CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

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I. THE CAMBODIAN EXTRAORDINARY CHAMBERS— A DANGEROUS PRECEDENT FOR INTERNATIONAL JUSTICE?

A. Introduction

In May 2003 the United Nations General Assembly approved an agreement between the United Nations and the Cambodian government (UN Agreement) providing for United Nations assistance in the establishment and operation of 'Extraordinary Chambers' within the domestic court structure of Cambodia.[1] The UN Agreement is the result of a lengthy process of negotiation between the United Nations and the Cambodian government, with the intervention of several interested states.[2] The final agreement reflects a compromise between the need to address impunity and the need to preserve Cambodian sovereignty.

The Extraordinary Chambers will have jurisdiction to prosecute individuals for serious violations of Cambodian penal law and international humanitarian law during the period of Democratic Kampuchea from 1975 to 1979.[3] This period is considered one of the darkest periods of human rights violations in modern history, being 'marked by abuses of individual and group human rights on an immense and brutal scale'.[4] Historians estimate that the Khmer Rouge killed between 1.5 and 1.7 million people during this period, equivalent to approximately 20 per cent of the population at the start of the regime.[5] Yet, despite the extent and serious nature of these violations, there has been virtually no accountability of any Khmer Rouge officials for these atrocities, either internationally or domestically.[6]

[1] Draft Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, dated 17 March 2003. Approved by GA Res 57/228B, 13 May 2003.

[2] Including France, Japan, the United States, Australia, India, and the Philippines.

[3] Art 1, Special Law; Art 1, UN Agreement.

[4] Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, dated 15 Mar 1999, UN Doc No A/53/850 and S/1999/231 (Report of the Group of Experts), para 18.

[5] Report of the Group of Experts, para 35.

[6] The Paris Peace Accords signed in 1991 did not include an express obligation on either the Cambodian government or the United Nations Transitional Authority in Cambodia (UNTAC) to prosecute offenders. Two trials were conducted in absentia after the fall of the regime, of Pol Pot and Ieng Sary, but these trials are not considered to be more than show trials. The proposed trial of Ta Mok, a Khmer Rouge general, for genocide under Cambodian law and by a Cambodian military court was postponed in 1999 pursuant to a controversial law permitting the extension of detention without trial by up to three years.

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Comprising both international and domestic personnel, including judicial and prosecutorial appointments, and with United Nations financial and other assistance, the Extraordinary Chambers will be a further version of a third-generation international criminal tribunal that is hybrid in nature.[7] Yet, despite the involvement of the United Nations, the Extraordinary Chambers are criticized for failing to meet fundamental international standards of justice and for threatening the integrity of the United Nations in the provision of post-conflict justice.[8]

This comment provides an overview of the Extraordinary Chambers and highlights the major differences between the Extraordinary Chambers and existing post-conflict justice mechanisms. It concludes by considering whether the model is a dangerous precedent for transitional justice, including examining how the tribunal may serve as a model for future prosecutions within the system of complimentarity to be adopted by the International Criminal Court (ICC).

B. History of Negotiations

In 1997 the Cambodian government formally requested assistance from the United Nations to establish a tribunal to prosecute the senior leaders of the Khmer Rouge for offences committed from 1975 to 1979. That request was transmitted to the General Assembly and the Security Council.[9] The General Assembly, at the initiative of interested states, asked the Secretary-General to consider the request, including the possibility of appointing a panel of experts to examine the legal issues raised and to make recommendations as to the form of any proposed tribunal.[10] The Group of Experts appointed by the Secretary-General concluded that the Cambodian judicial system was not sufficiently resourced and independent from state interference to conduct trials of the Khmer Rouge leaders.[11] Accordingly, the Group of Experts recommended establishing an ad hoc international tribunal, comprising international judges and sharing the Prosecutor for the ICTY, to be sited in the Asia-Pacific region, but not in Cambodia.[12] While the Secretary-General endorsed the conclusion of the Group of Experts that, for the tribunal to meet international standards of fairness and justice, it must be international in character, he did not endorse the recommendation that a tribunal be established,

[7] The ad hoc international criminal tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) are considered first-generation international tribunals, while the Special Court for Sierra Leone is a second-generation tribunal: see R Cryer 'A "Special Court" for Sierra Leone?' 50 ICLQ (2001) 443. Regulation 64 panels in Kosovo and Special Panels in East Timor are other examples of third-generation international tribunals: see L Dickinson 'The Promise of Hybrid Courts' 97 AJIL (2003) 295, S Linton 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice' 12 Criminal Law Forum (2001) 185 and S Kartenstein 'Hybrid Tribunals: Searching for Justice in East Timor' 16 Harvard Human Rights Journal (2003) 245.

[8] Both Amnesty International and Human Rights Watch, along with other human rights groups, have been highly critical of the Extraordinary Chambers: see Amnesty International, *Cambodia: Amnesty International's preliminary views and concerns about the draft agreement for the establishment of a Khmer Rouge special tribunal*, 21 Mar 2003 (ASA 23/003/2003) and Human Rights Watch, *Serious Flaws: Why the UN General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement*, available at <http://hrw.org/asia/cambodia.php>.

[9] Letter dated 21 June 1997 to the Secretary-General from the First and Second Prime Ministers of Cambodia, contained in Identical letters dated 24 June 1997 to the General Assembly and the Security Council from the Secretary-General, UN Doc A/51/930—S/1997/48.

[10] GA Res 52/135, para 16.

[11] Report of the Group of Experts, paras 131–8.

[12] Ibid, para 219.

given the stance of the Cambodian government and the lack of support among member states.[13] In any event, the Cambodian government[14] rejected that proposal, claiming that an international tribunal would not be feasible due to the probable veto of at least one permanent member of the Security Council.[15]

In 1999 the Cambodian government approached the United Nations for assistance in drafting domestic legislation to establish a specialized national court with jurisdiction to try Khmer Rouge officials and with international participation.[16] Negotiations regarding the proposed structure and functions of the tribunal commenced[17] and in August 2001, the Cambodian government introduced the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea (the Special Law).[18] Yet, in February 2002, after two and a half years of negotiations, the United Nations withdrew from the process, citing a 'lack of commitment' to the process on the part of the Cambodian government.[19]

Negotiations for a Cambodian tribunal only resumed following a General Assembly request for the Secretary-General to conclude an agreement on the establishment of the Extraordinary Chambers.[20] The Secretary-General interpreted GA Resolution 57/228 as imposing several limits on the mandate of the negotiating team. In particular, the resolution required the Secretary-General to base the resumed negotiations on the previous negotiations.[21] In addition, the resolution implied that the Secretary-General was to incorporate the provisions of the Special Law into the agreement between the United Nations and Cambodia.[22] Thus, the starting point was that the tribunal was to take the form of 'national courts, within the existing court structure of Cambodia, established and operated with international assistance'.[23] Yet the resolution also implied that the Secretary-General was to negotiate for amendments to the agreement

[13] Identical letters dated 15 Mar 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council.

[14] There had been a significant change in the Cambodian government following the request to the United Nations in 1997: the then Second Prime Minister, Hun Sen, staged a coup in July 1997 assuming complete control. This action was 'confirmed' by a 'tainted electoral process' in July 1998, in which Hun Sen was elected Prime Minister: S Ratner and J Abrams *Accountability for Human Rights Atrocities in International Law* (Oxford Oxford University Press 2001) 281.

[15] China, as a major ally of Vietnam, had historically vetoed Security Council resolutions dealing with the situation in Cambodia. However, the Chinese government had told the Group of Experts that it would not oppose an international tribunal if requested by the Cambodian government: Ratner and Abrams, above n 14, 281.

[16] Letter from Hun Sen, Prime Minister of Cambodia to HE Thomas Hammarberg, Special Representative of the UN Secretary-General for Human Rights in Cambodia dated 17 July 1999.

[17] P Shenon 'UN Plans Joint War Crimes Tribunal for Khmer Rouge' New York Times, 12 Aug 1999.

[18] A Memorandum of Understanding was reached in May 2000, although there is some dispute as to the intended effect of this document and the extent to which it was incorporated into the Special Law: C Lynch 'UN Warns Cambodia on War Crimes Tribunal' *Washington Post*, 3 Feb 2001. The Special Law was introduced in Dec 2000, but was referred to the Cambodian Constitutional Court for approval: 'Cambodia set for Khmer Rouge Trials' BBC Online 7 Aug 2001.

[19] Report of the Secretary-General on Khmer Rouge trials, 31 Mar 2003, UN Doc No A/57/769 (hereafter Secretary-General's Report), para 14.

[20] GA Res 57/228, 18 Dec 2002.

[21] Secretary-General's Report, para 11.

[22] GA Res 57/228, Preamble and paragraph 2. See also Secretary-General's Report, para 10.

[23] Ibid, para 10(a).

so that the Extraordinary Chambers would comply with 'established international standards of justice, fairness and due process of law'.[24] Accordingly, the Secretary-General instructed United Nations negotiators to attempt to strengthen the UN Agreement through proposed amendments to the structure and composition of the tribunal, and the standards it is to apply.[25]

During the course of negotiations, the Cambodian government rejected the majority of amendments sought by the United Nations and resisted any changes to the Special Law. Consequently, the Secretary-General concluded that the only option acceptable to the Cambodian government was for a national court with the structure and organisation envisaged in the Special Law.[26] The UN Agreement was finalised and initialled by both parties on 17 March 2003, approved by the General Assembly on 13 May 2003, and signed on 6 June 2003.[27] The UN Agreement will enter into force on the day after both parties have notified the other that the legal requirements for its entry into force have been satisfied.[28] Subject to meeting funding requirements, the Extraordinary Chambers are expected to commence operation in 2004, although the Cambodian government has already detained two suspects it intends to transfer to the Extraordinary Chambers when established.[29]

C. Legal Status

The Extraordinary Chambers are the most recent instance of a newly emerging form of accountability mechanism, known as the hybrid or mixed tribunal. Such tribunals are hybrid as 'both the institutional apparatus and the applicable law consist of a blend of the international and the domestic'.[30] Although the hybrid tribunal is a relatively new development in transitional justice, there are currently three examples of hybrid tribunals in post-conflict situations: Regulation 64 panels in Kosovo, Special Panels in East Timor and the Special Court for Sierra Leone.[31] A hybrid model is also under consideration for Bosnia and Herzegovina.[32] However, whilst the Extraordinary Chambers are not without legal precedent, their status in international law is distinct from other transitional justice models.

While the General Assembly approved the UN Agreement prior to its signature, GA

[24] GA Res 57/228 para 4(a): see also Secretary-General's Report, paras 10(b) and 12.

[25] The proposed amendments are set out in the Secretary-General's Report, at para 16, and include simplifying the structure of the tribunal and requiring a majority of international judges in each chamber.

[26] Ibid, para 23.

[27] See UN Press Release, UN and Cambodia Reach Draft Agreement for Prosecuting Khmer Rouge Crimes, 17 Mar 2003, UN Press Release GA/10135 of 13 May 2003, and UN Press Release, UN, Cambodia Sign Agreement to prosecute former Khmer Rouge leaders, 6 June 2003.

[28] Art 32, UN Agreement. The only outstanding legal requirement is for the Cambodian government to obtain the ratification of Cambodia of the agreement: Art 30, UN Agreement. However, Art 29 provides for the phased commencement of the Extraordinary Chambers.

[29] Letter dated 5 May 2003 from the Permanent Representative of Cambodia to the United Nations addressed to the Secretary-General, UN Doc No A/57/808. The two suspects are Ta Mok, a former general, and Duch, the former head of the Tuol Sleng prison.

[30] Dickinson, above n 7, at 595.

[31] For further details of these tribunals refer to the sources cited above, n 7.

[32] See Report on the Judicial Status of the ICTY and the Prospects for referring Certain Cases to National Courts, UN Doc S/2002/678.

Resolution 57/225B does not form the legal basis of the Extraordinary Chambers. This distinguishes the Extraordinary Chambers from the ad hoc international criminal tribunals, which are established as necessary measures for the restoration of international peace and security pursuant to Security Council resolutions under Chapter VII of the United Nations Charter.[33] It also distinguishes the Extraordinary Chambers from the hybrid judicial panels in Kosovo and East Timor, which also ultimately derive their authority from resolutions of the Security Council under Chapter VII.[34] The absence of a Chapter VII mandate has had two important implications for the Extraordinary Chambers. First, the main features of the tribunal, including its structure, composition and applicable law, had to be negotiated with the Cambodian government, rather than imposed by a United Nations administration as in Kosovo and East Timor.[35] Second, the lack of Chapter VII powers will restrict the ability of the Extraordinary Chambers to obtain the production of suspects and witnesses located on the territory of other states. Although the majority of potential suspects are located within Cambodia, it is possible that some suspects are now, or will in the future be, located in neighbouring states, particularly Thailand.[36] This has proved to be a significant difficulty for the Special Court for Sierra Leone, which, also lacking Chapter VII powers, has been forced to negotiate bilateral agreements both for the production of indictees by states and for the provision of medical services.[37] At least the Extraordinary Chambers, as a Cambodian court, will be able to rely on existing extradition and judicial assistance agreements, although the Extraordinary Chambers will be dependent upon the Cambodian government to enforce the provisions of those agreements.[38] Whilst the UN Agreement imposes an obligation on Cambodia to comply 'without undue delay' with any request or order issued by the Extraordinary Chambers, that obligation does not expressly extend to the commencement of extradition proceedings to procure the extradition of suspects or witnesses located in another state.[39]

As with the Extraordinary Chambers, the Special Court for Sierra Leone and the

[33] SC Res 827 of 25 May 1993 for the ICTY; SCR 955 of 8 Nov 1994 for the ICTR.

[34] SC Res 1244 of 10 June 1999 authorizes the establishment of an international civil presence in Kosovo in order to provide an interim administration for Kosovo. Similarly, SC Res 1272 of 25 October 1999 granted UNTAET extensive power to administer East Timor during a transitional period to independence.

[35] The interim administrations exercised all legislative and executive authority, including the administration of the judiciary: UNMIK Regulation 1 (Kosovo) and SC Res 1272 (East Timor). See H Strohmeyer 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor', 95 AJIL (2001) 46.

[36] Report of Group of Experts, para 112. The Group of Experts suggested that the signatories to the Paris Agreements (in particular Thailand, Laos and Vietnam) have an obligation to cooperate with any transitional justice mechanism, para 119.

[37] Eg, the transfer of former Liberian President Taylor to the Special Court from Nigeria is currently the subject of negotiations: UN Press Release 'Sierra Leone Court says Taylor must face justice to ensure lasting peace in Liberia' 12 Aug 2003. In terms of medical assistance, the Special Court was unable to transfer Foday Sankoh to another state to obtain medical treatment: UN Press Release *Former Sierra Leonean rebel leader, indicted war criminal Foday Sankoh dies*, 30 July 2003.

[38] Cambodia and Thailand entered into an extradition agreement in 1998 that is still to be ratified by the Thai government. There are two agreements for judicial assistance signed in 1960. The Thai government has expressed its willingness to cooperate with any Cambodian tribunal: Report of the Group of Experts, para 121.

[39] Art 25, UN Agreement.

ICC are not established pursuant to a resolution of the Security Council under Chapter VII, but are treaty-based organs.[40] The constitutive instrument for the Special Court for Sierra Leone is a bilateral agreement between the United Nations and the Government of Sierra Leone,[41] and the legal basis for the ICC is found in a multilateral treaty.[42] As treaty-based organs, the Special Court for Sierra Leone and the ICC do not form part of the domestic legal system, nor are they attached to an existing international legal regime. In contrast, while the Extraordinary Chambers are the subject of a bilateral agreement the tribunal is not a treaty-based organ: the Special Law and not the UN Agreement is the constitutive instrument for the Extraordinary Chambers. The UN Agreement is only 'to regulate the cooperation' between the United Nations and Cambodia, and to provide 'the legal basis and the principles and modalities for such cooperation'.[43] In addition, the Extraordinary Chambers will be established within the existing court structure of Cambodia and form part of the Cambodian legal order. This raises two interesting questions: what is the status of the UN Agreement in international and Cambodian law, and what is the sanction, if any, for the breach of its terms?

In international law, the UN Agreement will have effect as a bilateral treaty between the United Nations and Cambodia. All the obligations placed upon Cambodia under the UN Agreement are treaty obligations owed to the United Nations by Cambodia and enforceable under international law. The parties have accepted that the Vienna Convention on the Law of Treaties 1969 (VCLT) will apply to the UN Agreement.[44] Consequently, Cambodia is bound by its treaty obligations and must perform those obligations in good faith.[45] In addition, Cambodia may not rely on any provision in its internal law to justify failure to perform its treaty obligations and must amend national laws (which would include the Special Law) to ensure that it is consistent with its treaty obligations.[46] There are several instances where the Special Law is inconsistent with the UN Agreement (discussed below), and the Cambodian government will be under a duty in international law to amend the Special Law to remove any inconsistency.[47] The Cambodian government must consult with the United Nations prior to any amendment to the Special Law,[48] which will provide the United Nations with an opportunity for input into, but not approval of, any amendments required due to inconsistency with the Special Law.

As far as sanctions for breaches are concerned, the only enforcement mechanism contained in the UN Agreement is the withdrawal of United Nations assistance.[49] The UN Agreement aims to 'guarantee' the performance of the Extraordinary Chambers through specifying how the Extraordinary Chambers must be structured and operate in order to receive assistance from the United Nations. As the Secretary-General noted:[50]

[40] The Security Council was involved in the drafting of the bilateral agreement for the Special Court, but did not take action to approve or authorize the agreement: see Cryer, above n 7.

[41] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 Jan 2002.

[42] Rome Statute of the International Criminal Court, Doc A/CONF 183/9, 17 July 1998.

[43] Art 1, UN Agreement.

[44] Art 2(2), UN Agreement.

[45] Art 26, VCLT.

[46] Art 27, VCLT.

[47] Eg, the inconsistency between the right to defend themselves with the assistance of their counsel (Art 35, Special Law) with the right to have counsel appointed if the accused cannot afford counsel (Art 13(2), UN Agreement).

[48] Art 2(3), UN Agreement.

[49] Art 28, UN Agreement.

[50] Secretary-General's Report, para 51.

> If the United Nations were to agree to provide such assistance, it is only to be expected that the instrument by which it assumed the obligation would specify the precise nature of the institution that it was undertaking to help set up and run.

Accordingly, the UN Agreement sets out the jurisdiction, structure and composition of the Extraordinary Chambers, largely reflecting the provisions of the Special Law. If the Cambodian government were to change the structure and organization of the Extraordinary Chambers so that it failed to conform to the UN Agreement, then the obligation of the United Nations to provide assistance would cease to apply. The same would occur if the Government were to cause the Extraordinary Chambers to function in a manner that did not conform to the UN Agreement,[51] including conforming to international procedural standards (see below).

Although the ability of the United Nations to enforce the terms of the UN Agreement through the withdrawal of assistance is the key to managing the Extraordinary Chambers, Article 28 is imprecise. It does not specify the degree of inconsistency or non-conformity with the UN Agreement that must exist prior to the right to withdraw being exercised. Is a slight deviation sufficient, or must the extent of non-conformity be substantial? It is also uncertain which entity would determine whether the terms of the UN Agreement are being met, with possible options including the Secretary-General, the General Assembly or a judicial body, such as the International Court of Justice (ICJ). Any disputes as to the interpretation or application of the UN Agreement are to be settled by negotiation or by any other mutually agreed mode of settlement.[52] A dispute could not be referred to the ICJ for a judicial determination, as the United Nations is not a party to the ICJ's statute,[53] although the General Assembly may agree to refer the matter to the ICJ for an advisory opinion.[54] It is also possible that the parties may request the creation of a conciliation commission to determine the dispute pursuant to the provisions of the VCLT.[55]

As the assistance is offered under the authority of the General Assembly, it is likely that any breach would be referred to that body for determination, resulting in a political, rather than legal, determination of the situation. The opposition of several influential states may prevent the United Nations from taking the drastic action of withdrawing assistance, even though such withdrawal may be legally justified. The absence of strict legal criteria for the withdrawal of United Nations assistance and the potential exposure of the decision to political factors weakens the likely effectiveness of the threat of withdrawal as an enforcement mechanism. Another fundamental weakness is the absence of any monitoring mechanism to ensure compliance with the provisions of the UN Agreement. There is no obligation for the Secretary-General to report to the General Assembly on a regular basis regarding the agreement's implementation, as is the case with the other hybrid tribunals.[56] Instead, the UN Agreement is limited to providing that representatives of Member States, the United Nations, the media and non-governmental

[51] Ibid, para 51.
[52] Art 29, UN Agreement.
[53] Art 34, ICJ Statute, provides that only states can be a party to cases before the ICJ.
[54] Ch IV, ICJ Statute; Art 96(1) UN Charter.
[55] Art 66(b) and Annex VCLT. This is uncertain as the drafting of these provisions is such that they are arguably limited to states.
[56] The ICTR and ICTY are required to provide regular reports to the Security Council by their constitutive resolutions. Mission reports are also required on a regular basis for Kosovo and East Timor, and the Secretary-General reports to the Security Council on the progress of the Special Court for Sierra Leone.

organizations must be granted access to proceedings in order to ensure the credibility of those proceedings.[57] The Special Court for Sierra Leone reports to a Management Committee, comprising representatives of Sierra Leone, the United Nations and contributing states. A similar arrangement may be established for the Extraordinary Chambers, although a management committee would necessarily be largely concerned with financial performance and not compliance with international standards. If the committee did take an interest in the non-financial operation of the tribunal, it would risk being accused of interfering with the independence of the judicial process.

The status of the UN Agreement in Cambodian law is less certain. Article 2(1) provides that the UN Agreement shall be implemented in Cambodia through the Special Law. However, Article 31 states that the UN Agreement is to apply as law within Cambodia following its ratification under internal legal provisions. There are several possible interpretations of these provisions. First, these provisions may be intended to sidestep any procedural requirements under domestic law for implementing international obligations. Second, the provisions might be designed to ensure that the UN Agreement has at least equal status with, if not precedence over, the Special Law under domestic legislation.[58] A more controversial possible effect is that, as the UN Agreement and the Special Law have the status of national laws, their provisions could be enforced against the Cambodian government pursuant to domestic civil procedures, thus creating rights that are directly enforceable within the Cambodian legal system. Alternatively, as Cambodia has ratified the ICCPR, complaints relating to procedural standards and judicial independence could be referred to the Human Rights Committee. However, as Cambodia is not a signatory to the Optional Protocols, the HRC could not receive communications from individual complainants.

D. Structure, Composition, and Funding

1. Structure and Composition

The Extraordinary Chambers will comprise a Trial Chamber and a Supreme Court Chamber.[59] The Trial Chamber will consist of three Cambodian judges and two international judges, and the Supreme Court Chamber of four Cambodian judges and three international judges.[60] The Extraordinary Chambers will be the only example of a hybrid tribunal not to have a majority of international judges. The United Nations had sought to amend the agreement to provide for a majority of international judges in both chambers, recognizing that the composition of the Extraordinary Chambers failed to protect the tribunal against political interference and intimidation.[61] Given the precarious state of the judiciary in Cambodia,[62] this risk was

[57] Art 12, UN Agreement; Art 34, Special Law. This right is not absolute and may be limited 'in exceptional circumstances'.

[58] See Secretary-General's Report, para 25.

[59] Art 3(2), UN Agreement. The previous draft (and the Special Law) had provided for a more complicated structure, with a three-tier structure consisting of a Trial Chamber, an Appeals Chamber and a Supreme Court Chamber (see Art 9, Special Law). In the current, simpler model, the Supreme Court will have both appellate and final instance jurisdiction: Art 3(2)(b), UN Agreement

[60] Art 3, UN Agreement; Arts 10 and 11, Special Law.

[61] Secretary-General's Report, paras 16(c) and 17.

[62] Several reports have highlighted the vulnerability of the Cambodian judiciary to political pressure: see country reports at <http://www.amnesty.org>. The Secretary General's Special

perceived as significant.[63] Experience in Kosovo shows that the inclusion of international judges on judging panels made only minimal improvement to the quality of judgments where international judges did not form a majority.[64] However, the Cambodian government refused to accept an amendment that would remove the Cambodian majority.[65] Instead, the Special Law adopts a 'supermajority' requirement, with decisions requiring the affirmative vote of a majority of the judges in each chamber plus one.[66] This will ensure that a decision cannot be taken in either chamber without the support of at least one international judge. While the supermajority formula does provide some protection against corruption, it will place considerable pressure on the international judges and will potentially expose international staff to threats and intimidation. As Human Rights Watch writes, there is a risk that 'the decisions of the tribunal will only be as strong as its weakest international member'.[67]

The prosecution strategy is to be devised by two co-prosecutors, one Cambodian prosecutor and one international prosecutor.[68] The co-prosecutors are to work together to initiate investigations, formulate charges, request the opening of judicial inquiries, and conduct any ensuing prosecutions and appeals before the Extraordinary Chambers. The Special Law provides that the co-prosecutors must cooperate to develop a common prosecutorial strategy. If the co-prosecutors cannot agree regarding a prosecution, the prosecution will proceed unless a co-prosecutor refers the dispute to the Pre-Trial Chamber.[69] The Pre-Trial Chamber will sit only as required, and will consist of three Cambodian judges and two international judges, with a decision requiring an affirmative vote of four members. If this 'supermajority' were not obtained, the prosecution would continue.[70] All judicial investigations will be the responsibility of two co-investigating judges: one Cambodian investigating judge and one international investigating judge.[71] If judicial investigations reveal sufficient evidence, the co-investigating judges will send the accused for trial before the Extraordinary Chambers. The Special Law contains similar arrangements for the referral of disputes between the co-investigating judges to the Pre-Trial Chamber, and if a supermajority is not obtained in that chamber, the investigation will proceed.[72] A national organ, the Supreme Council of the Magistracy, will appoint all Cambodian judicial and prosecutorial personnel, and will select and appoint international judicial and prosecutorial staff from nominees provided by the Secretary-General.[73]

Representative for Human Rights in Cambodia has consistently highlighted the difficulty of ensuring a fair trial: see the most recent report: Doc No E/CN.4/2003/114, 18 Dec 2002.

[63] Secretary-General's Report, para 10(c).

[64] OSCE, Department of Human Rights and Rule of Law, Legal Systems Monitoring Section. *Kosovo's War Crimes Trials: A Review*, Sept 2003.

[65] Secretary-General's Report, paras 16 and 17.

[66] Art 14, Special Law. Judges are to attempt to achieve unanimity in their decisions, but where this is not possible, a decision in the Trial Chamber requires the affirmative vote of at least four judges, and a decision of the Supreme Court Chamber requires the affirmative vote of at least five judges.

[67] Human Rights Watch, above n 8, 5.

[68] Art 6, UN Agreement; Arts 16–19, Special Law.

[69] Art 6(4), UN Agreement; Art 20, Special Law.

[70] Art 7, UN Agreement; Art 20, Special Law.

[71] Art 5, UN Agreement; Arts 23 and 26, Special Law.

[72] Arts 5(4) and 7, UN Agreement; Arts 20 and 23, Special Law.

[73] Art 11 (judges), 18 (prosecutors) and 26 (investigating judges), Special Law.

As the prosecutor will serve arguably the most important role in the tribunal, an independent prosecutor, immune from political interference and willing to vigorously pursue suspects is essential. The Cambodian prosecutorial service is believed to be subject to the same concerns as the judiciary, and the practice is to seek political approval before initiating prosecutions.[74] The co-prosecutors are expressed to be independent in the performance of their functions and are not to seek instructions from either the Cambodian government or the United Nations.[75] However, the co-prosecutor arrangement limits the impact that the international prosecutor can have on the process, as the Pre-Trial Chamber process has the potential to delay prosecutions where the Cambodian government instructs the national prosecutor to 'slow things down'. Similar concerns exist regarding the co-investigating judges.[76] The United Nations had attempted to negotiate the removal of the joint system, with the co-prosecutors and co-investigating judges replaced by an international investigating judge and prosecutor, with Cambodian deputies, as is found in the Special Court for Sierra Leone and the Special Panels in East Timor. This would also have removed the need for the complicated structure of the Pre-Trial Chamber and its potential for obstruction and delay in the conduct of proceedings. The Cambodian government rejected those proposed amendments in the final round of negotiations.[77] However, the continuation of a prosecution/investigation as the default position where there is no agreement and no affirmative vote in the Pre-Trial Chamber may restrict abandonment of prosecutions/investigations for political reasons.[78]

The final organ of the Extraordinary Chambers will be the Office of Administration, which will consist of a Cambodian Director and an international Deputy Director appointed by the Secretary-General. The Deputy Director would be responsible for the international components of the system and the recruitment of all international staff. The Cambodian Director will have responsibility for the overall management of the Office, but will not have power for matters that are subject to United Nations rules and procedures. Both the Director and the Deputy Director are to cooperate so that the Office functions in an effective and efficient manner.[79]

The Special Law does not establish an Office of the Defence, merely providing that 'the accused shall be entitled to the following minimum guarantees . . . (d) to defend themselves or with the assistance of their counsel'.[80] The UN Agreement extends this right to include the right to appoint counsel of his or her choice and for the provision of counsel if the accused lacks sufficient means to pay for it.[81] The United Nations has undertaken to meet the costs of defence counsel.[82] This still falls short of creating a properly staffed and funded Office of the Defence. However, despite its importance, the existence of a formal Office of the Defence is rarely found in international tribunals.[83]

[74] See Human Rights Watch, above n 8.
[75] Art 6(3), UN Agreement; Art 19, Special Law.
[76] See sources cited above n 8.
[77] Secretary-General's Report, paras 16 and 17.
[78] Note that the term 'affirmative' vote is not clear: does this mean that there must be an affirmative vote for the continuation or discontinuation of the prosecution/investigation/trial?
[79] Ch IX, Special Law and Art 8, UN Agreement.
[80] Art 35, Special Law.
[81] Art 13, UN Agreement. See also Secretary-General's Report, para 49.
[82] Art 17(c), UN Agreement.
[83] The Registry of the Special Court for Sierra Leone established an Office of the Defence within the structure of the tribunal, although this office was not originally contained in the

In addition, similar open-ended arrangements for defence counsel funding were partly responsible for large 'blow-outs' in the budgets of the ICTY and ICTR.[84] Defence counsel are protected under Article 21 of the UN Agreement, which states that such counsel shall not 'be subjected by the Royal Government of Cambodia to any measure which may affect the free and independent exercise of his or her functions'.[85] Witnesses and experts are also to be protected from interference by the Cambodian authorities.[86] However, the effect of these protections depends both on the cooperation of the Cambodian government and the extent to which the United Nations monitors and enforces the provisions of the UN Agreement (see above).

2. Funding

Under the terms of the UN Agreement, the United Nations will be responsible for the remuneration of the international personnel employed by the Extraordinary Chambers, including the international judges, the international co-prosecutor, the international co-investigating judge and the Deputy Director of the Office of Administration. In addition, the United Nations has undertaken to meet part of the costs of services and utilities, remuneration of defence counsel, the cost of witness travel from within Cambodia and abroad, an agreed contribution towards safety and security arrangements, and 'such other limited assistance as may be necessary to ensure the smooth functioning' of the Extraordinary Chambers.[87] The total cost for three years of operation (three years being the period during which it is assumed all trials and appeals will be complete) is US$19 million,[88] although it is not clear whether this estimate includes the cost of defence counsel. The General Assembly determined that the United Nations contribution to the operation should be funded by voluntary contributions,[89] despite the opinion of the Secretary-General that voluntary contributions 'would not provide the assured and continuous source of funding' needed to appoint international staff.[90] Despite calls by the General Assembly for member states to contribute to the Extraordinary Chambers,[91] and the offers of assistance received from several Member States, the Secretary-General remained pessimistic as to the availability of sufficient funds. Accordingly, he determined that the process of establishing the tribunal would not commence until sufficient financial resources were in place.[92]

The Secretary-General is rightly concerned regarding the source of funding for the Extraordinary Chambers. The experience of the Special Court for Sierra Leone, also funded by voluntary contributions, bodes ill for the Extraordinary Chambers. The Secretary-General was forced to scale down already modest budget estimates when sources of finance were not forthcoming, and even those revised estimates were not

Statute for the Special Court. In East Timor, there is a Public Defenders Unit funded and staffed by East Timor (Katzenstein, above n 7), while in Kosovo, a regulation dealing with access to legal representation was not promulgated until Oct 2001: UNMIK Regulation 2001/28 *On The Rights of Persons Arrested by Law Enforcement Authorities*, 12 Oct 2001. The procedure of the ICTR and ICTR is to meet the costs of defence counsel from the budget.

[84] Informal discussions with ICTY and ICTR staff—on file with the author.
[85] Art 21(1). Art 21(2) specifies the immunities to be provided to counsel.
[86] Art 22, UN Agreement.
[87] Art 17, UN Agreement.
[88] Secretary-General's Report, para 56.
[89] GA Res 57/228B, 22 May 2003, para 3.
[90] Secretary-General's Report, para 74.
[91] GA Res 57/228B, para 3.
[92] Secretary-General's Report, para 77.

met.[93] The difficulty in obtaining pledges for the requisite amount of funds caused a considerable delay in the establishment of the Special Court, with appointment of judges delayed until July 2002.[94] The hybrid tribunals in Kosovo and East Timor also face a severe lack of resources, which is one of the key factors contributing to the failure of the tribunals to meet international standards.[95] Despite this, the budgets of the hybrid tribunals are significantly lower than their international counterparts: for the year 2002–3, the budgets of the ICTR and the ICTY were US$178 million and US$223 million respectively.[96]

E. Jurisdiction

1. Temporal and Personal Jurisdiction

Only crimes committed within the period from 17 April 1975 to 6 January 1979 will be within the temporal jurisdiction of the Extraordinary Chambers.[97] This period reflects the accepted duration of the rule of the Khmer Rouge in Cambodia. The jurisdiction of the Extraordinary Chambers does not extend to the human rights violations of the Khmer Rouge either before or after that date. This limit on the temporal jurisdiction of the tribunal was contained in the original request from the Cambodian government to the United Nations, and has been accepted in subsequent GA resolutions and drafts of the UN Agreement.[98]

The personal jurisdiction of the Extraordinary Chambers will be limited to senior leaders of Democratic Kampuchea and those most responsible for the crimes falling within the Extraordinary Chambers' subject matter and temporal jurisdiction.[99] Thus, the personal jurisdiction is limited in two ways. First, it is limited to the acts of the Khmer Rouge and not those of any other person or states that may have committed human rights violations in Cambodia during the relevant period. This excludes from prosecution leaders of other political factions in Cambodia (including the government), which have had strong connections with the Khmer Rouge and include former Khmer Rouge members. In addition, this limit protects Vietnamese and Thai officials from prosecution by the Extraordinary Chambers for possible violations by state officials during the relevant period.[100] Secondly, the focus of the Extraordinary Chambers is on the leaders of the Khmer Rouge and 'persons most

[93] The original budget was a total of US$114.6 million for three years of the Special Court's operation, which was scaled down to US$57 million for the same three-year period: Letter dated 12 July 2001 from the Secretary-General to the Security Council, UN Doc S/2001/693. As the beginning of July 2001, only US$35.4 million had been pledged; despite this the Secretary-General announced that the level of funding was sufficient to commence establishment of the Special Court. The Special Court is approximately US$14 million short for the current year. See also Cryer, above n 7.

[94] Press Release SG/A/813 *Appointments to Sierra Leone Special Court*, dated 26 July 2002.

[95] See Katzenstein, above n 7, and various OSCE Legal Systems Monitoring Section reports on the Criminal Justice System in Kosovo, available at <http://www.osce.org/kosovo/reports/justice/criminal>.

[96] Information taken from the website of each organization.

[97] Art 2, Special Law.

[98] Report of the Group of Experts, pt II.

[99] Art 2, Special Law.

[100] Vietnam and Democratic Kampuchea had engaged in a low-intensity border war from 1975, which gradually intensified leading up to the invasion of Cambodia by Vietnam in 1979. There were also border skirmishes with Thailand and Laos.

responsible' for the commission of those crimes. This excludes many low-level offenders from prosecution. Again, these limits were contained in the original request for assistance, and have been incorporated into the Special Law and the UN Agreement.[101] The limited personal jurisdiction also reflects the limited resources available to the tribunal.

One jurisdictional issue that remains unresolved is the effect of de facto amnesties granted by Cambodia to members of the Khmer Rouge. The Cambodian government has encouraged members of the Khmer Rouge to defect to government forces in exchange for immunity from prosecution under ordinary criminal law and a 1994 law banning the Khmer Rouge. The Khmer Rouge were then integrated into the national forces, and the territory controlled transferred to the government. Together with the end of foreign military assistance to the Khmer Rouge, this policy 'resulted in the surrender and defection of almost the entire Khmer Rouge army and the end to its insurgency'.[102] The amnesties granted were informal, with the Government only issuing one formal amnesty: to Ieng Sary, the former Deputy Prime Minister. The UN Agreement provides that the Cambodian government shall not request an amnesty for any person investigated for or convicted of crimes under the agreement,[103] a prohibition that is reinforced in the Special Law.[104] The UN Agreement, but not the Special Law, also refers indirectly to the amnesty given to Sary. This amnesty is stated to be the only pardon granted by the Cambodian government and the parties have agreed that the scope of the amnesty is to be decided by the Extraordinary Chambers.[105] This leaves the status of the de facto amnesties granted to other Khmer Rouge members uncertain, and is inconsistent with the United Nations' general stance that domestic amnesties are not effective for crimes under international law. While this is the position that has been taken in Sierra Leone,[106] given that the Extraordinary Chambers will be a national institution, it may not apply to the Cambodian tribunal.

2. Subject Matter Jurisdiction

The subject matter jurisdiction of the Extraordinary Chambers comprises both offences under international humanitarian law and offences under Cambodian criminal law. The Special Law incorporates into Cambodian domestic law several crimes under international law. Article 4 of the Special Law provides that the Extraordinary Chambers will have the power to prosecute for genocide, largely as defined in the Genocide Convention.[107] Due to the nature of the crimes committed by the Khmer Rouge, which were directed more at political groups, the element of intention to destroy a particular national, ethnic, racial or religious group may be difficult to establish. However, genocide may be established in relation to acts against particular groups, such as the Cham, Chinese and Vietnamese and the Buddhist monkhood.[108] Article 5 of the Special Law

[101] Report of the Group of Experts, pt II.
[102] Ibid, para 44.
[103] Art 11(1), UN Agreement.
[104] Art 40, Special Law.
[105] Art 11(2), UN Agreement.
[106] Art 10, Statute of the Special Court for Sierra Leone.
[107] Cambodia has been a party to the Convention on the Prevention and Punishment of Genocide 1948 since its entry into force in 1951. There is no evidence that the Government of Democratic Kampuchea denounced the Convention during the period of its regime.
[108] Report of the Group of Experts, para 61–5. See also Ratner and Abrams above n 14, 284–8 and Linton, above n 7.

loosely adopts the definition of 'crimes against humanity' set out in Article 3 of the ICTR Statute. This definition does not require a nexus to armed conflict: it is sufficient that the acts are 'acts committed as part of a widespread or systematic attack against any civilian population, on national, political, ethnical, racial or religious grounds'.[109] Interestingly, the UN Agreement provides that the subject matter jurisdiction shall include crimes against humanity as defined in the ICC Statute, which is not identical to that in the ICTR Statute or the Special Law.[110] As the Special Law must be consistent with the UN Agreement (see above), this may require an amendment to the Special Law so that it reflects the ICC Statute.

The Extraordinary Chambers will also have jurisdiction in respect of grave breaches of the Geneva Conventions of 1949.[111] The grave breaches regime requires a nexus to an international armed conflict.[112] Cambodia had been involved in hostilities with Vietnam from as early as 1975, and had engaged in attacks on Vietnam, Thailand and Laos in 1977. All four states were parties to the Geneva Conventions during the relevant period, although it is not certain that the intensity of those incidents amounted to a situation of international armed conflict. If so, the Geneva Conventions could be used to examine the conduct of the Khmer Rouge towards members of the armed forces (Geneva Conventions I and II), prisoners of war (Geneva Convention III) and Vietnamese civilians both in Cambodia and Vietnam (Geneva Convention IV). The Special Law does not give the Extraordinary Chambers jurisdiction regarding violations of Common Article 3 of the Geneva Conventions and the laws and customs of war in internal conflicts, probably as Cambodia was not a party to Additional Protocol II of the Geneva Conventions during the relevant period.[113] Consequently, crimes of this nature committed against Cambodian civilians (which formed the greatest proportion of offences) are excluded from the jurisdiction of the Extraordinary Chambers.

In addition to these international crimes, the Extraordinary Chambers will have jurisdiction in relation to violations of two conventions recognised by Cambodia: the destruction of cultural property during armed conflict in circumstances prohibited by the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and the commission of crimes against internationally protected persons in circumstances prohibited by the Vienna Convention on Diplomatic Relations 1961.[114] Despite the strong evidence of systematic torture occurring at the hands of the Khmer Rouge during the relevant period, torture is not

[109] This definition differs slightly from the definition in Art 5 of the ICTY statute, which requires the acts to be 'committed in armed conflict, whether international or internal in character, and directed against any civilian population' and in Art 7 of the ICC Statute, which defines crimes against humanity as comprising a wider list of crimes 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. The definition is similar to that adopted in Art 2 of the Statute of the Special Court for Sierra Leone, although the latter statute includes 'sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence' in addition to rape, and also ethnicity as a prohibited ground of persecution.

[110] Art 9, UN Agreement. See Art 7, ICC Statute and Art 3, ICTR Statute.

[111] Defined as specified grave breaches of the Geneva Conventions of 12 Aug 1949: Art 6, Special Law.

[112] Art 2 common to the four conventions.

[113] It is doubtful that the Protocol represented customary international law during that period, and even if liability under international criminal law did exist at that stage, the internal conflict was comparatively limited: see discussion in Ratner and Abrams, above n 14.

[114] Arts 7 and 8, Special Law.

included as a separate international crime within the jurisdiction of the Extraordinary Chambers.[115] However, torture may be prosecuted as a crime against humanity (see above) or under domestic law (see below).

In addition to torture, the Extraordinary Chambers will have jurisdiction in relation to the crimes of homicide[116] and religious persecution under the 1956 Penal Code of Cambodia.[117] The Special Law extends the limitation period for those domestic crimes within the jurisdiction of the Extraordinary Chambers by 20 years[118] and removes the death penalty as an available punishment.[119] The 1956 Penal Code was the current Cambodian criminal law during the relevant period, thus its selection as the applicable law avoids violating the principle of *nullem crimen sine lege*. However, the application of the 1956 Penal Code is expected to create several practical difficulties. First, primary and secondary sources on the Penal Code are scarce, and fail to update the law from its adoption until 1975. Secondly, the extent to which its contents remained in force during subsequent governments is not clear. Thirdly, judges, prosecutors and defenders have not applied the law for a considerable time, and are likely to be unfamiliar with its provisions and their application. Fourth, provisions of the law may be inconsistent with more recently developed international standards.[120] Similar difficulties were encountered in Kosovo and East Timor, where the hybrid tribunals were required to apply criminal law statutes from previous regimes.[121]

Article 29 of the Special Law incorporates principles of individual responsibility and command responsibility. Any person who planned, instigated, ordered, aided and abetted or committed the crimes referred to in the Special Law is individually responsible for his or her crimes, irrespective of the position or rank of that person. Crimes committed by a subordinate do not relieve the superior of individual criminal responsibility where the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate had committed or was about to commit such acts, and the superior failed to take necessary or reasonable measures to prevent such acts or to punish the subordinate. This wording is drawn from the ICC Statute[122] and reflects the jurisprudence of the ICTY and the ICTR on command responsibility. The Special Law does not set out specific defences to crimes within its jurisdiction. This is a source of concern, as the defences available under the 1956 Penal Code are more extensive than those available under international law, and include insanity, minority at the time of the offence, force

[115] The UN Convention on Torture was not concluded until 1984 (Cambodia acceded to the Convention in Oct 1992) so, unless the principles contained in the convention formed part of international customary law in 1975, the principles were not part of Cambodian law during the relevant period. For further discussion see Ratner and Abrams, above n 14, 296.

[116] Arts 501, 503, 504, 505, 506, 507, and 508 of the 1956 Penal Code of Cambodia: Art 3, Special Law.

[117] Arts 209 and 210 of the 1956 Penal Code of Cambodia: Art 3, Special Law.

[118] Art 3, Special Law. The Penal Code otherwise provides that the limitations period is 10 years for felonies, five years for misdemeanours and one year for police infractions, therefore these period would have expired in 1989 at the latest (Arts 109–14).

[119] Under the 1956 Penal Code, the death penalty was a sentencing option for some offences. However, in order to adhere to the provisions of the Cambodian Constitution, which precludes the death penalty, and to meet concerns of the United Nations, Art 38 of the Special Law provides that all penalties should be limited to imprisonment.

[120] See Linton, S, above n 7, and Ratner and Abrams, above n 14.

[121] Strohmeyer, above n 35.

[122] Arts 25 and 28, ICC Statute.

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majeure, action ordered by law and pursuant to legitimate authority and self-defence.[123] The Special Law fails to clarify whether these defences will apply to international crimes under the Special Law or whether international law defences are to be available for all offences under the Special Law. The existence of different defences depending on whether the crime is national or international also raises difficulties of differential treatment of defendants.

F. Procedural law

The Special Law provides that:[124]

> The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If necessary, and if there are lacunae in these existing procedures, guidance may be sought in procedural rules established at the international level.

Thus, the judges, prosecutors and investigating judges must comply with existing Cambodian criminal procedure law. However, determining the existing law may provide an initial practical challenge for the tribunal, with several possible sources of criminal procedural law existing within the Cambodian judicial system. First, the Cambodian Constitution guarantees the presumption of innocence, the right to counsel and the independence and impartiality of the judiciary, as well as containing provisions relating to the arrest, indictment and detention of individuals. Secondly, UNTAC introduced a substantial framework of criminal law and procedure, implemented by decree in 1992 and continuing in force. Thirdly, the National Assembly promulgated a Law on Criminal Procedure in 1993. Fourthly, the National Assembly passed a Law on the Organization and Functioning of the Supreme Court of Magistracy in 1994. Finally, the Cambodian government issued two decrees under which prosecutions have been filed which have little procedural protection for the accused.[125]

The existence of so many possible sources of criminal procedure law, with different levels and types of protection for the accused, will create uncertainty in the application of the Special Law. This has been one of the key concerns in the hybrid tribunal systems in Kosovo and East Timor, where confusion as to the applicable law resulted in differential treatment of defendants.[126] The provision permitting the Extraordinary Chambers to seek guidance in international law will only add to that confusion, as it is not clear when and on what basis reference may be made to international standards or to which international standards the tribunal should refer. The Cambodian judiciary is also likely to be unfamiliar with international standards and may simply ignore, or incorrectly apply, international standards, as has been the experience in Kosovo and East Timor.[127] In any event, the requirement to consult international standards is not mandatory, thus there is no obligation for the procedures applied to be consistent with international procedural rules.

The Special Law does provide some basic protections for the accused, based on

[123] Ratner and Abrams, above n 14, 303.
[124] Art 33, Special Law.
[125] 1986 Decree-Law 27 'Concerning Arrests, Holding in Custody, Temporary Detention, Release and Search of Domicile, Possessions, and the Person' and 1980 Decree-Law 2 'Against Betraying the Revolution and Other Offences'.
[126] Strohmeyer, above n 35 and OSCE reports, above nn 64 and 95.
[127] Strohmeyer above n 35.

Article 14 of the ICCPR.[128] However, given the concerns regarding the independence of the judiciary and the weakness of the supermajority formula, the United Nations has attempted to safeguard compliance with international standards through the provisions of the UN Agreement.[129] The UN Agreement attempts to enhance the procedural protection available to suspects, recognizing that the UN Agreement must 'ensure that the impartiality and independence of the Extraordinary Chambers and the integrity and credibility of their proceedings were fully guaranteed'.[130] Importantly, the UN Agreement, unlike the Special Law, provides that the Extraordinary Chambers must exercise jurisdiction 'in accordance with international standards of justice, fairness and due process of law'.[131] These standards are then defined as those set out in Articles 14 and 15 of the ICCPR, which must 'be respected at all stages of the criminal process'.[132] In particular, these rights include a fair and public hearing, the presumption of innocence, to engage counsel of choice, to have adequate time and facilities for the preparation of a defence, to have counsel provided if the suspect lacks sufficient means, and to examine or have examined the witnesses against the suspect.[133] As noted above, the Special Law provides for the application of only some of these guarantees.

The protection of procedural norms in the Special Law and the UN Agreement has been heavily criticized by human rights organizations for falling short of the international standards, particularly the procedural standards set out in the ICC Statute.[134] This raises the issue of which international fair trial standards are appropriate for a hybrid tribunal such as the Extraordinary Chambers. The ICC is an international court, the 'flagship' of international justice, which is supported by financial contributions from numerous states, with a budget and resources substantially greater than that of the Extraordinary Chambers. Its procedural standards represent the 'ideal' for international criminal justice systems and may not be feasible for a domestic or even hybrid system that faces considerable resource constraints.[135] The Special Court for Sierra Leone, Regulation 64 panels in Kosovo and even the ICTY and the ICTR do not meet the stringent procedural standards of the ICC.[136] The Special Panels in East Timor are the only example of a hybrid tribunal that has adopted the stringent standards set out in the ICC Statute as their applicable procedural law, a decision that has proved controversial and is blamed for causing significant delays in the judicial process.[137] The lack of consistency across the existing international criminal justice mechanisms suggests that there is still no consensus as to exactly which standards are recognised in customary international law as the 'minimum' fair trial standards. Instead of criticizing these mechanisms for providing 'imperfect' justice, international effort should be applied towards developing a common set of 'minimum practice', rather than 'best practice', procedural

[128] Art 35, Special Law.
[129] Secretary-General's Report, paras 48–50.
[130] Ibid, para 13.
[131] Art 12(2), UN Agreement. This follows the wording in GA Res 57/228.
[132] Art 12(2), UN Agreement.
[133] Art 13(1), UN Agreement.
[134] See reports cited above, n 8.
[135] The procedural guarantees are mainly set out in Part VI, ICC Statute.
[136] The applicable law for each tribunal is not the same as that of the ICC: see Art 20 ICTR Statute, Art 21 ICTY Statute, UNMIK Regulation 24 (Kosovo) and Art 17 of the Statute of the Special Court for Sierra Leone.
[137] UNTAET Regulation 2000/15 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, 6 June 2000. See Linton and Katzenstein, both above n 7.

norms for international criminal justice systems: requiring trials that are 'fair enough' rather than perfect.[138] These standards should then be strictly enforced by the international community, potentially through such measures as linking international funding to their attainment. The UN Agreement has adopted this approach, specifying that the minimum standards are not those in the ICC Statute, but are those in the ICCPR (although not including Article 9). These less extensive standards are then to be enforced through the provisions of the UN Agreement and the potential withdrawal of funding.

The United Nations guarantee is an example of a possible enforcement mechanism that, together with minimum practice standards, could provide a link to the 'complementarity' regime under the ICC Statute.[139] Where a state party fails to meet minimum standards in domestic prosecutions, even through a hybrid process such as the Extraordinary Chambers, the state could be considered 'unwilling or unable genuinely to carry out the investigation or prosecution'.[140] The ICC is already required to consider whether national proceedings have not been or are not being conducted 'independently or impartially' or 'in a manner which, in the circumstances, is inconsistent to bring the person to justice' and the condition of the domestic judicial system and its impact upon the ability of the domestic court to carry out its proceedings.[141] Adopting minimum practice standards would provide both the ICC and state parties with clear criteria for when the ICC may intervene and exercise its jurisdiction. Unfortunately, it appears that state parties to the ICC might be required to adopt the stringent standards as domestic law as part of the ICC implementation process, a policy that may be unrealistic and present a disincentive for states to become a party to the statute.

While the intervention of the ICC is not an option for enforcing Cambodia's obligations,[142] the ICC may be relevant for future hybrid tribunals and thus the Cambodian model potentially provides a valuable model for international criminal justice. The international community, through the United Nations, the ICC or contributing states, could enter into an agreement with the relevant state for the conduct of trials by domestic courts with limited international assistance similar to those set out in the UN Agreement. If the state failed to comply with the agreed 'level' of international standards or to satisfy other fundamental requirements under the agreement, instead of (or in addition to) withdrawing funding, the prosecution could be referred to the ICC. The parties would have agreed, in advance, that the ICC had jurisdiction in those circumstances. However, in order to avoid uncertainty and disputes, the agreement would have to set out clearer guidelines for monitoring of the tribunal's performance than those in the UN Agreement.

[138] C Warbrick 'International Criminal Courts and Fair Trial' 3 Journal of Armed Conflict Law (1998) 45.

[139] The effect of Art 17 of the ICC Statute is that the ICC does not have primacy over national courts, and is intended to compliment domestic prosecutions.

[140] Art 17(1)(a), ICC Statute.

[141] Arts 17(2) and 17(3), ICC Statute.

[142] The ICC has jurisdiction only in relation to crimes committed after the entry into force of its statute, therefore, although Cambodia is a party to, and has ratified, the ICC Statute, the crimes committed during the relevant period are not within the ICC's temporal jurisdiction.

G. Concluding Remarks

Several institutions, including the Office of the Secretary-General of the United Nations, have expressed serious reservations regarding the Extraordinary Chambers, particularly in relation to its ability to meet international standards of procedural fairness and judicial independence and impartiality.[143] The lack of a majority of international judges and the super-majority formula, the presence of co-prosecutors and co-investigating judges with recourse to the Pre-Trial Chamber, and the 'basic' level of applicable procedural standards are all key concerns. Yet, the Extraordinary Chambers have the potential to bring the advantages associated with the existing hybrid tribunals. The deployment of international judges and personnel may help to improve the population's perception of the independence of the judiciary, while creating a small body of Cambodian judges and personnel that have had experience both in operating within an independent and impartial environment and in applying international legal standards. This will result in increased domestic capacity at the end of the tribunal's operation and in penetration of international norms into the wider domestic legal system.[144] Whether this potential will be realized depends on the good faith of the Cambodian government and the ability of the United Nations system to monitor the standards required by the UN Agreement and to enforce compliance through utilizing the guarantee provision if required. Thus at this juncture, we must simply wait until the tribunal commences its operations to assess the success or otherwise of this latest experiment in international justice.

There is an emerging consensus that, in future, domestic courts will be the primary mechanism for dispensing post-conflict justice.[145] This development has occurred due to the dissatisfaction amongst Member States with the performance of the ad hoc criminal tribunals, the realization that domestic judicial capacity must be developed, and the commencement of the jurisdiction of the ICC. The system of complimentarity introduced by the ICC Statute clearly leaves at least the initial responsibility for investigating and prosecuting offenders with the domestic courts of the state concerned. The role for hybrid tribunals within that system is uncertain. While the ICC does not have temporal jurisdiction regarding the crimes that are the subject matter of the Extraordinary Chambers, the tribunal could serve as a possible model for how this relationship might be managed in future.

Finally, the international community must assess the weaknesses of the Extraordinary Chambers against the alternative: continued impunity for Khmer Rouge offenders. In Cambodia, the importance placed by the international system on state sovereignty, the absence of a Chapter VII mandate and the intransigent stance of the Cambodian government preclude the attainment of 'perfect' justice. As national courts are increasingly evaluated against international standards of justice as part of the ICC's complementarity regime, the international community must assess whether imperfect justice is better than no justice at all.

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[143] Secretary-General's Report, para 30. See reports cited above, n 8.
[144] See Dickinson, above n 7.
[145] See, eg, W Burke-White 'A Community of Courts: Toward a System of International Criminal Law Enforcement', 24 Michigan Journal of International Law (2002) 1.

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