



On the Record: Civil Society and the Tribunal in Cambodia

Issue 2: July 17, 2000

The Case for Prosecution

Issue 2 looks at the crimes committed by the Khmer Rouge and the events leading up to the current plan for a tribunal, including the government's reversal of support for such a tribunal. It also analyzes some of the flaws and ambiguities in the proposed tribunal itself.

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From the AP Editorial Desk

About the Khmer Rouge

'Khmer Rouge' (Red Khmers) is the name given to the left wing in Cambodian politics by King Norodom Sihanouk in the 1950s. Since then, the name has come to be identified with an extreme faction of the Cambodian left. This was formally known during the 1970s as the Communist Party of Kampuchea (CPK) and during the 1980s and 90s as the 'Party of Democratic

Kampuchea.' On April 17, 1975, after a bitter five-year civil war, the Khmer Rouge secured victory over the U.S.-backed Khmer Republic of General Lon Nol. Thus arose the 'Khmer Rouge regime.'

The Khmer Rouge subsequently established the state of Democratic Kampuchea and instituted what was arguably the most radical experiment in social engineering of the twentieth century.

In an effort to 'purify' the 'Khmer race' and create an absolutely classless utopian society, the Khmer Rouge began by emptying all Cambodian urban centers of their population, abolishing banking, finance, and currency, outlawing all religions, reorganizing traditional kinship systems into a communal order, and eliminating private property so completely that even personal hygiene supplies were communal.

Extreme levels of coercion were required to effect this total transformation of Cambodia's conservative, agrarian Buddhist peasant society. The cost in human life was high. Of the total Cambodian population of some seven to eight million in 1975, various estimates put the death toll over the following three years and eight months at 15 to 40 percent of the total. (Craig Etcheson discusses the death toll below.)

Cambodia had lost territory to Vietnam during 500 years of Vietnamese expansion, and one of the goals of the Khmer Rouge leaders was to retrieve these regions. After several years of border conflict, Vietnam finally invaded Cambodia on December 25, 1978. Within two weeks, on January 7, 1979, Vietnamese armed forces entered the Cambodian capital at Phnom Penh and proclaimed the end of the Khmer Rouge state of Democratic Kampuchea.

The Khmer Rouge fled to jungle hideouts along Cambodia's western border with Thailand, from where they waged war against the Vietnamese-backed regime in Phnom Penh. The Paris peace agreement of October 23, 1991, finally put an end to a decade of war and isolation. Under the terms of the agreement, the Khmer Rouge were invited to participate in a provisional government of national unity, pending UN-supervised elections. They quickly pulled out of the peace process and returned to guerrilla warfare, drawing on the proceeds from smuggled timber and gems.

Meanwhile, throughout this long period the Standing Committee of the Central Committee of the Khmer Rouge comprised the same core group. Often called the 'Party Center,' this group comprised Saloth Sar (alias Pol Pot), Nuon Chea, Chhit Choeun (alias Ta Mok), Khieu Samphan, Ieng Sary, Son Sen, Yun Yat, Ieng Thirith, and Ke Pauk.

It was not until the late 1990s that the movement finally began to disintegrate. On September 15, 1996, the Cambodian government offered an amnesty to Ieng Sary, Pol Pot's deputy, in return for the defection of his troops. Son Sen was killed in an internal power struggle in April 1997.

A year later Pol Pot, the movement's leader, died after being detained at the Khmer Rouge army base of Anlong Veng. Nuon Chea and Khieu Samphan defected on December 30, 1998, and in February 1999 the Cambodian government announced the incorporation of the last remaining Khmer Rouge soldiers in the national army.

Two prominent leading members of the Khmer Rouge are now in detention awaiting prosecution under a 1994 law that outlawed the movement. They are Chhit Choeun, the one-legged military commander known as Ta Mok and 'The Butcher,' and Kang Kek Iev (Duch), who headed the extermination center at Tuol Sleng.

Two other former Khmer Rouge members are in detention in Phnom Penh (but lower ranking than Ta Mok and Duch). Nuon Paet received a life sentence one year ago for the kidnapping and murder of three western backpackers in 1994. Commander Chouk Rin was arrested six months ago on the same charges, and faces trial on July 18, 2000.

- More information can be found at <http://www.yale.edu/cgp/dccam> from the Yale University's Cambodian Genocide Program and its Cambodian-based affiliate, Documentation Center of Cambodia.

'Please Explain Before You Die': An open letter to the Khmer Rouge from a survivor, Bou Sarouen

Bou Saroeun was eleven years old when the Khmer Rouge took over Phnom Penh. He is now a reporter with the Phnom Penh Post. In this open letter to the Khmer Rouge leadership, he demands an explanation.

'Dear Nuon Chea, Khieu Samphan and Ieng Sary,

The people harmed by your rule between 1975 and 1979 need to know why you behaved as you did during your years in power. Their anger will only be lessened if you honestly reveal the mysteries of the DK regime.

I was eleven years old when you came to power and I still remember the day well. My grandmother had brought me to Phnom Penh as a treat for Khmer New Year. I had wanted to see Cambodia's capital despite my parents telling me there was fighting in the area.

But when we arrived we found the fighting was worse than expected. My grandparents stocked up on food and medicine and packed clothes in case we needed to make a quick escape. I soon wanted to go back to my village, but we could not travel. My grandfather dug a bunker behind the house, and we hid in it on the morning of April 17.

Later I was allowed to watch the young Khmer Rouge fighters enter the city; they carried B-40 rocket launchers and AK-47s. People hung white flags from their windows and even a helicopter flying across the city had a white flag.

On April 18 my holiday ended. Everyone in the city was forced to leave. As we walked from Phnom Penh I could smell the dead bodies and charred flesh. Some time in May I arrived at my home village and returned to school, but the subjects had changed. There were now lessons on political thought.

I remember the teacher snatching a pair of earrings from my Aunt, who was in my class, and throwing them out the window saying: 'Our Angkar hates capitalism.'

I was not in school for long. The Khmer Rouge started fighting against Vietnamese, so I was in the midst of a war again. A Khmer Rouge commander, who had no ears and was carrying a pistol and an AK-47, passed through our village and asked me to join his troops saying 'It's fun' so I went with them. A few hours later a group of Vietnamese soldiers appeared, and a fire-fight broke out.

I was very scared and started crying, but a Khmer Rouge soldier shut my mouth and put my head in the ground. I was lucky: the Khmer Rouge won the encounter and I was not hurt. After that the fighting near my village became more intense so the Khmer Rouge evacuated us. We left on foot and as we traveled through the countryside we saw many children dead from disease and starvation. There were dead bodies everywhere -- lying on the ground, floating in the water, and in numerous stinking, shallow graves.

Once we were passing a canal and my parents asked me go and get some water. I was pleased: the water was clear and I drank deeply and washed myself. Just as I finished I looked up and saw three bodies, tied hand and foot, floating in the water.

All the parents tried to find food for their children and went without so we could eat. We children were always crying for food, not realizing how difficult it was for them to find anything to eat. I remember watching them cry and their exhaustion from lack of food. Our parents became beggars as we traveled but locals often refused to help, calling us 'Kbal Yuon Kloun Khmer' (Vietnamese head, Khmer body).

After the evacuation I was separated from my parents. I was sent to a Kong Koma (youth group) where I was tied up and beaten.

If you don't know what your regime did to Cambodia's children, let me tell you.

I was accused of stealing a coconut. I had picked it up off the ground and was giving it to an elderly man who was ill. For this I was stripped and tied to a tree branch on an ant's nest in the sun.

I cried for help but no one dared to help me. They released me after the sun set. I could not eat porridge, and I had contracted a serious and painful fever. The next day they forced me to go to the rice field to help the adults to transplant rice. I could not walk and I fell asleep on the dike, but I was kicked into the water by the head of the youth group. You can imagine how I felt. I remember one tearful woman who tried to help me, but she was so scared.

My friend was treated more harshly. He was permanently crippled after the head of the youth group placed a stick across his waist and then had people jump on it.

We were hungry, we needed food to fill our stomachs. So we were forced to steal bananas, mangoes, and anything else that was edible. We didn't know the meaning of 'thief', we just took

the food for survival. Do you know how hungry we were, Mr. Ieng Sary and Mr. Khieu Samphan and Mr. Noun Chea?

Do you know how it feels to be so hungry that you'll pick out and eat undigested corn from human feces? The children of 1975 Cambodia all know what that hunger is like.

Why did we have to live like this? Who are the top leaders? Who is the mysterious 'Angkar' responsible for this, we asked ourselves.

Two sentences that I will remember forever, are 'Touk Min Chom Nenh Dork Chenh kor Min Kat' (Keeping you is no benefit, losing you is no loss) and Sam At Kmang (Cleanse the enemy). In my mind the Khmer Rouge used these words to kill the people.

We were children. Did you think that we were the enemy, or the CIA? Are you responsible for the violence and brutality that happened to the children?

To keep this knowledge in your head must be hard to endure in your heart. You should speak out before you die. If you die without explaining why you behaved in this way there will still be a mystery and no resolution for your victims. Khmers will still mistrust Khmers.

Now we have already lost two key men -- Pol Pot and Son Sen. You must think of the generations that come after you. Your own progeny will be condemned for your actions if you do not explain why you did what you did.

Mr. Khieu Samphan, I heard that you are a good man, not corrupt and an intellectual, so you must stand up and tell us why more than one million Khmers died.

I shed a tear when I hear the foreigners comment that Khmers like killing Khmers.

I recently attended a seminar overseas and when I introduced myself as a Cambodian, the first reaction was invariably 'Oh, Pol Pot'. People kept asking me again and again about Pol Pot and why did Khmers kill their own people.

In the public forums recently held on the Khmer Rouge trial and national reconciliation, there has been a call for justice and truth.

You can help these people.

Mr. Khieu Samphan and Mr. Nuon Chea, you said 'Sorry' at the press conference after you defected. It is not enough. What you did to the people must be explained more fully. We need to know why you killed your own people, people who spoke the same language and from the same nation.

Mr. Khieu Samphan, one of your former student colleagues said that you were the tool of the powerful and you were used because you were popular with the people. If this is so I hope you will tell us who these people were and what they ordered you to do.

I also beg of the United Nations that you provide good security for any trial so that he can stand up in confidence before the court and answer why these people died.

Please, please tell us what happened and why so many people died before you pass away.'

- Bou Saroeun works as a reporter for the *Phnom Penh Post*. This letter was published in the paper [Free Online Edition], April 14-27, 2000.

Cambodia's Most Wanted: The surviving Khmer Rouge leaders most deserving of prosecution

The following is a list of surviving Khmer Rouge leaders, who would probably be the first targets of any prosecution, compiled by Craig Etcheson.

- Nuon Chea, aka 'Brother Number 2', former Deputy Prime Minister of Democratic Kampuchea, former member of the Standing Committee of the Communist Party of Kampuchea, currently living in retirement in Pailin, Cambodia;
- Khieu Samphan, aka Hem, former President of the Presidium of Democratic Kampuchea, former member of the Central Committee of the Communist Party of Kampuchea, currently living in retirement in Pailin, Cambodia;
- Ieng Sary, aka Van, former Democratic Kampuchea Deputy Prime Minister for Foreign Affairs, former member of the Standing Committee of the Communist Party of Kampuchea, currently leader of the 'Democratic National United Movement,' living in Phnom Penh and Pailin;
- Chhit Choeun, aka Ta Mok, former Chief of the General Staff of the National Army of Democratic Kampuchea, former member of the Standing Committee of the Communist Party of Kampuchea, currently detained in Phnom Penh on charges of genocide;
- Ke Pauk, aka Ke Vin, former Chairman of the Central and Northern Zones of Democratic Kampuchea, former member of the Central Committee of the Communist Party of Kampuchea, former Deputy Chief of the General Staff of the National Army of Democratic Kampuchea, currently a General in the Cambodian Royal Armed Forces and living as a 'gentleman farmer' in Siem Reap, Cambodia;
- Ieng Thirith, nee Khieu Thirith, married to Ieng Sary, former Democratic Kampuchea Minister of Social Affairs, currently living in semi-retirement in Phnom Penh and Pailin;
- Pol Ponnary, nee Khieu Ponnary, widow of Pol Pot, former chair of Democratic Kampuchea Women's Commission, currently living in retirement in Phnom Penh;
- Kang Kek Iev, aka Duch, former director of S-21 (functionally, chief of the Khmer Rouge secret police), currently detained in Phnom Penh on charges of genocide;
- Mam Nay, aka Chan, former chief of interrogation at S-21, currently serving as a Royal Government policeman in Battambang Province (absent without leave from his post for the last year, since the arrest of Duch).

When Three Million Died

The world scoffed in 1980, when the Cambodian government announced that three million Cambodians had died during the Khmer Rouge rule. That amounted to one-third of the entire pre-war population. Craig Etcheson re-examines the evidence.

Many Cambodians believe, almost as an article of faith, that the Khmer Rouge killed more than three million people during the Democratic Kampuchea regime. When this estimate of the Khmer Rouge death toll was first publicized in the early 1980s, commentators in the West almost universally dismissed it as a product of 'Vietnamese propaganda,' an invented figure designed strictly for political purposes.

In later years, more sober analysts examining this three-million figure also discounted it, basing their much lower estimates of the death toll on interview data, demographic analyses, and other statistical methodologies.

Yet, the three-million figure was not a complete invention. In the early 1980s, the authorities of the People's Republic of Kampuchea (PRK) carried out what amounted to a national household survey, aiming to interview every head of household in the entire country about what had happened to their families during the Pol Pot regime.

On July 25, 1983, the 'Research Committee on Pol Pot's Genocidal Regime' issued its final report, including detailed province-by-province data. Among other things, their data indicated that 3,314,768 people lost their lives in the 'Pol Pot time.' But that report was quickly forgotten inside Cambodia, and it never became known outside of Cambodia.

More than a decade later, researchers working at the Documentation Center of Cambodia discovered many of the records from this remarkable research project. Those records allowed Documentation Center researchers to reconstruct the methodology employed by the PRK Research Committee, and they detected some flaws in their research design that they believed would tend to lead to an overestimation of the total casualty figure.

The Research Committee interviewers of the early 1980s had gone from house to house, and from village to village, collecting death tolls from each head of household. It appeared, however, that they did not adequately account for the fact that extended families are usually spread out across more than one household, and therefore double counting of some victims could occur based on reports from different households belonging to the same extended family.

The Documentation Center subsequently concluded that the 3.314 million figure reported by the PRK Research Committee may have been overestimated by perhaps 50 percent, putting the actual death toll somewhere nearer to two million.

Over the last five years, researchers at the Documentation Center of Cambodia have continued to quietly and systematically study this elusive question of 'The Number.' They have been using a new methodological approach: mass grave survey research. The Documentation Center is in the process of attempting to locate and map each and every mass grave in Cambodia.

Although this work is not yet complete, the results to date are quite startling. So far, 20,438 mass graves dating from the Khmer Rouge regime, spread all across Cambodia, have been precisely surveyed using modern mapping technologies. According to the Documentation Center data, these mass graves contain the remains of 1,110,829 victims of execution.

Let's look a little more closely at that number. By the end of 1999, Documentation Center mass grave mapping teams had made at least one visit to 144 of Cambodia's 170 districts, and in the process had surveyed approximately two-thirds of Cambodia's subdistricts. Many subdistricts in the northern and northwestern regions of the country have not yet been carefully surveyed, due to obvious security considerations -- this is the heart of the 'former' Khmer Rouge zones.

Because it is suspected that populous northwestern provinces such as Battambang and Banteay Meanchey had very high rates of execution during the Khmer Rouge regime, it is likely that the estimate of the number of victims in mass graves will rise significantly when the mapping surveys are finally completed. The total number could reach as high as 1.5 million.

The 20,000 mass graves mapped so far are virtually all located at, or near, Khmer Rouge security centers. Eyewitnesses at most of these mass grave sites have testified that the graves contain victims brought there by Khmer Rouge security forces, and that the victims were murdered either in the adjacent prisons or at the mass grave sites themselves. Thus one can conclude that virtually all of the mass graves contain victims whose cause of death was execution by the Khmer Rouge.

What about other causes of death during the Khmer Rouge regime, such as starvation, disease, and overwork? Anecdotal evidence from survivors strongly suggests that the death toll from these other causes of death was also very high. How high?

According to historian Ben Kiernan, data collected by Milton Osborne suggested that executions amounted to only 31 percent of all deaths during the Khmer Rouge regime. The demographer Marek Sliwinski estimates that about 40 percent of the death toll resulted from execution, 36 percent from starvation, 13 percent from disease, and the remainder from either combat or natural causes. Other work carried out by a political scientist, Steve Heder, suggested that different proportions of the total death toll could be attributed to execution for urban versus rural dwellers, about 33 percent among the urban population ('new people') and 50 percent among the rural population ('base people').

Thus the various estimates of the proportion of deaths resulting from execution range from a low of about 30 percent for the entire population to as high as 50 percent among the rural population.

The implications of these figures are enormous. If these calculations of the proportion of deaths due to causes other than execution are accurate, then we begin to approach an astonishing conclusion. It begins to look possible that the original Cambodian estimate of 3.3 million deaths during the Khmer Rouge regime might be very nearly correct.

If as little as 31 percent of the death toll was the result of executions, then a total of 3.3 million deaths would imply slightly more than one million executions, and the Documentation Center data suggest they have already found more victims of execution than that. If we apply Heder's top estimate of 50 percent for the rural population to the entire population, and find upon the completion of the mass grave surveys that the number of suspected victims of execution is around 1.5 million, then we again end up with a figure in the vicinity of three million total dead

in the Pol Pot time.

In either case, we would be driven to the conclusion that not one million, not two million, but rather three million or more Cambodians died during the Khmer Rouge regime.

It is important to note that these figures all represent preliminary findings. More data need to be collected. The existing data from the Documentation Center mass grave-mapping project are far from perfect and contain some uncertainties. Resolving those uncertainties will require further research. That research is continuing at the Documentation Center of Cambodia.

But in the meantime, one thing is clear. It is no mystery why 25 years after the Khmer Rouge came to power, the Cambodian people still suffer from the effects of the Khmer Rouge genocide. And it is no wonder that the Cambodian people continue to demand real justice, in the form of a criminal tribunal fully consistent with international judicial standards, to judge the leaders who killed so many of their mothers and fathers, brothers and sisters, and children.

- **Craig Etcheson** is an independent genocide researcher and Cambodia expert.

Co-opting the Khmer Rouge

In 1979, the Cambodian government ardently supported prosecuting the Khmer Rouge, but by 1999, it opposed trials. George Chigas explains what changed.

On January 7, 1979, Vietnamese troops invaded Cambodia and overthrew the Pol Pot regime. In its place they installed the People's Republic of Kampuchea (PRK), comprised in part of former Khmer Rouge cadres who had escaped internal purges by fleeing to Vietnam. They included the current Prime Minister Hun Sen.

The PRK immediately proclaimed itself liberator of Cambodia from the genocidal 'Pol Pot-Ieng Sary clique' and attempted to defeat the remnant Khmer Rouge forces that had regrouped in the mountains along the Thai-Cambodian border.

The PRK government demanded that the Khmer Rouge be brought to justice, at least partly as a way of affirming its legal and moral authority. In August 1979, the PRK created a tribunal to try Pol Pot and Ieng Sary, the two top Khmer Rouge leaders, in absentia. A jury of ten proclaimed them guilty of three million deaths, and of destroying the religion, economic structure, culture, and family and social relationships of the Cambodian people. The sentence was death.

This message was reinforced in government propaganda and later with national celebrations such as 'Hate Day.' This annual event is dedicated to recalling the crimes of the Khmer Rouge period.

During this period, the U.S. government saw justice very differently. From a Cold War perspective, the invasion of Cambodia by Vietnam was a violation of international law, which accelerated the communist domination of Southeast Asia and posed a threat to American values of democracy and freedom.

As a result, U.S. foreign policy during the 1980s was geared toward ensuring that the PRK remained politically and economically isolated from the international community. The United States also saw to it that the Khmer Rouge retained Cambodia's seat at the United Nations.

Co-option -- and Rejection

Vietnamese troops finally withdrew from Cambodia in 1989, opening a new chapter in the story of the Khmer Rouge. The United States discontinued its support for the Khmer Rouge. In spite of the objections of the Cambodian government, however, the United States (together with China) also attempted to engage the Khmer Rouge in the peace process.

On October 23, 1991, four Cambodian parties and 18 foreign ministers of interested countries signed the Paris Agreement on Cambodia. The Khmer Rouge acted as a full participant and signed the agreement, which made provisions for a cease-fire, UN supervision, demobilization, and disarmament.

This agreement sidestepped any reference to the crimes of the Khmer Rouge (instead, it merely called on the signatories not to 'repeat the policies of the past'). Nor did it give the United Nations Transitional Authority in Cambodia (UNTAC) a mandate to pursue trials against Khmer Rouge leaders or deprive them of privileges. Khieu Samphan, one of the top Khmer Rouge leaders, was appointed to the provisional ruling council that administered Cambodia leading up to UN-administered elections.

These elections took place in May 1993. They produced coalition government formed by Prince Norodom Ranariddh's FUNCINPEC Party (which won a plurality of votes) and Hun Sen's Cambodian People's Party (CPP).

The Khmer Rouge boycotted the elections, just as they had worked to undermine the Paris Agreement. This turned them into international pariahs. But they were still able to sustain a military threat from the Thai-Cambodian border, using proceeds from illegal trade in gems and timber.

Assimilation

After the 1993 elections, the newly formed Cambodian coalition government began to receive substantial international aid. The government also began to apply a carrot and stick strategy toward the Khmer Rouge.

On the one hand, in January 1994, the Cambodian National Assembly passed legislation outlawing the Khmer Rouge. On the other hand, the government began to assimilate Khmer Rouge forces into the army. Former Khmer Rouge leaders were given senior positions in exchange for their defection. The government voiced only as much support for prosecuting the Khmer Rouge as was needed to appease the international community and to intimidate the remaining Khmer Rouge leadership. But it was careful not to jeopardize the policy of assimilation.

Hun Sen began to portray justice in terms of national reconciliation. Peace and stability, he claimed, were preferable to disruptive legal proceedings against the Khmer Rouge. His real goal was to consolidate political power.

Hun Sen's first major success came on September 15, 1996, when the government was able to entice Ieng Sary, the former Deputy Prime Minister of the Khmer Rouge government, to defect in return for amnesty. The amnesty covered his 1979 conviction by the PRK tribunal, which had sentenced him in absentia to death, as well as the 1994 law outlawing the Khmer Rouge.

The amnesty allowed Ieng Sary to bring over former Khmer Rouge troops loyal to him and extend government control over the territories they controlled. It also caused a split within the remaining Khmer Rouge forces. This burst into public view in April 1997, when Pol Pot killed Son Sen (the former Khmer Rouge Deputy Prime Minister) and his family at the Khmer Rouge stronghold in Anlong Veng.

Pol Pot himself was then placed under house arrest by his rival Khmer Rouge leaders Ta Mok, Nuon Chea, and Khieu Samphan. Ta Mok was now in control, and in May 1997, rival Khmer Rouge forces tried Pol Pot in their jungle base at Anlong Veng. He died on April 15, 1998, supposedly of a heart attack.

International Shift

As the Cambodian authorities cooled toward the idea of a tribunal, so the international community embraced it. The United States had come out in support of a trial of the Khmer Rouge in April 1994, when the US Congress passed legislation aimed at bringing the Khmer Rouge leadership to justice. One product of this was the establishment of the Cambodian Genocide Program (CGP) at Yale University.

On April 11, 1997, the UN Commission on Human Rights adopted a resolution (1997/49), which requested 'the Secretary General, through his Special Representative, to examine any request for assistance in responding to past serious violations of Cambodian and international law.'

On June 21, 1997, the two prime ministers of Cambodia (First Prime Minister Norodom Ranariddh and Second Prime Minister Hun Sen) responded to the Commission resolution by requesting the assistance of the United Nations and international community 'in bringing to justice those persons responsible for the genocide and crimes against humanity during rule Khmer Rouge rule from 1975 to 1979.'

From the time of this letter until today, the Cambodian government and the international community have been playing a complicated chess game, which finally appears to be leading to a mixed (national and international) tribunal for the former Khmer Rouge leaders.

- George Chigas is Associate Director of the Cambodian Genocide Program at Yale University. This article has been extracted from a longer version, which ran in the Bangkok Post on March 19, 2000.

End of the Road for the Khmer Rouge- or a Travesty of Justice?

Will the proposed compromise put an end to the long trauma of Cambodians and see justice done? Or will it result in yet another betrayal? Craig Etcheson dissects the proposal and speculates on the possible pitfalls.

Jurisdiction

Following the exchange of letters in late May 2000 between the Royal Cambodian Government and the United Nations, there appears to be agreement in principle on the general outlines of a tribunal to try Khmer Rouge leaders on charges of war crimes, genocide, and other crimes against humanity.

The next step is for the Cambodian National Assembly and Senate to debate and presumably pass the draft law on the tribunal, based on the formula agreed by the government and the United Nations. However, several key sources in Cambodia have suggested that the parliament may make significant changes to the agreement in the course of debate. Some of these changes could be unacceptable to the United Nations and drive the whole issue back to the bargaining table, or perhaps kill the deal altogether.

The temporal jurisdiction of the tribunal -- that is, the time period for which violations of the law could be prosecuted -- would be from April 17, 1975 to January 7, 1979.

Personal jurisdiction -- that is, who could be prosecuted -- remains somewhat ambiguous. The most recent draft of the law speaks of 'senior leaders of Democratic Kampuchea and other persons responsible for the most serious violations' of law. (Democratic Kampuchea was the name the Khmer Rouge gave to their regime.)

The subject matter jurisdiction -- or applicable law -- includes war crimes, genocide, crimes against humanity, destruction of cultural property, and crimes against internationally protected persons. The penalties are imprisonment from five years to life. The Cambodian constitution bans the death penalty.

The tribunal would be seated in Phnom Penh and would be constituted as a special court under Cambodian law. It would be three tiered: a court of first instance (or trial chamber), an appeals chamber, and a supreme court.

The trial chamber would consist of five judges, three Cambodians and two foreigners; the appeals chamber would have seven judges, four Cambodians and three foreigners; and the supreme court would have nine members, five Cambodians and four foreigners.

Prosecutions

The Cambodian Supreme Council of the Magistracy (a body dominated by members of the ruling CPP) would appoint the Cambodian judges, while the UN Secretary-General would

nominate the foreign judges. Decisions in all chambers of the tribunal would be taken by a so-called 'supermajority,' meaning that a majority of the judges plus at least one foreign judge would have to concur in order to achieve a conviction.

How prosecution would be handled has been a point of sharp contention during the negotiations. In a potentially very confusing and unwieldy arrangement, there would be both investigating magistrates (as in the civil law system) and prosecutors (as in the common law system). Presumably, the investigating judges would be charged with carrying out the initial investigation and recommending cases to the prosecutors. The prosecutors would then be responsible for proving the case in court.

The offices of both the investigating judges and the prosecutors would be structured with one Cambodian and one foreigner, working together as co-equals. In other words, there could be co-investigating judges and co-prosecutors.

The Cambodian side had insisted that for any case to proceed, the Cambodian and foreign co-prosecutors would have to agree. The United Nations viewed this as unacceptable, on the grounds that it theoretically gave the Cambodians a method to veto certain cases on political grounds and allow the government the option to protect certain favored former members of the Khmer Rouge. One example might be Ieng Sary, Foreign Minister and Deputy Prime Minister of the Khmer Rouge state of Democratic Kampuchea.

US Senator John Kerry (D-MA) proposed a compromise formula, which was accepted by both the Cambodian government and the United Nations, resolving the deadlock. Kerry's compromise simply applies the supermajority principle to potential disputes in the office of the co-prosecutors.

Under this mechanism, a disagreement between the Cambodian and foreign prosecutors over whether to prosecute a particular person would be referred to a specially constituted panel of Cambodian and foreign judges drawn from tribunal chambers. They would decide the issue based on the supermajority principle.

Exactly what sort of disputes might arise remains somewhat ambiguous. They might involve questions of jurisdiction, questions of the prima facie strength of the case, or possibly other issues.

Finance

Financing for the tribunal would come mainly from a trust fund established by the UN General Assembly. Such matters in the UN General Assembly are handled by an organ called the 'Fourth Committee,' widely known as an extremely deliberate body. Thus it might take some time for the appropriate financing mechanism to actually be established, and even more time for sufficient voluntary contributions to accumulate in the trust fund to support the operations of the tribunal.

Because so much preparatory work was required, two full years passed between the decision by the UN Security Council to establish the ad hoc International Criminal Tribunal for the former

Yugoslavia (ICTY) at The Hague and the first working session of the ICTY. It also took two years to establish the ad hoc International Criminal Tribunal for Rwanda (ICTR).

One might think that the United Nations would move fast on Cambodia. Yet the UN bureaucracy has a logic all its own, and there are also many complications in the case of Cambodia that were not present in the cases of the ICTY and ICTR. Even in the event that the United Nations and Cambodia were to seal a final deal in the coming weeks, we should still expect a substantial delay before all the necessary financial and logistical arrangements are completed and an actual tribunal could begin hearing cases.

Turmoil in the Ruling Party

All these considerations are in the realm of conjecture. There still is no 'deal.' But there is great turmoil on the issue within the ruling CPP. Opinion is bitterly divided between -- and even within -- two camps.

On one side, there are three schools of opposition to a tribunal, or at least to intensive UN involvement in a tribunal.

One group, which we can call the 'nativists,' opposes any UN participation in a tribunal. This reflects an abiding revulsion at external interference in the affairs of the Cambodian state, conditioned by centuries of foreign meddling in Cambodia's affairs.

Another group, who we will call the 'rejectionists,' opposes the entire idea of any tribunal on the grounds that it could be harmful to national reconciliation.

A third group is one we can charitably label the 'protectionists.' They feel there are simply too many skeletons in the CPP's closet to risk a free, fair, and independent Khmer Rouge tribunal. Some members of this third group definitely have something to fear from a tribunal that might delve deeply into precisely who did what to whom.

These three strands of opposition to a tribunal in the CPP are countered by three other loose groupings in the party who support the idea of vigorous international participation in a genocide tribunal.

One of these, which we might refer to as 'internationalists,' understands that cooperation with the United Nations on the tribunal can bring many side benefits, ranging from increased bilateral and multilateral financial aid to greater political credibility in international fora such as the Association of South East Asian Nations (ASEAN).

Another group, which might be labeled the 'modernizers,' looks more to the many domestic benefits that might result from a well-conducted tribunal. These could include combatting the culture of impunity and providing a salutary example of the value of an independent judiciary.

Finally, there is a group we might call 'triumphalists.' This group wants to see a full-scale tribunal for the Khmer Rouge and wants to have that tribunal fully legitimated by the

international community. This would amount to a final act of revenge against those who destroyed Cambodia's revolution and wrought so much havoc. It will also provide final 'proof' of the correctness of the party's perception of its own historic legacy.

How will Hun Sen find a balance between these competing perspectives? It could prove to be one of the greatest political challenges of his long career.

Questions and Risks

Beyond the political considerations, there are many potentially vexing technical concerns.

Witness protection has received little attention during the negotiations. The same is true of providing capable counsel for defendants. The rules of procedure for the tribunal must also be hashed out. Although there are several ready models to draw from, the history of the negotiations to date suggests that the Cambodians will not meekly accept a UN formula based, for example, on the ICTY and ICTR.

Issues like these have been raised by a number of critics of the emerging deal. Khmer Rouge scholar Steven Heder has argued that Hun Sen intends to follow the model of international justice used during most of the twentieth century. Most likely, says Heder, that means that he will impose a cynical and politically inspired 'victor's justice' on the Khmer Rouge. In the process he would run rings around efforts by the international community to encourage impartial justice.

Brad Adams, an attorney with broad human rights experience in Cambodia, has argued that the proposed model would constitute a major setback for efforts to deter violations of international criminal and humanitarian law. It would, says Adams, create a tragic precedent that regimes elsewhere in the world could exploit if they wanted to avoid the scrutiny of a future International Criminal Court.

Paul C. Grove of the International Republican Institute has argued that the behavior of the Cambodian government with respect to the tribunal is of a piece with its record on illegal land confiscation, demobilization of soldiers and militias, terrorism, and narcotics and human trafficking. Grove worries that the political will to address these issues in an effective manner probably does not exist, and that the international community would be 'willfully blind' to continue indulging the regime.

Human Rights Watch has argued that the tribunal would -- as currently constituted -- amount to second-class justice for Cambodia. Human Rights Watch argues that the United Nations should require the same standards of jurisprudence and judicial independence as have been applied in the cases of the former Yugoslavia and Rwanda.

There is no avoiding the fact that all such matters are deeply political and that politics -- as they say -- is the art of the possible. Yet supporters of the emerging deal are left in the uncomfortable position of arguing that some justice is better than no justice, and that the best is the enemy of the good. It may not be possible to obtain 'perfect justice' in the case of the Khmer Rouge, whatever

that might mean. It might not even be possible to achieve moderately effective justice.

The question is how much justice is enough to make the project worthwhile -- and how much would amount to an unacceptable risk. There is clearly a risk that the reputation of the United Nations could be further tarnished and that an unfortunate precedent could be set for future attempts to prosecute war crimes, genocide, and other crimes against humanity.

Finally, it is pertinent to recall that we still have not seen the formal promulgation of a law. In fact, at the beginning of July 2000, the draft tribunal law was not yet even on the agenda of the Cambodian National Assembly for debate. Thus, despite some encouraging signs in recent months, it remains to be seen if an impartial and effective Khmer Rouge tribunal will ever be established -- or if the Khmer Rouge will continue to enjoy the impunity they have maintained for more than 20 years.

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In the next Issue: The Human Rights Community