

All Quiet on the Eastern Front: The Khmer Rouge tribunal in practice.

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The Khmer Rouge tribunal¹ in Phnom Penh has finally come to life. It has taken a long time, but the first trial actually started a couple of months ago.

This first trial has only one suspect, Kaing Guek Eav, a.k.a. Duch, the former commander of the notorious S-21, a camp where more than 10,000 prisoners are said to have been tortured and killed² between 1976 and 1979. The other four suspects are still awaiting trial. All four suspects will stand trial at the same time and this trial is expected to be held no sooner than in the autumn of 2011.

One of the suspects yet to appear before the courts is Nuon Chea, the former deputy of Pol Pot, the leader of the Khmer Rouge who died at the end of the previous century. People generally also refer to Nuon Chea as ‘brother number 2’, apparently due to his place in the Khmer Rouge’s pecking order. I have been Nuon Chea’s international legal counsel or co-lawyer since 2007, together with my associate in Amsterdam, Victor Koppe, and a Cambodian lawyer, Son Arun.

Although the four main suspects of the tribunal have yet to stand trial, it won’t hurt to report on the current state of play and to highlight the problems I have been running into in Phnom Penh. The problems the tribunal faces are all due or closely related to the Cambodian government’s desire to keep a tight grip on the course of the proceedings. In order to properly understand the issues at hand, it is imperative to briefly concentrate on Cambodian politics and the history of the tribunal.

¹ The tribunal’s official name is ‘Extraordinary Chambers in the Courts of Cambodia’ (ECCC); the tribunal has its own website: www.eccc.gov.kh. The website provides all the relevant regulations of the tribunal, including the agreement which led to the constitution of the tribunal (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), and the internal rules of procedural law governing the tribunal (Internal Rules); the tribunal also has an official page on facebook, where at the time of writing this footnote, on August 9 2009, the tribunal had 254 fans: www.facebook.com/pages/Phnom-Penh-Cambodia/Khmer-Rouge-Tribunal-ECCC.

² The proceedings against Duch are not being webcast but the hearing is followed closely by journalists and representatives of non governmental organizations, who frequently report their findings on the internet: <http://cambodia.ka-set.info/the-khmer-rouge-trial.html>; www.cambodiatribunal.org; http://socrates.berkeley.edu/~warcrime/KRT_reports.html. The ECCC also reports on the progress of the proceedings against Duch, in so-called Court Reports which are posted on the official website.

Previous history

Cambodia has little experience with democracy. The current political system can at best be described as a traditional single-party state, led by the Cambodian Peoples' Party (CPP) and controlled by a political triumvirate for thirty years now³. The country's human rights record is all but spotless. The way the current prime minister Hun Sen dealt with the political opposition in the summer of 1997 is in fact notorious; dozens, if not hundreds of members of the opposition lost their lives during this coup⁴.

The judiciary in Cambodia is weak. Reports on Cambodia and its legal system are published rather regularly and time and again refer to rampant corruption and the considerable influence the government has on the outcome of legal proceedings.

Corruption is so much part of the Cambodian legal system, that judges are sometimes quite outspoken about pocketing money, thus acquiring assets that are in no proportion to their miserly wages⁵. Cambodia ranks high in the 2009 annual global corruption overview published by Transparency International. According to the NGO, Cambodia is the most corrupt country in the region, and special reference is made to the judiciary which the respondent generally referred to as the institution most affected by corruption⁴.

Judicial proceedings in Cambodia often focus on neutralizing inconvenient political opponents. The powers that be therefore also regard the law as a tool to silence the opposition. People who venture to criticize members of government or the CPP, are sure to be charged for libel or for insulting the government. Cambodia's history is full of examples of important politicians who were prosecuted and ultimately sentenced under questionable circumstances⁵.

The judiciary is formally controlled by the so called 'Supreme Council of the Magistracy', which in Cambodia is i.a. in charge of appointing judges and prosecutors. The independence of this body is however questioned by many, including the United Nations⁶. Members of said Council

³This triumvirate consists of Hun Sen, the current prime minister of Cambodia, Chea Sim, the Chairman of the CPP and Heng Samrin, the "chairman of honor". After the fall of the Khmer Rouge in 1979, the Vietnamese occupying forces put forward Hun Sen, Chea Sim and Heng Samrin as members of the new government; they have been in power, uninterrupted, since 1979.

⁴ For a description of the events in July 1997, see: Human Rights Watch, www.hrw.org/ja/news/2007/07/27/cambodia-july-1997-shock-and-aftermath as well as Amnesty International, Kingdom of Cambodia: Human Rights at Stake, 1 March 1998, ASA 23/004/1998.

⁵LICADHO, Cambodian League for the Promotion of Defense and Human Rights, Human Rights in Cambodia: The Charade of Justice, December 2007, ('LICADHO'), p. 22.

⁶Transparency International, 2009 Global Corruption, Barometer, www.transparency.org, pp. 28, 30, 32; 62 percent of the respondents in Cambodia referred to the judicial power as the most corrupt sector in society.

⁷For an overview of criminal proceedings against the opposition see LICADHO, pp. 5,6. The international press recently reported on the case against Mu Sochua; this member of the parliamentary opposition could find no legal counsel who would be prepared to represent her in a trial for defamation: International Herald Tribune, Series of lawsuits chills Cambodia rights groups, 21 July 2009.

are mostly also members of the governing CPP and the party's influence in practice often permeates through to this so called independent council⁷.

The negotiations on the constitution of the Khmer Rouge tribunal started in 1997 and mainly focused on the tacit international desire to limit the CPP's influence in the tribunal's legal proceedings as much as possible. The meetings between the stakeholders – Cambodia, the United Nations and also the United States – were extremely tough and it has to be said that the Cambodian negotiating team managed to get the best possible deal. Only few of the original conditions put forward by the international community were accepted by the Cambodians⁸.

From the very beginning, the international community insisted, in vain, on guarantees in order to make sure that the procedures of the incipient tribunal would meet international standards.

In 2000, on the brink of desperation, after several years of very tough negotiations, the Secretary General of the United Nations submitted a set of minimum requirements which were to guarantee a fair trial, i.e. a trial without political influencing⁹.

At the time, the international community's main requirement was that the prosecutor and the majority of the judges were not to be from Cambodia and were to be appointed by the Secretary General of the United Nations. Aforementioned set of conditions was already a diluted compromise, since the international community originally preferred an institution such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), or at any rate a tribunal where all the judges and prosecutors – i.e. not just the foreigners – would be appointed by the United Nations. But Cambodia never so much as considered the original proposal of the international community. The proposal was disregarded at the very beginning of the negotiations, for the simple reason that the government would have had to relinquish whichever form of control it had over the tribunal.

The fact that even the diluted proposal never made it, typifies the negotiations as such. The international community is now 'stuck' with an international court which in no way resembles what the international community had originally envisaged and which in my opinion offers insufficient guarantees for a fair trial.

Unfortunate compromise

⁸Documentation Centre for Cambodia, Ambassador Thomas Hammarberg, How the Khmer Rouge tribunal was agreed: Discussions between the Cambodian government and the UN, 2001, http://www.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm, ('Hammarberg'), pp. 22 and further (own page numbers).

⁹ Hammarberg, p. 24.

¹⁰ For an overview of the negotiations see Hammarberg as well as: David Scheffer, The Extraordinary Chambers in the Courts of Cambodia, in Cherif Bassiouni, ed., International Criminal Law, 2008.

¹¹ Hammarberg, p. 25.

The compromise which was reached is hardly a reflection of the original international idea.

The Khmer Rouge tribunal now consists of three chambers, a Pre-Trial Chamber, a Trial Chamber and a Supreme Court Chamber, administering justice in first and last instance respectively. Each chamber has a majority of Cambodian judges¹⁰. The tribunal furthermore has two examining judges and two prosecutors, nicely divided into 'national' and 'international'¹¹. Hence there is a Cambodian examining judge and an international examining Judge. The same applies to the public prosecutors. Although the international legal professionals are nominated by the Secretary General of the United Nations, all judges and prosecutors are appointed by the aforementioned Supreme Council of the Magistracy, the same body the United Nations initially referred to as unreliable, for not being entirely independent.

The Cambodian government was allowed quite some political leeway in the appointment of the legal professionals. And credit where credit is due, the government has managed to make the most of the leeway it was given.

The Supreme Council of the Magistracy appointed legal professionals who are not beyond reproach. According to experts who advise our team in Phnom Penh, of the eleven Cambodian judges there are at least six who have played a role in the politically tainted trials against opponents of the current regime in Phnom Penh; one of these six judges admitted in public that he had accepted money from parties in disputes he was to rule on.¹²

These 'tainted' judges have all been appointed by the Supreme Council of the Magistracy. The fact that these appointments were fishy, in the sense that this was not a decision of an independent body, recently became apparent when I received a copy of a document from an anonymous source, from which one can infer that prime minister Hun Sen 'approved' the selection of judges even before these judges had actually been appointed by the Supreme Council. One of the members of this council acknowledged just after the document had been leaked, that the council "had been asked" to unanimously accept the nominations and that there had indeed been no impartial judgment.¹³

Optimists amongst the critics will refer to the two guarantees the United Nations managed to incorporate in the system of the Khmer Rouge tribunal. These are mechanisms which have

¹² The composition of the chambers is laid down in the Agreement, Article 3.

¹³ Agreement, Articles 5 and 6.

¹⁴ The candid judge is Nil Non, then president of the provincial court in Battambang, now president of the Trial Chamber. See: LICADHO, pp. 22, 25, 26.

¹⁵ The Cambodia Daily, Nuon Chea Lawyers Query Hun Sen on KR Tribunal Judgeships, 6 August 2009: "Former Appeal Court Prosecutor-General Hanrot Raken, until recently a member of the Supreme Council of the Magistracy [...] said the council had enjoyed little independence at the time of the appointment. The council was asked to approve by a unanimous vote, he said".

been incorporated into the rules in order to overcome the aforementioned shortcomings of the tribunal.

First of all there is the mechanism of the 'super majority', a principle entailing that a chamber of the tribunal can only reach a positive decision if at least one of the international judges supports the position of the Cambodian judges. A conviction by the Trial Chamber therefore not only requires the votes of the three Cambodian judges, but also the vote of one of the two international judges¹⁴.

Even aforementioned optimists will agree that this is an unfortunate compromise; it underscores that there are two categories of judges, the implicit idea being of course that the international judges are more of a judge than their Cambodian counterparts¹⁵.

It remains to be seen whether the super majority system will actually work. What if there is a majority in favor of a decision, but the majority is not a "super" or qualified majority? And what is a positive decision exactly?

Although it is early days to judge, there are already signs that the super majority system is prone to abuse and that, at any rate, it can lead to undesirable deadlocks or serious delays.

The second mechanism embedded in the tribunal's rules to avoid excessive government influence, is the possibility for the examining judges and also the public prosecutors to appeal to the Pre-Trial Chamber should there be a dispute between them¹⁶. This mechanism was devised in order to prevent the Cambodian examining judge or the Cambodian public prosecutor from blocking a decision of their international counterpart by simply pronouncing a veto.

Thus far, such a dispute has occurred once, i.e. a dispute between the international and the Cambodian public prosecutors, which dispute was then submitted to the Pre-Trial Chamber.

Again it remains unclear whether this system of dispute resolution will actually work properly in practice. At any rate it is a legal monster, and for that reason alone it does not deserve to be copied.

¹⁶ This principle is laid down in the Agreement, Article 4, and elaborated in the Internal Rules, Rule 98 (4).

¹⁷ I deem Thomas Hammarberg to also be one of the optimists, who when concluding the negotiations on the tribunal intimated that he was quite apprehensive of the outcome: "The 'super majority' notion is clearly a compromise and not without problems. [...] If international standards are to be met, neither the Prime Minister nor any other politician in Cambodia should influence the trial – or be seen to do so. The tribunal should not be an instrument for political purposes. The main problem with the final compromise is that it does not offer full guarantees on this crucial aspect; there is a widespread concern in Cambodia that Prime Minister Hun Sen will be able to influence the proceedings heavily", Hammarberg, p. 28.

¹⁸ Agreement, Article 7, Rules 71 and 72.

Symbiosis of legal systems

The Khmer Rouge tribunal is formally part of the Cambodian legal system. The Agreement between the United Nations and Cambodia, i.e. the agreement upon which the tribunal is based, defines in so many words that the procedures for the tribunal are governed by Cambodian law¹⁷.

Embedding this into the agreement does not imply that the Khmer Rouge tribunal cannot draft its own procedural rules, the so called Internal Rules, which in fact have been amended by the tribunal on several occasions and have clearly been influenced by the procedural laws of other tribunals. These Internal Rules often do, although sometimes they do absolutely not, correspond with Cambodian laws of criminal procedure. The tribunal's procedural laws are somewhat schizophrenic since it is unclear which law is to be implemented in the event of conflicting principles. Although the Agreement seems to imply that Cambodian law prevails¹⁸, in practice the judges seem to prefer the rules they themselves have drafted in the form of the Internal Rules¹⁹.

The tribunal's legal practice, albeit limited thus far, provides a mixed situation. From the perspective of international law, the procedure in Phnom Penh is really neither fish nor fowl. There is an emphasis on 'civil law', but there is a strong influence of 'common law', evidenced by the fact that the judges in their rulings often refer to case law of the ICTY.

Among those who follow international tribunals there was indeed some initial hope that the Khmer Rouge tribunal would prove to be an example of efficiency for other tribunals. Europe has been especially critical of the slow judicial processes at tribunals in The Hague, a slowness mainly caused by the Anglo-Saxon practice of questioning all witnesses at a trial; a practice which I by the way, fully endorse. The examining judge's introduction at the Phnom Penh tribunal would put an abrupt stop to the endless hearings. Civil law countries could teach common law countries a lesson or two in procedural efficiency, without prejudicing suspects' rights.

A nice case of wishful thinking. The Khmer Rouge tribunal is on the verge of becoming the least efficient tribunal to date. I believe that this is due to the neither fish nor fowl idea governing its rules.

¹⁹ Agreement, Article 12 (1).

²⁰ Agreement, Article 12 (1): "The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level."

²¹ We submitted the question of how to resolve a conflict between different legal systems to the Pre-Trial Chamber; however the chamber did not wish to touch upon this thorny issue. The important question concerning the legal system that is to prevail can only be submitted to the Trial Chamber at the start of the hearing.

From the point of view of efficiency, which is also quite relevant to the (imprisoned) suspect, the tribunal seems to have succeeded in combining the 'worst' of the two legal systems.

In the case against Nuon Chea and the other suspects, the preliminary inquiry was started two years ago and doesn't seem to be nearing its conclusion. It is an inquiry which may well be followed by a trial which in turn will surely take another year or two, if not longer. The case against my client could very well become the longest proceedings in the history of international criminal law.

The preliminary inquiry

This is a gloomy prospect for all stakeholders and it is mainly due to the position taken by the examining judges during the preliminary inquiry²⁰.

Although the Internal Rules did, in principle, provide for this possibility, at the start of the preliminary enquiry the judges disregarded our request to attend the questioning of witnesses. Contrary, for instance, to the standard procedure in The Netherlands, the examining judges in Phnom Penh question witnesses behind closed doors and the defense counsel is not informed of such questioning, let alone given the opportunity to submit questions to the witnesses.

Defense counsel can request the examining judge to conduct an additional inquiry, requests which are similar to our mini-instruction, but defense counsel does not play any role whatsoever in such an additional inquiry, i.e. if the request is at all granted.

In Phnom Penh the preliminary inquiry is secret, as it is for the defense counsel. I only receive bits and pieces of the outcome of the inquiry, and often at a late stage. This forces the defense counsel and by the way also the public prosecutors to remain passive for a long time, if only because at the start of the inquiry the examining judges have forbidden the defense counsel to conduct any form of investigation itself.

Since the Khmer Rouge tribunal cannot deprive the defense counsel of the right to subject a witness for the defense to a cross-examination, the position of the examining judges in Phnom Penh entails that all the witnesses they have questioned in the preliminary inquiry are to be questioned again at the trial, as in the Anglo-Saxon model²¹. Important witnesses will have to appear before a judge twice to tell the same story twice. The case in suit against said Duch

²²The case against Duch shows that the expected length of the trial against Nuon Chea c.s. is also due to the ample opportunity the aggrieved party has, from the Dutch perspective, to speak at the trial, to question witnesses and suspects, to make request, etc.

²³Although the preliminary inquiry is secret, the international examining judge intimated in public that he wants to question several hundreds of witnesses in his inquiry into Nuon Chea.

shows that the Trial Chamber does indeed not intend to deprive the suspect of his right to a cross-examination and will have all key witnesses appear before the court at the trial.

It is quite possible that defense counsel would have decided not to question many of these witnesses at the trial, should it have been given the opportunity to be present when the witnesses were questioned by the examining judge.

The extraordinary nature of the preliminary inquiry, hidden from the defense counsel's view and also virtually beyond its sphere of influence, poses more fundamental questions. Doesn't such a preliminary inquiry conflict with the defense's rights?

I am very apprehensive and must admit that a recent decision by the examining judges hasn't been able to dispel my fears regarding the preliminary inquiry.

This decision concerned the request submitted by another suspect, to conduct an additional inquiry into exculpatory evidence in favor of said suspect. The examining judge denied this request.²² The Khmer Rouge tribunal itself says that its preliminary inquiry is governed by the "principle of sufficiency", a principle unknown in international law and which seems to have been formulated by the examining judges themselves for this purpose. As I understand the decision, the examining judges' duty at the Khmer Rouge is only to investigate whether there is enough evidence to be able to summon a suspect to appear before the Trial Chamber; the examining judges do not consider gathering exculpatory evidence to be within their remit.

The outcome of the preliminary inquiry is the basis for the inquiry conducted by the Trial Chamber at the trial itself, just as in the Dutch legal system. The prospect that a "prejudiced" preliminary inquiry could influence the proceedings at the trial, is unsettling. It seems inevitable that the trial should make a false start.

Independence under pressure

The arduous tug-of-war over the preliminary inquiry in the case against Nuon Chea has, however, been overshadowed by two other problems which could undermine the proceedings of the Khmer Rouge tribunal and its independence. The international community's biggest fear at the time the tribunal was constituted, seems to be coming true.

²⁴ Office of the Co-Investigating Judges, Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, 002/19-09-2007-ECCC-OCIJ, D164/2, 19 June 2009. This ruling, contrary to most of the decisions taken by the examining judge, is public and has been posted on the tribunal's official website.

The first problem threatening the tribunal is the issue concerning the cases the international public prosecutor wishes to start against new suspects. The Cambodian prosecutor is a staunch opponent of this idea.

The fact that the Cambodian public prosecutor is resisting the expansion of the number of suspects, will come as no surprise. In the negotiations it became clear that the Cambodian government wanted to limit, as much as possible²³, the number of prosecutions before the tribunal, particularly since the current leaders in Cambodia, the triumvirate mentioned earlier, all have a past in the Khmer Rouge. All three of them held important positions in the so called Eastern Zone in the period which is relevant to the tribunal's jurisdiction, in 1977 and 1978. In the Eastern Zone, the local officers are said to have committed serious violations of the laws of war. The triumvirate's hands are therefore said to be drenched in blood which is why they themselves fear prosecution by the Khmer Rouge tribunal²⁴.

The international public prosecutor has decided to take little heed of the Cambodian sensitivities and has submitted the dispute to the Pre-Trial Chamber. It is the first official dispute between the national and international pillar of the tribunal. The Pre-Trial Chamber will have to take a decision, as the aforementioned "mechanism" prescribes.

As in so many procedures at the Khmer Rouge tribunal, the procedure concerning the dispute is largely hidden from public view. It is however clear that the Pre-Trial Chamber keeps postponing a decision in this dispute. On the face of it, it seems the Pre-Trial Chamber cannot agree on its own agenda, allowing the Cambodian judges to achieve the deadlock some of us had feared. As long as the Pre-Trial Chamber fails to pronounce itself on the dispute, the international public prosecutor cannot file new charges²⁵.

The remarkable thing is that the Cambodian government is openly getting involved in the dispute. The government has conjured up arguments against the extension of the number of suspects, which arguments have been obediently repeated by the Cambodian public prosecutor, hence confirming the general impression that the latter is not independent either.²⁶

²⁵ See above: Steve Heder, *Politics, Diplomacy, and Accountability in Cambodia: Severely Limiting Personal Jurisdiction in Prosecution of Perpetrators of Crimes Against Humanity*, in: *Historical Justice in International Perspective: How Societies are Trying to Right the Wrongs of the Past*, 2008, ('Heder').

²⁶ Chea Sim, as a party secretary in the Eastern Zone, is said to have been responsible for executing thousands of people. Heng Samrin was the head of a division of the Khmer Rouge army, whose troops are said to have killed large numbers of civilians in the war against Vietnam. See Heder above, pp. 192-194.

²⁷ Rule 71 (3).

²⁸ Article 6 (3) Agreement stipulates that the public prosecutor at the tribunal must act independently and may not receive instructions from any authority or government.

Corruption

The second problem undermining the tribunal's independence is corruption. It has now become common knowledge that Cambodians who work for the tribunal, are to pay or were to pay for the honor of being appointed.

Each month, Cambodian employees of the tribunal are expected to put money in an envelope, a fixed percentage of their salary, and to hand over the envelope to the person who has been appointed especially to collect the bribes²⁷. The Cambodian judges haven't seemed to shy away from this corruption regime; they have allegedly been forced to hand over money, in exchange for being appointed to the tribunal²⁸.

The United Nations has commissioned an investigation into corruption at the tribunal²⁹ and although this is a confidential study, its main conclusions seem to be out in the open. The investigation appears to confirm the stories the media have been picking up on for a while now.

In a meeting with German members of parliament, the most senior international 'officer' at the tribunal, Knut Rosandhaug, happened to mention that the Cambodian head of the tribunal's administration, the most important non-legal position, has had to leave the tribunal after the United Nations' investigators found that he played a key part in the corruption scandal³⁰.

Despite everything, the United Nations refuses to make the report on corruption at the tribunal available to the defense counsel. The Cambodian government is also refusing to cooperate in disclosing the results.

As a consequence, in January 2009 I decided to report this to the public prosecutor of the Phnom Penh court. Corruption or bribery constitutes an offence, also in Cambodia, although I have been told that it was the first time in the country's contemporary history that it was reported to the competent authorities. The public prosecutor binned my report within a month of reporting to the authorities, the main argument being that we hadn't managed to 'prove' that there was corruption at the tribunal.³¹

²⁹ See: Dan Rivers, CNN, Cambodian war crimes court in corruption probe, 1 April 2009; The Economist, The Khmers Rouges and justice: The court on trial, 4 April 2009, p. 31; Joel Brinkley, Foreign Affairs, Cambodia's Curse: Struggling to Shed the Khmer Rouge's Legacy, 16 April 2009, pp. 112-118.

³⁰ Cat Barton, The Wall Street Journal, Disorder in the Court, 1 April 2009.

³¹ This investigation was conducted by the Office of Internal Oversight Services ('OIOS'), see: Douglas Gillison, The Cambodia Daily, 5 August 2008, UN 'Reviews' Claims of Graft: ECCC Official.

³² Bundestag Delegation, [Draft] Report on the trip to Cambodia and Indonesia by a delegation of the Committee for Human Rights and Humanitarian Aid, 25 October-3 November 2008, <http://www.bundestag.de/ausschuesse/a17/reisen/ASEAN2008.pdf>.

³³ Cambodia Daily, Phnom Penh Court Halts ECCC Investigation, 7-8 February 2009, pp. 1 en 11; Giorgia Wilkins, The Phnom Penh Post, Defence lawyers condemn halt of KR tribunal probe, 9 February 2009.

The suspicion is that the tribunal's staff still has to hand over money. In any case, the accusations published in the media alone are enough to undermine faith in the tribunal. These accusations pose a threat to the tribunal's independence and hence to the suspects' chances of having a fair trial³².

Employees of the tribunal who have paid off third parties in order to be appointed and who in fact hand in part of their salary every month, can hardly be considered to be sufficiently independent. Staff members who hand in money are vulnerable and are open to unacceptable influencing by superiors. Corruption is not only a way to acquire an unlawful income, but especially to exercise power over those individuals who are being corrupted by the phenomenon.

The defense has expressed its concerns on several occasions in the course of the preliminary inquiry against Nuon Chea. National and international organizations share these concerns and have called upon the responsible individuals to put a stop to corruption.³³

A couple of months ago, following all the accusations, the United Nations decided to cease payments to the Cambodian branch of the tribunal, especially since the government refuses to take the accusations seriously and to take action. This attempt on the part of the United Nations to force the Cambodians to do something about corruption at the tribunal, was thwarted by Japan and Australia, which countries helped the Cambodians out with substantial last minute donations³⁴.

My attempts to interest the tribunal in corruption have failed abysmally. The examining judges have denied our request to investigate the accusations, arguing that they didn't have the jurisdiction. Although several international judges and also the international public prosecutor have expressed concerns about corruption in public, the concerns of these international legal professionals have not prompted specific steps. The appeal we filed against the aforementioned decision of the examining judges has been pending before the Pre-Trial Chamber for months now; once again the suspicion is that the Cambodian judges are frustrating the judicial process.

In exchange for all our efforts, particularly my report to the public prosecutor at the Phnom Penh court, the Cambodian judges at the tribunal issued a press release, threatening to take

³⁴ See also: Amnesty International, Cambodia: After 30 years Khmer Rouge crimes at trial, ASA 23/003/2009, p. 3.

³⁵ See: Open Society Justice Initiative, Press Release, Corruption Allegations at Khmer Rouge Court Must Be Investigated Thoroughly, 14 February 2007; Documentation Centre of Cambodia, The Cambodia Daily, Provisos to US Directly Funding KR Tribunal, 1 February 2008; Human Rights Watch, Cambodia Daily, ECCC Needs Reforms First, Money Next, 16 June 2008; Europe and Commission, Cambodia Daily, EC, UN Want Inquiry if KRT Allegations Surface, 1 August 2008 en The Phnom Penh Post, EC review raises KRT graft, 4 March 2009; John Hall, Far Eastern Economic Review, Judging the Khmer Rouge Tribunal, 2 March 2009.

³⁶ Chun Sakada, VOA Khmer, Calls mount for release of tribunal funding, 21 April 2009.

legal steps against Victor Koppe and myself. Although the judges didn't specify which steps they were envisaging, it was clear to all that they intended to file a complaint against us, following a good Cambodian tradition, for libel or defamation.

This press release did not only lead to indignation among lawyers at the tribunal; the Special Rapporteur for the United Nations on the independence of judges and lawyers, also formally expressed his concern about the actions of the Cambodian judges³⁵.

Our efforts to address corruption at the tribunal have had little effect. Even though the media in Cambodia and other countries have paid quite a lot of attention to the issue, it seems that the responsible staff at the United Nations, the Cambodian government and also the tribunal prefer to draw a veil over the whole issue. None of these people seem to be losing any sleep over the fact that continued corruption could undermine the tribunal's independence and hence also the defense's rights.

Final reflections

I am pessimistic regarding the tribunals' prospects, that much will be clear. The Cambodian political system has a corrupting effect on the tribunal. The hybrid nature of the tribunal is such that it is very difficult for the tribunal to avoid the country's ways, despite the presence of international legal professionals. Although the main suspects have yet to stand trial, it seems fair to say that the Cambodian government does not intend to release its traditional grip on the judicial process.

So far the international judges have avoided a public confrontation with the Cambodian judges. The question is how long the international community will want to turn a blind eye to all the tribunal's problems, only a few of which I have been able to address in this article. The tribunal's international judges are in fact considered to be stewards of the law, of the international principles of law that are not yet embedded in Cambodia's legal culture. It is the international judges who especially, if not exclusively, bear the burden of a fair trial.

The agreement the United Nations has entered into with Cambodia in order to constitute the tribunal, provides for the possibility of dissolution, the so called 'opt out clause', a provision the United Nations can invoke should the Cambodian government fail to comply with the Agreement³⁶. I don't think it would hurt to remove the dust from this clause in the agreement and to rather emphatically remind Cambodia of the fact that this clause does indeed exist.

³⁷ United Nations Special Rapporteur on the independence of judges and lawyers, press release, Cambodia: UN Expert concerned at restrictions on freedom of lawyers to represent their clients, 1 July 2009.

³⁸ Agreement, Article 28.