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THE ESTABISHMENT OF A TRIBUNAL FOR GENOCIDE FROM 1975 – 1979 IN CAMBODIA

BY

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Abbreviations

MOJ	Ministry of Justice
BLDP	Buddhism Liberal Democracy Party
CDP	Cambodian Defenders Project
CPP	Cambodian People's Party
FUNCINPEC	Acronym from French means National Unified Front for the Independent, Neutral, Peaceful, and Cooperative Cambodia
Genocide Convention	The Convention on the Prevention and Punishment of the Crime of Genocide
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
Law on Khmer Rouge	Law on Establishment of a Tribunal For Khmer Rouge Genocide From 1975-79
LKR	Law on Khmer Rouge
MOLINAKA	Movement Liberation National Kampuchea Party (National Liberation Movement For Cambodia)
NGO	Non-Governmental Organization
Rome	The Rome Statute of the International Criminal

Statute	Court
SOC	State of Cambodia
UN	United Nations
UNTAC	Provisions Relating to the Judiciary and Criminal
Criminal Law	Law and Procedure Applicable in Cambodia During the Transitional Period was adopted by SNC on September 10, 1992.
UNTAC	United Nations Transitional Authority in Cambodia

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Suon Visal

Justice and Power

Within

A Framework of Genocide?

Chapter I
Introduction

Section 1: Scope of Dissertation

The value and dignity of a human life is immeasurable. However, many millions of innocent and vulnerable people have suffered and died day after day because of the extreme desire for power and wealth of a number of the world's dictators, past and present. In response to barbarity and abuse of power, many people who love peace, justice and human dignity struggle and try to bring these dictators to justice.

This dissertation is intended to analyze the law on the "Establishment of a Tribunal For Genocide From 1975–1979 in Cambodia", the so-called "Law on Khmer Rouge (LKR)", which was adopted by the Cambodian National Assembly on January 2, 2001 and promulgated on August 10, 2001. In this sense, it will focus on the role, functions, structure, impact, and any gaps or deficiencies that such a tribunal may face in working at the domestic level within the framework of international human rights instruments and international criminal law. In addition, it will show whether this law and the expected tribunal can bring justice to the Cambodian people, the victims, and whether it can do so in the eyes of the international community.

In elaborating this law, various international laws related to international crimes will also be discussed, such as the International Convention on the Prevention and Punishment of the Crime of Genocide 1948, the International Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity 1968, the Statute

of the International Tribunal for the former Yugoslavia (the Statute of ICTY), the Statute of the International Tribunal for Rwanda (the Statue of ICTR) and the Rome Statute of the International Criminal Court (Rome Statute). The purpose of the present study is to consider whether the Khmer Rouge Tribunal Law can function in a manner consistent with international human rights standards.

More significantly, this study will indicate those who are believed to be the senior persons and prominent subordinates responsible for crimes committed during the Democratic Kampuchea (DK) regime. Finally, this study will consider whether the Law on Khmer Rouge can find real justice for the victims as well as the accused and whether, if this Tribunal is established, it will advantage or disadvantage the Cambodian legal system and the Cambodian people as a whole.

Section 2: Factual Background of the Violations in Cambodia from 1975-1979

After fighting for a long time to free itself from French rule, Cambodia at last became independent in 1954. Within a few years, however, Cambodia fell into civil war. Amid widespread dissatisfaction with the ruling elite, a communist regime seized power on April 17, 1975.[1][1] The Year Zero began. Pol Pot[2][2] was fanatical to turn Cambodia into an agrarian state to

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[1][1] See David P. Chandler, *Brother Number One*, *A political Biography of Pol Pot, (*Thailand Silkworm Books 1993), p. 1, para 1.

[2][2] Ibid. pp.7, 8, 27 and 28. Pol Pot was born on May 25, 1928 to a peasant family in the village of Prek Snoul, Kampong Thom province, Cambodia. He was the 8th of nine children in the family. In 1934, he left home, accompanied by his oldest brother Chhay, to live with his relatives, Meak and Soung who had Palace connections, in Phnom Penh when he was 6 years old. In 1949, he received a scholarship to study in Paris, France, with 21 Cambodian students (five of them, Saloth Sar, Uch Ven, Chau Seng Mey Mann and Mey Phat, later became strong communist members) where he joined the French Communist Party with Cambodian colleagues in 1952. He returned to Cambodia without a formal degree in 1952 and started cooperating with Vietnamese Indochina's Communist Party.

accomplish his Marxist-Stalinist's theory.[3][3] The new regime was led by Pol Pot who was originally named Saloth Sar. This regime came to be known as the Khmer Rouge regime, or Red Khmer, of Democratic Kampuchea (DK).

After taking over the capital city of Phnom Penh, Pol Pot virtually destroyed all social institutions and structures and established his new regime. On October 9, 1975, he held a standing committee meeting. The most important communist members (eleven men and two women) were appointed to hold various positions in the government's cabinet and were given responsibility for specific tasks. King Sihanouk's position as Head of State during the revolutionary period seemed to be ignored and his role in the new government became increasingly unclear.[4][4]

Within a few days of victory, Pol Pot ordered the evacuation of all populations from the cities to live and work in rural areas. Legal and educational institutions were destroyed. The Khmer Rouge soldiers started killing former government officials, soldiers, policemen and people who refused to leave the towns. The killing was committed in the cities, along the roads to rural areas and at every checkpoint. In addition, many women and children died from illness and starvation over the course of the long journey from the city to their designated rural areas. In Phnom Penh city alone, approximately 10,600 people died during the period of evacuation.[5][5] The same situation occurred in others cities in Cambodia.

In the following years, Pol Pot single-mindedly implemented the DK's four-year plan and associated policies to build socialism for the whole

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[3][3] See Howard Ball, *Prosecuting War Crimes and Genocide,* (University Press of Kansas, 1999), p 95, paras (1&2).
[4][4] See David P. Chandler, *Brother Number One*, *A political Biography of Pol Pot,* (Thailand Silkworm Books 1993), pp.112-114.
[5][5] See Ben Kiernan, *The Pol Pot Regime; Race, Power and Genocide in Cambodia under the Khmer Rouge, 1975- 1979,* (Yale University Press, Silkworm Books, Thailand 1997), pp. 39-48.

country. Examples of the main policies were the "empowerment" of the poor, compulsory work in agriculture, abolition of the free market economy and the institution of private property, collectivization, barring of religion and religious practice and continuous purging of all enemies of the revolution (anyone who opposed the DK regime).[6][6]

These policies and their enforcement gave a great deal of power to the party center and the domestic members who were designated to carry them out. First, they investigated to detect former government officials such as soldiers, policemen, judges, prosecutors, lawyers, intellectuals, educated people and other people "who wore glasses". Then they arrested for re-education. Most of the arrested people never came back.[7][7] They were executed. Any Pol Pot soldier or security police member could arrest and execute any person whom they believed was an enemy of the revolution. An enemy of the revolution, at that time, meant any person who challenged DK policies, or was lazy in their work, or was a rich person, or who would not abandon individualism, or who was an agent of a foreign country, such as a member of the CIA or KGB or a Vietnamese spy. In other words, people whom they believed were counter revolutionaries. The arrest or execution of any person was based on the order of the party center, the beliefs of the security police, or a confession obtained from previously arrested persons.[8][8] People were condemned without trial. Indeed, there was no court system or procedure for trying them. After a time, Pol Pot started purging "enemies" from the party itself, mainly in the northern and the eastern Zones. Thousands of revolutionary cadres were arrested and

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[6][6] Howard Ball, *Prosecuting War Crimes and Genocide,* University Press of Kansas, 1999, p 101.

[7][7] See Stuart Coghill, *Resource Guide to the Criminal Law of Cambodia,* (International Human Rights Law Group/ Cambodian Defenders Project 2000,) p. 52 (2.13).

[8][8] See David Chandler, *Voice from S- 21; Terror and History in Pol Pot's Secret Prison,* (Silkworm Books Thailand 2000), p. 62, paras 1-2.

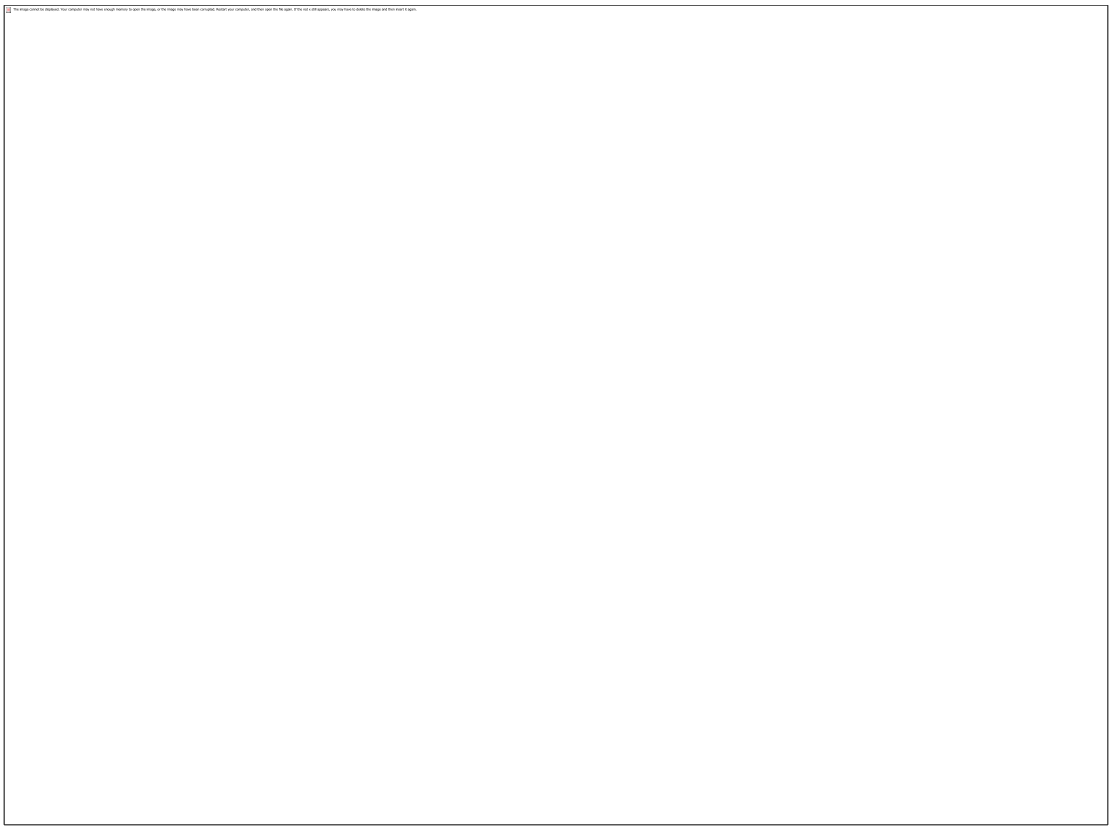
detained at Toul Sleng, known as the S-21 secret prison[9][9] where the Khmer Rouge detained and tortured all high-ranking Khmer officials who were purged from the party.

Before execution, detainees were brutally tortured by many cruel means, such as electric shocks, cigarette burns, hanging upside down, and forced to drink urine and eat excrement. Such kinds of torture were committed to compel prisoners to confess.[10][10] For example, the confession of the prisoners Ney Saran and Sun Ty suggested that they had been severely tortured during the interrogation. In his confession, Sun Ty said, "*at first, I refused to answer, but after I had been beaten with a heavy stick, I invented an answer. I begged the party not to arrest the people I named. Our comrades are good….*".[11][11]

[9][9] Toul Sleng or S-21 was a Party Center Prison under the direct control of Son Sen and Pol Pot. It was a place to carry out Party center policies. Before 1975, S-21 was a special zone prison located in southern Phnom Penh. After 1979, this prison became a national museum for genocide. Documents of torture, portraits of prisoners, prisoners' clothes, and means of torture are now displayed there.

[10][10] Howard Ball, *Prosecuting War Crimes and Genocide,* (University Press of Kansas, 1999), p 95, para.3.

[11][11] See David Chandler, *Voice from S- 21; Terror and History in Pol Pot's Secret Prison,* (Silkworm Books Thailand 2000), pp. 129-133.



Portrait of detainee before taken to be executed at Cheung Ek, Killing Field (picture posted at Toul Sleng museum, former S-21 prison).

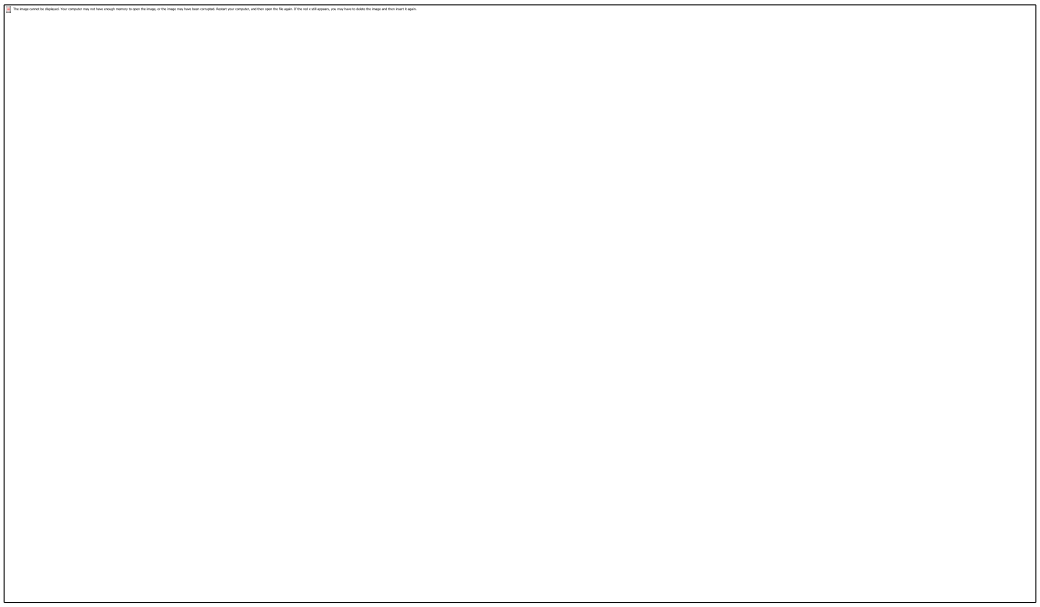
Some detainees died in the prisons and others were taken to be executed at Chheung EK. Usually, the execution was carried out in secret at nighttime. The prisoners were loaded into trucks and taken to Cheung Ek prison where most of the S-21 prisoners were killed. Between thirty and three hundred people were killed each day there in 1978.[12][12]

When the Vietnamese took over Phnom Penh, soldiers witnessed the bodies of detainees in S-21 and a lot of skulls and bones were found in Chhueng Ek prison, which later became known as "the killing fields".[13][13] Approximately, 14,000 prisoners were killed in Toul Sleng and Chheung Ek

[12][12] Ibid. pp. 139-142.

[13][13] Chheung Ek is a branch of the S-21 prison located 15 kilometers southwest of Phnom Penh. Vietnamese soldiers recovered this place in 1980. Thousands of skulls and piles of bones were found in its compound. Now it is known as the killing fields museum.

prison.[14][14] Considerable evidence was recovered from Toul Sleng and Chheung Ek prisons, and other places in the country, in the form of archive documents of confessions, fresh bodies of prisoners in prison compounds, and other working communication documents of high-ranking DK officials.



The same situation occurred in each zone in the country as a whole. The DK Regime set up a system of prisons called at that time "re-education centers". Khmer Rouge comrades arrested, tortured and killed the people.[15][15] The DK killed all kinds of people indiscriminately, regardless of whether they were Vietnamese, Chinese, Chams[16][16] or Europeans. When one family member was considered to have made a mistake, security police often arrested all family members and put them all to death. Usually, the families and children of arrested persons were kept only a few days in the prisons and then executed.[17][17] The killing was carried out everywhere in Cambodia

[14][14] See David Chandler, *Voice from S- 21; Terror and History in Pol Pot's Secret Prison,* (Silkworm Books Thailand 2000), p.36, para 4.
[15][15] See Kalyan Sann, *Searching For the Truth, Killing Pits in Banteay Meanchay Province*, (Magazine of Document Center of Cambodia N. 9, September 2000), pp.6-7.
[16][16] Cham is one of the ethnic minority groups in Cambodia.
[17][17] See David Chandler, *Voice from S- 21; Terror and History in Pol Pot's Secret Prison,* (Silkworm

as a whole. The revolutionary organization of the DK acted as police, prosecutor, judge and executioner. The legal system and judiciary were ignored.[18][18] Basically, the destiny of people was completely in the hands of the party center and security police. Many found themselves labelled an "enemy of the revolution" by unseen accusers in an arbitrary and secret process. They just disappeared and were never seen again.

Besides directly killing, the Khmer rouge forced the people to work very hard in the countryside and allowed them very little to eat. People had only gruel twice a day. The people worked at least 12 hours per day, 7 days a week. The children were forced to leave their parents and also worked in the fields from the age of 6 or 7 years old. In the dry season, the DK forced people to build dams, canals and reservoirs. In the rainy season, people were forced to work in the rice fields. In the eyes of the DK regime, the lives of human beings were worth less than those of animals.

The author has had direct experience of life under the DK Regime. From 1976 till 1979, I always worked in the fields and slept in the rain, with no house, not enough food and only a small tent with two changes of clothes. I never had enough food. As mobile workers, the work was harder than the people who were married. I recalled that my group, named "Kong Cha Lat," worked at least 16 – 18 hours per day, with no rest, throughout the entire year. My group was composed of about 200 men. In 1977, we worked for 3 or 4 months on building a dam named "Tuom Noup Mlik" located in Chhuok District, Kampot province. After finishing the project, there remained in my group, only about 100 men. The others were killed by starvation, sickness with no medication, overwork and some by execution. It

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Books Thailand 2000), p. 38, para 3.

[18][18] See Caroline Hughes, *UNTAC in Cambodia: The Impact on Human Rights*, (Institute of Southeast Asian Studies, Singapore 1996), p. 7 para 1.

was terrible. A person would die nearly every day.[19][19] During the DK time, Pol Pot's cadres always used one sentence to kill people. It was, *" Keeping [you] is no gain. Losing [you] is no loss."*[20]***[20]*** This was the ideology that existed in the Khmer Rouge regime at all levels.

It is estimated today that about 1.7 million[21][21] to three million people were killed during the Pol Pot regime by extra-judicial execution, starvation, illness, and forced labor.

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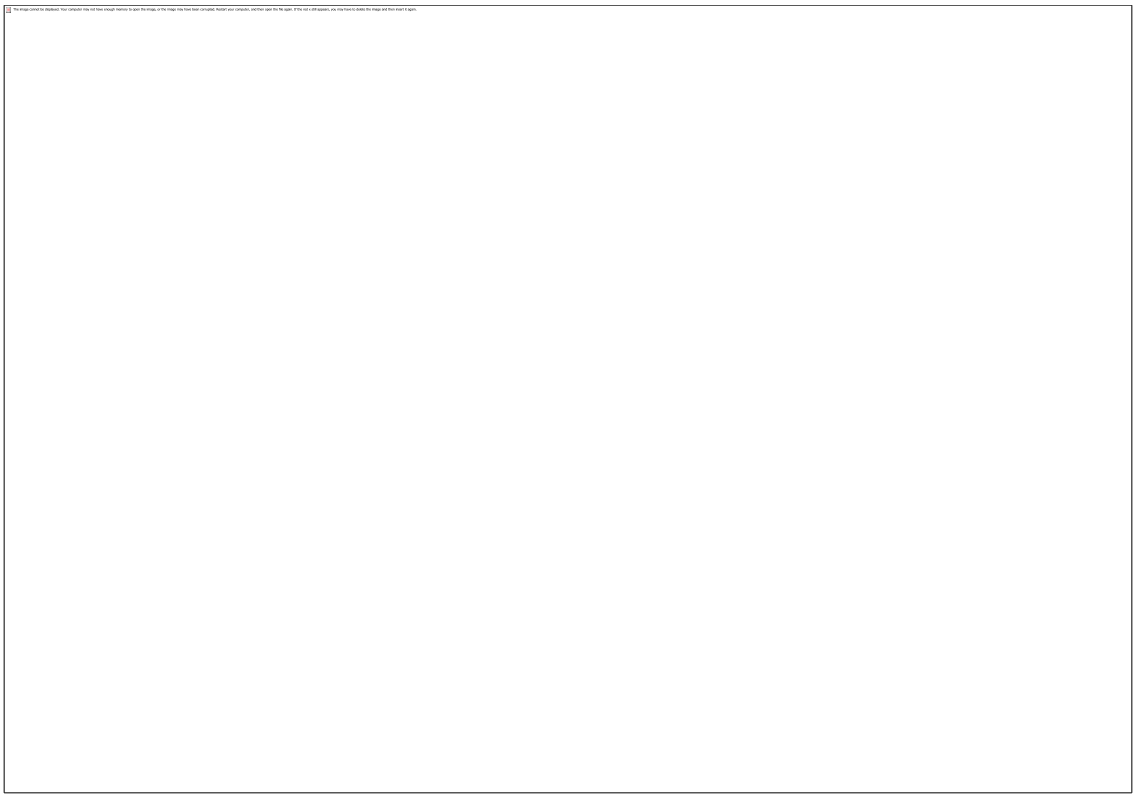
[19][19] Author's experiences during the DK regime.

[20][20] See Author heard this sentence in the his ears during the DK and David P. Chandler, *Brother Number One*, *A Political Biography of Pol Pot, (*Thailand Silkworm Books 1993), p 123, para 3.

[21][21] See Ben Kiernan, *The Pol Pot Regime; Race, Power and Genocide in Cambodia under the Khmer Rouge, 1975- 1979,* (Yale University Press, Silkworm Books, Thailand 1997), p.458. The precise death toll during the DK regime is unclear, but estimates range between 1.7 millions and 3 millions. Another source by the government, in 1979, said that 3 millions were killed.



In January 1979, a Khmer force that had earlier fled DK purges advanced into Phnom Penh, backed by the Vietnamese. Pol Pot fled to the Thai border and occupied areas in the northern part of the country. To bolster its international credibility, the Khmer Rouge formed a coalition government with non-communist movement factions[22][22] to fight against the Phnom Penh government forces supported by Vietnamese troops. This coalition government was supported both politically and financially by the United States, China and Thailand.[23][23] The civil war lasted for over 10 years. Both sides suffered from this war, especially the Cambodian people. In this period, the Phnom Penh Government established a legal system and

[22][22] Non-Communist Movement Factions were composed of two main political Parties, FUNCINPEC led by King Sihanouk and BLDP led by former Prime Minister Son Sann.

[23][23] See David P. Chandler, *Brother Number One*, *A Political Biography of Pol Pot,* Thailand Silkworm Books 1993, pp.169-170.

other structures in accordance with communist concepts and policies. Young students were sent to study abroad in Communist bloc countries only.[24][24]

In 1992, following the Paris Peace Agreements, the United Nations Transitional Authority in Cambodia (UNTAC) attempted to control the various factions in Cambodia and to prepare for a general election. The Supreme National Council of Cambodia (SNC), the country's ruling body set up under the Paris Agreements, passed a statute on criminal law and procedure for temporary use pending a more comprehensive law from the new government. Because it was drafted by UNTAC, this law came to be known as the "UNTAC Code". [25][25]

In 1993, the historic election organized by UNTAC marked the turning point toward peace in Cambodia. As the result of this election a new constitution was promulgated and a coalition government formed, led by two Prime Ministers, Prince Norodom Ranariddh and Prime Minister Hun Sen. Four parties, - FUNCINPEC (Acronym from French means National Unified Front for Independent, Neutral, Peaceful, and Cooperative Cambodia), Cambodian People's Party (CPP- socialist based party), Buddhism Liberal Democratic Party (BLDP) and Movement Liberation National Kampuchea Party (MOLINAKA) – held seats in the National Assembly. However, the coalition government 's life lasted for only a few years, before a political crisis between the two main parties occurred. The political tension could not be solved internally. On July 6-7, 1997, bloody fighting erupted between CPP and FUNCINPEC forces in Phnom Penh. Later, the international community said that this event was a coup led by the Second Prime Minister Hun Sen.[26][26]

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[24][24] See Stuart Coghill, *Resource Guide to the Criminal Law of Cambodia,* (International Human Rights Law Group/ Cambodian Defenders Project 2000), p. 53 (2.16).
[25][25] Ibid. p. 54 (2.19 & 2.20).
[26][26] See CNN World Reports: *Fighting intensifies between Cambodian rivals*, (July 5, 1997), and

In any event, the 1993 elections were not fully representative of all the parties to the Paris Agreements. The Agreements were signed on October 23, 1991 by four factional political groups- CPP, FUNCINPEC, BLDP and DK, but Pol Pot later refused to participate in the elections and had boycotted them, claiming that the CPP party controlled the levers of power and that UNTAC had failed to ensure a fair and neutral environment in which the Khmer Rouge could compete on an equal footing. The Khmer Rouge reverted to using military force against the new government,[27][27] but in 1996, there was an internal conflict among the top DK leaders leading to a spit in the group. In August, Ieng Sary, who was foreign minister in the Pol Pot era and who controlled the zones of Pailin and Malai, defected to the new government with his troops. And in 1998 two more senior DK leaders defected to the government after Pol Pot died in the jungle on April 15.[28][28]. This event marked the end of the political life of Pol Pot as well as the DK regime. Pol Pot and the DK died, but they left millions of victims behind. One critical issue remains that vitally affects the Cambodian people. Should the world, especially the United Nations and the Cambodian government forget the tragedy of the Cambodian people during the Khmer Rouge regime now that Pol Pot has died? And if not, how will justice be found for the victims and based on what law?

The answer to these questions will be examined in Chapters III, IV and V of this text.

Cambodian forces take royalist stronghold (August 24, 1997), CNN websites available on www.cnn.com/WORLD/9707/05/cambodia, and www.cnn.com/WORLD/9708/24/cambodia Visited on May 8, 2002.

[27][27] See, Cambodia: *Major News Items, 5/28/93 - 6/14/93*; Available on Mekong net website: http://www.mekong.net/cambodia/061493ns.htm, visited on May 8, 2002.

[28][28] Thet Sambath and Adam Piore, *The Veil of Secrecy is Lifting On the Last Days of the Khmer Rouge, (*May 15, 2000); Website: http://www.khmer.cc/channels/0,11,6,01,6801.html, visited on February 10, 2002.

Chapter II

Brief Overview of the Cambodian Legal System

In 1983, post-Pol Pot's time, Cambodia restored its judicial system based on the socialist system. One ruling party controlled the judiciary.[29][29] At that time, there were only courts at trial level, provincial and municipal. A trial court was composed of one judge and two lay judges,[30][30] a prosecutor and clerk(s). The trial court had jurisdiction over all kind of cases. The judgment of court at that time was the first and the final. The parties in dispute were not allowed to appeal the court's decision.

In 1986, the Supreme Court was established. Then a few years later, the Appeal Court was also created. In 1993, the judicial system was reformed. The fundamental rights of accused persons were guaranteed in the new Constitution, such as the concept of presumption of innocence, right to lawyer, and right not be tortured. The trial court was composed of only one judge, a prosecutor and clerk(s).[31][31] The investigating judge was introduced into the Cambodian legal system for pre-trial investigation in the trial courts and sometimes at appeal level.

Presently, Cambodia has a three-tiered court system with general jurisdiction.

Section 1: Court System

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[29][29] See Stuart Coghill, *Resource Guide to the Criminal Law of Cambodia,* (International Human Rights Law Group/ Cambodian Defenders Project 2000), p. 53 (2.16-17).

[30][30] See Article 28 of the SOC Criminal Procedure which was adopted on June 20, 1989.

[31][31] See Article 96, para 2 of the SOC Criminal Procedure 1993.

Trial Courts

There are 21 trial courts at municipal and provincial level, and one military court in Phnom Penh. The courts have jurisdiction over all kinds of cases.[32][32] The trial court is composed of one judge, a prosecutor, and a clerk. Usually, the judge reads the case dossier in advance and asks questions actively during the trial. The military court[33][33] has jurisdiction over military offenses throughout the country.

There is only one Appeal Court in Cambodia, which accepts cases from trial courts and sometimes cases referred back to it from the Supreme Court. The Appeals Court hears issues of both fact and law.[34][34] The Appeal Court conducts hearings in a panel composed of three judges.[35][35] The prosecutor and defense counsel present evidence to assist judges to find the truth. The clerk arranges the courtroom and records all matters raised during the hearing.

Supreme Court

The Supreme Court is the highest judicial body. It reviews cases only on matters of law. However, there is an exception[36][36] for a case of revision and a case that is appealed twice. The Supreme Court is composed of five judges, a prosecutor and a clerk during an ordinary hearing. When hearing a case *en banc*, the court is composed of nine judges including a presiding judge. The president of Supreme Court always presides over the hearing.[37][37] The Supreme Court was established in 1985. However, it did not function properly until 1992.[38][38]

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[32][32] See Article 128, Para No 3 of Cambodian Constitution adopted by the National Assembly in Phnom Penh, on 21 September 1993, Article 96 of SOC Criminal Procedure 1993 and Article 3 (2) of UNTAC criminal law adopted by SNC on 1992.

[33][33] See Article 11 of the UNTAC Criminal Law adopted by the SNC in 1992.

[34][34] Ibid. Article 4(5)

[35][35] Ibid. Article 4(2)

[36][36] See Article 14 of the Law on the Organization and Functioning of the Judiciary adopted by the SOC on January 25,1993 and Article 5 of UNTAC law.

[37][37] See Article 16 of the Law on the Organization and Functioning of the Judiciary adopted by the

Supreme Council of the Magistracy

The Supreme Council of the Magistracy (SCM) is the highest body to guarantee the independence of judiciary, discipline for judges and the efficient functioning of the courts in Cambodia.[39][39] The King is the President of the Supreme Council of the Magistracy. However, he may assign someone to be his representative in his absence. The SCM is composed of nine members.[40][40]

Constitutional Council

The Constitutional Council is a unique body designed to safeguard respect for the Constitution, and to interpret the Constitution and the laws passed by the National Assembly. It has the power to hear cases related to electoral matters.[41][41] There are nine persons on the Council. Three members are appointed by the King, three by Parliament, and another three by the Supreme Council of the Magistracy. The Constitutional Council decides cases through a request from the King, the Prime Minister, and the President of the National Assembly, 1/10 of the National Assembly members and the courts. The people may appeal the unconstitutionality of laws or government actions only through their representatives in Parliament.[42][42]

SOC on January 25, 1993.

[38][38] See Stuart Coghill, *Resource Guide to the Criminal Law of Cambodia,* (International Human Rights Law Group/ Cambodian Defenders Project 2000), p. 27 (1.40).

[39][39] See Article 1 of the Law on the Organization and Functioning of the Supreme Council of the Magistracy adopted by the Cambodian National Assembly on December 22,1994.

[40][40] See Stuart Coghill, *Resource Guide to the Criminal Law of Cambodia,* (International Human Rights Law Group/ Cambodian Defenders Project 2000), pp. 30-31 (1.42) and Article 134 of the Cambodian Constitution and Articles 3 to 6 of the Law on the Organization and Functioning of the Supreme Council of the Magistracy adopted by the Cambodian National Assembly on December 22, 1994.

[41][41] See Article 136 of the Cambodian Constitution.

[42][42] See Stuart Coghill, *Resource Guide to the Criminal Law of Cambodia,* (International Human Rights Law Group/ Cambodian Defenders Project 2000), pp.32-33 (1.43-44) and Article 141 of the Cambodian Constitution.

Section 2: Major Issues in Cambodian Legal System

There are many critical problems existing in the Cambodian legal system but this discourse will be limited to a discussion of some of the major issues related to criminal proceedings.

Lack of Applicable Laws

- **Rules of evidence**

So far, Cambodia has not had enough laws applicable in all fields in the country especially laws that can ensure citizen's rights. In respect of general criminal matters, only the UNTAC Criminal Law (1992) and the SoC law on Criminal Procedure (1993) are being used in the courts every day. The evidence gathered by coercion or from illegal search shall not be admitted at court.[43][43] However, there are virtually no rules of evidence to determine what kinds of evidence should be admitted or not admitted in criminal proceedings. Judges admit all kinds of evidence to be heard in court. There are a number of Articles in the UNTAC law and SoC law that repeatedly mention the word "evidence" but do not provide any clear guidance as to what evidence is and how evidence is valued.[44][44] There is no standard to measure the value and credibility of evidence. This makes it difficult for lawyers to challenge evidence in court. The judge can decide whatever he wants. So the decision of judge can be biased, unfair or

[43][43] See Stuart Coghill, *Resource Guide to the Criminal Law of Cambodia,* (International Human Rights Law Group/ Cambodian Defenders Project 2000), p.139 (3.90).

[44][44] See Article 24 of the UNTAC Law and Articles 38, 42-44, 101, 114, 125, 127, 135, 148, 188, and 190 of the SoC Criminal Procedure 1993.

arbitrary. Referring to this issue, sometimes the judges themselves admitted that they were difficult to decide on the cases when there were not enough rules of procedure and evidence. Therefore the Rule of Procedure and Evidence must be adopted.[45][45]

- **Code of Conduct of judges and prosecutors**

To ensure the proper functioning of the courts, a set of internal rules and codes of conduct for judges and prosecutors must be adopted. This would also include rules for the supervision of quasi-judicial officials. If a mechanism for controlling the conduct of a judge or prosecutor (code of conduct) were in place, this would make it easy for a disciplinary body, as well as the public, to see whether the conduct of the judge or prosecutor is right or wrong in performing his or her duty. Disciplinary action could then be taken decisively and transparently against judges or prosecutors. Presently, there is no code of conduct for judges or prosecutors. A draft law entitled "the Statute of Judges and Prosecutors" has been before the National Assembly for many years but has been ignored, probably for political reasons.

Before 1993, the Ministry of Justice closely supervised the courts.[46][46] It could be said that the courts were not independent. But as a result of the close supervision, corruption appeared to be contained. As this supervision has reduced, now judges or prosecutors have considerably more freedom of action, and levels of corruption have increased markedly. It seems that there has been little or no disciplinary action taken against justice officials who themselves violate the law. Sometimes, the disciplinary action taken is

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[45][45] See Danish Center For Human Rights, *Three Critiques on Flaws in the Cambodian Legal System,* Legal Reforms in Cambodia Series Paper No. 2, (April 2001), p.7 (III).

[46][46] See Stuart Coghill, *Resource Guide to the Criminal Law of Cambodia,* (International Human Rights Law Group/ Cambodian Defenders Project 2000), p. 53 (2.17)

just to mislead the public for a while. It was not a genuine disciplinary action.[47][47]

- Overlapping Role of Prosecutors and Investigating Judges

Prosecutors play an important role in criminal proceedings in order to serve the public interest. Article 131 of the Cambodian Constitution says: "*Only the Department of Public Prosecution shall have the right to file criminal suits*." Based on this principle the prosecutors have considerable power in investigating a criminal case to ensure that there is enough evidence to prosecute an offender. To effectively prosecute the case, prosecutors must perform their duties closely with judiciary police. They must examine the facts and evidence obtained by the judiciary police carefully. In addition, they should provide legal advise to the judiciary police if necessary. The prosecutors must have enough time to prepare the case before it goes to trial. However, in the existing system, the prosecutors seem not to fulfill these obligations properly. Intentionally, they rely on the investigating judge to do this kind of work. This attitude is caused by unclear or flawed criminal procedure that makes it difficult for prosecutors to investigate and prepare cases for trial.[48][48]

Within 48 hours after arresting an accused person, police have to send the case and the accused person to appear before a judge.[49][49] In this

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[47][47] See Human Rights Watch: *Condemns Rearrest Campaign in Cambodia*, (New York December 10, 1999); Available on Human Rights Watch, Available on Human Rights Watch website: http://www.hrw.org/press/1999/dec/camb1210.htm, visited on May 8 2002. In 1999, the Chief judge and prosecutor of the Phnom Penh municipal court faced allegation of corruption. Referring to this case, on 3 December 1999, Prime Minister Hun Sen ordered the rearrest of hundreds of people who had been acquitted or released by the courts. After being suspended by the Ministry of Justice for a few months, both officials appeared to receive promotions. One was sent to work as a prosecutor in the Appeal Court and the other was sent to work at the SCM as member of the Council, the highest judicial body that controls and all judges and prosecutors in the country.

[48][48] Basil Fenando*, Decline of Fair Trial in Asia: Trial in Cambodia* (Sok Sam Oeun*)*, (Asian Human Rights Commission, 7-12 November 1999), pp.137-138, 237(last para), 238 and 239 (para.1).

[49][49] See Article 13, para 1 of UNTAC.

period, first police have to bring the accused person to see the prosecutor for an initial indictment. Most of the time, it is almost 48 hours before police send a case to the prosecutor. So the prosecutor only has time for a superficial examination, then he or she must make a preliminary initial indictment and send the case to an investigating judge for detailed investigation. Very often, police send the case to the prosecutor without sufficient evidence. In practice, police do not start collecting evidence first and then arrest the accused when they have sufficient evidence. They tend to arrest first and then collect evidence to justify the arrest. As many prosecutors also do not understand the function of the 48-hour time limit, they are forced to make a rushed decision to send the case to the investigating judge (or not) in order to comply with the law and be released from their duties.[50][50]

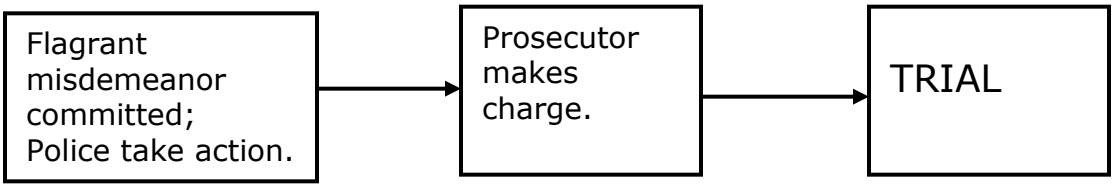
Within 4-6 months, after completing his investigation, the investigating judge sends the case back to the prosecutor for the final charge. Prosecutors have only three days to review the case dossier, after which they must send the case back to investigating judge to take another step for trial. So the prosecutors often do not care much about the case. Despite the fact that it is the prosecutor who must present the case in court, prosecutors sometimes do not know who is their own witness. Most of the time, they blame the judicial police for misconduct in their duties. Prosecutors think that the investigation of a criminal case is the job of the investigating judge. What prosecutors usually do is just review the written statements made by the police and the findings of the investigating judges. Based on this system, the person who is responsible for investigating the case (the investigating judge) is not the person who must present the case in court, and so it appears that nobody is responsible for the overall

[50][50] See Danish Center For Human Rights/ Cambodian defenders Project/ Asian Human Rights Commission, *Three Critiques on Flaws in the Cambodian Legal System,* Legal Reforms in Cambodia Series Paper No. 2, (April 2001), p.6, para 2.

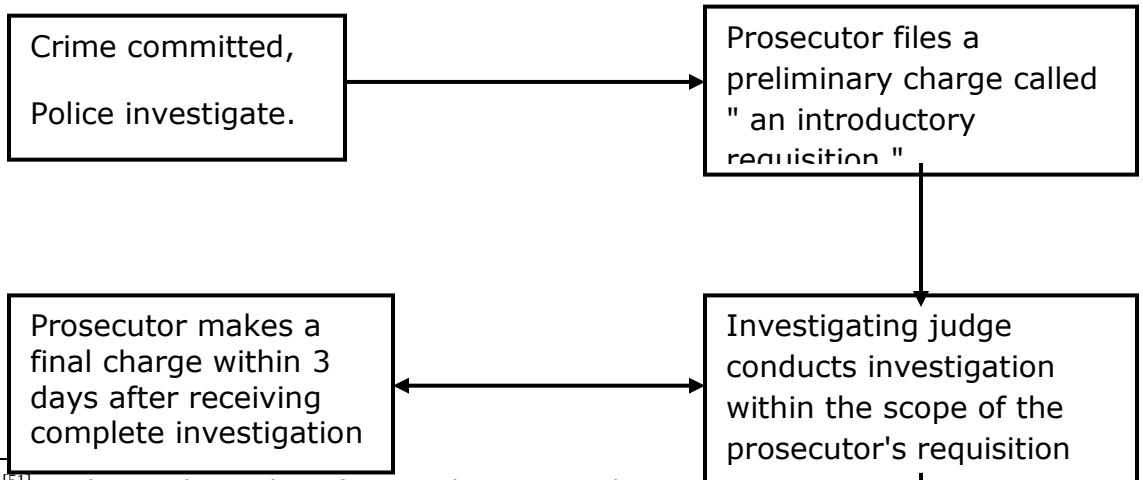
prosecution. This is a big problem with current Cambodian procedure.[51][51] In any event, if the prosecution case is weak or deficient, and if the judge seriously applies the law, the accused must be acquitted and released.[52][52] The point is that neither police nor prosecutor realize that they actually have unlimited time for investigation AS LONG AS THEY DO NOT ARREST. As soon as they arrest, the protections given by the 48-hour rule come into play.

*** Flow Chart of Criminal proceeding**

(1) Where a *flagrante delicto*[53][53] misdemeanor is committed which is punishable with not more than one year's imprisonment:[54][54]



(2) All crimes except above mentioned.[55][55]



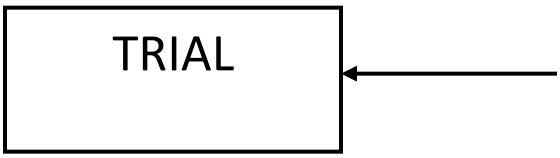
[51][51] Basil Fenando*, Decline of Fair Trial in Asia: Trial in Cambodia* (Sok Sam Oeun*)*, (Asian Human Rights Commission, 7-12 November 1999), pp. 237(last para), 238 and 239 (para.1).

[52][52] Author worked in the system and reviewed over 7000 criminal and civil cases represented by Cambodian Defenders Project (See *Six-Month Report, February 2001 – July 2001*, International Human Rights Law Group/ Cambodian Defenders Project, (September 1, 2001), p. 5 (Casework and management).

[53][53] A *flagrante Delicto* offense is where the suspect is found in the act of committing the offense: she or he is observed committing the offense; or is pursued by a public outcry; or is identified at the scene of the offense by a witness or victim; or attempts to flee the scene of the offense. See Article 18 of the UNTAC and Article 35 of the SoC Criminal Procedure 1993.

[54][54] See Articles 61, 66 & 67 of the SoC Criminal Procedure 1993.

[55][55] Ibid. Articles 66 & 89.



Independence of the Judiciary:

The independence of the judiciary is essential to the functioning of a democratic regime. To guarantee the independent and impartial functioning of the judiciary, certain key elements must be present, such as the training and competence of judges, adequate remuneration, an autonomous budget, and a neutral and impartial body to discipline and regulate the judiciary.[56][56] Further, the principle of the separation of the powers of government must both exist and be guaranteed in law and practice. An independent judiciary can exercise its powers for the public good and better protects the rights of citizens.

To what extent does the Cambodian judiciary meet the basic principles just mentioned? Taking firstly the **competence of judges,** the question can be asked where the existing judges who are working in Cambodian courtrooms every day come from. Because almost all lawyers and educated people were killed by the DK regime, nearly all Cambodian judges were appointed by the socialist regime established by Vietnam after 1979. Only ten lawyers were left after 1979.[57][57] These judges were chosen from the ordinary people: former teachers, soldiers, police or workers in previous

[56][56] See Principles 1, 2,10 and 11 of the Basic Principles on the Independence of the Judiciary.
[57][57] See Caroline Hughes, *UNTAC in Cambodia: The Impact on Human Rights*, (Institute of Southeast Asian Studies, Singapore 1996), p. 7 para 1.

regimes. Probably, eighty percent of existing judges do not have any legal background at all. Only some recently graduated from law school in the Communist countries, such as the Soviet Union, East Germany and Vietnam and these new judges are in lower positions. These people are used to thinking in terms of socialist ideology. They do not have a sense of what human rights actually mean in the context of a liberal democracy. Since the promulgation of Cambodia's 1993 Constitution, which mandates liberal democratic norms, there has been no substantial, intensive and systematic training for these judges. The same issue applies to prosecutors who are working in the legal system.[58][58] We can conclude that most judges and prosecutors working in the Cambodian justice system are neither trained nor qualified to do so.

Secondly, **the issue of resourcing** lies at the heart of many problems in the Cambodian judicial system. Even with the best of qualifications and training, if financial resources are inadequate, very little can be accomplished. The budget of the judiciary is nominally under the control of the Ministry of Justice, which of course is part of the executive branch of government. However, the amount of the budget is decided by the Royal Government (Council of Ministers), which has consistently allocated less than 0.3% of the government's budget to running the entire MOJ and court system. This is grossly deficient and indicates the low priority given to the justice system in Cambodia. The courts often do not have money to support their basic operations and they frequently lack the resources to process cases properly and expeditiously. They lack nearly every basic requirement for their work. The Prosecutor General once complained at a Judicial Reform Workshop that he had to put his personal money in the power meter at his office in order to continue working**.** Unlike the National Assembly, the courts

[58][58] See Basil Fenando*, Decline of Fair Trial in Asia: Trial in Cambodia* (Sok Sam Oeun*)*, (Asian Human Rights Commission, 7-12 November 1999), pp. 135 –136 and the author's experiences in court since 1985, two years after the court system was established.

do not have an autonomous budget to run their branch of government. It is in the hands of the executive body.

Thirdly, the independence of the judiciary is related to their **remuneration.** Presently, we can see that judges and prosecutors receive only a small monthly payment that is below subsistence level. They receive $20 to $25 per month. This amount of money cannot begin to support even their basic living expenses. This totally inadequate salary almost inevitably leads judges into taking bribes and other corrupt practices in order to survive and support their families. The inevitable result is bias, unfairness and injustice in cases where judges' decisions have been influenced by the giving of money or favors. This issue has been recognized by a number of high-ranking government officials. For example, Mr. Chem Sngoun, Minister of justice, gave an interview and responded to questions from Eric Pape of the Phnom Penh Post on October 20, 1997. The question was " *how do you respond to allegations that you preside over a corrupt legal system?". He said, " There is corruption. We have found that at Pursat and Takao provinces. When we checked all the prisoners, we found out that some are missing*…" With regard to low salaries leading to corruption, he said, " *What you say is true. When the salary is too low, when the salary only provides four or five days of food for the family, there is a great temptation".*[59][59] These answers are a candid admission of the serious problems in the Cambodian justice system. To date, no concrete steps have been taken by the government to in any way improve the situation. A draft law that would raise judges' salaries to a level of approximate parity with those of members of the National Assembly has made no progress through government committees for nearly four years. Because there has been no change in nine years, corruption in the judiciary continues.

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[59][59] See Basil Fernando*, Problems facing the Cambodian Legal System*, *(*Asian Human Rights Commission, July 1998), pp 81-83.

Fourthly, for justice to be achieved, the courts must be **neutral and impartial**. This concept is particularly important for any official who works as a judge. If the judge cannot keep his or her neutrality, the judgment made by him or her can easily lead to unfairness and injustice. People who are denied justice, come to distrust the courts and start to look for justice by other illegal means. In Cambodia, judges are generally neither neutral nor impartial. Most judges are playing an active role in one or other of the political parties. Often, the chief or deputy chief judge is also the head of the local branch of a political party. Very often, they place the interests of their political party ahead of the interests of the law, of the accused or the parties in dispute, and of justice. For example, in the case of Sum Rasmie[60][60] at Kampong Cham provincial court, the judge had a phone call during the trial. He postponed the trial leaving many people, including the interested parties, waiting in the courtroom. The judge remarked as he left: "I must join a meeting with the governor - my boss has called me".[61][61] All high positions in the judiciary are appointed by and affiliated to political ruling parties, such as chief trial judges and prosecutors, chief judges and prosecutors of the Appeals Court and Supreme Court and members of the Supreme Council of the Magistracy. There is apparently a long-standing arrangement between CPP and FUNCINPEC to share power in the judicial system. For example, the President of the Supreme Court is a CPP party member and the prosecutor attached to Supreme Court is a FUNCINPEC party member. This indicates that judges play an important role in political parties from the bottom to the top of the judiciary. The inevitable conclusion is that they cannot perform their judicial role conscientiously or independently.

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[60][60] Sum Rasmie is a high profile case represented by Mrs. Touch Voleak working for the Women's s Resource Center, Domestic Violence Unit, of the CDP. The victim was attacked with acid by men under the orders of the wife of a high-ranking police official in Kampong Cham province and then kidnapped to Vietnam. She was badly disfigured. At the trial, held in December 2000 at Kampong Cham provincial court, the wife of policeman received a two years suspended sentence and the other perpetrators were not apprehended. CDP lawyers have appealed the verdict.

[61][61] Personal observation of the author.

Finally we will examine the principle of **separation of powers of government.** The Constitution of Cambodia sets out this basic principle at Article 51, para 4: "*The legislative, executive, and judicial powers shall be separated*." This means that the three branches of the government must be separate and equal in terms of power, management and budget. No branch is higher than the others or can take over the others' function. However, this principle appears only on paper in the Constitution. Practically, it is not applied. As mentioned in section 1 of this chapter, the Supreme Council of the Magistracy (SCM) is the supreme supervisory body of the judiciary and is empowered to appoint, promote, remove and discipline judges and prosecutors. Even though this body is supposed to play a major role in ensuring the independence and proper functioning of the judiciary, in practice it does not function well and rarely meets. This is caused by a lack of political will and the law itself. It can be seen that the Article 1 of the Law on the Organization and Functioning of the Supreme Council of the Magistracy guarantees the independence of the judiciary but Article 2 of this law takes away this concept by allowing the Minister of Justice, a member of the executive branch, to be a member of the Council to supervise judges. So this Article is unconstitutional and may be struck down. One can see that the executive branch casts its controlling hand over the judicial body. This is not a clear separation of powers and it violates the principle of an independent judiciary. A further barrier to the effective functioning of the SCM is the workloads of its members. Most are senior judges and prosecutors who already have a huge daily workload of cases and administrative duties. So they have little time to think about the Council job. Even if they were to devote the necessary time to the SCM, their judicial duties and their prestige would no doubt suffer. As a consequence of these problems, the SCM has

rarely met and has been ineffective in fulfilling its function as mandated by the Constitution.[62][62]

These and other problems combine to create serious barriers to the effective functioning of the Cambodian justice system.

Chapter III
Applicable Norms Related to the International Laws on Genocide and Others Crimes

During World War I and II, a hundred million people were killed.[63][63] In an attempt to prevent further such terrible wars, the United Nations was established in 1945. Gradually, international criminal laws were introduced to prevent and punish criminals who were responsible for serious criminal acts whether committed in wartime or peacetime. Genocide, war crimes and crimes against humanity are serious crimes and grave human rights violations. Any person who commits these crimes must be brought to justice in a domestic court or international court. Practically, one can see that most of the perpetrators who committed these crimes were powerful persons and high-ranking government officials such as heads of state, Ministers and high-ranking military officers. These crimes very often concern the mass killing of people in domestic or international situations, during peacetime as well as in armed conflict. It seems likely to be difficult to prosecute all those who commit such crimes.

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[62][62] See Basil Fenando*, Decline of Fair Trial in Asia: Trial in Cambodia* (Sok Sam Oeun*)*, (Asian Human Rights Commission, 7-12 November 1999), p 136 (A).

[63][63] See World War I, the Great War in Numbers, available on website: http://www.worldwar1.com/sfnum.htm and World War II, available on website: http://www.infoukes.com/history/ww2/page-18.html, visited on April 12, 2002.

The following paragraphs will specifically discuss the relevant international laws.

Section 1: The Convention on the Prevention and Punishment of the Crime of Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide,[64][64] the so-called " Genocide Convention" was adopted by the United Nations General Assembly resolution 260 A (III) of 9 December 1948 and entered into force on 12 January 1951, in accordance with article XIII. This convention provides a number of principles in term of the international law as follows:

- **Crime of genocide** has to be prevented and punished, both in the time of peace or in the time of war whether committed at the domestic or international level. This crime is categorized as an international crime. The States Parties to this convention have the obligations to both prevent the crime, and to punish any person, including private individuals, public officials and rulers, who commit it. They must adopt legislation and other legal means to prevent and provide serious penalties for those persons of guilty of genocide.[65][65]

- **Crime and its elements:** The principal crime stipulated in the Genocide Convention is "Genocide". Generally, the term genocide is too broad. However, legally it has its own elements that constitute the crime of genocide. There are two main elements that constitute genocide: The first element is criminal intent. In other words, all the acts that constitute the

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[64][64] Cambodia is one of the 133 States Parties to the Genocide Convention and gave accession on October 14, 1950; Available on UN Human Rights Website: http://www.unhchr.ch/html/menu3/b/p_genoci.htm, visited on April 12, 2002.

[65][65] See Articles 1,4 & 5 of the Genocide Convention.

crime must have been conducted with a malicious intention within knowledge of their likely consequences. The second element is the act of destroying a group of people that comprise the whole or a part of a nation, ethnic group, race or religion. The following is an example of criminal acts that satisfy this second element:

- Killing members of a group;
- Causing serious bodily or mental harm to members of a group;
- Deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births with a group;
- Forcibly transferring children of a group to another group.

The above examples constitute genocide if committed with the requisite intent, but are by no means exhaustive. For the sake of clarity, the definition of "genocide" is categorized by specific action, for example, genocide by killing. There are four specific elements:

1. The perpetrator killed one or more persons. This means that the act of killing can be one or more.

2. Such person or persons belonged to a particular national, ethnic, racial or religious group.

3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.

4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction. [66][66]

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[66][66] See UN Reports: *Element of Crimes,* Preparatory Commission of the International Criminal Court, (New York from 13-31 March 2000 and 12-30 June 2000), genocide by killing, p. 6; Available on UN website: http://www.un.org/law/icc/index.html, visited on April 25, 2002.

This is only one example of one of the acts of genocide. Other acts constituting genocide may also be analysed in this way.

In addition, those who commit indirect and inchoate acts sufficiently related to genocide are also within the ambit of the Genocide Convention. Such acts include:

- Conspiracy to commit genocide;
- Direct and public incitement to commit genocide;
- Attempt to commit genocide;
- Complicity in genocide. [67][67]

These acts attach criminal liability to those who do not directly commit the genocide but who plan, or order genocide, or provide assistance to those who commit genocide. Conspiracy and complicity can be committed before or after the genocide is committed.

- Jurisdiction: There are two jurisdictions over persons who are alleged to have committed genocide or related actions as defined in the Convention. The first is the domestic jurisdiction. States Parties on whose territory the crimes were committed can use their own judicial system to try individual suspects charged with crimes mentioned in the Genocide Convention. Any State Party where such crimes are committed has jurisdiction over those crimes by using its domestic courts to try the perpetrators. However, the domestic court must show that it is competent and genuine. Secondly, the international penal court may be given jurisdiction if the States Party wishes to do so. This depends on the political will of the concerned States Party or the UN to choose the international jurisdiction.[68][68] For example, recently, the ICTY and ICTR were created to try individuals alleged to have committed war crimes, crimes against humanity and genocide in the former Yugoslavia and Rwanda (see discussion

[67][67] See Articles 2 and 3 of the Genocide Convention.
[68][68] Ibid. Article 6.

below).

- **Extradition:**

The crimes stipulated in the Genocide Convention are not political crimes, so a State Party must send any suspect as requested to the requesting state. In terms of cooperation and suppression of genocide, States Parties have to promise to grant an extradition.[69][69] A requested State Party cannot use the provision mentioned in Article 33(1) of the International Convention Relating to the Status of Refugees as a ground to keep genocide suspects in its country.

- **Relationship between States Parties and the International Court of Justice and UN:**

The relationship between States Parties and the UN is set out in Article 8 of Genocide Convention, which provides:

"Any Contracting Party may call upon the competent organs of the UN to take such action under the Charter of the UN as they consider appropriate for the prevention and suppression of acts of genocide or any of other acts enumerated in Article III."

This means that any State Party can invite the UN to take action to prevent or suppress any acts of genocide committed elsewhere among the States Parties. It can bring evidence or accusations of violations to the UN or put more pressure on State Party suspected of being in violation of the Convention. Mainly, the issue can be brought to the UN as a matter of international security or peace. In addition, where there is any dispute in interpretation, application and responsibility of a State Party for crimes mentioned in the Genocide Convention, one or both of the parties in dispute

[69][69] Ibid. Article 7.

can bring the issue to the International Court of Justice for resolution.[70][70]

- **Absence of statutes of limitation:**

The crimes mentioned in the Genocide Convention do not contain any statutes of limitation. However, these crimes are covered by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity below. This gives rise to the interesting question of whether the Non-Applicability of Statutes of Limitation can be applied to a state that is only a State Party to the Genocide Convention and not a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. This could be a critical enforcement issue where the country is not a party to the latter convention. Internationally, in principle, a convention is applicable only to parties to that convention. A country that is not a party to the convention is not bound and has no obligations under that convention. For example, Cambodia is a party to the Genocide Convention but it is not a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (see discussion below). In this case, there are two possible answers: Firstly, if Cambodia has its own legislation that provides a statute of limitation for genocide enacted before or at the time the genocide was committed, that statute of limitation shall be applied. On the other hand, if Cambodia has not enacted legislation containing a statute of limitation for genocide, presumably all acts of genocide maybe brought to justice at any time without regard to limitation.

Section 2: Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity

[70][70] Ibid. Article 9.

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, also called the "Convention on the Non-Applicability of Statutory Limitations",[71][71] basically provides three major points.

The first point is concerned with statutes of limitation on crimes such as war crimes, crimes against humanity and genocide. The Convention provides that the statutes of limitation do not apply to these types of crimes.[72][72] This means that whenever these crimes were committed, the appropriate legal authority still has power to bring the suspect to justice without time limitation, on both offense and punishment. So, the legal authority has power to investigate, prosecute, apprehend a suspect or imprison a convicted accused at any time after commission of the crime; although of course there will be practical limitations, such as the availability of evidence and witnesses, and the length of the human life span. This special legal authority to bring any criminal who committed crimes as mentioned above to justice effectively means that, while the alleged perpetrator is alive, s/he can never feel entirely safe from the reach of this law. The European Union also adopted its own Convention on the Non-Applicability of Statutes of Limitation for War Crimes, Crimes against Humanity and Genocide, on January 25, 1974. However, one can see that not many states have verified this Convention.[73][73]

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[71][71] There are 45 States Parties to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. However, Cambodia is not one of them; Available on UN Human Rights website: http://www.unhchr.ch/html/menu3/b/p_limit.htm, visited on May 8, 2002.

[72][72] See Article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968, entry into force 11 November 1970, in accordance with article VIII; Available on UN Human Rights website: http://www.unhchr.ch/html/menu3/b/p_limit.htm; visited on May 8, 2002.

[73][73] See ICRC: *National Enforcement of International Humanitarian Law: Time-barring,* the time bar and international law, *(*February 23, 1999), (paras 1-4); Available on ICRC website: http://www.icrc.org/icrceng.nsf/5cacfdf48ca698b641256242003b3295/03bfb6d13bffdd4741256721004bbda6?OpenDocument, visited on May 9, 2002.

Secondly, this convention covers the criminal responsibility of representatives of states, or individual persons, who commit genocide, war crimes or crimes against humanity, whether as principal or accomplice.[74][74] So any person, regardless of his or her status in society, shall be responsible for their crimes and subject to criminal action.

The third point is related to the obligation of a State Party to the present convention. The State Party is obliged to take all necessary measures to make sure that the crimes as mentioned in articles 1 and 2 of this convention are prevented and, if committed, that they are prosecuted. These measures include legislation and other legal means. If domestic laws are contradictory to this convention, the State Party must take positive measures to abolish those laws. This means, in particular, that statutes of limitation on genocide, war crimes and crimes against humanity must no longer exist in the country.[75][75]

Section 3: The Statutes of ICTY and ICTR

The Statutes of the International Criminal Tribunal for Former Yugoslavia [76][76] and the Statute of the International Criminal Tribunal For Rwanda were adopted to create the Ad hoc Tribunals to try criminals who violated the international law in the former Yugoslavia and Rwanda**.** The ICTY was established to try any individual who committed crimes under the international law that occurred in the territory of the former Yugoslavia between January 1, 1991 and the date of restoration of peace determined by

[74][74] See Article 2 of Convention on the Non-Applicability of Statutory Limitations.
[75][75] Ibid. Article 3 & 4.
[76][76] The ICTY was established by the Security Council of the UN referred to RESOLUTION 827 (1993) adopted on 25 May 1993, (S/RES/827 (1993).

the Security Council.[77][77] The ICTR was also established to try individuals who committed crimes under the international law in the territory of Rwanda and neighboring countries between January 1 and December 31, 1994 under the authority of Resolution 955 of 8 November 1994 of the Security Council.[78][78]

Both these Tribunals were based on similar models in respect of jurisdiction and legal basics. The motive for establishing these ad hoc tribunals, rather than the domestic court, was to ensure fairness and justice for both victims and accused persons. The paramount concern is for impartiality, the independence of the judiciary and protection of human rights.[79][79]

Crimes against humanity and genocide are similarly defined in both Statues.[80][80] Other types of crimes are defined differently. The ICRY contains the crimes of a "grave breach of the Geneva Convention 1949" and the "violation of the laws or the customs of war"; whereas the ICTY defines crimes in terms of a violation of the common Article 3 of the Geneva Convention and of the Additional Protocol II.[81][81] The ICTY and ICTR do not specifically define war crimes. However, the crimes contained in the common article 3 of the Geneva Convention 1949, and violation of laws or customs of war, are classified as war crimes.[82][82]

Organizationally, both Tribunals have the same structure, which is

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[77][77] See John R.W.D. Jones, *the Practice of the International Criminal Tribunal for the Former Yugoslavia and Rwanda,* (Transnational Publisher, and Inc. 1998), p.3.

[78][78] See John R.W.D. Jones, *the Practice of the International Criminal Tribunal for the Former Yugoslavia and Rwanda*, (Transnational Publisher, Inc. 1998), p.4 para. 2 and See Virginia Morris and Michael P. Scharf, *The International Criminal Tribunal For Rwanda*, (Transnational Publisher Inc. 1998), pp. 47 and 48, para 1.

[79][79] See Virginia Morris and Michael P. Scharf, *The International Criminal Tribunal For Rwanda*, (Transnational Publisher Inc. 1998), pp. 75-76 and 99, para 2.

[80][80] See Articles 4 and 5 of the ICTY and Articles 2 and 3 of the ICTR.

[81][81] See Articles 2 and 3 of the ICTY and Article 4 of the ICTR.

[82][82] See Article 8 of the Rome Statute.

composed of: Chambers, consisting of two trial Chambers and an Appeals Chamber; a Prosecutor; and a Registry serving both the Chambers and the Prosecutor.[83][83] The ICTY and ICTR are almost the same in terms of structure, mechanism and legal framework. Most of the Articles are identical but vary in numbering and order.[84][84]

Section 4: The Rome Statute

The Rome Statute[85][85] is the most advanced of the international criminal laws. It creates the world's first permanent international criminal court thereby answering the call of international lawyers and legal scholars, some of whom had participated in previous international criminal ad hoc Tribunals such as the Nuremberg Tribunal, Tokyo Tribunal, ICTY and ICTR. The Rome Statute is a dream come true for many. It is full of hope for the implementation of human rights in the future. It is like a speech addressed by H.E Kofi. Annan, Secretary General of the UN in the opening signature of the Statute. He said," *The establishment of the court is still a give of hope to future generations, a giant step forward in the march towards universal human rights and the rules of laws*."[86][86]

The Statute provides the principles and legal framework for the International Criminal Court (ICC) as follows:

Purpose

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[83][83] See John R.W.D. Jones, *the Practice of the International Criminal Tribunal for the Former Yugoslavia and Rwanda*, (Transnational Publisher, Inc. 1998), pp.78-79.

[84][84] See John R.W.D. Jones, *the Practice of the International Criminal Tribunal for the Former Yugoslavia and Rwanda*, (Transnational Publisher, Inc. 1998), Table of Contents.

[85][85] The Rome Statute of the International Criminal Court was adopted by UN conference on July 17 1998. As of April 11, 2002, 66 countries have verified it. Based on Article 126, the International Criminal Court shall commence functioning on July 1 2002. See Human Rights Watch: http://www.hrw.org/campaigns/icc/ratifications.htm, visited on May 9, 2002.

[86][86] See Cherif Bassiouni, *The Rome Statute of the International Criminal Court: A Documentary History*, (Transnational Publishers Inc. New York 1998), Preface IX.

The purpose of this Statute is to create a permanent international criminal court that can bring to justice any individual within its jurisdiction who commits the most serious international crimes regardless of high government position or authority, except those under 18 years of age at the alleged time of commission. However, the ICC will not take criminal jurisdiction away from domestic criminal courts. Its function is as a complementary body to national criminal jurisdictions, in that the ICC will only assume jurisdiction where the domestic courts of the member state are not willing or fail to prosecute the crimes as mentioned the Statute (see discussion on jurisdiction below).[87][87]

Jurisdiction

Generally, first, the ICC has jurisdiction over the most serious crimes of concern to the international community. It has power to prosecute genocide, crimes against humanity and war crimes. Its function shall not replace domestic jurisdictions. It is a supplementary judicial body to domestic criminal courts only.[88][88] As for other international treaties, in principle, the ICC 's jurisdiction binds only the States Parties to the Rome Statute. Exceptionally, it also has jurisdiction over a non-State Party where that non-State Party requests and accepts its jurisdiction or where the ICC has a special agreement regarding jurisdiction with the state concerned.[89][89] More importantly, the ICC has power over the crimes as mentioned above without any restriction regardless of whether such crimes were committed in peace time or war time and no statute of limitation shall be applied. This means that the ICC can prosecute any criminal who commits crimes

[87][87] See Articles 1 and 26 of the Rome Statute.
[88][88] Ibid. Articles 1, 4(1) and 5.
[89][89] Ibid. Articles 4 (2) and 12(3).

mentioned in this Statute forever without time limitation of prosecution or punishment.[90][90]

Second, with regard to case acceptance, the Prosecutor[91][91] has three main jurisdictions to exercise his or her power within the framework of the ICC with respect to crimes defined in the Rome statute:[92][92]

1- He or she accepts a case that is referred by a State Party. In other words, when a crime stipulated in the Rome Statute is committed and a State Party refers this case to the Prosecutor for investigation;

2- The Prosecutor accepts a case from the Security Council of the United Nations. This means that the Security Council uses its power stated in Chapter VII of the United Nations Charter to intervene in a situation concerning international peace and security and then it refers the matter of violations to the Prosecutor in order to prosecute perpetrator(s);

3- The Prosecutor himself or herself has power to initiate an investigation based on information received. In this sense, the Prosecutor analyzes all information referred to him or her by many sources to make sure this information is reliable and appropriate. Article 15 point No. 2 of the Rome Statute states: "*The Prosecutor shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from states, organs of the United Nations, intergovernmental or non-governmental organizations or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the court.*" Relying on this Article, all concerned people and institutions such as states, human rights NGOs, families of victim(s) and victims themselves, can refer case(s) to the prosecutor to take action on the matter. Basically, the Prosecutor investigates or prosecutes the case based on his or her assessment of whether the information received is credible and appropriate.

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[90][90] Ibid. Article 29.
[91][91] "Prosecutor" in this Section, means the Prosecutor of the ICC.
[92][92] See Article 13 of the Rome Statute.

Third, with regard to the admissibility of a case, as the complementary judicial body to the national courts, the ICC also has jurisdiction over the alleged case where the national courts (domestic jurisdiction) do not have the willingness or capacity to carry out the investigation or prosecution. In other words, the legal authority of the state does not want to investigate or prosecute the individual suspected of committing the international crime. To assess whether domestic jurisdictions are unwilling or unable to proceed with the case, the ICC must look at the minimum standards set up in international law, such as due process, impartiality and the independence of judiciary.[93][93]

Crimes

There are four crimes covered under the Rome Statute. Three of these crimes are defined clearly such as war crimes, crimes against humanity and genocide. Exceptionally, the crime of aggression is not yet defined but it is referred to an adoption of provision of this crime in accordance with the procedure set in Articles 121 and 123 because, it needs a clear definition for implementation.[94][94]

In addition, complicity, incitement and attempted commission of a crime are also defined as crimes under the statute.[95][95] The specific elements of these crimes have been refined and developed by the UN Preparatory Commission for the ICC to make them more precise and easier to apply in court.[96][96]

There were some concerns regarding to the limitation of the ICC's jurisdiction on certain crimes. The question is that why the ICC has only

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[93][93] Ibid Article 17-point No.1 (a & b) and No. 2 (a, b & c).

[94][94] See Lyal Sunga, *The Crimes within the Jurisdiction of the International Criminal Court (Part II, Articles 5-10),* (European Journal of Crime, Criminal and Justice 1998). Note: Class Materials, 6 March 2002, pp 64(2.2)- 65.

[95][95] See Articles 5-8 and 25 of the Rome Statute.

[96][96] See UN Reports, *Element of Crimes*, Preparatory Commission of the International Criminal Court, New York from 13-31 March 2000 and 12-30 June 2000; Available on UN website: http://www.un.org/law/icc/index.html, visited on May 8, 2002.

jurisdiction over some crimes but not all the international crimes. However, the answer likely leaves the possibility to Article 121 of the Rome Statute. This Article opens an opportunity for the States Parties to the Statute to amend the present Statute. At that time, they can add more crimes under the jurisdiction of the ICC.[97][97] In this case, it depends on whether the States Parties want to amend.

Non-retroactive principle

The ICC has jurisdiction to try only those crimes as stated in the Rome Statute that were committed after the Statute comes into force. So the ICC cannot hear any case concerning a crime that was committed before the ICC was legally established.[98][98]

Responsibility of commanders

A Military Commander or superior is a very important officer in the armed forces. S/he has power to control and to supervise all his or her subordinates and soldiers in order to make sure they follow orders and do not commit wrongdoing. He or she has extensive powers to exercise control over all the activities of the soldiers under his or her command. More specifically, to ensure the proper exercise of the commander's powers so that soldiers or subordinates do not commit crimes while under the commander's control, the Rome Statute provides in many instances that the commander shall be responsible for criminal acts that were committed by his or her subordinates or soldiers during the period of time they were effectively under the commander's control. There are some key elements

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[97][97] See Lyal Sunga, *The Crimes within the Jurisdiction of the International Criminal Court (Part II, Articles 5-10),* (European Journal of Crime, Criminal and Justice 1998). Note: Class Materials, 6 March 2002, p 62(2.1)- 63.

[98][98] See Article 11 of the Rome Statute.

that are required in order to hold a commander responsible for such criminal acts where the commander personally has not taken part in or has not committed such alleged crimes. This responsibility is clearly stated in Article 28(a) of the Rome Statute which states:

"In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) *That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and*

(ii) *That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."*

Based on this Article, one can see that not only the military commander but also any person who effectively controls the forces shall be held criminally responsible for acts in which he or she has not taken part. In this sense, the law requires the military commander or superior or any person effectively in charge to take extensive control of the activities of his or her subordinates to prevent any violation that may be committed by them.[99][99]

[99][99] Ibid. Article 28(b).

Superior orders

Generally, a person who commits a crime is responsible for that crime provided s/he has the requisite intention to commit it.[100][100] However, the Rome Statute does provide limited room for an accused person to be relieved from criminal responsibility where he or she commits certain crimes stated in the Statute pursuant to an order from a superior. Such protection does not extend to circumstances where the accused person learns that the order is illegal or is suggested or manifested unlawfully and nevertheless commits the resulting crime.

Specifically to establish a defense under the present Statute, the accused person has to provide three conditions: 1- the accused person is under the legal obligation to abbey the order of the Government or the superior in question; 2- the person did not know the order was unlawful; and 3- the order was not manifestly unlawful. This means that the accused person shall be relieved from criminal responsibility if she or he can prove that she or he committed crimes under these circumstances.

Further, superior orders can never be a defense to acts of genocide and crimes against humanity. This provision places the onus on subordinates to refrain from committing certain serious and obvious crimes, even when ordered to do so by superiors, and relies upon the knowledge of subordinates that they cannot escape criminal responsibility under the Statute by saying "I was just following orders". The goal of this provision is not just punishment, but also prevention.[101][101]

Unlike previous international criminal laws, the Rome Statute recognizes superior orders as a defense to some crimes contained in the Statute in certain carefully defined circumstances. Superior orders can also

[100][100] Ibid. Articles 25 and 30.
[101][101] Ibid. Article 33.

function as a form of mitigating circumstance for serious crimes such as war crimes, crimes against humanity and genocide.[102][102]

Grounds for excluding criminal responsibility

There are four main grounds for excluding criminal responsibility under the Statute. The first ground is the mental disease of the accused person. This means that at the time s/he committed the crime, the accused person had lost his or her capacity to know the nature of the crime required by law or s/he could not control his/her conduct as a result of disease. The second ground is the intoxication of the accused. There will be no criminal responsibility where the accused person lost his or her capacity to control his or her actions, as a result of intoxication. The third ground is self–defense, defense of another or defense of property from an illegal act where there is a serious threat to the survival of the person or property. It means that the accused is under serious threat and cannot escape unless fights to survive. Finally, an accused person will be excused if s/he commits a crime stated in the Rome Statute under duress resulting from threat of death or imminent serious bodily harm. In other words, if the accused person does not commit the crime, his life or other's lives could be ended. So he or she must commit the crime for his or her own survival or another person' s survival. These four grounds provide complete defenses to criminal charges brought under the Statute.[103][103]

Rights of accused person

The Statute sets out certain fundamental principles to protect the rights of accused persons, the most important of which is the principle of

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[102][102] See Christine Van de Wyngaert, *International Criminal Laws, (*Kluwer Law International 2000), pp. 56 (Article 8 of Nuremberg Charter) & 64 (Article 6 of Tokyo Charter). The Nuremberg Charter was adopted and signed by 5 Allied countries on August 8, 1945 at London to try major war criminals of the European Axis. The Tokyo Charter was adopted by the Allied Powers on January 19, 1946 in Tokyo to try major war crimes committed in the Far East.

[103][103] Ibid. Article 31.

presumption of innocence.

The presumption of innocence means that an accused person has not duty to prove his or his innocence at all. The burden is on the prosecutor to prove, beyond reasonable doubt, that the accused person committed the alleged crime. In this sense, the prosecutor has to conduct a serious investigation to ensure that all elements of the crime are proved. Where there is doubt, the accused person must be acquitted. In addition, the accused person is granted many rights protected under the international human rights instruments.[104][104]

Furthermore, the accused person has the right to receive compensation for unlawful arrest or detention by the authorities. This means that the accused is entitled under law to be compensated for damage, loss of reputation, and loss of benefits suffered as a result of and during the period of the unlawful action, following release as a result of a final decision of acquittal or a termination. However, judge has discretion toward compensation only in case a grave and miscarriage of justice has been found. [105][105]

Rules of Procedure and Evidence

There are number of provisions related to evidence defined in the Rome Statute. All these provisions provide basic principles for establishment of Rules of procedure and evidence. For example, evidence obtained by means of a human rights violation shall not be admitted. Witnesses must be present at court to give testimony. Significantly, before admitting evidence, the court shall rule on its relevance to the alleged case and the court shall not consider evidence rules based on domestic law.

The detailed rules of procedure and evidence shall be separately adopted by the respective Assemblies of State Party. This rule may be

[104][104] Ibid. Articles 55, 66 & 67.
[105][105] Ibid. Article 85.

amended through the proposal requested by the any State Party, judge and prosecutor. This gives power to judicial personnel to review all gaps of the law that can lead to be unenforceable in the court proceeding.[106][106]

Court structure

The ICC consists of six main organs: The Presidency, An Appeals Division, a Trial Division and Pretrial Division, the office of the Prosecutor, and Registry.

The Presidency is a governing body composed of the President, the First vice- and Second vice- president. The First and Second vice-President can replace the President in case the President is absent or disqualified. This body is responsible for all the administrative work of the court and other work required by the Statute. It can propose to increase judges depending on caseload.[107][107]

According to article 34, the ICC will exercise its judicial function through its divisions as follows:

The Appeals Division is composed of the President and four judges. It operates in the form of an Appeals Chamber, which is composed of all judges in the Appeals Division. The Appeals Chamber has jurisdiction over the issues of procedural error, error of fact and error of law appealed by a convicted person, the Prosecutor and the prosecutor on that person's behalf. In addition, it hears appeal petitions against other decisions as provide by the Statute. [108][108]

The Trial Division is composed of not less than six judges. It carries out its work through Chambers, the so- called "Trial Chambers" which are composed of three judges in each Trial Division. The Trial Chamber plays an

[106][106] Ibid. Articles 51 & 69.
[107][107] Ibid. Article 34, 35 & 38.
[108][108] Ibid. Articles 39 (paras 1 and 2(b1)), 81-84.

important role to ensure that the trial is conducted fairly in accordance with the law and the Rules of Procedure and Evidence. It has to make sure that the accused person understands the charge(s) confirmed by the Pre-Trial Chamber and that both sides in the proceedings have equal opportunity to present their case in court. More importantly, the Trial Chamber has to play this role in impartially, independently and fairly, with full respect for the rights of accused person as well as the safety of witness and victims. Trial shall be conducted in public. However, exceptionally, the court may decide to conduct a closed session based on such reasons as confidentiality of information and protection of victims. The Trial Chamber can consider only facts and evidence presented before it at trial. A decision shall be made by a majority of judges if there is not unanimity. All decisions must be well written with reasons and conclusions. Where the accused person is convicted, the Trial Chamber shall schedule the sentencing hearing for a later date. Both parties should be able to submit additional material related to sentencing at the sentencing hearing, not just the prosecutor.[109][109]

The Pre-Trial Division is also composed of not less than six judges. The Pre-Trial division caries out its function as a "Pre-Trial Chamber" which is composed of either three judges or a single judge. This assignment is based on the Statute. The Pre-Trial Chamber has power to issue orders or make rulings on requests for investigation and arrest made by the Prosecutor, the admissibility of a case, measures related to investigation, pre-trial detention, pre-trial motion and other pre-trial procedural matters. Decisions are made by a majority of judges in the Chamber.[110][110]

The ICC shall organize and assign the judges by itself.[111][111]

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[109][109] Ibid. Articles 39 (paras 1 and 2(bii)) 64, 68, 74 & 76.
[110][110] Ibid. Articles 39(paras 1 and 2(b iii) and 57-61.
[111][111] Ibid. Article 39.

Selection of judges

Judges are employed through a process of election for terms set by the Statute. Any State Party can nominate only one candidate, whether or not that candidate is one of its nationals, who is qualified as provided by the Statute. The nominations are voted on at an Assembly of States Parties by secret ballot. The judges who are elected shall work full-time and cannot engage in any job or activity that may affect the judicial function and the independence of the judiciary. In other words, each judge has to show that he or she is neutral, impartial and independent in his or her judicial profession.

For the first election, the term of judges shall be divided into three categories: one third of elected judges shall serve for a three-year term, one third for a six-year term and the remaining judges shall serve for 9 years. Any judge who is selected for a three-year term is entitled to be re-elected for a full term.[112][112]

Prosecution office

The Prosecution Office is led by the Prosecutor who is responsible for the management and administrative work of the office. The office is operated independently from the other organs of the court. To assist the Prosecutor, one or two Deputy Prosecutors who are of different nationalities, are employed to carry out work as required by the Statute. As for judges' selection, the Prosecutor shall be elected by secret ballot for a nine-year term, not subject to re-election, by an absolute majority of the members of the Assembly of States Parties.

The office of the Prosecutor is primarily responsible for investigation of crimes under the Statute, receiving referred cases, and the prosecution and

[112][112] Ibid. Article 35, 36, 40 & 41.

presentation of the case before the court. In addition, the Prosecutor has power to interview witnesses, collect evidence, request an order of arrest and so on. However, to proceed with the investigation, the Prosecutor has to submit his or his request to the Pre-Trial Chamber for approval by presenting all supporting materials such as witnesses, relevant documents and jurisdiction of the case under the Statute to convince the judges.[113][113]

The Registry is a supporting body of the ICC. It carries out administrative work within a non-judicial framework. This office is headed by the Registrar who performs duties under the authority of the President of the Court. She or he is elected for a full-time five-years term by secret ballot of an absolute majority of judges upon a recommendation of the Assembly of States Parties and eligible for re-election once. In the same way, A Deputy Registrar may be recruited if required. Other staff may be appointed if the office of the Registry or the Prosecutor requires additional staff. [114][114]

Disciplinary Measures

Any judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct is subject to disciplinary action according to the nature of the misconduct. If s/he has committed serious misconduct or a serious breach of his or her duties as provided for in the Rules of Procedure and Evidence, s/he may be removed from office. A decision to remove is made by secret vote of the Assembly of States Parties.[115][115]

Chapter IV

[113][113] Ibid. Articles 15, 42, 53, 54 and 56.
[114][114] Ibid. Article 43 & 44.
[115][115] Ibid. Articles 46 & 47.

Proposals to Establish a Mechanism to Prosecute Genocide in Cambodia

There are three possible approaches to prosecuting those who have committed on Cambodian soil, genocide, crimes against humanity and other crimes constituting grave international human rights violations.

Section 1: The International Criminal Court

The establishment of the International Criminal Court is a new innovation by the international community to bring to justice individuals who violate international criminal laws. This is a permanent international criminal court that has a jurisdiction over most serious crimes such as war crimes, crimes against humanity and genocide (see discussion on ICC 's jurisdiction above). The ICC strictly applies the principle of non-retroaction. In other words, it has jurisdiction to try only those offenses stipulated in the present convention that are committed after the convention has entered into force. This clearly excludes the jurisdiction of the ICC from the Khmer Rouge crimes that were committed in Cambodia before the ICC is established.

However, ICC is expectedly an effective mechanism for the future to bring any person who violates international criminal laws to justice. The ICC can function independently of domestic governments in terms of establishment and proceedings.

Based on this analysis, it is legally clear that the ICC does not have jurisdiction over Khmer Rouge case but it is very important that the expected Khmer Rouge Tribunal should be established within the framework of the ICC in term of structure, legal context and the rule and procedure. All these should be taken into account for the new establishment of ad hoc international tribunal, especially Khmer Rouge Tribunal while Cambodia is one of the States Parties to the Rome Statute.

Section 2: A mixed Tribunal

The option of a mixed Tribunal has been previously considered in Cambodia as a means of prosecuting any person who violates international criminal law, in particular in the context of the Khmer Rouge atrocities. This kind of international Tribunal is created by special agreement among the states concerned and/or in cooperation with the UN. It means that the states concerned and/or the UN jointly create the Tribunal to cover defined situations where human rights violations have already been committed or are continuing to be committed. They are jointly responsible for the operation of the Tribunal based on the agreement.[116[116]] In the past, one can see that a numbers of International Tribunals have been established in this form, for example ICTY (1993) and ICTR (1994).

Section 3: Domestic court

Another form of Tribunal for genocide, war crimes and crimes against humanity can be established at the domestic level. Any State Party can initially establish a tribunal to try those who commit crimes under international law. In this sense, international law empowers any State Party to the international convention to use its own judicial system to bring any accused person to justice. This means that any country where these crimes were committed has jurisdiction to use its own judicial system to bring those suspects to justice. In this case, the state concerned can use its own existing judicial system or create an ad hoc tribunal to try alleged perpetrators within the framework of its competence.

For example, recently, the Indonesian government established its own

[116[116]] See Article 6 of the Genocide Convention.

ad hoc tribunal to try perpetrators who committed crimes under the international criminal law in East Timor in August 1999. Eighteen suspects were found and are expected to be brought to trial before the Ad hoc tribunal. Most of the suspects are former high-ranking military commanders.

However, the UN still pays a great deal of attention to this form of tribunal and offers technical assistance as needed.[117][117] In practice, this form of Tribunal is usually the subject of much concern and criticism by the international community, especially where the domestic judiciary is observed to be incompetent or impartial, or both, and where the country's basic substantive and procedural laws are weak. Further, the domestic government may not have the genuine political will to try particular groups of perpetrators, for political or other reasons. So, even though, the state concerned chooses its own legal system, it is essential that such a system conform to international standards which can ensure justice for both victims and accused.[118][118]

Chapter V
Law on Establishment of Tribunal For Khmer Rouge

[117][117] See Asia Human Rights News*: UN to Offer Technical Assistance for Ad Hoc Tribunal*, Indonesia January 21, 2002; Available on Asia Human Rights News Website: http://www.ahrchk.net/news/mainfile.php/ahrnews_200201/2295/, visited on May 10, 2002.

[118][118] See: Asia Human Right News*: Ad hoc tribunal will be closely monitored for international standards*, Jakarta, January 23, 2002; Available on Asian Human Rights New website: http://www.ahrchk.net/news/mainfile.php/ahrnews_200201/2306, visited on May 10, 2002.

Genocide From 1975-79

Section 1: History of law

After 1979, the genocide in Cambodia was well known to the outside world. Many people started wanting to know what happened in Cambodia in the 1970s. Much research had been done to document the period. So the real evidence gradually became more reliable throughout Cambodian society as well as in the international community. The documents indicate that millions of people were killed during the Pol Pot era.

As the result of this killing, the Peoples' Republic of Kampuchea (PRK) installed by Vietnam after 1979, established a special tribunal and brought Pol Pot and Ieng Sary to trial in absentia for the crime of genocide and other crimes committed during DK time. In August 1979, they were both found guilty and sentenced to death. The PRK used the Decree-Law on the Creation of a Revolutionary People's Tribunal adopted by the Revolutionary Council on July 15, 1979 as the legal basis for this trial.[119][119]

Another international attempt was made by two human rights activists to bring Pol Pot to trial before the International Court of Justice in the Netherlands. However, it seems the international community was not focused on genocide in Cambodia at that time. After 1979, legally Pot Pot's representative was still allowed to take Cambodia's seat at the UN.[120][120] It looked like some concerned countries such as Thailand, China and the United States lacked the political will to urge and bring Pol Pot to justice under

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[119][119] See Amnesty International's report, *Kampuchea Political Imprisonment and Torture*, (Amnesty International Publication, London 1987), pp.63 (paras 7&8) & 64 (paras 1 to 3) and see Howard J. De Nike, John Quigley and Kenneth J. Robinson, *Genocide in Cambodia Document from the Trial of Pol Pot and Ieng Sary*, (Pennsylvania studies in Human Rights), p.584, website: http://www.upenn.edu/pennpress/book/13366.html, visited April 12, 2002.

[120][120] See Sharmila Devi, Cambodia: Bringing the Khmer Rouge to Justice, (Foreign Wire October 5, 2001), Para. 4; Available on Global policy website: http://www.globalpolicy.org/intljustice/tribunals/2001/1005kmer.htm, visited on May 10, 2002.

international law. China and the US, in particular, wanted to push Vietnamese troops from Cambodia rather than bring Pol Pot to justice. Even though they knew that Pol Pot had committed atrocities in Cambodia, they themselves had manipulated Pol Pot as a barrier to block the Vietnamese communist movement supported by USSR. They had supported and tolerated Pol Pot because he despised Vietnam and was therefore useful as a tool to stop the spread of Russian-style communism.

Later, there were still other movements to bring Pol Pot to the International Tribunal under the control of the United Nations. But the Cambodian government did not want to hand this issue to the United Nations. Cambodian Prime Minister Hun Sen objected to such proposals based on the ground of national sovereignty and demanded the trial be held under Cambodia's domestic legal system.[121][121] Meanwhile, China also did not support the proposed trial under the supervision and the auspices of the United Nations. China thought that the Khmer Rouge issue was an internal dispute of Cambodia, so it should be resolved by Cambodia based on the principle of national reconciliation.[122][122] However, the Cambodian Government, under international pressure, agreed to UN participation in a tribunal and proposed that the UN provide assistance in bringing Pol Pot and the top Khmer Rouge leaders to trial.[123][123] From that time, the United Nations played a major role in assisting the government to explore the possibility of trying Khmer Rouge leaders for genocide and others crimes committed in the period of Pol Pot regime.

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[121][121] See Sharmila Devi, *Cambodia: Bringing Khmer Rouge to Justice*, para 2, website: http://www.foreignwire.com/cambodia.html, visited on March 25, 2002.

[122][122] See David Brunnstrom, *China declines comment on Khmer Rouge trial veto*, (Reuters, February 5, 1999); Available on Camnet website: http://www.camnet.com.kh/ngoforum/aboutcambodia/Resource_Files/Tribunal/china_declines_comment_on_khmer_.htm, visited on March 25, 2002.

[123][123] Prince Ranariddh and Prime Minister Hun Sen requested the UN assistance to bring Khmer Rouge leaders to justice on June 21, 1997. See Chronology of a Khmer Rouge Tribunal 1994-2001; Available on Yale University website: http://www.yale.edu/cgp/ visited on May 9, 2002.

Many ideas emerged from both sides. The Cambodian Government proposed a mixed tribunal of Cambodian and international composition, in Cambodia. The United Nations seemed to agree with this idea but proposed a number of conditions in order to set up this tribunal. The UN appointed Mr. Hans Corell as its Chief Negotiator to work on this issue with the Cambodian government. After two years, the two sides had apparently still not reached agreement on some key issues.

On August 10, 2001, despite the absence of a Memorandum of Agreement with the UN on some key issues of the KR Tribunal, Cambodia went ahead and adopted legislation, the "Law on the Establishment of a Tribunal For Genocide From 1975 – 1979 in Cambodia", the so-called "Law on Khmer Rouge (LKR) ", without incorporating the major points proposed by the United Nations. Following the passage of the LKR, the United Nations continued to push the Cambodian government to amend the law in order to conform with international standards of justice. However, it appeared that the Cambodian government was determined to go its own way. After extensive dialogue between Mr. Hans Corell and Cambodian high-ranking officials, the impasse remained. Finally, the United Nations decided to withdraw its participation from the tribunal. The decision on February 8, 2002 made it clear that the UN would not participate in the tribunal unless substantial changes in the law were made. After the announcement of the withdrawal of support for the tribunal to try Khmer Rouge leaders, Prime Minister Hun Sen urged and requested the United Nations to reconsider and join the process of the tribunal, and not to make another mistake. He said

"The door is still open for the UN", but that Cambodia *"cannot wait forever".*[124]***[124]***

At the time of writing, the situation has not progressed, and the tribunal's future is unclear. It is unlikely that the UN will reconsider its participation without any change to the Khmer Rouge law and equally unlikely that the Cambodian government will change its attitude toward amendment of the law as proposed by the UN. There is also considerable doubt as to whether Cambodia will continue with the tribunal without participation from the UN. Some possible answers will be given below in this Chapter.

Section 2: Analysis of Tribunal Mechanism

Purpose

The purpose of the establishment of this tribunal, the so-called "Khmer Rouge Tribunal "or "Extraordinary Chamber", is to bring justice to Cambodian society, the families and victims who were killed by the DK regime. More specifically, the tribunal's purpose is to prosecute those responsible and to bring them to justice for the crimes they committed. The prime targets of the tribunal are senior leaders of the DK and others directly or indirectly involved.[125][125] The Cambodian people are unlikely to forget this bitter tragedy. They have a strong desire to find out what justice and human rights really are.

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[124][124] See BBC News, Cambodia *urges UN rethink on trials*, (11 February, 2002); Available on BBC website:news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1813000/1813858.stm,

visited on March 25, 2002.

[125][125] See Article 1 of the Law on the Establishment of a Tribunal For Genocide From 1975 – 1979 in Cambodia", the so-called "Law on Khmer Rouge," adopted by National Assembly on July 11, 2001 and promulgated by the King on August 10, 2001.

Jurisdiction

The Khmer Rouge Tribunal has jurisdiction over Cambodian territory as a whole. It has power to investigate, to arrest, to prosecute and to try any suspect who committed crimes as stipulated in the LKR in Cambodia during Pol Pot 's era from April 17, 1975 to January 6, 1979.[126][126] There is some doubt as to the Tribunal's jurisdiction over foreigners and those currently residing outside Cambodia. Presumably, the Tribunal can use Article 7 of the Genocide Convention to cooperate with concerned countries to arrange for investigation, rogatory requests, and bringing foreigners and non-residents before the court. But if those concerned countries are not parties to the Genocide Convention and Cambodia does not have an extradition treaty with them, how can the Tribunal take action against those suspects? The matter would seem to depend wholly on the willing co-operation of the concerned countries.

Offenses

The crimes covered by the LKR are genocide, crimes against humanity, serious violations of the August 12, 1949 Geneva Convention, destruction of cultural property during an armed conflict under the Hague Convention 1954, and crimes against protected persons under the Vienna Convention 1961. All of these crimes are the same as the crimes mentioned in the international laws, both in terms of definition and drafting. We can say that these crimes are incorporated almost word by word from the international conventions.[127][127] In addition, other crimes are also covered in the LKR as crimes stated in the old Cambodian Penal Code of 1956.[128][128] The incorporation of specific Articles from the old 1956 Penal Code is probably to

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[126][126] Ibid. Article 2.
[127][127] Ibid. Articles 4 to 8.
[128][128] See Sok, Eng, *Study All Articles of Criminal Code,* Ministry of Justice 1964, pp. 118- 119 and 282-286 and Article 3 of the Khmer Rouge Law.

avoid problems associated with the general prohibition on the retroactive application of laws.

Two major crimes, genocide and crimes against humanity, do not have a statute of limitations. This means the Tribunal has jurisdiction to prosecute and bring to trial any suspect charged with committing these crimes without any time limitation.[129][129] As to the other crimes, no statute of limitation is mentioned. This would seem to imply that the statutes of limitation as mentioned in existing Cambodian criminal laws are applicable.[130][130] If this is so, prosecution for all crimes stipulated in Articles 6, 7 and 8 may not be prosecuted under the LKR because the statute of limitations has run out. In addition, if this law intends to apply the domestic statutes of limitations for war crimes, it clearly violates the international criminal law (see discussion in Chapter III above).

Structure of Tribunal

The Khmer Rouge Tribunal will operate within the existing Cambodian judicial system with the same three-tiered court structure of Trial Court, Appeal Court and Supreme Court. However the courts will be of mixed composition. The Trial Court will be composed of five judges of which three will be Cambodian and two foreigners. The Appeal Court will be composed of seven judges, of which four will be Cambodian and three foreigners. It may decide issues of both fact and law. The Supreme Court will be composed of nine judges, of which five will be Cambodian and four foreigners. The Supreme Court is the highest court of appeal. It can review both facts and law and, unlike its counterpart in the domestic system, will

[129][129] See Articles 4 and 5 of the LKR.
[130][130] See Article 30 of the UNTAC Law. The statute of limitations is 10 years for felonies and 3 years for misdemeanors.

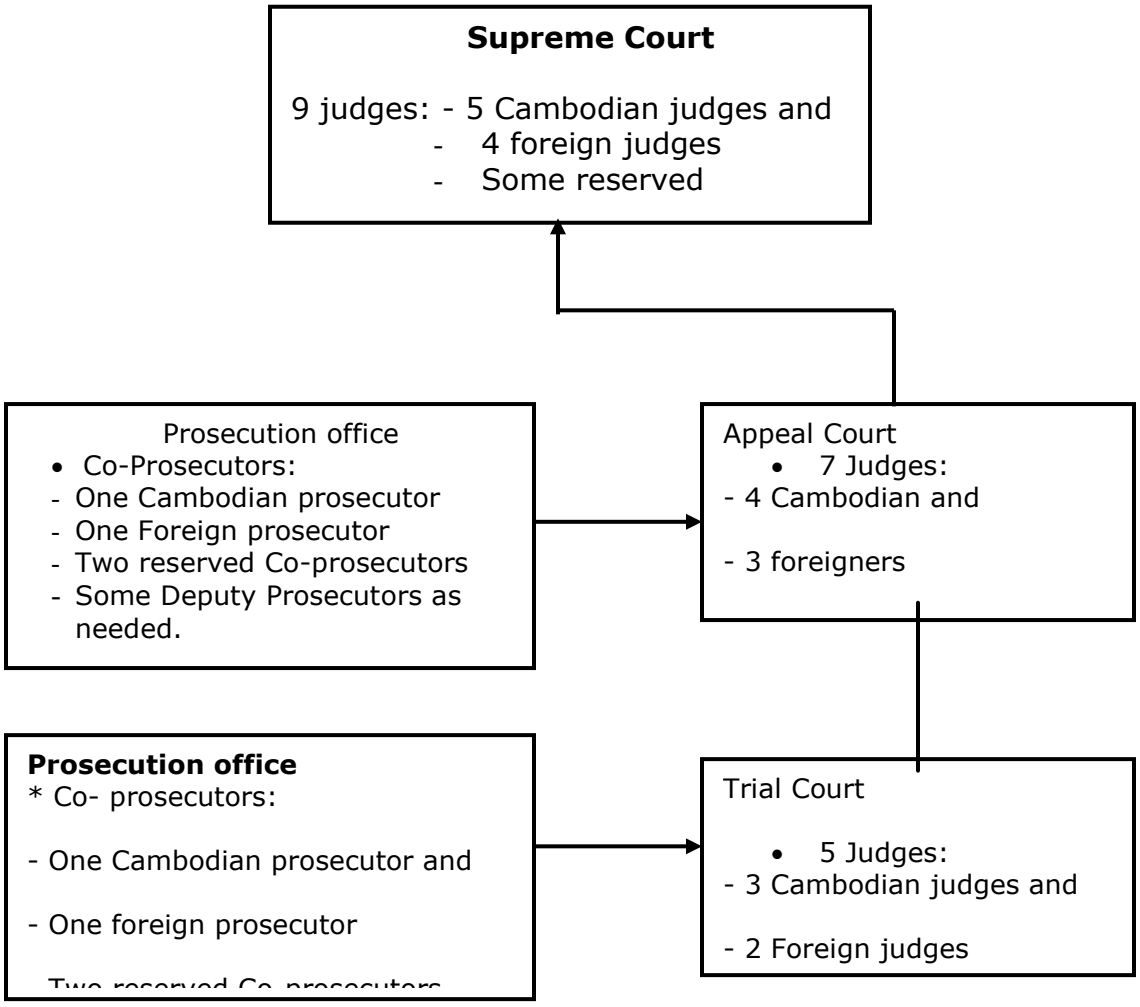
not send overturned cases back to the Appeal Court for a second decision.

In each court, one of the Cambodian judges will be the Chief Judge and one or more court clerks shall be appointed as needed.[131][131]

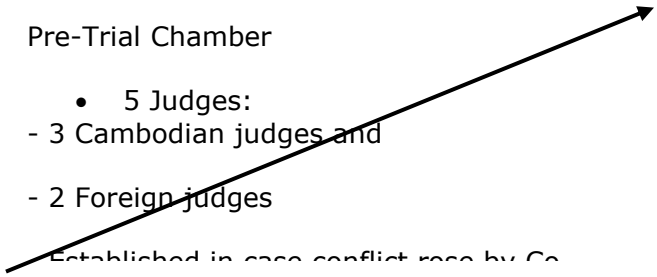
In addition, the Pre-Trial Chamber (court) is also established but likely only when the conflict is arose among the Co-Prosecutors in regarding with prosecution or among the Co-investigating judges in regarding with investigation process. The Pre-Trial Chamber will be composed of five judges of which three will be Cambodian and two foreigners. The procedure of appointment and decision making of judges shall be made in the same way as there is done for other judges (see discussion below). However, a decision of Pre-Trial Chamber shall not be openly accessed for appeal.[132][132] Particularly, its power is limited. It does not have power to decide on arrest, detention and so on. This is totally different from the international criminal tribunals that were previously established or the ICC that shall be established soon (see above discussion on Pretrial Chambers). This is also an issue. If the Khmer Rouge Tribunal is established, it will face difficulty in terms of arrest, pretrial detention or release, motion to suppress evidence, and so on.

[131][131] See Articles 2, 9, 36 and 37 of the LKR.
[132][132] See Articles 20, paras (5-8) and 23, paras (5-7) of the LKR.

* Flow Chart of Khmer Rouge Tribunal



* Pre-Trial Chamber



Appointment of Judges

The appointment of judges is very important to ensure the competence, impartiality and independence of the judiciary. It reflects on the whole process of the tribunal. If judges are partial, or not independent, or do not have legal competence, the tribunal will bring no justice for Cambodia and the trials will be meaningless.

Appointment of judges is based on the existing Cambodian judicial system. Accordingly, the Supreme Council of the Magistracy[133][133] will initially select and appoint the Cambodian judges from those who are working in the present courts. In addition, the Supreme Council has power to appoint foreign national judges from a list of candidates nominated by the United Nations Secretary General and sent to the Supreme council.[134][134]

Article 10 of LKR States: "*Trial Judges of the Extraordinary Chamber shall be appointed from among the judges who are currently in function, and the judges who are additionally appointed according to the procedure of appointment of judges in force, and among those who have good moral character and high spirit of responsibility, impartial and integrity, and who have experiences in the profession, especially in criminal law and international law".*

This is a good provision. But practically, can judges who are currently working in the judicial system meet the above requirements? It is not

[133][133] See Article 11 of the Law on the Organization and Functioning of the Supreme Council of the Magistracy, adopted by the Cambodian National Assembly on December 22,1994.
[134][134] See Article 11 of the LKR.

credible that Cambodian judges are qualified for this tribunal. They lack both legal knowledge and morality especially in the field of the international human rights laws. Some of the problems in the Cambodian legal system that severely weaken the Cambodian judiciary have been discussed in Chapter II, Section 2 of this text. For example, most Cambodian judges were selected from ordinary people, appointed by political parties and are notoriously corrupt.

Decision making of judges

In principle, judges have to seek unanimity in making any decision in each court. If there is no unanimity, the decision may still be carried by a majority vote of at least 4 judges in the Trial Court, 5 judges in Appeal Court and at least 6 judges at Supreme Court level. Where a decision is by majority, the opinions and decisions of both sides must be written.[135[135]]

The decision-making is the conclusive part of finding justice in the tribunal proceeding, but the process is clearly weighted in favor of the Cambodian judges. In each chamber, Cambodian judges are in the majority. They may make any decision by persuading only one foreign judge, but the foreign judges need at least two from the Cambodian side to support their decision. As discussed in Chapter II, section 2, Cambodian judges are inextricably linked to one of the principal Cambodian political parties. They are not independent and have the political tendency not to bring some of the top KR leaders to trial. Further, they may easily be pressured and influenced by those who have power to threaten their employment and well-being. After the Tribunal has finished and the foreign officials have packed up and gone home, the Cambodian judges will remain – vulnerable as ever. As a result, decisions made by Cambodian-weighted panels will likely be unfair for

[135[135]] Ibid. Article 14.

victims as well as the accused.

In contrast, if all foreign judges in the Chamber disagree with the Cambodian judges' opinion, a majority cannot be found and a decision cannot be made. Of course, the case may proceed to the appellate Court but, where the deadlock remains, the LKR provides no procedure for its resolution. There are two decisions - decision to punish and decision to acquit. For example, in the trial court, 3 judges said guilty and 2 judges said no, not guilty. It is presumed that accused person has to be released based on the principle of the presumption of innocence and the basic requirement that the prosecution must prove its case beyond reasonable doubt. [136][136] However, the LKR specifically does not provide a resolution for this sort of issue that may be faced. It is unclear whether the police should take the accused back to prison or the accused person should be released as described above. In practice, if the court does not order release, police will not release the accused person. In this case, if the court uses the existing procedure, the accused person shall be released if there is no appeal made soon after judgment is rendered. If the prosecutor appeals and the accused person is in jail, he or she shall be continuously kept in jail.[137][137] But, more importantly, the accused may have spent a very long period in detention awaiting resolution of the impasse. The existing procedure at appeal court level does not have any time limitation for hearing the case after it receives the appeal against judgment. It may take years to wait for trial except a bail motion in which the Appeal Court shall decide within 15 days upon on receiving of appeal request.[138][138]

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[136][136] See Article 38, para 6 of Cambodian Constitution. Any doubt must be in favor of accused.
[137][137] See Article 152 of SoC Criminal Procedure 1993.
[138][138] Ibid. Article 79, para 3.

Two accused[139][139] have already spent over three years[140][140] in pre-trial detention waiting for the tribunal to be formed, and this cumbersome system can be expected to add considerably to the detention time of most, if not all, the accused.

Based on this analysis, this system is flawed. It cannot function properly. It cannot find a just decision in the case. This is a system that constantly tends toward deadlock.

Investigation

Investigation is a key element in criminal proceedings. If the system of investigation is not strong enough, it leads to insufficiency of evidence and doubt. As a result, the accused person must be acquitted.[141][141] In this Tribunal, the investigation is based on the ability of the investigating judges to conduct a thorough investigation of all the cases brought before them.

There are only two permanent investigating judges, one Cambodian and one foreign, called "the co-investigating judges". They are appointed by the Supreme Council of the Magistracy in the manner described above, along with two reserve judges, again one foreign and one Cambodian.[142][142]

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[139][139] Ta Mok was arrested and detained in jail in June 1999 and Kang Kek Eiv was arrested and put in jail in May 1999. At the time of writing, both have been detained in military prison waiting for trial. http://www.yale.edu/cgp/readings/bp1999_10_31.htm

[140][140] In the ordinary crime, the pretrial detention is only 6 months but the for the genocide, crimes against humanity and war crimes, pretrial detention shall be one year and can be extended up to maximum three years. See Article 1 of the Law on Pre-Trial Detention that was adopted by the Cambodian National Assembly on August 12, 1999.

[141][141] See Article 38, paras 6 & 7 of the Cambodian Constitution; Article 14, para 2 of the International Covenant on Civil and Political Rights; and Article 35, para 1 of the LKR.

[142][142] See Articles 23 (para 1), 25, 26, & 27 of the LKR.

These co-investigating judges are jointly responsible for the investigation of the cases submitted to them. Where the co-investigating judges disagree with each other, the matter shall be resolved by the Pretrial Chamber (discussed below in ”Prosecution”). The investigation shall be continued unless a written statement of dispute is filed by one or both co-investigating judges within 30 days.[143][143]

Paragraph 9 of Article 23 of the LKR provides the Co-investigating judges with wide powers to conduct their investigations. They have power to interview witnesses, accused persons, victims, and collect evidence. In addition, they may issue an order to request prosecutors to conduct additional inquiries. But the Article does not mention any power to dismiss the case if the co-investigating judges cannot find enough evidence to bring the accused to trial. However, an investigating judge has power to dismiss the case in accordance with the existing criminal law.[144][144] Specifically, the Article doe also not mention about power to decide on arrest warrant, pretrial detention, or other motions that may be submitted by the prosecutor or defense counsel.

Prosecution

There are two mixed prosecutors, one Cambodian and one foreign, called "Co-prosecutors" who are jointly responsible for the prosecution of criminal cases before the Tribunal. They are both appointed by the Supreme Council of the Magistracy using a procedure similar to that for judges. However, a particular procedure is applied to foreign prosecutors. The Secretary General of the United Nations shall send a list of prosecutors as candidates to the Cambodian government for appointment to hold this

[143][143] Ibid. Article 23, paras 2 to 7.
[144][144] See Article 90 of SoC Criminal Procedure 1993.

position. Besides these co-prosecutors, other reserved prosecutors are also appointed to perform prosecution duties in the event that the co-prosecutors are absent or unable to perform their duties for some other reason. In addition, each co-prosecutor can recruit deputy prosecutor(s) to assist in his/her daily operations. The same recruitment procedure is applied to deputy prosecutors as to co-prosecutors. Co-prosecutors are attached to the Trial Court and Appeal Court but the LKR is unclear whether there are co-prosecutors attached to the Supreme Court in the same way. However, the Law does provide that one foreign prosecutor shall have power to represent the prosecution case at all levels of the tribunal.[145][145]

Co-prosecutors have two main powers to perform their duties. Firstly, they have power to conduct a prosecution against any suspect. Secondly, they may file an appeal against any decision of the lower court to the Appellate Court. If the co-prosecutors disagree, the prosecution shall be continued unless a written statement of dispute is filed by one or both co-prosecutors within 30 days. In this case, a written minute of disagreement must be submitted, stating facts and reasons, to the chief of the administrative office. This minute will be heard by the Pretrial Chamber, which is composed of three Cambodian judges and two foreign judges. The affirmative votes of at least four judges are required for a valid decision**.** However, a prosecutor may still continue his or her prosecution even if there is no majority vote as required.[146][146] In this case, it means that each co-prosecutor can go ahead with his or her own prosecution and bring the case before the Tribunal with only his or her signature on the introductory charge in accordance with the existing criminal procedure required. If the co-investigating judges disagree and the Pre-trial Chamber cannot get the majority to resolve that disagreement, then the case still can go to

[145][145] See Articles 16 to 19 & 22 of the LKR.
[146][146] Ibid. Articles 16, 17 & 20.

trial.[147][147] In other words, a case can get to trial with only one prosecutor and one investigating judge agreeing, provided the appeal body (the trial level) cannot reach a valid decision in both disagreements (between prosecutors and investigating judges).

Now, one can see a potential conflict between Article 16 and Article 20 of the LKR. Article 16 states clearly that both co-prosecutors must be jointly responsible for all introductory charges before the Tribunal. Article 16 does not allow each co-prosecutor to file an introductory charge before the Tribunal, and so clearly does not contemplate the situation of disagreement and deadlock discussed above. The question is whether Article 20 really allows each co-prosecutor to file a case alone where there is a conflict and the Trial Level Court cannot resolve the matter by the required majority or it can work out as interpreted in the above paragraph.

Another issue that also exists in this prosecution system is that it does not mention the relationship between the prosecution office and judicial police. The process of acceptance of cases is not mentioned. It is unclear whether the judicial police have any role in conducting the investigation of crimes stipulated in this law, or whether they just wait for an order or request for cooperation, or whether they can investigate as they would an ordinary offense and send the case to the prosecutors for an introductory charge. If the LKR implies that investigation and prosecution have to be carried out in accordance the existing Cambodian procedure, then it is unlikely to function well. In the Cambodian system, the prosecutor rarely plays an active role in the investigation of a case or its prosecution before or during trial – mainly due to deficiencies in the law (see Chapter II, section 2 above).

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[147][147] Ibid. Article 23 para 7.

Defense Lawyer

The defense lawyer plays an important role in the justice system. Basically he or she protects the interests of her or his client, especially the rights and other benefits ensured by law. If the legal system does not provide equal opportunity for both prosecutor and defense lawyer to carry out their respective functions, then justice, human rights, and citizens' rights are violated.

There are two articles of the LKR that concern the role of lawyers. These two articles provide lawyers' rights and powers to perform their duties freely and independently under the law, and also the right to receive a fee upon appointment to represent a client before the Tribunal.[148[148]] As to the legal representation fee, it is unclear how the lawyer is to receive this fee or whether the Bar Association, the Government or some other body is responsible for payment of lawyers' fees.

Rights of Accused

To guarantee fairness and basic human values in terms of respect for and protection of human rights, the rights of an accused person must be ensured at all stages of criminal procedure. The most important right of an accused, which bolsters many other fundamental rights, is the right to be presumed innocent until proved guilty. When the legal authorities do not understand this right, it usually follows that other rights of the accused will not be preserved.

Article 35 of the LKR provides many basic rights for an accused person that are almost identical to the rights granted in Article 14 of the ICCPR.

[148[148]] See Articles 42, point No. 3 and 44 point No. 4 to 19 & 22 of the LKR.

The right to legal counsel is also provided. Article 24 of Khmer Rouge Law states, *"During the stage of investigation, any suspect has an absolute right to receive assistance with his or her defense from a defense lawyer free of charge if he or she cannot afford to hire a lawyer."* This provision binds the government to provide any accused person with a lawyer free of charge when he or she cannot afford a lawyer to represent him or her. However, the question remains whether the government will fulfill this obligation. Under Cambodian law, the suspect has this right[149[149]] but in practice the government frequently fails to give effect to it. Almost all accused persons who manage to obtain free legal representation in Cambodia do so through the efforts of the Cambodian Bar and NGOs such as the Cambodian Defenders Project and Legal Aid of Cambodia – none of which receive any funding from the government. Moreover, the Bar Association of Cambodia has not been particularly active because it has no money to hire lawyers to represent those accused persons who cannot afford to hire a lawyer. When the government sets up a rule but does not provide tools for its enforcement, so that rule will become cosmetic only. So far, the government has never seriously considered the issue of legal aid, nor has it allocated even a small amount of money to hire lawyers to represent indigent accused. Therefore, if the Extraordinary Chamber is eventually established, accused persons may well face difficulties in realizing their right to free legal representation.

Another issue is related to grounds for excluding criminal responsibility. The LKR contains no provisions as to these circumstances in which an accused person can be freed from criminal responsibility. If the LKR intends to use existing domestic law, the result will be total disappointment because there are no affirmative defenses provided by the Cambodian

[149[149]] See Article 76 of the SOC Criminal Procedure 1993.

criminal law – not even self-defense or duress.[150][150]

Evidence

The Law on Khmer Rouge does not provide any provisions related to evidence. It is presumed that the inadequate rules in the existing Cambodian legal system must be used - as mentioned in Article 2 of the LKR. Cambodia currently has only a very few "rules" of evidence, and those it does have are not particularly clear in their application. (See Chapter II, Section 2, evidence).

Trial Procedure

The Law on Khmer Rouge states that the trial procedure shall be the existing trial procedure in Cambodia. One major problem with using existing trial procedure is that it violates the rights to fair trial of accused persons in the same ways as in the domestic system and it would allow many of the judges who are well known in the existing system as incompetent, partial, corrupted and not independent, to sit in the Trial Chamber (see Chapter II, section 2, the independence of judiciary above). Furthermore, the existing trial procedure does not provide for the defense lawyer to make an opening statement to defend his or her client.

The domestic procedure may be summarized briefly. Firstly, the judge introduces the case to be heard and asks for identification and other details of the accused, civil plaintiff, victim and witness. Secondly, the prosecutor makes an opening statement, which is frequently inadequate and may not even disclose the precise charge. Thirdly, the judge commences his interrogation of the accused as to the facts. If the judge has no more

[150][150] Author has experienced in Cambodian judicial system since in 1985.

questions, the prosecutor may then question the accused followed by the defense lawyer. Because the Cambodian judge plays such an active role in questioning both the accused and witnesses in whatever order he deems fit, the defense often has difficulty in presenting its case and often it is unclear which witness belongs to what party, or whether the questioning is supposed to be direct examination or cross-examination.[151][151]

This procedure clearly violates the right of an accused person to present a defense. Further, the judge has often pre-judged the case based on the case dossier and may even have pre-written the judgment before the trial. The prosecutor frequently uses the trial as a means to further investigate and clarify the charges, and the judge, having failed to advise the accused of his/her right to silence, proceeds to interrogate the accused in a way that presumes guilt. Fundamental breaches of the presumption of innocence and the right to a fair trial are all too common occurrences in Cambodian trials. In short, the trial procedure that is expected to be used in the Extraordinary Chamber does not comply with the rights of accused persons guaranteed in the International Human Rights Instruments as well as the Cambodian Constitution. It may be expected to produce frequent and serious violations of the accused person's trial rights and human rights.

Penalties

The death penalty is not applied in this Tribunal. The minimum penalty is 5 years imprisonment and the maximum penalty is life imprisonment. An amnesty request by the Cambodian government is prohibited.[152][152]

Management

[151][151] See Articles 132, 133 and 137 of the SoC Criminal Procedure 1993.
[152][152] See Article 40 of the LKR.

The Tribunal shall have one administrative office led by an Administrative Chief and a Deputy Administrative Chief. The Administrative Chief must be a Cambodian who is appointed by the Royal Government of Cambodia for a two-year term and can be reappointed. The Deputy Administrative Chief must be a foreigner who is nominated by the UN Secretary General and appointed by the Royal Government of Cambodia. The Deputy Chief of the Administrative Office will be responsible for the recruitment of foreign staff and the financial budget funded by the UN.

To assist judges, co-investigating judges and co-prosecutors, the administrative office shall be able to recruit one or more Cambodian staff and foreigners to work for the Tribunal. The Cambodian staff is under the supervision of the Administrative Chief and foreigners shall be under the supervision of the Deputy Chief.[153][153] There seems to be no provisions concerning case management and how the office can assist the Tribunal in order to properly function. Usually, these sorts of laws set out the broad general rules, and need an organic law (setting up and governing the office) or regulations to fill in the detail. The Office of the Administrative Chief could also make its own bylaws. With the UN pullout, probably the process will never get to this stage.

Expenses

There are two separate expense regimes. For Cambodian judges, prosecutors and staff, expenses shall be levied on the Cambodian national budget. For foreign judges, prosecutors and staff, expenses will be levied on the UN. This is a clear-cut division of expenses during the proceedings of the Tribunal.

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[153][153] See Articles 30 to 32 of the LKR.

This type of system will lead to a very lop-sided allocation of resources. For example, Cambodian judges, prosecutors and staff typically receive payment of only $20 to 25$USD per month and there is no budget for daily operations (see Chapter II above). In contrast, foreign judges, prosecutors and staff receive probably 6 to 8 thousand USD per month. This could create many problems in the system in terms of morality, commitment and conflict in performing duties, especially where Cambodian officials may not be independent. It is like a car with two flat tires that constantly veers off course due to the imbalance. It is unclear whether the Cambodian government has considered this issue or would consider raising remuneration and resources for Cambodian judges, prosecutors and staff to match minimum international employment standards. If the Government thinks in this way, probably the Tribunal would function a little better.

Absence of foreign Judges, Prosecutors

Article 46 of the Law on Khmer Rouge is intended to resolve a deadlock where the UN or the foreigners do not participate in the proceedings of the Tribunal. Firstly, it resolves the problem when there are no candidates nominated by the UN and secondly it covers the situation where no foreigner wishes or is able to participate in the Tribunal. The resolution is that the Supreme Council shall appoint Cambodian judges and prosecutors to replace all foreign positions stated in this law. At that time, the whole Tribunal becomes a Cambodian Tribunal at the domestic level, not a mixed system as originally considered and viewed by many as essential if international standards of justice are to be reached.

Other gaps

There are two other major gaps in the Law Khmer Rouge. First, it does not contemplate the consequences where police or other authorities do not comply with court orders. There is no provision to prevent this mater. Cambodian Criminal Law contains no provisions on contempt of court. So the court may often face this issue without solution. Second, the LKR does not provide a punishment or disciplinary mechanism for the Tribunal personnel who commit misconduct. These issues also lead to create many problems in enforcing the law.

Section 3: Criminal Suspects

Article 1 of the LKR says " *This law is established for the purpose to bring to trial the senior leaders of the Democratic of Kampuchea and those person who are responsible the most for the serious crimes and violations of the Cambodian law, the international humanitarian laws, the international custom, and the international Conventions recognized by Cambodia, and which were committed in the period from April 17, 1975 to January 6, 1979."*

This Article reveals the main suspects targeted under this law. The first is the senior leaders of the DK and the second is the most responsible persons. This Article sets the broad framework for investigations and prosecutions before the court. The senior leaders could mean all leaders who held a high position in the DK government; and the most responsible persons in committing crimes could mean any person in respect of whom there is evidence that he or she committed crimes as mentioned in the Law on Khmer Rouge during DK regime. If this interpretation is correct, so many suspects can be faced criminal charge before the court. Regarding to this, the law should provide precise definition against whom it intends to

prosecute under the law.

Presently, many senior leaders of the DK regime have been identified as suspects who should be brought before the Tribunal if the Tribunal is established as scheduled. Through research, there is a small group of persons against whom there is believed to be enough evidence to support a prosecution before the tribunal. They are: Pol Pot, Noun Chea, Ieng Sary, Khieav Samphorn, Ta Mok, Koe Peuk, Sou Met, Meah Mut and Kang kech Eav.[154][154] Two of these people died. On 15 April 1998, Pol Pot, known as the "Bother Number One" in DK regime, died in the jungle and Keo Peuk died in February 2002. Now, only 7 persons may be faced prosecution before the Tribunal. However, one can see that these people joint with the government and walk freely behind the bar. Particularly, many people concern that Ieng Sary who was granted amnesty by the King may be excluded from the jurisdiction of the Tribunal but some think that Ieng Sary has to be brought to justice.[155][155] Based on this, there are not many suspects who may be prosecuted if the Tribunal is established as planned. In contrast, if the government really has commitment to bring criminals to justice, probably there would be considerably more individuals who could be prosecuted.

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[154][154] See Stephen Heder with Brian D. Tittemore, *Seven Candidates for Prosecution: Accountability For the Crimes of Khmer Rouge,* (War Crimes Research Office, American University, June 2001), pp 11&12.

[155][155] See Laura McGrew, *Truth, Justice, Reconciliation and Peace in Cambodia: 20 Years After the Khmer Rouge*, (Phnom Penh Cambodia, December 1999- February 2000), pp. 22-24 and see Yahoo News: *Cambodian NGO coalition supports UN withdrawal from Khmer Rouge Trial*, (February 21, 2002); Available on Yahoo website: http://sg.news.yahoo.com/020221/1/2iuav.html, visited May 10, 2002.

Chapter VI
Evaluation/ Recommendations

Section 1: Evaluation

The idea for the creation of a Tribunal to try Khmer Rouge leaders has been developed for many years since the outside world learnt that serious human rights violations, especially genocide, were committed in Cambodia in the 1970s under the DK regime. This is a critical and difficult task for both the international community and Cambodian people. The movement in support of a Tribunal shows that not only Cambodian people but also other people in the world want to see that justice is done and preserved in Cambodia. They want to see who was really responsible for the torture, starvation deaths and abuses that blighted the lives of so many innocent people. Mainly, people desire to see peace, justice and respect for human rights.

On August 10, 2001, a shadow of justice seemed to arrive. The Cambodian Government adopted the Law on Khmer Rouge for the purpose of trying Khmer Rouge leaders and their close associates. But the UN 's withdrawal from participation in the Tribunal on February 8, 2002 made hopes of justice fly away.

Even if the LKR were applied tomorrow, it is doubtful whether it would be effective in finding justice for Cambodian society or the international community. There are many problems in the law, stemming mainly from its reliance on Cambodia's domestic legal system:

First, the law itself is flawed due to an inbuilt tendency toward deadlock. The law has many obstructions that may impede the Tribunal's functioning. For example, a formula that may often result in judges being unable to reach the required majority for decision-making. This issue is critical to the success of the Tribunal. If the judges cannot reach a decision, everything is frozen in the system (see decision making of judges above).

Second, the country lacks some basic laws to support the application of the LKR. Because the expected Tribunal intends to use the existing laws, it will encounter great difficulty in finding relevant applicable laws when it needs them; for example, Rules of evidence, code of conduct of judges and prosecutors, contempt of court provisions, and basic criminal defenses. Cambodia does not have these provisions and neither does the Law on Khmer Rouge.

Third, the issue of the rights of accused persons is also one of concerns. Even though the existing Cambodian laws and the LKR together provide a number of rights for accused persons, still there are deficiencies. Both existing laws and the LKR envisage the application of the basic principle of the presumption of innocence but neither law clearly provides how this principle is to be applied in practice, both at pre-trial and trial level. One facet of the presumption of innocence is the concept of burden of proof, whereby the prosecutor, not the accused person, has the obligation to prove

the case. In Cambodia, it has been very difficult to make prosecutors understand that they have this obligation, and how to discharge it, especially while the law is inadequate and omits to clearly state the burden of proof or that the prosecutor must prove the case beyond reasonable doubt. So when the principle of burden of proof is not applied, the principle of presumption of innocence means nothing. This is a key issue in criminal law.

The fourth issue is concerned with the quality of judges who will to sit in the Tribunal. As discussed above in Chapters II and V, most Cambodian judges have inadequate legal education and do not understand key principles of human rights or international law. Yet they are the majority in the Trial Chambers. Logically, this is unbelievable. It should be the educated and professional judges who supervise and control the Tribunal. In this way, Cambodian judges can learn from their more experienced colleagues and then, after the Tribunal ends its mission, those Cambodian judges can teach and share their experiences to help build a new group of professional judges in the country. This would be an important step in the future development of the Cambodian judicial system.

Finally, there is the crucial issue of the independence of the judiciary. To date, it is abundantly clear that the Cambodian judiciary is not independent, both in terms of the relevant law, and in practice. The current laws do not provide real independence to the judiciary. The Law on the Supreme Council of the Magistracy, which is the body mandated by the Constitution to ensure the independence of the judiciary, has many gaps and lacks basic principles on the independence of the judiciary, for example in respect of an autonomous financial budget, prohibition of political affiliation of judges and prosecutors, and prohibition of members of the executive branch serving on the SCM. In practice, all judges are active members of

political parties. They engage in political activities openly. So, one way or another, they are influenced by the political parties or other branches of government. Cambodia has been consistently criticized by the international community for the lack of independence of its judiciary and the lack of transparency in its legal system that reflects upon the application of human rights in Cambodia. Similarly, one of the reasons that UN withdrew from participation in the Khmer Rouge Tribunal is that the UN did not trust the Cambodian legal system, which cannot function properly in accordance with international standards.[156[156]]

In light of the above, it must be concluded that the Law on Khmer Rouge is inconsistent with international law in respect of the independence of the judiciary and rights of accused, which are guaranteed by the international human rights instruments. Additionally, this legal mechanism as set up in the Tribunal cannot respond to the peoples' wish for justice.

Section 2: Recommendations

Based on the analysis above, the following recommendations are made:

1- Because Cambodia lacks laws, human resources (unqualified judges and prosecutor), legal expertise and financial budget as recognized by Prince Norodom Ranariddh and Prime Minister Hun Sen,[157[157]] the Tribunal should be controlled by the UN within a framework of domestic cooperation. The models of the ICTY and ICTR must be considered and

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[156[156]] See UN *Ends Negotiation on war crimes for Cambodia*, (February 15, 2002); Available on War Crime website: www.crimesofwar.org/onnews/news-cambodia.html, visited on May 14, 2002.

[157[157]] Stephen Heder with Brian D. Tittemore, *Seven Candidates for Prosecution: Accountability For the Crimes of Khmer Rouge, (*War Crimes Research Office, American University, June 2001), p 13, para 3.

applied. This approach would improve the credibility of the Cambodian government and finally bring to Cambodians the experience of justice.

2- The Cambodian government should not use Article 46 of the Law on Khmer Rouge to go ahead without UN support or cooperation. The result would simply be a mock trial for publicity purposes. Such a course would damage the reputation of the Cambodian government and destroy the hopes of the people. The international community, as well as victims, would clearly see that the government does not want to try the perpetrators of genocide, war crimes and crimes against humanity even though Cambodia is obliged to do so under international law (the Genocide Convention).

3 - If the Cambodian government still wants to go forward with this process, Cambodia should reform its own judicial system, amend some existing laws discussed above and adopt new laws as mentioned in Chapter II. This means that Cambodian Government has to make sure its judicial system is credible, qualified and transparent to try the case. It is just not believable that the Cambodian government, having shown so little interest in instituting judicial reforms in the past, could achieve the kind of improvements necessary for a credible KR trial to take place in the near future.

4- Cambodia should establish a permanent human rights court to try cases related to human rights issues. This course is even less likely than the establishment of an Adhoc tribunal. However, some countries, such as Indonesia, have chosen this mechanism.

5- If Cambodian Government really has no commitment to try Khmer Rouge leaders, then no Tribunal should be established. There is no

point in having a show-trial. It would just waste everybody's time, money and energy. What has gone, let it be gone. If the hope for justice is to be buried, let us not continually resurrect it.

Chapter VII
C o n c l u s i o n

There is abundant evidence that genocide, war crimes, crimes against humanity and other crimes have been committed in Cambodia. But for over 20 years, justice has not been found. Many Cambodians are reluctant to forcefully express their demands because they are tired of war and have already suffered greatly at the hands of one regime or another. Many must live in their own country amongst known perpetrators of the worst crimes known to humanity who walk or live freely nearby or travel around the world unafraid. It is no wonder that many feel that the authorities are always right and that it is pointless to try to make them accountable.

The idea to establish a Tribunal for genocide in Cambodia has widespread popular support. Many people think that it could give a lesson to other Cambodian leaders not to persecute and kill their own people. Such a Tribunal would also show that the United Nations and the international community, as well as the Cambodian government, are willing to find justice for the victims who suffered and died during the DK regime. The people want to believe that the United Nations, in practice as well as in theory, can be effective in addressing human rights violation issues in the world. More

importantly, bringing past perpetrators to justice would impact on the evil behavior of all-powerful persons who are currently abusing their power and committing blatant human rights violations against innocent people. At the very least, perpetrators may be forced to consider the possibility that they themselves could be brought to justice at some time in the future.

Now, hope is fading fast for any credible tribunal. The UN has withdrawn its participation and the international community does not appear to support any alternatives. The absence of UN participation in the Tribunal may be both an advantage and a disadvantage. The advantage is that the UN will not give legitimacy to the Cambodian legal system. If the UN were to continue its participation in a sub-standard trial process, this could seriously damage the UN's credibility, as well as undermine efforts to reform the Cambodian legal system. The UN's cooperation would be a tacit endorsement of the current Cambodian legal system and provide the government with a ready excuse for inaction on reform issues. On the other hand, if the Cambodian government were to reform the country's legal system to meet international standards as proposed by the UN, this would be a good sign for Cambodia. Cambodian lawyers, prosecutors, law professors and judges could see international criminal law in action and use the experience to strengthen the Cambodian legal system.

The disadvantage of the UN pullout is that Cambodian government now has the opportunity to run this Tribunal alone – or not run it at all. Either way, it is likely that some identified perpetrators would not be prosecuted, mainly in the interests of "political stability". The result would be the kind of impunity that has plagued the country for years. When people perceive that they cannot get justice, they become very reluctant to challenge what they observe is wrong in society. If the UN participates, probably the system could be upgraded step by step during the operation and many perpetrators could be prosecuted. But when the UN stays outside

the system like this, there is nothing else the UN can do besides imposing political or economic sanctions. This method would not hurt the Cambodian leaders but would increase the people's suffering.

The history of the Law on Khmer Rouge shows clearly the lack of commitment of the Cambodian Government to a credible tribunal that meets international standards. Although the UN negotiated with the Government for over four years, the Tribunal in its current form cannot function properly. It is flawed by the system. Many factors are involved, such as the independence of the judiciary and the rights of accused. Fundamentally, the way that the Tribunal functions would not preserve the justice for society, for victims or for the accused. Legally, the Tribunal is not established within a framework of international law, especially the international human rights instruments. It looks like a mock Tribunal, not a genuine one.

For this country to move forward, the Government must have a strong commitment to bring those who committed crimes to justice. It should not reject the proposal of the UN. This proposal is in the interests of Cambodia, not the UN. In this century, one cannot live outside the world.

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