

Recent Developments

JUSTICE DELAYED? RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

In April 1975 the Khmer Rouge seized control of Cambodia and began the drastic reorganization of Cambodian society that would, in the brief course of three years, eight months, and twenty days, leave 1.7 million Cambodians—nearly a fifth of the population—dead from starvation, disease, overwork, armed conflict, and mass execution.¹ Some thirty years later, hope has finally emerged that several of the individuals most responsible for “some of the most horrific violations of human rights seen in the world since the end of the Second World War”² may finally be brought to account for their actions. Between July and November of 2007, the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), the hybrid Cambodian-international tribunal tasked with investigating and prosecuting those responsible for crimes committed in Cambodia between 1975 and 1979, arrested five former Khmer Rouge leaders and charged them with crimes against humanity and war crimes.³ While enthusiasm for this progress should be tempered by concerns about the obstacles that remain for the ECCC to surmount, any step towards justice this long delayed marks a significant moment for the future of Cambodia.

I. BACKGROUND

The significance of the recent work of the ECCC can only be understood in the context of the events of the 1970s, which illustrate both the ECCC’s undeniable importance and the difficulties the tribunal faces.

A. *The Horrors of the Democratic Kampuchea Period*

The morning of April 17, 1975—the day Phnom Penh fell to the forces of the Khmer Rouge—would come to mark “a horrific turning point in

1. The Group of Experts for Cambodia, *Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135*, ¶ 1, U.N. Doc. S/1999/231, A/53/850 (Mar. 16, 1999) [hereinafter Group of Experts Report].

2. *Id.*

3. Kevin Doyle, *Cambodia Arrests Brother No. 2*, TIME, Sept. 19, 2007, <http://www.time.com/time/world/article/0,8599,1663314,00.html>; Ek Madra, *Court Charges Khmer Rouge President*, REUTERS, Nov. 19, 2007, <http://uk.reuters.com/article/topNews/idUKBKK8935020071119?feedType=RSS&feedName=topNews&pageNumber=1&virtualBrandChannel=0>.

Cambodian history.”⁴ With the victory of the Pol Pot-led Khmer Rouge over Lon Nol and the Khmer Republic (which had ruled Cambodia, with the backing of the United States, since overthrowing Prince Norodom Sihanouk in 1970), Cambodia was thrust into a nightmare permeated “by abuses of individual and group human rights on an immense and brutal scale.”⁵

The complete reorganization of Cambodian society along extreme communist revolutionary lines followed rapidly upon the establishment of Democratic Kampuchea (“DK”) under the rule of the Khmer Rouge. In order to build from scratch an agrarian communist social utopia in Cambodia, the regime put an end to all pre-existing economic, social, and cultural institutions: money, markets, formal education, Buddhism, books, private property, diverse clothing styles, freedom of movement, and all foreign influences.⁶ The ideological leaders of the Khmer Rouge, drawing on the revolutionary examples of China, Vietnam, and North Korea, believed that the elimination of these “feudal institutions” would allow a nation of peasants to replace widespread inequity with social justice.⁷ In the week after seizing control, the new government ordered over two million Cambodians, including the sick and the elderly, out of the nation’s cities and into the countryside where the masses were forced to work growing rice and other crops in communes, often separated from family members, under the armed supervision of soldiers.⁸ The intense physical labor of agricultural work, coupled with famines that struck much of the country in 1977 and 1978, decimated the population.⁹ The policies of the economic transformation of Cambodia engineered by the Khmer Rouge were the greatest cause of death during the period of the DK; hundreds of thousands were killed by starvation, disease, exhaustion, or execution for insufficient labor.¹⁰

In addition to the deaths attributable to communist economic reorganization, members of the Khmer Rouge executed hundreds of thousands of civilians in bloody purges targeting the educated, racial minorities, religious figures, officials of the former regime, and Khmer Rouge members themselves, all as perceived enemies of the revolution.¹¹ A network of prisons throughout the country helped ferret out these “spies” and “conspirators” through the detention and brutal torture of anyone with a middle-class background, a link to foreign countries, or a friend or family member who had confessed.¹² Between 1975 and 1979, in the regime’s principal

4. Group of Experts Report, *supra* note 1, ¶ 14. See DAVID CHANDLER, A HISTORY OF CAMBODIA 254–55 (4th ed. 2008).

5. Group of Experts Report, *supra* note 1, ¶¶ 14, 18.

6. *Id.* ¶ 16. See CHANDLER, *supra* note 4, at 256–57.

7. CHANDLER, *supra* note 4, at 256.

8. *Id.* at 257; Group of Experts Report, *supra* note 1, ¶¶ 20–22.

9. CHANDLER, *supra* note 4, at 264.

10. Group of Experts Report, *supra* note 1, ¶ 23.

11. *Id.* ¶¶ 24–30; CHANDLER, *supra* note 4, at 259.

12. CHANDLER, *supra* note 4, at 268.

detention and interrogation center alone, known by the codename S-21, some 14,000 men, women, and children were interrogated, tortured, and, in all but a handful of cases, put to death.¹³ Those who survived interrogation were routinely executed in nearby killing fields and buried in one of the many mass graves that now dot the Cambodian countryside.¹⁴ It is estimated that “[p]erhaps as many as four hundred thousand were killed outright as enemies of the revolution.”¹⁵ Together these facts constitute only a brief overview of a vast historical record rife with human rights abuses startling in their breadth, speed, brutality, and long-lasting repercussions.

The short reign of the Khmer Rouge ended on January 7, 1979, when a better-equipped Vietnamese army, provoked by escalating border conflicts with Cambodia and the Khmer Rouge’s expulsions and massacres of ethnic Vietnamese living in Cambodia, routed Pol Pot’s army and captured Phnom Penh.¹⁶ The Vietnamese established the People’s Republic of Kampuchea (“PRK”), led by many former Khmer Rouge members who had defected to Vietnam during the purges; the new government ruled Cambodia with Vietnamese support for over a decade.¹⁷ After fleeing to the Cambodian-Thai border, the Khmer Rouge survived into the 1980s as a guerrilla force with support from an anti-Vietnam coalition including China, Thailand, and the United States.¹⁸ In this capacity the Khmer Rouge continued to fight the Vietnamese and later the United Nations Transitional Authority (“UNTA”) that entered the country after the Vietnamese withdrawal.¹⁹

The UNTA helped establish a new coalition government in 1993, headed by a young Khmer Rouge defector named Hun Sen.²⁰ The new Prime Minister neutralized the Khmer Rouge as a military threat and finally brought a measure of peace to the ravaged country.²¹ Nevertheless, many former Khmer Rouge leaders, including Pol Pot who died in 1998, managed to live out their lives without being brought to justice. Many others were welcomed into the new government and army in the interests of peace.²²

13. *Id.* at 124.

14. TOM FAWTHROP & HELEN JARVIS, GETTING AWAY WITH GENOCIDE? ELUSIVE JUSTICE AND THE KHMER ROUGE TRIBUNAL 9–10 (2004). See also Cambodia Genocide Project - Maps, <http://www.yale.edu/cgp/maps/staticmaps.html> (last visited Dec. 10, 2007).

15. CHANDLER, *supra* note 4, at 259.

16. *Id.* at 274.

17. *Id.* at 277.

18. Group of Experts Report, *supra* note 1, ¶ 38. CHANDLER, *supra* note 4, at 281.

19. CHANDLER, *supra* note 4, at 286–89.

20. Group of Experts Report, *supra* note 1, ¶¶ 44, 95–98.

21. CHANDLER, *supra* note 4, at 289–90.

22. *Id.*

B. *The Establishment of the Extraordinary Chambers*

The current²³ attempt to hold accountable those most responsible for the atrocities of the Khmer Rouge period dates back to 1997, when Co-Prime Ministers Hun Sen and Norodom Ranariddh requested assistance from the U.N. in creating a forum in which to bring the Khmer Rouge, or at least its former leaders, to justice.²⁴ The Secretary General responded in July 1998 by appointing a Group of Experts who recommended the establishment of an international tribunal akin to those created for the former Yugoslavia and Rwanda, and cautioned against U.N. involvement in a Cambodian domestic trial.²⁵ The Experts felt that the Cambodian legal system lacked the ability to conduct a fair process, citing a dearth of trained judges, lawyers, and infrastructure, and a culture of impartial criminal justice administration.²⁶ Moreover, the Experts worried that the Cambodian government's lingering connections to the Khmer Rouge and willingness to exercise political influence over the judiciary would greatly jeopardize the independence of the court and the perception of judicial integrity and justice.²⁷

During the complex negotiations between U.N. officials and the Cambodian government that followed from 1999 to 2002, Hun Sen remained insistent that any tribunal be more national than international, out of a desire to maintain national autonomy and perhaps form a court over which he could wield significant control.²⁸ After the U.N. pulled out of the process in 2002 (citing the inability of the proposed agreement to guarantee independence, impartiality, and objectivity), it was only the intervention of interested countries led by Japan, France, Australia, and the United States that ultimately salvaged the tribunal.²⁹ The final agreement of 2003 created a hybrid tribunal that retained some of the features that led the U.N. and many international and domestic human rights groups to conclude that it could not fairly administer justice.³⁰ Unlike at other international criminal tribunals, at the ECCC, Cambodian national judges make up the majority

23. Pol Pot and Ieng Sary were both tried in absentia in 1979 and sentenced to death in proceedings conducted by the Vietnamese-backed PRK, proceedings that were widely criticized as rife with violations of due process and fair trial rights (for example, no evidence was offered in defense of either individual). These "show trials" were largely aimed at absolving socialism in general of the brutalities of the regime, instead placing blame on the individual regime leaders. CHANDLER, *supra* note 4, at 280. *But see* FAWTHROP & JARVIS, *supra* note 14, at 40–51 (arguing that while the PRK trials had shortcomings, they were more than mere show trials when viewed through the prism of the civil law tradition).

24. FAWTHROP & JARVIS, *supra* note 14, at 117–18.

25. Group of Experts Report, *supra* note 1, ¶¶ 132–38, 178–84.

26. *Id.* ¶¶ 126–30.

27. *Id.* ¶¶ 95–98.

28. CHANDLER, *supra* note 4, at 295–96. *See generally* Herbert Bowman, *Not Worth the Wait: Hun Sen, the UN, and the Khmer Rouge Tribunal*, 24 UCLA PAC. BASIN L.J. 51 (Fall 2006).

29. Craig Etcheson, A "Fair and Public Trial": A Political History of the Extraordinary Chambers, JUST. INITIATIVES, Spring 2006, at 7, 16–19.

30. *Id.* at 19. *See generally* Bowman, *supra* note 28.

of the pre-trial chamber, the trial court, and the appeals chamber.³¹ Additionally, one of each of the two Co-Investigating Judges and Co-Prosecutors is a Cambodian national, and the procedural law employed by the ECCC is Cambodian, though the agreement does provide for consultation of international procedural law for guidance in situations of uncertainty or conflict.³² The predominantly national character of this final agreement left many doubtful of the ability of the ECCC to uphold international standards of justice and to maintain its independence from the influence of the Hun Sen government.³³

II. RECENT DEVELOPMENTS AT THE ECCC

In June of 2007, judges removed the last obstacle to the full operation of the ECCC when they adopted internal rules of procedure.³⁴ Then, in July, the Co-Prosecutors formally initiated the tribunal by filing their first Introductory Submission in the office of the Co-Investigating Judges,³⁵ requesting the investigation of “twenty-five distinct factual situations of murder, torture, forcible transfer, unlawful detention, forced labor and religious, political and ethnic persecution” that prosecutors believed constituted crimes against humanity, genocide, and breaches of the Geneva Conventions.³⁶ The prosecutors further requested that the judges charge five suspects who, as senior Khmer Rouge leaders, bore responsibility for these crimes.³⁷ These requests were supported by the submission of more than 14,000 pages of documents that included 350 witness statements, thousands of pages of Democratic Kampuchea-era documentation, and the locations of over forty undisturbed mass graves.³⁸ Although the names of the five suspects were not initially made public, their identities were revealed when the ECCC arrested and detained Kaing Guek Eav, Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan.³⁹

31. 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, G.A. Res. 57/228(B)/Annex, arts. 3.1, 3.2, 7.2, U.N. Doc. A/RES/57/228(B)/Annex (May 22, 2003) [hereinafter Agreement]. The super-majority provision, which requires that at least one international judge agree to any decision, *id.* art. 4.1, assuages some of this worry, but it remains unclear how the rule will operate in practice.

32. *Id.* art. 12.1.

33. See generally Bowman, *supra* note 28.

34. OPEN SOCIETY JUSTICE INITIATIVE, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: AUGUST 2007 UPDATE 3 (Aug. 3, 2007) [hereinafter August Developments].

35. Press Statement, Extraordinary Chambers in the Courts of Cambodia, Statement of the Co-Prosecutors 1 (July 18, 2007), available at http://www.eccc.gov.kh/english/cabinet/press/33/Statement_of_Co-Prosecutors_18-July-2007_.pdf [hereinafter Statement of the Co-Prosecutors].

36. *Id.* at 4.

37. *Id.* at 5.

38. *Id.* at 6.

39. See Extraordinary Chambers in the Courts of Cambodia, Order of Provisional Detention, Investigation No. 001/18-07-2007, available at <http://www.eccc.gov.kh/english/cabinet/indictment/1/Or->

A. *Kaing Guek Eav* (“Duch”)

On July 31, 2007, Kaing Guek Eav, known by the alias “Duch,” became the first suspect to be brought before the Extraordinary Chambers when he was detained and charged with crimes against humanity for widespread and systematic abuses including arbitrary detention, torture, inhumane treatment, and mass executions.⁴⁰ Duch stands accused of directing the Khmer Rouge main security prison and torture center Tuol Sleng (also known as S-21),⁴¹ which occupied the site of a former high school in the southern section of Phnom Penh and was the setting for the detention, torture, and eventual execution of 14,000 “enemies of the revolution.”⁴² The Co-Investigating Judges found a “well-founded belief” that countless crimes that allegedly occurred at S-21 were committed under Duch’s authority and targeted civilians, elements of the charge of crimes against humanity.⁴³

Commenting on the strength of the evidence, the judges found that there were well-founded reasons to believe that Duch participated in the crimes alleged in the introductory submission, noting that he was implicated by many documents and several witnesses.⁴⁴ Indeed, the Khmer Rouge’s focus on meticulous record-keeping and obtaining confessions from the party’s enemies resulted in over 4,000 dossiers of the victims who passed through S-21 and several thousand of typed and handwritten confessions, some of them hundreds of pages long.⁴⁵ Additionally, internal prison documentation and memoranda implicate Duch in acts of torture and execution.⁴⁶ It does not appear that Duch intends to challenge the factual information of abuses that occurred at S-21. The judges indicated that Duch has already stated that he was indeed the director of the prison.⁴⁷ Furthermore, in a previous interview in 1999, Duch acknowledged not only his position but his signature on S-21 documents ordering the torture and execution of pris-

der_of_Provisional_Detention-DUCH-EN.pdf [hereinafter Duch Order]; Extraordinary Chambers in the Courts of Cambodia, Order of Provisional Detention, Investigation No. 002/19-09-2007, available at http://www.eccc.gov.kh/english/cabinet/indictment/2/Provisional_Detention_Order_Nuon_Chea_19_092007_ENG.pdf [hereinafter Nuon Order]; Extraordinary Chambers in the Courts of Cambodia, Order of Provisional Detention, Investigation No. 002/19-09-2007-ECCC/OCIJ, available at http://www.eccc.gov.kh/english/cabinet/indictment/11/Provisional_detention_order_IENG_Sary_ENG.pdf [hereinafter Sary Order]; Extraordinary Chambers in the Courts of Cambodia, Order of Provisional Detention, Investigation No. 002/19-09-2007-ECCC/OCIJ, available at http://www.eccc.gov.kh/english/cabinet/indictment/10/Provisional_detention_order_IENG_Thirith_ENG.pdf [hereinafter Thirith Order]; Extraordinary Chambers in the Courts of Cambodia, Order of Provisional Detention, Investigation No. 002/19-09-2007-ECCC/OCIJ, available at http://www.eccc.gov.kh/english/cabinet/indictment/12/Provisional_detention_order_KHIEU_Samphan_ENG.pdf [hereinafter Khieu Order].

40. Duch Order, *supra* note 39, ¶ 1.

41. *Id.*

42. Doyle, *supra* note 3; DAVID CHANDLER, BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY OF POL POT 123 (rev. ed. 1999).

43. Duch Order, *supra* note 39, ¶¶ 1, 23.

44. *Id.*

45. CHANDLER, *supra* note 4, at 265–66.

46. CHANDLER, *supra* note 42, at 127.

47. Duch Order, *supra* note 39, ¶ 1.

oners.⁴⁸ Rather than deny the facts, it appears Duch intends to deflect the culpability for his actions onto his superiors. The Tribunal has indicated that Duch plans to “reveal the crimes committed by the Khmer Rouge,”⁴⁹ and in the past Duch tried to cast his own role in the atrocities as a subordinate simply following orders from above.⁵⁰ This defense strategy makes it likely that Duch will provide valuable information that will aid in proving the connection of senior Khmer Rouge leadership to the killings at S-21 and elsewhere in the country.⁵¹

Additionally, the judges ordered Duch into provisional detention in a specially built detention center in order to ensure his presence during proceedings, protect his personal safety, and preserve public order.⁵² In fact, Duch has been in Cambodian military prison since May 1999,⁵³ when he was arrested and charged with murder, torture, and membership in an outlawed group.⁵⁴ At the ECCC, Duch’s lawyer has challenged this earlier detention as contrary to both Cambodian Law and international standards and has requested Duch’s release.⁵⁵

The Co-Investigating Judges rejected this claim and found that Duch’s prior detention required neither his pre-trial release nor the outright cessation of proceedings in the present case against him.⁵⁶ The judges saw the conflict as a choice between the two competing doctrines, found in foreign and international precedents, of *male captus, bene detentus* (the arrest and mode of bringing an accused into the jurisdiction of a court has no relevance to his trial) and abuse of process (it is proper for courts to decline to exercise jurisdiction on the ground that the state has come to the court with unclean hands).⁵⁷ In rejecting the application of abuse of process to Duch’s case, the judges were persuaded by the solution adopted by international criminal courts in *Prosecutor v. Nikolic* and *Prosecutor v. Lubanga*, which required a showing of grave violations of rights in order to justify the application of abuse of procedure doctrine and the dismissal of the case.⁵⁸ The judges found that given the extraordinary nature of a charge of crimes

48. Press Release, The Far Eastern Economic Review, Khmer Rouge Chief Executioner Confesses to his Past in Exclusive Review Interview (Apr. 28, 1999), available at http://www.feer.com/breaking_news/duch.html [hereinafter Chief Executioner Confesses].

49. Duch Order, *supra* note 39, ¶1.

50. See Doyle, *supra* note 3.

51. FAWTHROP & JARVIS, *supra* note 14, at 268.

52. Duch Order, *supra* note 39, ¶¶ 22, 23.

53. *Id.* ¶ 2.

54. *Id.* ¶ 1.

55. *Id.* ¶ 1.

56. *Id.* ¶¶ 20–22.

57. See *id.* ¶¶ 4–5, 12.

58. *Id.* at ¶¶ 18–19, 21, (citing *Prosecutor v. Nikolic*, Case No. IT-94-2-PT, Decision on Defense Motion Challenging the Exercise of Jurisdiction by the Tribunal, ¶ 111 (Oct. 9, 2002) and *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court, ¶¶ 42–43 (Dec. 14, 2006)).

against humanity, the conditions of Duch's prior detention (which were not alleged to have included torture or serious mistreatment) were not so grave as to require his release or a stay of the proceedings.⁵⁹ On appeal, after the first public hearing held by the ECCC, on November 20 and 21, 2007, the Pre-Trial Chamber affirmed the Co-Investigating Judges' detention order.⁶⁰

B. Nuon Chea ("Brother Number Two")

On September 19, 2007, Nuon Chea, also known as "Brother Number Two," became the second person to stand accused at the Extraordinary Chambers for his role in the atrocities committed under the Khmer Rouge.⁶¹ In a statement of the factual allegations, the Co-Investigating Judges charged Nuon Chea with crimes against humanity (for murder, torture, imprisonment, persecution, extermination, deportation, forcible transfer, enslavement, and other inhumane acts) and war crimes (for willful killing, torture, inhumane acts, causing great suffering or bodily injury, deprivation of fair trial rights, unlawful confinement, and unlawful deportation).⁶²

Nuon Chea was a founding member of the Kampuchean People's Revolutionary Party (the predecessor of the Khmer Rouge) in 1951, and during the Democratic Kampuchea period he served as the chief ideologue of the Khmer Rouge and right-hand man to Pol Pot.⁶³ Between 1975 and 1979, Nuon Chea held numerous posts in the upper echelons of the Khmer Rouge leadership, serving as Deputy Secretary of the Communist Party of Kampuchea ("CPK"), a member of the CPK Central and Standing Committees, the Chairman of the Democratic Kampuchea People's Assembly, the acting prime minister, and the Vice Chairman of the CPK Military Committee.⁶⁴ The judges allege that in these capacities Nuon Chea planned, ordered, directed, or aided and abetted in the commission of crimes against humanity and war crimes by exercising authority over the internal detention centers and by directing and enforcing the Party policy of forcible transfers, enslavement, forced labor, and other inhumane acts.⁶⁵ Nuon Chea has also been implicated by Duch in the deaths that occurred at Khmer Rouge detention facilities, particularly S-21. In a 1999 interview, Duch said that Nuon Chea had given him direct orders to kill 300 soldiers in a party purge in 1978 and ordered the execution of eight captured Wes-

59. Duch Order, *supra* note 39, ¶ 21.

60. Extraordinary Chambers in the Courts of Cambodia, Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias "Duch", Case No. 001/18-07-2007-ECCC-OCIJ (PTC01), 18-19, *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/16/PTC_decision_appeal_duch_C5-45_EN.pdf.

61. Doyle, *supra* note 3.

62. Nuon Order, *supra* note 39, ¶ 1.

63. FAWTHROP & JARVIS, *supra* note 14, at 260.

64. Nuon Order, *supra* note 39, ¶ 2.

65. *Id.*, ¶ 2.

terners and the burning of their bodies.⁶⁶ Duch also alleges that he worked closely with Nuon Chea and that Chea had knowledge of the waves of purges undertaken by the regime.⁶⁷ Duch has even identified the handwriting of Nuon Chea on S-21 prison documents.⁶⁸ Some genocide researchers believe that Nuon Chea may have actually played a greater role than Pol Pot in the regime's executions.⁶⁹

According to his detention order, Nuon Chea has disputed the charges against him, like Duch, by deflecting blame for the regime's atrocities onto others.⁷⁰ Nuon Chea claims to have been unaware of what was happening at local bases and asserts that during the Democratic Kampuchea period all real power was in the hands of the Military Committee, of which he was not a member.⁷¹ He further points out that he lost around forty family members during the events of the time and that he, like Duch, desires to reveal the truth about the Khmer Rouge period.⁷² Nuon Chea also criticizes the ECCC's lack of jurisdiction to investigate the United States' "secret bombing" of Cambodia, the anti-communist purges conducted by King Norodom Sihanouk, and the atrocities committed after the Vietnamese invasion that toppled Pol Pot.⁷³ As in Duch's case, the Co-Investigating Judges found reason to provisionally detain Nuon Chea before his trial, citing risks that his release would provoke protests and possible violence, the opportunity for intimidating witnesses, and the possibility of him fleeing prosecution.⁷⁴

C. *Ieng Sary & Ieng Thirith*

Ieng Sary, who served as the Foreign Minister and Deputy Prime Minister in Pol Pot's regime, and his wife, Ieng Thirith, who served as Social Affairs Minister, were arrested together in November 2007, and ordered into detention by the ECCC.⁷⁵ Ieng Sary stands charged with war crimes and crimes against humanity.⁷⁶ Survivors and reports allege that in his responsibilities for the re-education of returnees during the DK period, Ieng Sary persuaded diplomats, students, and other Cambodians living abroad to

66. Press Release, Far Eastern Economic Review, Review Exclusive: Duch Implicates Living Khmer Rouge Leaders in Killing (May 4, 1999), available at http://www.feer.com/breaking_news/duch2.html [hereinafter *Duch Implicates*].

67. *Id.*

68. Doyle, *supra* note 3; Chief Executioner Confesses, *supra* note 48.

69. Amanda Pike, *Reporter's Diary: In Search of Justice* (pt. 10), PBS: FRONTLINE, Oct. 2002, <http://www.pbs.org/frontlineworld/stories/cambodia/diary10.html>; Duch Implicates, *supra* note 66.

70. Nuon Order, *supra* note 39, ¶ 4.

71. *Id.*

72. *Id.*

73. Ek Madra, "I'm Innocent," Says Khmer Rouge Brother No. 2, REUTERS, Sept. 21, 2007, <http://www.reuters.com/article/latestCrisis/idUSBKK152486>.

74. Nuon Order, *supra* note 39, ¶ 5.

75. Thomas Fuller, *Couple Formerly in Top Khmer Ranks Arrested, Accused of Crimes Against Humanity*, INT'L HERALD TRIB., Nov. 12, 2007, at 3.

76. Sary Order, *supra* note 39, ¶ 1.

return home, where many of them were executed.⁷⁷ After the fall of the Khmer Rouge to Vietnam, Ieng Sary was sentenced to death for the crime of genocide in a trial held by the People's Revolutionary Tribunal in Phnom Penh in 1979.⁷⁸ This sentence was rescinded in 1996 by royal pardon and Ieng Sary was granted amnesty under domestic laws that criminalized Khmer Rouge membership.⁷⁹ The Co-Investigating Judges found that neither the previous conviction, nor the ensuing pardon and amnesty, presented obstacles to prosecution before the ECCC.⁸⁰ The judges held that Sary's conviction for genocide did not preclude trial before the ECCC under the general principle of *ne bis in idem* (generally, that no legal action can be instituted twice for the same crime) because his charges before the ECCC were limited to war crimes and crimes against humanity — offenses that contain distinct elements from the crime of genocide.⁸¹ They also held that Sary's pardon was limited in effect to the annulment of the sentence imposed under his earlier conviction and that the amnesty he received only applied to crimes defined in domestic Cambodian law, not international law, making both inapplicable to the ECCC's proceedings.⁸²

Ieng Thirith, also a government official and close associate of Pol Pot, stands charged of crimes against humanity.⁸³ She was one of only a few women to reach the upper levels of the Khmer Rouge hierarchy and vociferously defended the regime even after its demise.⁸⁴

D. *Khieu Samphan*

In November 2007, Cambodian police also arrested Khieu Samphan at a Phnom Penh hospital where he had been receiving treatment for a stroke.⁸⁵ He was detained on charges of war crimes and crimes against humanity.⁸⁶ During the period of Democratic Kampuchea, Khieu Samphan held the highest formal position, replacing deposed King Norodom Sihanouk as Head of State.⁸⁷ He continued to hold positions in the DK government-in-exile, and throughout the 1980s was the moderate face of the Khmer Rouge.⁸⁸ The Co-Investigating Judges found reason to believe that Khieu Samphan stands criminally responsible as the Head of State for facilitating and legitimating the continued perpetration of criminal acts throughout Cambodia during the DK period through speeches, political training, pub-

77. FAWTHROP & JARVIS, *supra* note 14, at 261.

78. *Id.* at 40–51.

79. *Id.* at 262.

80. Sary Order, *supra* note 39, ¶ 14.

81. Sary Order, *supra* note 39, ¶¶ 7–9.

82. Sary Order, *supra* note 39, ¶¶ 12–13.

83. Fuller, *supra* note 75.

84. FAWTHROP & JARVIS, *supra* note 14, at 265–66.

85. Madra, *Court Charges Khmer Rouge President*, *supra* note 3.

86. Khieu Order, *supra* note 39, ¶ 1.

87. FAWTHROP & JARVIS, *supra* note 14, at 263.

88. *Id.*

lic approbation of the regime, and denial in international forums of the crimes being committed in Cambodia.⁸⁹

III. THE FUTURE OF THE EXTRAORDINARY CHAMBERS

Despite the obvious progress made with arrests and charges, the ECCC faces many challenges in pursuing its current prosecutions, and in overcoming the issues that have raised concern about the tribunal since its inception.

A. *Next Steps in the Judicial Process*

With Khieu Samphan's arrest, the ECCC has now detained all five suspects named by the Co-Prosecutors in their initial submission.⁹⁰ A hearing on the detention order was already held before the Pre-Trial Chamber in Duch's case and similar hearings will likely occur on challenges to some of the other four provisional orders—though whether they receive public hearings like Duch will be left to the discretion of the Pre-Trial Chamber.⁹¹ Duch's trial, the first to be held by the ECCC, is expected to start in 2008 and will proceed separately from the others.⁹² The remaining four accused may be investigated and tried together as part of the same criminal conspiracy.⁹³ The Co-Prosecutors will participate in the investigation led by judges and may choose to submit additional names to the Co-Investigating Judges in order to initiate more proceedings.⁹⁴

B. *Ongoing Challenges Facing the ECCC*

Many of the same issues that have faced the court since its inception will continue to challenge its prospects for success. The aging of both former Khmer Rouge leaders and their victims exerts serious time pressure on the proceedings. For instance, Ta Mok, a high-ranking official in both the Party and the armed forces, would have been an obvious choice for the prosecutors' list, but he died in 2006 of tuberculosis.⁹⁵ Interference from the Cambodian government also threatens the proceedings of the court, the independence of its judges, and the public perception of the fairness of the venture. In September 2007, a government spokesperson claimed that the government has the authority to terminate the tribunal if judges bring

89. Khieu Order, *supra* note 39, ¶ 5.

90. OPEN SOCIETY JUSTICE INITIATIVE, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: DECEMBER 2007 UPDATE 3 (Dec. 7, 2007)

91. *Id.* at 9.

92. *Id.* at 3.

93. *Id.* at 3–4.

94. August Developments, *supra* note 34, at 5.

95. *Former Khmer Rouge Commander Dies*, TAIPEI TIMES, Jul. 22, 2006, at 5, available at <http://www.taipetimes.com/News/world/archives/2006/07/22/2003319875>.

charges against former King Norodom Sihanouk.⁹⁶ In August, the UN expressed concern that the government's promotion of one of the Chambers' Co-Investigating Judges to the presidency of the Cambodian Court of Appeals could threaten efficiency and the perception of judicial independence at the ECCC.⁹⁷ An independent audit in January 2007 investigated allegations that U.N. funds for the tribunal were being siphoned off as kickbacks.⁹⁸ These difficulties reveal deep institutional instability within a tribunal that has little protection from government pressure. Additionally, in relying on a voluntary funding scheme to finance the ECCC, the U.N. and the Cambodian government created uncertainty about the tribunal's future and its impartiality.⁹⁹

IV. THE VALUE OF IMPERFECT JUSTICE

How successful this flawed tribunal can ultimately be in providing the people of Cambodia with a sense of justice and an understanding of the horrific Khmer Rouge period and its tragic reverberations thirty years after the fact remains uncertain.¹⁰⁰ But the arrest, detention, and eventual trial of men who have thus far enjoyed relative impunity for their part in brutalizing a nation and its people is a step forward—and perhaps should be embraced as the last chance to make such a step.

—Padraic J. Glaspy*

96. Caitlin Price, *Cambodia Can 'Terminate' Genocide Tribunal if Ex-King Prosecuted: Official*, JURIST, Sept. 3, 2007, available at <http://jurist.law.pitt.edu/paperchase/2007/09/cambodia-can-terminate-genocide.php>.

97. UN Concerned at Appointment of Judge on Khmer Rouge Tribunal to National Court, UN NEWS CENTRE, August 16, 2007, available at <http://www.un.org/apps/news/story.asp?NewsID=23519&Cr=cambodia&Cr1=&Kw1=Cambodia&Kw2=&Kw3>.

98. John A. Hall, *Yet Another U.N. Scandal*, WALL ST. J., Sept. 21, 2007, at A15.

99. See Thordis Ingadottir, *Cambodian Extraordinary Chambers — Justice at Long Last? Financial Challenges and Their Possible Effects on Proceedings*, 4 J. INT'L CRIM. JUST. 294 (2006).

100. See, e.g., *Cambodians Await Khmer Rouge Trials*, BBC NEWS, Sept. 19, 2007, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/7002764.stm>.

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