



FACULTY OF LAW  
University of Lund

Johanna Lindblad

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into the Extraordinary Chambers  
in the Courts of Cambodia

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Ilaria Bottiglierio

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# Summary

The topic of this thesis is the upcoming proceedings of the Extraordinary Chambers in the Courts of Cambodia. These Extraordinary Chambers take their place in international justice as part of a third generation, so-called internationalized or hybrid courts, which combine the needs for international involvement in international justice mechanisms and the need for domestic involvement in transitional justice. As the Extraordinary Chambers were established through an agreement between the United Nations and the Royal Government of Cambodia in March 2003, a complex system of balancing the international-domestic control was put into place.

The capacity of structure of the Extraordinary Chambers to ensure a fair trial and respect of international standards of justice has since received various criticisms. This thesis does not aim to reach any conclusions on whether the Extraordinary Chambers will indeed fulfil this aspect of its mission. Rather, as the Extraordinary Chambers are presently initiating their work, this thesis will constitute a case study, examining the various international standards of justice which the Extraordinary Chambers, like any other court, will need to respect, and how these standards are being implemented into the structure and regulations of the Extraordinary Chambers.

In doing so, the author studies international treaties such as the International Covenant on Civil and Political Rights, and the General Comments of the Human Rights Committee, as well as non-binding documents such as the UN Principles on Detention and the UN Basic Principles on the Independence of the Judiciary. Furthermore, the author uses the experiences and jurisdictions from the ad hoc tribunals and other internationalized courts to establish what international justice standards exist, and to compare their implementation in different situations.

The situation of the Extraordinary Chambers in the Courts of Cambodia is unique in that more than 25 years have passed since the atrocities committed during the Khmer Rouge reign. Consequently, part of the problem for the court proceedings will relate to the age of defendants, victims and witnesses, yet attempting to remember and provide justice for the events taking place so long ago. In spite of problems concerning the independence of the Cambodian judiciary, the proceedings of the Extraordinary Chambers are a last chance of justice, and a step for reconciliation, for the people of Cambodia.

# Preface

‘...For the United Nations, ‘justice’ is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant. The international community has worked to articulate collectively the substantive and procedural requirements for the administration of justice for more than half a century.’<sup>1</sup>

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<sup>1</sup> *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, S/2004/616 p. 4 para 7.

# Abbreviations

ASEAN	Association of Southeast Asian Nations
ASP	Assembly of States Parties
CEC	Cambodian Extraordinary Chambers
DK	Democratic Kampuchea
EC or ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economical, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IMT	International Military Tribunal in Nuremberg
KRT	Khmer Rouge Trial
NGO	Non-Governmental Organization
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
SRSR	Special Representative of the Secretary-General of the United Nations
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Administration for East Timor

# 1 Introduction

## 1.1 Subject and Aim

As the Extraordinary Chambers in the Courts of Cambodia are being set up, discussions continue on the likeliness that the EC will comply with international standards of justice. The aim of this thesis is not to conclude on the capacity of the EC to conduct fair trials, but rather to take a step back. What are the international standards the Extraordinary Chambers will need to comply with? How are these being incorporated into the rules regulating the Court's proceedings?

### 1.1.1 Cambodia and the Khmer Rouge – Historical Background

The Khmer Rouge forces entered Phnom Penh on 17 April 1975, establishing the state of Democratic Kampuchea (DK). The Khmer Rouge were headed by Pol Pot, or 'Brother Number One', formerly known as Saloth Sar, who joined the communist ranks while being a student in Paris in the early 1950s. The Khmer Rouge reign ended when, on 7 January 1979, Vietnamese troops entered Phnom Penh.<sup>2</sup> By then, 1.7 million Cambodians had lost their lives.<sup>3</sup> Following their coming into power, 2 million people were forced out of the city into the countryside, and categorized 'new people'; as opposed to the 'old people', the pre-Khmer Rouge rural population of Cambodia. This was part of the Khmer Rouge strategy to erase the country's economic, cultural and social structures, and isolate the population from foreign influences.<sup>4</sup>

Except for a show trial in 1979 of Pol Pot and Ieng Sary, the political climate in Cambodia did not lead to any accountability for the Khmer Rouge in the decades after their removal from power.<sup>5</sup> Only in 1997, the United Nations received a request from Prince Norodom Ranariddh, then-First Prime Minister of Cambodia, and Hun Sen, then-second Prime Minister of Cambodia, asking for assistance in bringing the persons responsible to justice.<sup>6</sup> This would be the official start of a long-lasting negotiation process between the Royal Government of Cambodia and the United Nations in agreeing upon the conditions under which such assistance could be given. Initially, the Secretary-General issued a mandate for a Group of Experts to 'evaluate the existing evidence and propose further

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<sup>2</sup> Kiernan, Introduction - Conflict in Cambodia 1945-2002, 34:4 *Critical Asian Studies* (2002), pp. 483-486.

<sup>3</sup> *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, A/53/850, S/1999/231, Annex, para 35.* The number has been debated by scholars, and estimated from 1.5 to up to 3 million deaths during the Khmer Rouge regime.

<sup>4</sup> *Ibid*, para 16 and 19.

<sup>5</sup> *Ibid*, para 43.

<sup>6</sup> *Ibid*, para 5.

measures, as a means of bringing about national reconciliation, strengthening democracy, and addressing the issue of individual responsibility’<sup>7</sup>. The Group of Experts visited Cambodia, and issued a 1999 Report, recommending the establishment of an ad hoc international tribunal, preferably outside of Cambodia.<sup>8</sup> Subsequently, the negotiations were prolonged by the domestic situation in Cambodia as well as difficulties between the two parties in agreeing upon the conditions of a tribunal, where the Cambodian side wished to retain national control of the court and the UN negotiators were concerned with the possibility of ensuring fair trials.

In March 2003, an agreement was finally reached between the UN and the Royal Government of Cambodia on establishing the Extraordinary Chambers in the Courts of Cambodia, a court within the Cambodian justice system with UN participation, to bring former Khmer Rouge leaders to trial. The Agreement ‘recognizes that the Extraordinary Chambers have subject-matter jurisdiction consistent with that set forth in “the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea” (...) as adopted and amended by the Cambodian Legislature under the Constitution of Cambodia’<sup>9</sup>. Consequently, the Extraordinary Chambers in the Courts of Cambodia have two sets of regulations stipulating their establishment; the Agreement between the Cambodian Government and the UN, and 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>10</sup>

## 1.1.2 Internationalized Courts and Tribunals

Following the establishments of the ad hoc tribunals for former Yugoslavia and Rwanda, there were still situations in the world where accountability was required for international crimes. These could not be addressed by the International Criminal Court, and the establishment of any new ad hoc tribunals were not likely. These were deemed too costly to become a favoured solution, and were also sometimes problematic due to their placement away from the scenes of the atrocities, thus being seen as detaching themselves from the process of reconciliation, and the domestic realities and traditions of the country in question. In this context, a third generation of international criminal courts emerged, the so-called ‘hybrid’, ‘mixed’, or ‘internationalized’ courts. All three terms are used in academic writings, however, the author has chosen to use the term ‘internationalized criminal courts’ for the purposes of this thesis. Although internationalized to some extent could also be used to describe the ad hoc tribunals, for instance,

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<sup>7</sup> GA Resolution 52/135 of 12 December 1997, para. 16.

<sup>8</sup> *Report of the Group of Experts*, para 179.

<sup>9</sup> Article 2 of the Draft Agreement.

<sup>10</sup> Article 47 bis new of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (hereinafter ‘the Special Law’); Article 2 of the Draft Agreement between the United Nations and the Royal Government of Cambodia of 17 March 2003 (hereinafter ‘the Agreement’).



as all international criminal bodies do possess internationalized elements, this author finds it appropriate to emphasize the internationalized elements of the third generation courts, as a reminder of their equally national elements. The reader should here be reminded that the different internationalized criminal courts, do differ in the extent to which, and how, their international and national elements are structured.<sup>11</sup>

Much of modern international criminal law emerged from the International Military Tribunals in Nuremberg and Tokyo after WW2. International standards of justice have been integrated into the statutes and rules of procedure of the already existing international criminal tribunals. Therefore, it will be useful to look at how this has been done for the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone.

The case law of international human rights tribunals is useful in establishing the concepts of international standards of justice. However, these deal with issues in national courts. Therefore, the jurisprudence of the ad hoc tribunals is of particular interest to see how the standards can be applied in international criminal justice.<sup>12</sup> Where ad hoc tribunals are imposed over a state's sovereignty in crime justice, as part of their legitimacy 'the adherence to internationally recognized human rights standards has been held as necessary for ICTY and ICTR'<sup>13</sup>. The Special Court for Sierra Leone has emphasized in *Prosecutor v. Brima et. al.* the importance of ICTY and ICTR jurisprudence to its work, in spite of there being no formal requirement for it to follow the ad hoc tribunals' precedents.<sup>14</sup>

The first internationalized tribunal to emerge was East Timor's Special Panels for Serious Crimes, established by the UN Transitional Administration for East Timor, UNTAET, issuing its first indictment in the *Lospalos* case in December 2000.<sup>15</sup> The statute and jurisprudence of the Special Court for Sierra Leone deserves attention, especially in the context of this thesis, as being regarded as the most successful internationalized criminal court so far. This thesis will therefore look more closely at the

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<sup>11</sup> For a discussion on the emergence of internationalized criminal court, and the terminology choices, see e.g. Dickinson, 'The Promise of Hybrid Courts', 97:2 *The American Journal of International Law* (2003) pp. 295-310; Cassese, 'The Role of Internationalized Criminal Courts and tribunals in the Fight Against International Criminality', in Romano et al (eds), *Internationalized Criminal Courts and Tribunals* (2004) pp. 3-13; as well as Preface by the editors in Romano et al (eds), *Internationalized Criminal Courts and Tribunals* (2004).

<sup>12</sup> See, *inter alia*, Schabas, *An Introduction to the International Criminal Court*, (2004) p. 100.

<sup>13</sup> Friman, p. 323.

<sup>14</sup> Negri, *The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure*, (2005), p. 551-552.

<sup>15</sup> Linton, *Accountability in East Timor, Indonesia and Cambodia* (2005) p 2.

Sierra Leone experience than the ones in East Timor<sup>16</sup> and Kosovo, which have attracted various criticisms. Like the Extraordinary Chambers, the Special Court for Sierra Leone was established by an agreement with the United Nations. Yet, in Sierra Leone, the international aspect is stronger, and the rules of the Special Court have clear links with the ICTR.

Internationalized courts do not suffer from being an intrusive institution to the same extent as the ad hoc tribunals and the ICC, as they are rather to be seen as a part of the national court system, with international features. Still, the involvement of the United Nations makes the argument that adherence to international standards of justice remains necessary, or the United Nations would not be acting in accordance with the aim in its Charter to promote and encourage respect for human rights and fundamental freedoms for all.<sup>17</sup> The emergence of Rome Statute of the International Criminal Court is of particular interest, as it must also be seen, to some extent, as codification of the international justice standards a majority of states at the time of drafting could agree upon.

## **1.2 Method and Material**

The author will rely upon the Agreement between the United Nations and the Royal Government of Cambodia, and the Special Law establishing the Extraordinary Chambers in the Courts of Cambodia in the discussions concerning the provisions of the Extraordinary Chambers. Furtheron, the author will cite some Cambodian domestic laws as well as international treaties relating to the provisions of the Extraordinary Chambers as well as to establish international standards of justice.

Moreover, international standards of justice have been identified by analysing international legal documents and jurisdiction. Throughout the thesis, academic writing will be used to bring the discussions further.

As there is to date no jurisdiction from the Extraordinary Chambers themselves, the method has rather been a comparison between the provisions set up for the Extraordinary Chambers, and provisions already set up in similar contexts as well as experiences made in those contexts.

## **1.3 Structure and Delimitations**

This thesis has already started out with the above section, giving a short background note on the Khmer Rouge regime and the emergence of internationalized criminal courts. Much more could be said on both these topics; however, such details were not deemed necessary by the author for the following discussion.

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<sup>16</sup> Although Timor-Leste was admitted as the 191<sup>st</sup> member of the United Nations in 2002, the old name of East Timor shall be used here for ease of reference.

<sup>17</sup> Friman, p. 323-324.

In Chapter 2, the jurisdiction and the structure of the Extraordinary Chambers in the Courts of Cambodia will be examined. This will further give the framework of the circumstances under which the Chambers will be functioning.

Thereafter, Chapter 3 will contain a discussion of international standards of justice. The chapter will examine what these standards are, and how they have been interpreted in an international context. This will include examining international treaties and non-binding documents, as well as jurisdiction from the ad hoc tribunals and other internationalized courts. Moreover, the examination of each standard will conclude with a discussion on how this standard is being incorporated into the Extraordinary Chambers.

Finally, in Chapter 4, a number of conclusions will be provided on the topic.

As the purpose of the thesis is to examine how the international standards of justice are being incorporated into the Extraordinary Chambers in the Courts of Cambodia, discussions here will not conclude on whether the Extraordinary Chambers will abide by said standards. While the Chambers are only starting their work now, this thesis is rather to be seen as a case study on how international justice standards are being implemented in an internationalized context, and on certain difficulties that may arise in that implementation.

# 2 The Extraordinary Chambers in the Courts of Cambodia

## 2.1 Legal Basis

The Cambodian Government passed the Special Law in 2001, causing the Secretary-General to withdraw from negotiations. Urged by the General Assembly to resume negotiations,<sup>18</sup> in March 2003 the United Nations and the Cambodian Government reached a draft agreement, which as stated above was implemented into Cambodian law through the Special Law. The Agreement was to enter into force when ‘both parties have notified each other in writing that the legal requirements for entry into force have been complied with’<sup>19</sup>. The Secretary General of the United Nations announced on 29 April 2005 that the Agreement had entered into force.<sup>20</sup> In case of conflict, the Agreement takes priority over the Special Law, in that the Special Law will need to be amended so as not to contradict the Agreement. This has already taken place once, as the Special Law was first passed prior to the entry into force of the Agreement, while containing some provisions which differed from the corresponding provisions in the Agreement.

Following the entry into force of the Agreement, the Cambodian government has established a Khmer Rouge Trial Task Force, assigned to prepare the trial in cooperation with foreign legal experts. The Extraordinary Chambers began their work officially on 10 July 2006, after the judges were sworn in on 3 July in Phnom Penh. One of the first steps for the newly sworn in judges would be to meet and commence discussions on the working methods of the Court, including the Rules of Procedure ‘that will need to be adopted to fill in all the remaining gaps in the legislation’<sup>21</sup>.

## 2.2 Jurisdiction

This section will discuss the temporal, personal and subject matter jurisdictions of the Extraordinary Chambers, as set out in the Special Law and the Agreement. In accordance with the principle of *nullum crimen sine lege* the jurisdiction of the Extraordinary Chambers must remain within the

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<sup>18</sup> UN Doc A/75/228.

<sup>19</sup> Art. 32 the Agreement.

<sup>20</sup> The Cambodian Government provided the UN with an Instrument of Ratification of the Agreement on 2 November 2004, and provided the UN with the notification according to Art. 32 of the Agreement on 16 November 2004; Report of the Secretary-General on Khmer Rouge trials UN Doc A/59/432/Add.1. The UN notified Hun Sen, the Prime Minister of Cambodia, on 29 April 2005 that the Agreement had entered into force; ‘*Khmer Rouge Trial Gets Final Go Ahead*’ 25 International Justice TRIBUNE (9-22 May 2005), p.2.

<sup>21</sup> Interview with co-investigating judge Marcel Lemonde, *Focus on the Essentials*, 50 International Justice TRIBUNE, (10-23 July 2006), p. 1-2.

crimes that were crimes under international and national law when the Khmer Rouge seized power in 1975.<sup>22</sup>

*Nullum crimen sine lege* is defined as “[t]he principle that conduct does not constitute crime unless it has previously been declared to be so by the law; it is sometimes known as the principle of legality”<sup>23</sup>. The principle, whose Latin translates into ‘no crime without a law’, prohibits the prosecution of acts not considered as crimes when committed, as a due process safeguard. Prohibiting retroactivity of crimes and punishments, *nullum crimen nulla poena sine lege* is regarded to be a fundamental principle of international human rights law<sup>24</sup>, and one of the recognized principles and norms of international law.<sup>25</sup> According to the standard regarding retroactive crime set by the European Court of Human Rights, the crime must be foreseeable by the offender.<sup>26</sup> The principle of *nullum crimen sine lege* has been incorporated into Article 22 and 23 of the Rome Statute, laying down the principle of legality as a fundamental aspect to prohibiting retroactivity and introducing a time limit to the jurisdiction of the ICC.<sup>27</sup>

There is no equivalent to *nullum crimen sine lege* as regards procedural law. In contrast, the accused shall be entitled to the procedural protection at the time of trial, as found in international as well as domestic law. The procedural law for the Extraordinary Chambers will be the procedural provisions in the Special Law, as well as the Cambodian Criminal Procedure Code, both of which have received criticism for not providing adequate safeguards.<sup>28</sup> The Cambodian government is currently in the method of implementing a modern criminal procedure code, although it is unclear whether this process will be finalized in time for the new code to have an impact on the procedures in the Extraordinary Chambers.

## 2.2.1 Temporal Jurisdiction

The Extraordinary Chambers of Cambodia will have *ratione temporis* jurisdiction of crimes that were committed during the period from 17 April 1975 to 6 January 1979<sup>29</sup>, corresponding to the main period of Democratic Kampuchea and the reign of the Khmer Rouge.<sup>30</sup> Due to the extent of the

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<sup>22</sup> *Report of the Group of Experts*, para 60.

<sup>23</sup> As defined in the Oxford Online Dictionary of Law.

<sup>24</sup> Schabas (2004) p. 70.

<sup>25</sup> Friman, p. 308.

<sup>26</sup> *SW v. United Kingdom*, Series A, No 335-B, 22 November 1995, paras. 35-36. *See also* Schabas (2004) p. 71.

<sup>27</sup> Colitti, ‘Geographical and Jurisdictional Reach of ICC: Gaps in the International Criminal Justice System and a Role for Internationalized Bodies’, in Romano et al (eds), *Internationalized Criminal Courts and Tribunals*, (2004), p. 424.

<sup>28</sup> Friman, p. 327.

<sup>29</sup> Arts 1 to 8 of the Special Law; Preambular paras 1 and 3, Arts 1, 5 and 6 of the Agreement.

<sup>30</sup> Meijer ‘The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal’ in Romano et al (eds), *Internationalized Criminal Courts and Tribunals*, (2004) p. 211.

Cambodian conflict, some of the crimes within the subject matter jurisdiction of the Extraordinary Chambers were committed before as well as after this period. Still, the Extraordinary Chambers will not be competent to try crimes other than the ones committed between 17 April 1975 and 6 January 1979. This limitation was made bearing in mind the practical aspects of the work of the Extraordinary Chambers, allowing them to focus on certain crimes during a certain period in time.<sup>31</sup> Moreover, the temporal jurisdiction limitation means events such as the US air bombings over Cambodia 1970 – 1975, killing one million Cambodians, will not make a case before the Extraordinary Chambers.<sup>32</sup>

## 2.2.2 Personal Jurisdiction

The Extraordinary Chambers will have *ratione personae* jurisdiction over ‘senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations’<sup>33</sup>. The Extraordinary Chambers will need to consider how to interpret the seniority and who has been the most responsible.<sup>34</sup> The Group of Experts noted that ‘[t]he list of top governmental and party officials may not correspond with the list of persons most responsible for serious violations of human rights in that certain top governmental leaders may have been removed from knowledge and decision-making; and others not in the chart of senior leaders may have played a significant role in the atrocities’<sup>35</sup>.

In April 1988, Pol Pot died, close to the Cambodian Thai border.<sup>36</sup> Since 1999, two Khmer rouge leaders have been arrested and awaiting trial; military commander Ta Mok, a.k.a. ‘The Butcher’, and commandant of the Tuol Sleng prison, Kang Kek Ieu.<sup>37</sup> The recent death of Ta Mok on 21 July 2006, due to poor health at the age of 80, shows the risks of trials with ageing defendants are very real.<sup>38</sup> Only Kang Kek Ieu remains in detention until further arrests warrants are issued by the Extraordinary Chambers.

## 2.2.3 Subject Matter Jurisdiction

The Extraordinary Chambers will have *ratione materiae* jurisdiction over crimes under the 1956 Penal Code of Cambodia, genocide, crimes against humanity, and grave breaches of the 1949 Geneva Conventions.<sup>39</sup> Furthermore, the Chambers may exercise jurisdiction over the destruction of

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<sup>31</sup> Ibid, p. 212.

<sup>32</sup> Beigbeder (2002) p. 178.

<sup>33</sup> Arts 1 and 2 of the Special Law; Preambular para 3, Arts 1, 2, 5 and 6 of the Agreement.

<sup>34</sup> Meijer, p. 214.

<sup>35</sup> *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, A/53/850, S/1999/231, Annex p. 32 para 109.*

<sup>36</sup> Kiernan, p. 487.

<sup>37</sup> Beigbeder (2002) p. 176.

<sup>38</sup> ‘*Khmer Rouge ‘butcher’ Ta Mok dies*’ news.bbc.co.uk, 21 July 2006. See also ‘*Ta Mok will not stand trial*’, International Justice TRIBUNE no 51, 24 July - 3 September 2006, p.

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<sup>39</sup> Arts 3-6 of the Special Law; Art 9 of the Agreement.

cultural property during armed conflict under the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, as well as of crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations.<sup>40</sup> The Agreement only specifies that the crimes falling within the jurisdiction of the Extraordinary Chambers are genocide as defined in the 1948 Genocide Convention, crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court, grave breaches of the 1949 Geneva Conventions and ‘such other crimes as defined in Chapter II of the [Special Law]’<sup>41</sup>. There is, however, some discrepancy between the descriptions of the respective crimes in the Special Law and the treaties referred to in the Agreement.<sup>42</sup>

### 2.2.3.1 Genocide

Cambodia has been party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide<sup>43</sup> since 1951 when the Convention entered into force.<sup>44</sup> Thus, there is no *nullum crimen sine lege* obstacle to including the crime of genocide in the competence of the Extraordinary Chambers. It is, however, worthwhile to compare the definition of genocide in the Genocide Convention to that in the Special Law, as well as to look at the applicability of the genocide regulations to the acts committed by the Khmer Rouge.

In order for an act to be defined as genocide, Article 2 of the Genocide Convention requires *i*) an act committed with the intent to destroy, in whole or in part, one of these groups as such, *ii*) an act against a national, ethnical, racial or religious group, *iii*) killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction; imposing measures intended to prevent births; or forcibly transferring children from the group.<sup>45</sup>

Article 4 of the Special Law states that the Extraordinary Chambers have competence over ‘the crimes of genocide as defined in the [1948 Genocide Convention]’<sup>46</sup> within the temporal jurisdiction of the Extraordinary Chambers. According to the Special Law, the punishable acts are attempt, conspiracy and participation.

There seems to be little doubt that the acts required by the Genocide Convention and the Special Law do indeed correspond to acts committed by the Khmer Rouge. It will, however, be more complicated for the Court to determine whether the Khmer Rouge had the required intent, and whether the acts were carried out against the groups protected by the Convention.<sup>47</sup>

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<sup>40</sup> Arts 7-8 of the Special Law.

<sup>41</sup> Art. 9 of the Agreement.

<sup>42</sup> Meijer, p. 212.

<sup>43</sup> Convention on the Prevention and Punishment of the Crime of Genocide, A/RES/26A (III), 9 December 1948, in force 12 January 1951 (hereinafter ‘the Genocide Convention’).

<sup>44</sup> *Report of the Group of Experts*, para 61.

<sup>45</sup> Art. 2, the 1948 Genocide Convention.

<sup>46</sup> Art. 4 of the Special Law.

<sup>47</sup> *Report of the Group of Experts*, para 62.

The groups, which have been suggested could come in question, would primarily be the Vietnamese, the Muslim Cham and the Buddhist monk hood populations,<sup>48</sup> and the more controversial suggestion of auto genocide of the Cambodian population in general<sup>49</sup>. The Khmer Rouge atrocities are occasionally referred to as an example of auto-genocide, falling under genocide against a national group.<sup>50</sup> The Group of Experts noted that ‘whether the Khmer Rouge committed genocide with respect to part of the Khmer national group turns on complex interpretative issues, especially concerning the Khmer Rouge’s intent with respect to its non-minority-group victims’<sup>51</sup>, without expressing an opinion on the matter.<sup>52</sup>

Political groups are not included in the Genocide Convention definition, which some observers have argued leads to the inapplicability of the Convention in situations such as Cambodia, due to the political nature of the Khmer Rouge atrocities. Others, however, including the International Law Commission, maintain that the political group concept is too instable and difficult to define for it to be appropriate to include in the Genocide Convention. The acts committed against such a group can instead be prosecuted as crimes against humanity, where it is included in the customary law conception of crimes against humanity.<sup>53</sup>

Moreover, the Khmer Rouge atrocities have been used by scholars as an example in favour of including social and economic groups in the genocide definition.<sup>54</sup> In fact, the Cambodian Government included ‘wealth, level of education, sociological environment (urban/rural), allegiance to a political system or regime (old people/new people), social class or social category (merchant, civil servant etc.)’ in a 1999 Draft Law on the Repression of Crimes of Genocide and Crimes Against Humanity. However, the UN negotiators, observing the differences between the definition in the Draft Law and the Genocide Convention, asked that the conventional definition of genocide be used, and other acts be punished under crimes against humanity.<sup>55</sup>

### **2.2.3.2 Crimes Against Humanity**

The nexus with armed conflict which was once a requirement for crimes against humanity has subsequently been removed, and the nexus is no longer a requirement for crimes against humanity in international law.<sup>56</sup> The decisive issue as concerns the Extraordinary Chambers will be whether the nexus of armed conflict can be determined to have been removed already in 1975. The 1954 Draft Code of Offences Against the Peace and Security of Mankind, where the International Law Commission did not include a nexus

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<sup>48</sup> Ibid, para 63.

<sup>49</sup> Ibid, para 65.

<sup>50</sup> Schabas (2000) p. 118.

<sup>51</sup> *Report of the Group of Experts*, para 65.

<sup>52</sup> Schabas (2000), p. 119.

<sup>53</sup> Ibid, p. 144-145.

<sup>54</sup> Ibid, p. 145.

<sup>55</sup> Ibid, p. 145-146.

<sup>56</sup> *Report of the Group of Experts*, para 71.



to armed conflict, and the drafting of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity suggest that by 1975 the change had taken place. Thus, there would be no *nullum crimen sine lege* obstacle to the Extraordinary Chambers defining crimes against humanity without a nexus to armed conflict.<sup>57</sup> Since then, several international documents such as the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind, and the Statutes of the ad hoc tribunals, have emerged, further strengthening the concept of crimes against humanity. The Extraordinary Chambers are to follow the definition of crimes against humanity as laid out in Article 7 of the Rome Statute.<sup>58</sup>

### 2.2.3.3 War Crimes

For the majority of its time in power, the Khmer Rouge regime was involved in warfare with neighbouring states, and a significant number of atrocities were committed in this context.<sup>59</sup> Cambodia, as well as Vietnam, Thailand and Laos were parties to the 1949 Geneva Conventions, and were therefore obliged to abide by the grave breaches provisions, as well as the additional criminality under the then customary law.<sup>60</sup>

Although the conflict with neighbouring states would be included in the competence of the Extraordinary Chambers, the internal conflict is much less likely to be so. The International Committee of the Red Cross first regulated the laws of war in internal conflict in the 1977 Additional Protocol II. As there are no signs of these being customary law prior to the Additional Protocol II, including internal conflict in the jurisdiction of the Extraordinary Chambers would seem to violate the principle of *nullum crimen sine lege*.<sup>61</sup>

### 2.2.3.4 Other International Crimes and Crimes Under Cambodian Law

Remaining in accordance with the principle of *nullum crimen sine lege*, the Cambodian Law on which the Extraordinary Chambers would base their competence would have to be the domestic laws in force in 1975. This is most probably the 1956 Penal Code, the last known source of criminal law prior to the Khmer Rouge – the issue is complicated by there being very few sources of Cambodian law, no updates or new publications being available, and no secondary sources.<sup>62</sup> Nor are there any later denunciations by the Khmer Rouge of the criminal laws.<sup>63</sup> The Group of Experts therefore assumed, and the Special Law concurs, that the primary domestic law

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<sup>57</sup> Ibid.

<sup>58</sup> Article 9 of the Agreement.

<sup>59</sup> *Report of the Group of Experts*, para 72.

<sup>60</sup> Ibid, para 73.

<sup>61</sup> Ibid, para 75.

<sup>62</sup> Ibid, para 84.

<sup>63</sup> Ibid, para 85, where the Group of Experts further points out that even had there been such a denunciation, it would not necessarily have removed the Khmer Rouge from criminal responsibility; in particular had such a denunciation been made aiming at justifying their atrocities.

relating to the Khmer Rouge atrocities is represented by the 1956 Penal Code, as the pre-1975 Cambodian criminal law.<sup>64</sup>

The crimes specified in Article 3 of the Special Law as relevant to the Extraordinary Chambers under the 1956 Penal Code of Cambodia are homicide, torture, and religious persecution.<sup>65</sup> These being crimes under a domestic law, the Prosecutor would not need to convince the Extraordinary Chambers of the additional elements required for international offences.<sup>66</sup>

In 1975, torture was prohibited in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as a 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Although the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was only completed in 1984, the criminality of torture at the time of the Khmer Rouge atrocities seems sufficiently established not to be violating the principle of *nullum crimen sine lege*.<sup>67</sup>

## **2.3 Organizational Structure of the Extraordinary Chambers**

### **2.3.1 Structure and Composition of the Court**

Both the Extraordinary Chambers of Cambodia and the Special Court for Sierra Leone are similar in structure to the ad hoc tribunals, consisting of the Registry, the Prosecutor's Office, and the Chambers. They are, however, characterized in their constitution by the mixed staff at all levels.

Under the Agreement, the Extraordinary Chambers are a two-tiered court, consisting of a Trial Chamber and a Supreme Court Chamber, serving as both appellate body and court of final instance.<sup>68</sup> In addition, a Pre-Trial Chamber can be constituted on an ad hoc basis to settle any differences between the co-prosecutors and the co-investigating judges. The two-tiered court was favoured by the UN during negotiations for several reasons; one being that the process would be more expeditious than the three-tiered court proposed by the Cambodian government. Considering the age and physical condition of some potential Khmer Rouge defendants, lengthy court proceedings were undesirable. Furthermore, the right to appeal would be respected, while being cost-effective. In addition, prosecutions would not be possible after 6 January 2009 due to Cambodian statute of limitations.<sup>69</sup>

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<sup>64</sup> Ibid, para 85; Art. 3, the Special Law.

<sup>65</sup> Art. 3, the Special Law.

<sup>66</sup> *Report of the Group of Experts*, para 89.

<sup>67</sup> Ibid, para 78.

<sup>68</sup> The Agreement, Article 3.2.

<sup>69</sup> Meijer, p. 217-218.

The Registry, or the Office of the Administration, will be managed by a Cambodian Director and an international Deputy Director<sup>70</sup>, who were appointed winter 2006 to initiate the work of the Extraordinary Chambers. The Pre-Trial Chamber and the Trial Chamber are both composed of five judges, two of whom are international, while the Supreme Court Chamber is composed of seven judges, three of whom are international.<sup>71</sup> Besides the majority of judges being Cambodian, so is the President of each Chamber. Therefore, a compromise was reached on a ‘supermajority rule’, under which the Extraordinary Chambers will need a majority plus one of the judges to take a decision.<sup>72</sup>

The Cambodian Supreme Council of the Magistracy will appoint the Cambodian judges on the Extraordinary Chambers according to the standard national procedure, while the international judges will be appointed by the same body, based on a list of candidates from the UN Secretary-General.<sup>73</sup> Thus the Cambodian Council decides what international judges to appoint. The same appointment procedure applies to investigating judges and prosecutors.<sup>74</sup> In this context, the discussions later on in this thesis relating to the risks of the common practice of political influence over the judiciary in Cambodia might be of relevance also to the process of appointing judges on impartial grounds.

Neither the Special Law nor the Agreement contain provisions on dismissal of judges, leaving the issue to Cambodian legislation.<sup>75</sup> In May 2006, the judges of the Extraordinary Chambers were selected by the Supreme Council of the Magistracy and subsequently appointed by Royal Decree.<sup>76</sup>

### **2.3.2 Decision-making and the Supermajority Rule**

The judges of the Extraordinary Chambers are instructed to seek unanimity in their decisions. Should this not be possible, decisions must be taken according to the ‘supermajority’ rule, unique to the Extraordinary Chambers, meaning an affirmative vote of at least four judges in the Trial Chamber or an affirmative vote of at least five judges in the Supreme Court Chamber. Where a decision is taken by the ‘supermajority’ rule, the decision must contain both the majority and the minority views.<sup>77</sup> Although opposing the supermajority rule throughout the negotiations process, the UN

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<sup>70</sup> Special Law Article 30, the Agreement Article 8.

<sup>71</sup> Special Law Article 9new, the Agreement Article 3.

<sup>72</sup> Special Law Article 14new, the Agreement, Article 4.

<sup>73</sup> The Agreement, Article 3.5.

<sup>74</sup> The Agreement Article 5.5 (investigating judges) and Article 6.5 (prosecutors).

<sup>75</sup> Meijer, p. 221.

<sup>76</sup> Royal Decree NS/RKT/0506/214. The Royal Decree and list of judges appointed are available at the Khmer Rouge Trial Task Force website, [www.cambodia.gov.kh/krt](http://www.cambodia.gov.kh/krt).

<sup>77</sup> The Agreement, Article 4.

finally agreed, hoping that in the end the rule would prevent interference with the independence of the judiciary.<sup>78</sup>

However, the ‘supermajority’ rule has received much criticism, primarily because it risks enhancing a divide along national/international lines<sup>79</sup> and will not provide a sufficient safeguard against interferences with the independence of the judiciary. Even though the expectation is that, with the rule, an innocent person will not be convicted due to inappropriate pressure on Cambodian judges, Meijer gives an example of a worse case scenario. A Khmer Rouge defendant, although guilty, could be set free, if after outside pressure all four Cambodian judges in the Supreme Court Chamber voted ‘not guilty’. In this case, the final decision would include the three international judges’ ‘guilty’ votes, but the defendant would not be convicted. Moreover, as the decision would have been taken following the rule and the Agreement to the point, these proceedings, endorsed by the UN, would risk being branded as mock trials.<sup>80</sup>

### **2.3.3 Prosecutors and Investigating Judges**

Recognising the civil law domestic legal system of Cambodia the Extraordinary Chambers include some characteristics not seen in the ad hoc tribunals, or other internationalized criminal courts; the foremost example being the feature of the investigating judge. Under the Agreement, investigations are to be conducted by two co-investigating judges, one international and one Cambodian.<sup>81</sup> Correspondingly, the prosecution is composed of two co-prosecutors, one international and one Cambodian.<sup>82</sup>

The composition with two investigating judges and two prosecutors was due to the negotiations process and the balance between the international and Cambodian elements of the Extraordinary Chambers. In order to settle any disputes that may arise between the two, it was agreed to establish a Pre-Trial Chamber. The two co-prosecutors ‘shall cooperate with a view to arriving at a common approach to the prosecution’<sup>83</sup>. Should they not be able to agree, the prosecution will proceed, unless one of the co-prosecutors decides to request the Pre-Trial Chamber settle the dispute.

The Pre-Trial Chamber also follows a ‘negative supermajority’ rule, requiring the affirmative vote of four of the five judges, where the prosecution will proceed if no decision can be reached.<sup>84</sup> There is no appeal to the Pre-Trial Chamber decisions. The same process applies to the

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<sup>78</sup> Meijer, p. 219.

<sup>79</sup> Beigbeder, *International Justice against Impunity* (2005), p. 139.

<sup>80</sup> Meijer, p. 220.

<sup>81</sup> The Agreement Article 5, Special Law Article 23new.

<sup>82</sup> The Agreement Article 6, Special Law Article 16.

<sup>83</sup> The Agreement, Article 6.4.

<sup>84</sup> The Agreement, Article 7.4.

decision-making and dispute settlement of the co-investigating judges on proceeding with an investigation.<sup>85</sup>

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<sup>85</sup> The Agreement, Article 5.4 and 7.4.

### 3 International Justice Standards and the Extraordinary Chambers in the Courts of Cambodia

There is no universal definition of the standards of international justice established in international law. When examining what these recognized standards are, and what it is generally accepted that they encompass, this thesis will rely upon key international and regional legal instruments, United Nations resolutions and reports, academic opinions, as well as the statutes and jurisprudence of international criminal tribunals.

The Extraordinary Chambers in the Courts of Cambodia have been designed as an instrument to achieve transitional justice, and the following discussion will benefit from a brief examination of this broader context that the Extraordinary Chambers are to fit into. Transitional justice is expressed by the UN Secretary-General as:

‘...the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.’<sup>86</sup>

Being an internationalized criminal court, with the involvement of the UN, means the Chambers must meet with the highest standards, as the UN can be associated with nothing else. UN Secretary-General Kofi Annan has repeatedly voiced concerns regarding the credibility of the judicial process of the Extraordinary Chambers since the submitting of the Report of the Group of Experts in 1999.<sup>87</sup> The UN involvement in the court proceeding means, however, that UN standards subsequently developed need to be taken into account and respected with special attention, in order for the UN to live up to its own goals.<sup>88</sup>

The co-investigating judge of the Extraordinary Chambers sees the dilemma that the Court ‘must reconcile what the 2003 agreement calls international standards, i.e. an acceptable level of justice in accordance with the

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<sup>86</sup> *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, S/2004/616 p. 4 para 8.

<sup>87</sup> *Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council*, A/53/850 p. 3.

<sup>88</sup> Warbrick, *International Criminal Courts and Fair Trial*, p. 49.

international criteria of developed societies, and at the same time be efficient.’<sup>89</sup>.

### 3.1 Legal Sources of International Justice Standards

Firstly, this section will discuss whether international standards of justice exist at all, and if so what they are based on, and what they represent. The three primary source of international law are international treaties, international custom, and general principles of law as recognized by civilized nations.<sup>90</sup> While there is no hierarchy between the three, general principles of law have been given a more marginal significance in case law.<sup>91</sup> International human rights law has been established through a limited number of international treaties; however, through the years, they have also become a part of international custom and general principles of law, in which cases they will be binding on all states, and not only the ones who have ratified the treaties. The state obligations set out in international human rights instrument are minimum standards, meaning as long as the states do not violate their international responsibilities, each state has some freedom in how to incorporate these standards into their own criminal system.<sup>92</sup> Furthermore, it can be argued that human rights standards are not as much of use as guidance for the criminal procedure, as they are standards of review of whether a fair trial has been conducted<sup>93</sup>.

Individual states have differing justice systems, with different procedures and different emphasis. Since 1945, international human rights law has developed, creating binding obligations of some minimum standards. Since then, the majority of states have become parties to the basic human rights instruments.<sup>94</sup> The ‘international bill of human rights’ consists of the Universal Declaration of Human Rights (UDHR)<sup>95</sup>, the International Covenant on Civil and Political Rights (ICCPR)<sup>96</sup>, and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)<sup>97</sup>. Adopted in 1948, several of the UDHR provisions have since developed into customary international law.

Furtheron, regional instruments such as the American Convention on Human Rights (hereinafter the ACHR), the African Charter on Human and

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<sup>89</sup> Interview with co-investigating judge Marcel Lemonde, ‘*Focus on the Essentials*’, International Justice Tribune, no 50, 10-23 July 2006, p. 1.

<sup>90</sup> Article 38 of the Statute of the International Court of Justice (ICJ).

<sup>91</sup> Schabas (2004) p. 91.

<sup>92</sup> Warbrick, p. 51.

<sup>93</sup> Ibid, p. 51.

<sup>94</sup> O’Brien, *International Law*, (London, 2002) p. 379-381.

<sup>95</sup> *Universal Declaration of Human Rights*, A/RES/217A(III) of 10 December 1948.

<sup>96</sup> *International Covenant on Civil and Political Rights*, A/RES/2200A(XXI), in force 23 March 1976.

<sup>97</sup> *International Covenant on Economic, Social and Cultural Rights*, A/RES/2200A(XXI), in force 3 January 1976.

Peoples' Rights (hereinafter the AfCHR) and the European Convention on Human Rights (hereinafter the ECHR), have been agreed upon. However, in the case of Cambodia, there is no corresponding regional human rights mechanism in Asia. In the following, we will occasionally look to the provisions of regional instruments in establishing what international standards exist.

This chapter will discuss some generally accepted principles in international law, however focusing on the ones relevant to international justice, and leaving principles such as the sovereignty of states within their own territory and basic state responsibility for a different discussion. The discussions on international justice standards will to a large extent focus on international due process standards. International standards of due process are usually connected with the rule of law and fair trial. Due process emphasizes elements such as the right to counsel and the presumption of innocence, and thus focuses on the consequences of being found guilty for the individual.<sup>98</sup>

As stated above, there are no international treaties on 'international justice standards' as such. Rather there are some provisions related to primarily fair trial incorporated into more general treaties, principally the International Covenant on Civil and Political Rights, mainly containing minimum standards, complemented by the practice of the Human Rights Committee<sup>99</sup>. 156 states have ratified the International Covenant on Civil and Political Rights<sup>100</sup>, showing the near universal acceptance of the standards of the treaty. Under Article 28, the Human Rights Committee (hereinafter the HRC) was established to monitor the compliance of states parties to the treaty. Besides reviewing state reports, and individual complaints under its Optional Protocol, a main function of the HRC is to issue advisory General Comments on the covenant, guiding states on the interpretation and application of the treaty provisions.<sup>101</sup>

The ICCPR outlines the basis for international justice principles on the right to a fair and public hearing, the presumption of innocence, equality before the law and some minimum procedural guarantees, which have subsequently been developed in numerous UN treaties and declarations.<sup>102</sup> 'For a legal system to ensure justice and the protection of the rule of law to all, it must incorporate these fundamental norms and standards'<sup>103</sup>. This is equally true of a transitional justice mechanism such as the Extraordinary Chambers.

The ICCPR provisions most relevant to the fair trial discussion in this thesis will be Article 9 on 'the right to liberty and security of the person' and

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<sup>98</sup> Warbrick, p. 53.

<sup>99</sup> Ibid, p. 47.

<sup>100</sup> Number of ratifications as stated on the official website of the High Commissioner for Human Rights, [www.ohchr.org](http://www.ohchr.org). Last visited on 21 August 2006.

<sup>101</sup> Carlson and Gisvold, *Practical Guide to the ICCPR*, p. 4.

<sup>102</sup> *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, S/2004/616 para 9.

<sup>103</sup> Ibid, p. 23 footnote 7.



Article 14 on ‘due process rights in civil and criminal trials’<sup>104</sup>. The fair trial provisions of Article 14 are complemented by the prohibition in ICCPR Article 15 of arbitrary prosecution, conviction or punishment. In this context, we will primarily examine those provisions relating to fair trial in criminal proceedings. However, these rights are not absolute – the obligation to provide legal assistance, e.g., limited to ‘any case where the interests of justice so require’ – but rather relative to where necessary to fulfil the requirement of a fair trial.<sup>105</sup> In its General Comments, the HRC has stated that states ‘should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation’<sup>106</sup>.

ICCPR Article 9 contains provisions on the right to liberty and security of the person, and apply ‘to all persons deprived of their liberty by arrest or detention’, whether criminal cases or other.<sup>107</sup> There is a prohibition of arbitrary arrest and detentions, and time-related provisions such as the right to be promptly informed of the charges against him, to be brought promptly before a judge, and to be given a trial ‘within reasonable time’ or to be released.

ICCPR Article 14 provides for the general right to a fair trial as well as more explicit rights during the proceedings.<sup>108</sup> In Article 14.3 ‘minimum guarantees’ of the procedure during trial are provided: knowing the charges against him, having time and facilities for preparing his defence, being tried in his presence and having legal assistance for his defence, obtaining the attendance of and examining the witnesses, having interpretation if needed and enjoying the privilege against self-incrimination.<sup>109</sup>

ECHR Article 6 in particular corresponds closely to the due process provisions of ICCPR Article 14.<sup>110</sup> Similar provisions can also be found in UDHR Articles 10 and 11, as well as ACHR Article 8. The impact of specific provisions will be discussed in more detail below, as the significance of international standards of justice in international law are examined.

Moreover, guidance on relevant international standards can be sought in documents and principles adopted through resolutions by the General Assembly of the United Nations. Such standards include the Basic Principles on the Independence of the Judiciary<sup>111</sup>, the UN Guidelines on

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<sup>104</sup> Carlson and Gisvold, *Practical Guide to the ICCPR*, pp. 37 and 81.

<sup>105</sup> Warbrick, p. 54.

<sup>106</sup> Human Rights Committee, *CCPR General Comment no 13*, 21<sup>st</sup> session 1984, para. 4.

<sup>107</sup> Human Rights Committee, *CCPR General Comment no 8*, 16<sup>th</sup> session 1982, para. 1.

<sup>108</sup> Warbrick, p. 54.

<sup>109</sup> Art. 14 (3) of the ICCPR.

<sup>110</sup> Carlson and Gisvold, p. 38.

<sup>111</sup> UN Basic Principles on the Independence of the Judiciary, UN Doc. A/40/32 of 29 November 1985 and UN Doc. A/40/146 of 13 December 1985, (hereinafter the UN Principles on the Judiciary).

the Role of Prosecutors<sup>112</sup>, the UN Basic Principles on the Role of Lawyers<sup>113</sup>, the UN Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment<sup>114</sup>.<sup>115</sup> There is also a draft UN Body of Principles on the right to a Fair Trial and a Remedy.

Cambodia will be bound by the international treaties the state was party to in 1975. The Agreement particularly draws attention to Articles 14 and 15 of the ICCPR,<sup>116</sup> which Cambodia signed in 1980, and ratified in 1992. In 1975, no additional customary law seems yet to have emerged on the subject. As creating obligations for the state, more modern fair trial provisions binding upon Cambodia would be applicable to the Extraordinary Chambers, as they have created the obligation for trials conducted within the state to be ‘fair trials’ at the time of the proceedings, regardless of when the crime was committed. Although there is no regional human rights convention in Asia, Cambodia’s status as a state party to the ICCPR shows a long-term acceptance of the fundamental international human rights standards therein. In addition, Cambodia ratified the Rome Statute of the International Criminal Court in 2002, thereby further expressing acceptance of the legal standards and obligations that have been incorporated into the rules of the ICC.

Interestingly, the Agreement and the Special Law provide for the Chambers seeking guidance in international law, where Cambodian procedural law is unclear or quiet on an issue.<sup>117</sup> Although being somewhat ambiguous, this provision opens up for an opportunity for the judges to return to international standards where the Cambodian law could be deemed unsatisfactory.<sup>118</sup> Cambodian procedural law is based in inquisitorial tradition, and is therefore likely to differ somewhat from the existing procedures from the ad hoc tribunals, based more on an adversarial common law model, in the Rules of Procedure and Evidence to be adopted by the Cambodian and international judges in co-operation. Needless to say, the same basic international standards will still apply.

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<sup>112</sup> UN Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>113</sup> UN Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>114</sup> UN Doc. A/43/173 of 9 December 1988, (hereinafter the UN Principles on Detention).

<sup>115</sup> Scheffer, *Memorandum on the Application of International Standards of Due Process by the Extraordinary Chambers in the Courts of Cambodia*, (Open Society Justice Initiative, 2006), p. 7.

<sup>116</sup> The Agreement, Art. 12 para. 2, Art. 13 para. 1.

<sup>117</sup> Article 33new of the Special Law, Article 12.1 of the Agreement.

<sup>118</sup> Friman, p. 322.

## 3.2 The Right to a Fair Trial

The right to a fair trial is a fundamental right in international criminal procedure, and will be discussed here as a general concept before we further examine some of the more specific standards. It provides further protection for the accused, particularly in a situation where no other right may apply. In such circumstances, the prospects for a fair trial are enhanced, when this general principle comes into play.<sup>119</sup> The right to a fair trial also implies that the tribunal must be established by law. General principles such as the Rule of law, and principles of legality such as *ne bis in idem*, *nullum crimen sine lege*, and the presumption of innocence are key elements of what constitutes a fair trial. These principles are of outmost importance for international involvement in countries in transitional justice, and will be so for the Extraordinary Chambers as well.

‘For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.’<sup>120</sup>

The UN Secretary-General has defined the concept of rule of law as:

‘...a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.’<sup>121</sup>

The Secretary-General then went on to say that

‘...For the United Nations, ‘justice’ is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant. The international community has worked to articulate collectively the substantive and

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<sup>119</sup> Zappalá, *Human Rights in International Criminal Proceedings*, p. 111.

<sup>120</sup> *Prosecutor v Dusko Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* IT-94-1-AR72, 2 October 1995, para. 45. See also Warbrick, p. 48.

<sup>121</sup> *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, para 6.

procedural requirements for the administration of justice for more than half a century.’<sup>122</sup>

The concept of a fair trial relates to standards of due process, the treatment of individuals, as well as defendants’ rights to equal treatment. In the following, both aspects and their bearing on the Extraordinary Chambers will be examined.

### **3.2.1 The Right to a Fair and Public Hearing**

The right to a fair hearing is a general term, covering a number of specific rights of the accused. In the ICCPR, the right to a fair and public hearing is covered by Article 14.1 as a general rule, and Article 14.3 as specific rights contributing to a fair hearing. As observed by the HRC, these rights are minimum requirements, ‘the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1’<sup>123</sup>.

In the ad hoc tribunals, the right to a fair hearing is recognized in Article 21 (ICTY Statute) and Article 20 (ICTR Statute) respectively. Just like under the ad hoc and internationalized tribunals, where the principle is equally established, there are provisions for exceptions under the ICCPR. Similar to many national justice systems, these exceptions often relate to national security and the privacy of persons (East Timor) or the protection of victims and witnesses (Special Court for Sierra Leone).<sup>124</sup> The right to a ‘fair hearing’ as established in Article 67 of the Rome Statute, while referring to minimum guarantees, provides an opening for the International Criminal Court to fill in potential gaps in the Rome Statute and follow general human rights law developments.<sup>125</sup>

As regards the right to a public hearing, this is ‘an important safeguard in the interest of the individual and of society at large’<sup>126</sup>. The public should only be excluded from a trial under exceptional circumstances, and even then, the judgement must be made public.

Regarding the Extraordinary Chambers, the Agreement states clearly that ‘[i]n the interest of securing a fair and public hearing and credibility of the procedure’<sup>127</sup>, representatives of the UN, its Member States and the Secretary-General, media and NGOs, are to have access to the proceedings at all times. Only strictly necessary exceptions, in accordance with ICCPR Article 14, are to be allowed. Here, the language of the Agreement is stronger than the Special Law which allows for exceptions ‘for good cause in accordance with existing procedures in force’<sup>128</sup>.

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<sup>122</sup> Ibid, para 7.

<sup>123</sup> Human Rights Committee, *CCPR General Comment no 13*, para. 5.

<sup>124</sup> Friman, p. 329-330.

<sup>125</sup> Schabas (2004) p. 98-99.

<sup>126</sup> Human Rights Committee, *CCPR General Comment no 13*, para. 6.

<sup>127</sup> Article 12.2 of the Agreement.

<sup>128</sup> Article 33new of the Special Law.

### 3.2.1.1 Equality of Arms

Equality of arms is ‘the idea that both parties should be treated in a manner ensuring they have a procedurally equal position to make their case during the whole course of the trial’<sup>129</sup>. It is a general principle of law that goes to the core of what the right to a fair trial entails. There is ample jurisprudence on equality of arms from the International Court of Justice, regional human rights courts as well as the ad hoc tribunals. The principle of equality of arms has been developed through the jurisprudence of the European Court of Human Rights.

Traditionally viewed as a purely procedural right, ‘[entitling] both parties to equality before the courts, giving them the same access to the powers of the court and the same right to present their case...’<sup>130</sup> the concept first received a more liberal interpretation by the ICTY in 1999. The Appeals Chamber confirmed that ‘the principle of equality of arms falls within the fair trial guarantee under the Statute’<sup>131</sup>, and went on to state that ‘under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case’<sup>132</sup>, thus broadening the principle.<sup>133</sup>

Further on, the ICTY Appeals Chamber has time and again given the concept a more liberal interpretation,<sup>134</sup> seeing it as ‘important and inherent in the concept of equality of arms that each part be afforded a reasonable opportunity to present his or her case under conditions that do not place him at an appreciable disadvantage vis-à-vis his opponent’<sup>135</sup>. Altogether, the case law of the ad hoc tribunals suggests that, particularly in criminal proceedings, substantive equality and concern for the weaker party is fundamental for equality of arms and a legitimate trial.<sup>136</sup> However, there seems to be some discrepancy among legal writers as to whether equality of arms advocates a complete equality between both parties, or whether there is still the basic assumption that it is first and foremost a right in support of the defendant.<sup>137</sup>

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<sup>129</sup> Negri, p. 513.

<sup>130</sup> The Prosecutor in *Prosecutor v. Dusko Tadic (Appeals Chamber, Judgement)*, Case No IT-94-1-A, 15 July 1999, para 37.

<sup>131</sup> *Prosecutor v. Dusko Tadic (Appeals Chamber, Judgement)*, Case No IT-94-1-A, 15 July 1999, para 48.

<sup>132</sup> *Ibid*, para 52.

<sup>133</sup> Negri, p. 545.

<sup>134</sup> Schabas (2004) p. 99.

<sup>135</sup> *Prosecutor v. Brdjanin and Talic (Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002)*, Case No IT-99-36-PT, 23 May 2002.

<sup>136</sup> Negri, p. 570.

<sup>137</sup> Zappalá, p. 113.

Finally, equality of arms as a fundamental idea of ‘fair trial’ is interlinked with most of the standards set out below in this chapter. It will thus not be respected when some standard is affected and the defendant not given the full opportunity to defend himself. One example could be the right to legal assistance, and legal aid, the denial of which would have obvious impacts on the fairness of the trial.

Some fear has been expressed that the question of legal aid could have implications of the equality of arms for defendants before the Extraordinary Chambers. According the Article 17 of the Agreement, the UN is responsible for defence counsel. Due to the imprecision of the funding and budget, there is some risk that this could affect the opportunities for a trial with two equal parties.<sup>138</sup>

### 3.2.1.2 Trials in Absentia

The permissibility of trials *in absentia* has been a controversial issue, which relates to the fundamental right of the accused to be present at trial. ICCPR Article 14.3(d) provides the accused with the right to be tried in his presence. The HRC has observed that ‘[w]hen exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary’<sup>139</sup>.

The ICTY, ICTR and ICC all prohibit trials *in absentia*. It has been noted that this prohibition is more likely out of concern for the effectiveness of proceedings than due to the rights of the accused.<sup>140</sup> However, the Special Court for Sierra Leone has amended the rules of the ICTR to allow trials *in absentia* in some cases (providing the Court has seen the initial appearance of the accused). Moreover, an Expert Group authorized by the General Assembly to review the ad hoc tribunals remains open to the possibility of trials *in absentia* as a final option.<sup>141</sup> Further notable in this context is recent United Kingdom case law, also allowing for trials *in absentia* under certain circumstances, contributing to the overall unclear picture of the status of trials *in absentia* on an international level.<sup>142</sup>

Under the Cambodian Criminal Procedure Code, trials *in absentia* are permissible. Judging by the somewhat open position on trials *in absentia* in international law, there could be room for permitting these in the Extraordinary Chambers, allowing the procedure in connection therewith would be of a sufficient standard.<sup>143</sup> In 1979, Pol Pot and Ieng Sary were convicted of genocide at a trial *in absentia* held in Cambodia. It is partly regarding this conviction amnesty was granted to Ieng Sary in 1996.<sup>144</sup>

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<sup>138</sup> Negri, p. 559.

<sup>139</sup> HRC, *CCPR General Comment no 13*, 21<sup>st</sup> session 1984, para. 11.

<sup>140</sup> Zappalá, p. 126.

<sup>141</sup> *Report of the Expert Group*, UN Doc. A/54/634, 22 November 1999, para 25.

<sup>142</sup> Friman, p. 329.

<sup>143</sup> *Ibid*, p. 329.

<sup>144</sup> Shraga, *The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions*, in Romano et al (eds), *Internationalized Criminal Courts*, p. 30.

### 3.2.2 A Competent, Independent and Impartial Tribunal

ICCPR Article 14.1 ascertains the right to a ‘fair and public hearing by a competent, independent and impartial tribunal’. The HRC has emphasized the importance of ‘the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative’<sup>145</sup> to the independence and impartiality of a court. The right to be judged by an independent and impartial tribunal is further provided for in UDHR Article 10 and ECHR Article 6, and reiterated in the UN Basic Principles on the Independence of the Judiciary. Moreover, the independence and impartiality of the judiciary are key principles of the *rule of law*.<sup>146</sup>

The requirement of a ‘competent’ court is a condition that the court must be established by law. The Special Court for Sierra Leone is based on domestic law. In Kosovo and East Timor the ‘Regulation 64 Chambers’ and the ‘Serious Crimes Panels’ are products of UN Missions’ legislations, and therefore more complex. However, in *Prosecutor v Tadić*, the Appeals Chamber upheld the constitutionality of the ICTY, and its powers being derived from Chapter VII of the UN Charter.<sup>147</sup>

The ‘independence’ of a court ‘implies the ability of a judge to determine a matter free from the improper influence of the executive, the legislature, the parties or anyone with an interest in the process or its outcome’<sup>148</sup>. This has an impact on selection and appointment of judges and prosecutors, and the protection of independence from external authorities. The nature of the crimes under the jurisdiction of internationalized courts generates additional risk of inappropriate pressure on court officials. This is one reason why, at the Special Court for Sierra Leone, the UN Secretary-General appoints the judges and prosecutors, the majority of whom are international.

Moreover, a hearing must be ‘conducted impartially’, a prerequisite to independence.<sup>149</sup> This is likely to influence the composition of the court, and the rules on disqualification of judges. The European Court of Human Rights has established that impartiality ‘must be determined according to a subjective test, that is, on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, namely,

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<sup>145</sup> HRC, *CCPR General Comment no 13*, para. 3.

<sup>146</sup> Zappalá, p. 100.

<sup>147</sup> *Prosecutor v Tadić*, IT-94-1, 2 October 1995, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction.

<sup>148</sup> Linton, ‘*Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers*’, *Journal of International Criminal Justice* (2006), p. 328.

<sup>149</sup> *Ibid*, p. 328.

ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect'<sup>150</sup>.

The ICTY Appeals Chamber dealt with the issue when the defendant questioned one of the judge's impartiality, as the judge during the proceedings was elected vice president of her country. The Appeals Chamber applied the test 'whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement) would be that [the judge] might not bring an impartial and unprejudiced mind to the issues arising in the case'<sup>151</sup>. The argument was dismissed, and the Appeals Chamber noted that the judge had not performed any executive functions during the trial.<sup>152</sup> Furthermore, the Appeals Chamber discussed a similar 'hypothetical fair-minded observer' test, in *Furundžija*, concluding a judge will be disqualified when an actual bias exists, the judge is a party to the case or has financial interests in it, or 'the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias'<sup>153</sup>.

ICC Judges must not engage 'in any activity which is likely to interfere with their judicial function or to affect confidence in their independence'<sup>154</sup>. Moreover, the Rome Statute states that 'the accused shall be entitled (...) to a fair hearing conducted impartially'<sup>155</sup>. In the statutes of the ad hoc tribunals, the independence and impartiality of the judges is implied, albeit not specifically provided for.<sup>156</sup> Consequently, the judges have completed the protection with provisions such as disqualification of judges in the Rules of Procedure and Evidence.<sup>157</sup>

The ECHR has repeatedly stated that it is not enough to protect the impartiality of the court; it must also be perceived that way.<sup>158</sup> The impartiality of the judges may be affected by pressure from the outside community as well as by personal experiences of the judges of the atrocities that have taken place. In the context of impartial administration of justice, the 'Regulation 64 Chambers' in Kosovo provide an enlightening example. Initially the local Kosovo-Albanian judges were in majority, and it was clear from the outcome of proceedings that they were much more inclined to convicting a defendant of Serbian origin than a Kosovo-Albanian defendant.

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<sup>150</sup> *Hauschildt v. Denmark*, Series A, No 154, 24 December 1989, para. 46.

<sup>151</sup> *Prosecutor v. Delalic (Judgement)*, Case No IT-96-21-A, 20 February 1999, para 46.

<sup>152</sup> Schabas (2004) p. 100.

<sup>153</sup> *Furundžija (Appeals Chamber Judgement)*, Case No IT-95-17/1-A, 21 July 2000, para 189.

<sup>154</sup> Article 40.2. of the Rome Statute of the International Criminal Court (hereinafter 'the Rome Statute').

<sup>155</sup> ICC Statute, Article 67.

<sup>156</sup> Zappalá, p. 101. ICTY Statute Article 11 and 13 and ICTR Statute Article 10 and 12, refer to the independence and impartial character of the judges.

<sup>157</sup> Zappalá, p. 105.

<sup>158</sup> *ECHR Delcourt v Belgium*, Series A No 11, 17 January 1970, para. 31.



As a result, the role of international judges and prosecutors was strengthened, and ethnic diversity prioritized in appointing court officials.<sup>159</sup>

Like the Special Court for Sierra Leone, the Extraordinary Chambers have been established through domestic legislation, and so fulfil the ‘competent’ requirement of a court established by law.

There are, in theory, abundant requirements on the independence and character of judges in Cambodia. The Cambodian Constitution provides for the judiciary as an ‘independent power’ with a duty to ‘guarantee and uphold impartiality and protect the rights and freedoms of the citizens’<sup>160</sup>. The UN Transitional Authority in Cambodia (UNTAC) Code implemented the UN Basic Principles on the Independence of the Judiciary into the Cambodian legal system.<sup>161</sup> The Special Law requires the judges of the Extraordinary Chambers to ‘have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law, including international humanitarian law and human rights law’. Furthermore, they are to ‘be independent in the performance of their functions, and [not to] accept or seek any instructions from any government or any other source’<sup>162</sup>.

Several authors believe the Extraordinary Chambers will not be able to exercise its powers without interference and pressure from the Cambodian authorities.<sup>163</sup> Others argue the Extraordinary Chambers may contribute to establishing a tradition of fair trial and in independent judiciary in Cambodia. Several NGOs have reported on wide-spread corruption and a judiciary often influenced by political considerations.<sup>164</sup> Moreover, in the opinion of the Group of Experts ‘the Cambodian judiciary presently lacks three key criteria for a fair and effective judiciary: a trained cadre of judges, lawyers, and investigators; adequate infrastructure; and a culture of respect for due process’<sup>165</sup>.

The fear is that the formal requirements of an independent judiciary will have little impact on reality.<sup>166</sup> It is further noteworthy that the General Assembly, on the same day as asking the Secretary-General to resume negotiations with the Cambodian government, passed a resolution on the situation of human rights in Cambodia, expressing concern over the state of the judiciary in the country.<sup>167</sup> It has been suggested that one reason why the international community could not push harder in the negotiations with Hun

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<sup>159</sup> Friman, p. 332.

<sup>160</sup> Constitution of Cambodia as amended in 2004, Article 128.

<sup>161</sup> Linton (2006), p. 329.

<sup>162</sup> Special Law Article 10new.

<sup>163</sup> Beigbeder (2002), p. 179, 202.

<sup>164</sup> See Amnesty International Report ‘*Kingdom of Cambodia, No Solution to Impunity: the Case of Ta Mok*’ of 22 April 1999, AI Index ASA23/005; and Human Rights Watch Press Release ‘*Cambodia Tribunal Must Meet International Standards*’ of 12 February 2002.

<sup>165</sup> Group of Experts, para 126.

<sup>166</sup> Friman, p. 332.

<sup>167</sup> General Assembly Resolution 57/225 of 18 December 2002.

Sen for a tribunal of a less domestic character was the knowledge in some countries of what actions of their own could be exposed, as past supporters of the Khmer Rouge.<sup>168</sup> This is also a reason for alert as concerns of political influence over the judiciary in Cambodia, should there exist political motives exist to influence the outcomes of investigations or proceedings before the Extraordinary Chambers.

### 3.2.3 The Rights of the Accused<sup>169</sup>

Since the Nuremberg trials, the rights of the accused have included the right of the accused to confront witnesses, to introduce and to present evidence, to have counsel of choice, to be tried in public, to be informed of the nature of the charges and the presumption of evidence.<sup>170</sup>

The rights of the accused are detailed in ICCPR Article 14 and 15, as well as Article 9 for the rights upon arrest. The UDHR Articles 10 and 11.3, and regional human rights conventions ACHR Article 8, ECHR Article 6, AfCHR Article 7, also provide for rights of the accused. Furthermore, the Convention on the Rights of the Child Article 40.2, and humanitarian law instruments such as the Geneva Convention III Articles 84-87, 99-108, Geneva Convention IV Articles 5, 64-76, and Additional Protocol I Article 75 and Additional Protocol II Article 6, contain provisions relating to the rights of the accused.

ICCPR Article 14.3(a) commences with the right of the accused ‘[t]o be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him’. Promptly ‘requires that information is given in the manner described as soon as the charge is first made by a competent authority’<sup>171</sup>. Furthermore, the accused is entitled from ICCPR Article 14.3(g) ‘[n]ot to be compelled to testify against himself or to confess guilt’. In this context, it must be noted that confessions and evidence obtained through coercion are ‘wholly unacceptable’<sup>172</sup> and not admissible.

Experiences from the ad hoc tribunals show that the implementation of due process safeguards to a certain extent is depending on the judges, in developing their Rules of Procedure and Evidence, and completing them where necessary in case law.

On rights of the accused, the Rome Statute goes slightly beyond the minimum guarantees of Article 14 of the ICCPR.<sup>173</sup> Article 67 provides for the defendant the right to be informed promptly of the nature, cause and

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<sup>168</sup> Beigbeder, *Judging Criminal Leaders* (2002), p. 203.

<sup>169</sup> Guidance to the structure of the following standards has been sought primarily from Friman, *Procedural Law in Internationalized Criminal Courts*.

<sup>170</sup> Schabas (2004), p. 97.

<sup>171</sup> Human Rights Committee, *CCPR General Comment no 13*, para.8.

<sup>172</sup> *Ibid*, para. 14.

<sup>173</sup> Schabas (2004) p. 100.

content of the charge; to have adequate time and facilities for the preparation of his defence, to communicate freely with counsel of his own choosing; to be tried without undue delay; to be present at the trial, to conduct defence in person or through legal assistance; to examine witnesses; to have the assistance of a competent interpreter if necessary; to remain silent; to make an unsworn statement; and not to have the burden of proof reversed.<sup>174</sup>

The defendants before the Extraordinary Chambers are entitled to the safeguards of the ICCPR. The Agreement and the Special Law especially emphasize that ICCPR Article 14 and 15 shall be respected<sup>175</sup>, although not diminishing the equal importance of all relevant provisions in the ICCPR to the proceedings of the Extraordinary Chambers.

In the sections below, the rights of the accused will be more thoroughly examined.

### **3.2.3.1 The Right to Trial without Undue Delay**

The right of the accused to a trial without undue delay can also be described as one part of the defendant's right to a (fair and) expeditious trial. The right to trial without undue delay should be kept separate from the right to be tried within reasonable time (see 3.4.3 below), by being concerned with the time prior to the initiation of trial, rather than provisional release.<sup>176</sup> Under ICCPR Article 9.3 and 14.3(c) a person arrested must be tried 'within a reasonable time' or released, and has a 'right to be tried without undue delay'. The HRC has noted that this applies to all stages of the trials, and that 'to make this right effective, a procedure must be available in order to ensure that the trial will proceed "without undue delay", both in first instance and on appeal'<sup>177</sup>.

Both the ICTY and the ICTR have been experiencing problems with time-consuming trials, due to the number of defendants as well as the procedural requirements. In efforts to make the proceedings more expeditious, the ICTY judges have made amendments to their Rules of Procedure and Evidence. The new rules allow for, *inter alia*, the admission of written evidence, and for the judges to decide not to hear certain witnesses.<sup>178</sup>

Investigations and the judicial process could be made more efficient with the employment of modern procedures; however, this also requires highly educated and experienced staff to carry out the procedure appropriately. In East Timor and Kosovo the domestic legislation has been improved to provide a more complete procedural system. Thus, the Serious Crimes Panel

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<sup>174</sup> ICC Statute Article 67.

<sup>175</sup> Article 13 of the Agreement, Article 33new of the Special Law.

<sup>176</sup> Zappalá, p. 117.

<sup>177</sup> Human Rights Committee, *CCPR General Comment no 13*, para. 10.

<sup>178</sup> Zappalá, p. 118.

has delivered judgments speedily, but also received some criticism for how justice has been delivered.<sup>179</sup>

The time-frame for the Extraordinary Chambers has been set for three years, including time for indictments, trial and appeal. The Extraordinary Chambers may need to consider the issue of undue delay in relation to the one former Khmer Rouge leader who has been detained awaiting trial since 1999.

### 3.2.3.2 The Presumption of Innocence

‘Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law’. The presumption of innocence is recognised by states in ICCPR Article 14.2 and UDHR Article 10 as a key fair trial principle, ‘fundamental to the protection of human rights’<sup>180</sup>. Hereby, it is the responsibility of the Prosecutor to, beyond any reasonable doubt, prove the guilt of the accused. There is ‘a duty for all public authorities to refrain from prejudging the outcome of a trial’<sup>181</sup>. Thus, the defendant must be acquitted in case of doubt, *in dubio pro reo*. In contrast, the HRC has concluded that the presumption of innocence does not apply to witnesses to the same extent as to a person suspected of committing a crime.<sup>182</sup>

As a consequence, it is important to establish a common international standard on the burden of proof, to determine the question of guilt. The standard has been set to ‘guilt beyond reasonable doubt’ by the ad hoc tribunals, the ICC and the Special Court for Sierra Leone (through the application of the ICTR Rules of Procedure and Evidence). Although this standard has been complicated to agree upon, partly because of national variations, there seems to be wide agreement on ‘guilt beyond reasonable doubt’ as a generally recognized principle of law.<sup>183</sup>

Furthermore, the presumption of innocence has consequences for procedure throughout the investigative and trial process. Zappalá submits there are three main consequences: the overall treatment of the individual; the burden of proof on the Prosecutor; and a standard of proof and procedure in determining the question of guilt.<sup>184</sup> Such rights include the right of the accused to remain silent during investigation and trial, the right not to testify against him- or herself, the right to interim release while awaiting trial and the right of the accused to be detained separately from persons who have been convicted. The Rome Statute of the International Criminal Court provides an extensive listing of related procedural rights.<sup>185</sup> It has been observed that in order for the presumption of innocence to have a proper

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<sup>179</sup> Friman, p. 338.

<sup>180</sup> Human Rights Committee, *CCPR General Comment no 13*, para. 7.

<sup>181</sup> *Ibid*, para. 7.

<sup>182</sup> HRC *López v Spain*, Communication no 777/1997 (25 November 1999) para 6.4, CCPR/C/67/D/777/1997.

<sup>183</sup> Friman, p. 333.

<sup>184</sup> Zappalá, p. 85.

<sup>185</sup> Schabas (2004) p. 95. ICC Statute Articles 55(2)(b), 59(3)-(6) and 60(2)-(4).

protective impact on the administration of justice, more specific procedural provisions must be put in place for the court to complement it. These should be both procedural, such as the right to interim release, and substantive, such as applications of presumptions for establishing a crime.<sup>186</sup>

Although the presumption of innocence is not specifically laid out in the constitutional law of the Extraordinary Chambers, the accused enjoys the presumption of innocence under Article 13.1 of the Agreement, which refers back to the ICCPR, and Article 35.1 of the Special Law.<sup>187</sup> The fear expressed by some authors, that the Cambodian authorities might attempt to exercise influence over the outcome of the proceedings, would besides compromising the independence of the judiciary, violate the presumption of innocence as laid out by the UN Human Rights Committee as a duty of public authorities to ‘refrain from prejudicing the outcome of trial’.<sup>188</sup>

### 3.2.3.3 Deprivation of Liberty

Article 9 of the ICCPR, on the other hand, focuses on the rights of the accused prior to trial, where the deprivation of a person’s liberty is one of the more serious measures that can be taken against an individual, thus strengthening the need for appropriate safeguards. Article 9 ensures everyone ‘the right to liberty and security of the person’. Thus, it provides for the detainee to be detained only according to procedures established by law, for the person arrested to be told why and be promptly informed of the charges against him, and that he be brought promptly before a judge who has the power to order his release.<sup>189</sup> Arrests must be made following the issuing of an arrest warrant, and according to the procedural laws in force. A violation of these pre-trial rights will have consequences upon the fairness of the following trial.<sup>190</sup> Moreover, it has been held that the presumption of innocence may be affected by a prolonged pre-trial detention period.<sup>191</sup>

The ICTY and ICTR Rules of Procedure and Evidence initially required that an arrested person could be released only under ‘exceptional circumstances’, which has been criticized for turning deprivation of liberty into the rule instead of the exception. This has since been amended in the ICTR Rules of Procedure and Evidence, and arrest warrants issued by the SCSL have the same effect as domestic arrest warrants according to the Rules of Procedure and Evidence of the Special Court.<sup>192</sup> Article 55 of the Rome Statute stipulates the rights of persons under investigation by the ICC, including a ban on arbitrary arrests.

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<sup>186</sup> Friman, p. 333.

<sup>187</sup> Art. 13 para. 1 of the Agreement; Art. 31(1) of the Special Law.

<sup>188</sup> *See inter alia* Schabas, *An Introduction to the International Criminal Court* (2004).

<sup>189</sup> ICCPR Article 9.

<sup>190</sup> Warbrick, p. 55.

<sup>191</sup> Carlson and Gisvold, p. 44.

<sup>192</sup> Friman, p. 336.

According to Article 38 of the Cambodian Law on Criminal Procedure a person cannot be arrested for more than 48 hours before being brought to court.

### **3.2.3.4 The Right to Defence and Free Legal Assistance**

ICCPR Article 14.3(b), (d) and (e) sum up several of the components of the right to defence and free legal assistance. The right in Article 14.3(b) to adequate time for the preparation of defence applies to the accused as well as his defence lawyer, at all steps of the proceedings. They are also entitled access to documents and files that are necessary for the defence, following interpretations of the right to adequate facilities.<sup>193</sup> Moreover, it follows that defence lawyers ‘should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter’<sup>194</sup>.

ICCPR Article 14.3(d) contains the right of the accused to be tried in his presence; the right to defend himself in person; the right to choose his own counsel; the right to be informed of the right to counsel; and the right to receive free legal counsel; all key elements of the right to defence. The ECtHR has interpreted the corresponding ECHR Article 6.3(c) restrictively, and accepts that the accused may be obliged to accept counsel ‘in the interest of administration of justice’. This is not common practice in many countries, and the ICTY has chosen not to impose counsel, but rather to appoint counsel whose main task is to ensure the rights of the accused are respected in court, as demonstrated in the *Milosevic* case<sup>195</sup>. As experience from East Timor and Kosovo shows, there is not much benefit from legal assistance unless it can be provided from well-trained, experienced counsel.<sup>196</sup>

The right of the accused in ICCPR Article 14.3(e) to examine, and have examined, witnesses, ‘is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution’<sup>197</sup>; it is fundamental to the principle of equality of arms. In addition, the HRC has interpreted the provision as an obligation for states to ensure the presence of witnesses at the trial.<sup>198</sup>

Although the legal status of foreign defence counsel under Cambodian law still seems somewhat unclear, the Agreement presupposes that both

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<sup>193</sup> Carlson and Gisvold, p. 44-45.

<sup>194</sup> Human Rights Committee, *CCPR General Comment no 13*, para. 9.

<sup>195</sup> *Prosecutor v Milosevic (Appeals Chamber Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel)*, Case No IT-02-54, 1 November 2004.

<sup>196</sup> Friman, p. 340.

<sup>197</sup> Human Rights Committee, *CCPR General Comment no 13*, para. 12.

<sup>198</sup> Human Rights Committee, *Grant v Jamaica*, Communication no 353/1988 (4 April 1994) para 8.5, CPR/C/50/D/353/1988.

Cambodian and foreign lawyers will appear as defence counsel before the Court.<sup>199</sup> It has been held that the availability of foreign counsel is paramount to uphold the equality of arms in internationalized criminal courts, where some prosecutors, as well as judges, are foreign. In such a situation, it could be difficult, or more challenging, for defence counsel of a purely domestic background to provide an adequate defence. According to the Agreement and the Special Law, the defendant shall be allowed free legal counsel if he ‘does not have sufficient means to pay for it’<sup>200</sup>.

### **3.2.3.5 The Right of Appeal and Compensation**

ICCPR Article 14.5 states that ‘everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law’. The paragraph should be read together with ICCPR Article 14.3(c) on undue delay, which applies to appeal as well.<sup>201</sup> The HRC has noted the importance of observing the requirements of a fair and public hearing as in ICCPR Article 14.1 during appeal proceedings as well.<sup>202</sup> The ICTY, ICTR and ICC Statutes all provide for an Appeals Chamber, including a right for the prosecutor to appeal an acquittal.<sup>203</sup> In Sierra Leone, the Statute of the Special Court provides for an Appeals Chamber, which is explicitly to seek guidance from the Appeals Chambers of ICTY and ICTR.<sup>204</sup>

Furthermore, Article 85 of the Rome Statute contains provisions on the right to compensation for persons who have been unlawfully arrested or detained. Similar compensation schemes are not available at the ICTY, ICTR or SCSL. The right to compensation after an unlawful arrest, detention or conviction is, however, granted in ICCPR Articles 9.5 and 14.6, albeit not an extensive right.

As discussed above in section 2, the two-tiered structure of the Extraordinary Chambers allows for one level of appeals to the Supreme Court. The accused, as well as the prosecutor and victims, can appeal a decision of the Trial Chamber. Both the Agreement and the Special Law are silent on compensation due to an unlawful arrest, detention or conviction. Consequently, the matter is left for Cambodian law, or the judges of the Extraordinary Chambers to settle in the Rules of Procedure and Evidence.

### **3.2.3.6 *Ne bis in Idem*, Pardons and Amnesties**

ICCPR Article 14.7 contains a *res judicata* provision, prohibiting the bringing of a person to trial for an offence for which he has already been convicted or acquitted. The provision corresponds to the civil law concept

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<sup>199</sup> See e.g. the Agreement, Article 21.3.

<sup>200</sup> Article 13.1 of the Agreement; see also Article 35new of the Special Law.

<sup>201</sup> Carlson and Gisvold, p. 45.

<sup>202</sup> Human Rights Committee, *CCPR General Comment no 13*, para. 17.

<sup>203</sup> ICTY Statute Article 25, ICTR Statute Article 24, ICC Statute Article 81. The Rome Statute also grants the prosecutor the right to appeal, on the convicted person’s behalf, the conviction and sentence.

<sup>204</sup> Statute of the Special Court for Sierra Leone, Article 20.3.

of *ne bis in idem*, or double jeopardy in common law systems. This prohibition concerns proceedings within one country, and not courts at an international level, unless specifically provided for, e.g. in the treaty establishing the court in question. The Rome Statutes provision on *ne bis in idem* does, however, accept a new trial where the first trial was held either with the purpose of protecting the person from further criminal responsibility, or did not constitute a fair trial.<sup>205</sup>

Moreover, processes separate from the court proceedings, such as truth commissions, may simultaneously be addressing and gathering information on the same issues. They may also include the granting of amnesties, as did the Lomé Accords in Sierra Leone, including crimes against international humanitarian law. The Statute of the Special Court does, however, stipulate that amnesties do not bar persons from prosecution of the international crimes under the Court's jurisdiction.<sup>206</sup> In the words of the UN Secretary-General, '[c]arefully crafted amnesties can help in the return and reintegration of both groups and should be encouraged, although (...) these can never be permitted to excuse genocide, war crimes, crimes against humanity or gross violations of human rights'<sup>207</sup>.

The Special Law does not contain a *ne bis in idem* provision, leaving the Court to look to domestic criminal procedure. Seeking guidance from the Rome Statute, an exception to allow a second trial should still be possible, in the case that the first trial did not comply with international due process standards.<sup>208</sup>

The Royal Government of Cambodia has agreed not to ask for any further amnesty or pardon for any person who could come under the jurisdiction of the Extraordinary Chambers. When signing the UN Agreement, one royal pardon had already been issued, granting amnesty to Ieng Sary for his 1979 conviction of genocide at a trial *in absentia*, as well as from prosecution under the 1994 Cambodian Law outlawing the Khmer Rouge.<sup>209</sup> In spite of the UN position during negotiations that an amnesty granted by national authorities would not apply to international crimes, the Special Law does not provide that amnesty would be a bar to prosecution if granted in respect of any of the international crimes within the Extraordinary Chambers' jurisdiction.<sup>210</sup> As a result, the compromise reached in the UN Agreement provides that 'the scope of this pardon is a matter to be decided by the Extraordinary Chambers'<sup>211</sup>.

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<sup>205</sup> ICC Statute Article 20.3.

<sup>206</sup> Statute of the Special Court for Sierra Leone, Article 10.

<sup>207</sup> *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, paras 32, 64c.

<sup>208</sup> Friman, p. 345-346.

<sup>209</sup> Meijer, p. 214.

<sup>210</sup> Shraga, p. 30.

<sup>211</sup> Draft UN Agreement, Article 11.



### 3.2.3.7 Penalties

International justice standards limit the maximum penalty to life imprisonment. Although still in use in many domestic legislations, the death penalty is not accepted as an international standard of due process, and the maximum penalty in all international criminal tribunals is life imprisonment.

The fundamental international justice principle of certainty in the punishment of crimes, *nulla poena sine lege*, is laid out in UDHR Article 11.2, as well as ICCPR Article 15.1. In accordance with the discussion above in section 2 on jurisdiction and *nullum crimen sine lege*, this means no penalties heavier than those which were applicable at the time of the offence can be imposed. Furthermore, the ICCPR stipulates the offender shall benefit from any lighter penalty regulations that have come into force subsequent to the offence.

International criminal courts and tribunals do need to work with and impose those domestic penalties in force at the time of the offence, as there are no international codes on penalties.<sup>212</sup> The ICTY and ICTR Statutes direct the courts to rely on the domestic laws in their respective jurisdiction when deciding on penalties.<sup>213</sup> In Sierra Leone, the Special Court is also asked to seek guidance from the national courts in Sierra Leone, as well as the ICTR.<sup>214</sup> Furthermore, these three tribunals, and the ICC, include a requirement for the courts to take into account the gravity of the offence and the individual circumstances of the offender into the determination of penalty.<sup>215</sup> The issue of individual circumstances gains significance in situations such as those before international criminal courts and tribunals, where there must be a sense of balance between justice for atrocities committed by a group and the criminal responsibility of an individual for the crimes he has committed.<sup>216</sup>

The maximum penalty in the Extraordinary Chambers will be lifetime imprisonment.<sup>217</sup> There is, however, no further specification on considerations of individual circumstances.<sup>218</sup>

### 3.2.4 Victims and Witnesses

Traditionally, the role of victims in proceedings on violations of humanitarian law and human rights was primarily as contributors of evidence. In more recent years, with the creation of international criminal tribunals, a shift has been made towards recognition of certain interests relating to victims. Arguably, international focus on victims' need for

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<sup>212</sup> Scheffer, p. 41.

<sup>213</sup> ICTY Statute Article 24, and ICTR Statute Article 25.

<sup>214</sup> Statute of the Special Court for Sierra Leone, Article 19.1.

<sup>215</sup> ICTY Statute Article 24.2, ICTR Statute Article 23.2, SCSL Statute Article 19.2.

<sup>216</sup> Scheffer, p. 42.

<sup>217</sup> Article 38 of the Special Law.

<sup>218</sup> Scheffer, p. 42.

justice and remedies was a contributing factor to the establishment of international courts and tribunals. Especially the establishment of the ICC signified a development in victims' rights, although it seems premature to state that agreed international standards on victims rights exist.<sup>219</sup>

Included in the Rome Statute are comprehensive provisions on restitution, compensation and rehabilitation.<sup>220</sup> In December 2005, the Assembly of States Parties to the ICC created the Regulations of the Trust Fund for Victims<sup>221</sup>, as provided for as part of the reparation scheme in the Rome Statute. The Trust Fund is 'for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims'<sup>222</sup>, thus enabling victims to seek redress. For instance, the judgements can specify for reparations to be paid to the victims' Trust Fund. However, it remains to be clarified whether victims who are not connected to the proceedings before the ICC are also eligible for compensation.<sup>223</sup>

The Special Court for Sierra Leone decided to establish a Victims and Witnesses Section to assist victims and witnesses, as well as give guidance to the Court.<sup>224</sup> The Special Court has maintained the ICTR Rules on protection of victims and witnesses. Similar to the ICTR, the Special Court has also decided to leave victims' compensation to the domestic legal system.<sup>225</sup>

In addition, victims' rights have been further elaborated under United Nations assistance. The 1985 Declaration of Basic Principles for Victims of Crimes and Abuse of Power<sup>226</sup> stressed reparations remedies and victims' involvement in criminal proceedings. A Handbook on Justice for Victims<sup>227</sup>, as well as a Guide for Policymakers<sup>228</sup>, facilitating its incorporation into national legislations, complement the Declaration provisions.

Special Rapporteur Professor van Boven presented what has become known as the van Boven principles, outlining the right to a remedy and the right to reparation for victims of violations of human rights and international

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<sup>219</sup> Friman, p. 350.

<sup>220</sup> ICC Statute, Article 75, and ICC Rules of Procedure and Evidence, Rule 97.

<sup>221</sup> Report from the Fourth Session of the Assembly of States Parties, ICC-ASP/4/32, p. 320.

<sup>222</sup> ICC Statute, Article 79.1.

<sup>223</sup> Bottiglierio, *Redress for Victims of Crimes under International Law* (2004), pp. 230-233.

<sup>224</sup> Special Court for Sierra Leone, Rules of Procedure and Evidence, Rule 34.

<sup>225</sup> Ibid, Rule 105.

<sup>226</sup> General Assembly Resolution A/40/34 of 29 November 1985.

<sup>227</sup> UN Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims – On the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Centre for International Crime Prevention, New York 1999.

<sup>228</sup> UN Office for Drug Control and Crime Prevention, *Guide for Policymakers – On the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Centre for International Crime Prevention, New York 1999.

humanitarian law.<sup>229</sup> The principles include an obligation for states to allow expeditious and effective reparations proportionate to the gravity of the violation and the harm caused by the violation. Forms of reparation include satisfaction, rehabilitation, restitution and guarantees of non-repetition, as well as non-monetary types. Independent expert Professor Bassiouni subsequently presented the revised van Boven principles, where, *inter alia*, it is held that the international community may need to address the liability of a successor government for violations committed by previous regimes. These revised principles were then the basis for the UN General Assembly resolution on The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations on International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>230</sup>

The co-prosecutors, co-investigating judges and the Extraordinary Chambers have an obligation to protect victims and witnesses, *inter alia* through ‘the conduct of *in camera* proceedings and the protection of the identity of a victim or witness’<sup>231</sup>. Furthermore, there are provisions in Cambodian criminal law on the participation of victims in the proceedings, as well as claims of compensation.<sup>232</sup> The Special Law, albeit silent on compensation as such, does provide for confiscation of personal property, to be returned to the state.<sup>233</sup>

### 3.2.5 Language Issues

ICCPR Article 14.3(f) states the right ‘to have the free assistance of an interpreter if he cannot understand or speak the language used in court’. The provision is meant to contribute to the defendant’s full understanding of the trial proceedings, and his right to defend himself, and is not to be interpreted as the right to interpretation into his native language when he does understand the trial language.<sup>234</sup> The HRC has considered this right ‘of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence’<sup>235</sup>. Moreover, there is regularly a need for translating documents the defendant requires while preparing his defence.<sup>236</sup>

The Rome Statute is more far-reaching in stipulating a right for all persons questioned during an investigation ‘if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the

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<sup>229</sup> *Basic Principles and Guidelines on the Rights to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law*, Annex to E/CN.4/1997/104.

<sup>230</sup> UN Doc A/C.3/60/L.24, adopted by the Third Committee without a vote.

<sup>231</sup> Draft Agreement, Article 23.

<sup>232</sup> See Law on Criminal Procedure, e.g. Articles 9, 10, 17, 19, and 131.

<sup>233</sup> Article 39 of the Special Law.

<sup>234</sup> Carlson and Gisvold, p. 47.

<sup>235</sup> HRC, *CCPR General Comment no 13*, 21<sup>st</sup> session 1984, para. 13.

<sup>236</sup> Friman, p. 341.

assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness<sup>237</sup>.

Language related concerns are an issue for all internationalized courts, as by their nature they will have to overcome the obstacles of working simultaneously in several languages. This means interpretation must always be provided into the working languages of the court, as well as document translation. The Special Court for Sierra Leone operates in English; however, the defendant is entitled to using his own language. In East Timor, the courts are working in four different languages. Working in several languages, and not necessarily their mother tongue, court officials must pay special attention to the meaning attached to a certain phrase. In addition, cultural differences may contribute to the judges and the defendant not attributing the same meaning to certain words or concepts. The ICTR has had this experience, for instance with the expression ‘rape’, or a tradition of spoken story telling where it is not always known who told the story first.<sup>238</sup> In this context too, the importance of skilled translators is significant, the lack of which has been a concern during the proceedings in East Timor and Kosovo. Moreover, taking the time for translating documents has been a reason for delays at both ICTY and ICTR.<sup>239</sup>

The Extraordinary Chambers will operate with Khmer as the official language, with interpretation into French and English.<sup>240</sup> Therefore, the need for qualified interpreters will be raised in the Extraordinary Chambers as it has in East Timor.<sup>241</sup>

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<sup>237</sup> Statute of the International Criminal Court, Article 55.1(c)

<sup>238</sup> Friman, p. 342-343.

<sup>239</sup> Ibid.

<sup>240</sup> Article 45new of the Special Law.

<sup>241</sup> Friman, p. 342.

## 4 Conclusions

We have seen in the above chapters signs of some of the challenges facing the Extraordinary Chambers. For a state to attain the rule of law, a well functioning judiciary, defence lawyers representing the accused, the application of modern laws, as well as a police force with the capacity to make arrests and humane detention facilities must all be in place.<sup>242</sup> With a corrupt judiciary, few competent defence lawyers, outdated laws, a police force which is not independent, and detention facilities of poor quality, the challenges for Cambodia to live up to the rule of law in the Extraordinary Chambers, just as in its ordinary justice and law enforcement system, are numerous.

International standards of justice exist to ensure a minimum level of acceptable practices in the various legal systems of the world. It is the responsibility not only of the United Nations but of the international community, as a whole and individual actors, to ensure that these standards are respected and promoted - in all situations, but especially in situations where they are active participants. This entails not only ensuring that appropriate rules and regulations are put in place, but also that the capacity of the actors in a legal system is at a level to respond to the requirements of international standards of justice.

For the Extraordinary Courts in the Chambers of Cambodia, the Agreement and the Special Law have established provisions which, in theory, adhere to international justice standards. With a few exceptions, these provisions would in principle allow for proceedings which respect international standards of justice to take place. We have seen, foremost in Article 12.2 and 13 of the Agreement, the insertion of safeguards of the rights of the accused into the proceedings before the Chambers. The challenge of the Extraordinary Chambers will, primarily, be to ensure that circumstances, such as political considerations, outside of the Court's control will influence the adherence to these trials, and by doing so also ensuring a fair trial for future defendants, and the opportunity for an over-due justice process for Cambodia.

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<sup>242</sup> *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, paras 30, 35.

# Supplement A

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

## **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**

*Whereas* the General Assembly of the United Nations, in its resolution 57/228 of 18 December 2002, recalled that the serious violations of Cambodian and international humanitarian law during the period of Democratic Kampuchea from 1975 to 1979 continue to be matters of vitally important concern to the international community as a whole,

*Whereas* in the same resolution the General Assembly recognized the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security,

*Whereas* the Cambodian authorities have requested assistance from the United Nations 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,

*Whereas* prior to the negotiation of the present Agreement substantial progress had been made by the Secretary-General of the United Nations (hereinafter, “the Secretary-General”) and the Royal Government of Cambodia towards the establishment, with international assistance, of Extraordinary Chambers within the existing court structure of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea,

*Whereas* by its resolution 57/228, the General Assembly welcomed the promulgation of 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 and requested the Secretary-General to resume negotiations, without delay, to conclude an agreement with the Government, based on previous negotiations on the establishment of the Extraordinary Chambers consistent with the provisions of the said resolution, so that the Extraordinary Chambers may begin to function promptly,

*Whereas* the Secretary-General and the Royal Government of Cambodia have held negotiations on the establishment of the Extraordinary Chambers, *Now therefore* the United Nations and the Royal Government of Cambodia have agreed as follows:

### **Article 1**

## **Purpose**

The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes 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. The Agreement provides, inter alia, the legal basis and the principles and modalities for such cooperation.

## **Article 2**

### **The Law on the Establishment of Extraordinary Chambers**

1. The present Agreement recognizes that the Extraordinary Chambers have subject-matter jurisdiction consistent with that set forth in “the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea” (hereinafter: “the Law on the Establishment of the Extraordinary Chambers”), as adopted and amended by the Cambodian Legislature under the Constitution of Cambodia. The present Agreement further recognizes that the Extraordinary Chambers have personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement.
2. The present Agreement shall be implemented in Cambodia through the Law on the Establishment of the Extraordinary Chambers as adopted and amended. The Vienna Convention on the Law of Treaties, and in particular its Articles 26 and 27, applies to the Agreement.
3. 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.

## **Article 3**

### **Judges**

1. Cambodian judges, on the one hand, and judges appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations (hereinafter: “international judges”), on the other hand, shall serve in each of the two Extraordinary Chambers.
2. The composition of the Chambers shall be as follows:
  - (a) The Trial Chamber: three Cambodian judges and two international judges;
  - (b) The Supreme Court Chamber, which shall serve as both appellate chamber and final instance: four Cambodian judges and three international judges.
3. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to judicial offices. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. In the overall composition of the Chambers due account should be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.
5. The Secretary-General of the United Nations undertakes to forward a list of not less than seven nominees for international judges from which the Supreme Council of the Magistracy shall appoint five to serve as judges in the two Chambers. Appointment of international judges by the Supreme Council of the Magistracy shall be made only from the list submitted by the Secretary-General.
6. In the event of a vacancy of an international judge, the Supreme Council of the Magistracy shall appoint another international judge from the same list.
7. The judges shall be appointed for the duration of the proceedings.
8. In addition to the international judges sitting in the Chambers and present at every stage of the proceedings, the President of a Chamber may, on a case-by-case basis, designate from the list of nominees submitted by the Secretary-General, one or more alternate judges to be present at each stage of the proceedings, and to replace an international judge if that judge is unable to continue sitting.

#### **Article 4**

##### **Decision-making**

1. The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply:
  - (a) A decision by the Trial Chamber shall require the affirmative vote of at least four judges;
  - (b) A decision by the Supreme Court Chamber shall require the affirmative vote of at least five judges.
2. When there is no unanimity, the decision of the Chamber shall contain the views of the majority and the minority.

#### **Article 5**

##### **Investigating judges**

1. There shall be one Cambodian and one international investigating judge serving as co-investigating judges. They shall be responsible for the conduct of investigations.
2. The co-investigating judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to such a judicial office.
3. The co-investigating judges shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. It is understood, however, that the scope of the investigation is limited to 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.
4. The co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation. In case the co-investigating judges



are unable to agree whether to proceed with an investigation, the investigation shall proceed unless the judges or one of them requests within thirty days that the difference shall be settled in accordance with Article 7.

5. In addition to the list of nominees provided for in Article 3, paragraph 5, the Secretary-General shall submit a list of two nominees from which the Supreme Council of the Magistracy shall appoint one to serve as an international co-investigating judge, and one as a reserve international co-investigating judge.

6. In case there is a vacancy or a need to fill the post of the international co-investigating judge, the person appointed to fill this post must be the reserve international co-investigating judge.

7. The co-investigating judges shall be appointed for the duration of the proceedings.

## **Article 6**

### **Prosecutors**

1. There shall be one Cambodian prosecutor and one international prosecutor competent to appear in both Chambers, serving as co-prosecutors. They shall be responsible for the conduct of the prosecutions.

2. The co-prosecutors shall be of high moral character, and possess a high level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases.

3. The co-prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. It is understood, however, that the scope of the prosecution is limited to 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.

4. The co-prosecutors shall cooperate with a view to arriving at a common approach to the prosecution. In case the prosecutors are unable to agree whether to proceed with a prosecution, the prosecution shall proceed unless the prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with Article 7.

5. The Secretary-General undertakes to forward a list of two nominees from which the Supreme Council of the Magistracy shall select one international co-prosecutor and one reserve international co-prosecutor.

6. In case there is a vacancy or a need to fill the post of the international co-prosecutor, the person appointed to fill this post must be the reserve international co-prosecutor.

7. The co-prosecutors shall be appointed for the duration of the proceedings.

8. Each co-prosecutor shall have one or more deputy prosecutors to assist him or her with prosecutions before the Chambers. Deputy international prosecutors shall be appointed by the international co-prosecutor from a list provided by the Secretary-General.

## **Article 7**

### **Settlement of differences between the co-investigating judges or the**

### **co-prosecutors**

1. In case the co-investigating judges or the co-prosecutors have made a request in accordance with Article 5, paragraph 4, or Article 6, paragraph 4, as the case may be, they shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.
2. The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three appointed by the Supreme Council of the Magistracy, with one as President, and two appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General. Article 3, paragraph 3, shall apply to the judges.
3. Upon receipt of the statements referred to in paragraph 1, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.
4. A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the co-investigating judges or the co-prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority, as required for a decision, the investigation or prosecution shall proceed.

### **Article 8**

#### **Office of Administration**

1. There shall be an Office of Administration to service the Extraordinary Chambers, the Pre-Trial Chamber, the co-investigating judges and the Prosecutors' Office.
2. There shall be a Cambodian Director of this Office, who shall be appointed by the Royal Government of Cambodia. The Director shall be responsible for the overall management of the Office of Administration, except in matters that are subject to United Nations rules and procedures.
3. There shall be an international Deputy Director of the Office of Administration, who shall be appointed by the Secretary-General. The Deputy Director shall be responsible for the recruitment of all international staff and all administration of the international components of the Extraordinary Chambers, the Pre-Trial Chamber, the co-investigating judges, the Prosecutors' Office and the Office of Administration. The United Nations and the Royal Government of Cambodia agree that, when an international Deputy Director has been appointed by the Secretary-General, the assignment of that person to that position by the Royal Government of Cambodia shall take place forthwith.
4. The Director and the Deputy Director shall cooperate in order to ensure an effective and efficient functioning of the administration.

### **Article 9**

#### **Crimes falling within the jurisdiction of the Extraordinary Chambers**

The subject-matter jurisdiction of the Extraordinary Chambers shall be the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, crimes against humanity as defined

in the 1998 Rome Statute of the International Criminal Court and grave breaches of the 1949 Geneva Conventions and such other crimes as defined in Chapter II of the Law on the Establishment of the Extraordinary Chambers as promulgated on 10 August 2001.

**Article 10**  
**Penalties**

The maximum penalty for conviction for crimes falling within the jurisdiction of the Extraordinary Chambers shall be life imprisonment.

**Article 11**  
**Amnesty**

1. The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement.
2. This provision is based upon a declaration by the Royal Government of Cambodia that until now, with regard to matters covered in the law, there has been only one case, dated 14 September 1996, when a pardon was granted to only one person with regard to a 1979 conviction on the charge of genocide. The United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers.

**Article 12**  
**Procedure**

1. 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 established at the international level.
2. The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party. In the interest of securing a fair and public hearing and credibility of the procedure, it is understood that representatives of Member States of the United Nations, of the Secretary-General, of the media and of national and international non-governmental organizations will at all times have access to the proceedings before the Extraordinary Chambers. Any exclusion from such proceedings in accordance with the provisions of Article 14 of the Covenant shall only be to the extent strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice.

**Article 13**  
**Rights of the accused**

1. The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the

right: to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her.

2. The United Nations and the Royal Government of Cambodia agree that the provisions on the right to defence counsel in the Law on the Establishment of Extraordinary Chambers mean that the accused has the right to engage counsel of his or her own choosing as guaranteed by the International Covenant on Civil and Political Rights.

#### **Article 14**

##### **Premises**

The Royal Government of Cambodia shall provide at its expense the premises for the co-investigating judges, the Prosecutors' Office, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration. It shall also provide for such utilities, facilities and other services necessary for their operation that may be mutually agreed upon by separate agreement between the United Nations and the Government.

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## **Article 15**

### **Cambodian personnel**

Salaries and emoluments of Cambodian judges and other Cambodian personnel shall be defrayed by the Royal Government of Cambodia.

## **Article 16**

### **International personnel**

Salaries and emoluments of international judges, the international co-investigating judge, the international co-prosecutor and other personnel recruited by the United Nations shall be defrayed by the United Nations.

## **Article 17**

### **Financial and other assistance of the United Nations**

The United Nations shall be responsible for the following:

- (a) Remuneration of the international judges, the international co-investigating judge, the international co-prosecutor, the Deputy Director of the Office of Administration and other international personnel;
- (b) Costs for utilities and services as agreed separately between the United Nations and the Royal Government of Cambodia;
- (c) Remuneration of defence counsel;
- (d) Witnesses' travel from within Cambodia and from abroad;
- (e) Safety and security arrangements as agreed separately between the United Nations and the Government;

(f) Such other limited assistance as may be necessary to ensure the smooth functioning of the investigation, the prosecution and the Extraordinary Chambers.

## **Article 18**

### **Inviolability of archives and documents**

The archives of the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration, and in general all documents and materials made available, belonging to or used by them, wherever located in Cambodia and by whomsoever held, shall be inviolable for the duration of the proceedings.

## **Article 19**

### **Privileges and immunities of international judges, the international co-investigating judge, the international co-prosecutor and the Deputy Director of the Office of Administration**

1. The international judges, the international co-investigating judge, the international co-prosecutor and the Deputy Director of the Office of Administration, together with their families forming part of their household, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:
  - (a) Personal inviolability, including immunity from arrest or detention;
  - (b) Immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;
  - (c) Inviolability for all papers and documents;
  - (d) Exemption from immigration restrictions and alien registration;
  - (e) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents.
2. The international judges, the international co-investigating judge, the international co-prosecutor and the Deputy Director of the Office of Administration shall enjoy exemption from taxation in Cambodia on their salaries, emoluments and allowances.

## **Article 20**

### **Privileges and immunities of Cambodian and international personnel**

1. Cambodian judges, the Cambodian co-investigating judge, the Cambodian co-prosecutor and other Cambodian personnel shall be accorded immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity under the present Agreement. Such immunity shall continue to be accorded after termination of employment with the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration.
2. International personnel shall be accorded:
  - (a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity under the present Agreement. Such immunity shall continue to be accorded after termination of employment with the co-investigating judges, the co-prosecutors, the

Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration;

(b) Immunity from taxation on salaries, allowances and emoluments paid to them by the United Nations;

(c) Immunity from immigration restrictions;

(d) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Cambodia.

3. The United Nations and the Royal Government of Cambodia agree that the immunity granted by the Law on the Establishment of the Extraordinary Chambers in respect of words spoken or written and all acts performed by them in their official capacity under the present Agreement will apply also after the persons have left the service of the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration.

## **Article 21**

### **Counsel**

1. The counsel of a suspect or an accused who has been admitted as such by the Extraordinary Chambers 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 under the present Agreement.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed by them in their official capacity as counsel.

Such immunity shall continue to be accorded to them after termination of their functions as a counsel of a suspect or accused.

3. Any counsel, whether of Cambodian or non-Cambodian nationality, engaged by or assigned to a suspect or an accused shall, in the defence of his or her client, act in accordance with the present Agreement, the Cambodian Law on the Statutes of the Bar and recognized standards and ethics of the legal profession.

## **Article 22**

### **Witnesses and experts**

Witnesses and experts appearing on a summons or a request of the judges, the co-investigating judges, or the co-prosecutors shall not be prosecuted, detained or subjected to any other restriction on their liberty by the Cambodian authorities. They shall not be subjected by the authorities to any measure which may affect the free and independent exercise of their functions.

## **Article 23**

### **Protection of victims and witnesses**

The co-investigating judges, the co-prosecutors and the Extraordinary Chambers shall provide for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the identity of a victim or witness.

#### **Article 24**

##### **Security, safety and protection of persons referred to in the present Agreement**

The Royal Government of Cambodia shall take all effective and adequate actions which may be required to ensure the security, safety and protection of persons referred to in the present Agreement. The United Nations and the Government agree that the Government is responsible for the security of all accused, irrespective of whether they appear voluntarily before the Extraordinary Chambers or whether they are under arrest.

#### **Article 25**

##### **Obligation to assist the co-investigating judges, the co-prosecutors and the Extraordinary Chambers**

The Royal Government of Cambodia shall comply without undue delay with any request for assistance by the co-investigating judges, the co-prosecutors and the Extraordinary Chambers or an order issued by any of them, including, but not limited to:

- (a) Identification and location of persons;
- (b) Service of documents;
- (c) Arrest or detention of persons;
- (d) Transfer of an indictee to the Extraordinary Chambers.

#### **Article 26**

##### **Languages**

1. The official language of the Extraordinary Chambers and the Pre-Trial Chamber is Khmer.
2. The official working languages of the Extraordinary Chambers and the Pre-Trial Chamber shall be Khmer, English and French.
3. Translations of public documents and interpretation at public hearings into Russian may be provided by the Royal Government of Cambodia at its discretion and expense on condition that such services do not hinder the proceedings before the Extraordinary Chambers.

#### **Article 27**

##### **Practical arrangements**

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Extraordinary Chambers, a phased-in approach shall be adopted for their establishment in accordance with the chronological order of the legal process.
2. In the first phase of the operation of the Extraordinary Chambers, the judges, the co-investigating judges and the co-prosecutors will be appointed along with investigative and prosecutorial staff, and the process of investigations and prosecutions shall be initiated.



3. The trial process of those already in custody shall proceed simultaneously with the investigation of other persons responsible for crimes falling within the jurisdiction of the Extraordinary Chambers.

4. With the completion of the investigation of persons suspected of having committed the crimes falling within the jurisdiction of the Extraordinary Chambers, arrest warrants shall be issued and submitted to the Royal Government of Cambodia to effectuate the arrest.

5. With the arrest by the Royal Government of Cambodia of indicted persons situated in its territory, the Extraordinary Chambers shall be fully operational, provided that the judges of the Supreme Court Chamber shall serve when seized with a matter. The judges of the Pre-Trial Chamber shall serve only if and when their services are needed.

#### **Article 28**

##### **Withdrawal of cooperation**

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

#### **Article 29**

##### **Settlement of disputes**

Any dispute between the Parties concerning the interpretation or application of the present Agreement shall be settled by negotiation, or by any other mutually agreed upon mode of settlement.

#### **Article 30**

##### **Approval**

To be binding on the parties, the present Agreement must be approved by the General Assembly of the United Nations and ratified by Cambodia. The Royal Government of Cambodia will make its best endeavours to obtain this ratification by the earliest possible date.

#### **Article 31**

##### **Application within Cambodia**

The present Agreement shall apply as law within the Kingdom of Cambodia following its ratification in accordance with the relevant provisions of the internal law of the Kingdom of Cambodia regarding competence to conclude treaties.

#### **Article 32**

##### **Entry into force**

The present Agreement shall enter into force on the day after both parties have notified each other in writing that the legal requirements for entry into force have been complied with.

Done at [place] on [day, month] 2003 in two copies in the English language.  
For the United Nations For the Royal Government of Cambodia

# Supplement B

Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia

**the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).**

*Unofficial translation by the Council of Jurists and the Secretariat of the Task Force.  
Revised 29 Sept 2005*

## **LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA**

### **CHAPTER I - GENERAL PROVISIONS**

#### **Article 1:**

The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

### **CHAPTER II - COMPETENCE**

#### **Article 2 new**

Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, 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.

Senior leaders of Democratic Kampuchea and those who were most responsible for the above acts are hereinafter designated as “Suspects”.

#### **Article 3 new**

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed any of these crimes set forth in the 1956 Penal Code, and which were committed during the period from 17 April 1975 to 6 January 1979:

- Homicide (Article 501, 503, 504, 505, 506, 507 and 508)
- Torture (Article 500)
- Religious Persecution (Articles 209 and 210)

The statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers.

The penalty under Articles 209, 500, 506 and 507 of the 1956 Penal Code shall be limited to a maximum of life imprisonment, in accordance with Article 32 of the Constitution of the Kingdom of Cambodia, and as further stipulated in Articles 38 and 39 of this Law.

#### **Article 4**

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and which were committed during the period from 17 April 1975 to 6 January 1979.

The acts of genocide, which have no statute of limitations, mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children from one group to another group.

The following acts shall be punishable under this Article:

- attempts to commit acts of genocide;
- conspiracy to commit acts of genocide;
- participation in acts of genocide.

#### **Article 5**

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.

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.

#### **Article 6**

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions of 12 August 1949, such as the following acts against persons or property protected under provisions of these Conventions, and which were committed during the period 17 April 1975 to 6 January 1979:

- wilful killing;
- torture or inhumane treatment;
- wilfully causing great suffering or serious injury to body or health;
- destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;
- compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- wilfully depriving a prisoner of war or civilian the rights of fair and regular trial;
- unlawful deportation or transfer or unlawful confinement of a civilian;
- taking civilians as hostages.

#### **Article 7**

The Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979.

#### **Article 8**

The Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations, and which were committed during the period from 17 April 1975 to 6 January 1979.

### **CHAPTER III - COMPOSITION OF THE EXTRAORDINARY CHAMBERS**

#### **Article 9 new**

The Trial Chamber shall be an Extraordinary Chamber composed of five professional judges, of whom three are Cambodian judges with one as president, and two foreign judges; and before which the Co-Prosecutors shall present their cases. The president shall appoint one or more clerks of the court to participate.

The Supreme Court Chamber, which shall serve as both appellate chamber and final instance, shall be an Extraordinary Chamber composed of seven judges, of whom four are Cambodian judges with one as president, and three foreign judges; and before which the Co-Prosecutors shall present

their cases. The president shall appoint one or more clerks of the court to participate.

#### **CHAPTER IV - APPOINTMENT OF JUDGES**

##### **Article 10 new**

The judges of the Extraordinary Chambers shall be appointed from among the currently practising judges or are additionally appointed in accordance with the existing procedures for appointment of judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law, including international humanitarian law and human rights law.

Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source.

##### **Article 11 new**

The Supreme Council of the Magistracy shall appoint at least seven Cambodian judges to act as judges of the Extraordinary Chambers, and shall appoint reserve judges as needed, and shall also appoint the President of each of the Extraordinary Chambers from the above Cambodian judges so appointed, in accordance with the existing procedures for appointment of judges.

The reserve Cambodian judges shall replace the appointed Cambodian judges in case of their absence. These reserve judges may continue to perform their regular duties in their respective courts.

The Supreme Council of the Magistracy shall appoint at least five individuals of foreign nationality to act as foreign judges of the Extraordinary Chambers upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of not less than seven candidates for foreign judges to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint five sitting judges and at least two reserve judges. In addition to the foreign judges sitting in the Extraordinary Chambers and present at every stage of the proceedings, the President of each Chamber may, on a case-by-case basis, designate one or more reserve foreign judges already appointed by the Supreme Council of the Magistracy to be present at each stage of the trial, and to replace a foreign judge if that judge is unable to continue sitting.

##### **Article 12**

All judges under this law shall enjoy equal status and conditions of service according to each level of the Extraordinary Chambers.

Each judge under this law shall be appointed for the period of these proceedings.

**Article 13**

Judges shall be assisted by Cambodian and international staff as needed in their offices.

In choosing staff to serve as assistants and law clerks, the Director of the Office of Administration shall interview if necessary and, with the approval of the Cambodian judges by majority vote, hire staff who shall be appointed by the Royal Government of Cambodia. The Deputy Director of the Office of Administration shall be responsible for the recruitment and administration of all international staff. The number of assistants and law clerks shall be chosen in proportion to the Cambodian judges and foreign judges.

Cambodian staff shall be selected from Cambodian civil servants or other qualified nationals of Cambodia, if necessary.

**CHAPTER V - DECISIONS OF THE EXTRAORDINARY CHAMBERS**

**Article 14 new**

1. The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply:
  - a. a decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least four judges;
  - b. a decision by the Extraordinary Chamber of the Supreme Court shall require the affirmative vote of at least five judges.
2. When there is no unanimity, the decision of the Extraordinary Chambers shall contain the opinions of the majority and the minority.

**Article 15**

The Presidents shall convene the appointed judges at the appropriate time to proceed with the work of the Extraordinary Chambers.

**CHAPTER VI - CO-PROSECUTORS**

**Article 16**

All indictments in the Extraordinary Chambers shall be the responsibility of two prosecutors, one Cambodian and another foreign, hereinafter referred to as Co-Prosecutors, who shall work together to prepare indictments against the Suspects in the Extraordinary Chambers.

**Article 17 new**

The Co-Prosecutors in the Trial Chamber shall have the right to appeal the verdict of the Extraordinary Chamber of the trial court.

**Article 18 new**

The Supreme Council of the Magistracy shall appoint Cambodian prosecutors and Cambodian reserve prosecutors as necessary from among the Cambodian professional judges.

The reserve prosecutors shall replace the appointed prosecutors in case of their absence. These reserve prosecutors may continue to perform their regular duties in their respective courts.

One foreign prosecutor with the competence to appear in both Extraordinary Chambers shall be appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Prosecutor to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one prosecutor and one reserve prosecutor.

#### **Article 19**

The Co-Prosecutors shall be appointed from among those individuals who are appointed in accordance with the existing procedures for selection of prosecutors who have high moral character and integrity and who are experienced in the conduct of investigations and prosecutions of criminal cases.

The Co-Prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.

#### **Article 20 new**

The Co-Prosecutors shall prosecute in accordance with existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Prosecutors may seek guidance in procedural rules established at the international level.

In the event of disagreement between the Co-Prosecutors the following shall apply:

The prosecution shall proceed unless the Co-Prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions;

The Co-Prosecutors shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.

The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three Cambodian judges appointed by the Supreme Council of the Magistracy, one of whom shall be President, and two foreign judges

appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations. The appointment of the above judges shall follow the provisions of Article 10 of this Law.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority as required for a decision, the prosecution shall proceed.

In carrying out the prosecution, the Co-Prosecutors may seek the assistance of the Royal Government of Cambodia if such assistance would be useful to the prosecution, and such assistance shall be provided.

**Article 21 new**

The Co-Prosecutors under this law shall enjoy equal status and conditions of service according to each level of the Extraordinary Chambers.

Each Co-Prosecutor shall be appointed for the period of these proceedings.

In the event of the absence of the foreign Co-Prosecutor, he or she shall be replaced by the reserve foreign Co-Prosecutor.

**Article 22 new**

Each Co-Prosecutor shall have the right to choose one or more deputy prosecutors to assist him or her with prosecution before the chambers. Deputy foreign prosecutors shall be appointed by the foreign Co-Prosecutor from a list provided by the Secretary-General.

The Co-prosecutors shall be assisted by Cambodian and international staff as needed in their offices. In choosing staff to serve as assistants, the Director of the Office of Administration shall interview, if necessary, and with the approval of the Cambodian Co-Prosecutor, hire staff who shall be appointed by the Royal Government of Cambodia. The Deputy Director of the Office of Administration shall be responsible for the recruitment and administration of all foreign staff. The number of assistants shall be chosen in proportion to the Cambodian prosecutors and foreign prosecutors.

Cambodian staff shall be selected from Cambodian civil servants and, if necessary, other qualified nationals of Cambodia.

## **CHAPTER VII - INVESTIGATIONS**

**Article 23 new**



All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.

In the event of disagreement between the Co-Investigating Judges the following shall apply:

The investigation shall proceed unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions.

The Co-Investigating Judges shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration. The difference shall be settled forthwith by the Pre-Trial Chamber referred to in Article 20.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Investigating Judges. They shall immediately proceed in accordance with the decision of the Pre-Trial Chamber. If there is no majority as required for a decision, the investigation shall proceed.

The Co-Investigating Judges shall conduct investigations on the basis of information obtained from any institution, including the Government, United Nations organs, or non-governmental organizations.

The Co-Investigating Judges shall have the power to question suspects and victims, to hear witnesses, and to collect evidence, in accordance with existing procedures in force. In the event the Co-Investigating Judges consider it necessary to do so, they may issue an order requesting the Co-Prosecutors also to interrogate the witnesses.

In carrying out the investigations, the Co-Investigating Judges may seek the assistance of the Royal Government of Cambodia, if such assistance would be useful to the investigation, and such assistance shall be provided.

#### **Article 24 new**

During the investigation, Suspects shall be unconditionally entitled to assistance of counsel of their own choosing, and to have legal assistance assigned to them free of charge if they cannot afford it, as well as the right to interpretation, as necessary, into and from a language they speak and understand.

**Article 25**

The Co-Investigating Judges shall be appointed from among the currently practising judges or are additionally appointed in accordance with the existing procedures for appointment of judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.

**Article 26**

The Cambodian Co-Investigating Judge and the reserve Investigating Judges shall be appointed by the Supreme Council of the Magistracy from among the Cambodian professional judges.

The reserve Investigating Judges shall replace the appointed Investigating Judges in case of their absence. The reserve Investigating Judges may continue to perform their regular duties in their respective courts.

The Supreme Council of the Magistracy shall appoint the foreign Co-Investigating Judge for the period of the investigation, upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Investigating Judge to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one Investigating Judge and one reserve Investigating Judge.

**Article 27 new**

All Investigating Judges under this law shall enjoy equal status and conditions of service.

Each Investigating Judge shall be appointed for the period of the investigation.

In the event of the absence of the foreign Co-Investigating Judge, he or she shall be replaced by the reserve foreign Co-Investigating Judge.

**Article 28**

The Co-Investigating Judges shall be assisted by Cambodian and international staff as needed in their offices.

In choosing staff to serve as assistants, the Co-Investigating Judges shall comply with the spirit of the provisions set forth in Article 13 of this law.

## **CHAPTER VIII - INDIVIDUAL RESPONSIBILITY**

### **Article 29**

Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.

The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.

The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.

## **CHAPTER IX - OFFICE OF ADMINISTRATION**

### **Article 30**

The staff of the judges, the investigating judges and prosecutors of the Extraordinary Chambers shall be supervised by an Office of Administration.

This Office shall have a Cambodian Director, a foreign Deputy Director and such other staff as necessary.

### **Article 31 new**

The Director of the Office of Administration shall be appointed by the Royal Government of Cambodia for a two-year term and shall be eligible for reappointment.

The Director of the Office of Administration shall be responsible for the overall management of the Office of Administration, except in matters that are subject to United Nations rules and procedures.

The Director of the Office of Administration shall be appointed from among those with significant experience in court administration and fluency in one of the foreign languages used in the Extraordinary Chambers, and shall be a person of high moral character and integrity.

The foreign Deputy Director shall be appointed by the Secretary-General of the United Nations and assigned by the Royal Government of Cambodia, and shall be responsible for the recruitment and administration of all international staff, as required by the foreign components of the

Extraordinary Chambers, the Co-Investigating Judges, the Co-Prosecutors' Office, and the Office of Administration. The Deputy Director shall administer the resources provided through the United Nations Trust Fund.

The Office of Administration shall be assisted by Cambodian and international staff as necessary. All Cambodian staff of the Office of Administration shall be appointed by the Royal Government of Cambodia at the request of the Director. Foreign staff shall be appointed by the Deputy Director.

Cambodian staff shall be selected from Cambodian civil servants and, if necessary, other qualified nationals of Cambodia.

**Article 32**

All staff assigned to the judges, Co-Investigating Judges, Co-Prosecutors, and Office of Administration shall enjoy the same working conditions according to each level of the Extraordinary Chambers.

**CHAPTER X - TRIAL PROCEEDINGS OF THE EXTRAORDINARY CHAMBERS**

**Article 33 new**

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 these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level.

The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.

Suspects who have been indicted and arrested shall be brought to the Trial Chamber according to existing procedures in force. The Royal Government of Cambodia shall guarantee the security of the Suspects who appear before the court, and is responsible for taking measures for the arrest of the Suspects prosecuted under this law. Justice police shall be assisted by other law enforcement elements of the Royal Government of Cambodia, including the armed forces, in order to ensure that accused persons are brought into custody immediately.

Conditions for the arrest and the custody of the accused shall conform to existing law in force.

The Court shall provide for the protection of victims and witnesses. Such protection measures shall include, but not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.

**Article 34 new**

Trials shall be public and open to representatives of foreign States, of the Secretary-General of the United Nations, of the media and of national and international nongovernment organizations unless in exceptional circumstances the Extraordinary Chambers decide to close the proceedings for good cause in accordance with existing procedures in force where publicity would prejudice the interests of justice.

**Article 35 new**

The accused shall be presumed innocent as long as the court has not given its definitive judgment.

In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights.

- a. to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them;
- b. to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;
- c. to be tried without delay;
- d. to be tried in their own presence and to defend themselves in person or with the assistance of counsel of their own choosing, to be informed of this right and to have legal assistance assigned to them free of charge if they do not have sufficient means to pay for it ;
- e. to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them;
- f. to have the free assistance of an interpreter if the accused cannot understand or does not speak the language used in the court;
- g. not to be compelled to testify against themselves or to confess guilt.

**Article 36 new**

The Extraordinary Chamber of the Supreme Court shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court. In this case, the Supreme Court Chamber shall make final decisions on both issues of law and fact, and shall not return the case to the Extraordinary Chamber of the trial court.

**Article 37 new**

The provision of Article 33, 34 and 35 shall apply *mutatis mutandis* in respect of proceedings before the Extraordinary Chambers of the Supreme Court.

## **CHAPTER XI - PENALTIES**

**Article 38**

All penalties shall be limited to imprisonment.

**Article 39**

Those who have committed any crime as provided in Articles 3 new, 4, 5, 6, 7 and 8 shall be sentenced to a prison term from five years to life imprisonment.

In addition to imprisonment, the Extraordinary Chamber of the trial court may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct.

The confiscated property shall be returned to the State.

**CHAPTER XII - AMNESTY AND PARDONS**

**Article 40 new**

The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers.

**CHAPTER XIII - STATUS, RIGHTS, PRIVILEGES AND IMMUNITIES**

**Article 41**

The foreign judges, the foreign Co-Investigating Judge, the foreign Co-Prosecutor and the Deputy Director of the Office of Administration, together with their families forming part of their household, shall enjoy all of the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. Such officials shall enjoy exemption from taxation in Cambodia on their salaries, emoluments and allowances.

**Article 42 new**

1. Cambodian judges, the Co-Investigating Judge, the Co-Prosecutor, the Director of the Office of Administration and personnel shall be accorded immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration.
2. International personnel shall be accorded in addition:
  - a. immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the co-investigating judges, the co-prosecutors, the

Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration;

- b. immunity from taxation on salaries, allowances and emoluments paid to them by the United Nations;
- c. immunity from immigration restriction;
- d. the right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Cambodia.

3. The counsel of a suspect or an accused who has been admitted as such by the Extraordinary Chambers shall not be subjected by the Government to any measure that may affect the free and independent exercise of his or her functions under the Law on the Establishment of the Extraordinary Chambers.

In particular, the counsel shall be accorded:

- a. immunity from personal arrest or detention and from seizure of personal baggage relating to his or her functions in the proceedings;
- b. inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;
- c. immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of their function as counsel of a suspect or accused.

4. The archives of the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration and in general all documents and materials made available to, belonging to, or used by them, wherever located in the Kingdom of Cambodia and by whomsoever held, shall be inviolable for the duration of the proceedings.

#### **CHAPTER XIV - LOCATION OF THE EXTRAORDINARY CHAMBERS**

##### **Article 43 new**

The Extraordinary Chambers established in the trial court and the Supreme Court Chamber shall be located in Phnom Penh.

#### **CHAPTER XV - EXPENSES**

##### **Article 44 new**

The expenses and salaries of the Extraordinary Chambers shall be as follows:

1. The expenses and salaries of the Cambodian administrative officials and staff, the Cambodian judges and reserve judges, investigating judges and reserve investigating judges, and prosecutors and reserve prosecutors shall be borne by the Cambodian national budget;

2. The expenses of the foreign administrative officials and staff, the foreign judges, Co-investigating judge and Co-prosecutor sent by the Secretary-General of the United Nations shall be borne by the United Nations;
3. The defence counsel may receive fees for mounting the defence;
4. The Extraordinary Chambers may receive additional assistance for their expenses from other voluntary funds contributed by foreign governments, international institutions, non-governmental organizations, and other persons wishing to assist the proceedings.

## **CHAPTER XVI - WORKING LANGUAGES**

### **Article 45 new**

The official working languages of the Extraordinary Chambers shall be Khmer, English and French.

## **CHAPTER XVII - ABSENCE OF FOREIGN JUDGES, INVESTIGATING JUDGES OR PROSECUTORS**

### **Article 46 new**

In order to ensure timely and smooth implementation of this law, in the event any foreign judges or foreign investigating judges or foreign prosecutors fail or refuse to participate in the Extraordinary Chambers, the Supreme Council of the Magistracy shall appoint other judges or investigating judges or prosecutors to fill any vacancies from the lists of foreign candidates provided for in Article 11, Article 18, and Article 26. In the event those lists are exhausted, and the Secretary-General of the United Nations does not supplement the lists with new candidates, or in the event that the United Nations withdraws its support from the Extraordinary Chambers, any such vacancies shall be filled by the Supreme Council of the Magistracy from candidates recommended by the Governments of Member States of the United Nations or from among other foreign legal personalities.

If, following such procedures, there are still no foreign judges or foreign investigating judges or foreign prosecutors participating in the work of the Extraordinary Chambers and no foreign candidates have been identified to occupy the vacant positions, then the Supreme Council of the Magistracy may choose replacement Cambodian judges, investigating judges or prosecutors.

## **CHAPTER XVIII - EXISTENCE OF THE COURT**

### **Article 47**

The Extraordinary Chambers in the courts of Cambodia shall automatically dissolve following the definitive conclusion of these proceedings.



## **CHAPTER XIX - AGREEMENT BETWEEN THE UNITED NATIONS AND CAMBODIA**

### **Article 47 bis new**

Following its ratification in accordance with the relevant provisions of the law of Kingdom of Cambodia regarding competence to conclude treaties, the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crime Committed during the period of Democratic Kampuchea, done at Phnom Penh on 6 June 2003, shall apply as law within the Kingdom of Cambodia.

### **FINAL PROVISION**

### **Article 48**

This law shall be proclaimed as urgent.

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