

Introduction to the Khmer Rouge Tribunal

Janet Lee and Karen Yookyung Choi

Edited by Héleyn Uñac, Legal Training Coordinator

DC-Cam's 2005 Legal Training Project focused on criminal defense before the upcoming Khmer Rouge Tribunal. This document is an excerpt from the legal training course material.

I. CREATION OF THE KHMER ROUGE TRIBUNAL (KRT)

At least 1.5 million people, approximately 20 percent of the Cambodian population, are believed to have died during the Khmer Rouge regime. However, despite the scale and seriousness of the crimes, no formal efforts to prosecute and punish the perpetrators of such crimes were initiated after the fall of the regime. The only trials that took place were those that the People's Republic of Kampuchea arranged in August 1979 against Pol Pot and Ieng Sary. But, they are generally regarded as show trials.

The United Nations (UN) and the Royal Government of Cambodia (RGC) have for several years pursued negotiations over possible methods for bringing Khmer Rouge leaders to trial for atrocities of the past. The disintegration of Pol Pot's insurgency and his detention by Ta Mok in mid-1997 added further impetus and urgency to deal with this issue.

In June 1997, then Co-Prime Ministers Prince Norodom Ranariddh and Hun Sen formally requested the assistance of the UN in bringing to justice "*those persons responsible for the genocide and crimes against humanity during the Khmer Rouge regime.*" Subsequently, the UN appointed a Group of Experts, who considered various options on how to proceed, including holding trials before the existing domestic courts or setting up a mixed tribunal, like the ones later implemented in Sierra Leone and East Timor. Ultimately, the Group of Experts concluded that only an *ad hoc* international criminal tribunal would be effective given the precarious state of the judiciary in Cambodia. This recommendation was rejected by Prime Minister Hun Sen, citing national sovereignty. To break the deadlock, Thomas Hammarberg of Sweden, the UN Special Representative for Human Rights in Cambodia, proposed that a mixed tribunal with a majority of international judges and an international prosecutor be set up. Prime Minister Hun Sen also disagreed with this proposal. In February 2000, the UN Secretary General, Kofi Annan, issued a statement that the UN would agree to a mixed tribunal only if the Cambodian government resolved the following four fundamental issues: the status of the foreign prosecutor, apprehension of suspects, amnesty, and the number of foreign judges.

Despite those divergences between the UN and the RGC, the Cambodian National Assembly passed a “*Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*” (ECDK Law) in January 2001. This law, which was promulgated on 10 August 2001, provides that “*Extraordinary Chambers*” (commonly known as the Khmer Rouge Tribunal) will be set within the national court structure and will be composed of a majority of Cambodian judges. Following the promulgation of the above-mentioned ECDK Law, the UN and the RGC negotiated an agreement with the purpose of regulating their cooperation in bringing to trial individuals before the “*Extraordinary Chambers*.” The UN insisted that international standards of fair trial be incorporated into the Agreement. The draft UN-RGC Agreement was signed by both parties in June 2003.

The Cambodian legislature made several amendments to the 2001 ECDK Law, notably to put it in conformity with the above-mentioned UN-RGC draft Agreement. In October 2004, the Cambodian National Assembly adopted both the UN-RGC Agreement and the amended ECDK Law, which were promulgated on 19 and 27 October 2004, respectively. The Khmer Rouge Tribunal is, thereby, a product of these two legal instruments, namely the Amended ECDK Law and the UN-RGC Agreement.

The UN and RGC also agreed that the estimated cost of proceedings before the KRT will amount to 56 million US dollars over a three-year period. At the end of April 2005 the UN Secretary General announced that sufficient pledges and contributions were in place to fund the staffing of the two Extraordinary Chambers and their operations for a sustained period of time.

II. JURISDICTION OF THE KHMER ROUGE TRIBUNAL

A. Territorial, temporal and personal jurisdictions

1. Territorial jurisdiction

The KRT will sit in Phnom Penh, but the jurisdiction of this court covers the entire territory of the Kingdom of Cambodia.

2. Temporal jurisdiction

The KRT has a limited temporal jurisdiction. It can only try crimes that occurred between 17 April 1975 (the day that the Khmer Rouge arrived in Phnom Penh) and 6 January 1979 (the day that the Khmer Rouge was removed from power).

3. Personal jurisdiction

The KRT's mandate is to prosecute and try senior leaders of Democratic Kampuchea and those who were most responsible for the crimes listed in the ECDK Law as mentioned below.

Article 29 of the ECDK Law further specifies who could be held criminally responsible:

“Any suspect who planned, instigated, ordered, aided and abetted or committed the crimes referred to in new articles 3, 4, 5, 6, 7 and 8 of this law”

Article 29 of the ECDK Law further sets forth the possibility of holding individuals criminally responsible for the acts committed by their subordinates by application of the command responsibility doctrine.

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

B. Subject matter jurisdiction

Perpetrators of human rights abuses will be tried under two sets of criminal laws at the KRT, i.e., international law and domestic law. The international crimes include genocide, crimes against humanity, grave breaches of the Geneva Convention, destruction of cultural property, and crimes against internationally protected persons. The domestic crimes are those covered by the 1956 Penal Code of Cambodia, namely homicide, torture and religious persecution.

1. International crimes

a. Genocide

Definition:

Pursuant to Article 9 of the UN-RGC Agreement (which adopts the definition of the 1948 Genocide Convention): “*the acts of genocide mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*

- (a) Killing members of the group;*
- (b) Causing serious bodily or mental harm to members of the group;*
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- (d) Imposing measures intended to prevent births within the group;*
- (e) Forcibly transferring children of the group to another group.”*

Article 4 of the ECDK Law adopts the same definition, but also enumerates the following punishable acts: attempt to commit acts of genocide, conspiracy to commit acts of genocide, and participation in acts of genocide.

Key elements:

- i. Acts committed against a national, ethnical, racial or religious group. Note that it does not cover political or socio-economic groups.
- ii. With an intent to destroy, in whole or in part, one of these groups as such.

Remarks:

- i. Cambodia has been a party to the Genocide Convention of 9 December 1948, without reservation, since the Convention’s entry into force in 1951.
- ii. The crime of genocide is considered to be *jus cogens* and customary international law.

b. Crimes against humanity (CAH)

Definition:

According to Article 9 of the UN-RGC Agreement, crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court (ICC Statute) fall within the jurisdiction of the KRT.

Article 7 of the ICC Statute defines CAH as follows: “*Crimes against humanity mean any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*

- (a) Murder;*
- (b) Extermination;*
- (c) Enslavement;*
- (d) Deportation or forcible transfer of population;*
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
- (f) Torture;*
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court;*
- (i) Enforced disappearance of persons;*
- (j) The crime of apartheid;*
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”*

The ECDK Law’s definition of CAH differs from the one provided in the UN-RCG Agreement. Article 5 of the ECDK Law provides as follows:

“*Crimes against humanity (...), are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as:*

- *murder;*
- *extermination;*
- *enslavement;*
- *deportation;*
- *imprisonment;*
- *torture;*
- *rape*

- *persecutions on political, racial, and religious grounds;*
- *other inhuman acts.*”

Key elements:

i. A widespread or systematic attack against any civilian population.

ii. Knowledge of the attack

Actual or constructive knowledge, meaning that the defendant must know that his or her act is part of a widespread or systematic attack on a civilian population, is necessary to satisfy the *mens rea* element. The phrase, *with knowledge of attack*, is absent in the ECDK Law. The ICTR, whose Statute provides for the same definition as the ECDK Law, nevertheless ruled that such knowledge is an essential element of the CAH.

iii. Nexus to armed conflict

The Charter of the Nuremberg Tribunal required that the crimes be linked to armed conflict to counter any argument of *nullum crimen sine lege*. The link to armed conflict disappeared from customary international law for a long period of time. But it was revived in the ICTY Statute. It remains uncertain whether the nexus to armed conflict was part of the definition of crimes against humanity at the time the Khmer Rouge took power. A successful defense will need to focus on the nexus to armed conflict, while the prosecutor will try to show that a link to armed conflict is no longer required for a charge of crimes against humanity.

iv. State action/direction

Authorities on international law are divided as to whether governmental direction is a necessary element.

v. Discriminatory intent

Under the UN-RGC Agreement's, there is no requirement that the enumerated acts, other than persecution, be committed with discriminatory intent so long as the acts are committed against civilians (see *Prosecutor v. Akayesu, ICTR Appeals Chamber Judgment, para. 447-469*). By contrast, the ECDK Law's definition requires a discriminatory intent on political, ethnical, racial or religious grounds.

Remarks:

i. Crimes against humanity originate in customary international law. It was the Nuremberg Charter that first crystallized the use of the term "*crimes against humanity*." The definition of crimes against humanity has evolved over time and differed depending on the tribunal. Different definitions of CAH were used in the Charter of the Nuremberg Tribunal, the ICTY Statute, the ICTR Statute and the ICC Statute. Given the legal principle *nullum crimen sine lege*, it will be necessary for the KRT to determine the extent to which CAH were prohibited by customary international law at the time the Khmer Rouge were in power.

ii. Cambodia has been a member of the International Criminal Court (ICC) since October 23, 2000. Cambodia ratified the ICC Statute on April 11, 2002.

c. Grave Breaches of the Geneva Convention

Definition:

Article 9 of the UN-RGC Agreement refers to Grave Breaches of the Geneva Conventions of 12 August 1949, which are any of the following acts committed against persons or property protected under the provisions of the relevant Geneva Conventions.

- (a) Willful killings;
- (b) Torture or inhuman treatment, including biological experiments;
- (c) Willfully causing great suffering, or serious injury to body or health;
- (d) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) Compelling a prisoner of war or other protected person to serve in the forces of a hostile power;

(f) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(g) Unlawful deportation or transfer or unlawful confinement;

(h) Taking of hostages.

Article 6 of the ECDK Law adopts the same definition.

Key elements:

i. An armed conflict. The prosecutor must demonstrate that a sustained armed conflict was taking place during the period at issue.

ii. State nexus. It requires the perpetrator to be an official acting for the country.

Remarks:

i. Cambodia was a party to all four Geneva Conventions of 1949 during the relevant period at issue. In addition, grave breaches of the Geneva conventions are considered to be customary international law.

ii. Common Article 3 of the Geneva Conventions of 1949 is the only international humanitarian law provision governing *internal* conflicts in effect during the Khmer Rouge years.

Can decisions of prior international criminal tribunals

be used before the KRT?

Ordinarily, prior case laws from other international courts do not become binding laws in the context of international or mixed criminal tribunals. However, in the past, defense counsel and prosecutors have frequently made reference to prior decisions with the hope that the courts would follow those interpretations of the applicable law. Although not all prior case laws will be adopted in the decision, judges of international or mixed criminal courts are mindful of precedents and often cite principles established from prior decisions.

For example, in *Prosecutor v. Dragan Nikolic*, Judgment of 5 May 2003, page 9, the Supreme Court of Kosovo made reference to some ICTY and ICTR decisions in its decision.

The presiding judge held that;

“...Appropriate guidance in this regard can be found in the case-law of The Prosecutor v. Jean-Paul Akayesu before the International Criminal Tribunal of Rwanda (ICTR) (Decision of 2 September 1998, paragraph 140, 142, 155, 156) and in the ICTY case The Prosecutor v. Tadic (Trial Chamber Judgment of 7 May 1997, paragraph 54).”

d. Destruction of cultural property

Definition:

Article 7 of the ECDK Law provides as follows: “[t]he Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict...”

Key element:

The destruction of artistic, literary, religious, architectural and other cultural property during an armed conflict.

Remarks:

i. Cambodia has been a party to the Hague Convention since 1962.

ii. Note that Article 44 of the UNTAC refers to the Law on the 1996 Protection of Cultural Heritage.

e. Crimes against Internationally Protected Persons

Definition:

This crime is covered by Article 8 of the ECDK Law, which sets forth that the KRT will try “*all suspects most responsible for crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations, and which were committed during the period from 17 April 1975 to 6 January 1979.*”

Remarks:

i. The Vienna Convention of 1961 deals with a State’s obligation towards foreign diplomatic missions. Article 29 provides in particular that: “[t]he person of a diplomat agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.”

ii. In April 1975, the Khmer Rouge regime detained personnel in the French embassy and then removed and murdered Cambodian spouses of foreign diplomatic personnel.

2. Domestic crimes

a. 1956 Code Penal of Cambodia

The principle of *nullum crimen sine lege* requires that a person be punished only for crimes that are recognized as crimes at the time they are committed. Therefore, if Cambodia is to hold accountable individuals for crimes committed under the Khmer Rouge regime, it can apply only laws in effect as of 17 April 1975, when the Khmer Rouge took control of the Kingdom of Cambodia. At that time, the primary source of substantive domestic law for prosecution of criminal acts in Cambodia was the 1956 *Code Pénal et Lois Pénales*, published by the Ministry of Justice of the Kingdom of Cambodia.

Although Cambodian courts have not applied the 1956 law for a generation, it constitutes the primary source of law for the prosecution of domestic crimes before the KRT. The ECDK Law refers to its provisions, in Article 3, as follows:

“*Extraordinary Chamber shall have the power to bring to trial all suspects who committed crimes set forth in the 1956 Cambodian penal code and which were committed during period from 17 April 1975 to 6 January 1979:*

- *Homicide (articles 501, 503, 504, 505, 506, 507 and 508)*

- *Torture (article 500)*

- *Religious persecution (articles 209 and 201)."*

The 1956 Penal Code of Cambodia classifies offenses by severity into *crimes* (akin to felonies); *délits* (misdemeanors); and *contraventions* (police infractions or petty offenses). *Crimes* and *délits* are divided into first degree, second degree, and third degree depending on the degree of severity of the sentence; third degree is the most serious.

Moreover, the 1956 Penal Code provides for clear statutes of limitations: ten years for *crimes*, five years for *délits*, and one year for *contraventions*. The statute of limitations runs from the date of the commission of the criminal act. The statutes of limitations of the domestic crimes enumerated in the ECDK Law are extended for an additional 30 years (Article 3 of the ECDK law).

b. Homicide - Articles 501, 503, 504, 506, 507 and 508 of the 1956 Penal Code.

Homicide can be voluntary or involuntary. This depends on whether or not the perpetrator of the crime intended to cause death. Homicide requires the act of killing, and a culpable mental state – intent to kill, reckless disregard for life or negligence. The different levels of mental state correspond to different “degrees” of homicide.

Involuntary homicide includes manslaughter through negligence and other types of recklessness, and is punishable in varying degrees of severity.

Homicide committed with the intent to cause death is murder, a second-degree felony. When the murder has been premeditated, the crime is qualified as assassination, a third degree felony.

c. Torture - Article 500 of the 1956 Penal Code.

Art. 500: “*Any individual who commits acts of torture against a third person, either in order to extract from the person, under pain, some useful information on the commission of a crime or misdemeanor, or for reprisal or barbaric motives, shall be punished with a third degree criminal sentence felony.*” (Unofficial translation)

d. Religious Persecution - Articles 209 and 210 of the 1956 Penal Code.

Art. 209: “*An attack on the life of a religious person practicing a religion recognized by the Cambodian government while exercising his profession or in the course of the exercise of his profession shall be punished by a third degree criminal sentence.*” (Unofficial translation)

Art. 210: “*An attack on a religious person practicing a religion recognized by the Cambodian government while exercising his profession or in the course of the exercise of his profession shall be punished by a second degree criminal sentence.*” (Unofficial translation)

III. PROCEDURAL RULES BEFORE THE KHMER ROUGE TRIBUNAL

A. Procedural Rules in General

Rule of law implies that government authority may only be exercised in accordance with established procedural laws. Criminal procedural rules aim at protecting the interests of the suspects, as well as those of society and the victims. In most jurisdictions, a criminal action will be invalid if the action was not initiated in accordance with the criminal procedural rules. Generally, procedural rules are encoded in criminal procedure laws.

Procedural rules in international and mixed criminal courts

For international criminal courts, sets of rules of procedure and evidence have been specifically drafted.

ICC: Rules of Procedure and Evidence.

ICTY: Rules of Procedure and Evidence.

ICTR: Rules of Procedure and Evidence.

For mixed tribunals, some courts apply domestic procedural law, while others created new procedural rules to be followed during war crime proceedings.

Kosovo: In April 2004, the Provisional Criminal Procedure Code of Kosovo replaced the Socialist Federal Republic of Yugoslavia Criminal Procedure Code formerly applicable.

Sierra Leone: Rules of Procedure and Evidence of the Special Court of Sierra Leone.

East Timor: Transitional Rules of Criminal Procedure.

As of June 2005, there are two criminal procedural laws operating in Cambodia – the 1993 Cambodian Law on Criminal Procedure and the United Nations Transitional Authority in Cambodia’s decision of 10 September 1992 on Provisions Relating to the Judiciary and Criminal Law and Procedures Applicable in Cambodia during the Transitional Period (UNTAC Law).

B. Khmer Rouge Tribunal’s procedural law

UN-RGC Agreement

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 Article 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 Security-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 and where publicity would prejudice the interest of justice.*

1. Domestic Procedural Law

Regarding the KRT, Article 12 of the UN-RGC Agreement provides that “*the procedure shall be in accordance with Cambodian Law*” and Article 33 of the ECDK Law provides that trials are “*conducted in accordance with existing procedure in force.*”

Hence, in the absence of any Rules of Procedure and Evidence specifically drafted for the KRT, the Extraordinary Chambers shall ensure that trials are conducted in accordance with the 1992 UNTAC Law and/or 1993 Law on Criminal Procedure.

2. International Procedural Law

The UN-RGC Agreement and the ECDK Law make it clear that rights provided and guaranteed by Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) should apply before the KRT. Those ICCPR provisions should supersede any other criminal procedural rules. In addition, considering that Cambodia has ratified the ICCPR (on 26 May 1992), it could be argued that the KRT judges should also respect all rights provided in this Covenant, such as, for instance, the right to liberty and security (Article 9 of the ICCPR).

For international procedural rules other than the ones provided in the ICCPR, the UN-RGC Agreement, Article 12, and the ECDK Law, Article 33, provide that: “[w]here *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.*”

Therefore, it is left to the KRT to decide when to seek guidance in international law.

IV. ACTORS BEFORE THE KHMER ROUGE TRIBUNAL

Overview of the persons likely involved in the KRT’s proceedings

- 12 Trial Chamber and Supreme Court Chamber judges (7 Cambodian judges and 5 International judges), and 5 Pre-trial Chamber judges
- 2 investigating judges (one Cambodian and one International)
- 2 prosecutors (one Cambodian and one International)
- The accused
- Defense Counsel
- Witnesses and victims

A. Trial and Supreme Court Chamber Judges

1. Composition

The KRT will consist of a Trial Chamber and a Supreme Court Chamber. These chambers will be set within the existing court system. The Trial Chamber and the Supreme Court Chambers will be respectively composed of 5 judges (3 Cambodian and 2 International judges) and 7 judges (4 Cambodian and 3 International judges)

The decisions and judgments would require a so-called “*supermajority*,” namely, the affirmative vote of a majority of the judges of that Chamber, plus one. This would mean that in the trial court, at least four votes are needed. In the Supreme Court, at least five votes are needed.

2. Selection of Judges

Cambodian judges

Under Article 3 of the UN-RGC Agreement and Article 11 of the ECDK Law, the Supreme Council of Magistracy (SCM) will appoint 7 Cambodian judges, as well as reserve judges as needed.

International judges

The United Nations shall submit a list of at least 7 candidates for foreign judges to the Royal Government of Cambodia, and the Supreme Council of Magistracy shall appoint five sitting judges and 2 reserve judges from the list.

B. The Pre-Trial Chamber

(See Article 20 of the ECDK Law and Article 7 of the UN-RGC Agreement)

1. Composition

The function of the pre-trial Chamber is to resolve disagreements between the two co-prosecutors, as well as those between the two co-investigative judges. The Pre-trial Chamber will be composed of 5 judges (3 Cambodian and 2 International judges).

Decisions of the Pre-trial Chamber would be taken by an affirmative vote of at least four judges. A decision therefore could not be taken without the support of at least one International judge.

2. Selection of Judges

The three Cambodian judges will be appointed by the Supreme Council of the Magistracy, and the two foreign judges will be appointed by the Supreme Council of the Magistracy (SCM) upon nomination by the Secretary-General of the United Nations.

C. Co-Prosecutors

Under Article 6 of the UN-RGC Agreement and Article 19 of the ECDK Law, two co-prosecutors, one International and one Cambodian national, will be responsible for the conduct of the prosecutions.

Article 18 of the ECDK Law provides that the SCM shall appoint Cambodian prosecutors and Cambodian reserve prosecutors as necessary from among the Cambodian professional judges. In addition, the SCM will appoint one foreign prosecutor and one reserve foreign prosecutor from a list of at least two candidates submitted to the RGC by the Secretary-General of the United Nations.

If the co-prosecutors disagree about whether to proceed with a prosecution, one of them can request a decision from the pre-trial chamber (see above).

D. Co-Investigating judges

Under Article 5 of the UN-RGC Agreement and Article 23 of the ECDK Law, two co-investigating judges, one International and one Cambodian national, will be responsible for the conduct of the investigations.

Article 26 of the ECDK Law provides that the SCM shall appoint Cambodian investigating judges and Cambodian reserve investigating judges as necessary from among the Cambodian professional judges. In addition, the SCM will appoint one foreign investigating judge and one reserve foreign investigating judge from a list of at least two candidates submitted to the RGC by the Secretary-General of the United Nations.

If the co-investigating judges disagree, one of them can request a decision from the pre-trial chamber (see above).

E. The Accused

The KRT will have a jurisdiction to try the senior leaders of Democratic Kampuchea, as well as those most responsible for committing serious crimes. Therefore, it is very likely that some of the top leaders who held government posts during the Khmer rouge regime will be among the KRT's suspects.

Royal pardon of Ieng Sary

Ieng Sary was granted a royal pardon on charges of genocide in 1996. To date, the status of his royal pardon has not yet been resolved. While Article 11 of the UN-RGC agreement excludes amnesties or pardons for anyone who may be investigated or convicted for crimes covered by the agreement, the law omits references to the effect of a previous pardon. Instead, Article 11 states that *“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 Chamber.”*

Even though Ieng Sary has already been pardoned for genocide, he might still be vulnerable to other charges under international criminal law. Furthermore, his pardon for genocide may not be valid under international law. For instance, in the case of the Sierra Leone mixed tribunal, the UN rejected amnesties which had already been agreed in the Lomé peace agreement.

D. Defense Counsel

1. Is self representation permitted before the KRT?

The Law on Criminal Procedure of 1993 provides that the presiding judge shall *automatically* appoint a lawyer to a suspect who is accused of committing a *crime* (akin to

felony) and cannot afford a defender. This language appears to exclude the possibility for a person accused of serious crimes to waive his right to counsel and to defend oneself in person before Cambodian domestic courts.

By contrast, Article 35 of the ECDK Law refers to Article 14 of the ICCPR and provides that the accused is entitled “*to defend himself in person.*” Therefore, it is contended that accused persons before the KRT are certainly going to be entitled by the court to present their defense themselves, without the assistance of a defense counsel, if they wish to.

2. Can foreign defense counsel advocate before the KRT?

There is some uncertainty as to the extent of the role of foreign defense counsel before the Extraordinary Chambers. Article 21 (3) of the UN-RGC Agreement states that “*Any counsel, whether of Cambodian or non-Cambodian nationality, engaged by or assigned to a suspect or an accused shall in the defense 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.*” This provision does not specify the extent to which foreign defense counsel could be involved in the defense of an accused during the criminal proceedings.

The Cambodian Law on the Bar mentioned in the above provision provides for duties to be respected by defense counsel, as well as for the proceedings to be followed by foreign defense counsel who want to practice in Cambodia. In accordance with this law, while foreign lawyers are allowed to practice in Cambodia once authorized by the Khmer Bar Council, only Cambodian lawyers can represent defendants in court (See Articles 5 to 7 of the Law on the Bar). Therefore, it could be argued that pursuant to the Law on the Bar, foreign defense counsel’s role shall be limited to assistance (but not to representation) of the accused in court.

On the other hand, the UN-RGC Agreement and the ECDK Law have incorporated the right of the defendant to select a counsel of his own choosing as provided by Article 14 of the ICCPR. Therefore, it could also be contended that Article 21 (3) should be interpreted as allowing foreign defense counsel to fully represent defendants before the KRT, as long as they respect defense counsel’s duties.

3. Remarks

Both above mentioned issues might be clarified by the UN or the RGC before the KRT proceedings commence. Otherwise, it will be incumbent upon the Trial and/or Supreme Court Chambers to decide how to interpret the above-mentioned provisions.

Foreign defense counsel in other international and mixed criminal courts

1. ICTY and ICTR: Accused is entitled to be represented by foreign lawyers.
2. Kosovo: Foreign attorneys have been allowed to assist the defendants during criminal proceedings. However, so far, only attorneys who are registered with the Kosovo Bar Association can stand in court.
3. Sierra Leone: Both foreign and domestic defense counsel are entitled to stand in court.
4. East Timor: Accused persons have been represented by both foreign and domestic defense counsel.

D. Witnesses and victims

Witnesses

The UN-RGC Agreement and ECDK Law contain provisions dealing with witnesses and victims' protection (see Art. 33 of ECDK Law and Art. 23 of UN-RGC Agreement), as well as with the witnesses' immunity from prosecution or from limitation of their liberty (see Art. 22 of UN-RGC Agreement).

However, those laws do not make any other specific references as to the role of witnesses during the KRT's trials. Nonetheless, the Law on Criminal Procedural of 1993 contains numerous provisions on witnesses and experts.

Victims

The role of the victims appears to be limited before the KRT. Apart from the provisions referring to the victims' protection above mentioned and to the victims' right to appeal decisions of the Extraordinary Chambers trial court (Art. 36 of ECDK Law), the ECDK Law and UN-RGC Agreement do not further specify the role of the victims during the future KRT's trials. In particular, those laws do not specifically provide for the victims to be a party at a criminal trial and to claim compensation, although they are entitled to do so under the current Cambodian Law on Criminal Procedure.

Janet Lee and Karen Yookyung Choi were 2005 summer legal associates at DC-Cam. Héleyn Uñac was our 2005 legal training coordinator.