

New approaches to international justice in Cambodia and East Timor

by

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Throughout 2001, the *United Nations Transitional Administration in East Timor (UNTAET)*¹ held trials of persons accused of committing atrocities in East Timor in 1999. On 11 December 2001, the first judgement in a crimes against humanity case was delivered — the ten accused militiamen were convicted and sentenced to a total of 206 years. The cases have been conducted at the District Court of Dili, where Special Panels of international and East Timorese judges have jurisdiction to try what are known as “Serious Crimes”, namely genocide, crimes against humanity, war crimes, torture and certain violations of the applicable domestic legislation, the Indonesian Penal Code. This project, the first of its kind to be implemented, draws from an early model of a Cambodian tribunal for the prosecution of Khmer Rouge atrocities and reportedly also from the abandoned War Crimes and Ethnic Crimes Court project for Kosovo.

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On 23 July 2001, Cambodia's Senate approved legislation for the creation of *Extraordinary Chambers* for the prosecution of crimes committed during the reign of the Khmer Rouge from 1975 to 1979. These Chambers, which do not yet exist, will consist of panels of judges of different nationalities functioning within the Cambodian justice system. The Extraordinary Chambers will have jurisdiction to try both international and domestic crimes arising from the atrocities perpetrated by the Khmer Rouge, including genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions on the protection of war victims and violations of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

These "internationalized domestic tribunals" are the result of a new approach to international justice by the United Nations. They are not ad hoc international tribunals created by the Security Council under Chapter VII of the United Nations Charter, nor are they regular domestic courts. They can be seen as the product of partnerships between the State concerned and the United Nations, which has a considerable input into the design and structure of the court. In East Timor, the United Nations as *de facto* ruler drafted, adopted and implemented the necessary legislation; it has also funded and administered the project through the provision of materiel and international personnel. By contrast, the project in Cambodia will be administered and controlled by Cambodians, although it is premised on there being extensive international support.

The purpose of this paper is to provide an outline of the internationalized domestic tribunals in Cambodia and East Timor. Constraints of space mean that this examination can only be a brief one that simply highlights the key features of these new mechanisms of justice and identifies some of the many major issues.² Drawing on

¹ UNTAET was established by SC Res. 1272 (1999).

² For more detailed examinations of issues covered in this paper, see Suzannah Linton, "Cambodia, East Timor and Sierra Leone: Experiments in international justice", *Criminal Law Forum*, Issue 12(2), pp. 185-246;

"Prosecuting atrocities at the District Court of Dili", *Melbourne Journal of International Law*, Vol. 2/2, 2001, pp. 414-458; "Rising from the ashes: The creation of a viable criminal justice system in East Timor", *Melbourne University Law Review*, Vol. 25/1, 2001, pp. 122-180.

the experience of East Timor, the paper seeks to draw on some of the lessons that can be learnt from the East Timor experiment and makes a number of recommendations for the court in Cambodia, should it ever come to fruition.

Cambodia

On 17 April 1975, Cambodia's capital Phnom Penh fell to the forces of the Communist Party of Kampuchea, popularly known as the Khmer Rouge. From then until 1979, the Cambodian people endured horrific abuses of international humanitarian and human rights laws. These atrocities were generally not the isolated acts of individual officials, but rather resulted from the policies of the Khmer Rouge and its leaders. A shadowy group of persons functioned as Angkar ("the Organization") and the victory over the pro-US Lon Nol regime was trumpeted as ending thousands of years of subjugation of the Khmer peasantry at the hands of foreign and class enemies. The exact nature of the Khmer Rouge movement has been controversial — there has been much debate over whether this was a "complete peasant revolution", a Marxist-Leninist experiment or a uniquely Cambodian phenomenon driven by a perverse concept of a superior race.³ What is clear is that the movement brought unspeakable horror and suffering to millions of Cambodians.

Having finally seized power, the new leaders of Cambodia directed their energies towards eliminating those regarded as internal enemies, who threatened the vision of a fully independent, socially and ethnically homogeneous Cambodia. Within days of the Khmer Rouge seizure of power, hundreds of thousands of urban dwellers were forcibly deported from the cities. Those that did not die or get murdered along the way were dispatched to work camps in the rural areas to be re-educated through enslavement. Countless persons were murdered or died of starvation, overwork or sickness and disease. Purges of urban dwellers (who became known as "New People") continued

³ See, for example, Michael Vickery, *Cambodia 1975-1982*, Boston 1984; Ben Kiernan, *The Pol Pot Regime*, Yale University Press, 1996; David Chandler, *Voices from S-21*, Silkworm Books, 1999.

throughout the reign of the Khmer Rouge and there were also waves of internal purges of Khmer Rouge cadre considered to have become threats to the system. Entire villages suspected of harbouring enemies of Democratic Kampuchea were decimated. “To counter the perceived threat and build a ‘clean social system’, the regime launched a uniquely thorough revolution whereby all pre-existing economic, social and cultural institutions were abolished, all foreign influences were expunged and the entire population was transformed into a collective workforce, required to work at breakneck speed to build up the country’s economic strength.”⁴

On 6 January 1979, an invading Vietnamese Army liberated Cambodia from the Khmer Rouge but did not leave until 1989. The various often conflicting estimates of the death toll during the Khmer Rouge reign point to approximately 20 per cent of the April 1975 population of 7.3 to 7.9 million people having lost their lives.⁵ This has led many to describe the acts of the Khmer Rouge as genocidal.⁶

The road to an internationalized tribunal in Cambodia

For 20 years, there seemed to be no institutional move towards bringing those responsible for the atrocities of the Khmer Rouge to account. In 1997, the situation changed when the Cambodian government sought the assistance of the United Nations. The United Nations appointed a Group of Experts to evaluate existing evidence with a view to determining the nature of the crimes committed, to assess the feasibility of apprehending the perpetrators, and to explore the legal options for bringing them to justice before an

⁴ Report of the Group of Experts for Cambodia established pursuant to UNGA Res. 52/135 (Group of Experts Report), transmitted by the Secretary-General along with his own report, UN Doc. A/53/850, S/199/231, paras 15 and 16.

⁵ *Ibid.*, para. 35.

⁶ See, for example, Ben Kiernan, “The Cambodian genocide: Issues and responses”,

in George J. Andreopoulos (ed.), *Genocide: Conceptual and Historical Dimensions*, University of Pennsylvania Press, 1994; Kathryn Railsback, “A Genocide Convention action against the Khmer Rouge: Preventing a resurgence of the Killing Fields”, *Connecticut Journal of International Law*, Vol. 5, 1990, pp. 457-465.

international or national jurisdiction.⁷ The Group of Experts' close study of the situation and the various possible models led it to recommend that the only suitable option was to create an ad-hoc international tribunal, controlled and administered by the United Nations. It noted the prevalence of corruption and political influence over the judiciary, and concluded that Cambodia's system fell short of international standards of criminal justice required by the 1966 International Covenant on Civil and Political Rights.⁸ The experts in fact advised against an internationalized domestic tribunal of the type that has subsequently been created by the Law on Extraordinary Chambers.⁹ Cambodia rejected the recommendation, and the United Nations eventually agreed to the compromise proposal of a tribunal situated within the Cambodian legal system, with jurisdiction over both international and national crimes and manned by both internationals and Cambodians. United Nations' support was conditional upon the relevant law being in accordance with a draft Memorandum of Understanding.¹⁰ This draft Memorandum of Understanding set out the blueprint for an internationalized domestic tribunal, and the modalities for cooperation between Cambodia and the United Nations, and was to have been signed after the passing and adoption of the Law on Extraordinary Chambers.

The *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Cambodia* (Law on Extraordinary Chambers) was initially passed by Cambodia's National Assembly on 2 January 2001 but, due to amendments made by the Senate, was returned for reconsideration. It was finally approved by the Senate on 23 July 2001 and came into law upon being signed by the King on 10 August 2001.¹¹ This law differs in a number of material aspects from the draft Memorandum of Understanding. It was announced to be one of the reasons of the United Nations to withdraw from the negotiations with

⁷ UNGA Res. 52/135.

⁸ Group of Experts Report, para. 129.

⁹ *Ibid.*, para. 137.

¹⁰ "Tribunal Memorandum of Understanding Between the United Nations and the

Royal Government of Cambodia", http://www.yale.edu/cgp/tribunal/mou_v3.htm.

¹¹ For the text see <http://www.derechos.org/human-rights/seasia/doc.krlaw.html>.

the Cambodian Government to set up a tribunal.¹² Yet Cambodia's leaders have repeatedly stated that they will proceed with or without the involvement of the United Nations.

The Extraordinary Chambers

Article 3 of the Law on Extraordinary Chambers establishes the court's jurisdiction over the crimes of homicide, torture and religious persecution as violations of the 1956 Penal Code of Cambodia. Given that the crimes in issue are at least 22 years old, the Penal Code's statute of limitations has been extended for a further twenty years. Genocide as defined in Article 4 derives from Articles 2 and 3 of the 1948 Genocide Convention. Article 5's definition of crimes against humanity is taken from the Statute of the International Criminal Tribunal for Rwanda (ICTR). Article 6 gives the Extraordinary Chambers jurisdiction over war crimes, limited here to grave breaches of the 1949 Geneva Conventions. There is also jurisdiction over breaches of the 1954 Cultural Property Convention. Finally, the Law on Extraordinary Chambers provides that crimes against internationally protected persons pursuant to the 1961 Vienna Convention on Diplomatic Relations may also be prosecuted.¹³ It is important to note that jurisdiction is limited to senior leaders of Democratic Kampuchea and those most responsible for the atrocities committed during the reign of the Khmer Rouge (17 April 1975 to 6 January 1979).

The Law on Extraordinary Chambers creates special chambers within Cambodia's domestic court structure. By all accounts, including that of the Cambodian government itself, this is a weak system that is subject to much undue influence and corruption.¹⁴

¹² <<http://www.un.org/apps/news/story.asp?NewsID=2829&Cr=cambodia&Cr1=court>.

¹³ The basis of criminal action is in fact contained in the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.

¹⁴ Group of Experts Report, para. 129; letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addres-

sed to the UN Secretary-General, annexed to UN Doc. A/1997/488 of 24 June 1997. See also the reports of the Special Representative of the Secretary-General for Human Rights in Cambodia, in particular UN docs E/CN.4/1999/101 of 26 February 1999 and E/CN.4/2001/103 of 24 January 2001, and the Secretary-General's Report to the General Assembly A/54/353 of 20 September 1999.

Cambodian judicial personnel will not just participate in the work of the courts but, being in a majority, will control the Extraordinary Chambers.¹⁵ All judges and prosecutors will be appointed by Cambodia's Supreme Council of the Magistracy, although the international personnel are to be selected from a list prepared by the United Nations Secretary-General. Human Rights Watch is not alone in alleging that this body is subject to much political manipulation and control by the ruling CPP party — its reform is seen as a key element in creating an independent and impartial Cambodian judiciary.¹⁶

The chambers will be three-tiered, mirroring the existing structure of Cambodian courts. There will be a Trial Court, sitting as a court of first instance with three Cambodian judges and two international judges; an Appeal Court, hearing appeals from the Trial Court, with four Cambodian judges and three international judges; and a Supreme Court composed of five Cambodian judges and four international judges. The President of each of the chambers will be Cambodian.

A Cambodian and an international judge are to be appointed as Co-Investigating Judges. They will be jointly responsible for investigations and are equal in status. Likewise, a Cambodian and an international jurist will be appointed Co-Prosecutors, jointly responsible for the preparation and issuing of indictments and trial proceedings. In addition to the three levels of court, there is also to be a specially appointed Pre-Trial Chamber, whose task seems to be just to sort out the differences between the Co-Prosecutors and Co-Investigating Judges. All these layers are hardly likely to promote expeditious trial. It appears that questions that may be put to the Pre-Trial Chamber are only those which are capable of having an affirmative or negative answer, for example, whether to proceed with a particular course of action. If the Pre-Trial Chamber cannot reach a decision (voting by Super Majority — see below), Article 20 provides that “prosecution may proceed” in the case of Co-Prosecutor disputes and

¹⁵ In this context, see *Cambodia: Judiciary on Trial*, New York/London, 20 June 2001, Press Release by Amnesty International and Human Rights Watch.

¹⁶ Human Rights Watch, *Cambodia, World Report 2001*.

Article 23 provides that the “investigation may proceed” in the case of Co-Investigating Judge disputes. These provisions therefore do not adequately address the other issues of controversy that can be expected to arise between Co-Prosecutors and Co-Investigating Judges and which will require a specific decision, such as disputes on the selection of appropriate charges. A stalemate on the chamber may in fact block any investigative or prosecutorial action on the case.

Apart from a provision prohibiting the use of superior orders to negate criminal responsibility, the Law on Extraordinary Chambers has no provisions that deal with defences. The Constitution recognises the right to defend oneself at trial but Cambodia’s current criminal procedure laws, which will apply, do not contain any provisions on defences. The 1992 Supreme National Council Decree on Criminal Law and Procedure (“UNTAC Law”) identifies factors that can mitigate sentence, including necessity and the psychological or psychiatric state of an accused, which are usually regarded as defences. It would therefore seem that recourse must be had to the law applicable at the time of the crimes, the 1956 Cambodian Penal Code. This recognises the following as defences: (1) Insanity or unsoundness of mind; (2) Youth (for those under 18 years of age, the court must determine the capacity for discernment); (3) Duress arising from a state of absolute necessity, that is when the accused was exposed to an actual and imminent danger that arose from circumstances beyond his control, and had no other option; (4) Superior orders, provided the order came by law or a legitimate authority; (5) Self-defence or the defence of another, subject to certain conditions.

Cambodia’s criminal procedure is famously unsatisfactory but this is the law that has been chosen to apply to proceedings under the Law on Extraordinary Chambers.¹⁷ Several laws will be simultaneously applicable: the 1993 Constitution, UNTAC Law and the 1993 State of Cambodia Law on Criminal Procedure (“SOC Law”). As mentioned, there are major human rights concerns that arise from the

¹⁷ See the reports cited in note 14. A new draft criminal procedure code is being drafted with French assistance.

provisions dealing with arrest and detention, the trial process, as well as large gaps in areas such as defences. SOC Law requires prosecutors to seek and follow political instruction in “exceptionally serious cases”.¹⁸ UNTAC Law requires that a person must be tried within six months of the date of arrest; this is also interpreted by some as meaning that anyone who has been released pending trial cannot be tried after six months.¹⁹ Cambodia’s judicial process places great reliance on confessions, which are usually extracted while a suspect is in the custody of the Judicial Police and prior to his/her coming before an Investigating Judge. The law considers the dossier of the Judicial Police to be authentic unless evidence to the contrary is shown. An accused who seeks to retract his confession at trial faces an uphill battle to convince the court to disregard the confession. There are no procedural safeguards of the rights of an accused who confesses or pleads guilty. Many published reports about the Cambodian justice system have highlighted the use of torture to obtain confessions and the willingness of judges to accept confessions as the main, sometimes only, evidence of guilt.²⁰ In order to strengthen the human rights protections for an accused, the Law on Extraordinary Chambers has through Article 35 drawn in Article 14 of the International Covenant on Civil and Political Rights. Nevertheless, the actual procedure remains deeply flawed.

As noted above, the 1956 Penal Code provided that superior orders could amount to a defence if the order arose as a result of law or came from a legitimate authority. At the time of the crimes, one could not be convicted for acting in pursuance of superior orders in certain situations. The drafters of the Law on Extraordinary Chambers chose to remove this defence, even for those crimes prosecuted under the 1956 Penal Code. International law has not been settled on the

18 Art. 55: “In cases where the committed crime or misdemeanor is exceptionally serious, the prosecutor shall inform immediately the General Prosecutor at the Appeal Court and the Minister of Justice. The prosecutor shall carry out the instruction he/she receives from them in this matter.”

19 See, however, the discussion on the 1999 Law on Duration of Pretrial Detention discussed at the end of the article.

20 See, for example, Basil Fernando, *Problems Facing the Cambodian Legal System*, 1998, Asian Human Rights Commission and Human Rights Watch, Cambodia, *World Report 2001, 2000, 1999*.

issue of superior orders as a defence, even in relation to crimes of universal jurisdiction, so this is not a situation where one could turn to general principles of law recognised by the community of nations. This raises a serious issue of legality, for it is a basic principle of criminal justice and human rights (see Article 15 of the International Covenant on Civil and Political Rights) that a person cannot be prosecuted for an act or omission that was not a crime at the time it was committed.

Control of the tribunal has been a particularly contentious issue. Cambodian judges will form the majority, but a significant compromise between the United Nations and Cambodia was brokered through the adoption of a voting formula known as the “Super Majority”. As a result, decisions on innocence or guilt can be made only on the basis of unanimity or a qualified majority. For example, a Trial Chambers is to be composed of five judges, three Cambodians and two internationals. Where there is no unanimity, a conviction can be agreed upon only if approved by at least four judges, one of whom would have to be an international judge.

Controversy still surrounds the bars to prosecution that exist in Cambodia today, specifically the pardon granted to Ieng Sary, a senior Khmer Rouge leader who was convicted *in absentia* in 1979 and amnesties granting immunity from prosecution given to others who surrendered to the government in 1996. The United Nations is insistent that “there shall be no amnesty for the crimes of genocide, war crimes and crimes against humanity. An amnesty granted to any person falling within the jurisdiction of the chambers shall not be a bar to prosecution.”²¹ Article 40 of the Law on Extraordinary Chambers provides that “[t]he Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law”. This provision would still permit the King of Cambodia to grant amnesties pursuant to his constitutional powers and laws to be passed which could shield persons from being investigated or prosecuted under the Law on Extraordinary Chambers. Unaddressed are

²¹ *Op. cit.* (note 10), Art. 9.

the questions of what happens to someone who has already been pardoned and those who benefit from existing amnesties.

Funding is anticipated as being provided by Cambodia, the United Nations (through a specially created trust fund composed of voluntary contributions), States contributing staff and other voluntary funds contributed by foreign governments, international institutions, non-governmental organizations and private donors.

East Timor

For most of 1975, the Portuguese colony, or “non-self-governing territory”, of East Timor seemed well on the way to becoming an independent State.²² However, on 7 December 1975 East Timor was invaded by the armed forces of the Republic of Indonesia. Indonesia’s 24-year-long occupation of East Timor was a particularly brutal one; the firepower of a modern army that had been trained and armed by the West was unleashed upon a small, poorly armed yet determined national liberation movement and on the civilian population that provided it with extensive grassroots support. The Indonesian forces were assisted by domestic militias and other paramilitary groups. Allegations of planning, ordering and perpetrating genocide in East Timor have regularly been levelled at Indonesia.²³

Indonesia remained in occupation of East Timor until 25 October 1999, when its armed forces were withdrawn in accordance with the outcome of a United Nations-administered referendum held on 30 August 1999. In that referendum, despite an intimidating and violent environment created by pro-Jakarta militias and the Indonesian authorities, 78.5% of East Timorese voters made it clear they wanted to be free of Indonesia. It did not take long for the backlash to come. Within hours of the announcement of the result, an

22 In 1960, the UN General Assembly declared East Timor to be a non-self-governing territory administered by Portugal. UNGA Res. 1542(XV).

23 See Arnold Kohen and John Taylor, *An Act of Genocide: Indonesia's Invasion of East Timor*, Tapol, London, 1979; John Taylor, *East*

Timor: The Price of Freedom, Zed Books, London, 1999; Roger Clark, “Does the Genocide Convention go far enough? Some thoughts on the nature of criminal genocide in the context of Indonesia’s invasion of East Timor”, *Ohio Northern University Law Review*, Vol. 8, 1981, p. 321.

already violent situation escalated dramatically throughout East Timor, with widespread murders, kidnappings, rape, property destruction, theft of homes and property and the burning and destruction of military installations, offices and civilian residences. The United Nations withdrew to its compound in Dili where it was besieged by marauding militias and eventually evacuated its staff and some East Timorese civilians. It was not until 20 September 1999 that an international force (INTERFET) mandated by the Security Council in its Resolution 1264 (1999) was able to land in East Timor and start restoring order. The United Nations has taken over the administration of East Timor by establishing UNTAET, headed by a Special Representative of the Secretary-General (SRSG) who acts as Transitional Administrator of the territory. Following national elections on 30 August 2001, UNTAET is now in the process of devolving authority to the democratically elected representatives of East Timor.

The road to an internationalized domestic tribunal

In East Timor, the United Nations engaged its own experts to investigate what had happened in 1999 and to establish responsibility for the crimes committed. An International Commission of Inquiry²⁴ and three Special Rapporteurs were dispatched to the region.²⁵

Both the International Commission of Inquiry and Indonesia's own investigators from KPP-HAM (an investigatory body created by the Indonesian Human Rights Commission) identified key elements of what constitutes a crime against humanity, namely widespread, systematic attacks on the civilian population of East Timor coupled with Indonesian government involvement through its

²⁴ Report of the International Commission of Inquiry on East Timor to the Secretary-General, UN Doc. A/54/726, S/2000/59 (2000) (Report of the International Commission of Inquiry).

²⁵ Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, Special Rapporteur of the Commission on the Question of Torture

and Special Rapporteur of the Commission on Violence against Women, Its Causes and Consequences. Their common report is contained in the Report submitted by the Secretary-General to the General Assembly on the Situation of Human Rights in East Timor, UN Doc. A/54/660 (1999) (Report of the Special Rapporteurs).

military and police.²⁶ The Special Rapporteurs applied the tests of dependency and effective control utilized by the International Court of Justice in the *Nicaragua Case* to establish State responsibility for the acts of armed groups²⁷ and found that there was sufficient evidence that Indonesian armed forces participated in the operational activities of the militia, which for the most part were the direct perpetrators of the crimes.²⁸ They concluded that this involvement was sufficient to incur the responsibility of the Government of Indonesia. These findings were cited with approval by the Special Panel in *The Prosecutor v. Joni Marques et al*, the first crimes against humanity case to be tried in East Timor.²⁹

Both international investigations called for the creation of an international tribunal to try the 1999 East Timor atrocities; their mandates had precluded the examination of the preceding 24 years of Indonesia's occupation. The International Commission of Inquiry suggested Indonesian and East Timorese participation in such a tribunal,³⁰ and the Special Rapporteurs recommended that if Indonesia failed in a matter of months to "investigate TNI involvement in the past year's atrocities (...) both in the way of credible clarification of the facts and the bringing to justice of the perpetrators", an international tribunal should be created.³¹ The Special Rapporteurs also wisely foresaw that the "as yet unformed East Timorese judicial system could not hope to cope with investigations into atrocities of this scale", and that "the best efforts would be unlikely to result in complete investigations into the full range of crimes".³² Moreover, it was only as an interim measure pending the establishment of an international tribunal that the

26 *Ibid.*, paras 135-142; KPP-HAM, Report on the Investigation of Human Rights Violations in East Timor (2000), paras 22, 60. Only an Executive Summary of this report has been officially made public in English: Embassy of Indonesia, Ottawa, Canada, Doc. No. BB-451/DEP/030300, <http://www.indonesiaottawa.org/news/Issue/HumanRights/kpp-timtim-01312000.htm>.

27 *Nicaragua v. USA*, I.C.J. Reports 1986, pp. 64-65.

28 Report of the Special Rapporteurs, para. 72.

29 *The Prosecutor v. Joni Marques et al [nine others]*, Case No. 09/2000, Judgment, 11 December 2001.

30 Report of the International Commission of Inquiry, para. 153.

31 *Ibid.*, para. 74. — TNI: Indonesian Armed Forces.

32 *Ibid.*, para. 73.

International Commission of Inquiry recommended strengthening UNTAET's investigative capacity.³³ However, Indonesian promises to try perpetrators persuaded the international community to put its faith in the justice system of the nation whose forces had brutally occupied East Timor for 24 years. It was also decided that UNTAET's own investigative capacity in East Timor should be developed, which led to the establishment of the Serious Crimes project.

Within months of taking over as *de facto* ruler of East Timor, UNTAET designed an ambitious scheme for the prosecution of atrocities by way of an internationalized domestic tribunal centred at the District Court of Dili, and passed the necessary implementing legislation.³⁴ It has been a controversial scheme, and UNTAET has been criticized for not carrying out sufficient or meaningful consultation with the East Timorese on this issue. For this reason, the adoption of the crucial Regulation 2000/15 was greeted with much anger by the judges, prosecutors and public defenders of the District Court of Dili. There is in fact great support among the East Timorese for an ad hoc international tribunal to deal with the atrocities committed not just in 1999 but during the 24 years of Indonesian occupation.³⁵ This has been fuelled by a perception that both UNTAET's Serious Crimes enterprise and the efforts in Indonesia have failed to deliver much awaited justice. Nevertheless, there has been precious little State support for the establishment of an ad hoc international tribunal for East Timor. And, given the changed priorities of the post September 11 world, the prospects are not good. The District Court of Dili is therefore the only venue where the atrocities of 1999 are being actively prosecuted.

³³ *Ibid.*, para. 150.

³⁴ UNTAET Regulation No. 2000/11 on the Organization of Courts in East Timor (promulgated 6 March 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/Add.1 (Regulation 2000/11); and UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15 (entered into force on 6 June 2000), *Official Gazette of East Timor*,

UNTAET/GAZ/2000/Add. 3, 99 (Regulation 2000/15).

³⁵ On 20 June 2001, East Timor's National Council passed a resolution calling for the creation of an international tribunal. See "East Timor National Council sets up truth commission to probe rights violations", *UN Department of Public Information*, 20 June 2001. For a minority view in favour of amnesties see "Human rights tribunal not a priority: Gusmao", *Jakarta Post*, 20 April 2001.

East Timor's Serious Crimes project at the District Court of Dili

UNTAET's Serious Crimes project derives from its Regulations 2000/11³⁶ and 2000/15.³⁷ On the basis of these instruments, a dedicated prosecution service (almost exclusively "international" in composition, with an exclusively "international" investigation unit) pursues cases of genocide, crimes against humanity, war crimes, torture and certain violations of the Indonesian Penal Code (murder and sexual violence) before panels of judges known as the Special Panels. The panels are part of the District Court of Dili and each consists of one East Timorese judge and two judges of other nationalities. Their judgments can be appealed to the Court of Appeal (the majority of whose members are again "international"), which hears all appeals from the four district courts of East Timor.

Section 4 of Regulation 2000/15 adopts the customary definition of the crime of genocide as codified by the 1948 Genocide Convention and the ICC Statute. Section 5.1 replicates the definition of crimes against humanity in the ICC Statute, with the subtle distinction that both the punishable act and the widespread or systematic attack must be directed against the civilian population. Section 6.1 allows for the prosecution of war crimes. It mirrors Article 8(2) of the ICC Statute and includes four categories of war crimes: grave breaches of the 1949 Geneva Conventions; other serious violations of the laws and customs applicable in international armed conflict; serious violations of Article 3 common to the Geneva Conventions; and serious violations of the laws and customs applicable in armed conflicts not of an international nature. Torture may be prosecuted either as a stand-alone crime or as a crime against humanity, a war crime or a means of perpetrating genocide. Murder and sexual offences that took place between 1 January 1999 and 25 October 1999 can be tried by the Special Panel as violations of the Indonesian Criminal Code.

Regulation 2000/15, which provides the "nuts and bolts" of the project, reiterates many of the substantive legal provisions of the Statute of the International Criminal Court (ICC). This reliance on

³⁶ *Op. cit.* (note 33).

³⁷ *Ibid.*

the ICC Statute to prosecute atrocities that span a 24-year-long occupation raises particular problems. That Statute is not designed to be retroactive and some of its provisions are reflective of *lex ferenda* rather than *lex lata*. Should acts of torture committed by “private” persons in the 1970s, 1980s and even the 1990s be prosecuted on the basis of Regulation 2000/15, questions with regard to retroactive prosecution and violations of the principle of legality will undoubtedly be raised. Moreover, the prosecution for acts of torture is complicated by the fact that Regulation 2000/15 utilizes two definitions for this offence, neither of which conforms with the definition contained in the 1984 UN Torture Convention.³⁸

Those accused of Serious Crimes in East Timor are entitled to raise the same defences as those who will appear before the ICC. In occupied East Timor, one could not be found guilty under Indonesian law if one acted in pursuance of superior orders in circumstances set out in Article 51 of the Indonesian Penal Code. Under Regulation 2000/15, superior orders are not recognised as a defence but merely a factor that may be considered in mitigation. The problems of retroactively changing the substantive criminal law that applied at the time of commission of the crimes when its provisions were not inconsistent with international standards, have already been discussed in relation to Cambodia and apply equally to East Timor.

Implementation of the Serious Crimes project in East Timor

Despite certain serious flaws in design, the Serious Crimes project is an innovative scheme that has always had much potential to bring justice and accountability to East Timor. It has, however, had a troubled record, facing major problems that prevented the fulfillment of that promise and which have arguably caused further injustice to the people of East Timor. After over a year of inertia in the face of much publicised problems (those who voiced concerns included the

³⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1.

Security Council and the High Commissioner for Human Rights³⁹) UNTAET finally recognised the damage that was being done and that immediate remedial steps were needed. The Serious Crimes Unit has now been removed from the control of the Ministry of Justice and comes under the supervision of the SRSG's office. Meaningful resources have finally been made available and offices are being opened in the rural districts of East Timor. Prosecutors are now permitted to supervise investigations directly. There is new leadership at the Ministry of Justice and in the Office of the General Prosecutor, including the Serious Crimes Unit. All these changes will hopefully bring positive results but it remains to be seen what can be achieved in the remaining months of the project's existence.

Despite the promising reforms, there is much to be gained from a closer examination of the Serious Crimes project in East Timor. Lessons learnt, if applied, will certainly benefit the other projects that are pending in Cambodia and Sierra Leone. A major problem has been the Serious Crimes project's association with a dangerously weak criminal justice system.⁴⁰ From the charred ruins left behind by Indonesia, UNTAET rushed to create a justice system apparently without a master plan and without sufficient focus on the development of local capacity or on the viability of that system. Poor administration of the courts has been identified as the source of many of the shortcomings of the justice system, including the Serious Crimes project.⁴¹ Lack of resources has played a role too — the Serious Crimes project faced enormous difficulties in 'getting up and running' with no material or personnel allocated to it (staff and equipment were

39 See Report of the Security Council Mission to East Timor and Indonesia, UN Doc. S/2000/1105 (2000), para. 8, and concerns voiced by the Security Council when extending UNTAET's mandate to 31 January 2002, UN Doc. S/RES/1338 (2001). See also Report of the High Commissioner for Human Rights on the situation of human rights in East Timor, UN Doc. E/CN.4/2001/37, para. 13.

40 Although there are many media reports highlighting the problems of the criminal justice system, in particular the Serious Crimes

project, there have been few substantive examinations. Among these are the reports of Amnesty International, in particular *East Timor: Building a New Country based on Human Rights*, 2000, and *East Timor: Justice Past, Present and Future*, 2001. The author's studies, *op. cit.* (note 2), and Judicial System Monitoring Programme, "Justice in Practice: Human Rights in Court Administration", *JSMP Thematic Report 1*, November 2001.

41 *JSMP Thematic Report 1*, *op. cit.* (note 40).

'loaned' from other departments). Once it was operational, the minimal resources that were allocated to the ambitious project until recently have hindered effective investigation of the complete range of crimes committed in East Timor and led to a focus on prosecuting low-ranking militiamen, and doing so using domestic law rather than international law. To date, over 30 indictments have been filed and out of 12 judgements delivered, only one has been in a case prosecuted as a crime against humanity. There are no witness protection or counselling programmes for victims and witnesses. There is no provision for witness expenses. Forensic facilities have been, and continue to be, extremely basic. Criticisms about the pace of work have, however, not been entirely fair, for cases were identified, investigated and prosecuted with minimal resources. The first Special Panel, which only started to function actively in January 2001, achieved a very respectable rate of convictions for crimes prosecuted as violations of the Indonesian Penal Code⁴² and was engaged for almost six months on the first crimes against humanity case. In light of the tremendous obstacles to the successful investigation, prosecution and trial of Serious Crimes in East Timor, it is important to recognise that a remarkable amount has in fact been achieved.

The other crucial factor behind the problems of the venture has been the failure/inability of UNTAET and/or the International Community to provide adequate material support (through resources and suitable personnel with the necessary professional skills) and political support (for example, in addressing the many reported problems and creating a culture of transparency and accountability). This has resulted in many suspects being released and others being prosecuted for domestic rather than international crimes due to lack of resources. It has also impacted on the ability of the Serious Crimes Unit to investigate fully what occurred in 1999, let alone earlier years. There were persistent, highly damaging personnel disputes within the Serious Crimes Unit and there emerged public

42 Between 1 January and 31 August 2001, the Special Panel rendered decisions in 12 cases. There were ten convictions with sentences ranging from 4 to 15 years imprisonment and two dismissals (currently on appeal). There have been no acquittals. Source: Judicial System Monitoring Programme, Dili, East Timor.

allegations of incompetence, mismanagement, lack of communication, political interference and an absence of direction, strategy or policy in investigations and prosecutions. In this context, it should be noted that there has been large staff turnover (there have been many resignations by legal and investigative staff). All the senior personnel in the justice and prosecution sectors have now been replaced as part of UNTAET's recent shake-up, carefully timed to merge with accelerated 'Timorisation' of the administration following the 30 August 2001 elections.

There have also been serious concerns about whether international human rights standards have been respected, in particular relating to arrest and detention, due process and fair trial. Some of these problems have been addressed; others continue. Both the quality and quantity of interpretation and translation facilities into the four languages used in court (Bahasa Indonesia, Tetum, English and Portuguese) are regarded as impacting negatively upon the fairness of the trial process and the rights of accused persons.⁴³ Given that the prosecution have laboured under tremendous limitations in developing cases, the fact that there have been no acquittals to date may reflect the reality that East Timorese defence counsel were given little training or mentoring to equip them for the task of defending persons accused of the most serious crimes. Also, certain highly questionable decisions have been made by the Special Panel. One case raised particular concerns when the panel made findings of fact about Indonesia's role in the East Timor carnage without evidence being submitted by the parties, without the issues being litigated, by relying on a test of 'what even the humblest and most candid man in the world can assess' and by drawing on extraneous sources of information.⁴⁴

The reports indicate that the other major factors that have hindered the effectiveness of the Serious Crimes project have included: (1) The International Community's continuing faith in the justice system of the nation that occupied East Timor for 24 years,

43 Judicial System Monitoring Programme, *Justice in Practice: Human Rights in Court Administration, JSMP Thematic Report 1*, November 2001.

44 See *Prosecutor v. Joseph Lekí*, Judgment of the Special Panel, 11 June 2001, Case No. 5/2000, p. 7.

despite ample evidence of a concerted effort to block both prosecutions for the East Timor atrocities in Indonesia itself and UNTAET's own investigations. (2) UNTAET's wooing, under the banner of reconciliation, of militia leaders currently in West Timor, with a view to securing the return of up to 100,000 refugees currently under their control, and the impact that this has had on Serious Crimes Unit strategy and decisions. For example, militia leaders engaged in reconciliation negotiations appear to be benefitting from *de facto* immunity from arrest and prosecution. There also continues to be concern about the impact on criminal justice of the new Reception, Truth and Reconciliation Commission. (3) Weak, or the absence of any effective, investigative and prosecutorial strategy which led to scant resources being spent focusing on "small fry" rather than developing cases against the responsible leaders. There has also been a perceived failure to develop a policy in relation to atrocities that were committed between 1975 and 1999, which has resulted in a complete failure of the Serious Crime authorities to investigate or prosecute atrocities of that era.⁴⁵ In addition, the prosecution of cases as domestic crimes rather than international ones has been seen as diminishing the significance of the crimes committed, letting those involved "get off easily" and creating an incorrect historical record. (4) The development of the Serious Crimes project as an "international" process with marginalised East Timorese participation, and in spite of public preference for the establishment of an ad hoc international tribunal. The problem of a local population that was alienated from the process was worsened by a perceived failure to engage in outreach to the East Timorese and explain the Serious Crimes process, and allegations of cultural insensitivity and arrogance on the part of UNTAET's foreign personnel.

45 It is also possible that this may reflect Regulation 2000/15's inadequacy for use in prosecuting atrocities committed over a 24-year-long period in accordance with international standards.

The United Nations withdrawal from the Cambodian Tribunal

The United Nations announced on 8 February 2002 it was ending negotiations with Cambodia to set up the tribunal.⁴⁶ It concluded “that the proceedings of the Extraordinary Chambers would not guarantee the international standards of justice required for the United Nations to continue to work towards their establishment (...) [A]s currently envisaged, the Cambodian tribunal ‘would not guarantee the independence, impartiality and objectivity that a court established with the support of the United Nations must have’.”⁴⁷

The Government’s refusal to accept an agreement that would have governed the UN’s involvement in the court and Phnom Penh’s unwillingness to address the Organization’s concerns about the national law that was passed last year paving the way for the tribunal were other obstacles according to the Legal Counsel of the United Nations.

The author takes no position on whether the United Nations should or should not involve itself in the process, but it is clear that an enterprise of this nature requires enormous international assistance if it is to meet recognised standards of fair trial and due process.

Lessons to be learned

An internationalized domestic tribunal has much potential as a new method of ensuring accountability. Unlike at the international tribunals for the Former Yugoslavia and Rwanda, where Yugoslav and Rwandese involvement was shunned, the internationalized domestic tribunal embraces the local legal community. Institution-building is thus an important by-product. Such an institution is also more cost-effective than an ad hoc international tribunal and, if properly administered, justice may be achieved expeditiously and in accordance with international human rights standards.

⁴⁶ <<http://www.un.org/apps/news/story.asp?NewsID=2829&Cr=cambodia&Cr1=court>>

⁴⁷ Statement by UN Legal Counsel Hans Corell at a press briefing at UN Headquarters in New York, 8 February 2002, <<http://un.org/News/dh/infocus/Cambodia/corell-brief.htm>>, quoted in *Ibid.*

However, this short discussion has revealed that despite the potential, there are major problems of implementation. The law on Extraordinary Chambers is now promulgated and it is the stated goal of the Cambodian Government to establish it as soon as possible (even without United Nations assistance), but some lessons from the East Timor experience can still be drawn.

For a start, an internationalized domestic tribunal that is grafted onto a weak domestic criminal justice system which cannot guarantee respect for fundamental human rights is unlikely to succeed in its task of bringing justice in accordance with international standards. International control of the process in such a situation is crucial, but it should not be assumed that United Nations control of the process will guarantee that the process will accord with international standards. The Cambodian tribunal in its current form has internationals in a minority; this makes it all the more important that international personnel involved in the project have the appropriate specialisation and practical experience in international criminal and humanitarian law.

Another important lesson from East Timor is that the judicial mechanism adopted should be compatible with local expectations. It must be realistic in light of the circumstances of the country and the ability of its institutions to cope with the demands placed upon them. There does not currently appear to be interest in a truth-and-reconciliation mechanism in Cambodia; if any such mechanism is eventually established, it must clearly be subordinate to judicial institutions and the criminal justice process.⁴⁸

The tribulations of the Serious Crimes project have taught that provision of resources is a most useful way of controlling the effectiveness of any enterprise. If the institutions connected with the Extraordinary Chambers project are not provided with adequate

48 East Timor has recently established a Truth and Reconciliation Commission to deal with atrocities committed between 1975 and 1999 during the period of occupation by Indonesia. The Commission is expected to operate for at least 2 years and work in

conjunction with the East Timorese judicial system. While the Commission will deal with more minor offences, cases dealing with serious offences such as rape and murder will be passed on for prosecution to the Special Panels.

resources to enable them to perform their tasks, the project will undoubtedly fail to deliver justice. It is therefore of utmost importance that sufficient resources are provided to the investigation, prosecution and trial of accused persons at start-up and throughout the lifetime of the Extraordinary Chambers project.

Immediate reform is needed to strengthen Cambodia's courts and investigative agencies. The Cambodian government has in fact prepared a Master Action Plan for the reform of the judicial sector, but has yet to implement its proposals. Many reports of the United Nations SRSG on Human Rights in Cambodia and by non-governmental organizations have identified ways to deal with the problems of impunity, corruption, political influence over judges and prosecutors, inadequate legal regulation and weak institutions. One of the first steps towards developing institutional capacity to deal with the Extraordinary Chambers project would be the strengthening of court administration and the establishment of a professionally run registry.⁴⁹

A special unit of Judicial Police investigators that exclusively investigates crimes within the jurisdiction of the tribunal should be established. In this, international assistance is crucial and the Ministry of Interior should consider permitting specialist investigators to work alongside Cambodian investigators. The existing forensic facilities badly need to be strengthened. Preparation needs to be made for the development of victim and witness protection programmes, along with counselling facilities.

While trial and appeal judges will also need training, Judicial Police, Investigating Judges and Prosecutors require additional training to develop particular skills for investigating crimes of such magnitude. Given that there will be enormous pressure for the enterprise to get to work immediately once the "green light" is given, Cambodian personnel should be appointed as soon as possible in order that there is sufficient opportunity to develop their capacity through highly intensive and specialised training in international criminal,

49 The Law on Extraordinary Chambers creates an Office of Administration, but the duties of its Director are only stated as being

to oversee the work of the staff of the Chambers and Offices of the Co-Investigating Judges and Co-Prosecutors.

human rights and humanitarian law. Substantive work should not begin until local staff have received adequate training — it would be advisable for the institutions to be given a grace period to have their offices established before being expected to commence work. There will also be a need for ongoing training and to have legal experts attached to both the judiciary and prosecution in order to advise on substantive legal matters from the start.

Cambodia's current criminal procedure is unsatisfactory and if used for the Extraordinary Chambers will hamper its work and the rights of accused persons. The new Criminal Procedure Code that is being drafted with French assistance may offer a solution but this has long been on the drawing board and shows no sign of materialising as an approved law in the immediate future. Specially adapted Rules of Procedure and Evidence along the lines of those used at the International Criminal Tribunals for the the Former Yugoslavia and Rwanda may therefore be the most appropriate alternative for the Extraordinary Chambers.

An issue that is crucial to fair trial and due process is the availability of competent and experienced defence counsel who are able, willing and provided with the means to defend persons facing severe punishment for their alleged perpetration of the most heinous crimes. Few if any local lawyers have the expertise to defend persons accused of these most serious of crimes; intensive training would be one option, another would be to lift restrictions on foreigners appearing before Cambodian courts as defence counsel.

International standards require prosecutorial and judicial independence from undue influence. A compromised system will result in tainted justice and every effort needs to be made to select personnel who are, and can be expected to remain, immune to improper influence. Many observers have written about the lack of integrity of the Cambodian judiciary, arising more than anything because of the deplorable working conditions of court staff and the particular history of Cambodia. An impartial and independent Supreme Council of Magistracy would be a significant step towards ensuring that both local and international appointees are persons with the necessary competence, moral integrity, impartiality and independence. The swift

adoption of a Code of Ethics containing provisions for dealing with misconduct would be advisable, as would a substantial increase in the woefully inadequate salaries of magistrates. Also, Cambodian law does not recognise interference with the course of justice as a crime and serious thought should be given to the criminalisation of any wilful attempts to obstruct, pervert or interfere in the course of justice as a means of both preventing such acts and protecting court personnel from improper pressure. Nevertheless, principles of professional independence should not prevent an administrator from taking a proactive role to address personnel issues and other problems, for example insisting upon accountability for professional misconduct or mismanagement. A culture of accountability needs to be established from the start and prompt remedial action for any emerging problems is essential.

There are currently two persons held in detention in Cambodia in relation to Khmer Rouge atrocities.⁵⁰ Kang Keck Ieu (Duch) was the commander of the notorious S-21 detention facility in Phnom Penh. Ta Mok was a major leader of the Standing Committee of the Khmer Rouge (Brother Number Four). The two have been held in detention well beyond UNTAC Law's six-month limit within which trial must be held. The Law on Duration of Pre-Trial Detention was passed by the National Assembly on 12 August 1999 to deal with their situation, extending the maximum period of detention to three years in cases of genocide, war crimes and crimes against humanity. The current discussion is about whether the three-year period will need to be extended even further given the delay in getting the tribunal established. There are therefore already issues concerning the right to expeditious trial and excessive pre-trial detention. The authorities will have to consider carefully their obligations under domestic and international law, both in relation to prosecuting international crimes expeditiously and respecting basic human rights in the process.

⁵⁰ The two were charged by the military court in Phnom Penh with violating the 1994 Law Outlawing the Democratic Kampuchea Group, and with genocide under a Vietnam-era 1979 law whose compliance with international standards of justice was suspect.

Human Rights Watch and other human rights organizations questioned the legality of the involvement of the military court, since neither had served in the Royal Cambodian Armed Forces.

A lesson from East Timor is that the choice may be between having to release the accused due to excessive detention or proceeding with charges under the applicable domestic law, namely the 1956 Penal Code which will enable a swifter investigation and trial.

The role of other States is a sensitive issue and one that may impact on the efficacy of many judicial projects to secure individual criminal responsibility for atrocities. A much heralded *Memorandum of Understanding between the Republic of Indonesia and UNTAET on Cooperation in Legal, Judicial and Human Rights Related Matters* signed on 6 April 2000 has delivered little benefit to the investigation and prosecution of Serious Crimes in East Timor. It has been denounced in Indonesia as contrary to national sovereignty and Constitutional provisions prohibiting the extradition of Indonesian nationals — no one has been surrendered or is likely to be surrendered to face trial in East Timor. The intelligence services of the United States, the United Kingdom and Australia are believed to have material that is highly relevant to the prosecution of atrocities in East Timor but so far no such evidence has emerged during trial. In 1979, the Vietnamese-backed regime prosecuted, *in absentia*, the major leaders of the Khmer Rouge and it is believed that Vietnam possesses material evidence derived from those trials and from other sources. The roles of Vietnam, the United States and China may well come under scrutiny in the course of trials. Also, their intelligence reports may be of great importance in uncovering the truth. There should be established a reliable mechanism for securing international cooperation. One option that may be considered (but only where the United Nations is a partner in the process) is for the Security Council to become “seized” if the Extraordinary Chambers come into existence and may in certain circumstances exercise its powers to assist Cambodia in securing international cooperation.

Finally, the Cambodian public must have a sense of ownership and involvement in the judicial process. Meaningful local involvement in the process is one of the potential strengths of the internationalized domestic tribunal. In post-conflict societies where a decision has been made to pursue individual criminal responsibility, it is crucial that the public understands that decision and the steps being

taken to implement it. If trials are to be a means of achieving reconciliation through justice, the ordinary citizen has to be informed about the judicial process. This will require close monitoring of the trials and dissemination through unbiased and objective media coverage, public education on the importance of the rule of law and of a fair trial (especially the presumption of innocence). If Cambodian society is ever to heal the wounds it still carries, the opportunity provided by the trials must be used to encourage public discussion about the justice process and what happened between 1975 and 1979 as well as the years preceding and following Cambodia's terrible nightmare.



Résumé

Nouvelles mesures prises en vue de l'établissement d'une justice internationale au Cambodge et au Timor oriental

PAR SUZANNAH LINTON

L'Administration transitoire des Nations Unies au Timor oriental (ATNUTO), établie par la résolution 1272 (1999) du Conseil de sécurité pour administrer ce territoire, a créé une chambre spéciale (special panel) au tribunal de district de Dili pour juger les crimes graves commis au cours du déferlement de violence qui a suivi le référendum sur l'indépendance, en septembre 1999. Au Cambodge, la communauté internationale a pris l'initiative de faire en sorte que les crimes commis sous le régime des Khmers rouges ne restent pas impunis.

L'auteur fait l'historique de ces deux décisions et se penche sur les premières expériences faites par le biais de cette nouvelle approche qui, au lieu d'établir un tribunal international ad hoc, crée une forme de juridiction nationale internationalisée. Il reste cependant beaucoup à faire avant d'aboutir à une justice qui fonctionne d'une manière satisfaisante.

