

Chapter 2

Trials and Tribulations: The Long Quest for Justice for the Cambodian Genocide

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Abstract The ‘Cambodian model’ of the ECCC—a domestic court with international participation and assistance—emerged through years of tough negotiations between the Cambodian government and the UN, after the massive crimes had been ignored by the international community for 20 years. This contested history provided the backdrop to the work of the Court and to the judicial and non-judicial challenges it has faced, giving alternate prisms through which to assess its achievements and failings.

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2.1 Introduction

During a period of three years, eight months and 20 days (from 17 April 1975 to 6 January 1979), under the rule of the Khmer Rouge known as Democratic Kampuchea (DK), at least 1.7 million Cambodians perished, a quarter of the population, dying in miserable circumstances of starvation, overwork and untreated illness or from brutal torture or execution.¹ Although this was one of the largest and most egregious crimes of the 20th century, a generation went by before the Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in February 2006, following many years of failed attempts to achieve justice, geopolitical manoeuvring and tortuous and difficult international negotiations.²

The final quarter of the 20th century witnessed enormous changes in the international political landscape. Moves towards setting up a tribunal to judge the crimes of the Khmer Rouge were but one strand among many in the weaving of the new cloth of international humanitarian and criminal law and justice—cloth whose warp and weft are still being changed, and whose colour is by no means permanently fixed.

It was against this background of emerging possibilities for international justice and domestically amid the final stages of the disintegration of the Khmer Rouge that, in June 1997, the Cambodian government requested the United Nations to provide assistance in finally holding accountable the top Khmer Rouge leaders who had masterminded massive human rights violations some twenty years before.

It took six years of tense and fractious negotiations for Cambodia and the United Nations to agree on what should be done and a further three years until in July 2006 the judges of the Extraordinary Chambers in the Courts of Cambodia (ECCC) were sworn in. This article reviews the causes for such a delay and the judicial and non-judicial challenges faced by this institution.

¹Kiernan 1996; Closing Order, *Nuon Chea and others* (002/19–09–2007/ECCC-D427), Co-Investigating Judges, 15 September 2010.

²For interpretations of this extenuated process, see Fawthrop and Jarvis 2004; Scheffer 2012, at 341–405.

2.2 Background

2.2.1 *The Long Process of Seeking Justice for the Khmer Rouge Crimes*

Within days of the ouster of the Khmer Rouge regime, evidence of systematic crimes against humanity was uncovered. Two Vietnamese photographers stumbled on S-21 or Tuol Sleng, the former high school in Phnom Penh, where more than 15,000 people were imprisoned and tortured before being executed on the outskirts of the city at Choeung Ek.³

Tuol Sleng became a museum of genocide, preserving not only the physical remains of the horror that took place there but an extraordinary cache of documentary evidence in the form of prisoner biographies and forced ‘confessions’, photographs (including of torture), execution lists and staff biographies, manuals and notebooks.⁴ But Tuol Sleng was only one such site—mass graves and prisons have been found in every province, showing that the same horror had been meted out throughout the country in a widespread and systematic manner.⁵ Tuol Sleng and other sites were shown to international journalists and visitors. Numerous survivors’ accounts and journalists’ written and filmed reports gave a picture of what had occurred, but unfortunately the international community paid scant attention to human rights and issues of justice in the seventies and eighties.

In 1979 a 6–3 majority at the UN’s credentials committee accepted the DK as the ‘legitimate representative of the Cambodian people,’ endorsed in the UN General Assembly and thus preserving the seating of the toppled murderous regime, unbelievably for more than a decade, even after their crimes were widely known and documented.

The opposition to the new government in Cambodia, the People’s Republic of Kampuchea (PRK) was ostensibly because Vietnam had invaded a smaller neighbour (albeit to overthrow a murderous regime, and to respond to thousands of unprovoked attacks on Vietnam’s territory and population). But similar outrage and denial of United Nations recognition were not forthcoming in four other contemporary cases of external intervention (Uganda, when Idi Amin was overthrown largely by Tanzanian forces in 1978–79; Central African Empire, by France in 1979; Grenada, by the United States in 1983 and Panama by the United States in

³Chandler 2000; Panh 2003.

⁴The photographic and documentary archives of Tuol Sleng Genocide Museum were inscribed on UNESCO’s Memory of the World International Register in 2009. Details of the collection are available at <http://www.unesco.org/new/en/communication-and-information/flagship-project-activities/memory-of-the-world/register/full-list-of-registered-heritage/registered-heritage-page-8/tuol-slung-genocide-museum-archives/#c188357> (visited 15 June 2015).

⁵The Documentation Centre of Cambodia, ‘Mapping Project: 1995–Present’, available at <http://www.dccam.org/Projects/Maps/Mapping.htm> (visited 15 June 2015). From 1995 to 2004 Yale University’s Cambodian Genocide Program and the Documentation Centre of Cambodia recorded 388 burial sites, 196 prisons and 81 memorials.

1989),⁶ not to mention East Timor (although its ‘integration’ into Indonesia was never officially recognized by the United Nations, nothing was done to end it until the people themselves forced a solution in 1999).

The Khmer Rouge continued to hold the Cambodian seat in the UN until 1991, and the issue of their crimes was erased from the UN agenda for nearly two decades until the General Assembly formally recognized it for the first time.⁷

As it was struggling to rebuild the country from what was accurately described as ‘Year Zero’, the fledgling government of the PRK invested significant scarce resources to document the crimes committed by the Khmer Rouge, and to bring international jurists and observers to Phnom Penh to participate in the People’s Revolutionary Tribunal. They were convinced that once the world understood the barbarities of life and death under the Khmer Rouge, the international community could hardly fail to be more sympathetic to the new government in Phnom Penh.

The People’s Revolutionary Tribunal—the trial of the ‘Pol Pot – Ieng Sary clique’ on the charge of genocide—was held in Phnom Penh August 1979. Predictably, the defendants were convicted, but the expected moral and diplomatic benefits did not flow to the PRK, and instead it was widely denounced internationally for staging a ‘show trial’. Despite its undoubted weaknesses, the tribunal should not have been merely dismissed as propaganda show. The witnesses called by the prosecution provided crucial and authentic testimony against the Khmer Rouge regime, which deserved to be scrutinized seriously by international jurists and the outside world.⁸ Instead of being ostracized, DK continued to be given international recognition, VIP hospitality and sanctuary and military rebuilding in Thailand, in spite of genocide convictions for a crime that had been outlawed under the Genocide Convention since 1948.⁹

In the late 1980s, as the Soviet Union collapsed, leading to a withdrawal of crucial economic and political support for the PRK, and after a military and political stalemate inside Cambodia left all sides weakened, in 1987 the first moves towards peace talks were held. The PRK then announced a policy of national reconciliation

⁶Amer 1989, especially at 24–39.

⁷*Infra* ‘2.2. United Nations acknowledgment’.

⁸Fawthrop and Jarvis 2004, at 40–51.

⁹While widely termed genocide, both in common parlance and in academic, government and even legal circles for the past 35 years, controversy still rages as to whether or to what extent the Genocide Convention of 1948 applies. The Genocide Convention has generally been interpreted (at least until recent cases in Argentina and Bangladesh) as applying to acts committed on one protected group by another group, and therefore, it has been argued, does not apply in Cambodia’s case. The Group of Experts established by the Secretary-General of the UN in 1997, while concluding that ‘evidence suggests the need for prosecutors to investigate the commission of genocide against the Cham, Vietnamese and other minority groups, and the Buddhist monkhood’, took an agnostic position on genocide against the Khmer national group, stating that ‘any tribunal will have to address this question should Khmer Rouge officials be charged with genocide against [them]’. The charge of genocide against the Muslim Cham and Vietnamese is part of the ECCC’s Case 002/02, the Initial Hearing of which took place on 30 July 2014. See also M. Vianney-Liaud, Chap. 10 in this Volume.

with all parties except Pol Pot and the top Khmer Rouge leaders. This policy was implemented through a series of unilateral actions—in 1988 an offer to accept Sihanouk as head of state, and in 1989 a profound change of constitutional status from the People's Republic of Kampuchea to the State of Cambodia (flag, religion, economy etc.). Vietnam continued its unilateral withdrawal of its advisers and troops, which had begun in small measure even as far back as 1982, with the final contingent leaving Cambodia in September 1989.

Deadlock was reached in the negotiations on the future role of the Khmer Rouge and the use of the term 'genocide' in describing Democratic Kampuchea. After months of wrangling, Cambodian prime minister Hun Sen under enormous international pressure finally abandoned all attempts to include references to the genocide in the draft peace treaty.¹⁰

On 23 October 1991 the Paris Peace Agreements were signed, formally guaranteeing international political support for an arrangement that included the Khmer Rouge as legitimate political actors and part of the Supreme National Council, mandated to exercise sovereignty over Cambodia during a transitional period to elections, during which time the United Nations would play a major political, administrative and military role.¹¹ Some 22,000 United Nations officials and soldiers arrived in Cambodia in an exercise that cost some US\$3 billion and was the first of what has become a continuing series of large-scale deployment of international forces wearing blue berets.¹²

The Paris Peace Agreements laid the ground for what followed. In the name of reconciliation, all references to genocide had been masked in euphemisms, such as the agreement to the 'non-return to the policies and practices of the recent past'.

The Khmer Rouge refused to implement a single one of the pledges it had signed in Paris, and instead continued to terrorize and intimidate people in many parts of the country, including perpetrating a number of atrocities against people of ethnic Vietnamese origin. The long-standing anti-Vietnamese tone of the Coalition Government of Democratic Kampuchea (its principal glue) was transferred into action within the borders of Cambodia itself.

After the 1993 elections, the Cambodian government launched a strategy to break up the Khmer Rouge. Known as DIFID (Divide, Isolate, Finish, Integrate, Develop), it involved military, political and economic tactics—military assaults, outlawing the Khmer Rouge, wooing defectors and repeatedly raising the prospect of justice being done through the setting up of a new tribunal. The Khmer Rouge

¹⁰Fawthrop and Jarvis 2004, at 70–107. In February 2015 Prime Minister Hun Sen expressed his continuing anger at that pressure from the international community not to include the word 'genocide' in the Paris Peace Agreements in impromptu comments made during his opening keynote address at the conference on "The Responsibility to Protect at 10: Progress, Challenges and Opportunities in the Asia Pacific", Sofitel, Phnom Penh, Cambodia 26–27 February 2015 (<http://cnv.org.kh/?p=4130>).

¹¹Agreement on a Comprehensive Political Settlement of the Cambodian Conflict, 23 October 1991, 31 *International Legal Materials* 183.

¹²Findlay 1995; Widyono 2008.

started fracturing and so did the coalition government. As almost their last common act, the Co-Prime Ministers (Hun Sen and Norodom Ranariddh) on 27 June 1997 signed a joint letter to UN Secretary-General Kofi Annan requesting international assistance to bring the Khmer Rouge to trial.¹³

2.2.2 *United Nations Acknowledgment*

Finally, in February 1998, 19 years after the Khmer Rouge was overthrown, for the first time a major organ of the United Nations acknowledged that massive human rights violations had occurred in Cambodia during the Democratic Kampuchea period of 1975–1979, when the General Assembly voted to accept the report of its Third Committee, including a request for examination of the July 1997 letter signed jointly by the then Co-Prime Ministers Hun Sen and Norodom Ranariddh requesting assistance in bringing the Khmer Rouge to justice.¹⁴

Following the formal adoption of the resolution by the General Assembly, the Secretary-General established a Group of Experts to give an opinion as to whether sufficient grounds existed for a trial, and to explore the advantages and disadvantages of various types of tribunals, with different levels of international involvement. The Group of Experts determined *prima facie* that both international and national crimes of a serious nature had been committed; that evidence and witnesses could be presented to support prosecution of these crimes; and that at least some potential suspects survived and could be brought to trial. They then went on to canvass various options—truth and reconciliation commission, international tribunal or domestic trials.

The Group of Experts advocated an international tribunal such as those already in operation for Rwanda and the former Yugoslavia, dismissing both a domestic process and even the novel concept of a mixed tribunal, on the grounds of distrust

¹³See *Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135*, UN Doc. A/53/850-S/1999/231, 16 March 1999 (hereafter Report of the Group of Experts), § 5.

¹⁴GA Res. 52/135, 27 February 1998 on the report of the Third Committee, Add. 2 on the Situation of Human Rights in Cambodia, refers in its preamble to ‘international crimes, such as acts of genocide and crimes against humanity’ (A/52/644/Add.2). It was adopted by the Third Committee on 12 December 1997 and by the General Assembly on 27 February 1998. § 15 ‘Endorses the comments of the Special Representative that the most serious human rights violations in Cambodia in recent history have been committed by the Khmer Rouge and that their crimes, including the taking and killing of hostages, have continued to the present, and notes with concern that no Khmer Rouge leader has been brought to account for his crimes’; and §16. ‘Requests the Secretary-General to examine the request by the Cambodian authorities for assistance in responding to past serious violations of Cambodian and international law, including the possibility of the appointment, by the Secretary-General, of a group of experts to evaluate the existing evidence and propose further measures, as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability’.

of the Cambodian legal system. They went even further, insisting even that the tribunal be located outside Cambodia.¹⁵ In Cambodia and in the court of international opinion these options were argued, not only during the time that the Group of Experts were preparing their report, but for long afterwards, right up until the establishment of the Khmer Rouge tribunal and even throughout its lifetime, with many critics claiming that the model proposed by the Group of Experts, or perhaps a truth and reconciliation commission, or even no formal process at all, would have been better for Cambodia than the model eventually adopted—a domestic court with international participation and assistance.

Vigorous debates continued and many NGOs maintained that national reconciliation and healing of psychological damage would be better served without the judicial process, while others maintained the view articulated in the slogan ‘No peace without justice’.

In any event, the Group of Experts’ recommendation for an international tribunal met with a sharp rejection from the Cambodian government, which reiterated its request for international assistance for and involvement in a Cambodian domestic process.¹⁶

2.2.3 *The End of the Khmer Rouge*

Running parallel to these discussions between the Cambodian government and the UN on the nature of a future trial was the culmination of Hun Sen’s DIFID strategy and the ending of the Khmer Rouge as a political and military organization. The first major break came in August 1996 when Ieng Sary, former foreign minister of Pol Pot, and several thousand Khmer Rouge soldiers defected to the government. He was granted a royal amnesty protecting him against prosecution under the 1994 law outlawing the Khmer Rouge, and a pardon for the sentence imposed in his 1979 conviction for genocide. He was also allowed to retain *de facto* control over the area around his former base in Pailin, which was accorded provincial status, with his son as deputy governor. This reduced the Khmer Rouge insurgency to one major zone around Anlong Veng, the main base and headquarters of Ta Mok, Pol Pot’s military chief.

The Khmer Rouge split fatally, with Ta Mok arresting Pol Pot, who died on 15 April 1998 in suspicious circumstances. In a dramatic breakthrough, the Khmer Rouge was virtually brought to an end as a political and military force in the closing days of 1998 leaving only the rump military force of Ta Mok still at large, when Hun Sen undertook a complicated manoeuvre on 25 December 1998, bringing in from the cold the two remaining Khmer Rouge senior leaders, Nuon Chea and Khieu Samphan.

¹⁵Report of the Group of Experts, *supra* note 13.

¹⁶Fawthrop and Jarvis 2004, at 113–133 and Scheffer 2012, at 381–385.

Then on 6 March 1999, Ta Mok was taken into military custody and charged under the 1994 law banning the Khmer Rouge and, on 9 May 1999, Kaing Guek Eav, better known as Duch, the former commandant of the Tuol Sleng prison S-21, was arrested and charged under the same law, following public disclosure of his whereabouts and new identity as a born-again Christian NGO worker. After two decades of many countries obstructing efforts to bring the Khmer Rouge to justice, the tide was decisively turning towards the setting up of a tribunal.¹⁷

2.2.4 The Law and Agreement on Establishment of the ECCC

In August 1999 the United Nations sent a high-level delegation from its Office of Legal Affairs to embark on formal negotiations with the Cambodian government, which had established its own Task Force as a counterpart, led throughout by Sok An, Deputy Prime Minister and Minister in charge of the Office of the Council of Ministers. On 2 January 2001, just before the twenty-second anniversary of the ousting of the Khmer Rouge from Phnom Penh, the National Assembly unanimously approved a draft law to establish extraordinary chambers in the courts of Cambodia to bring to trial senior leaders of Democratic Kampuchea and those responsible for serious violations of Cambodian criminal law and international law and custom, and international conventions recognized by Cambodia, and which were committed during the period from 17 April 1975 to 6 January 1979.

Unfortunately, continuing differences between the UN and the Cambodian government escalated, with the UN formally withdrawing from the process on 8 February 2002 on the grounds that: ‘the United Nations has concluded that as currently envisaged, the Cambodian court would not guarantee independence, impartiality and objectivity’; and because of differences in views on the relationship between the ECCC Law and the agreement to be signed governing of assistance from the UN for such a court. After almost a year of diplomatic effort by the Cambodian government, the UN Secretariat was instructed to resume negotiations by a General Assembly resolution, passed by its Third Committee on 18 December 2002.¹⁸

The Agreement was finally signed on 6 June 2003, laying down the modalities of international participation,¹⁹ but a further two and a half years were lost before it could be ratified, due to domestic political turmoil in Cambodia following the mid-2003 elections, followed by a slow process to seek the funds made necessary

¹⁷Fawthrop and Jarvis 2004, at 155–188.

¹⁸GA Res. 57/228, 27 February 2003 on the report of the Third Committee (A/57/556/Add.2 and Corr.1-3).

¹⁹Available at <http://www.eccc.gov.kh/en/documents/legal/agreement-between-united-nations-and-royal-government-cambodia-concerning-prosecution> (visited 15 June 2015).

by the General Assembly's decision that the ECCC should be funded solely through voluntary rather than assessed contributions by Member States as with the International Criminal Tribunals for the Former Yugoslavia and Rwanda.²⁰

Legal history was made as the ECCC opened its doors in February 2006 in Phnom Penh, Cambodia's capital. The 'Cambodian Model' was the first attempt to mix international and national expertise and jurisprudence in trial proceedings conducted in the domestic courts, largely under domestic procedural law.

When the ECCC did finally become a reality in early 2006 it was a fragile and shaky reed, with the odds still stacked firmly against it. External and internal forces seem always to loom over the Court, at times threatening its very survival, while its challenges were manifold—financial, administrative, legal, cultural, political—with the ticking of the clock being the biggest threat of all.

The story of the ECCC is how it has faced up to these constant and unremitting challenges, and the stark contrast between the Court's actual achievements and the way in which it is continually portrayed as a failure in reports in the press and by the bevy of monitors and observers who have scrutinized its every step.

2.3 Key Features of the Extraordinary Chambers in the Courts of Cambodia

2.3.1 Jurisdiction

The Cambodian law promulgated on 27 October 2004 establishing the ECCC had as its purpose 'to bring to trial *senior leaders of Democratic Kampuchea and those who were most responsible* for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979'.²¹

The ECCC's subject matter jurisdiction is limited to:

- the following offences under Cambodia's 1956 Penal Code:
 - Homicide (Articles 501, 503, 504, 505, 506, 507 and 508)
 - Torture (Article 500)
 - Religious Persecution (Articles 209 and 210)
- the crime of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948

²⁰GA Res. 57/228B, 22 May 2003 on the report of the Third Committee (A/57/806).

²¹Article 1 ECCC Law (emphasis added). The details of the structure and procedures of the ECCC in the following paragraphs are also taken from the ECCC Law.

- crimes against humanity
- grave breaches of the Geneva Conventions of 12 August 1949
- destruction of cultural property during armed conflict pursuant to The Hague Convention of 1954²²
- crimes against internationally protected persons pursuant to the Vienna Convention of 1961.²³

Article 29 of the ECCC Law stipulates that

any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes shall be individually responsible for the crime, regardless of [their] position or rank.... The fact that any of the acts were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.... The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.

2.3.2 *Structure*

The Law established Extraordinary Chambers within the existing court structure consisting of three judicial chambers:

- Pre-Trial Chamber (three Cambodian and two international judges)
- Trial Chamber (three Cambodian and two international judges)
- Supreme Court Chamber (four Cambodian and three international judges)

The ECCC has two Co-Prosecutors (one national and one international) and likewise two Co-Investigating Judges.

All these judicial officers are appointed by Cambodia's Supreme Council of the Magistracy, which selects the international judges and co-prosecutor from nominees submitted by the Secretary-General of the UN.

Article 46 new of the ECCC Law lays out a series of steps that may be taken by the Supreme Council of the Magistracy 'in the event any foreign judges or foreign investigating judges or foreign prosecutors fail or refuse to participate in the Extraordinary Chambers'. Firstly, the Council may appoint other judges or investigating judges or prosecutors to fill any vacancies from the nominees provided by the UN; then from candidates recommended by the Governments of Member States of the United Nations or from among other foreign legal personalities; and finally it stipulates that, if

following such procedures, there are still no foreign judges or foreign investigating judges or foreign prosecutors participating in the work of the Extraordinary Chambers and no

²²It should be noted that no indictments have been made relating to this offence.

²³It should be noted that no indictments have been made relating to this offence.

foreign candidates have been identified to occupy the vacant positions, then the Supreme Council of the Magistracy may choose replacement Cambodian judges, investigating judges or prosecutors.

Article 47 of the ECCC Law stipulates that the ECCC ‘shall automatically dissolve following the definitive conclusion of these proceedings’.

2.3.3 Decisions

The judges and co-prosecutors are mandated to try to seek unanimity in their decisions. While national judges are in the majority in each Chamber, a super-majority is required for any decisions to investigate, try or convict (four of five judges in the Trial Chambers, and five of seven in the Supreme Court Chamber).²⁴ This super-majority formula ensures that no such decisions can be made without the participation of at least one national and one international judge.

In the case of a disagreement being recorded between the two Co-Prosecutors or the two Co-Investigating Judges, the matter may be brought to the Pre-Trial Chamber for adjudication. Should the Pre-Trial Chamber fail to reach a super-majority, then any proposed prosecution, investigation or indictment would proceed.²⁵ In this way, neither the national nor international co-prosecutor or co-investigating judge acting individually can block the process.

2.3.4 Penalties, Amnesties and Pardons

Sentences may be from five years to life imprisonment, and property gained unlawfully or by criminal conduct may be ordered to be confiscated and returned to the State.²⁶

One issue that was hotly debated during the negotiations between the Royal Government of Cambodia and the UN was that of amnesties or pardons. Finally, agreement was reached on the following wording:

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 Articles 3, 4, 5, 6, 7 and 8 of this Law. 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.²⁷

²⁴Article 14 new ECCC Law.

²⁵Articles 20 new and 23 ECCC Law.

²⁶Article 39 ECCC Law.

²⁷Article 40 new ECCC Law.

2.3.5 Procedure

Article 33 new of the ECCC Law states that its proceedings shall be conducted according to Cambodian current procedural law, but that if ‘these existing procedure 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, guidance may be sought in procedural rules established at the international level’. It goes on to stipulate that the ECCC proceedings ‘shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights’.

2.3.6 Administration and Expenses

Unlike the international and other internationalized courts, no provision was made for the ECCC to have a Registrar. Instead, the Law stipulated that there should be a Cambodian Director of Administration and an international Deputy Director of Administration.²⁸

The Law divided the responsibilities of the Royal Government of Cambodia (RGC) and the United Nations with regard to financing the establishment and operations of the ECCC.²⁹ Applying and interpreting these obligations proved to be quite problematic, as discussed below concerning the Agreement and financial problems.

2.3.7 The Agreement Between the Royal Government of Cambodia and the United Nations

The Agreement recognizes that the Extraordinary Chambers have subject matter and personal jurisdiction consistent with that set forth in the Law. It stipulates that the Vienna Convention on the Law of Treaties, and in particular its Articles 26 and 27, applies. It went on to repeat and at times to expand on certain provisions in the Law, in particular procedures governing nomination, appointment and privileges and immunities of international judicial officials and the Deputy Director of the Office of Administration; rights of the Accused and financial and other obligations of the Royal Government of Cambodia and the UN. It did not include the provisions in Article 46 of the Law on filling any vacancies of international judges.

²⁸Article 30 ECCC Law.

²⁹Article 44 ECCC Law.

The Agreement added a new article on the withdrawal of cooperation (Article 28) stating

Should the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present Agreement.

Another element in the Agreement that did not appear in the ECCC Law, showing the concern of the United Nations on this point, was the following addition to stipulations on amnesty:

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 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.³⁰

2.4 Judicial Challenges

The ECCC is generally referred to as a ‘mixed’ or ‘hybrid’ court. In introducing the Ratification of the Agreement to the National Assembly on 4 and 5 October 2004, Deputy Prime Minister Sok An referred to it as ‘a national court with international characteristics’, and judicial decisions have subsequently confirmed this character. The Pre-Trial Chamber found that:

The ECCC is distinct from other Cambodian courts in a number of respects. [...] The ECCC is entirely self-contained, from the commencement of an investigation through to the determination of appeals. There is no right to have any decision of the ECCC reviewed by courts outside its structure, and equally there is no right for any of its Chambers to review decisions from courts outside the ECCC. [...] For all practical and legal purposes, the ECCC is, and operates as, an independent entity within the Cambodian court structure [...] which makes the ECCC a ‘special internationalized tribunal’ [...].³¹

The Trial Chamber also found that the ECCC is a ‘separately constituted, independent and internationalized court’ which, despite having been ‘established within the existing Cambodian court structure,’ qualifies as ‘an independent entity’³² and the Supreme Court Chamber confirmed this, seeing ‘no reason to depart from these uncontested findings of fact’.³³

³⁰Article 11 ECCC Agreement.

³¹Decision on Appeal Against Provisional Detention of Kaing Guek Eav (Duch), *Kaing Guek Eav (Duch)* (001/18-07-2007/ECCC-C5/45), Pre-Trial Chamber, 3 December 2007, §§ 18–19.

³²Decision on Request for Release, *Kaing Guek Eav (Duch)* (001/18-7-2007/ECCC-E39/5), Trial Chamber, 15 June 2009, § 10.

³³Judgment, *Kaing Guek Eav (Duch)* (001/18-07-2007/ECCC-F28), Supreme Court Chamber, 3 February 2012 (hereafter Duch Appeal Judgment), § 393.

This structure makes the ECCC quite distinct from the ICC or the ICTY and ICTR, although the extent to which it differed made for frequent legal argument between the Defence teams and the Co-Prosecutors or Co-Investigating Judges as to how much of the jurisprudence from such courts should apply.

As with all new, and especially so-called special or extraordinary courts or jurisdictions, the ECCC has had to face many challenging procedural and substantial legal issues, some of which are detailed below.

2.4.1 Qualification of Crimes Prosecuted

The Introductory Submission filed by the Co-Prosecutors on 18 July 2007 opened a judicial investigation against five suspects, namely Kaing Guek Eav known as Duch, Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith. A case was made for indictment of all of the five Suspects on crimes qualified under four headings: the national crimes of torture and murder; crimes against humanity; genocide; and grave breaches of the Geneva Conventions of 1949.³⁴

In September 2007, the Co-Investigating Judges ordered the separation of the case-file into two.³⁵ Case 001 was restricted to a single crime site (S-21 and its ancillary units) and a single defendant (Duch), who was indicted initially for crimes against humanity and grave breaches of the Geneva Conventions of 1949, and then, on appeal by the Co-Prosecutors, also for the national crimes of torture and premeditated murder. After 77 trial days, held between 17 February 2008 and 27 November 2009, the Trial Chamber judgment was issued on 26 July 2010³⁶ and the final judgment by the Supreme Court Chamber was issued on February 2012, affirming his conviction for crimes against humanity and grave breaches of the Geneva Conventions of 1949, and sentencing him to life imprisonment. The Supreme Court Chamber also entered separate convictions for the crimes against humanity of persecution (encompassing murder), enslavement, torture and other inhumane acts.³⁷

2.4.2 National Crimes

Ironically, although the Cambodian negotiators had argued hard for national substantive law to be included in the jurisdiction of the ECCC, this proved to be the most difficult to apply, as the Defence vigorously challenged the statute of

³⁴First Introductory Submission, (ECCC-D3), Co-Prosecutors, 18 July 2007; see also the public statement of the Co-Prosecutors, 18 July 2007.

³⁵Separation Order, *Kaing Guek Eav (Duch)* (001/18-07-2007/ECCC-D18), Co-Investigating Judges, 19 September 2007.

³⁶Judgment, *Kaing Guek Eav (Duch)* (001/18-07-2007/ECCC-E188), Trial Chamber, 26 July 2010.

³⁷*Duch* Appeal Judgment, *supra* note 33.

limitations (also known, especially in civil law systems, as prescription), affecting the validity of the 1956 Criminal Code during 1975–1979 and its applicability today to offences committed during 1975–1979). The Trial Chamber judges failed to agree or even reach a super-majority, thereby preventing the ECCC from trying the accused for national crimes,³⁸ and Duch was convicted only for international crimes. In Case 002, the Accused were not indicted for national crimes, as the Co-Investigating Judges explained: ‘Given the multiple legal problems arising from the charges brought based on national criminal legislation, the Co-Investigating Judges deemed it preferable to accord such acts the highest legal classification, namely crimes against humanity or grave breaches of the Geneva Conventions of 12 August 1949.’³⁹

2.4.3 *Genocide*

In a great disappointment for many victims, for the prosecution and for all those who had since 1979 used the term ‘genocide’ to refer collectively to the crimes of the KR regime, the ECCC adopted a narrow interpretation of the Genocide Convention, and by mid-2015, even this narrow interpretation was yet to be heard by the Trial Chamber.

The Closing Order in Case 002 indicted the other four Suspects with crimes against humanity, grave breaches of the Geneva Conventions of 1949 and genocide (but only against the Cham and Vietnamese minorities). The Co-Prosecutors acted conservatively, not taking up the challenge suggested by the UN Group of Experts in 1998 to test whether mass crimes against the Khmer majority national group could be qualified as genocide.⁴⁰ In this regard, despite a submission by Civil Party

³⁸Decision on the Defence Preliminary Objection Concerning the Statute of limitations of Domestic Crimes, *Kaing Guek Eav (Duch)* (001/18-07-2007/ECCC-E187), Trial Chamber, 26 July 2010.

³⁹Closing Order, *supra* note 1. On appeal, the Pre-Trial Chamber ordered that the Closing Order be amended with a specification for the requirement of the existence of a link between the underlying acts of crimes against humanity and an armed conflict, and that rape could charged not as a separate crime, but considered as ‘other inhumane acts’ within the legal definition of crimes against humanity, see Decision on Ieng Sary’s Appeal against the Closing Order, *Nuon Chea and others* (002/19-09-2007/ECCC-D427/1/26), Pre-Trial Chamber, 13 January 2011.

⁴⁰Report of the Group of Experts, *supra* note 11, § 65, stating: ‘As for atrocities committed against the general Cambodian population, some commentators have asserted that the Khmer Rouge committed genocide against the Khmer national group, intending to destroy a part of it. The Khmer people of Cambodia do constitute a national group within the meaning of the Convention. However, whether the Khmer Rouge committed genocide with respect to part of the Khmer national group turns on complex interpretive issues, especially concerning the Khmer Rouge’s intent with respect to its non-minority-group victims. The Group does not take a position on this issue, but believes that any tribunal will have to address this question should Khmer Rouge officials be charged with genocide against the Khmer national group.’ See also *supra* note 9.

lawyers to the Co-Investigating Judges to appoint an expert to examine the facts and to establish whether the charge of genocide against the Khmer national group is justifiable, no judicial officer or Chamber of the ECCC has made judicial advances on this question, such as in other national jurisdictions, notably Argentina and Bangladesh.⁴¹

The Co-Investigating Judges also rejected a request initially filed by Civil Parties and then supported by the Co-Prosecutors to expand the scope of the charge of genocide against Vietnamese to include acts committed in places other than the limited border areas included in their original investigation and also to include charges of crimes against humanity and genocide against the Khmer Krom minority. The rejection was justified in terms of procedural irregularity in the form in which the Co-Prosecutors filed their request.⁴²

When Case 002 finally commenced trial on 21 November 2011, the Opening Statements covered all the charges made in the amended Closing Order, but the Trial Chamber judges had already made a significant severance decision that put the charge of genocide onto the back burner.

2.4.4 *Scope of the Trials*

On 22 September 2011 the Trial Chamber announced that, in order to speed up proceedings, Case 002 would be severed into five parts in chronological sequence, to be tried and adjudicated with the judgment on each trial to be issued in turn. The first trial (Case 002/01) would deal only with the first and second forced movements of population and the related charges of crimes against humanity, although it also considered the roles of the Accused in the Democratic Kampuchea regime, including the establishment and implementation of the regime's policies relevant to the charges set out in the Closing Order. The Trial Chamber justified their decision to select these acts for the first phase of the trial on the grounds that they affected the great majority of Cambodians and of the Civil Parties in Case 002. All parties appealed this decision. The Co-Prosecutors argued vigorously that the advanced age and infirmity of the Accused meant that this first phase may turn out to be the only trial held, and therefore it must be more representative of the totality of crimes charged.

Later the Trial Chamber did decide to add the execution of Khmer Republic soldiers at the Tuol Po Chrey execution site immediately after the Khmer Rouge

⁴¹6th request for investigative actions concerning the charge of Genocide against the Khmer nationals, *Nuon Chea and others* (002/19-09-2007/ECCC-D349), Civil Party Lawyers, 10 February 2010. For Argentina, see Ferreira 2013, at 5–19; Feierstein 2012, 2014. In Bangladesh, the International Crimes Tribunals are currently considering such qualification of crimes.

⁴²Combined Order on Co-Prosecutors' Two Requests for Investigative Action Regarding Khmer Krom and Mass Executions in Bakan District (Pursat) and Civil Parties Request For Supplementary Investigations Regarding Genocide of the Khmer Krom & the Vietnamese, *Nuon Chea and others* (002/19-09-2007/ECCC-D250/3/3), Co-Investigating Judges, 13 January 2010.

takeover in 1975, but the Co-Prosecutors appealed this to the Supreme Court Chamber, which issued two decisions sharply criticising the Trial Chamber's approach to severance but, in view of the late stage in Case 002/01, considered that an order to expand the scope would inevitably cause further delays, and instead ordered that the evidentiary hearings in Case 002/02 shall commence as soon as possible after closing submissions in Case 002/01, and that Case 002/02 shall comprise at minimum the charges related to S-21, a worksite, a cooperative, and genocide. Further, it proposed that the Trial Chamber consider the establishment of a second panel of judges into hear Case 002/02 in order to speed up proceedings—a suggestion that was rejected by the Trial Chamber.⁴³

The hearing of evidence in case 002/01 ended on 23 July 2013, after 212 trial days, and the closing statements concluded on 31 October 2013. The Trial Chamber's first-instance judgment was issued on 7 August 2014, convicting both Accused of crimes against humanity and sentencing both to life imprisonment.⁴⁴

Several other hotly debated legal issues in the opening phase of Case 002/01 will not be adjudicated due to the death of Ieng Sary on 14 March 2013 and the consequential dropping by the Co-Prosecutors of all charges against him. These include the validity of Ieng Sary's conviction for genocide in 1979 (raising issues of double jeopardy or *ne bis in idem*); and the validity and scope of Ieng Sary's 1996 pardon for the sentence awarded for that 1979 conviction. However, certain other of Ieng Sary's legal challenges were subsequently pursued by the remaining two Accused who maintained Ieng Sary's preliminary objection to the applicability of the grave breaches provisions of the Geneva Conventions, and Khieu Samphan further maintained the preliminary objection to the Chamber's jurisdiction to hear charges of deportation as a crime against humanity.⁴⁵

In November 2008, the international Co-Prosecutor prepared to file two Introductory Submissions, requesting the Co-Investigating Judges to initiate investigation of six additional suspected persons (two of whom have since died) for crimes allegedly committed at a number of new crime sites. The proposed investigations (which became Cases 003 and 004) were opposed by the national Co-Prosecutor, who viewed them as unnecessary, as the alleged crimes are already covered by the first Introductory Submission of 2007. Further, she opined that prosecuting these suspects is beyond the

⁴³Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, *Nuon Chea and others* (002/19-09-2007/ECCC-E163/5/1/13), Supreme Court Chamber, 8 February 2013; Decision on Immediate Appeals of the Trial Chamber's Second Decision on Severance of Case 002, *Nuon Chea and others* (002/19-09-2007/ECCC-E284/417), Supreme Court Chamber, 23 July 2013; Trial Chamber Memo to the Director of Administration, *Nuon Chea and others*, (002/19-09-2007-ECCC-E301/4), Trial Chamber, 20 December 2013.

⁴⁴Judgment, *Nuon Chea and others* (002/19-09-2007/ECC-E313), Trial Chamber, 7 August 2014.

⁴⁵Position on Remaining Preliminary Objections raised by the Ieng Sary Defence Team, *Nuon Chea and others* (002/19-09-2007/ECCC-E306/1), Defence, 20 May 2014, and Conclusions de la Defense de M. Khieu Samphan sur les exceptions preliminaires sur lesquelles la Chambre n'a pas encore statue, *Nuon Chea and others* (002/19-09-2007/ECCC-E306/2), Defence, 20 May 2014.

limits of personal jurisdiction of the court to senior leaders and those most responsible; that it potentially threatens national reconciliation and the political stability of the country; and that the resource requirements would put at risk the functioning of the court and the successful completion of cases already under way.⁴⁶

The Prime Minister and other ministers in the Cambodian government have also not supported extending the work of the ECCC beyond Cases 001 and 002.⁴⁷ A super-majority was not assembled in the Pre-Trial Chamber on the disagreement between the two Co-Prosecutors,⁴⁸ and so the investigations have gone forward, albeit slowly, without the participation of the national Co-Investigating Judge, and have been pursued by a series of international Co-Investigating Judges in somewhat controversial circumstances. It is now understood that the latest international Co-Investigating Judge expects to close the investigations by mid-2015 and to issue a Closing Order either dismissing them or sending them to trial by the end of 2015. The identity of the suspects in Cases 003 and 004 was for some time officially confidential, although they were widely reported in the press. This changed when the International Co-Investigating Judge, Mark Harmon, on 3 March 2015 announced that he had charged two persons *in absentia* (Meas Muth in Case 003 and Im Chaem in Case 004), and then on 27 March also Ao An (Case 004), this time in person.⁴⁹ As of the end of May 2015, none of these three persons had been indicted or arrested.

2.4.5 Legal and Administrative Framework for Victim Participation

The ECCC had to develop a *modus operandi* for incorporating into the judicial process the massive number of victims of the Khmer Rouge crimes, especially those who sought to become recognized as Civil Parties.

⁴⁶International Co-Prosecutor's Written Statement of Facts and Reasons for Disagreement pursuant to Internal Rule 71(2), (Pre-Trial Chamber Disagreement No. 001/18-11-2007/ECCC), International Co-Prosecutor, 3 December 2008; National Co-Prosecutor's Response to the International Co-Prosecutor's Written Statement of Facts and Reasons for Disagreement pursuant to Internal Rule 71(2), (Pre-Trial Chamber Disagreement No. 001/18-11-2007/ECCC), National Co-Prosecutor, 29 December 2008, (publicly redacted versions).

⁴⁷C. Sokha and J. O'Toole, 'Hun Sen to Ban Ki-moon: Case 002 last trial at ECCC', *Phnom Penh Post* (27 October 2010), citing a briefing to the press by Foreign Minister Hor Namhong on the meeting between Prime Minister Hun Sen and Secretary-General Ban Ki-moon and a statement by the Minister for Information, Khieu Kanharith: 'The purpose of forming the court was to seek justice for victims and guarantee peace and stability in society. [...] If the court walks farther than that, it will fall.'

⁴⁸Considerations of the Pre-Trial Chamber on the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71 (publicly redacted version), (Disagreement No. 001/18-11-2008/ECCC), Pre-Trial Chamber, 18 August 2009.

⁴⁹Statements by the ECCC International Co-Investigating Judge, 3 and 27 March 2015 (<http://www.eccc.gov.kh/en/articles>).

Victim participation at the ECCC has not been without controversy, rising at times to heated argument and even bitter conflict. The roles and rights of Civil Parties and the level of support extended to them have proved to be among the most difficult and ongoing problems the court has had to face as it grappled with the realities and emotions of this sensitive issue.

Administratively, the ECCC was completely unprepared for any role of Civil Parties—one of the clearest instances in which the United Nations' Technical Assessment Mission simply applied the formulas from the ad hoc tribunals of the ICTY and ICTR and the Sierra Leone Special Court without regard to the very different legal and judicial context of Cambodia. Neither the budget nor staffing tables for the ECCC included any provision for Civil Parties. The first UN Deputy Director of Administration (who had previously served in the ICTR) expressed this approach clearly when she stated at the first press conference held in the new premises of the Court that 'the only role for victims in the ECCC would be as witnesses'.⁵⁰

However, as mentioned above, the foundation documents for the ECCC stipulate that the Court shall utilize Cambodian criminal procedure, except in certain circumstances when it is silent, internally contradictory, or when it conflicts with international standards.⁵¹ And Cambodian criminal procedure includes the right for victims to participate as Civil Parties in criminal proceedings. Further, while neither the ECCC Law nor the ECCC Agreement made specific mention of the role of Civil Parties, the Law did envisage victims as Parties to the cases when Article 36 new of the ECCC Law stipulated the rights of victims to appeal decisions of the Trial Chamber.

In its preparatory work for the establishment of the Court, the Cambodian Government Task Force anticipated that one of the areas requiring early decision would be how to apply Cambodian procedure allowing victims' participation and claims for reparations in circumstances in which millions of people were victims of the crimes being tried.⁵²

However, judges from common law systems (who constituted the majority of international judges) were adamant that full victim participation as Civil Parties would place an impossible burden on the court in terms of finances and

⁵⁰M. Lee, Deputy Director of Administration in ECCC Press Conference, 9 February 2006 (as noted by the author, then ECCC Chief of Public Affairs).

⁵¹Article 33 new ECCC Law; Article 12(1) ECCC Agreement.

⁵²A 'Draft Internal Procedures and Regulations', developed by Dr Gregory Stanton for and with the Cambodian Government Task Force for the Khmer Rouge Trials, was presented to the Judicial Strategic Planning and Development Workshop held in early July 2006. This draft made provisions for victims to apply to participate in the hearings (Article 89), to appoint legal representatives, even envisaging the probable need for common legal representation for groups of victims and for legal assistance for representation (Article 90) and to claim reparations, including remedies such as restitution, compensation and rehabilitation (Article 94). See also *An Introduction to the Khmer Rouge Trials* (Phnom Penh: Secretariat for the Task Force for the Khmer Rouge Trials, 2004).

time. Judges from civil law systems, who were used to Civil Parties even in mass crimes, were equally adamant that the ECCC had to accommodate Civil Parties, as it had no power to limit rights that are clearly and unambiguously provided under Cambodian criminal procedure, so it seemed inevitable that some compromise would emerge, providing a limited form of victim participation and claims for reparations.

After intense debate in many meetings of the Rules Committee, and as one of the very final matters in the Internal Rules to be resolved, the Plenary Session in June 2007 adopted a severely limited right to reparations: ‘the Chambers may award only collective and moral reparations to Civil Parties. These shall be awarded against, and be borne by convicted persons.... Such awards may take the following forms: (a) An order to publish the judgment in any appropriate news or other media at the convicted person’s expense; (b) An order to fund any non-profit activity or service that is intended for the benefit of Victims; or (c) Other appropriate and comparable forms of reparation.’⁵³

Severe public criticism and disappointment among victims of these very limited provisions, and their even narrower interpretation by the judges of the Trial Chamber in Case 001 (in which the only reparation awarded was an order to publish copies of Duch’s acknowledgments and apologies stated in court, alongside the listing of the names of Civil Parties in the judgment⁵⁴), led to their expansion. By the time of Case 002, funding from third parties could be accepted towards reparations⁵⁵ and the ECCC’s Victims Support Section was also instructed to examine other, non-judicial programmes and measures to support victims.⁵⁶

The Office of Administration responded to the adoption of the Internal Rules by establishing a small Victims Unit (later known as the Victims Support Section). However, with such a late start, and with woefully inadequate funds, the Victims Unit was very quickly overwhelmed as the enormity of its task became evident. How to reach the unknown number of victims throughout the country, inform them of their rights to participate and encourage the filing of complaints and civil party applications was a major challenge. A working relationship was quickly developed between the Victims Unit and a number of NGOs that had already established or were ready to establish programmes relating to Khmer Rouge victims, known as intermediary organizations.

While in its first year the Victims Unit was allocated no resources specifically for outreach, such funding was already flowing to the intermediary organizations from a number of donors (notably the German and French governments, the European Union and the Open Society Justice Initiative, OSJI). And in early 2009

⁵³Rule 23(12) ECCC Internal Rules, adopted 7 June 2007.

⁵⁴Judgment, *Kaing Guek Eav alias Duch*, *supra* note 36, § 682–683.

⁵⁵Rule 23*quiquies* ECCC Internal Rules (Rev. 6), adopted on 9 February 2009 and amended on 17 September 2010.

⁵⁶Rule 12*bis*(3) ECCC Internal Rules (Rev.6), adopted on 9 February 2009 and amended on 17 September 2010.

the German Government made a significant direct grant to the Victims Unit, funding that was renewed through 2015.

Forums were held throughout the country, and teams assisted victims in completing the somewhat complex form the ECCC had developed for them to file a complaint and to apply for status as a Civil Party. As a result of the fact that Case 001 was limited to crimes relating to a single crime site (the security centre of S-21 and its ancillary units) and because the procedural decisions governing Civil Party participation were not made until almost the time of the filing of the Closing Order, a relatively small number of victims applied before the deadline—94, of whom 90 participated and 76 were finally recognized by the Supreme Court Chamber. In Case 002, the Victims Unit and the NGOs made a strong and concerted outreach effort, and 3,988 victims applied. The Co-Investigating Judges recognized only some 50 % of these Civil Party applicants for Case 002, but on appeal 3,867 Civil Parties, close to 100 % of those who had applied, were recognized.

Even after adoption of Internal Rules allowing for Civil Party participation, the ECCC did not initially provide any financial support for legal representation for Civil Parties. This contrasted sharply to the Defence, which was generously supported from the international side of the budget, on the basis of the Law and Agreement provisions for legal support for any Accused deemed to be unable to afford their own lawyers.⁵⁷ All five Accused in Cases 001 and 002 were provided with legal teams funded through a legal aid fund administered through the Defence Support Section. No such support from the Court was offered for Civil Parties. Offers of legal pro bono representation were made by lawyers, mostly funded from foreign governments through the intermediary organizations. Legal teams emerged, not on the basis of inherent or identified differentiation of interest among groups of Civil Party applicants, but rather from their relationship to the intermediary organizations that had facilitated the collection of their applications for Civil Party status. It soon became painfully obvious that such a haphazard basis for Civil Party legal representation could not be continued in Case 002, a much more complex case in every way, and in which thousands of Civil Parties would be participating.

Following lengthy debate, the Internal Rules were extensively revised regarding the legal representation of Civil Parties at the ECCC, providing that Civil Parties

at the trial stage and beyond shall comprise a single, consolidated group, whose interests are represented by the Civil Party Lead Co-Lawyers[...]. Civil Party Lead Co-Lawyers shall file a single claim for collective and moral reparations.⁵⁸

This novel approach went into operation in Case 002 and certainly formed a more coherent framework for Civil Party legal representation in Case 002/01, and a far more efficient functioning of the trial, without substantially curtailing their

⁵⁷Article 35 new ECCC Law; Articles 13(1) and 17 ECCC Agreement.

⁵⁸Rules 12*ter* and 23(3) and 23*ter* ECCC Internal Rules (Rev. 5), adopted on 9 February 2009 and amended on 9 February 2010.

rights. The Trial Chamber's decisions on reparations in Case 002/01⁵⁹ were widely welcomed, approving most of a creative suite of proposals submitted by the Civil Party Lead Co-Lawyers, designed to provide remembrance and memorialization, rehabilitation of victims, and documentation and education.⁶⁰

2.5 Non-judicial Challenges

2.5.1 *The Ticking of the Clock*

An external factor, undoubtedly constituting the greatest threat of all, was the passage of time. Most of the senior leaders and those most responsible for the crimes had died even before the Court was established—most notably Brother Number One, Pol Pot, in April 1998, never having had to answer for his role. Pol Pot himself ordered the execution of a number of his lieutenants during the period of Democratic Kampuchea and then again in mid-1997 of his chief of internal security Son Sen and his wife Yun Yat. Others, like Pol Pot's deputy Ke Pauk, died in the period of negotiations to establish the Court.

The vulnerability of the Court to passing time was shown acutely when military leader Ta Mok died, while in military detention, on 21 July 2006, just a month after the swearing in of the Court's judges and co-prosecutors. Age and poor health continued to trouble the five defendants. When charged by the ECCC in late 2007, Duch, the youngest, was already in his mid-60 s, while the other four were aged from 79 to 83, all beyond Cambodia's life expectancy and all suffering various ailments as would be expected for their age. Each time the Court reported that one had been taken to hospital even for a regular check-up and each time an ambulance was seen to leave the ECCC compound, rumours would circulate that another defendant was close to death. Even if they were all to survive, how would their age and poor health affect their ability to participate in their trials? By the time the second case got under way, one of the four defendants (former Minister of Social Action, Ieng Thirith) was severed from the case, in November 2011 deemed unfit to stand trial due to her mental health, while another (her husband and former Deputy Prime Minister for Foreign Affairs, Ieng Sary) died soon afterwards, on 14 March 2013, leaving only two persons in the dock (former chief ideologue, Deputy Secretary of the Communist Party of Kampuchea and Chairman of the People's Representative Assembly Nuon Chea and former Head of State Khieu Samphan).

⁵⁹Judgment, *Nuon Chea and others*, *supra* note 44.

⁶⁰Civil Party Lead Co-Lawyers' Response to the Trial Chamber's Memorandum (E218/7/2) Concerning Reparations Projects for Civil Parties in Case 002/01, *Nuon Chea and others* (002/19-09-2007/ECCC-E218/7/3), Civil Party Lead Co-Lawyers, 23 August 2013, wherein the Civil-Party Lawyers outline thirteen proposed projects.

And of course the victims who survived the horrors of Democratic Kampuchea were likewise not spared the consequences of the tolling of the bell of time. Many died before seeing any perpetrator stand accountable in a court of law or without having the chance to tell their stories as witnesses or as civil parties. At every public forum, interview or visit to the Court, time and again Cambodians expressed bitter frustration at how long it had taken to establish the Court and even shed tears of anxiety as to whether trials could be completed and verdicts reached before defendants died. Public Affairs Section officials valiantly argued that, however fast the Court worked now, the ECCC could not turn back the clock and recover the lost 30 years. And, even though they argued with some reason that the Court was moving fast when compared to others of its type dealing with massive crimes and involving international laws and judges, in the assessment of many, especially ordinary people, the progress of the legal process was painfully slow.

The Duch trial lasted 77 trial days over a period of nine months. How would the Trial Chamber manage to complete the second trial in a reasonable time in a situation where initially four, later reduced to two, defendants were being tried together, varying day by day in their health and strength. The spectre of Milošević, who died in March 2006 just a few months before the verdict was due in his four-year trial at the ICTY, haunted the ECCC and posed the nagging contradiction between ensuring defence rights and maintaining international standards of fair trial while at the same time moving as fast as possible in the interest of ensuring that the trials could be completed before the defendants died. While the time taken to carry out every individual action could always be argued as justified due to the legal and judicial complexity of matters being considered, problems of translation and operating in three languages, difficulty in recruiting personnel and many other entirely reasonable considerations, the sum total of all the delays meant that the initial estimates for the time needed for the ECCC to carry out its mandate were woefully understated.

Neither the United Nations nor the Cambodian government anticipated that the ECCC would be a permanent or even long-lasting institution, but the initial three year projection was clearly quite an unrealistic expectation for an undertaking of this nature, and the contradiction between this plan and the ever-extending reality led to frustration and anxiety.

2.5.2 Chronic Under-Funding

Next to the passing of time, the ECCC's main and continuing problem was a lack of financial security. As mentioned above, this was a problem that had been anticipated by the Secretary-General in his March 2003 report in which he advocated that the ECCC be financed under assessed contributions, like the ICTY and ICTR, concluding that 'assessed contributions are the only mechanism that would be viable and sustainable'.

However, fearing being caught in ever spiralling demands for funds as in the ICTY and ICTR, the major contributors to the United Nations budget ruled out assessed contributions, and the UNGA resolution approving the Court specified that it should be funded by voluntary contributions like the Sierra Leone Special Court. This proved to be just as heavy a burden on the ECCC as it was in Sierra Leone. Some observers went so far as to call this formula a ‘time-bomb’. Both the Sierra Leone and Cambodian courts were weighed down by the responsibility of constantly seeking funds and projecting new or revised budgets to address the reality of conflicting requirements for more time and money as the cases continued to roll on, in the face of the absence of even the originally budgeted funds, let alone the ever increasing amounts. Stephen Rapp estimated that he spent about one-third of his time on fund raising when he was Prosecutor of the Sierra Leone Special Court (SCSL).⁶¹ Eventually, in 2011, the UN made the decision to provide supplementary funds from its regular budget to the SCSL,⁶² and a similar arrangement was made in 2014 and again in 2015 for the ECCC⁶³ (but, on the initiative of the US, this subvention was limited only to the international component of its budget).

As with the time projection, the initial cost estimate for the ECCC of \$19 million over three years was ridiculously low (albeit, even though not stated, this was only for the international component of the budget). Two UN Technical Assessment Missions were dispatched to Phnom Penh and a budget was readied for presentation to the donors by the end of the first quarter of 2004.

Of some surprise to the Cambodian side was that the UN had decided to present the needs of the Court in two separate funding requests—for the international and national components respectively—and that the relative size of the two requests was vastly different. The division of responsibility was ultimately derived from the Agreement (which specified that premises and national staff would be provided by Cambodia, while the United Nations was responsible for remuneration of international judges and staff, defence counsel, witness travel etc.), but there was considerable latitude as to how a number of items would be costed and to which side they would be allocated. The international component was extended from the figures in the Secretary-General’s 2003 report, while a separate budget was developed for items under the responsibility of the Cambodian government. This two-column staffing table, defining in advance every single post in the ECCC as either international or national, was argued to be necessary because they anticipated differential pay-scales for national or international staff.⁶⁴

⁶¹Wierda and Triolo 2012, at 155.

⁶²See Sanusi 2013, at 472.

⁶³GA Res. 68/247B, 9 April 2014.

⁶⁴In a compromise between calls for equality of salaries and the difficulty of securing sufficient funds, it was agreed during the negotiations in 2004 that national staff in professional grades would receive 50 % of the salary of their international counterparts according to the UN pay scale of 2004, while non-professional staff were to follow the pay scales set for Cambodia by the United Nations Development Programme (UNDP) and this formula was subsequently endorsed in several reviews, see Deloitte Touche Tohmatsu, ‘Report of the Special HRM Review’ (24 March 2008) at 3.

Although important preparatory steps were being taken in terms of budget definition and training of potential judges and prosecutors, the Agreement had still not been ratified as a result of the protracted and indeed intensifying political stand-off in Cambodia. The constitutional requirement for a two-thirds majority to form a government had not been met following the July 2003 election, and by mid-2004 this impasse was still preventing the convening of the National Assembly, whose approval was necessary to ratify the Agreement and to amend the 2001 Law on the Establishment of the Extraordinary Chambers. The political deadlock in Cambodia was eventually broken and on 4 October 2004 the National Assembly unanimously approved the Agreement, adopting the amended Law on the following day.

But cold water was poured on this progress in Cambodia by a statement by the Secretary-General that ‘the process of setting up the Extraordinary Chambers can only be initiated once sufficient money is in place to fund their staffing and operations for a sustained period of time... when pledges for the full three years of the Extraordinary Chambers’ operations as well as actual contributions for its first year of operations have been received’⁶⁵—a very high bar to place and one that almost prevented the Court from ever going ahead. Up until that time the only pledges that had been made were from Australia (\$1.5 million), France (EUR 3 million) and the European Union (EUR 3 million)—and the targets seemed impossibly far away. Only Japan’s bold move in early February 2005 to pledge \$21.6 million, a half of the projected international component, saved the day.

By the time of the initial pledging conference at UN headquarters on 28 March 2005, the budget estimates for a court projected to last some three years had risen to \$56.3 million broken down into two columns—an international component of \$43.3 million and a national component of \$13 million. At the pledging conference, \$38.4 million was pledged towards the international component. However, the Cambodian side was severely under-funded, with only India (\$1 million) and Thailand (\$25,000) coming on board towards the \$13 million national target. This under funding continued to dog the Court not only because the uncertainty hampered long-term planning and appropriate forward commitments. It also gave a weapon to the Court’s critics to pressure donors or certain constituencies in the donors’ home countries to channel funding only to certain activities or to pressure the Court in one way or another.

Governments and international organizations were very sensitive to criticisms of the ECCC, and were often reluctant to grant funds and the court has continued to face financial crisis after crisis, especially on the national side, with staff even going without pay on several occasions for periods of months at a time. The total expenditure of the ECCC from its establishment in 2006 until the end of December 2014 amounted to \$236.2 million (international \$180.1 million and national \$56 million).⁶⁶

⁶⁵*Secretary-General’s Report to the General Assembly*, UN Doc. A/59/432/Add.1, 12 October 2004, § 14b.

⁶⁶Summary of expenditure and donor contributions as of 31 December 2014, ECCC Budget and Finance Offices, available at <http://www.eccc.gov.kh/en/about-eccc/finances/summary-expenditure-and-donor-contributions-31-january-2015> (visited 15 June 2015).

Alongside the Court's vulnerability to political campaigns, its financial health was jeopardized by an anomaly in the budget presentation and differing views as to what was obligatory or appropriate for the Cambodian government itself to fund (and indeed how much it was actually providing to the Court). Ambiguity and confusion over this issue in turn served to fuel the critics of the Court and further undermine funding appeals, especially for the Cambodian component, even though the Cambodian government had made it clear right from the start of discussions with the UN Technical Assessment Mission in 2003 and 2004 that it would be appealing for donor funds for the majority of the \$13 million designated as the Cambodian responsibility.

The Cambodian government's own contributions for the ECCC from 2006 to the end of 2014 amounted to \$30.6 million (consisting of in-cash expenditure from the national budget of over \$18.5 million and \$12.1 million in in-kind expenditure for items such as provision of the premises, utilities and other operational costs, detention and medical costs for detainees and other non-obvious costs such as the substantial additional security expenditures surrounding the holding of the trials as well as processing of related visas and import of materials tax-free). A substantial increase in cash contributions in 2014 and 2015, brought Cambodia's total contributions to more than 10 % of the total budget of the Court and placed it as the second highest donor (after Japan).

Remarkably, the Cambodian government's own contributions to the Court were not even included in the main tables in budgets presented to the donors and the Cambodian government was constantly berated and belittled for what was termed its 'absence' of funding, and failure to meet its financial obligations, despite the fact that its expenditure on the ECCC amounted to more than 200 % of the annual budget for the Appeals Court of Cambodia. In contrast, none of the other countries in which tribunals were established with international participation had made any substantial financial commitments to the operations of these courts.

The early decisions by the UN Technical Assessment Missions to set up separate national and international budget columns and staffing tables led to a bifurcated foundation for the Court, and the ways these decisions were implemented only served to solidify and increase this bifurcation. The negotiators originally envisaged the Court to have 2/3 national staff and 1/3 international. While the numbers of Judges, Co-Prosecutors and Co-Investigating Judges and the Director and Deputy Director of Administration were prescribed in the ECCC Law and ECCC Agreement, outside these 31 positions this 2:1 plan remained somewhat notional and was subverted by the reality that all the most junior and most numerous staff in the Court—maintenance, drivers, messengers, security staff—were all Cambodians, while more senior positions were more heavily international. Furthermore, the UN engaged a considerable number of consultants and interns who did not figure in the staffing tables. As a result, the real number of international staff, particularly in the judicial areas and at senior level continued to mount, at least until some severe budgetary pruning in 2013.

2.5.3 *The Tower of Babel*

Under the Cambodian Constitution, Khmer is the only official language of Cambodia and, as a Cambodian court, the ECCC of course also used Khmer as its official language. However, the ECCC Law and the ECCC Agreement stipulated that English and French would also have the status of ‘official working languages’ in order to facilitate international participation by lawyers, judges, administrative and legal staff and the public. In early drafts the Cambodian side proposed to include Russian, as many Cambodian judges and legal staff had been trained in the former Soviet Union and Russia had assisted Cambodia by sending legal experts to help draft the ECCC Law, but, after the UN team advised against adding this heavy extra financial burden, this idea was dropped.

Neither the ECCC Law nor the ECCC Agreement, nor even the Internal Rules as adopted, stipulated exactly what type of documents would need to be translated into which language, nor what level of interpretation would be mandatory. It took some time for practice directives and decisions to evolve to regulate this complicated and yet essential area of the Court’s activity, and for the necessary funding and staffing to be provided to support it. This was yet another area that had been woefully underestimated in the original budget provisions, and the difficulty of finding sufficient translators and interpreters, especially to and from French and Khmer, had not been anticipated or prepared for, and the Court relied heavily on relay translation and interpretation to and from English and French.

But, daunting as it was, the need for official translation of documents and interpretation of proceedings was only one side of the linguistic challenge faced by the Court. Developing working relationships among the judges and staff in each Chamber and Office proved to be just as hard. Not a single international judicial officer (and less than a handful of legal or administrative staff) had any Khmer language capability at all, and most of the Cambodian judges had limited foreign language capability, with Russian or Vietnamese the most predominant second language. And no attempt was made on either side to pairing the linguistic ability of counterparts when appointing judges.

This limitation of language skills on the international side was not surprising, as Khmer is a language spoken hardly at all outside the borders of the country. On the part of the Cambodian judges, it was result of the policies of the Khmer Rouge regime that had obliterated almost all educated people, and the long years of boycott that had delayed the rebuilding of professional skills. The Supreme Council of Magistracy appointed Cambodia’s most senior judges to the ECCC, and people of their age typically have less foreign language capability than their more junior colleagues. So it was that the three reserve Cambodian judges in each Chamber all could speak English, and managed to facilitate internal communication.

But language was not the only barrier to communication and understanding—the multiplicity of cultures and legal systems among the judges caused considerable problems, particularly as a number of the international judges had limited experience in the civil law system followed in Cambodia or in international criminal law

or trials for mass crimes. On the Cambodian side, their limited experience of such trials was matched by lack of exposure to any trials with a strong defence and subject to high public interest and exposure.

2.5.4 The Crusade Against the ECCC by Human Rights Organisations

Throughout the life of the ECCC there was an ambiguity and even a tug-of-war between those who seemed to want it to succeed and those who, for many varied reasons seemed to be happy to see it fail, some even gloating over its every stumble. Such differing views should really have been hardly surprising given the background of disregard for the crimes for twenty years followed by rocky and contested negotiations throughout the Court's gestation period from 1997 right up to the its establishment in 2006. The same actors who stood by helping or hindering the birth continued to play the same roles as the infant struggled to breathe, to crawl and finally to walk and even run.

Paradoxically, the principal and most outspoken critics of the ECCC were the two most well-known international human rights organisations, Amnesty International and Human Rights Watch (HRW). Both had campaigned vigorously for a purely international court throughout the negotiations and seemed never able to reconcile themselves to the 'Cambodian model' that did become a reality. Certainly neither of them was ever ready to welcome or praise the Court, deciding instead to play a role of constant detractor, allowing their opposition to Hun Sen and his government to outweigh the need for support for this long-overdue effort to address the most significant human rights violations in Cambodian history.

Alongside these two NGOs, and more closely involved on the ground in Cambodia, was the Open Society Justice Initiative (OSJI, and its local offshoot, the Cambodian Justice Initiative—CJI). These are part of the Open Society Foundations (formerly known as the Open Society Institute) stable of organisations set up by US financier and philanthropist George Soros around the world, particularly in the former socialist countries, with the financial resources to make quite an impact in a number of local situations. While Soros is well known in the USA as a supporter of the Democratic Party, in the Cambodian instance his organization worked in tandem with that arch-conservative newspaper the *Wall Street Journal* in a most damaging and sustained campaign.⁶⁷

Even before the ECCC was formally established, OSJI adopted an active stance in the self-appointed role as monitor of the ECCC, to which end it published

⁶⁷In October 2006 OSJI wrote to donors raising concerns about 'hiring practices', kicking off a campaign of unspecific and unsubstantiated allegations that were reported repeatedly in the *Wall Street Journal*. See for example J.A. Hall, 'Yet another UN scandal', *Wall Street Journal* (21 September 2007); 'Corruption complaints at the Khmer Rouge War Crimes tribunal', *Wall Street Journal Asia* (2 October 2008); J.A. Hall, 'A UN fiasco in Cambodia', *Wall Street Journal* (5 October 2011) and elsewhere in the press, continuing to dog the ECCC until today.

regular reports and press releases. While these documents served as a useful record of the Court's progress, and a means to highlight special needs for funding, their principal focus was to criticize. Their content, often based on internal, even confidential, information and complaints, served to undermine and destabilize the Court and particularly to unsettle donors and interrupt its funding.

These criticisms from international NGOs were supported by a number of local human rights organizations, particularly those grouped together as the Cambodian Human Rights Action Committee (CHRAC). It was ironic and contradictory that most of these NGOs were at the same time conducting parallel activities with the stated aim of supplementing or sometimes collaborating with the Court's own activities, particularly in the fields of outreach and promoting victim participation. Their role as critics, often shrill and vitriolic, scarcely laid the basis of trust and confidence needed to make for smooth partnerships. This was exacerbated by the fact that the NGOs applied for and succeeded in gaining funds for such activities—many donors preferring to channel funds through the NGO sector rather than directly to the Court—while at the same time those very NGOs continued to denounce the Court for not doing these same activities.

This crusade from the human rights organisations certainly had an effect on public attitudes to the Court, even weakening support within the structures of the Court's 'parents'—the United Nations and the Cambodian government. On both sides, everyone knew that it had been a risk to set up the 'Cambodian Model'—the question was whether it was a risk that had proved to be worth taking.

2.6 Conclusion

It would undoubtedly have been an easier process and many of the difficulties outlined above could have been avoided had the ECCC been a wholly international or wholly national institution but neither of these options was ever really on the cards. The crimes were committed before the Rome Statute entered into force, and so the ICC had no mandate; the threat of the veto power had stymied several tentative moves made during the 1980s to engage the UN Security Council; and the Cambodian government opposed any action to take the issue out of its hands, asserting adamantly that under the Genocide Convention it had the primary responsibility to act and indeed was willing to do so, but was seeking international assistance and involvement.

So it was that in 1999 the United Nations and Cambodia launched into the world's first negotiations for a hybrid tribunal, although, due to the lengthy negotiations discussed above, the ECCC was established only in 2006, being preceded by hybrid courts in several other countries.⁶⁸

⁶⁸Other hybrid courts preceding the ECCC include the Special Panel for Serious Crimes within the Dili District Court of East Timor (established by the United Nations Transitional Administration in East Timor in 2000) and the Special Court for Sierra Leone (established by in 2003 on the basis of an Agreement between the United Nations and the Government of Sierra Leone), while the United Nations Mission in Kosovo began appointing international judges to the Kosovar district courts in 2000.

Whether the framework of the ECCC may serve as a model for other countries deserves discussion, and indeed has been emulated in some aspects in the structure of the Extraordinary African Chambers within the Senegalese judicial system established in 2013 following the signing of an Agreement between the government of Senegal and the African Union.⁶⁹

A mixed or hybrid court such as the ECCC has certain advantages and yet also faces some inherent difficulties of divided responsibilities and slow decision-making that either a purely national or international court can be spared.

Certainly holding the trials in situ, with the involvement of national judges, prosecutors and defence lawyers, proceedings broadcast in the national language, accessible to direct public involvement, and especially victim participation as Civil Parties, have been extremely positive features—critical in attracting such a high level of popular support for the ECCC, particularly when compared to the international tribunals. But such an approach of course depends on a government that supports the process as well as having the domestic judicial, legal, financial and security structures capable of sustaining the heavy demands of such a court.

International participation was a fundamental aspect of the ECCC and from the start was a precondition for international financial support, which has been essential to underpin the relatively costly framework and structure when compared to a purely domestic process. The involvement of the United Nations necessarily incurs a very heavy financial and administrative burden, but it can of course bring to the court expertise, facilities and procedures to complement those prevailing in the domestic judiciary, not to mention giving greater international exposure and recognition. This contrasts with the conduct of a purely national process as in the International Crimes Tribunals in Bangladesh, which is markedly speedier and less costly in financial terms, but lacks the benefit of the international input and is bearing the brunt of even more strident international criticism.

Whether to proceed via a purely national or international process, or whether to embark on the complex road of gaining support internationally and then negotiating, designing and actually establishing a hybrid process, and what balance should be struck between national and international elements, is not something that can be prescribed from outside, but must be decided according to the specificities of each case, taking into account historical factors as well as the objective and subjective situation.

The ECCC is still in train, not yet a historical event to be evaluated. Until it finishes its work, one cannot venture to conclude whether or how well this process of judicial accounting was achieved and how it contributed to Cambodia's struggle to free itself from the weight of this brutal period in its recent history.

What can be stated unequivocally, however, is that millions of Cambodians are watching the process intently. By March 2014, more than 450,000 Cambodians

⁶⁹Agreement between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System, 22 August 2012.

had visited the court. The courtroom is said to be the largest in the world, holding some 500 people in the public gallery, and its proceedings are often broadcast live on national television and radio. In a poll taken towards the end of Case 001, more than 80 % of those surveyed reported being aware of the ongoing process, 60 % having themselves seen it on television and 70 % believing it is providing justice.⁷⁰ A flowering of public and private reflection, research and comment is under way, really seizing popular attention alongside the judicial process. Week after week, month after month, programmes and activities are carried out throughout the country—on screen, on stage, in print, in schools, in *wats*, mosques and churches, at memorial sites, in meetings, forums, discussions, therapy sessions etc.

The participation of some 4,000 victims as Civil Parties may be considered one of the ECCC's main contributions to the development of international justice, despite the fact that precisely because it was a pioneer in this field, the ECCC had no precedents or road maps on which to rely, but had to develop its own procedures for victim participation, a process that was severely impeded by the unfamiliarity of common law judges and United Nations administrators with this element of civil law.

Further, many Cambodian judges and legal and administrative staff have gained tremendous benefits from working in a modern court functioning according to international standards alongside more experienced international colleagues. Issuance of reasoned judgments; support and protection for witnesses, victims and the defence; translation and interpretation services; an efficient registry of court documents, most of which are posted publicly and promptly on the Court's web site along with press releases and news; outreach activities in the provinces and the media—all these are new features of court management for Cambodia that are now starting to be introduced into the domestic court system.

Some have criticized the ECCC for its high costs, in a poor country that has many pressing needs. Others have ridiculed the small number of people brought to trial. But that was inevitable, given the Court's personal jurisdiction of trying only 'senior leaders and those most responsible' and the 30 year delay before the process even started. But, even if no more cases are tried, with the successful completion of Case 001 and the first part of Case 002, the Court can establish the historical record for future generations and provide justice to the victims through judicial accountability by the senior leaders and those most responsible for the suffering of the Cambodian people during the period of Democratic Kampuchea—the principal objectives for establishing the ECCC and its true legacy.

⁷⁰International Republican Institute, 'Survey of Cambodian Public Opinion', (2 February 2010), available at <http://www.iri.org/news-events-press-center/news/iri-releases-latest-survey-cambodian-public-opinion> (visited 15 June 2015).

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