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Transitional Justice Challenges Facing Lawyers in Cambodia

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TRANSITIONAL JUSTICE CHALLENGES FACING LAWYERS IN CAMBODIA

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Preface

This report was commissioned as part of the *Lawyers, Conflict & Transition* project – a three-year initiative funded by the Economic & Social Research Council.

The wider project explores the role of lawyers during conflicts, dictatorships and political transitions. Despite the centrality of the rule of law to the contemporary theory and practice of transitional justice, there is little emphasis in the relevant literature on the role of lawyers outside the courts – or indeed as ‘real people’ at work in the system.

Drawing on six key case studies (Cambodia, Chile, Israel, Palestine, Tunisia and South Africa) we set out to establish a comparative and thematic framework for lawyering at historic stages in conflicted and transitional societies. Taking a holistic approach to the role and function of law and lawyers, the project is intended as a bridgehead between transitional justice and the sociology of the legal professions.

Project staff members are based at the School of Law, Queen’s University Belfast, and the Transitional Justice Institute, Ulster University.

This project has at its core a ‘real-world’ dimension and seeks to make a difference both to theory and practice. In addition to academic outputs, we were determined to produce a body of work that will assist the societies we have researched. We were also conscious from the outset that academic fieldworkers are sometimes guilty of ‘parachuting in’ and then moving on, with little demonstrable benefit for participants. As part of our ethics policy we thus developed this series of practice-orientated reports, specifically tailored for each jurisdiction under scrutiny, as well as briefing papers for international audiences.

The individuals interviewed for the wider project (more than 120) were each invited to suggest research topics and themes that are of direct relevance to them and the organisations and networks with whom they work. The core team sifted and analysed these suggestions and commissioned two key reports per jurisdiction. In some instances the work was completed in-house; in other cases we drew on the resources and talents of our international consultants.

The reports are designed to be of immediate value to practitioners and as such we have sought to avoid complex academic terminology and language. We have made the texts available in English and relevant local languages.

The anticipated readership mirrors the diverse range of interviewees with whom we engaged:

- National and international legal professionals (including cause / struggle lawyers and state lawyers)
- Scholars interested in the role of lawyers as political and social actors (with a particular focus on transitional justice)
- Government officials
- International policymakers
- Civil society activists
- Journalists and other commentators

The entire series will be made available on our website (www.lawyersconflictandtransition.org) and will be circulated via our various networks and twitter account (@lawyers_TJ).

We hope that you will enjoy reading this report and encourage you to disseminate it amongst your networks.

For further information about the wider project please feel free to contact us at:

www.lawyersconflictandtransition.org/contact



Kieran McEvoy PhD
Director, *Lawyers, Conflict and Transition* Project

June 2015

Acknowledgements & Disclaimer

This report was prepared by Alex Batesmith, in association with the *Lawyers, Conflict and Transition* project. Alex is a Manchester-based barrister and mediator with twenty years' practical legal experience in national and international human rights, humanitarian and criminal law, transitional justice, conflict resolution and rule of law issues. He spent five years as an international prosecutor for the United Nations in Kosovo and Cambodia and was employed as the Cambodian consultant for the *Lawyers, Conflict & Transition* project.

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Executive Summary

Transitional justice refers to the process by which a society attempts to deal with mass human rights abuses, typically an event or series of events, and to make the transition not simply from the cessation of abuses but towards stability, tolerance and fairness.

In Cambodia, transitional justice is complicated by the fact that, although the Khmer Rouge atrocities of 1975-1979 have long since finished, the authorities are continuing to commit and/or condone serious ongoing human rights violations. Land grabbing, human trafficking, sexual violence and exploitation, discrimination against minorities, impunity for violence against human rights defenders, corruption in the justice system and other public institutions, and restrictions on freedom of expression and assembly have made the job of lawyers working in Cambodia even more difficult.

The object of this paper is to highlight some of the principal constraints and opportunities for lawyers in Cambodia as they go about their daily work, both inside and outside the courtroom, caused by both twin transitional justice themes of the Khmer Rouge legacy and the longstanding and continuing challenges to democracy.

Part I will examine three transitional justice challenges following the Khmer Rouge regime: the lasting impact of trauma on the victims and the problem of witness support and protection; the limited capacity-building effect of the Extraordinary Chambers in the Courts of Cambodia (the ECCC); and managing expectations of justice.

More than thirty-five years have passed since the Khmer Rouge were driven from power on 7 January 1979, only three people have been tried before the ECCC. At the time of writing the ECCC had completed only two trials since it began work in 2006, one trial to final judgment against a single accused (Kaing Guek Eav), and one further trial to first instance judgment against two separate accused (Nuon Chea and Khieu Samphan). A third trial is also underway (as of January 2015) in which Nuon Chea and Khieu Samphan will face allegations including – for the first time – genocide.

As an effective transitional justice mechanism, the ECCC has faced widespread criticisms: there have been complaints about the cost, the slow pace and the scope of the process and the limited capacity building impact upon the domestic justice system. There have also been concerns regarding protection and support of witnesses. The problems facing the ECCC and the transitional justice challenges that still persist following the Khmer Rouge regime do little to enhance the public's already low opinion of the justice system. Lawyers working in the ordinary Cambodian courts have a difficult job to convince the sceptics, but opportunities remain to advance people's understanding of the ECCC trial process (including its limitations) as well as to explain and illustrate the importance of international fair trial principles in the domestic sphere.

Part II of this paper will examine five challenges of lawyering in a limited democracy, many of which overlap, and the constraints and/or opportunities they create for lawyers today. Specifically, we will examine the persistent weak rule of law across the country; the lack of independence of the Cambodian Bar Association; intimidation of lawyers; restricted access to justice; and land grabbing. Individually, any one of these issues would present a significant

challenge to lawyers. Taken together, they present tremendous difficulties to legal professionals attempting to run their practice in a fair, robust and ethical fashion.

One commentator wrote in 1993 that rebuilding the Cambodian legal system in the aftermath of the Democratic Kampuchea regime would 'require a major governmental effort in the realms of legislation and administration of justice.'¹ Cambodia needed a massive injection of human and financial resources, and a total redefinition of values in political ideology and legal culture. More than twenty years on from these comments, despite improvements in the country's economy and infrastructure, the poorest people in Cambodia continue to experience serious ongoing human rights violations with little or no prospect of redress.

Even before the violence following the disputed general election results of July 2013, international non-governmental organisations (NGOs) were observing that the human rights situation was deteriorating in Cambodia. Although commercial and business development continues for the wealthy and the well connected, the rights of Cambodian workers and other ordinary citizens are being eroded along with the right to protest.

The government appears persistently reluctant to undertake serious measures to bring laws, policies and practices into line with the Constitution and Cambodia's international human rights obligations – particularly when it comes to building independent legal and human rights institutions.

United Nations Special Rapporteur on Cambodia Surya Subedi remarked in his report to UN Human Rights Council in August 2013 that the Cambodian government's tolerance of criticism is decreasing. Professor Subedi also highlighted a disturbing lack of dialogue between the government and opposition parties. As he explained:

Criticism is not a crime but an exercise of freedom of conscience, an act of intelligence. These are inherent attributes of democracy. Their absence is one of the reasons why Cambodia falls short of the full liberal democracy envisaged in the Constitution of the country.²

Others have spoken of a 'sharp moral decline' in society's value system which, coupled with an absence of a culture of obedience to law, 'is affecting the functioning of all state institutions and in particular the institutions of the rule of law.'³ As Part II of the report will examine, lawyers have come under increasing pressure from the government, and the space for disagreement, let alone dissent, is shrinking.

Finally, a postscript to the paper will consider the impact of the recent challenges to government authority from garment workers and opposition political parties, the violent repression of these protests, and the communication submitted to the Prosecutor of the International Criminal Court (ICC) requesting that an investigation be opened against the current Cambodian Government for allegations that the ruling elite were responsible for crimes against humanity

¹ Dolores Donovan, 'Cambodia: Building a Legal System From Scratch' (1993) 27(2) *The International Lawyer* 445, 446.

² Surya Subedi 'Report of the Special Rapporteur on the Situation of Human Rights in Cambodia' (2013), United Nations Human Rights Council, 5 August, UN Doc A/HRC/24/36.

³ Lao Mong Hay 'Institutions for the Rule of Law and Human Rights in Cambodia' (2006) Asian Legal Resource Centre <<http://www.article2.org/mainfile.php/0501/223/>> accessed 13 February 2015.

committed against Cambodian citizens in the course of land grabbing. In particular, the paper will examine whether these events herald a new phase for the current regime, and the implications for lawyers practising within the Cambodian justice system.

I. The Transition from the Khmer Rouge Regime

The immediate human, practical and physical impact of the Khmer Rouge upon the country as a whole is well known. In less than four years, the regime killed an estimated two million out of a population of seven million people,⁴ and destroyed Cambodia's society, economy and religious, cultural and political institutions.⁵ The legal system was systematically dismantled. The regime destroyed all the country's legal structures including the courts, public prosecutors' offices, law offices and all related administration. An entire generation of lawyers, prosecutors, judges and university law professors was wiped out, and any trace of or belief in the rule of law was eradicated.

As far as transitional justice is concerned, the first credible, concerted effort at coming to terms with the past was the foundation of the Documentation Center of Cambodia ('DC-Cam') in 1997. DC-Cam is an independent research institute with the stated focus to 'shed light on the Khmer Rouge era' with the aim of 'helping Cambodians to heal the wounds of the past by documenting, researching and sharing the history of the Khmer Rouge period.'⁶ DC-Cam's work across the country was the first time any systematic efforts had been made to document the atrocities through taking oral testimony and the preservation of evidence.

The Extraordinary Chambers in the Courts of Cambodia (ECCC) has continued the process, but with the narrower mandate of a criminal tribunal – in this case, to prosecute 'the senior leaders and those who were most responsible' for the crimes in Democratic Kampuchea.⁷ Of course, unlike DC-Cam, the ECCC examines the evidence for the express purpose of bringing a case against named individual suspects. The ECCC broadly functions as do all courts: following procedural rules, admitting legal challenges and ultimately recording a final judgment on the particular set of facts that are brought to bear on criminal charges with specific formal definitions against named individuals. However, as a single mechanism to bring justice, closure, satisfaction or even simply clarity to mass human rights violations it has its limitations, as do all courts.

More than a generation after the atrocities, and notwithstanding the work of the ECCC since it began operations in 2006, lawyers in the ordinary Cambodian courts continue to be affected by the transitional justice challenges of the Khmer Rouge regime. We shall discuss the lasting impact of Khmer Rouge-era trauma upon the victims (which is to say the whole of Cambodian society) and the consequences for witness support and protection; the limited capacity-building impact of the ECCC upon domestic justice institutions; and the difficulties in managing the population's expectations of justice.

⁴ Craig Etcheson, *After the Killing Fields: Lessons from the Cambodian Genocide* (Praeger 2005) 117-119.

⁵ Ben Kiernan, *The Pol Pot Regime: Race, Power and Genocide in Cambodia under the Khmer Rouge, 1975-1979* (Yale University Press, 2nd edition 2002).

⁶ DC-Cam public website <http://www.dccam.org/> accessed on 19 December 2014.

⁷ Article 2, Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

Challenge 1: Trauma and the issue of Victim / Witness Support and Protection

The huge, de-humanising scale of crimes committed by the Khmer Rouge, and the disorientating way in which the regime controlled the country, left vast numbers of the population traumatised, both directly and indirectly. During the trials at the ECCC, clinical psychologists and victims themselves gave evidence of the impact of murder, violence, rape, slavery, imprisonment and persecution.⁸ International witness support experts also explained⁹ that the situation was further compounded by the fact that at the time the crimes were committed, all society's usual support mechanisms (family, police, hospitals, courts) did not exist, had been rendered ineffective or had been co-opted by the totalitarian regime. Given such circumstances, victims – arguably the whole of Cambodian society – have had little opportunity to recover from the trauma, and many are still suffering.¹⁰ Even for a country with a modern, fully functioning victim and witness support and protection system, this would be challenging, but in Cambodia's domestic courts, there is neither. Can lawyers working on domestic cases, where witnesses have no support or protection or support, learn from the experiences of the ECCC?

The Khmer Rouge regime is now being taught in Cambodian schools¹¹ and – as a direct result of the work of DC-Cam and the ECCC – is more openly discussed in society. The ECCC in particular as a public facing (and during the trial phase, very public) transitional justice mechanism needs to handle witnesses and victims with extreme care. There are real risks of re-traumatisation, either through the process of giving evidence before the judges, making written statements before investigators or even simply attending the court or hearing about the detail of the cases through the media.

In common with other international criminal tribunals, the ECCC has a dedicated support unit that is professionally run by people with decades of experience in both witness treatment and protection. The tribunal has also developed special procedures to ensure that the court deals sensitively with victims and witnesses, by ordering protective measures to take account of the particular needs of a person appearing before the court.¹² Similarly, ECCC officials have been given training on specific transitional justice issues such as gender sensitivity.¹³

⁸ Dr Chhim Sotheara testified in 2009 during the Duch that 40% of all Cambodians over the age of 18 experienced post-traumatic stress disorder as a direct or indirect consequence of the Khmer Rouge regime: 25 August 2009, trial transcript day 64, pp. 9 and 17 - *The Co-Prosecutors v Kaing Guek Eav alias Duch*, Case File No. 001/18-07-2007.

⁹ Alex Bates 'Transitional Justice in Cambodia: Analytical Report' (2010) The ATLAS Project, Université Paris 1 < http://projetatlas.univ-paris1.fr/IMG/pdf/ATLAS_Cambodia_Report_FINAL_EDITS_Feb2011.pdf > para 55 n 84 accessed 12 February 2015.

¹⁰ Estelle Bockers, Nadine Stimmel, Christine Knaevelsrud 'Reconciliation in Cambodia: Thirty Years After the Terror of the Khmer Rouge Regime' (2011) 21(2) *Torture* 71.

¹¹ Khamboly Dy 'Challenges of Teaching Genocide in Cambodian Schools' *Policy and Practice: Pedagogy about the Holocaust and Genocide Papers* Paper 4 (Clark University, Clark Digital Commons 2013).

¹² Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 8), r.29 and Practice Direction ECCC/03/2007/Rev.1.

¹³ Extraordinary Chambers in the Courts of Cambodia 'Report Training Workshop on Gender Sensitivity and Transitional Justice for ECCC Officials 22 June 2012' (2012)

Reports from surveys show that those victims and witnesses that have appeared before the ECCC are largely positive about their experiences. Most victims who were fortunate enough to participate in the ECCC trials reported that they felt 'mentally stronger' after the process – even though the court had no authority to offer specific financial reparations.¹⁴ For these victim participants, being given the opportunity to tell the world about their injury, loss or trauma was empowering, cathartic and allowed many of them to find closure. Of course, these are but a fraction of the victim population across the country, and as we shall discuss in challenge 3, expectations of justice are difficult to manage.

The majority of criminal trials in Cambodia take place without witnesses giving oral testimony. Not only is this a violation of the right of the accused to be able to challenge the evidence against him, it also deprives the victim of the opportunity to present his or her testimony.

However, although occasional training courses are held and other piecemeal efforts made to discuss these issues within the Cambodian domestic justice system, there is very little by way of practical support for victims of modern-day crime. The lack of capacity to treat victims and witnesses sensitively is a serious and ongoing problem. A commitment from the Cambodian government is urgently required to establish systematic witness support and protection mechanisms, as well as to enact robust laws and procedures to ensure these mechanisms function appropriately. In addition, greater understanding is needed of the impact of trauma upon victims and witnesses, and of how testimony can be both supported by the prosecution and challenged by the defence within a functioning court process. All actors within the justice system will require training on issues of witness protection and support. Judges, prosecutors and lawyers need to be better informed about victims' rights and the impact of trauma. Civil society too will need to become more coordinated in this field.

Defence lawyers working within the Cambodian criminal justice system could use ECCC jurisprudence as a basis for developing submissions to a domestic court on the right to a fair trial. Victims' lawyers might argue their client's right to truth and to be given the opportunity to share their experiences.

Cambodian lawyers pressing for reform should take encouragement from initiatives in other countries dealing with the aftermath of mass human rights violations. For example, in the Balkans peer-to-peer seminars to facilitate discussions between UN judges, lawyers and prosecutors and their domestic counterparts have resulted in real progress and a transfer of knowledge from the

<http://gbvkr.org/wp-content/uploads/2013/01/Report-on-the-ECCC-Gender-Sensitivity-Training-Workshop-22_June_-2012.pdf> accessed on 19 December 2014.

¹⁴ Nadine Kirchenbauer and others 'Victims Participation before the Extraordinary Chambers in the Courts of Cambodia' (2013) Cambodian Human Rights and Development Association and Harvard Humanitarian Institute, Harvard University; Stammel and others 'The Survivors' Voices: Attitudes on the ECCC, the Former Khmer Rouge and Experiences with Civil Party Participation' (2010) Berlin Centre for the Treatment of Torture Victims <http://psychologybeyondborders.org/wp-content/uploads/2013/08/bzfo_cambodia_report_20101.pdf> accessed 12 February 2015; Eric Stover, Mychelle Balthazard, & Alexa Koenig 'Confronting Duch: civil party participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia' (2011) 93(882) International Review of the Red Cross, 503.

International Criminal Tribunal for the Former Yugoslavia to the domestic courts in the region.¹⁵

The Office of the UN High Commissioner for Human Rights in Cambodia has been organising a series of Legacy meetings where Cambodian and international justice professionals discuss what the domestic courts can learn from the experiences of the ECCC: lawyers should take the opportunity in these and similar meetings to seek reform on issues of witness support and protection.

Challenge 2: The Limited Capacity-Building Effect of the ECCC

One of the main arguments for establishing the ECCC in Cambodia with international assistance was that the tribunal would have a capacity building effect on the domestic justice system and personnel. In particular, the hope was that working with United Nations counterpart lawyers, prosecutors and judges would have a significant educative and value-shifting impact upon Cambodian legal professionals. In other words, that it would demonstrate to the Cambodian population how the rights of due process operate to produce a fair trial, which in turn would be a catalyst for the government to implement much-needed legal and judicial reform.

Despite support for the proposition that the ECCC was to be a 'model' for Cambodia's domestic courts,¹⁶ the required major changes in legal culture and practice have not materialised.

Cambodian lawyers have undoubtedly played a major role in the work of the ECCC to date, representing accused and victims alongside their international colleagues. There is anecdotal evidence that the lawyers and other colleagues who had not worked at the ECCC are making fair trial arguments before local Cambodian courts based on international human rights law,¹⁷ although it is unclear the extent to which this is as a result of observing the practice of defence counsel before the ECCC.

In general, however, there is little sign that judges are conducting trials any more fairly, as recent reports of the International Commission of Jurists have shown.¹⁸ Despite Cambodian judges and prosecutors participating in ECCC Legacy meetings with their UN counterparts, no real progress has been made by the Cambodian government in enhancing the independence and impartiality of judges and improving the quality of justice dispensed in the country's courts.

It may be impossible for individual lawyers to have any influence over the way in which laws are made in Cambodia, nor to immediately transform the persistent culture of corruption and partiality. Nevertheless, the very public nature of the

¹⁵ See for example *The War Crimes Justice Project* at the International Criminal Tribunal for the Former Yugoslavia (ICTY), designed to transfer expertise to the local judiciaries: ICTY, 'Capacity Building' <<http://www.icty.org/sections/Outreach/CapacityBuilding>> accessed 12 February 2015

¹⁶ Michael Karnavas 'Bringing Domestic Cambodian Cases into Compliance with International Standards' (2014) 1 *The Cambodia Law and Policy Review* 44, 61-62.

¹⁷ 'Off the record' conversations in Phnom Penh, March 2014, with Cambodian lawyers working in the domestic courts, notes on file with the author.

¹⁸ Kinglsey Abbott 'Scenes from a Kangaroo Court' *The Phnom Penh Post*, 11 September 2014.

ECCC trials, and the fact that most judgments, orders, transcripts and videos of court proceedings are available in Khmer, create opportunities for private lawyers working in the domestic courts.

Whilst the setting and the procedure are considerably different from the ECCC, lawyers can still argue certain fundamental principles in domestic courts. Both the Cambodian Constitution and the Law on the Establishment of the ECCC incorporate the International Covenant on Civil and Political Rights (ICCPR). ECCC judgments discussing specific provisions of the ICCPR can and should be used by Cambodian lawyers in defence of their clients' constitutionally protected rights.¹⁹ If the former leaders of the Khmer Rouge are entitled to a fair hearing and all that this entails (equality of arms, presumption of innocence, adequate time and facilities to prepare a defence, examining witnesses, provision of legal representation), lawyers should appeal to judges to apply the same standards of justice for ordinary Cambodian citizens, as is guaranteed under the Constitution.

Another beneficial aspect for Cambodian lawyers in holding the Khmer Rouge trials in Cambodia is that it has stimulated a discussion on the rights of the accused. Lawyers have a real opportunity to promote the rule of law by explaining the value of fairness and equal treatment in the justice system. In so doing, lawyers can help to gradually challenge public understanding of justice as a perpetuation of impunity for the wealthy.

Challenge 3: Managing Expectations of Justice

One of the biggest challenges facing international tribunals is how they can manage the expectations of a population keen to see successful and wide-ranging prosecutions and punishment for the guilty. However, international criminal courts are not established to prosecute thousands of foot soldiers but rather a small number of high-ranking alleged perpetrators. Trials are usually lengthy and complex, the result of difficult procedural, logistical and translation issues, and the need to demonstrate due process to an international audience. In comparison, as far as domestic courts handling day-to-day crimes are concerned, expectations of justice may differ from country to country depending on the prevailing view of the particular criminal justice system in question. Whether at the international or the domestic level, there may be a gap between the justice that the population expects, and the justice that in fact can (or will) be delivered. This section will examine how the expectations of justice at the ECCC were managed, how this might affect the Cambodian population's view of justice as a whole, and what is the ongoing impact on lawyers practising before the domestic courts.

No transitional justice mechanism on its own is ever likely to bring full satisfaction to a country scarred by mass human rights violations. However, as well as bringing retributive justice for the victims, there were a disparate and ambitious set of goals for the ECCC that it would (variously) find the truth of what happened in the Khmer Rouge era, that it would lead to national reconciliation, that it would set an example to the domestic courts for how to run fair trials and that it would challenge the culture of impunity.²⁰ Such expectations were almost inevitably impossible to fulfil.

¹⁹ Karnavas (n 16) 73-74.

²⁰ Duncan McCargo 'Politics by Other Means? The Virtual Trials of the Khmer Rouge Tribunal' (2011) 87(3) *International Affairs* 613.

Already overburdened by re-igniting expectation after a generation of silence, the ECCC has arguably faced more problems than any comparable international criminal tribunal attempting to deliver justice for the victims. Problems particular to the ECCC include the dual UN / Cambodian government administrative structure, the majority of Cambodian government-controlled judicial personnel and allegations of corruption and political interference, a sometimes confusing mixture of civil law and common law procedure, the translation burden caused by three official court languages, and an uncertain funding mechanism.

During the negotiations over the establishing of the tribunal, no figure for the number of target suspects to be prosecuted was ever specified, although once the work of the court began Hun Sen and his government repeatedly said that there should be no more than five.²¹ As it has turned out, the ECCC is likely to prosecute the smallest number of accused of any international criminal tribunal in history.

The ECCC has attempted to manage the expectations of the population through an ongoing series of public forums and outreach workshops, in which staff members of each of the principal judicial offices would explain the scope of the trials and the process itself. The ECCC's outreach department, DC-Cam and many other national and international NGOs have attempted to promote better understanding of the work of the court through numerous other outreach activities, including community workshops, publications, radio and television programmes.²²

Many tens of thousands of Cambodians have attended the ECCC's trial hearings. They have listened to the witnesses and to the accused, and to the questions of and responses to the lawyers, prosecutors and judges. Both DC-Cam and the ECCC Public Affairs office organised 'orientation' materials for those who attended the trials, to enrich their understanding of the process and to help them explain the tribunal to their communities.²³

Additionally, victims have been entitled to participate as 'civil parties' in the ECCC's court proceedings. Groups of victims have been assisted throughout the process by individual Civil Party lawyers (assigned by the court as advocates for groups of victims), that in turn have been represented in the trials by Civil Party Lead Co-Lawyers.²⁴ Such measures have ensured that victims have played a far more prominent role at the ECCC than they have at most other international tribunals.

²¹ Overseas Justice Initiative 2010, 16-17 and 20.

²² Christoph Sperfeldt, 'Broadcasting Justice: Media Outreach at the Khmer Rouge Trials' (2014) 115 Asia Pacific Issues 1; DC-Cam 'Tribunal Response Team: A Response Team for the Khmer Rouge Tribunal' DC-Cam, Phnom Penh <http://www.d.dccam.org/Projects/Tribunal_Response_Team/Tribunal_response.htm> accessed on 12 February 2015; East-West Center 'Khmer Rouge Tribunal Monitoring and Community Outreach in Cambodia' East-West Center, Honolulu <<http://linux.corporatezen.com:50023/research/asian-international-justice-initiative/current-projects/cambodia>> accessed on 12 February 2015.

²³ Extraordinary Chambers in the Courts of Cambodia 'Outreach' (n d) <<http://www.eccc.gov.kh/en/tags/topic/70>> accessed on 14 February 2015.

²⁴ Rules 12, 12*bis* and 12*ter*, Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 8) 3 August 2011.

The ECCC has its supporters and its detractors. There are those who say that the very fact the tribunal exists is a symbolic victory for justice;²⁵ that as a result of the trials, for the first time in a generation people now have the space to talk about the Khmer Rouge regime;²⁶ that the convictions of once-powerful men demonstrates an alternative model to the prevailing culture of impunity.²⁷ Nevertheless, many feel that the ECCC has failed them. Some victims have even disengaged from the process.²⁸ Criticisms have tended to focus on four main issues (discussed at some length by others elsewhere): the limited number of suspects tried by the court;²⁹ the limited number of victims that are able to give live testimony before the court;³⁰ the court's limited powers to deliver reparations;³¹ and the frustrations with the delays.³²

Society's confidence in the justice system is essential: if promises are broken or reasonable expectations unmet, lawyers will find it more difficult to do their job. Cambodia's domestic courts continue to have a very poor reputation amongst the population. Most people believe, and as we shall discuss in the second section of this paper, that the 'justice' dispensed domestically will be tainted by bribery and corruption. There is a real danger that the criticisms of the ECCC for failing to meet expectations of justice may do serious damage to public trust not only in the tribunal itself but also in the capacity of internationally conceived 'justice' as a whole to provide satisfaction to a population. This is of particular concern when the rule of law is as much under threat as it is in Cambodia, as we shall examine in the second section of this paper.

The great challenge for Cambodian lawyers – whether they are representing the victims of the Khmer Rouge before the ECCC or ordinary Cambodians before the

²⁵ Kheang Un and Judy Ledgerwood 'Is the Trial of Duch a Catalyst for Change in Cambodia's Courts?' (2010) 95 Asia Pacific Issues 1, East-West Center.

²⁶ Thierry Cruvellier 'Cambodia: Reflections on the Duch Trial' (*Crimes of War* 2011) <<http://www.crimesofwar.org/commentary/regions/cambodia-reflections-on-the-duch-trial/>> accessed 14 February 2015.

²⁷ Denis Schrey and Simon M. Meisenberg 'The Contribution of the Khmer Rouge Tribunal to Reconciliation, Remembrance and Memorialisation in Cambodia' (2013) 4 Konrad Adenauer Stiftung Reports 75.

²⁸ Bridget Di Certo 'KR Victims Face Rocky Road to Reparations' (2011) The Center For Justice And Accountability <<http://www.cja.org/downloads/kr-victims-face-rocky-road-to-reparations.pdf>> accessed 13 February 2015.

²⁹ Charlie Campbell 'Cambodia's Khmer Rouge Trials are a Shocking Failure' Time 13 February 2014.

³⁰ Phuong N. Pham and others 'Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia' (2011) 3(3) Journal of Human Rights Practice 264.

³¹ Cambodian Human Rights Action Committee and REDRESS 'Considering Reparations for Victims of the Khmer Rouge Regime: A Discussion Paper' (REDRESS, November 2009) <<http://www.redress.org/downloads/publications/CHRAC%20REDRESS%20Cambodia%20Reparations%20final%2018%20Nov%2009.pdf>> accessed 14 February 2015.

³² Ilario Bottigliero 'International Criminal Adjudication Bodies : to what Extent can they promote Human Rights effectively in Post-conflict Situations?' in Gudmundur Alfredsson and others, *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moller* 263 (Martinus Nijhoff Publishers / Brill Academic; 2nd Revised edition 31 August 2009); Human Rights Watch 'Cambodia: Khmer Rouge Trial is Justice Delayed' 24 June 2011; Human Rights Watch 'Cambodia: Khmer Rouge Convictions "Too Little, Too Late"' 8 August 2014.

domestic courts – is to explain the functioning of the justice system (including its limitations) to a sceptical public, and to convince them that it is still both possible and necessary to retain faith in the process. Additionally, if lawyers can explain how they engage with and be engaged by victims, and how they give them a voice in the courtroom through the civil party system at the ECCC, this can be a basis for starting a discussion about establishing a similar, more inclusive process in the domestic courts.³³

Given the lack of confidence in the official Bar Association of the Kingdom of Cambodia (BAKC) and threatened restrictions on talking to the media, as we shall discuss in section two of this paper, there may be limited opportunities for Cambodian lawyers to help educate the public about the justice system through official channels. However, lawyers should take encouragement from the efforts of certain legal NGOs, and by DC-Cam, to publish opinion papers, hold seminars and public discussion forums on the aims of justice, on fair trial rights and on sentencing practice and theory.

DC-Cam is itself in the process of transforming itself into 'the premier Asian centre for conflict and human rights studies' and will house a museum, research centre and a graduate studies programme.³⁴ There will undoubtedly be continuing opportunities for lawyers to participate in DC-Cam, to share their experiences and increase understanding of the ECCC trial process. It is through such outreach and education programmes that the expectations of victims and wider Cambodian society can be acknowledged and further discussed, not just in relation to the process of justice for Khmer Rouge era crimes but also to the everyday Cambodian justice system.

³³ Although the Cambodian Code of Criminal Procedure includes provisions for victims to testify, to file a complaint, to bring a civil action, and to seek reparation for their injuries (Bunleng Cheung and Jürgen Assmann *Code of Criminal Procedure of the Kingdom of Cambodia* (Khmer-English Translation. 1st edn. 2008 Cambodia: Editions Angkor), in practice this does not happen.

³⁴ Documentation Center of Cambodia, public website <<http://www.dccam.org/>> accessed 19 December 2014.

II. Lawyering in a Limited Democracy

Today, lawyers in Cambodia not only have to struggle with the legacy of the Khmer Rouge, they also have to work within a legal and political system that international human rights organisations continue to recognise as being unfair, corrupt and overly controlled by the Executive. Cambodia ranked 156th out of 177 countries on the Transparency International Corruptions Perceptions Index 2014.³⁵ Out of 99 countries surveyed in the World Justice Project's Rule of Law Index for 2014, Cambodia placed 91st.³⁶

Prime Minister Hun Sen has been in power continuously since 1985. Together with his Cambodian People's Party ('CPP'), he continues to come under strong criticism from the United Nations and international NGOs for the state of human rights in the country. In a 2013 report to the Human Rights Council, UN Special Rapporteur Surya Subedi identified continuing impunity, poor respect for freedom of expression and weak judicial independence.³⁷ This section will discuss some of the major challenges for lawyers working within a limited democracy and the opportunities that may arise, if any, in particular: the weakness of the rule of law; the lack of independence of the Bar Association of the Kingdom of Cambodia; the intimidation of lawyers; restrictions on access to justice and lack of legal aid; and the problem of land grabbing including threats to land rights activists.

Challenge 4: Weak Rule of Law

Cambodian lawyers will know from their daily practice that the judiciary and the legal system remain closely controlled by the executive. It is widely known, though not officially acknowledged, that court officials must be bribed before a party can lodge a case. Corruption is endemic in the courts, a product not simply of the low wages for everyone from police officers and court clerks to prosecutors and judges, but an entrenched part of public life in Cambodia for decades.³⁸

Although Cambodia has recently revised its Code of Criminal Procedure, there are still serious problems in applying due process rights consistent with the new code and with international fair trial standards. Failure to respect the specific fair trial rights of accused persons and victims is a denial of the effective right to access to justice in general. Data from a trial monitoring project run by the Cambodian Center for Human Rights reveals how poorly fair trial rights are being observed in

³⁵ Transparency International 'Corruptions Perceptions Index 2014: Results' (Transparency International 2014) <<http://www.transparency.org/cpi2014/results>> accessed 19 December 2014.

³⁶ World Justice Project 'Rule of Law Index 2014' (World Justice Project 2014) <<http://data.worldjusticeproject.org/#/index/KHM>> accessed 19 December 2014.

³⁷ Subedi (n 2).

³⁸ Surya Subedi 'Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 16 September 2010' United Nations Human Rights Council, UN Doc A/HRC/15/46, paragraph 52; Yash Ghai 'Access to land and justice: Anatomy of a State Without the Rule of Law' in Yash Ghai and Jill Cottrell, eds, *Marginalized Communities and Access To Justice* 20 (New York: Routledge 2010).

the courts: consistent breaches of the right to defence counsel, the right to have witnesses examined and even the right to be present at the hearing.³⁹

In July 2014, Cambodia passed three long-awaited fundamental laws on the judiciary. Rather than bolster the independence of judges or improve the weak state of the rule of law in the country, in the words of Professor Subedi the legislation enables the Ministry of Justice to exert 'undue influence' over the court system and the judiciary.⁴⁰

It is undoubtedly difficult and frustrating working as a lawyer where there is little confidence in the independence of the judge or in the fairness of the proceedings. However, lawyers continue to show great courage in defending their clients regardless of the problems. Notwithstanding the Cambodian government's continuing failure to reform the legal system and the corrupt culture of patronage, and despite the recent further crackdowns following opposition demonstrations, defence lawyers can play an important collective role in the way they conduct their cases.

As an international lawyer explains,

By fearlessly and zealously advocating for domestic courts to conduct trials in accordance with Constitutionally enshrined fair trial principles as applied and interpreted by the ECCC in selected jurisprudence and procedural practices, defense lawyers can play a leading role in 'internationalising' domestic cases throughout the courts of Cambodia...⁴¹

Lawyers consistently referring to universally applicable fair trial principles as discussed in relevant ECCC jurisprudence will make it more difficult for domestic prosecutors and judges to continue ignoring the rights of due process.

With the increased national and international media scrutiny of the Cambodian government's response to opposition demonstrations, there are fresh opportunities for lawyers to develop public understanding of the rule of law. Whilst there may be understandable reluctance for some Cambodian lawyers to discuss their cases outside the court in the light of recent Bar Association threats (discussed below), well-trained court reporters and trial monitors could ensure accurate reporting of the constitutionally-guaranteed fair trial arguments used by lawyers in the courtrooms.

Challenge 5: Government Controls over the Bar Association

There has and continues to be strong criticism of the Bar Association of the Kingdom of Cambodia (BAKC) for perceived lack of independence and for its close

³⁹ Cambodian Center for Human Rights *Trial Monitoring Database* <http://tmp.sithi.org/data/advanced_search/search.php?l=en#go> accessed 19 December 2014.

⁴⁰ Surya Subedi 'Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, United Nations Human Rights Council' 15 August 2014 UN Doc A/HRC/27/70, paragraph 37.

⁴¹ Karnavas (n 16), 74.

ties to the ruling CPP in particular.⁴² The number of complaints made by the BAKC against independent lawyers is rising, as are instances of threats or actual prosecution of lawyers representing land rights activists and other opponents of the government.⁴³

A series of events over the last ten years have demonstrated the dysfunctional state of the BAKC: from the admission without qualifications of the Prime Minister and other high CPP officials to the Bar;⁴⁴ the protracted saga of the disputed BAKC elections between 2004 and 2005⁴⁵ in which the non-CPP candidate stated he 'would not find justice in the courts';⁴⁶ the allegations of corruption and undue influence made by an international NGO against a BAKC President;⁴⁷ and investigations over the years that the BAKC were threatening lawyers⁴⁸ and attempting to restrict lawyers from speaking to the media during the year of a general election.⁴⁹

A Bar Association should be nonpartisan, impartial and should strive to promote and protect the independence of lawyers from outside interference, especially government interference. However, as one legal human rights NGO has expressed it, 'in the context of Cambodia's feeble and dysfunctional justice system, the Bar has shown itself to be part of the problem, not the solution.'⁵⁰

Whilst such conditions persist, independent Cambodian lawyers cannot rely on the BAKC to fully protect their interests. Reform of the institution will again require a change of legal culture at the heart of government that few will be able to influence. Nevertheless, lawyers can still work within the BAKC to gradually bring about that change, promoting dialogue within the profession on issues of independence, training and support, and seeking the outside assistance of international organisations such as the International Bar Association through seminars on the role of national bar associations more generally.

⁴² Yash Ghai 'Report of the Special Representative to the Secretary-General for human rights in Cambodia' United Nations Human Rights Council, 30 January 2007, UN Doc. A/HRC/4/36.

⁴³ Catherine Morris 'Concerns about the Independence of Lawyers and Judges in Cambodia: 2004-2009' (2009) Lawyers Rights Watch Canada.

⁴⁴ *ibid.*

⁴⁵ International Bar Association 'IBA Concerned at Crisis in Cambodian Legal Profession' 30 June 2005 <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=5df6ad67-f299-4368-8737-1bd09f83d0c8>> accessed 19 December 2014.

⁴⁶ Cheang Sokha, Shane Worrell and May Titthara 'Mass Demonstration a Restrained Affair' (*The Phnom Penh Post*, 7 September 2013) <<http://www.phnompenhpost.com/national/mass-demonstration-restrained-affair>> accessed 19 December 2014.

⁴⁷ Global Witness 'Cambodia's Family Trees: Illegal Logging and the Stripping of Public assets by Cambodia's elite' 31 May 2007.

⁴⁸ International Bar Association 'Cambodian Bar issued instructions forbidding lawyers from attending a training programme planned by IBA and ECCC' 24 November 2006 <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=FF0D8629-6CCD-41A2-8360-A08A7B0BC2A6>> accessed 19 December 2014.

⁴⁹ Human Rights Watch 'Government Muzzles Lawyers' 11 February 2013.

⁵⁰ LICADHO *Restrictions on the Legal Profession by the Bar Association: A Threat to Free and Independent Legal Aid in Cambodia: A LICADHO Briefing Paper* (LICADHO, Phnom Penh 2007).

Challenge 6: Intimidation of Lawyers

In 2009, UN Special Rapporteur on the independence of judges and lawyers Leandro Despouy decried the threats and intimidation lawyers were facing, remarking that recent moves against lawyers in Cambodia indicated 'a worrying new trend which could have a chilling effect on the legal profession.'⁵¹ Former UN Special Representative Yash Ghai repeated these concerns in 2010.⁵²

Lawyers representing human rights defenders and opposition leaders are vulnerable to the threat of legal charges themselves, or of being disbarred.⁵³ Most cases follow a familiar pattern. Litigant activists or government opponents engage lawyers to represent them in cases in which they allege violation of their human rights. A counter-suit and a criminal prosecution are then filed by CPP lawyers against both the activists and their lawyers for (usually) incitement to commit criminal offences and criminal defamation. Anonymous threats of violence are often issued.⁵⁴ The criminal charges are withdrawn after the lawyers agree to join the CPP and/or to discontinue the original litigation, with the litigants often being left without representation and/or being forced to accept a derisory financial settlement of their original claim.

The Kong Yu land grabbing case 2007 is typical: lawyers representing ethnic Jarai villagers faced threats and a complaint made to the BAKC about them by the wealthy and well-connected defendant in the case. The lawyers were later placed under investigation for incitement of the villagers they were representing to commit fraud, and were warned by the investigating judge that they would face criminal defamation charges if they spoke to the media. The majority of the lawyers eventually withdrew and the victims' case has ground to a halt.⁵⁵

The work of activist lawyers or non-CPP politicians is fraught with difficulty. Other cases include those against prominent lawyer Kong Sam Onn (in July 2009),⁵⁶ against Choung Chou Ngy (in December 2011)⁵⁷ and most recently in 2014 against ten members of the Cambodian opposition Cambodian National Rescue Party (CNRP).⁵⁸ It is impossible to predict whether recent events challenging the government will result in meaningful change, but there are still lawyers willing to

⁵¹ United Nations Office of the High Commissioner for Human Rights 'Cambodia: United Nations Expert Concerned at Restrictions on Freedom of Lawyers to Represent their Clients' 1 July 2009.

⁵² Ghai 2010 (n 38).

⁵³ Cambodian Center for Human Rights and Article 19 *Defending the Defenders: Security for Cambodian Human Rights Defenders* (Phnom Penh and London 2013).

⁵⁴ LICADHO, *Attacks and Threats Against Human Rights Defenders in Cambodia 2007, A LICADHO Briefing Paper* (LICADHO, Phnom Penh 2008, 7).

⁵⁵ *ibid*, 20-22; East-West Management Institute, 'Program on Rights and Justice: Final Report' 2009.

⁵⁶ Meas Sokchea 'Embattled Attorney Quits SRP' (*The Phnom Penh Post*, 8 July 2009) <<http://www.phnompenhpost.com/national/embattled-attorney-quits-srp>> accessed 19 December 2014.

⁵⁷ Meas Sokchea 'Bar Targets Lawyer's Protest' (*The Phnom Penh Post*, 10 January 2012) <<http://www.phnompenhpost.com/national/bar-targets-lawyer%E2%80%99s-protest>> accessed 19 December 2014.

⁵⁸ *The Phnom Penh Post* 'Six CNRP Members in Jail' (*The Phnom Penh Post*, 17 July 2014) <<http://www.phnompenhpost.com/national/six-cnarp-members-jail>> accessed 19 December 2014.

take on unpopular cases, and opposition politicians willing to challenge the government.

This would suggest that the tactics of intimidation and selective use of criminal charges against supporters of the opposition has not worked. Many lawyers in Cambodia understand the vocational nature of their career and the importance of ensuring their clients have a voice in the courtroom, even if it comes at a potentially high personal cost.

The way forward for lawyers may be in the development of 'hybrid' public interest firms. These firms handle a broad range of work, from pro bono or reduced cost representation for indigent litigants or defendants in the traditional NGO fields of operation, to corporate and contract work, and even work in partnership with government ministries. The aim of these new firms is 'to bridge the gap between the NGO and private legal communities, improve relations with the Bar Association..., and undertake more effective advocacy through building connections with reform minded pockets of government.'⁵⁹ Lawyers would do well to consider such practice models when considering how to operate within a difficult environment.

Challenge 7: Restrictions on Access to Justice and Lack of Legal Aid

One of the biggest obstacles to access to justice in Cambodia is the lack of a proper legal aid system. As the Office of the UN High Commissioner for Human Rights has said, the legal aid situation is in critical need of improvement.⁶⁰ Notwithstanding the Ministry of Justice taking over responsibility for legal aid, the government's allocated legal aid budget is insufficient. There is still no permanent official legal aid infrastructure, despite the recommendations of several major international studies.⁶¹

In 2011, the Danish Agency for International Development (DANIDA) made various recommendations in a report prepared for the Council for Legal and Judicial Reform. The DANIDA report recognised that it was unlikely that the legal aid budget would be increased for the foreseeable future, and instead proposed that the government should increase the rate of lawyer intake, formalise the role of legal assistants and paralegals to assist, encourage university legal clinics to provide legal aid services and set up a legal aid hotline.⁶²

⁵⁹ East-West Management Institute 'Cambodia's First Public Interest Law Firm Launches Operations' (East-West Management Institute 2009) <<http://www.ewmi-praj.org/news.asp?nID=7>> accessed 19 December 2014.

⁶⁰ United Nations Office of the High Commissioner for Human Rights in Cambodia public website <http://cambodia.ohchr.org/EN/PagesFiles/legal_aid.htm> accessed 14 February 2015.

⁶¹ East-West Management Institute 'Legal Aid in Cambodia: Practices, Perceptions and Needs: A study based on a National Survey' East-West Management Institute, Program on Rights and Justice 2006.

⁶² Danish Agency for International Development (DANIDA) 'Options For Approaches to Legal Aid Services Delivery in Cambodia' 12 September 2011.

Nearly four years later, the majority of legal aid continues to be provided by Cambodian NGOs whose in-house lawyers are funded by international donors,⁶³ and the number of legal aid lawyers fell from 119 in 2010 to 78 in 2013.⁶⁴ Many believe this to be a direct result of proposed restrictions by the BAKC on lawyers working for NGOs (later withdrawn)⁶⁵ or threats to lawyers participating in internships with international human rights organisations.⁶⁶ The government's new regulations have not helped matters – international NGOs are now required to enter into a Memorandum of Understanding (MOU) with the Ministry of Foreign Affairs and national NGOs an MOU with the Ministry of the Interior.⁶⁷

Indigenous ethnic communities face even greater problems in accessing justice. Often unfamiliar with both the written and spoken Khmer language and with Khmer legal systems and terminology, their marginalisation is compounded by the fact that there are few trained indigenous lawyers.⁶⁸ Cases of 'land grabbing' are all too common, where wealthy and well-connected businessmen and women take advantage of indigenous peoples' unfamiliarity with the justice system and lack of representation when the dispute reaches the court system, as will be discussed in the next section.

There are several organisations within Cambodia that are committed to improving access to justice and reforming legal aid. The East-West Management Institute (EWMI), sponsored by USAID, has been working on its Program on Rights and Justice since 2008. EWMI provides assistance to the Cambodian government to implement the legal aid strategy of their Legal and Judicial Reform Action Plan, and supports four local NGOs providing legal aid to indigent clients.⁶⁹ EWMI also regularly invites Cambodian legal aid lawyers to Legal Aid Lawyer Working Groups in Phnom Penh, Battambang and Siem Reap for practitioners to discuss common problems, share information, and receive continuing legal education and refresher skills training. At a higher level, EWMI holds a Legal Aid Leadership Forum, an event 'designed to provide a venue for the leaders of legal aid service providers to discuss common issues and problems.'⁷⁰

⁶³ See International Bridges to Justice and their legal aid work: <<http://internationalbridgestojustice.org/Cambodia.html>> accessed on 19 December 2014.

⁶⁴ Speech of Ms Wan-Hea Lee, OHCHR Country Director, National Conference on Legal Aid in Phnom Penh, 29 November 2013, citing a 2013 BAKC report, <<http://cambodia.ohchr.org/EN/PagesFiles/NewsIndex/NewsArchives2013.htm>> accessed on 19 December.

⁶⁵ Erika Kinetz & Prak Chan Thul 'Bar Association tells NGO not to Employ Lawyers on Staff' *The Cambodia Daily*, 27 July 2007; Erika Kinetz and Yun Samean 'Bar Questions Aid Lawyers' Standing' *The Cambodia Daily*, 25 June 2007.

⁶⁶ East-West Management Institute (n 59), 26.

⁶⁷ Additionally, a new Anti-Corruption Law that will provide that directors of NGOs fall within the legal definition of 'public servants' - FIDH (International Federation For Human Rights) 'Cambodia - Freedoms of Expression, Association and Assembly: A Shrinking Space' 2010 FIDH, Paris..

⁶⁸ United Nations Development Project 'A Case Study of Indigenous Traditional Legal Systems and Conflict Resolution in Rattanakiri and Mondulakiri Provinces, Cambodia (UNDP Cambodia, Ministry of Justice, Ministry of Interior 2007).

⁶⁹ East-West Management Institute (n 55).

⁷⁰ East West Management Institute, 'Legal Reform: Program on Rights and Justice in Cambodia II (2008-2013)' (n d)

Cambodian lawyers can take encouragement from these and similar initiatives aimed at educating the legal community and the population at large about the fair trial rights to representation and equality of arms.

Challenge 8: Land Grabbing and Threats to Land Rights Activists

Cambodia is a country rich in natural resources. There is much money to be made in timber, mining, gems and rubber. Soaring land prices – particularly in Phnom Penh – and a boom in the economy, should be good news for the prosperity of all Cambodians, but the reality is somewhat different.⁷¹ Not only do the poor majority of ordinary Cambodians see nothing of the money from the country's economic boom – there is no proper taxation system – but the resulting inequalities in society are widening and creating tensions that the political system is doing its best to silence and repress. Forced evictions are on the rise in rural and urban Cambodia, and the authorities are increasingly heavy-handed in their crackdowns on activists' protests.

The law governing land rights and ownership, and the way in which it is implemented, continues to be abused in Cambodia. Collusion between corrupt officials and rich and/or powerful individuals has led to the issuing of dubious land titles and eviction orders. The court system has been misused to prevent invariably poor victims from acting to defend their rights.⁷² Land rights activists and their lawyers have been subjected to threats, intimidation and criminal prosecution. Wealthy and powerful parties to land disputes are increasingly using the courts to criminalise their opponents, changing the character of these disputes from civil cases against the wealthy into criminal cases against the poor.⁷³

UN Special Rapporteur Surya Subedi has called for the government to re-examine how it handles land disputes. Concerned by the reports of violent evictions and destruction of homes, Professor Subedi has urged the government to develop a national resettlement policy to regulate the process. If not, he fears that the population's deep frustration at the lack of progress on land issues will erupt into violence.⁷⁴

International donors continue to provide financial assistance to enable Cambodian legal NGOs to fund lawyers for those defending their land rights. However, without the political will to improve the system of land title, and to tackle the problems of corruption and lack of independence in the judiciary, lawyers will continue to find it difficult to represent those who oppose the wealthy or powerful. With the increased focus on land issues in the media, and the way in which the Cambodian government responds to protesters' legitimate demands for justice, lawyers should ensure their arguments are consistently grounded in human rights

<<http://ewmi.org/sites/ewmi.org/files/files/programpdfs/EWMICambodiaPRAJII2009.pdf>
> accessed on 19 December 2014.

⁷¹ Global Witness (n 47).

⁷² Siena Anstis 'Access to Justice in Cambodia: The Experience of Grassroots Networks' in *Land Rights Issues, Centre for International Sustainable Development Law*, 2012, 8.

⁷³ FIDH (n 67), 19; Ghai 2010 (n 38); Suzanne Chinnery 'Access to Justice? Forced Evictions in Cambodia' (2009) 11(2) *Australian Journal of Asian Law*, 167.

⁷⁴ Tom Maddocks 'UN rights envoy Surya Subedi concerned by barricading of Cambodia's Freedom Park' *ABC News* (Sydney, 25 June 2014) <<http://www.abc.net.au/news/2014-06-25/un-rights-envoy-concerned-by-closure-of-cambodia27s-freedom/5547916>> accessed 14 February 2015.

principles as enshrined by the Cambodian constitution – and that these arguments are accurately reported.

Postscript: A New Phase in the Transition?

Since mid-2013, Hun Sen's government has faced serious challenges to its authority and legitimacy, both from inside and outside the country, ushering in a new phase to the transitional environment in Cambodia.

The general election of July 2013 saw Hun Sen's CPP lose 22 seats to the newly formed opposition, the CNRP. The official result gave 68 parliamentary seats to the CPP as against 55 to the CNRP, but the count was strongly disputed by a rejuvenated political opposition, with the CNRP alleging fraud, mobilising mass public rallies and calling for the resignation of Hun Sen.

Political protests have proceeded in parallel with the grievances of garment workers, angry at low wages and poor conditions despite record exports and huge profits for the factory owners. There has been a dramatic rise in the number of garment factory strikes over recent years; even so, the demonstrations that took place in September, October and December 2013 were the largest in twenty years, with some estimating that crowds of 100,000 protesters had taken to the streets.⁷⁵

Initially the demonstrations were peaceful,⁷⁶ but live ammunition was subsequently used against protesters, some of whom were shot dead, some of whom are still missing. Large numbers of protesters were arrested, remanded in custody and tried for public order offences by courts that continue to fail to observe rights of due process.⁷⁷ Senior opposition CNRP politicians have also been arrested, remanded in custody and accused of incitement,⁷⁸ and the authorities have banned public gatherings and cordoned off public spaces, squeezing further the space for legitimate protest and democratic debate.

The Cambodian government has come under intense international criticism for its response to the political protests, factory workers' demonstrations, and to other peaceful gatherings. The government has previously denounced demonstrations as the acts of terrorists and an attempted coup d'état.⁷⁹ The CNRP has stated that the CPP is using violence and intimidation and misusing the court process to silence legitimate opposition. The situation remains fluid and dynamic.⁸⁰

The Cambodian authorities are facing another attack on their credibility. In 2014, international lawyers from two independent organisations acting on behalf of Cambodian victims filed separate communications to the Prosecutor of the

⁷⁵ Daniel Pye and Meas Sokchea 'An Act of Coup d'Etat' *The Phnom Penh Post* 24 December 2013 <<http://www.phnompenhpost.com/national/%E2%80%98act-coup-d%E2%80%99etat%E2%80%99>> accessed 14 February 2014.

⁷⁶ Cheang, Worrell and May (n 46).

⁷⁷ Daniel Quinlan and David Boyle 'Democracy Unravelling' *The Phnom Penh Post* 1 January 2014 <<http://www.phnompenhpost.com/video/democracy-unraveling>> accessed 14 February 2015.

⁷⁸ Kuch Naren and Mech Dara 'Four CNRP Leaders Arrested Over Violent Protest' *The Cambodia Daily* 16 July 2014 <<https://www.cambodiadaily.com/archives/police-arrest-four-cnrp-leaders-over-violent-protest-64148/>> accessed 14 February 2015.

⁷⁹ Pye and Meas (n 75)

⁸⁰ Kevin Doyle 'Challenging Cambodia's Strongman Hun Sen' *Al Jazeera* 1 January 2014 <<http://www.aljazeera.com/indepth/features/2014/01/challenging-cambodia-strongman-hun-sen-20141184836510703.html>> accessed on 19 December 2014.

International Criminal Court,⁸¹ requesting her to open official investigations against the current regime. The communications allege that the Cambodian government has committed international crimes against hundreds of thousands of its own citizens since 2002.⁸² The allegations include murder, sexual abuse, violence, harassment, illegal imprisonment, persecution, unlawful eviction and forcible transfer. One of the communications also alleges that the Cambodian government should be investigated for genocide for allegedly obstructing the ECCC's own investigations into the crimes of the Democratic Kampuchea regime.⁸³

Although the Prosecutor of the International Criminal Court is not obliged to accede to the requests, and a trial before judges in The Hague is a remote prospect, the communications have received global attention, as well as support from several prominent international NGOs. The Cambodian government's public response so far has been dismissive, but the carefully drafted allegations and detailed supporting materials provided in the communications have provided fresh impetus and a focal point for Hun Sen's opponents to argue for real political change.

Do the ICC communications, public protests and opposition demonstrations make reform more or less likely in Cambodia? What will be the government's long-term strategy towards debate and dissent? Is it likely that Cambodia's legal system and its lawyers will come under even greater scrutiny – and possibly greater pressure – as the situation develops?

2015 will be a pivotal year for Cambodia as it remains in the international spotlight. Despite the challenges outlined in this paper, lawyers can play a central role in the transition process by continuing to courageously represent their clients, armed with arguments based on fundamental universal principles as enshrined in the Cambodian constitution.

⁸¹ Michael Peel 'Cambodians Claim Land Grabs are Crime against Humanity' *The Financial Times* 6 October 2014 <<http://www.ft.com/cms/s/0/d88613bc-4d66-11e4-bf60-00144feab7de.html#axzz3RIJUtEHq>> accessed 12 February 2015; Amy Mathieu 'Human Rights Lawyer urges ICC to Investigate Cambodia Officials' *Jurist*, 20 March 2014 <<http://jurist.org/paperchase/2014/03/human-rights-lawyer-accuses-cambodia-officials-of-intervening-in-khmer-rouge-tribunal.php>> accessed 12 February 2015.

⁸² The ICC was established on 1 July 2002. Cambodia ratified the Rome Statute of the ICC in April 2002, and as a result, the Court can exercise jurisdiction over crimes committed in Cambodia since its establishment.

⁸³ Yun Samean 'Cambodian PM Hun Sen Faces ICC Complaint Over Human Rights Abuses' *Radio Free Asia*, 20 March 2014 <<http://www.rfa.org/english/news/cambodia/icc-03202014213755.html>> 14 February 2015.

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