TRYING THE PAST ATROCITIES IN CAMBODIA: ANOTHER PASS TO THE IMPLEMENTATION OF INTERNATIONAL CRIMINAL LAW

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I. Introduction

For more than six decades after the Second World War, efforts have been made, whenever the political environments so permitted, to put some horrendous atrocities committed in the form of war crimes, crimes against humanity and genocidal crimes, etc, on trials which extended beyond national boundaries. The first well-known effort was the International Military Tribunal established in 1946. More recently the ad hoc international courts set up in the 90s to try the crimes committed in the former Yugoslavia and Rwanda also drew much attention. Then came the latest movement at the turn of the 21st century when hybrid courts emerged as an important model in trying some past atrocities committed in serious violation of international humanitarian and human rights laws.[1]

Some view this shift towards the use of hybrid courts as a reaction to the problems of ad hoc international tribunals. Zacklin calls the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) "costly", "inefficient" and "ineffective", and stated further that it would be "impossible today to envisage the establishment of an ICTY-type tribunal in new situations". Governments or civil societies are not dissuaded from trying to deliver justice in post-conflict societies, but it is imperative that they "find alternative ways for doing so".[2]

Roper and Barria try to show that financial considerations and assertions of state sovereignty have led states to change their preferences opting for mixed or purely domestic tribunals in lieu of the purely international one.[3] Others deem the recent trend as a proliferation of forums that will ultimately strengthen the international system of criminal jurisdiction.[4]

From Nuremberg to Rwanda, international ad hoc tribunals were established to try war crimes, crimes against humanity and other crimes under international law. They exercised these jurisdictions independently but not in isolation from the national court proceedings. The Nuremberg Tribunal was created to try the major war criminals, whose offenses have no 'specific geographical local ization', leaving minor Nazi war criminals to be judged and punished in the countries where they committed their crimes.[5] In the cases of the former Yugoslavia and Rwanda, international tribunals were established by the United Nations Security Council in 1993 and 1994 respectively, acting under Chapter VII of the United Nations Charter, to prosecute persons responsible for serious violations of international humanitarian law in order to restore and maintain international peace.[6] These international court proceedings took place side by side with domestic court trials of lower-ranking suspects for other related crimes.[7] In significant contrast to these tribunals are the International Criminal Court established in 1998 and the so-called hybrid courts or internationalized criminal courts in some post-conflict situations like Cambodia, Timor-Leste, the Kosovo courts and the Special Court for Sierra Leone, etc. With few exceptions, the hybrid courts are domestic courts with strong international participation.[8] The participation goes beyond mere technical or advisory assistance and takes the form of direct engagement by foreign professionals, including judges, prosecutors and defense counsels, in exercising the judicial power of the nation concerned, on a par with their national counterparts.

The case of Cambodia, where the Extraordinary Chambers in the Court of Cambodia (ECCC) have recently been established to

try the past atrocities committed by the Democratic Kampuchea regime between 1975 and 1979, belongs to the new category of "hybrid" court system. Unlike the other hybrid courts where international judges and prosecutors played a majority role in deciding cases, the Extraordinary Chambers allow merely sufficient room for international judges and prosecutors to operate freely without being influenced by their national counterparts. The structure and the procedures for the Chambers are designed to give no ambivalent emphasis on the importance of Cambodian players.

This paper looks into the significance of the Extraordinary Chambers being established as a domestic judicial institution striking a sensitive balance between its proclaimed international features and the embedded domestic control. The focus here will not be on the question of accountability of those responsible for the past atrocities, but on the significance of the Chambers' status as domestic institutions, the roles of international judges, prosecutors and defense counsels jointly operating the system with their Cambodian counterparts, and the implications which this "hybrid" court has in the future development of Cambodian judicial and international criminal justice systems.

II. The return of controversial topics

The issue of atrocities and crimes committed by the Khmer Rouge has been discussed in Cambodia and, to some extent, internationally, since the late 1970s.[9] The first effort to establish a domestic tribunal in Cambodia to implement this idea took place in 1979 right after the Democratic Kampuchea regime was toppled.[10] The effort was never taken seriously by the international community even though it may have served the purpose of justice for a lot of Cambodians at that time. There was no question that the Western camp looked at that tribunal as a political maneuver by Vietnam to justify its invasion into Cambodia and to legitimize the new regime which it helped establish at the fall of the Democratic Kampuchea

regime.[11] The Tribunal brought in numerous evidence and witnesses against Pol Pot and Ieng Sary, the only two accused leaders of the Democratic Kampuchea prosecuted in absentia. There was an obvious lack of due process and no appropriate respect for the fundamental principles of a fair trial as it was understood under the human rights conventions already in existence at that time.[12] Pol Pot and Ieng Sary were given death sentence in absentia but the civil war went on.

After the general elections organized under the auspices of the United Nations in 1993, a new government was elected with two leaders being nominated as the Co-Prime Ministers of the Kingdom of Cambodia, following a unique formula of compromise in the name of national conciliation.[13] The ex-Democratic Kampuchea faction defied results of the general elections and chose to continue with their armed struggle for power. The newly established Royal Government of Cambodia at that time took active legislative and military actions in hope of defeating the resistance.[14] The efforts took strongest momentum particularly in 1996 when political struggles between the two Co-Prime Ministers also gradually escalated as the coalition started hitting hurdles in daily operation of the administration. One landmark incident was the Royal amnesty offered to Ieng Sary to facilitate his surrender to the Government forces. His surrender ended a large part of the ongoing civil war but was made on condition that he and his subordinates continued to rule the areas which had been under their control, on an autonomous basis with a certain level of government presence but not full control.[15]

This led to significant debates among the human rights community. All these events took place in the context of increasing international attention to transitional justice projects in the former Yugoslavia and in Rwanda. The Royal amnesty was presented by its critics as a sign of increasing practice of impunity resulting from the “peace vs. justice” controversy of Cambodian politics in the mid-90s.[16] The Special Representative of the United Nations

Secretary-General for Human Rights in Cambodia at that time specifically touched on this question of amnesty in his annual report submitted to the United Nations Human Rights Commission through the Secretary-General. It is interesting to note that he referred to this problem in the context of impunity and a lack of judicial independence and rule of law in Cambodia. In that particular section, the Special Representative explicitly referred to the amnesty accorded to Ieng Sary and expressed his hope that the action would not pre-empt the possibility of launching a judicial process or establishing a truth commission to examine what happened and who was responsible for the killings of the 70s.[17]

In response to this report, the United Natioins Human Rights Commission adopted the Resolution 1997/49 expressing its desire to see the United Nations assistance in investigating the atrocities of Cambodia's recent history and requesting "the Secretary-General, through his Special Representative for human rights in Cambodia, in collaboration with the United Nations Centre for Human Rights,[18] to examine any request by Cambodia for assistance in responding to past serious violations of Cambodian and international law as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability."[19] The Royal Government of Cambodia responded to the Resolution and sent an official letter dated 21 June 1997 to the Secretary-General requesting "the assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979".[20]

This letter officially opened up negotiations between the Government and the United Nations on a possible cooperation. Initially, the letter suggested that assistance resembling that provided to the former Yugoslavia and Rwanda be extended to Cambodia.[21] The United Nations Secretary-General was then asked by the General Assembly to appoint a group of experts to study the kind of cooperation which the United Nations could offer to

Cambodia.[22] A group of three experts was appointed and they came up with a report in 1999 suggesting the establishment of an international tribunal attached to the International Criminal Tribunal for the Former Yugoslavia (ICTY), to be placed in a country outside Cambodia but in the Asia-Pacific region, and that the prosecutor of the ICTY should also act as prosecutor for the tribunal with an investigation and prosecution office inside Cambodia. The Group also suggested the establishment of a truth-telling mechanism to take account of what actually happened during the period.[23]

Soon after the Group of Experts submitted their report, the Cambodian government changed its position and suggested that the United Nations play only a supportive role in this matter. It was a complete shift in the government's position towards the idea of conducting the trial in domestic courts. It is important to note here that between the time when Cambodian government sent the first letter asking for the establishment of an international court and March 1999 much had changed on the Cambodian political landscape. Pol Pot had died after being arrested by his subordinates in a coup inside the Khmer Rouge movement.[24] The other senior Khmer Rouge leaders, including such figures as Khieu Samphan and Nuon Chea, had surrendered in exchange for their safety and freedom to live in areas of their previous control and to move around.[25] Ta Mok, the remaining most senior Khmer Rouge leader not having surrendered, was arrested and would perhaps be the one to face a trial like this.[26] Under this new circumstance, the Government's commitment to the trial became ambivalent. Skeptic views questioned the commitment of the government in view of this change in attitude. As the former Special Representative later put it:

> Had there been a change of heart? Or had a price been paid for these crucial defections?
>
> Hun Sen now stressed the importance of putting an end to civil war, that there might be a conflict between a trial and peace..... It appears that the tribunal had been considered as a means of defeating the Khmer Rouge. When this goal now had been

> achieved through other means, there was no need to try anyone else than the one person who had refused to surrender...[27]

Perhaps due to the same skepticism, the UN had no faith in any fruitful negotiation with the Government when the negotiations failed to achieve any result in the second half of 1999 over some differences including those regarding the official participation of foreign judges and prosecutors to be appointed by the UN. The Cambodian government went ahead with its legislative preparation and submitted a draft law on the establishment of Extraordinary Chamber[28] to the National Assembly for adoption, with some further advice being sought from the United Nations. After some technical revisions, the Law was promulgated on 10 August 2001.[29] This move by the Government was the final say on the form of cooperation with the United Nations, namely a mixed tribunal to be set on a domestic setting. The remaining negotiations were focused on how big a role the foreign legal professionals could play in the system and on some other technical issues, such as the choice of attorneys, protection of witnesses, etc.[30] Moreover, there was disagreement between the United Nations and the Cambodian Government regarding the hierarchical relationship between this law and the possible agreement between the two.

Facing this reality, on 8 February 2002, Hans Corell, the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel who was in charge of negotiations with Cambodia on the issue of the tribunal, expressed UN's regrets that the Cambodian government was unable to address UN's concerns before the law was adopted. He also raised UN's concern at the lack of urgency shown by the Cambodian government over the years, and announced that,

> ...having carefully considered these concerns, the United Nations has concluded that the proceedings of the Extraordinary Chambers would not guarantee the international standards of justice required for the United Nations to continue to work towards their establishment and have decided, with regret, to

end its participation in this process.[31]

Afterwards, there were many behind-the-scene bilateral interventions by states that used to express interest in the issue, including the US and Japan, for the resumption of the United Nations-Cambodia talks.[32] The United Nations was finally put back to direct negotiations with Cambodia in 2002 by a General Assembly resolution.[33] As a result, negotiations were resumed and the final agreement between the United Nations and the Cambodian government was finally signed in 2003.[34] The 2001 Law was accordingly amended to reflect the new results of negotiations and then promulgated on 27 October 2004. The Chambers adopted the Internal Rules on 12 June 2007.[35] This brought the Chambers into full operation after one decade's debates and negotiations.

III. The Final Arrangements

The United Nations has been criticized mainly by human rights groups both inside and outside of Cambodia for the compromises it made in negotiations with the Cambodian government.[36] Few would question the weakness of the current Cambodian judicial system in ensuring trials based on international standards. Not only the United Nations, members of the opposition parties, human rights groups, practicing lawyers, but also the Cambodian Government itself have reportedly complained about this on different occasions.[37] Although not all individual legal professionals are to be blamed for it, the system in general is considered corrupt and frequently subjected to political manipulation, particularly whenever it is put to politically sensitive tests. It is therefore important to examine the final agreement between the United Nations and the Cambodian Government in terms of their cooperation within the context of the Extraordinary Chambers and the framework of the Law on Establishment of the Extraordinary Chambers as amended on 27 October 2004.

1. The Chambers

The Law establishes a two-tier system, the Trial Chamber and the Supreme Court Chamber. Each chamber consists of a panel of foreign and Cambodian judges. The Trial Chamber is composed of three Cambodian judges and two foreign judges. The President is one of the Cambodian judges.[38] Appeals will go to the Supreme Court Chamber which serves as the appellate and final level of the Chambers. The Supreme Court Chamber is composed of four Cambodian and three foreign judges. One of the Cambodian judges acts as the President of the Chamber upon appointment by the Supreme Council of Magistracy.[39]

Prosecution is the joint duty of the Co-Prosecutors, one Cambodian and one foreigner. In the event of disagreement between the co-prosecutors with regard to the decision to prosecute, the prosecution shall proceed unless both or one of the Co-Prosecutors requests within thirty days that the disagreement be settled by a Pre-Trial Chamber.[40] The Pre-Trial Chamber of three Cambodian and two foreign judges will be convened under the presidency of one of the Cambodian judges to decide on the disagreement.

Investigation of suspects is assigned to Co-Investigating Judges, one Cambodian and one foreigner. They have to work together on every single case. In the event of disagreement between the two Co-Investigating Judges with regard to the investigation or non-investigation of a case, the investigation shall proceed unless one or both of them request within thirty days that the disagreement be settled by a Pre-Trial Chamber.[41] Decision of the Pre-Trial Chamber requires the affirmative vote of at least four judges. It is not subject to appeal. However, both in cases of the Co-Prosecutors and the Co-Investigating Judges, a failure to secure the super-majority vote in the Pre-Trial Chamber works in favor of the decision to proceed with the prosecution or the investigation.[42]

2. Rights of The Accused

Just like in any international and national criminal proceedings,

the Extraordinary Chambers guarantee that the rights of the accused are protected. Article 33 (New) of the Law on Establishment of the Extraordinary Chambers states that:

> The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims ....

Details on institutional arrangements for defending the right of the accused and the protection of victims are found in the Internal Rules of the Extraordinary Chambers of the Courts of Cambodia. Rule 11 requires that the Office of Administration establish a Defense Support Section, to register and maintain a list of national and international lawyers to be chosen by the accused for defense. Qualified foreign lawyers may participate in the defense under this arrangement by first registering with the Bar Association of the Kingdom of Cambodia, and then registering with the Defense Support Section. Substantively, Rule 21(1) guarantees the implementation of fundamental principles in protecting the interests of the Suspects, Charged Persons and Accused together with those of the Victims in the following terms:

> The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of the proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement...[43]

The rights of the accused to a lawyer are guaranteed from the early stage of the proceedings. The presence of defending lawyer(s) of the suspect is guaranteed during the period of police custody subject to the administrative requirements of the detention facility.[44] The suspect may meet with a lawyer of his/her own choice before being presented to the prosecutors following his/her arrest.[45] At the time of initial appearance, the Co-Investigating Judges shall inform the accused of his/her right to have a lawyer.

Interviews by the Co-Investigating Judges shall only be done in the presence of the lawyer, unless the Charged Person waives his/her right to that.[46] The Charged Person is also entitled to having consultation with a lawyer prior to the interview.[47]

3. Victims' Interests

Interests of the victims are promoted by the system of Civil Party participation in the criminal proceedings against those responsible for crimes within the jurisdiction of the Extraordinary Chambers.[48] Victims are also allowed to seek collective and moral reparations as provided by the Internal Rules.[49] The enforcement of sentences and reparations is provided for in Article 113 of the Internal Rules, which states that,

> The enforcement of a sentence shall be made at the initiative of The (sic) Co-Prosecutors. The enforcement of reparations shall be made at the initiative of a Civil Party.[50]

Meanwhile, Rule 12 also requires that a Victim Unit be established by the Office of Administration of the Extraordinary Chambers to offer assistance to Civil Parties constituting of the victims or associations of victims.[51] Given the numerous victims of the Democratic Kampuchea regime which ruled the countries for almost four years over three decades ago, it is expectable that this Civil Party system if properly promoted will likely encourage massive participation. This may be particularly serious in the case of the Extraordinary Chambers due to the small number of suspects to be targeted. All fingers will probably point to the five suspects apprehended. However, to what extent the civil society is going to make use of this opportunity and how the Extraordinary Chambers are going to cope with such demands remain to be answered. There is no indication yet as to how reparations will be made.

4. Amicus Curiae Briefs

Article 33 states that "At any stage of the proceedings, the Co-Investigating Judges and the Chambers may, if they consider it desirable for the proper adjudication of the case, invite or grant

leave to an organization or person to submit a written amicus curiae brief concerning any issue. The Co-Investigating Judges or Chamber concerned shall determine what time limits, if any, shall apply to the filing of such briefs".[52]

Although in an international tribunal, submission of amicus curiae brief is an ordinary business, it should not be taken as such in the Cambodian court. It is new to the system and the practitioners. Cambodian people's reaction to this system seems to have been rather positive so far.[53] How this system will contribute to the future of judicial development in Cambodia is an interesting subject for further research.

5. Balancing the Interests

Through the history of their establishment, the Extraordinary Chambers will have to operate in a very special environment. The Chambers are founded on legally mixed cultures and concepts and complicated mixture of interests. Although appointment of the Co-Investigating Judges reflects the current Cambodian system of investigation in criminal procedures, the Internal Rules which govern detailed operation of the Extraordinary Chambers are compromised products between the Cambodian and the foreign actors. These Internal Rules differ significantly from the criminal procedures currently applied by Cambodian domestic courts.[54] They are more progressive in terms of implementing international human rights standards in dealing with criminal matters. The final structure of the Extraordinary Chambers agreed upon between the United Nations and the Cambodian Government may thus be the minimum that the United Nations could agree to in terms of ensuring the integrity of a tribunal to be funded and operated in the name of the world community.

The Law on the Establishment of the Extraordinary Chambers of the Courts of Cambodia paves the way for judgments to be made by judges of mixed nationalities inside the jurisdiction of Cambodian courts regarding specific crimes committed by the former senior and most responsible leaders of the Khmer Rouge.

Although the majority are Cambodian judges, a final judgment which literally divides the chambers along "international versus national" lines will not be possible since all decisions and judgments of the Chambers are to be adopted by the supermajority votes.[55] A Pre-Trial Chamber is also designed to handle any case of a failed agreement between the Co-Prosecutors regarding a decision whether to prosecute or not to prosecute, or a disagreement between the Co-Investigating Judges over the issue of whether or not an investigation has to go ahead. The Pre-Trial Chamber adopts the same decision-making methodology as the other Chambers and ensures that judgments will be made on professional grounds without giving way to divides along "international versus national" lines. Any political interference leading to a clear divide along the "international versus national" lines will automatically result in the total paralysis of the proceeding. That might be the last thing which the United Nations and the Cambodian Government would prefer to see happen.

Accordingly, for any final decision and judgment to be made, a foreign judge will have the decisive voice if not the major say. In case of a disagreement between the Cambodian and the foreign prosecutors or investigating judges, and if the Pre-Trial Chamber cannot agree on a final decision, the decision to prosecute will dominate. This is an apparent attempt to reduce the risk of a political block, particularly by the Cambodian Government in pressuring the Cambodian prosecutor or investigating judge, against the prosecution of some sensitive figures of the former Democratic Kampuchea regime. If the Cambodian prosecutor or investigating judge chose to avoid colliding with a government desire to leave out any defendant, the chance of moving ahead with the prosecution would remain, provided that the foreign prosecutor or investigating judge would retain a strong stance for the prosecution or investigation and if the Pre-Trial Chamber does not rule otherwise.

If confrontations along the United Nations-Cambodian line

would take place over the substance of any particular case even after the Pre-Trial Chamber has passed its judgment for the prosecution to go ahead, for sure the next hurdles would be securing the final decisions of Cambodian judges at the Trial and perhaps the Supreme Court Chambers. The accused could either be acquitted or sentenced by the Chambers, in defiance of any domestic political preferences for the judgment to be passed otherwise, only if more than half of the Cambodian judges decide along the line of the minority foreign judges. To the contrary, for any political interference in the decisions of Cambodian judges to succeed, at least one foreign judge must be convinced to make the same decision as the majority Cambodian judges, against the position of the other international judge(s). Without securing either of the two, the result would be a judicial deadlock.

As rightly pointed out by De Bertodano, such deadlock may happen in many different circumstances.[56] If there is a split between two opinions among the judges, without either being able to secure a supermajority,[57] the trials will end in a limbo. There will neither be a conviction nor an acquittal and as a consequence the accused persons will presumably have to be freed. It is not yet clear what will happen if no super-majority can be obtained for such issues as protection of witnesses, disclosure of some documents, and the admissibility of evidence. Any disagreement on these issues may result in impossibility for a trial to continue. In addition, there is no provision for publishing individual opinions of the judges if there is no unanimous or super-majority decision. The Law does not provide for appeals to be made to the Supreme Court Chamber either, if the Trial Chamber fails to reach a decision.[58] However, the positive side of this arrangement is that if the disagreement is based on purely technical differences, the system will be appreciated for its seriousness in maintaining an exceptionally high judicial standard. But whether or not this judicial standard will be emotionally accepted by the Cambodian society and the international community is a different question.

One worse, though highly unlikely, scenario would be the refusal by the Cambodian authorities to cooperate in apprehending and presenting a particular defendant for trial. That would definitely send a negative message to the society on the authority of the Extraordinary Chambers but in no way on the integrity of the judges or the trial per se. After all, the Extraordinary Chambers are part of the domestic courts and the United Nations retains the final decision either to continue with its funding and cooperation or to withdraw. This is stipulated in Article 25 reading in connection with Article 28 of the Agreement. Article 25 reads:

> The Royal Government of Cambodia shall comply without undue delay with any request for assistance by the co-investigating judges, the co-prosecutors and the Extraordinary Chambers or an order issued by any of them, including, but not limited to:
> a. identification and location of persons;
> b. service of documents;
> c. arrest or detention of persons;
> d. transfer of an indictee to the Extraordinary Chambers.

And Article 28 allows the United Nations to withdraw its support by stating that:

> 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 to 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

Thus, at the end of the negotiations, ideas about having an international court, a truth commission or a domestic special court with a majority of foreign judges have all gone. The two parties came to an agreement to ensure the domestic status of the Extraordinary Chambers but with limited technical control by external elements. The final compromise puts the international community in a position to recognize the active roles of the Cambodian participants and to exercise the function of a second

entrenchment to prevent political interference in the work of the Chambers. It is this function of a second entrenchment that the C hambers' contribution to the development of the rule of law in Cambodia ought to be examined. This question will be further analyzed below.

IV. The political environment and the compromising choice

The choice to establish the Extraordinary Chambers as part of the domestic judiciary is the hard-won result of tough negotiations by the Cambodian government. For Cambodia as a sovereign state, this domestic status serves some very significant purposes. It helps retain, at least in form, the judicial sovereignty of the nation, since it is also a serious Cambodian problem - the crimes were committed on the Cambodian soils, the suspects and the victims were Cambodians.[59] By making it the job of the domestic courts to try these crimes, the efforts may give a rare opportunity to the Cambodian judicial system to claim for new legitimacy after it has frequently been tainted with charges of corruption and incompetence.[60]

For the ruling party,[61] what the People's Republic of Kampuchea could not achieve in the trial of 1979 is being achieved by the Royal Government of Cambodia now. Although no one has really made Pol Pot, the number one suspect, a charged person or an accused to come and face the Chambers, recent arrests of Ieng Sary, Nuon Chea and Khieu Samphan have drawn attention to the seriousness of the project. The same group of persons who liberated the population from the genocidal regime and used to fight against military return of the Democratic Kampuchea for more than one decade will have the chance to see their victory in finally destroying the regime and contributing to bringing to justice those most responsible for the atrocities committed.

Finally, the compromising choice perhaps works less in the interests of the international communities. There are apparent conflicting interests among major players in the international community, with some favoring a strong international participation while others more receptive of the idea of a mixed court rather than a purely international one.[62] China, a Security Council member, even favored non-action in this matter, dubbing it a purely internal affairs of Cambodia.[63] To a certain extent, the United Nations was compelled to make compromises as it had to walk the thin line of accommodating these different interests. Although further analyses are needed for a deeper appreciation of the international stance in this issue, for the purpose of this paper it suffices to say that an international court, resembling those of the Nuremberg, Tokyo, former Yugoslavia or Rwanda, would perhaps be the most easily acceptable formula for the United Nations, but was the most unfeasible alternative, given the need for it to work in cooperation with the present Cambodian government. A domestic court taking up the hybrid model was the more feasible choice, provided the United Nations has substantive controls over the technical part of the administration of justice to be rendered by the Chambers.

All these factors formed a favorable political environment for establishing the Extraordinary Chambers in the Courts of Cambodia. These Chambers bear unique characteristics tailored to meet the need of a three-year project to be operated jointly by the Cambodian government and the United Nations. However, it is important also to review two major hurdles embedded in the political environment mentioned above.

First, the political need to have peace and national conciliation continued well after the Royal Government was established by the 1993 elections organized under the auspices of the United Nations Transitional Authorities in Cambodia (UNTAC). Some defected leaders of the former Democratic Kampuchea government were granted freedom and the authority to exercise autonomous rules

over regions where they had occupied for years in fighting the guerilla wars, in exchange for their agreement to give up armed struggles and join the Government. The most notorious case was the granting of Royal pardon and amnesty to Ieng Sary, the former Minister of Foreign Affairs of the Democratic Kampuchea government. There were concerns particularly by the human rights activists that the pardon and the amnesty in particular would rule out any possibility to bring Ieng Sary to justice. But the Royal Government was worried that attempts to bring these senior Khmer Rouge leaders to justice would ignite civil war again, before the ex-Khmer Rouge soldiers could really trust the sincerity of the Royal Government's policy on peace and national conciliation.[64]

Second, several leaders of the ruling party were once senior leaders and officials of the Democratic Kampuchea regime. They later defected and joined forces with the Vietnamese army to topple the regime. It is therefore understandable that some of these leaders were wary of the judicial proceedings being abused or distorted to discredit their legitimacy in the leadership. Although the trials of Nuon Paet et al by domestic courts indicated that the current Cambodian leaders were willing to bring members of the Khmer Rouge to justice, it may be over-simplified to conclude that the willingness means an absolute positive attitude towards a free-hand policy for the international community to pursue whatever is regarded by independent liberalists as part of the past atrocities committed in Cambodia.[65] A system which gives too much power to independent international judges and prosecutors would deprive the Cambodian government of any possible control over the process in accordance with the terms of the law as interpreted in the way they understand it, and would therefore not be something acceptable to some Cambodian politicians.

The political choice therefore had to be creation of an internationally recognized, domestically legitimate and politically accepted judicial process to try the crimes of the Khmer Rouge from 1975 till 1979. The concern of political interference and lack of capacity

is not fully responded to, but the system however reserves a place for international guarantee of its neutrality and impartiality. From a national perspective, the Extraordinary Chambers may invoke some interesting observations on the question of national implementation of international criminal justice standards. The following section will examine some latest developments in the actual practices of the Extraordinary Chambers in implementing the stipulated rules and procedures so far.

V. Detention orders and the Pre-Trial Chamber hearing

Unprecedented in the performance of Cambodian courts is the effort by the Extraordinary Chambers to post on the website almost real-time information on orders being issued, relevant documents submitted by the defense counsel, reports by the judges, and hearings conducted by the Chambers. Since the establishment of the Extraordinary Chambers, there have been provisional detention orders issued against the five suspects currently under custody, appeals filed against some of these orders, and one public hearing on the case of appeal by Kaing Guek Eav against his long detention. This Section briefly reviews some aspects of the detention order against Ieng Sary and the public hearing conducted by the Pre-Trial Chamber on the appeal by Kaing Guek Eav against his detention.

1. The detention of Ieng Sary and the question of Royal pardon and amnesty

This review focuses in particular on the question of Royal pardon and amnesty granted to Ieng Sary when he defected to the Royal Government of Cambodian in 1996. This issue has been a serious subject of debates. Though it is not yet clear what impact the issue will likely have on the merits of the case, the provisional detention order issued by the Co-Investigating Judges was the first effort by the Extraordinary Chambers to confront this highly

controversial question.

Ieng Sary was the second most senior leader of the Democratic Kampuchea, after Pol Pot. He was the Deputy Prime Minister in charge of Foreign Affairs of the Democratic Kampuchea regime.[66] His wife Ieng Thirith, then the Minister of Social Affairs, is also one of the five suspects now apprehended. Together with Pol Pot, he was sentenced to death in absentia by the Kampuchean People's Revolutionary Tribunal in 1979 for the crime of genocide.[67] After 1979, he has continued to be one of the leaders of the Khmer Rouge movement engaged in the guerilla war. After the general elections in 1993, he remained to be an important leader of the Khmer Rouge forces and partly controlled the Northern region, notably the city of Pailin. He defected to the Royal Government in 1996 and was granted pardon from the death sentence given in 1979 and an amnesty against the implementation of the 1994 Khmer Rouge Law, by a Royal Decree dated 14 September 1996.[68] Since then he has been moving freely in and out of Phnom Penh and his forces were allowed to retain control in Pailin.

He was arrested together with his wife on 12 November 2007 and was charged with "Crimes against Humanity and Grave Breaches of the Geneva Convention of 12 August 1949, crimes defined and punishable under Articles 5, 6, 29 (new) and 39 (new) of the Law on the establishment of the Extraordinary Chambers".[69] He argued against his provisional detention by raising, among other things, the Royal pardon he received. After having conducted an adversarial hearing, the Co-Investigating Judges, You Bunleng and Marcel Lemonde, nonetheless ordered on 14 November 2007 that he be placed in provisional detention for a period not exceeding one year. In this order, the Co-Investigating Judges made the following analyses regarding the issue of Royal pardon and amnesty granted to Ieng Sary.[70]

The Co-Investigating Judges first stated that the 1979 judgment appears final under Cambodian law. They then examined two legal

questions. First, "does the current prosecution before the ECCC infringe the binding authority of a previous legal decision, under the general principle of criminal law *ne bis in idem*?" Second, "assuming that the answer to the first question is negative (and providing that the Co-Investigating Judges have the jurisdiction to decide on the scope of the 1996 Royal Decree), are the pardon and amnesty granted to Ieng Sary opposable to the ECCC?".[71]

They proclaimed that Article 14(7) of the International Covenant on Civil and Political Rights does not represent an absolute principle under international criminal law and stated that,

> 8. Thus, as a general rule, the statutes and practice of international and internationalized tribunals permit the prosecution of a person for the same acts and under the same legal characterization, in particular where "*the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice*". ..... In any case, the question whether this solution is applicable to the circumstances of the case in hand does not arise at this time since, without prejudice to the outcome of on-going judicial investigation, IENG Sary is not currently charged with genocide.

Then referring specifically to the judgment of the ICTY Appeals Chamber on *The Prosecutor v. Delalic et al.*, the Co-Investigating Judges added that,

> 9. ..... consistent case law of the international tribunals establishes that, as regards international crimes, cumulative convictions are possible in relation to the same act as long as each offence has a materially distinct element not contained in the other. Therefore, it is accepted that a person may be prosecuted for genocide, crimes against humanity and war

crimes based on the same acts, given that each of these international offences has a distinct element not contained in the others and protects different values.

10. Finally, and above all, it already appears to be established that the 1979 Judgement did not cover all of the acts for which IENG Sary is currently being charged. Accordingly, there does not appear to be any valid argument here concerning the binding authority of previous legal decisions.[72]

With this, the Co-Investigating Judges moved on to examine the second question. They first confirmed their jurisdiction over this issue by citing Article 40 of the Law on Establishment of the Extraordinary Chambers[73] and stated that,

11. ..... In its capacity as a judicial body of the ECCC responsible for conducting an exculpatory and inculpatory investigation into IENG Sary's alleged acts, the Co-Investigating Judges thus have jurisdiction to decide on the scope of the pardon and amnesty in question. Of course, their determination is of a provisional nature and does not bind the Trial and Supreme Court Chambers.

12. As regards the effects of the royal pardon, it is important to note that they are limited to annulment of the sentence, as well as its execution, without having any effect on the conviction decision as such. Accordingly, even if it were opposable against the ECCC, this measure would have no effect on the current prosecution, and the only issue is that of the conviction itself, which has been dealt with above.

13. The amnesty, on the other hand, makes express reference to the 1994 Law. Yet, apart from an allusion to genocidal acts in its preamble, this law only refers to a number of domestic law offences subject to prosecution in accordance with national legislation applicable at the time, as well as a series of crimes against State security. Therefore, it does not cover the offences

coming within the jurisdiction of the ECCC.

14. In summary, neither the pardon nor the amnesty currently establish any obstacles to prosecution before the ECCC for the international crimes with which IENG Sary stands charged.[74]

The Co-Investigating Judges therefore made it clear that the pardon and amnesty granted to Ieng Sary do not constitute obstacles to the prosecution to be made against him. However, they were careful not to question the validity of the 1979 trial despite its well-known lack of internationally accepted standards in terms of judicial performance. They chose to avoid the question of genocide which is more relevant to the merits of the case and left it to the Trial Chamber and the Supreme Court Chamber to decide further on the issue of the pardon and amnesty with regard to the merits of the case.

2. The case of Kaing Geuk Eav and the jurisdiction of the ECCC

Kaing Geuk Eav, alias Duch, was the head of the S-21 Security Prison (commonly known as the Tuol Sleng prison) run by the Democratic Kampuchea government between 1975 and 1979. Inmates were interrogated, tortured and finally killed in this prison located in the center of Phnom Penh. After the fall of the regime, Kaing Geuk Eav stayed along the Cambodian-Thai border. Then he had been living here and there inside Cambodia with different names. In 1995, he was baptized by a Christian mission and became a priest. In 1999, he revealed his original identity and gave himself in to the Royal Government.[75]

Since 1999, he was detained by the Military Court, under different charges. He was later transferred to the jurisdiction of the Extraordinary Chambers on July 31, 2007.[76] The Co-Investigating Judges decided to keep him under provisional detention for no longer than one year. He appealed against this decision by claiming that his long detention without trial since 1999 has been against

Cambodian law and the International Covenant on Civil and Political Rights, that he should be released on bail or kept under house arrest, or even released pending trial[77] and he should be granted compensation for damages incurred on him as a result of the excessive provisional detention.[78]

The Pre-Trial Chamber conducted a public hearing of his case on 3 December 2007 and judged in favor of the Co-Investigating Judges' decision, by first proclaiming that the "question of relationship between the ECCC and the Military Court" is "relevant to a consideration of whether the Co-Investigating Judges and the Pre-Trial Chamber have any jurisdiction to inquire into the legality of the prior detention"[79]. On that basis, it states:

> 17. According to, and as provided in the Internal Rules, the Co-Investigating Judges have jurisdiction to decide on provisional detention and release, and the Pre-Trial Chamber has jurisdiction on appeals against these decisions. The Agreement, the ECCC Law, the Internal Rules and Cambodian law do not explicitly or implicitly give any jurisdiction to the Co-Investigating Judges or the Pre-Trial Chamber to rule upon any matter related to decisions or actions of the investigating judges of the Military Court or any other court within the Cambodian court system. The jurisdiction of the Pre-Trial Chamber and other organs of the ECCC is expressly limited to the subject matter of the ECCC Law. There is no provision for interaction between the ECCC and any other judicial bodies within the Cambodian court structure.[80]

In response to the contentions that "(P)rovisional detention of more than 8 years is illegal under Cambodian law. New charges were brought several times against Duch in order to keep him in provisional detention"[81] and that "(I)n ordering Duch's detention for a ninth year, the Co-Investigating Judges have contributed to the excessive duration of the detention and validated the prior proceedings relating to his detention. Duch has been detained while awaiting the establishment of the ECCC and the proceedings before

the military court and the ECCC are intrinsically linked",[82] the Pre-Trial Chamber states:

> 21. As the ECCC has no direct relationship to the Military Court, it has no direct jurisdiction to review the actions of that Court or the compliance of those actions with Cambodian law. There is similarly no evidence that the Military Court acted on behalf of the ECCC in detaining the Charged Person, or of any concerted action between any organ of the ECCC and the Military Court. The Co-Lawyers for the Charged Person produced at the hearing of the Pre-Trial Chamber one document from the Case File which is said to have emanated from the Military Court. The way in which this document came into the Case File has not been disclosed, and on its face does not provide any proof of a link between the ECCC and the Military Court or demonstrate that the Military Court and the ECCC acted in concert in any way whatsoever in detaining the Charged Person for the whole or any part of the period in excess of eight years.
>
> 22. In fact, the ECCC only existed in any form after the swearing-in of the judges of the ECCC, which took place on 3 July 2006. The ECCC did not exist as an organ before this date. The first task of the judges was to formulate the Internal Rules, on the basis of which the prosecutions could take place. These Rules were adopted in the plenary meeting of judges on 12 June 2007. Thus there cannot have been any connection or any actions on behalf of any organ of the ECCC by the authorities of the Military Court prior to these dates. To the extent that the Military Court purported to base certain actions on the pre-amendment and amended ECCC Law, this cannot have been at the direction of the ECCC.[83]

However, in drawing this separation of jurisdictions between the ECCC and the Military Court, the Pre-Trial Chamber went on to examine the legal status of the ECCC within the Cambodian court structure. It declares that,

> 19. For all practical and legal purposes, the ECCC is, and operates as, an independent entity within the Cambodian court structure and therefore has no jurisdiction to judge the activities of other bodies. The Co-Prosecutors have submitted that this independence, which makes the ECCC a "special internationalized tribunal", is demonstrated by a number of factors that are summarized in the Report.[84]

The Chamber then looked to the case of *Prosecutor v Charles Ghankay Taylor* decided by the Special Court for Sierra Leone(85) for an interpretation of the nature of an "international court" and concluded that,

> 20. In reaching its conclusion, the Pre-Trial Chamber also refers to the decision of the Appeals Chamber of the Special Court for Sierra Leone in the case of *Taylor*, where it considered the indicia of an international court included the facts that the court is established by treaty, that it was "an expression of the will of the international community", that it is considered "part of the machinery of international justice" and that its jurisdiction involves trying the most serious international crimes.[86]

Although the Chamber was right in denying that the proceedings before the ECCC and the Military Court were intrinsically linked, by emphasizing on the self-contained nature of the Chambers, it seemed to have gone too far by comparing the ECCC to that of the Special Court of Sierra Leone. The latter was established by an international treaty while the former was not evidently so.[87]

VI. Domestic Impacts of the ECCC on Building the Rule Of Law

Analyses on the merits which the Extraordinary Chambers may bring to the Cambodian society in the future have most frequently been made in very general terms. It is presumed that a comprehensive evaluation of the achievements is possible by linking the

effects of the Khmer Rouge trials on the question of accountability for past atrocities to discovery of truth, national conciliation, justice (retributive and restorative), elimination of impunity and establishment of the rule of law, etc. While this is inspiring and may at least constitute an important step towards strengthening the judiciary and building up the rule of law in Cambodia, a more careful look and analysis has been seriously lacking. Undoubtedly, further qualifications are needed to claim that the three years project to try a few former Khmer Rouge leaders will contribute to the better development of rule of law in Cambodia. A strong case of "rule of law" development will have serious impacts on a culture of impunity only if the "rule of law" is genuine and not economically or politically biased. This section will therefore examine the kind of "rule of law" to be developed by the ongoing transitional justice project in Cambodia.

The concept of "rule of law" is used in this context in relation to the question of due process or fair trials to be conducted by independent and impartial judges of high integrity and experience, particularly in the fields of criminal or international laws.[88] It therefore specifically refers to the rule of law in the field of criminal justice. Proponents of the Extraordinary Chambers suggest that an important long-term legacy which the project will leave behind at the end of the three year efforts is the aspect of capacity building in strengthening the rule of law in Cambodia. It is argued that by working with Cambodian counterparts in a domestic judicial system setting, international judges and experts will ultimately help produce a group of future Cambodian legal professionals and court staff who will be experienced in applying international standards of justice and fairness to the domestic legal system.[89] This is a valid evaluation in so far as achievements of the three year project remain stable at the closure of the Extraordinary Chambers. Some determinants and potential challenges are listed here for further assessment.

1. Effects of A Wake-Up Call

For nearly thirty years, condemnation of some Khmer Rouge leaders either by the domestic courts, political institutions, the international legal scholarships or by circles outside of the legal arena has been going on since the end of the 1970s. Introduction of the internationally acceptable standards into the Cambodian criminal justice system would therefore be a wake-up call for a lot of Cambodian citizens to learn about the other aspects of the due process in a formal judicial process, namely the respect for the right of suspects including those charged for the crime against humanity or war crimes.[90] Victims of the past atrocities need to take it for granted that the same person who was sentenced to death in 1979 in absentia may claim in front of the judges his innocence and human rights, driving the prosecutor(s) into tough exchange of evidence with highly technical and sophisticated defense teams challenging against each detail of acts allegedly committed over 30 years ago. Victims may even need to accept that a suspect whom they have long believed to deserve a death or life sentence may end up with a much lenient punishment. The public relations section of the Extraordinary Chambers and non-governmental organizations are conducting public awareness activities to enhance people's understanding of the roles and functions of the Chambers.[91] Whether Cambodian public will react positively and soon enough to this wake-up call remains to be seen at this stage.

2. Performance at the End of the Project

Another deciding factor is the performance of Cambodian legal professionals at the end of the three year experience with the Extraordinary Chambers. After years of legal and judicial reform and improvements in legal education in Cambodia, legal professions in Cambodia have been exposed to new standards of behavior and new legal norms. Three years of working experience with international judges, prosecutors and defense counsels well-versed in international criminal law cases will undoubtedly further enhance the capacity of Cambodian counterparts. However, studies have also

shown the weakness of Cambodian judiciary as an institution.[92] At the end of the Extraordinary Chambers, how the small number of selected Cambodian legal professionals will perform within the politically and logistically weak Cambodian judicial institution will spell the success or failure of this assistance project. Until then, the success should not be over-expected.

3. Success in Transplanting A New Judicial Culture

Just like in most international assistance in legal reforms, the question of transplanting or simply introducing new legal or judicial standards of behavior in a different national or social context is complicated. The same can be said for the experience of the Extraordinary Chambers. It is not enough that a few Cambodian legal professionals conceive these new inputs to be acceptable. To a certain extent, the inputs have to be politically and socially acceptable as well. The Extraordinary Chambers creates a judicial process within a multi-cultural environment, as a result of its multinational legal representation. Legal professionals coming from different backgrounds and cultures may leave behind a great fortune of knowledge and information based on different legal traditions which Cambodians are yet to absorb or scrutinize for domestication. This process of scrutinization and domestication may take decades to bear fruit. Success or failure of the Extraordinary Chambers is therefore not something one can easily state with precisions and sufficient confidence. Clear standard of reference and strong theoretical grounds in support of the conclusions, whatever they are, are needed for convincing and objective assessments of the legacy to be left behind by the experience of the Extraordinary Chambers.

4. Confronting the Question of "Equality Before the Law"

Like many other countries in transition, there have not been sufficient debates and explanations about the conflicts between different values in the zealous pursuit of accountability for past atrocities. The need to stop a culture of impunity and to enhance the value of fair trials even in dealing with the crime of crimes is not sufficient to justify special treatments to be given to only the

most senior culprits. Such special treatments are no doubt bitter pills for tens of thousands of the victims. The combination of Cambodian government's insistence to make the Extraordinary Chambers part of the domestic judicial institution and the international community's desire to confine the Chambers to two-layered trials, despite the current three-layered court system in Cambodia is another important detail in thinking about the meaning of the "rul e of law" in the Cambodian society. How this abnormality is to be explained and interpreted by Cambodian jurists will in effect play an important part in shaping the judicial and legal culture of the country in the future. Whether and how the double judicial systems and standards created under the United Nations auspices will be of any significant impact on the development of Cambodia's judicial system therefore remains to be seen in many years to come.[93]

VII. The Extraordinary Chambers and the future of international criminal law

Despite the criticisms and cautions made on the current creation of the Extraordinary Chambers, much is anticipated of the positive outputs which they may deliver to the development of Cambodian law and society. The model of a hybrid court so created is part and parcel of the current development in the field of international criminal law, since cases brought before these courts not only involve crimes defined under the national criminal codes, but also concern serious breaches of international treaty or customary laws. Until recently, permission for foreign judges and prosecutors to directly participate in bringing charges and trials in a sovereign nation state was not conceivable. The Extraordinary Chambers are created as domestic courts with direct participation of international prosecutors and judges. These prosecutors and judges were recommended by the United Nations Secretary General and appointed by the Supreme Council of Magistracy,[94] which is the only institution in Cambodia to appoint prosecutors and judges. The details are stipulated in a law adopted by the National Assembly

and declared constitutional by the Constitutional Council.[95]

Although confined to a limited jurisdiction, the establishment and development of the ECCC will constitute an important precedent for future international technical cooperation in the field of criminal justice. This arrangement will not only be essential for enhancing the capacity of local professionals in dealing with criminal cases having high international implications but also an important means to avoid carrying out the "victor's justice". Three years after working with highly qualified international counterparts, at least several Cambodian judges, prosecutors, defense counsels and other court staff will acquire precious technical experiences in conducting proceedings at internationally accepted standards, by introducing new legal techniques. For instance, in Cambodian criminal cases, there has not been the practice of elaborating detailed legal reasoning in any court judgments or decisions. Nor has there been a space for expressing dissenting views in court documents. This practice is being changed, at least in conducting trials in the Extraordinary Chambers. If this practice is fully inherited after the Extraordinary Chambers wind up their missions, it will be a very important break-through in the process of judicial reform in Cambodia. It will lead to more transparency in the judiciary, higher professionalism in judicial performance and, as a result, greater independence to be exercised by every individual judge.

During the years of civil war, the Khmer Rouge was fighting against the administration whose leaders continue to occupy some important portfolio in the Royal Government today. Now the guerilla movement is over. Should the former guerilla leaders be tried by the Cambodian government alone, particularly since almost everybody in Cambodia including the great majority of judges and prosecutors and the defense counsels used to be victims of the past ruling of the Democratic Kampuchea regime, it would easily be considered the "victor's justice" to be rendered to the losers of a civil war. For that reason, participation by independent and highly

professionalized international personnel as the third party in the process will reduce the risk of attaching this image of the "victor's justice" to the Chambers.

The experience of the Extraordinary Chambers may therefore suggest some important approaches to the implementation of international criminal law by national courts. Particularly regarding atrocities committed by a government against the population of its own nation, the trials may be better conducted locally offering easy access for victims or their offspring. But in this situation, there could easily be allegation of the justice being that in favor of the victors. It is therefore essential that due process and fair trials be strictly guaranteed. This should be taken seriously in the post-conflict situation where living experiences of a properly functioning judicial system and reliable human resources may be short. While a hybrid court arrangement may be a good choice to tackle the questions mentioned above, it has to be tailored to the needs of the society concerned by means of clear legislative provisions and adoption of relevant international cooperation agreements with the United Nations or other international organizations. However, on the negative side, there could be risk that the whole process would be hijacked for political gains of the government concerned. The need to take into consideration the local context should not justify a compromise of the quality and integrity of the process, particularly if direct international participations in the court proceedings are involved. The pull-out clause should be the last but important option to consider.

VIII. Concluding observations

After the course of three years, the Extraordinary Chambers will most likely contribute to internationalizing a few Cambodian legal professionals, including judges and prosecutors in the way they perceive rules and norms regarding human rights and criminal justice. The Extraordinary Chambers have been established as part

of the Cambodian system but with a very different institutional arrangement. An arrangement in which foreign prosecutors, judges and lawyers may participate in prosecuting, investigating, trying, and passing judgments on specific crimes side by side with their domestic counterparts is an important feature of the Chambers.

Among the many justifications for establishment of the Extraordinary Chambers to try crimes committed thirty years ago is the need to deal with the "culture of impunity" existent in Cambodia after decades of civil wars and a future-oriented transitional justice to fulfill an important mission, namely to strengthen the rule of law particularly in the field of criminal justice. However, the establishment was confronted by political and technical hurdles and the whole process went through different levels of compromises and led to several deviations from the original plan.

A close look into the changes which emerged from the negotiations and facilitated the final establishment of the Extraordinary Chambers in the Courts of Cambodia indicates an interesting evolution in the national implementation of international criminal justice at the turn of the century. This Cambodian experience, once proven successful, may serve as a useful model for future efforts to be taken somewhere else. The process of creating international tribunals to try serious past atrocities is now seeking a more domestically oriented trend. The process in Cambodia suggests that the world community is now witnessing the growth of a new model for nationalization of international norms and values in the field of criminal justice. It may testify to the effects of two important developments which has been taking place since the end of the 20th century. First, nation-building projects[96] at the end of the Cold War may now be redefining the roles of the nation states in managing internationalization process which has taken dramatic steps since the end of the Second World War. The growing participation of the civil society, in the form of non-state independent mass associations and organizations, in affairs

traditionally appertaining to the exclusive authority of the states may have also contributed to this redefinition of the roles for nation states. These new roles require sovereign states to allow for strong public participation in the search for social justice and strengthening the rule of law. In the case of Cambodia in particular, the introduction of *amicus curiae* briefs, albeit still in a limited context hitherto, in highly important court cases related to crimes with serious human rights and humanitarian implications may be one essential aspect of the new roles which the state is now learning to undertake. For countries in political and economic transitions in general, engaging international technical cooperation actively in some parts of the domestic legal development process is also an important assignment to be done by the states at the end of the Cold War. But this assignment also imposes on the states a new role in ensuring that such cooperation be handled with great care to secure appropriate balance between implementation of widely observed international values and respect for legitimate interests of the local population.

Second, in terms of legal development, the internationalization process is coming to a cross-road where diversification of some core norms is gaining new momentum in a new global context. This diversification has to develop not only with sufficient participation by the governments and the civil societies but also by making the broadest use of the world knowledge acquired from the experiences of different systems and cultures. Although much remains to be seen on how the Extraordinary Chambers choose the most appropriate approach to handle the substantial parts of the upcoming trials, the active pursuit of existing judicial practices and principles developed by other international and hybrid courts,[97] not only suggests that a new judicial culture may soon take root in Cambodia but also points to the fact that horizontal flow of judicial experiences and knowledge beyond national boundaries is taking place in Asia, Africa, Europe and elsewhere. Although at this point of time, this seems to suggest more questions than answers regarding how to do the jobs appropriately, it may be time now to

consider the details seriously both in theory and practice. However, the focus on diversification as being emphasized here does not necessarily suggest that specificity is dominating universality of norms and values. For one can still well believe that the process is actually leading to a more generally acceptable form of implementing some core universal values in the field of criminal justice.

Notes

[1] Focusing particularly on the growing demands for transitional justice in the last decades, Roht-Arriaza describes the shift in international attention from reconciliatory by means of amnesty and truth commissions to prosecutorial attempts by establishment of international tribunals, and later to a "package" of measures composed of "truth, justice reparation and guarantees of non-repetition". She then attributes the latter attempts to set up complementary (truth commission plus justice) and hybrid (partly international and partly national in nature) systems at the end of the last millennium to the emerging "next generation" transitional justice. See Naomi Roht-Arriaza (2006) "The new landscape of transitional just ice" in Naomi Roht-Arriaza and Javier Meriezcurrena (eds.) *Transitional Justice in the Twenty-First Century*, Cambridge University Press, at pp.2-10.

[2] Ralph Zacklin, "The Failings of Ad Hoc International Tribunals", 2 *Journal of International Criminal Justice* (2004), at p.545.

[3] Steven D. Roper and Lilian A. Barria, "Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rig hts", Ashgate Publishing, (2006). See some critical reviews by Zachary D. Kaufman, "Book Review: Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights", 10 *Yale Human Rights & Development Law Journal* (2007), at pp.209-214.

[4] Fausto Pocar, "The Proliferation of International Criminal Courts and Tribunals - A Necessity in the Current International Community", 2 *Journal of International Criminal Justice* (2004), at pp.304-308. Focusing his research on the Convention for the Prevention and Punishment of the Crime of Genocide, Schabas argues that interactions between the

international and the national jurisdictions can stimulate legal clarity in the interpretation and implementation of the Convention. See William A. Schabas, "National Courts Finally Begin to Prosecute Genocide, the 'C rime of Crimes'", 1 *Journal of International Criminal Justice* (2003), at pp.39-63.

[5] Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law - Beyond the Nuremberg Legacy*, Oxford, (1997), at pp.162-163; Richard Overy (2003), "The Nuremberg trials: international law in the making", in Philippe Sands (ed.) *From Nuremberg to the Hague - The Future of International Criminal Justice,* Cambridge, at p.2.

[6] UN Security Council Resolution 827 (1993) and Resolution 955 (1994). Cherie Booth (2003), "Prospects and issues for the International Criminal Court: lessons from Yugoslavia and Rwanda", in Philippe Sands (ed.) *id,* at pp.157-161.

[7] "Report on the Situation of Human Rights Submitted by the Special Representative, Mr. Michel Moussalli, Pursuant to Commission Resolution 1999/20", UN Doc. E/CN.4/2000/41, para.92 onwards. National court proceedings not only take place in the countries concerned, some third countries also help prosecute suspects of Rwandan genocide cases. See William A. Schabas, *supra* note 4 at p.47. A system of hybrid Kosovo courts was established under the United Nations Mission in Kosova (UNMIK). For some details and analyses, see Laura A. Dickinson, "The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo", 37 *New England Law Review* (2003) pp.1060-1062. Local trials also took place in Bosnia and Herzegovina. Most recently, the Bosnia and Herzegovina's War Crimes Chamber has also been established and become operational in March 2005. For some brief details, see "Bosnia and Herzegovina: Selected Development in Transitional Justice", Case Study Series available on the International Center for Transitional Justice website http://www.ictj.org/images/content/1/1/113.pdf (access date: January 2, 2008), and book review by Fannie Lafontaine, "Cesare P.R. Romano, Andre Nollkaemper and Jann K. Kleffner (eds), Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia", *Journal of International Criminal Justice* 5 (2007), at pp.249-254.

[8] For example, the Special Court for Sierra Leone is said to be one exception. Albeit consisting of judges nominated by the UN Secretary-

General and the Government of Sierra Leone, the Special Court is treaty-based and is not subordinated to the Sierra Leonean court system. See Sigall Horovitz (2006), "Transitional criminal justice in Sierra Leo ne", in Naomi Roht-Arriaza and Javier Meriezcurrena (eds.) *supra* note 1, at pp.43-69.

[9] Apart from the tribunal on the crime of genocide established in Cambodian in 1979, there are discussions on the international arena and reports prepared on behalf of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1979; Senator McGovern's suggestion of an international force to drive out the Khmer Rouge in 1978; the launch of the Cambodian Genocide Project by some volunteers in the US; hearings at the 1986 session of the UN Human Rights Commission; and the adoption of a joint resolution in October 1988 by the US Congress asking the US government to take actions to bring the "Pol Pot clique" to trial. See Michael Haas, *Cambodian, Pol Pot, and the United States - the Faustian Pact*, Praeger, (1991), at pp.97-102; Gary Klintworth, *Vietnam's intervention in Cambodia in international law*, (1989), at pp.61-62 and Appendix IX.

[10] The tribunal was established by the Decree Law No.1 on the Establishment of People's Revolutionary Tribunal at Phnom Penh to Try the Pol Pot - Ieng Sary Clique for the Crime of Genocide, adopted by the People's Revolutionary Council of Kampuchea in Phnom Penh on July 15, 1979.

[11] See Howard J. de Nike, John Quigley, and Kenneth J. Robinson (eds.) *Genocide in Cambodia - Documents from the Trial of Pol Pot and Ieng Sary,* Pennsylvania, (2000), at p.8.

[12] For descriptive details and relevant documents relating to the trial, see Howard J. de Nike, John Quigley, and Kenneth J. Robinson, id.

[13] For details on the political situation before and after the 1993 elections, see William Shawcross, "Cambodia's New Deal - A Report by William Shawcross", *Contemporary Issues Paper #1,* Carnegie Endowment Publication, (1994).

[14] See Pierre P. Lizee, Cambodian in 1995: From Hope to Despair, 36 *Asian Survey* 1, January 1996, at pp.85-86. The Law on the Outlawing of the "Democratic Kampuchea" Group was promulgated on 7 July 1994.

[15] See Pierre P. Lizee, Cambodia in 1996: Of Tigers, Crocodiles and Doves, 37 *Asian Survey* 1, January 1997, at pp.65-69.

[16] See Kem Sokha, "A Reassessment of Peace and Justice in Cambodia" (Spring 1997) and Kassie Neou and Jeffrey Gallup, "Human Rights and the Cambodian Past: In Defense of Peace Before Justice" (Spring 1997) in 1(8) *Human Rights Dialogue* "Transitional Justice in East Asia and Its Impact on Human Rights" available at http://www.cceia.org/resources/publications/dialogue/index.html (accessed date: October 2007).

[17] "Situation of human rights in Cambodia - Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr. Thomas Hammarberg", E/CN.4/1997/85, 31 January, 1997, Section II(D).

[18] Currently the Office of the High Commissioner for Human Rights in Cambodia.

[19] "Situation of Human Rights in Cambodia", Commission on Human Rights resolution 1997/49, para.12.

[20] "Letter dated 21 June 1997 from the co-Prime Ministers of Cambodia addressed to the United Nations Secretary-General", annexed to the report of the Special Representative of the UN Secretary-General for Human Rights in Cambodia E/CN.4/1999/101, 26 February 1999.

[21] The relevant part of the letter reads: "Cambodia does not have the resources or expertise to conduct this very important procedure. Thus, we believe it is necessary to ask for the assistance of the United Nations. We are aware of similar efforts to respond to the genocide and crimes against humanity in Rwanda and the former Yugoslavia, and ask that similar assistance be given to Cambodia".

[22] UN General Assembly Resolution 52/135 *Situation of Human Rights in Cambodia,* dated 12 December 1997, para.16.

[23] Report of the Group of Experts for Cambodia (hereinafter "Report of the Group of Experts"), established pursuant to General Assembly resolution 52/135, para.219 available on University of Minnesota homepage http://www1.umn.edu/humanrts/cambodia-1999.html (accessed October 2007). For some scholarly reviews of the options for a tribunal on Khmer Rouge atrocities at the time when the Group of Experts were to submit their report, see Stephen P. Marks, "Elusive Justice for the Victims of the Khmer Rouge", 52 *Journal of International Affairs,* 1999, at pp.691-718; and Balakrishnan Rajagopal, "The Pragmatics of Prosecuting Khmer Rouge", 1*Yearbook of International Humanitarian Law 1998,* at pp.195-204.

[24] Peter Sainsbury, “Burned like old rubbish”, *Phnom Penh Post,* vol.7, Issue 8, April 24 - May 7, 1998.
[25] See Christine Chaumeau and Samrech Sopha, “"Sorry, very sorry” for so much death”, *Phnom Penh Post,* vol.8, issue 1, Jan. 8-21, 1999.
[26] Kelly Whitley (2006), “History of the Khmer Rouge Tribunal: Origins, Negotiations, and Establishment”, and Heleyn Unac and Steven Liang (2006), “Delivering Justice for the Crimes of Democratic Kampuchea”, in John D. Ciorciari (ed.), *The Khmer Rouge Tribunal,* Documentation Series No. 10, Documentation Center of Cambodia, at pp.52-53 and 152 respectively.
[27] Thomas Hammarberg, “How the Khmer Rouge tribunal was agreed: discussions between the Cambodian government and the UN”, *Searching for the Truth (English version), 19 Magazine of Documentation Center of Cambodia,* (July 2001), at pp.43-44.
[28] Officially known as the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecutions of Crimes Committed during the Period of Democratic Cambodia, hereinafter “the ECCC Law” or simply “the Law”.
[29] The Constitutional Council ruled that would be in violation of the Constitution of the Kingdom of Cambodia.
[30] David Boyle, “Establishing the Responsibility of the Khmer Rouge Leadership for International Crimes” in H. Fischer and Avril Mcdonald (eds.), 5 *Yearbook of International Humanitarian Law 2002,* at pp.179-185.
[31] Briefing by Hans Corell reprinted in Ben Kiernan (2007), “Cambodia and the United Nations - *Legal Documents*”, in Ben Kiernan (ed.) *Conflict and Change in Cambodia,* Routledge, at pp.125-126.
[32] Thomas Hammarberg, “How the Khmer Rouge tribunal was agreed: discussions between the Cambodian government and the UN” *Searching for the Truth (English version),* 20 *Magazine of Documentation Center of Cambodia,* (August 2001), at pp.45-46; and, Helen Jarvis, “Trials and Tribulations - Late Twists in the Long Quest for Justice for the Cambodian Genocide” (2007) in Ben Kiernan (ed.) id., at pp.113-117.
[33] Resolution adopted by the General Assembly, A/RES/57/228, 27 February, 2007, at para.1.
[34] Officially known as the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic

Kampuchea, hereinafter “the Agreement”.
[35] Extraordinary Chambers in the Courts of Cambodia, Press Release by Judicial Officer, 12 June 2007. See also Cat Barton and Vong Sokheng, “KRT climbs over major rules hurdles”, *Phnom Penh Post,* Issue 16/12, June 15-28, 2007.
[36] For a brief summary of the debates on the issue of whether “potenti ally bad trials were better than no trials at all”, see Peter Maguire’s conclusion in his book, *Facing Death in Cambodia,* Columbia (2005), at pp.191-196.
[37] Yuok Chhang “The Thief of History - Cambodia and the Special Court” (2007) 1 *The International Journal of Transitional Justice,* at p.168.
[38] The Law with inclusion of amendments as promulgated on 27 October 2004, Article 9 new.
[39] id.
[40] id., Article 20 new.
[41] id., Article 23 new.
[42] id. Articles 20 new and 23 new.
[43] Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (hereinafter “Internal Rules), Article 21(1).
[44] id. Article 51(5).
[45] id. Article 51(5).
[46] id. Article 58(2).
[47] id. Article 57(1).
[48] id. Article 23(1)(a).
[49] id. Article 23(1)(b).
[50] id. Article 113(1).
[51] id. Article 12.
[52] id. Article 33(1).
[53] The local NGOs have shown their positive attitude in making use of this system most recently on 13 December 2007 when the Cambodian Human Rights Action Committee (CHRAC), a coalition of 23 local NGOs, submitted an *amicus curiae* brief to the Pre-Trial Chamber regarding an appeal made by Nuon Chea against the Provisional Detention Order issued by the Co-Investigating Judges. The CHRAC urges the Chamber to reconsider Mr. Nuon Chea’s complaint of procedural infirmities which took place during the Initial and Adversary Hearings and might have led to his failure to fully enjoy his right to

counsel. See letter by the CHRAC submitted to the Pre-Trial Chamber on 13 December 2007 and the *amicus curiae* briefs attached therewith. Available at http://www.eccc.gov.kh/english/court_doc.list.aspx (access date: 25 January 2008).

[54] Cf. the Law on Criminal Procedure promulgated under the State of Cambodia on 8 March 1993 and the Provisions Relating to the Judiciary and Criminal Law and Criminal Procedure Applicable in Cambodia during the Transitional Period adopted by the Supreme National Council on 10 September 1992. These were the two main legislative documents laying out the criminal procedures to be implemented by the courts in Cambodia in 2001 - the year when the ECCC Law was adopted.

[55] If no unanimity is possible, decisions of the Chambers shall be made by 4/5 majority of the Trial and the Pre-Trial Chambers, 5/7 majority of the Supreme Court Chamber. See Articles 14 and 20 of the ECCC Law.

[56] Sylvia de Bertodano, "Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers", 4 *Journal of International Criminal Justice* (2006).

[57] This is not limited to the case of political interference along the "national vs international" line. Theoretically, there could be technical disagreements splitting the number of international and national judges into two opposing camps as well.

[58] Sylvia de Bertodano, *supra* note 56, at pp.289-292.

[59] Cambodian Minister of Foreign Affairs, Hor Namhong, reportedly said this to the UN Secretary General, Kofi Annan, in their meeting on 12 March 1999. See the UNSG's introduction to the Report of the Group of Experts.

[60] All reports prepared by the Special Representative of the United Nations Secretary General for Human Rights in Cambodia since 1994 have been describing in some concrete details the lack of judicial independence in Cambodia. All reports are available at http://www2.ohchr.org/english/countries/kh/mandate/index.htm (access date: January 2008). See also the Statement made in New York on 13 January 2003 by the Cambodian Delegation to the United Nations Regarding the Establishment of Extraordinary Chambers within the Courts of Cambodia. Paragraph 3 of the Statement reads:

> "We are acutely aware of the relative weakness of the Cambodian judiciary and legal system, resulting mainly from the blows inflicted on the entire Cambodian society fabric by the Khmer

Rouge. Indeed, this was one of the principal reasons that we requested assistance from the UN in 1997. We wish, however, to refute the notion that our judiciary ought not to be conferred an active and significant role in the process of seeking justice regarding the most serious crimes in our nation's history."

[61] The Cambodian People's Party was derivative of the previous People's Revolutionary Party created after the Democratic Kampuchea regime was defeated by the new revolutionary government established under Vietnamese assistance in 1979. Several top leaders and members of the Central Committee of the Cambodian People's Party are former leaders of the People's Revolutionary Party and used to be officers of the Democratic Kampuchea government.

[62] At the beginning, the US representative to the UN was reportedly pushing for establishment of an ad hoc international tribunal under Chapter VII of the UN Charter. That proposal was not adopted at the Security Council due to China's likely veto. See David Boyle, *supra* note 30, at pp.181-182. Referring to the choice of a Special Court for Sierra Leone, Boyle also argued that "the international community is becoming more and more wary of committing scarce financial resources to pure forms of international justice".

[63] The Chinese Foreign Ministry spokesman was reported to have said that "The issue of the Khmer Rouge has become history" and "As for how the leaders of the Khmer Rouge should be dealt with, this is in essence an internal matter". See Nate Thayer, "Cambodia: Peace or Jus tice?", *Far Eastern Economic Review,* January 21, 1999, at pp.24-25.

[64] Kofi Annan's summary of a letter from the Cambodian government dated 3 March 1999, in the report of the experts. See also the statement made in New York on 13 January 2003 by the Cambodian Delegation to the United Nations regarding the establishment of Extraordinary Chambers within the courts of Cambodia.

[65] Hall is also cautious in concluding his research on the trials of Nuon Paet et al. when he suggests that "(T)he trials demonstrated that the Cambodian government is willing and able, in appropriate circumstances, to bring members of the Khmer Rouge to justice". See John Hall, "In the Shadow of the Khmer Rouge Tribunal: the Domestic Trials of Noun Paet, Chhouk Rin and Sam Bith, and the Search for Judicial Legitimacy in Cambodia", 20 *Columbia Journal of Asian Law* (2006), at p.295.

[66] Article 1 of the Royal Decree NS/RKT/0996/72, signed by His

Majesty Norodom Sihanouk on 14 September 1996.

[67] Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide? Elusive Justice" and the Khmer Rouge Tribunal,* Pluto, (2004), at pp.40-51.

[68] Article 1 of the Royal Decree NS/RKT/0996/72, signed by His Majesty Norodom Sihanouk on 14 September 1996.

[69] Provisional Detention Order, Criminal Case File No: 002/14-08-2006.

[70] Rule 63(3) of the Internal Rules defines the conditions under which the Co-Investigating Judges may order the Provisional Detention of the Charged Person as:

a) here is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and
b) the Co-Investigating Judges consider Provisional Detention to be a necessary measure to:
    i) prevent the Charged Person from exerting pressure on witnesses or Victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;
    ii) preserve evidence or prevent the destruction of any evidence;
    iii) ensure the presence of the Charged Person during the proceedings;
    iv) protect the security of the Charged Person; or
    v) preserve public order.

In regard to all the five suspects under detention by the ECCC, the Co-Investigating Judges considered the provisional detentions as necessary to fulfill more than one of these conditions. Particularly in the case of Noun Chea, some human rights NGOs submitted the Amicus Curiae Brief criticizing the decisions made by the Co-Investigating Judges for lack of convincing evidence in holding that some of these conditions have been met. See Amicus Curiae Brief submitted by the Cambodian Human Rights Action Committee relating to the appeal by Noun Chea against the Order of Provisional Detention by the Co-Investigating Judges, 13 December 2007 available at http://www.eccc.gov.kh/english/court_doc.list.aspx

[71] Provisional Detention Order, Office of the Co-Investigating Judges, Criminal Case File no.002/14-08-2006, issued on 14 November 2007, at para.6.

[72] id., at paras.8-10.
[73] Part of Article 40 reads: "…. 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".
[74] Provisional Detention Order, Office of the Co-Investigating Judges, Criminal Case File no.002/14-08-2006, issued on 14 November 2007, at paras.11-14.
[75] Report of Examination, Pre-Trial Chamber Criminal Case File No.001/18-07-07- ECCC-OCIJ(PTC01), Section C, dated 19 November 2007, co-signed by Justice Rowan Downing and Judge Huot Vuthy.
[76] id.
[77] Appeal Brief Challenging the Order of Provisional Detention of 31 July 2007, Case No.002, submitted to the Pre-Trial Chamber on 5 September 2007, paras.120-126.
[78] id., at paras.13 and 127.
[79] Decision on Appeal Against Provisional Detention Order of Kaing Geuk Eav Alias "Duch", Criminal Case File No.001/18-07-2007-ECCC-OCIJ(PTC01), dated 3 December 2007, at para.16.
[80] id., at para.17.
[81] Report of Examination, Pre-Trial Chamber Criminal Case File No. 001/18-07-2007- ECCC-OCIJ(PTC01), 19 November 2007, at 00152901.
[82] id., at 00152902.
[83] Decision on Appeal Against Provisional Detention Order of Kaing Geuk Eav, *supra* note 79, at paras21-22.
[84] id., at para.20.
[85] *Prosecutor v Charles Ghankay Taylor,* SCSL-2003-01-1, "Decision on Immunity from Jurisdiction", Appeal Chamber, 31 May 2004, as cited in footnote no.6 of the Pre-Trial Chamber Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch", dated 3 December 2007, Criminal Case File No. 001/18-07-2007-ECCC-OCIJ(PTC01).
[86] Decision on Appeal Against Provisional Detention Order of Kaing Geuk Eav, *supra* note 79, at para.20.
[87] Unlike the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, the Agreement between the UN and the Royal Government of Cambodia concerns merely "the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea".

Article one of the latter reads: "The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes..... The Agreement provides, inter alia, the legal basis and the principles and modalities for such cooperation". The provision which comes almost close to a joint UN-Cambodia establishment of the Chambers is Article 2(1), which says "The present Agreement recognizes that the Extraordinary Chambers have subject matter jurisdiction consistent with that set forth in "the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea".

[88] Article 10 of the ECCC Law.

[89] See Kelly Whitley (2006) at pp.52-53, and Heleyn Unac and Steven Liang (2006) at p.152.

[90] Lejmi looks into technical problems related to testimonial evidence, material and documentation evidence, and the right to trial without undue delay, as challenges likely to confront the Chambers due to the thirty-year long passage of time. See Mohamed Ali Lejmi, "Prosecuting Cambodian Genocide - Problems Caused by the Passage of Time since the Alleged Commission of Crimes", 4 *Journal of International Criminal Justice* (2006), at pp.300-306.

[91] Michael Hayes, "Public forum highlights need for KR trial outreach", *Phnom Penh Post,* Issue 15/21, October 20 - November 2, 2006.

[92] In a detailed study of the so-called "show-trials" of Nuon Paet, Chhouk Rin and Sam Bith, the three notorious former Khmer Rouge military officers for their roles in commanding and directing a train ambush and subsequent murders of three young Western tourists inside Cambodia in 1994, John Hall shows how the trials were "a test of Cambodia's notoriously inefficient, corrupt and governmentally-dominated judiciary and legal system". According to Hall, the trials represented a significant advance for a judiciary generally regarded as barely moving towards international standards of honesty, professionalism and independence. However, he also considers these trials as the government's attempt to indicate to the international community that Cambodians would be capable of bringing Khmer Rouge elements to justice and that the judiciary would be capable of doing that independently and professionally, at a time "when the Cambodian government

was negotiating with the international community over the structure of the proposed United Nations-backed Khmer Rouge tribunal". See John Hall, *supra* note 65, at pp.235-297.

[93] Unlike the case of Nuremberg and Tokyo Military Tribunals, the ECCC is a domestic judicial institution established by a sovereign state and legitimate government. Serious explanation of this "one country, two systems" in the field of criminal justice may require more than just reiterating the logistical and budgetary grounds.

[94] Under the Cambodian domestic law, the Supreme Council of Magistracy is the only legitimate body to appoint, dismiss and discipline judges and prosecutors. See the Law on the Organization and Functioning of the Supreme Council of Magistracy, promulgated on 22 December 1994.

[95] The draft Law went to the Constitutional Council for the first time in early 2001 and was ruled unconstitutional due to its Article 3 which was interpreted as allowing for a death sentence to be pronounced. The draft was then revised and sent to the Constitutional Council again to be reviewed and found constitutional on 12 February 2001. For some details regarding adoption of the 2001 law, see Tom Fawthrop and Helen Jarvis, *supra* note 67, at pp.155-188.

[96] Nation-building in this context is used broadly to include efforts of different countries seeking to shift towards more democracy and market-oriented economy at the end of the Cold War. These countries introduce legal, political and economic reforms, often with technical assistance from international organizations or foreign aid agencies. In a somehow simplified theoretical summarization, Francis Fukuyama states that nation-building is part of the exercise in "political reconstruction or re-legitimation, or else a matter of promoting economic development". See Francis Fukuyama, "Nation-Building and the Failing of Institutional Memory" in Francis Fukuyama (ed.), *Nationa-Building Beyond Afghanistan and Iraq,* (2006), at p.4.

[97] Throughout the analyses made by the Co-Investigating Judges and the Pre-Trial Chamber examined in this paper, some important arguments have been based on decisions and judgments made by the ICTY, ICTR, Timor Leste Special Panels and: the ICC cases.