

What Has Been ‘Extraordinary’ About International Justice in Cambodia?

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On February 4th, a survivor of the Pol Pot regime’s rule over Cambodia in the 1970s testified in a courtroom in Phnom Penh that as a 15 year old he witnessed children being “smashed” against palm trees by the Khmer Rouge and their gallbladders removed and hung beside them. On January 21st, another Civil Party victim, Meas Sokha, told the judges and hundreds of Cambodian spectators in the courtroom that he witnessed the Khmer Rouge slit the throats of more than 100 prisoners a day who then were thrown into mass grave pits. Prison guards consumed the prisoners’ gallbladders along with rice wine. And on January 29th, Cheang Srei Mom testified how she was forced to marry a man whom she hated just a short time after her father had been taken away and killed by the Khmer Rouge.

For years such testimony has been delivered before the Extraordinary Chambers in the Courts of Cambodia. These are the human faces of the evidence that reveals the horrors of a four-year period in world history when more people perished from criminal acts under the rule of the Pol Pot regime than in any other contemporary conflict which has been the subject of international accountability.

This year is the tenth anniversary of the Extraordinary Chambers in the Courts of Cambodia. We also are approaching the 40th anniversary of the beginning of the Pol Pot regime’s atrocity crimes in Cambodia on 17 April 1975, a catastrophic period in Cambodia’s history that continued unabated for almost four years until 6 January 1979.

This, then, is an appropriate time to reflect on the last decade’s record of the Extraordinary Chambers’ operations, examine the present, and look towards the future. While I speak today in my capacity as the United Nations Secretary-General’s Special Expert for United Nations Assistance to the Khmer Rouge Trials, my views do not necessarily reflect those of the United Nations.

The Extraordinary Chambers have had their share of difficulties, as have all of the

international and hybrid criminal tribunals of the last two decades. Nonetheless, it is an unprecedented and increasingly productive endeavor to achieve justice, within a limited mandate, for the estimated 1.7 million Cambodians who perished during the Pol Pot regime of 1975 to 1979 and the surviving victim population of Cambodia. One cannot walk down any city street or rural path in Cambodia without meeting someone deeply impacted by the atrocity crimes of the past. Much of the population, both older and younger who were direct victims or are deeply influenced by what happened to family members and ancestors 40 years ago, remains hostage to different degrees of trauma and reflective grief.

The Extraordinary Chambers are an internationally-assisted domestic court in Cambodia that was created on 29 April 2005, when a treaty between the United Nations and the Royal Government of Cambodia setting up the Chambers entered into force (the “UN/Cambodia Agreement”). The Extraordinary Chambers began their operations in February 2006 and became fully operational after the adoption of their Internal Rules in June 2007. So this court in Cambodia is not an international criminal tribunal, such as the permanent International Criminal Court or the International Criminal Tribunals for the former Yugoslavia and Rwanda, or those international criminal tribunals with unique characteristics like the Special Tribunal for Lebanon, the former Special Court for Sierra Leone, and the residual courts set up to cover the winding down of some of these tribunals. They were created either by the U.N. Security Council or by a treaty, each possessing its own international legal personality and standing apart from national court systems. They are predominantly staffed by international judges, prosecutors, administrators, and defense counsel. Nonetheless, some of these tribunals draw upon domestic law where it pertains to the atrocities at issue. The Sierra Leone and Lebanon tribunals include significant numbers of judges who are nationals of those countries, respectively.

In contrast, the Extraordinary Chambers flip the equation and stand as a court of the Cambodian national legal system, albeit uniquely structured to require direct participation by the United Nations and international judges and officials in its staffing and administration by virtue of the UN/Cambodia Agreement as well as the Cambodian domestic law governing the Extraordinary Chambers, adopted in 2001, and amended in 2004 (“ECCC Law”). The subject matter jurisdiction of the Extraordinary Chambers draws primarily from international criminal law as well as Cambodian criminal law and procedure. Cambodian citizens occupy the majority of judgeships at each stage of the court’s judicial chambers: the Pre-Trial Chamber, the Trial Chamber, and the Supreme Court Chamber. There is a Cambodian Co-Prosecutor who works jointly with an International Co-Prosecutor to submit cases for judicial investigation. There is also a Cambodian co-investigating judge who works jointly with an international Co-Investigating Judge to undertake judicial investigations of cases advanced by the Co-Prosecutors and to issue any indictments. A dispute resolution procedure is built into the constituent documents of the Extraordinary Chambers to enable any dispute between the two Co-Prosecutors or between the two Co-Investigating Judges to be addressed. The collective interests of Civil Parties, who are victims formally recognized as linked to the alleged crimes in the particular case on trial, also are represented in the trial courtroom by a pair of Cambodian and International Civil Party Co-Lawyers. Lead defense counsel for each accused also consist of a pair of Cambodian counsel and international co-counsel.

The personal jurisdiction of the Extraordinary Chambers is limited and covers only “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations” of the Cambodian penal law and international law specified in the ECCC Law and the UN/Cambodia Agreement. The court’s temporal jurisdiction stretches from 17 April 1975 to 6 January 1979, namely, the period during which Pol Pot’s Khmer Rouge held power in Phnom Penh. International standards of due process are a critical part of the court’s legal procedures and are amplified in detailed Internal Rules that took one year to negotiate among the full college of national and international judges. The maximum sentence that can be delivered on a guilty verdict by the court is life imprisonment.

In a context unique amongst UN and UN-assisted criminal tribunals, the investigations and trials of the Extraordinary Chambers are taking place decades after the commission of the atrocity crimes that ravaged Cambodia in the late 1970s. That reality presents significant and time-consuming difficulties, notably in a) identifying witnesses and securing the testimony of those with aging memories, b) securing physical evidence, including the greatly decomposed and degraded remains found in mass graves which themselves must be painstakingly located and unearthed, c) translating important quantities of preserved documents about events during the distant Khmer Rouge period that require time-consuming historical and sociological verification and analysis, and d) the need to hold extensive outreach programs to educate the public, particularly the younger generations, as to court’s work and processes in relation to events decades-old and recall the importance of the court’s work for justice and reconciliation notwithstanding that passage of time. .

Finally, the suspects and defendants in the cases are advanced in age and, in a number of instances, have experienced health incidents that have delayed trial proceedings. In the current trial, Khieu Samphan is 83 and Nuon Chea is 88. Unfortunately, such senior Khmer Rouge leaders as Pol Pot, Son Sen, Ta Mok, and Ke Pauk died as the years tolled. Ieng Sary, the Deputy Prime Minister of the Khmer Republic and a major accused in the current case on trial, died at the age of 87 in March 2013 in the midst of trial. His wife Ieng Thirith, the Khmer Republic’s Social Affairs Minister, now 83 years old, is also an accused in Case 002 but she was ruled mentally unfit to stand trial following a medical diagnosis of dementia and proceedings against her have been stayed as a result.

The United Nations engages in significant measure with the Extraordinary Chambers by virtue of its commitments under the UN/Cambodia Agreement. A major component of the operation of the court is the U.N.’s technical assistance project formally known as the United Nations Assistance to the Khmer Rouge Trials, or UNAKRT, which supplies international officials and staff of different components of the court. All UNAKRT staff and financial transactions are activities of the UN Secretariat at Headquarters—lawyers and financial, administrative, and personnel officers—to ensure that UN and other international standards are being fully implemented. While the Cambodian Government funds the national side of the Extraordinary Chambers from its own resources and voluntary contributions of foreign governments, the UN Secretariat and UNAKRT are responsible for managing the funds derived from international sources for the much larger costs of the international side of the court. This, then, is a different management structure of perhaps more complexity than compared to a self-governed

tribunal with a single registrar.

The negotiations leading to the creation of the Extraordinary Chambers were a multi-year exercise in complex diplomacy between the United Nations, led by the United Nations Legal Counsel, and the Royal Government of Cambodia stretching from June 1997 to June 2003, when the UN/Cambodia Agreement was signed. At one point, in early 2002, the negotiations broke down. But the General Assembly, in Resolution 57/228 of December 18, 2002, directed the United Nations Secretary-General to re-engage with the Royal Government of Cambodia in order to try to establish the court. Following further talks in which the Government was requested, and agreed, to amend the ECCC Law, the two parties finally agreed upon the terms of the UN/Cambodia Agreement. The ECCC Law was successfully amended by October 2004. There then transpired a waiting period whereby the United Nations sought pledges of voluntary funds from governments to cover three years of the Extraordinary Chambers' operations and secured actual contributions for the first year of work. These goals were accomplished by April 2005.

There have been no shortage of what might be termed extraordinary moments in the jurisprudence and operation of the Extraordinary Chambers. Both international and Cambodian criminal justice have benefited, to varying degrees, from the Extraordinary Chambers' jurisprudence and the lessons learned.

Most importantly, the Extraordinary Chambers have achieved substantial progress towards fulfilling their mandate. Indeed, the jurisprudence of the Extraordinary Chambers, including their procedural and substantive decisions and their judgments of guilt or acquittal, is now a voluminous record of international criminal justice—applied in an internationalized domestic court—and it grows by the day. Other tribunals are citing jurisprudence of the Extraordinary Chambers. It has also served in important respects as a model for the creation of similar courts anchored in national systems with external assistance, such as the Extraordinary African Chambers in the Senegalese courts established to investigate and prosecute former Chadian leader Hissène Habré as a result of a joint agreement between Senegal and the African Union. When one examines what might be achievable some day in other nations suffering the commission of international crimes, one should not underestimate the value of the precedent set by the Extraordinary Chambers in the Courts of Cambodia.

The context of modern trials of international crimes committed in the 1970s has given rise to a series of unique legal challenges that have been addressed in different ways. Pioneering endeavors by the Extraordinary Chambers have resulted in crafting a unique procedural scheme for victim participation in the trials of international crimes designed to best harmonize fair trial requirements with the expectations of large numbers of victims. Both the Pre-Trial Chamber and the Trial Chamber have found that the extended mode of participation known as “Joint Criminal Enterprise III”, which is well-settled elsewhere, did not form part of customary international law and was not a general principle of law between 1975 and 1979 applicable to the proceedings before the court. The Supreme Court Chamber is now seized with an appeal from the Co-Prosecutors regarding that central legal issue. The Extraordinary Chambers have carefully worked to define the content of crimes against humanity during the period of the court's temporal jurisdiction, in particular the crimes of persecution, enslavement, torture, and rape. In the course of the analysis, the Supreme Court Chamber found, for example, that while rape

was *not* a distinct crime against humanity during 1975 to 1979 in its own right, rape nonetheless constituted torture as a crime against humanity.

The Supreme Court Chamber agreed with the Trial Chamber that, “[a]lthough the immorality or appalling character of an act is not a sufficient factor to warrant its criminalization under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts.” In Case 002, the Trial Chamber affirmed that the armed conflict nexus was not part of the definition of crimes against humanity within customary international law between 1975 and 1979. The Trial and Supreme Court Chambers also ironed out the methodology for severing into more compact, distinct phases a case as extensive and complex as that now found in Case 002 against Khieu Samphan and Nuon Chea, a process of deliberation that took considerable time to undertake but the procedures are now established.

Again with respect to Case 002, the Supreme Court Chamber addressed a critical issue that confronts tribunals in one form or another that are dependent on voluntary contributions, and that is the impact of financial considerations on the core work of the court. In that regard, the judges found “the Trial Chamber’s reliance on the ECCC’s financial malaise [in its approach to specific severance issues] to be irrelevant and inappropriate in the present decision-making process.” The Supreme Court Chamber’s decision is worth quoting at length: “While judges are at all times certainly obligated to be mindful of the efficiency of proceedings, they must always act within the sacrum sphere of the law, the tenets of which cannot be overridden by the profanum of budgetary savings....[I]n international criminal proceedings financial policies may legitimately enter into the equation and affect the scope of the charges in three ways: by legislative decisions shaping personal and subject-matter jurisdiction; by efficiency-driven prosecutorial decisions on which cases to prosecute; and eventually, by efficiency-driven decisions on the withdrawal or reduction of charges, the latter however being necessarily predicated upon the criterion of reasonable representativeness of the indictment. Beyond such exceptions, trial judges cannot tailor their cognizance of pending matters to budgetary savings....If there is insufficient funding to guarantee a trial driven by law, all ECCC proceedings must be terminated and the court must close down. Barring this, proceedings must go on without individual decisions on matters of law and the facts being unduly influenced by financial considerations.”

The Supreme Court Chamber also has contributed to a better understanding of the procedural consequences of unfitness for trial in the context of international crimes. It has held that the court “is obliged to exhaust all measures available to it which may help improve the Accused to become fit to stand trial.” The Supreme Court Chamber affirmed the Trial Chamber’s view, with respect to defendant Ieng Thirith in Case 002, that, “[i]t remains exceptional that proceedings against permanently unfit accused are terminated and that courts forfeit jurisdiction over them, especially in cases involving serious crimes. The mere fact that proceedings remain pending against unfit accused charged with serious crimes, even if permanently unfit, is generally not considered as a disproportionate infringement upon the accused’s fundamental rights, in particular, the right to be tried within a reasonable time.”

The impact of the Extraordinary Chambers on the Cambodian judiciary is a work in progress that unfolds day by day. Based on the experiences from the Extraordinary

Chambers, modern concepts of court administration are being introduced into the national courts and a number of important dimensions have been integrated into the new laws on the organization of the national courts within the framework of the Legal and Judicial Reforms of the Royal Government of Cambodia. Through daily interactions between Cambodian and international staffs at the court, the Extraordinary Chambers have trained Cambodian judges, prosecutors, lawyers, court administrators, and other professionals who also hold positions within the national judiciary or who will assume its ranks in the future. With its procedural rules mainly based on the Cambodian Criminal Procedure Code, the Extraordinary Chambers have produced a wealth of jurisprudence on procedural matters relevant for national courts. Through initiatives like the UN Office of the High Commissioner for Human Rights' annotated version of the Cambodian Criminal Procedure Code, cross-referenced knowledge of the Extraordinary Chambers' jurisprudence should aid judges and legal practitioners within the national judiciary.

With respect to specific defendants and suspects, the Extraordinary Chambers have made progress. In respect of the court's first case, styled Case 001, the Supreme Court Chamber upheld the Trial Chamber convictions of Kaeng Guev Eav (alias "Duch") on 3 February 2012, but increased his sentence from 35 years to life imprisonment. Duch, who was Deputy Chairman of Tuol Sleng Prison (S-21) during the Khmer Rouge period, was convicted for crimes against humanity of persecution and of extermination (encompassing murder), enslavement, imprisonment, torture, and other inhumane acts.

The trial and appeal judgments in Case 001 were landmark moments for the Extraordinary Chambers and for calls for accountability generally in respect of the crimes of the Khmer Rouge. The Chambers demonstrated their capacity to prosecute complex crimes and bring proceedings to a final conclusion in accordance with international standards. It also paved the way for the Chambers to efficiently approach the considerably greater complexity of Case 002.

The Trial Chamber pronounced its judgment in the first phase of Case 002 on 7 August 2014, in which two surviving senior leaders of the Khmer Rouge regime—Khieu Samphan, the former Head of State of Democratic Kampuchea, and Nuon Chea, the former Chair of the Democratic Kampuchea National Assembly and the Deputy Secretary of the Communist Party of Kampuchea—were convicted of crimes against humanity and sentenced to life imprisonment. As I have already noted, two other senior leaders originally part of the case regrettably were lost to the proceedings through death and unfitness for trial, respectively. Khieu Samphan and Nuon Chea, however, were found, through their participation in the joint criminal enterprise, to have committed the crimes against humanity of murder, political persecution and other inhumane acts (comprising forced transfers and attacks against human dignity) during movement of population; political persecution and other inhumane acts (comprising forced transfers and attacks against human dignity) during movement of population, and murder and extermination through executions of Khmer Republic officials at Tuol Po Chrey. Nuon Chea and Khieu Samphan also were found to have planned, instigated, and aided and abetted the crimes of extermination (during movement of population), other inhumane acts (comprising enforced disappearances) during movement of population, and political persecution (at Tuol Po Chrey). Additionally, Nuon Chea was found to be responsible as a superior for all crimes committed in the course of the movements of population and at Tuol Po Chrey.

In sentencing both defendants to life imprisonment, the Trial Chamber considered the gravity of the crimes, including that they were committed across the whole of Cambodia during more than a two-and-a-half-year period against a vast number of victims, among the highest of any decided case concerning international crimes. The gravity of the crimes was further illustrated by the conditions of forced transfer, which were severe, unrelenting, and inhumane. Further, the crimes had serious and lasting impact upon the victims, their relatives and Cambodia in general. The Trial Chamber found a number of aggravating circumstances had been established. Notably, Nuon Chea and Khieu Samphan were well educated and knew the import and consequences of their actions; the crimes were committed in abuse of their positions of authority and influence; and many victims were vulnerable and defenseless. The Trial Chamber found limited mitigating circumstances. The Supreme Court Chamber is now deliberating appeals by the defendants and by the Co-Prosecutors of the Trial Chamber judgment. It is expected that the appeals judgment will be rendered in 2016.

The Trial Chamber also determined that, as a consequence of the crimes of which Nuon Chea and Khieu Samphan were convicted, the Civil Parties in the proceedings and a very large number of additional victims had suffered immeasurable harm, including physical suffering, loss of dignity, economic loss, and psychological trauma and grief arising from the deaths of family members or close relations. The role of Civil Parties, and hence of victims, in the work of the Extraordinary Chambers is unprecedented and indeed a major innovative step in international criminal justice. Their participation has evolved during the trials, however, and adaptations have been required to ensure participation remained fully consistent with fair trial rights. The experiences with a multiple number of trial counsel for different groups of a nevertheless limited number of Civil Parties (less than 100) in Case 001 led to a fundamental reorganization of Civil Party participation in Case 002, involving some 4,000 victims ultimately recognized as Civil Parties. The court's plenary college of judges accordingly amended the Internal Rules to institute one lead Cambodian counsel and one lead international counsel to represent the collective interests of Civil Parties at trial, even as individual Civil Parties retained their own legal representation. A major function of the so-called Lead Co-Lawyers for Civil Parties is therefore collaboratively to marshal the legal representation at a coherent strategic level that is in the best interests of Civil Parties as a whole.

The approach to reparations also has evolved with the Extraordinary Chambers. The Internal Rules have always been clear that reparations in this context are moral and collective in character and preclude individual financial compensation. During the trial of Case 001 against Duch, his indigence prevented the Trial Chamber from awarding any reparations against him and it simply ordered the recording of names of the Civil Parties and immediate victims in the final judgment of guilt, as well as compiling and publishing Duch's statements of apology drawn from the trial record. In view of that experience, for the trial of Case 002, the Trial Chamber's authority to provide reparations was expanded beyond the traditional notions of reparations awarded against convicted persons to a more functional approach responding to the interests of victims. Specifically, the Extraordinary Chambers were authorized to develop, with third parties, specific projects coordinated by the court's Victim Support Section and secured with pledged external funding. This novel procedure has opened the way to consideration of a wide range of projects of remembrance, education, mental health, and museum exhibits not linked to a convicted

person's financial means.

Thus, the Trial Chamber endorsed in its Case 002/01 judgment last August the implementation of 11 specific reparation projects that were designed to appropriately acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes at issue in this trial and to provide benefits to the Civil Parties that address this harm. These projects, which were planned in consultation with civil society and victims and their representatives and were sufficiently funded in advance, include the institution of a National Remembrance Day project; the construction of a memorial in Phnom Penh to honor victims of forced evacuations; a testimonial therapy project; self-help groups; a permanent exhibition; a mobile exhibition and education project; the inclusion of a chapter on forced population movement and executions at Tuol Po Chrey within the Cambodian school curriculum; the construction of a peace learning center; a booklet on adjudicated facts and civil party participation at the Extraordinary Chambers; two editions of the verdict in Case 002/01 for distribution among villagers in Cambodia; and inclusion of Civil Party names on the website of the Extraordinary Chambers. Planning is already underway for the reparations projects that could be identified and funded in advance in the event there is a guilty verdict in Case 002/02.

Concurrently with deliberating the judgment in case 002/01, the Trial Chamber last year initiated the trial in the second phase of Case 002. These evidentiary hearings are now fully underway and have commenced with charges relating to the Tram Kok Cooperatives, including treatment of Buddhists, and the related Kraing Ta Chan Security Centre, following which the trial will address charges relating to three specific worksites. Thereafter, the trial will consider treatment of targeted groups (Cham and Vietnamese), including the charge of genocide, as well as further security centers and internal purges, forced marriages and rape, the nature of the armed conflict, and the role of the accused.

Recently, the Trial Chamber increased the number of days it sits for this phase two of the trial against Khieu Samphan and Nuon Chea from three to four days a week, thus accelerating the pace of the trial. The Trial Chamber currently expects its proceedings in phase two of the trial to continue into early 2016 and for its judgment to be rendered by 2017.

The occasional delays and lengthy nature of such proceedings are understandably frustrating, especially from the perspective of victims, but they reflect once again how international due process rights are taken seriously by all of the Chambers—the Pre-Trial Chamber, the Trial Chamber, and the Supreme Court Chamber. Delays to the substantive proceedings have resulted from a variety of factors, which have arisen at different times with varying degrees of effect on the proceedings. These have included the need to address a) the defendants' health, b) a variety of parties' procedural motions in a novel legal environment, c) certain conduct of defense counsel, d) the need for interpretation and translation into three separate official languages (English, Khmer, and French) of all proceedings, motions, decisions, and judgments, and e) temporary funding shortages that have had an impact on the morale and availability of critical staff.

Judicial investigations into two further cases, labeled Case 003 and Case 004 and concerning several suspects, are currently ongoing. No suspect has been arrested or formally charged, and their identities remain confidential. The crimes under investigation are genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, and violations of the 1956 Penal Code of Cambodia.

There are 10 crime scenarios in Case 003 and 55 crime scenarios in Case 004. The Co-Investigating Judges are legally obligated to investigate all crime scenarios of which they have been seized. Since the current International Co-Investigating Judge commenced his work in October 2012, an excess of 90 field missions have been conducted and more than 350 witness interviews have been completed. On 31 October 2014, the International Co-Prosecutor filed a supplementary submission, formally requesting the Co-Investigating Judges to expand the investigations in Case 003 to include new allegations of forced marriages and rape.

Last month the Extraordinary Chambers, sitting in plenary session, agreed to amend the Internal Rules so as to allow the Co-Investigating Judges “to reduce the scope of the judicial investigation by excluding certain facts...as long as the remaining facts are representative of the scope of the filed submissions.” Other amendments to the Internal Rules will “allow the Trial Chamber to reduce the scope of the trial by excluding certain facts set out in the indictment, as long as the remaining facts...are representative of the scope of the indictment.” These are useful powers that may be used to maintain representativity of the proceedings before the court but to accelerate timelines in respect of exceptionally complex cases. It should be stressed that these determinations will be judicial and reviewable on appeal.

As to current timelines in these cases, the court projects that the investigations in Case 003 could be finished by the first quarter of this year and a decision, in the form of a closing order, on whether any suspect will be indicted and sent for trial will follow accordingly. As for Case 004, the investigations are progressing towards their conclusion and we should anticipate closing orders in due course.

The Co-Prosecutors have stated publicly that there will be no further cases after Cases 003 and 004, a point publicly and formally reiterated by the International Co-Prosecutor recently. The existing caseload thus represents the totality of the caseload to be addressed by the Extraordinary Chambers.

Since early 2014, the Extraordinary Chambers have publicly issued, in each quarter of the year, a Completion Plan that details the remaining work required to be completed in the current proceedings and the progress made toward meeting those targets. The Plan, prepared with input from the judges and Co-Prosecutors, sets out a specific road map highlighting the remaining procedural milestones and projects the timelines required for judicial completion of the current caseload. In view of progress over the last quarter, there are 15 remaining milestones for the three cases. The trial in Phase 2 of Case 002 should conclude its substantive/evidentiary hearings in 2016 and the Trial Chamber’s judgment should be delivered in 2017. Delivery of any appeal judgment is anticipated by 2019. As for Cases 003 and 004, they are still in the investigative stages and thus it is uncertain whether any of these cases will result in indictments to go to trial. But as I noted above, the investigative work and closing order for each of these two cases, with a decision either to send the case to trial or to dismiss the case, should occur by the end of this year. If there are appeals on the closing orders to the Pre-Trial Chamber, then we might anticipate decisions by the Pre-Trial Chamber during the first half of 2016.

Remarkably, there has been an unprecedented participation by the Cambodian people as spectators of the trials in the Extraordinary Chambers. Since the opening of the Chambers for the first day of trial proceedings against Duch in 2009 through to 23

February 2015, a total of 165,407 people, almost all being Cambodian citizens from throughout the country, have witnessed the trials in person. That number exceeds the total number of spectators for the Nuremberg and Tokyo military tribunals after World War II, the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Special Tribunal for Lebanon, and the International Criminal Court, combined. The Court has cooperated with non-governmental organizations, including the Documentation Center of Cambodia (DC-Cam), to facilitate the transportation of hundreds of Cambodians in the morning to the courthouse in Phnom Penh and then transporting such individuals back to their villages and homes at night after the close of that day's trial proceedings. These can be arduous, long journeys in each direction, sometimes requiring people to board buses at 2 am in the morning in order to be present for the opening of the trial proceedings that day. But Cambodians of all character and age do so willingly because they believe in bringing the alleged architects of the atrocity crimes of four decades ago to justice.

In addition to the many Cambodians who have made this journey to the court, a variety of outreach and education programs bring information about the Extraordinary Chambers to Cambodians throughout the country. One initiative, led by DC-Cam, sends teams of educators to universities, local schools, and villages to hold classes and workshops educating citizens about the Court and its progress. From classes of 70 students to town hall meetings of more than 400, these sojourns reach hundreds of people a month and direct them to the resources they can use to stay engaged with the trial. On August 7th of last year, DC-Cam broadcast the verdict in Case 002/01 to thousands of Cambodians in 22 locations, deploying teams to project moving images of justice rendered onto the walls of towns and villages in remote corners of the country. Illustrative of the sometimes very personal impact of these proceedings among the population, I have an original drawing now hanging in my home that was drawn by a local artist on August 7th in a Cambodian village. It portrays a crowd of villagers huddled around one rather old television set as the verdict was read against their former leaders, Khieu Samphan and Nuon Chea. Remarkably, more than 434,000 people have participated in the entire outreach program, which includes study tours, video screenings, school lectures, and town hall meetings, as well as the phenomenal number who have sat in the courtroom to attend the trials.

The outreach of the Extraordinary Chambers includes a weekly radio call-in program, produced by the court, and television summaries of the hearings, produced by a private production company. Transcripts of the radio show are published on the court's website (<http://www.eccc.gov.kh/en/media-center/weekly-radio>). "Facing Justice" television updates have been broadcast three times weekly on two television stations and on multiple Internet sites (e.g. <http://krtmonitor.org/category/case-002-facing-justice-videos/>). These two activities have reached a wide audience throughout the country with current information about the trials and thus help educate the public.

In another civil society initiative, the Robert Bosch Stiftung funds the Cambodia Tribunal Monitor (www.cambodiatribunal.org), which is operated by Northwestern University School of Law in partnership with DC-Cam. The Cambodia Tribunal Monitor covers every day of the trials of the Extraordinary Chambers with blogs, video, and occasional legal commentaries and for years has been an Internet source of critical information alongside the court's own web site (<http://www.eccc.gov.kh/en>). The court

itself also has gone to considerable lengths to make its work accessible online, in all three official languages, including through social media. Thus the international community as well as Cambodians with access to the web can keep abreast of developments and court filings on a daily basis, alongside more traditional print and broadcast media reporting.

It must be acknowledged that there have been setbacks along the way and, at times, unfortunate delays arising from a number of factors not uncommon to the international criminal tribunals of our times. But negativity that sometimes emerges in media coverage and in some scholarly assessments about the Extraordinary Chambers needs to be put in proper perspective.

Let me address head-on some of the common criticisms, which I will refer to in general terms for the sake of efficiency. First, there have been contentions of political influence with the Extraordinary Chambers, notably from public statements from senior officials. Defence counsel have advanced such contentions to the court, which has addressed, up the level of the Supreme Court Chamber, the matters raised within the framework of the court's rules and processes. As anywhere where sensitive issues are before the courts, one must always be vigilant on this issue, but the independence of the tribunals is the norm, not the exception.

Another criticism is that the Extraordinary Chambers have been tainted by corruption. In the early years of the Chambers, there were allegations in that regard concerning administrative aspects of the court, which led to important reforms to ensure the integrity of the Extraordinary Chambers. An Independent Counsellor was appointed under an agreement between the government and the United Nations several years ago and he reports regularly and confidentially about any allegations of improper behavior.

Third, some legal commentators in particular take issue with the supermajority vote rule under which the Extraordinary Chambers operate. This rule, which was the result of lengthy and intensive negotiations with the government during the formation of the Chambers, resulted from the fact that there is a majority of Cambodian judges in each of the Chambers. It had long been the position of the United Nations in the talks creating the Extraordinary Chambers to seek a majority of international judges in each Chamber and a single international prosecutor. But that is not how the negotiations ended. The supermajority vote was devised, however, as an important safeguard for fair trial interests in the Extraordinary Chambers. Under these rules, no valid judicial decision can be reached without at least one international judge joining the full number of Cambodian judges or at least two Cambodian judges joining the full number of international judges in a decision by any particular Chamber.

The extensive and impressive jurisprudence and decisions of each of the Extraordinary Chambers demonstrate the workability, in principle, of the supermajority vote rule. It largely has not been a significant issue before the Supreme Court Chamber or the Trial Chamber. On occasion, the supermajority vote requirement has had important implications for the Pre-Trial Chamber. Judges can and do file dissenting opinions, illuminating different perspectives on the legal issues in question. And there are numerous examples of international judges on a particular Chamber taking differing views on a specific legal issue, illustrating again that there is not necessarily a uniform international perspective on any particular question of law.

Finally, the duration and expense of the investigations and trials of the Extraordinary Chambers is a constant refrain among the critics and in the media.

International criminal justice is by definition the “long game” and requires sustained financial support for the duration of a tribunal’s mandate. Investigating and prosecuting atrocity crimes, which involve thousands, hundreds of thousands, or sometimes millions of victims and vast crime scenes and hundreds upon hundreds of witnesses are all complex challenges which require sufficient time and significant resources to master. Meeting international standards of due process in an international or hybrid tribunal in respect of international crimes is, almost by definition, costly and time-consuming—ask any competent defense counsel who will legitimately insist on every possible credible avenue of protection in proceedings for his or her client’s interests. For these judgments to stand the tests of time and legitimacy, exhaustive process is essential.

The Extraordinary Chambers is voluntarily funded and thus not part of the assessed budget of the United Nations. International criminal justice, whether it is administered by an international tribunal or by a hybrid tribunal such as the Extraordinary Chambers, whether it is funded through assessments or through voluntary funds, entails significant expenditures to cover salaries, benefits, and associated expenses for international staff, fees of defense counsel (which are substantial), costs associated with witnesses (including witness protection), interpretation and translation fees (again, substantial), facilities expenses (including the courtrooms, offices, and computers for staff), salaries and benefits for national staff, public relations officers, and victim support services relating to the trials.

The budget for the Extraordinary Chambers reflects all of its operational expenses, whereas, in contrast, when one examines the budget of a national court, rarely would the financial figures reflect the totality of operational expenses that, in contrast, are covered in the stand-alone tabulation of an international or hybrid tribunal’s budget. When the work of international and even domestic justice, particularly regarding the Extraordinary Chambers as an internationalized Cambodian court, stretches into many years and then beyond the first decade of the tribunal’s existence, some begin to question the overall cost of the enterprise. That is understandable, but so too is the basic cost of international justice.

It is an important lesson from around the world that voluntary contributions are not a sustainable, long-term financing model for an international criminal tribunal, of whatever precise character. The fact remains, however, that the negotiated formula for the Extraordinary Chambers endorsed by the General Assembly requires voluntary funding, and that is the challenge that today must be met.

Every year, the staffs of the Extraordinary Chambers and the UN Secretariat prepare an annual budget of the Extraordinary Chambers and submit it to the Principal Donors Group of States for review and approval. The approved budget then becomes the basis for voluntary fundraising among the donor governments and what is expected from the Royal Government of Cambodia for the national component of the Extraordinary Chambers, as the government is obligated by the UN/Cambodia Agreement and the ECCC Law to cover the salaries of the Cambodian staff of the Chambers and the facilities expenses (courtroom, office building, etc.).

By the end of January 2015, the Extraordinary Chambers required total expenditures since its creation of just over \$237 million. The international component over the last ten years totals \$177 million and the national component totals \$60 million. The major funders over the years have been Japan (35%), the United States (11%),

Australia (10%), Germany (6%), United Kingdom (5%), European Union (4%), France (3%), Sweden (3%), Norway (3%), and the Republic of Korea, Canada, Denmark, Finland, and the Netherlands each at one percent of the total requirements. Other governments have contributed important but smaller amounts. Also, Cambodia has contributed 31% of the national budget of the Extraordinary Chambers, with the rest of the national component being covered by foreign donors, which are also contributing to the international component.

In 2014, the major international donors were the United States, Japan, Australia, Sweden, Denmark, Germany, the United Kingdom, the Republic of Korea, and Austria. The 2014 international budget was \$23.4 million. Norway's \$1 million contribution in 2014 was applied to the national component, which also received funding from Chile, Germany, Malaysia, and Qatar, as well as Cambodia, to meet a 2014 budget of \$6.38 million. One major international donor also loaned funds for the national component to help meet the needs in 2014.

Funding shortfalls in 2012 and 2013 required major efforts to expand the donor base and seek increased funding from existing donors. The efficiency of the Extraordinary Chambers at times suffered in the result as funding gaps had impacts on staff morale and retention and even led, on occasion, to walk-outs. But we ultimately succeeded each year to raise sufficient voluntary funds to cover budgetary requirements and both international and national budgets have been stabilized. The Royal Government of Cambodia provided contributions from its own national budget to meet the national staff salaries for a six-month period, namely the final quarter of 2013 and the first quarter of 2014. Recently, following discussions between United Nations Secretary-General Ban Ki-moon and Prime Minister Hun Sen, the government contributed funding for the fourth quarter 2014 for national salaries and pledged to cover six months of national staff salaries in 2015.

An important part of stabilizing the budgets has been the General Assembly's authorization in March 2014 for the Secretary-General, as an exceptional measure, to enter into financial commitments up to \$15.5 million to supplement, if necessary, the voluntary financial resources of the international component of the Extraordinary Chambers for 2014. This was a novel device by which the court could avoid peaks and troughs over the year in the court's cash flow from contributors having immediate impact on the court's operations. As the Secretary-General's Special Expert, I was still tasked to facilitate fundraising through voluntary sources, with the commitment authority being a *de facto* line of credit that could be drawn upon as a funding source of last resort. The approval of that financial authority enabled approval of contracts for the year for the international staff, thus stabilizing an uncertain staffing situation and enabling full focus on discharge of the judicial mandate.

The General Assembly's decision last April to grant this special financial authority in respect of the court demonstrated significant confidence of Member States in the Extraordinary Chambers, and affirmed the high priority accorded to their work. The UN General Assembly is currently seized with a request for renewed commitment authority for 2015 when it reconvenes on this issue next month, and once again approval would go far to mitigate adverse cash flow effects arising from the timing of donors' contributions. While less visible, these tools are critical contributors to the effectiveness of the court's judicial work.

The extensive jurisprudence of the Extraordinary Chambers demonstrates that international justice, and indeed a new era of Cambodian justice, is at work in Phnom Penh influencing not only the work of international and hybrid criminal tribunals, but also the domestic courts of Cambodia in the future. Both objectives are already happening, but the full impact of the Extraordinary Chambers on justice at home and abroad will be a long-term benefit. The United Nations and donor States remain dedicated to this pursuit of justice for millions of Cambodian victims, until the mandate of this extraordinary institution is fully completed, according to law.

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