

## COMMENTARIES

### THE CAMBODIAN KHMER ROUGE TRIBUNAL: THE PROMISE OF A HYBRID TRIBUNAL

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*[The proposed Cambodian Khmer Rouge Tribunal, intended to prosecute former senior leaders of the Khmer Rouge for egregious human rights abuses committed during the era of Democratic Kampuchea, is the latest hybrid tribunal to be devised. The rocky path to its establishment highlights the tension between the unique social and political context of the tribunal and sustained international interest in ensuring those most responsible for these crimes are brought to justice at an international standard. Despite some identified problems and concerns, many of which are manageable, the hybrid model has real potential to deliver tangible, achievable and substantial benefits to Cambodia. This may hold promise for further hybrid tribunals to be created and adapted to suit the peculiar circumstances in other jurisdictions addressing gross violations of human rights, particularly in post-conflict societies.]*

#### CONTENTS

- I Introduction
- II Historical Overview of the Atrocities Committed during the Period of Democratic Kampuchea
- III History of Efforts to Establish a Khmer Rouge Tribunal
- IV Analysis of the Features of the Khmer Rouge Tribunal
- V The Promise of a Hybrid Tribunal for Cambodia
- VI Conclusion

#### I INTRODUCTION

The last decade has witnessed the evolution of various international mechanisms designed to address gross violations of human rights. These include purely international mechanisms such as the establishment of the International Criminal Court, and the creation of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. During this period a number of domestic mechanisms, such as the South African Truth and Reconciliation Commission and, more recently, the Iraqi Special Tribunal<sup>1</sup> have also been developed to address human rights atrocities. Another more

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<sup>1</sup> Article 6(b) of the *Statute of the Iraqi Special Tribunal* provides that the President of the Tribunal must appoint international advisers or observers in all areas of the Tribunal (except for administration) to provide assistance on international law, including the experience of similar tribunals, and to ensure that due process is observed. The President is also entitled to ask for assistance from the UN in appointing such advisers and observers.

recent development has been the creation of so-called 'hybrid tribunals'<sup>2</sup> in East Timor, Kosovo, Sierra Leone and most recently, Cambodia.

In regards to Cambodia, the unique nature and political context of the struggle to bring the perpetrators of human rights atrocities to justice is highlighted by a historical overview of the atrocities committed during the period of Democratic Kampuchea, and the contemporary position of the Khmer Rouge in Cambodian government and society. The rocky path to the formation of the Khmer Rouge Tribunal ('KRT')<sup>3</sup> reflects the way in which these circumstances have plagued domestic and international efforts to establish a credible mechanism to prosecute these perpetrators.

The KRT faces a number of legal and procedural challenges that some commentators consider may threaten its ability to deliver an appropriate forum for providing justice to the Cambodian people.<sup>4</sup> This commentary argues that, despite such concerns, the KRT is an innovative and creative mechanism to address egregious human rights abuses in circumstances where there are drawbacks to both purely international and purely domestic tribunals. The hybrid KRT model has the potential to deliver important legal capacity building and other benefits to Cambodia. This may hold promise for further hybrid tribunals to be tailored to suit the political circumstances in other jurisdictions in order to address gross violations of human rights.

## II HISTORICAL OVERVIEW OF THE ATROCITIES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA

The brutal history of the Communist Party of Kampuchea (which, until 1966, was known as the Workers Party of Kampuchea), popularly known as the Khmer Rouge, began 15 years before the group obtained control of Cambodia in 1975. Pol Pot, 'Brother Number One' of the Khmer Rouge,<sup>5</sup> served as a senior officer of the Workers' Party of Kampuchea from 1960 and became secretary in 1962. In the mid 1960s the Khmer Rouge moved its operations into the Cambodian jungle to evade government observers. The Khmer Rouge led a resistance against Prince Sihanouk and subsequently against General Lon Nol and his

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<sup>2</sup> Hybrid tribunals have been described as

third-generation criminal bodies; the Nuremberg and Tokyo Tribunals being the first, and the ICTY, ICTR and ICC being the second generation. The nature of these tribunals can be mixed. They can be a part of the judiciary of a given country or may be grafted onto the local judicial system. In all cases they are composed of international and local staff; including judges, prosecutor and support staff. International and national substantial and procedural laws may be applied by the tribunal.

Project on International Courts and Tribunals, *Hybrid Courts* (2004) <<http://www.pict-pcti.org/courts/hybrid.html>> at 1 October 2004.

<sup>3</sup> See Alan Sipress, 'Khmer Rouge Trials Stalled by Political Deadlock', *Washington Post Foreign Service* (Washington, United States), 5 May 2004, A24.

<sup>4</sup> These challenges include ensuring that the presiding judiciary and the staff are independent of the Cambodian government and that they exercise their roles with competence and impartiality. See Lawyers Committee for Human Rights, *A Court for Cambodia?* (2003) <[http://www.humanrightsfirst.org/international\\_justice/w\\_context/w\\_cont\\_05.htm](http://www.humanrightsfirst.org/international_justice/w_context/w_cont_05.htm)> at 1 October 2004.

<sup>5</sup> For an overview of Pol Pot's role in maintaining control of the Khmer Rouge for more than three decades, see Nate Thayer, 'Pol Pot Unmasked' (7 August 1997) 160(32) *Far Eastern Economic Review* (Hong Kong) 19.

pro-American, anti-communist regime known as the Khmer Republic.<sup>6</sup> The Khmer Rouge seized large amounts of territory within Cambodia between 1970 and 1975. On 17 April 1975, following the United States' withdrawal of assistance to the Lon Nol regime, the Khmer Rouge overthrew the Khmer Republic and seized control of Cambodia's capital, Phnom Penh. Within hours of seizing control, the Khmer Rouge began emptying Phnom Penh of its 2.5 million inhabitants. The forced evacuation of many other Cambodian cities and villages ensued. Pol Pot was announced as the Prime Minister following the resignation of Prince Sihanouk on 2 April 1976.

The Khmer Rouge's political ideology was based on a Maoist conception of achieving self-sufficiency through agrarian communism.<sup>7</sup> Upon seizing control of government, the Khmer Rouge sought to establish a new beginning for Cambodia, declaring it 'Democratic Kampuchea' and turning back the clock to 'Year Zero'. The Khmer Rouge's four-year plan, which aimed to treble the country's agricultural output within 12 months, required the abolition of all pre-existing economic, social and cultural institutions, expunging all foreign influences, and transforming the entire Cambodian population into an agrarian collective workforce to work at rapid speed to build up the country's economic strength.<sup>8</sup> The regime sought to eliminate all societal elements suspected of being hostile to the new order.

The United Nations *Report of the Group of Experts* reflected that 'the years of Democratic Kampuchea were marked by abuses of individual and group human rights on an immense and brutal scale'.<sup>9</sup> The atrocities committed by the Khmer Rouge during this period included systematic and widespread forced population movements to rural locations to facilitate the construction of a communal agricultural society; forced labour and inhumane living conditions aimed at fostering rapid economic development; and the extermination of certain groups considered enemies of the revolution. Such groups included officials of the former Khmer Republic, ethnic minorities (including ethnic Muslim Cham minorities, Chinese and Vietnamese minorities, native hill tribes and religious groups such as Buddhist monks), teachers, students and other persons believed to be 'educated', as well as purges within the Khmer Rouge itself.<sup>10</sup> During the era of Democratic Kampuchea an estimated 1.7 million Cambodians lost their lives.

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<sup>6</sup> General Lon Nol seized power from Prince Sihanouk in a 1970 coup that led to civil war. The US supported the Lon Nol regime until the Khmer Rouge seized power in 1975. See 'A Dictator's Rise and Fall', *New York Times* (New York, US), 17 April 1998, A15.

<sup>7</sup> See Thayer, above n 5, 20; Karl Jackson, 'The Ideology of Total Revolution' in Karl Jackson (ed), *Cambodia 1975-1978: Rendezvous with Death* (1989) 37.

<sup>8</sup> See *Report of the Group of Experts for Cambodia Established pursuant to General Assembly Resolution 52/135* (1999) [16] <<http://www1.umn.edu/humanrts/cambodia-1999.html>> at 1 October 2004 ('*Report of the Group of Experts*'). The UN Group of Experts was established pursuant to *Situation of Human Rights in Cambodia*, GA Res 52/135, UN GAOR, 53<sup>rd</sup> sess, 70<sup>th</sup> mtg, UN Doc A/RES/52/135 (1997).

<sup>9</sup> *Report of the Group of Experts*, above n 8, [16].

<sup>10</sup> See *ibid* [15]-[35]; Theresa Klosterman, 'The Feasibility and Proprietary of a Truth Commission in Cambodia: Too Little? Too Late?' (1998) 15 *Arizona Journal of International and Comparative Law* 833, 845; Mann Bunyanunda, 'The Khmer Rouge on Trial: Whither the Defense?' (2001) 74 *Southern California Law Review* 1581, 1593, for a discussion of the abuses committed by the Khmer Rouge during the era of Democratic Kampuchea.

This has been estimated as between 20 and 25 per cent of the Cambodian population at the time.<sup>11</sup>

Although the supreme command of the Khmer Rouge was based in Phnom Penh, the regime was organised into a highly hierarchical and stratified system in which control was divided between numerous zones and further subdivided into sectors. Until January 1976 the central regime in Phnom Penh set policy at a national level through directives issued to regional and local branches of the Khmer Rouge. In January 1976 the government of Democratic Kampuchea adopted a new *Constitution*<sup>12</sup> that codified the principles that had already been violently enforced since the 1975 revolution.<sup>13</sup> Following the adoption of the 1976 *Constitution*, the central command in Phnom Penh issued no further decrees and passed no laws to enforce its political order.

Although there is some debate amongst historians concerning the degree of influence exerted by the central Phnom Penh command over regional and local branches after 1976,<sup>14</sup> many accept that the central command did not *directly* control the workings of many of the regional and local sub-branches of the party.<sup>15</sup> However, it is generally accepted that the central command in Phnom Penh exercised a loose form of control over the hierarchical Khmer Rouge structure and purged the ranks of regional and local branches of any Khmer Rouge officials considered to be failing to implement its principles. Numerous documents obtained from Tuol Sleng prison in Phnom Penh reflect a large number of tortures and murders of Khmer Rouge members: it is estimated that four out of five people killed at Tuol Sleng prison were Khmer Rouge personnel.<sup>16</sup> These issues become important in the context of determining culpability, in regards to which members of the Khmer Rouge should be subject to the KRT's jurisdiction.

The era of Democratic Kampuchea ended in January 1979 when Vietnam launched an invasion of Cambodia following protracted border skirmishes and the defection of a number of ex-Khmer Rouge officials from the eastern region of Cambodia. However, due to the nature of the UN system of political representation, the Khmer Rouge was still the official representative government until 23 October 1991 when the UN Paris Conference on Cambodia signed the *Agreement on a Comprehensive Political Statement of the Cambodia Conflict*<sup>17</sup> and the *Agreement concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia*.<sup>18</sup> The 1991 Paris Peace Agreement established the UN Transitional Authority in

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<sup>11</sup> *Report of the Group of Experts*, above n 8, [35].

<sup>12</sup> *Constitution of Democratic Kampuchea*.

<sup>13</sup> See Roman Ortega-Cowan, 'Dubious Means to Final Solutions: Extracting Light from the Darkness of Ein Fuhrer and Brother Number One' (2003) 31 *Florida State University Law Review* 163, 182; and Bunyanunda, above n 10, 1586, for a discussion of the 1976 *Constitution of Democratic Kampuchea*.

<sup>14</sup> *Report of the Group of Experts*, above n 8, [17].

<sup>15</sup> See Bunyanunda, above n 10, 1586; Timothy Carney, 'The Organization of Power' in Karl Jackson (ed), *Cambodia 1975–1978: Rendezvous with Death* (1989) 79, 79, 85, 95.

<sup>16</sup> See Klosterman, above n 10, 849, for a discussion of the execution of Khmer Rouge officers accused of sedition or suspected of dissident ties.

<sup>17</sup> Opened for signature 23 October 1991, 1663 UNTS 27, 56 (entered into force 23 October 1991) ('1991 Paris Peace Agreement').

<sup>18</sup> Opened for signature 23 October 1991, 1663 UNTS 27, 249 (entered into force 23 October 1991).

Cambodia ('UNTAC') and democratic elections were subsequently held in 1993 under UNTAC's auspices. Since the overthrow of Democratic Kampuchea, various members of the Khmer Rouge have been reabsorbed into Cambodian society and government. In February 1999, the Cambodian government incorporated much of what was left of the Khmer Rouge into the Royal Cambodian Armed Forces. The principal political parties have close links with the Khmer Rouge, with some of their members having been drawn from the former ranks of the Khmer Rouge. This may in part explain the historical reticence of contemporary Cambodian governments to develop mechanisms to prosecute those responsible for the atrocities committed during the era of Democratic Kampuchea.

### III HISTORY OF EFFORTS TO ESTABLISH A KHMER ROUGE TRIBUNAL

In light of the preceding discussion, it is perhaps not surprising that the Cambodian government has been reluctant to bring to justice those responsible for the atrocities committed by the Khmer Rouge.

Acting in formal compliance with its obligation to prosecute persons committing genocide pursuant to the *Convention on the Prevention and Punishment of the Crime of Genocide*<sup>19</sup> — to which Cambodia was a party at all relevant times — on 15 July 1979, the People's Revolutionary Council of Kampuchea issued *Decree-Law No 01*<sup>20</sup> to establish a People's Revolutionary Tribunal to judge, in absentia, the crimes of genocide committed by the 'Pol Pot-Ieng Sary clique'.<sup>21</sup> This tribunal found that acts committed by the 'Pol Pot-Ieng Sary clique' constituted genocide as defined by the *Decree-Law*, held the two leaders individually criminally responsible, and sentenced them to death.<sup>22</sup> However, some commentators considered this to be a mere 'show trial' with no regard for due process.<sup>23</sup> This assessment is somewhat justified in light of the September 1996 amnesty granted by Prince Sihanouk to Ieng Sary — the Foreign Minister during the period of Democratic Kampuchea, who was never captured following the 1979 Trial — in respect of his conviction under the *Decree-Law*, and the absence of any explicit obligation to prosecute in the 1991

<sup>19</sup> Opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*').

<sup>20</sup> The *Decree-Law* contained an idiosyncratic definition of genocide to fit the particular fact situation, defining genocide as

the planned mass killing of innocent people, the forced evacuation of the inhabitants of towns and villages, the rounding up of the population and forcing them to labor in physically exhausting conditions, the banning of religious practices, the destruction of economic and cultural institutions and social relations.

Reproduced in *Letter dated 17 September 1979 from the Permanent Representative of Viet Nam to the United Nations addressed to the Secretary-General*, UN Doc A/34/491 (20 September 1979).

<sup>21</sup> See *Letter dated 4 October 1979 from the Permanent Representative of the Socialist Republic of Viet Nam to the United Nations addressed to the Secretary-General*, UN Doc A/C.3/34/1 (11 October 1979), containing the indictment transmitted by the Permanent Delegation of the Socialist Republic of Vietnam to the UN. All references to the indictment of the Pol Pot-Ieng Sary clique are hereafter referred to as the '1979 Trial'.

<sup>22</sup> See Stephen Marks, 'Forgetting "The Policies and Practices of the Past": Impunity in Cambodia' (1994) 18 *Fletcher Forum of World Affairs* 17, 123–4.

<sup>23</sup> See Hurst Hannum, 'International Law and Cambodian Genocide: The Sounds of Silence', (1989) 11 *Human Rights Quarterly* 82; *Report of the Group of Experts*, above n 8, [43].

*Paris Peace Agreement* and the UNTAC mandate.<sup>24</sup> The primary purpose of the 1979 Trial appears to have been to allow the Cambodian People's Party, still a communist organisation at that time, to distance itself from the Khmer Rouge.<sup>25</sup>

Ieng Sary's pardon prompted the UN Commission on Human Rights to pass a resolution in April 1997 requesting the Secretary-General to consider creating a KRT.<sup>26</sup> Thomas Hammarberg, the then UN Special Representative for Human Rights in Cambodia, subsequently met with the Cambodian government to discuss this resolution. On 21 June 1997, Hun Sen and Prince Norodom Ranariddh, the then co-Prime Ministers of Cambodia, wrote to the UN requesting assistance to establish a tribunal to prosecute former members of the Khmer Rouge responsible for committing human rights abuses.<sup>27</sup> This letter stated:

On behalf of the Cambodian Government and people, we write to ask you for the assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979 ... Cambodia does not have the resources or expertise to conduct this very important procedure. Thus, we believe it necessary to ask for the assistance of the United Nations. We are aware of similar efforts to respond to the genocide and crimes against humanity in Rwanda and the former Yugoslavia, and ask that similar assistance be given to Cambodia ... We hope that the United Nations and the international community can assist the Cambodian people in establishing the truth about this period and bringing those responsible to justice. Only in this way can the tragedy be brought to a full and final conclusion.<sup>28</sup>

However, in the 1997 Joint Letter, the Cambodian government ruled out a purely international tribunal as the appropriate forum for addressing the human rights violations that occurred during the rule of the Khmer Rouge, and contemplated a somewhat lesser role for UN involvement.

In July 1997, Hun Sen's Cambodian People's Party staged a coup to oust Prince Ranariddh's Funcipec party from the shaky coalition government that had been in place since the UN sponsored elections in 1993. After this coup, Hun Sen effectively took control of the domestic policy-making process concerning the KRT.<sup>29</sup> Although Cambodia's most prominent opposition party, the Sam Rainsy Party, consistently argued in favour of an international tribunal, Hun Sen's government has clung to the concept of a Cambodian-dominated KRT. On 18 February 1999, the UN Group of Experts delivered its recommendations for

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<sup>24</sup> The 1991 *Paris Peace Agreement*, above n 17, art 15(2)(a), contained an obligation on the Cambodian government 'to take effective measures to ensure that the policies and practices of the past shall never be allowed to return', to 'ensure respect for and observance of human rights and fundamental freedoms in Cambodia' and 'to adhere to relevant international human rights instruments'.

<sup>25</sup> See Daniel Donovan, 'Joint UN-Cambodia Efforts to Establish a Khmer Rouge Tribunal' (2003) 44 *Harvard International Law Journal* 551, 555, for a discussion of the 1979 Trial.

<sup>26</sup> *Situation of Human Rights in Cambodia*, CHR Res 1997/49, 53<sup>rd</sup> sess, 58<sup>th</sup> mtg, UN Doc E/CN.4/RES/1997/49 (11 April 1997).

<sup>27</sup> Letter from Hun Sen and Prince Norodom Ranariddh to UN, 21 June 1997 ('1997 Joint Letter').

<sup>28</sup> *Ibid*; Reproduced in *Report of the Group of Experts*, above n 8, [5].

<sup>29</sup> Prince Ranariddh was subsequently persuaded to assume the position of President of the National Assembly: *Ibid* [93].

the creation of a prosecution mechanism to the Secretary-General of the UN, Kofi Annan.<sup>30</sup> The recommendations revolved around cloning the existing ad hoc tribunals, the ICTY and the ICTR, to create a tribunal relevant to the Cambodian context, and seating it near, but not in, Cambodia. The UN Group of Experts recommended that personal jurisdiction was recommended to be limited to those most responsible for the serious violations of human rights committed during the era of Democratic Kampuchea, and temporal jurisdiction to be limited to the period of Khmer Rouge rule, from 17 April 1975 to 7 January 1979.

After a series of strained discussions with UN officials, Hun Sen wrote to Kofi Annan in September 1999 setting out three options for UN involvement in the KRT: provide a legal team and participate in a tribunal conducted in Cambodia's existing courts; provide a legal team to act only in an advisory capacity to the tribunal; or withdraw from the tribunal completely. This followed the 18 September 1999 statement by some former Khmer Rouge members, who were then part of the Cambodian government, that the establishment of a KRT would lead to further civil unrest. Although it is difficult to determine the precise impact this statement had on the attitude of the Cambodian government to the creation of the KRT, it appears to have had some effect on the government's approach to the creation of the KRT, as the negotiations between the UN and Cambodia 'limped along without ever coming to a resolution for the following two and a half years'.<sup>31</sup>

To break this deadlock, in October 1999 the US proposed the creation of a hybrid KRT largely based on the first option for UN involvement proposed by Hun Sen. On 8 February 2000, Kofi Annan stated that the UN would only agree to the establishment of a hybrid KRT if it had a majority of international judges and an independent international prosecutor, guaranteed the arrest by Cambodian authorities of all indictees on Cambodian soil, and provided that pardons would not bar prosecution.<sup>32</sup>

In January 2001, Hun Sen convened the Cambodian National Assembly to create the *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*.<sup>33</sup> This legislation was required to create a special tribunal within the existing Cambodian court structure. In effect, the 'Extraordinary Chambers' are the tribunal component of the KRT. The

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<sup>30</sup> Ibid [178]–[184]. See generally Craig Etcheson, 'Accountability Beckons during a Year of Worries for the Khmer Rouge Leadership' (2000) 6 *International Law Students Association Journal of International and Comparative Law* 507, for an overview of the findings of the UN Group of Experts.

<sup>31</sup> Donovan, above n 25, 560.

<sup>32</sup> Thomas Hammarberg, 'Efforts to Establish a Tribunal against the Khmer Rouge Leaders: Discussions between the Cambodian Government and the UN' (Paper presented at seminar organised by the Swedish Institute of International Affairs and the Swedish Committee for Vietnam, Laos and Cambodia on the Proposed Trial against Khmer Rouge Leaders Responsible for Crimes against Humanity, Stockholm, 29 May 2001) 26–7; Documentation Center of Cambodia, *History of the Negotiations on the Khmer Rouge Tribunal between the United Nations and Cambodia* (2002) <[http://www.dccm.org/Documents%20and%20Microfilm/History\\_of\\_the%20negotiations.htm](http://www.dccm.org/Documents%20and%20Microfilm/History_of_the%20negotiations.htm)> at 1 October 2004; Royal Government of Cambodia, *Chronology of the Developments relating to the KR Trial* (2002) <<http://www.ocm.gov.kh/chrono.htm>> at 1 October 2004.

<sup>33</sup> (2001) (Cambodia), available at <<http://www.cambodia.gov.kh/krt/english/law%20on%20establishment.htm>> at 1 October 2004 ('*Extraordinary Chambers Law*').

*Extraordinary Chambers Law* passed quickly through Parliament.<sup>34</sup> This law provides that the KRT should be established within the existing Cambodian court structure and target those most responsible for the relevant human rights violations, including violations of Cambodian law, the *Genocide Convention* and crimes against humanity. The law prescribes that so-called “supermajority” decisions in each chamber of the KRT are mandatory, requiring one vote beyond the total number of Cambodian judges sitting in the relevant chamber. This indicates recognition of the importance of impartial decisions delivered to international standards. The law provides that all courts are to be located in Phnom Penh.

Citing continuing concerns over the impartiality, independence and objectivity of the KRT as contemplated by the *Extraordinary Chambers Law*, the UN ceased discussions with the Cambodian government on 8 February 2002,<sup>35</sup> much to the dismay of many members of the international community, including Australia.<sup>36</sup> In response, a coalition of states presented a resolution to the UN, which was later passed by the General Assembly, requesting the Secretary-General to resume talks with the Cambodian government concerning the establishment of the KRT.<sup>37</sup> The *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*<sup>38</sup> — an agreement regulating the cooperation between the UN and the Cambodian government in connection with the KRT — was signed by both

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<sup>34</sup> The Cambodian Constitutional Court subsequently held that the death penalty provision contained in art 3 of the initial *Extraordinary Chambers Law* violated Cambodia’s *Constitution*, which prohibits the death penalty: Royal Government of Cambodia, *Constitutional Council Decision on the KR Law* (2001) <<http://www.cambodia.gov.kh/krt/pdfs/Const%20Council%20Res%20on%20KR%20Law%2012%20Feb%202001.pdf>> at 1 October 2004. Article 32 of the *Constitution of the Kingdom of Cambodia* states unambiguously that ‘there shall be no capital punishment’. As a result, a revised *Extraordinary Chambers Law*, containing a revised art 3, was placed before the National Assembly and passed on 11 July 2001. This was approved by the Senate on 23 July 2001 and the Constitutional Council on 7 August 2001. On 10 August 2001, King Norodom Sihanouk signed the revised, and final, *Extraordinary Chambers Law*, and it was promulgated. Article 38 of the revised *Extraordinary Chambers Law* provides that the maximum penalty under the KRT is life imprisonment.

<sup>35</sup> See Hans Corell, UN Legal Counsel, ‘Negotiations between the UN and Cambodia regarding the Establishment of the Court to Try Khmer Rouge Leaders’ (Press Release, 8 February 2002) <<http://www.un.org/News/dh/infocus/cambodia/corell-brief.htm>> at 1 October 2004.

<sup>36</sup> See Alexander Downer, Minister for Foreign Affairs, Australia, ‘Khmer Rouge Tribunal Should Not be Abandoned’ (Press Release, 11 February 2002) <[http://www.foreignminister.gov.au/releases/2002/fa020\\_02.html](http://www.foreignminister.gov.au/releases/2002/fa020_02.html)> at 1 October 2004.

<sup>37</sup> *Khmer Rouge Trials*, GA Res 57/228, UN GAOR, 57<sup>th</sup> sess, 77<sup>th</sup> plen mtg, Agenda Item 109(b), UN Doc A/RES/57/228A (2002).

<sup>38</sup> *Khmer Rouge Trials*, GA Res 57/228 B, UN GAOR, 57<sup>th</sup> sess, 85<sup>th</sup> plen mtg, Agenda Item 109(b), Annex, UN Doc A/RES/57/228B (2003) (*KRT Agreement*).

parties on 6 June 2003.<sup>39</sup> The features of the KRT contemplated by the *KRT Agreement* are discussed below in Part IV of this commentary.

On 16 July 2003, the Cambodian People's Party submitted a letter signed by Hun Sen to the Cambodian National Assembly, urging the Parliament to expedite the ratification of the *KRT Agreement*. The *KRT Agreement* was formally submitted to the National Assembly on 17 July 2003. In response to this letter, on 18 July 2003, Prince Norodom Ranariddh, President of the National Assembly, stated that the *KRT Agreement* would be approved shortly. Following these developments, the UN sent two delegations to Cambodia under the supervision of Karsten Herrel — the Coordinator of the UN Assistance to the KRT — to consider and report on the administration of the KRT as well as its likely cost.<sup>40</sup>

On 4 October 2004, the National Assembly ratified the *KRT Agreement*.<sup>41</sup> Ratification had been delayed, mainly because Cambodia had no functioning legislature during the year-long deadlock over the formation of government in the wake of the 2003 elections.<sup>42</sup> All 107 members of the 123-seat National Assembly who were present voted in favour of the *KRT Agreement*, including members of the opposition Sam Rainsy Party which has historically favoured a purely international tribunal.<sup>43</sup> At the time of writing, the *KRT Agreement* remained to be approved by the Senate and the King, although these are likely to be mere formalities.<sup>44</sup> The National Assembly has also approved amendments to the *Extraordinary Chambers Law*, including formally abolishing the Appeals Court Chamber, discussed in Part IV of this commentary, and, as contemplated by the *KRT Agreement*, explicitly empowering the KRT to retrospectively determine the scope of pardons granted to members of the Khmer Rouge.<sup>45</sup> This also requires the signature of the Senate and the King. Although it is not known how quickly the KRT will commence its operations, the path to it becoming operational is clearly paved.

<sup>39</sup> Royal Government of Cambodia, *Remarks by His Excellency Sok An, Senior Minister, Minister in Charge of the Office of the Council of Ministers, Chairman of the Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders at the Signing Ceremony of the Agreement between the United Nations and the Royal Government of Cambodia* (2003) <<http://www.cambodia.gov.kh/krt/pdfs/Remarks%20by%20Sok%20An%20at%20Signing%20Ceremony%2006-06-03.pdf>> at 1 October 2004.

<sup>40</sup> UN, Offices of the Spokesman for the Secretary-General and the Spokeswoman for the General Assembly President, 'Daily Press Briefing' (Press Release, 5 December 2003) <<http://www.un.org/News/briefings/docs/2003/db120503.doc.htm>> at 1 October 2004.

<sup>41</sup> See 'Cambodian National Assembly Ratifies Law on Khmer Rouge Tribunal', *Agence France Presse Newsfeed*, 6:25am GMT, 4 October 2004; Ker Munthit, 'Cambodia's Legislature Approves Amendments to Khmer Rouge Tribunal Law', *The Associated Press Newsfeed*, 5 October 2004.

<sup>42</sup> *Constitution of the Kingdom of Cambodia* art 82 requires a political party to obtain two-thirds of seats in the National Assembly in order to obtain government. On 15 July 2004, the stalemate regarding the formation of government ended with the National Assembly approving a new coalition government comprising Hun Sen's Cambodian People's Party and Prince Norodom Ranariddh's Funcinpec Party.

<sup>43</sup> See Munthit, above n 41.

<sup>44</sup> See generally Verghese Matthews, 'Trial for Khmer Rouge Tribunal', *Straits Times* (Singapore), 7 October 2004 <<http://straitstimes.asia1.com.sg/commentary/story/0,4386,276500,00.html>> at 7 October 2004.

<sup>45</sup> Munthit, above n 41.

## IV ANALYSIS OF THE FEATURES OF THE KHMER ROUGE TRIBUNAL

The *KRT Agreement* is heavily based on the principles established in the *Extraordinary Chambers Law*, discussed in Part III of this commentary.<sup>46</sup> However, there are some differences and potential points of conflict between the two documents, which will be discussed below. As outlined in Part III of this commentary, the *Extraordinary Chambers Law* creates the KRT within the existing Cambodian court structure, whilst the stated purpose of the *KRT Agreement* is

to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.<sup>47</sup>

Although, as discussed in Part II of this commentary, the lack of direct, written orders from the Khmer Rouge ‘command centre’ in Phnom Penh after January 1976 makes it difficult to identify individual perpetrators as being responsible for specific atrocities committed, experts have been able to chart a general structure of the Khmer Rouge leadership.<sup>48</sup> Furthermore, many former low-ranking members of the Khmer Rouge have been reabsorbed into Cambodian society, meaning the prosecution of such people may have the potential to spawn civil unrest. Therefore, the *KRT Agreement* limits the KRT’s jurisdiction to only the senior members of the Khmer Rouge between 1975 and 1979. For most of the Democratic Kampuchea era, the central command in Phnom Penh consisted of a high-ranking leadership core, constituting a Central Committee, with a Standing Committee led by General Secretary Pol Pot, who died under house arrest in the Cambodian jungle in April 1998. Accordingly, those who are most likely to stand trial initially are the living former members of the Standing Committee: Ieng Sary, Khieu Samphan, Ta Mok and Nuon Chea, together with Kang Khek Ieu, the former warden of Tuol Sleng prison in Phnom Penh. In all, between 20 and 30 former Khmer Rouge leaders are likely to stand trial.<sup>49</sup>

The *KRT Agreement* provides that the KRT will only consist of two chambers — the Trial Chamber and the Supreme Court Chamber — rather than the three chambers originally proposed by the *Extraordinary Chambers Law*. The three-layered model contemplated by the original *Extraordinary Chambers Law* reflected the general structure of the Cambodian court system. The National

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<sup>46</sup> According to the *KRT Agreement*, above n 38, art 2.2, the *Extraordinary Chambers Law* will implement the *KRT Agreement* in Cambodia.

<sup>47</sup> *KRT Agreement*, above n 38, art 1.

<sup>48</sup> A number of records have proved useful in this exercise, including the records at the Tuol Sleng prison in Phnom Penh, the Santebal archives (which may be particularly valuable as a record of the Khmer Rouge’s military and security activities and which may connect senior Khmer Rouge leaders to specific crimes), and the work performed by the Cambodian Genocide Program at Yale University, including the establishment of an independent research institute — the ‘Documentation Center of Cambodia’ — in Phnom Penh: Yale University, *Cambodian Genocide Program: The Documentation Centre of Cambodia* (2004) <<http://www.yale.edu/cgp/dccam.html>> at 1 October 2004.

<sup>49</sup> *Report of the Group of Experts*, above n 8, [110].

Assembly recently approved legislation formally abolishing the Appeals Court Chamber in the *Extraordinary Chambers Law* to reflect the tribunal structure contemplated by the *KRT Agreement*.<sup>50</sup> The removal of the top-level Appeal Court Chamber is designed to make the tribunal process less cumbersome and more cost-effective, particularly as the *Extraordinary Chambers Law* originally envisaged a total of nine judges sitting on the Appeal Court Chamber. The *KRT Agreement* provides that the Trial Chamber will consist of three Cambodian judges and two international judges, and the Supreme Court Chamber will comprise four Cambodian judges and three international judges.<sup>51</sup> The two chambers shall attempt to achieve unanimity in their decisions but, if this cannot be achieved, they will apply the ‘supermajority’ vote suggested by the US, in which decisions require one vote beyond the total number of Cambodian judges sitting in the relevant chamber.<sup>52</sup> This is a complicated procedure which may lead to unintended stalemates in decision-making.<sup>53</sup> This is particularly so given that art 7 of the *KRT Agreement* does not contemplate how the KRT is to function should a ‘supermajority’ decision not be reached on matters requiring a final decision, other than requiring that any minority opinion to be published in the chamber’s judgment.<sup>54</sup> There are to be co-investigating judges, consisting of one Cambodian and one international judge, responsible for the conduct of investigations.<sup>55</sup> There shall also be co-prosecutors, consisting of one Cambodian and one international prosecutor, responsible for the conduct of prosecutions.<sup>56</sup>

The *KRT Agreement* provides that Cambodia shall not request an amnesty or pardon for any person who may be investigated for, or convicted of, crimes by the KRT.<sup>57</sup> Ieng Sary is not explicitly mentioned. The *KRT Agreement* does not definitively determine the status of the 1996 pardon granted by Prince Sihanouk to Ieng Sary, but provides that ‘the scope of this pardon is a matter to be decided by the Extraordinary Chambers’.<sup>58</sup> Legislation recently approved by the National Assembly explicitly empowers the KRT to determine the scope of this pardon.<sup>59</sup> Although the KRT clearly has the authority to determine the scope of the pardon granted to Ieng Sary, the failure to explicitly and comprehensively resolve this significant amnesty issue has been criticised,<sup>60</sup> and the complicated

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<sup>50</sup> Munthit, above n 41.

<sup>51</sup> *KRT Agreement*, above n 38, art 3.

<sup>52</sup> *Ibid* art 4.

<sup>53</sup> See, eg, Suzannah Linton, ‘Comments on the 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’ (2003) 40 *Searching for the Truth, Magazine of the Documentation Center of Cambodia* <[http://www.dccam.org/Article%20and%20Translation/draft\\_agreement\\_between\\_UN\\_and\\_RCG.htm](http://www.dccam.org/Article%20and%20Translation/draft_agreement_between_UN_and_RCG.htm)> at 1 October 2004.

<sup>54</sup> *KRT Agreement*, above n 38, art 4(2).

<sup>55</sup> *Ibid* art 5(1).

<sup>56</sup> *Ibid* art 6(1).

<sup>57</sup> *Ibid* art 11(1).

<sup>58</sup> *Ibid* art 11(2).

<sup>59</sup> Munthit, above n 41.

<sup>60</sup> Human Rights Watch, *Serious Flaws: Why the UN General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement* (2003) <<http://www.hrw.org/backgrounder/asia/cambodia040303-bck.htm>> at 1 October 2004.

decision-making procedures of the KRT may not make a decision on this issue any easier.<sup>61</sup>

The principle of *nullum crimen sine lege*<sup>62</sup> provides that only the laws in force as at 17 April 1975 — the day that the Khmer Rouge seized control of government — may be sources of substantive law for which persons may be prosecuted by the KRT. However, according to art 9 of the *KRT Agreement*, the subject-matter jurisdiction of the KRT extends to the crime of genocide as defined in the *Genocide Convention*, crimes against humanity as defined in the *Rome Statute of the International Criminal Court*,<sup>63</sup> grave breaches of the 1949 *Geneva Conventions*<sup>64</sup> (in other words, crimes commonly known as ‘war crimes’ and ‘breaches of international humanitarian law’) and other crimes defined in ch II of the *Extraordinary Chambers Law*<sup>65</sup> (which include the crimes of homicide, torture and religious persecution set out in the 1956 *Code Pénal et Lois Pénales* (Cambodia)).<sup>66</sup> Consequently, art 9 could potentially contravene the doctrine of *nullum crimen sine lege* by invoking the ICC’s definition of ‘crimes against humanity’ which, given that the *Rome Statute* was adopted on 1 July 2002, was effected significantly later than 17 April 1975.<sup>67</sup> There is nothing in the *KRT Agreement* to suggest that the UN and the Cambodian government intended to supersede the definition of ‘crimes against humanity’

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<sup>61</sup> See Linton, above n 53.

<sup>62</sup> This principle means that ‘there is no crime without law’. This principle has been adopted in art 15 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Further, a discussion of this principle in the context of the Khmer Rouge is also found in the *Report of the Group of Experts*, above n 8, [85].

<sup>63</sup> Opened for signature 17 July 1998, 37 ILM 999 (1998) (entered into force 1 July 2002) (*‘Rome Statute’*).

<sup>64</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31, art 3 (entered into force 21 October 1950) (*‘Geneva Convention I’*); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85, art 3 (entered into force 21 October 1950) (*‘Geneva Convention II’*); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135, art 3 (entered into force 21 October 1950) (*‘Geneva Convention III’*); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287, art 3 (entered into force 21 October 1950) (*‘Geneva Convention IV’*). The four conventions are collectively referred to as the ‘1949 Geneva Conventions’.

<sup>65</sup> *KRT Agreement*, above n 38, art 9.

<sup>66</sup> The 1956 *Code Pénal* does not mention international offences such as ‘genocide’, ‘crimes against humanity’ or ‘war crimes’. The question of whether the 1956 *Code Pénal* permits direct prosecution of individuals for such ‘international’ crimes in the absence of codification of those crimes is yet to be resolved: See *Report of the Group of Experts*, above n 8, [87].

<sup>67</sup> However, to some extent, the ICC’s definition can be regarded as codifying public international law regarding ‘crimes against humanity’. For a discussion of the *Rome Statute*’s definition of ‘crimes against humanity’, including pre-1998 developments in the concept under public international law, see Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (2<sup>nd</sup> ed, 2002) 357–61.

contained in art 5 of the *Extraordinary Chambers Law*.<sup>68</sup> Presumably, the reference to the ICC's definition of 'crimes against humanity' is designed to ensure that no nexus between a 'crime against humanity' and armed conflict, discussed below, is required to bring a prosecution for a 'crime against humanity' — this nexus not being included in the ICC's definition following various debates between international jurists on its efficacy. The reference in art 9 of the *KRT Agreement* to the ICC's definition of 'crimes against humanity' could well be a typographical error, particularly in light of the fact that art 2 of the *KRT Agreement* recognises that the KRT has subject-matter jurisdiction consistent with that set out in the *Extraordinary Chambers Law*.<sup>69</sup> The *Extraordinary Chambers Law* also provides that the KRT has personal jurisdiction over the senior leaders of the Khmer Rouge during the relevant period.<sup>70</sup>

The *KRT Agreement* does not explicitly define or clarify the relationship between it and the *Extraordinary Chambers Law*. This may be particularly problematic with respect to legal status and hierarchy. Although the *KRT Agreement* mildly describes itself as an instrument regulating the cooperation between the UN and the Cambodian government with respect to the KRT, it clearly goes much further than this given its many substantive provisions dealing with the operation and administration of the KRT. Further, as discussed below, this issue has significant consequences for the interpretation and meaning to be given to each of the instruments. The Cambodian government appears to have recognised this and attempted to give legal effect to the *KRT Agreement* through the recent legislation passed by the National Assembly. The specific relationship between the two instruments may require further clarification.<sup>71</sup>

There has been considerable debate as to whether many of the human rights atrocities committed during the Democratic Kampuchea period constitute 'genocide'.<sup>72</sup> Article 4 of the *Extraordinary Chambers Law*, which is consistent with the *KRT Agreement*, provides that the KRT has the power to bring to trial all 'suspects'<sup>73</sup> who may have committed crimes of genocide during the era of

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<sup>68</sup> See *Extraordinary Chambers Law* art 5:

Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds such as: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political; racial and religious grounds; other inhumane acts.

<sup>69</sup> *KRT Agreement*, above n 38, art 2(1).

<sup>70</sup> *Extraordinary Chambers Law* art 2(1).

<sup>71</sup> *KRT Agreement*, above n 38, art 2(3), provides that 'in case amendments to the *Law on the Establishment of the Extraordinary Chambers* are deemed necessary, such amendments shall always be preceded by consultations between the parties'.

<sup>72</sup> See in particular the debate between William Schabas, 'Problems of International Codification — Were the Atrocities in Cambodia and Kosovo Genocide?' (2001) 35 *New England Law Review* 287, 292; and Jason Abrams, 'The Atrocities in Cambodia and Kosovo: Observations on the Codification of Genocide' (2001) 35 *New England Law Review* 303, 306. See also *Report of the Group of Experts*, above n 8, [65]; Bunyanunda, above n 10, 1601; Steven Ratner, 'Why Only War Crimes? De-linking Human Rights Offenses from Armed Conflict' (1999) 3 *Hofstra Law and Policy Symposium* 75.

<sup>73</sup> *Extraordinary Chambers Law* art 2, which defines 'Suspects' as those senior leaders of the Khmer Rouge most responsible for the atrocities committed. This is consistent with the *KRT Agreement*, above n 38, art 2(1).

Democratic Kampuchea. The definitions of ‘genocide’ in both the *Extraordinary Chambers Law* and the *KRT Agreement* are the same as that under the *Genocide Convention*, which includes acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Accordingly, ‘genocide’ may only be committed against any or all of these four categories of groups. Acts committed against other groups — identifiable on the basis of political belief, economic or educational status, or social class — do not constitute genocide. As outlined in Part I of this commentary, many of the atrocities committed by the Khmer Rouge were committed against the Cambodian people as a whole. Some groups, however, were considered to be enemies of the revolution, including ethnic Muslim Cham minorities and religious groups such as Buddhist monks, teachers, students and other ‘educated’ Cambodians.<sup>74</sup> On this basis, it may be difficult to categorise many of the crimes committed by the Khmer Rouge as ‘genocide’ — because many victims of these atrocities were identified by social or economic standing — except perhaps for those crimes committed against identifiable national, ethnical, racial or religious groups such as the ethnic Muslim Cham minority and Buddhist monks.<sup>75</sup>

International law defines ‘crimes against humanity’ to include acts committed against a wider range of groups than those recognised by the definition of genocide. Perpetrators of such crimes require no intent to commit the crime, but rather knowledge of a widespread or systematic attack against any civilian population. The requisite ‘knowledge’ can constitute actual subjective knowledge by the perpetrators, or so-called ‘constructive knowledge’<sup>76</sup> by those in power who acquiesced to an attack. As noted by the UN Group of Experts:

International law has long recognized that persons are responsible for acts even if they did not directly commit them. This principle has appeared in various instruments that declare individuals responsible if they plan, instigate, order, aid or abet or conspire to commit the crimes ... Military commanders and civilian leaders are criminally responsible in the obvious case where they order atrocities and they are also generally responsible if they knew or should have known that atrocities were being or about to be committed by their subordinates and they failed to prevent, stop or punish them.<sup>77</sup>

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<sup>74</sup> *Report of the Group of Experts*, above n 8, [26]–[28].

<sup>75</sup> *Ibid* [63]–[65]; Bunyanunda, above n 10, 1607–8.

<sup>76</sup> Under the common law and international law, the doctrine of constructive knowledge is akin to imputed knowledge. The doctrine generally provides that, unlike actual subjective knowledge, a person may be held to have the requisite degree of knowledge where a reasonable person in the same circumstances would have been so aware. In other words, a person may be held responsible not for what he or she actually knows but what they should have known: See discussion in *Report of Group of Experts*, above n 8, fn 43.

<sup>77</sup> See *Report of the Group of Experts*, above n 8, [80]–[81]. See also *Extraordinary Chambers Law* art 29, which states that ‘any Suspect who planned, instigated, ordered, aided and abetted, or committed, the crimes referred to [above] shall be individually responsible for the crime’ and also that

the fact that any of the acts referred to [above] were committed by a subordinate does not relieve the superior or personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators.

This concept is particularly important in the KRT context because, as noted in Part II of this commentary, the senior leaders of the Khmer Rouge in Phnom Penh may be regarded as exercising some loose form of control over regional and local branches in the absence of specific directions. This loose control, as a result of which many of the senior leaders of the Khmer Rouge may not have had actual subjective knowledge of many of the acts committed by regional or local branches, may be sufficient to establish the requisite degree of ‘knowledge’ for prosecution for a ‘crime against humanity’. However, it will still be for the KRT to determine whether a ‘crime against humanity’ requires a nexus with armed conflict. According to William Schabas:

At some point between 1945 and 1998 the *nexus* or connection between crimes against humanity and armed conflict disappeared. But when? Khmer Rouge defendants will argue that this took place after 1979, and that they cannot therefore be prosecuted for crimes against humanity absent proof of an armed conflict in Cambodia between 1975 and 1979.<sup>78</sup>

The crime of genocide does not face this difficulty, because art 1 of the *Genocide Convention* provides that genocide can be committed in times of peace or war.

Despite the relatively broad subject-matter jurisdiction of the KRT, some observers have criticised the *KRT Agreement* — and, for that matter, the *Extraordinary Chambers Law* — for failing to specify clearly and consistently the applicable procedures to be followed by the KRT, which could impact on due process.<sup>79</sup> This failure may result in different procedures being applied in different cases, making it difficult to establish precedent from the decisions of the KRT. One potential point of tension between the international and Cambodian personnel is the extent to which international procedures — such as the law drafted by UNTAC<sup>80</sup> — or domestic Cambodian procedures<sup>81</sup> should

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<sup>78</sup> William Schabas, ‘Should Khmer Rouge Leaders be Prosecuted for Genocide or Crimes against Humanity?’ (2001) 22 *Searching for the Truth, Magazine of the Documentation Center of Cambodia* (emphasis in original) <[http://www.dccam.org/Article%20and%20Translation/Debate\\_on\\_genocide.htm](http://www.dccam.org/Article%20and%20Translation/Debate_on_genocide.htm)> at 1 October 2004.

<sup>79</sup> *KRT Agreement*, above n 38, art 12, states that the

procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules at the international level.

The *KRT Agreement* does not specify which international criminal laws and procedures at the international level should be considered in this event. See Human Rights Watch, *Serious Flaws*, above n 60, 6–7.

<sup>80</sup> *Provisions relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period* (1992) (Cambodia), available at <<http://www.cdpcambodia.org/untac.asp>> at 1 October 2004. This was adopted by the Supreme National Council, a body constituted under UNTAC in Cambodia in 1992–93.

<sup>81</sup> *Law on Criminal Procedure* (1993) (Cambodia), available at <[http://www.bigpond.com.kh/Council\\_of\\_Jurists/Penal/pen002g.htm](http://www.bigpond.com.kh/Council_of_Jurists/Penal/pen002g.htm)> at 1 October 2004. The Cambodian personnel may also seek to draw from the *Code de Procédure Pénale* (France) and the *Constitution of the Kingdom of Cambodia*.

apply.<sup>82</sup> It is a shame that, unlike the ICTY, the ICTR and the ICC, neither the *KRT Agreement* nor the *Extraordinary Chambers Law* provides any real guidance on this issue. As Suzannah Linton has noted in respect of the Sierra Leone hybrid tribunal:

The UN was able to agree with the Sierra Leone Government that the ICTR rules of procedure and evidence would apply *mutatis mutandis* to the proceedings at the Special Court but the judges would be able to adapt them as necessary.<sup>83</sup>

In addition, although the *KRT Agreement* and the *Extraordinary Chambers Law* provide some detail on the role of the Office of Administration in connection with the KRT, there is no clear responsibility for matters such as witness protection, protection of the accused, security, filing and service issues, provision of public information, and other procedural and administrative matters. Leaving important matters such as these unresolved is unhelpful.

Although not contemplated by the *KRT Agreement*, the *Extraordinary Chambers Law* provides that '[t]he fact that a Suspect acted pursuant to an order of the government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility'.<sup>84</sup> Accordingly, although the question of what defences may be raised has not been clarified, following orders is clearly not an acceptable defence. The extent to which other defences recognised by international criminal law, such as duress or coercion based on imminent threat or serious bodily harm, mental defect and self-defence, may be utilised remains to be seen.<sup>85</sup>

The *KRT Agreement's* most significant departure from the *Extraordinary Chambers Law* is art 7, which establishes procedures for resolving differences between the co-investigating judges or the co-prosecutors. The procedure requires the submission of written statements to the director, who then calls a Pre-Trial Chamber consisting of five judges comprised of three judges appointed by the Cambodian Supreme Council of the Magistracy and two by the Secretary-General of the UN.<sup>86</sup> In practice this will consist of three Cambodian and two international judges. The 'supermajority' decision-making rule applies to this Pre-Trial Chamber and, in the absence of a 'supermajority', the relevant investigation or prosecution shall proceed. This is a cumbersome and complicated procedure.

Other concerns regarding the KRT that have been expressed by non-government organisations include the potential for political interference by the Cambodian government, the perceived low level of competence of the Cambodian judiciary, and reports of systematic judicial corruption. These fears are encapsulated in the concerns expressed by Kofi Annan on 31 March 2003 in

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<sup>82</sup> As noted by the UN Group of Experts, Cambodian criminal procedure is currently in a state of flux. For a full description of the current status of Cambodian criminal procedure, see *Report of the Group of Experts*, above n 8, [125].

<sup>83</sup> See Linton, above n 53.

<sup>84</sup> *Extraordinary Chambers Law* art 29.

<sup>85</sup> See *Report of the Group of Experts*, above n 8, [82]; *Rome Statute*, above n 63, arts 31–3; *Prosecutor v Erdemovic (Appeals Chamber Judgment)* Case No IT-96-22 (7 October 1997).

<sup>86</sup> *KRT Agreement*, above n 38, art 7.

respect to the draft *KRT Agreement*:

I cannot but recall the reports of my Special Rapporteur for human rights in Cambodia, who has consistently found there to be little respect on the part of the Cambodian courts for the most elementary features of the right to a fair trial. I consequently remain concerned that these important provisions of the draft agreement might not be fully respected by the Extraordinary Chambers and that established international standards of justice, fairness and due process might therefore not be ensured. Furthermore, in light of the clear finding of the General Assembly in its resolution 57/225 that there are continued problems relating to the rule of law and functioning of the judiciary in Cambodia resulting from interference by the executive with the independence of the judiciary, I would very much have preferred that the draft agreement provide for both of the Extraordinary Chambers to be composed of a majority of international judges.<sup>87</sup>

Despite the explicit references in the 1997 Joint Letter to the ICTY and the ICTR, the features of the KRT contemplated by the *KRT Agreement* depart to an appreciable extent from those adopted for the ICTY and ICTR. This is due in large part to the intransigence of the Cambodian government. Part of the answer to this issue may be found in the changes to the domestic Cambodian political arena since the 1997 Joint Letter, including the coup by Hun Sen's Cambodian People's Party. Further answers may be found in the peculiar and unique nature of the reintegration of the Khmer Rouge into Cambodian society and government, and the resultant domestic Cambodian concerns regarding sovereignty and domestic control of the process designed to deliver justice to its own citizens. Human Rights Watch has criticised the KRT on the basis that the 'Group of Interested States'<sup>88</sup> has pressured the UN to make unprincipled concessions on the basis that the UN must capitulate since the Cambodian government's position represents the last chance for justice. In the words of Human Rights Watch, 'politics and expediency appear to have won out over principles'.<sup>89</sup>

## V THE PROMISE OF A HYBRID TRIBUNAL FOR CAMBODIA

The form of KRT contemplated by the *Extraordinary Chambers Law* and the *KRT Agreement* is a hybrid tribunal established in Phnom Penh under Cambodian domestic law but heavily influenced by, and subject to the key involvement of, international personnel. In order to provide a meaningful process of accountability, responses to atrocities such as those committed by the Khmer Rouge must reflect the peculiar social, cultural and historical culture of the country in which they occurred. In the words of Dianne Orentlicher 'there cannot be a one-size fits all response to crimes against human dignity'.<sup>90</sup> In the words of

<sup>87</sup> Kofi Annan, *Report of the Secretary-General on Khmer Rouge Trials*, 57<sup>th</sup> sess, Agenda Item 109(b), [28], UN Doc A/57/769 (31 March 2003).

<sup>88</sup> The 'Group of Interested States' includes Australia, France, the United Kingdom, Canada, the US, the European Union, South Korea, Japan and a number of ASEAN nations: Royal Government of Cambodia, *The Khmer Rouge Trial Task Force: Chronology of the Developments relating to the KR Trial* <<http://www.cambodia.gov.kh/krt/english/chrono.htm>> at 1 October 2004.

<sup>89</sup> Human Rights Watch, *Serious Flaws*, above n 60.

<sup>90</sup> Dianne Orentlicher, 'International Criminal Law and the Cambodian Killing Fields' (1997) 3 *International Law Students Association Journal of International and Comparative Law* 705, 705.

the UN Group of Experts, the 'unique agglomeration of political forces renders the Cambodian context impervious to simple solutions'.<sup>91</sup>

In their report, the UN Group of Experts rejected the concept of a hybrid tribunal as an appropriate mechanism for prosecuting the perpetrators of the atrocities committed during the era of Democratic Kampuchea.<sup>92</sup> In their view, such a hybrid body would not address their concerns:

based on our assessment of the situation in Cambodia ... even such a process would be subject to manipulation by political forces in Cambodia. The possibilities for undue influence are manifold, including in the context of the organic statute of the court and its subsequent implementation, and the role of Cambodians in positions on the bench and on prosecutorial, defence and investigative staffs.<sup>93</sup>

Nevertheless, in May 1999, following protracted discussions with the Cambodian government, Thomas Hammarberg proposed the establishment of a hybrid tribunal. This was justified in light of the potential educative effect and contribution to the overall reform of the Cambodian judiciary as well as the reduced ability of the Cambodian government to control and manipulate the process.<sup>94</sup>

The hybrid tribunal model has been developed in a number of recent contexts including Kosovo, East Timor and Sierra Leone.<sup>95</sup> The Kosovo hybrid tribunal was established as a mechanism to assist the ICTY cope with the sheer number of cases concerning gross human rights abuses, whereas the hybrid tribunals for East Timor and Sierra Leone were created to fill the vacuum of post-conflict societies 'where no politically viable full-fledged international tribunal exists'.<sup>96</sup> However, as these tribunals were largely been created on an ad hoc 'on the ground' basis rather than being the product of grand institutional design, they have not been subject to much sustained commentary or analysis. Indeed, the very hybrid nature of these tribunals leaves them open to challenge by both those who reject international intervention in the prosecution of domestic human rights abuses, and by those who envisage international mechanisms as the most appropriate method for resolving such violations. As the criticism directed toward the KRT by both sides of this debate indicates, hybrid tribunals may be 'squeezed from both sides'.<sup>97</sup>

However, the hybrid model reflected in the *KRT Agreement* holds significant promise for Cambodia. The peculiar nature of the domestic political situation in Cambodia and the reabsorption of former members of the Khmer Rouge into Cambodian society and government means that a hybrid KRT has the potential to provide an appropriate forum for addressing the atrocities committed during the

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<sup>91</sup> *Report of the Group of Experts*, above n 8, [95].

<sup>92</sup> *Ibid* [137]–[138].

<sup>93</sup> *Ibid* [137].

<sup>94</sup> For a discussion of the background to the KRT, including the efforts of Thomas Hammarberg to establish a hybrid tribunal, see Human Rights Watch, *Serious Flaws*, above n 60.

<sup>95</sup> For a historical overview of the development of hybrid courts and their operation in Kosovo, East Timor and Sierra Leone, see Laura Dickinson, 'The Promise of Hybrid Courts' (2003) 97 *American Journal of International Law* 295.

<sup>96</sup> *Ibid* 295.

<sup>97</sup> *Ibid* 296.

Democratic Kampuchea era. Indeed, the hybrid nature of the KRT respects Cambodian sovereignty while facilitating some degree of international involvement to ensure that impartial and objective justice is delivered to an international standard.

On the whole, most of the problems discussed in Part IV of this commentary are manageable. Many could now sensibly be dealt with by way of further good faith negotiations between the UN and the Cambodian government. It is important that expectations about the KRT be realistic. Given this hybrid structure has been agreed upon after protracted and heated international negotiations, surely the most prudent way forward would be to make the most of it. The opportunity to prosecute senior members of the Khmer Rouge for human rights atrocities may not come again.

As to the perceived lack of competence of the Cambodian judiciary, the involvement of Cambodian jurists in the KRT has significant potential to increase legal capacity by training future Cambodian personnel. Given the decades of civil conflict, and the targeting of ‘educated’ persons by the Khmer Rouge, it is perhaps not surprising that there is a lack of qualified legal professionals in Cambodia. An important byproduct of the KRT may be to increase the numbers of lawyers and judges trained in Cambodian domestic law and legal procedures to an acceptable international standard. I consider this to be a tangible, achievable and substantial benefit. The Cambodian Genocide Program, based at Yale University, has already conducted legal training courses in Cambodia.<sup>98</sup> The potential for legal capacity building will of course depend on who the judges, prosecutors and other personnel (such as the staff of the Office of Administration) are, and the extent to which an environment that fosters learning and legal capacity building develops. The provisions of the *KRT Agreement*, which require judges and prosecutors to be persons of high moral character, impartiality and integrity — with the requisite qualifications<sup>99</sup> — go some way towards ensuring that the quality of personnel is conducive to creating such an environment.

These concerns regarding the perceived lack of competence of the Cambodian judiciary and the threat of political interference by the Cambodian government are not unfounded.<sup>100</sup> However, it is perhaps unfair to criticise Cambodian judges of political bias and susceptibility to political interference in advance. Suggesting that Cambodian judges and officials cannot be trusted to conduct

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<sup>98</sup> Yale University, Cambodia Genocide Program, *Introduction* (2004) <<http://www.yale.edu/cgp/cgpintro.html>> at 1 October 2004; Office of Public Affairs at Yale University, ‘Luce Foundation Funds Cambodian Genocide Project’ (Press Release, 14 November 1996) <<http://www.yale.edu/opa/newsr/96-11-14-02.all.html>> at 1 October 2004.

<sup>99</sup> *KRT Agreement*, above n 38, arts 5(2), 6(2).

<sup>100</sup> See *Report of the Group of Experts*, above n 8, [129], for an analysis of the threat of political interference in the Cambodian judicial system:

Criminal justice receives only a fraction of a per cent of the national budget, with judges paid as little as \$20 per month. As a result, despite the presence of persons of character in parts of the judiciary, it is widely believed that judges can easily be bought by defendants or victims. The vast majority of judges are also closely associated with the Cambodian People’s Party. Powerful elements in the Government such as important political figures, the security apparatus and the Ministry of Justice are widely believed to exert overt and covert influence over the decisions of investigating judges and trial courts.

quality proceedings worthy of the losses sustained by the Cambodian people is an unconstructive attitude in regards to the development of a post-conflict society and risks being perceived as a hegemonic and neo-imperialist. As noted by John Ciorciari:

By announcing that the Cambodian judiciary is unreliable and taking all possible measures to minimize its room for manoeuvre, critics of the proposed tribunal would deny the Cambodian government an opportunity to contribute meaningfully to the search for justice.<sup>101</sup>

It is important that the Cambodian people have the opportunity to see that their legal system, judiciary and government have the capacity to deliver real justice. Effective outreach programmes will be particularly important in this regard. This will help ensure that, in the future, Cambodians and the international public (including foreign investors) regard the Cambodian judiciary and legal system as stable, trustworthy, competent, credible and reliable. Despite the involvement of the UN and international personnel in the KRT, the future of the Cambodian legal system ultimately lies in the hands of domestic Cambodian judges and court personnel. Any opportunity to train them to an international standard, and therefore increase their legitimacy in the eyes of the Cambodian people and the international public, must be welcomed. The culture of teamwork and legal training that may become part of the operation of the KRT has the potential to contribute to the development of a competent Cambodian judiciary. This will have lasting benefits for the ongoing development of the Cambodian legal system. It is important that the international community, particularly the Group of Interested States, now contributes to funding the KRT to an appropriate extent.<sup>102</sup>

The hybrid operation of the KRT may assist in quelling Cambodian concerns in respect of intrusion into their sovereignty and increase the legitimacy of the KRT in the eyes of the Cambodian people by forcing the new government, some of whom have close links to the Khmer Rouge, to confront and respond to the atrocities committed. The international influence may help to raise the legitimacy of the KRT for the Cambodian people by seeking to ensure that due process is observed and that the operations of the KRT are as impartial and objective as possible. It is particularly important to note in this regard that the UN has sought to ensure the KRT will meet international standards, despite its heavy Cambodian influence. For example, art 28 of the *KRT Agreement* provides that the UN may withdraw its participation in the KRT (including by ceasing to provide financial or other assistance) should the Cambodian government change the structure or organisation of the KRT or otherwise cause it to function in a

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<sup>101</sup> John Ciorciari, 'The Khmer Rouge Trials: Now, Never, or Somewhere in between?' (Special English Edition, April 2003) *Searching for the Truth, Magazine of the Documentation Center of Cambodia* 41, 42 <[http://www.dccam.org/Magazine/Special%20Issue/page\\_41.pdf](http://www.dccam.org/Magazine/Special%20Issue/page_41.pdf)> at 1 October 2004.

<sup>102</sup> Australia recently doubled its financial commitment to the KRT, bringing its total contribution to approximately A\$3 million over three years: See Alexander Downer, Minister for Foreign Affairs, Australia, 'Further Australian Contribution to Khmer Rouge Tribunal' (Press Release, 19 June 2003) <[http://www.foreignminister.gov.au/releases/2003/fa070\\_03.html](http://www.foreignminister.gov.au/releases/2003/fa070_03.html)> at 1 October 2004; Alexander Downer, Minister for Foreign Affairs, Australia, 'Australia Welcomes New Cambodian Government' (Press Release, 20 July 2004) <[http://www.foreignminister.gov.au/releases/2004/fa0108\\_04.html](http://www.foreignminister.gov.au/releases/2004/fa0108_04.html)> at 1 October 2004.

manner that does not conform with the terms of the *KRT Agreement*. The ‘supermajority’ decision-making process is also designed to assist in this regard, as is the international involvement in the Office of Administration. From my recent discussions with a number of Cambodians, it is my firm view that the Cambodian people desire a quality process led by Cambodians, which is conducted in accordance with the highest legal, ethical and administrative standards, and not a mere legal spectacle.

Moreover, the hybrid KRT also has the potential to further develop the penetration and advancement of international human rights norms.<sup>103</sup> The involvement of international personnel in the KRT will increase the prospects for cross-fertilisation of domestic Cambodian and international human rights norms. Of course, the extent to which this will happen will again depend on the quality of personnel involved, although some measures, discussed above, have been put in place to address this. Rather than being a structural problem of the KRT, the ability to attract suitably-qualified professional personnel may have more to do with resource constraints. In any event, the international judges appointed to the KRT are likely to have knowledge of the relevant international norms and jurisprudence, including that of the ICTY and the ICTR. The cross-fertilisation of these ideas through the hybrid model may well encourage Cambodian judges to develop these norms in future domestic Cambodian court cases and jurisprudence.

Although the KRT, like many hybrid tribunals, has been subjected to criticisms by both sides of the debate concerning domestic–international criminal tribunals, a hybrid KRT has the potential to deliver significant, and perhaps unexpected, positive and lasting benefits to Cambodia. These benefits should not be forgotten in the continued quest for legal, technical and administrative finesse and specificity for the KRT.

## VI CONCLUSION

Despite some identified problems and concerns, this commentary submits that the KRT is an innovative and creative mechanism to address egregious human rights abuses in circumstances where there are drawbacks of both purely international and domestic tribunals at a practical Cambodian domestic level. Further, as many of these concerns are manageable and can sensibly be dealt with, there is a real potential for the KRT to deliver tangible legal capacity building and other benefits to Cambodia which would arguably not accrue in either a purely international or domestic tribunal. The hybrid KRT reflects the social, cultural and historical context of the human rights atrocities committed by the Khmer Rouge in Cambodia during the era of Democratic Kampuchea and has the potential to provide a meaningful process of accountability that is acutely important in a transitional post-conflict context. This may hold promise for further hybrid tribunals to be adapted to suit particular political circumstances in other jurisdictions attempting to address gross violations of human rights.

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<sup>103</sup> See generally Dickinson, above n 95.