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# **In Pursuit of Transitional Justice in Cambodia: From Theoretical to Pragmatic Applications**

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## **Abstract**

This paper aims to investigate the current status of the transitional justice in Cambodia – both restorative and retributive mechanisms – in order to seek both peace and justice, though not perfect, for Cambodian victims having suffered during the Khmer Rouge Regime from 1975 to 1979. The theoretical frameworks of the transitional justice in existing literatures are explicitly and critically discussed and then applied to the pragmatic transitional justice in Cambodian context. The major challenges to the Extraordinary Chambers in the Court of Cambodia (ECCC), the future perspective of Cambodian transitional justice as a whole, and the possible recommendations through the utilization of victim-centered and religious-cultural approach are thoroughly addressed for reconstruction of a better transitional justice in Cambodia.

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**IN PURSUIT OF TRANSITIONAL JUSTICE IN CAMBODIA:**

## *From Theoretical to Pragmatic Applications*

*“Transitional justice is not a ‘special’ kind of justice, but an approach to achieving justice in times of transition from conflict and/or state repression. By trying to achieve accountability and redressing victims, transitional justice provides recognition of the rights of victims, promotes civic trust and strengthens the democratic rule of law” (ICTJ, 2012).*

### **1. HISTORICAL BACKGROUND**

Historically, Cambodia used to experience a very long period of the internal instability and the changes in political regimes. From 1863 to 1953, Cambodia was under the colonization of France and then fully attained its independence on November 09, 1953. In the late 1960s, the first Kingdom of Cambodia was established under the control of Prince Sihanouk in the country. In the early 1970s, Prince Sihanouk was ousted from the power by General Lon Nol, and simultaneously Cambodia was dragged into a chronic conflict with Vietnam. In mid-1975, Cambodia was taken by Khmer Rouge under the command of Pol Pot. During this Leninist/Maoist regime from 1975-1979, approximately 1.7 million people were believed to have died of torture, diseases, starvation, exhaustion, and slaughters in a number of killing fields in the country (Muddell, 2003; Filatova, & et al., 2008), and most of the remaining others are, though survive, still living in traumatic conditions (Sopal & Virorth, 2009). In the early 1979, the Liberation Forces with the military assistance of Vietnamese troops to liberate the country from the so-called “Dark Age” period in Cambodian history (Dep, 2008). According to Muddell (2003), during the six months after the Pol Pot authoritarian regime collapsed, there was the confusion as to whether or not the Khmer Rouge was in exile. Some top leaders of the Khmer Rouge regime escaped to the jungles along the Southwestern border between Cambodia and Thailand (Dep, 2008). The “Decree Law Number one” was introduced, outlining the basis for a tribunal to target and indicate Pol Pot and Ieng Sary, who were the top leaders of the regime, in the charge of the crime of genocide (Muddell, 2003). However, the early domestic trial took place without them, and they were convicted in absentia. Because this tribunal had no legal foundation and the international support and since the defenders could not be successfully convicted in person, it was considered inadequate and ineffective at all to bring the transitional justice to Cambodian victims nationwide.

Remarkably, the 1991 Paris Peace Accords officially recognizing the Khmer Rouge as the part of the government undermined any formal avenues to pursue transitional justice mechanisms (Muddell, 2003). Until Khmer Rouge withdrew from the election in 1993, there was a space opened up to discuss what types of legal mechanisms might be relevant to bring transitional justice for the victims. According to Muddell (2003), “the United States Congress passed the 1994 Cambodian Genocide Justice Act, Yale University established its Cambodian Genocide Program, and NGOs began conversing with the United Nations”. In 1996, the remaining Khmer Rouge regime fell, and its troops integrated into Cambodia’s new government according to the coined “Win-win policy”. However, most of the victims under the Khmer Rouge’s regime persistently seek an avenue to ask for justice and insist to see those perpetrators punished, to know the truth as well as to receive reparations. As Kelli Muddell (2003) noted, the [frequently] historical asked questions raised by these victims and their families would be “why?”, “why did Pol Pot do it?”, “why did we have to suffer so much?”, and “why was our country destroyed by its own children?” As a consequence, with voices of the victims demanding for justice and foreign participations, there were many negotiations taken place in the purpose of establishing the postwar tribunal to punish Khmer Rouge senior leaders who committed serious crimes in order to seek the justice for Cambodian people.

In 2001, after many years of negotiations, the Cambodian National Assembly passed the law on the “Establishment of the Extraordinary Chambers in the Courts of Cambodia”, but UN withdrew the case because it was impossible to be reached in the United Nations Security Council (Muddell, 2003). However, in 2003, the General Assembly took the process and approved the agreement to establish the ECCC in Cambodia to convict the persons who are the most responsible for the crimes committed from April 17, 1975 to January 6, 1979. Finally, in November 2005, Cambodian government, in order to prosecute the highly responsible perpetrators in accordance with international standard (Lambourne, 2008:6), made the ECCC come into existence.

Therefore, the ultimate objective of this working paper is to investigate the current status of the transitional justice in Cambodia – both restorative and retributive mechanisms. In doing so, we first clearly demonstrate the purposes of the establishment of the Extraordinary Chambers of the Court of Cambodia (ECCC). Then, we critically and thoroughly discuss the theoretical frameworks of the transitional justice as well as the pragmatic applications in Cambodian

context. Moreover, the key challenges of the establishment of the ECCC are explicitly illustrated as the major foundation for reconstruction of a better transitional justice in Cambodia.

## **2. PURPOSES OF THE EXTRAORDINARY CHAMBERS IN THE COURT OF CAMBODIA (ECCC)**

According to Andelini, Conaway, and Kays (n.d.), transitional justice is achieved through “the short-term and often temporary judicial and non-judicial mechanisms and processes that address the legacy of human rights abuses and violence during a society’s transition away from conflict or authoritarian rule”. Additionally, transitional justice can also be reached through “a range of approaches undertaken to reckon with legacies of widespread or systematic human rights abuses” (Filatova, Louise, et al, 2008). Therefore, the establishment of the ECCC embraces five main objectives for obtainment of the transitional justice for Cambodian victims. First and foremost, it intends to create justice for the victims by holding perpetrators accountable through the judicial mechanisms. Second, it provides an explicit explanation and the truth as to why the Khmer Rouge leaders slaughtered their own millions of people during April 17, 1975 to January 6, 1979. Third, it has the judicial function as the deterrence for future leaders or aggressors throughout the world to prevent the same tragedy from repeating. Fourth, it catalyzes the healing of Cambodian society from the psychological trauma inflicted during the Khmer Rouge era because people could be satisfied with the verdicts pronounced by the ECCC and accept the justice. Finally, this tribunal serves as a model in reforming Cambodia’s legal system. Therefore, with these clear objectives, the ECCC was eventually established as a hybrid court by the Royal Government of Cambodia in November 2005 in order that the trials conducted will meet the international standard as well as easily access to that of Cambodia (all the Khmer Rouge trials will be conducted only in Phnom Penh and will be only in the Khmer language according to Cambodian Criminal Code).

## **3. APPROACHES OF TRANSITIONAL JUSTICE IN CAMBODIAN CONTEXT**

As having learned from various post-conflict societies most notably in Germany, South Africa, Former Yugoslavia, Rwanda, Serra Leone and East Timor, in order for the victims and related stakeholders (victims’ families, civil society and international organizations, etc.) to bring

about transitional justice, there are various holistic approaches that have so far been employed as to reflect upon unique cultural, historical, political and socio-economic status of each country concerned, consisting of all the mechanisms that states, societies, and communities use to provide accountability and redress for genocide, war crimes, ethnic cleansing, and crimes against humanity (Patel, Greiff & Wardorf, 2009). Transitional justice is simultaneously backward-and-forward-looking: addressing past abuses with the aim of preventing future ones from repeating. As such, it often involves difficult choices between punishment and forgiveness, accountability and reconciliation, remembrance and forgetting (Ibid.). These methods of transitional justice are, but not limited to, criminal prosecutions, reparations, truth seeking, truth commissions, memory and memorials, and institutional reforms (ICTJ, 2012; Chan, 2006; et al.). Such a broad distinctive mechanisms can be best and commonly grouped into two main approaches, that is, *restorative* and *retributive justice*. To be more precise, the demand to bring perpetrators to court and hold them accountable, through either punishment or atonement, for past wrongdoings is retributive justice. On the other hand, restorative justice seeks to construct the relationships between the victims and perpetrators in the communities as well as individual and social healing (Sandra, 1999; Sophal & Virorth, 2009; Chan, 2006).

However, between these two extreme continuums, it is arguably intractable and dilemmatic to achieve both forms of justice simultaneously in the sense that to ensure retributive justice by making those liable for the crimes prosecuted, [justice] will prevail at the expense of [peace] as the criminal prosecution can be very likely, if not properly implemented, to trigger another conflict or civil war aroused by those perpetrators and their associates. In vice versa, to put an end to war and bring about peace [as] the prerequisite and most-desired foundation for development in post-conflict society, it is unavoidable to exercise restorative approach as a mean to grant the perpetrators amnesty, forget their past wrongdoings, and reintegrate them into the society. In this scenario, peace would be very likely achievable, but [perfect] justice will not be provided to the victims. In its intuitive awareness, to breakthrough these two extremes, Cambodian government has chosen the middle ground to seek a balance between peace and justice. In the first place, the government led by Premier Hun Sen prioritized peace to justice through its strategic channel, so-called Win-Win Strategy whereby some top Khmer Rouge leaders and all former-Khmer Rouge troops [in 1997] were granted forgiveness and reintegration into the society which in turn trigger an end to its two decades of prolonging, devastating civil

war and break the ground for political stability, peace and development for the country (Sovat, 2011). After achieving a firm peace and political stability, the government righteously has then diverted its agenda in pursuit of justice for the country, which is also in response to the demand of international community by the establishment of its UN-supported hybrid tribunal, Extraordinary Chamber in the Court of Cambodia (ECCC) as commonly known as Khmer Rouge Tribunal, in November 2005 in order to prosecute those senior and highly responsible perpetrators in accordance with international standard (Lambourne, 2008:6).

### **3.1 Contextualization of Restorative Justice in Cambodian Setting**

#### **3.1.1 Theoretical Framework**

The term “restorative justice” is defined as “a process through which all those affected by an offence – victims, perpetrators and by-standing communities – collectively deal with the consequences; [...] a systematic means of addressing past wrongdoings that emphasizes the healing of wounds and rebuilding of relationships” (Sanam, Anderlini, Camille, et al, n.d.). This approach has multiple goals including, but not limited to, resolving original conflict, building trust, integrating all affected parties, healing pains of victims through apologies and restitution, and reducing the likelihood of future offenses through community confidence building measures (Zehr&Gohar, 2003; Sanam&Anderlin, et al, n.d.). Restorative justice seeks to rebuild relationships and trusts between or among victims and perpetrators through the so-called channels of amnesty, forgiveness and public apology organized by the Truth Commission which is the community-based forum or memorials. This approach of truth telling and meeting between or among victims and perpetrators is very useful and effective in unifying the fractions in the society, providing an effective means for rehabilitation, confidence building as well as peaceful co-existence and preventing further harm to the society (Sopha&Virorth, 2009; Leebaw, 2004; Sanam&Anderlini, n.d., et al).

In doing so, as Zehr and Gohar (2003) suggests, the theory of restorative justice rests on four general principles as prerequisites to achieve its objectives: 1) Victims are involved in the process and come out feeling satisfied; 2) Offenders understand how their actions have affected other people and take responsibilities for these actions; 3) Outcomes help to repair the harms done and address the reasons for the offense; and 4) Victim and offender both gain a sense of “closure”, and both are reintegrated into the community. A successful lesson, as shown below,

learned from South Africa after the apartheid system might set the light of how the aforesaid theoretical framework works.

### **Case Study: Restorative Justice in South Africa after the Apartheid System**

Between 1948 and 1990s, the racial discrimination in South Africa was institutionalized with a rigid, legalized policy of racial segregation better known as “apartheid”. Led by the National Party (NP), which was in large comprised of white Afrikaners, South Africa adopted specific laws and regulations to enforce such an order (Chan, 2006). These legislations in turn made millions of the black South Africans lose their citizenships, millions be legally arrested, tortured and imprisoned for violating these laws, and millions be forcibly relocated. All populations in general who fell into non-white racial category were given inferior education, health care, social welfare benefits and housing, and associated human right abuses (Dugard, 1997). However, after years of non-violent protests and the intense international sanctions, South Africa’s apartheid was finally brought to an end constitutionally under the Act 200 of 1993 (Chan, 2006).

Soon after, Nelson Mandela, a nearly-three-decade prisoner, was released and elected as the first president of new South Africa. He then in 1995 established the Truth and Reconciliation Commission (TRC) presided over by Archbishop Desmond Tutu to uncover the dark facts of apartheid as well as report them to South Africa and the international community and to grant amnesty to the perpetrators in order to cement a peaceful co-existence of a multiracial society and a strong foundation of democracy (Dugand, 1997). In short, the transitional justice in South Africa was centered on reconciliation and understanding rather than those of revenge and punishment as integrated in previous transitional justice mechanisms like in Nuremberg, Germany, which will be explicitly discussed later in this paper.

To qualify for the amnesty, the conditions that applicants [perpetrators] needed to meet were: 1) Having committed an act that constitutes “a gross violation of human rights”; and 2) Fully disclosing all relevant facts, especially ones that demonstrated that a political objective was involved in the act (Chan, 2006). According to the Committee on Amnesty, the gross violations of human rights were confined to “the killing, abduction, torture, or severe ill-treatments of any person” (Dugand, 1997). For the South Africa case, therefore, the process of the Truth and Reconciliation Commission was to be centered on the victims with the aims of reclaiming the

victims' dignity through truth, acknowledgment, public deliberation, collective understanding, and reparation. This, as a result, enables the wounds of victims to be healed and development and democracy to be established. As Desmond Tutu (1999) once stated that “No future without forgiveness” and “acknowledge the evils of the past, accept responsibility, and then move on” is the only approach to peace.

### **3.1.2 From Theoretical to Pragmatic Application:**

#### ***[From Civil War to Reconciliation and Reintegration]***

So indifferent from the South Africa's restorative peace approach, the Cambodian government centered on amnesty, reconciliation and reintegration by passing two successive amnesties in the last decade in response to the legacy of the Khmer Rouge.

In 1994, the Cambodian government passed legislation granting the amnesty to Khmer Rouge guerrillas who defected to the government between July 7, 1994 and January 7, 1995 (Slye, n.d.). The amnesty provision states as the following:

This law shall allow for an amnesty period of six months after coming into effect to permit the people who are members of the political organization or military forces of the “democratic Kampuchea Group” [i.e. the Khmer Rouge] to return to live under the authority in the Royal Government of the Kingdom of Cambodia, without facing punishment for crimes which they have committed (as cited from Slye, n.d.).

Two years after this first amnesty, on 14 September 1996, the King Norodom Sihanouk issued a royal decree granting the amnesty to the former Deputy Prime Minister of the Khmer Rouge government, Ieng Sary, as requested by the two Prime Ministers, Norodom Ranaridh and Hun Sen (Slye, n.d.). The amnesty was granted in return for Ieng Sary's defection from the Khmer Rouge, referred to in the decree as “the Democratic Kampuchea Group”. The relevant substance of the decree is as the following:

Amnesty is granted to Mr. Ieng Sary, former Deputy Prime Minister responsible for Foreign Affairs in the Government of Democratic Kampuchea, who was sentenced to death and confiscation of all property by order of the People Revolutionary Court of Phnom Penh dated 19 August 1979 and with regard to penalties stipulated by the Law on the Outlawing of the Democratic Kampuchea Group which was promulgated by Royal Proclamation no. 01 BM 94 dated 15 July 1994 (as cited from Slye, n.d.).

On 22 August 1996, Prime Minister Hun Sen publicly issued basic principles of his “**Win-Win Strategy**” in an effort to reintegrate and disarm the Khmer Rouge as emphasized on three factors: supporting reintegration, ensuring safety and security to those reintegrated Khmer Rouge troops, considering the possibility of amnesty, and building infrastructure to facilitate such reintegration (as translated from Sovat, 2011). With this dynamic leadership, finally, on 06 April, 1998, 1549 Khmer Rouge troops and 4109 civilians surrendered and reintegrated this signified the complete territorial unification and triggered an end to the two decades of longstanding civil war and guerilla warfare in the country (Ibid.). Such remarkable unification in post-conflict landscape was also strongly supported by the United Nations in conformity with its disarmament, demobilization, and reintegration (DDR) programs (Patel, Greiff&Wardorf, 2009).

However, in spite of the fact that this reintegration is the precondition of political stability and peace in the country, there are also several underlying criticisms regarding this approach. Ironically, this reintegration/amnestic approach was designed based on entrench impunity and discourage even the most minimally-required investigation and accountability (Chan, 2006; Slye, n.d.). Therefore, as Slye observed, they discourage justice in the way that the amnesty typically has two consequences: 1) It prevents the criminal prosecution and punishment of perpetrators, and 2) It prevents victims from seeking damages, truth, and other forms of accountability from those responsible for the violation of their freedom and rights. Thus, unlike the amnesty of Truth Commission and Reconciliation of South Africa whereby the perpetrators just only publicly apologized, acknowledged and uncovered their wrongful acts in the past, which, to a great extent, helped heal the wounds of the victims and promoted accountability and rules of law, Cambodian amnesty has none of these attributes as these KR troops even after their integration have not uncovered their atrocious acts and sought apology from the victims which in turn leave these victims and their families the sense of attached antagonisms and hatred against those former Khmer Rouge troops and their leaders.

## **3.2 Contextualization of Retributive Justice in Cambodian Setting**

### **3.2.1 Theoretical Framework:**

Retributive justice as labeled by Zehr (2003), legalistic justice as theorized by Estrada-Hollebeck (2001), or prosecutorial justice as Leebaw (2009) opinions that crime is wrong and against the will of the society; therefore, the perpetrator is needed to be held accountable to an

extent to which identical and proportional to the crime s/he has committed as the basis to seek justice for the victims and establish a rule of law and democratic society. Whereas restorative justice lies on reconciliation and amnesty, the integral features of retributive justice center on criminal prosecution and atonement (Bloom, 1999; Sophal&Vororth, 2009). In other words, retributive justice names punishment as the necessary mechanism through which such equality is to be achieved; it identifies the very idea of restoration with punishment. Retributive justice is in this way backward-looking. Punishment is warranted as a response to a past event of injustice or wrongdoing. It acts to reinforce rules that have been broken and balance the scales of justice (Majidzadeh, 2011). On a normative basis, transitional retributive justice functions as a morally corrective mechanism against perpetrators who have done unacceptable actions against the society (Ibid.). Restorative peace approach has multiple goals including, but not limited to, administering justice for victims, punishing the wrongdoing of perpetrators, deterring future recurrence, and promoting rule of law and human rights by obligating governments to conduct themselves in accordance with public and broadly applicable rules (Couenhoven, 2009; Sophal&Vororth, 2009).

Perpetrators justify to be punished by judicial means through judicial proceedings to avoid retaliation from the victims (Sophal&Vororth, 2009). This involves formal judicial procedures from filing of complaints to investigation by prosecutors, with formal testimony from victims and perpetrators to gather sufficient evidences and witnesses to support the accusation and the formal procedural hearing in the courts as attempts to ensure equal distribution of justice to both victims and perpetrators (Ibid.).

Proponents of this approach argue that there are several grounds of the positive correlation between judicial prosecution and peace, or more likely positive peace. In connection with this idea, advocates of prosecutorial justice commonly argue that “ending impunity” contributes to reconciliation, thereby reducing hatreds and revenge in society constituting the main pillar for social harmony and development (Leebaw, 2009). Second, as those perpetrators are held accountable, it would set the favorable precedent discouraging the likelihood of future crimes against the society; or otherwise, judicial punishment will be enforced against the wrongdoers (Sanam, Anderlini, Camille, et al, n.d.). Third, the prosecutorial approach is based on the idea that “*individual guilt*” contributes to peace-building. AryehNeier, former head of Human Rights Watch, summarizes this view with the statement that “[B]y trying and punishing those

directly responsible...culpability would not be passed down from generation to generation” (Leebaw, 2009).

However, the judicial prosecution can be resulted in a two-sided effect. On the one hand, as prescribed above, it would contribute to peace-building and peace-restoring. On the other hand, it could also possibly re-awaken the forgotten civil wars to the forefront as the perpetrators and their associates, upon realizing they individually would be prosecuted, will threaten to terminate the proceedings, arouse the conflict and, as a result, re-victimize the citizens.

### **Case Study: Retributive Justice in Nuremberg Tribunal after the Nazi Regime**

In the course of Nazi Regime (1919-1945) under the leadership of Adolf Hitler, there emerged the radical sentiment of German nationalism which integrated into the very structure of German political and social-economic system of the country (The Avaron Project, 2012). Such extremist sentiment lied on the foundation aimed at purifying the German race through such deadly inhumane and virulently racist acts as anti-Semitism culminated in the Holocaust, ethnic nationalism with the notion of Germans’ status as the master race, and German purification by culminating in the involuntary euthanasia of disabled people and compulsory sterilization of people with mental deficiencies (About Nazism, n.d.). This in turn led to a very atrocious human rights violation, genocide, ethnic cleansing, war crime and crime against humanity both in Germany at home and other countries under Germany’s occupation resulted in the dead of a third of 15 million Jews by 1939 (Holocaust Memorial Center, 2012), 2.8 non-Polish Jewish (IPN, 2009), 27 million of Soviet citizens and 10.6 million of Soviet troops (BBC, 2005), and 6.5 million of Ukraine (Jajda, et al, 2012) and many more. As a reaction to these mass atrocities against the dignity of humanity and in pursuit of justice and reparations for the victim[s], only six and a half months after Germany surrendered, a series of trials, known as International Military Tribunal (IMT), were held by the Allied powers namely, the U.S., UK, France and Soviet Union in Nuremberg from November 1945 to October 1946 (Heller, 2011). Each of the four Allied nations supplied a judge and a prosecution team for initiating court proceedings and rulings against perpetrators who committed or conspired to commit war crimes and crime against humanity during World War II (Facing History, 2012). The IMT defined crimes against humanity as “murder, extermination, enslavement, deportation...prosecution on political, racial, or religious grounds” (CAHI, 2012). After subsequent proceedings, 26 former Nazi leaders were

indicted and tried (Facing History, 2012). However, some Nazi senior leaders such as Adolf Hitler, Heinrich Himmler, and Joseph Goebbels never stood trial as they committed suicides since Germany lost the war.

After several hearings, the judges delivered their verdict on October 1, 1946. Three of four judges were needed for conviction (Ibid.). Twelve defendants were sentenced to death, among them Joachim Von Ribbentrop, Hans Frank, Alfred Rosenberg, and Julius Streicher, all of whom were the senior or high-ranking officials of German Nazism (Delage, 2007). They were hanged, cremated in Dachau, and their ashes dropped in the Isar River (Ibid.). The IMT sentenced three defendants to life imprisonment and four to prison terms ranging from 10 to 20 years, and three of the defendants were acquitted (Facing History, 2012).

The IMT trial at Nuremberg was one of the earliest and most well-known of several subsequent war crime trials. After the conclusion of the IMT, there were several other subsequent war crime tribunals executed by the four Allied powers' zones in their own occupied German territory, involved lower-level officials and officers. They included concentration camp guards and commandants, police officers and doctors who participated in medical experiments (Delage, 2007). As responses to victims' lawsuit and other prosecutorial processes 160, 282 of perpetrators were tried, of whom 1,441,391 were convicted in US Zone; 17,353 tried, 7,033 convicted in French Zone; and 18, 328 tried and 18,061 convicted in Soviet Zone, whereas in British Zone, the data was unavailable (Cohen, n.d.). The victims' sufferings, pains and mental wounds, as a result, were healed which in turn contributed to the smooth democratic transition and development for the country.

### **3.2.2 From Theory to Pragmatic Application:**

#### ***[From Reconciliation to the Establishment of ECCC]***

Just soon after Cambodia has enjoyed relative peace and political stability, the newly formed Royal Government of Cambodia (RGC) pragmatically began to take the lead in pursuance of justice for the victims and also in response to the insistence of the international community, most pronouncedly the United Nations (UN), United States of America, European Union, and Japan (Etcheson, 2003). On 21 June 1997, Cambodia's co-prime ministers Hun Sen and Norodom Ranariddh sent a letter to the UN formally requesting assistance in bringing to [justice] for those perpetrators responsible for the "genocide and crimes against humanity"

committed during Khmer Rouge Regime (Bates, 2010). In January 2001, after years of negotiations, the Cambodian National Assembly passed the law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia. The UN abruptly withdrew from negotiations in the process in 2002 based on concerns over the structure of the body, but returned in 2003, whereupon both sides agreed to move forward with the process (Cohen, 2011). In May 2003, the General Assembly approved an agreement with Cambodia to establish the Extraordinary Chambers. After additional delays, the ECCC, simply known as Khmer Rouge Tribunal, came finally into existence in November 2005 (Lambourne, 2008). This tribunal is hybridity in nature reflecting upon its domestic and international prosecutorial features and legal applications (Cohen, 2011).

Its mandate is exclusively to prosecute to those who were “senior leaders” and “the most responsible figures” in Khmer Rouge Regime (ECCC, 2004). With this limitation, so far there have been only 2 cases, namely Case 001 and Case 002 that have been conducted with merely five peoples in charge. The first trial of this tribunal began with Case 001 in February 2009 against KaingGechEav, alias Duch, the S-21 jailer and finally on 03 February 2012, the pronouncement of appeal decision was to put him in life imprisonment for “particularly shocking and heinous character” of his crime (Phnom Penh Post, 2012). The commencement of Case 002 was launched on January 2011 shortly after conclusion of Case 001, in which four defendants were charged for their seniority in Khmer Rouge Regime, namely Noun Chea, IengSary, KhieuSamphan and LengThearith (ECCC, 2011). On the one hand, the tribunal is really significant in educating people, convicting the top perpetrators and seeking symbolic justice for the victims. On the other hand, this, a very few numbers of people holding responsible for the massive genocide, is not compensated to losses of millions of lives and on-going sufferings of Cambodian people, to a great extent. However, there is a plan to open the hearing of Case 003 and Case 004 with a request from the Co-investigating Judges to investigate eight “distinct factual situations of murder, torture, unlawful detention, forced labour and persecution [which]..., if proved, would constitute crimes against humanity, grave breaches of the Geneva Conventions and violations of the 1956 Cambodian Penal Code” (Bates, 2010). The names of the suspects and the locations remain confidential. However, there has not so far consensus whether to open the hearing of Case 003 and 004 as they are outside in the scope of the court’s jurisdiction as they do not fall into the category of the senior and highly responsible persons. Moreover, the push for

more prosecutions on former Khmer Rouge cadres by the International Co-Prosecutor can lead to a failure in the national reconciliation process through the Khmer Rouge cases as it would increase the number of prosecutions and create more complications (Pheaktra, 2011). The Cambodian Premier Hun Sen stated in the past that he would rather see the Khmer Rouge Tribunal fail than allow Cambodia to return to a new civil war (Ibid.). For this reason, as to date, there is no judicial progress in these two cases.

#### **4. CHALLENGES OF TRANSITIONAL JUSTICE IN CAMBODIA**

With many challenges and criticisms such as dissatisfaction and discontentment over the Case 001 and the next, incompetence of rules of law, ineffectiveness of structure of the tribunal, corruptions, time-consuming judicial processes, complicated political issues, etc., the ECCC has been regarded as an inadequate mixed tribunal in the postwar period and therefore could not effectively seek the maximum transitional justice or [perfect] justice to satisfy Cambodian victims and partially the international community who are donors and whose people were also killed during the Khmer Rouge Regime.

Since the early 1999, the negotiations between the Cambodian government and the United Nations were dominated by the agenda of Cambodian officials and foreigners (Muddell, 2003). Therefore, public opinions, public participations, and the views of Cambodian NGOs did not have voices in the debate on how the tribunal should be functioned and how much justice Cambodian victims want to fulfill their satisfaction. In general, the importance of NGOs in the transitional justice is to bring the voices of ordinary people to the government to effectively hold the criminals accountable before the tribunal and to bring them the maximum justice. However, the roles of NGOs were somewhat restricted. For example, NGOs have to request permissions from the government first before they meet the negotiation teams (Muddell, 2003). Therefore, in short, the restriction of the roles of Cambodian NGOs and the ignorance of people' active participation in the transitional justice have so far resulted in the dissatisfaction and insufficient justice provided for Cambodian people.

Moreover, according to Muddell (2003), the judicial system in Cambodia is incomplete. For instance, the Supreme Council of Magistracy, a constitutional body, can take the disciplinary actions against the judges and prosecutors. Therefore, the tribunal cannot effectively prosecute individuals who have already been incorporated into the power of the government and therefore

cannot penalize them because the SCM will take disciplinary measures against those charges. Hence, it is clearly seen that it is impossible to bring the perpetrators currently in power to the court, given the supreme authority of the government. Interestingly, the 1999 research study conducted by Cambodian civil society showed that approximately 84,000 Cambodians voiced their preference for an international tribunal rather than domestic one (Muddell, 2003). Another huge challenge is that Cambodia is regarded as the immaturely democratic nation, so it is unlikely that there is the genuine division of power among executive, legislative, and judicial branch. The influence of the executive power over the judicial branch only makes the tribunal ineffective and incompetent to bring the maximum justice to Cambodian people. Therefore, first and foremost, the judicial system should be reformed and the separation of power should be genuinely strengthened in response to the needs of the justice sought by Cambodian people and to the transition to democratic State.

In addition, the will of Cambodian leaders is limited regarding the prosecution of any perpetrator during the Pol Pot regime due to political issues and regional stability. In general sense, there is mostly the dilemma between justice and peace or internal security/stability. According to the statement of Cambodian Prime Minister Hun Sen, it is warned that the civil war would be repeated if more Khmer Rouge leaders who are now holding the high positions in the government are to be investigated related their roles and crimes committed during the killing field regime (CWC International, 2009; Pheaktra, 2011). Moreover, according to Boreham and Hobbs (2011), Cambodian Premier Hun Sen stated that there will be no more than four or five individuals [in Case 001 and Case 002] who will be charged and that the Case 003 and 004 “will not be allowed”. In addition to the statements of the Prime Minister, the Information Minister, Khieu Kanharith, reaffirmed and warned international staff that “if they want to go into Case 003 and 004, they should just pack their bags and leave”. Therefore, currently only five former senior Khmer Rouge leaders, namely Kang Kek Iew, Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith, have appeared before the tribunal, and the rest of the low- and middle-ranking perpetrators as well as the other top Khmer Rouge leaders are now holding power and staying out of the judicial mechanism. Therefore, due to the political constraints and government’s intervention in the judicial process, it is unlikely that the maximum justice through the tribunal can be sought to highly satisfy Cambodian people in the country.

Last but not least, the systematic corruption in the ECCC remains one of the big challenges in the legal process in the transitional justice in Cambodia. According to YashGai, the former United Nations human rights envoy to Cambodia, wrote in *The Standard* that “the weakness and corruption within the national legal system have infected the ECCC, instead of the ECCC influencing the conduct of local judges and prosecutors” (Euraka Street, 2009). Moreover, according to Muddell (2003), generally people have lost faith in the public institutions and little trust in holding perpetrators accountable before the ECCC due to the corruption in the legal system. Therefore, the high corruption viewed as judicial scandals in Cambodian domestic legal system has so far undermined the credibility, efficiency, and competence of the judicial process and thus resulted in the procrastination as well as [imperfect] justice for Cambodian people.

### **5. FUTURE PERSPECTIVE: In Search of Transitional Justice in Cambodia**

As having critically discussed the distinct significances and limitations of both mechanisms at a moment both in theories and applications along with the key challenges to the ECCC, it can be said that both restorative and retributive approaches in which Cambodian government has implemented thus far are complementary and mutually inclusive thereby cannot be isolated. Both judicial and non-judicial approaches seek to establish justice, peace, rule of law and advanced democracy for Cambodia. However, each has played a distinctly important role. Normatively speaking, judicial approach of retributive justice with the establishment of the ECCC puts more emphases on “justice” in the sense that the senior and the most responsible perpetrators are tried and convicted before the court so that there would be, relatively speaking, justice for the victims and related stakeholders. However, as Cambodian youth, we both opinion that the conclusion of Case 001 and 002 is symbolically enough to soften the hatred and revenge of victims although the number of prosecuted perpetrators are relatively limited. This is due to the fact that crimes of Khmer Rouge are systematically committed, meaning to say that if deeply uncovered, there would not be just a few but hundreds or even thousands of people liable. If this scenario comes to place, more and more people, more seriously if those people involved government officials who got amnesty in 1990s, were charged, there would be no peace and high possibility of civil war in the country.

On the contrary, non-judicial approach of restorative justice stresses on “peace” rather than “justice” as it seeks to reconcile the division and hatred between victims and perpetrators

through the public amnesty and apology so that both can reunite in a peaceful manner. If this reconciliation does not come into place, there would be on-going division and conflict between social groups which would, otherwise, threaten to peace and political stability in the country. However, there are certain loopholes regarding restorative approach implemented by the government in 1990s as it is reconciliatory-oriented but not victim-centered in nature. The amnesty was granted just in exchange of social reintegration and ending the war, but there was no public acknowledgement and apology to the victims for the mass atrocities committed by these Khmer Rouge troops and their senior leaders. Moreover, social-religious substances which are the foundations and effective approach in reconciliation and social re-harmonization were arguably not strongly put into consideration both in 1990s' reconciliation and the formation of ECCC.

In this regard, with the ultimate objectives to optimize the balance of both peace and justice for Cambodia, we hereby would like to propose two important practical recommendations as not to challenge but as to complementary to existing transitional justice approaches in Cambodia, that is, victim-centered reconsideration and religious-cultural orientation.

***From Prosecution to Victim-Centered Approach:***

As Chan (2006) observes from Reconciliation to Judicial Measures in Cambodia, they have failed to contextualize the transitional justice around its most important audience: the victim(s). In its first attempt, the reconciliation strategy based on forgive-and-forget policy in 1990s clearly prioritized integration and civil war conclusion, but did not seek to find justice for the victims. Never have been heard the apology and remorse from these Khmer Rouge troops and their leaders, the victims still painfully live in the community together with those former-Khmer Rouge troops who killed their family members, tortured them, and even leaved them in traumatic state. Coming to the establishment of the ECCC, although the victims' participation is widely promoted as to be an integral feature of Civil Party participation, damage reparation seeking, evident gathering and witnessing (Bates, 2010), the empowerment is still somewhat limited. In today's tribunal processes, there is no public platform at all for victims and their families to tell the stories, platform for acknowledgement, reconciliation and forgiveness between victims and perpetrators, and accountability for non-top leaders of Khmer Rouge (Chan, 2006). The lack of victim-centralized approach to the transitional justice may not have the

intended consequences of uncovering the truth about the past, reaching reconciliation between victims and perpetrators, and achieving healing (Ibid.). Therefore, on the elements of truth, memory, history, acknowledgment, and accountability that have been voiced by victims and their families as important to their idea of justice shall be by virtue part of a leading processes in the tribunal.

***From Prosecution to Religious-Cultural Approach:***

The victim-oriented approach is not necessarily implemented through the channel of the Khmer Rouge Tribunal as it is too costly and not likely to simultaneously approach victims and perpetrators, there are some other marginalized, less-costly, but proven effective in many post-conflict states, that is, culturally and religiously based mechanisms to justice. Cambodian society has long been historically and culturally attached with the Buddhist philosophy accounted for 96.4% of its population (World Factbook, 2012). In this sense, it would make more sense to reconfigure Buddhism as an effective medium of reconciliation between victims and perpetrators in Cambodian context. Due to a Buddhist perception on justice, it involves the “undoing” and “forgiveness” of a crime so that order might be restored (Harris in Lambourne, 2008). This Buddhist perspective is consistent with ideas of restorative justice which rests on the virtue of forgiveness, amnesty and reconciliation, and which could be pursued via a truth commission or other culturally appropriate mechanisms. As suggested by Virorth and Sophal (2009), community-based public forums (preferably Buddhist pagodas) with involvement from Buddhist monks could also play a crucial role in reconciliation process by providing opportunity for both victims to formally express their suffering and complaint and perpetrators to express their acknowledgement, apology and remorse. Through this process, the victims can be relieved as their suffering is officially heard, inflicted wounds and trauma can be healed, the dignity of the victims can also be restored, truth can be sought, broken relationships can be restored and youth can participate and learn (Ibid.). This is where peace of mind of the victims and their dignity can be addressed, and post a positive environment to peacefully reintegrate in the society. This reconciliatory cultural mechanism is not only more victim-empowered, but also would be more cost-efficient and can engage a large numbers of both the victims and the perpetrators, particularly non-Khmer Rouge top leaders thereby reaching much more accountability and social cohesion.

## **6. CONCLUSION**

After many years of negotiation with the United Nations, Royal Government of Cambodia eventually established the Extraordinary Chambers in the Court of Cambodia in 2005 to bring only the senior leaders and the most responsible Khmer Rouge perpetrators to hold accountable before the hybrid court in order to seek the justice for the victims during the KR regime. In addition to this retributive justice process, the government has followed the restorative justice of which some former Khmer Rouge leaders and all former KR troops have been granted the amnesty and forgiveness to ensure that the peace and internal stability are highly guaranteed in the country.

Although the establishment of the ECCC after years of negotiations is inadequate in providing Cambodian people with satisfactory [perfect] justice, the imperfect justice through the ECCC remains important because it symbolizes the healing of Cambodian society, especially of those who have psychological trauma, and is regarded as the strong message to prevent any future aggressive act against all forms of inhumanities from repeating in Cambodian society as well as in the world at large. In addition, the creation of the ECCC crucially serves as the new model in reforming Cambodia's legal system to be diverse, effective, just, and civilized in response to later cases.

Hopefully and optimistically, the challenges as described above could be minimized in the future, given that Cambodian government is very sensitive to how they are perceived in the international arena and depends heavily on foreign aids and that there is the establishment of the anti-corruption law along with the anti-corruption unit to penalize those who corrupt during the judicial processes. Therefore, if the challenges are gotten rid of to some large extent, there will be more possible and positive outcomes for seeking maximum justice for Cambodian people in the transitional justice.

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**APPENDICES**

**General Assembly Resolution 2003-22 May: A/RES/57/228B Khmer Rouge Trial**

*The General Assembly,  
Recalling its resolution 57/228 of 18 December 2002,*

*Welcoming* the efforts of the Secretary-General and the Royal Government of Cambodia to conclude the negotiation of the draft Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea contained in the annex to the present resolution,

*Taking note* of the report of the Secretary-General:

1. *Approves* the draft Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea contained in the annex to the present resolution;
2. *Urges* the Secretary-General and the Royal Government of Cambodia to take all the measures necessary to allow the draft Agreement referred to in paragraph 1 to enter into force, and to implement it fully after its entry into force;
3. *Decides* that the expenses of the Extraordinary Chambers to be defrayed by the United Nations in accordance with the relevant provisions of the draft Agreement shall be borne by voluntary contributions from the international community as indicated in paragraph 9 of resolution 57/228, and appeals to the international community to provide assistance, including financial and personnel support to the Extraordinary Chambers;
4. *Requests* the Secretary-General to report to the General Assembly at its fifty-eighth session on the implementation of the present resolution.

## **Annex**

### **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.

## **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