Cambodia, from a Killing Field to a Court of Justice:

Challenges Ahead

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Abstract

This paper examines the process leading to the establishment of the Khmer Rouge Tribunal, analyses the institutional building of the tribunal and its relevance to the issue of justice. The study provides that the Khmer Rouge Tribunal, with the incorporation of Articles 14 and 15 of the ICCPR and the participation of international judges and prosecutors in court proceedings, can meet the basic standards of justice. However, under the current Cambodian judicial system, the court will face several obstacles that might prevent it from providing the kind of justice sought by the Cambodians and by the international community. The main obstacles are the lack of independence, competence, and impartiality of the Cambodian judges and prosecutors, the lack of political will on the part of the Cambodian government, and the difficulties faced by the defense counsel.

Keywords: Cambodia, Khmer Rouge Tribunal, justice

Introduction [1]

The Khmer Rouge Tribunal (KRT) is a product of a long struggle between the Cambodian government and the United Nations (U.N.), within the framework of state sovereignty and international law. As the ex-Australian Ambassador Thomas Hammerberg pointed out, "the Khmer Rouge Tribunal has been shaping up as a classic confrontation between the conflicting demands of national sovereignty and of international concerns that justice be seen to be done" (Phnom Penh Post, March 17-30, 2000).

The establishment of the Khmer Rouge Tribunal is complicated and there are two contradictory views about it. On the one hand, the Cambodian government has stated that the establishment of the KRT will meet the requirements of both the international standards of justice and Cambodian sovereignty (Sean 2005). Un Ning, Vice-Chairman of the Committee for International Affairs and Cooperation in the Cambodian National Assembly, stated that the Cambodian government desires to bring to justice the perpetrators of atrocities during the Khmer Rouge regime for the sake of peace, stability, reconciliation, democracy, human rights, and development (Un 2005).

[1] This paper is based on the author's Master Thesis submitted at the International University of Japan in June 2006

On the other hand, some human rights groups and legal experts have expressed their concern about the issue of justice within the institutional building of the KRT.

This paper, therefore, attempts to examine the process of the establishment of the KRT and analyze the institutional building of the KRT in order to determine if indeed there are some barriers to the court's implementation of justice.

The Road to the Establishment of the Khmer Rouge Tribunal (KRT)

The Democratic Kampuchea or Khmer Rouge Regime, under the leadership of Saloth Sar (alias Pol Pot) and his clique, swept away by the ideology of "peasant utopia", established a regime in which everyone became farmers working in the paddy fields with no markets, no money, no education, no religion, no rule of law, no respect for human rights, with nothing but killings, torture, and starvation, which resulted in the death of about one third of the total Cambodian population. Between 500,000 and one million people were executed, while others died of starvation and untreated diseases (Kiernan 2002: 456-7).

After toppling the Khmer Rouge in 1979, Vietnam pressured the installed government to try the Khmer Rouge leaders including Pol Pot and Ieng Sary for genocide in absentia and sentence them to death. This was, however, generally regarded as a mere "show trial" because there was no defense counsel nor any acceptable due process, both of which are vitally important for the provision of justice and fairness in court proceedings (De Nike *et al*. 2000; Beigbeder 2002: 173-4). After that, any thought of bringing Khmer Rouge leaders to account seemed to have been forgotten both by the Cambodian government and by the international community, partly because of the complexities of the Cold War (Kelly 2005: 29-35) and partly as the price of national reconciliation and reconstruction (Robertson 1999: 288). However, in 1994 the congress of the United States signaled its recognition of the Khmer Rouge genocide by passing a Cambodian Genocide Act, which prohibited further cooperation with the Khmer Rouge and initiated the collection of evidence. Moreover, the establishment of Yale University's Cambodian Genocide Program and Documentation Center of Cambodia were significant milestones in the examination of crimes committed by the Khmer Rouge. In addition, several NGOs became actively engaged in trying to find truth and justice for the Cambodian people (Fawthrop and Jarvis 2004).

In April 1997, after nearly two decades of neglect, the United Nations Human Rights Commission requested the U.N. to examine the possibility of helping the Cambodian government bring the remaining Khmer Rouge leaders to justice. The U.N. Commission on Human Rights made requests to the Secretary General to "examine any request by Cambodia for assistance in responding to past serious violations of Cambodian and international laws as means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability" (Fawthrop and Jarvis 2004: 117). Two months later, in June 1997, the then Co-Prime Ministers Prince Norodom Ranariddh and Hun Sen formally asked the U.N. for assistance to try "those persons responsible for the genocide and crimes against humanity during the Khmer Rouge from 1975 to 1979". It was generally thought that the trials would be similar to the ones that took place in the former Yugoslavia and Rwanda.

The decision of the then Cambodian Co-Prime Ministers to officially request

the assistance of the United Nations was politically motivated. The then Cambodian government wished to divert the attention of the international community from the domestic political tension between the two ruling parties: the CPP (Cambodian People' s Party) represented by Hun Sen and the FUNCINPEC Party (the National United Front for an Independent, Peaceful, and Cooperative Cambodia) led by Norodom Ranariddh. This tension led to an armed conflict between the two Prime Ministers in July 1997, one month after the request to the U.N. for assistance in establishing the KRT. Norodom Ranariddh was overthrown by Hun Sen and the situation continued to worsen until, by mutual agreement, Norodom Ranariddh was allowed to come back in early 1998 and preparations were made for parliamentary elections on 26 July 1998.

After the July crisis in 1997 and especially the death of Pol Pot on 18 April 1998, calls for the establishment of the Khmer Rouge Tribunal became very urgent. A Group of Experts was appointed by the U.N. in 1999 to collect evidence and to examine the nature of the crimes committed by the Khmer Rouge leaders during the period 1975-1979. Based on their research, the Group of Experts concluded that only an ad hoc international criminal tribunal would be effective in bringing justice due to the weak judiciary in Cambodia. The report prepared by the Group of Experts recommended a trial to be held entirely outside of Cambodia, with no Cambodian participation, except in the form of defendants and witnesses.

However, not surprisingly, Prime Minister Hun Sen refused to accept this proposal, referring to Article 6 of the Genocide Convention, which gives priority to the state in which the genocide took place. Hun Sen then proceeded to establish his own body called the "Khmer Rouge Trials Task Force" in December 1999, in an attempt to try the remaining Khmer Rouge leaders within the Cambodian court system with minimal participation from foreign countries. On the basis of this task force, the Cambodian government set up the Extraordinary Chambers to try Khmer Rouge leaders for genocide and crimes against humanity during the period from 1975 to 1979.

In response, the U.N. made a statement requesting more independence from the Cambodian government and renunciation of the amnesty provided to Ieng Sary by Phnom Penh in 1996. Moreover, U.N. Secretary General Kofi Annan stated that a mixed tribunal would be possible only if the Cambodian government resolved the following four fundamental issues: "the status of the foreign prosecutor; apprehension of suspects; amnesty; and the number of foreign judges" (Associated Press, September 16, 2004). However, the negotiations became stalled since Hun Sen's cabinet was not willing to accept the conditions of the U.N.

In spite of these differences, the Cambodian government passed a "Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea" (ECDK Law) in January 2001. This law, promulgated on 10 August 2001, stipulated that the Extraordinary Chambers would be operated under the Cambodian national court structure and would be composed of a majority of Cambodian judges.

In February 2002, the U.N. ended negotiations with Cambodia because it did not believe that the Cambodian government could guarantee international standards of justice. In a letter delivered to the Cambodian government, the U.N. provided two reasons for the stalled negotiations between the U.N. and Cambodia: First, a Cambodian court could not guarantee the "independence, impartiality and objectivity" which would be required by the U.N. if it were to cooperate with such a court. Second, Phnom Penh

had refused the U.N.'s proposal by explaining that the assistance provided by the U.N. would be governed by the agreement between the U.N. and the Cambodian Government. However, Cambodia demanded that "only its own rules would govern such assistance." The UN withdrew from the negotiations, stating that they could not move forward unless the Cambodian government accepts the necessary conditions for a fair trial (Jarvis, 2002:615).

Concerning this issue, Scott Luftglass argued that the agreement between the U.N. and the Cambodian government was irrelevant to the question of international standards of justice, which is a necessary factor for international involvement in the Khmer Rouge Tribunal. He suggested that the UN should withdraw from this court (Luftglass 2004). On the other hand, Gerald V. May III (2004) criticizes the U.N. as an "obstructionist" in establishing the KRT.

Pressured by some major powers, especially Japan and France, the U.N. General Assembly passed a resolution ordering the return of the U.N. team to renegotiate with the Cambodian government (The Associated Press, March 17, 2003). U.N. Secretary-General Kofi Annan called on Cambodian lawmakers to ratify a U.N.-Cambodian agreement establishing a Khmer Rouge tribunal as a priority agenda item of the new National Assembly. FUNCINPEC (the United National Front for an Independent, Peaceful, and Cooperative Cambodia) and CPP (Cambodian People Party) lawmakers supported the agreement (The Cambodia Daily, December 11, 2003).

The Cambodian government then indicated that it was ready to meet the concerns raised by the U.N. by amending the law on the Extraordinary Chambers to try Khmer Rouge leaders (ECDK Law). In return, the Secretary General said that in order to renew the negotiations it required a mandate from the General Assembly or Security Council. Only then would the Secretary General discuss further with the Cambodian government on how to fulfill the mandate. The Secretary General noted that "As a sovereign state, Cambodia has the responsibility for the trial while the international community, through the United Nations or otherwise, can help provided that the Government demonstrates its preparedness to ensure the observance of international standards of justice" (UN News Center, retrieved on November 22, 2005 from http://www.un.org/News/Press/docs/2002/SGSM8341.doc.hmt).

In December 2002, the Secretary General sent a letter to the Prime Minister Hun Sen to invite the Cambodian delegation for an exploratory meeting leading to the new round of talks on the establishment of a special court to try Khmer Rouge leaders. The Cambodian government accepted this invitation. In January 2003, the two sides, the U.N. and the Cambodian government, concluded exploratory talks with a relatively successful outcome. In March 2003, the two sides reached a draft agreement regarding the establishment of the court as part of the Cambodian court which would be composed of two chambers, the Trial Court and Supreme Court, containing a mix of international and domestic judges. The decision of the court required at least one approval from the foreign judges. In May 2003, the General Assembly adopted, by consensus, a resolution containing the draft agreement. In June 2003, the U.N. and the Cambodian government signed an agreement to prosecute under Cambodian law the Khmer Rouge leaders who had committed crimes between 17 April 1975 and 6 January 1979.

The Cambodian side made some amendments to the 2001 ECDK Law in compliance with the UN-RGC draft Agreement mentioned above. In October 2004, the Cambodian National Assembly adopted both the amended ECDK Law and the UN-RGC

Agreement. On April 29 2005, the agreement between the U.N. and Cambodia to set up a special court to try the remaining Khmer Rouge leaders took effect, paving the way for the tribunal to begin its operations.

The Institutional Building of the Khmer Rouge Tribunal: An Analysis

Crimes committed by the Khmer Rouge leaders are international crimes. Therefore the ultimate goal of the tribunal is to meet the requirements of both domestic and international justice. The local as well as the international community must be confident that the perpetrators are brought to justice in an objective and impartial manner. It is, therefore, important to examine and analyze the institutional building of the Khmer Rouge Tribunal.

Overview of the Khmer Rouge Tribunal

The Khmer Rouge Tribunal or the Extraordinary Chambers are set up as part of the Cambodian court system. However, they have the special features of a "mixed tribunal". The majority of the staff will be Cambodian. They will have Cambodian and international judges, prosecutors, defense lawyers, and court personnel. They will use both Cambodian law and international law in the proceedings.

The court is located in Phnom Penh, the capital of Cambodia, and it has jurisdiction over the entire territory of the Kingdom of Cambodia (Article 3 of the ECDK Law). This court will only try those crimes committed from 17 April 1975 to 6 January 1979 (Article 2 of the ECDK Law). The mandate of the court is to try those most responsible for the crimes mentioned in the law of the establishment of the Extraordinary Chambers in the Courts of Cambodia (Article 1,2,7,8 of the ECDK Law).

The chambers consist of two levels, that is to say, there will be a two tier court system. The first level is a trial court that functions as a court of first instance made up of three Cambodian judges and two international judges; the second is a supreme court functioning as the appellate chamber and court of final instance, composed of four Cambodian judges and three international judges. The President of each of the chambers will be Cambodian (Article 9 of the ECDL Law).

The KRT will use both international and domestic criminal codes. International crimes comprise genocide, crimes against humanity, grave breaches of the Geneva Convention, destruction of cultural property, and crimes against internationally protected persons. Domestic crimes include homicides, torture and religious persecution, as stipulated in the law on establishing the KRT.

An Analysis of the Institutional Building of the Khmer Rouge Tribunal

In analyzing the issues of justice in the context of the institutional building of the Khmer Rouge Tribunal, we need to examine two important matters. These are substantive criminal justice and procedural criminal justice.

Substantive criminal justice

Regarding substantive criminal justice, it is necessary to consider the questions of superior orders, which defines who is under the orders or supervision of whom, and

that if subordinates simply obey the orders through a sense "absolute responsibility" and the perception of legality and morality, there is a possibility of excuse; duress, which means the perpetrators are forced, under threat, to commit crimes; and "moral perception", which means the ability to be certain about what is morally right or wrong in particular circumstances (May 2005: 179-200).

The mandate of the KRT is to prosecute and try the most responsible leaders of the Khmer Rouge regime which committed crimes such as genocide, crimes against humanity, grave breaches of the Geneva Conventions of August 12, 1949, destruction of cultural property, crimes against internationally protected persons, and other domestic crimes under the Penal Code of Cambodia adopted in 1956, which includes homicide (articles 501, 503, 504, 505, 506, 507, and 508), torture (article 500) and religious persecution (articles 209 and 201).

The genocide provision is one of the most difficult issues for the court to decide. From a hard line legal perspective, although the Vietnamese, Cham (Islamic group in Cambodia), Chinese ethnics and Buddhist monks were murdered, it is not altogether clear whether this constitutes genocide as defined by the Genocide Convention in 1948 which is incorporated into Article 9 of the UN-Royal Government of Cambodia (RGC) Agreement:

> The acts of genocide mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: Killing members of the group; Causing serious bodily or mental harm to members of the group; Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; Imposing measures intended to prevent births within the group; Forcibly transferring children of the group to another group.

Even in light of the facts, Steven Ratner posits that "the argument that the Khmer Rouge committed genocide with respect to the Khmer national group appears to be relatively weak" because there is no strong evidence showing that the Khmer Rouge intended to destroy any national, ethnic or religious group in whole or in part (Ratner & Abrams 2001: 284-94). Cambodian historians Michael Vickey (1984) and David Chandler (1992) also agree that there is no clear indication that the Khmer Rouge committed genocide. On the other hand, other Cambodian historians such as Ben Kiernan (2002) and legal analyst Hurst Hannum (1989) contend that the Khmer Rouge actually did commit genocide.

The problem of "whether the Khmer Rouge committed genocide with respect to part of the Khmer national group turns on complex interpretative issues, especially concerning the Khmer Rouge's intent with respect to its non-minority-group victims" (UN Doc. A/53/850, UN Doc. S/1999/231, Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135). There is no conclusion as to whether the Khmer Rouge committed genocide and the matter must be left to the Court. Therefore, the question of whether the Khmer Rouge committed genocide will be a major issue for the upcoming KRT, which should begin in proceedings in 2007.

Procedural criminal justice

The extraordinary chambers will apply both domestic and international procedural rules. Regarding the domestic procedural law, Article 12 of the UN-RGC Agreement stipulates that "the procedure shall be in accordance with Cambodian law". Moreover, Article 33 of the ECDK Law requires that the trials are "conducted in accordance with existing procedure in force". This is the core concern because the court is dominated by Cambodian law, which is seen by many not to be strong enough to provide justice.

Concerning the international procedural law, the UN-RGC Agreement and the ECDK Law incorporates Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) which are the basis for international standards of justice. In addition, Article 12 of the UN-RGC Agreement and the ECDK Law stipulates that: "where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level" (Article 12 of the UN-RGC Agreement and Article 33 of the ECDK Law).

Due process

Due process is one of the necessary elements in providing justice. De Francia holds that "[d]ue process in the international context concerns such issues as, inter alia, the right to counsel, the right against self-incrimination, the right to confront witnesses, and the general right to a fair trial" (De Francia 2001:1381). According to King, "justice is due process which guarantees equality between the parties, rules protecting defendants against error, restraint of arbitrary power, and presumption of innocence, and justice shall also includes discretion and expertise of decision makers, independence from political considerations, equality of arms, protection of victims and witnesses, and speed and efficiency of the trials" (King 1981:13). This is to say, due process is founded upon: competence, independence, impartiality of the judges and prosecutors, rights of the defendants, equality of arms, protection of victims and witnesses, expeditiousness of the trials, and public participation.

Competence, Independence and Impartiality of the Judges

The competence, independence and impartiality of the judges are the determinant factors in providing justice and fair trials. Article 3 of the UN-RGC Agreement and Article 10 of the ECDK Law on the appointment of judges stipulate that all judges of the Extraordinary Chamber shall possess "high moral character, a spirit of impartiality and integrity . . . independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source". Similarly, Article 6 of the UN-RGC Agreement and Article 19 of the ECDK Law on Co-prosecutors state that latter shall have "high moral character and integrity and who are experienced in the conduct of investigations and prosecutions of criminal cases" and shall be "independent in the performance of their functions and shall not accept or seek instructions from any government or any other source". However, in reality, it is difficult to have independent and impartial judges.

Rights of Defendants

Respect for the rights of the accused constitutes an important element in fair trials. This is the standard set forth in Articles 14 and 15 of the International Covenant on Civil and Political Rights, and these two articles are incorporated in Article 13 of the UN-RGC Agreement and in Article 33 of the Law on the Establishment of the Khmer Rouge Tribunal stating that: "The Extraordinary Chambers of the trial court shall perform its jurisdiction in accordance with the procedures of international justice, fairness, and due process of law as referred to in Article 14 and 15 of the International Covenant on Civil and Political Rights". However, there is still a shortage of access for defendants to engage a defense counsel.

Equality of Arms

Antonio Cassese (2003:395-6) stresses the importance of equality between parties in ensuring fairness and justice in the trials. To ensure the equality of arms, KRT must maintain an equal position between the defense and the prosecution throughout the trial. This means that both sides must have an equal right and opportunity to present their case, equal access to evidence and witness testimony, and equal rights and privileges before the court. These elements of equality of arms are enshrined in Articles 33, 34, 35, 36, and 37 of the ECDK Law.

Protection of Victims and Witnesses

Victims and witnesses can be well protected at the KRT. Article 33 paragraph 5 of the ECDKL law stipulates that “the court shall provide the protection of victims and witnesses”. In addition, Article 35 provides that “the accused shall be presumed innocent as long as the court has not given its definitive judgment” and Article 36 gives the right to the accused to appeal against the decision of the court.

Participants in a seminar on the Khmer Rouge trial on March 3, 2004 called upon the Cambodian government to take steps to safeguard the identities of possible Khmer Rouge Tribunal witnesses and to establish a fund to compensate victims. They also noted that potential witnesses and victims have expressed fears for their safety. For this reason, the UN and Cambodia agreed that the Cambodian government would provide the necessary security at the tribunal (The Cambodia Daily, March 4, 2005).

Expeditiousness of Proceedings

One of the concrete requirements of a fair trial is that trial proceedings be as expeditious as possible (Cassese 2003: 398). The Extraordinary Chambers may have some difficulty fulfilling this requirement due to the existing structure of the court, which makes it hard to reach a decision. Particularly, the potential disputes between the Cambodian and foreign co-prosecutors and investigating judges over various issues concerning the standard of justice may be time consuming and difficult to overcome. Similarly, if the international judges fail to hand down a decision, a final verdict cannot be reached, which would extend things indefinitely.

Outreach or Public Access

“Publicity of the hearings is clearly a means of better ensuring that the trial, being under public scrutiny, be fair, in particular that the rights of the accused are not infringed and that the court conducts the proceedings impartially”(Cassese 2003: 397).

This principle is stipulated in Article 34 of the law on the establishment of the KRT which reads: “Trials shall be public and open to representatives of foreign states, of the Secretary-General of the United Nations, of the media, and of national and international non-government organizations, unless in exceptional circumstances the Extraordinary Chambers decide to close the proceedings for good cause in accordance with existing procedures in force where publicity would prejudice the interests of justice.”

Composition of the Khmer Rouge Tribunal

The effective participation of international judges, prosecutors, and other legal and administrative officers is necessary to improve the standard of justice of the Khmer Rouge court. Assured of key international participation, Cambodian society will be more willing to accept the result as fair and just (San Jose Mercury News (California), November 14, 1999). International safeguards will help ensure credible justice in Cambodia (New York Times, December 21, 2002). Moreover, Yasushi Akashi (2005), Chairman of the Japan Center for Conflict Prevention (JCCP), expressed his relative optimism about the KRT because of the participation of international judges and prosecutors in the Khmer Rouge court system.

The Khmer Rouge Tribunal is composed of two chambers, a trial chamber and a supreme chamber. The trial chamber consists of three Cambodian and two international judges and there are four Cambodian and three international judges in the supreme chamber. The president of each chamber is to be a Cambodian national. The decision and judgments need a “super-majority” which means they need the majority of affirmative votes from the judges plus one, or in other words in the Trial Court at least four votes are needed and in the Supreme Court at least five votes are needed. It means that at least one approving vote from international judge must be obtained before making decision and judgment (Article 9 and 14 of the ECDK Law).

There are two co-prosecutors, one Cambodian and one international, working together to “prepare indictments against the suspects in the Extraordinary Chambers” (Article 16 of the ECDK Law) and the co-prosecutors “in the trial chamber shall have the right to appeal the verdict of the extraordinary chamber of the trial court” (Article 17 of the ECDK Law). If there is a disagreement, one of them can bring the case to the pre-trial chamber of five judges, three Cambodian judges and two foreign judges, to receive a decision (Article 17 of the ECDK Law).

There are two Co-investigating judges, one Cambodian and one international, whose duty is to carry out the investigations. As in the case of co-prosecutors, if there is disagreement or conflict between the two co-investigating judges, settlement can be found by referring the matter to the pre-trial chamber (Article 23 of the ECDK Law).

There is a problem in the decision making process in the context of the institutional building of the KRT. If the judges cannot reach a unanimous agreement, then a decision requires a super-majority model. Such a model gives more power to the Cambodian judges than to the international judges. That is to say, the Cambodian judges are given more power than the international judges to decide whether an accused person is guilty or not.

Barriers to Justice in the Khmer Rouge Tribunal

There has been much concern regarding the establishment of the court in this fashion, since it is dominated by the Cambodian judicial system. The issue of "justice" lies at the core of the concerns felt by many people. The retired King Norodom Sihanouk warned of a possible revolt against the government if people feel that injustice has been done to the Khmer Rouge leaders (The Cambodia Daily, January 27, 2005) (this argument may not be well founded, since the former Khmer Rouge forces now consist of nothing more than a few aging individuals). In addition, Chea Sim, President of Senate and of the Cambodian People's Party, stated that only a successful implementation of the court can have meaning for Cambodian people (The Nation, June 28, 2004). What is important here is how to implement the proceedings successfully and provide an acceptable international standard of justice.

The institutional building of the KRT can guarantee, to a large extent, that international standards of justice are observed. The incorporation of Articles 14 and 15 of the ICCPR into the law on the establishment of the court, the international participation in the court, the provisions regarding the integrity of the court, and the principles to protect victims and witnesses are especially notable in this regard. However, in reality, since the court is dominated by the Cambodian court system, there are some limitations in terms of providing justice.

The Weak Cambodian Judicial System

Kassie Neou, the Director of the Cambodian Institute for Human Rights, when asked about the establishment of the KRT and the issue of justice, emphasized that "real justice will not be possible unless a strong judicial system with a truly independent judiciary is very well in place . . . " (cited in Marks 1994: 40). Lao Mong Hay, political analyst and Director of Cambodian Development Centre, insists that the Cambodian judicial system is extremely corrupt (USA Today, March 21, 2005). The United States claims that the KRT cannot meet the international standard of justice because of the weak judicial system in Cambodia (VOA News, retrieved on August 24, 2004 from www.voanews.com/khmer). Samrainsy Party members, too, have indicated their mistrust in the KRT because judges are appointed by the Supreme Council of Magistracy, a body which is viewed by many, including King Norodom Shihanouk, as corrupt (The Cambodia Daily, December 13-14, 2003). Amnesty International, Human Rights Watch and some other human rights groups, both inside and outside Cambodia, have questioned the objectivity and competence of Cambodian judges to try former Khmer Rouge leaders. Diplomats "remain unconvinced that the impoverished Cambodian people would see justice for the 1975-79 genocide in which almost a quarter of the population were killed or died from disease and starvation" (Guardian, May 2, 2005). Even ordinary Cambodians are worried and express concern over the credibility of the Khmer Rouge Tribunal (The Cambodia Daily, September 16, 2005). Therefore, it is necessary to investigate the judicial system in Cambodia in order to determine whether the KRT can provide justice under the current system.

The judicial system in Cambodia was totally destroyed by the Khmer Rouge regime. Many judges and lawyers were exterminated. Given the lack of competent legal officers, former teachers, who represented the largest group of educated people surviving

from the Khmer Rouge genocide, were recruited to become judges and prosecutors. Thus these judges and prosecutors do not have legal background to properly fulfill their responsibility (Kato *et al*. 2000; Neilson 1996).

Moreover, the Cambodian judicial system is heavily influenced by the socialist legal system and substantive laws of the Cambodian legal system from the 1980s. The lack of competent legal officers together with a centralized and communist type of policy gave the Ministry of Justice (MOJ) a dominant role in judicial system. This legacy of control over the judiciary by the Ministry of Justice still exists today, despite progress in reforming the structure of the Judiciary (Kato *et al*. 2000).

The current Cambodian judicial system is an outcome of the first national general election in 1993 when a new Constitution was promulgated. The Constitution states that the legislative, executive, and judicial powers shall be independent from each other. "The judiciary is to be impartial and protect the rights and freedoms of citizens". The Supreme Council of the Magistracy, chaired by the King, is entitled to appoint judges and prosecutors. However, in practice the court is still very much dominated by the executive (Marks 1994). For instance, both the Ministry of Justice and the judicial system are strongly influenced by the Ministry of Interior and the military. If members of the security forces themselves commit crimes, the courts do not have the courage or the resources to bring them to justice. Furthermore, many people argue that the Supreme Council of the Magistracy, established in 1994, is strongly dominated by the ruling Cambodian People's Party (CPP), given that members of the Supreme Council, with the exception of the King and the Minister of Justice, are prosecutors and judges who have been appointed by the CPP. As a result, most members of the Supreme Council have connections with the CPP. It is thus easy for them to be influenced by politicians from the CPP due to the absence of any representation from other political parties or any sector independent of politics (Neilson 1996).

This weakness of the Cambodian judiciary, the fact that it is subject to political influence and the fact that the Cambodian police do not respect the rights of suspects may make it difficult for the Khmer Rouge Tribunal, which is part of the Cambodian court system, to provide international standards of justice.

The Issue of the Competence, Independence, and Impartiality of the Court

The competence of the judges is one of the principal problems of the Cambodian judiciary. The lack of impartiality and independence of the judges and court officials also pose obstacles in providing justice. For instance, court officials attending a UN-funded legal training course convened in preparation for the Khmer Rouge Tribunal have been criticized by human rights and legal experts as lacking independence (The Cambodia Daily, May 6, 2005).

As noted earlier, the main problem which could compromise international standards of justice at the Khmer Rouge Tribunal is that the Cambodian judges will form a majority of the court, and that the judicial system of Cambodia has been criticized for its low level of competence, for political interference and corruption, all of which undermine the rule of law. It is difficult to provide justice in such an environment. As Strohmeyer has noted, "[i]n a society that had never before experienced respect for the rule of law, and in which the law was widely perceived as yet another instrument for wielding authority and control over the individual, the meaning of independence and

impartiality of the judiciary had to be imparted gradually" (Strohmeyer 2001: 55). Many hold out little hope that the Cambodian judges and prosecutors can work effectively and free from political domination.

The Lack of Political Will from the Cambodian Government

International law, especially international humanitarian and human rights laws, has been progressing and entering into a new era which emphasizes the struggle for global justice. These developments have begun to change the perception of state sovereignty (Goldstone 2004). However, the distance which global justice can reach depends on the willingness of nation states to implement and enforce such global jurisdiction.

The Cambodian government is bound by its agreement with the U.N. and the law on the establishment of the Khmer Rouge Tribunal. However, political will is still an issue. The political reluctance of the present government can be a hindrance to the successful work of the Extraordinary Chambers.

Various human rights groups have expressed strong doubts about the current Cambodian government's commitment to the KRT. For instance, Sok Sam Oeun, the Executive Director of Cambodia Defenders Project (The Cambodia Daily, January 2, 2004), In Vuthy (2005), Director of the Cambodian Human Rights Task Force and Lao Mong Hai (2005), Director of the Centre for Development of Cambodia, have raised concern about the intentions of the Cambodian government regarding the KRT. They state that the KRT is just a *Baylok Baylor* (Cambodian children's game), referring to the lack of serious attention from the government. International donors have also expressed their concern that the Cambodian government apparently lacks the will to try former Khmer Rouge leaders, after Prime Minister Hun Sen warned in his speech that "if they don't give us money, I will not have the trial" (The Cambodia Daily, August 16, 2005).

Many argue that it will be difficult to find justice since Prime Minister Hun Sen does not have good faith or the will to follow the issue through. "Hun Sen is not eager to establish accountability as a standard of Cambodian governance" (Liberman 2005). War crimes author and researcher Peter Maguire argues that "the proposed Khmer Rouge tribunal is likely to lack political will and the potential for political interference by the Cambodian government is great" (Phnom Penh Post, November 6, 2003).

The Defense Counsel

Potential problems faced by the defense counsel during the judicial investigation may include: (a) lack of investigatory resources, given that there are fewer resources for the defense counsel to investigate than the prosecution; and (b) possible failure of officials and other individuals to cooperate with the defense. This failure to cooperate may have resulted from hostility relating to civil conflict or fear of being associated with a suspected war criminal. The KRT's defense counsel may also face such problems when ordering relevant government agencies and private individuals to uncover specific information.

Concerning the access to defense counsel, none of the KRT's laws specify how counsel will be freely provided to defendants who are indigent (i.e. too poor to afford their own lawyer). Thus, the KRT judges will have to apply the procedures established under the Cambodian courts. In Cambodia, the president of the Court's registrar must

determine and certify that a defendant is indigent; however, no standard is provided. If a defendant is found indigent, the president of the trial chamber will ask the Bar Association, which has a small team of lawyers who represent indigent defendants. Besides these lawyers, the Bar Association might instead appoint a lawyer in private practice or a lawyer from one of the Non Governmental Organizations (NGOs) that provide legal services to the poor, such as the Cambodian Defenders Project and Legal Aid of Cambodia. In practice, judges often contact one of these lawyers directly and bypass the Bar Association.

Another problem the Khmer Rouge Tribunal might face is ensuring an effective defense by a competent defense counsel. Suzannah Linton states that a "[f]air trial at the KR Tribunal requires that there be competent and experienced defense counsels who are able, willing and provided with the means to defend persons facing severe punishment for their alleged perpetration of the most heinous crime recognized by the international community" (Linton 2002). This principle is provided in the International Convention on Civil and Political Rights (ICCPR), which holds that the counsel provided to defendants must be reasonably competent. For instance, in *Phillip v. Trinidad and Tobago* case, a man charged with the capital crime of murder complained to the Human Rights Commission (HRC) that he was provided counsel only three days before his trial, and that the lawyer provided was inexperienced.[2] If the same thing happens in the court proceedings of former Khmer Rouge leaders, the cause of justice would not be served.

The accused can defend himself/herself in person and he/she has the right to choose his/her own defense counsel. Article 21 of the UN-RGC Agreement stipulates that "[a]ny counsel, whether of Cambodian or non-Cambodian nationality, engaged by or assigned to a suspect or an accused shall in the defense of his or her client, act in accordance with the present Agreement, the Cambodian Law on the Statutes of the Bar and recognized standards and ethics of the legal profession". However, the Cambodian law on the Statutes of the Bar provides that only Cambodian lawyers can represent defendants in court (Article 5 to 7 of the Cambodian Law on the Bar). This was confirmed by Ky Tech, the President of the Cambodian Bar Association, who stated that a foreign lawyer could participate in the court but could not fully represent a defendant in the court; in other words, a foreign lawyer can provide assistance to Cambodian counsel who will appear in that court to defend his/her client (Radio Free Asia (Khmer Service), retrieved on November 9 2005 from http://www.rfa.org/khmer/pordamean/2005/11/07/Progress_in_KR_tribunal/)

In December 2005, during a visit to Cambodia, the International Bar Association (IBA) Executive Director Mark Ellis stated that this provision was unfair to the accused since the law of the Extraordinary Chambers allows co-investigators or co-investigating judges, but not co-foreign defense lawyers (Radio Free Asia (Khmer Service), retrieved on February 10 2006 from http://www.rfa.org/khmer/samleng). Certainly, the accused should be given full access to any lawyers whom they trust to ensure justice and fairness for themselves.

Conclusion

Justice, which is a common global public good, has recently undergone much progressive development. Many efforts have been made to find justice for the victims of

[2] See summary of United Nations Human Rights Committee's views, Communication No. 594/1992, Phillip v. Trinidad and Tobago, 20 October 1998.

international crimes such as genocide, crimes against humanity, and other war crimes. International humanitarian and human rights law has gone beyond the borders of state sovereignty. The violators, regardless of whether they are state leaders, are subject to a court of justice.

The KRT is the first hybrid court, in context of transitional justice, which is dominated by the domestic court in which there is a supermajority of Cambodian judges and prosecutors. The law on the establishment of the court, which is based on the agreement between the United Nations and the Royal Government of Cambodia, includes some important elements of international standard of justice, especially through the incorporation of Articles 14 and 15 of the ICCPR and the participation of international judges and prosecutors in the court proceedings. Nevertheless, there are obstacles standing in the path of justice. These obstacles include the lack of independence and impartiality of the court, the lack of political will from the Cambodian government, difficulties in provision of adequate defense counsel and other challenges of the court in guaranteeing the rights of the defendants.

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