



On the Record: Civil Society and the Tribunal in Cambodia

Issue 1: July 14, 2000

Cambodia's Terrible Legacy

The first issue gives a background on the atrocities committed by the Khmer Rouge and the struggle to hold them accountable. It speaks of the problem with past truth commissions around the world that simply identify many criminals but do not punish them. The issue also notes that persecution through a court only punishes a few people. So the question is raised of whether to identify many criminals without persecuting them or to persecute a few criminals while leaving the majority unnamed. The answer for Cambodia has been a hybrid tribunal set up through the Cambodian legal system but with some international involvement. Laura McGrew seeks to unravel civil society's opinion on this tribunal through her research which is presented throughout the rest of the issues.

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From the AP Editorial Desk

Between 1975 and 1979, up to three million Cambodians died under the rule of the Khmer Rouge. Twenty-five years later, the Cambodian government may be on the brink of finally calling the killers to account -- after a great deal of pressure from the international community.

On May 19, 2000, in a letter to the United Nations, the Cambodian Prime Minister Hun Sen signaled his willingness to accept a new tribunal that will prosecute the surviving Khmer Rouge leaders. The draft of a law establishing the tribunal is expected to be taken up by the Cambodian National Assembly shortly.

This agreement follows months of arduous negotiations between the Cambodian government and the United Nations. The final push for an agreement has been followed with rapt attention by

diplomats and international lawyers. But what do Cambodians feel about putting the Khmer Rouge on trial? Their voice has been largely absent from the debate -- yet they were the ones who suffered from the cruelty of the Khmer Rouge.

This new series of 'On the Record' allows their voice to be heard. It is based on recent research by Laura McGrew, a long-time expert on Cambodia and associate of The Advocacy Project.

Laura recently spent ten weeks in Cambodia, canvassing the opinion of Cambodian civil society and a wide range of Cambodians. She wanted to know what Cambodians expect from the tribunal, and what form they feel it should take. But her wider interest is in recovery and reconciliation -- between individuals and in society. Cambodians remain deeply traumatized by the Khmer Rouge era, and recovery will not be easy. Justice will help -- but not any type of justice. And justice is only part of the story.

Laura's findings are a valuable contribution at a critically important time. The debate over a tribunal is far from over. The Cambodian parliament could toughen up the draft law or weaken it. The United Nations could disassociate itself from the result, in which case any tribunal might have trouble attracting international funding and support.

This means that the next few weeks could be decisive. Now, more than ever, it is important that Cambodians make their views known. It is also crucial that the Cambodian government and the international community heed these views.

We hope that this series of 'On the Record' can help to make this possible.

The Crime

Many societies have struggled to recover from past violence, but nothing compares to the legacy left by the Khmer Rouge. The scale of the killing was extraordinary. In Issue 2 of this series, Craig Etcheson, a genocide investigator and Cambodia expert, suggests that as many as three million Cambodians died out of a pre-war population of roughly eight million.

There were mass executions of civil servants (soldiers, teachers, etc.); of educated city people; of religious and ethnic minorities (Buddhist monks, Cham Muslims, Chinese); and of people living in the Eastern zones. Hundreds of thousands also died from overwork, inadequate food, and lack of medical care.

Freedom of choice was spurned as the Khmer Rouge tried to break up the family unit and de-socialize an entire people. Children were taken away from parents. Meals were made communal. Couples were forced to marry. Speech, politics, education, culture, religion, and other basic rights were denied.

Every Cambodian who lived through the period has a story to tell. Bou Saroeun was eleven when the Khmer Rouge marched into Phnom Penh. Readers will find his poignant story in Issue 2 of this series.

The Khmer Rouge left their mark on the entire society -- not just individuals. This emerged clearly last year at a seminar on violence against women that took place in Phnom Penh and was covered by 'On the Record' (Volume #6). That meeting made it clear that the violence from the Khmer Rouge era lives on in different forms, including murder and wife beating.

The fact that not one of those responsible has yet been punished adds to the sense of frustration and anger felt by many Cambodians. Just recently, on May 20, hundreds of Cambodians gathered at the notorious killing fields of Choeung Ek outside Phnom Penh to observe an official 'Day of Anger' commemorating those who died under the Khmer Rouge. Weeping and chanting, they stood among the thousands of human skulls and bones that have been collected to form a monument. Many protested angrily at the long delay in establishing a tribunal. It is clear they can wait no longer.

But if the stakes are huge for Cambodia, they are also high for the international community. The fact that this horrific act of mass murder has gone unpunished for so long has eroded confidence in international law.

Much is therefore hanging on the outcome of the forthcoming debate -- for Cambodia and for international law. We are talking of national catharsis.

Seeking the Truth

During the 1990s it became an article of faith that past abuses cannot be swept under the carpet if a society is to recover. The question is how to initiate such a process without disrupting society or triggering a civil war. In any case, old wounds will invariably be opened. A score of countries, from Bosnia to Rwanda, has wrestled with the dilemma, with varying degrees of help from the international community. Cambodia is now facing it squarely.

Many of these societies have started from the assumption that the first priority is to both tell and acknowledge the truth. They have done this by setting up a truth commission, the goal of which was to set the record straight and get the grim facts out in the open -- all the while addressing the needs of the victims.

Truth commissions look at the history, the institutions, and the big actors, and provide a broad explanation of what happened. They can answer a very basic need in a traumatized society where truth was often the first casualty. El Salvador, South Africa, Argentina, Guatemala, and Chile are just some of the countries that have established truth commissions of one kind or another.

How far the truth commission can go in exposing the truth is likely to depend on the nature of the transition undergone by the society in question. If the military retains power and credibility, as the Chilean army did following Chile's transition to democracy in 1989, any inquiry is likely to be relatively toothless. (The Chilean government created a commission in 1990 that documented 2,000 deaths and disappearances. But those responsible were not identified, and the architect of the repression, General Pinochet, was given lifetime immunity from prosecution. This was only lifted earlier this year after Pinochet's enforced exile in Britain had made him something of a liability for the Chilean military.)

In contrast to Chile, the Argentinian military had been humiliated in the Malvinas/Falklands war when it handed over power to democrats in 1983. The new government felt confident enough to create an independent commission on inquiry (CONADEP), which named those who had disappeared. It followed this by prosecuting eight former military rulers.

Truth commissions can be more outspoken and less vulnerable to internal pressures when they include international commissioners, like the commission established on El Salvador (1992) and the (1997-98) Verification Commission on Guatemala. However, national commissioners are equally important. What matters is the final outcome -- and this will depend on the implementation of any recommendations. In this respect, Guatemala is still a long way from success.

Set up in 1995, South Africa's Truth and Reconciliation Commission (TRC) has gone further than any other similar body in identifying the victims and agents of past abuse (apartheid). It is also national. The TRC was born of political compromise, in that widespread prosecutions were not feasible in South Africa at the time. But it has still managed to be effective and outspoken. This is due to overwhelming popular support, both for the commission and for its chairman, Desmond Tutu. The majority of South Africans understand the importance of expunging apartheid from the nation's soul.

Yet the fact that truth commissions do not normally allow for prosecutions can be a serious limitation. If the killers are identified by the truth commission but allowed to escape punishment, as happened in El Salvador in 1992, it tends to increase the sense of frustration among victims and their families. Once they know who pulled the trigger or gave the order, they are unlikely to settle for the facts. Rather, they will want to see justice done.

This series of 'On the Record' demonstrates clearly that in this respect, Cambodians are no different from any other victims of past abuse.

Prosecutions

Justice -- in the form of prosecutions -- can indeed be done. This is, in essence, the other principal mechanism for dealing with past abuses.

Instead of focusing on the broad picture, as truth commissions do, justice focuses on ascribing criminal responsibility to a number of individuals. But there is a trade-off. However many persons are prosecuted, the number is certain to be far fewer than those identified by a truth commission.

International prosecutions -- for international crimes -- were first initiated at the Nuremberg and Tokyo tribunals, created by the Allies at the end of the World War II to prosecute Nazi and Japanese war criminals.

The 1945 Nuremberg tribunal was particularly relevant to the case of Cambodia. It was the first modern attempt to punish crimes (war crimes and crimes against humanity) that were universal

in nature -- in other words, considered so heinous that they transcended national boundaries. (Genocide was only enshrined in international law with the drafting of the 1948 Genocide Convention.)

But the goal of the prosecutors was also to put the entire Nazi apparatus on trial and show that Nazism had been in effect a gigantic plot against civilization. The 23 defendants were chosen as representatives of Nazi institutions, as well as for their individual responsibility.

The main criticism of this first Nuremberg tribunal is that it was an example of 'victor's justice' that did not do enough to safeguard the rights of defendants. This has tarnished the tribunal in the eyes of many lawyers and was a key factor in ensuring that the rights of the defense were built solidly into the statutes of the criminal tribunals on Rwanda and the former Yugoslavia. But the notion of prosecuting an entire movement is clearly relevant to the current debate in Cambodia. It is deliberate that Pol Pot's Khmer Rouge are compared to Hitler's Nazis.

Prosecutions at the national level are most likely to occur when there is a radical change of government following a coup or the overthrow of a dictator. Indeed, in such situations, the new government may be only too willing to prosecute officials from the discredited previous regime. This was the case in Rwanda (1994) and Ethiopia (1995). One of the first actions of the Cambodian government that took over after the Khmer Rouge were ousted in 1979 was to hold a show trial of Khmer Rouge leaders in their absence.

In each of these three cases, however, the trials failed to meet minimum legal standards. As a result, they have come across as acts of revenge, not justice. In one of the most distressing current examples, thousands of suspected Rwandan 'genocidaires' have been detained in Rwandan jails for years without even being charged. While this abuse is not on the same scale as the 1994 genocide, it further undermines confidence in the rule of law.

As with truth commissions, prosecutions may best serve to advance the rule of law when the involvement of the international community is secured. In May 1993, the UN Security Council took the momentous decision to punish international crimes (war crimes, crimes against humanity, and genocide) when it established an international criminal tribunal for the former Yugoslavia, based in The Hague. The following year, it created a second tribunal to punish those responsible for the genocide in Rwanda, based in Arusha (Tanzania). Both tribunals are staffed and funded by the United Nations and have panels of international judges.

The Hague and Arusha tribunals are now an accepted part of the machinery of international law and peace building, but they also underline the limitations of the strictly legal approach to accountability. As of writing, the Hague tribunal has 70 indictments currently outstanding. They include the two former Bosnian Serb leaders and the current president of Yugoslavia. Of those indicted, 36 are in custody in The Hague. Two have been convicted.

The Arusha tribunal has indicted fewer individuals (52) than the Hague tribunal, but arrested more (46). It also has a better record of convictions (seven). But this overall record is still totally inadequate in the view of most Rwandans. As a result, Rwanda has pressed ahead simultaneously with its own national system of justice, with all of its manifest limitations.

In principle, international participation should improve the prospects for accountability. But given the scale of the crimes that were perpetrated in Bosnia and Rwanda, many would say that the two tribunals have failed in their main goal, which is to reestablish respect for the rule of law in the two regions. The results seem particularly meager to Rwandans and Bosnians, when set against the money spent by the two tribunals -- well over a billion dollars.

At the same time, it is impossible to measure the alternative. What would have happened if there had been no trials at all?

Hybrid Tribunal

The lesson to be drawn from all of these examples, from El Salvador to Rwanda, is clear. If the goal is indeed to rebuild society and reestablish respect for the rule of law, then neither of the two models -- truth commission or the law court -- will be sufficient on their own.

At best, the truth commission will lay out all the painful details -- but without taking any punitive action. The law court may take punitive action, but only against a tiny handful of criminals. Faced by all kinds of constraints -- money, courtroom space, lawyers, investigators -- it will probably chose to focus on those who gave the orders, which means that thousands of killers will escape justice.

In other words, both of these two approaches -- truth commission and law court -- are likely to involve compromise and leave the victims unsatisfied.

How does the proposed Cambodian tribunal fit into this? Obviously, it will fall into the category of the law court rather than truth commission. But apart from that, it will have little in common with previous tribunals. Unlike the Arusha and Hague tribunals (which are both funded, staffed, and administered by the United Nations) this will be a Cambodian tribunal, set up within the Cambodian legal system. But unlike other national courts (like Rwanda), some of its judges and investigators, and one of its two prosecutors, will be chosen by the international community.

There is no precedent for this kind of hybrid. It requires some historical perspective to understand how the United Nations and Cambodian government arrived at this compromise, and what its shortcomings are likely to be. Some of this perspective is supplied in Issue 2 by George Chigas, from the Yale University's Cambodia Genocide Program.

The Government Shift

Chigas explains how the Cambodian government that took over power from the Khmer Rouge after their expulsion in 1979 initially supported prosecutions. But by the late 1990s, the view from Phnom Penh had changed completely, from support for prosecutions to opposition. As the Khmer Rouge movement disintegrated, so the political rationale for a high profile trial - nation building -- receded.

In addition, there was growing opposition from the Cambodian establishment to opening the dark

period of Khmer Rouge rule up to public scrutiny. Many of its leading members -- even Hun Sen -- had held positions of responsibility in the Khmer Rouge before breaking ranks in the late 1970s. Some might have been wondering whether an energetic prosecutor might go after them.

Others may have worried that a tribunal could create new tensions between the government and the former Khmer Rouge leadership -- if, for example, the prosecutor were to go after Ieng Sary, Pol Pot's former deputy for foreign affairs. Acting on the request of Hun Sen and Ranaridh, King Sihanouk granted amnesty to Ieng Sary, on September 14, 1996. This amnesty for one of the most notorious Khmer Rouge leaders undoubtedly helped to neutralize the Khmer Rouge and persuade many soldiers to defect. But it is hard to see how any tribunal could avoid indicting Ieng Sary and remain credible.

The result was that as the international clamor grew in support of a tribunal, Hun Sen's government dug in his feet and insisted on retaining control of the process. This created tension with the United Nations, which was being pressed to establish a tribunal.

The United Nations failed to win Cambodia's backing for an international tribunal. It then made a major concession in agreeing to a Cambodian court. This, however, was completely unacceptable to human rights activists. These groups have little confidence in the independence or proficiency of the Cambodian legal system, which was destroyed by the Khmer Rouge and been heavily politicized in the years since.

The United States then stepped in with a compromise proposal for a mixed court with Cambodian and international judges and two prosecutors -- one of whom would also be appointed by the international community.

The Cambodians insisted that a majority of the judges be Cambodian, which prompted another round of intense negotiations. Eventually, it was decided that in the event of a disagreement between the judges, or between the two prosecutors, a vote would be taken by a so-called 'supermajority.' This would require the agreement of at least one of the international judges, and it would prevent the Cambodian judges from blocking a controversial prosecution. Under mounting international pressure, Hun Sen and his cabinet colleagues accepted the compromise.

From the UN perspective, it is obviously essential that the supermajority compromise formula be preserved. But, as CRAIG ETCHESON points out in a review of the entire tribunal package in Issue 3, the supermajority is not the only component that could come unraveled.

Many other issues have to be resolved that could have a bearing on the tribunal's credibility. For example, how will the tribunal decide who to prosecute? Will the tribunal receive prompt and adequate funding to be able to mount a credible case? This is particularly relevant, because all of the tribunal's funding will come from voluntary contributions.

In other words, it will take a mighty effort to preserve even the modest compromise that has now been reached.

Seizing the Opportunity

Looking back over the last year, many will be deeply angered by the horse-trading and haggling over the tribunal. This is no way to show respect for the millions who died under the Khmer Rouge. There will also be deep skepticism at the compromise that has emerged. A tribunal of this kind might just prosecute a handful of old Khmer Rouge notables, who are universally detested. But this will not suffice to root out the deep violence that has eaten away at society, or heal the broken families, or get rid of the nightmares. In short, it will not rid Cambodia of the deep and terrible legacy of Khmer Rouge rule.

This skepticism is completely understandable. But it has to be said that catharsis on this scale would require a more profound process than anything hitherto attempted in recent years in the form of prosecutions or a truth commission.

It is just possible that Cambodia might break the cycle and generate a process that not only straddles the two approaches to accountability -- truth and prosecutions -- but also ushers in a new model of cooperation between the national and international legal systems.

However, if the last year is anything to go by, this will not be handed to Cambodians -- they will have to demand it. They have to define the process and decide what priority to give the new tribunal. If Cambodians are not convinced that the tribunal is central to their recovery and to the recovery of their society, the tribunal is doomed, and international law will be severely damaged. But if Cambodian civil society can seize the initiative and impose their needs on the process, the tribunal might just surprise the skeptics and expand the possibilities for accountability.

This underscores the relevance and the importance of the research that is presented in this series of 'On the Record.'

The Research Study

Cambodia is currently in the throes of the same kind of dilemma that has faced many of the nations referred to earlier in this issue. The country is trying to decide how far to go in punishing the Khmer Rouge without creating instability and resentment -- in other words, without jeopardizing whatever 'normalization' has occurred over the last 20 years.

But this dilemma is presented almost exclusively from the perspective of the government, not the Cambodian people. When Prime Minister Hun Sen talks of 'opening up wounds,' he is talking of upsetting the political status quo. Only rarely are the views of Cambodians considered.

Yet it is in Cambodian communities and among Cambodian families that the dilemma is most evident. Cambodians are living next to former Khmer Rouge cadres, who tormented them 20 years ago and are now asking for forgiveness and understanding. Former Khmer Rouge soldiers are wrestling with their own nightmarish memories. How far the process of exposure and punishment should go is a question for the entire society, not just the political elite.

This underscores the importance of the recent research by Laura McGrew in Cambodia and of the views of Cambodians that are presented in this series of 'On the Record.'

Laura's research was conducted over a period of three months at the end of 1999 and the beginning of 2000, with support from the Canadian embassy in Phnom Penh. The goal was to help civil society be heard on an issue that had been largely discussed between the United Nations and Cambodian government, behind closed doors.

Laura asked a range of civil society leaders for their views on key issues. Their statements were published in article-form in the local press, and are reproduced in Issues 3 to 8 of this series. They amount to a unique statement by civil society on what Cambodia needs to recover.

Taking advice from these eminent persons and others, Laura designed a questionnaire that she was administered to more than 50 individuals from nongovernmental groups (NGOs) and international organizations (IO) in Cambodian cities.

Individual interviews and focus group discussions were also held with approximately 180 NGO and IO workers, farmers, persons with disabilities, youth, people in war-affected areas, widows, former Khmer Rouge, and others. Laura also used two videotapes to stimulate discussion and provoke new thinking. The research was conducted in the Phnom Penh municipality, and Battambang and Kampot provinces.

As Laura herself makes clear, the mere process of the study was intensely emotional. Discussions were, she says, 'animated, enthusiastic, tearful, angry, and thoughtful. The memories of the Khmer Rouge are clearly very close to the surface of the Cambodian psyche.' There was also deep skepticism: very few participants felt that their government would listen to them.

This is one reason why a public discussion is needed. Another is illustrated by the response to Laura's survey. Mental health experts, academics, legal experts, and the Cambodians themselves have said, that for reconciliation and healing to take place, the voices of the victims must be heard. Ideally, the perpetrators must also offer some explanation for their misdeeds.

Of course, none of this will be easy. Laura quotes David Chandler, the noted Cambodian historian: 'The concepts of justice, forgiveness, mercy and revenge are perhaps hopelessly tangled in the minds of DK [Khmer Rouge] survivors.'

Laura herself hopes that her work so far only be considered a preliminary phase. A next step would be to broaden out and expand the cross-section of those surveyed to the villages. Also many other aspects touched on in the study need further exploration. The discussions resulted in many specific recommendations. These will be presented in Issue 9 of the series, but some of the most important can be summarized briefly:

- Transparency in the discussion over the tribunal;
- Adequate funding for the tribunal and wider process of reconciliation. This should include some kind of truth-telling process that would allow for all of the facts to come out;

- Public education (on justice, reconciliation, legal processes, the role of religion and -- most important -- the proposed tribunal). These sessions would be conducted in public fora, seminars, international meetings and the media;
- Testimonials and historical analysis that documents the Khmer Rouge regime and allows individuals to tell their stories and write their histories. This would supplement the important work of the Documentation Center of Cambodia to date;
- Explore and (where appropriate) establish memorials, burying rites and exhumations, ceremonies, cultural exhibitions and activities (such as art, music, and theatre);
- Provide mental health services to address any post-traumatic stress that might arise from public debate, or a tribunal, or truth telling.
- Use the run-up to the tribunal and its establishment as a way of addressing the wider issue of impunity in Cambodian society. Many of those interviewed said that they hoped the Cambodian judiciary would benefit from the presence of foreign judges and prosecutors. Cambodians as a whole feel that impunity is one of the most important problems facing them today, and they hope to see some benefits from the costly exercise of sending foreign experts to Cambodia.

Series Organization

The series is presented as follows. Issue 2 looks at the crimes committed by the Khmer Rouge and the events leading up to the current plan for a tribunal. It also analyzes some of the flaws and ambiguities in the proposed tribunal itself.

Issues 3 to 8 present the views of Cambodia civil society, politicians and the Khmer Rouge themselves. In Issue 3, human rights leaders provide their own critical analysis of the proposed tribunal. In Issue 4, legal experts assess it from a legal perspective. Issue 5 looks at the key notion of reconciliation, while Issue 6 looks at how Buddhism -- Cambodia's main religion -- would deal with the legacy of the Khmer Rouge.

Issue 7 presents the views of politicians. Issue 8 offers some surprising insights into how the former Khmer Rouge are thinking. Issue 9 draws some conclusions about the material and summarizes Laura's research findings. The final issue of the series profiles some of the key organizations that are working on justice and reconciliation in Cambodia and that served as key counterparts for Laura's study.

We at The Advocacy Project hope that this series will not be the end of our involvement on this critical issue. We particularly hope that Cambodians and readers of this series will continue to exchange information and advocate. An email discussion list is in the process of being set up. There is no more important issue on the international agenda -- and no better way of commemorating those who fell victim to the Khmer Rouge.

- Laura McGrew has written the findings of her research in the form of a report. **Contact Laura at lamegrew@igc.org** for a copy or other information.

In the Next Issue: The Case for the Prosecution