



On the Record: Civil Society and the Tribunal in Cambodia

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The Legal Experts

In Issue 4, legal experts assess the tribunal from a legal perspective. Sam Sok Oeun, the head of the Cambodian Defenders Project, feels that a tribunal will bring many benefits to Cambodia's weak legal system. He draws a distinction between top leaders of the Khmer Rouge, who should be tried, and lower-level leaders, who should be given an amnesty if they tell the truth. There is also a piece by Dr. Kao Kim Hourn that speaks of justice, the trial, its timing, security, amnesty and the role of civil society.

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From the AP Editorial Desk

The Khmer Rouge targeted lawyers and judges for extermination, and only a handful survived. As a result, Cambodia's legal profession has had to build itself up from ground zero. In this issue, two surviving legal experts look at some of the legal issues surrounding the tribunal.

Throughout most of the 1980s, Sok Sam Oeun lived in refugee camps. Today, he heads the busy Cambodian Defenders Project, which provides legal services for Cambodia's poor. Sok Sam Oeun is impressive in court, where he invariably knows more than the judges and lawyers (who usually have less training than he does). But nowadays he tends to spend more time in administration and legal punditry than in court. He serves on many committees and has been outspoken on several controversial episodes in Cambodia's recent history -- notably the polarized 1998 elections. He has also provided the most detailed legal analysis of the draft tribunal law.

Sam Sok Oeun lost several family members to the Khmer Rouge. In the longer version of the article that follows, he started out by describing his own personal feeling of terror at being a victim. He also lamented the lack of confidence in law that resulted from the Khmer Rouge period. The article looks at how the government's position has changed repeatedly, and at the loopholes in the draft law. Sam Sok Oeun feels that a tribunal will bring many benefits to Cambodia's weak legal system. He draws a distinction between top leaders of the Khmer Rouge, who should be tried, and lower-level leaders, who should be given an amnesty if they tell the

truth.

Kao Kim Hourn, who authors the second article, holds a PhD from the University of Hawaii. In our interview, which lasted two hours, he exhibited skills learned during his education -- a sharp mind and thoughts of a trained analyst. Talking without notes he covered almost every topic related to justice and reconciliation of the Khmer Rouge: truth, justice, history, the timing of a trial, security, amnesty, punishment, forgiveness, and the role of civil society. Dr. Kao Kim Hourn also recalled his own nightmares. During his studies, he was nicknamed 'the screamer' by his college dorm-mates because he used to cry out in his sleep.

Dr. Kao Kim Hourn's Cambodian Institute for Peace and Cooperation (CICP) has a long history of organizing large meetings around sensitive issues. These provide an opportunity for senior government officials to meet civil society on neutral ground. The institute is exploring the possibility of holding a conference on truth, justice, and reconciliation related to the Khmer Rouge era.

Legal Standards and International Principles by Sok Sam Oeun

At first I was very happy to hear that both Co-Prime Ministers sent a letter to the U.N. General-Secretary to request assistance in setting up an international tribunal for Khmer Rouge leaders. However, I was later shocked when I heard that the government changed its position and stated they did not need assistance from the United Nations anymore. Now, I am hopeful again, because the Royal Government drafted a law for an extraordinary tribunal to try senior Khmer Rouge leaders.

If this tribunal is conducted well, in accordance with international standards and principles of fair trials, it can have at least four following good results: first, to provide justice to Cambodian people who are victims of this regime; second, to heal Cambodian society and end nightmares of Cambodian victims; third, to find the truth, so that Cambodians and the rest of the world can know why 1.7 million people died; and finally, I hope that this tribunal can serve as a model to show Cambodian people what the principles of a fair trial are.

Although there have been concerns that this tribunal could cause a new civil war, I believe that now all Cambodian people want peace and we are tired of war. I believe that all top Khmer Rouge leaders who are found to be responsible for the regime should be punished and that this will deter future dictatorship. The tribunal, which should be organized by the government and the United Nations together, should try the senior Khmer Rouge leaders (at least all members of the Central Committee) and should give amnesty to others who confess in advance. I believe that this solution can achieve both justice and peace. At the same time, we do not want any Cambodian politician to use the people living in remote areas to support guerilla warfare again, so the Royal Government should reach those people by building roads and bringing development and telecommunication.

To heal Cambodian society, it is of utmost importance that the people have confidence in the tribunal, and that it be done fairly. Although there is currently an agreement between the Royal Government and the United Nations to have a mixed tribunal, many points are not clear and

transparent enough. Those unclear points can make the people lose confidence in the tribunal. At present, the people have no confidence in the Cambodian court system, so they do not trust Cambodian judges and prosecutors. The order for re-arrests that was made by the executive branch of the government shows the lack of confidence in the current court system. Thus I think that the United Nations should play a greater role in establishing this tribunal. The United Nations should be the guarantor for the independence of judiciary.

The current draft law of the tribunal cannot ensure the independence of the judiciary and the effectiveness of the tribunal. The draft law states that the Supreme Council of the Magistracy (SCM) appoints all Cambodian and foreign staff. But I do not think that the people have enough confidence in the SCM to be strong and independent. There are several examples of cases where the SCM has not used its powers appropriately.

To obtain a fair judgment, we should have qualified prosecution, qualified defense, and competent judges through a fair process. To have good prosecution, we should have competent and professional investigators to gather evidence to give to the prosecutor. The prosecutor should be neutral and competent so he or she can prosecute properly. Investigating judges should not be included, or if they are, their role needs clarification.

Besides good prosecution, the rights to qualified defense counsel should also be guaranteed. If the defendant cannot afford a lawyer, the United Nations and the government should be responsible for hiring a qualified lawyer of their choice and should pay for the lawyer.

The independence of judiciary is a very important factor in a fair trial. The judge should be free to make decisions without fear, without interference from other branches of the government or from others with power, without misleading, irrelevant, or illegally obtained evidence, and without fear of job security.

I would like to recommend that the draft law for the tribunal for the Khmer Rouge leaders include the following:

- A foreign chief prosecutor appointed by the United Nations
- Clarification of 'the most serious violations'
- All judges, prosecutors, and chief administrators to be appointed by the United Nations
- Key Cambodian posts to be matched by foreign counterparts
- Clarification of the role of investigating judges
- Security for trial participants
- Internationally accepted rules of procedure
- An autonomous budget for the tribunal
- Arrest of indictees
- Right to counsel
- Right to appeal
- A royal pardon
- Sok Sam Oeun is Executive Director of the Cambodian Defenders Project. The full recommendations are available from the Defenders Project.

Our History Must be Written, so we can Come to Terms With Our Past by Dr. Kao Kim Hourn

The Cambodian Institute for Peace and Cooperation (CICP) held a conference from January 12-14, 2000, on 'The New Millennium: Managing the Past and Building the Future.' The conference was very timely, and it was a start. But we only did a two-hour session on the legacy of the Khmer Rouge, which was not enough.

We now have a chance for an open-ended discussion. Our hope is to contribute as much as possible to the process. If we don't do so, we will be responsible. Everyone should submit their contributions. Based on this input we can have a better law that can lead to a better trial. A good trial can contribute to healing and ultimately to national reconciliation. Time has been lost already. Time is important to keep up the momentum of the issue. Many Cambodians still have nightmares about the past. We have to deal with the past in a constructive way.

-Justice

It is important that we not seek justice for the sake of revenge. Truth is more important than justice. The Khmer Rouge dilemma is every Cambodian's problem. If we start to talk about it, everyone will have to face their pasts. We have to be sensitive, but at the same time should not let it go. History cannot be subtracted, added, or divided. History must be written -- why and how it happened. This is important for Cambodia and should be done in a constructive and non-confrontational way. The purpose is to learn more and to think of how we would deal with such situations in the future. We have to find those who are responsible, and by doing so we will go through a healing process. National reconciliation is important, but not at the expense of truth or justice.

-Trial

It is imperative that Cambodians come to terms with the past. We have a moral responsibility for the people who died during the Khmer Rouge period. We should not conduct a trial for the international community, but to satisfy the needs of the people of Cambodia. There should be more interest in determining what the people want and need, and the draft law should be based on those needs. Of course there will have to be some compromises because the needs of all people are not exactly the same.

I think it is important to have a mixed trial including Cambodians and international participants. We have to make our standards as good as anyone else's. Why should Cambodians have inferior standards? We should have excellent standards. This is vital because if it is only a Cambodian trial, people won't trust the outcome. Because the people have been living under so many different regimes, they now don't trust the system, especially the courts.

It is important for the government to gain the confidence of the people. A well-conducted trial would be the best opportunity to regain the lost confidence of the people. If we are not serious about this, it would be a terrible thing. We need to include national judges who are doing a good job in drafting.

Another reason it is important to have a trial is that this is the only way to build a culture of justice in society. It is essential to establish the rule of law and to reverse the process of the culture of impunity. A trial will also serve to make the Cambodian leadership more accountable.

We should look at the spirit of the law. This is more important than procedure. If we get bogged down with procedures we will lose the focus in determining where we need to go. We all want to have a credible, free, and fair trial. In this context, we have to build a consensus and national spirit. The prime minister has more to gain from a credible trial than one that is not. This is a key political issue. If he can deal with this trial in a credible way, then he can be included in history with other great leaders of Cambodia. This issue is too important to let it go. I still have a great hope in this government to deal with the trial.

Although I am sure that my view is not different from many other Cambodians, it is my own view and we need to look at the views of all Cambodians. We need to understand views of the silent majority, because it is vital to be inclusive and participatory.

Who Should Be Tried? We must, however, realize that we can't put everyone on trial. This would be impossible and costly, with other serious implications. We should also have a fairly speedy process because this affects the whole country: a trial of the Khmer Rouge leaders will be like a trial of the whole country. Concerning how many will go to trial, this is not just a question of number, but we have to ascertain who were mainly responsible for the policy and implementing that policy at the highest level. Those who are found guilty have to be dealt with according to the rule of law.

At the next level, we must help them come out at perhaps at some kind of a truth commission. We need to find out what they did and why. Then they should be forgiven and let go. The lower-level Khmer Rouge we should forget, as they were also basically victims. They should be given courses on human rights, democracy, and morality, to improve their integration into society. They should not be kept together in one place. They should be scattered through the country and return to their native villages. This is the only way to become integrated into society. But this cannot be done by coercion. They must be offered support. This is the only way to socialize people, so they can work on their own.

Another important issue is this question of witnesses and also suspects. We have to be clear about this. If we call witnesses to the stand and turn them into suspects, this will have very adverse consequences. The trial must keep the numbers in mind, and there must be enough evidence. The evidence must be researched carefully. There must be realistic ideas about who to prosecute. The trial should not raise false expectations. If the trial does not meet the expectations of people both inside and outside the country, it will be condemned.

-Timing of a Trial

Timing is of key importance. We can't wait until all the Khmer Rouge leaders die. We have to try them while they are still alive. But let me emphasize, this should not be a witch hunt. It is not a way of getting even. It is very important for the national psychology. We have to manage the

challenge of the Khmer Rouge legacy, and we have to deal with it in our society.

At the same time, we should not rush the trial. If we don't do this properly we can fumble the issue, which would have negative consequences. When morality has declined in Cambodia, a proper trial on the Khmer Rouge issue can help strengthen and re-arm morality in society.

But we must understand that peace is still fragile in Cambodia. Political stability is at its early stages. Therefore, we must think of the conduct of the trial to ensure that we don't go back to square one. We can ensure this by beginning a process of discussion and trying to increase the confidence of the general public. This of course includes the people living in the former Khmer Rouge zones. The ex-Khmer Rouge soldiers must be integrated into society. They should understand that the trial is not about revenge. There should be guarantees of a fair trial by the international community if there is not yet adequate confidence in Cambodia.

The trial, however, should not be a drawn-out process. This could be very costly in every way -- financial, political, and psychological -- not just for the people involved, but also because the international community will scrutinize the process and Cambodian development will be on the back burner. If it is a long drawn-out process, it will hurt the economy, tourism, and the image of the country. Thus, the international community should also think of the negative effects of the trial and plan ahead to help Cambodia. If not properly conducted, the trial will undoubtedly have negative effects on the economy and nation building.

-Security for the Trial

The government needs to provide security for the people living in the former Khmer Rouge areas especially during the period of the trial and after the trial. It will be tense. The government should be prepared to face the challenges of the consequences of organizing the trial. They should anticipate the problems that could arise. These problems could range from an attack to harassment of witnesses. We will have to be very careful. We have to protect everybody involved in a trial. There will be major financial implications of this.

-Amnesty and Punishment

Amnesty is the King's prerogative. I believe that inserting a clause in the draft law about amnesty would be unconstitutional, because in our constitution only the King can give an amnesty. We should not tell the King what to do, because he is fully responsible for any amnesty. In my view, if he thinks there are grounds for amnesty then he has the right to do that -- it is in our constitution. To induce the former Khmer Rouge to come to the trial, it may have been necessary to offer them amnesty. But of course they should admit their wrong doing if they are given amnesty. Amnesty can be thought of in different ways, as it can range from a reduction of a sentence to a complete amnesty. The King, in any case, would be morally responsible as well as politically responsible for any amnesty decision.

My notion of justice for those who are suspected of committing crimes is that they should be given a fair trial. But we should not be vengeful. This should not be done for political convenience either. Justice should not be defined by the victors only. Justice should be kind and

generous. At the same time, it doesn't mean justice should condone those crimes. He who grants amnesty is wholly morally responsible. In the case of an axe murderer who committed heinous crimes, an amnesty would be impossible. However, the number of years of the sentence could be reduced for various reasons as long as the reasons are in the national interest of Cambodia, such as for the maintenance of peace and stability. For example, if someone is given a life sentence and it is reduced to 20 years, but that person is already 70 years old, it will depend on how you look at it.

Amnesty for the low-level people must be given -- but only for those who were following orders, not for those at the high level of decision making. The names of those high-level persons are known already.

-The Debate on the Trial

It is also important that when the National Assembly debates this draft law that it is broadcast on television. The National Assembly should welcome comments from the people throughout the country. This should be an open, transparent process. It is the most important national issue facing us today.

The government should initiate the process, and then the National Assembly should debate. The Senate will also have its turn. Civil society organizations and other interested parties outside should also discuss. We must use all channels and we should not get bogged down pursuing one particular route. There are so many ways to approach this issue. It is important that we don't have pre-judgment. We must let all views be heard. There should be meetings to send ideas to the government and the National Assembly about what is best to do on this issue.

The government should continue to tolerate the contending views on the Khmer Rouge issue. They should let the people talk and let their voices be heard. I commend the government because so far it has been able to do this already. This is a strength of the government. It has shown already that it has been accepting of dissenting views. This is an important step forward. Hopefully this process will lead to even more vigorous, open debate in the future.

-Role of Civil Society

Civil society should be more proactive on this issue. We all have a role to play. Those who want to express new ideas -- let them be heard. Some people focus only on the positive; others only on the negative. But it is nonetheless important to hear all the views. Not about what was right and wrong, but Cambodia has to come to terms with its past. We have to bury the past somewhere. That doesn't mean we should forget the past, but we have to close the sad chapter otherwise it will continue to haunt us. As Cambodians, we must proceed on this issue as soon as possible. We must not let this issue be a burden for the society and for the future of this country. It has already been a burden for too long.

The civil society debate could be done in parallel. We should not think that the government and National Assembly have absolute monopoly or ultimate wisdom. The people should have the right to participate as well.

- **Dr. Kao Kim Hourn** is Executive Director of the Cambodian Institute for Peace and Cooperation (CICP).

In the next Issue: Defining Reconciliation