

*Searching for*

# THE TRUTH

- ◆ ECCC : The Role of Asean
- ◆ "Day of Remembrance" : Wat Snguon Pich Memorial

**Special**  
English Edition  
Second Quarter 2010

«Those [young generation] who did not experience the DK period first-hand act as messengers of history by transmitting information from their parents to the younger generation..»

-- Socheat Nhean

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Magazine of the Documentation Center of Cambodia  
Special English Edition, Second Quarter 2010

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Relocation of remains to a new stupa

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LETTER FROM YOUK CHHANG:

## ECCC: THE ROLE OF ASEAN

In his recent address on May 25, 2010, UN Secretary General Ban Ki-moon praised the efforts of the Khmer Rouge Tribunal and reiterated its importance for Cambodia and the international community at large. It is without a doubt that the tribunal is vital for Cambodia's long road to recovery from years of genocide and decades of civil war. Likewise, this tribunal also promises to end one of the worse cases of impunity which existed for more than a quarter century: atrocities committed by the Khmer Rouge regime from April 1975 to January 1979 that claimed two million lives and displaced nearly the entire population.

Cambodians have waited patiently for justice and they must not be denied it any longer. As ASEAN members are aware of, the tribunal currently lacks the funds needed to complete its trials. A sudden ending to the tribunal resulting from insufficient funds would be a disaster in the justice-seeking process and also an embarrassment for the international community's commitment to protecting human rights.

Since officials and staff began work in 2006, the tribunal has wrapped up its first case involving former S-21 prison chief Duch in November 2009 (verdict expected in late July 2010) and is presently working on Case 002 involving the four highest level Khmer Rouge leaders still alive: Noun Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith. During its three years of

operation, the tribunal has overcome many serious challenges and has improved in its outreach to survivors of the Khmer Rouge regime allowing over 31,000 Cambodians to directly observe Duch's trial hearing. It is expected that many more Cambodians will observe the trial hearings of Case 002 given the prominence of the four defendants. Additionally, the trials of former of Khmer Rouge leaders has helped to promote national discussions of the atrocities during that era, thereby breaking a long and deeply painful silence borne by millions of survivors. Lastly on a global scale, the tribunal can serve as an effective model for other internationalized criminal tribunals due to its relative low cost, speedy progress, and victim outreach, as noted by his Excellency Mr. Chan Tani, Secretary of the State of the Office of the Council of Ministers of Cambodia at the pledging conference on May 25, 2010. Thus, it is imperative that the tribunal has the necessary funds to continue this valuable work.

I therefore call upon ASEAN member states to answer Secretary General Ban Ki-moon's call for pledge contributions to the tribunal and suggest additionally other ways to provide support. As a fellow ASEAN member nation, Cambodia hopes that other member states will show their support for human rights in the region and in the world, by providing much needed assistance for the Khmer Rouge tribunal. As of present, no member nation has done so.

For the sake of justice for millions of Cambodians, national healing, strengthening relations among ASEAN members, and support of the international human rights regime, it is greatly hoped that ASEAN members will support its neighbor in their effort to rebuild a stronger and more just society.

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*Youk Chhang is the Director of the Documentation Center of Cambodia and Editor-in-Chief of Searching for the Truth Magazine.*



UN Secretary General Ban Ki-moon



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**  
Extraordinary Chambers in the Courts of Cambodia  
Chambres extraordinaires au sein des tribunaux cambodgiens

**ព្រះរាជាណាចក្រកម្ពុជា**  
**ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia  
Nation Religion King  
Royaume du Cambodge  
Nation Religion Roi

24 May 2010

**PRESS RELEASE**

**KAING GUEK EAV (DUCH) TRIAL CHAMBER VERDICT  
TO BE PRONOUNCED ON 26 JULY 2010**

The verdict in Case File No. 001/18-07-2007-ECCC/TC concerning the Accused, KAING Guek Eav alias Duch, will be pronounced on **Monday 26 July 2010** in the main courtroom of the Extraordinary Chambers in the Courts of Cambodia (ECCC). The time of commencement of the hearing will be communicated in due course.

KAING Guek Eav chaired what is alleged to have been the headquarters of the Communist Party of Kampuchea (CPK) Special Branch of the secret police (*Santeab*) “Office S21” (S21) during most of its existence between 1975-1979. He is accused of crimes against humanity and war crimes, as well as premeditated murder and torture pursuant to the 1956 Cambodian Penal Code.

KAING Guek Eav was detained and transferred to the ECCC Detention Centre on 30 July 2007. After an Initial Hearing on 17 and 18 February 2009, the trial on the substance commenced on 30 March and concluded on 27 November 2009. During the 77 days of trial, 9 expert witnesses, 17 fact witnesses, 7 character witnesses and 22 Civil Parties were heard before the Trial Chamber. More than 31,000 people followed the proceedings at the court building.

**Background information for media:**

A separate press release with information about media facilities and accreditation will follow. Please find below some background resources which can be freely used by representatives of the media.

Fact sheet about Case 001:

[http://www.eccc.gov.kh/english/cabinet/files/Case\\_Info\\_DUCH\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/files/Case_Info_DUCH_EN.pdf)

Closing order indicting Kaing Guek Eav:

[http://www.eccc.gov.kh/english/cabinet/courtDoc/115/Closing\\_order\\_indicting\\_Kaing\\_Guek\\_Eav\\_ENG.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/115/Closing_order_indicting_Kaing_Guek_Eav_ENG.pdf)

Official trial photos:

<http://www.flickr.com/photos/krtribunal/sets/72157623332496818/>

High resolution video clip from last day of the closing arguments where Kaing Guek Eav requests the Trial Chamber to set him free:

<http://unakrt-online.org/MEDIA/>

# MESSENGERS OF HISTORY

*Socheat Nhean*

The Documentation Center of Cambodia, in cooperation with the Ministry of Education, has begun training history, literature and citizen morality teachers across Cambodia on how to teach the history of Democratic Kampuchea (1975-1979). History teachers at the junior and high school level have been given priority to join these trainings, which are being conducted from April to October 2010. By the end of the year, approximately 1,600 teachers will have been trained. In 2011, the trainings will continue and reach an additional 1,600 teachers in all provinces.

The training is primarily intended to share new teaching methodologies from the "Teacher's guidebook: the Teaching of a history of Democratic Kampuchea 1975-1979," written by Dr. Phala Chea, a Cambodian-American who lived through Democratic Kampuchea regime, and Christopher Dearing, an American lawyer with a professional background in education. After the trainings, the teacher participants will be able to fully incorporate the suggestions in the guidebook when teaching students in their communities.

The first training in April was organized in four locals: Steung Treng, Kratie, Kampot, and Sihanouk provinces. Two-hundred and six history, literature and citizen morality teachers joined this training session. The second training in May was attended by 330 teachers and held in Takeo, Kampong Thom and Prey

Veng provinces. In the month of June, the training will also be held in three provinces: Svay Rieng, Siem Reap and Pursat.

Through these trainings, teachers gain knowledge of the history of Democratic Kampuchea and new teaching methodologies. The teachers are divided into small groups of 8 to 10 in order to work through the teacher's guide book and practice teaching this new methodology. They also hear from survivors and watch documentary films.

These trainings are a turning point for Cambodia and are providing teachers who lived through the DK regime with the opportunity to take ownership of that history and to transfer what they experienced to youth born after the regime. Those who did not experience the DK period first-hand also act as messengers of history by transmitting information from their parents to the younger generation.

Teaching the history of Democratic Kampuchea to Cambodian youth can help prevent a similar regime from coming to power again and also contribute to healing survivors' mental illness. Only when Cambodians learn about their history can they move forward towards prosperous lives.

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***Socheat Nhean is the Team Leader of Searching for the Truth Magazine.***



ECCC Co-prosecutor and DC-Cam director Youk Chhang talking to commune teachers in Kampot province.



Commune teacher training in Steung Treng province

# DISTRIBUTION OF "A HISTORY OF DEMOCRACY IN CAMBODIA" SCHOOL, ODDAR MEANCHEY PROVINCE



# "ATOMIC KAMPUCHEA" AT ANLONG VENG HIGH PROVINCE ON JUNE 21, 2010



# EXHIBITION AT TUOL SLENG: LEARNING ABOUT ECCC CASE 002

*Socheat Nhean*

Tuol Sleng Genocide Museum, the site where approximately 14,000 prisoners were detained and then killed by the Khmer Rouge, is now the home of an exhibition about Case 002 of the Extraordinary Chambers in the Court of Cambodia (ECCC). This second ECCC proceeding is expected to bring to trial the four senior living Khmer Rouge leaders on charges including crimes against humanity and genocide for acts they committed when they were in power between April 1975 and January 1979. Tuol Sleng, known during the Khmer Rouge period as S-21, was a hell to the prisoners who were incarcerated there; only a miniscule number of them walked out of this hell alive.

After a nearly one-year-long trial, the verdict of S-21 chief, Kaing Guek Eav aka Duch in Case 001 will be read on July 26 at the ECCC premises. The trial in Case 002, however, is not expected to begin until 2011.

The Case 002 exhibition will be on display at Tuol Sleng for six months beginning in early June. During the first three days of the exhibition, the booklet

that was the inspiration for the Case 002 exhibition, called "Genocide: Who are the senior Khmer Rouge leaders to be judged? The importance of Case 002," was distributed. The goal of exhibition is to teach the public about four senior Khmer Rouge leaders-Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith-who are expected to be tried next year. Another aim of the exhibition is to make sure that both survivors and their children understand the crimes with which the accused will be charged. Only if the public understands who persecuted them can justice be meaningful.

The exhibition is also intended to educate the international community about the accused who plunged the country into the darkness three decade ago. For example, the exhibition interests Jennifer, an American tourist, who is on her first visit to Cambodia. Before coming to Cambodia, Jennifer read some history books about the Khmer Rouge in Cambodia. "While here, I have learned a lot about the Khmer Rouge," said Jennifer. "I used to read about Tuol Sleng and



Exhibition on Case 002 at Tuol Sleng Genocide Museum



now I am here."

As the Khmer communists, later known as Khmer Rouge, emerged from the jungle to conduct armed struggle in 1970, they organized an army that was obedient and kind to poor farmers living in rural areas. Jennifer said, "The Khmer Rouge spent a long time gathering power to fight against the American-backed Cambodian government; however, they killed their former supporters." Emphasized Jennifer "This is a very negative point."

Undoubtedly, the Khmer Rouge leaders were responsible for setting harsh policies that resulted in the deaths of nearly two million people. Although these events took place more than three decades ago, survivors still have the desire to demand justice for themselves and for the children of younger generation. One of the accused in Case 002, Ieng Sary, was sentenced to death in absentia in August 1979, seven months after the Democratic Kampuchea (DK) regime collapsed, together with Pol Pot, the head of the genocidal regime, who died quietly in a Khmer Rouge-controlled area in 1998.

The younger generation who learned about what happened during the DK regime from their parents

are nevertheless unclear about who its leaders were and how they set the policies that plunged the country into darkness. One Cambodian student, Lida, who was visiting Tuol Sleng Prison for the first time, said that she was very shocked to see photos of prisoners hanging on the prison walls. Her visit coincided with the opening of exhibition of the Case 002 exhibition at Tuol Sleng. "Khmer Rouge leaders who were responsible for the death of those prisoners should be brought to trial," said Lida. "They should not be forgiven."

As a youth, Lida only learn about the regime from her parents, and little from the school curriculum. Visiting Tuol Sleng because of her desire to learn about the Khmer Rouge regime, Lida vowed to stop such a regime from happening again. Lida supports the on-going Khmer Rouge tribunal so that it can offer justice to her parents and the Cambodian people as a whole who suffered under the brutal regime of Democratic Kampuchea. Most of all, Lida is concerned that the four accused may die before trial begins.

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*Socheat Nhean is the Team Leader of Searching for the Truth Magazine.*



# REVENGE IS NOT A SOLUTION

*Leakhena Tat*

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Heng Sochet lives in Peany commune, Kampong Tra-Lach district, Kampong Chhnang province. During the Democratic Kampuchea period, Sochet's grandfather was killed by the Khmer Rouge after his relatives informed Angkar that he used to be a doctor. After the fall of the regime, Sochet's family still loved and kept in touch with his grandfather's relatives. Even though he had known about this happening, he also could not save his grandfather's life and it created difficulties among the relatives.

Immediately after the soldiers took power in Phnom Penh, the lives of Cambodian people completely changed. A few hours after arriving, the Khmer Rouge soldiers pointed their guns to the sky and expelled all the people from their homes. Like other families, Sochet's family arranged their things and left the city by walking, in their case toward Prey-Thiet village, Leaybo commune, Tram-kok district, Takeo province. There, Angkar arranged for Sochet's family to stay together in one house. Then they started to break up his family and had them live very far away from each other. He could only meet with his family members after working in the unit for every a half month. For food, everyone received only one scoop of porridge each.

Later, the Khmer Rouge became even stricter with people and arrested and killed villagers whom they thought had betrayed them. Sochet said that his mother had seen Khmer Rouge soldiers taking people away in a car and that most of those people had disappeared. His grandfather's destiny was not different from those people. The night that his grandfather's relatives reported to the Khmer Rouge that his grandfather was a doctor, a Khmer Rouge spy arrived at his grandfather's house. The spy said that the wife of the village chief was very sick and they needed Sochet's grandfather to look for medicine. Because the spy called for him in the night, his grandfather realized that he would be killed. He took off the glasses that he wore everyday and threw them to the ground to break them in order to show his mother that the Khmer Rouge arrested him. Even

though Sochet's family did not have a good political background, because of their hard work, the Khmer Rouge did not put any pressure at all on his mother's family.

After the fall of Khmer Rouge regime, Sochet's family walked back to their home. However, after arriving in Phnom Penh, his family was very afraid to live in their house because the environment around there was silent and no people lived there. Sochet's family was very happy that they were still in touch with the family of the relative who caused his grandfather's death. His mother did not want to take revenge and did not want to ask the reason for the betrayal. She thought that the event had happened many years ago and even if she tried to learn the reason, it would be useless because he would still be dead.

In 1983, Sochet's mother brought him to register to study at Sontephep primary school near his house. After passing high school exam in 1994, Sochet applied to study geography at the Phnom Penh Pedagogy School. Continuing his pedagogy training one more year, Sochet was assigned to teach at Hun Sen Kampong Tra-Lach High School. When he became a provincial teacher, Sochet was very happy that he could become an educator to teach the next generation about the Khmer Rouge regime. Sochet said, "Even though I teach geography, there are also some lessons that are related to history, such as the movement of Cambodian youth related to the Khmer Rouge regime. These subjects can be mixed, so that my students can know and believe that Khmer Rouge regime really existed and left many documents and much evidence that survives until today. Knowing about this regime will provide the benefit of making the next generation know about Khmer Rouge history and prevent it from happening again. Furthermore, the court now is prosecuting the leaders of this regime in order to provide justice for the people who died as well as the survivors."

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*Leakhena Tat is the Staff Writer of Searching for the Truth Magazine.*

# SAING SARIN: KHMER ROUGE CADRES KILLED MY FATHER

*Bunthorn Som*

Saing Sarin, 41 years old, was born at Bralay Meas village, Bralay Meas sub-district, Kampong Leng district, Kampong Chhnang province. The Khmer Rouge cadres killed Sarin's father after accusing him of being a Lon Nol ME 50 Khnang (a person in charge of taking care of 50 families in the village, but not a village chief) and his mother died of illness because of a lack of treatment. As a consequence he was an orphan at eleven years old. After that he lived with his grandmother.

In 1974, Sarin attended to school at a local village school. After studying there for a while, Sarin quitted because the village was in chaos. There were Khmer Rouge soldiers coming to the village to make propaganda and call for villagers' support against the Lon Nol Regime. At Sarin's house, there were guns because his father was ME 50 Khnang. Every night, he saw people come to get guns from his father in order to guard the village.

Later, in April 1975, the Khmer Rouge soldiers took complete control of the village. Soon after that the soldier asked the villagers to leave their homes for two or three days, saying that they did not need to bring along any belongings because they would soon return. His entire family including his parents, grandmother, brother and sister, were evacuated to Po village of Po sub-district. His family brought only plates, pots, rice and clothes. At that village, there were hundreds of families coming from Dok village, Thmei village and Bralay village gathered together. Not long after, Angkar separated the evacuees. Sarin's family was sent to live in Chheu Ak cooperative while his grandmother was selected to work as midwife in Po sub-district. Because she had pity on her grandson, she requested Angkar to allow Sarin to live with her in the sub-district hospital. Angkar assigned Sarin to help make wine and mold medicine into small pills and then dry them.



After his parents were displaced by Angkar to Chheu Ak cooperative in Po sub-district, they were separated from the base people. At first Angkar divided people into a children unit, women's unit and youth's unit to work in the village. When work was finished, Angkar allowed each unit to return to their parents and relatives. Later on, Angkar started to separate children from their parents. Those children were collected in a children's center. Children who looked well built were soon transferred to join the mobile youth unit. Sarin's parents, however, were assigned to work in the rice fields. Not long after, her mother became sick and was transferred to the hospital in Po sub-district. Because her illness became worse and worse, she was sent to Kampong Leng district hospital for an operation. After that he didn't hear anything new from her about her illness. Later on, he was told that his mother was dead.

After the death of his mother, Sarin had no chance to see his father and brother anymore because Angkar sent all children living in the hospital to live in another cooperative. Only staff was left working at the hospital. Sarin was asked to work in the rice fields at the Prey Chakeang workplace located in Dar village. There he worked in a children's unit consisting of about 50 children. He had to pull out the rice seedlings, transplant them, and tend cattle. However, he got only two or three ladles for his food ration. Every half month or month, Angkar transferred Sarin to work at a different workplace in Kampong Leng district without allowing him to return home. Even with this restriction, Sarin's father often brought dried coconut flesh for him.

One day, while Sarin's father was working in Chheu Ak cooperative, a Khmer Rouge spy arrested him and accused him of being a spy during the Lon Nol era. The spy then escorted him to be killed in Laban prison located in district 16 (Kompong Leng district). After executing Sarin's father, the spy told the unit chief to look for Sarin's brother Sokea in the name list. Because Sarin's brother had changed his name from Sokea to Son, the unit chief of unit could not find him. Soon after the spy left, Sokea was frightened and got a fever and could not eat. Sokea's relatives who worked in the same

unit told him not to be scared and tried to work hard so Angkar would not suspect. Sarin, who was young and worked in the cooperative, was not investigated.

When Khmer Rouge troops reached Kompong Chhnang in 1979, Sarin, his brother and grandmother were forced to move to the forest. Although aware of the liberation, Sarin's family did not dare to go back his hometown due to fear of the Khmer Rouge. Later, the Khmer Rouge announced that all people could go home. Hence, Sarin decided to settle in Kompong Chhnang until today.

Sarin said that when he recalls the past he always cries "because I experienced it directly, and my parents who took care of me were killed," Sarin often use his experiences to teach his students. However, some of them do not believe his stories. He suggests that there should be more Khmer Rouge documentation in order to show students and let them understand about the Khmer Rouge regime more broadly.

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***Bunthorn Som is the Staff Writer of Searching for the Truth Magazine.***

## SIGNIFICANCE OF GENOCIDE EDUCATION

- ◆ *Your questions empower and give meaning to those who have suffered. Asking your parents and grand-parents about the Khmer Rouge will further there conciliation of the Cambodian nation.*
- ◆ *Teaching children about the Khmer Rouge regime means teaching students the difference between good and evil and how to forgive. Broken societies must know their past in order to rebuild for their future.*
- ◆ *Teaching children about the history of the Khmer Rouge regime, as well as stimulating discussion between children and their parents and grant-parents about what happened, are important to preventing genocide both in Cambodia and the world at-large.*

# VILLAGERS ERASE DOUBT, S-21 GUARD SAYS

*Vannak Sok*

After learning that Chiem Soeur was a former security guard at S-21, where approximately 14,000 victims died, people living in his village looked down on him and were hateful. Once while Chiem Soeur was carrying palm fruit juice he was insulted as a "killer" by some villagers. He felt pained when hearing these cruel and prejudiced words. But after telling the true story of his experiences before Khmer Rouge tribunal, he feels better and villagers treat him as a friend now that they understand that Soeur was not involved in the mass killings.

At the age of seventeen years old, Soeur voluntarily joined the Khmer Rouge revolutionary movement after seeing Lon Nol's armed forces torture and kill villagers and bomb their houses. When the Khmer Rouge armed forces won victory on April 17, 1975,

Soeur was very happy, hoping that the country would return to peace and he would be able to repatriate to his hometown. However his dream disappeared under the restrictions put in place by the Khmer Rouge leadership, commonly known as "Angkar." In 1976, Angkar assigned Soeur to be an S-21 security guard, which he did until 1979. He returned to his hometown and was reunited with his family after the collapse of Khmer Rouge regime.

Nearly thirty years later, Soeur was living furtively even though his wife and children did not know about his hidden career. Then his family acknowledged that Soeur was a former S-21 security guard as a consequence of DC-Cam research into former S-21 security guards' biographies. When his biography reappeared, Soeur was shocked because he could not believe that his biography still existed, as even at that time Khmer Rouge regime asked him to write many biographical documents. Soeur did not deny it was his biography, but his responses seemed to hide some information.

After learning about Soeur's true story, Rithy Pan's documentary film team asked him to visit S-21 again to reenact his role as a guard. When Soeur arrived at S-21, now known as the Tuol Sleng Genocide Museum, he immediately felt fear and regret and asked to return home. However Soeur changed his mind when he saw other former security guards there. After he returned home Soeur's wife asked him why he went to Phnom Penh. He then admitted with shame to his wife that he had gone to Phnom Penh to make a documentary film "because I was a former Tuol Sleng prison security guard."

Not long after, news of his biography spread among villagers when the Khmer Rouge Tribunal called him as a witness in the trial of Duch, the chief of S-21 prison and Soeur's former boss. Soeur worried about his and family's destiny, because victims whose relatives died at Tuol Sleng prison looked negatively at



Chiem Soeur In 2002

his past and hated him.

One day when Soeur returned from carrying palm juice, a villager insulted him, saying: "Killer, you were nearly on trial." He responded, "I did not kill people and I will tell the truth before the Khmer Rouge Tribunal." Soeur returned home with sadness and pain.

On August 5, 2009, Soeur was a witness at the Duch's trial and judges and lawyers clearly explained to him his legal rights as a witness. After he finished his testimony, Duch denied that Soeur was a former S-21 security guard. Soeur was taken care of and his rights as a witness were protected by court officials. When he returned home, many villagers asked him what happened. Soeur responded, "My entire story has been told before the tribunal and broadcast on TV; I have nothing else to say."

Today, Soeur feels better and is living happily with his family after breaking the silence hidden in his mind for over 30 years. He wants the public to know that his situation has been solved by Khmer Rouge

Tribunal. Soeur does not feel shame like before, frequently joins village ceremonies, and most importantly, villagers treat him as a friend.

Soeur is living in Kompong Chhnang province and works as a palm tree climber. None of his children are able to go to school because they are a poor family. Soeur said, "Although I live in poor conditions, I can survive with this family without restrictions like there were under the Khmer Rouge regime."

Chiem Soeur's example shows that Extraordinary Chambers in Courts of Cambodia can bring justice for victims who lost their lives during Khmer Rouge regime, even if such justice is insufficient. This tribunal serves as a reminder to world leaders not to commit serious crimes or the law will punish them even when they are old.

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*Vannak Sok is a member of Victim Participation Project.*

## SEARCHING FOR MISSING SON

I am Chhoeun Uy, 84, with seven children. I lived in Svay Chek village, Ta Trao sub-district, Puok district, Siem Reap province. Now I live in Svay Chek village, Svay Chek sub-district, Ang Thom district, Siem Reap province. I would like to search for my son named Duong Tuy, who disappeared in 1973 after he was recruited into a Khmer Rouge art unit. Tuy was the third child and went to grade 11. In 1970, Tuy became a Khmer Rouge comrade whose duty was to guard the village. Later on, Angkar selected him to work in the art unit. In 1973, Tuy's mother and I were evacuated to Svay Leu district. I lost contact with Tuy at that time.

After the Khmer Rouge was toppled in 1979, we returned to our homeland and heard that Tuy had become the chief of his art unit. According to the news, he traveled to perform and then disappeared. If anybody knows or has any information regarding Duong Tuy, please contact me via the Documentation Center of Cambodia at 023 211 875.



Chiem Soeur in 2010

# JOURNALIST REUNION

*Socheat Nhean*

During the wars in Vietnam and Cambodia in the 1960s and 1970s, many journalists came to report and photograph what was happening in these countries, and many lost their lives on the job.

April is the hottest month in both of these countries, and that was the month that the war ended in both in 1975. Few journalists were able to enter Cambodia after April 1975 until the fall of the Khmer Rouge in 1979, and many never returned to the country. It was not until April 2010 that many Cambodian war journalists had a chance to meet with one another again. By this time, most of them had retired from their professions.

At the April 2010 event, forty current and retired journalists, camera persons and photographers came to Cambodia for a reunion co-organized by Chhang Song, a former information minister during Lon Nol administration, and Carl Robinson, a photographer and the Associated Press correspondent.

During the reunion, all attendees gathered at Le Royal Hotel in Phnom Penh, where journalists had taken shelter when the Khmer Rouge soldiers captured Phnom Penh, before they were evacuated to the French embassy nearby. During the reunion they visited Wat Po pagoda in Boset district, Kampong Speu province, where six journalists were ambushed, arrested and killed by the Khmer Rouge in May 1970.

At Wat Po, a Buddhist religious ceremony was held to honor the six journalists who died on duty. A Buddhist tree (Po tree) was planted near the place where they were ambushed. Elizabeth Becker, a New York Times and Washington Post journalist and author who covered the war in Cambodia and is one of only a few journalists to visit Cambodia during the Khmer Rouge regime, read out the names of the journalists who perished.

The visit by these journalists to Cambodia over three decades after the end of the war brought back

strong memories and emotions for many of the journalists present. Elizabeth Becker said, "It is important to come to honor our fallen colleagues; we have come from all over the world." Also present was Yoko Ishiyama, whose husband Koki Ishiyama, a Kyodo News correspondent, was captured and killed by the Khmer Rouge in 1974. Yoko Ishiyama could not hold back her tears when Becker read out her husband's name.

Afterward, all the journalists and correspondents gathered at a garden near Le Royal Hotel to attend the ground-breaking ceremony for a memorial in honor of all journalists, both foreign and Cambodian killed during the Cambodian war.

*Foreign visitors attending the Cambodian war correspondents' reunion included:*

♦ Chhang Song: Co-organizer of the reunion. When the war started in Cambodia in 1970 after the coup against Prince Sihanouk, Chhang was working as a captain in the armed forces with Colonel Am Rong. In 1974, he was promoted to Minister of Information of the Lon Nol government. Just before the Khmer Rouge soldiers entered Phnom Penh in April 1975, Chhang was evacuated to the United States.

♦ Carl Robinson: Co-organizer of the reunion. Robinson was a photographer for the Associated Press (AP) in Saigon and later served as a full-time correspondent from 1968 until the war ended in 1975 when he moved to Australia.

♦ Jim & Milly Pringle: Currently residents of Phnom Penh, the Pringles covered wars in Vietnam and Cambodia for Reuters, and later for Newsweek and The Times in London.

♦ Peter Sharrock: Former Reuters correspondent and now an archaeologist at London University's School of Oriental and African Studies.

♦ T. Jeff Williams: A reporter for AP and CBS news. Williams arrived in Cambodia three days before the March 18, 1970 coup. This is his first return to

Cambodia since he left three decades ago.

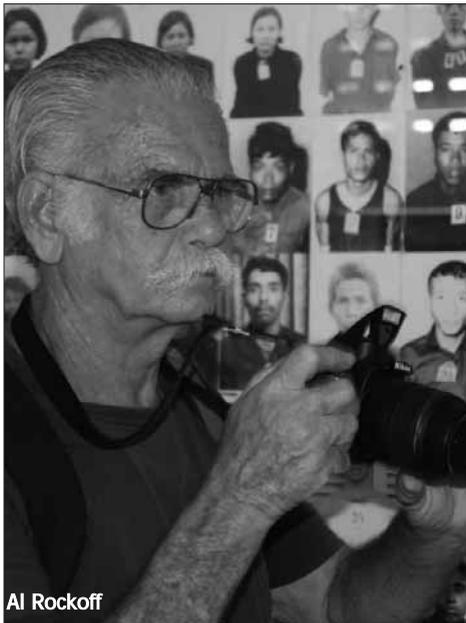
◆ Kurt Volkert: A former CBS News correspondent. Volkert first arrived in Cambodia in mid May 1970 from Japan. He returned to Cambodia in 1992 to help search for missing US soldiers' remains.

◆ Elizabeth Becker: A reporter on international and national affairs for more than three decades as a correspondent for the New York Times and the Washington Post, most recently specializing in trade, development and agriculture. She is the author of "When the War Was Over" (1986), a history of the Khmer Rouge, which includes her rare interview with Pol Pot. Becker was the Senior Foreign Editor at

National Public Radio and has won awards from the Overseas Press Club, DuPont Columbia Award and the Robert F. Kennedy Book prize. Recently, Becker released a book about a story of a Cambodian girl living under the Khmer Rouge named Bophana.

◆ Al Rockoff: A former freelance photographer who covered the war in Cambodia. He was in Cambodia when the Khmer Rouge soldiers arrived in Phnom Penh.

◆ Dan Southerland: A correspondent with United Press International (UPI) and later the Christian Science Monitor. He was the last correspondent to see photographer Sean Flynn and journalist Dana Stone before their



Al Rockoff



Carl Robinson



David Bradbury



Milly Pringle



Sylvana Foa



Atsuo Kaneko

disappearance east of Chipou in April 1970.

♦ **Sylvana Foa:** Covered the war in Cambodia for Newsweek and UPI from its early days in 1970. Foa joined UPI in Hong Kong and then interviewed Prince Norodom Sihanouk in Beijing in October 1973. She was one of the first American reporters to be allowed to enter China during the Cultural Revolution. She was the first woman to serve as foreign editor of a major international news organization (UPI), the first woman news director of an American television network and the first woman to serve as Spokesman for the Secretary General of the United Nations. Twice nominated for Pulitzer Prize, Foa now teaches journalism at New

York University in Israel.

♦ **Jacques & Leslie Leslie:** Former Los Angeles Times correspondents from January 1972 to July 1973 when they were expelled by Saigon government. They were first Americans to visit the "liberated area" after the 1973 cease-fire between North Vietnam and the United States. They returned to Cambodia in February 1975 and stayed until a couple days before Khmer Rouge occupied Phnom Penh on April 17, 1975.

♦ **Mike Morrow:** A former Dispatch News agent captured by the Viet Cong and held for one month in Cambodia in 1970. The reunion was Morrow's first return to Cambodia since 1975.



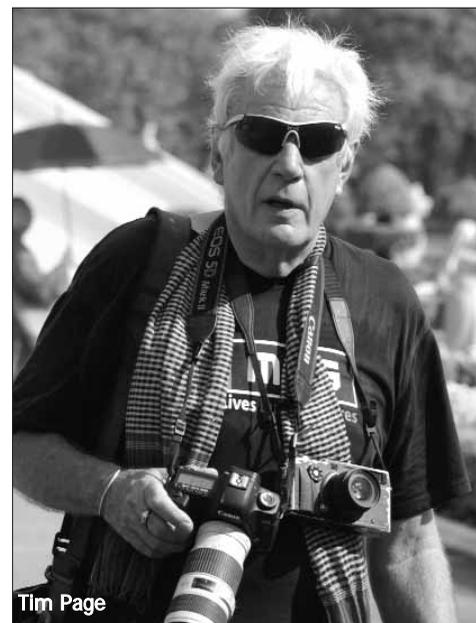
Elizabeth Becker



Jim Pringle



Jon Swain



Tim Page



Yoko Ishiyama



Kurt Volkert

◆ Jon Swain was an AFP correspondent and later with the Times of London. He covered both the Vietnam and Cambodian wars. He took shelter at the French embassy in Phnom Penh when the Khmer Rouge soldiers captured Phnom Penh.

◆ Terry Wolkerstorfer: A former AP correspondent based in Saigon who covered the invasion of Cambodia and subsequent events inside the country.

◆ Glenn McDonald: A former ABC radio worker who covered the Cambodian war between 1970 and 1975.

◆ Steve Northup: A former UPI correspondent and then a photographer for the Times.

◆ Martin Stuart Fox: A former UPI correspondent who covered the wars in Laos and Vietnam.

◆ Tim Page: A former Time-Life photographer. He was badly wounded in 1969 in Vietnam and then evacuated to United States. He never covered Cambodian missing photographer Sean Flynn.

◆ Perry Deane Young: A former UPI correspondent. Young left Vietnam in 1968. This is Young's first time in Cambodia.

◆ David Terry: A freelance photographer who covered both the Vietnam and Cambodian wars.

◆ Tom Cheatham: A correspondent with UPI who covered Vietnam in the mid to late 1960s.

◆ Atsuo Kaneko: A Saigon Bureau Chief for the Kyodo News Agency during Vietnam War.

◆ Yoko Ishiyama: Widow of Koki Ishiyama, Kyodo News correspondent who was captured and killed by the Khmer Rouge in early 1974.

◆ George Hamilton: Actor and close friend of Sean Flynn who is attending to pay homage to his friends.

◆ Lance Woodruff: Reporter who covered Vietnam for the National Council of Churches (1966-1968).

◆ David Bradbury: A renowned documentary filmmaker.

◆ John Giannini: A freelance photographer.

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***Socheat Nhean is the Team Leader of Searching for the Truth Magazine.***



Cambodian photographer Heng Sinith meeting with Chang Song

# MEDIA CASUALTIES OF THE CAMBODIAN WAR: 1970 -1975

*Compiled by the Richard Pyle of The Associated Press (AP) and last updated on 19/3/10. Further refined by Carl Robinson*

A total of thirty-seven international and Cambodian journalists, photographers & cameramen were killed or missing-in-action (MIA) in Cambodia between April 1970 and April 1975. The largest number were from Japan (10), France (8) and USA (7 each). Cambodia lost five (5) during the war. Other nationalities are Switzerland (2), West Germany (1), Austria (1), Netherlands (1), India (1), Laos (1) and Australia (1).

## 1970

- ◆ Gilles Caron France Gamma phtg MIA Rte 1 Chipou CA Apr 4
- ◆ Claude Arpin France FL/Newswk phtg Cap VC Rte 1 Chipou CA Apr 5
- ◆ Guy Hannoteaux Switz L'Express Cap VC Rte 1 Chipou CA Apr 5
- ◆ Akira Kusaka Japan Fuji TV MIA Rte 1 Chipou CA Apr 6
- ◆ Yujiro Takagi Japan Fuji TV MIA Rte 1 Chipou CA Apr 6
- ◆ Sean Flynn USA FL/Time MIA Rte 1 Chipou CA Apr 6
- ◆ Dana Stone USA FL/CBS MIA Rte 1 Chipou CA Apr 6
- ◆ Dieter Bellendorf WGermany phtg NBC Cap KR Svay Rieng CA Apr 8
- ◆ Georg Gensluckner Austria FL Cap KR Svay Rieng CA Apr 8
- ◆ Willy Mettler Switz FL MIA Kampot CA Apr 16
- ◆ Takeshi Yanagisawa Japan Nihon Denpa corr MIA Kampot CA May 10
- ◆ Teruo Nakajima Japan Omori Inst MIA unk loc CA May 29
- ◆ Tomoharu Iishi Japan CBS cam KR/VC ambush Wat Po Rte 3 CA May 31

## 1971

- ◆ Francis Bailly France FL Murdered Rte 4 CA

Feb 19

## 1972

- ◆ Alan Hiron Australia FL Cap KR Neak Luong CA Apr 25
- ◆ Terry L Reynolds USA FL/UPI Cap KR Neak Luong CA Apr 25
- ◆ Chim Sarath Cambodia FL Cap KR Neak Luong CA Apr 25

## 1973

- ◆ Has Prak Cambodia MIA Has Santeheap CA date unk
- ◆ Taizo Ichinose Japan FL MIA Angkor CA Nov 23
- ◆ Lim Saroen Cambodia MIA Nokor Thom CA date unk

## 1974

- ◆ Koki Ishiyama Japan Kyodo/FL Cap KR Oct 73/rptd died CA Jan 20
- ◆ Marc Filloux France AFP/Laos murdered by KR CA Apr 15 (aprx)
- ◆ Manivanh Laos AFP FL/interpreter murdered by KR CA Apr 15 (aprx)
- ◆ Lim Savath Cambodia FL/AP KIA Kampong Chhnang CA Oct 1 (aprx)

## 1975

- ◆ Ly Eng Domneung Peel Prik (Morning News) killed by KR Phnom Penh CA
- ◆ After 17 April 1975 - The Time of the Prison Without Walls

## CAMBODIANS KIA/MIA AFTER THE FALL OF PHNOM PENH

Accurate accounting of Cambodian nationals KIA/MIA after 1975 is problematical due to scant information and the unknown fate of many of the victims. The list below is not definitive and more information is needed on the circumstances of death. Most of these Cambodians had worked on the front

lines of the fighting as freelancers for the international press-and were targeted by the Khmer Rouge for this work-while also working for their local papers. As they vanished after the Khmer Rouge takeover when hostilities ended in April 1975, they are treated here as a separate category.

- ◆ Chhor Vuthi AP
- ◆ Hong Ho UPI
- ◆ Sun Heang freelance/AP
- ◆ Tea Kim Heang (Moonface) freelance/AP

photographer

- ◆ Mean Leang AP/freelance
- ◆ Put Sophan CBS
- ◆ Sou Vichit Gamma photographer
- ◆ Sok Ngoun Reuters
- ◆ Ith Chhun freelance
- ◆ Chea Ho UPI
- ◆ Lanh Daunh Rar AP
- ◆ Lek
- ◆ Leng

- ◆ Lyng Nhan AP
- ◆ Ty Many
- ◆ Heng Hok UPI
- ◆ Vantha AP
- ◆ Ung Kim Seng aka Cheav
- ◆ Saing Hel editor Areyathor newspaper
- ◆ Yun Huor Nihon Dempa News
- ◆ Keo Yun freelance TV cameraman
- ◆ Soeung Phoeuk Thor editor of Maet-to-Phum,  
or Newspaper Editor
- ◆ Ou Nget photographer with Minister of  
Information
- ◆ Hak Kheng freelance cameraman
- ◆ Buoy Sreng editor of Sangkruos newspaper
- ◆ Suon Chheng Horn
- ◆ Chey Chum
- ◆ I Ith
- ◆ Men Manil
- ◆ Ly Khuon
- ◆ Koy Sarun



The man with the cigarette is Barney Selbert of UPI. The man standing on the far left is Heng Hok. Back row, second from left is Path Sun; back row, third from left is Im Vann; back row, far right is Chey Sarun; front row, far right is Sing Siphy; front row, second from right is Veng Eng. The others are all photographers or freelancers who worked with the press. Their names are unknown.

# OAKCHON SOKRITH: KHMER ROUGE IS BAD AND GOOD

*Sayana Ser*

From my youngest years, any stories about the Khmer Rouge (KR) that I heard from my parents, neighbors and even at school sounded like fiction to me. I thought that the Pol Pot, Ieng Sary and Khieu Samphan clique were only names people called supposed or alleged national traitors. I think that I did not believe because it was too much to believe. All I heard about was starvation, killing, suffering, forced labor, cursing, scolding and blaming. I saw no proof or evidence, but only words and drawings in primary school textbooks. Later, in early 1990s, my home in the Russey Keo district of Phnom Penh came under Khmer Rouge guerrilla gunfire. I still thought it was a rebel group against the government called Khmer Rouge soldiers. In 1999, I came to realize the truth after reading more than two hundred notebooks written and used during the Khmer Rouge period and collecting interrogation and prisoner lists from Tuol Sleng.

Since 2005, there have been efforts by NGOs and educational institutions to inform the public, victims, survivors, religious groups, and youths about KR history. The Student Outreach project is a program created in 2005 by the Documentation Center of Cambodia (DC-Cam) to educate youths about the Democratic Kampuchea period and the Extraordinary Chambers in the Courts of Cambodia (ECCC). It has designed and implemented a variety of activities to raise public awareness about and understanding of the Khmer Rouge history as well as the Khmer Rouge Tribunal process.

The Student Outreach team has been working with high school and university students, both public and private, on activities including voluntary work, introductory sessions on KR history and the ECCC law and agreement, interview techniques, report writing, and study tours.

To reach out to students using another approach, we plan to visit schools in different provinces once every one or two months to meet with recruited students, arrange local tours and bring students from

different schools together in Phnom Penh to participate in trial hearings and/or study trips of significant historical sites in the city. The first province we chose to visit is Kampot. We did that in mid-March 2010. Parts of Kampot province were still dangerous to travel even more than 25 years after the KR collapsed in January 1979. In June 1996, KR guerrillas frequently destroyed villagers' properties and belongings and kidnapped hundreds of villagers to Taten forest in Koh Sla district. Four foreigners were arrested by the KR guerrillas in the area of Voar Mountain.

We traveled to Chhouk district in Kampot province with another colleague, Piseth Phat, to work with a group of students who had been selected by their English teacher, Matthew Rullo, a U.S Peace Corps volunteer in Cambodia. We arrived at Hun Sen Chhouk high school the afternoon of March 17 and met with the school's vice director, Mrs. Yoek Nhaun. I had planned with Matthew to have one or two survivors speak to the students about their experiences during the Khmer Rouge and what they most remember from that time. It turned out that two additional female teachers at the school who survived the Khmer Rouge regime were also interested in speaking to the class about their personal experiences.

About 40 students from grades 10 to 12 joined the class. I first introduced ourselves, where we are from, and the purpose of the trip, then spoke about KR history and the ECCC's second case (Case 002). I asked the class if they believed that the KR period did occur and if they had previously learned in class about that period. Some students replied that they believed the KR did exist from 1975 to 1979. They heard about it from their parents, relatives, teachers at school, TV and radio. From their answers, I noticed that they knew more than I did when I was their age. It seemed that they were very intelligent.

A few questions were raised by the students.

How did the KR regime happen in Cambodia? Why did they want to kill? How did people survive? Why did they kill men more than women? I had four survivor teachers take turns telling their personal stories to the class. The four teachers were Mr. Net Kab, 67, a history teacher at the school; Mrs. Yoek Nhaun, 58; Mrs. Sok Lang Sat, 59; and Mrs. Kum Sakrun, 57. After hearing their stories and holding a discussion with the four teachers, each participant received a new DC-Cam booklet called "Genocide: The Importance of Case 002," and an ECCC booklet called "Introduction to the Khmer Rouge Tribunal."

The next morning, on March 18, we brought the students and three teachers to Phnom La-ang Mountain. We wanted to show the students one of the Khmer Rouge's security offices located next to their village. La-ang Mountain is a beautiful site located in La-ang village, La-ang commune, Dang Tung district (formerly Chhouk district), about 15 km from Hun Sen Chhouk high school. The caves in La-ang Mountain were used from 1975 to 1979 for detaining "new" or "April 17" people, and soldiers and police officers from Lon Nol regime. The area around the mountain is littered with more than one hundred mass graves, which are now covered by water and rice fields. About 325 human skulls along with their remains have been excavated from the graves. They are now placed in Wat Stung memorial in Chhouk district.

The students could not go into the caves because the whole area has become a private site for cement production by the Thai Boon Roong Cement Company. For security reason, we were not allowed to go near the mountain or walk around it. We could only view the mountain from the gate and take pictures.

After a short break, we left La-ang Mountain for Rumlich dam located in Chum Kiri district, about 30-minute drive from La-ang mountain. The original size of the dam was about ten meters in width. It was expanded during the Khmer Rouge time by forced labor. According to two teachers who used to work there during the Khmer Rouge period, the site was filthy and full of dark flies. Hundreds of people died at

the site due to forced dam construction, starvation and disease.

Viewed from outside, La-ang Mountain and Rumlich dam are two beautiful sites. Very few visitors would know the mysteries and tragic stories that lie beneath their beautiful scenery.

When we arrived at Rumlich, we were pleased with the strong and cool wind blowing from the west, even though it was the hot and dry season. The wind kept blowing very hard making us feel like it was autumn as we stood on the dam looking out on a wide open lake surrounded by mountains. Rumlich has become a tourist destination, attracting many local visitors during national holidays and festivals who paddle on small boats on the calm surface of the lake. However, we saw no information provided for tourists that might help reveal any history of this beautiful place.

At the dam, the students were divided into small groups. Some walked with their teachers. I talked to a student named Sokrith, a 10th grader, at the side of the dam. At one point, I asked him what he



Students and teachers during a field trip to La-ang Mountain

thinks about the Khmer Rouge. He replied, "I think the Khmer Rouge was bad and also good." I was intrigued. So I asked him what was bad and good about the Khmer Rouge. He said, "They were bad because they forced people to work to death, and good because they had the idea to build this dam that now is an attraction, their legacy."

Before joining the trip, Matthew taught the students who participated in his English class about Haiku. He let them write about Khmer Rouge. Sokrith wrote:

*Khmer Rouge is stupid  
They killed many poor people  
So, they are crazy.*

The Student Outreach team has organized genocide education and justice tours at least once a year, bringing more than 300 students to see the ECCC and visit significant sites in Phnom Penh. The participants are two different groups separated accordingly: university students, and high school students in Phnom Penh and from the provinces. We

receive a variety of feedback and reflections from the students afterward, including tour reports, short stories, slogans, poems, letters of thank, and requests from other school teachers and students to join study tours.

The objectives of this program are to provide the opportunity for students to learn more about the development of the ECCC process and the Khmer Rouge history by visiting and seeing genocide sites and not only hearing about it from their parents, relatives, neighbors, and teachers. The goal is for the future generation to continue preserving and honoring the memory and humanity of those who suffered under the Khmer Rouge regime. The tour provided an opportunity for these students from different schools to meet and get to know each other, to be friends and together to find broader understanding of their shared history.

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***Sayana Ser is a Team Leader of Student Outreach Project.***



Oakchon Sokrith

# "DAY OF REMEMBRANCE": WAT SNGUON PICH MEMORIAL

*Pong-Rasy Pheng*

On the afternoon of May 19, 2010, six packets of remains made up of the skulls and bones of people who died during Democratic Kampuchea (1975-1979) were placed in a newly built memorial located in the compound of Snguon Pich Pagoda, Kanthok commune, Ang Snuol district, Kandal province. Speaking during the "Day of Remembrance" ceremony, His Excellency Suong Sithy explained why this memorial was established: to remember the sufferings that befell millions of Cambodians during the Democratic Kampuchea regime. His Excellency emphasized that the souls of people who lost their lives due to unjust acts of the Khmer Rouge now could receive serious attention and warm care from the Khmer Rouge survivors and the younger generation who is now acknowledging the truth due to in-class study of this period.

People from all communes of Ang Snuol district as well as students from several schools attended the ceremony. They organized a procession to bring the remains of the Khmer Rouge victims to the newly built memorial, which is quite similar to the Choeung Ek Killing Field Memorial. Everything was done in accordance with Khmer tradition. Also present at this event were Mr. Youk Chhang, director of the Documentation Center of Cambodia, and the international co-prosecutor of the Extraordinary Chamber in the Courts of Cambodia, Andrew Cayley, who burned incenses in honor of those who died of unjust acts so that their souls could rest in peace.

Cambodian people cannot forget the Khmer Rouge regime. It is Cambodia's history, which the next generation must learn comprehensively to know the true story of what happened to their families during the rule of Democratic Kampuchea.

In 1976, the Khmer Rouge created a security center based in Ang Snuol district in the compound of Wat Snguon Pich pagoda. In the security center, comrade Dan was the chief and comrade Im was the

deputy chief of the center. The Kuti (Monk's house) and class rooms were used as the prisoners' detention center and also the place for Khmer Rouge cadres to live. The temple was used as a dining hall and the pagoda's compound was employed to bury the prisoners' corpses.

Prisoners detained in Wat Snguon Pich pagoda were people whom the Khmer Rouge had arrested from all communes of Ang Snuol district and included Chinese and Cham minorities. Among the prisoners, there were evacuees who were accused of being White Khmer, CIA, KGB and former old society officers with political tendencies. Base people were mostly accused of disobeying Angkar's regulations or not serving the revolution well.

Kim Se, who lives in Snguon Pich village, Kanthok commune, Ang Snuol district, said that his unit of thirty members was arrested by the security guards because they had picked up a ripe palm seed



Youk Chhang joining "day of remembrance" ceremony with villagers.

and shared it among themselves. All the detainees were deprived of food and had very small daily rations. While working, some detainees secretly picked up sprouts of green grass growing along the levee in the rice field and some detainees were so weak that could not stand any longer and died on the spot. Besides dying of overwork and starvation, detainees mostly died from being tortured and interrogated in Wat Snguon Pich temple. One type of torture was tying a detainee's feet with a rope that went through a pulley on the roof of the temple, pulling it up and then dropping it down heavily.

At the end of 1978, most of the detainees at Wat Snguon Pich security center were brought to be executed around the compound of the pagoda, such as near the pond in front of the temple and to the west of the school. However, that same year, some detainees managed to escape from the security center while others were caught and brought back.

After 1979, at Wat Snguon Pich security center, many of the torture implements and blood stains remained on the temple walls. In 1982, all the remaining equipment was transported to Phnom Penh. Villagers

dug up some of the mass graves in order to put them in Wat Snguon Pich pagoda. Those mass graves ranged from small pits to a big one five-meters-square and about two-meter-deep that could hold 150-200 corpses to 300-500 corpses. Today these pits no longer exist.

An old building located to the southwest of Wat Snguon Pich temple was used to place the remains the villagers dug it up from about ten pits around the pagoda's compound. Many years later, this old building was so old that it was about to collapse. The pagoda committee, monks, and villagers moved the remains temporarily to the pagoda's dining hall. After that they initiated the building of the new memorial. They sought assistance from district and provincial officers and held two fundraising ceremonies in order to support its construction. In mid-May 2010, the memorial was erected and was publicly announced the afternoon of 19 May, in time for the anniversary of "the national day for remembering."

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*Pong-Rasy Pheng is a Team Leader of Genocide Education Project.*



ECCC Co-prosecutor Andrew Cayley burning incenses to honor those who died during DK period

# PROVING GENOCIDAL INTENT: INTERNATIONAL PRECEDENT AND ECCC CASE 002

*Ryan Y. Park*

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## I. The Problem of Intent

On December 29, 2009, the ECCC co-investigating judges announced the possibility of charges of genocide in Case 002 against Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith—widely considered the most senior surviving members of the Khmer Rouge—for their role in the regime's persecution of Cambodia's Cham Muslim and ethnic Vietnamese minorities. The co-investigative judges' decision as to whether to include genocide charges based on Khmer Rouge persecution of Buddhists is pending.

This paper seeks to evaluate international legal precedent on an issue that is likely to be critical to the ECCC's examination of these genocide charges: establishing a criminal defendant's genocidal *mens rea* by inference from the surrounding factual circumstances. In particular, it identifies and explores four key factors that international tribunals have found relevant to determining whether genocidal intent is properly inferable: (1) statements of the accused and his or her associates; (2) the scale of atrocities in question; (3) systematic targeting of the victim group; and (4) evidence that atrocities were planned. The paper also seeks to offer preliminary observations on the relative applicability of international precedent to the Cambodian context.

## II. Genocide: the ECCC's Legal Definition

ECCC Law Article 4 defines an act of genocide as "any...committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group." International courts have interpreted identical language in their respective statutes as imposing a requirement of special or "specific intent." Thus, establishing liability for a principle perpetrator of genocide requires "proof of intent to commit the underlying act" as well as "proof of intent to destroy the targeted group."

International tribunals have repeatedly emphasized the importance to "distinguish between motive and intent," however, as "in genocide cases, the reason why the accused sought to destroy the victim group has no bearing on guilt." In other words, while a perpetrator may be motivated by any number of unrelated objectives—such as personal economic gain, tactical military advantage, or the desire to expel a group from a given territory—this does nothing to neuter the specific intent to achieve these objectives through genocidal means.

## III. Inferring Genocidal Intent

In *Akayesu*, the first-ever genocide prosecution in an international tribunal, the ICTR's Trial Chamber noted that "[i]ntent is a mental factor which is difficult, even impossible, to determine" directly, at least absent a confession. The Court further determined, however, that "the genocidal intent inherent in a particular act"



Ieng Thirith



Nuon Chea

may "be inferred ... from the general context" in which the act occurred. The ICTR therefore recognized that absent extraordinary circumstances or a confession direct evidence of genocidal intent will very rarely be available even where such intent otherwise exists. As such, courts must rely on inferences from the surrounding factual circumstances in order to determine whether a defendant acted with the requisite genocidal intent.

#### A. The General Existence of Genocide

Prior to assessing the question of a defendant's individual liability, international criminal tribunals first seek to establish that the situation in question generally constitutes genocide. In assessing the mens rea element at this initial stage, courts do not require that the factual circumstances point to any particular individual(s); they merely seek to establish whether the broader atmospherics suggest that someone acted with genocidal intent.

If the tribunal makes a general finding of genocide, it then investigates whether the individual defendant participated in the genocidal actus reus while possessing the requisite *mens rea*. While this entails a distinct second inquiry into factual circumstances particular to the accused, courts necessarily draw to some extent on their earlier observations and findings in their subsequent

analysis focused on the individual, as "the larger atmosphere in which an individual acted is "relevant to the context in which individual crimes are charged."

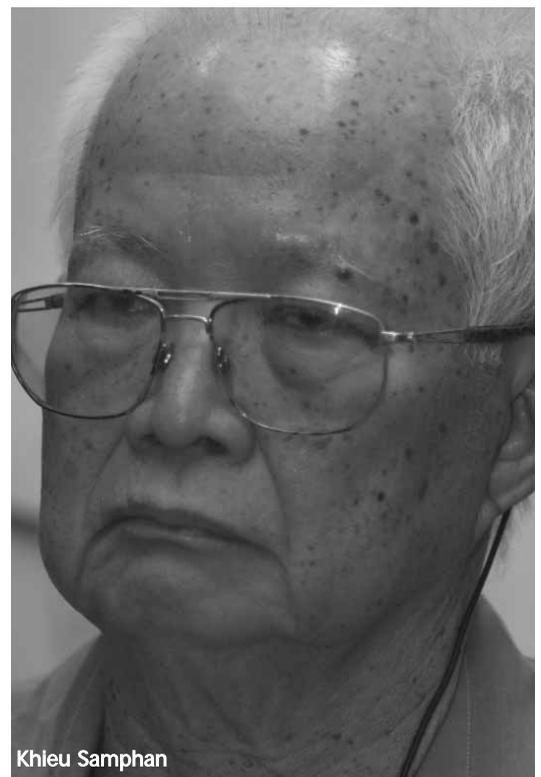
#### B. Statements Manifesting Individual Genocidal Intent

The most direct evidence by which one might infer individual genocidal mens rea is through examining a defendant's verbal and written statements that manifest an intent to destroy a protected group. Accordingly, in the course of determining whether an individual possessed the requisite genocidal intent, the ICTR has closely examined the accused's public statements arguably to that effect. For example, in *Akayesu* the Tribunal found relevant witness testimony that the accused had publicly declared that "if a Hutu woman were impregnated by a Tutsi man, the Hutu woman had to be found in order 'for the pregnancy to be aborted'." Similarly, in *Kayishema*, the ICTR found that the accused had "encourage[ed] the extermination of the Tutsis," and thus possessed the requisite genocidal intent, on the basis of witness testimony that he had exhorted his followers to "go to work" just prior to a massacre of Tutsis.

Moreover, while the inference of genocidal intent might logically be strongest when the defendant himself



Leng Sary



Khieu Samphan

utters the incriminatory statement, the ICTR has often relied on statements manifesting genocidal intent made by others associated with the defendant. Sometimes the association has legal significance in itself, as in *Kayishema*, where the ICTR pointed to "songs about exterminating the Tutsi" sung by those for whom the defendant had command responsibility. In other instances, however, the association in question merely supports a factual inference that the accused agreed with the statements made by the other person. In the course of finding that Jean Paul Akayesu acted with genocidal intent, for example, the ICTR pointed to the testimony of two witnesses indicating that the accused had "chaired...a public meeting" at which another had stated that he "would rest only when no single Tutsi is left in Rwanda."

### **Distinguish: Mere Derogatory Statements**

International tribunals have disagreed over whether "the use of derogatory language toward members of the targeted group" that stops short of calling for (or suggesting support for) the group's physical destruction is probative of genocidal intent. For example, in *Kayishema*, the defendant's use of "hostile language when referring to Tutsis" contributed to the ICTR's finding that he possessed the requisite genocidal intent. In *Ntagerura*, however, the ICTR did not find the fact that the accused had publicly labeled Tutsi "cockroaches" to have significant probative weight. More broadly, in *Krstić*, the ICTY ruled that "no weight can be placed upon Krstić's use of derogatory language [against Bosnian Muslims] in establishing his genocidal intent," as "charged language is commonplace amongst military personnel during war." Whether the ICTY would extend this reasoning outside of the military context, however, is unclear.

### **C. Scale of the Atrocities Committed**

It appears that in every instance in which an international tribunal has contemplated the factors bearing on an inference of genocidal intent, it has emphasized the importance of assessing the "scale... of the atrocities." The scale by which the *actus reus* was committed is relevant from both an absolute and a

relative perspective (i.e. "the [total] number of victims from the group" affected; and "the relative proportionate scale of the actual or attempted destruction of a group). Inferring genocidal intent from the scale of atrocities appears to derive from the legal presumption—present in many domestic jurisdictions—that people intend the foreseeable consequences of their deliberate acts. In other words, the fact that one takes action (e.g., killing large amounts of people) "with full knowledge of the detrimental consequences it would have for the physical survival of [a particular] community" is highly probative on the question of whether the actor specifically intended to destroy that community.

The preceding analysis begs the question: what constitutes 'large scale' atrocities? Again, the Rwandan genocide seems to offer the paradigmatic modern example. Though definitive findings on the absolute number and relative proportion of the population of Tutsi killed during the genocide will likely never emerge, experts estimates range from five hundred thousand to two million were killed in less than four months, constituting from seventy-five to eighty-five percent of the Tutsi population living in Rwanda at that time. Subsequent jurisprudence makes clear, however, that a scale of this staggering magnitude is not necessary for atrocities to be sufficiently 'large-scale' so as to support an inference of genocidal intent. In *Krstić*, for example, the ICTY found that the murder of 7,000 to 8,000 Bosnian Muslim men—of a geographically limited target population of at least four times that number constituted a large enough "scale of killing" (along with other factual circumstances) to support a finding of the perpetrators' genocidal intent.

On the other hand, while highly probative, the existence of 'large scale atrocities' committed at the hands of the perpetrator and/or his associates is not necessary to an inference of genocidal intent. Indeed, in ratifying the theoretical possibility of a "lone génocidaire scenario" whereby a "single perpetrator...[is] capable of committing genocide" on the basis of a relatively small number of discrete killings, the Appeals Chamber of the ICTY implicitly recognized that the scale of

atrocities in question is not a dispositive variable in the calculus of inferring genocidal intent. In other words, "[t]here is no numeric threshold of victims necessary to establish genocide."

#### **D. Systematic Targeting**

Genocidal intent to destroy a group may also be inferred from "the perpetration of other culpable acts systematically directed against the same group." For example, in *Akayesu* and other cases, the ICTR found it highly relevant that Tutsis nationwide had been singled out for persecution and condemnation. The Court found that systematic targeting of Tutsi during the Rwandan genocide occurred through three principle means: First, the setting up of roadblocks, at which "soldiers, troops of the Presidential Guard and/or militiamen ... systematic[ally] check[ed] identity cards indicating the ethnic group of their holders," with anyone listed as a Tutsi "immediately apprehended and killed, sometimes on the spot." Second, the distribution of "execution lists" composed largely of the names of Tutsis and perceived Tutsi sympathizers, with substantial evidence linking the use of such lists to the actual targeting of Tutsi and the sparing of others. Third, "a propaganda campaign conducted before and during the tragedy" via the audio, visual and print media which involved the widespread dissemination of messages "overtly call[ing] for the killing of Tutsi" as a group.

The ICTY in *Krstić* ascribed inferential weight to forms of targeting with less direct relation to the genocidal act, such as "destroying homes" of Bosnian Muslims; destroying the city's "principal mosque"; "preventing any decent burial [of the dead] in accord with religious and ethnic customs"; and the "physical targeting" of Bosnian Muslim property. While such offenses are clearly not acts of genocide in and of themselves, the Tribunal found "evidence relating to acts that involved cultural and other non-physical forms of group destruction" highly relevant to discerning the genocidal intent of their perpetrators.

#### **Systematic Targeting: No Requirement of Exclusivity**

No international tribunal that has considered evidence of systematic targeting of a protected group

for its bearing on genocidal intent has suggested that such targeting must be exclusively directed at the protected group in order to be probative. The ICTR, for example, pointed to a military-issued public letter defining "the enemy" that listed several non-Tutsi social and ethnic groups, including "Hutu dissatisfied with the current regime," "[f]oreigners married to Tutsi women" and the "Nilotic-hamitic tribes in the region." That the targeting in question was not exclusively directed at the Tutsi, however, did not negate the inference of the perpetrators' genocidal intent with respect to the Tutsi. Nevertheless, the ICTR has found that the relative probative weight of targeting is increased if the perpetrators "exclud[e] the members of other groups," and is presumably concomitantly reduced to the extent that other groups are targeted as well.

#### **Comprehensiveness of Targeting: the Existence of an Armed Conflict**

Most instances of alleged genocide in the modern era have occurred amidst an armed conflict in which a military force perpetrated mass killings against a population sharing racial, ethnic or national characteristics with an opposing military force. In this context, defendants have often responded to genocide charges by asserting that any targeting of the protected group was driven by tactical military considerations rather than the desire for the group's destruction.

International tribunals, however, have universally rejected the contention that the existence of a military conflict between forces largely comprised of two ethnic, national, or racial groups necessarily negates an inference of genocidal intent from one group's targeting of the other. As an initial matter, tribunals have pointed to any targeting of civilian persons as near-definitive proof that the motive was not primarily military. The ICTR in *Akayesu*, for example, emphasized that Tutsi women and children were targeted as well as men, and that these two groups were not generally combatants in the civil war. Similarly, even though Serbian forces explicitly spared Muslim women and children from murder at Srebrenica—thereby enhancing the credibility of Serbian claims of harboring purely military motives

–the ICTY in *Krstić*? refused to hold this factor dispositive. Instead, the Court noted that Serbian forces did not distinguish between different types of men, killing almost all members of this sub-group (including the handicapped and "elderly men several years above [military] age") regardless of whether or not they could be expected to serve in battle.

### **E. Evidence of Planning**

International tribunals consider evidence suggesting that commission of the crime's actus reus was the result of conscious planning to be probative of genocidal intent. As the ICTR remarked in *Kayishema*, "although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation." In other words, while "the existence of a plan [is] not a legal ingredient of the crime of genocide" it can "be of evidential assistance to prove the intent of the authors of the criminal act(s)." International courts thus tend to treat any evidence that commission of the actus reus resulted from conscious "methodical planning" to inexorably support an inference of genocidal intent.

Similar to the process for inferring genocidal intent itself, determining the sorts of acts which indicate that atrocities were "pre-arranged" is a contextual, fact-intensive process. For example, the ICTR has pointed to the following as evidence that the atrocities in Rwanda were planned: "the existence of lists of Tutsi to be eliminated"; the media propaganda campaign condemning Tutsis, which it described as "psychological preparation of the population to attack the Tutsi"; and the roadblocks at which Tutsi were screened out and killed.

More generally, international courts treat evidence demonstrating "a pattern of purposeful action" to be indicative of prior planning. For example, the ICTY found evidence that the massacre at Srebrenica was planned from "the number of [Serbian military] forces involved, the standardised coded language used by the units in communicating information about the killings" and the invariability of the killing methods applied." Similarly, the ICTR found the "consistent...

repetitive [and] methodical manner" by which attacks against Tutsi took place to be "compelling" evidence of planning. Note that in many instances, the factual circumstances suggestive of genocidal intent discussed above—the scale of atrocities, incriminating statements, and targeting of the protected group—also support the inference that the genocidal actus reus was planned.

As these examples illustrate, determining whether atrocities were planned is likely to rest on highly fact and context-sensitive presumptions of what circumstances the Tribunal believes are unlikely to have arisen absent a pre-established arrangement.

### **IV. Applying International Precedent to Cambodia**

In a debate that precedes the establishment of the ECCC, commentators have long disagreed over whether the atrocities perpetrated in Cambodia by the Khmer Rouge legally constitute genocide, and if so, which ones. As done by the ICTR and ICTY in the cases of Rwanda and Srebrenica, therefore, the ECCC will first have to engage in a threshold inquiry as to whether genocide was committed in Cambodia before addressing the narrower question of whether the particular defendants before the Court can be held individually liable for its commission.

#### **A. Statements**

Given the secretive nature of the Khmer Rouge regime, there are unlikely to be many public statements made by high-level officials which manifest genocidal intent. And any statements that do exist are unlikely to be as explicit or as graphic as those relied on by the ICTR. Written documentation, however, may prove a more promising source for incriminating statements by which the Court might infer genocidal intent. The Documentation Center of Cambodia (DC-Cam) has collected and catalogued "hundreds of thousands of pages" of documents from the Khmer Rouge era, which many observers believe to contain many strong indications of the regime's genocidal intent. While this paper does not seek to delve deeply into the weeds of interpreting and analyzing individual documents, the foundation of the co-prosecutor's case will likely consist of references to written statements contained in the

documentary evidence.

### **B. Scale**

The atrocities committed by the Khmer Rouge were of undeniable scale, and at least with respect to the Cham Muslim minority, this factor should point clearly towards an inference of genocidal intent. Though exact numbers are difficult to precisely ascertain, Youk Chhang of DC-Cam estimates that between 100,000 and 400,000 Cham died during the Khmer Rouge regime. Evidence with respect to ethnic Vietnamese and Buddhists is less definitive, though the historical evidence suggests that a large proportion of ethnic Vietnamese were subject to forcible removal, with the Khmer Rouge "killing those that remained behind." Reliable estimates of the number of ethnic Vietnamese killed, however, are unavailable. And with respect to Buddhists, the scope of the alleged genocidal actus reus is limited to religious figures (i.e. priests and monks), which necessarily limits its scale.

### **C. Specific targeting**

In many respects, the specific targeting factor militates towards a finding of genocidal intent in the context of the Khmer Rouge. It has been widely observed that the Cham "suffered immensely" under Khmer Rouge rule, "as the regime broke up their families, banned their language and customs, and killed their leaders." In addition, ethnic Vietnamese minorities were subject to widespread forcible removal; and both Muslims and Buddhists suffered ongoing onslaughts on their religion. These are all specific contextual elements that the ICTY and ICTR has found relevant to inferring genocidal intent in the past.

But while ICTR and ICTY jurisprudence demonstrates that strict exclusivity in targeting is not required for this element to be relevant, the lack of exclusivity with which Khmer Rouge leaders targeted the Cham Muslims, ethnic Vietnamese and Buddhists will pose significant difficulties for ECCC co-prosecutors in their efforts to establish the Khmer Rouge leaders' specific intent to destroy these groups. Broad targeting of many sectors of society suggests that the Khmer Rouge may not have been singling out specific groups

protected by the Genocide Convention for destruction. While observers have argued that ethnic Vietnamese and Cham Muslims were disproportionately targeted by the Khmer Rouge, the strength of any inference drawn from their disproportionate targeting is necessarily far weaker than that involved in situations like the crimes Rwanda and Srebrenica, where the protected group in question was the near *exclusive* target of persecution.

Furthermore, ECCC co-prosecutors will likely need to overcome contentions that any targeting of protected groups was merely incidental to the Khmer Rouge's broader military and/or ideological objectives. In particular, they are likely to face objections that any disproportionate targeting of the Cham Muslims was merely the result of that group's greater intransigence in resisting the regime's political reforms. Defense lawyers will surely point to the Cham insurgency as evidence that the Cham's greater proportionate prosecution was logically related to Khmer Rouge military objectives. To rebut this claim, co-prosecutors will likely point to the Khmer Rouge's targeting of combatants and non-combatants (such as women, the elderly and children) alike—a line of argumentation persuasive to the ICTY in *Krstić*?

Note that none of the preceding considerations demonstrate definitively that genocide cannot be proven in Case 002 at the ECCC. Indeed, rigorous external examination of whether it would accord with international practice and precedent to infer genocidal intent in that case is infeasible at this time, as the co-prosecutors' charging documents, as well as the specific evidence relied upon in those documents, are currently under seal. In any case, this paper suggests—through an analysis of relevant international precedent—that ECCC co-prosecutors face significant doctrinal obstacles in their upcoming effort to establish that the Khmer Rouge leaders at trial in Case 002 are guilty of genocide.

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# THE SCOPE OF THE AUTHORITY OF THE EXTRAORDINARY CHAMBERS TO OBTAIN THE TESTIMONY OF HIGH-LEVEL CAMBODIAN GOVERNMENT OFFICIALS AND KING FATHER SIHANOUK

*Anne Heindel*

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## I. Introduction

The necessity and appropriateness of having the Retired King Norodom Sihanouk testify before the Extraordinary Chambers in the Courts of Cambodia ("ECCC" or "Extraordinary Chambers") became publicly contentious in 2007 when a previously unknown US-based NGO requested that his immunity be lifted and he be investigated for his role during the Democratic Kampuchea regime. The Court spokesperson was then quoted as saying that "the retired King could be called as a witness, 'but whether he's bound to show up is another question entirely'." In response, the Retired King invited UN staff to attend a televised three-hour chat at the Royal Palace. At the time, the King Father stated that the interview would "obviate any need for him to testify before the tribunal" and that if the UN did not accept, he would "not accept to see or speak to, nor correspond with the ECCC's UN." The UN, however, chose not to attend.

Over a year later the Nuon Chea defense team reportedly asked the ECCC Co-Investigating Judges to seek the testimony of retired King Sihanouk, as well as Prime Minister Hun Sen, Senate President Chea Sim, and National Assembly President Heng Samrin. The following July it was reported that the international Co-Investigating Judge, Marcel Lemonde, had sent a letter to King Father Sihanouk "possibly with the aim of seeking his testimony" possibly at the urging of the defense. There is no report of a similar letter being sent to the high-level government leaders the Nuon Chea team seeks to interview.

## II. ECCC Authority to Issue Summons to Appear

As originally conceived, the ECCC was intended to apply Cambodian criminal procedural law and to

draw on international procedures when necessary to fill in the gaps between domestic Cambodian law and international standards. However, until the Criminal Procedure Code (CPC) was adopted in August 2007, Cambodia lacked a comprehensive code for the Extraordinary Chambers to consult. For that reason, the ECCC judges drafted their own Internal Rules and adopted them by judicial plenary in June 2007. The Pre-Trial Chamber (PTC) has said that, with the adoption of the Internal Rules, the CPC "should only be applied where a question arises which is not addressed by the Internal Rules." Where there is "uncertainty regarding the interpretation or application" of these rules, "guidance may also be sought in procedural rules established at the international level."

The Internal Rules give the Co-Investigating Judges the authority to issue summons and "take statements from any person whom they consider conducive to ascertaining the truth[,]" subject only to the right against self-incrimination of witnesses. Trial and Supreme Court Chambers have similar authority. These bodies are not mandated to issue summons, but may do so at their discretion.

Summonses are defined by the Internal Rules as "an order to any person to appear before the ECCC." Once summoned, witnesses must appear. "In the case of refusal to appear, the Co-Investigating Judges may issue an order requesting the Judicial Police to compel the witness to appear."

Both the Internal Rules and the CPC provide blanket authority to summon witnesses with no exception. Nevertheless, it is notable that the International Criminal Tribunal for the Former Yugoslavia ("ICTY") has said with regard to subpoenas that they "should not be issued

lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction." Therefore,

*[w]hile a Trial Chamber should not hesitate to resort to this instrument where it is necessary to elicit information of importance to the case and to ensure that the defendant has sufficient means to collect information necessary for the presentation of an effective defence, it should guard against the subpoena becoming a mechanism used routinely as part of trial tactics.*

The Special Court for Sierra Leone ("SCSL") has agreed that subpoenas should be used "sparingly." Indeed, a SCSL Trial Chamber judge has opined that a coercive measure "should not be used at all where its issuance will put the interests of peace, law and order and the stability of the Country and of its Institutions at peril or in jeopardy[.]"

However, one SCSL Appeal Chamber judge has strongly disagreed with this approach. Justice Robertson noted that the "nervousness" of international courts to use compulsory orders to obtain testimony may stem from the rigorous exclusion of *tu quoque* ("you did it too") evidence at Nuremberg, the desire to prevent harassing and embarrassing verbal assaults on victorious political leaders, and early uncertainty about whether their orders would be respected by states. In his view, international court's compulsory powers "should be used whenever the use is necessary to achieve fair trial, no more and no less."

In determining whether or not it is appropriate to coerce testimony, international court judges have looked at whether a witness is protected by any procedural immunities and also the statutory requirements for issuance. These criteria are discussed below.

### **III. Do High-Level Cambodian Officials or the King Father Have Immunity from Testifying Before the ECCC?**

Neither the Framework Agreement, the ECCC Law, nor the Internal Rules offers any privileges and immunities to anyone except court personnel and defense counsel. For that reason it is necessary to consider whether high-level Cambodian officials and the King

Father have procedural immunity under either Cambodian or international law.

First, however, it is necessary to determine the legal characterization of the ECCC as either a national or an international court—or something in between—in order to determine the scope of the Court's authority. As noted by Professor Sands in the context of the issuance of an arrest warrant to a head of state, lawfulness of process "depends on the Court's powers and attributes and the legal basis upon which it was established." If the ECCC is a Cambodian court, it must adhere to Cambodian law. However, if it is an international court the ECCC is only obligated consider Cambodian law to the extent that it is consistent with customary international law.

#### **A. Character of the ECCC As a Hybrid Court**

Unlike the ICTY, the International Criminal Tribunal for Rwanda ("ICTR"), or the SCSL, the ECCC was not established by the United Nations or by an international agreement. Instead, the ECCC was established by a domestic Cambodian law pursuant to a 2003 agreement between the United Nations and the Government of Cambodia setting out the "legal basis and the principles and modalities for ... [their] cooperation." This Framework Agreement was approved by the Cambodian legislature and implemented by it through a 2004 law (the "ECCC Law"). According to the Framework Agreement, the ECCC has been created "with international assistance...within the existing court structure of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea." Royal spokesperson Prince Sisowath Thomico has emphasized that the King Father has immunity from process under Cambodian law because "the ECCC is situated within the Cambodian legal framework and cannot leave this, save by renegotiating the terms with the United Nations."

Although the ECCC is formally part of the Cambodian court system, it also has some features of an international court. Cambodian Deputy Prime Minister Sok An has characterized it "a national court with international characteristics." He has noted that it is "a mixed or hybrid tribunal—firmly located in the national

courts but involving both national and international law; national and international judges, prosecutors, staff; and national and international financing." The ECCC's Pre-Trial Chamber has said that the Court is "a special internationalized tribunal" because it is "an independent entity within the Cambodian court structure." Nevertheless, to date, no ECCC Chamber has clearly defined or directly ruled on the Court's legal status.

Because of the uncertainty regarding the exact legal nature of the ECCC and just how "internationalized" it may be, the application of personal immunities under both Cambodian and international law are discussed below.

## **B. Immunities under Cambodian Law**

### **1. Constitutional "Inviolability" of the King**

The Cambodian Constitution provides, "The King of Cambodia shall reign but shall not govern. The King shall be the Head of State for Life. The King shall be inviolable." King Father Sihanouk retired in 2004 and his son King Sihamoni assumed the throne. In October of that year the Cambodian National Assembly passed the "Law on the Titles and Privileges of the Former King and Queen of Cambodia," which, among other things, bestows on Sihanouk the title "Great Valorous King" or "Hero King."

Persons close to the Royal Family believe the provision of this title grants King Father Sihanouk the same immunities to which he was entitled under the Constitution while he was King. For example, Ke Kim Se, the retired King's former cabinet chief, has said that "calling the 'king father of the nation' to the court would be 'violating the constitution and law of preparation of the royal title and royal privilege of His Majesty.'" This impression is apparently shared by the Cambodian Government, which reportedly referred to this law and the Constitution when a US-based NGO suggested the King Father be stripped of immunity and investigated. In contrast, the Asian Human Rights Commission has argued,

*the Constitution of Cambodia, in its letter and spirit, confers inviolability including the immunity from prosecution upon the person*

*of the reigning monarch and not upon anybody else. No act of parliament can confer the same inviolability upon former King Sihanouk*

Additionally unnamed "legal monitors" have been reported as opining "that it is, in fact, not against the constitution to call the former king...to the court, though it may be a sensitive risk."

If the King Father is entitled to constitutional protections equivalent those enjoyed by the reigning monarch, the question becomes whether his "inviolability" includes protection from providing court testimony. Neither the Constitution nor apparently any Cambodian domestic laws define the term "inviolability." The Vienna Convention on Diplomatic Relations, which recognizes the inviolability of diplomatic agents, prohibits not only such agents' arrest or detention, but also provides that they "[are] not obliged to give evidence as a witness." Therefore it appears that the plain meaning of "inviolability" would preclude an obligation to testify.

This appears to be the common view of both the Government and the Royal Family. Commenting on the scope of the Retired King's constitutional immunity, National Assembly Deputy President Nguon Nhel has asserted that the Retired King "cannot rightfully be summoned to testify at the tribunal." Likewise, Prince Sisowath Thomico has said that the Retired King "cannot be compelled to testify." Nevertheless, he has also said that it is "unclear whether any head of state can be questioned by investigators under Cambodian law." To remove any doubt, an authoritative pronouncement on this topic is required from the Constitutional Council on the legal effect of Article 7 of the Constitution and the 2004 Law on the Titles and Privileges of the Former King and Queen of Cambodia. If the ECCC is considered to have the character of a domestic Cambodian court, any decision by the Constitutional Council would be binding on it. However, because the Pre-Trial Chamber has found that the Court is not an ordinary Cambodian court, but "a special internationalized tribunal," even if the King Father is considered to have full immunity under Cambodian law it also may be necessary to determine if he is entitled

to immunity under international law.

## 2. Protections of High Cambodian Officials under Cambodian Law

The Cambodian Constitution provides members of the National Assembly and Senate immunity from criminal arrest and detention, unless waived. Article 80 of the Cambodian Constitution provides in part that "[t]he accusation, arrest, or detention of [a National Assembly] member shall be made only with the permission of the National Assembly[.]" Likewise, Article 104 provides the same protection for members of the Senate, whose immunity from arrest may only be waived by the Senate.

With regard to members of the Royal Government, the Constitution recognizes their potential liability "for any crime or misdemeanour that he/she has committed in the course of his/her duty," however the National Assembly must vote to file charges against him or her in the case of serious offenses committed in the course of duty.

Unlike the King Father, high-level officials are not provided "inviolability," but waivable procedural immunity from arrest and detention. It appears that neither the Constitution nor any other Cambodian laws offer such officials immunity from testifying at either a domestic Cambodian or international court.

Nevertheless, it remains possible that Cambodian courts may find that these officials are exempt from process due to the high-level offices they hold. Judge Itoe of the SCSL has cited a French case where the French Cour de Cassation found that President Chirac was not under any obligation to appear as a witness at the pre-trial stage of a trial because "the obligation is accompanied by a measure of a constraint...and is punished by a criminal penalty." Similarly, the Supreme Court of Sierra Leone has found that, "A serving Head of State is entitled to absolute immunity from process brought before national courts as well as before the national courts of third states[.]" However, as with the immunity of the King Father discussed above, even if these officials have immunity under Cambodian law, such immunity may not be applicable before an

internationalized court such as the ECCC.

## C. Applicability of Personal Immunity Under International Law

International law establishes that certain high officials enjoy full immunity from the jurisdiction of foreign states. Immunity *ratione personae*, also called personal immunity, attaches "to the status of certain incumbent officials and operates as a procedural bar to the exercise of jurisdiction over them by the courts of another state."

The International Court of Justice has noted, "[I]n international law it is firmly established that ... certain holders of high-ranking office in a State, such the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal." The immunities are not for an official's personal benefit, but to ensure that he or she is able to carry out required duties of the office he or she holds. Therefore, the extent of the immunities accorded is dependent on the nature of the functions an official exercises. With regard to a Minister of Foreign Affairs, who travels frequently and conducts foreign relations with the full authority to act on behalf of his or her country, the ICJ found that "throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and immunity."

International law does not, however, provide any jurisdictional immunity from prosecution for high officials in their home countries. They "may thus be tried by these countries' courts in accordance with the relevant rules of domestic law." Moreover, high-level officials such as incumbent heads of state or former Ministers for Foreign Affairs may be subject to criminal proceedings before certain international courts, where they have jurisdiction. According to the SCSL Appeals Chamber:

*A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on*

*the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community.*

However, even if the ECCC were found not to be bound by Cambodian law on immunities and Cambodian high officials and the King Father were found to have no immunity from prosecution by the ECCC under international law, it is nevertheless unclear whether this necessarily means that they also have no immunity from testifying.

The ICTY and ICTR Trial Chambers have found that government officials have no immunity from being subpoenaed to testify before them and also may be compelled to attend pre-testimony interviews; however they have not subpoenaed incumbent high level officials. In discussions not material to the holding of any SCSL decision, two judges of the SCSL agreed; however a third has argued to the contrary. Trial Chamber Judge Thompson has said:

*[I]f a priori there is no entitlement to immunity from international criminal prosecution reserved to a Head of State or government or any responsible government official under international law as regards the perpetration of international crimes, a fortiori international law does not confer any immunity from testifying as witnesses in international criminal trials.*

Likewise, Judge Robertson of the Appeals Chamber has said:

*There is now such overwhelming authority that incumbent heads of state are amenable to international law, that the very proposition that they have sovereign immunity from the processes of international criminal courts must be viewed as the jurisprudential equivalent of the proposition that the earth is flat.*

On the other hand, Trial Judge Itoe, while agreeing that a head of state is not immune from being charged for crimes under international law by an international

criminal court, does not think he or she can be required to testify before an international court. This is because "contempt" for failure to comply with a subpoena is not an international crime and in his view international criminal courts do not have the jurisdiction to prosecute heads of state for ordinary offenses.

#### **D. Conclusion**

There are many uncertainties with regard to the possibly immunity of King Father Sihanouk and Cambodian high-level government officials. It is not entirely clear that they have immunity from testifying under Cambodian law, but even if they do they may not before the ECCC. The exact character of the ECCC as an "internationalized" court has not been defined, nor has its relationship to Cambodian law. If the ECCC is not obligated to recognize any presumptive immunities under domestic law, while the King Father and high-level officials would not necessarily be immune from prosecution by the ECCC, it remains unclear whether or not they would nevertheless be immune from testifying.

Although international courts have not issued any holdings on incumbent high-officials' immunity from testifying before them, they have considered whether or not the testimony of such officials meets their statutory requirements for issuing a subpoena. In all instances thus far they have been able make a determination solely by considering whether or not these officials' testimony would be helpful to the case and whether or not it would be necessary to compel their testimony.

#### **IV. Is It Legitimate and Necessary to Summon the Retired King or High-Level Government Officials?**

At the SCSL there have been requests in two cases to subpoena President Ahmed Tejan Kabbah of Sierra Leone. SCSL Rule 54 states:

*At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.*

This is the same standard applied by the ICTY

and ICTR, but with a noticeably higher threshold than that set out in the ECCC Internal Rules, which give the Co-Investigating Judges the authority to summon and "take statements from any person whom they consider conducive to ascertaining the truth[.]" Nevertheless, it is instructive to review the SCSL's analysis and the factors it considers in determining the appropriateness of compelling testimony.

The SCSL Trial Chamber, following the jurisprudence of the ICTY, has found that Rule 54 involves a two-step test: determining (1) whether "the applicant has demonstrated a reasonable basis for the belief that the prospective witness is likely to give information that will materially assist the applicant's case with regards to clearly identified issues in the forthcoming trial" and (2) whether "the use of the subpoena is necessary for an investigation or for the preparation or conduct of the applicant's case and whether this information is obtainable through other means." "If the applicant has been unable to interview the prospective witness, the test will have to be applied in a reasonably liberal way[.]"

#### **A. Will the Testimony Sought Be Conducive to Ascertaining the Truth?**

The ECCC standard for issuing a summons is whether the testimony sought would be "conducive for ascertaining the truth." The ICTY and SCSL apply a higher standard: whether the testimony "will materially assist the applicant's case with regards to clearly identified issues in the forthcoming trial." The ICTY has said under this standard the applicant "must be specific about the information sought from the prospective witness and must demonstrate a nexus between this information and the case against the accused." In determining whether information will materially assist an applicant seeking to subpoena or summon a witness, these courts consider,

*the position held by the prospective witness in relation to the events in question, any relationship he may have (or have had) with the accused which is relevant to the charges, the opportunity which he may reasonably be*

*thought to have had to observe those events (or to learn of those events) and any statements made by him to the prosecution or to others in relation to those events.*

In the SCSL Norman Trial Decision regarding President Kabbah, the SCSL examined President Kabbah's position as President during Sierra Leone's armed conflict, as it was alleged that at that time he was "commanding, materially supporting, and communicating with various members of the alleged CDF leadership" who sought his testimony. The Trial Chamber found that the accused had failed to identify "with specific specificity" how his testimony would relate to a charge in the indictment or materially assist their case.

Likewise, as to the President's potential testimony about private conversations he had with the accused regarding acts and places in the indictment, the Trial Chamber found that there was no specific information about how this testimony would help the accused overcome criminal responsibility for the alleged acts. And with regard to evidence the President may have about the accused's participation in a common plan to restore the President's government, the Trial Chamber said he had not provided sufficient explanation of how such testimony would impact the court's findings on any element of any crime or mode of responsibility.

Comparatively, in a later Sesay et al. decision, the Trial Chamber found that the (by that time) Former President Kabbah's testimony would materially assist the accused with regard to two clearly identified issues: (1) that the accused "was doing his best to protect the detained UNAMSIL peacekeepers, and to reinstate the stalled disarmament process," and (2) that the accused "was not ordered to attack or coordinate attacks against the said UNAMSIL peacekeepers but acted alone."

The decision did not clearly indicate why the result was different in this case. However in his concurrence, Judge Itoe stated his view that, whereas in the Norman case the defense did not seek testimony directly impacting the determination of guilt or innocence,

in this case, the defense sought evidence that would assist them in defending specific counts of the indictment. In his view, the Norman request was clearly made solely for the purposes of venting anger against Kabbah for "sacrificing them to the Prosecution," embarrassing and ridiculing him, and exposing his criminal involvement in the Sierra Leone conflict.

The Nuon Chea team, who are seeking an opportunity to question the King Father, have said, "It's hard to imagine a more uniquely situated individual to shed light on the events of Democratic Kampuchea." They have highlighted the retired King's brief role as head of state of the DK regime, his presence in Cambodia during much of the Khmer Rouge period, and the information he may have been privy to due to his "unparalleled access to its senior leaders and hierarchy." Moreover, "'Sihanouk is singularly capable of providing information relevant to the [prosecutors] allegations relating to the DK authority structure'."

With regard to the specified high-level Cambodian officials, who all held positions of command with the Khmer Rouge but defected before the fall of the DK regime, the Nuon Chea team has noted that they are "'uniquely situated' to assist judicial investigators by providing information about the Khmer Rouge power structure." The Nuon Chea investigative request apparently highlighted these officials' "former ranks within the DK" and possible information in their possession about "the existence of a 'common plan of systematic persecution'." In response, Minister for Information Khieu Kanarith noted:

*You have to ask the logical questions. If they were low-ranking officers, how could they know about the system? If Hun did not clearly know who Nuon Chea was [during the regime], how could he be a witness?*

In his dissent in the Norman Trial Decision, Judge Thompson argued that the SCSL should adopt a more flexible standard for compelling testimony in order to uphold the equality of arms and principles of fundamental fairness and "ensure that no relevant evidence vital to the discovery of the truth is foreclosed

by reasons of legal technicalities." His preferred approach appears closer to the ECCC Internal Rules requirement that the Co-Investigating Judges (CIJs) consider only whether it would be "conducive to ascertaining the truth" to issue a summons. In Judge Thomson's view, it is premature to consider whether the evidence a subpoenaed witness may provide is favorable or adverse to the applicant as it amounts to "a predetermination of the probative value of such evidence." Instead, he believed only prima facie evidence should be required to show that the information sought is necessary for the investigation or trial.

Additional insight into ECCC standard may be provided by Judge Robertson's discussion in the SCSL Norman Appeals dissent regarding the materiality of evidence that will "get at the 'full truth' of what happened." Although he, like Judge Thomson, believes that the SCSL should apply a more flexible approach to the issuance of subpoenas, in his view,

*...it is not the function of a war crimes court to get at the "full truth" about the war. That lengthy exercise must be left to historians and truth commissions. This court is only concerned to get at the truth concerning the specific acts that are charged against the defendants: more precisely, to examine whether the prosecution evidence provides the charge beyond a reasonable doubt. It is a frequent mistake, often made by prosecutors who overload indictments but here made by counsel on behalf of defendants, to think that the court can cope with receiving evidence which is "relevant" only because it illuminates some aspect of the conflict.*

Bearing in mind Judge Robertson's admonition, the roles of the potential witnesses and their relative access to Nuon Chea or the other suspects suggest that obtaining the testimony of Former King Sihanouk may "be conducive to ascertaining the truth" about the charges against Nuon. However it is not clear that this standard can be met with regard to the named high-level government officials, who were mid-level

KR commanders apparently not in contact with or privy to the decisions or policies formulated by the charged DK leaders.

## **B. Is a Summons Necessary?**

In determining if a coercive order is not only material, but "necessary," as required by their statutes, international tribunals require an applicant to show that the evidence at issue "cannot be obtained without judicial intervention." This includes two considerations: would the witness testify voluntarily; and can the information be obtained from another source.

### **1. Will High-Level Cambodian Government Officials or the King Father Accept a Request to Testify Voluntarily?**

International tribunals require that the applicant seeking compelled testimony "must first demonstrate that it has made reasonable attempts to obtain the voluntary cooperation of the parties involved and has been unsuccessful."

Throughout the 12 years since the Cambodian Government first requested international assistance in the creation of a Khmer Rouge tribunal, King Father Sihanouk has many times indicated that he is willing to testify about his experiences during the Khmer Rouge regime. A UN negotiator involved in early negotiations on the framework for the Court reports,

*King Sihanouk gave full support to the efforts on the Khmer Rouge issue outlined in my General Assembly report, telling me that if this initiative was not pursued, there would never be an end to impunity in Cambodia. He added that he himself was willing to be called to a tribunal to explain his own relationship to the Khmer Rouge regime. 'This is my duty,' he said.*

In 1999 the King Father said "he was willing to give up his royal and constitutional immunity and accept a prison term" should a Khmer Rouge court wish to put him on trial. Moreover, "Even if the judges of this tribunal do not summon me, I will present myself before this tribunal[.]" In 2004 the King Father issued an announcement stating his willingness to

testify at the ECCC: "I will testify before the court not only one time but every time the court holds a hearing for questioning this person and that person, every day, every week, every month, every year, as long as I am alive." He also asked that his wife, Queen Norodom Monineath, be allowed to testify, "[A]s she remembers dates well and was privy to his "living conditions." As late as 2006 it was reported as saying, "I am not lacking the courage to go answer before the tribunal."

Nevertheless, the retired King's expressions of support for the ECCC process have been regularly punctuated by vocal dislike of the Court and a lack of willingness to participate. In particular, since the UN refused to go to the Palace at his request in 2007, the King Father has consistently said that he will not cooperate. Shortly after, it was reported that the Former King said "he had told the officials that the meeting was the only chance for the court to get his input." Most recently, in July 2009, an aid to the retired King said that he would refuse to cooperate "even if the court calls him to testify."

Even if the King Father wanted to testify, he may be counselled not to do so by the Government. Information Minister Khieu Kanharith has said that the Government does not want the retired King to be called because it was adversely impact his role as a symbol of national unity.

No information has been made public about the Prime Minister and other named officials willingness to testify. Although he originally requested UN assistance in creating a Khmer Rouge Court and his Government negotiated its creation, Prime Minister Hun Sen's public support for the Court has never been strong. Most recently he has indicated that he wouldn't mind if it closed down and has opposed the Court extending investigations to five more suspects. Nevertheless, it is not clear that he and other officials would refuse to testify if asked.

Due to the uncertainty regarding the Retired King and high-level officials' willingness to testify if asked, assessing their willingness may be an appropriate first step for the ECCC before issuing a summons.

## 2. Can the Desired Information Be Obtained from Another Source?

The SCSL, referencing ICTY jurisprudence, has said that "convenience is not a sufficient justification for the issuance of a subpoena, and that when the evidence sought to be proffered can be obtained through other means, it would be inappropriate to grant such an order."

In the Norman case, the accused argued that as President of Sierra Leone, Kabbah was "the top figure of the CDF" and he would have important evidence regarding its command structure, including subordinates' duties and the chain of command. Nevertheless, the Trial Chamber decided with little analysis that this information was obtainable through other means. On appeal, the SCSL Appeals Chamber agreed with the lower court that "[t]he Appellant has not shown why the President's personal observations about [his] relative culpability ... are unique."

In dissent from the Trial Chamber decision, Judge Thomson argued that in determining "what actually transpired at the highest level of the CDF hierarchy," the President would be best placed to provide that information. Likewise, in dissent from the Appeals Chamber decision, Justice Robertson argued that evidence obtained from a willing foot soldier is not as valuable as that obtained from an unwilling commander because the commander's testimony by definition will be more reliable, authoritative, and credible. For that reason, he suggested that, instead of considering whether evidence may be obtained by other means, courts should consider whether the requested testimony may be the "best evidence available."

In contrast to the SCSL, which seems to have had strong concerns that the Norman accused sought merely to embarrass President Kabbah, the ICTY ordered the former sector commander and military observer of the United Nations Assistance Mission in Rwanda and Chief of Staff of the Ghanian army to testify after noting in particular that the testimony involved his personal observations. Highlighting his position as an UNAMIR official and his meetings with the accused,

it found that he "had the opportunity to observe the events at issue" and that the information he may provide would be relevant and "could not be obtained by other means."

King Father Sihanouk likely personally observed relevant events at issue in the case against Nuon and others. This type of access, even if limited, was uncommon, and therefore, there are few others who would be able to provide similar testimony. On the other hand, it appears that the Prime Minister and other high-level Government officials would be unlikely to have any information related to events that could not also be obtained from an equally knowledgeable source.

## C. Conclusion

The King Father was initially supportive of the ECCC and in the past has expressed a willingness to testify if called. If the Court were to call up on him and request his assistance, it remains possible that he would be willing to offer his personal recollections to the Court. It seems unquestionable that his testimony would be "conducive to ascertaining the truth" about many events related to crimes charged against Nuon and others. As the King Father has been unwell in recent years, it is notable that the Cambodian Procedure Code provides, "If the witness is sick or cannot travel, the investigating judge and the clerk may visit his residence or the place where the witness stays to take the statement of the witness." Such a procedure might also be adopted by the ECCC.

It is unknown whether the Prime Minister and other high-level officials have been asked to testify, and if their testimony is found relevant this would be an appropriate first step before issuing a summons. However, based on international jurisprudence is not clear that their testimony is necessary to the proceedings or would directly relate to the charges against the accused.

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# PROCEDURAL JUSTICE: A EXPLORATION OF THE ECCC'S INTERIM APPELLATE REVIEW REGIME

*Mary U. Irozuru*

The legitimacy of proceedings at the Extraordinary Chambers in the Courts of Cambodia (ECCC) will be judged, in large part, on its ability to ensure procedural justice, not just for the victims of the Khmer Rouge, but for the accused as well. The ability of the parties to a proceeding to request an interlocutory appeal is an important component of procedural fairness. An interlocutory appeal, also referred to as interim review, is an appeal of a non-final decision while the proceedings are still in progress. In international criminal proceedings, interlocutory appeals operate as a procedural check where the rights of a party to the proceedings are at risk of being violated by a decision of the court. Though this remedy is universally deemed exceptional in criminal proceedings, many international criminal courts have permitted the parties to request interim review of a wide range of issues.

In establishing rules for interlocutory review, or an interim review regime, international and hybrid national/international courts must, not only, make accommodations for the unique challenges present in international criminal proceedings, but they must also balance competing interests, namely the Defense's right to a fair trial and right to an expeditious trial. However, the ECCC's interim appeal regime provides insufficient protection for the rights of the Defense and is inconsistent with international practice. This article examines a number of these concerns and explores some corrective measures the ECCC could adopt.

## **I. The ECCC's should not have a restrictive interim appeal regime and a restrictive final appeal regime**

At the ECCC, the Defense only has limited rights to appeal interim decisions. Defendants at the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR, collectively known as the "Ad

Hoc Tribunals"), and the Special Court for Sierra Leone (SCSL) have greater rights of appeal. The ECCC's restrictive regime is not well suited for the its similarly restrictive regime for appellate review of final decisions. To ensure that all decisions involving issues of fairness can be reviewed, without unduly delaying proceedings, a permissive interim appeal regime should be coupled with a restrictive final appeal regime, or vice versa.

Before the amendments to the ECCC Internal Rules in 2008, the accused could request an appeal at judgment of "any issues of fact and law, against decisions of the Trial Chamber." However, after these amendments, this broad right to appeal was considerably restricted. Currently, the Supreme Court Chamber will only hear final appeals on the following grounds: "a) an error on a question of law invalidating the judgment or decision; or b) an error of fact which has occasioned a miscarriage of justice." Additionally, the amended rules call for higher standards of admissibility for appeals at the final judgment stage. No longer can the accused submit a brief request, containing the reasons for the appeal; the new provisions require that the accused either specify the alleged error of law and demonstrate how it invalidates the decision or specify the alleged error of fact and demonstrate how it occasioned a miscarriage of justice. Each ground of appeal must be supported with arguments and authorities.

This move toward a restrictive approach to appeals at the final judgment stage should have triggered a more permissive approach to interim appellate review for the Defense. Where there is no right during the trial or after the trial to request a review of a matter involving the fundamental rights of the accused, the legitimacy of the entire proceedings may be questioned. Matters concerning the Defense's right to an expeditious

trial and the interference with the Defense's ability to develop a defense strategy, among others, may not be afforded appellate review at any stage of the proceedings.

## **II. The ECCC's overall appellate review regime is inconsistent with international and national criminal practice**

The ECCC limits the Defense's right to appeal interim decisions, but does not limit the Prosecution's rights. Neither the ICTY, the ICTR, the SCSL, nor the International Criminal Court (ICC) limit the appeal rights of the accused with the respect to those granted the Prosecution. Further, none of these other courts uses a regime for appellate review of final judgments that is as restrictive and inflexible as the one in place at the ECCC. Instead they appear to approach appellate review holistically, by permitting appellate review of fundamental issues at the final judgment stage where it is unavailable at the interlocutory stage.

For example, the ICC, which has the most restrictive interim review regime, appears, at least facially, to take the most permissive approach to appeals at the final judgment stage. Its regime for final appellate review permits appeals of the following: (i) procedural error, (ii) error of fact, (iii) error of law, or (iv) any other ground that affects the fairness or reliability of the proceedings or decision. A requirement that the error of law invalidate the decision and that the error of fact occasion a miscarriage of justice might be considered a heightened standard for errors of law and fact. Unlike the ECCC, the ICC does not require this heightened standard. Moreover, the ICC permits appellate review of procedural errors and any other ground affecting the proceedings fairness and reliability, a term that can be interpreted quite broadly.

The other courts discussed in this article also have more permissive final appellate regimes. The SCSL, for instance, permits the review of procedural errors, in addition to the grounds permitted under the ECCC. Though the Ad Hoc Tribunals also require that the error of law invalidate the decision and that the error of fact occasion a miscarriage of justice, they differ from the ECCC in one important way. The ICTY and ICTR

Appeals Chambers (AC) are allowed to vary the grounds for final appeals, upon a good showing. This not only gives the court some flexibility, but it also appears to permit the appeal of certain issues at the final judgment stage that were not appealable during the trial.

Appellate review at the ECCC is also inconsistent with the practice in the French system. French courts "look at the fairness of procedures globally, allowing the absence of one guarantee to be counterbalanced by the existence of another." Though, like the ECCC, the French criminal system restricts the accused's right to interim review, what distinguishes the French civil system from the ECCC is that both the Prosecution and the Defense can initiate a full review of the facts and law of the case at the final judgment stage. This would be like getting a new trial. Issues that could not be reviewed during the first trial, will be reviewed at the second. This counter-balancing is absent from the ECCC's appellate regime.

## **III. The ECCC's restrictive approach to interim review interferes with the defense's right to a fair trial**

Historically, efforts by defense lawyers to provide adequate representation for their clients in international criminal proceedings have been obstructed by a lack of human and economic resources compared to those afforded the prosecution. Hence, at the "heart" of modern international criminal justice is the principle of equality of arms, a component of the right to a fair trial. The principle implies that "each party must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent." The following subsections will explore two instances in the ECCC's pre-trial proceedings where the Defense's restricted access the interim appellate review places it at a disadvantage in relation to the Prosecution.

### ***(a) The Defense's minor role in fact-finding coupled with its limited right to appeal investigative actions places it at a substantial disadvantage vis-à-vis the Prosecution***

At the ECCC, the Defense is not permitted to conduct its own investigation; it may only request

that the Office of the Co-Investigating Judges (OCIJ) undertake certain investigative actions or pursue additional expert reports on its behalf. Though the OCIJ is not required to pursue these requests, the Defense is given a right to appeal the refusal. However the Defense has no right to challenge the manner in which the request, if accepted, is satisfied.

According to the ECCC Internal Rules, the OCIJ may delegate investigative tasks to the Judicial Police or the ECCC Investigators. The Judicial Police operates under the sole instructions of the Co-Prosecutors during the preliminary investigation stage, the OCIJ during the judicial investigation stage, and the Pre-Trial Chamber (PTC) during supplementary investigations. The Judicial Police are not permitted to seek or take orders from any other person in carrying out their investigative functions. Nor are the Judicial Police permitted to question the accused. Similarly, the ECCC Investigators are to conduct their investigations in accordance with the requests of the Co-Prosecutors or the OCIJ, depending upon the stage of the proceedings, and are not permitted to question the accused.

Should the Defense request that the OCIJ pursue a particular investigative action and should the OCIJ agree to pursue that lead, there is no guarantee that the lead will be pursued in a manner most helpful to the accused. Moreover, there is no remedy through which the Defense can seek an expanded or altered focus for the investigative action. Without a more expansive right to interim appellate review, the Defense's ability to present its case is compromised.

The ability of the Defense to influence the investigation or the evidence upon which the trial will be based is greater at international courts. At the ICC, the Defense is also not involved in pre-trial investigations. Nonetheless, it may fully challenge the evidence and provide its own evidence during the confirmation hearing. It may also request approval to appeal any pre-trial decision that "would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial." Similarly, the Ad Hoc Tribunals do not permit the Defense to participate in the

investigation; however, the Defense may request an interlocutory appeal to challenge the investigative action.

Notably, the lack of control over the manner in which an investigation is conducted is a common criticism of the French criminal system, upon which Cambodian Law and Internal Rules are based. Though the investigating police are operating under the judge's orders, even the judge "cannot ensure that such orders are fully complied with." The ECCC's adoption of this French law feature without adapting it to address the investigative challenges of international proceedings and the heightened necessity for equality of arms in international criminal proceedings is problematic.

*(b) The Defense's inability to independently challenge the substance of the Closing Order places it at a disadvantage vis-à-vis the Prosecution and is inconsistent with international criminal practice*

At the ECCC, the Closing Order is functionally equivalent to an indictment. The Closing Order contains the material facts of the indictment, their legal characterization, the relevant criminal provisions, and the nature of the accused's criminal responsibility. While the Prosecution is permitted to appeal the Closing Order issued by the OCIJ, the Defense cannot. This places the Defense on unequal footing with the Prosecution and hampers the Defense's ability to adequately prepare its case.

Errors in the Closing Order with the potential to vastly alter the nature of the proceedings and the legal strategies of the parties ought to be remedied by interim review. However, under the Internal Rules, only the Prosecution is authorized to challenge these types of errors. The practice in other international criminal courts with respect to the indictment and procedures for confirming charges sheds light on the significance of the Defense's inability to question the contents of the Closing Order at the ECCC. At the ICC, the charges against the accused must be confirmed in a hearing before he or she can be brought to trial. However, prior to the confirmation hearing, the Defense must receive a copy of the document containing the charges and information regarding the evidence to be used in support

of those charges. At the confirmation hearing, the Defense may: (a) object to the charges, (b) challenge the evidence presented by the Prosecutor, and (c) present new evidence. At the ICTY and ICTR, the Defense may challenge the form or substance of the indictment via interlocutory appeal.

Because substantive challenges to a Closing Order may only be initiated by the Prosecution, the Defense is in a disadvantaged position. Further, not only is the Defense's access to judicial remedies limited in relation to the Prosecution, but the Defense's ability to prepare an effective defense may also be compromised without the power of appeal. The consensus in criminal proceedings is that where the indictment is found to be vague or lacking in specificity, the Defense's ability to adequately prepare his case may be handicapped. Where access to a remedy in such a case hinges on the discretion of the opposing party, the principle of equality of arms cannot be guaranteed.

#### **IV. How might the ECCC correct these concerns?**

As discussed above, the ECCC's approach to interlocutory review may be compromise the legitimacy and fairness of the proceedings. However, if the ECCC were to shift from its current position to a more intermediate one, some of these concerns, such as the equity between the Prosecution and the Defense, could be addressed and possibly eliminated. This section will explore three ways in which the ECCC can achieve a more intermediate approach to interlocutory appeal: the adoption of discretionary review, the adoption of the fast-track mechanism, and the use of broad statutory interpretation.

##### ***(a) Adopt a provision for discretionary review***

Absent from the ECCC rules, but available at all international courts is a mechanism for discretionary interlocutory appeals - appeals that are granted based on the judgment, or opinion, of the chamber. The ICC and the Ad Hoc Tribunals use similar language to grant discretionary power to the Appellate Chamber to review decisions involving issues that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion

of Chamber, an immediate resolution may materially advance the proceedings may be accepted for appeal. The SCSL employs two separate standards, depending upon whether the issue arises from a pre-trial decision (preliminary) or a trial decision (non-preliminary). Preliminary issues that "significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial" may be referred directly to the Appeals Chamber for adjudication. Non-preliminary decisions, "in exceptional circumstances and to avoid irreparable prejudice to a party," may be subject to interlocutory appeal. A number of critical issues have been certified for appeal via these provisions, including the statutory rights guaranteed to the accused and the admission of evidence.

The ECCC would similarly benefit from the addition of discretionary review. Discretionary review would give the ECCC greater flexibility to address many of the fairness concerns discussed in the previous section.

##### ***(b) Adopt a fast-track mechanism***

The ECCC could also adopt the fast-track mechanism of the SCSL, which allows the Trial Chamber (TC) to refer an issue directly to the AC and receive "authoritative interpretations" on crucial preliminary matters without first ruling on the issue. Because referral precedes any judgment on the issue, the parties do not have to present these issues at the TC, only to present them again at the AC. As a result, the fast-track mechanism is believed by the SCSL to "enhance rather than undermine the basic right to expeditious justice."

##### ***(c) Employ Flexible Statutory Interpretation***

Alternatively, or in addition to the above methods, the ECCC could broadly interpret its Internal Rules on appellate review. The ICTY and the SCSL have relied on broad interpretations of their interlocutory review rules when presented with an issue of fundamental fairness. For instance, the ICTY's first request for interlocutory review in *Prosecutor v. Tadic*, challenged the very foundation and legality of the court. Typically, these matters would not involve questions of jurisdiction –subject matter, personal, or otherwise. The court, nonetheless, approved the request under a rule that

permitted interim review of jurisdictional issues. This broad interpretation of the notion of jurisdiction gave the court the flexibility to settle with finality a fundamental matter. Though the ICTY has since used a stricter interpretation of jurisdiction, the initial flexible interpretation was critical for establishing the legitimacy and the proper functioning of the court.

The proceedings at the ECCC could similarly benefit from flexible statutory interpretation where it is necessary to uphold the fairness of the proceedings. This is particularly true where investigative action is concerned. As indicated above, the Defense has limited rights during the investigation phase and may only appeal certain OCIJ orders. The disadvantage the Defense experiences as a consequence could be worsened by the PTC's intention to interpret the term "investigative action" strictly. However, if the term were broadened to refer to not just the action itself (eg. request to interview a witness), but also to the manner in which the action is performed (eg. request to interview a witness

and pursue a particular line of questioning), then the ECCC could move closer to satisfying the principle of the equality of arms.

## V. Conclusion

From a Defense perspective, the ECCC's current interlocutory appeal regime is restrictive and inflexible. Because the restrictiveness of the regime limits the ECCC's ability to adequately respond to the needs of the Defense and because the regime is internally inconsistent, the fairness and legitimacy of the proceedings may be in jeopardy. However, with the adoption of discretionary review or the fast-track mechanism or the use of more permissive statutory interpretation, the ECCC can better address issues of fairness.

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Villagers walking into the Courtroom to attend Duch's hearing

# ACCOUNTING FOR FAMINE AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: THE CRIMES AGAINST HUMANITY OF EXTERMINATION, "OTHER INHUMANE ACTS" AND PERSECUTION

*Randle C. DeFalco*

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## I. Introduction

The Extraordinary Chambers in the Courts of Cambodia ("ECCC") was created to try "senior leaders" and others "most responsible" for international and domestic crimes committed during the period of Democratic Kampuchea ("DK") in Cambodia from 1975-79. Throughout this period Cambodia suffered one of the worst famines of the twentieth century, resulting in the starvation of at least several hundred thousand people.<sup>4</sup> If the ECCC is to fulfill its mandate, it is essential that the suffering associated with mass famine during the DK period be addressed.

Accounting for famine at the ECCC is complicated by the fact that there is no single international or domestic crime that alone encompasses the harms suffered by victims of extended famine. While this lack of a discrete, "famine crime" is regrettable, genocide, crimes against humanity and/or war crimes charges may all be predicated on causing famine in certain circumstances.

This submission, which is part of a larger, ongoing project on the international criminal dimensions of starvation in the context of the DK period, focuses exclusively on crimes against humanity, which appear to be best suited to address famine in Cambodia from 1975-79. Crimes against humanity are applicable to situations where criminal acts form part of a widespread or systematic attack against a civilian population. The specific crimes against humanity that are most likely to be implicated under the ECCC's jurisdiction in the context of starvation are: extermination, "other inhumane acts" and persecution.

Extermination involves acts or omissions that contribute to mass killing and would be implicated if

senior DK leaders implemented social policy causing mass starvation while intentionally, knowingly or recklessly disregarding the fact that mass death would naturally follow. "Other inhumane acts" are those that do not fall under a crime against humanity enumerated in ECCC Law, yet are of equal gravity. They could be used to account for the physical and mental traumas, both temporary and lasting that resulted from famine during DK. Persecution is the discriminatory denial of a fundamental right to members of a protected class. The same criminal acts may underlie both persecution and "other inhumane acts." However, the victims of persecution must also be specifically targeted "on political, racial, [or] religious grounds." Persecution would be implicated in situations where senior DK leaders intentionally subjected a disfavoured political, racial or religious group to famine, resulting in serious physical and/or mental suffering amongst members of the group.

Combined, these three crimes against humanity can provide a full picture of famine-based suffering during DK and the culpability of those responsible. Extermination could be charged to account for the massive death toll attributable to starvation during DK. "Other inhumane acts" could be charged to account for the various forms of suffering other than death associated with famine endured by Cambodians during DK. Finally, persecution could be charged to account for the especially harsh famine endured by members of disfavoured political groups, such as so-called "new" people, who were given the least food and forced to do the most work. Each crime will be analyzed in turn.

## A. Crimes Against Humanity Relevant to Starvation

## at the ECCC

As mentioned supra, all crimes against humanity charged at the ECCC must form part of a widespread or systematic attack against a civilian population. Once it has been established that such an attack took place, each discrete crime against humanity discussed below must be shown to form part of the attack for liability to be proper.

### 1. Extermination

The crime against humanity of extermination involves killing on a massive scale.<sup>10</sup> There is no need that the victims of extermination share "any common national, ethnical, racial or religious characteristics" beyond comprising a civilian population. The actus reus ("physical act") of extermination is the "act of killing on a large scale" and includes ". . . subjecting a number of people to conditions of living that would inevitably lead to death." A recent Judgment of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") held that the actus reus of extermination covers "any act, omission, or combination thereof which contributes directly or indirectly to the killing of a large number of individuals." Moreover, extermination charges are appropriately brought against individuals who "exercise[d] authority or power over many other individuals or did otherwise have the capacity to be instrumental in the killing of a large number of individuals."

The mens rea ("guilty mind") required for extermination is that "the accused intended, by his acts or omissions, either killing on a large scale, or the subjection of a widespread number of people, or the systematic subjection of a number of people, to conditions of living that would lead to their deaths." There has been some disagreement between reviewing courts as to whether this mens rea standard includes gross or criminal negligence.<sup>16</sup> Recent jurisprudence on the issue suggests that *dolus eventualis* ("recklessness") is the minimum mens rea standard that must be proved by the prosecution.

#### *a. Extermination Need Not Be Committed Violently*

The typical actus reus of extermination involves an episode of violent mass killing. However, extermination can also be committed indirectly, by bringing about living conditions that cause mass death amongst a civilian population, such as the denial of necessary foodstuffs. For example, the Rome Statute of the International Criminal Court ("Rome Statute") explicitly states that extermination "includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population." Similarly, one of the examples of acts amounting to the crime of extermination given by the Trial Chamber of the International Criminal Tribunal for Rwanda ("ICTR") is "[i]mprisoning a large number of people and withholding the necessities of life which results in mass death."

#### *b. The Massiveness Threshold*

"Mass" death is the key element of extermination setting it apart from the crime against humanity of murder. There is no numerical threshold of victims that automatically establishes the necessary element of massiveness. Instead, the determination in each case involves a careful analysis of the relevant factors, including: "the time and place of the killings, the selection of the victims, and the manner in which they were targeted." Individual victims however, need not be named or described, as the accused need not have specific victims in mind during the commission of the crime. Additionally, the accumulated deaths from geographically and/or temporally separated killing events may be aggregated to reach the required massiveness threshold so long as each event falls within the overall extermination episode charged.

#### *c. Extermination by Enforced Starvation at the ECCC*

There would likely be a strong basis for extermination charges at the ECCC predicated on starvation. The KR leadership conceived of and implemented a national system of forced labour and cooperative living that permeated every aspect of Cambodian life from 1975-79. KR policy banned any individual efforts to gather

food or cultivate crops. Even eating alone was forbidden and violators of the ban risked death. These harsh rules made Cambodians wholly reliant on their daily communal rations provided by the DK government. These rations were woefully insufficient, in terms of both calories and basic nutrition, typically consisting of around two ladles of watery rice gruel per day. These pathetic rations were made even more inadequate by the long hours of labour Cambodians were forced to perform every day. Moreover, the total lack of medical provisions, infrastructure or qualified personnel further amplified the number of famine-related deaths across the country. It may be argued that these conditions, set in place by the KR leadership who exercised absolute authority over Cambodia, naturally and foreseeably led to mass starvation.

The actus reus of extermination via starvation at the ECCC would consist of formulating and implementing this system of radical social change and thereby "subjecting" Cambodian civilians to "conditions of living that would inevitably lead to death" by starvation. Although implementing and enforcing this plan involved acts of brutal violence and killing, the plan itself does not have to have necessarily involved acts of violence as discussed supra at 5. Furthermore, either a general extermination campaign covering all of Cambodia or smaller extermination episodes in specific regions or zones could be charged. Regardless of how the charges were framed, the alleged extermination episode would easily surpass the massiveness threshold, as even the most conservative estimates place the number of starvation-related deaths in Cambodia from 1975-79 in the hundreds of thousands.

The difficult aspect of obtaining a successful conviction for extermination at the ECCC predicated on starvation would be establishing the mens rea of dolus eventualis for each of the accused. Preliminary research suggests that there may be no single document or communiqué that clearly establishes that members of the KR leadership were aware of the starvation that surrounded them. Thus, the accused may claim that they had been at most, negligent in their formulation

of social policy. To overcome this hurdle the Co-Prosecutors would have to demonstrate clearly that any lack of knowledge of starvation was due solely to willful ignorance on the part of the accused, rather than a true lack of information. A cursory examination of available primary and secondary contemporaneous documentation suggests that this task is possible. A carefully crafted and well-researched case may prove that the DK leaders were aware that massive food shortages were occurring throughout Cambodia and that they willfully ignored this fact, along with the evidence of mass starvation surrounding them. If the requisite recklessness or knowledge is established, it appears a conviction for extermination via starvation may be possible at the ECCC.

### **B. "Other Inhumane Acts"**

Article 5 of the ECCC Law includes a residual provision conferring jurisdiction over the crime against humanity of "other inhumane acts." The non-specificity of the crime against humanity of "other inhumane acts" is intentional, designed to account for the astonishing ingenuity of human beings when developing new methods to abuse one another. The ICTY and ICTR have held that for an act to be serious enough to be considered "inhumane" it must be of "similar gravity" to other, enumerated crimes against humanity.<sup>41</sup> Additionally, specific inhumane acts must be proven, rather than merely showing general mistreatment of a civilian population.<sup>42</sup> The perpetrator of an "other inhumane act" must possess a mens rea of at least recklessness (*dolus eventualis*) when committing the specific inhumane acts alleged.

#### **a. The Legal Definition of "Similar Gravity"**

The key element of "other inhumane acts" is that such acts must be of similar gravity to other crimes against humanity. Acts of requisite gravity have been described qualitatively by the ICTY, ICTR and International Law Commission as those that injure the victim in terms of "physical or mental integrity, health or human dignity." Similarly, the Rome Statute provides for prosecution of the crime against humanity of "... acts of a similar character intentionally causing great

suffering, or serious injury to body or to mental or physical health."

#### **b. Case Law Examples of "Other Inhumane Acts"**

Accused have been found guilty of "other inhumane acts" for various acts of cruelty and abuse committed against civilians. Examples include: attempted murder, forcible transfer, "confinement . . . on exposed ground without water, food or sanitary facilities" for over five days, mistreatment of detainees including causing injury, "beatings, torture, sexual violence, humiliation, harassment, psychological abuses, and confinement in inhumane conditions," the "use of persons as human shields," forced marriage, physical and sexual violence perpetrated against dead bodies, injuries sustained during forced labour and general physical assaults causing injury. Additionally, the ICTY Trial Chamber has noted that "enforced prostitution" and "enforced disappearance of persons" presumptively rise to the level of "other inhumane acts."

#### **c. Causing Mass Famine as an Inhumane Act at the ECCC**

The crime against humanity of "other inhumane acts" could be used to account for the culpability of KR leaders who designed and implemented the social policies of the regime that led to nationwide famine. Much of the analysis regarding the actus reus and mens rea of "other inhumane acts" would overlap with that of extermination, discussed supra. The difference between the two charges would turn largely on the alleged harms and the class of victims. "Other inhumane acts" charges could be predicated on a variety of harms associated with famine and undernutrition during DK that all presumably rise to the level of similar gravity to other crimes against humanity. Victims of chronic undernutrition may suffer a wide variety of painful symptoms and enduring health issues, especially children born during to undernourished mothers. Additionally, famine victims often suffer severe emotional trauma from their experiences. Finally, it may be argued that forcibly subjecting victims to famine constitutes an attack on human dignity. Thus, the victims of the crime of "other inhumane acts" in the context of starvation at

the ECCC are not only those who died of starvation during DK (who were also victims of extermination), but also survivors, both of whom endured extreme suffering due to chronic undernutrition throughout the DK period.

While the Co-Prosecutors cannot simply allege general mistreatment of the civilian population, specific KR policies can be fairly characterized as "inhumane" in the truest sense of the word. Furthermore, a short perusal of survivor statements makes it clear that virtually every Cambodian civilian endured inhumane conditions during DK and surely thousands, if not millions of survivors could testify as to the inhumanity of the perpetual hunger and deprivation that was forced on them during DK. The key for a successful prosecution would not be establishing that living conditions, especially the inadequate provision of food, were inhumane, but establishing the necessary *dolus eventualis mens rea* for each individual accused.

#### **C. Persecution**

The ECCC Law includes the crime against humanity of "persecutions on political, racial, [or] religious grounds."<sup>62</sup> Persecution under the Rome Statute is the "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." The ICTY has adopted a similar definition:

*"the crime of persecution consists of an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the actus reus); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the mens rea)."*

#### **a. Severe Infringement of a Fundamental Right**

The actus reus of persecution will likely be found to follow international precedent and require acts or omissions that severely infringe a "fundamental right laid down in international customary or treaty law." "Only gross or blatant denials of fundamental rights" qualify as persecution, meaning that the acts must be

of "similar gravity" to other crimes against humanity. Thus, the actus reus of persecution is comparable to that of "other inhumane acts" discussed supra. Additionally, as is the case with "other inhumane acts," specific persecutory acts must be alleged rather than general mistreatment. Moreover, various discriminatory acts not individually rising to the requisite gravity may cumulatively qualify as persecution.

#### **b. Persecutory Dolus Specialis and Protected Classes**

The key to any persecution conviction is establishing that the accused had the specific "intent to commit the underlying act and to discriminate on political, racial or religious grounds."<sup>70</sup> This mens rea of special intent ("dolus specialis") is the distinguishing feature of persecution from amongst crimes against humanity. Thus, a perpetrator of persecution must intentionally target members of a political, racial or religious group for harsher treatment.

One of the protected classes in the ECCC Law definition of persecution is "political" groups. The ICTR Trial Chamber has commented that "[p]olitical grounds include party political beliefs and political ideology." Political identity can be subjectively defined by the perpetrators of persecution and may have ethnic or other dimensions. Additionally, an accused may still be held liable for persecution if he acted with the intent to discriminate based on a false assumption regarding the identity of the victim.

#### **c. Possible Famine-Related Persecution Charges at the ECCC**

The nature of persecution charges predicated on the denial of adequate food at the ECCC would hinge on how the persecuted group is identified. One possible method of framing persecution charges would be to allege that the persecuted class during DK consisted of perceived political enemies, who were labelled "new" or "17 April" people, and included everyone who was forcibly evacuated from Cambodians urban areas to the countryside, along with other Cambodians deemed to have an "impure" revolutionary background. After defining the protected victim class, the Co-Prosecutors

would need to establish that members of this class of "new" people were targeted for harsher treatment, including reduced rations, resulting in greater famine amongst the group. This showing of disparate treatment could be combined with various pieces of KR propaganda and slogans that referred to "new" people in derogatory terms to demonstrate the requisite discriminatory intent. The key to a successful prosecution would once again likely hinge on mens rea issues, as the accused may claim that all suffering due to famine was merely consequence of a general plan that did not target any group for discrimination.

#### **II. Conclusion**

The suffering of Cambodians from lack of food during the DK cannot be captured by one crime alone. A mere recitation of the number of people who were exterminated via starvation fails to capture the full suffering that occurred due to the draconian social policies of the KR. However, when the crimes against humanity of extermination, "other inhumane acts" and persecution are combined, a more accurate accounting can be made. Suffering from chronic lack of food was an experience that was virtually universal for all Cambodians during DK. In order to provide full accountability and develop an accurate historical record of the experiences of Cambodians under the KR from 1975-79, the ECCC should address this suffering.

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## **READING HISTORY OF DEMOCRATIC KAMPUCHEA**

*DC-Cam's publication History of Democratic Kampuchea written by Dy Kamboly and teacher guidebooks can be downloaded with free of charge at [http://dccam.org/Projects/Genocide/Genocide\\_Education.htm](http://dccam.org/Projects/Genocide/Genocide_Education.htm)*

# PUBLIC COMMENT ON PROPOSED CHANGES TO CIVIL PARTY PARTICIPATION BEFORE THE ECCC

*Andrew F. Diamond*

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## Introduction

The Extraordinary Chambers in the Courts of Cambodia's (ECCC) scheme for survivor participation has been hailed as groundbreaking and unprecedented, due in large part to the recognition of certain survivors as "civil parties" who were to be treated as full parties to the proceedings. Substantively, however, this scheme did not even survive the first trial intact. With an eye towards the second case, for which pre-trial proceedings are already underway, the Chambers are seeking to further restrict the role of civil parties and their lawyers, particularly in light of the large number of survivors seeking civil party status. They are doing this through the revision of the ECCC's Internal Rules governing civil parties. The Rules and Procedure Committee is set to discuss the draft Rules during the first week of December and, if accepted, the plenary will decide on adoption shortly thereafter.

According to an ECCC Plenary Session press release, the proposed rule changes will focus on "promot[ing] greater efficiency in trial management." Although almost all observers recognize that better civil party organization and management is essential for the much larger Case 002, the revised Rules should not be used as a Trojan horse, where in the name of judicial management, the rights of civil parties are undercut to such an extent that they could no longer in good faith be properly considered "parties" to the proceedings. In such an instance, to gut the role of civil parties and their lawyers while not acknowledging that fact would seriously undermine the very credibility of the Chambers itself.

Under Cambodian law and in other civil law jurisdictions, persons qualifying as "civil parties" are afforded certain minimum rights, rights that both survivors

and their lawyers must also have before the ECCC. If the Chambers fail to retain these rights under the revised Rules, the ECCC will not only distort the precedential value of its survivor participation scheme for future internationalized tribunals, but also mislead the survivors about their role in the proceedings. This legal sleight of hand would be unconscionable as these participants are survivors of one of humanity's worst crimes.

## The Legal Rights of Civil Parties

The ECCC is the first internationalized tribunal to explicitly provide for civil party participation. "Civil party" is a legal term of art. Although the basket of rights it includes varies among jurisdictions, a tribunal cannot just declare certain victims to be "civil parties" in the proceedings while not affording them the concomitant rights that accompany this role. Notably, while the International Criminal Court (ICC) provides for enhanced victim participation, its scheme purposefully does not rise to the level of civil party participation, as victims before the ICC are not recognized as parties to the proceedings. Additionally, the Special Tribunal for Lebanon, which is heavily influenced by civil law, provides that "[a]lthough [victims] do not have the same right as the parties civiles (private complainants) of the civil law system—such as to seek compensation—they may exercise a number of procedural rights (for instance, receiving documents filed by the Parties, calling witnesses upon authorization of a Chamber, examining and cross-examining witnesses, filing motions and briefs." Given that these international tribunals provide for survivor participation that intentionally does not rise to the level of civil party participation, it would seem only logical that the ECCC's civil party participation scheme must at least provide survivors the rights contained in those lesser survivor participation

schemes. However, as discussed below, there are concerns that with ECCC civil parties may in fact have fewer rights.

Admittedly, the rights of civil parties—and more broadly, survivors—do not exist in a vacuum. In criminal proceedings, the court must balance survivors' rights with the need for a fair trial that preserves the rights of the accused. Additionally, the proceedings should proceed as expeditiously as possible. These three competing interests often operate in tension with each other, where the expansion of one interest serves to restrict another. This is especially true for the ECCC, as it oversees proceedings potentially involving thousands of civil parties. The ongoing tension between these competing interests that have led to departures from Cambodian practice prompted Judge Lavergne to ask, "[h]ow far can one go without breaching the spirit of the law, or fundamentally distorting the meaning of the involvement of Civil Parties before the ECCC and the purpose of the trial as a whole, characterized by the coexistence of two interrelated actions, namely criminal and civil actions."

With the adoption of more restrictive civil party rules, there is a concern that the ECCC will pass that point. To combat these concerns, the revised Rules must at a minimum preserve the attorney-client relationship—and its attendant rights—while also continuing to guarantee the right of survivors to participate in the proceedings as "parties." A failure to do either would so undermine the rights of survivor-participants that they could no longer properly be considered civil parties.

### **Attorney-Client Relationship**

As parties to the proceedings, civil parties currently have a right under the Internal Rules to be represented by counsel. For this right to be robust and meaningful, it must continue to include the necessary elements of any attorney-client relationship: the right of the client to hire an attorney of his/her choice, the client's right to fire his/her attorney, the obligation of the attorney to represent the client's interests, and the authority of the client to determine the objectives of

the legal representation and participate in deciding the means of carrying them out. A failure to include these necessary elements in the revised Rules would so severely undermine the right to counsel as to leave serious questions as to whether the Chambers are paying anything more than mere lip service to this fundamental principle of the rule of law.

According to the ECCC press release, beginning at the trial stage civil parties will be consolidated into a single group and the group's interests as a whole will be represented by the co-lead counsel. It further states that civil party lawyers are to provide support to the co-lead counsel. Under this scheme, however, it is unclear who will represent the interests of individual civil parties. It is essential that civil party lawyers are not relegated to being glorified paralegals, confined to non-substantive tasks, and prohibited from advocating to the court behalf of their client. If this proves to be the case however, there must be a clear reciprocal



DC-Cam staff member explains to civil parties about the legal representation

relationship between the lead counsel and each civil party with clear language as to the co-lead counsel's obligation to the individual civil parties, and not just the consolidated group as a whole. For example, the ICC has specifically stated that "[t]he common legal representative shall be responsible for both representing the common interests of the victims during the proceedings and for acting on behalf of specific victims when their individual interests are at stake." Such language in the revised Rules would help allay concerns that the civil parties' individual interests are being subjugated to the overall interests of the single consolidated group.

The revised Rules must also contain a mechanism for the raising or settlement of strategy disputes between a civil party lawyer and the co-lead counsel. Such disputes will inevitably arise between lawyers, in particular when they represent clients with different interests and goals. To provide no dispute resolution

mechanism in the revised Rules would ignore the certainty that legitimate disagreements will arise. Notably, the ICC provides that if the common legal representative cannot "fairly and equally" represent the interests of one or more groups of victims, the common legal representative will inform the Trial Chamber "who will take appropriate measures and may, for example, appoint the Office of the Public Counsel for the Victims to represent one group of victims with regard to the specific issue which gives rise to the conflict of interest."

Likewise, there must be an incentive for the ECCC co-lead counsel to take into account dissenting opinions from the civil party lawyers. If a civil party lawyer vehemently objects to a certain decision made by the co-lead counsel, there must be choices available beyond continuing on as a civil party lawyer despite this objection or quitting. Given that civil party lawyers, like all legal counsel, are obligated under national and international ethics codes to represent their client's views and interests, this would put them in an impossible situation.

Moreover, the rights of the civil parties themselves must be protected. Civil parties must also be allowed throughout the proceedings to hire counsel of their choosing, as well as fire their counsel, and determine the objectives and means of implementing those objectives. This is essential because many of the survivors in Case 002 come from different ethnic or religious backgrounds, may have experienced their injuries at different times, different locations and at the hands of different people, and are likely to have different objectives for their participation and desire differing forms of reparations. These varying and potentially divergent interests must be represented if there is to be true civil party participation under the revised ECCC Rules.

#### **Right to Participation**

Under the ECCC Internal Rules as originally drafted, once a civil party joins the proceedings, "the Victim becomes a party to the criminal proceedings." As a result, the civil party is entitled to "[p]articipate in criminal proceedings against those responsible for



crimes within the jurisdiction of the ECCC by supporting the prosecution," as well as to seek "collective and moral reparations." This right to meaningfully participate in the proceedings as a party carries with it certain rights, such as the right to call, examine and cross-examine witnesses, to be questioned as an interested party, and to request investigative action, among others. In order to still be considered "parties" to the proceedings, these rights must remain intact.

Because the co-lead counsel are intended to take the lead in representing all civil parties, civil party rights most likely will have to be exercised through the co-lead counsel. This could render many of these rights illusory. For example, one of the key participatory rights afforded to civil parties in civil law jurisdictions around the world, including Cambodia, is the right to request investigative action. Previously, this right could have been exercised through the civil party lawyers. It is now unclear what impact the creation of a co-lead counsel will have on this right but presumably it would have to be exercised through the co-lead counsel. However, the co-lead counsel are responsible for the interests of all survivors within the consolidated group. Thus, if one group of survivors wishes to request investigative action, but the co-lead counsel feels that this action could run counter to the overall strategy, then the co-lead counsel could refuse to request investigative action, undercutting the right entirely. Again, the presence of a dissent mechanism is vital to provide substance to the exercise of these rights.

As Judge Lavergne noted in a dissenting opinion, civil parties in domestic jurisdictions "may participate throughout the legal proceedings, the common purpose of which is to ascertain the truth concerning the accused's criminal responsibility, which might also be the basis of his or her civil responsibility." This dissent was to the mid-2009 decision by the Trial Chamber that eliminated outright the right of civil parties to participate in sentencing proceedings and severely undermined their right to cross-examine certain witnesses. The ECCC so ruled despite the fact that both international tribunals that allow victims to participate

in proceedings, though not as civil parties, provide victims with the right to participate in sentencing proceedings. Although individual changes to the Rules may not be decisive, in combination with this recent decision, a revised Rules scheme that does not preserve such fundamental civil party rights as the right to request investigative action would suggest that ECCC "civil parties" are no longer "parties" to the proceedings.

### **Conclusion**

If new civil party rules are adopted that do not preserve the attorney-client relationship and a genuine right for civil parties to act as "parties" in the proceedings, it is unclear what role, if any, survivors will continue to have before the ECCC. To preserve their meaningful role, as originally envisioned, the Chambers must ensure that it does not strip away too many civil party rights, all in the name of judicial management of the case. While the Chambers have every right to do this, if they are to end civil party participation, they should be honest with the survivors. As two observers have written, "[i]f civil party participation is replaced by representation of victims' collective interests...the Court must explain to applicants that their participation rights have been eliminated." Likewise, as stated by Youk Chhang, Director of the Documentation Center of Cambodia, in the September 2009 edition of *Searching for the Truth Magazine*,

It is true that many civil parties do not fully understand the meaning of the term "civil party" and the scope of their role in the proceedings; however, it would be disrespectful for the Court to hide behind this outreach failure. If the Court wants to limit civil party rights, it has an obligation to explain the full legal implications both to the public at large and to the applicants before a final plan is adopted.

Given the immense suffering and trauma experienced by these survivors, it is the very least the Chambers can do.

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# PATRON-CLIENT TIES: A NECESSITY DURING DEMOCRATIC KAMPUCHEA

*John Munger*

Archuon and his son have no pity for Tum. They brutally destroy Tum and hack his entire body to a pulp, blood flowing endlessly. King Reamea fiercely sends his army to Tbaung Khmum for Archuon's blatant disregard to King Reamea's authority. Archuon offers King Reamea gifts as forgiveness and compensation for his disobedience, but they are of no use. King Reamea, "...commands that Archuon's family and relatives seven generations removed be buried up to their necks in the ground and then have their heads raked off by an iron plow and harrow. In addition, all members of Archuon's political faction are to be boiled alive..." These violent acts in the story of Tum Teav are connected to the tension between order and disorder as pointed out by Alexander Hinton's article, "Songs at the Edge of Democratic Kampuchea."

Reamea's response to Archuon's disorderly act is an attempt to restore the order Reamea signifies in the hierarchical system of Cambodia. Reamea was a patron and Archuon his client. However, Archuon's disobedience led to Reamea's remorseless vengeance. This display of power in Cambodia's romantic epic poem during the sixteenth century resembles the tumultuous times of 1975-1979. The complete elimination of Archuon's entire family and community is related to how the Khmer Rouge (KR) dealt with disorder. When parents along with their children were sent to S-21 Tuol Sleng prison, the children would be killed shortly after the arrest of their parents. Destroying the links of the enemy was key to KR strategy for protecting itself from the "hidden enemies" the Central Committee often referred to.

The KR attempted to create a completely socialist society based on rice agriculture. However, they fell short of fully reaching this form of a state as they only continued to form a patron client (p-c) structure that was utilized in the past. In general, a p-c relationship can be defined as an exchange between two people where one individual has a higher socioeconomic status (patron) who uses their influence, resources, connections,

to provide protection or benefits or both, to a person of lower status (client) who reciprocates by offering general support and assistance, including personal services to the patron. According to James Scott's article, "Patron-Client Politics and Political Change in Southeast Asia," the difference between a pure coercion or formal authority relationship from that of a p-c tie is that some reciprocity is involved.

Scott also states that a patron can have complete control, "Being a monopolist, or at least an oligopolist, for critical needs, the patron is in an ideal position to demand compliance from those who wish to share in these scarce commodities." The types of commodities a patron can monopolize include protection, security, employment, education, food, and property. The p-c relationship is based on an imbalance between the two people involved. However, Scott does not clearly



A Cell of Tuol Sleng prison

draw the line between coercive, pure command and that of a p-c tie. Scott writes, "But if the force or authority at his [the patron's] command are alone sufficient to ensure the compliance of another, he has no need of patron-client ties which require some reciprocity." Here the reciprocity needs to be defined because in compliance to a patron, one can provide material items as reciprocity or a façade of political support. In the case of S-21, many of the prisoners complied with the authorities in order to live, supplying patrons with material reciprocity.

Whether this was reciprocity or purely compliance is obscure according to Scott's article. As he later writes, "At one end are the clients with virtually no choice but to follow the patron who directly controls their means of subsistence...in a society where land is scarce and insecurity rife." The situation in S-21 harbored such conditions as the only means of subsistence and security both inside and outside of its walls. Granted, one could attempt to escape, but outside its walls the chances of survival were very minimal. Scott never denies the patron his/her status as a patron who has such control over necessary resources but only points out the differences between this type of patron and that of one who is weaker in coercive power. The primary difference is the patron with stronger coercive power, can use sanctions, threats to punish clients for disobedience; while a weak coercive patron would need to give inducements, incentives to clients for obedience to him/her.

Theoretically the client has four alternatives: reciprocate enough to restore the imbalance, find another patron, coerce the patron into providing services, or go without services from the patron. In the case of S-21, the only alternative would be to go without the services provided by the patron even though it would likely lead to death. Due to this vague line between pure command and p-c relationships, it will be assumed that every potential client has a choice in every situation. Even if resistance in complying with an authority will likely lead to one's death, one does have the choice to comply or not. With this stance in mind, the relationships of Vann Nath, Comrade Duch, and the Central Committee to their patron clients will be analyzed. Through this analysis

one will see patron-client relationships continued to flourish in Democratic Kampuchea, despite its claims of ending 2,000 years of history.



Vann Nath, one of three living prisoners who survived S-21 established p-c ties with guards and with the chief, Duch. In Nath's autobiography, he states:

This one [painting] was much better than the first and Duch was now very cordial with me. The reward they'd promised was to give me five packs of cigarettes. The prison guards were now very friendly with me and some young guards secretly came to see me during the night. They asked me to paint some colorful pictures of villagers, people planting rice, and people harvesting. When I had free time I painted pictures for them with approval from the room guards."

Now, after Nath showed he was adequate in painting what Duch and the Central Committee wanted, he was given rewards. Nath was not only given his life, but cigarettes. There is reciprocity in this relationship just as there is supposed to be in a p-c relationship. This one is not completely coercive because Nath receives more than just his life. His relationship with the guards and Duch are all based upon a service that he can provide, painting. The patron here at first is the Central Committee who desires paintings of the leader of Angkar, Pol Pot. Nath becomes the client as he paints pictures that please and meet the requirements of the Central Committee and Duch. Later, the guards become

patrons to Nath as they ask him to paint personal pictures of villages and traditional life. Nath's role solely as a client later changed as a fellow painter's life became threatened.



Bou Meng

Duch wanted to get rid of Meng who he thought was abusing his privilege as a painter because he told Nath what to do. Nath pleads to Duch to give him one more chance. Surprisingly, Duch agrees under three conditions: Meng cannot smoke, he is only allowed to walk within five squares of the floor from his painting, and his ankles must be chained. Duch put Nath in charge of ensuring Meng follows the conditions and if Meng fails to, then Nath will be punished. Here, responsibility and power is delegated to a painter, a prisoner. This clearly shows how Duch is giving him more than just housing and subsistence, but he is relying on him. This has a more intimate tie versus a purely instrumental one of making paintings and going back to his cell and sleeping. Risks during this time of Nath's patronage to Meng were also taken.

Although warned to be careful, Nath secretly gave Meng cigarettes when the room guards were out. Nath justifies this by saying, "...Meng was the first person I had met when I arrived. Even though there were strict, life-threatening restrictions, I had to take the risk because I felt so sorry for him." This is phenomenally a strong p-c relationship because Nath knew a likely consequence of being caught could be death. That did not matter

to him because he felt such a strong tie to Meng. This relationship clearly illustrates the enhanced p-c tie when it is more intimate versus simply instrumental. Meng provided guidance to Nath when he first arrived to paint. At this point, Nath felt obligated and indebted to offer Meng what he could. Nath had to reciprocate to Meng by risking his own life.

Nath later received even more privilege as the guards no longer made him go upstairs at night to sleep with the fellow painters and carpenters, but instead to sleep in the work room. Nath carefully observed this, "While this meant they trusted me more, I knew I still had to be very cautious." There was always a chance Nath may be killed if Duch or the Central Committee were not pleased with his work. However, his patrons were pleased with his work and he developed stronger ties than most did during his time as a painter in S-21. This is not to say his life would be spared if Angkar decided to eliminate him because in the end Duch's allegiance was to Angkar and no one else.

Taking a broader view of Nath's ties to his immediate patrons, the guards and Duch, one can view his position as being part of a network. His network includes the fellow painters, sculptors, and carpenters who all provided specific services to the patrons. These clients all slept in the same room except for Nath at one point. This client network looked out for each other as a carpenter often gave Nath advice, "As long as they [Duch, Peng (chief guard)] are satisfied, you will be able to live for a bit longer." Whenever a change occurred in the prison or when something strange occurred, Nath would find a way to speak with the carpenters for more information. Also near the end of S-21, the artists rooms had metal doors and iron windows installed. Just as they were given privileges, they were also contained to similar constraints.

Shortly thereafter, Nath and three other artists were given the task of creating an eight-meter-tall concrete statue of Pol Pot standing with farmers carrying flags. These clients were given the same task for pleasing the patrons. This further shows the network created amongst the artists in the prison. When Nath first joined

the painters, Duch told Meng he had a new "colleague" added to his network. However, this p-c network would be short lived as S-21 fell to Vietnam before the four could complete the sculpture of Pol Pot. For Nath, his ultimate allegiance was to Khmer people and especially those who died during the DK regime.

After DK rule, he assisted in transforming S-21 into a museum for the public and in doing so, "[he] began to believe that the spirits of the people who died there would be able to rest in peace. Sometimes we invited monks to come and hold ceremonies at the prison in commemoration of the dead." Nath is a patron to the spirits as he channels merit to them to ensure a good rebirth. Nath is also taking good action which will perpetuate good karmic results in his life and in the next life. Nath proves Khmer people as being his patron by attempting to save Meng's life when it was likely he would die even for asking Duch to reconsider killing Meng.

Comrade Duch was introduced to the Communist Party of Kampuchea (CPK) by a professor of his, Chhay Kim Hour, before DK was formed. Duch established an early relationship with one of the leaders in the CPK, Son Sen. Sen was the director of the Institut de Pédagogie where Duch earned his teaching certificate. Duch was first appointed as a prison commandant at M-13 which gave him the experience to be entrusted with running S-21. As the chief of the prison, Duch reported directly to the KR Minister of National Security and Defense, Sen. In Nic Dunlop's book, *The Lost Executioner*, he chronicles Duch's life and centers in on his involvement with S-21.

Duch reportedly spent a lot of his time corresponding with Sen, reading over confessions, constructing networks of enemies, indexing, and signing execution orders. The Central Committee wanted Duch to get specifics out of the confessions, "If he found fault with the interrogator, or if they couldn't understand what was being demanded of them, Duch would slam his fist on the table and grind his teeth." Apparently there were specifics to be extracted from the confessions; otherwise, Duch would not have to go to such extremes to get the 'correct'

confessions. The Central Committee wanted confessions to reveal a person's network of enemies, whether it was with the CIA, KGB, or Vietnamese (S-21). Finding a prisoner's network allowed for the Central Committee to locate the next group of enemies to be sent to the prison. One interrogator, Prak Khan, in Rithy Pann's documentary, "*S21: The Khmer Rouge Killing Machine*," admitted to writing out the confession for a prisoner, Nai Nan (S-21). Khan fully understood what Duch wanted or rather what the Central Committee wanted. Khan had to please Duch who had to please the Central Committee, even if it meant completely forging a confession.



Aside from confessions, Duch made a client out of the photographer Nhem En. En built a good relationship with Duch who allowed En to have more freedom. In return, En took photos of Duch and his family regularly. This was not part of his job, but En had to and wanted to please his patron. En had the notion of being a client who is obedient taught to him by his father, "The rice won't bear grain when it stands tall, but it will if it bows." En's father said this to him before he left his home. Besides En, Duch also helped Nath in becoming an obedient client. As Duch said to him, "I have a hint for you. Staying here, you must know how to put yourself lower than the masses. The important thing is to be gently humble." This shows how Duch really wanted Nath to reciprocate with not

only obedience, but also with the paintings that were ordered by the Central Committee. Duch went out of his way to give Nath a chance in becoming a client.

David Chandler, in his book, *Brother Number One: A Political Biography of Pol Pot*, summarizes what Duch did in order to survive. As he writes, "By keeping his superiors happy and those who worked for him afraid, he survived the DK period, unlike at least sixty of his staff, who were executed in a variety of charges." Ruling by fear or patronizing by fear was an incremental part to DK rule. Duch utilized this in the prison where he kept his guards constantly below him and in fear. Nath describes this relationship, "The two guards seemed to treat the man [Duch] on the sofa with a lot of respect...His words seemed so powerful and his bodyguards appeared like mice cowering in front of a cat." Duch was one of the few who made a strong p-c relationship that lasted even after the rule of DK.

The archives in S-21 were supposed to be destroyed, but Duch did not follow through with that order. As a repercussion, this reflected badly on Nuon Chea, brother number two, who relieved Duch of his duties. Aside from this failure to follow the order, it was reported that Duch and Chea did not get along already when Chea took over for Sen. Even though Chea was above Sen, Duch's p-c tie was strong enough to save his life. Duch taught Sen's children in one of the camps and he became close friends with another Central Committee member, Khieu Samphan's wife. It is likely that due to Duch's personal affectionate tie with Sen, his life was spared. This p-c relationship proved to be more than simply instrumental like that of Nath's tie with Duch or any of the other prison guards. However, the ultimate patron during the time of S-21's existence as a prison was Angkar.

Angkar referred to the leaders of the Khmer Rouge. There was nothing above Angkar; there were only people below it. The power of Angkar was incomparable to anyone. Its power contained that of a devaraja or god king, as stated by a guard, "Angkar has eyes everywhere, it makes no mistakes, it arrests rightfully." In the

documentary, former guard Khan tells of his patronage to Angkar, "To demonstrate my position with Angkar, my loyalty to Angkar, I killed so that they would be convinced I am a child of Angkar." Khan truthfully speaks of the immense power of the patron as he uses the word 'child,' he admits Angkar became his parent, his guardian. The leaders of the KR did their best to enhance its authority by separating children from their parents, turning families against each other to root out the 'enemies' in the party, and by becoming the sole provider of subsistence for all Cambodians.

Angkar not only became the only provider of subsistence, but of every type of support as they singled out doctors, teachers, students, engineers, lawyers, bankers, dancers, businessman, and killed them. As a result, Angkar became the only source for any social, psychological, or physical assistance. The Party, another term used for Angkar, destroyed the people of these professions to make everyone even more reliant upon them. This made them the only solution to anyone's problems. Ironically enough, Chandler points out the most common profession amongst the Central Committee:

*In Cambodia the teacher-student relationship was another crucial place where power and subservience were deployed; it is not accidental that so many Khmer Rouge leaders were schoolteachers by profession, adept at controlling rooms full- to say nothing of a country full- of potentially unruly people.*

Angkar saw itself as having the collective support of its clients. This is essential to have the social, collective support in such a particular p-c relationship. Angkar would say that any decision of the Party was a collective decision, not one of the individual or of a small group of leaders that it actually was. The masses or clients were also subservient to the orders given to them. They worked the rice fields, followed the social conduct the KR established and were politically loyal as much as they could prove it, whether it was true or not. This overwhelming power by Angkar, the responsibility of being the ultimate patron to all Cambodians could also be what led to its downfall.

The ego of the party was so greatly elevated

that they believed clients were expendable. As one of the famous sayings Angkar used, "To keep you is no gain, to lose you is no loss," or similarly as a prisoner with Nath states it, "It's better to kill you by mistake than to keep you by mistake." As contradictory as the last quote is, the guards, Duch, and likely Angkar itself believed that it did not make any mistakes. One of the guards, Huy, states, "When the party makes an arrest, it arrests an enemy of the party...The Party, S21, never made arrests by mistake." Since Angkar did not make any mistakes, the Party had to make sense as to why there were failings in DK. They needed reasons for the people dying of starvation and why agricultural quotas were not being met. This is where the confessions came into play.

Angkar needed a scapegoat to protect itself because it was perfect and it did not fail. En explains this, "'Tuol Sleng was the heart of the movement, the heart of the country. If security was not established the situation would become chaotic and the nation would be in trouble.'" S-21 became the 'heart' because it purified the country and it gave life to Angkar. It gave the leaders the excuses needed for their shortcomings. At S-21 the enemy networks were destroyed just like how they were in Cambodia's past. When a prisoner confessed, they gave names of friends, family, and other associates. The network would be punished just as in the story of Tum Teav, where Orh-Chhuon who disobeyed a king's order had his entire family and network, "...reduced to ashes, one after the other!" Disobedience or the misperception of disobedience from a client to Angkar was punished as brutally as clients were by the kings of Cambodia. This is another example of how the past perpetuated itself into the ruling of the KR.

Angkar was protection for the leaders as Chea explains in a speech, " We base everything on secrecy ... we developed the tactic of secrecy, firstly to defend ourselves, secondly, to mobilize more forces, and finally to serve our struggle..." The term Angkar is a single term for a group of people. It does not give any specific names or implications as to who the real leaders are. The term itself allows for a more distant being, one that

almost ceases to exist. In secrecy, the masses do not know where the leaders are, who they are, or what they are. The faceless leadership gives its members protection if the government fell apart or even if there was an uprising during its rule.

The leaders were clients to Angkar, they had to make Angkar to be a devaraja because it did not make mistakes or at least was not supposed to. Angkar became the ultimate patron to everyone, especially the leaders because it provided protection and security, while its leaders did their best to weed out the failures by pointing fingers at enemies with foreign influences. Chea fully describes the vital necessity of Angkar:

*The leadership apparatus must be defended at any price...As long as the leadership is there, the party will not die. There can be no comparison between two to three leading cadres and two to three hundred members...Otherwise the party has no head and cannot lead the struggle.*

Angkar excused the leaders of their failures and protected them from making mistakes. It was the sole provider and sole destroyer of DK. The leaders could not have survived with it or without it.

Just as in Cambodia's past and during Angkar's rule, the essence of leadership in Cambodia was exploitation rather than service to people, it was patronage rather than true cooperation. P-c ties continued during the rule of DK, despite their attempts to completely change and revolutionize the government of Cambodia. Though the structure of government changed, the use of power over the people did not. Coercive labor and minimal food offered as a reward perpetuated a similar structure to that of King Suryavarman II who had the world's largest tomb built for him. His was a monument for a single individual that used the collective forced labor just like that of Pol Pot, or Angkar's forced labor to create the first completely communist state. In the end, p-c ties remained throughout S-21 and up into the highest ranks of Angkar.

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***John Munger is under graduate student at University of California, Berkeley.***

# RECONCILIATION ROAD: BRIDGING COMMUNITIES, REBUILDING TRUST

*Krista Nelson*

On May 28, 2010, the staff of DC-Cam vacated its Phnom Penh office and travelled to Preah Net Preah District, Banteay Meanchey province, for the inauguration of "Reconciliation Road." The small community of Kandal is where DC-Cam Director, Youk Chhang, was relocated during the forced evacuations of Phnom Penh over thirty years ago. After several months of improvements funded by DC-Cam, the road was completed in late May.

DC-Cam believes that while holding senior leaders accountable for the atrocities committed under the Democratic Kampuchea is critical, so too are efforts to rebuild trust and repair wounded communities that were torn apart during the violence. The road will serve as a symbol of reconciliation by linking local villages to vital resources and encourage forgiveness among its users, both former soldiers and victims of the Khmer Rouge.

DC-Cam staff were welcomed by members of the community, many of whom traveled long distances to attend the ceremony. Several hundred people packed into the event hall, eager to come together for the celebration. Outside, additional tents were needed to accommodate the large group and children scrambled to peek in open windows. Local youth leaders sang the national anthem and several young women performed a traditional dance before a captivated audience.

Lok Chumteay Tun Sa-Im, Deputy Secretary of Education of Youth and Sports, delivered opening words, followed by the local Commune Chief Hong Huy. Among familiar faces, Youk

Chhang spoke of the need to acknowledge the past in order to move forward and heal old wounds. Both Mr. Chhang and the Deputy Secretary were presented medals of honor for their leadership.

DC-Cam staff distributed hundreds of copies of educational materials, including *A History of Democratic Kampuchea (1975-1979)* and DC-Cam's recent publication *Genocide: The Importance of Case 002*. Children, persons too young to remember the days of the Khmer Rouge, and those who recall the Democratic Kampuchea far too well, flipped through pages describing the painful era of Cambodia's history.

Yet as members of the community walked together to the road's ribbon cutting ceremony, their smiles and laughter evidenced the true spirit of Cambodian forgiveness. The inauguration of Reconciliation Road serves a symbol of one community's healing process and the rebuilding of trust necessary to move forward.

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*Krista Nelson, Seattle University School of Law, JD 2012, DC-Cam legal associate, Summer 2010.*



Youk Chhang, his old friends during DK period, and DC-Cam staffs walking on "reconciliation road"

# FORGIVENESS IS DIFFICULT FOR VORK TY

*Kok-Thay Eng*

Vork Ty is a Cham woman living in Chankiek village, Ourussey commune, Kampong Tralach district, Kampong Chhnang province. She is 45 years old, and when the Khmer Rouge took control of Kampong Tralach in 1975 she was 15 years old. Vork Ty is careful to say that she does not remember many events that happened before the Lon Nol regime and she can only describe what happened to her village when the Khmer Rouge intensified its grip on Cambodia. Vork Ty does not remember when US B-52 bombers sprayed the Cambodian countryside with bombs, images that are still vivid in the memories of many Cambodian survivors today. What Vork Ty remembers is only the blurry images and sounds of low flying aircraft just above the tree tops, strafing people running to take cover.

When asked her opinion about America, Vork Ty said she does not know the United States' policies today or what it did about the bombing of Cambodia. The only things she knows about the United States are the American people who come to visit her village and ask villagers about their living conditions. Some have supported her village with English language tutoring and smaller village projects. Currently the embassy of the United States provides funding for her Imam San sect community to conduct a small research project on the traditional Cham dialect. She said, "Many Americans I meet are very nice. So I like America."

Under the Khmer Rouge regime, Vork Ty lost an elder sister who was executed after stealing food in Kampong Chhnang. She does not know where her sister was buried or the larger details surrounding her death. The news about her death came to her through fellow villagers who were kind enough to send her family the bad news. Vork Ty, however, remains grateful that only her sister perished under the Khmer Rouge, while the rest of her family survived the regime. Vork Ty never blamed Allah for her and her family's ordeal or for the

death of her sister, but she is grateful to Allah that her family did not suffer as much as other families in the village. Before 1975 there were 63 families in Chankiek village, but in 1979 only 33 families returned to the village. Vork Ty's faith in Islam remains strong, even stronger than it was before the Khmer Rouge. Indeed many villagers in her village think the same. They see the suffering under the Khmer Rouge regime as a suffering that happened to everyone including Buddhists, Christians, Hindus and Muslims. Thus God is not to blame.

Many villagers in Chankiek village were evacuated from their homes when the Khmer Rouge completely controlled Cambodia. They were sent many places: some to Khmer villages, a few others to Cham villages. Many of them were forced to eat pork, and women were not allowed to keep their hair long. They were not allowed to speak the Cham language. They were ordered to change their Cham names and given new Khmer names. Qurans were collected and burned. However, according to a woman in Chankiek village, one Khmer Rouge cadre also showed pragmatism in his practice of atheism. The cadre forced a woman to eat food with some pork hidden inside. When she ate the food she threw up in front of the cadre. The cadre thought that this showed that not eating pork was not only a belief, but also that some Cham people could not digest pork. The cadre therefore never asked her to eat pork again. Some village men reported that a Cham died after he was forced to eat pork due to sickness.

In early 1975, Vork Ty's family moved from Chankiek village to a small town just 15 kilometers away, south of Udong. The first time she encountered the Khmer Rouge was when they marched into the town and ordered everyone to leave. She said her family and others left in haste. On a small dirt road leading away from the town, people marched with their belongings. Nobody dared stray from the road

because the Khmer Rouge would shoot them if they did. Vork Ty's family was sent to Kampong Cham. She was put to work in a children's unit. She used to speak with some Khmer Rouge cadres and village guards in the field. She said she was very scared of the Khmer Rouge but she was never victimized by them in any brutal way. She saw a child who was tortured with plastic bag covering her head and beaten until she almost fainted. Later the child disappeared.

Although she did not suffer nearly as much as other victims of the Khmer Rouge, Vork Ty can not forgive Khmer Rouge leaders. She is also certain that other women she knows would not be able to forgive them because they lost too many loved ones. She

said, "The loss to some families is too great to forgive anyone." Vork Ty knows through newspaper articles, radio broadcasts, and television shows that there is a Khmer Rouge tribunal in Phnom Penh. She also heard that what's being done at the court is intended to help people feel relief that some degree of justice can be given to the victims, but won't bring the complete justice that victims of murder should receive. She said, "It is only symbolic. It would be disappointing if any of the Khmer Rouge leaders currently on trial were released. I want them to stay in prison for the rest of their lives."

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***Kok-Thay Eng is the Deputy Director of the Documentation Center of Cambodia.***

## LOOKING FOR MONTAGNARD MEN, WOMEN, AND CHILDREN...

*who expelled by the French Embassy in Cambodia on April 20, 1975*

When the Khmer Rouge marched into Phnom Penh on April 17, 1975 and ordered a city-wide evacuation, hundreds of people fled to the French Embassy for refuge. Upon pressure from the Khmer Rouge however, the French Embassy expelled between 150-300 Montagnard (of Rhade and Jarai ethnicity) men, women, and children on April 20, 1975 reportedly under the direction of Comrade Nhem. Thirty years on, their family members are still patiently awaiting news and would be extremely grateful for any information. Below is a partial list of some of the people who were handed over to the Khmer Rouge that day. If you have any information regarding Comrade Nhem or the people listed below, please contact Documentation Center of Cambodia or Youk Chhang immediately by mail or phone.

- ◆ Y Huer Buon Ya (male, ~50 years old now, once a student at Lycee Descartes, son of Y Bhan Kpor)
- ◆ H'Lan Buon Ya (female, ~ 45 years old) ◆ H'o Buon Ya (female, ~ 40 years old)
- ◆ Y Van Buon Ya (male, ~37 years old) ◆ H'dak Buon Ya (their mother, ~65 years old)
- ◆ Y Dhik Buon Ya (their uncle, ~60 years old) ◆ Y Nam Buon Ya (their uncle, ~60 years old)
- ◆ Y Ju Buon Ya (male, ~50 years old now, son of Y Nham Eban)
- ◆ H'Ngiem Buon Ya (female, ~47 years old) ◆ Y Huan Buon Ya (male, ~45 years old)
- ◆ H'Nut Buon Ya (their mother, ~60 years old)
- ◆ "Bernard" Eban (male, ~45 years old now, son of Y Dhon Adrong)
- ◆ H'Dua Eban (his mother, ~60 years old)
- ◆ Y Goc Buon Ya (male, ~ 43 years old now, son of Ksor Duot)
- ◆ H'Nguom Buon Ya (his mother, ~60 years old) ◆ Y Paul (male, ~ 43 years old now, son of Kpa Doh)
- ◆ H'Diat (his mother, a nurse, ~ 65 years old) ◆ H'Rec (daughter of Y Dhun Nie, ~55 years old now)
- ◆ H'Ni (daughter of Y Bham Enuol, ~55 years old now)
- ◆ Y Be and \_\_\_ and \_\_\_ (~43 year old son, and two younger children, of Y Ksuah Buon Krong, a teacher H'Ri Buon Ya (their mother, also a teacher, ~65 years old)
- ◆ Y Phut (~45 years old, son of Y Wun Nie)

# THE BOOK OF MEMORY OF THOSE WHO DIED UNDER THE KHMER ROUGE

The Documentation Center of Cambodia is writing and compiling a book of records of names of those who died under the Khmer Rouge regime from 1975 to 1979 and those who disappeared during the period, who are still not known by their relatives. It also includes a section for family tracing purposes. DC-Cam already has in its database up to a million names of those who may have died under the Khmer Rouge. If you would like to have your relatives' names, who died under the Khmer Rouge or disappeared then, appearing in this book.

Please contact Kok-Thay ENG Tel: 012-955-858 Email: [truthkokthay@dccam.org](mailto:truthkokthay@dccam.org) Website : [www.dccam.org](http://www.dccam.org) or [www.cambodiatribunal.org](http://www.cambodiatribunal.org)

