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GENOCIDE PREVENTION: GENOCIDE EDUCATION PROJECT NATIONAL TEACHER TRAINING FOR LOWER AND UPPER SECONDARY SCHOOL OF CAMBODIA

Senate Library, Phnom Penh, Cambodia
June 29-July 7, 2009

PAPER FOR THE DC-CAM GENOCIDE STUDIES TRAINING

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This paper is based on the introduction to a forthcoming DC-Cam book entitled “*On Trial: The Khmer Rouge Accountability Process*”

This paper discusses the Extraordinary Chambers in the Courts of Cambodia (ECCC), better known as the Khmer Rouge Tribunal. The ECCC is a special judicial body housed in a revamped military building complex on the western edge of Phnom Penh. It is a hybrid or “mixed” tribunal, established and operated by officials of the United Nations and Royal Cambodian Government. Since opening its doors in 2006, the ECCC has been entrusted with the monumental task of conducting criminal trials and delivering a measure of justice to the victims of Khmer Rouge misrule. I briefly discuss some of the forces that drove the tribunal’s creation, analyze its basic legal and institutional features, assess its progress to date, and discuss its potential to contribute to justice and reconciliation in Cambodia.

WHY THE ECCC IS SO IMPORTANT

The ECCC is an institution with profound moral, legal, political, and even educational significance. It represents the latest stage in a long, tortuous process of dealing with the Khmer Rouge legacy in Cambodia. Between April 17, 1975 and January 6, 1979, the Khmer Rouge regime ruled Cambodia with an iron fist, renaming it “Democratic Kampuchea” (DK) and implementing an infernal reign of terror. Khmer Rouge atrocities are not simply shards from the country’s shattered past. They continue to haunt countless Cambodians today and contribute to unhealthy divides in Cambodian society and politics. After three decades of waiting, Cambodians have an opportunity to pursue a modicum of justice and take another important step toward reconciliation.

The atrocities committed in Democratic Kampuchea are certainly not the only past wrongs casting shadows over modern Cambodian society. They were embedded within decades of conflict that involved abuses by myriad domestic and foreign actors. Nevertheless, the Pol Pot era was the most gruesome, savage, and shocking act in that tragedy. Nothing will erase survivors’ pain, but to the ECCC’s many supporters, the Khmer Rouge trials represent an indispensable stand against impunity that can help Cambodians come to terms with the past and move on with their lives.

Challenging Impunity

The single greatest reason for holding the Khmer Rouge trials is to deliver a measure of justice to a society that has suffered impunity for too long. In January 1979, when the overthrow of the DK regime raised the curtain around Cambodia, official documents and physical evidence revealed abuse on a staggering scale. The Cambodian countryside is still littered with the remains of Khmer Rouge brutality. Makeshift prisons, rusting torture devices, and thousands of mass burial pits provide daily reminders to Cambodians of the agony that they or their parents suffered during the Pol Pot period. The Documentation Center of Cambodia (DC-Cam) has identified roughly 20,000 mass graves and almost 200 former Khmer Rouge detention centers across the country, many with chilling remains of makeshift torture devices.

Most scholars believe that the Khmer Rouge regime consumed somewhere between one fifth and one third of the country's population. In fact, the piles of human remains are so vast, and survivors' accounts so abundant, that the world may never have an accurate estimate of the carnage. Even that shocking death toll paints only part of the picture; the Khmer Rouge tragedy can never be reduced to mere statistics. Every individual life lost was a father or mother, sister or brother, son or daughter, husband or wife, friend or companion. While the sheer number of Khmer Rouge crimes demands justice, the stories of individual victims issue even more powerful pleas.

Documents and abundant witness testimony tell of unimaginable suffering and cruelty. Khmer Rouge cadres required villagers to watch as their loved ones faced firing squads for the most trivial or arbitrary offenses, such as stealing rice or vegetables to avoid starvation. Some pregnant women, accused of ill-defined "anti-revolutionary" behavior, were strung up and disemboweled for all to see. Witnesses even tell of Khmer Rouge soldiers tossing infants into the air and catching their live bodies on bayonets. In makeshift prisons, Khmer Rouge interrogators tested baseless accusations of espionage or subversion by strapping their victims to rusty bed frames, burning them with embers, ripping off their fingernails, and dunking them in cold water to the point of drowning. Without ever facing trials, countless prisoners were taken to mass burial pits, where Khmer Rouge executioners killed them with axe-handles to avoid wasting precious bullets.

Those who avoided untimely death fared little better. Rampant rape and religious persecution plagued the country. Sick and elderly Cambodians endured endless hours of forced labor, occasionally unearthing the corpses and bones of their lost loved ones as they toiled in the field. Most ordinary people slaved away, furtively eating bugs and bark to stay alive, wondering if they would ever see their families again. The regime denied them even the most basic rights of worship, free expression, and intimacy. Children learned in school to disavow their parents and devote their lives only to *Angkar* (the "Organization.") Indoctrinated to kill, those

young cadres were criminal perpetrators, but in many respects they were victims of the regime as well. The scars of the DK era run deep.

Until quite recently, even the most senior surviving architects of Democratic Kampuchea walked about freely. Some lived in comfortable villas while their victims wrestled with the demons of the past. The ECCC provides a long-overdue opportunity to challenge that abhorrent legacy of impunity. Three decades after the fall of the Pol Pot regime, no senior Khmer Rouge official has ever been convicted of a crime by a credible court of law. However, that may soon change. Since commencing operations in 2006, tribunal officials have taken a crucial first step against impunity by detaining five former Khmer Rouge officials and charging them with criminal offenses.

The trial of one DK official—Duch, the former chief of the infamous Tuol Sleng Prison in Phnom Penh—has already begun. Four other surviving senior leaders are also in the dock: Nuon Chea, Ieng Sary, Khieu Samphan, and Ieng Thirith. All carried high-ranking titles and were members of the shadowy committees that defined the inner circle of Democratic Kampuchea.

The clock is ticking. Many senior Khmer Rouge leaders have died in the past decade—including Party Secretary Pol Pot, Defense Minister Son Sen, Central Committee member Ta Mok (also known as “the Butcher”), Education Minister Yun Yat, and Zone Commander Ke Pauk. Many second-tier perpetrators of Khmer Rouge terror also lived out their final years in relative comfort without facing so much as a slap on the wrist. All five current defendants are advanced in years, and some or all could pass away or lose their mental capacity before facing legal condemnation. Allowing all Khmer Rouge leaders to pass freely from the scene would be a grave affront to the millions of innocent victims whose lives they tore asunder.

Delivering Justice

For the ECCC to succeed, one thing is clear: it has to deliver a significant measure of justice in the eyes of Cambodians and the international community. Justice is a complex concept, especially in the wake of such wide-ranging atrocities. Conducting a process and producing outcomes that satisfy diverse audiences’ notions of justice will be no easy endeavor. Issuing a few guilty verdicts is certainly not enough. As we will argue, the ECCC needs to prioritize retributive, restorative, and procedural aspects of justice.

Justice means many different things to Cambodians and international observers of the trials. Notions of *retributive justice* provide much of the foundation for criminal law. The moral logic behind legal retribution is simple: an offender committed a social harm and must be condemned and punished by the state. The ECCC’s success will certainly be judged in part by its ability to issue moral condemnation and mete out punishment where it is due. However, retribution is only one aspect of justice. Victims may derive satisfaction from seeing Khmer Rouge leaders shamed and punished, but even life sentences will hardly make victims whole.

One of the key issues relating to retribution will be the scope of the prosecution. Trying only a handful of leaders means that many mid-level Khmer Rouge officers will go free. So will low-level cadres, who committed an overwhelming majority of the physical abuses that continue to haunt survivors to this day. The United Nations and Cambodian government agreed to prosecute only “senior leaders” and others deemed “most responsible” for the atrocities of the DK era. Like other tribunals, the ECCC has been accused of “selective justice.” The tribunal will not be able to erase all of the impunity that lingers after the DK era but it needs to do its best to identify and successfully prosecute key architects of Khmer Rouge terror.

One problem with focusing on criminal trials and retribution is that even guilty verdicts provide little *restorative justice*. Throwing a thuggish Khmer Rouge leader in prison does not compensate victims or “restore” their well-being before the crimes in question. Providing restorative justice in a country as badly ravaged as Cambodia is a tall order, but taking some significant steps to address victims’ needs is vital. Victims should, after all, be the primary beneficiaries of the accountability process.

Restorative justice has historically been a weakness of international tribunals, and it represents a special challenge for the ECCC. Money is never a substitute for lost loved ones of serious human rights abuses, but like other tribunals, the ECCC lacks the resources to issue much beyond token financial compensation. The ECCC has taken an innovative approach to restorative justice. It has established a mechanism for civil party participation in the trials and envisioned restorative awards in the form of “collective or moral reparations,” such as memorials to honor victims or centers that provide basic health or educational services to survivors. The success of the ECCC’s restorative efforts will go a long way toward determining public perceptions of the tribunal.

A third imperative feature of the ECCC process is *procedural justice*. Achieving a just outcome requires holding fair trials. To some observers, it is doubtlessly enervating to watch Khmer Rouge defendants receive basic due process rights that the DK regime so cruelly denied to millions. Most people harbor few doubts that the defendants now in custody are guilty of serious wrongdoing, even if their specific crimes remain unspecified. Some observers would probably consider it just simply to line former Khmer Rouge leaders against a wall and pull the trigger. In the aftermath of any widespread human rights abuses, the thirst for retribution is a powerful and understandable impulse. This is true even in Cambodia, where religious and cultural norms and the passage of time have softened public vindictiveness to some degree.

Nevertheless, defendants’ rights must be respected if the ECCC is to be a model for justice and not a kangaroo court. Every international tribunal since Nuremberg has been lambasted by someone as “victor’s justice” or “show trials.” These critiques are not entirely unfounded—tribunals inevitably do reflect the political realities in which they are created. The best way to reduce the force of such critiques is to promote transparency and fairness. The Nuremberg Tribunal set an important

precedent in this regard by acquitting a few Nazi defendants for lack of evidence. Other international tribunals—including those for the former Yugoslavia and Rwanda—have also acquitted some defendants. The ECCC is bound by a complex set of substantive laws, procedural rules, and rules of evidence that are designed to promote fairness. If the ECCC is to set an example of justice, it must stick to them.

Fair trials require that convictions be based on sound legal proof, and even the most odious defendants must be able to mount defenses. Guilty verdicts cannot be foregone conclusions. There is extensive potential evidence available against Khmer Rouge leaders—including official DK documents, witness testimony, and physical remains—but proving individual defendants responsible for particular offenses is not as simple as it may seem. Where particular crimes cannot be proven, defendants have to be acquitted.

Treating Khmer Rouge defendants in this way may be morally or politically tough to swallow, but the ECCC will only fulfill its mandate with an even-handed administration of justice. The ECCC may never be able to provide “complete” retribution or restoration to Cambodians, but it does have control over running a fair process. In addition to setting an example of fairness and transparency, sticking to due process principles can facilitate a useful transfer of knowledge and expertise between Cambodian and international officials that helps to strengthen Cambodia’s beleaguered and notoriously corrupt judicial system. One tragic legacy of Democratic Kampuchea is that few intellectuals survived the Pol Pot era, leaving the country with a dearth of lawyers and other professionals. Without a critical mass of well-trained judges and lawyers, it is difficult if not impossible to build a strong legal system. The potential for knowledge transfer has been a key justification for the establishment of hybrid tribunals, in Cambodia and in other war-torn states.

The retributive, restorative, and procedural aspects of justice are not mutually exclusive, even if they are sometimes in tension or suggest different ways of using limited resources. Retribution can challenge the culture of impunity and provide moral condemnation of offenders. Proponents of the trials hope it would also deter future criminal behavior and help to uphold the rule of law. Restorative justice can help to repair social and economic damage and thus facilitate reconciliation. Setting an example of procedural fairness can pave the way toward a more robust rule of law, addressing the future as well as the past. In Cambodia, like other societies plagued by mass human rights atrocities, all of these aspects of justice are crucial. The ECCC’s challenge is to optimize them under conditions in which time and money are limited and in which the demands for justice would be difficult for any tribunal to deliver.

Performing a Truth-Telling Function

To many observers, the ECCC also holds the promise to perform an even wider range of functions than running fair trials and issuing verdicts of guilt or innocence. If it conducts its affairs soundly, the tribunal can serve as an invaluable truth-telling mechanism in a country where public

education about the Khmer Rouge tragedy has been sorely lacking. Essentially all survivors of the Pol Pot era know that mass human rights abuses occurred between 1975 and 1979, but few know the full extent of the atrocities. Even fewer have the faintest notion of why the Khmer Rouge leaders and cadres inflicted such agony on their own people. In thousands of interviews with DC-Cam, most victims show more interest in seeking an explanation than in seeking revenge. To cope with the past, those who bear the scars of Khmer Rouge rule and lost loved ones want to know why.

In addition to benefiting survivors of Democratic Kampuchea, public dissemination of facts about the Pol Pot period can help their children by showing the need for a just and orderly society and the perils of a breakdown in the rule of law. Most of Cambodia's current citizens were born after the Khmers Rouges were thrown from power. They have no first-hand experience of the extraordinary suffering of their parents' generation. Some young Cambodians hear about the terror from relatives and teachers, but for many others, the period is a darkly shrouded mystery. Without an understanding of the Pol Pot era, many youths have difficulty understanding the psychological, emotional, and social challenges that their elders face.

For years, Cambodian schools offered little if any instruction about the Khmer Rouge period. Only recently have some textbooks been approved and introduced into public school curricula. The ECCC can serve as one credible source of history about the regime, alongside the accounts given in textbooks, museums, and other media. Court reports, media coverage, public visits, and outreach by ECCC and NGO officials can all help to provide answers. Only if they are armed with knowledge of the past can young Cambodians make sense of their country's troubled history, achieve a greater degree of closure than they have to date, and prepare themselves to prevent human rights abuses in the future.

Setting an International Example

The ECCC also has importance well beyond Cambodia's borders. It is one of the most recent embodiments of an expanding international effort to hold venal regimes accountable for their abuses and promote greater respect for basic rights. Since the era of Nuremberg, key members of the international community have worked to devise international proceedings to address the limitations of domestic criminal proceedings in post-conflict societies. During the 1990s, the United Nations established ad hoc international tribunals for the former Yugoslavia and Rwanda and later a permanent International Criminal Court in The Hague.

The UN-administered tribunals have been criticized on a number of grounds, including their cost and their relative distance—geographic and otherwise—from the victimized societies. The ECCC is one of the few examples of an alternative “mixed tribunal” model that involves shared duties between the United Nations and the government of the affected state. Proponents of the model believe mixed tribunals will better enfranchise victims, facilitate transfer of expertise, and deliver justice at a lower cost in countries that need money for many other uses. Opponents of the hybrid court model fear that partnering with suspect governments could water

down the trials' legal and procedural integrity, undermine the UN's reputation, and reduce the likelihood of credible justice. Some also fear that holding trials locally could reopen old wounds and backfire in the quest for reconciliation. The ECCC's performance will be a crucial test for the mixed tribunal model.

Affecting Cambodian Politics

The ECCC's mandate is a legal one, but it has great political relevance in Cambodia as well. In 1979, when the Pol Pot regime was overthrown, a new Vietnamese-backed government took over in Phnom Penh. That government—which renamed the country the People's Republic of Kampuchea (PRK)—based its claim to power and legitimacy primarily on having saved the country from Khmer Rouge terror. Years later, the PRK leadership founded the Cambodian People's Party (CPP), which governs Cambodia today. The CPP and its long-time leader, Hun Sen, continue to derive public support by emphasizing their role in purging the country of the Khmer Rouge problem.

Opposition parties, including the royalist Funcinpec, the Sam Rainsy Party, and the Human Rights Party, have attacked that claim and accused the CPP of worsening rather than improving respect for human rights in Cambodia. Some foreign governments and human rights organizations have said the same. The Khmer Rouge trials could indeed have some impact on public perceptions of the CPP. If they proceed well, the CPP will probably reap a modest political benefit. If the trials are botched, they may have an opposite effect. A shoddy process would likely contribute to public and international donor frustration with government—and particularly judicial—corruption in Cambodia. The trials are unlikely to become an existential issue in national politics, as they are sometimes portrayed in the foreign press, but they could generate some meaningful near-term diplomatic and domestic disruptions. That gives them importance well beyond the courtroom.

Overall: A Herculean Set of Tasks

The goals above are a tremendous amount to ask of a single tribunal. One of the ECCC's greatest challenges is to manage public expectations about what it can realistically accomplish. Even if the tribunal is wildly successful, a series of criminal trials will be no panacea. The ECCC cannot cure all of the ills of a society struggling to overcome mass atrocities. It cannot replace lost loved ones, and it cannot rectify all of the political and economic problems that flow from the Khmer Rouge reign of terror. It cannot alone transform Cambodian governance, put an end to criminality and corruption, bring about a major improvement in contemporary human rights in Cambodia, or address a host of other developmental needs.

The tribunal's importance lies more in its ability to serve as a catalyst and bellwether for change in Cambodia. It can become a necessary, highly visible step toward a more promising future by challenging impunity, setting an example of a just trial, sharing information about the Pol Pot period, and drawing attention to victims' needs. The ECCC can also focus renewed

domestic and international attention on issues of governance and human rights and increase the prospects for future progress. If it performs all of these functions ably, the ECCC will have done a great service indeed.

THE ECCC'S BACKGROUND AND PROGRESS TO DATE

The next section briefly discusses the ECCC's origins, basic features, performance, and prospects. I begin by discussing how the ECCC came to be established and analyze the particular form that it took. I then critique its operations during its first three years of operation, looking at three aspects of its work—its judicial findings, its institutional management, and its outreach to victims. Finally, I examine how the ECCC can best deliver credible justice and contribute to genuine reconciliation in Cambodia going forward.

The Rough Road to Justice

To understand the ECCC's strengths, shortcomings, and progress to date, some background is essential. I therefore begin with a review of the history and politics behind the ECCC's establishment. There have been countless calls for justice in Cambodia since the demise of "Democratic Kampuchea" (DK). Victims, human rights advocates, domestic political parties, and foreign governments have all pressed for accountability to varying degrees. Nevertheless, the tribunal's creation was a slow, painful process. The ECCC did not open its doors until almost three decades after the fall of the Khmer Rouge regime.

The delay in the tribunal's creation owed primarily to power politics. The Khmer Rouge movement was forged in the crucible of Cold War conflict, and subsequent treatment of Khmer Rouge members has always been embedded in broader domestic and international competition for influence in Cambodia. Despite heroic efforts by some individuals and non-governmental groups, calls for Khmer Rouge accountability were buried beneath broader political and strategic considerations during the latter stages of the Cold War. A serious international push for accountability began only after the negotiated withdrawal of Vietnamese troops from Cambodia, eighteen months of United Nations administration, and UN-sponsored elections brought a measure of peace to the country and marginalized the Khmers Rouges as a political and military force.

Beginning in 1997, the United Nations and Cambodian government began a decade-long diplomatic dance to establish a tribunal. Disputes flared over the "balance of influence" between UN and Cambodian officials on the tribunal, the scope of the tribunal's jurisdiction, the defendants to be charged, and the laws and procedures to be applied. Finally, in 2003, more than a quarter century after the collapse of the Khmer Rouge regime, the United Nations and Royal Cambodian Government hammered out an agreement (the "UN-RGC Agreement") to establish the ECCC. The following year, the Cambodian National Assembly passed a law—approved by the UN—to govern the tribunal proceedings (the "ECCC Law").

The UN-RGC Agreement and was a product of grueling political battles and frequent compromises between the Cambodian government and United Nations. Some of the key sticking points related to the tribunal's temporal, personal, and subject-matter jurisdiction. It would be empowered to try only certain former Khmer Rouge officials for certain crimes committed during the specific period of Khmer Rouge rule. Another key bone of contention related to the balance of influence on the court. Unlike other tribunals, which had been dominated by international civil servants, the ECCC was designed in a manner than ensured a narrow preponderance of Cambodian personnel. The UN-RGC Agreement and subsequent ECCC Law drew sharp criticism from many Western observers, who argued that it conceded too much authority to the Hun Sen government and compromised on considerations of integrity and justice.

All international criminal tribunals reflect political realities and carry important political implications. The ECCC is certainly no exception. For better or worse, the tribunal's jurisdictional limits and organizational structure were deemed necessary to achieve buy-in from the relevant parties. Nevertheless, the legacy of tough negotiations and political compromises has left residual discomfort and distrust. Much of the political friction that surfaced during the UN-Cambodian negotiations continues to haunt the ECCC proceedings. In particular, the tribunal's jurisdiction and the appropriate balance of influence remain key subjects of debate, as Cambodian and UN officials argue over the possible inclusion of additional defendants and spar over the ways to improve the tribunal's management.

The Tribunal Takes Shape

The 2003 agreement between the United Nations and Cambodian government and the 2004 ECCC Law contained the blueprint needed to create the tribunal. It set out the substantive laws that would govern the proceedings and set forth many of the organizational and administrative features of the ECCC. This section discusses the tribunal's basic features and how the tribunal took shape after the signing of the ECCC Law.

In addition to deciding what time period to cover and who to prosecute, the architects of the ECCC had to define the tribunal's subject-matter jurisdiction. This meant deciding which of the many possible crimes of the DK regime to prosecute. Cambodian and UN officials drew from both local and international law and ultimately settled on eight crimes, including genocide, war crimes, crimes against humanity, torture, homicide, religious persecution, and a few lesser-known, previously untried international offenses.

The legal definitions of some of these crimes were not obvious. Justice requires that Khmer Rouge defendants be tried only for crimes that existed at the time of the acts in question, and both international criminal law and Cambodian law were in flux during the 1970s. As Heindel describes, the ECCC Law left open some important questions about the precise "elements" (i.e., the specific acts and criminal intent) that prosecutors must prove to secure convictions for particular offenses. It also left open some complex legal issues surrounding the "forms" of criminal

responsibility. In cases of mass human rights abuses, holding high-ranking leaders accountable usually requires proving that they issued orders, engaged in conspiracy, or otherwise bore indirect responsibility for the crimes of their colleagues or subordinates. The ECCC's legal formulation of direct and indirect criminal responsibility could have a major practical impact on the trials.

Equally important are the laws and rules established to safeguard the rights of defendants. As argued above, the ECCC can only be deemed a success if it enables defendants to mount defenses and adheres to common notions of procedural justice. Legal defenses are available to Khmer Rouge defendants under the ECCC Law and other relevant sources of law. Internal Rules were agreed only in 2007 to govern the internal operations of the ECCC.

Finally, it is worth touching on the judicial and administrative structures laid out in the UN-Cambodian agreement and the ECCC Law. Much of the concern over the ECCC's form and procedure relates to the mixed character of the tribunal. Investigative, prosecutorial, and judicial duties will all be divided between Cambodian and international personnel. There are some strengths of the model—such as the potential for complementary skills and expertise and the possibility of useful knowledge transfer. There are also some problems with the ECCC's form and the possibility of institutional deadlock or procedural complications in certain cases.

Assessing the ECCC's Performance to Date

When the ECCC finally took shape and commenced operations in 2006, it was given an unofficial three-year mandate and a corresponding budget to tackle Khmer Rouge impunity by putting some surviving DK officials on trial. Over its first three years, the ECCC has validated both the hopes of its proponents and the fears of its critics. To its supporters, the ECCC has taken major steps toward justice. To some critics, the tribunal has been a farce and a failure. The truth lies somewhere in between.

Since 2006, notable progress has been made. Investigations have been conducted, five key suspects are in custody, numerous pre-trial proceedings have transpired, and the trial against Duch has begun. The tribunal has also established workable administrative organs and has improved its outreach through the establishment of a new Victims' Unit. Conducting effective criminal trials is no easy task, especially when the scale of the crimes committed is so vast. The challenge is even greater in a new institution using multiple languages, serving diverse donors, and implementing rules and procedures based on a complex blend of local and international legal traditions. Viewed in this light, the ECCC may even have exceeded expectations.

Nevertheless, the accountability process is far from complete, and the ECCC has hit frequent bumps in the road. A number of disputes, problems, and scandals have arisen, impeding the tribunal's efficiency, sometimes undermining its perceived legitimacy, and occasionally jeopardizing its

existence. Many of the challenges at the ECCC have involved tension between Cambodian and international officials. Tough compromises have been necessary throughout the process to keep the tribunal functioning. The tribunal has often moved slowly, and some analysts have particularly criticized the pace of criminal investigations. The ECCC was created with a three-year mandate and corresponding budget. It is now clear that the tribunal will consume much more time and money than originally envisioned to complete its mission. To critics, it has also failed to provide adequate outreach to victims and issued legal judgments of variable quality. Perhaps even more damning are allegations that some ECCC officials have mismanaged the institution and allowed corruption to creep into the process. Some observers, including prominent human rights advocates, have even advocated shutting down the ECCC.

The ECCC's Legal Judgments

Since mid-2007, the Pre-Trial Chamber a unit composed of three Cambodian and two international judges, has conducted a number of public hearings and issued a number of important decisions. Many have related to procedural rights and the lawfulness of the ECCC's detention of the defendants. A number of the charged persons have filed appeals against the Co-Investigating Judges' detention orders, arguing that they are either too sick to be in detention or unfit to stand trial. Duch has sought release on the grounds that his rights were violated by a lengthy pre-trial detention by the Phnom Penh Military Court—which began in 1999 and extended well beyond the three-year maximum in Cambodian law. Ieng Sary has argued that he should be immune from prosecution due to the principle of “double jeopardy”—he was convicted in absentia of genocide in a brief trial in 1979. Ieng has also appealed his detention, pointing to the amnesty and pardon he received when he defected to the government in 1996.

The Pre-Trial Chamber has rejected all of the foregoing appeals. It has also had to grapple with other diverse issues. These have included the rights of civil parties to participate in the process, the forms of criminal responsibility that will be accepted at trial, and the scope of the defendants' right to translation of case file documents.

The Tribunal's Institutional Management

The ECCC is not only a court of law – it is also a complex bureaucratic organization subject to various forms of political oversight and influence. The ECCC cannot perform its mandated judicial and public outreach functions without running an effective institution. The ECCC faces steep challenges that all international and hybrid tribunals have faced—how to set up a sophisticated bureaucracy from scratch, manage complex donor relations, assemble a diverse staff, manage linguistic and logistical headaches, and tackle tough criminal cases.

The ECCC has made important strides, but it has also faced significant administrative challenges. Foremost among these has been the problem of alleged corruption in the tribunal. In 2007, an audit conducted for the UN Development Program noted allegations of kick-backs, illegal

hiring practices, and other malfeasance. A few ECCC employees later issued corroborating claims. The episode sparked a significant crisis, provoking recriminations between the United Nations and Cambodian government and prompting some donors to suspend financial contributions. The ECCC has since taken some responsive measures, issuing new guidelines and creating a new anti-corruption commission. However, concerns about corruption have not evaporated, and the measures taken to date have failed to satisfy some donors and external observers.

Another concern about the ECCC's operations surrounds the length and financial cost of the process. The ECCC began with an agreed budget of roughly \$56 million, of which the international community contributed the lion's share. That budget was intended to cover the entire trial process for a period of three years. However, by early 2008, the ECCC estimated a need for a further \$114 million to complete its work. Donors were not enthusiastic, especially in the wake of corruption allegations. The tribunal eventually shaved its budget request by a significant margin but has still requested roughly \$50 million in additional funds. It now estimates that the trials of four defendants will not begin until 2010, making further funding requests likely. Should the ECCC decide to prosecute additional defendants, the price tag will further rise. Donors have taken some measures to improve budgetary and management oversight, but budgetary tugs-of-war will likely continue.

Critics argue that the ECCC is proving wasteful and that money could be more productively used for development projects given all of Cambodia's needs. Supporters of the process respond that the ECCC is still much cheaper than the wholly international processes carried out for the former Yugoslavia and Rwanda. Moreover, the funds provided for the tribunal would not necessarily be furnished for other ends. Hall evaluates these arguments and assesses the measures that donors and the ECCC have taken to promote sound financial management.

The ECCC's Outreach to Victims

A third key aspect of the tribunal's operations is its outreach to survivors of the DK era and other ordinary people. Robust victim participation is essential if the ECCC is to be successful. The Khmer Rouge trials are not just an antiseptic legal exercise; they represent an effort to help millions of Cambodians heal and to advance principles of justice and human rights in a society that has seen too little of both. The ECCC can fulfill those missions only if Cambodians are able to follow, understand, and meaningfully participate in the process.

The ECCC is part of an evolution of victim participation in international and hybrid international tribunals. Limited victim access has severely compromised the effectiveness of the ICTY and ICTR, in contrast to the Special Court of Sierra Leone, which has made considerable advances in connecting the local community to the proceedings.

Under the framework for victim participation at the ECCC victims can participate directly in the trials—by issuing formal complaints, serving as

witnesses, or joining the proceedings as civil parties. They also can participate through educational sessions, visits to the court proceedings, and village discussion forums. There are many challenges that the ECCC faces in responding to the needs of millions of Cambodian victims. These include the legal complexities of including civil parties, the difficulty of managing voluminous victim complaints and coordinating NGO activities in the field, and the need for strong outreach and witness protection programs.

The ECCC's Prospective Role in Justice and Reconciliation

The final section of this paper discusses how the ECCC fits into broader efforts to achieve a measure of justice and reconciliation in Cambodia. As stressed above, the tribunal is not a cure-all for the wounds inflicted by Khmer Rouge terror. It is part of a broader process of healing that is taking place on both societal and personal levels. At both public and private levels, Cambodians pursued various forms of reconciliation long before the tribunal was created. Those efforts have helped survivors and their families begin to rebuild and have contributed to improved social stability after decades of armed conflict.

The ECCC has the potential to deliver meaningful justice and contribute to genuine reconciliation. To do so, it needs to devote tremendous effort and energy to enhanced public outreach. It must focus as much on the needs of ordinary Cambodians as it does on the imperatives of a sound judicial process. That is a great deal to request from a tribunal that is already entrusted with a complex set of criminal cases. However, even perfectly run cases with well-reasoned verdicts will ring hollow if the public is not able to follow and understand the process.

Of course, the ECCC is not acting alone, and it is not the only body with responsibility to reach the public. It is just one prominent institution working on an array of problems which government agencies, international organizations, NGOs, religious groups, and ordinary citizens have also begun to address. The tribunal draws useful attention to the Khmer Rouge legacy. Schools, NGOs, health clinics, and other providers of education and counseling need to seize this opportunity to address crucial public needs for information, counseling, and dialogue. We note some of the efforts underway and stress the importance of an all-hands effort to make the ECCC-led process a success and to follow up on the trials with a continued commitment to justice, reconciliation, and the rule of law.