



CAMBODIA

Submission to the Universal Periodic Review
of the UN Human Rights Council
Sixth Session: 30 November – 11 December, 2009

International Center for Transitional Justice (ICTJ)
April 14, 2009

Introduction

1. Between 1975 and 1979 at least 1.7 million people died due to mass killings, torture, and forced labor, and many more suffered other serious human rights violations, in the country then known as Democratic Kampuchea. The impact of this period specifically, together with the broader conflict that engulfed Cambodia from 1968 and continued in some form until 1998, irreparably damaged the social and cultural fabric. That damage continues to affect many Cambodians still.
2. The start of the first trial before the Extraordinary Chambers in the Courts of Cambodia (ECCC) against Kaing Guek Eav or “Duch,” an official of Democratic Kampuchea, represents a major step forward for those seeking justice. If the ECCC are able to implement their mandate fully, they may make a limited but essential contribution toward combating a persisting culture of impunity by demonstrating an effective, fair, judicial response that leaves a lasting legacy for Cambodia’s judiciary. However, ongoing concerns about political influence, corruption, and delays in the process risk undermining the ECCC’s ability to ensure that the trials are fair, meet victims’ expectations, and provide a model of justice for the Cambodian public.
3. Other than the ECCC, the Cambodian government has given minimal support for other forms of transitional justice measures since the end of the conflict with the Khmer Rouge. Although the 1991 Paris Peace Accords contained no explicit provision for justice or accountability for past crimes, the parties did commit “to take effective measures to ensure that the policies and practices of the past shall never be allowed to return.”¹ The government has prioritized political stability and economic development over accountability, in contrast to earlier limited justice efforts that it conducted together with military attempts to defeat the Khmer Rouge. Civil society initiatives have made important contributions to dealing with the ongoing legacy of past crimes, through documentation, education, and reconciliation programs. More coordinated, state-supported efforts are needed to give meaning to the rights of victims under the Universal Declaration of Human Rights and other treaties in order to provide an effective remedy for past and ongoing human rights violations, including in terms of reparations, truth-seeking, and institutional reform.
4. The question of human rights violations in Cambodia today, especially in relation to forced evictions, arbitrary arrests and other serious violations of the rights of suspects and

¹ Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Article 15(2)(a), Oct. 23, 1991.

defendants in criminal proceedings, deserves the attention of the Human Rights Council. This submission, however, focuses on the efforts undertaken to date to provide justice for the atrocities committed during Cambodia's long conflict, particularly by the Khmer Rouge. Although these events began more than 40 years ago, they have direct relevance to the current human rights situation in Cambodia and for this reason should also be considered as part of the Universal Periodic Review process. The obligation to provide justice to victims for these past atrocities is itself an ongoing human rights issue. The absence of accountability for mass crimes symbolically remains a contributing factor to prevailing conditions of impunity and the extent to which the rule of law is able to develop in Cambodia.

Substantive concerns

5. The Extraordinary Chambers have jurisdiction to prosecute senior leaders of Democratic Kampuchea and those most responsible for crimes against humanity, genocide, violations of international humanitarian law, and certain crimes under national law committed between April 17, 1975, and January 6, 1979. The June 2003 Agreement between the UN and the Royal Government of Cambodia that established the ECCC states that the procedures shall follow Cambodian law, and the ECCC "shall exercise their jurisdiction in accordance with international standards of justice, fairness, and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party."² Under Article 28 of the agreement, the United Nations reserves the right to withdraw cooperation from the process if Cambodia causes the ECCC to fall short of complying with those standards.
6. Several factors are undermining the ECCC's operations. First, there has been a lack of clear resolution on an appropriate response to repeated allegations of corruption within the Cambodian side of the court. These allegations first arose in 2007. Details continue to emerge about payments some members of the Cambodian staff reportedly made to court or government officials in return for recruitment to the ECCC and of a kickback scheme in which some employees are permanently obliged to pay a proportion of their salary to their superiors. The Cambodians who have tried to complain about these practices to international colleagues have allegedly lost their jobs as a direct result. While the ECCC's Cambodian administration has denied the allegations, the persistence of the claims and increasing willingness by Cambodian staff to raise them publicly in a context in which corruption is endemic have seriously damaged the ECCC's legitimacy. These claims have prompted key international donors to suspend funding to the Cambodian side of the court, causing uncertainty and risking potential delays to the judicial process, because of the inability to pay judicial salaries. The UN and the government have yet to successfully negotiate an effective complaints and investigation mechanism for corruption issues. To date there have been no reports of corruption within the Cambodian judiciary involved in the ECCC. Unsurprisingly, defense lawyers have argued that institutionalized corruption within the Office of Administration compromises the ability of the administration to support and serve the judicial officers in a fair, independent, and impartial manner, undermining the integrity of the proceedings as a whole.³
7. Second, the ECCC's ability to provide fair trials depends on all court officers exercising their professional responsibilities absolutely free from political influence. Unlike other hybrid tribunals, the majority of the judges at all three judicial levels of the Extraordinary

² Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, June 6, 2003, Article 12(2).

³ Eleventh Request for Investigative Action, Case No 002/19-09-2007-ECCC/OCIJ, March 27, 2009.

Chambers are Cambodian; there is one Cambodian and one international co-prosecutor, and one Cambodian and one international co-investigating judge of equal authority. This arrangement leaves open the possibility of deadlocks. For this reason, the UN included unique dispute resolution and decision-making requirements within the agreement to protect the ECCC from political interference. In late 2008 the international co-prosecutor's request to investigate several additional suspects was opposed by his national counterpart on ostensibly political grounds that some observers fear reflects the government's will. ECCC judges must resolve this. However, public comments by the prime minister and other senior government officials that no further prosecutions should occur because of risks to political stability have reinforced popular perceptions that the government will attempt to dictate the judges' decisions. If the Extraordinary Chambers are to achieve even the minimum of success in discharging their role to fairly prosecute based on the evidence before them, there can be no actual or perceived influence from any political source.

8. According to the ECCC Internal Rules, victims can participate as civil parties to the proceedings; more than 3,000 victims have applied to the court for civil party status or made complaints. Insufficient attention and not getting resources in a timely fashion to support this process has caused serious backlogs in processing claims, hiring lawyers for victims, and coordinating groups of victims to ensure that their involvement does not compromise defendants' rights to expeditious trials. This also risks undermining the ability of victims to meaningfully participate in the proceedings and presents the real possibility that victims' expectations have been raised in ways that cannot be met.
9. Another concern worth noting is the length of time taken to complete the judicial investigation in the second case against Ieng Sary, Ieng Thirith, Khieu Samphan, and Nuon Chea. All four are elderly, in increasingly fragile health, and have been held in pre-trial detention at the ECCC since 2007. Their trial is unlikely to commence before early to mid-2010, which increases the chances that some of the accused will not be healthy enough to stand trial. These circumstances have compounded concerns over a lack of transparency and regular access to public information about the progress of the court's work, although both the administration and judicial officials of the court have made improvements in this regard.
10. The Internal Rules of the Extraordinary Chambers state that the court can award "moral and collective reparations" to civil parties following a conviction at trial.⁴ Victims' lawyers have challenged the legality of this provision as an unacceptable restriction of broader victims' rights to individualized reparations that exist under the Cambodian Criminal Procedure Code. It remains to be seen what moral and collective reparations the ECCC may order against defendants who have declared indigence, since they are supposed to bear such costs. In addition, criminally acquired assets are to be "returned to the State."⁵ This limitation demonstrates the need to examine reparations beyond the ECCC's mandate as a state obligation. The UN General Assembly has affirmed that the state has the obligation to "establish national programmes for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligations."⁶ No systematic reparations program exists for victims of past conflict-related crimes, a stark contrast to the widespread land concessions granted to demobilized Khmer Rouge combatants.

⁴ Rule 23(11), Extraordinary Chambers in the Courts of Cambodia Internal Rules [Rev. 3], as revised on March 6, 2009.

⁵ Chapter XI, Article 39 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2004).

⁶ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (April 19, 2005), Paragraph IX(16).

11. National and local authorities erected memorials to victims soon after the fall of Democratic Kampuchea, notably the Tuol Sleng genocide museum in Phnom Penh and the Choeung Ek “killing fields” site, and proclaimed two public days of remembrance. These important but limited efforts, like the popularly constituted “People’s Revolutionary Tribunal” in 1979 that convicted Pol Pot and Ieng Sary of genocide in absentia, were established in the context of the ongoing military and diplomatic conflict against the Khmer Rouge, rather than to acknowledge the government’s obligations to provide victims with redress or their right to the truth. Since the conflict ended in 1998, there has been no official willingness to conduct national truth-seeking for all victims. Instead, the defections of the remaining combatants in the 1990s were accompanied by de facto and de jure amnesties and assurances of protection from legal repercussions. As a result, many victims continue to see their former abusers in positions of authority and privilege, as the policy of “national reconciliation” allowed defecting Khmer Rouge leaders and combatants to be integrated into the Royal Cambodian Armed Forces as well as into senior civilian administrative posts. Effective measures to guarantee that serious human rights violations do not recur should include thorough institutional reform, particularly of state institutions such as the police and military by removing people with records of committing human rights abuses.⁷

Achievements

12. The first trial before the ECCC is under way; Duch faces charges of crimes against humanity and war crimes. Four other suspects are in custody awaiting trial. After years of delays, many victims feared that nobody would ever face trial for the Khmer Rouge-era crimes. The ECCC has issued public pre-trial decisions on provisional detention and other procedural matters, making reference to international case law and standards. Such jurisprudence forms part of an historical record of the process and may be useful for Cambodian domestic proceedings. Two noteworthy examples include the determination that the 1996 pardon and amnesty of Ieng Sary’s 1979 conviction did not bind the ECCC, and the voluntary recusal of one of the Pre Trial Chamber’s Cambodian judges from participating in a review of Duch’s pre-trial detention because of his previous involvement in the matter.

13. The ECCC judges’ decision to adopt rules allowing victims to participate as civil parties in the proceedings and to create a dedicated victims’ unit has been a positive development for the ECCC’s legacy within Cambodia and also as a precedent for other internationally assisted courts. In areas such as witness protection, court management practices, provision of transcripts of hearings, and an independent defense support unit that works with defense legal teams, the ECCC have also made important steps toward modeling a functioning, fair judicial process.

14. In addition, the ECCC have provided a useful way for civil society to publicize the trials, and that has begun to promote both the public and media to reflect on a little-discussed aspect of Cambodia’s history. Court officials have participated in public outreach events, and Cambodian nongovernmental organizations such as the Center for Social Development, the Khmer Institute for Democracy, and ADHOC have been active in developing a range of public fora and reconciliation exercises. The independent Documentation Center of Cambodia has done impressive work on collecting and preserving documentation and providing victims with information. Despite these vital unofficial efforts, according to a 2009 survey by the Human Rights Center at the University of Berkeley, California, 81

⁷ Ibid, principle 36.

percent of Cambodians still have little knowledge of the ECCC and their work.⁸ Popular knowledge about the crimes committed during the conflict, including the number of people killed, the fate of those who disappeared, the reasons for the violence, and the involvement of external forces, varies widely. Since the end of the conflict in the late 1990s, public debate has been limited and the topic absent from school curricula, although most Cambodians were born after 1979. Although there were official efforts to collect testimonies of survivors in the early 1980s as part of an intended petition to raise international attention to the need for justice, the government has not been published these or made them more widely available. In light of these facts, the Ministry of Education's recent decision to approve a school textbook that the Documentation Center of Cambodia prepared on the Khmer Rouge era is an important step forward.

15. In December 2001 the prime minister issued a directive to local authorities to "examine, restore and maintain existing memorials" of Khmer Rouge-era crimes and to identify and protect other grave sites "[i]n order to preserve the remains as evidence of these historic crimes and as the basis for remembrance and education by the Cambodian people as a whole."⁹ The Ministries of Culture and Fine Arts, and Tourism were to provide further guidance and technical support for these purposes. While this was largely enacted to develop tourism, it provides a useful basis for future official public education and memorial efforts.

Recommendations

16. To ensure the effective functioning and public credibility of the ECCC, the government should take immediate steps to publicly reaffirm their independence, and government officials should refrain from actions that are or could be perceived as attempts to influence the judicial process. Similarly, the government should take immediate steps to ensure the Cambodian side of the ECCC is free from corruption; this means that Cambodian staff members are free to make confidential complaints to an internationally supervised mechanism, and officials implicated in corruption allegations are fully investigated and removed if found to have engaged in corrupt practices.
17. As reparations are ultimately a state obligation, the government should use the opening created by the ECCC to determine what measures it could take to make reparations available to all victims of conflict in Cambodia. The ECCC should also consider how to maximize the impact of the reparations mandate, including soliciting public input on the feasibility of a trust fund for victims and relevant cultural considerations in formulating appropriate collective reparations for the various categories of victims involved.
18. Within the context of Cambodia's continued economic growth and political stability, renewed official attention should be given to issues of truth-seeking and accountability for victims of the conflicts in Cambodia. Most essentially, these require that the state accept its obligations to provide truth, justice, and reparations to all victims. At a minimum, this should include acceptance of public dialogue on the extent of government obligations to address the legacy of the past, and broad-based public consultation on what forms this could take.

⁸ *So We Will Never Forget: A Population-based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (January 2009), Human Rights Center, University of California, Berkeley.

⁹ Circular Concerning Preservation Of Remains Of The Victims Of The Genocide Committed During The Regime Of Democratic Kampuchea (1975-1978), And Preparation Of Anlong Veng To Become A Region For Historical Tourism, No 13, Dec. 14, 2001.