

# THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA -- A “MAGIC TREE?”

*Cambodia Learning Community*

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*On the site of the Cheong Ek “killing fields” outside Phnom Penh, a large tree stands. During the Khmer Rouge regime large speakers were attached to that tree over which loud music was played during the executions in order to mask the sounds of the nocturnal mass murders, including the screams and moans of the dying victims. It was called the “Magic Tree.”*

## **INTRODUCTION**

The Extraordinary Chambers in the Courts of Cambodia (ECCC) represents an attempt, almost 30 years after the fact, to bring to justice individuals responsible for the murder, torture and willful starvation of hundreds of thousands of Cambodians during the period April 1975 to January 1979, when the country was called Democratic Kampuchea by its Khmer Rouge masters. This tribunal faces enormous challenges as it goes about its task of fairly and justly bringing accused wrongdoers to trial. The problems confronting the ECCC are both inherent in its own charter and created by outside influences. The Tribunal’s difficult task is further complicated by only lukewarm Cambodian governmental support and underfunding by those nations supporting it financially.

The question is whether the ECCC can overcome these obstacles and make a significant contribution to both the practice and respect for international and Cambodian law or whether it will become merely a convenient vehicle for evading responsibility for the crimes of Democratic Kampuchea.

## **THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

On the outskirts of Phnom Penh, a large complex of buildings houses the Tribunal known as the Extraordinary Chambers in the Courts of Cambodia (ECCC). This is the court which has been convened to conduct trials of former leaders of the Khmer Rouge regime of Cambodia. From 1970 to 1975 a bitter civil war raged in Cambodia between the armies of strongman Lon Nol, aided by the United States, and the forces of the communist Khmer



Rouge. The Khmer Rouge defeated the Lon Nol regime and occupied Phnom Penh on April 17, 1975.

Even before that date, the Khmer Rouge had controlled large areas of Cambodia. After completing their conquest of the country, they inaugurated one of the most despot, murderous regimes in the history of political systems. As many as two million people perished<sup>1</sup> during the four years in which the Khmer Rouge controlled the Cambodian government. The forced overnight evacuations of all cities and large towns, the systematic starvation of former urban residents or “new people,” the wanton torture and cruelty, and the arbitrary execution of perceived class enemies have all been graphically documented in books and films.<sup>2</sup>

Headed by Pol Pot, the Khmer Rouge regime of Democratic Kampuchea was the most complete slave society ever created, at least in what is considered modern times. Marriage was abolished, except as dictated by the state, family ties were denigrated, education was considered a counter-revolutionary attribute of the elite and bourgeoisie, and virtually all intellectual activity was forbidden. Money was abolished, and all commerce was to be conducted by barter. The aim was for the entire Cambodian population to be reduced to the status of mindless ants, laboring as peasants in the fields under the strict direction of the political authorities.

In December, 1978, Vietnam invaded Cambodia, fronted by a group of Khmer Rouge renegades, which numbered among its members the current Cambodian Prime Minister, Hun Sen. The Vietnamese army quickly routed the Khmer Rouge,<sup>3</sup> capturing Phnom Penh on January 7, 1979.<sup>4</sup> The main body of the Khmer Rouge retreated to a small area in the northwest part of the country adjacent to the Thai border around Pailin, where they remained for many years.

In a show trial that was organized by the Vietnamese in 1979, Pol Pot, Khieu Samphan and other Khmer Rouge leaders were convicted in absentia of genocide.<sup>5</sup> No legal action was ever taken, however, against the vast majority of Khmer Rouge, even those known to be particularly responsible for horrendous brutality.<sup>6</sup> Subsequent years were consumed with a confusing disjointed civil war. Capitalizing on international condemnation of the Vietnamese invasion, the Khmer Rouge enjoyed diplomatic recognition from a number of countries and controlled the Cambodia seat in the United Nations.<sup>7</sup> In 1991 the United Nations sponsored a political settlement and embarked upon the largest peacekeeping operation in its history. Unsurprisingly, the Khmer Rouge failed to cooperate, and resumed its conflict with the Phnom Penh government, by then headed by Hun Sen.

Beginning in the mid-1990s, the Khmer Rouge began to fall apart. Ieng Sary, a Khmer Rouge government official, defected and was ultimately pardoned by King Norodom Sihanouk. Pol Pot was deposed by the remaining Khmer Rouge leadership and died in captivity in the jungle in 1998. Its primary military leader, Ta Mok, was captured in 1999, and the Khmer Rouge became effectively extinct.



### ORIGINS OF THE TRIBUNAL

The horrific crimes of the Khmer Rouge generated a call to bring its leadership to trial<sup>8</sup>. Negotiations between the United Nations and the Cambodian government to establish a tribunal were long and tortuous.<sup>9</sup> In fact, the United Nations pulled out of these discussions in 2002 in disgust, declaring that it was impossible to convene a court which would conform to internationally recognized standards of law. Negotiations were later resumed and the compromise eventually resulted in the present court.<sup>10</sup>

### THE ECCC

Any “war crimes” tribunal is as much a political exercise as it is a legal one. It is by definition a proceeding imposed by the victor upon the vanquished. There is always some degree of suspicion that such a tribunal is merely a thinly disguised form of retribution. The trial of the Nazi leaders at Nürnberg was the first widely publicized proceeding of this nature. A number of other tribunals have been organized - Rwanda, Yugoslavia, and Sierra Leone are but a few examples.<sup>11</sup> The ECCC is unique among international tribunals of this sort, in that it is the first tribunal in which the proceedings are held within the country where the crimes occurred. It is a “mixed” court of both Cambodian and international judges, unique in that a majority of the judges are Cambodian nationals. While this represents a clear victory for Cambodia in the overall negotiations, the juridical makeup of the court has created its own set of problems.

First, the Cambodian judiciary is widely viewed as having insufficient legal training to properly conduct a complex proceeding of this sort.<sup>12</sup> Second, the Cambodian judiciary as a whole is often seen as an instrument of government policy and needs rather than as independent jurists capable of judging legal issues on their merits.<sup>13</sup> The concept of the judiciary as an independent and coequal branch of government, one of the fundamental principles of the American republic, is unknown in Cambodia. Third, any seasoned members of the Cambodian judiciary will likely have had personal experiences with the Khmer Rouge regime. The perspective of those judges would almost certainly be biased, rendering impartial decisions extremely difficult to achieve.

Another unique aspect to the ECCC is that Cambodian law is to be applied in the proceedings. Previous international tribunals have utilized recognized principles of international law. This is complicated by the fact that Cambodian legal principles are undeveloped or unclear in several respects. There is no agreement on how the court will address issues on which Cambodian law provides little or no guidance. However, one issue is clear: there is no death penalty in Cambodia, so the maximum sentence any defendant can receive is life in prison.

## THE DEFENDANTS

The charter of the ECCC extends to trials of “those most responsible” for Khmer Rouge atrocities. It is unclear how far down the Khmer Rouge chain of command that description applies. What is certain is that many thousands of Cambodians who willingly engaged in mass torture and murder can continue their existence without fear of arrest and incarceration by the tribunal. The five individuals currently accused certainly qualify under the term “most responsible,” but many ask whether the description could also be applied to the deputies, assistants, and close collaborators of the accused.

Because the Khmer Rouge was driven from power almost 30 years ago, all of the current defendants and other potential Cambodian war criminals are elderly and may not be in the best of health. All concerned recognize the need to proceed quickly to ensure that the guilty do not evade justice by dying of natural causes before they can be prosecuted. The current defendants listed below are accused of war crimes and/or crimes against humanity.

- (1) **Ieng Sary** was the deputy prime minister for foreign affairs of the Khmer Rouge government and was Pol Pot’s brother-in-law. He was convicted of genocide and mass murder in 1979 by the “People’s Court” organized by the Vietnamese. However, in 1996 he was pardoned by the King. Until his recent arrest, Ieng Sary lived in Phnom Penh for many years. He is in ill health and has been hospitalized for much of his confinement.
- (2) **Nuon Chea** (“Brother Number Two”) is the highest-ranking Khmer Rouge official still alive. He was the deputy secretary of the CPK (Communist Party of Kampuchea). Until arrested some months ago, Nuon Chea lived in peace and relative comfort in Pailin, in northwestern Cambodia.
- (3) **Khieu Samphan** was the Khmer Rouge head of state and occupied several cabinet positions under Norodom Sihanouk prior to 1970 before going over to the Khmer Rouge. He has been described as the chief ideologist of the Khmer Rouge regime. He holds a Ph.D. from the Sorbonne in Paris, and, interestingly, his doctoral dissertation involved recommendations for the evacuation of Cambodian cities to concentrate on the enhancement of agriculture in that country.

- (4) **Kaing Guek Iev (“Deuch”)** was the commandant of the infamous S-21 prison facility at Tuol Sleng in Phnom Penh. This center of torture and execution was responsible for the deaths of many thousands of Cambodians during the Khmer Rouge era. Deuch will be the first accused put on trial because his is considered the easiest case to convict. In interviews he has admitted guilt, but claims he was only following orders.<sup>14</sup>
- (5) **Khieu Thirith** is the wife of Ieng Sary and the sister of Khieu Samphan. She occupied several positions in the Khmer Rouge hierarchy. She is reported to be in a state of mental decline.<sup>15</sup> She is accused specifically of directing and coordinating widespread purges.<sup>16</sup>

Other Khmer Rouge leaders have escaped the judicial process by dying before they could be arrested. Pol Pot himself died in the jungle in 1998 after being deposed by the remnants of the Khmer Rouge leadership. Chhit Choen, better known as Ta Mok (also nicknamed “The One-Legged Butcher”), was captured while still fighting with the last remnants of the Khmer Rouge armed forces. He died in prison in 2006. Kae Pok, a member of the CPK Central Committee, died of natural causes in 2002.

### THE VICTIMS

The procedural rules of the ECCC make reference to the participation of “civil parties” in the proceedings. These “civil parties,” victims who were substantially affected by the Khmer Rouge atrocities, have the power to hire lawyers, question witnesses, appeal rulings of the investigative or trial courts, and press for additional charges to be brought. However, the charter makes no provision for witness protection. This means that victims, who may have reason to fear retribution from former Khmer Rouge members or the families of such, may be reluctant to come forward. On the other hand, the lack of protection for witnesses may also make it more difficult for the defense lawyers to obtain witness testimony helpful to the cause of their particular clients. The ECCC charter has no provision for monetary damages to be awarded any of the victims.

### CAMBODIAN POLITICAL LANDSCAPE

The ECCC faces many difficulties as it proceeds with the trials of the Khmer Rouge defendants. Among the major issues is that it has less than enthusiastic support from the current Cambodian government. A number of cabinet officers and other government officials, including the Prime Minister and effective ruler of Cambodia, Hun Sen, are former Khmer Rouge.

Needless to say, these individuals have no interest in assisting the tribunal in investigating anyone other than the five currently accused or otherwise dredging up evidence pertaining to the Khmer Rouge years.<sup>17</sup>

The ECCC has a three-year life span. Currently, the tribunal is more than one and one-half years into the process, and trials have not yet even started. Court facilities are still under construction. Extensions can be applied for, and it is difficult to envision how the entire process can be completed with respect to those currently accused, let alone any additional defendants, in the remaining time originally allotted.

Perhaps as much as the five individuals who currently stand accused, Cambodian justice is itself on trial in the ECCC proceedings. Cambodian court procedures have been all too often characterized by forced confessions, disregard of defense evidence and arguments, and judgments which are predetermined to suit the political authorities. It may be entirely understandable that Cambodian authorities feel defensive in the face of international criticism of the country's legal system.

#### **A MAGIC TREE?**

The challenges facing the ECCC are daunting. Lack of adequate financing, apathetic support from the host government, and a charter which was cobbled together in an attempt to reconcile virtually irreconcilable positions, all combine to threaten the ability of the Tribunal to fulfill its stated purpose.

If the judges, lawyers, and staff of the ECCC can bring the trials to a successful conclusion with orderly presentation of evidence, impartial weighing of the cases, and verdicts which can be recognized as just and in accordance with applicable legal principles, they will have accomplished something noteworthy under international, as well as Cambodian law.

However, the questions remain: Will the trials of the five accused former Khmer Rouge go forward in a relatively fair, impartial manner, or will the Tribunal be used as a mechanism to railroad the five defendants into oblivion, covering up the more basic issues concerning responsibility for the former regime's atrocities? Can the predominantly Cambodian court conduct itself as a responsible, respected international court of justice, or will "business as usual" procedures dominate? Will the Tribunal fulfill the functions of administering justice, while at the same time fostering reconciliation, or will it be used as another "Magic Tree," making a loud noise to cover up Cambodian reality?

The answers to these questions should become clearer soon enough.



## ENDNOTES

- (1) Estimates of the total number of deaths caused by the Khmer Rouge vary widely. They range from perhaps 600,000 to 1,500,000 to 1,700,000 or as many as 2,000,000. . Compare P. Short, *Pol Pot: Anatomy of a Nightmare*, (Henry Holt & Co., 2004), pp. 10-11, with Henry Kamm, *Cambodia: Report from a Stricken Land*, (Arcade Publishing Co. 1998), p. xix, and L. Ung, *First They Killed My Father*, (Harper Collins Publishing, 2000), p. ix. . Data posted at the Tuol Sleng Prison Museum in Phnom Penh claim that some 3,000,000 died.
- (2) The 1984 film, “The Killing Fields,” is perhaps the most well known. . Other accounts include: Short, *supra*; Kamm, *supra*; *The Quality of Mercy*, by William Shawcross, (Simon & Schuster, 1984); David Chandler, *Facing the Cambodian Past: Selected \ Essays, 1971-1994*, (Silkworm Books, 1996); and *Hear Me Now*, by Sophal Leng Stagg. There are many others.
- (3) The quick collapse of the Khmer Rouge army may be explained in part by Pol Pot’s savage purges of the ranks of the military, as well as of other components of the communist cadres. These purges, as sweeping and brutal as any conducted by Joseph Stalin, drastically weakened the capacity of the army as a functioning organization, as well as impairing the ability to govern generally. *See Short, supra* at pp. 383-401.
- (4) January 7 is still celebrated in Cambodia as Liberation Day, or, in perhaps more politically correct terms, Victory Over the Genocidal Regime Day.
- (5) Ieng and Khieu were later pardoned by King Norodom Sihanouk after defecting from the Khmer Rouge. *See p. 5 below*.
- (6) Isolated prosecutions did occur, however. For example, in 2002, Sam Bith, Nuon Paet and Chhouk Rin, were tried and sentenced to life imprisonment for the 1994 murder of three western backpackers by the Khmer Rouge. Sam Bith recently died in prison.
- (7) After January 1979, the Khmer Rouge was supported by, among others, the United States. This policy was continued until around 1990.
- (8) Publicity concerning the atrocities was cynically exploited by the Vietnamese, anxious for any opportunity to discredit their long-time adversaries.



- (9) For a detailed history of the process of discussions and negotiations leading up to the establishment of the ECCC, see C. Etchison, "A Fair and Public Trial: A Political History of the Extraordinary Chambers," JUSTICE INITIATIVES (Spring 2006).
- (10) See, "Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea," June 6, 2003.
- (11) See, e.g., *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Statute, U.N. Doc. S25704 (May 3, 1993)*.
- (12) Recall that the legal profession was almost entirely exterminated by the Khmer Rouge. See, D. PoKempner, *The Khmer Rouge Tribunal: Criticisms and Concerns*, JUSTICE INITIATIVES, p. 34 (Spring 2006). Many Cambodian jurists have legal backgrounds which would be considered sketchy in western countries. *Id.*
- (13) *Id.* See also, *Report to the U.N. General Assembly of the Secretary General on Khmer Rouge Trials*, 28-30, A/57/769 (March 31, 2003) ("... consistently found there to be little respect on the part of Cambodian courts for the most elementary features of the right to a fair trial.")
- (14) For a rather more sympathetic picture of Deuch, see F. Bizot, *The Gate*, (Alfred A. Knopf, 2003). M. Bizot is one of the very few westerners to have survived imprisonment by the Khmer Rouge.
- (15) Her other sister, Khieu Ponnary, wife of Pol Pot, was severely afflicted with schizophrenia in later years.
- (16) The applicability of the charge of "genocide" to the defendants is far too broad a topic to cover in this paper. The term "genocide" is typically understood to refer to actions taken against some identifiable national, racial, ethnic or religious group. The Khmer Rouge wantonly murdered many hundreds of thousands, but arguably this was a function of class warfare rather than classic "genocide" as the term has been applied to the Nazi Holocaust, the Rwanda campaign against the Tutsi people, and the Serbian war against Bosnian Muslims, among others. However, see, G. Stanton, *The Cambodian Genocide and International Law*, Monograph 41 in *Genocide and Democracy in Cambodia*, (Kiernan, ed.), Yale University Southeast Asia Studies 1993.
- (17) Prime Minister Hun Sen announced in 1998, when accepting the surrender of Khmer Rouge elements led by Nuon Chea and Khieu Samphan, that "... Cambodians should dig a hole and bury the past and look to the future." Fontane, "Cambodia Premier Says No To Trial," *Associated Press*, December 28, 1998, quoted in PoKempner, *supra* at 36.

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