that they will never be called to account for their actions".⁶⁴
- "The Committee is concerned about the following: (a) The numerous, ongoing and consistent allegations of acts of torture and other cruel, inhuman or degrading treatment or punishment committed by law enforcement personnel in police stations and prisons; ... (d) Impunity for past and present violations of human rights committed by law enforcement officials and members of the armed forces and, in particular, the failure of the State party to investigate acts of torture and other cruel, inhuman or degrading treatment or punishment and to punish the perpetrators; (e) The allegations of widespread corruption amongst public officials in the criminal justice system; (f) The absence of an independent body competent to deal with complaints against the police; (g) The ineffective functioning of the criminal justice system, particularly the lack of independence of the judiciary as well as its inefficiency; (h) The importance given to confessions in criminal proceedings and the reliance of the police and the judiciary on confessions to secure convictions; (i) The unwarranted protraction of the pre-trial detention period during which detainees are more likely to be subjected to torture and other ill-treatment; (j) The use of incommunicado detention for 48 hours, at least, before a person is brought before a judge, during which the detainee has no access to legal counsel or to his/her relatives. Furthermore, recent legal amendments allow the police to extend this period; (k) The lack of access by detainees in general to legal counsel and a medical doctor of their choice; (l) The overcrowding and poor conditions in prisons, as well as alleged cases of ill-treatment of prisoners, and the difficulties faced by international organizations, NGOs and family members in gaining access to prisoners".⁶⁵
- "14. It has become increasingly clear that impunity is not only the result of low capacity within law enforcement institutions and of a weak judiciary. By upholding a system under which selected institutions and individuals have been allowed to breach the law and violate human rights without being held to account, those with economic and political power have been able to obtain personal enrichment and maintain vested interests. 15. The Special Representative's analysis of patterns and cases of violations of human rights over the last decade shows that human rights violations have often not been carried out at the direct behest of key power holders, but that they have been condoned to maintain vested

⁶¹ Minister of Justice Chem Snguon, interviewed in the *Phnom Penh Post*, 7-20 November 1997, cited in Fernando & Wickremasinghe, "Cambodia: An Absence of Genuine Courts—A Fundamental Absence to Democracy in Cambodia", *supra* note 28, 11.

⁶² Amnesty International, "Kingdom of Cambodia—No Solution To Impunity: The Case Of Ta Mok", AI-index: ASA 23/005/1999, 22 April 1999 (hereafter "Amnesty International, 'No Solution to Impunity'").

⁶³ ADHOC Human Rights Report 2004, *supra* note 3, 47.

⁶⁴ *Supra* note 59.

⁶⁵ *Conclusions and recommendations of the Committee against Torture: Cambodia*, U.N.Doc CAT/C/CR/31.7 (2002).

interests. Thus, members of the armed forces, police, and others have routinely not been arrested or prosecuted even when suspicions and evidence have been well known to the authorities and the general public..."⁶⁶

This is about deep-rooted structural problems, not a few bad apples who need to be removed before they spoil the pristine ones in the barrel. After 16 years of investment in Cambodia, how is this still possible? One major reason for the low return is that reform has not been self-initiated but has been donor-driven. All manner of agencies have been trying to 'do something' in Cambodia. As time progresses, it becomes increasingly clear that the international community, including the international NGOs, has been trying to impose a system onto Cambodia which its leaders do not want. There is some truth in the contention that this arises because "*sophisticated and foreign concepts of western liberal democracy have been imposed on a society virtually devoid of the institutions necessary to protect and nurture them*".⁶⁷ Cambodia is not the only country in the world where justice has been a lesser priority in the reconstruction of a war-torn nation. The challenges of what to prioritise in an extreme situation are never easily dealt with and have been faced by other Southeast Asian nations such as Indonesia and Timor Leste, and across the world in countries like South Africa, Chile, Argentina and Czechoslovakia. But the lack of progress in implementing Rule of Law in Cambodia seems to arise from self-interest of the ruling elite, whose arbitrary exercise of economic and administrative power are at stake, and a public that has always deferred to the decisions of authoritarian leadership and feared the consequences of challenging them. Traditional power relationships would be undermined if comprehensive legal and judicial reform were implemented. One commentator points out that the regime demanded by the international community for Cambodia, "*in addition to imposing liberal democratic concepts on an unenthusiastic leadership, also introduced them to a populace that has no history or understanding of them or their role in establishing them*".⁶⁸ Another assessment is that maintaining that disempowerment has been deliberate "*because [empowerment of victims] would involve empowering people who might use that power to threaten governmental dominance on various fronts. It's not about healing social wounds, it's about preventing social restructuring that might threaten the wealth and power of the wealthy and powerful*".⁶⁹ It is widely argued that the fundamental problem is not a lack of knowledge or training within the judiciary, although more of both is sorely needed: "*The problem is the determination of key political players to prevent training and knowledge from being put to use against their fundamental political and economic interests*".⁷⁰ In 2004, the Secretary-General's Special Representative to Cambodia conceded that:

There can be little progress in the justice sector unless political decisions for delivering reform are made at the highest levels of Government. The situation in many ways remains as elusive as when the Special Representative first took up his appointment in August 2000. Progress will be evident when Cambodia's courts can rule in accordance with the law without fear of reprisal and politically motivated disciplinary action, and when they begin to treat all citizens as equal before the law. Corruption in the judicial system must be challenged and the separation of powers must be respected.⁷¹

The RGC has been pressed by its donors into pursuing several key reforms which are believed to be vital for the creation of an efficient, credible and transparent legal and justice

⁶⁶ SRSR Cambodia Report 2004, *supra* note 3, paras. 14-15.

⁶⁷ Neilson "They Killed All the Lawyers", *supra* note 27, 15.

⁶⁸ *Ibid.*, 15.

⁶⁹ Steve Heder, cited in Linton, "Reconciliation In Cambodia", *supra* note 8, 90.

⁷⁰ See, for example, Unofficial Transcript, "The Khmer Rouge Trials: Is it worth it and for whom?, A public discussion held in Phnom Penh", 17 November 2004, comments of Steve Heder.

⁷¹ SRSR Cambodia Report 2004, *supra* note 3, para. 32.

system based on the rule of law.⁷² These are legislative reform and institutional strengthening; judicial strengthening; legal training; legal information and public access; law and justice facilitation; and project management and implementation.⁷³ Some of the steps due to be taken by the RGC will, if properly implemented, impact tremendously upon the quality of justice. For example, the selection of judges and prosecutors will be vastly improved if there were a Statute of Magistrates, and if the body entrusted with judicial appointments, removals and discipline, the Supreme Council of Magistracy,⁷⁴ is de-politicised through substantial reform. But, having been originally drafted in 1994, the draft Statute remains in draft form: one commentator is of the view that the “*ability to be arbitrary and unpredictable has always been the CPP’s goal and style of governing*”.⁷⁵ The Judicial Reform Council seems to be doing little to develop and implement reform measures. Adoption of drafts—10 years in the making—of criminal procedure and criminal codes would improve the highly unsatisfactory situation that currently exists and set a legislative framework for due process. But there is an established record of failure to keep promises to do the doable and the watchdogs were still complaining in 2006 that the Legal and Judicial Reform Strategy remains unaccomplished.⁷⁶

III. DEALING WITH THE ATROCITIES OF THE KHMER ROUGE

A. *The PRK: Summary Justice, Early Prosecutions, Administrative Proceedings and Amnesties*

After the fall of Democratic Kampuchea, many Khmer Rouge who were not able to escape to safety were killed in revenge attacks by those whom they had until recently repressed. Exact numbers are not known, but anecdotal indications are that the numbers were large and widespread across Cambodia.⁷⁷ One Cambodian author has written about a chance witnessing of the mob killing of a captured Khmer Rouge cadre.⁷⁸

In August 1979, two of the leaders of the Khmer Rouge, Pol Pot and Ieng Sary, were tried *in absentia* over five days from 15 to 19 August 1979 by a People’s Revolutionary Tribunal of the PRK.⁷⁹ The action was brought under the charter of the special tribunal,

⁷² See the Government’s Action Plan of 2000; Strategy for Legal and Judicial Reform, June 2003; Short and Medium Term Action Plan, June 2004; National Strategic Development Plan 2006-2010, all enthusiastically embracing the jargon and buzzwords of international development and human rights agencies.

⁷³ At the Consultative Group for Cambodia meeting in December 2004, it was agreed that the following laws should be adopted as a matter of urgency: a Criminal Code, a Criminal Procedure Code, a Civil Code, a Civil Procedure Code, a Law on the Organization and Functioning of the Courts, a Law on the Amendment of the Law on the Supreme Council of the Magistracy and a Law on the Status of Judges and Prosecutors. The Civil Code, drafted with extensive Japanese assistance, was promulgated on 6 July 2006, and will come into force in July 2007 after a period of induction.

⁷⁴ The authority of the Supreme Council of Magistracy derives from the Constitution. The nine member council has the authority to appoint, transfer, discipline or dismiss judges and prosecutors; it is also empowered to review and draft legislation concerning the judiciary. Its members are appointed by the King and include a member of the Executive (the Minister of Justice), the President of the Supreme Court, the President of the Court of Appeal, the Prosecutor-General of the Supreme Court, the Prosecutor-General of the Court of Appeal, and three other judicial appointees. It is regularly condemned for being ineffectual and appears to function as an auxiliary of the ruling party, the CPP.

⁷⁵ Bora Touch, email correspondence with the author, 10 June 2007.

⁷⁶ See the NGO Statement to the 2006 Consultative Group Meeting on Cambodia, 9; 13-19.

⁷⁷ Evan Gottesman, *Cambodia after the Khmer Rouge: Inside the Politics of Nation Building* (New Haven: Yale University Press, 2003) 37-38.

⁷⁸ Luong Ung, *First They Killed My Father* (Sydney: Harper Collins, 2000) 203-208; See also *Ibid.*

⁷⁹ Some of the translated documents from the trials may be found in de Nike, Quigley and Robinson, “Genocide in Cambodia: Documents From the Trial of Pol Pot”, *supra* note 17.

Decree Law No. 1 dated 15 July 1979⁸⁰ and on the basis of an indictment dated 30 July 1979. The law was directed at the prosecution of the 'Pol Pot-Ieng Sary clique' in terms making it clear that they were already considered guilty of genocide. This was obviously wholly inconsistent with the presumption of innocence and rendered trial pointless. The law provided for the prosecution of genocide alone, and set down punishment for 2 categories of the 'Pol Pot-Ieng Sary clique': instigators and planners, and direct perpetrators of multiple acts of cruelty and barbarity (Article 2). The sentences ranged from death all the way down to below 5 years where there were particularly mitigating circumstances, and allowed confiscation of property. The PRK People's Revolutionary Council appointed those who took part, including ten 'peoples advisors' and the President of the Tribunal (who was in fact the Minister of Information),⁸¹ two prosecutors, the Secretariat, legal representatives and defence counsel from among party stalwarts, and invited international jurists of appropriate political inclination.⁸² Victims participated extensively, as witnesses, and as 'civil plaintiffs' with legal representation. The trial was held at the Chakdomuk Theatre in Phnom Penh, conducted in English, Khmer and French, and was attended by some 700 Cambodians, along with international observers and media.

The charges were of genocide, not as international lawyers know it from the Genocide Convention of 1948⁸³ which applied in Cambodia at the time through custom and treaty law, but a made-to-measure crime purporting to be genocide. Article 1 gave the tribunal jurisdiction over "*the acts of genocide committed by the Pol Pot—Ieng Sary clique, namely, planned massacres of groups of innocent people, expulsion of inhabitants of cities and villages in order to concentrate them, and force them to do hard labour in conditions leading to their physical and mental destruction; wiping out religion, destroying political, cultural and social structures and family and social relations*". This is a good illustration of an international norm, the prohibition of genocide, being manipulated to fit actual events in a way that is bound to secure a conviction, with no regard for its actual content. Hence, this process revolved about a crime of 'genocide' whose elements were invented by the drafters of the law after the crime was perpetrated. The reason is obvious to international lawyers: there are certain legal obstacles to a finding that there was genocide in Cambodia (see later discussion).

As already noted, the relevant law itself presumed the guilt of the 'Pol Pot-Ieng Sary clique' for genocide. Before the trial began, senior officials were publicly proclaiming on behalf of the government that the 'Pol Pot-Ieng Sary clique' was guilty of the crimes charged and needed to be punished.⁸⁴ The President of the Court (the erstwhile Minister of Information) was not at all shy about declaring the Pol Pot-Ieng Sary clique guilty before the trial began.⁸⁵

The indictment was grounded in nine factual allegations, said to have been in violation of Decree Law No.1 and international law on genocide, specifically the Genocide Convention. 54 survivors were brought in to testify; extensive documentation was presented.⁸⁶ Analysts who have subsequently examined the trial documents in the National Archives suggest that

⁸⁰ Decree Law No. 1: Establishment of People's Revolutionary Tribunal at Phnom Penh to Try the Pol Pot-Ieng Sary Clique for the Crime of Genocide, July 15, 1979.

⁸¹ *Supra* note 77, 63.

⁸² The international participants included an American acting as one of three defence counsel, a Syrian acting for civil plaintiffs, and three witnesses (Cuban, Japanese and American) who had "made on the spot investigations".

⁸³ Convention on the Prevention and Punishment of the Crime of Genocide 1948.

⁸⁴ *Supra* note 77, 61. Gottesman point out that this was a strategic decision to distinguish these individuals from the large numbers of cadre and soldiers that the PRK sought to co-opt.

⁸⁵ See Press Conference of Keo Chanda, 28 July 1979, in de Nike, Quigley and Robinson, "Genocide in Cambodia: Documents From the Trial of Pol Pot", *supra* note 17, 47-49.

⁸⁶ See Kelly McEvers, "The People's Revolutionary Tribunal of 1979" *Cambodia Daily* (8 January 2000) (hereafter "McEvers 'The People's Revolutionary Tribunal of 1979' ") interviewing witnesses who testified at the trial; also *supra* note 77, 64-65.

the event was scripted in nearly every way; each session of the trial even came with a theme, such as 'hard life in the communes'.⁸⁷ "*Much of the material is transparent political propaganda*", it is alleged.⁸⁸ There was apparently stage-managing, and witnesses who had never seen either accused would say 'Pol Pot' or 'Ieng Sary' did x y or z, equating them with the movement itself or any individual within it.⁸⁹ The documents show a tendency for any Khmer Rouge cadre to be described as a member of the 'Pol Pot Ieng Sary clique' or a 'Polpotist' or a 'Pol Pot agent' or 'Pol Pot man'.⁹⁰ However, the trial records also show that a significant amount of what seems to be reliable evidence of the commission of crimes of the utmost seriousness and depravity under the Khmer Rouge were in fact presented.⁹¹

Much is made of the trial being held in the absence of the accused. The fact that there was a trial *in absentia* does not in itself render the process unsound in international human rights law, for the right to be present at one's trial does not require one actually to be there. It is based on the right of an accused person to defend himself from the charges against him, set out in Article 14 of the ICCPR.⁹² The Human Rights Committee and European Court of Human Rights have found that trial *in absentia* are not incompatible with international norms if the accused is given due notice and is properly informed of the proceedings against him and where there has been no denial of the right to legal assistance.⁹³ The human rights bodies are not keen on this mode of trial, but none has held trial *in absentia* to be a violation of human rights *per se*. A 2000 decision of an ICTR⁹⁴ Trial Chamber in *Barayagwiza* (where trial *in absentia* is forbidden under the Statute of the tribunal) found that where a defendant has been informed of his trial, but has chosen not to be present, neither the Statute of the tribunal nor human rights law prevent trial from proceeding in his absence.⁹⁵ The *Norman* case at the Sierra Leone tribunal saw a similar decision.⁹⁶ In the *Milosevic* case at the ICTY⁹⁷ (where trial *in absentia* is also prohibited under the Statute), trial has proceeded in the absence of the accused on ill-health; this follows an interpretation of a decision of the Appeals Chamber to the effect that a trial chamber has

⁸⁷ McEvers 'The People's Revolutionary Tribunal of 1979', *ibid*.

⁸⁸ *Ibid*.

⁸⁹ *Ibid*. This is borne out in some of the documents contained in de Nike, Quigley and Robinson, "Genocide in Cambodia: Documents From the Trial of Pol Pot", *supra* note 17, 280. See for example the following assertion in a statement by Vandy Kaon (Professor of Philosophy) that "Pol Pot and Ieng Sary used a very simple yet quite infamous trick...", when the named deponent did not actually know them or ever see them.

⁹⁰ This is borne out in the documents contained in Ieng Sary, "Genocide in Cambodia Documents From the Trial of Pol Pot".

⁹¹ *Ibid*; the collection includes witness statements, forensic records and other relevant documents, some of which was hearsay or in the third person and of lesser probative value in assessing the charges against the accused.

⁹² International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, *entry into force* 23 March 1976.

⁹³ *Mbenge v. Zaire* (Communication 16/1977 of 8 September 1977 and *Maleki v. Italy* (Communication 699/1996 of 27 July 1999); *Medenica v. Switzerland* (20491/92)) [2001] ECHR 391 (14 June 2001). Also see Human Rights Committee General Comment #13 on Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Article 14), 13 April 1984, para. 11.

⁹⁴ International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, (hereafter 'ICTR') established pursuant to Security Council Resolution 955.

⁹⁵ *Prosecutor v. Jean-Bosco Barayagwiza*, ICTR Case No.97-19-7, Decision on the Defence Counsel Motion to Withdraw, 2 November 2000, para.6.

⁹⁶ *Prosecutor v. Samuel Hinga Norman*, Case No.SCSL-2004-14-T, Decision on the Application of Samuel Hinga Norman for Self-Representation under Article 17(4)(d) of the Statute of the Special Court, 8 June 2004.

⁹⁷ Statute of the International Tribunal for the Former Yugoslavia, SC Res 827, 48 UN SCOR (3217th mtg), UN Doc S/Res/827 (1993); 32 ILM 1203.

an inherent discretion to address issues causing substantial disruption to trial, for example, ill-health.⁹⁸ In the Cambodian case at hand, warrants were issued for the attendance of Pol Pot and Ieng Sary. On the other hand, in the prevailing environment, it was hardly likely that either of the accused would have turned up—they were at war with the regime trying them. But, three persons were appointed to represent them (one of whom became the President of the Supreme Court of Cambodia—this lawyer lost 38 family members and also testified for the prosecution).⁹⁹ Given the circumstances, where conviction seemed a foregone conclusion, they probably could not have done more than seek mitigation. This they actually did, by attempting to shift responsibility on to the Chinese and suggesting insanity. But they went well beyond that—between them, the three defence counsel spoke of how “*through a blind, virtually mad, obedience to the dogma of Maoism, [they] perpetrated acts which any person having a conscience and a normal state of mind would never commit*”;¹⁰⁰ called their clients “*criminally insane monsters*”;¹⁰¹ and demanded the death sentence.

The convictions and death sentences imposed on Pol Pot and Ieng Sary¹⁰² have never been recognised by the international community, which regarded the process as a politically designed show trial that lacked due process. The Group of Experts for Cambodia adjudged this to be a show trial with no regard for due process.¹⁰³ Schabas points out that this hardly

⁹⁸ *Slobodan Milosevic v. Prosecutor*, Case No.IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, 1 November 2004, paras. 9, 12, 13, 14. The right to self-representation is presumptive and fundamental, but is qualified and not absolute. There are circumstances where the accused’s decision may be overridden, for example where the accused’s exercise of the right is substantially and persistently obstructing the proper and expeditious conduct of his trial (para. 12, 13). Also see the preceding decision in *Prosecutor v. Vojislav Seselj*, Case No.IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, 9 May 2003.

⁹⁹ *Supra* note 77 at 64.

¹⁰⁰ *Supra* note 86.

¹⁰¹ *Supra* note 77 at 65.

¹⁰² “The Council of Judges of the People’s Revolutionary Tribunal held in Phnom Penh has determined the nature of the present case as follows: After a valiant, protracted, and arduous struggle, shoulder to shoulder with fraternal peoples of Vietnam and Laos, against the French colonialist invaders and subsequently the American imperialists and their agents, the Lon Nol clique, our people gained a glorious victory: on April 17, 1975, our dear Cambodia was completely liberated. The most profound aspiration of all strata of our people is to live in an independent, peaceful and happy country in a society which is truly equal, just and democratic and to unite in building and defending our Kampuchean fatherland advancing on the road of prosperity to develop to the highest degree our glorious traditional Angkor civilization and entertaining peaceful, and friendly relations with the fraternal neighbour nations. But during their four years in power the accused Pol Pot and Ieng Sary betrayed our people and our fatherland. The Tribunal finds that the accused have committed the following crimes: I. Implementation of a plan of systematic massacre of many strata of the population on an increasingly ferocious scale; indiscriminate extermination of nearly all the officers and soldiers of the former regime; liquidation of the intelligentsia, massacre of all persons and destruction of all organizations assumed to be opposed to their regime. II. Massacre of religious priests and believers, eradication of religious, systematic extermination of national minorities without distinction between opponents and non-opponents, for the purpose of assimilation; extermination of foreign residents. III. Forcible evacuation of the population from Phnom Penh and other liberated towns and villages; breaking or upsetting of family and social structures; mass killing and creation of lethal conditions. IV. Herding of people into “communes” i.e. Disguised concentration camps where they were forced to work and live in the conditions of physical and moral destruction, were massacred or died in large numbers. V. Massacre of small children, persecution and moral poisoning of the youth, transforming them into cruel thugs devoid of all human feeling. VI. Undermining of structures of the national economy; abolition of culture, education and the health service. VII. After their overthrow by the genuine revolutionary forces, the Pol Pot—Ieng Sary clique still persisted in opposing the revolution and committed new crimes in massacring those who refused to follow them. VIII. During their four years in power the Pol Pot—Ieng Sary clique used most barbarous methods of torture and killing”. Unofficial translation by the Documentation Center of Cambodia, People’s Revolutionary Tribunal Held in Phnom Penh for the Trial of the Genocidal Crime of the Pol Pot-Ieng Sary Clique, Judgement of the Tribunal, undated.

¹⁰³ Group of Experts Report, *supra* note 55, para. 43.

deserved to be called a 'trial', and that it was simply an "*exercise in public denunciation of a pair of brutal despots*".¹⁰⁴

Unknown numbers of captured Khmer Rouge foot-soldiers were also punished by the PRK authorities for their roles in the atrocities. A 1 January 1979 document examined by the Lawyers Committee for Human Rights showed that there was already, before the fall of Phnom Penh, consideration of how to handle Khmer Rouge defectors—those who abandoned their previous activities could, subject to clearance, be 'welcomed' and treated with 'benevolence'.¹⁰⁵ Those who did not get such clearance, and were captured, were "*to be considered as children of the people who had been deceived or forced to work for the enemy*" and would be subjected to five days of re-education before being allowed to return home; the recalcitrant ones would have to undergo re-education for longer.¹⁰⁶ But the first major policy document calling for trials seems to have been a document entitled 'Instructions of the RPKC Regarding Criminals', which envisaged trials for the most seriously criminal of the cadres and soldiers of the 'Pol Pot-Ieng Sary clique' and prescribed severe punishment although forbidding Khmer Rouge style cruelties.¹⁰⁷ The document also called for 2-5 years of re-education following trial, required lesser perpetrators to "*stand before the local revolutionary power and ask forgiveness from the people for all the wrongdoings they committed*", and spoke of how "*Proper compensation should be envisaged by the local revolutionary power for anyone who has served the revolution by informing it about the enemy's jungle bases...*". As for the soldiers and cadre who surrendered, "*the revolutionary power must arrange that they stand before and ask forgiveness from the people for the wrongful acts they have committed. After they understand their errors, the local revolutionary power will let them return to their families and live like any other ordinary inhabitant*".

The PRK issued guidelines on the legal status of Khmer Rouge cadre and soldiers in a 1980 'Circular On Punishment For Those Who Committed Offences Against The People During The Pol Pot-Ieng Sary Regime'.¹⁰⁸ Several alleged members of the so-called 'Pol Pot-Ieng Sary clique' were among those tried in October 1982 but it seems not in relation to acts during the DK period, but for setting off explosives during a football match and of throwing a grenade into a market in Phnom Penh.¹⁰⁹ At another trial in 1983, one of ten alleged 'traitors' reportedly confessed to "*servicing the activities of the genocidal Pol Pot-Ieng Sary-Khieu Samphan clique whose hands are stained with the peoples blood*".¹¹⁰ A number of trials involving persons associated with the 'Pol Pot regime' were also identified by Amnesty International, but none seem to have been in relation to events from 1975-1999: one such example involves offences in Kampong Speu allegedly led by a "*wicked commando of the Pol Pot remnants*".¹¹¹ There are numerous reports of low-ranking Khmer Rouge being incarcerated, but these seem to have been administrative processes, i.e. without trial. One of these cadre was Him Huy, a guard from the notorious detention centre in Phnom Penh known as S-21 (Tuol Sleng). He was 're-educated' for more than a year in a prison in Koh Thom district, Kandal province.¹¹² Suos Thy, another former S-21 employee, was detained

¹⁰⁴ William Schabas, "Cambodia: Was it really Genocide?" 23 Hum. Rts. Q.470-477, 96.

¹⁰⁵ Abrams, Orentlicher and Heder, "*Kampuchea: After the worst*", *supra* note 23, 89.

¹⁰⁶ *Ibid.*, 89. For more on 're-education' in the PRK, see Amnesty International, *Kampuchea: Political Imprisonment and Torture*, ASA/23/05/87, June 1987, pp. 57-60.

¹⁰⁷ *Kampuchea: After the Worst* (New York: Lawyers Committee for Human Rights, 1990) at 90.

¹⁰⁸ This is also referred to as the Decree-Law of 15 May 1980 on Punishment for Treason and Other Offences Against the People's Revolution.

¹⁰⁹ *Supra* note 107 at 96.

¹¹⁰ *Supra* note 107 at 95-96.

¹¹¹ Amnesty International, *Kampuchea: Political Imprisonment and Torture*, ASA/23/05/87, June 1987, 61-69.

¹¹² See Vannak Huy, "Him Huy Needs Justice" *Searching for the Truth Magazine* 28 at 54.

in a high security prison for four years, again in Kandal province.¹¹³ Yet another S-21 guard, Lor, was arrested in 1979, interrogated by district police, and despite claiming to have killed one thousand people, was sent to prison for a year and then released to return to his native village and resume a normal life.¹¹⁴ There is no indication of a trial. Overall, there does not appear to have been a systematic purging of those Khmer Rouge who remained within Cambodia. Gottesman's study reveals that:

The fate of Khmer Rouge cadre "who killed people directly or who signed orders to have people killed" depended entirely on the defendants attitude towards the new regime and on their value to the ongoing military campaign. Those unfortunate enough to already have been arrested and detained were of little use to the regime and were stuck with a prison sentence of between three and five years perhaps longer if they failed to become "honest persons". Khmer Rouge cadres and soldiers not yet in detention were more valuable and could earn a reduced sentence through such "achievements for the revolution" as convincing resistance fighters to surrender or reporting their whereabouts to the military. Those who were not yet under the control of the State authority were the luckiest of all. "Soldiers and cadres of Pol Pot-Ieng Sary who come join the local revolutionary state authority, as individual units, or groups, and apologise to the people for their past offences shall after careful examination and education to make them [politically] aware, be permitted to return to work and make a living with their families as normal people". The real crime, then was not so much the past killings, as continued resistance to the new regime, an offence that would be punished severely.¹¹⁵

So, after the dust had settled, most Khmer Rouge who remained in Cambodia were considered to have abandoned their earlier affiliations and earned informal amnesty; Chandler points out how many of them had gained valuable administrative and military experience under Democratic Kampuchea that was useful in the rebuilding of Cambodia after 1979.¹¹⁶

B. *The Early 1990s: "Divide, Isolate, Finish, Integrate and Develop"—Outlawing the Khmer Rouge and Amnesties for Defectors*

The sidestepping of accountability in the Paris Peace Accords has already been discussed.

With the revival of the armed conflict with the Khmer Rouge, the government actively resumed an earlier strategy of the Vietnamese-era PRK and sought to lure cadre away from the movement under the banner of political reconciliation. Stated government policy towards the Khmer Rouge was to "*divide, isolate, finish, integrate and develop*".¹¹⁷ The Law to Outlaw the Democratic Kampuchea Group 1994 both outlawed the Khmer Rouge and offered defectors amnesty (there had to be an act of 'defection', which was undefined in the law but in common usage would require more than just laying down arms, that is,

¹¹³ See Vannak Huy, "Former S-21 Comrades Reunite and Recall their Past Experiences" *Searching for the Truth Magazine* 31 (July 2002), 5.

¹¹⁴ *Supra* note 12 at 3.

¹¹⁵ *Supra* note 77 at 61-62.

¹¹⁶ David Chandler, "Will There Ever Be a Trial For the Khmer Rouge" (2000) 14 *Ethics and International Affairs* at 67-82.

¹¹⁷ Presentation by His Excellency Sok An, Senior Minister, Minister in Charge of the Office of the Council of Ministers, Kingdom of Cambodia, and President of the Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders, Stockholm International Forum on Truth, Justice and Reconciliation, 23-24 April 2002 (hereafter "Sok An Stockholm Forum Speech").

actively joining the ranks of the enemy).¹¹⁸ Article 5 of this law provided for immunity from prosecution for those low ranking Khmer Rouge who defected to the government within six months of the passing of the law. Although officers were not to be given amnesty, the government rewarded defecting Khmer Rouge officers with senior positions in the Royal Cambodian Armed Forces (RCAF).¹¹⁹ The deadline of 6 months was never adhered to, and by the end of 1994, the Royal Government had secured some 6,600 defections under the amnesty programme.¹²⁰ Those Khmer Rouge who 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.¹²¹ They were also given land and financial assistance to ease their integration. One report paints a striking picture of the situation in Siem Reap:

...“cautious military pressure” as well as the offer of amnesty to Khmer Rouge troops had “turned Siem Reap province into a model of national reconciliation that has brought a level of peace and development unseen in decades. In many areas long under guerilla control, the Khmer Rouge defectors have rallied to the government and continue to administer the same zones as they did as guerilla cadre”. According to Thayer [journalist Nate Thayer], wholesale Khmer Rouge defection in Siem Reap produced unprecedented levels of security in many areas of the province. The improved security, in turn, permitted “an array of development projects such as road construction, dam repair, demining, around former front-line villages, and agricultural infrastructure improvements. These efforts have increased levels of local support for the government, further eroding the rebels’ ability to appeal to the sympathies of long neglected villagers”. If the experience in Siem Reap demonstrated that increased security and development would ultimately eliminate the Khmer Rouge, Thayer’s report

¹¹⁸ Kingdom of Cambodia, Law to Outlaw the Democratic Kampuchea Group, Law No. 064, 7 July 1994, Approved by the National Assembly of the Kingdom of Cambodia, 7 July 1994, promulgated by Reachkram No.01.NS.94, 15 July 1994. Reproduced in Phnom Penh Post, Vol.3, No.14, pp.15-28, July 1994. It is now clear that amnesties for international crimes, such as those committed in Cambodia, are incompatible with the State’s obligations under International Law, namely to investigate, prosecute and punish, or to extradite alleged perpetrators to stand trial elsewhere. There is extensive judicial and academic material confirming the unacceptability of amnesties for international crimes, culminating in the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/ADD.1, 8 February 2005. On amnesties, see ICTY Trial Chamber, *Prosecutor v. Anto Furundzija*, Trial Chamber Judgement, 10 December 1998, para.155; Appeals Chamber of the Special Court for Sierra Leone, *Prosecutor v. Morris Kallon, Brima Bazzy Kamara*, Decision of 13 March 2004; Human Rights Committee, General Comment No.20 on Article 7 of the ICCPR; R. A. V. N. *et al. [names deleted] v. Argentina*, Communication No. 343/1988, U.N. Doc. CCPR/C/38/D/343/1988 (1990); Human Rights Committee, Comments on El Salvador, U.N. Doc. CCPR/C/79/Add.34 (1994); Human Rights Committee, Comments on Paraguay, U.N. Doc. CCPR/C/79/Add.48 (1995); HRC Comments on the Report submitted by Peru of 25 July 1996, UN Doc. CCPR/79/Add.67, para.9; Concluding Observations of the Human Rights Committee: Croatia, 30/04/2001, CCPR/CO/71/HRV; Inter-American Court of Human Rights, *Barrios Altos case*, Judgment of 14 March 2001; UN Commission on Human Rights Resolution 2002/79 on Impunity; Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 October 2000, para. 23; Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, UN doc. S/2004/616, 3 August 2004, para. 64. On the duty to investigate and prosecute grave violations of human rights see ICCPR Art.2(3), Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 1984, Art.4-7, 12-14; Convention on the Prevention and Punishment of the Crime of Genocide 1948, Arts.1, 4, 5, 6; Geneva Conventions Relative to the Protection of Civilian Persons in Time of War 1949, Art.146.

¹¹⁹ The RCAF was formed in 1993 to unite the armed forces of the former Cambodian government with the military forces of FUNCINPEC and the KPNLF.

¹²⁰ Grant Curtis, *Cambodia Reborn? The Transition To Democracy And Development* (The Brookings Institute Press, 1998) at 35.

¹²¹ Presentation by His Excellency Sok An, Senior Minister, Minister in Charge of the Office of the Council of Ministers, Kingdom of Cambodia, and President of the Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders, Stockholm International Forum on Truth, Justice and Reconciliation, 23-24 April 2002 (hereafter “Sok An Stockholm Forum Speech”).

also noted that the government's clear-cut success in marginalizing the Khmer Rouge was in stark contrast to the situation in Battambang province, where the Khmer Rouge continued to pose a potent threat.¹²²

Although the 1994 Law Outlawing the Khmer Rouge/CPK suggests that there was a plan to prosecute low ranking cadre, there is nothing to indicate that the authorities ever had a concrete accountability strategy, let alone one involving courts of law or an informal accountability process according to which unrepentant Khmer Rouge would be punished *en masse*. It seems as though it was just a bluff to secure defections, and justice was not really an issue. Notwithstanding the 1979 *in absentia* trial, and a handful of trials, criminal justice for the Khmer Rouge seems only to have become a live political issue relatively recently with the 1996 pardon issued to Ieng Sary. Nevertheless, the Prime Minister and Foreign Minister Sok An attempted to link the revived interest in trials with the 1979 trials and convictions of Pol Pot and Ieng Sary to suggest a consistent policy of accountability rather than political opportunism.¹²³ Yet through the arguments that they put forth, justice emerges as separate, even incompatible with peace, although the Prime Minister claimed that both peace and justice are needed in Cambodia. Peace is invariably the factor that is linked with the buzz notion of 'reconciliation'—it seems that reconciliation (meaning effective surrender of the Khmer Rouge) brought peace—there is no role for justice in this and it is seen as being the dangerous factor that could 'rock the boat'. Prosecutions—the government has since 1997 claimed to be formally 'committed' to the prosecution of Khmer Rouge leaders—may be undertaken in principle, but as a question of justice.

C. *The Mid-1990s to 2001: More "Divide, Isolate, Finish, Integrate and Develop", Four Khmer Rouge Trials and The Internationalisation of Accountability*

The tortuous process of agreeing the Law on Extraordinary Chambers reveals not just the complex pressures that exist in Cambodia and within the International Community on this matter of accountability, but also illustrates the many challenges that countries in flux face when dealing with massive violations of human rights.

The stick-and-carrot approach to defeating the Khmer Rouge went on throughout the 1990s.¹²⁴ Accountability and impunity were just two strategies for overcoming the Khmer

¹²² *Supra* note 120, 34-35, citing Nate Thayer, "Faded Red: The Death Throes of KR" Phnom Penh Post (April 21-May 4 1995).

¹²³ 'Cambodian Prime Minister seeks reconciliation through reconstruction', Interview with Prime Minister Hun Sen conducted by Executive Intelligence Review Vol. 26 No.7, at online: <http://www.cambodianpeopleparty.org/news_eng2i.htm>: "As I said in my New Year's statement, the trial of the Khmer Rouge is not a new issue, it is a fait accompli. At the time, in 1979, when we prosecuted the leaders of the Khmer Rouge, we were condemned. Yet when we received the Khmer Rouge leaders here [in December 1998], there was a movement calling for the prosecution of the Khmer Rouge leaders, which suggests our policy during the last 20 years was a success. You see, when we had the trial of the Khmer Rouge 20 years ago, we were condemned, but right now, those people who condemned us for prosecuting the Khmer Rouge then, now urge us to hold a trial for the Khmer Rouge". Also see Presentation by H.E. Sok An, Senior Minister, Minister in Charge of the Office of the Council of Ministers, Closing Ceremony of the Follow-up Experts Conference on the ICC, Phnom Penh, October 10, 2002.

¹²⁴ For more detailed analysis, see Balakrishnan Rajagopal, "The Pragmatics of Prosecuting the Khmer Rouge", (1998) 1 Y.B. Int'l Human. L 189; Rajiv Chandrasekaran, "25 Years After Khmer Rouge's Rise, Would Justice Derail Peace? Cambodia's Tribulations/A 'Culture of Impunity'" *International Herald Tribune* (18 April 2000); George Chiagas, "Cornering the Khmer Rouge" *Bangkok Post* (19 March 2000); Thomas Hammarberg, "How the Khmer Rouge Tribunal was agreed: Discussions between the Cambodian government and the UN" *Searching for the Truth* (June 2001 to 21 September 2001) (hereafter "Hammarberg 'How the Khmer Rouge Tribunal was agreed'"); Craig Etcheson, "The Politics of Genocide Justice in Cambodia", in *Cesare P. Romano et al. eds., Internationalized Criminal Courts* (Oxford: Oxford University Press, 2004), 181-207; Helen Jarvis and Tom Fawthrop, *Getting Away with Genocide: Cambodia's Long Struggle Against the Khmer Rouge* (Michigan: University of Michigan Press, 2004).

Rouge. In the words of Senior Minister Sok An, the government pursued a “*multifaceted strategy involving political, legal, economic and military campaigns... What Prime Minister Hun Sen has described as a ‘win-win’ policy that has formed the bedrock, of the political platform of the Royal Government of Cambodia involved five facets: ‘divide, isolate, finish, integrate and develop’*”.¹²⁵ At the time that the two Co-Prime Ministers wrote to the UN Secretary-General (see below), the Khmer Rouge was still in existence as a fighting force, although it was already weakened by infighting and defections encouraged by the 1994 Law Outlawing the Democratic Kampuchea Group. Three Khmer Rouge officers who would eventually stand trial for the killing of three Westerners (see later), Nuon Paet, Chhouk Rinn and Sam Bith, were among those who defected—two of them were rewarded with senior positions in the RCAF. Chhouk Rin’s defection, with some 200 of his men in October 1994, was hailed as highly significant, and he was rewarded with a Colonel-ship in the RCAF. The movement suffered a further blow in 1996 with the defection of its Deputy Prime Minister for Foreign Affairs, Ieng Sary, along with a significant number of troops from Pailin and Phnom Malai following internal strife.¹²⁶ At the request of the two Co-Prime Ministers, on 14 September 1996, the King drew on his constitutional powers and pardoned, Ieng Sary, in relation to his 1979 conviction and amnestied him in respect of further prosecutions under.¹²⁷ Prime Minister Hun Sen told the United Nations Special Representative to Cambodia of the time, Thomas Hammarberg, that this was meant to encourage more defections.¹²⁸ There was outrage, tempered with reluctant understanding that this was “*a necessary and important step toward both ‘national reconciliation’ and the elimination of the Khmer Rouge as a guerilla force*”.¹²⁹ Pol Pot and his commanders such as Ta Mok remained at large, and the Khmer Rouge continued to resist government forces.

It is in this context of a continuing threat that the letter of Cambodia’s two Co-Prime Ministers in 1997 to the United Nations seeking assistance with trying the Khmer Rouge should be seen.¹³⁰ The triggering request was also in part based on concern over the inability of the domestic system to hold to account those responsible for the horrors inflicted on the nation and its citizens during the reign of the Khmer Rouge. This drew on three other issues, the first being Cambodia’s sovereign right and duty to prosecute Cambodian nationals for crimes committed in Cambodia on Cambodians. Secondly, it drew on the collective interest, even responsibility, of the international community to assist with the repression of international crimes. Third, it drew on the international community’s failure to intervene to stop the humanitarian disaster in Cambodia when it was going on between 1975-1979, and

¹²⁵ *Supra* note 121.

¹²⁶ David Ashley, “Between War and Peace: Cambodia 1991-1998”, in *Safeguarding Peace: Cambodia’s Constitutional Challenge*, Accord, Issue 5, November 1998, online: <<http://www.c-r.org/accord/index.htm/cam/accord5/index.htm>>.

¹²⁷ Unofficial translation (Khmer Rouge Tribunal Task Force), Royal Decree (Reach Kret), NS/RKT/0996/72, 14 September 1996, Norodom Sihanouk. Under all the English versions of Article 27 of the Constitution that I have studied, the King has power to grant complete or partial amnesty; but the provision appears to mean something else in Khmer. “The relevant constitutional provision uses the term “loekaengtoh”, literally meaning to “lift guilt”, implying that the King may only have the power to grant post-conviction pardon. The precise Khmer word for amnesty is *nittooskamm*”, Bora Touch, ‘Been Pardoned, But Can Justice Still Stalk Ieng Sary?’, online: <<http://www.khmerinstitute.org/articles/art03c.html>>. The question of whether this Royal Decree was an amnesty from any future prosecution has been a subject of controversy, but the text itself seems clear that what was being pardoned was the 1979 conviction and what was amnestied was future prosecution under the 1994 Act only. Also the pardon is for a genocide conviction, and violates Cambodia’s treaty and customary obligations to punish genocide and to provide victims of gross violations of human rights with an effective remedy. The legality of the amnesty granted to Ieng Sary is also problematic, as the law itself provides that senior leaders could not benefit from amnesty.

¹²⁸ Hammarberg “How the Khmer Rouge Tribunal was agreed”, *supra* note 124, 37.

¹²⁹ *Supra* note 120 at 41.

¹³⁰ Letter dated June 20 1997 from the First and Second Prime Ministers of Cambodia to the Secretary General, annexed to UN Doc.A/1997/488 (24 June 1997), “Identical letters to the President of the General Assembly and the President of the Security Council”.

its continued recognition of the Khmer Rouge for many years after its fall as the legitimate representatives of Cambodia, despite knowing what they had done. With the encouragement of the then Special Representative to Cambodia, Thomas Hammarberg,¹³¹ the United Nations finally began to take the problems of impunity in Cambodia seriously. A Group of Experts was appointed to evaluate existing evidence with a view to determining the nature of the crimes committed by the Khmer Rouge in the years 1975-1979, assessing the feasibility of their apprehension and exploring legal options for bringing Khmer Rouge leaders to justice before an international or national jurisdiction.¹³² The report of the Group of Experts found clear evidence that gross violations of international and domestic law had been perpetrated in Democratic Kampuchea.¹³³ They were emphatic that the only satisfactory option for Cambodia was to create an *ad hoc* international tribunal under the control of the United Nations.

In the meantime, Cambodia had fallen into turmoil yet again. There had been an alleged coup and violent counter-coup in the capital with one Co-Prime Minister (Hun Sen) overpowering the other (Prince Ranaridhh), amid much secretive negotiation with the Khmer Rouge. Hun Sen's 'win-win policy' towards the Khmer Rouge, in particular the success in obtaining the defection of Ieng Sary, seemed to contribute to the internal combustion of the remaining Khmer Rouge leadership. The infamous leader of the Khmer Rouge (Brother No.1) Pol Pot was eventually to be tried by his own people in relation to the killing of his one-time Deputy Prime Minister for Defence Son Sen and his family in June 1997. The killings sparked a revolt by other Khmer Rouge leaders who had Pol Pot arrested and tried in July 1997 by a 'people's court' for those murders; other charges against him related to attempted murder and detention of Ta Mok and Nuon Chea. It seemed like the settling of an internal family feud. What happened between 1975-1979 was not at issue for the 'people's court' sitting in Anlong Veng; it convicted him and three of his commanders of the Son Sen family's murder, of "*destroying national reconciliation*" and of stealing money from the party.¹³⁴ The sole international journalist who witnessed the proceedings has said that:

This was not a trial, in the sense that we understand it. It was not even a show trial, which actually has a definition in Asian communism. This was a classic people's tribunal, which is a mass meeting to denounce and humiliate political enemies. It's a very specific process for a people who are trained in this kind of political culture.¹³⁵

In March 1998, another senior Khmer Rouge figure, Ke Pauk, defected to the government and was made a one-star general in the RCAF.¹³⁶ But swirling rumours of an international trial for Pol Pot came to nothing when he died on 15 April 1998 in suspicious circumstances.

¹³¹ See UN Press Release, "Need to inject Justice and Accountability for Khmer Rouge period remains after death of Pol Pot— Special Representative of Secretary General says", HR/98/26 (16 April 1998): "*Injecting justice and accountability for the Khmer Rouge period is an important step in breaking the cycle of impunity which even today remains a major problem in Cambodia*".

¹³² General Assembly Resolution 52/135, 12 December 1997.

¹³³ Group of Experts Report, *supra* note 55.

¹³⁴ For a more detailed account, see Nate Thayer, "Day of Reckoning", *Far Eastern Economic Review* (30 October 1997) 14-20; Nate Thayer, "My Education", *Far Eastern Economic Review* (30 October 1997) 21; Thet Sambath & Adam Piore, "The Final Chapter: The Veil of Secrecy is Lifting On the Last Days of the Khmer Rouge", *The Cambodia Daily, Weekend Edition* (April 8-9 2000).

¹³⁵ An audience of hundreds of Cambodians chanted and shook their fists in unison as a series of speakers denounced Pol Pot. The proceedings lasted for about two hours, during which the former dictator never spoke. He was 'sentenced' to lifelong house arrest. See interview with Nate Thayer by Dale Keiger, "In Search of Brother Number One" *Johns Hopkins Magazine: Public Policy and International Affairs* (November 1997) online: <<http://www.jhu.edu-jhumag/1197wb/brother.html>>.

¹³⁶ Human Rights Watch, *Cambodia: World Report, 1999*. Ke Pauk died on 15 February 2002; he was said to have been closely associated with some of the worst atrocities in 1977 and 1978, including the killing and forced expulsion of large numbers of persons in the area around the Vietnamese border.

The Prime Minister then began talking about domestic trials for the remaining Khmer Rouge leaders.¹³⁷

On 30 December 1998, Nuon Chea (Brother No.2 and President of the Democratic Kampuchea People's Representative Assembly) and Khieu Samphan (President of the Democratic Kampuchea State Presidium) defected. Justice, to the extent that it was really what was being sought, was soon put aside in favour of what was called 'reconciliation'. With this decisive development, 'reconciliation' had ousted justice as the most important consideration for the Prime Minister. He told the two defectors that "[t]he goodwill and gestures of both of you show the precious will to end the war, to search for peace, national reconciliation, and national union, and to end internal rift in the nation in order to pool forces to restore and build our unfortunate country after our nation had been plunged into decades of war and internal conflicts".¹³⁸ The Prime Minister's warm welcome of the two caused great upset, particularly when he seemed to reverse the policy on justice and criminal accountability by promising to "welcome them with not guns, bullets, prisons or handcuffs, but a bouquet of flowers hailing their spirit of national reunification".¹³⁹ Hun Sen told the press that "we should dig a hole and bury the past".¹⁴⁰ He claimed that the government's policy was now of reconciliation and any trial would be divisive and mean a return to civil war.¹⁴¹ Former SRSJ Hammarberg observed that the defection of the two was turned into an occasion of reconciliation and forgiveness; the Prime Minister's "statements were controversial and even took some of his ministers by bitter surprise. One metaphor he used was that "the time had come to dig a hole and bury the past" which appeared to be at odds with his support for a tribunal and the principle of justice. Had there been a change of heart? Or had a price been paid for these crucial defections?"¹⁴² Following intense domestic and international criticism, Prime Minister Hun Sen publicly 'reaffirmed' his desire to see Khmer Rouge leaders brought to trial and a government statement to that effect was broadcast on Cambodian radio on 5 January 1999: "The Royal Cambodian government will consider the view of the UN law experts before deciding whether Khmer Rouge leaders Khieu Samphan and Nuon Chea, who have rejoined the national society, will be brought to trial".¹⁴³

The sole remaining Khmer Rouge military commander to fight to the bitter end, Ta Mok, was captured on 6 March 1999, somewhere near the border with Thailand. For him, there was no 'reconciliation' and no burying of the past. He was taken to the Detention Facility of the Military Prosecution Department in Phnom Penh that day.¹⁴⁴ Ta Mok was 'indicted' on 9 March 1999 by a military prosecutor in the Military Court on charges of crimes against domestic security with the intention of serving the policies of the Democratic Kampuchea Group which were committed from 1975 to 1999 and violation of Articles 2,3,4 of the Law to Outlaw the Democratic Kampuchea Group.¹⁴⁵ Shortly after, the remaining Khmer

¹³⁷ "Hun Sen Discusses Khmer Rouge Trial", *Associated Press* (3 December 1998).

¹³⁸ "Letters of surrender—full text", *BBC News*, 26 December 1998, online: <<http://news.bbc.co.uk/1/hi/world/asia-pacific/242670.stm>>.

¹³⁹ *Ibid.*

¹⁴⁰ *Supra* note 62; H. Watkin, "Irony not lost as Hun Sen "buries" the past" *South China Morning Post* (30 December 1998).

¹⁴¹ "US demands 'killing fields' trial" *BBC News* (29 December 1998) online: <<http://news.bbc.co.uk/1/hi/world/asia-pacific/244496.stm>>.

¹⁴² Hammarberg "How the Khmer Rouge Tribunal was agreed", *supra* note 124, 43.

¹⁴³ *Supra* note 62.

¹⁴⁴ *Supra* note 62, outlining the various violations of due process that had taken place within the first few months of arrest and detention.

¹⁴⁵ Order to Forward Case for Investigation (Requisitoire Introductif d'Accusation), Military Court, No. 019/99, 9 March 1999, Office of the Military Prosecutor (Major General Sao Sok), Unofficial Translation, at the website of the Khmer Rouge Trial Task Force. At least one commentator challenges the validity of this law, see Bora Touch, "Legal loopholes open for Ta Mok and Duch", *Phnom Penh Post*, Issue 8/20 (October 1-14, 1999).

Rouge combatants surrendered and joined the RCAF. In May 1999, Duch (also known as Kang Khék Iev), the former head of the notorious S-21 (Tuol Sleng) prison was 'discovered' integrated into mainstream society as a born-again Christian. On 10 May 1999, there was an order to forward the case for investigation; this time the same military prosecutor 'indicted' both Duch and Mok for crimes against domestic security with the intention of serving the policies of the Democratic Kampuchea Group which were committed from 1975 to 1999, and violation of Articles 2,3,4 of the Law to Outlaw the Democratic Kampuchea Group and Article 7(n) of Decree Law 2.¹⁴⁶ A third such order was issued on 6 September 1999, this time charging both with genocide in violation of Article 2 of Decree Law No.1 (15 July 1979).¹⁴⁷ A Law on Temporary Detention Period was passed on 26 August 1999 in order to address their being well in excess of the 6 month pre-trial timelimit of UNTAC Law.¹⁴⁸ Ta Mok died in custody on 21 July 2006, having been held pending trial since 6 March 1999.¹⁴⁹

In this changed environment, the RGC had emerged victorious and the threat of an international process of accountability was no longer needed. The government backtracked and warned of the dangers of trial in such a fragile situation reigniting armed conflict,¹⁵⁰ although it is noteworthy that the Group of Experts "significantly" discounted the risk of renewed warfare arising from prosecutions.¹⁵¹ The government spoke of exploring the South African (amnesty-granting) model of truth commission. While it did not explicitly reject accountability, it was clear that there were now other priorities and if it had to have a trial at all, it preferred a mixed panel option with local and international personnel (this had been considered but rejected by the Group of Experts), the entire operation being under Cambodian control. On 17 June 1999, Prime Minister Hun Sen wrote to the Secretary-General asking for the United Nations to provide experts to assist Cambodia in drafting legislation for the establishment of a special national court to try the Khmer Rouge, with international participation. From then until February 2002, the United Nations and the RGC were engaged in intensive, often unfruitful, negotiation. For the United Nations, key issues were guarantees that those indicted would in fact be arrested; no amnesties or pardons; the appointment of independent, international prosecutors; and the appointment of a majority of foreign judges. The United Nations had to deal with its own obligations on human rights under the Charter of the organisation, but also with a sovereign State jealously guarding its prerogatives and powers, determined to retain control of any judicial proceedings and prepared to proceed alone if it had to. For Cambodia, three key issues have been its ultimate power to appoint judges; the composition of the chambers, with Cambodian judges in the majority; and the existence of the chambers as part of the Cambodian legal structure. Throughout the negotiations, the government stressed the importance of justice while maintaining peace, stability, national unity, and its national sovereignty.

¹⁴⁶ Second Order to Forward Case for Investigation (Requisitoire Introductif d'Accusation), Military Court, No. 02/99, 10 May 1999, Office of the Military Prosecutor (Major General Sao Sok), Unofficial Translation, at the website of the Khmer Rouge Trial Task Force.

¹⁴⁷ Order to Forward Case for Investigation (Requisitoire Introductif d'Accusation), Military Court, No. 044/99, 6 September 1999, Office of the Military Prosecutor (Major General Sao Sok), Unofficial Translation, at the website of the Khmer Rouge Trial Task Force.

¹⁴⁸ Royal Kram, SC/RKM/0899/09, 26 August 1999, Unofficial Translation, at the website of the Khmer Rouge Trial Task Force.

¹⁴⁹ See "Khmer Rouge 'butcher' Ta Mok dies", BBC News (21 July 2006), online: <<http://news.bbc.co.uk/2/hi/asia-pacific/5201770.stm>>.

¹⁵⁰ Letter from the Prime Minister of Cambodia to the Secretary General of the United Nations, 3 March 1999, at <<http://www.camnet.com.kh/ocm/government7.htm>>. This was the Royal Government's initial formal reaction to the report of the Group of Experts.

¹⁵¹ *Supra* note 55 at para.108.

In the meantime, three trials that started in 2000 provided a taste of what could be expected of a purely Cambodian judicial process trying the Khmer Rouge.¹⁵² The results confirmed a justice system that is highly malleable in that it can function and malfunction as its masters require, and a government that responds to international pressure by pressuring the courts. The cases show Cambodia buckling under international pressure, albeit to what seems at times to have been highly improper international pressure placed on Cambodia to in turn pressure its judiciary.¹⁵³ With the irony of course, that at the same time the countries concerned were preaching to Cambodia about not interfering with the judiciary and maintaining its independence.

The cases were exceptional for having gone to trial at all. So many Cambodians had already died, and were still dying, but that bothered few in the international community. What differed here was that there was extensive diplomatic pressure because Western victims were involved. In July of 1994, when there once again was an armed conflict in Cambodia, an Englishman, a Frenchman and an Australian, along with 13 Cambodians, were abducted from a train ambushed in Kampot province by the Khmer Rouge. 10 Cambodians were killed and others wounded in the course of the attack. The foreigners were killed after several weeks of captivity, following a failed attempt to obtain ransom.

After the attack and killings, two of the senior officers involved—Sam Bith and Chhouk Rin—defected and were given high office in the RCAF (Sam Bith became a 2-star General, Chhouk Rin, a Colonel). Chhouk Rin's defection, with some 200 of his men in October 1994, was hailed as highly significant. The third officer also defected, later than his seniors. Officials were reluctant to prosecute for fear of jeopardising the arrangement, viewed as 'reconciliation'. Political consent, including from the Prime Minister's Office and the Council of Ministers, was eventually given to prosecute. The cases focused on the killing of the foreigners; the Cambodian deaths appeared irrelevant. The timing of these cases was also highly significant, coming as they did at the time when the focus of the international community was on the state of the courts of Cambodia and the protracted negotiations over trials of the Khmer Rouge leaders.

Nuon Paet

In June 2000, Nuon Paet, former Khmer Rouge commander of the Phnom Voar base in Kampot province, who had been the focal point for negotiations with the RGC during the hostage crisis, was convicted of ordering the murder of the three hostages. His arrest on 1 August 1998 came just before the UN Group of Experts' visit, and is considered to have

¹⁵² Unless otherwise acknowledged, notes on the three cases are compiled from Amnesty International World Reports for Cambodia, 2000 and 2001; United States Country Reports on Human Rights Practices 1999 and 2002, US Department of State and the NGO Forum's collection of materials, online: <http://www.ngo.forum.org.kh/Documents/Others/Nuon_Paet_Case.htm>. There has recently been a comprehensive study of the trials, see John Hall, "In the shadow of the Khmer Rouge Tribunal: The Domestic Trials of Nuon Paet, Chhouk Rin and Sam Bith, and the search for judicial legitimacy in Cambodia" (2006) 20 *Colum. J. Asian Law* at 235 (hereafter "Hall, 'In the Shadow of the Khmer Rouge Tribunal'").

¹⁵³ It seems clear that the Australian government was determined that Chhouk Rin was guilty and had to be convicted and as a result exerted pressure on the Cambodian government to secure this. See Media Release, Australian Minister for Foreign Affairs, Alexander Downer, 19 July 2000 following the acquittal: "I am deeply concerned that the trial of Khmer Rouge Commander Chhouk Rin has resulted in him being set free. We will look closely at the details of the judgement as it contains a number of technical legal issues which need careful consideration. I have instructed our Embassy in Phnom Penh to make the highest-level representations to the Cambodian authorities about the matter", online: <http://www.dfat.gov.au/media/releases/foreign/2000/fa083_2000.html>. Also, "I have instructed our embassy in Phnom Penh to make the strongest possible representations to the Cambodian Government to say that we are very concerned and very disappointed at what has happened. I have said both in Opposition and in Government that those who are responsible for the death of David Wilson and his two colleagues, one French and one British, should be brought to justice", Press Conference, 19/07/2000, Alexander Downer Discusses Fiji Government Issues, Cambodian Release, online: <http://www.dfat.gov.au/media/transcripts/2000/000719_fiji_cambodia.html>.

been intended to create the impression of a nation willing and able to try the Khmer Rouge itself.¹⁵⁴

Even with the international spotlight on this case, it was business as usual for the Cambodian justice system. By the time the accused went to trial, he had been held in detention well in excess of time limits set by the UNTAC Law. He had not had access to a lawyer for some 18 days, in violation of the UNTAC Law. Nuon Paet claimed the killings were committed in compliance with the orders of his commander, Sam Bith, transmitted through Vith Vorn (deceased). Family members of two of the foreign victims boycotted the trial claiming the accused was being made a scapegoat; the father of the French victim called the trial a farce for concealing the truth of what really happened. Both Sam Bith and Chhouk Rin testified, even though they were also charged in separate proceedings in relation to the same course of events.

The charges included illegal detention, terrorist activities, being an accomplice to murder, forming an armed group for the purpose of robbery and destruction of property, some under laws which Amnesty International allege were no longer in force and breached international standards. The allegations about decisions being pre-determined in Cambodian courts appeared well-founded when after an eight hour hearing, Judge Boninh Bunnary required just one hour to deliberate and deliver a reasoned written decision, which was read out in court. The judgment referred to evidence that was not presented in court, such as a supposed report by Australian and British sources concluding that this accused ordered the killing of the backpackers. Evidence considered as incriminating the accused included a four year old videotape of police conducting a group interview of witnesses (who were never called to testify and thus were not examined) against the accused. The controversial issue of superior orders, a live dispute in international criminal law and something much to be heard from former Khmer Rouge cadre, including the former guards of S-21, was raised but not considered in the judgement.

The life sentence imposed on Nuon Paet was upheld on appeal by the Supreme Court, which heard the case *de novo*. After the highly critical response to the trial and immense pressure from the concerned embassies, the appeal judgement was a marked improvement.

Chhouk Rin

In January 2000, after considerable pressure from the international community, RCAF Colonel Chhouk Rin and military commander in Phnom Voar, once a former Khmer Rouge officer and subordinate of Nuon Paet and Sam Bith, was arrested and charged in connection with the abduction and killings. His defection in 1994 was particularly significant, as he was the first commander to do so, and it "*had national implications, contributing to the collapse of the Khmer Rouge resistance at Phnom Voar, a stronghold that had never before fallen to the government*".¹⁵⁵ Chhouk Rin was more than just a symbol of the success of the then Co-Prime Minister Hun Sen's policy towards the Khmer Rouge, and he responded to the criticisms of the leniency in this matter by pointing out that they had left the Khmer Rouge so the matter should be left at that.¹⁵⁶

Chhouk Rin was tried in July 2000 at the Phnom Penh Municipal Court, on charges that included murder, organised crime and terrorism and unlawful confinement, based on the UNTAC Law and the Law on Terrorism. Observers were highly critical of the judge and prosecutor: the British Ambassador commented on the judge's demeanour, obvious desire to get the case out of the way as soon as possible, failure to make notes or examine papers,

¹⁵⁴ Craig Skehan, "The Long Road From Genocide to Justice", *Sydney Morning Herald* (29 August 1998).

¹⁵⁵ Hall "In the Shadow of the Khmer Rouge Tribunal", *supra* note 152, 264, citing Robert Mathews and Mathew Lee, "Paet 'Ready to Defect', Hostages Fate Unknown", 27 October 1994.

¹⁵⁶ Hall, "In the Shadow of the Khmer Rouge Tribunal", *supra* note 152, 266 citing Nate Thayer, "Govts Row over Defectors" *Phnom Penh Post*, Issue 3/22, (4-17 November 1994).

and on the prosecutor's limp performance.¹⁵⁷ The highly charged trial saw hundreds of his supporters being barred from travelling to Phnom Penh and the dramatic raising of a last minute defence based on the 1994 Law Outlawing the Democratic Kampuchea Group. Chhouk Rin was acquitted.¹⁵⁸ Somehow, the prosecution seem not to have anticipated that such a defence would have been raised (it is hard to assess if this was deliberate or not). Judge Thong Ol accepted the argument that although the offence occurred 19 days after the law was passed, the ambush and the accused's defection were within the amnesty period.¹⁵⁹

After winding its way through two separate hearings before the Court of Appeal in Phnom Penh, the case against Chhouk Rin finally led to a conviction and a life sentence. This case is particularly important as it is the only case to date examining the issue of amnesties for the Khmer Rouge, and assists in anticipating the handling of the amnesty, which could arise in actions that may be brought against Khieu Samphan and Nuon Chea (Ieng Sary is in a rather different position, for he has been granted a pardon on top of an amnesty from further prosecution).¹⁶⁰ The amnesty was accepted as a bar to the prosecution by the trial court judges, but rejected on appeal. Neither court entered into any consideration of the validity of amnestying the particularly serious crimes that had been committed in Cambodia. There was clearly no doubt for the judges that this was a valid law binding on the courts of Cambodia. As to whether it worked to immunise Chhouk Rin from prosecution, the Appeal Court reasoned that the amnesty provision in the 1994 law only applied to offences committed before it came into force (i.e. including the crimes during 1975-1979).¹⁶¹ There seems to have been no consideration of the issue of whether a commander of the Khmer Rouge could in fact benefit from an amnesty under the 1994 law.

Sam Bith

The most senior of the three, Sam Bith, who had been integrated into the RCAF as a 2-star General and served as an advisor to Ministry of Defence, was arrested in May 2002 after much international pressure and reluctance on the part of the military police. He was tried before Judge Sok Setha Mony on charges including premeditated murder, illegal detention and acts of terrorism.¹⁶²

Senior Khmer Rouge defector Nuon Chea, an anticipated target of the Extraordinary Chambers, testified in Sam Bith's defence that he had not been in the area when the ambush took place, and that Phnom Voar had been under the direct control of the now deceased Pol Pot. Central to Sam Bith's defence was the claim of alibi—he had been at a Thailand hospital receiving medical treatment during the period when the train was attacked and the hostages killed. Basic fact-checking by the prosecution revealed that the hospital in question had not been opened till after the killings. Sam Bith was convicted of all charges and sentenced to life imprisonment.¹⁶³ Another lesson in the realities of Cambodia came on 23 April 2003, when, presumably in response to his courage in convicting the one-time Khmer Rouge commander, Judge Sok Setha Mony, was shot dead while driving to work in his car by an unidentified assassin on a motorcycle.¹⁶⁴

¹⁵⁷ Hall "In the Shadow of the Khmer Rouge Tribunal", *supra* note 152, 269, citing a confidential letter from Ambassador George Edgar to Simon Wilson, dated 5 October 2000.

¹⁵⁸ Australian Broadcasting Corporation, Asia Pacific Transcripts, "Khmer Rouge Genocide Trial under cloud after Chouk Rin Acquittal" (19 July 2000).

¹⁵⁹ Bora Touch, "Why Chhouk Rin's acquittal is illegal", *Phnom Penh Post*, (Issue 9/16, (August 4-17, 2000).

¹⁶⁰ See earlier discussion on amnesties accompanying note 118.

¹⁶¹ Hall "In the Shadow of the Khmer Rouge Tribunal", *supra* note 152, 281

¹⁶² "Khmer Rouge Commander's life sentence for backpacker killings upheld" *Asia News* (5 April 2005); Chee Chee Leung and agencies, "Backpackers' murder: rebel gets life", *Sydney Morning Herald* (24 December 2002).

¹⁶³ "Life for Khmer Rouge Commander" *BBC News* (23 December 2002).

¹⁶⁴ See Saing Soenthrith, "Gunmen Kill Municipal Court Judge" *Cambodia Daily* (24 April 2003); "Cambodia: ICJ Deplores Murder of Judge" *International Commission of Jurists* (2 April 2003).

D. *Passing the Law on Extraordinary Chambers*

In preceding sections, I examined some of the background to the UN-RGC agreement for trials of the Khmer Rouge.

But before the draft Memorandum of Understanding was signed by the parties, Cambodia's National Assembly approved the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the period of Democratic Kampuchea on 2 January 2001.¹⁶⁵ It was signed into force by the King on 10 August 2001. This premature adoption irked the United Nations, and differences between the two sides continued to fester.¹⁶⁶ On 8 February 2002, the United Nations pulled out of the process, citing deep differences over the integrity of the planned proceedings before the Extraordinary Chambers, in particular that they could not guarantee independence, impartiality and objectivity, issues that were not likely to be resolved through further negotiations.¹⁶⁷ The dispute seemed not to be so much about the actual substance of the law prohibiting fair trial and due process, but the inability of the law to meet those standards in the Cambodian situation. It also appeared that the United Nations had been backed into a project it had no desire to be part of, and was desperately trying to get out of it. Although the law had been passed just a month earlier, the Secretary-General also complained about the government's "*lack of urgency, together with an absence of the active and positive commitment to the process that would be essential when it came to implementing any agreement and to establishing the Extraordinary Chambers, making them operational and ensuring their sustained operation.*"¹⁶⁸ According to the United Nations' Chief Legal Advisor, this failure to demonstrate an active commitment was the main reason for the pullout.¹⁶⁹

¹⁶⁵ Law on the Establishment of Extraordinary Chambers in The Courts of Cambodia For the Prosecution of Crimes Committed During The Period of Democratic Cambodia, 29 August 2001. It was then reviewed for constitutionality by the Constitutional Council, which was concerned about two issues: the death penalty and non-retroactivity in the context of statute of limitation (rather than the content of the law on crimes). The death penalty issue arose as a result of incompatibility of the 1956 Penal Code (which referred to third degree criminal penalties, i.e. the death penalty), with the current Constitution, which prohibits sentences of death. There is no express prohibition on retroactive prosecution in the Cambodian Constitution although it would be covered by Article 31's wide sweep, and partly by Article 6(2) of the 1956 Penal Code. The Council also found that the prohibition on the government requesting amnesty or pardon was not unconstitutional, being the right of the King. After the required amendments were made, the law was approved as constitutional on 7 August 2001. See Constitutional Council, Case No.038/001/2001, 17 January 2001, Decision No.040/002/2001, 12 February 2001; Constitutional Council case No.042/005/2001, 27 August 2001, Decision No.043/005/2001 KBT.DH, 7 August 2001, unofficial translation at the website of the Khmer Rouge Tribunal Task Force. For comment, see Bora Touch, 'KR Law is Wrong', Phnom Penh Post, Issue 10/6, March 16-29, 2001.

¹⁶⁶ Legal Counsel to the UN challenged provisions in the law and his negotiating counterpart said that amendments to the law were not possible and described the Memorandum of Understanding as 'Articles of Cooperation', determining 'the modalities of cooperation between the Royal Government of Cambodia and the United Nations in implementing those provisions of the Law concerning foreign technical and financial support. See Senior Minister Sok An, "Letter to Hans Correl" (23 November 2001) online: <<http://www.ocm.gov.kh/Statement and Letter.htm>>.

¹⁶⁷ Fred Eckhard, Spokesman for the Secretary-General, "Daily Press Briefing by the Office of the Spokesman for the Secretary-General" (8 February 2002).

¹⁶⁸ Report of the Secretary-General on Khmer Rouge trials, UN Doc. A/57/769, 31 March 2003, Fifty-seventh session Agenda item 109 (b) Human Rights Questions: Human Rights Questions, Including Alternative Approaches For Improving The Effective Enjoyment Of Human Rights And Fundamental Freedoms (hereafter "Secretary-General's Report on Khmer Rouge trials").

¹⁶⁹ Hans Correl, "Justice for the Killing Fields: Re-negotiating The Khmer Rouge Genocide Court for Cambodia" *Jurist* (3 March 2003) (hereafter "Correl, 'Justice for the Killing Fields'"), online: <<http://www.jurist.law.pitt.edu/forum/forumnew101.php>>; see also Secretary-General's Report on Khmer Rouge trials, paras.13 and 14 stressing Cambodia's lack of urgency and commitment to the process.

Despite its resistance and vociferous objections by leading Cambodian and international NGOs about the quality of the process envisaged in the Law on Extraordinary Chambers,¹⁷⁰ the United Nations Secretariat was forced back into discussions with the RGC by the General Assembly in resolution 57/228 of 18 December 2002. This required the Secretary-General to resume negotiations without delay and conclude an agreement with the Government of Cambodia on the establishment of Extraordinary Chambers. According to Legal Advisor Correl, complying with the terms of the mandate of the General Assembly required re-examining the previous draft agreement and proposing certain adjustments to ensure the impartiality, independence and credibility of the process before the future court and simplify its structure and operation, which “[a]s they stood, they simply provided too great a scope for delaying, hampering or frustrating investigations, prosecutions and trials”.¹⁷¹ Correl, writing in March 2003 before the draft was finally agreed, complained of “considerable pressure from some quarters for an agreement”, with those parties claiming that imperfect trials were better than no trials.¹⁷² He emphasised how the Secretary-General was continuing to try to meet his obligation to the General Assembly, and also his own duty under the United Nations Charter to promote respect for international human rights standards.¹⁷³ The Secretary-General’s own report to the United Nations reveals that the Secretariat attempted to go ‘back to the drawing board’ on a number of issues by proposing changes to the earlier agreement—for example, it suggested that there should be just one prosecutor (international) and one investigating judge (international) thus rendering the Pre-Trial Chamber defunct; removal of the super-majority formula for voting and reinstatement of the conventional bare majority vote.¹⁷⁴ According to the Secretary-General’s report:

20. It became apparent to me, during my team’s visit to Phnom Penh, that the Government of Cambodia was not prepared to contemplate proposals that would require it to make any changes to those provisions of its national Law that specified how the Extraordinary Chambers were to be structured and organized (with the exception of reducing the number of instances from three to two);

21. This was all the more apparent inasmuch as certain Member States that were closely following the resumed negotiations had made it clear to me that they expected me not to seek any changes to the structure and organization of the Extraordinary Chambers that had been contemplated during the earlier negotiations. The Government of Cambodia was obviously aware that this position had been communicated to me and acted accordingly;

22. Nevertheless, I resolved to make a final effort to strengthen the role of the international element at the stages of investigation and prosecution and, at the same time, to simplify those stages of the process by doing away with the Pre-Trial Chamber. [This was rejected by the RGC].

Following two rounds of negotiations in New York and in Phnom Penh, a draft agreement was reached on 17 February 2003.¹⁷⁵ Amendments made, such as to the number of levels of court,

¹⁷⁰ Amnesty International, “Cambodia: Flawed trials in no one’s best interests”, *AI Index ASA 23/001/2002* (11 February 2002); Human Rights Watch, “Cambodia: Khmer Rouge Tribunal Must Meet International Standards” (19 December 2002); “Rights groups support UN stance on Khmer Rouge trial” *Agence France-Presse*, (12 February 2002). On 21 February 2002, the Cambodian Human Rights Action Committee expressed support for the pullout of the United Nations.

¹⁷¹ *Supra* note 169.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ *Supra* note 168 at paras. 16-17.

¹⁷⁵ 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, signed 6 June 2003, ratified 19 October 2004 (hereafter ‘UN-RGC Agreement’). This is a bilateral treaty between the

did not detract from the fundamental weakness of design in overcoming structural problems in the Cambodian judiciary and legal system.¹⁷⁶ The Law on Extraordinary Chambers was accordingly amended and promulgated on 27 October 2004 (hereafter references to the Law on Extraordinary Chambers shall be to the amended version of 27 October 2004).¹⁷⁷ On 29 April 2005, sufficient funding was received on the United Nations side for the actual work of getting the institution up and running to begin. The judges, prosecutors and investigating judges were selected by the Supreme Council of Magistracy on 4 May 2006 and appointed by the King on 7 May 2006.¹⁷⁸ Operations began on 10 July 2006 when the two Co-Prosecutors began work. The Internal Rules were, after a painful and protracted negotiation, adopted by a full plenary of 25 judges on 12 June 2007.¹⁷⁹

IV. THE EXTRAORDINARY CHAMBERS

My purpose in this section is to deal with the chambers through the lenses of the Law on Extraordinary Chambers and the Internal Rules.¹⁸⁰ Seen in overview, the simplicity of purely domestic proceedings and the integrity of an international court have been lost. The Extraordinary Chambers are special chambers within Cambodia's domestic court structure; this means that they are part of the domestic court system of Cambodia and governed by the Cambodian Constitution and domestic laws, i.e. the Law on Extraordinary Chambers itself and existing Cambodian laws.¹⁸¹ The judges have now added to the layer with Internal Rules governing the conduct of proceedings. The court's structure is cumbersome: it has a judiciary comprised of United Nations and Cambodian judges, the latter being in the majority. Its investigative and prosecutorial institutions are weighed down by a dual system that has neither Cambodians nor the United Nations in charge and requires a separate chamber of judges to resolve differences. Funding is through a United Nations managed international trust fund (total budget US\$43 million) and a three year national programme (US\$13.3 million). This, probably the last ever chance of the international community and the Cambodian government to bring some relief to victims of the Khmer Rouge through justice and to uphold fundamental norms of humanity, has been labelled a "*quasi-national, quasi-kangaroo court*".¹⁸²

My preceding analysis has shown how the Extraordinary Chambers have been grafted onto an exceptionally dysfunctional criminal justice system. A system that cannot even deal

United Nations and Cambodia, to be interpreted in accordance with the 1969 Vienna Convention on the Law of Treaties. Importantly, it means that Cambodia may not rely on any provisions in internal law (for example, its Constitution, the Law on Extraordinary Chambers, UNTAC Law or SOC Law on Criminal Procedure, to justify failure to perform its treaty obligations under the UN-RGC Agreement. Any inconsistencies have to be addressed by amending the offending national law.

¹⁷⁶ See assessment of the agreement by Suzannah Linton, "Comments on the draft Agreement between the United Nations and the Royal Government of Cambodia", *Searching for the Truth, Special English Edition* (First Quarterly Edition, 2003); "Serious Flaws: Why the UN General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement" *Human Rights Watch* (April 2003).

¹⁷⁷ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, promulgated on 27 October 2004 (NS/RKM/1004/006), unofficial translation by the Council of Jurists and the Secretariat of the Task Force, 23 November 2004 (hereafter "Law on Extraordinary Chambers").

¹⁷⁸ Royal Decree (Preah Reach Kret) NS/RKT/0506/214, 7 May 2006.

¹⁷⁹ Joint Statement by Judicial Officers, 13 June 2007, ECCC Plenary Session Unanimously Adopts Internal Rules.

¹⁸⁰ In due course, they will come to be supplemented with Practice Directions and Administrative Regulations.

¹⁸¹ The relationship between the RGC and the UN is governed by a series of separate agreements, namely the UN-RGC Agreement, Supplementary Agreements on Security and Safety and Utilities, Facilities and Services between Royal Government of Cambodia and the United Nations of February 2003 and the Supplementary Agreement on Utilities, Facilities and Services February 2006 (the latter two are undated).

¹⁸² *Supra* note 116.

adequately with ordinary crimes is being made to support the prosecution of the most serious crimes in the international order. Surveys have consistently revealed that the citizens of Cambodia have no more confidence in their judiciary than do close observers: the feedback is consistent that Cambodians want not just trials but an internationally controlled process because they simply do not trust the Cambodian criminal justice system and those who work within it to do the job of investigating, prosecuting and punishing the Khmer Rouge properly.¹⁸³ Yet, interestingly, when asked in 2004 if they preferred no trial to substandard trial, a small majority preferred substandard trial: 55.9% for, 44.1% against.¹⁸⁴ And, 61.3% are expecting justice to be delivered; 22.9% are not expecting justice; 14/1% not expecting any result; 16% are expecting partiality.¹⁸⁵ However, it is relevant to recall the earlier analysis of the four Khmer Rouge trials in Part IV (B) of this paper, which showed that Cambodia's is a system that can be made to function adequately when its masters require it to do so; in other words, where it is seen to be in the masters' interests for the Extraordinary Chambers to function in a manner that satisfies the outside world, it may well do so.

A. A Realistic Mandate

The Law on Extraordinary Chambers is realistic for being strictly limited to the actions of senior leaders of the Democratic Republic of Kampuchea and "*those most responsible*" for crimes committed between 17 April 1975 and 6 January 1979. This careful limitation of jurisdiction *rationae personae* and *ratione temporae* was one of the recommendations of the Group of Experts.¹⁸⁶

The term "*those most responsible*" opens the possibility that it is not just the Khmer Rouge who may be prosecuted. In this age of globalised justice, one wonders about the leaders of those countries that supported the Khmer Rouge, whether actively through assistance, or passively by ignoring what they were doing to their fellow countrymen, or indirectly by driving ordinary people to them by massive aerial bombardments. Yet, from the originating request of the RGC and despite at least one effort to raise the issue of a widened jurisdiction as a means of leverage,¹⁸⁷ it has always been clear that the focus of the prosecutions has been on the Khmer Rouge alone and on the unique nature of the criminality committed in Cambodia during the identified period. Such an approach had been endorsed by the Group of Experts for focusing on the extraordinary nature of the Khmer Rouge's crimes.¹⁸⁸ The

¹⁸³ Linton, "Reconciliation In Cambodia", *supra* note 8, 162-163; 228-231. In the Documentation Center of Cambodia's 2002 survey, 70.19% said they preferred a trial with UN participation with 18.57% preferring a purely domestic process. Participants in the survey spoke of the need for international participation in order to overcome corruption in the judiciary. In a 1997 survey also conducted under the auspices of the Documentation Center, 71% wanted an international process. 96.8% voted in favour of an international process in a survey conducted by the Khmer Institute of Democracy, Survey on the Khmer Rouge Regime and the Khmer Rouge Tribunal, 2004.

¹⁸⁴ Khmer Institute of Democracy, Survey on the Khmer Rouge Regime and the Khmer Rouge Tribunal, 2004. This ties in with another assessment that "What does appear from the data is that Cambodians are seeking to find through the trial process a public coming to terms with the past, a symbolic formal act played out in the courtroom, where the Khmer Rouge/CPK and their philosophy would be brought into the open through trials of the leaders. The once powerful would be brought down to size, underlining that an era of extraordinary cruelty and abuse is really over, with symbolic lessons for today's leaders" in Linton, "Reconciliation In Cambodia", *supra* note 8, 230-231.

¹⁸⁵ Khmer Institute of Democracy, Survey on the Khmer Rouge Regime and the Khmer Rouge Tribunal, 2004.

¹⁸⁶ *Supra* note 55 at paras.109-110.

¹⁸⁷ In the Royal Government's response of 3 March 1999 to the recommendation of an ad hoc international tribunal, Prime Minister Hun Sen told the Secretary-General that what was being sought was "comprehensive justice for Cambodia and her people, and for a full investigation into the crimes committed during the whole period of civil wars in Cambodia starting from 1970 to 1998".

term “*those most responsible*” is designed to catch others outside the top leadership, such as the S-21 commander, Duch. It will be recalled that both he and the one Khmer Rouge military commander who fought on till the end (Ta Mok), were in detention throughout the time that the draft was being negotiated. It is no secret that the law has been drafted with a view to ensuring that if trials had to go ahead at all, at least these two would be prosecuted.¹⁸⁹ But, one of them has now died, and one independent study has identified seven candidates for prosecution on the basis of existing evidence.¹⁹⁰ One of its authors has recently claimed that within the category of senior leaders and those “most responsible”, the available evidence suggests that no more than 60 cases could be made, including perhaps 10 senior leaders and 50 most responsible subordinates.¹⁹¹

The law tries to do what is possible in the circumstances of Cambodia. This differentiates the Extraordinary Chambers from Timor Leste’s Serious Crimes project, where the governing legislation (Regulation 2000/15) was unfocused for not being directed at any particular situation or group or subject to any temporal limitation.¹⁹² But, there is a very significant accountability gap—what of the others, the hundreds perhaps thousands of ex-Khmer Rouge who have reintegrated into Cambodian life, or the others still living in the de-facto enclave of Pailin? As has been seen in the earlier section of this study, the PRK grappled with the issue. The theoretical possibility of mass trials has existed in Cambodia under the 1994 Law Outlawing the ‘Democratic Kampuchea’ Group, as also discussed earlier. This law had criminalised the Khmer Rouge, and all those who were members of its civilian or military wings. Under Article 2, their membership rendered those who did not surrender liable to prosecution. Ordinary crimes such as murder, rape or robbery would fall to be dealt with under existing criminal law (i.e. UNTAC Law), with acts interpreted as being against the internal security of the State (such as secession) carrying 20-30 year sentences. In this matter, the 1994 law, which was expressly inapplicable to the movement’s leaders, appears to be unaffected by the Law on Extraordinary Chambers and does form the basis for prosecution of anyone who, as of 15 July 1994 until present was or is a member of the Khmer Rouge and did not qualify for an amnesty: “*From the time this Law comes into effect, all peoples who are members of the political organisation or military forces of the ‘Democratic Kampuchea’ group shall be considered as offenders against the Constitution and offenders against the laws of the Kingdom of Cambodia*”. Had there ever been a coherent and principled strategy for post-conflict or ‘transitional justice’ in Cambodia (and there has been nonesuch), this could have been used as a mechanism for prosecuting mid to lower-levels, as was done with the European post-Nuremburg trials, which prosecuted persons for membership of criminal organisations. Some, such as the former S-21 camp guard Huy Hin have served some kind of punishment and depending on how the process was conducted, may or may not be protected by the principle of *non bis in idem*.

¹⁸⁸ *Supra* note 55 at para. 10.

¹⁸⁹ See Daphna Shraga, “The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions”, in *International Criminal Courts*, 24 (hereafter “Shraga, ‘The Second Generation UN-based tribunals’”). Also, close analysis suggests that the government has been pursuing a policy akin to peace and reconciliation at all costs, and carefully controlled and calibrated justice if it absolutely could not be avoided. “It follows from this reasoning that in the name of reconciliation those leaders of the Khmer Rouge/CPK who defected and ‘reconciled’ (Ieng Sary, Khieu Samphan, Nuon Chea) should not be prosecuted; on the other hand, those that remain regarded as ‘enemies’ (Ta Mok) or had no role in that ‘reconciliation’ (Duch) may and should be tried in the name of justice”, Linton “Reconciliation In Cambodia”, *supra* note 8, 39-67.

¹⁹⁰ Heder and Tittlemore ‘Seven Candidates for Prosecution’, *supra* note 16.

¹⁹¹ “The Khmer Rouge Trials: Is it worth it and for whom?, A public discussion held in Phnom Penh” (17 November 2004), comments of Steve Heder. Heder has categorically denied that the material he has seen incriminates Prime Minister Hun Sen or any one in the government.

¹⁹² This led to the situation where the Serious Crimes Unit, in the absence of anyone of hierarchical significance to actually prosecute before the courts, decided to pursue every incident of Serious Crime committed in East Timor in 1999 while at the same time maintaining a focus on ten ‘priority cases’.

Yet, mass trials on the basis of membership of a group are hardly something to recommend in a country with Cambodia's record and are unlikely to promote peace and security, with so many ex-Khmer Rouge having defected and received *de facto* amnesty, including some in high places. It would be simply unworkable and the harm that is likely to arise would outweigh the benefits. But the issue of what to do about the many low-ranking perpetrators is likely to re-emerge as a result of the trials at the Extraordinary Chambers. A 2002 survey showed deep public ambivalence: 41.29% saw lower level Khmer Rouge as being both victims and perpetrators; 29.95% saw them as purely victims; and 23.89% saw them as just perpetrators.¹⁹³ One reason for the contradictory responses is that many perpetrators were minors at the time and are widely acknowledged to have been subjected to duress and mental conditioning that made them exceptionally brutal. After all these years, there is, not surprisingly, no grassroots desire to see mass trials. But there is a fundamental social need for a wider social repair strategy going beyond the trials at the Extraordinary Chambers.¹⁹⁴

The other weakness of the exclusive focus on the Khmer Rouge is there will be no scrutiny of the rest of the 29 year armed conflict in Cambodia. The evidence in the public sphere reveals that massive and egregious crimes were committed under the rule of the Khmer Rouge. That is not at issue here. But the problem is that the focus of the law suggests that one side did all the wrong. Even if their crimes were unique, the Khmer Rouge were not the only ones to commit atrocities in Cambodia in all the long years of turmoil. It is not just the issue of other parties to the conflict. What about the States that supported the Khmer Rouge? Vietnam and China are usually fingered for direct support of the Khmer Rouge in their seizure and maintenance of power, but they were not alone. "*As the genocide progressed, for geopolitical reasons, Washington, Beijing, and Bangkok all supported the continued independent existence of the Khmer Rouge regime... Behind the scenes, the ousted Khmer Rouge received U.S. support from the Carter, Reagan and first Bush administrations*".¹⁹⁵

As with all other international and internationalised tribunals since the Second World War trials, aggression was not included in the mandate of the Extraordinary Chambers. Neither is there a mechanism for dealing with State responsibility to make reparation, such as through a claims compensation tribunal. What is at issue is possible complicity in genocide, crimes against humanity and gross violations of human rights. But global politics is such that any whiff of an attempt to investigate the roles of these other States would have put an end to any process of accountability for the Khmer Rouge.

¹⁹³ Linton "Reconciliation In Cambodia", *supra* note 8, 154-162.

¹⁹⁴ *Ibid.*, 232-252.

¹⁹⁵ Ben Kiernan, "Recovering History and Justice in Cambodia" (2004) 14 *Comparativ Heft 5/6*, S. 76-85. "When U.S. President Gerald Ford and Secretary of State Kissinger visited Indonesian president Suharto on 6 December 1975, the transcript released in 2001 reveals that Ford, deploring the recent U.S. defeat in Vietnam, told Suharto: "There is, however, resistance in Cambodia to the influence of Hanoi. We are willing to move slowly in our relations with Cambodia, hoping perhaps to slow down the North Vietnamese influence although we find the Cambodian government very difficult". Kissinger explained Beijing's similar strategy: "the Chinese want to use Cambodia to balance off Vietnam... We don't like Cambodia, for the government in many ways is worse than Vietnam, but we would like it to be independent. We don't discourage Thailand or China from drawing closer to Cambodia... Carter's national security advisor Zbigniew Brzezinski recalled Kissinger's earlier policy when he revealed that in 1979, "I encouraged the Chinese to support Pol Pot. Pol Pot was an abomination. We could never support him, but China could". According to Brzezinski, Washington "winked, semi-publicly" at Chinese and Thai aid to the Khmer Rouge. In 1982 the U.S. and China encouraged Sihanouk to join a DK coalition-in-exile. Secretary of State George Shultz refused to support a proposed international genocide tribunal. In 1989 his successor James A. Baker even urged that the Khmer Rouge be included in the Cambodian government. When Japan proposed a commission of inquiry into Khmer Rouge crimes, US Assistant Secretary of State Richard Solomon opposed the idea, stating on 18 March 1991 that it was "likely to introduce confusion in international peace efforts". [footnotes omitted].

B. *Taking Jurisdiction Over Historic Crimes*

The prohibition of prosecution on the basis of new laws criminalising what was not criminal at the time is enshrined in article 11(2) of the Universal Declaration of Human Rights and Article 15(1) of the ICCPR. However, acts that were already prohibited under customary international law such as genocide, even if not expressly prohibited in legislation, may be prosecuted using a law passed after the crimes were committed. This is confirmed by the Nuremberg and Tokyo precedents, and enshrined in article 15(2) of the ICCPR. In such a circumstance, the *ex post facto* law simply provides a mechanism for prosecuting what was already criminal, it does not make something lawful unlawful and thus does not violate the prohibition against retroactive prosecution.

The principle of legality is not expressly protected in the Cambodian Constitution¹⁹⁶ nor in Cambodian criminal procedure law, although it is to some extent protected under the 1956 Penal Code. In light of this, it is strange that there is no provision directly addressing the fundamental rule that *nullum crimen, nulla poena sine lege* in the Law on Extraordinary Chambers itself. But the Group of Experts' emphasis on the importance of ensuring that the law that was applicable at the time (1975-1999) would be used, was largely heeded.¹⁹⁷ The United Nations negotiators are known to have been insistent on protecting the integrity of the process to the fullest extent possible, including on this point.¹⁹⁸ The compromise was a tailor-made mix of international and domestic that seems to have generally (the exceptions are discussed later) captured the applicable law.

The 1956 Penal Code

The proof of careful consideration of the principle of legality is to be seen in Article 3 *bis* of the Law on Extraordinary Chambers, which establishes the court's jurisdiction over the crimes of homicide, torture and religious persecution as violations of the 1956 Penal Code of Cambodia. The specific provisions to be used are identified. Although there has been some doubt about whether this law continued to apply during the period of Democratic Kampuchea, when no pre-existing laws were applied, it was clearly the law that applied in Cambodia when the Khmer Rouge came to power. It is also unlikely that the formal applicability of a valid existing legal regime could simply be ousted through the seizure of power by a revolutionary, non-democratically elected movement that abolished Rule of Law and imposed its own whims upon the population.

Given that the crimes in issue date back to 1975, the Penal Code's statute of limitations has been extended for a further 30 years beyond the original 20 years. The legality of doing this for domestic crimes is open to legitimate challenge.

Genocide

Cambodia has been a party to the 1948 Genocide Convention since it entered into force in 1951. Genocide, as defined in Article 4 of the Law on Extraordinary Chambers, is taken directly from Article 2 and partly from Article 3 of the convention.

There is little dispute that the core crimes were committed during the reign of the Khmer Rouge. There also appears to be sufficient evidence suggesting the targeting, with the required *dolus specialis*, of specific minority groups on the basis of their nationality, race

¹⁹⁶ It is indirectly protected through the vague provisions of Article 31 of the Constitution: "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of human Rights, the covenants and conventions related to human rights, women's and children's rights".

¹⁹⁷ *Supra* note 55 at para. 60.

¹⁹⁸ For example, the Cambodian government originally attempted to introduce a tailor-made definition of genocide that did not reflect that of the Genocide Convention; this "eccentric post ex facto gloss" was rejected by the United Nations and the definition now used is that of the convention (see later)—*supra* note 104, at 475.

or ethnicity such as the Cham and Vietnamese, and the Buddhist monkhood on the basis of religion.¹⁹⁹

However, the largest group of victims of Khmer Rouge criminality appear to have been those Khmer who were not of their political persuasion, and formed the urban educated classes regarded by them as being responsible for the subjugation of the peasantry. People wearing eyeglasses came to be targeted, as did those with an education, urban dwellers (described as ‘new people’), those with an affiliation to the previous regime and Khmer Rouge cadre deemed as traitors. This appears to be about ideology, or identification of a group for targeted gross violations on the basis of their perceived political affiliation. The problem is that political, economic and social groups were deliberately excluded from the ambit of the crime of genocide set out in the Genocide Convention.²⁰⁰ This would therefore suggest that the Khmer Rouge committed crimes against humanity, rather than genocide, against their fellow Khmer. But to talk of Khmer-on-Khmer too may be too simplistic, for others point out that even within the Khmer Rouge movement, there was no notion of ethnic Khmer purity, for some of the leaders like Pol Pot and Khieu Samphan were/are Sino-Cambodian and Ieng Sary is a Sino-Vietnamese Cambodian.²⁰¹

The matter is properly to be decided by the Extraordinary Chambers rather than from the ivory towers, but as a matter of law and following established legal methodology, most international criminal law experts have been sceptical about whether the bulk of what happened in Cambodia falls within the definition of genocide under the Genocide Convention. One of the UN’s lawyers involved in the negotiations with the RGC has pointed out that outside of the major assaults on national, ethnic, racial or religious groups such as the Cham, Vietnamese, Thai and Chinese, the Khmer-on-Khmer horrors do not meet the technical definition of the Genocide Convention; she points out that there is no such thing as ‘auto-genocide’ under the Convention.²⁰² The genocide definition was actually retained in the law to permit prosecution of the criminal actions taken against the Cham, Vietnamese, Thai and Chinese.²⁰³ An attempt by the RGC to introduce a tailor-made definition of genocide that did not reflect that of the Genocide Convention, the better to convict, was rejected by the United Nations.²⁰⁴ Sir Ninian Stephen and the Group of Experts also had doubts about whether the Khmer-on-Khmer atrocities were, in the particular circumstances, actually genocide, but were clear that there should be jurisdiction over genocide in order to deal with other Khmer Rouge actions on national, ethnic, racial or religious groups such as the Cham and Vietnamese.²⁰⁵ Ratner and Abrams acknowledge that the bulk of the terror in Cambodia did not qualify as genocide.²⁰⁶ Schabas dismisses the argument that the mass killing of Khmers was in fact genocide.²⁰⁷ Abrams observes that horrible as they were, the acts against those such as officials of the prior regime, intellectuals and professionals (who comprised political, professional or economic groups) were unlikely to meet the legal definition of genocide.²⁰⁸ It is relevant to note here that the International Law Commission also

¹⁹⁹ See for example, Group of Experts Report, *supra* note 55, para. 63.

²⁰⁰ *Prosecutor v. Goran Jelusic*, Case No IT-95-10, Judgement, 14 December 1999, para. 69; *Prosecutor v. Georges Rutaganda*, paras. 55-57; *Prosecutor v. Jean-Paul Akayesu*, para. 516; William Schabas, “Comments on Article 6 of ICC Statute”, Otto Triffterer, *Commentary On The Rome Statute Of The International Criminal Court* (Baden-Baden, 1999), 110; William Schabas, *Genocide In International Law* (Cambridge University Press, 2000), 179-189 (hereafter “Schabas ‘Genocide In International Law’”).

²⁰¹ Bora Touch, “Legal loopholes open for Ta Mok and Duch”, *Phnom Penh Post* (1-14 October 1999).

²⁰² Shraga “Second Generation UN-Based Tribunals”, *supra* note 189 at 22.

²⁰³ *Ibid.*

²⁰⁴ *Supra* note 104, 475.

²⁰⁵ *Supra* note 55, para. 65.

²⁰⁶ Ratner and Abrams “Accountability for Human Rights Atrocities”, *supra* note 16, 269.

²⁰⁷ Schabas, “Genocide in International Law”, *supra* note 200; *supra* note 104, 472-475.

²⁰⁸ Jason Abrams, “The Atrocities in Cambodia and Kosovo: Observations on the Codification of Genocide” (2001) 35(2) *New Eng. L. Rev.* 306-307.

closely examined the issue of 'cultural genocide' by reference to the negotiating history of the Genocide Convention and concluded that it was clearly shown that "*the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, cultural or other identity of a particular group*".²⁰⁹

Generally, the argument for genocide tends to be made from a political science perspective.²¹⁰ Some of the few lawyers who make the case for genocide have claimed that the acts constituted genocide against the Khmer national group as such,²¹¹ or that the Khmer Rouge saw the Khmer who were not of their political persuasion as Vietnamese, rather than Khmer, and thus those attacks were on a national group.²¹² While the motivations behind humanitarian-based arguments are understandable, and reading a convention in light of its aims and objects is proper, such creative interpretation is unfortunately not consistent with the rigid established legal methodology as set out in Article 31 and 32 of the Vienna Convention on the Law of Treaties. These require that a treaty must be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in its context and in light of its object and purpose. Words are to be read in their natural and ordinary meaning, and in light of what the drafters intended. There is no ambiguity in the definition of genocide and it is consistent with the intention of the drafters of the original definition in the Genocide Convention, who deliberately excluded political, economic and social groups from its ambit. At the end of the day, unsatisfactory as it may be, the legal framework of genocide is as set out in the Genocide Convention, and has stood in treaty and custom for over 50 years now. The same definition has been used in the ICTY and ICTR Statutes, in the United Nations' legislation for the prosecution of Serious Crimes in Timor Leste and in the Statute of the ICC. This is the definition used in the Law on Extraordinary Chambers, and this is the notion of genocide on the basis of which any Khmer Rouge accused of genocide will be tried.

Crimes against Humanity

Article 5's definition of crimes against humanity is taken from the Statute of the International Criminal Tribunal for Rwanda, adopted in 1994. It is open to challenge as not reflecting customary law between 1975-1979. Two issues that immediately stand out as problematic are the absence of an armed conflict nexus and the requirement that all crimes against humanity must have a discriminatory or persecutory element. It is now clear that neither is required in the customary law of today, but what of the period 1975-1979?²¹³ The armed conflict was an element of the definition as set out in Article 6(c) of the Charter of the International Military Tribunal at Nuremberg, but was not present in other documents that followed such as Control Council Law No.10 or the British Royal Warrant. It is now no longer an element of the crime. The discriminatory or persecutory element was not a requirement for all crimes against humanity in Article 6(c) of the IMT Charter, just persecution. Neither was it present in other laws that followed such as Control Council Law No.10 or the British Royal Warrant. It is not the law of today.²¹⁴ Boyle has questioned whether the widespread

²⁰⁹ Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May-26 July 1996, G.A.O.R., 51st session, Supp. No. 10 (A/51/10) (1996), pp. 90-91.

²¹⁰ See the work of those who have been associated with the Cambodia Genocide Program at Yale University, such as Cambodia experts Ben Kiernan and Craig Etcheson.

²¹¹ *Supra* note 15. Further legal argumentation for genocide can be found in Gregory H. Stanton, "The Cambodian Genocide and International Law", in Ben Kiernan ed., *Genocide and Democracy in Cambodia* (New Haven: Yale University Southeast Asia Studies, 1993), 141-162; Gregory H. Stanton, "A Reply to Prof. William A. Schabas: Should Khmer Rouge Leaders be Prosecuted for Genocide or Crimes against Humanity", *Searching for the Truth* (October 2001).

²¹² The Khmer Rouge defined the Eastern Zone population as ethnically different from the rest of the population: they had Khmer bodies but Vietnamese heads. See Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia Under the Khmer Rouge* (New Haven: Yale University Press, 1996), 3.

²¹³ *Prosecutor v. Dusko Tadic*, Case No IT-94-1-A, Decision, 15 July 1999, paras.292, 289, 290.

²¹⁴ *Ibid.*, para. 305.

and systematic attack on the civilian population was indeed customary at the time of the offences.²¹⁵

However, this does not necessarily mean that there is a problem reconciling Article 5 with the fundamental principle of *nullum crimen, nulla poena sine lege*, for the definition is to the advantage of an accused, given that it places an additional burden on the prosecution. It can also be seen as simply imposing a jurisdictional limitation, i.e. it just limits the category of crime against humanity over which jurisdiction can be exercised in light of the ICTR Appeals Chamber decision in Akayesu.

Grave Breaches of the Geneva Conventions of 1949

Article 6 grants the Extraordinary Chambers jurisdiction over grave breaches of the Geneva Conventions of 1949, which in treaty and customary law may only be committed in international armed conflict.²¹⁶ There is no jurisdiction to prosecute other violations of the Geneva Conventions or violations of the laws and customs of war.

During the period 17 April 1975 to 7 January 1979, the Khmer Rouge were engaged in hostilities with neighbouring Vietnam, Laos and Thailand. All were parties to the Geneva Conventions of 1949.²¹⁷ Recalling the temporal and personal jurisdictional limitations to the Law on Extraordinary Chambers, it will not be possible for the law to be used to prosecute anyone but the leaders of Democratic Kampuchea and those “*most responsible*” for the atrocities of that era. Such one-sided prosecution arising from armed conflict is exactly what the Group of Experts cautioned against.²¹⁸

Moreover, it is war crimes in internal armed conflict that were rife in Cambodia, far more common than the instances of international armed conflict where neighbouring countries were engaged in armed conflict with the forces of Democratic Kampuchea. As the Group of Experts noted, grave breaches in international armed conflict constituted only a small portion of the human rights abuses of the Khmer Rouge.²¹⁹ Yet there is no provision for prosecution of war crimes in internal armed conflict under the Law on Extraordinary Chambers. One reason for the exclusion would have been doubts over the status in customary law on war crimes in internal armed conflict during the period; Common Article 3 clearly applied as treaty law, but had never been prosecuted as a war crime until the advent of the *ad hoc* tribunals in the 1990s.²²⁰ Then, Cambodia was not party to Additional Protocol II and it is unlikely that this in itself was customary law in the period at hand; it has only been possible to prosecute it under the Statute of the ICTR on the basis of Rwanda’s treaty obligations. On the other hand, it is possible to view the entire situation as a single internationalised armed conflict through the direct and indirect involvement of other States in armed conflict in Cambodia, beginning with the US bombardment and Vietnamese involvement with the Khmer Rouge, covering the support given by certain States to the regime of Democratic Kampuchea, the invasion and occupation of Cambodia by Vietnam, the involvement of various States in supporting the various parties to the continuing conflict until Vietnam’s departure in 1989. Thus, it is arguable that the target period fell within an internationalised armed conflict to which the rules of international armed conflict apply.

²¹⁵ David Boyle, “Establishing the Responsibility of the Khmer Rouge Leadership over International Crimes”, (2002) 5 Y.B. Int’l Human. L. 168-218, 204.

²¹⁶ *Prosecutor v. Dusko Tadic*, Case No IT-94-1-I, Decision on the Defence motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 79-84. The Rome Statute of the International Criminal Court retains the notion of grave breaches in international armed conflict only. There is however dicta that atrocities committed in internal armed conflicts can constitute grave breaches, see Separate Opinion of Judge Abi-Saab, part IV; *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo also known as Zenga*, IT-96-21-T, Judgement, 16 November 1998, para. 202. Also see George Aldrich, “Jurisdiction of the International Tribunal for the Former Yugoslavia”, 90 AJIL 64 (1996) at 68.

²¹⁷ Cambodia acceded on 8 December 1958, Vietnam (the Republic of South Vietnam) acceded on 14 November 1953, Laos acceded on 29 October 1956 and Thailand acceded on 29 December 1954.

²¹⁸ *Supra* note 55, para. 72.

²¹⁹ *Ibid.*

²²⁰ *Ibid.* at para. 75.

But, this does not tie in with the recommendation of the Group of Experts for inclusion of a war crimes jurisdiction “because certain Khmer Rouge atrocities took place in the course of warfare with other States, especially Viet Nam, as well as with certain domestic resistance forces, primarily during their last year and a half in power”.²²¹ It is also clear that the drafters did not want conduct outside of the narrow temporal scope opened up to scrutiny. This underscores political motivation behind some of the selectivity in jurisdiction.

Crimes against cultural property

Cambodia acceded to the 1954 Cultural Property Convention, its attached regulations and the First Hague Cultural Property Protocol on 12 October 1961. These provide for the protection of cultural property in times of international armed conflict, with more limited protection in a non-international armed conflict (the provisions on ‘respect for cultural property’ contained in Article 4 provide the minimum standard of protection in any conflict). Thus, by article 7 of the Law on Extraordinary Chambers, which is specifically rooted in the 1954 convention, Cambodia has taken steps towards the prosecution and imposition of “penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to commit or order to be committed a breach of the present Convention” in line with its treaty obligations.

Article 7 allows, for the first time, for violations of the 1954 Cultural Property Convention to be prosecuted on the basis of the treaty itself. The treaty provides a definition of ‘cultural property’ in Article 1, and places specific duties on States, but does not criminalise attacks on such property. The more orthodox course of action would be to prosecute attacks against cultural property in an international armed conflict as violations of the laws and customs of war, or grave breaches of the Geneva Conventions 1949 or Additional Protocol I. But like the Cultural Property Convention, these require an armed conflict. The historical record shows both internal and international armed conflict and a situation probably falling below Common Article 3, but one could of course argue that Cambodia was effectively in a state of some kind of armed conflict from 1970 till the capture of Ta Mok. In order to ensure that prosecutions under this provision pass the test of legality, and thus meet fair trial requirements, the Extraordinary Chambers will need to assess the provision in light of the test of the ICTY’s Appeals Chamber in *Tadic*:

1. the violation must constitute an infringement of a rule of international humanitarian law;
2. the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
3. the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a “serious violation of international humanitarian law” although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby “private property must be respected” by any army occupying an enemy territory;
4. the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.²²²

Crimes against internationally protected persons

Crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations are also a novelty in international criminal justice. This is a crime that was not widespread or systematic. It is known to have occurred when spouses

²²¹ *Ibid.* at para.72.

²²² *Prosecutor v. Dusko Tadic*, Case No IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 94.

of foreign diplomatic personnel were removed from the French Embassy after the fall of Phnom Penh and were murdered.²²³ Nevertheless, there is no basis for prosecution through the 1961 treaty; the basis of criminal action is in fact contained in the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.²²⁴

Here too, the Extraordinary Chambers will need to consider whether this provision actually does form the basis for lawful prosecution in light of the Tadic test.²²⁵

C. *Who Can Be Responsible—The Heads of Individual Criminal Responsibility*

Article 29 of the Law on Extraordinary Chambers draws from the standard ICTY-ICTR formulation that anyone who planned, instigated, ordered, aided and abetted, or committed crimes is individually criminally responsible for his actions.

But outside of conspiracy to commit genocide in Article 4, missing is the notion of joint criminal enterprise (hereafter ‘JCE’). Generally, for a JCE conviction in international criminal law, the prosecution will have to prove the following:

1. A plurality of persons were involved in the crime, but they need not be organised in a military, political or administrative structure.
2. There was a common purpose which amounted to or involved the commission of an international crime. This common purpose need not have been previously arranged or formulated, and may materialise extemporaneously and be inferred from the facts.
3. The accused participated in the common purpose. This participation need not have involved the commission of a specific crime under one of the provisions (for example murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose.

JCE is highly relevant to large scale criminality arising from a situation where a group of individuals was involved in the design of a plan, and its implementation, or in controlling much of what happened.²²⁶ It was first used internationally at the Nuremberg trials of the Nazi leadership. The use of this head of responsibility at the ICTY and ICTR is controversial, for it is not included within the Statute. But after the landmark *Tadic* appeal judgement on the merits, it has come to be accepted in the practice of the tribunals as forming part of the ‘commission’ of a crime.²²⁷ It has also been entrenched in the ICC Statute: Article 25(3)(d) permits prosecution on the basis of common purpose, although not in

²²³ *Supra* note 55 at para. 79.

²²⁴ Cambodia was a signatory to the 1961 Vienna Convention on Diplomatic Relations but neither signed, ratified nor acceded to the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.

²²⁵ *Supra* note 222 at para. 94.

²²⁶ One expert questions the adequacy of conventional explanations about totalitarian conspiracies beginning from the top and going down. There is, he argues, a need to examine the extent of local initiative and responsibility in precipitating and expanding murderous policies and practices, as well as carefully to examine variation in individual responsibility among the chief lieutenants. In relation to Cambodia, he argues that hundreds of thousands of other killings—perhaps the majority of them—were committed by regional and local authorities not acting not as part of a tight chain of command. “In perpetrating these murders, CPK lower level authorities were thus certainly not “just following orders”, and in many instances, they seem to have killed more indiscriminately than the party senior leadership envisaged. I have suggested that although this tendency on the part of local authorities was in some ways an inevitable and inherent result of the general policies pursued by the top leadership, above all their demands for an immediate and total communization of Cambodia and their empowering of local structures to kill real and imagined enemies of this project, the magnitude of these executions was beyond what the top leadership intended or was aware of”, Steve Heder, cited in Linton “Reconciliation In Cambodia”, *supra* note 8, 160.

²²⁷ *Supra* note 213, paras. 195-229.

identical terms.²²⁸ In Cambodia, we will have to wait and see how the Co-Investigating Judges will categorise the criminality that the Extraordinary Chambers is concerned with. But it must be stressed that there are legitimate concerns about violation of the principle of legality in the use of this concept, especially where the existing domestic law knows no such concept, when the Statute of the tribunal is silent on the matter, and when one considers that JCE is hardly settled law for the more complex forms of such liability still continue to be developed by the Appeals Chambers of the ad hoc tribunals in the cases, years after the crimes were committed.²²⁹

Command responsibility is provided for in the Law on Extraordinary Chambers, but without distinguishing civilian and military command responsibility. Paragraph 3 of Article 29 provides that crimes committed by a subordinate do not relieve a superior of personal criminal responsibility if that superior had effective command and control or authority and control over the subordinate, and knew or had reason to know that the subordinate was about to commit such acts or had done so and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators. This takes the ICTY-ICTR definition, adding the requirement that the superior must have “*effective command and control or authority and control*”, which would in any event apply in custom. The notion that a superior can be held criminally liable for the criminal acts of a subordinate is new to Cambodian law—there is no such thing under UNTAC Law or the SOC Law on Criminal Procedure. More to the point, it is also absent from the 1956 Penal Code. This means that under the applicable law of the time, a commander could not be held criminally liable for the criminal acts of a subordinate. The issue is not to be resolved simply by pointing to the international law of the time, for even if the basic concept of commanders being responsible for the acts of subordinates in certain situations has been recognized since the Nuremberg and Tokyo trials, with the fundamentals being laid down in cases such as *Yamashita*²³⁰ and *High Command*,²³¹ the precise content of the doctrine has been evolving since then. There are in fact important differences between the command responsibility formulations used in Article 86 of Additional Protocol I, the *ad hoc* international tribunals and the ICC (Article 28).²³² Which of these reflected the content of the doctrine between 1975-1979? To return to the Extraordinary Chambers, the fixing of the doctrine in the terms set out in the Law on Extraordinary Chambers can be expected to come under strong challenge for violation of the principle of legality in both domestic and international law.

Under Article 29 of the Law on Extraordinary Chambers, the fact that a person acted pursuant to an order of the government of Democratic Kampuchea or of a superior does not relieve the person of individual criminal responsibility. In other words, it is not a defence. The question as to whether superior orders can mitigate sentence following conviction is not addressed. Current Cambodian law is silent on the issue of superior orders but the

²²⁸ A person shall be criminally responsible for a crime if that person in any way (other than aiding and abetting or otherwise assisting in the commission of a crime) “contributes to the commission ... of ... 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”, Article 25(3)(d), Rome Statute of the International Criminal Court.

²²⁹ In addition to the landmark Tadic Appeal Chamber decision on the matter of JCE, there have also been major ICTY Appeals Chamber decisions on this in cases such as Stakic, Vasiljevic, Krnojelac and Blaskic.

²³⁰ *In Re Yamashita*, Supreme Court of the United States, (1946) 327 US 1.

²³¹ *United States of America v. Wilhelm von Leeb et al.*, Judgment, [1948] 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No.10.

²³² See generally Ilias Bantekas, “The Contemporary Law of Superior Responsibility” (1999) 93 A.J.I.L., 573; Matthew Lipman, “The Evolution and Scope of Command Responsibility” (2000) 13 Leiden J. Int'l L., 139; W.J.Fenrick, “Article 28: Responsibility of Commanders and Other Superiors”, in *Otto Triffterer ed., Commentary on the Rome Statute of the International Criminal Court—Observer's Notes, Article by Article*, 519.

1956 Penal Code allowed for a superior orders defence (under Article 99, a person was not criminally liable if he committed acts ordered by law or by a legitimate authority). The issue was raised but not considered in the trial of Nuon Paet (see the earlier section II(C)). At the time the crimes were committed, one could not be criminally liable if one acted in pursuance of superior orders in circumstances set out in Article 99. Here too, one cannot simply turn to international law, for it has been unsettled on the issue. Two positions exist in relation to the question of superior orders:

1. Superior orders are never a defence but may be considered as a mitigating factor. This derives from the Charter of the International Military Tribunal at Nuremberg, and is used in the Statutes of the ICTY and ICTR. This reverses the duty on a subordinate who is faced with a blatantly unlawful order; instead of the duty to obey orders, he or she is obliged to disobey that blatantly unlawful order.
2. Superior orders may in certain limited situations amount to a defence. The classical position was spelt out in Lassa Oppenheim's seminal 1906 treatise on International Law: "*In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy*". Some national systems took this position, for example section 47 of the German Military Penal Code of 1871, and the military codes of the USA and UK, before they changed the position during World War II. In fact, since 1956, the US Army's Field Manual has maintained the limited superior orders defence. Some World War II jurisprudence under Control Council Law No.10 moved away from the hard line of the Charter of the International Military Tribunal at Nuremberg when dealing with persons in subordinate positions. The Rome Statute of the ICC takes this position.

There is clearly a genuine problem in that the Law on Extraordinary Chamber's denial of what was a defence under the applicable domestic law, and in a situation where international law was unsettled, may violate the principle of legality.

D. Preliminary Observations on the Internal Rules²³³

I will examine particular issues of criminal procedure later, but there are a number of significant observations that need to be made at this stage about the Internal Rules.

The grafting of a deeply flawed internationalised mechanism, burdened with the onerous charge of trying international crimes, onto Cambodia's notoriously sub-standard justice system and its rudimentary physical and human infrastructure, has already raised challenging legal, practical and ethical issues. We will no doubt at some stage in the near future be seeing detailed chronicles from insiders about the bickering and the agonising 'Battle of the Internal Rules' as well as the painful realities of getting things working in this anomalous cross-cultural institution. But it suffices for now to say that the process of agreeing these rules almost caused the collapse of the entire operation, with the international judges threatening to withdraw in frustration. As it is, after just a few months of working together, there has been the spectacle of the national and international judges resorting to communicating with each other via media releases. There are many other conflagrations to come, and we shall see if they will prevent trials being commenced and concluded in the remaining lifetime of the tribunal. It is ominous that while these rules seem to be the best that could be agreed in the circumstances, the product is a set of rules carrying the stain of compromise throughout. This sorry *leitmotif* can be traced through the tangled tale of the agreeing of the establishment of the Extraordinary Chambers and further beyond, as examined earlier in this study.

²³³ Extraordinary Chambers in the Courts of Cambodia, Internal Rules, 12 June 2007 (hereafter "Internal Rules").

As was made clear in my earlier analysis, Cambodia's legal regime is a hotchpotch that reflects its historical legacy. If, as the Law on Extraordinary Chambers requires, Cambodian law is to be the controlling law, then several regimes are simultaneously applicable and one has to work through them. First there is the Law on Extraordinary Chambers itself, and its accompanying legal documents such as the UN-RGC agreement.²³⁴ Next are the UNTAC Law and the SOC Law on Criminal Procedure, with the former incorporating various soft laws into Cambodian law, such as the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Independence of the Judiciary. Then, it is also possible that older laws, such as the 1956 Penal Code itself and Vietnamese era laws, may still apply. Some of Cambodia's actual criminal procedure has come to be based on directives and instructions from the Ministry of Justice, for example, Ministry of Justice Circulars of 7 September 1998 concerning release on bail; 3 March 1995 on the Methods for Prosecutors in Making Charges with Offences, and the Instruction of 18 November 1993 on the Methods for Prosecutors in Making Charges with Offences. Then, there are the "*procedural rules established at the international level*" referred to in the Law on Extraordinary Chambers and the Constitution, with its sweeping statement in Article 31 that Cambodia "*shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of human Rights, the covenants and conventions related to human rights, women's and children's rights*".

The adoption of the long overdue Code of Penal Procedure would certainly have provided the most practical—and useful from a capacity building perspective—solution to the myriad problems arising from existing Cambodian law. That was indeed the hope of many observers and participants. But perusal of that document itself gives cause for concern about its compatibility with the ICCPR. The heavily Francophile draft with over 500 articles has been many years in the making. It has however recently moved from several years in the Council of Jurists to the Council of Ministers, who adopted it in August 2006 and sent it to the National Assembly in August 2006.²³⁵ The law was very conveniently adopted on 7 June 2007, 5 days before the Internal Rules were adopted, and 2 weeks before Cambodia's very first Development Cooperation Forum that replaced the regular Consultative Group meetings. The two processes appear to have been unusually well-coordinated, so one does wonder why, when it was clear that the Code of Penal Procedure was indeed going forward, the judges did not just wait for it to become law and then adopt Internal Rules within the limits prescribed by the Law on Extraordinary Chambers. At time of writing, this law has not yet been promulgated, so I must proceed with my analysis on the basis of the existing law, without reference to the new Code of Penal Procedure. But given my concerns about the constitutionality of the Internal Rules, the Extraordinary Chambers may yet have to resort to the Code of Penal Procedure once it becomes law in Cambodia.

The Internal Rules that the judges have adopted reduce the challenges of the applicable procedure considerably by creating a stand-alone collection of rules. There is no longer the need to battle one's way through the jungle of possible applicable laws. Much as we must laud their efforts, there are three significant concerns here: the legal status of these 'Internal Rules', their constitutionality under Cambodian law, and whether the judges have exceeded their authority in adopting this body of rules.

²³⁴ Under Article 47*bis* of the Law on Extraordinary Chambers, the UN-RGC Agreement has status of law once ratified in accordance with existing law. But while it has been ratified through the Law on Ratification of the UN-RGC Agreement, it has not been incorporated as domestic law in the manner required in the dualist theory, which the RGC claims applies in Cambodia. That does not affect its applicability between the parties (*pacta sunt servanda*).

²³⁵ Report of the Secretary-General on the role and achievements of the Office of the High Commissioner for Human Rights in assisting the Government and people of Cambodia in the promotion and protection of human rights, UN Doc.A/HRC/4/95, 18 January 2007, para. 30.

On the first issue, there are a number of inconsistencies between these Rules and the Law on Extraordinary Chambers; a law passed in accordance with Cambodia's Constitution must of course trump the Internal Rules and inconsistent provisions cannot be applied. Then on the second issue, the judges have chosen to call these 'Internal Rules' as opposed to 'Rules of Procedure and Evidence', presumably in an attempt to deny that this is a 'law', which under the Cambodian Constitution can only be made by the Assembly (under Article 90 of the Constitution, the Assembly is the only organ that can hold legislative power, which shall not be transferable to any other organ or any individual). Provisions concerning matters such as the order in the courtroom, rights of audience and time-limits for filing documents are procedural and can be considered of an 'Internal Rules' nature. However, provisions such as those covering arrest, detention, conduct of investigation and reparations are of normative content, and are laws, irrespective of whether they are dressed up as 'Internal Rules'. The preamble confirms that these are no mere 'Internal Rules', stating that they are intended to "*consolidate applicable Cambodian procedure for proceedings before the ECCC and adopt additional rules where those existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard*". But under the controlling Law on Extraordinary Chambers, the judges are obliged first and foremost required to apply existing Cambodian law. It is only if Cambodian law does not "*deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard*" that they can go beyond and seek guidance in procedural rules established at the international level. All laws in Cambodia must be read subject to the Constitution, for it is the supreme law under Article 131 thereof. This applies to the Law on Extraordinary Chambers too. Not just that, all decisions of State institutions, including the courts, have also to be in strict conformity with the Constitution. Under the Law on Extraordinary Chambers, the judges were only authorized to "*seek guidance in procedural rules established at the international level*" but they were never authorized to usurp the role of the Assembly and replace the entire corpus of applicable law. As such, the Internal Rules look to be unconstitutional.

To address the third issue of the scope of the powers of the court, we can take the example of Article 33 *bis* of the Law on Extraordinary Chambers, which provides that conditions for the arrest and custody of the accused "*shall conform to existing law in force*". But now, arrest and detention must be in accordance with the Internal Rules, not existing Cambodian law, which applies to everyone else. What the judges have done is not just create a whole new body of law, but the overwhelming majority of what they have relied on was not, and is not, existing Cambodian law. The Internal Rules have been cobbled together from:

1. bits and pieces of the most recent **draft** of the Code of Penal Procedure before it went to the National Assembly for parliamentary consideration;
2. French criminal procedure law;
3. *sui generis* provisions drafted specially for the Extraordinary Chambers;
4. the occasional provision from the SOC Law (note again that although in use, this is technically an invalid law) with nothing whatsoever taken from the applicable UNTAC Law (which is a valid law)²³⁶; and
5. articles culled from the rules and procedures of a variety of different international and internationalised courts ranging from the ICC to the Special Court for Sierra Leone.

²³⁶ The complete sidelining of the UNTAC Law, with its attempts to build in some basic human rights protections, suggests that it is regarded as an inapplicable law. Yet this is not the case, for the law is regularly used. And, in May 2006, the National Assembly passed an amendment to Article 63 of the same law removing the penalty of imprisonment for criminal defamation.

There are two ways of looking at this situation of law replacement: the Internal Rules are either *ultra vires* or the judges found that almost all of existing Cambodian criminal procedure law either failed to address necessary issues, created uncertainties about interpretation or application or doubts about their consistency with international standard, and thus required the adoption of an entirely new body of rules of procedure and evidence. If the rules are *ultra vires* they cannot be used, no matter that they were adopted in the good cause of making for fairer trials. If Cambodian law is really so bad as to be un-useable in the Extraordinary Chambers for the Khmer Rouge leaders, why is it still being applied to ordinary Cambodian citizens? Why has the United Nations become party to legitimising two very different standards of justice in the courts of Cambodia?

As for the substance of the rules, the judges have, to their credit, tried to adopt rules that are likely to be workable in the circumstances of Cambodia, including the court's limited budget, and go a good way towards securing a fair and legitimate process of accountability. Adoption of top-of-the-range rules of procedure and evidence would have been wholly unrealistic, given that there is simply no way to meet such standards in Cambodia. It is abundantly clear that the Cambodian system cannot even cope with meeting its existing Constitutional obligations in respect of human rights, let alone the demands of an exemplary 'model' criminal procedure. The judges do seem to have sensibly focused on a common set of minimum standards rather than 'best practice'; the rules aim for trials that are 'fair enough' rather than raising expectations of an exemplary or superior level of 'fairest of all' which we all know will never be met.²³⁷ But, analysis of the provisions such as in Rule 26 (see later section) suggests that they may in a number of places have actually surrendered too much in watering down human rights protections for the expediency of getting the job done. There are other specific instances, such as the consequences of failure to meet the Super-Majority in Co-Prosecutor and Co-Investigating Judge disputes, victim-witness protection and the right to be informed of a right to lawyer only coming into play at the Investigating Judge phase rather than from the moment a person is taken into custody, all discussed later, that raise alarm bells. It is a recurring tragedy of the odyssey of accountability in Cambodia that fundamental principles have consistently been bartered away. The lesson that the international community has taught Cambodia and other States is that when it comes down to it, these principles are not in fact fundamental.

Challenging the rules before the court itself is probably a futile exercise: arguments about their lawfulness will be decided by the very same persons who made those rules. What about the Constitutional Council, which has a role in such matters under Chapter X of the Constitution? The Extraordinary Chambers are subjects of domestic law and must function in accordance with the Cambodian Constitution. There are not only the matters referred to above, but also issues relating to Article 31, which does require the upholding of human rights standards. Interestingly, the role of the Constitutional Council in overseeing the constitutionality of the actions of the Extraordinary Chambers has not been specifically excluded in any of the agreements so it may yet have a role. And of course, all of this would mean yet more delays.

Another major concern is that the adoption of special rules for the Extraordinary Chambers sets a terrible precedent. It really is very unwise to establish another layer to the existing layers of justice in the courts of Cambodia, which have long been plagued by differing standards for the privileged and for the un-privileged. The 2004 report of the Secretary-General's Special Representative to Cambodia compares the case of the Prime Minister's nephew against whom all charges of unlawful killing (witnesses say he opened fire on a crowd following a traffic accident) were controversially dropped by a closed session hearing of the Court of Appeal, and the man who stole the equivalent of \$0.65 but was sentenced

²³⁷ Colin Warbrick, "International Criminal Courts and Fair Trial", (1998) 3 Journal of Armed Conflict Law 45, 54.

to four years imprisonment after his mother could not pay the \$1,000 bribe requested in exchange for his release.²³⁸ One of the more uncomfortable features of internationalised models of justice in post-conflict countries is that despite significant problems, they benefit from a much higher standard of process than the ordinary proceedings. The qualitative differences between proceedings at the ICTR and in the Rwandan justice system have been one reason for the tribunal's inability to contribute towards social repair in Rwanda. Languish the Serious Crimes project in East Timor certainly did, but it had markedly far more resources and human capacity than did the regular courts. In Cambodia, adopting special Internal Rules for the Extraordinary Chambers means that those accused of responsibility for the deaths of between 1-3 million people are to be tried under what will seem like five-star justice, while those ordinary citizens, who include victims of the Khmer Rouge, who steal out of hunger are subjected to the same old standard. Good intentions aside, the creation of a special rules for one group is further entrenching the inherent unfairness and inequalities of justice in Cambodia. In terms of law, it runs foul of fundamental notions of equality before the law for all citizens (Article 31 of the Constitution guarantees equality before the law for all 'Khmer' citizens). Creating a higher quality of process for a certain type of accused is a legacy that Cambodia really does not need.

E. *Institutions of the Extraordinary Chambers*

The deal to try the Khmer Rouge contains many compromises that will have significant ramifications across the board. The negotiated compromise reached in relation to investigations and prosecutions was to create two equally responsible Co-Investigating Judges and Co-Prosecutors in charge of investigations and prosecutions respectively. They are equal in status and jointly responsible for their mandated tasks. This balancing out of international Investigating Judge and Prosecutor by Cambodian *doppelgängers* of equal status introduces an immense potential for paralysing the entire project. With the focus being on the international-national split among the judges, we do not yet have insider information in the public sphere about how intra-Prosecutor and intra-Investigating Judge working relations are progressing. Without such insight and looking at it from the outside, it is extraordinarily cumbersome and will use up considerable resources from a shoe-string budget and a very tight timeframe. Cross cultural work ethics and inconsistent practices will surely cause difficulties and polarised office relations can be expected. One wonders about division of labour and standardisation of practice. Substantial delays are surely inevitable as both national and international officeholders are required to agree on a course of action. Disagreements, of which there can be expected to be many, have to be resolved by a panel of judges at the Pre-Trial level, but there is nothing for solving disagreements of the Co-Prosecutors and Co-Investigating Judges at trial. Given what we know about the Cambodian legal system, the peculiar setup of the two key offices makes it very easy for the Cambodian government, were it minded to paralyse the process, to have its personnel artificially challenging all manner of decisions of international counterparts. Of course, it can work the other way round too.

Another major compromise relates to the decision-making at the court. Cambodian judges are numerically in the majority but voting is to be by way of 'Super Majority' under which no decision can be made unless there is unanimity, at least one international judge agrees with the Cambodians or the Cambodian block is split and at least two of the local judges vote with the internationals. This voting formula suggested by Senator John Kerry was not the preference of the United Nations²³⁹ but has been incorporated into Article 14 of the Law on Extraordinary Chambers. It is to be applicable to all judicial decision-making.

²³⁸ SRSG Cambodia Report 2004, supra note 55, para. 24.

²³⁹ Secretary-General's Report on Khmer Rouge Trials, para. 29. A/57/769 dated 31 March 2003.

The compromise puts enormous pressure on the internationals, but less on the Cambodians (given that they are likely to vote as a block, the pressure on them will not be as extreme, although any Cambodian who breaks away from the block will certainly put himself at risk).

The Super Majority should function satisfactorily where the issue before the particular chamber is simple in the sense of requiring an affirmative or negative answer. Where more complex issues, such as legal interpretation, are required, there are likely to be more than two possible interpretations, and the Super Majority will not work in such a situation. I discuss the problems with the dispute-solving function of the Pre-Trial Chamber below. In relation to verdicts, the issue that a Trial Chamber must answer at the end of the trial is whether the accused is guilty as charged. A conviction requires unanimity or a qualified majority voting under the Super Majority (one of the internationals must join the Cambodians or two Cambodians must join the internationals). Where there is no Super Majority, the indictment is not proven and justice demands that there must be an acquittal. Fortunately, this is reflected in Rule 98(4) dealing with judgements.

1. *Co-Prosecutors*²⁴⁰

Cambodian law is fuzzy on the division of responsibility between the roles of prosecutors and investigating judges. The Internal Rules that have come some 5 years after the basic agreement, have sought to clarify the situation but caused inconsistencies. For example, Article 16 of the Law on Extraordinary Chambers expressly states that all indictments are the responsibility of the Co-Prosecutors, but Rule 67 seems to push that to the Co-Investigating Judges. While the Law on Extraordinary Chambers only specifies a role for the Co-Prosecutors in preparing indictments, under the Internal Rules, the Co-Prosecutors can now conduct preliminary investigations. If there are grounds for suspecting the commission of a relevant crime, then the matter must be referred to the Co-Investigating Judges for a judicial investigation. It only comes back to the Co-Prosecutors for trial if the accused is indicted following that investigation.

Under the Law on Extraordinary Chambers, the Co-Prosecutors may prosecute according to existing Cambodian procedure. But they seek guidance from “*procedural rules established at the international level*”²⁴¹ where existing procedures do not deal with a matter or if there is uncertainty regarding their interpretation or application or doubts about consistency with international standards. Irrespective of the fact that there are now Internal Rules, it is quite extraordinary for the prosecution to be given the right arbitrarily to pick and choose from “*procedural rules established at the international level*” that are to apply. Not only does this create uncertainty as to what the law used at the Extraordinary Chambers is, but inequality because the defence have no such rights. There are other problems that could arise—what if the accused disagrees with choice of particular provisions, which is almost certain to be self-serving, what if the Co-Investigating Judges or the Trial Chamber do not

²⁴⁰ Chea Leang (Cambodia) and Robert Petit (Canada) are the Co-Investigating Judges of the Extraordinary Chambers.

²⁴¹ This is a wholly amorphous concept—there are no such things that one can simply reach out to and pick and choose which to incorporate into the proceedings (in any event, such a methodology of incorporation would not be consistent with a dualist system, and also allows for bypassing of the democratic process). What do exist are general principles of due process and fair trial set out in documents such as the ICCPR, the jurisprudence of monitoring bodies such as the Human Rights Committee applying those standards to the practice of domestic courts, and individually crafted procedural rules adapted for the use of each international criminal tribunal (ICTY, ICTR, ICC) as well as the procedural laws of internationalised mechanisms in special courts such as Sierra Leone and Timor Leste. Questions arise over whether ‘soft law’ can be considered within this category, but a lot of ‘soft law’ has in fact already been introduced as law in Cambodia through the UNTAC Law. The truth is that despite frequent references to ‘international standards’, the precise normative content of those standards is not clear.

agree with the “*guidance*” that the Co-Prosecutors have derived from “*procedural rules established at the international level*” and actions have been taken on that basis? Rule 2 of the Internal Rules preserves this wholly unfair system, but the detail of the rest of the rules greatly limit the need to resort to this provision for they provide close regulation of the way that the Co-Prosecutors are to conduct preliminary investigations and trial proceedings.

Rule 71 also provides detailed regulation for the settlement of disputes between the two Co-Prosecutors by the Pre-Trial Chamber. This chamber will, as with every other decision involving the judges in Chambers, have to be made by way of the Super-Majority. What is most bizarre is what happens if the majority is not met. Sub-rule 71(4)(c) provides that “*the default decision shall be that the action or decision done by one Co-Prosecutor shall stand, or that the action or decision proposed to be done by one Co-Prosecutor shall be executed*”. This convoluted provision is clearly a compromise provision arising out of the failure to reach agreement on the consequences of the presumption of innocence in such a situation. The judges clearly could not agree on what seems elementary, that if there is failure to reach the required majority, then the matter must be decided in favour of the accused person who is presumed to be innocent. Their compromise provision is also inadequate. It addresses just one situation and misses the point that the two protagonists may be taking different courses of action, or proposing completely different actions or decisions. It must of course be noted here, that all of this is inconsistent with Article 20 *bis* of the Law on Extraordinary Chambers, which says that if there is no majority, “*the prosecution shall proceed*”.

2. Co-Investigating Judges²⁴²

The Investigating Judge is a much criticised feature of the Cambodian legal system; unlike the judiciary and prosecution, it is not rooted in the Constitution. There have long been calls for the abolition of this office for being unconstitutional and an impediment to the proper administration of justice in Cambodia; it is said to contribute to the systemic dysfunction and regular miscarriages of justice, as well as hindering police investigations into crimes and reducing the effectiveness of the prosecutor’s function.²⁴³ Yet, the Investigating Judge plays a central part at the Extraordinary Chambers.

Under the Law on Extraordinary Chambers, it is the Co-Investigating Judges that are responsible for all investigations and they are to conduct investigations on the basis of information received from unlimited sources and can question suspects, victims and witnesses, and collect evidence in accordance with existing procedure. The Internal Rules adapt this to allow a role for Co-Prosecutors to conduct preliminary investigations and to make the Co-Investigating Judges responsible for all judicial investigations. It also provides that Co-Investigating Judge investigations are only triggered by the Introductory Submission of the Co-Prosecutors (Rule 53 and Rule 55) or possibly further investigations referred by the Trial Chamber under Rule 93.

Here too, the Co-Investigating Judges are given the right to “*seek guidance in procedural rules established at the international level*” and the same concerns expressed earlier will apply here too. The matter is much alleviated by the detailed Internal Rules, although it preserves this unfortunate ‘make up your own rules’ power for the Co-Investigating Judges.

The earlier concerns about the failure to reach a Super-Majority at the Pre-Trial Chamber also apply to the situation of Co-Investigating Judge disputes. Here, the Internal Rules provide that failure to reach the Super Majority means that “*the default decision shall be*

²⁴² Marcel Lemonde (France) and You Bun Leng (Cambodia) are the Co-Investigating Judges of the Extraordinary Chambers.

²⁴³ See Statement of Participants of a Workshop on the Reform of Administration of Justice Relating to Police in Cambodia organised by Cambodian Defenders Project/IHRLG (CDP), online: http://www.c-r.org/acc_cam/intro.htm. The RGC’s insistence on the use of Cambodian procedure led the United Nations to insist on the inclusion of an impartial investigating judge.

that the order or investigative act proposed to be done by one Co-Investigating Judge shall be executed". Fortunately, the judges have provided that where the disagreement concerns provisional detention, "there shall be a presumption of freedom". But here too, the judges have not addressed the problem that under Article 23 *bis* of the Law on Extraordinary Chambers itself, in the even of a failure to reach the Super Majority, "the investigation shall proceed".

3. *The Chambers*

The Extraordinary Chamber panels are comprised as follows:

1. For the Trial Court sitting as a court of first instance: 3 Cambodian judges, 2 international judges.²⁴⁴
2. For the Supreme Court sitting as appellate court and court of final instance: 4 Cambodian judges, 3 international judges.²⁴⁵

Local and international judges enjoy equal status in this experiment. Control of the tribunal was always a contentious issue in negotiations. On the one side, Cambodia strenuously argued that its sovereignty required that locals control the process whereby Cambodians are tried in relation to what they did to other Cambodians. On the other side, the United Nations pushed for international control in order to cut the Gordian knot of political control over the Cambodian judiciary. Implicit in the control issue is the balancing of a nation's need to have ownership over a process of dealing with the defining period of its recent history, and the legitimate interest of the international community in any process of accounting for international crimes that strike at the core values of humanity.

Although not described as being part of the Chambers, there is also a Pre-Trial Chamber of five judges (3 Cambodians and 2 internationals)²⁴⁶ which will, *inter alia*, resolve disputes between the two Co-Investigating Judges and the two Co-Investigating Prosecutors. A fundamental objection of principle must be made to the fact that a panel of judges is drawn into the in-fighting of one party to the proceedings, and is empowered to make decisions on investigation and prosecution. It is contrary to all notions of professional independence for a panel of judges to decide on disputes about such matters, regardless of whether or not they serve as judges on the merits of the case. This dilutes standards of prosecutorial independence and creates a politically charged investigation, indictment and prosecution process.

F. *Defence Matters*

There is considerable confusion about the intentions of the RGC in relation to the accused, i.e. the Khmer Rouge. It is often accused of seeking to protect the 'reconciliation' reached with the Khmer Rouge, and thus it is blocking the process of accountability in every way. It is also alleged that the RGC is doing all it can to prevent any exposure of China's role vis á vis the Khmer Rouge. But on the other hand, the RGC is also blamed for the many barriers placed in the way of an effective defence for the same Khmer Rouge, for example

²⁴⁴ The Trial Court judges are Dame Silvia Cartwright (New Zealand), Jean-Marc Lavergne (France), Thou Mony (Cambodia), Nil Nonn (Cambodia) and Ya Sokhan (Cambodia).

²⁴⁵ The Supreme Court judges are Chandra Nihal Jayasinghe (Sri Lanka), Agnieszka Klonowiecka-Milart (Poland), Ya Narin (Cambodia), Motoo Noguchi (Japan), Sin Rinh (Cambodia), Som Sereyvuth (Cambodia), and Kong Srim (Cambodia).

²⁴⁶ The Pre-Trial Chamber judges are Rowan Downing (Australia), Prak Kimsan (Cambodia), Katinka Lahuis (Netherlands), Ney Thol (Cambodia) and Hout Vuthy (Cambodia).

by acting through the Cambodian Bar Association to block them from having international defence counsel. If the RGC is indeed seeking to protect the Khmer Rouge, one has to ask why they would be blocking foreign lawyers from providing them with an effective defence? One could speculate that the concern lies in the RGC's inability to control foreign lawyers; this raises the possibility that it may indeed be the China card which dominates the RGC's policy on the Extraordinary Chambers. To this end, it is interesting to note that this year, for the first time, China made a US\$91.5 million contribution to the international community's annual assistance package to Cambodia.²⁴⁷

Defence counsel

Together, the UN-RGC Agreement (Article 13) and the Law on Extraordinary Chambers (Article 35 *bis*) enshrine the accused's right "*to be tried in their own presence and to defend themselves in person or with the assistance of counsel of their own choosing, to be informed of this right and to have legal assistance assigned to them free of charge if they do not have sufficient means to pay for it*". This also goes towards ensuring an adversarial trial, meaning the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party.²⁴⁸ Rule 22(1)(b) of the Internal Rules provides that indigent persons have the right freely to choose from amongst national and foreign lawyers who appear on a list maintained by the Defence Support Services (discussed further below).

The issue of foreign defence counsel has been a source of major dispute at the Extraordinary Chambers. The Law on Extraordinary Chambers provides the accused is to have freedom of choice in selecting counsel, subject to meeting domestic requirements for admission to practice before the Extraordinary Chambers. Few local lawyers have the expertise to take on cases of the magnitude that will be tried at the Extraordinary Chambers. The UNTAC Law allows foreign lawyers to practice in Cambodia if they furnish proof of Bar membership or authority to practice in their own countries. But the Law on the Bar, which came later and is *lex specialis* to UNTAC Law, is stricter. Since 1995, this has authorised the Bar Association acting through the Bar Council to regulate the practice of law in Cambodia.²⁴⁹ To be licensed to practice, one needs to have 'Khmer' nationality, have a law degree following four years of legal study at an accredited institution, complete the Bar Association's course, pass the Bar examination and complete a one year apprenticeship. There are exceptions: for example, special provision is made for those who have been in practice for several years and those with doctorates in law. Then, in all cases, approval must be obtained from the Bar Council and the Appeal Court, and the person must have been admitted to their own Bar Association which must have a reciprocal arrangement for Cambodian lawyers.²⁵⁰ In any event, foreign lawyers are limited to working as co-counsel with Cambodian lawyers—they may not act as sole legal representatives. These criteria, laid down in Article 31, have rendered the Bar Association virtually a closed shop for several years. Yet, in September 2004, four parliamentarians including the Prime Minister, two Deputy Prime Ministers and Interior Ministry Secretary of State were admitted; they do not have the requisite legal qualifications, fuelling claims of arbitrariness, lack of independence and politicisation.²⁵¹

²⁴⁷ Ker Munthit, "Foreign donors pledge aid to Cambodia, rap corruption" *Associated Press* (21 June 2007). China has long been a donor; in 2006, it pledged Cambodia US\$ 600 million in aid, see "China gives Cambodia \$600m in aid", *BBC News*(8 April 2006).

²⁴⁸ *Ruiz-Mateos v. Spain*, Judgement of 23 June 1993, Series A, No.262. (1993), para. 24; *Rowe and Davis v. United Kingdom* (App.28901/95), Judgment of 16 February 2000, para. 60.

²⁴⁹ Law on the Bar, adopted 15 June 1995 promulgated 23 June 1995 (unofficial translation by Cambodian Defenders Project).

²⁵⁰ Koy Neam "Cambodian Judicial Process", *supra* note 21, 34.

²⁵¹ See ADHOC, Human Rights Report 2004, *supra* note 3; SRSR Report 2004, *supra* note 3, paras. 26 and 27.

The major disputes at the Extraordinary Chambers on defence counsel have centred on the role of internationals in Cambodia's legal community, and what is seen by some as an attempt to preserve the Cambodian Bar Association's monopoly control over the provision of legal defence in the country, and by others as an attempt by RGC officials to sabotage the chances of there being a genuine process of accountability. The first major confrontation came over the ability of foreign lawyers to appear in the courts of Cambodia, and then the terms of their membership of the Cambodian Bar Association (specifically the fees that they had to pay to become a member, which is required in order to be able to practice in Cambodia). Having held out for several months, the Cambodian Bar Association caved in to pressure and agreed to foreign lawyers in March 2007²⁵² and later reduced the proposed registration fees from US\$4,900 to US\$500 per foreign lawyer for the duration of the trials.²⁵³ The Internal Rules preserve a role for it in training (Rule 11), but effectively transfer the coordination of defence lawyers to the UN funded Defence Support Section, which is to maintain a list of lawyers who can appear before the Extraordinary Chambers. Such lawyers will have to be registered with the Cambodian Bar Association. The Defence Support Section is examined more closely below.

Problems of equality of arms have plagued earlier efforts in a range of judicial mechanisms from the ICTY and ICTR to Timor Leste. Serious efforts have been made to address the challenges of an effective defence through the creation of special defence units at the tribunals in Sierra Leone and Bosnia. But the Law on Extraordinary Chambers, dating to 2004 although negotiated over many years, is fundamentally imbalanced in relation to defence counsel. It makes the Office of Administration and RGC responsible for assisting everyone, including prosecutors and investigating judges, but leaves out defence counsel. The Rules contain provisions that repeatedly have the judges, Co-Prosecutors (regarded as judicial officers) and Co-Investigating Judges making decisions about the Extraordinary Chambers, but no provision is made for defence lawyers to participate or even be informed or heard. No provisions were made for a statutory office of a Public Defender or Office of the Defence in Cambodia. That in itself does not preclude an office from being created, and prior to the adoption of the Internal Rules there was already a Defence Support Section, funded by the United Nations.²⁵⁴ The fact that an international, and a common law practitioner, headed the office has irked the Cambodians, particularly the Cambodian Bar Association. The institutionalisation of this office has now occurred through Rule 11 of the Internal Rules, which provides for the establishment of the Defence Support Section. It is clear from the structure of this rule that its main concern is to deal with the dispute over the role of international lawyers in the courts of Cambodia. The Defence Support Section does not provide legal defence. It coordinates various lists of lawyers with the Cambodian Bar Association, manages defence counsel in situations where counsel is provided under the rules, and provides training along with basic legal assistance and support including legal research and document research for defence lawyers appearing before the ECCC. The Internal Rules also make an important step towards levelling out the playing field by allowing an accused two counsel, one international and one national, to balance the two Co-Prosecutors. The legal assistance scheme is a first in that the defence lawyers will be paid the same as prosecutors, and that the locals and internationals will all be paid at the same rate.

²⁵² "Major barrier to Khmer Rouge trials is removed", *Reuters* (13 March 2007).

²⁵³ The international judges argued that the high fee would have had a prohibitive impact on the rights of accused and victims to choose counsel, see Statement from the Review Committee of the Extraordinary Chambers in the Courts of Cambodia, 16 March 2007. Also, Seth Mydans, 'Cambodia moves a tiny step closer to Khmer Rouge trial', *International Herald Tribune* (1 May 2007).

²⁵⁴ The Head of the Defence Support Section is Rupert Skilbeck (UK).

The question of when a person becomes entitled to legal representation is controversial in Cambodian law,²⁵⁵ yet was not addressed in the Law on Extraordinary Chambers. Article 24 *bis* requires that during investigation, suspects are entitled unconditionally to assistance of counsel of choice, and to have legal assistance assigned free of charge if they cannot afford it. Article 35 *bis* simply reiterates the ICCPR's provision in Article 14 on the right to defend oneself in person or with the assistance of legal counsel of one's own choosing, which is in any event protected under Article 38 of the Constitution. The Internal Rules are not as clear as they should be on this point. Under Rule 51, when a person is taken into police custody at the instruction of the Co-Prosecutors on the grounds of being suspected of having participated in a relevant crime, he is to be informed of his rights under Rule 21(d). This rule does not require that such a person is informed of about the right to a lawyer during those 48 hours, merely that he or she has the right to be defended by a lawyer of choice and should at every stage be informed of the right to silence. This repeats the classical chicken-and-egg situation whereby one must be told that one is entitled to a lawyer in order to know to ask for a lawyer. If the person asks for a lawyer, the lawyer is to be informed of the request immediately and the two will have a maximum of 30 minutes to discuss the matter before going before the Co-Prosecutors. It is not clear if the authorities must provide the lawyer to the person, and there is nothing to prevent the person from being questioned if he does not ask for a lawyer (not knowing that he can do so), or in the absence of the chosen lawyer. This lack of clarity disappears when we get to the judicial investigations. Under Rule 57, the suspect, who is then an Accused, is entitled to legal representation when makes his first appearance before the Co-Investigating Judges, and the Co-Investigating Judges are specifically required to inform him of the right to a lawyer and the right to remain silent. If a lawyer is requested, the Accused cannot be questioned without the lawyer unless he expressly waives that right. Here, the lawyer must be summoned a minimum of 5 days before the interview with the Co-Investigating Judges takes place.

Defences to crimes

The Law on Extraordinary Chambers has no provisions concerning the kinds of defences that are open to those charged with crimes under its jurisdiction. All it provides is that neither position nor rank relieves an accused of criminal responsibility nor mitigates, and that superior orders are not a defence (Article 29). This is staggering given that there are no provisions on defences in domestic law. The Constitution simply recognises the right to defend oneself at trial, and UNTAC Law's Article 68 only identifies factors that can mitigate sentence, including necessity and the psychological or psychiatric state of an accused, which are usually regarded as defences to crimes. The SOC Law on Criminal Procedure has no provisions on defences. In light of this huge gap in the law, it is bizarre that the Internal

²⁵⁵ The dispute involves when the right to legal representation begins, and whether interrogation can take place in the absence of counsel where one has been asked for. Article 76 of the SOC Law on Criminal Procedure only requires that the accused have legal representation (if it is so requested) when the person is brought before an investigating judge (no such obligation exists for interrogation by a prosecutor, governed by Articles 62 and 63, although Article 62 requires interrogation in the presence of counsel who accompany the accused). If counsel is for any reason unable to attend at the fixed time and place, Article 77 allows the investigating judge to interrogate the accused without the presence of a lawyer. Article 10(1) of UNTAC Law states that the "right to assistance of an attorney or counsel is assured for any person accused of a misdemeanour or crime"; Article 10(2) then goes on to provide that no one may be detained on Cambodian territory "more than 48 hours without access to assistance of counsel, an attorney, or another representative authorised by the present text, no matter what the alleged offence may be". The detaining authorities insist that this means that the right to counsel only arises after 48 hours. Human rights advocates insist the right arises upon being taken into custody, and if the accused asks for counsel within the 48 hours it must be provided, otherwise it becomes mandatory after 48 hours. It should be noted that under the SOC Law's Article 47, the 48 hours do not include necessary transportation by the quickest means possible. Pursuant to Articles 75 and 76 of the same, it is only when the accused is brought before an investigating judge that there is a statutory requirement to advise a detained person of his or her rights, and legal representation is arranged if requested.

Rules are also silent on defences. The logical solution, at least for the crimes of murder, torture and religious persecution under the 1956 Penal Code, would be to revert to the law that was applicable at the time of the crimes. That code itself recognises the following as defences: (1) Insanity or unsoundness of mind; (2) Youth (for those under 18 years of age, the court must determine the capacity for discernment); (3) Duress arising from a state of absolute necessity, that is when the accused was exposed to an actual and imminent danger that arose from circumstances beyond his control, and had no other option; (4) Superior orders, provided the order came by law or a legitimate authority; (5) Self-defence or the defence of another, subject to certain conditions.

While these may reasonably be applied to crimes charged under the 1956 Penal Code, what of the defences to international crimes such as crimes against humanity and grave breaches of the Geneva Conventions? Is this a situation where one goes to “*procedural rules established at the international level*”? If so, does one look at what exists in the international arena at present time or at the time the offences occurred? Who decides what defences are open to an accused, and must an accused wait until judgement to see if the Trial Chamber accepts that the defence relied upon is in fact one recognised as lawful? It is true that there are no defences listed in the Statutes of either *ad hoc* tribunal and the ICC was the first to provide a detailed listing, but is this court really able to enter let alone survive intellectual mazes of the sort that the ICTY's Appeals Chamber in the Erdemovic case had to go through in identifying the content of customary rules on duress and superior orders in international law at the relevant time?

It is a major failure that the Internal Rules do not make any provisions on defences. It is also curious that while so many other substantive law issues have been packaged up as ‘Internal Rules’, defences were not.

Amnesties and pardons

The complex role of amnesties and pardons in Cambodia has already been examined. Particular note needs to be taken of the way that the Law Outlawing the Khmer Rouge and its amnesties were dealt with in the case of Chhouk Rin. Article 40 of the amended Law on Extraordinary Chambers is the product of the bitter wrangling between the United Nations and the RGC on the issue. The United Nations had originally insisted on a provision in the earlier draft UN-Cambodia agreement that there shall be no amnesty for the crimes of genocide, war crimes and crimes against humanity, and that an amnesty granted to any person falling within the jurisdiction of the chambers would not be a bar to prosecution.²⁵⁶ In the UN-RGC Agreement, the parties have agreed that:

1. The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement.
2. This provision is based upon a declaration by the Royal Government of Cambodia that until now, with regard to matters covered in the law, there has been only one

²⁵⁶ Article 9, draft Tribunal Memorandum of Understanding Between the United Nations and the Royal Government of Cambodia, Phnom Penh Post, No. 9/22, October 27-November 9, 2000, available at <http://www.yale.edu/cgp/mou_v3.html> at 5 May 2005. This incorporated a note from the Head of the Cambodian delegation “*The Cambodian Constitution gives the rights to His Majesty the King to grant amnesties (Article 27), and also to the National Assembly to make laws concerning amnesty (Article 90). So far His Majesty King Norodom Sihanouk has only exercised this right with regard to the Khmer Rouge when requested by the Royal Government of Cambodia, with a clear endorsement also by two-thirds of the members of the National Assembly. Our Draft Law (Article 40) makes a clear statement of the government's intent not to request an amnesty for any person who committed crimes relating to applicable law described in Articles 3-8 of the Draft Law. This indicates our intention to make a clear break in the cycle. As to the past, I can inform you that, with regard to matters covered in this Draft Law, there has been only one case, dated 14 September 1996, when an amnesty was granted to only one person with regard to a 1979 conviction on the charge of genocide*”.

case, dated 14 September 1996, when a pardon was granted to only one person with regard to a 1979 conviction on the charge of genocide. The United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers.

As previously observed, this agreement is binding as between the RGC and United Nations but absent enabling legislation, does not currently have status of law in Cambodia. The amnesty/pardon compromise is reflected in Article 40 of the Law on Extraordinary Chambers, which now provides that the government will not request any pardons or amnesties and that “*the scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers*”. The United Nations and RGC passed the hot potato to the judges. But this provision does not diminish the King’s Constitutional powers under Article 27; all it does is restrict the actions of the RGC. On the specifics, Khmer Rouge defectees Nuon Chea and Khieu Samphan were never convicted so they were never pardoned, and they did not get a legally recognized amnesty from prosecution. The government is now bound not to seek a formal amnesty from prosecution for them. It would therefore seem that the road is theoretically clear to prosecute them. But as already illustrated earlier in this paper, the controversy about Ieng Sary’s pardon from the 1999 conviction will most likely run and run. Depending on who is investigated and prosecuted, the Extraordinary Chambers may also have to examine the validity of amnesties granted under the 1994 Law Outlawing the Democratic Kampuchea Group, and whether these will protect the beneficiaries from prosecution under the Law on Extraordinary Chambers. As has already been illustrated in the three Khmer Rouge prosecutions arising from the Kampot train attack, the position taken by the domestic courts is that this is a valid law and amnesties granted under it are valid.

G. *Victims and Witnesses*

There are no specialised witness protection provisions in existing Cambodian law. Under Article 33 *bis* of the Law on Extraordinary Chambers, it is the court that is responsible for victim and witness protection.²⁵⁷ Such protection shall not be limited to the conduct of in camera proceedings (already possible under Article 129 of the SOC Law on Criminal Procedure) and the protection of the identity of a victim or witness. For all the UN’s experience in this field, that is all that the core agreement contained on victim and witness rights. It is important to underline that the issue goes beyond witness protection, and that witness care should also be part of the package.²⁵⁸ Experience has shown that retraumatisation is a very real danger that arises from testifying about horrifying atrocities and personal losses. On-site and follow-up counselling services are in some cases absolutely vital and should be tied into a comprehensive nation-wide mental health programme.²⁵⁹

A concern for victims seems to infuse through the Internal Rules. A ‘Victim’ is defined as a natural person or legal entity who has suffered harm as a result of commission of any crime within the court’s jurisdiction. Victims’ Associations also have standing at the Extraordinary Chambers, if they meet the requirements. But when one looks at the substance of the provisions on victims, they are most disappointing. The Victims Unit established under Rule 12 is wholly inadequate to meet their complex needs. The parties actually entered into this agreement with no funds budgeted for victim and witness protection, and the Victims Unit must be seen as a reflection of that reality. The unit’s tasks are unusually varied, but none of them include the crucial tasks of victim protection and care, and none of the provisions

²⁵⁷ This is not entirely consistent with Article 23 of the UN-RGC Agreement, which places the responsibility on the Co-Investigating Judges, Co-Prosecutors and the Extraordinary Chambers.

²⁵⁸ Note that under Article 36, victims may lodge appeals.

²⁵⁹ Linton “Reconciliation In Cambodia”, *supra* note 8, 131-142, 232-252.

are to do with witnesses who are not victims. There is nothing about medical assistance, counselling or other supportive services to be provided to victims before, during or after the trials. The unit is to perform such logistical tasks as maintenance of various lists, assisting victims with lodging complaints and making Civil Party applications (discussed below), providing information, 'facilitating participation' of Victims and Civil Party representatives, engaging in outreach and adopting administrative regulations. There is no requirement that the staff have the particular skills pertinent to a unit supposed to be dealing with victims, and there is no role for the Victims Unit to make representations to the court on victim and witness protection.²⁶⁰ The unit lacks the mandate to provide anything beyond logistical assistance to victims and witnesses. This situation reflects the budgetary constraints, but it is really unacceptable to have victims and witnesses handled in such an inadequate manner in this day and age.

Protective measures are governed by Rule 29. It is the duty of the court to ensure the protection of victims and witnesses, including Civil Parties (see later), and it may do so through a range of general protective measures including the following:

1. confidentiality of their private information, e.g. address;
2. use of pseudonyms;
3. anonymous recording of the person's statements (surprisingly, these can only be appealed within 15 days of notice of the order, where the person's identify is essential to the case for the defence);
4. distortion of voice of features where the Charged or Accused Persons seeks a confrontation with the witness;
5. as an exception to the principle of public hearings, order proceedings to be held in camera or presentation of evidence by electronic or other special means.

The failure to include any of the widely used provisions at international courts and tribunals for the protection of victims of sexual violence does not mean that such provisions cannot be introduced at a later stage.²⁶¹ Rule 29 is not exhaustive, and gives the court an inherent jurisdiction to order other means of protection. Rule 2 also contains a solution of sorts—questions not addressed in the Internal Rules can be resolved by everyone (except the defence, i.e. Co-Prosecutors, Co-Investigating Judges and Chambers) cobbling together their own solution as they see fit by relying on Rule 12.1 of the UN-RGC Agreement and Articles 20, 23, 33 or 37 of the Law on Extraordinary Chambers,²⁶² Rule 21 of the Internal Rules and the applicable criminal procedure laws. Fortunately, Rule 2 also provides that proposals for amendment of the Internal Rules should be submitted to the Rules and Procedures Committee as soon as possible thereafter.

Reparation is a key element of the right to an effective remedy and can take different forms such as restitution, rehabilitation, compensation, guarantees of non-repetition and satisfaction.²⁶³ Beyond Article 39 stating that all unlawfully acquired personal property

²⁶⁰ Rule 29 on Protective Measures does however provide for consultation of this unit should protective measures for victims and witnesses be sought.

²⁶¹ To date, sexual violence is not known to have been deployed as a weapon of war or as part of a widespread or systematic attack on civilians in Cambodia, which of course does not mean there were no such crimes. The Khmer Rouge leadership are known to have required strict adherence to certain norms of conduct, which included severe penalties for sexual acts, consensual or not, committed outside the framework it laid down. This understanding is reflected in the structuring of the jurisdiction *ratione materiae* chosen for the Extraordinary Chambers, which does not even include sexual violence as a domestic crime under the 1956 Penal Code. New evidence may well emerge as the trials progress. See Katrina Anderson, "Tang Kim's Dilemma: Responding to Sexual Violence Under the Khmer Rouge", *Searching for the Truth Magazine*, (First Quarter 2005) at 28-41.

²⁶² These are the provisions referred to earlier, which give everyone bar the Defence the right to pick and choose what they want from so-called "*procedural rules established at international level*".

²⁶³ See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc.A/RES/60/147, 21 March 2006.

of persons convicted shall be returned to the State (which is not required to return it the lawful owner), there is nothing in the Law on Extraordinary Chambers addressing the issue of reparations for victims. But the Internal Rules draw from existing law and through Rule 23, expressly permit victims to participate in proceedings against “*those responsible for crimes within the jurisdiction of the ECCC*” by supporting the prosecution and seeking “*collective and moral reparation*” for injuries caused by such persons. Sub-paragraph 12 explains that this type of reparation is awarded against, and borne by convicted persons, and may be in the form of a public judgement in the media at the convicted person’s expense, an order to fund a non-profit activity or service intended for the benefit of Victims or “[*o]ther appropriate and comparable forms of reparation*”.

Nothing can ever adequately compensate the survivors of the Khmer Rouge, and the judges have tried to do what they can in the absence of necessary legislation and a State-sponsored reparations programme. But the fact remains that the issue of reparations raises questions of national policy which are not for the judges of the Extraordinary Chambers to determine. This court cannot, as does the Inter-American Court on Human Rights, direct the State to set up complex reparation schemes for victims. Reparations for gross violations of human rights are an extremely sensitive and complex matter that must be very carefully considered, in consultation with a wide range of interested parties, most importantly the victims themselves. It is just not the place of judges to engage in this policy and lawmaking exercise. In any event, the reparations envisaged in the Internal Rules offer just symbolic reparations. They are vaguer than what exists under the applicable law²⁶⁴ and fall below the principles espoused in the UN’s Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. These are well-meant token gestures that will not make a difference to Victims. One has to stress that it is for the RGC to be focusing, as a matter of urgency, on designing an effective reparations policy that reaches as many of the victims and survivors of the Khmer Rouge as possible.²⁶⁵

Depending on the stage at which the proceedings are, the victim seeking to become a Civil Party has, under Rule 23, to petition either the Co-Investigating Judges, the Co-Prosecutors or the Trial Chamber itself. The last opportunity to do so is at the opening of proceedings before the Trial Chamber.²⁶⁶ The petition may be individual or on behalf of a group of victims. Becoming a civil party means the victim becomes a party to the criminal proceedings, and is entitled to legal representation. The civil party is no longer just a regular witness (parties can only be questioned in accordance with the procedure set down in law). But he or she remains entitled to seek protective measures in the same way as are other victims. The Cambodian Human Rights Action Committee has rightly pointed out that the form of

²⁶⁴ Article 2 of the SOC Law on Criminal Procedure recognises that any criminal offence may give rise to a public (criminal) action and a civil one. A civil award is to be proportionate to the damages incurred. Under Article 9, an injured person may also lodge a complaint along with the prosecution proceedings in order to obtain an award. This may be filed by the victim, legal guardian or others who by law (such as legal representatives) are authorised to represent the victim (Article 14). Under Article 15, the civil action may be exercised against principals, co-principals and others who are criminally responsible for the offence. There are court fees to be paid. Civil claims that are filed separately from the criminal action cannot be decided upon until the criminal case is determined (Article 16). The right is also preserved in Article 27 of UNTAC Law, drawing in the Basic Principles of Justice for Victims of Crime and Abuse of Power. Victims can be joined as civil parties to criminal proceedings, such civil action must be brought during preliminary investigations or during the sentencing period. Convicted persons and their accomplices are jointly liable for reparations or compensation.

²⁶⁵ There is a sound discussion of reparations and the policy considerations that need to be taken in ICTJ, Comments on Draft Internal Rules for the Extraordinary Chambers in the Courts of Cambodia, 17 November 2006, 6-9.

²⁶⁶ In light of the realities of Cambodia, Rule 82(2) is an unreasonable and draconian limitation: it actually provides that a Civil Party who does not appear personally or is not validly represented at any time during the trial will be deemed to have abandoned his or her action, unless the claim for reparation has been made before the start of trial.

participation envisaged is extremely limited and do not provide a meaningful opportunity for victims to be involved in the process.²⁶⁷ The group argues that the circumstances of Cambodia, with its high illiteracy rate, and some 35% of the population living on less than \$0.45 per day, victims will be unable to participate in the process. It suggests that the court should be able to “*meet victims on their own terms, by creating procedures that seek out the participation of rural, illiterate Cambodian victims...*”. It also cautions that if “*only urban and diaspora Cambodians have the resources to participate, it can lead to the perception that the Court is for the rich, and is fundamentally unfair*”.

Civil party reparations have been awarded in Khmer Rouge litigation in Cambodia. For example, the victims made claims in the Pol Pot-Ieng Sary trial of 1979, and the court ordered confiscation of all their properties. It is not clear if the King's amnesty nullified this confiscation order; the time-limit has no doubt expired, although as seen from the earlier discussion, it is unclear if the damages aspect of the 1979 judgement has been affected by the extension of the statute of limitations in the Law on Extraordinary Chambers. Also, some of the families of victims of the 1994 Khmer Rouge attack on the Phnom Penh-Sihanoukville train were awarded civil damages by the judges who convicted the three accused former Khmer Rouge soldiers. But given the scale of victimisation that occurred in the period under consideration by the Extraordinary Chambers project, it is difficult to see how pecuniary awards could be anything beyond symbolic. Obviously, Ieng Sary's reputed 12 bedroom mansion and extensive personal wealth acquired from the gems and natural resources of Pailin could never satisfy even a fraction of the damages that the countless victims of the Khmer Rouge would be entitled to.

While the statute of limitations has been clearly extended in relation to criminal cases, there has been no corresponding extension of the statute of limitations for civil claims that would be made by civil parties pursuant to Rule 27. Koy Neam points out that there is confusion over time limits for filing a civil claim in relation to criminal acts, and that the period may vary from 5 years to 30 years.²⁶⁸ The upper limit has now obviously been exceeded for events arising from 1975-1977, but there remains a window of opportunity for acts between 1977-1979. Furthermore, it is unclear if the 1956 Penal Code continues to apply—this provided in Article 110 that the limitation period for civil claims stemming from a criminal act runs parallel to that of the criminal offence, and that if a crime was jointly committed by several persons and proceedings were commenced against one of them, then the limitation period ceases to run for that accused as well as all the other defendant from that date.²⁶⁹ It is not clear if the extension of the time limits for crimes under the 1956 Penal Code will affect such civil claims at the Extraordinary Chambers.

Rule 100 deals with the judgement on civil party claims against the accused, but it is Rule 23(2) that deals with the conditions for claiming reparation. There has to be an injury, either physical, material or psychological, which is the direct consequence of the offence, personal to the victim, that needs to “*have actually come into being*”. The cryptic final phrase is most unhelpful. What is it supposed to do? Ensure that injuries are real and not imaginary? What is an “*injury*” which has “*actually come into being*”? When does that injury have to have come into being, and does it still have to subsist? What about psychosomatic illnesses caused by the trauma of one's experiences? Does this “*injury*” that has “*actually come into being*” requirement exclude those who ‘only’ survived the litany of horrors that comprised daily life under the Khmer Rouge? What about the unseen scars of psychological harm? Many survivors in Cambodia apparently have post-traumatic stress but do not know what

²⁶⁷ Cambodian Human Rights Action Committee, Comments on the ECCC Draft Internal Rules, 17 November 2006, 7-8.

²⁶⁸ Koy Neam “Cambodian Judicial Process”, *supra* note 21 at 42-43.

²⁶⁹ *Ibid.*, 91. Recall here the earlier sections of this paper examining the proceedings that were initiated in 1979 against Pol Pot and Ieng Sary and there was a confiscation order against all their properties.

exactly what ails them.²⁷⁰ They may think, and many do, that they are possessed by spirits etc, rather than that they have an injury stemming from their experiences under the Khmer Rouge that actually continue to subsist at the time of the proceedings. What about those who lost family members—is that the kind of ‘injury’ that can subsist for the purposes of making a claim for reparation?

H. *Issues Arising from the Internal Rules*

The procedure at the Extraordinary Chambers is that of the French civil law that is very familiar to Cambodia, although with some refinements.

The Internal Rules provide that the procedure will be as follows. Investigations are commenced by the Co-Prosecutors, who conduct preliminary investigations at their own discretion or based on complaints. There are no checks and balances should they reject a complaint or refuse to investigate. They are assisted in their task by the Judicial Police and/or the investigators from their own office. The Suspect is a person whom the Co-Prosecutors (or Co-Investigating Judges) consider may have committed a crime within the jurisdiction of the Extraordinary Chambers but has not yet been charged. If they have reason to believe that crimes within the jurisdiction of the Extraordinary Chambers have been committed, the Co-Prosecutors forward the complete case file and an Introductory Submission (*Réquisitoire introductif*) to the Co-Investigating Judges; this written submission requires the Co-Investigating Judges to open a formal judicial investigation into a crime, and also propose suitable charges. There is no discretion for the Co-Investigating Judges, who are obliged to investigate. The Co-Investigating Judges may charge suspects named in the Introductory Submission, and others who are not so named. The Charged Person (*personne mise en examen*) is any person who is subject to prosecution in a particular case, during the period between the Introductory Submission and Indictment or dismissal. It is only when a Charged Person first appears before the Co-Investigating Judges that he is advised of his right to a lawyer and the right to remain silent; it is here that he has the right to consult with a lawyer prior to being interviewed and to have a lawyer present while the statement is taken (he may of course waive that right, in which case questioning can commence in the absence of a lawyer). The Co-Investigating Judges may order provisional detention or release on bail of a Charged Person after an adversarial hearing, and can conduct search and seizure operations under strictly defined circumstances. Confrontations between the Accused and the other parties may be arranged. References to an ‘Indictment’ in this system are to a Closing Order by the Co-Investigating Judges or the Pre-Trial Chamber through which the charged person is committed to trial. This Closing Order marks the end of the judicial investigation—the Co-Investigating Judges may either choose to indict and send the person for trial, or to dismiss the charges. The Indictment is filed with the Extraordinary Chambers along with the sealed case file. It has to set out in sufficient detail, the identity of the Accused, a description of the material facts, and their legal characterisation, including the crimes and the nature of criminal responsibility. An Accused (*Accusé*) is a person who has been indicted by the Co-Investigating Judges (sometimes the Pre-Trial Chamber can also issue an indictment).

Sole prosecutorial authority lies with the Co-Prosecutors, who take the case to trial. Trials are in general to be in public, and the Office of Administration is required to ensure public broadcasts. Publicity of the trial is subject to any protective measures that may be ordered. The Accused must be tried in his presence under Rule 80, but there are tightly regulated provisions for proceeding in his absence (these include where the accused refuses to attend or is disruptive or ill-health). The basic rule in Rule 81 is that the Accused should remain at

²⁷⁰ Cambodia’s Transcultural Psychosocial Organisation estimates that some 28.4% of those Cambodians that it studied had post traumatic stress disorder. See Final Report on Victims of Torture, DC-Cam 2005.

liberty unless provisional detention is ordered. The Pre-Trial matters will go before the Pre-Trial Chamber, the Trial Chamber will actually try the Accused, and the Supreme Court will hear appeals on fact and law with no remittals back to the Trial Chamber. The penalties following conviction range from prison terms of five years to life imprisonment, and the court may order the confiscation of personal property, money and real property acquired unlawfully or by criminal conduct. This does not address the problem that the State may not be the original owner, whose rights remain unfulfilled until the property is returned.

The evidentiary standards employed in Extraordinary Chambers are familiar ones in the civil law system—under Rule 87, all evidence is admissible and the judges will assess the evidence independently. However, their standard of assessment is that of the common law, beyond reasonable doubt. Decisions can only be based on evidence in the case file, or evidence examined by the Court during trial. Making a decision just on the basis of evidence in the case file is of course contrary to the right of an Accused to challenge the case against him and the concept of the ‘adversarial’ trial enshrined in Rule 21(1). Confessions are to be given the same consideration as other forms of evidence (Rule 87(3)). Another provision, Rule 21(3), addresses the issue of statements under duress. It prohibits the use of coercion during interviews, and provides that statements obtained under such circumstances may not be admissible as evidence, and the person responsible shall be appropriately disciplined. This is a very necessary provision in light of the role of confessions and torture in the Cambodian legal system. Many published reports about the Cambodian justice system have highlighted, and continue to highlight, the regular use of torture to obtain confessions, and also the willingness of judges to accept confessions as the main, sometimes only, evidence of guilt.²⁷¹ This matter was not specifically addressed in the amended Law on Extraordinary Chambers, although there are the general statements about human rights and Article 35 *bis* underlining of the right of accused “*not to be compelled to testify against themselves or to confess guilt*”. The Internal Rules have plugged the gap, but there are likely to be Constitutional Law issues arising from this situation of judges claiming the power to criminalise very serious conduct, such as committing torture, and enforce it through ‘Internal Rules’ in the absence of statute.

A serious flaw in the approach taken in the Law on Extraordinary Chambers and UN-RGC Agreement is that they draw in broad and general statements about the principles of due process and fair trial from human rights instruments, much of which already existed in that form in either the Constitution or the UNTAC Law.²⁷² These wide provisions are essentially repetitive and simply standards of review; they go towards result but do not address the precise methodology by which that is reached. What was more pressing was the need to provide detailed practical assistance addressing specific weaknesses in the existing legal framework. The Internal Rules have provided an opportunity to fill such gaps. Yet Rule 21 on fundamental principles is a peculiar provision that raises serious concerns about fair trial and due process. In one sense, it repeats Article 33 requiring full respect for the rights of the accused and for the protection of victims and witnesses. But it does more than

²⁷¹ See for example, ADHOC, LICADHO and Human Rights Watch, “Impunity in Cambodia: How Human Rights Offenders Escape Justice”, June 1999; Fernando “Problems Facing the Cambodian Legal System”, *supra* note 28; Human Rights Watch, Cambodia, World Reports 2006-1999; Conclusions and Recommendations of the Committee against Torture: Cambodia, CAT/C/CR/31.7, 5 February 2004; ADHOC Human Rights Report 2004, *supra* note 3 and the annual reports of the Special Representative of the Secretary General, including SRSR Cambodia Report 2004, *supra* note 3.

²⁷² Interesting, the Law on Extraordinary Chambers also failed specifically to work in Article 9 of the ICCPR, dealing with pre-trial rights before the matter comes before the chambers. What happens to an accused before his trial is out of the public eye, and in the Cambodian context this is where some of the most serious rights violations occur. Such violations will also feed into the final assessment of whether a process has been fair. The Internal Rules have gone some way towards improving the situation, in the greater regulation of the preliminary investigations of the Prosecutor.

that, by requiring that all applicable laws be interpreted “*so as always to safeguard*” the following:

1. “*the interests of suspects, Charged Persons, Accused and victims*”; and
2. “*so as to ensure legal certainty and transparency of proceedings*”; and
3. “*in light of the inherent specificity of the ECCC*”.

It is going to be impossible always to interpret all applicable laws in a manner that satisfies all three requirements of Rule 21. For example, the interests of Accused Persons and victims just cannot both be “*always*” safeguarded. There has to be some kind of trade-off or balancing exercise with the fallback position always being the right to a fair trial with due process including the presumption of innocence, and then the right to an effective remedy. The person accused of international crimes is bearing a heavy burden with the accusations against him, and an even heavier one should he be convicted, and therefore has an incontrovertible right in international law to challenge his accusers; that cannot be denied him in order to spare victims some discomfort.²⁷³ What can be worked out is a way to afford him his rights without unnecessarily traumatising or endangering the victim. One would have expected to see a more carefully calibrated provision about balancing the different needs in a manner that is most consistent with the rights of suspects, Charged Persons, Accused and Victims. It also seems that the references to the “*inherent specificity of the ECCC*” are what human rights lawyers call a ‘clawback clause’. This seems to a provision designed to water down the guarantees of minimum fair trial and due process contained in the court’s core instruments and the Cambodian Constitution. A number of basic principles out of many are selected in order to implement the obligations discussed, and seem to form an exhaustive list of the guiding principles for the court. These exhaustive principles are:

1. procedural fairness, balance between rights of the parties, and a clear division between prosecuting and adjudicating authorities;
2. equality of treatment of suspects;
3. a duty to inform victims and protect their rights throughout the proceedings; and
4. in relation to the accused: the presumption of innocence, the right to be kept informed, the right to be represented by counsel of choice and the right to silence.

It is true that fair trial and due process rights may be limited in certain tightly regulated circumstances under human rights law, but even in the extremity of an armed conflict, they cannot fall below the standard of Common Article 3 of the four Geneva Conventions of 1949. Where in these Internal Rules, one might ask, is the fundamental principle of *nullum crimen, nulla poena sine lege*, something that the earlier analysis in this study on substantive international criminal law identified as being crucial to these cases? What of the *non bis in idem* rule? Given the circumstances, what about the principle of equality of arms? On the contrary, the phrase “*in light of the specificity of the ECCC*” seems to be saying that it is precisely because of the circumstances of Cambodia and these courts, that we are making exceptions to such fundamental principles.

There are a number of issues that are indeed peculiar to the Extraordinary Chambers, but which are not addressed in these Internal Rules. One relates to the former commander

²⁷³ The balancing of the rights of the accused in this new era of victims rights is not an easy task. See *Prosecutor v. Dusko Tadic*, IT-94-I-T, Decision on the Prosecutor’s Motion for Requesting Protective Measures for Witnesses, 10 August 1995, and especially the dissenting opinion of Sir Ninian Stephen; *Prosecutor v. Alfred Musema*, ICTR-96-13-T, Decision on the Prosecutor’s Motion for Protection of the Witnesses on 20 November 1998 and *Prosecutor v. Andre Rwamakuba*, ICTR-98-44-T, Decision on the Prosecutor’s Motion for Protective Measures for Witnesses, 22 September 2000. Also see the debate between Christine M. Chinkin (Due Process and Witness Anonymity) and Monroe Leigh (Witness Anonymity Is Inconsistent with Due Process) in *The American Journal of International Law*, Vol. 91, no. 1. (Jan., 1997).

of the S-21 detention centre, Duch, who has now been in detention since May 1999. The Internal Rules provide for lengthy provisional detention (one year detention is ordered each time for the international crimes within the court's jurisdiction, with provision for one extension). Ignored is the reality that the one person in detention that they are going to be having to deal with is being held in what falls within the UN's Working Group on Arbitrary Detention's definition of arbitrary detention, a most serious human rights violation.²⁷⁴ At time of writing, he has been in pre-trial detention for seven years. Litigation can be expected on the issue of violation of due process and unlawful prolonged detention without trial in these two cases.²⁷⁵ Duch's arrest and continued detention, along with that of the late Ta Mok, have been on the basis of a hotchpotch of laws, including decrees of the PRK and some detention orders have specifically be on the basis of Article 158 of the Constitution (see Order of the Military Prosecutor dated 6 September 1999) and the 1999 Law on Duration of Pre-Trial Detention. The latter was passed after the arrests, allowing annual extensions of detention for persons accused of genocide, crimes against humanity and war crimes up to three years maximum.

There are numerous other issues that flow from the Duch situation that the Internal Rules have wholly failed to address. These matters will likely have to be determined at the very first provisional detention hearing before the Co-Investigating Judges under Rule 63 (decisions in this situation are appealable to the Pre-Trial Chamber.) There remains doubt about whether the basis for Duch's arrest and detention was valid, i.e. whether pre-1993 laws are actually applicable in Cambodia, and whether the 1994 on Outlawing of the Khmer Rouge Group and the 1999 Law on Duration of Pre-Trial Detention are actually valid laws. Then, what are the consequences of human rights violations occurring the course of proceedings? What remedies are there? Can such violations serve to prevent the accused from being held to account? And, what of the actions done before the establishment of the Extraordinary Chambers, and before the adoption of the Internal Rules? The Internal Rules contain a transitional provision in Rule 114, immunising the Co-Prosecutors and Co-Investigating Judges from actions carried out under the applicable Cambodian criminal law and procedure, but before entry into force of the Internal Rules. There is no provision for reparation to the person who has been subjected to a serious violation such as arbitrary detention or torture or miscarriage of justice. It bears pointing out that in drafting the Internal Rules, the judges chose not to include Article 21(1) of UNTAC Law, which provides that any violation of that law's Articles 10-21 (which include provisions on legal assistance, treatment of detainees, arrest and detention, pre-trial detention, access to the file/dossier, searches and timelimits) requires immediate release of a detained accused, but only where this violation 'seriously' impairs the rights of the defence.²⁷⁶ This is unlikely to be an oversight and must be seen as an illustration of the "*inherent specificity of the ECCC*" referred to in

²⁷⁴ In 1998, the UN's Working Group on Arbitrary Detentions identified the following categories which would amount to arbitrary deprivation of liberty in contravention of international standards:

- a. When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (for example, when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him);
- b. When the deprivation of liberty results from the exercise of the rights and freedoms guaranteed by articles 7, 13, 14, 18, 19 and 20 of the UDHR and, insofar as States Parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR (for example, peaceful exercise of the right to freedom of opinion and other fundamental rights);
- c. When the total or partial non-compliance of the international human rights norms relating to the right to fair trial, established in the UDHR and in the relevant international instruments, accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (for example, where there is serious non-observance of some or all of international norms relating to a fair trial).

²⁷⁵ For observations of the due process problems that had already emerged in 1999, see Amnesty International, *No Solution to Impunity*, online: Amnesty International—Working To Protect Human Rights Worldwide <<http://web.amnesty.org/library/Index/ENGASA230051999?open&of=ENG-KHM>>.

²⁷⁶ For more on what this means, see Koy Neam "Cambodian Judicial Process", *supra* note 21, 112-113.

Rule 26, under which the court has sought to cut back on human rights protections in light of the prevailing conditions.

Another issue arises in relation to Ta Mok, who passed away in detention in 2006. There is no public information on the matter, but it seems most unlikely that a man of such national and international notoriety could have been held for six years without having been extensively questioned. If there are statements and interview transcripts of a deceased person, can they be used in court proceedings in his absence? The Internal Rules are silent on this issue, although they state that “*all evidence is admissible*”.

V. FINAL ANALYSIS AND OBSERVATIONS

Studies have shown that Cambodians want the process of accounting for the crimes of the Khmer Rouge to meet certain standards, but it seems that the term ‘international standards’ in the Cambodian context simply means a process that is not controlled by the deeply distrusted Cambodian judicial personnel.²⁷⁷ As noted earlier, the polls are consistent that Cambodians want justice in a court of law, but there is a significant division on whether a sub-standard trial is better than nothing at all, with a majority for. There is clear linkage between justice for the crimes of the past to issues of present day impunity and absence of Rule of Law, and the desire to see the one address the other. In a nationwide 2002 survey, not only did the vast majority reject the possibility of taking revenge against perpetrators, but they so expressly on the grounds that Cambodia is a nation with laws, and the appropriate way to deal with criminals was through the criminal justice system. The proper place for Khmer Rouge perpetrators—in particular the leaders—is in a court of law. The feedback is clear that Rule of Law is the route to social recovery from mass atrocity as well as one of the fundamental pillars of a healthy nation. For some, it seemed that there was retribution behind the call for criminal justice—those who committed such serious wrongs should get the punishment they deserve—they could not remain unpunished. There were many who pointed to the deterrent effect of trials as a moral lesson, which is linked to the great importance that respondents placed on attaining generational changes in conduct. Trials are seen as having the potential to break the cycle of violence and impunity. This is the use of the judicial process as educational, a deterrent in that what would emerge would be so shocking as to serve as a warning of blind obedience to doctrine, the extreme dangers of authoritarian leadership, and the punishment that would be meted to individuals for their role in the horrors would deter any such conduct in future. The mere fact of having a tribunal—irrespective of the quality of the process—would enable 56.59% to forgive those who harmed them. And sometimes it seemed as if respondents saw criminal justice as necessary to rebalance Cambodia, i.e. the actions of certain persons had thrown Cambodia seriously askew, and the natural response was to seek to rebalance through the application of the law and symbolically put the old regime to an end through the ritual of a legal process. All of this must be borne in mind as Cambodia and the United Nations inch towards making the Extraordinary Chambers a reality.

This study has shown three fallacies: first, that the Khmer Rouge are to blame for all that is wrong in Cambodia today, second, that the Extraordinary Chambers are the first ever effort at holding members of the Khmer Rouge accountable and finally, that trials of a few geriatrics before the Extraordinary Chambers will miraculously ‘repair’ Cambodia and its long-suffering citizens of their ailments by introducing finally international standards of fair trial and due process. Disturbingly substandard as it is, this form of court was the best that could be agreed upon. It does afford the last chance for some degree of accountability for the monstrous crimes of the Khmer Rouge era. Many within the system have been genuinely

²⁷⁷ See Linton “Reconciliation In Cambodia”, *supra* note 8, 229-231. The rest of the paragraph is drawn from this work.

trying to introduce fundamental standards into the court's workings, as evidenced by the Internal Rules, which make the chances of the process attaining an internationally acceptable standard more likely.

Yet many have pointed out how such a compromised process adds insult to the injuries suffered by victims and survivors.²⁷⁸ In his reports to the General Assembly, the Secretary-General has made it clear how concerned he is about the degree to which the United Nation's moral authority as the promoter of human rights is going to be compromised by its involuntary association with this project. Time will tell if direct but non-controlling international involvement in the Cambodian justice system will make for fairer trials at the Extraordinary Chambers, and actually has any influence on improving the state of justice in Cambodia.

So what will the United Nations do if it ends up being complicit in malpractices of the kind that are clearly endemic in the Cambodian justice system? It retains the right to withdraw its cooperation from the process under Article 28 of the UN-RGC Agreement if the RGC changes the structure or organisation of the chambers, or otherwise causes them to function in a manner that does not conform with the basic agreement. This may in fact be a non-starter given that the General Assembly has already demonstrated its willingness, despite the advice of the Secretary-General and his senior advisors, to force the organisation into a substandard judicial process. In any event, the world body had shown its willingness to tolerate unilateral changes to its agreement with the RGC: it made no complaints about the move of the court outside of the capital, despite the statutory requirement that the court be located in Phnom Penh. In any case, even if it has immunity, the organisation will of course be aware that it may be sued for having violated fundamental human rights for its role in the Extraordinary Chambers.²⁷⁹ This may well be the reason why there are no provisions on remedies for miscarriage of justice and the like contained anywhere in the core documents of the Extraordinary Chambers, and there is instead emphasis on the immunities that it enjoys from lawsuits in domestic courts in the UN-RGC Agreement.

A decade and a half of activism relying heavily on appeals to the conscience of the international community through calls for 'justice', 'truth', 'healing', 'reconciliation' and the like, and usually unsubstantiated claims that these would come with accountability in a court of law, has brought us to the Extraordinary Chambers. It is now essential to control the exuberant rhetoric in order to manage the artificially raised public expectations that this internationalised court will deliver what purely Cambodians courts patently cannot. In fact, no court of law—whether domestic or international—has ever been able to deliver on all these highly elusive aspirations. In any event, social repair is not the business of courts of law. Especially not, one should add, a court facing the challenges of the Extraordinary Chambers. The reality is that achieving first world standards of justice in Cambodia is out of the question. But while we must be honest about the problems, that does not justify abandoning the project. The least that can be done for Cambodians now is to ensure that the best is done in the circumstances and that is what many working within the court, and outside it, are rightly seeking to do. The challenge, on which all efforts must be focused, is

²⁷⁸ See for example, the principled positions taken by Human Rights Watch and Amnesty International and articles such as Bora Touch, "Jurisdictional and Definitional Issues", undated, at <<http://www.khmerinstitute.org/articles/art03b.html>>, Brad Adams, "The UN must stand firm on principles for KR Trial", *Phnom Penh Post*, Issue 9/6 (March 17-30 2000), Basil Fernando, "Cambodians Deserve Something More Than A Farcical Tribunal", Asian Legal Resources Center, at <<http://www.article2.org/mainfile.php/0102/28>>.

²⁷⁹ In the recent case of Rwamakuba, an ICTR Trial Chamber ordered the Registrar to pay compensation for violations of an accused's rights to legal assistance. See ICTR, Decision on Appropriate Remedy, Prosecutor v. Andre Rwamakuba, Trial Chamber II, 31 January 2007. I discuss this issue of the liability of the United Nations for human rights violations during its involvement in the administration of justice in greater detail in a forthcoming chapter "International Perspectives on the Serious Crimes Process in East Timor" in Suzannah Linton & David Cohen eds., *East Timor: Lessons Learned* (Washington DC: East-West Center, (forthcoming) 2008).

to ensure that the trials are able to meet the barest minimum of standards, and to maximise what potential there is for the trials to make a positive impact on the ongoing misery of life in Cambodia. It is obviously not enough just to hope earnestly that international exposure leads to positive impact on the existing system. Experience in other countries that have had international courts has shown that relying on wishful thinking and wholly informal 'mentoring' will not work—there has to be some structured way for international experts to convey enduring skills and expertise to local counterparts. There also need to be effective and concrete strategies for making something out of the points of contact between the Extraordinary Chambers and the regular Cambodian justice system, for example through the sharing of information and skills such as new methodologies in investigation and prosecution. The parallel yet intersecting processes of agreeing the Internal Rules and adopting the Code of Penal Procedure were such an opportunity but seem to have been wasted. However, we then go back to the problem of the basic concept of the Extraordinary Chambers. No one is responsible for ensuring that there actually is some long-term benefit, for such capacity building was never part of the actual package agreed between the United Nations and the RGC.

In Cambodia, there is a genuine danger that the diversion of attention and resources on the high-profile but short-term proceedings involving former Khmer Rouge will detract away from long-term capacity building work that strengthens the existing system. This occurred in Timor Leste, with tragic results for the regular criminal justice system. There is a point to the argument that every dollar spent on the one-off process at the Extraordinary Chambers is a dollar that could have been spent on alleviating poverty and long-term development, including of Cambodia's justice system. Certainly these trials are crucial, but every other legal proceeding—whether involving someone important or not—that takes place in Cambodia is at serious risk of running afoul of international standards. Miscarriages of justice caused by external influences and personal improprieties are everyday features of the Cambodian legal scene. When these 'important' trials are over in Cambodia, people will be left with the same old system, perhaps in even worse shape than it was before.

There are no signs yet that the Extraordinary Chambers have or will bring about a 'norms cascade' with genuine embracing of the concept of human rights.²⁸⁰ It is now one year into the Extraordinary Chambers experiment, and the 2007 report of the Special Representative of the Secretary-General to Cambodia reveals that it is business as usual.²⁸¹ In fact, Yash Ghai expressed concern about continuing executive interference in the work of the judiciary, alleged that judges have been unable or unwilling to exercise their functions independently, complained about continuing widespread corruption in the judiciary and that "*the system of prosecutions pollutes the system of justice*". His report to the Human Rights Council points out that the use of systemic human rights violations has been a rational choice for those who hold power in Cambodia, and who refuse to accept accountability vis-à-vis the law, and the people of Cambodia. It is also very revealing that to this day, despite Cambodia being one of the countries whose deposit of instrument of ratification brought the ICC into existence and a long-time party to the Geneva Conventions, Genocide Convention and ICCPR, it is

²⁸⁰ See Ellen Lutz & Kathryn Sikkink, "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America" (2001) 2 Chicago J. Int'l L. 1-33. The authors describe the various theories in international relations that have been developed in order to understand significant human rights developments. In this, the concept of 'norms cascade', developed in the writings of authors such as Cass R. Sunstein, *Free Markets And Social Justice* (OUP, 1999) and Kathryn Sikkink, "Transnational Politics, International Relations Theory, and Human Rights", *Political Science and Politics* 31 (3), 1 September 1998, 516-523, is important. There are said to be two stages: the emergence of the norm followed by its acceptance or a norm cascade. These two stages are divided by a threshold or tipping point, at which a critical mass of relevant publics accepts the norm. As these principles are increasingly shared and are less contested, a norms cascade develops and the norm becomes recognised as legitimate.

²⁸¹ SRSG Cambodia Report 2007, *supra* note 3.

only the Khmer Rouge that can commit and be prosecuted for international crimes such as genocide and crimes against humanity.

Therefore, in the heady rush to contribute to the Extraordinary Chambers, sight must not be lost of the bigger picture and the long term implications. Cambodia's exceptionally weak underlying judicial system cannot be neglected and allowed to slip further down the abyss just because there is a more high profile, historically and internationally significant process going on at the Extraordinary Chambers. It has already been sixteen years, but the international community must continue to stay the course in Cambodia for many more years to come.

