

*Searching for*

# THE TRUTH

- ◆ The U.S. Secretary of State Hillary Clinton's Visit to Cambodia
- ◆ ASEAN's Obligation to Fund the Khmer Rouge Tribunal

*«In memory of the tragic suffering of the people of Cambodia and in hope that there will be a future of peace, prosperity and greater awareness of all that needs to be done to move the country forward, including trials, accountability and reconciliation.»*

*-- Hillary Rodham Clinton on November 1, 2010*

**Special**  
English Edition  
Fourth Quarter 2010

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Sek Say, a daughter of S-21 prisoner Chan Kim Srun



Hillary Clinton and Youk Chhang at Tuol Sleng

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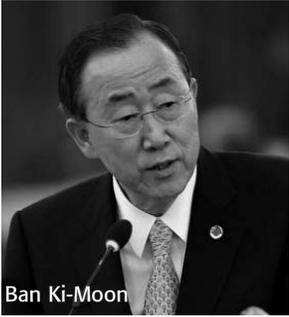
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LETTER FROM YOUK CHHANG:

## ASEAN'S OBLIGATION TO FUND THE KHMER ROUGE TRIBUNAL



Cambodia welcomes United Nations Secretary General Ban Ki-Moon to Cambodia. He is here in his role as the United Nations' highest official, but he is also a citizen of our region. Significantly, during his short

time in Phnom Penh, he is visiting both the Tuol Sleng Genocide Museum and the Extraordinary Chambers in the Courts of Cambodia (ECCC)—the former a memorial preserved by the Cambodian people for the past 30 years for the estimated 14,000 people who were tortured and killed there during the Khmer Rouge period, and the latter a joint United Nations/ Cambodian effort to construct from Khmer Rouge horrors a future based on human rights and rule of law. His visit should be seen as a message to Asia, and especially to Association of Southeast Asian Nations (ASEAN) members, about the regional significance of the ECCC and its second case against Ieng Sary, Nuon Chea, Khieu Samphan, and Ieng Thirith—the first genocide trial to be held in Asia.

Given the ages of the four accused, the possibility that their trial could drag on for several years, the likelihood of appeals, and not least of all, the track record of the Cambodian legal system, it is unlikely that most Cambodians' expectations for justice will be met. Nevertheless, the trial will provide three very important benefits for Cambodia. First, it can form a backdrop for helping people answer some of the questions they have about the tribunal and the Cambodian justice system. Second, it can stimulate a dialogue among Cambodians on whether their legal apparatus works and about what they want their justice system to become. And third, just a generation after

the genocide, many young Cambodians simply can't believe that their parents endured such hardships under the Khmer Rouge. Thus, the trial will help keep the memory of what happened in Cambodia alive and inspire people to work to prevent it from happening again. Whatever the outcome, the trial will be important for Cambodia's understanding of justice and human rights, in particular the right to life.

Some Asian governments still view human rights as an issue that is largely Western in orientation. Over the past few decades, however, people in many Asian countries have progressively demonstrated their belief that these rights are universal in nature and that due process and the rule of law are critical elements of democracy. As Asian countries and those from ASEAN in particular are playing an expanded role in world politics and the international economy, it is critical that their conduct and performance reflect the changes that have been taking place in Asia.

Although ASEAN seeks to promote democracy and human rights in the region, no ASEAN member state has yet made a monetary contribution to the ECCC, which suffers from a chronic budget shortfall. Because of its mandate, more than any of the current state donors, ASEAN has an obligation to ensure that the ECCC process proceeds according to the rule of law and without financial obstacles. It is my hope that Ban Ki-Moon's visit will spur other members of the ASEAN community to show their support for human rights in Asia by providing much-needed financial assistance for the Khmer Rouge tribunal.

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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.***

**“Ban Ki-Moon's visit will spur other members of the ASEAN community to show their support for Human Rights in Asia by providing much-needed financial assistance for the Khmer Rouge tribunal.”**

# THE U.S. SECRETARY OF STATE HILLARY RODHAM CLINTON

*"I had a very emotional tour of the Tuol Sleng Museum and I looked at that terrible place of suffering and those who did the killing. I am committed to educating the young generation about a painful chapter in this country's history. It is so hard to bring accountability and justice while seeking to stabilize and rebuild the country."*



*In memory of the tragic people of Cambodia and I believe there will be a future of peace and greater awareness of what can be done to move the country forward including trials, accountability and remembrance. May God rest their lives and their families of all Cambodians who want to make a difference for the next generation.*

*Hillary Rodham Clinton*

*4/1/10*

# Y RODHAM CLINTON'S VISIT TO CAMBODIA

*looked at the faces of the young Cambodians, both those who were killing. And what is most important is that Cambodians themselves are country's past and honoring the memory of those who died by working ze and reconcile as well." Hillary Rodham Clinton, November 1, 2010*



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# THE UN, CAMBODIA, AND THE KHMER ROUGE: POLITICS BEFORE VICTIMS?

*Dacil Q. Keo*

Beneath the upcoming high profile visit of UN General Secretary Ban Ki-Moon to Cambodia, upon request from Prime Minister Hun Sen, lies three decades of questionable UN efforts at mediating peace in Cambodia. The UN, known for both excellent health programs and embarrassing peace keeping missions, has a mixed record when it comes to dealing with the Khmer Rouge and promoting democracy in Cambodia. This mixed record—entailing official support and prosecution of the Khmer Rouge—is fresh in the minds of survivors of the Khmer Rouge regime. Consequently, survivors are both welcoming and weary of the UN. Given this, the UN should carefully assess if its agenda in Cambodia—whether to fashion a convenient peace or promote legal justice—is truly in the interest of survivors.

The UN has been involved in the Khmer Rouge issue on three prominent occasions. The first was after the fall of the Khmer Rouge regime in 1979 when the UN supported the defeated Khmer Rouge movement. As news of mass starvation, torture, and killings from Cambodian refugees reached international headlines, the UN decided to allow the Khmer Rouge to retain the Cambodian seat at the General Assembly. From 1979 to 1982, the Khmer Rouge under "Democratic Kampuchea" occupied Cambodia's seat. From 1982 to 1993, the Coalition Government of Democratic Kampuchea in which the Khmer Rouge was a tripartite member, held the seat. Thus for over a decade the UN recognized the Khmer Rouge faction as the legitimate government of Cambodia while rejecting the Vietnamese-backed People's Republic

of Kampuchea (PRK). Survivors of the regime were appalled. Indeed Cold War politics at the time shifted the focus from genocide in Cambodia to Vietnam's "invasion" of Cambodia, thus providing the UN justification for supporting the Khmer Rouge. However, as the bearer of the Universal Declaration of Human Rights, the Genocide Convention, and the Convention on Torture, the UN should not have prioritized politics over millions of survivors on an issue of government recognition.

The wave of UN support for the Khmer Rouge changed however with the falling tide of communism in Eastern Europe in the early 1990s. By this time, all Vietnamese troops—which numbered as many as 150,000 during its peak—had left Cambodia and the PRK government abandoned its Marxist ideology. The UN, and the international world, recast their eyes upon a newly non-communist Cambodia. It was an opportune time for the UN to make amends with the people of Cambodia after supporting the Khmer Rouge for ten years.

The United Nations Transitional Authority in



Election in Kampong Chhnang in 1993 organized by the United Nations

Cambodia (UNTAC) was created in 1992 to bring peace and order. It was a new experience for both Cambodians and the UN. For Cambodians, it was the first time a transitional authority governed their country. For the UN, it was the first time assuming control of a sovereign administration and running an election from scratch. The price tag of the operation was also a first—\$2 billion. It was the most that the UN had spent on a single peacekeeping operation at that time.

Unfortunately however, UNTAC failed to disarm the Khmer Rouge, allowing them the means to continue waging a low-intensity civil war.

UNTAC's failure to enforce the election results gravely tarnishes the otherwise noteworthy May 1993 election in which there was a 90% voter turnout. A convenient and temporary peace was achieved, but at the cost of potential long-term political reform. The election was the first time, and so far remains the only time, that the CPP faced a viable challenge to its omnipotent rule.

Once again, it appears that the UN prioritized political expediency over the interests of ordinary Cambodians.

The UN's latest involvement on the Khmer Rouge issue comes in the complicated form of a Cambodian-dominated hybrid tribunal called the Extraordinary Chambers in the Courts of Cambodia (ECCC). From its inception, the tribunal was entangled in a power struggle between the UN and the Royal

Cambodian Government (RGC). In the end, the UN compromised and heeded greater control over the tribunal to the underdeveloped, weak, and heavily politicized Cambodian judiciary. Unsurprisingly, allegations of corruption and charges of political influence enveloped the tribunal within its first year of operating. In response, the UN Office of Internal Oversight Services investigated the charges and issued a report in 2008. The report however was labeled confidential

and thus not released to the public. Similarly, a report compiling the results of a different investigation conducted by the Independent Counsellor of the ECCC was also classified as confidential. The Cambodia public, and in particular survivors of the Khmer Rouge regime, were left in the dark.

Another issue of concern is the number of defendants to be prosecuted. During the negotiation phase of the ECCC, the UN wanted a greater number of former Khmer Rouge to be prosecuted than the RGC. It seemed that the RGC had prevailed on this dispute with the

jurisdiction of prosecution in the ECCC law limited to "senior Khmer Rouge members and those most responsible." Five former leaders were charged by the ECCC and the RGC was content. Later however, former International Co-Prosecutor Robert Petit expressed the possibility of prosecuting more individuals than the five. The RGC quickly issued a counter response. It warned that expanding the number of defendants would lead



A Khmer Rouge Soldier in 1992

to instability and violence, thereby threatening the peace that Cambodia has enjoyed for two decades. Cambodian Co-Prosecutor Chea Leang supported the government's stance. Afterward, Petit resigned. The UN has not let the issue rest however; it is still pushing for more indictments.

Throughout this disagreement, one wonders if the wishes of the survivors have been considered. According to a 2009 report by the Victim Participation Project (VPA) of the Documentation Center of



A UN military observer from the U.S. with a hilltribe family



Cambodian soldiers demobilized



Ban Ki-Moon at ECCC in October 2010

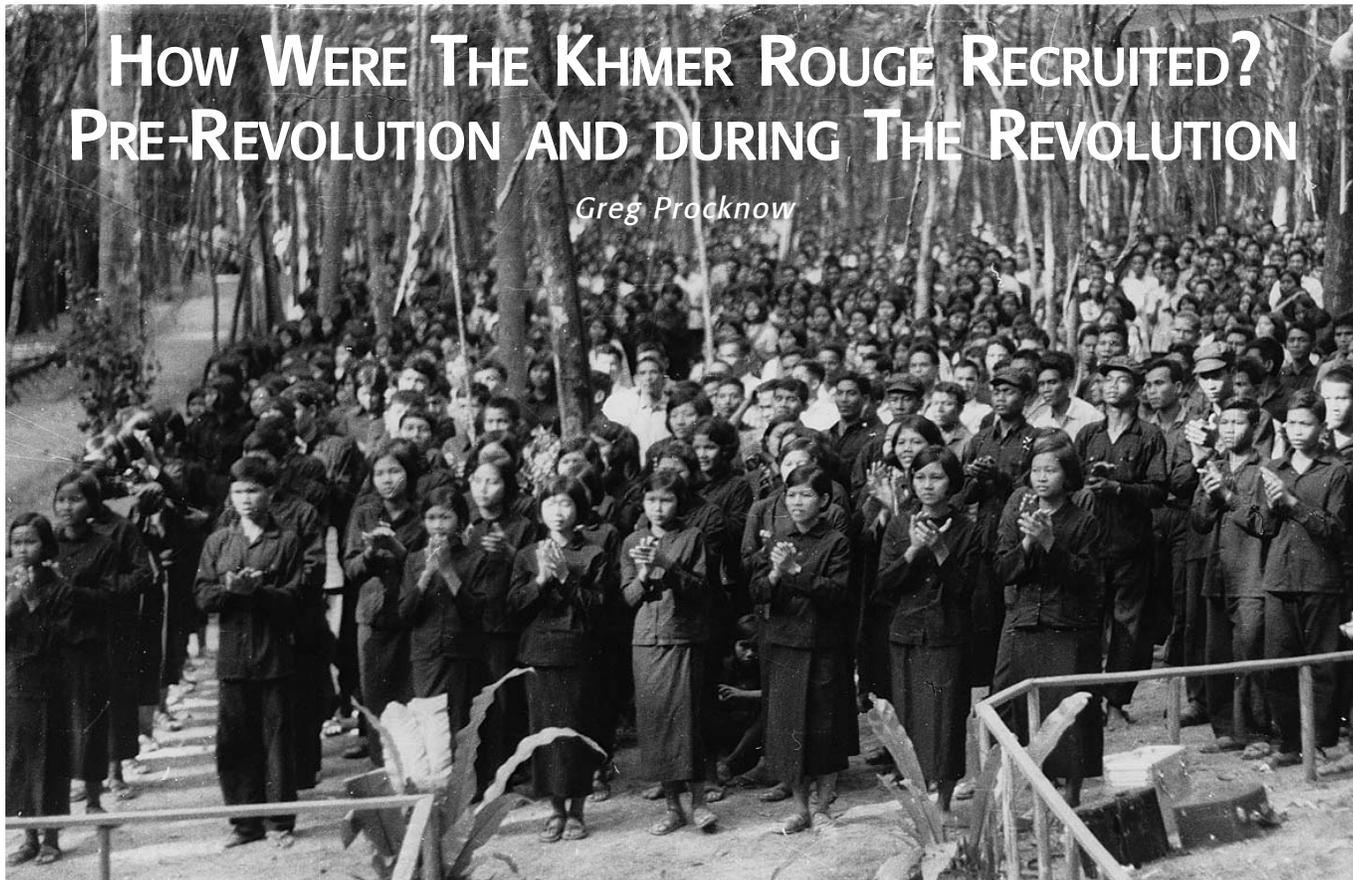
Cambodia, it found that 41.4% of 1,110 people surveyed did not want the ECCC to prosecute any more individuals while 56.8% wanted more individuals tried. It should be noted however that approximately 30% of survey respondents were those born after the regime, aged 20-30 years. This is a group that, although limited in their knowledge of the Khmer Rouge period, is nevertheless receptive to Western ideals of legal justice. The VPA report found that 67.5% of them wanted more individuals tried. Taking this into account, then approximately 52% of survivors (those who directly experienced the Khmer Rouge regime) want more prosecutions. Given this figure, it is difficult for either the UN or the RGC to claim that their decision to expand or limit prosecutions is reflective of the majority of survivors. Rather, the UN should take this opportunity to seriously consider what is in the best interest of survivors. Advancing a political agenda on such a significant human rights issue will once again signal to survivors that politics is more important than their suffering and loss. The new UN administration still has the chance to change its mixed record on the Khmer Rouge issue by how proceeding carefully and conscientiously with the ECCC. After all, the tribunal was created for the survivors.

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# HOW WERE THE KHMER ROUGE RECRUITED? PRE-REVOLUTION AND DURING THE REVOLUTION

*Greg Procknow*



To understand fully the Khmer Rouge's recruitment strategy in general, it is critical to discuss their strategy pre-April 17th, 1975, in comparison to their switched recruitment efforts post-April 17th. Those recruited pre-revolution were considered 'old people' where, those recruited after April 17th, were deemed 'new people'.

## **Recruiting: Pre-Revolution**

Pol Pot and others made one pivotal error; they failed to realize that some areas were poorer than others, for example, before 1975, peasants in the village of Sobay in Kandal province were much poorer than the average village. This would prove to turn out to be a fundamental mistake on part of the Khmer Rouge line; initially later contributing to the KR having difficulty recruiting peasants into their movements (pre-revolution). The Khmer Rouge would start to see a substantial increase in their potential recruitment pool, shortly after the devastation that the Vietnam War and the American bombardment of bordering Vietnamese - Cambodian villages brought. Many Cambodian farmers incurred much economic difficulty after having massive

damage done to their farms. Re-constructing efforts were just too costly. Many were left with heavy financial debts, having to sell off their property to pay their debts off. The deteriorating economic conditions of the peasantry alone were not widespread enough to generate nationwide support of the Khmer Rouge. Although the exact size of this recruitment pool and it's correlation with the landlessness of the peasantry, has been widely debated by scholars. But Ben Kiernan's assessment in his 1996 book, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79* on the matter most likely sums up the argument best, that the majority of the peasants in the country side were not widely drawn to the Khmer Rouge's proposal, although the number of recruits were substantial "enough to build a viable recruitment strategy targeting poor peasants, and particularly their teenage children".

A handful of the recruits who registered in the party in the early 1970's were driven by malice and anger towards the Lon Nol government. Khmer Rouge

early propaganda campaigns suggested that Lon Nol and his lackeys were responsible for the B-52 American bombardments of the Cambodian countryside. These Cambodian recruits were angered over this mass destruction of their homes and the death of their loved ones, inciting anger and resentment to those responsible; later incited to attack the Lon Nol government. The Lon Nol government had made a deal with the United States to bombard certain Vietnamese elements who were residing in bordering Vietnam villages to drive out the North Vietnamese communists. Those aforementioned recruits, who were economically impacted by the American bombings, which directly led to some 150,000 Cambodians alone perishing, and the displacement of thousands of others, were angered at these imperialist dogs, America and the Lon Nol regime. Khmer Rouge propaganda efforts played on their desire for revenge. A report compiled by the CIA's (Central Intelligence Agency) Directorate of Operations on May 2 1973, outlined how the Khmer Rouge had launched a new recruitment strategy in the Kandal province (Southwest) in which they exploited the damage done by the American bombings, as the main theme of their new propaganda campaigns. Party cadres would go around informing the people that the Lon Nol government was to blame, that Lon Nol himself requested that the Americans bombard the Cambodian countryside, responsible for the devastation and suffering of innocent agrarian villagers. They would entice people to join the revolutionary army, as the only way to stop this destruction. They need desperately to unite a revolutionary force large enough to defeat Lon Nol. An ample amount of recruits were those unemployed intellectuals, or middle class members who were largely drawn to the ideals presented by the Khmer Rouge. These recruits joined pre-revolution, and in most probability secured the highest positions within Democratic Kampuchea. Some recruits wanted to see King Norodom Sihanouk restored to power, after he was ousted by Lon Nol in 1970, in which Lon Nol created the Khmer Republic. Sihanouk had aligned himself with the Khmer Rouge, in which he later

called upon the rural children to fight the illegitimate Khmer Republic. His support of the Khmer Rouge enticed large numbers of peasants to follow the Khmer Rouge movement. If it were not for Sihanouk being on the Khmer Rouge's side, the Khmer Rouge would have never recruited enough help to overthrow the Lon Nol regime. An exorbitant amount of recruits naturally despised the wealth and status of the city people, the perceived rich. They resented those of the wealthy class, who exploited the poor, through low wages, and those responsible for diminishing the status and respect of the peasant class. These recruits were those who were in opposition to the wide class division of Cambodia, who were somewhat already class conscious. They were appalled by their debts, landlessness and poverty. The Khmer Rouge's propaganda had promised a new utopian, an egalitarian Cambodia. They were part of something much larger than themselves.

The earlier propaganda campaigns created to entice peasants to join by local Khmer Rouge cadres were non-complex. Often a local KR cadre would persuade members of the peasantry to join, often through registering through their district, sub-district and village chiefs. Recruitment was not forced in certain areas, Sokha, in her interview with Bunsou Sour, stated that, "No one forced us; they just launched a simple campaign as it was normally done, and we believed that it was good, so we joined." Cadres promised rewards to those recruits who joined, promising a higher standard of living in general for all peasants, only once capitalism and imperialism within the nation was vanquished. For many of the peasants their incentive to join, and lend their support, was derived from the Khmer Rouge promise that rewards will follow once the war ended.

### **Recruiting: During the Revolution Young Children**

In DK, parents were no longer allowed authority over grown children, and family connections were of no value in securing favorable living conditions. Khmer Rouge cadres responsible for local recruitment efforts, solicited the youngest members in Cambodia's poor



Khmer Rouge Child Soldiers

class, who would be willing to destroy the old society, out of resentment for having little stake in it. Much like Mao Zedong turned to youthful cadres and red guards for implementing the Great Leap Forward and the Cultural Revolution, Pol Pot followed the same method. The recruiting of young cadres and soldiers were instrumental in the revolution becoming as cruel as it had. Sihanouk suggests that once these children were enlisted in the revolutionary army, they were separated from their parents and families, taken from their home villages, and placed immediately into indoctrination camps. Many began their military careers at the age of 12. The party bestowed upon them what they thought was the greatest honor, and that was the title of "*Oppakar phdach kar robas pak*", which translates to, "the dictatorial instrument of the party". Dith Pran had once suggested that these young Khmer Rouge children turned cadres were the most brutal, often falling between the ages of 12-15 years of age. They appeared completely indoctrinated; they were taken young and taught nothing but discipline and hatred. These young cadres often identified their families as the enemy, in one instance a later survivor remembers one Khmer Rouge cadre, young in age, who was told to execute his father, the child had done so, but then turned the gun on himself. They used terror, violence to carry out the most of extreme orders passed unto them by their superiors. The Khmer rouge hoped to use children as

the basis of a new society without memory.

### The Illiterate Poor

The first of King Sihanouk's reasons why the Khmer Rouge was so successful in developing ferocious cadres was the method of recruitment employed. Sihanouk's description of those chosen candidates included those poor peasants, mountain people, inhabitants of the forested regions, and the most remote of villages. These were the most "neglected" by the old regime, these were almost exclusively recruited.

These were the ones who were more ignorant, and susceptible to believing the Khmer Rouge's clever propaganda schemes. This propaganda infiltrated the poor peasant's hearts and minds, with hatred for the upper echelons. Those who could afford clothes, housing, and education for their children, those who were not required to work in the field's day in day out, and those who could easily pay taxes were despised by this target recruitment group. Pol Pot sought the recruitment of those considered to have formed "the bottom rung of society", who were spiteful of the wealthy rich, who would unflinchingly strike them down without care. Pot found that the ill people and the poor Khmer peoples living in Northeastern Cambodia would be ideal candidates to recruit as his new party cadres. The poor were less educated, less literate, more ignorant, perfect candidates to follow orders without questioning first the morality of their actions. Pot stated in a post-1975-78 interview that, "my backing base was in the regions of the national minorities that were situated in the Northeast regions, I know perfectly that these national minorities were very miserable". Pol Pot described them as "completely illiterate people who did not have even the slightest idea of cities, automobiles and parliaments, but who dared to fight under the guidance of the party". Gerard Brisse in his introduction to Prince Sihanouk's book *War and Hope: The Case for Cambodia* suggests that "the people of the

high plateaus were much sought after, much worked on by special services of every variety; they formed the pool from which the Khmer Rouge found its future cadres. They were uneducated cadres, used to moving around. Instructed in hatred, they behaved like brutes"

Recruitment was practically at a stand still for the first few years under the DK government, but firmly resumed in July 1977, and had done so rather exponentially. New members to the party were required to have impeccable class qualifications, revolutionary experience (had participated in revolutionary movements in the past), as well a good personal history, which could be verified entirely. Having a higher education earned you no extra consideration into the party's higher ranks, post-April 17, 1975. Most of the low-mid leadership positions in Cambodia post April 1975 were largely demobilized soldiers, those wounded or disabled as a result of revolutionary activity. Surviving refugees have noted that often the Committee Chairman of many of the cooperatives across the nation, were ex-soldiers.

Recruiters were to ensure that the party candidate had the proper class background. The sneaky nature of the DK party exacerbated the difficulty of selection. Party members were advised to be on the lookout for hard working people with the right spirit, to be recommended for promotion from worker to cadre. This is an area where Pol Pot tended to deviate from emulating

Mao's policy on recruitment. In the People's Republic of China, following their victory in 1949, the CCP had changed its recruitment policy from emphasis on peasant to workers to intellectuals and city people, launching a program of urban industrial development, which in reality was the opposite of what was happening in DK. **How were Khmer Rouge Recruits Developed into Cadres?**

To assist the recruits, and active cadres, the party employed a variety of mediums to reach and inadvertently build these recruits political consciousness by subjecting them to mandatory meetings, radio broadcasts, studying short documents, word of mouth (discourse between two or more individuals) and from vigorously studying both regional and sector documents. These studies could be a half a day, one day or even a couple of days, it all depended on the situation, and environment i.e. regions. Personal development of the recruit was of the most essential importance to the Khmer Rouge. This was largely done through these five development programs: hands-on work experience; self-criticism/criticism sessions; autobiographies; school of cruelty; and public meetings.

#### **Hands-on Work Experience**

Training was largely undertaken in the form of hands-on practical work experience. A DK broadcast in April 1978, set out the formal structure as approved by

top DK cadres on party building. First was to identify those eligible recruits. Second, was to give them minor responsibilities in their respective cooperative as ways for the recruit to develop both work and leadership experience. This also acted as a selection tool in a way, because this preparation would be closely monitored much like a



A labor camp during the Khmer Rouge regime

test, failing the test would result in the candidate no longer being eligible for party comradeship. One way the Khmer Rouge cadres would filter out the weak workers (subsequent cadres) was that they would move large groups of workers around in the fields and woods, to willingly disorient them in a way to gather complete control. They did this to get rid of the useless people, those especially who were too weak to work. This was an important part of their training cycle for potential cadre candidates. They were filtering out the right candidates to be part of their organization; to the Khmer Rouge this is nothing but an intense training exercise. For the ones who demonstrated hard work, the Khmer cadres would note this and recommend these selected few to mid-cadre level leaders that certain workers should be considered for promotion to the party leadership ranks. When it came to work, the informal rule was of course, that repeated criticism led to execution. New people and other suspect groups were given the opportunity to prove themselves worthy of a position in the new regime by performing types of manual labor associated with the worker-peasant class.

### **Self-Criticism / Criticism Sessions**

Before undergoing the processes involved in publicly criticizing oneself in ones cooperative, it was mandatory that each recruit, cadre, answer a biographical questionnaire that was supposed to provide one early insight on how to effectively, and regularly give strength to a person to scrutinize their own thoughts and behaviors. The purpose of these self-criticism sessions was for one to admit their personal shortcomings in his/her consciousness. Having feelings and still mindfully being attached to their family; desire for personal property; were such feelings not in conformity with the DK party line. It was the responsibility of the on lookers to recognize and distinguish the self-criticizers wholesome and unwholesome thoughts and behaviors, and to effectively point them out, during the feedback sessions. Local cadres would be on the look out for any regressive consciousness traits, for example, when they are publicly self-criticizing themselves, if they

were to simply dwell on the past (this would symbolize that the speaker still retains some capitalist (attitudes), or if they the used foreign words (listeners would be able to infer that the speaker was educated under an imperialist system).

Vaen Kheun, a Khmer Rouge survivor, recalls how it was simple to fashion ones life history, but it was much more difficult during criticism sessions, because most people did not know what was going to be said about them, or how they would receive this criticism. These sessions were the ultimate performance area for those being watched to fully show Khmer Rouge ideology understanding and to emulate those KR desired best practices. The conscientious practice of self-criticism acted as a ruthless exposure to the individual criticizers own shortcomings. Criticism and self-criticism is part of the Marxist-Leninist arsenal, which works to filter out the good of leadership and conduct, neglecting the bad styles. Self-criticism was established as a crucial military and political training and development tool to enable communist cadres to learn from their mishaps. On January 8th, 1967, Mao Zedong stated in the Chinese Communist Party run newspaper, "The People's Daily", urging on all local government leaders to rise in self-criticism, and or criticize and purge others. Joseph Stalin believed that self-criticism was needed and required of those after they assume power. That some may fail to perceive there own flaws and weaknesses, which inadvertently make things easier for the enemy. Further that the purpose of self-criticizing is to "disclose and eliminate our errors and weaknesses". Lenin wrote in April-May 1920 in his pamphlet, 'Left-Wing Communism, an Infantile Disorder', that "there is only one conclusion: that without self-criticism there can be no proper education of the Party, the class, and the masses; and that without proper education of the Party, the class, and the masses, there can be no Bolshevism". Some alluded to the assumption that with self-criticism, there is no longer leadership needed, that we can just let things take their naturally destined course. Joseph Stalin suggested that self-criticism is "needed not in order to relax

leadership, but to strengthen it, in order to convert it from leadership on paper and of little authority into vigorous and really authoritative leadership...Is it so hard to understand that we need self-criticism not for the sake of a witch— hunt against our economic cadres, but in order to improve and perfect them?"

Phelim Kyne and Vong Sokheng in 2001 had interviewed a survivor of the infamous Cambodian Boeung Trabek re-education camp, Senator Keo Bunthouk, about life and death in this rehabilitation center. When asked what life was like in Boeung Trabek, Bunthouk replied, "we worked hard and didn't eat well... there were daily sessions of criticism and self-criticism". Criticism was part of the formula of full recovery to those who were bourgeoisie, city people. New leaders and leaders who represented the old were trained to criticize others as well themselves. Everyone worked their hardest to identify others faults, which left most in a state of fear and anxiety. Social evaluations under the DK were almost a constant ebb and flow. Evaluations that were positive could result in the person procuring a better position/rank, extra food, and as well other beneficial advantages. Cadets could negotiate their status by partaking in criticism and self-criticism sessions.

One could fabricate and alter ones life history, but the stakes were higher during criticism and self-criticism sessions, since the participant never knew what might be said about them or how their own words maybe manipulated and perceived by their peers. Here every facial twitch is monitored by gun holding Khmer Rouge. Although an alert individual recognizes their faults, strong criticism could result in shame and a loss of face.

Everyone was expected to attend these criticism and self-criticism sessions, including those in the higher ranks for example, the chief jailer, of S-21, Kaing Guek Eav (Duch). Duch admitted in March 2009, for being indirectly responsible for overseeing the execution of 15,000 Cambodians, who came through the Tuol Sleng prison. A former prison guard who worked under Duch informed the UN War Crimes Court, that he and others were forced to attend self-criticism sessions in order to improve their overall effectiveness while

working for Duch. The guard, Chan Khorn said, he was so terrified of Duch that he "could not look him in the face" when he worked under him at the Communist movement's M-13 prison in the early 1970s. Duch frequently warned his comrades if they did not regularly attend these sessions (a part of their job description) then they would be punished for not complying with their allocated job duties.

Self-criticism is strongly correlated with a range of psychopathologies, such as depression, eating disorders and anxiety. This feeds low self esteems. Most often self-criticisms are false and self defeating. Manuel London suggests that leaders, who have high evaluation apprehension and partake in high self-criticism, become debilitated. Their performance output is significantly reduced. They are low in self-efficacy. Lastly, self-criticisms were used to help cadres reflect on their newly arranged marriages. The newly married would inform others about the relationship, if the mass disagreed with the relationship, it would be suggested by the whole that the cadre divorce.

### **Autobiographies**

Much like criticism sessions, autobiographies were to be compiled in the recruit's respective cooperative. These were to be used to both help the recruit/cadre build their revolutionary/political consciousness, and to help the cadres responsible for reviewing these autobiographies to infer as much as possible about the autobiographers class background. For cadres themselves, completing autobiographies was a regular process, which was more critical to the advancement and sustainability of their career. It was mandatory for anyone new joining the party, to complete a dozen pages or so biographical questionnaire. This questionnaire was divided into seven sections, which required the individual to list information about their spouse, children, parents, siblings, close friends and social environment. This questionnaire did provide space for the respondent to list names, occupations, class, and revolutionary background of these aforementioned peers of the respondent. The questions were to ascertain a candidate's class status, history of associations, and the respondent's

state of consciousness. These questionnaires would ask the respondents previous work experience, as a way to determine prior class status. Other questions would attempt to determine the respondent's current revolutionary status by asking about their length of revolutionary service, previous membership in other revolutionary organizations, educational background, positions and ranks and history of revolutionary activity, i.e. Where did they join, when, did anyone recommend the party to them? In regards to self-scrutiny, the respondent was to answer questions about how they perceive their own character: "How clearly do you know your character? To what level? How well do you know your strengths and weaknesses? How have you changed your non-revolutionary character and weaknesses? These responses were typically organized to record the respondent's pre-revolutionary and revolution strengths, weaknesses and intent to direct change in their lives to be in compliance with Khmer Rouge values. Cadres would try to emulate those best practices suggested by the party line, by attempting to display those verbal and behavioral cues that signified proper revolutionary consciousness, because this public display and ultimate personal evaluation would determine their social standing as well odds of survival in the new regime. Much like criticism sessions, writing ones biography was a dangerous business, which required the participant to use undetectable deception when providing their answers.

### **School of Cruelty (Torture Games)**

The Khmer Rouge would subject the potential recruits, to witnessing acts of terror and extreme violence. Reum Sam, a surviving refugee, recalls having to watch the torture of two prisoners. She was told to sit directly in front of the prisoners and make eye contact: "If anyone cries or shows empathy or compassion for this person, they will be punished by receiving the same treatment". One of the prisoners was asked to confess their crimes. The prisoner refuted the claims of his guilt. The prisoner screamed at them condemning the Khmer Rouge cadre for killing without reason, actions unjust in its entirety. One of the Khmer soldiers

smashed him in the back of the head sending him face forward into the mud. Angkar, Sam remembers, cut the man from his breastbone to his stomach, and then removed his organs. Sam was shocked, as if she was struck herself, by the butt of the soldier's gun. The soldier that cut this man open, tied his organs with barbed wire, attached the opposite end of the wire to his bicycle's handle bars, got on his bike and rode away, leaving behind a bloody trail. The soldier announced over his microphone "all girls and boys, you have seen with your own eyes, if someone feels compassion or sympathy for the enemy that has just died then you will be punished just like him". Roem felt as if she was now not only a prisoner in the physical form, but as well in her mind.

Both Pol Pot and Ieng Sary, rigorously believed that by training the countries young recruits in cruel games, they wouldn't end up becoming soldiers/cadres who would not be compassionate, and loving for their fellow man, but would love killing and participating in cruel warfare. King Sihanouk had recorded in his 1980 work, *War and Hope: The Case for Cambodia*, that his time spent with the Khmer Rouge while under KR guarded house arrest, "I saw those guarding my camp constantly take pleasure in tormenting animals. The Khmer Rouge loved to make their victims suffers as much as possible. Torture games, were noted as being the cadres principle training tool, as it was believed that when young recruits were killing dogs, cats and other animals savagely with clubs and bayonets, they were in fact hardening their minds and hearts. Little animals were only the start, it was now time for the recruits to prove themselves, by demonstrating their cruelty and disregard towards human subjects. Some Khmer recruits were to prove themselves by cutting the breasts off well endowed Vietnamese woman, others were to do other cruel acts such as cutting unborn babies from those pregnant Vietnamese enemies, and upon doing so they would slap the dead fetus across the mothers face. Much like an American medical student being trained in surgery by operating on human cadavers, Khmer cadets would practice their

task of cruelty by dissecting the human form. The only time children would get time off from school/ or workers from field work, was to watch someone get killed.

Seath Teng, a survivor, remembers a day where she was working in the cooperatives vegetable garden pulling weeds. She heard a whistle blow, which was to acquire the immediate attention of workers both young and old, and they were to return to the cooperative. They were to go to a meeting immediately to see the punishment of a traitor. The children were placed in front of the victim, so they could get a close look at what was going to happen. In the center of the gathering spot was one woman who had both of her hands tied behind her back. She was pregnant, and her stomach bulged out. Standing to the side of her was a little boy who was about six years old and holding an ax. In the child's shrilled voice, he yelled for all of the other children to watch what he was going to do. Teng said the boy threatened that if they did not look, they would get similar treatment next. This boy used the back of the ax and smashed it hard into the poor pregnant woman's body until she dropped to the ground, and did so continuously until he was too tired to continue wielding the ax. This proves just how viscosly effective the Khmer Rouge indoctrination sessions were on those of the youngest age groups.

### **Public Meetings**

Status was often displayed here, as all the revolutionary participants in the crowd were expected to praise the revolution, and their local cadres respectively. Here they would together, sing revolutionary songs, chant slogans. A Khmer Rouge song, called "The Motherland of Kampuchea", accomplished stirring up American Imperialist resentment amongst the populace; chanting such slogans as, "(those) American imperialist(s) and their lackeys. (These) lackeys owe us blood as hot as fire...we will not forget the severe oppression. Seize hold of guns to kill the enemy quickly".

Karl Jackson, author of '*Cambodia 1975-1978: Rendezvous with Death*' suggested these meetings were "devoted to planning agricultural tasks or harping on themes related to security or the improved situation

over the old society, a more systematic approach aimed for meetings every month". The assembled mass would listen to their local cadres promoting the Revolutionary successes and advancements of DK under an able and progressive leadership and party center. The masses were expected to fully participate, despite exhaustion brought on by the long work day; they were to enthusiastically applaud each cadre's every sentence. This would symbolize to cadres keeping eye on the workers, who was being fully attentive, thus could prevent someone from being considered as an enemy. Both new and old people were required to frequently attend these public meetings. Most often the theme would constitute the local cadres telling them that they should love the party and obey its directions without question. Sometimes local cadres would discuss the Vietnamese and their intent to take over Cambodian soil. Some Village chiefs talked about the work that needed to be done in order to eliminate the party's enemies. Certain regional cadres would use this time with their cooperative to ask the people whether or not they were getting enough food: no one would dare to complain.

Cadres would further use this opportunity to increase intimidation, often widely announcing their more common slogan, "to keep you is no profit, to destroy you is no loss", that made everyone scared into complete submission to Angkar. Some have recounted that most who attended these meetings were many who were just too terrified to even move an inch from their listening spot. Andy Corvin, author of '*The Work Camps: Life and Death in the Farming Cooperatives*' suggests that these meetings held a dual purpose, "first, they served as propaganda sessions where people could be indoctrinated into Angkar's communist ideals. Second, the meetings were opportunities for people to confess their past political and ideological sins, as well as to rat out fellow Cambodians".

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***Greg Procknow is currently a graduate student at the Faculty of Education, the University of Regina, Canada.***

# LAI SIM: FEMALE REVOLUTIONARY COMBATANT

*Som Bunthorn*

During the revolutionary period, some Cambodian people changed their names in order to sever their relationship with previous regimes. In the early 1970's Lai Sim adopted a new name, Svay Bo, and has used this name ever since.

Lai Sim was born in Ampil village, Ponley sub-district, Prey Kabas district, Takeo province. She is now 56 years old, and lives in Banteay Malai sub-district, Meanchey province. During the Khmer Rouge era, she worked as a medic, a supervisor of the women's unit, a sub-district messenger, a special unit combatant, and a salt field worker.

Malai is a five minutes drive from Thailand, but approximately eight hours from Phnom Penh. It is reachable only by a dirt road heavily pockmarked by the rainy season and a steady traffic of overloaded vehicles transporting corn and green beans. Heading

south from Kon Damrei sub-district, the road follows the border through some of the most fertile and heavily mined land in Cambodia, connecting numerous villages settled by Khmer Rouge displaced after the fall of the Democratic Kampuchea regime.

Approximately 95% of the nearly 8,350 residents of Malai sub-district are former Khmer Rouge cadres from various provinces since 1979. Many fled to the border due to rumors spread by the Khmer Rouge leaders that the Vietnamese would cut their throats if they were caught.

The region was fiercely disputed during the 1980s and early 1990s, with the Khmer Rouge using the Phnom Malai range, a 400 square meter area, as its main military sanctuary. During those years, Khmer Rouge leaders warned people that if they fled to a government controlled area, they would be targeted for killing. On 6 August 1997, under the leadership of Ieng Sary, inhabitants in Malai integrated with the government.

Lai Sim studied in Kampeng primary school when she was young. During her childhood, she bought corn from Prey Lvea market to sell in her village. She stopped studying while she was in grade six. In 1970, following the order of Angkar, she volunteered to work as a revolutionary medic in Kampeng sub-district. During that period, she and many other women were encouraged to work while others were promoted to become female combatants. Other women who did not have strong commitment to the organization, were not selected by Angkar.

In 1972, she was appointed to be a supervisor of the women's unit in Ampil village. She was in charge of rice transplanting and harvesting. She attended several lifestyle meetings at a house, built of cement, which is still in the same shape today. A couple of members who has worked in her unit are still alive today.



Lai Sim in 2010

In 1973, she was transferred to work as a sub-district messenger responsible for sending letters to different villages by bicycle. She was satisfied with this work although she never knew what was contained in these letters as she never opened them. During the Khmer Rouge regime, the messenger was acknowledged as a powerful position. In general, Angkar recruited only reliable people as messengers. Until now, she still feels proud of that work.

Not long after, Angkar recruited women who came from poor parentage to serve in the revolution. Lai Sim met with the requirements of Angkar as her father was a cyclo driver in the Khmer Republic regime. She volunteered to serve in the army and her parents did not oppose her willingness. At first, Lai Sim was trained in crawling, bending down, in using a gun, and bombing in Prey Khmeng located in Kong Pisey district, Kampong Speu province. Soon afterward, she was sent to special unit 101 of region 33. Her food was prepared by people in the village.

Following the training, a regiment commander named Him, who mostly defeated enemies, assigned Lai Sim to fight in Pech Nil, Doh Kanhchor, Mohasaing, and Trapeang Kraleung battle fields. Sometimes, when she was defeated by the enemies, she would escape to save herself and left the remaining soldiers injured and dying. Her commander, however, had

never blamed her for this. Recognizing the sacrifices of their soldiers, Angkar ordered their armies to supervise people in the village to transport the injured and dead soldiers back from the battle fields. Bellies of the corpses were cut open and salt inserted to preserve the corpses so that their relatives could hold a funeral for them once the bodies were delivered. Two friends of Lai Sim were also killed, crushed by a tank, as they lay hidden in a trench to escape from American forces. Whenever Lai Sim visited the mothers of her deceased friends they always cried, mourning the death of their daughters.

Before struggling in the combat zone, Lai Sim's commander divided his subordinates into two groups of armies, one female and one male, to lie in different trenches, but to start fighting at the same time. Whenever she needed to move from place to place, Lai Sim had to cut trees to cover her head so that American air forces would not see and drop bombs on her. At that time, the Khmer Rouge did not acknowledge the Lon Nol armies but instead instigated the people to fight against American forces.

After the liberation in 1975, Lai Sim was sent to guard at Kampong Tuol of Phnom Penh suburbs. In 1976, she was appointed to work in a salt field in Kampot province. She and other women were ordered to stamp down the earth in the salt field

before flooding it with sea water, and then to rake that sea water. After the sea water became salt, the workers put the salt into sacks and then carried the salt to the store. Lai Sim's supervisor selected some female cadres who were active, capable, and reliable to visit Phnom Penh and watch a documentary film about salt fields at Chenla Theater. The purpose of the screening was to introduce their members about the improvement of salt production



Lai Sim (third from right) with DC-Cam staff and civil party complainant Hav Sophea (second from left)

in the regime. Lai Sim was one of the candidates chosen.

Lai Sim had separated from her parents since she was 15 years old, and did not want them to feel worried about her. She wrote a letter and addressed the envelope to her father, Svay Muy, living at Ampil village, Ponley sub-district. She sent the letter via a driver in the village.

After returning to the salt field, Lai Sim worked until the Vietnamese captured the village. She then ran to settle in her home village. Because she had served as a female village chief and a Khmer Rouge combatant, the villagers living nearby were dissatisfied with her. Eleven months later, she migrated to Pailin. After the Vietnamese invasion, virtually all Khmer Rouge ran to live in Malai, Samlot and Kamrieng and maintained their support of the Khmer Rouge. At first, countless people settling there became ill and died from malaria and insufficient food. Lai Sim also got swollen disease. Fortunately, she and other people survived after receiving food support from a Red Cross organization.

Recently, Lai Sim visited her father Svay Muy who is now 84 years old. On the way to her home village, Lai Sim seemed to be happy and described her life under the regime openly and honestly without fear

that villagers in her hometown would be dissatisfied with her arrival because she had worked for the evil Khmer Rouge. If she did not move out of her home village, would she feel ashamed that she was a Khmer Rouge? And if she was poor, would the villagers in her home village look down upon her? Would she be able to reconcile with the villagers if she did not move out? And would the villagers forgive her if she maintained contact with the other villagers and victims of the Khmer Rouge?

Some people in the village blame Lai Sim for the death of her nieces a few months ago. They say their deaths were caused by the karma she committed against many innocent people while she worked for the Khmer Rouge. Even worse, they have claimed that if she had not left the village, she may not have become so successful, or lived peacefully like this.

Stories of Lai Sim's life reflect the country's efforts toward national reconciliation and raises questions about whether victims and perpetrators living in the same village can achieve reconciliation, or if religious practice can bring about reconciliation.

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



Lai Sim's homeland in Takeo province

# ANTI-GENOCIDE SLOGANS UNVEILED

*Socheat Nhean*

Upon seeing the first anti-genocide slogans displayed in their school yard, students at Russey Keo High School in Phnom Penh applauded with excitement. The two slogans, "Talking about experiences during the Khmer Rouge regime is to promote reconciliation and educate children about forgiveness and tolerance" and "Learning about the history of Democratic Kampuchea is to prevent genocide," aim to spread awareness about the Khmer Rouge regime and encourage students to take a stand against genocide.

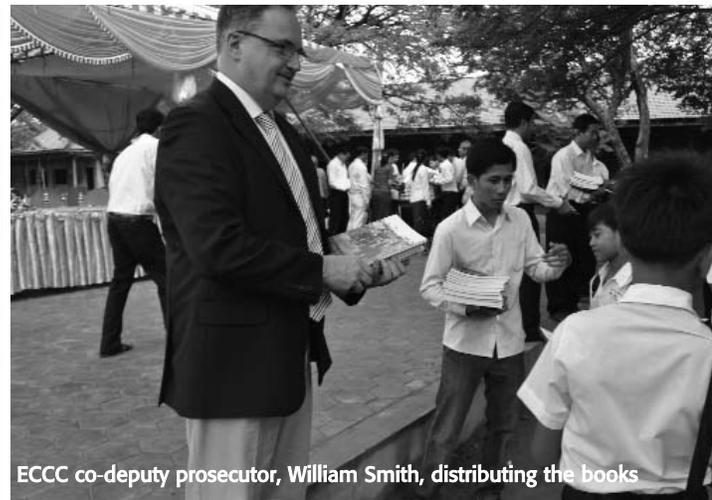
The unveiling ceremony of the slogans on October 2, 2010 was presided by Tun Sa Im, Undersecretary of the Ministry of Education, William Smith, Deputy Co-prosecutor of the Extraordinary Chambers in the Court of Cambodia,

and DC-Cam Director Youk Chhang. Ms. Farina So, an alumnus of Russey Keo High, hosted the event.

The school's Director Mr. Chao Vireak Yuth, 41, is proud that the slogans were mounted on his school yard. "It is good that the slogans are here so that students can read them and learn," said Mr. Chao. He told the more than 1,000 students present at the ceremony, "You did not experience the Khmer Rouge regime so it is important that you learn about the past and learn how to forgive one another." Mr. Chao hopes that the slogans and the textbook, *A History of Democratic Kampuchea (1975-1979)*, will encourage students to learn more about the regime and ultimately believe that it existed.



Lok Chumteav Tun Sa Im distributing books and posters to students



ECCC co-deputy prosecutor, William Smith, distributing the books



A student reading the poster



Posting in front of the anti-genocide slogan

The slogans were initiated by the Documentation Center of Cambodia (DC-Cam) and approved by the Ministry of Education mid this year. DC-Cam plans to display these slogans in all secondary schools nationwide next year. DC-Cam hopes that the slogans will encourage students to talk to their parents about the Khmer Rouge regime, which many of them know little about, as well as promoting discussions among survivors of the regime. This project is part of DC-Cam's mission to teach secondary school students across the country Democratic Kampuchea history.

The teaching of Democratic Kampuchea will also help students taking the high school examination at the end of the year. This exam is given at the end of grade 12 and contains several questions about Democratic Kampuchea. Tep Srey Nich, currently in grade 12, commented that the book will be helpful in her preparation for the exam.

Recently, DC-Cam finished training local history teachers using *A History of Democratic Kampuchea 1975-1979* and the accompanying teacher's guidebook. This textbook and posters containing the slogans were distributed to each student at Russey Keo High School. With textbook and poster in her hand, 12th grader Buth Sokanary said, "I am happy to receive the book. I will read it and learn more about the Khmer Rouge regime." Sokanary learned about the regime from her mother and is sympathetic to the hardships her mother experienced during that time. As such, she stated that she will "study hard in order to prevent future violence in the country." Likewise, Tuon Ravy, a teacher at the high school, also feels that education is important for preventing genocide because "when people are educated, they will be able to judge what is right and wrong."

For 11th grade Cham Muslim student El Lisa,

teaching about Democratic Kampuchea history can help to build tolerance and solidarity. When asked his opinion on genocide prevention, Lisa replied "In order to stop the killing, we have to love each other and work together to avoid violence. Chams and Khmers must love each other regardless of race or ethnicity." Lisa's mother spoke to him about her life under the Khmer Rouge regime with tears in her eyes. His mother lost many family members during the regime.

Pen Phai agrees that it is important for people to understand and forgive each other. Given that some of his peers do not believe what happened under the regime, Phai hopes that the slogans and history textbook will teach students about the reality of the regime. "The Khmer Rouge regime must be remembered," said Pen Phai.

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



books



Students with posters and books in their hands



DC-Cam deputy director reading slogan

# DEMOCRATIC KAMPUCHEA HISTORY FROM THE VILLAGES

*Khamboly Dy*

At a Documentation Center of Cambodia (DC-Cam) public education forum attended by teachers, students and parents, Oam Rim, age 70, was eager to share her experiences during the Democratic Kampuchea (DK) period (1975-1979). Asked if she believes that mass atrocities occurred during the DK regime, Rim said, "Absolutely, because my husband and four children died at that time." Then she told the participants about her experience—one of many stories of village life that should be documented and used to teach Khmer Rouge (KR) history in Cambodia.

Rim, a disabled widower, lives with her daughter



in Kampaeng commune, Kiri Vong district, Takeo province. Her first husband was taken for execution immediately after the KR victory, while she and her four children were evacuated to Romlech commune, Bakan district, Pursat province. In 1976, her two oldest sons were taken to join the army on the front lines near the border and have not been seen since. Her remaining two children, one son and one daughter, continued to live with her in Romlech, working in different units. Then they both fell ill from malnutrition at the same time and died after staying at a KR hospital for one week. Their bodies were carried by cart to the grave as Rim stood by and watched, unable to show

any emotion for fear being killed.

After these tragedies, Rim was like a body without soul. Due to her disability, she was allowed to stay in the cooperative and work on light tasks such as raising pigs. Living in the cooperative allowed her to see many crimes. Many Khmer Krom and ethnic Cham Muslim were taken for execution every day. One day Rim saw the hundreds of dead bodies in a pit close to the cooperative. She saw the two killers every day but never dared to look at their faces. The two also raped and executed beautiful young girls evacuated from the Eastern Zone. In late 1977, Rim was forced to remarry in a mass ceremony of ten couples. Although she did not agree with the marriage, she had a daughter with her second husband and lived with him until he died in 2005.

Each village in Cambodia has similar stories, all of which should be documented, preserved and discussed with students. In 2009, Khmer Rouge history was added to the secondary school curriculum and in 2010 it was added to the list of required university courses. The textbook, *A History of Democratic Kampuchea (1975-1979)* is now mandatory reading throughout



the country. But that alone is inadequate. Survivors' stories are the raw materials from which KR history will continue to be written and understood by future generations and must also be shared in the classroom.

For almost thirty years, the content of the KR history was dominated by politics and politicization. As a consequence, the younger and older generations have not discussed, much less reached a common understanding of, KR history. Documenting and discussing survivors' stories prevents political distortions of history. History is no longer a political stand about political regimes and senior leaders, but is the concrete experiences of survivors expressed in their own words.

Hearing stories about what happened in villages like their own will encourage students to connect the content in the KR textbook to their families' lives. Students will be encouraged to interview their own families—both victims and perpetrators—and uncover memories that will otherwise fade with time. Discussion and debate of village history in the classroom will lead common ground on which understanding and local reconciliation can grow.

Documenting and sharing stories from the villages will help people find a larger truth than can be found in any textbook: the truth of what happened to ordinary individuals throughout the country. These memories must be preserved and shared or the younger generation will never reflect on how their society today came to

be. These memories, however horrible, are also part of Cambodia's cultural heritage. Rim said, "I want my grandchildren and other young Cambodians to learn about killing, rape and other crimes that I witnessed when I was living in Romlech during the KR regime.

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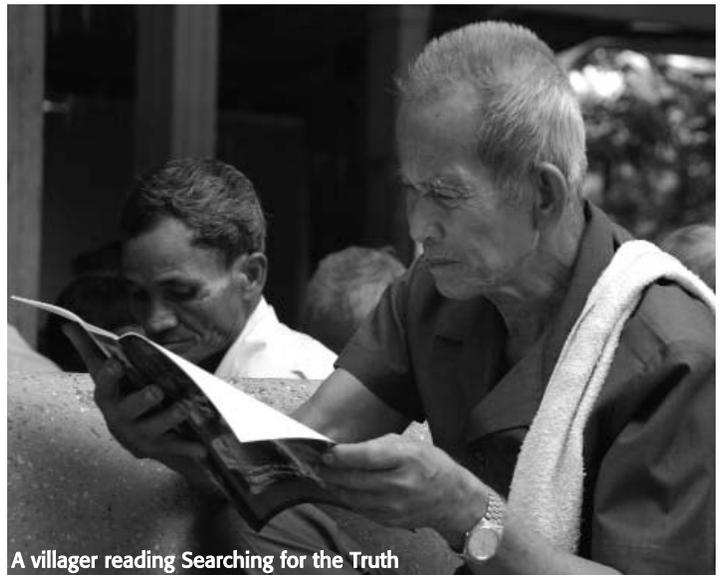
***Khamboly Dy is the Team Leader of Genocide Education Project.***

## 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.*



Monks, villagers and students in the forum



A villager reading Searching for the Truth

# A COMPLAINANT OF THE KHMER ROUGE TRIBUNAL

*Leakhena Tat*

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Nearly five years after The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established, former S-21 prison chief Duch was found guilty and sentenced to 35 years imprisonment, minus 11 years that he had already been jailed, and five years for illegal detention. In early 2011, the ECCC will try another four senior Khmer Rouge leaders: Ieng Sary, Khieu Samphan, Nuon Chea, and Ieng Thirith. Recently, 2,123 victims have been accepted by the court as civil parties in this case.

Prak Sinan, 45 years old, former teacher of La-ang commune, Dang Tong district, Kampot province, said, "I lodged a complaint to the ECCC with no blood on my hands, but those whose hands are full of blood do not want to file complaints, though I feel that they are also victims. I filed the complaint in order to take part in the court, but the court seems to be bored of me as well as with other complainants who have requested collective compensation, and see us as ordinary people. Those who worked for the Khmer Rouge and committed bad acts also dislike and hate me because I have challenged them."

Before the Khmer Rouge era, Sinan's family consisted of seven members. After the regime collapsed, only her and her mother survived. Sinan recalled that in 1972 she was sent to learn how to type by the Khmer Rouge. After learning it well, she was assigned to prepare documents related to "imperialist and capitalist oppression" for distribution to the people. A year later, the Khmer Rouge appointed her to tend cattle at Kampong Trea. In 1975, she was ordered to learn how to weave.

After the liberation in 1975, the Khmer Rouge selected Sinan to produce clothes for soldiers in Kampot. In 1977 she was sent to work in a salt field. Then, in 1978, the Khmer Rouge arranged her marriage without her approval. While she was building a dike, Angkar called out the names of her and other females

to attend a meeting. Once they arrived at the meeting place, Angkar called her and the other women to sit under a mango tree, then they called the men over and had them sit in couples. There were 38 couples at that time. Not long after, Angkar announced, "Today is your wedding day." Hearing that, Sinan was surprised. Her husband was a one-armed soldier named San. At night, she told her husband, "We shall not stay together because I will not be able to raise children since I work in a mobile unit." But she promised him that if the country became peaceful, he could come and find her in her hometown. Hearing that, her husband pulled out his gun to threaten her, and then hit her on the head with it, leaving a permanent scar. Later, Sinan was sent to the Svay Thom mobile unit. One day when she was threshing rice next to the train station, she saw Vietnamese soldiers. She escaped from them and returned home.

Keeping her promise, after returning home, Sinan waited and looked forward to the arrival of her husband. But she heard nothing about him. Consequently, she married the former deputy ambassador overseas as arranged by the two families. Prior to the wedding, Sinan told her new husband about her previous marriage. Fortunately, he did not mind about her past. Now she lives prosperously with him.

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

## 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)*

# FORCED MARRIAGE AS A CRIME AGAINST HUMANITY

*Natalae Anderson*

## I. Historical Background

During the temporal jurisdiction of the ECCC, the Khmer Rouge ("KR") systematically arranged marriages for men and women throughout Democratic Kampuchea ("DK"). Although some men arranged marriages with women of their choice by speaking with their village chief, most men and women had no choice as to their partner. Refusing to marry "could have resulted in torture, imprisonment or death."

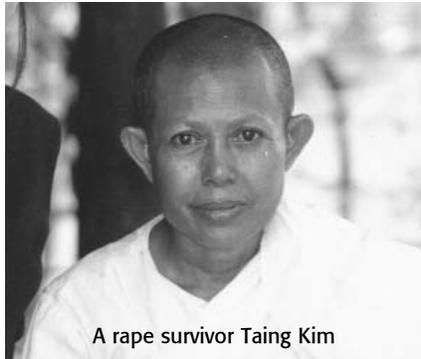
These marriage ceremonies consisted of no fewer than three couples and could be as large as 160 couples. Generally, the village chief or a senior leader of the community would approach both parties and inform them that they were to be married and at the time and place the marriage would occur. Often, the marriage ceremony would be the first time the future spouses would meet. Parents and other family members were not allowed to participate in selecting the spouse or to attend the marriage ceremony. The Khmer Rouge maintained that parental authority was unnecessary because it "w[as] to be everyone's 'mother and father.'"

Many atrocities were inflicted on the DK population during the KR regime's rule, but not every atrocity is punishable under international criminal law. International law has increasingly recognized gender-based crimes such as rape and sexual slavery as crimes against humanity. Nevertheless, it is questionable whether these gender-based crimes capture the harm that forced marriage inflicted upon men and women during DK or if there is a gap in international law "necessitat[ing] a separate crime of forced marriage as an 'other inhumane act.'"

## II. The Harms of Forced Marriage

Before the KR regime, arranging marriages was a family affair. Mothers and fathers went through great pains to find an appropriate spouse for their sons and

daughters. Parents researched the age of potential spouses, their social status and other factors to carefully analyze the probable stability of the match. Marriage ceremonies lasted three days and were festive occasions with all of the bride and groom's relatives and villagers celebrating together. Pre-KR arranged marriages stand in stark contrast to the forced marriages that took place under the KR regime. During the DK period, multiple couples were married at abrupt somber ceremonies without family present and generally with no forms of celebration following the event. Women and men who were forced into marriage were deprived of family input, consent and celebration.



A rape survivor Taing Kim

Although many couples married during the DK "fe[el]t anger and resentment at being forced to marry," many also felt obligated to stay with their spouse after the fall of the KR. After making a formal commitment to be with their partner for life, many men and women faced what they perceived to be insurmountable cultural barriers.

Couples were seen as married by the community and divorce was socially unacceptable. Other couples remained together because they believed it provided stability for the children that resulted from the forced wedlock. Still others, who found themselves with few resources following the collapse of the regime, resigned themselves to their marriages due to lack of financial resources and protection.

Even if men and women overcame the cultural difficulties and separated from their spouse after the fall of the KR, they still had to contend with the ongoing consequences of the forced marriage. One man learned from a friend that his wife from the DK era had a daughter who was his child. Fifteen years after the KR forced them to marry, the husband embarked on a trip to find his ex-wife and his daughter. After finding

both, the man began to send his ex-wife money for his daughter. This arrangement created tension between him and his second wife.

Men and women who were forced to marry suffered many mental and psychological harms. Victims were: 1) Deprived "of the opportunity for consensual marriage...as a pivotal life decision;" 2) submitted to violent or oppressively coercive measures to enter the marriage; 3) responsible for raising children resulting from the forced marriage; and 4) forced into an ongoing intimate relationship that affected their lives in various ways even if they separated after the fall of the KR.

### **III. The Elements of Forced Marriage**

In Cambodia, forced marriage may be said to have occurred when "a perpetrator through his words or conduct... [,] compel[led] a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or... mental or psychological injury to the victim." Therefore, to demonstrate that forced marriage occurred the Prosecution must establish three elements: 1) force, threat of force or coercion; 2) a conjugal association; and 3) severe suffering, or mental or psychological injury to the victim.

#### **A. Element 1: Compelled by Force, Threat of Force or Coercion**

The Khmer Rouge controlled the country by severely punishing individuals for even minor infractions. In this environment, many people felt powerless to oppose KR orders. Although some people refused orders to marry multiple times, some of these same people eventually acquiesced. Others who refused were merely fortunate enough to avoid a punishment as severe as death. In this oppressive environment, many individuals undoubtedly agreed to marry out of fear. Therefore, one should consider the repressive environment that the KR created when establishing the element of coercion. Such an environment should be prima facie evidence that victims of forced marriage during the DK could not freely give consent.

In *Prosecutor v. Kunarac*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) observed that some environmental factors are so coercive that

victims are incapable of giving genuine consent. In *Kunarac*, the accused were charged with enslavement and rape for holding a number of women captive for varying periods of time. The trial chamber broadly interpreted coercion as encompassing "most conduct which negates consent" thus evaluating the victims' ability to consent within the context of their surroundings.

In *Prosecutor v. Kronjelic*, the ICTY also recognized that coercive environments create a presumption of involuntariness. After analyzing the detention conditions of non-Serb prisoners, the Appeals Chamber held that "a reasonable trier of fact should have arrived at the conclusion that the detainees' general situation negated any possibility of free consent."

The ICTY firmly established that coercive environments deprive victims of the ability to freely give consent. The International Criminal Court (ICC) captured the ICTY's interpretation of coercion in its Elements of Crimes, which includes force, threat of force or coercion as an element of rape as a crime against humanity, and also recognizes that rape can be committed by taking advantage of a coercive environment.

Still, not everyone married during DK was forced into their marital relationships. Because some individuals participated in arranging their own marriages, the defense can submit evidence of consent as an affirmative defense. Some couples were able to maneuver around the KR's social constructs and were fortunate enough to arrange a marriage that was pleasing to both parties. "Some asked permission to marry someone of their own or a relative's choosing....Most significantly, in the first and last year of the regime, more family requests were granted than in the middle years of Democratic Kampuchea."

#### **B. Element 2: A Conjugal Association**

In the Cambodian context, a conjugal association was an exclusive marital relationship between two people resulting from a legally sanctioned ceremony performed by a state official. Proof of the union establishes the conjugal association element. In some cases, real evidence such as registries may be available. However, where such evidence is unavailable, testimony of witnesses and other relevant evidence can be relied upon. Because

the marriages were often group weddings and were public formal ceremonies, relevant evidence should be readily available.

### **C. Element 3: Severe Suffering, or Mental or Psychological Injury to the Victim**

Women and men who were forced to marry experienced an extreme range of emotions from anger to sadness. Many described the experience "as bitter as any other they suffered during the brutal regime." Some individuals were so emotionally overwhelmed by their forced marriage that they committed suicide after the ceremony.

The force and coercive measures that KR leaders employed to compel people to marry also caused victims' severe suffering. Some who merely contemplated not consenting to their forced marriage were plagued with visions of torture or death. Others who resigned themselves to the ceremony still faced alarming intimidation. One woman tried to refuse the order to hold hands with her future husband during the wedding ceremony until KR soldiers pointed a gun at her. Issuing death threats, forcing people to witness violence, and the other coercive measures employed by KR leaders undoubtedly caused victims severe suffering and mental trauma.

Forced marriage violated individuals' rights to autonomy and stripped them of the right to make what many would consider a life-changing decision, thus inflicting psychological injury on the victims. Because victims experienced a wide range of situations and endured different harms, the evidence establishing severe suffering, or mental or psychological injury to the victim will necessarily vary on a case-by-case basis.

### **D. Conclusion**

These harms and elements illustrate that the crime of forced marriage in the Cambodian context is largely a non-sexual crime. It is not subsumed by any of the previously recognized gender-based crimes and therefore should be recognized as a separate crime. Examining the jurisprudence and history of previously recognized gender-based crimes reveals the gap in international criminal law between these crimes and

forced marriage.

## **IV. Gender-Based Crimes Currently Punishable by International Tribunals**

### **A. Rape as a crime against humanity**

Rape is the only gender-based crime punishable as a separate offense in ECCC law. The International Criminal Tribunal for Rwanda (ICTR), the ICTY, the Special Court for Sierra Leone (SCSL) and the ICC also criminalize rape as a crime against humanity in their respective statutes. The tribunals' definitions are broad enough to cover any type of sexual invasion of a victim's body with any type of object.

Rape is distinguishable from forced marriage as it took place during the DK. The SCSL noted in Sesay that forced marriage had "a distinct element from the crime of rape...and vice versa. The offence of rape requires sexual penetration...." Rape requires a perpetrator to invade the body of a victim.

Even though the KR expected couples to consummate their relationship after marriage, not every couple followed their orders. One man, who considered himself lucky when his unit chief noticed that he was in love with a woman and arranged their marriage, described how he entered into an agreement with his wife not to have sex. "I fell in love with a widow who was two or three years older than me .... Unfortunately, after the marriage, I learned that she did not love me. She asked me not to have sex with her and I agreed." In these cases, the element of sexual penetration is missing. However, even where sexual penetration occurred following the marriage, rape still fails to capture the link between the perpetrator and victim of rape because it was not the KR who directly invaded the body of the wife, but the husband who often also had been forced into the marriage.

Therefore, the elements of rape fail to capture the crime of forced marriage as it took place during the DK because sexual penetration did not necessarily occur, the perpetrator-victim dynamic is missing even in cases where sexual penetration did occur and rape does not address the "non-sexual elements [of forced marriage] that are comparable violations of human

dignity." Since rape does not capture the crime of forced marriage and no other sexual crimes fall within the jurisdiction of the ECCC, forced marriage must be charged as an other inhumane act (OIA).

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

ECCC law does not list forced marriage as a separate crime against humanity, however it was charged in Case 002 by the Co-Investigating Judges in their September 15, 2010 closing order. The Nuremberg Charter established the residual category of OIAs. Control Council Law No. 10, created to guide post-war crimes trials in the occupied zones in Germany, and the Tokyo Charter, created to prosecute Japanese for WWII crimes, both recognized the OIA category. Because "one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts" the residual category exists to capture those crimes against humanity that are not enumerated.

To satisfy the requisite elements of OIAs, the perpetrator must "commit an act of similar gravity and seriousness to the other crimes against humanity enumerated in the relevant instrument, with intent to cause that other inhumane act." When defining inhumane treatment or acts, the Geneva Convention and scholars have lauded flexibility as opposed to rigid lists, but the category of OIAs has also run afoul of the principle of specificity because of its adaptive nature. International tribunals have helped to "rein in the imprecise and open-ended nature of this provision."

The trial chamber in *Prosecutor v. Kayeshima* articulated a standard for determining how an act qualifies as an OIA. The chamber observed that OIAs were "of similar gravity and seriousness to the enumerated acts" of the ICTR statute and that they were "acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity." Although the chamber articulated a definition, it found the defendant not guilty of OIAs because the Prosecution failed to "particularise the nature of the acts" relied upon for the charge.

In *Akayesu*, the ICTR found the accused criminally liable for OIAs. The Prosecution specified the following

acts for the charge:

(i) the forced undressing of the wife of Tharcisse outside the bureau communal, after making her sit in the mud, as witnessed by Witness KK;

(ii) the forced undressing and public marching of Chantal naked at the bureau communal;

(iii) the forced undressing of Alexia, wife of Ntereye, and her two nieces Louise and Nishimwe, and the forcing of the women to perform exercises naked in public near the bureau communal.

The trial chamber characterized all of these acts as sexual violence and concluded that sexual violence fell "within the scope of 'other inhumane acts.'"

International tribunals have recognized sexual slavery as an OIA. One can analyze whether forced marriage qualifies as an OIA by applying the elements set forth in *Kayishema* and by analyzing the jurisprudence of sexual slavery.

### **C. Sexual slavery as a crime against humanity**

Neither the ICTY nor the ICTR criminalizes sexual slavery in their statutes. However, in *Kunarac*, where the accused forcibly detained several girls in different apartments and continually raped them, the ICTY charged the accused with enslavement and rape as a crime against humanity thus capturing the offense of sexual slavery. Both of these crimes have also been charged by the ECCC in Case 002.

The Rome Statute Article 7(1)(g)-2 lists sexual slavery as a crime against humanity. The elements are:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

The SCSL statute explicitly penalizes sexual slavery under Article 2(g). In the *RUF* case, the Trial Chamber found the accused Sesay, Kallon, and Gbao guilty of sexual slavery as a crime against humanity after finding that they held women against their will for varying periods of time and forced them to engage in sexual

intercourse. Citing the ICTY's judgment in Kunarac and its definition of enslavement, the trial chamber concluded that the following "indicia" were illustrative when examining whether sexual slavery took place: "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour." Notably, the trial chamber declined to recognize forced marriage as a crime against humanity of other inhumane acts and held that sexual slavery subsumed forced marriage.

In the AFRC Case, also at the SCSL, the Prosecution argued that although forced marriage had sexual elements, it differed from sexual slavery because the perpetrator forced the woman to behave as a wife by performing non-sexual duties such as cooking, cleaning, laundry and rearing children. The Trial Chamber was not persuaded by the Prosecution's argument and concluded that "the Prosecution did not adduce any evidence that forced marriage was a non-sexual crime."

The Appeals Chamber reversed the trial chamber's decision. Persuaded by the Prosecution's argument, the Chamber held that forced marriage was not primarily a sexual crime and therefore could not be subsumed by sexual slavery. The Appeals Chamber highlighted the stigma that "Bush wives" face when trying to reintegrate into their communities. It also emphasized the non-sexual conjugal duties that rebel husbands forced their wives to perform. After detailing these distinctions, the Appeals Chamber described forced marriage as "a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim."

The decision of the Appeals Chamber has been criticized for labeling the experiences of the women in Sierra Leone as forced marriage. One scholar stated that forced marriage was "a criminal misnomer that masked what, under international criminal law, was clearly a situation of sexual slavery." The decision has also been

criticized for reinforcing stereotypes of women's roles by defining cooking, cleaning, and other household duties of women as conjugal duties instead of forced labor.

Although the AFRC Appeals judgment is helpful for parsing out the elements of forced marriage, forced marriage as it took place during the DK is factually different from the forced marriage that occurred in Sierra Leone. Forced marriages in the Sierra Leone context were different for a number of reasons: (1) they were crimes usually perpetrated by the husband; (2) rape and sexual violence were major components of the marital relationship; (3) the marriage was not legally sanctioned; and (4) the husbands subjected the wives to forced labor. Because of these differences, the elements of sexual slavery arguably better capture the crime suffered by women in Sierra Leone, while the elements of forced marriage aptly capture the crime suffered by men and women forcibly married during the DK.

## V. Nullum Crimen Sine Lege

### A. Definition

The principle of nullum crimen sine lege ("nullum crimen") dictates that to be prosecuted, an act must have "recognised as a crime entailing individual criminal responsibility" at the time that the acts took place. To satisfy nullum crimen, "forced marriage" must meet three elements: (1) existence at the relevant time (1975-1979) in a manner providing for individual liability; in a form (2) sufficiently specific to render the imposition of criminal sanctions for the acts of the accused foreseeable; and have (3) been accessible to the particular accused.

#### 1. Existence of the law at the relevant time

The Prosecution can establish whether a crime existed in customary law during the temporal jurisdiction of the court by examining traditional sources of law. These sources include international conventions, customs, "general principles of law recognized by civilized nations," and judicial decisions. Because customary law "takes time to develop" it is difficult to say exactly when a "norm has crystallized." Therefore, international instruments and jurisprudence occurring after the temporal jurisdiction of a court remain relevant for establishing

a "period where customary law begins to develop."

## **2. Specificity and foreseeability**

Specificity and foreseeability are closely associated. The law or provision outlining a crime must be sufficiently specific to ensure that an individual could foresee criminal liability for his conduct; however, "emphasis on conduct, rather than on the specific description of the offense in substantive criminal law, is of primary relevance." Nevertheless, nullum crimen cannot be violated simply because an individual's conduct was moral or appalling. The moral or appalling nature of the conduct merely combats foreseeability challenges because "if the crime is serious it is more likely that the perpetrator foresaw that what he did would render him criminally responsible."

Specificity and foreseeability do not preclude "refining and elaborating upon, by way of construction, existing rules." In *C.R. v. The United Kingdom*, the European Court of Human Rights found a man guilty of marital rape although at the time criminal liability did not exist for marital rape. The Court concluded that although their decision would change existing law, nullum crimen did not forbid "gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offense and could reasonably be foreseen." *C.R.* illustrates that the development of the law should not necessarily be hampered by foreseeability where the "case law develops after the offence has taken place but before it is dealt with in court, or even when the behaviour is declared criminal for the first time in the case at hand."

## **3. Accessibility**

In order to hold individuals criminally liable, they must have had sufficient notice that their conduct was prohibited. The Prosecution can establish accessibility by examining domestic and international jurisprudence as well as international instruments that existed at the relevant time period. It is not necessary that the perpetrator knew that his conduct was unlawful but only that information establishing the illegality of his conduct

was accessible to him.

## **B. Forced Marriage and Nullum Crimen**

Only the "legal ingredients" of the offense, not the specifically named crime of "forced marriage," must have existed at the time the act was committed. Therefore, the Prosecution must establish that being compelled by force, threat of force or coercion to marry was prohibited during the temporal jurisdiction of the ECCC.

### **1. Compelled by force, threat of force or coercion**

All of the gender-based crimes illustrate the legal relevance of consent and the illegality of using force, threat of force or coercion to override an individual's autonomy. Some scholars argue that the evolution of gender-based crimes shows a move from protecting women's dignity and honor to a paradigm "based on broader principles of human dignity, autonomy, and consent." Comparing the text of the Geneva Convention with the ICC Statute reveals a "gradual clarification of the [elements] of criminal liability" for rape.

Arguably, an individual's freedom of choice and consent is curtailed by the power of the state. Citizens are not unfettered in all decision making. However, considering the intimate relationship between a husband and wife, the social importance placed on the marital relationship and the right to consensual marriage that is enshrined in many international human rights instruments, consent and autonomy are as implicated in forced marriage as in the previously discussed gender-based crimes. Examining the evolution of gender-based crimes establishes that a prohibition against using force, threat of force or coercion to override an individual's autonomy existed prior to the temporal jurisdiction of the ECCC: thus satisfying the nullum crimen principle.

Although rape and sexual violence "have long been recognized as international crimes," the Nuremberg Charter lacked explicit prohibitions against any forms of sexual violence. It was not until the four allied powers created Control Council Law No. 10 to guide post-war crimes trials in the occupied zones in Germany that rape was listed as a crime against humanity.

The Tokyo Tribunal prosecuting Japanese for WWII crimes did not list rape as a crime in its charter; however, it did prosecute the rape of women and other civilians as an affront to family honor and inhumane treatment and prosecuted such gender-based crimes under the war crimes provision of the charter.

Following WWII, the Geneva Conventions were amended to provide better protection to civilian populations. The Geneva Convention IV of 1949 thus captures the international norms that were created as a result of the violence committed upon civilians during WWII. Article 27 of the Geneva Convention IV of 1949, which is universally binding on all countries and considered customary international law, prohibits rape. In 1977, two Additional Protocols were added to the Geneva Conventions, both of which explicitly prohibit rape.

The Geneva Conventions of 1949, the jurisprudence following WWII and the jurisprudence that subsequently came out of the international tribunals demonstrate that criminal liability for gender-based crimes existed prior to the ECCC's temporal jurisdiction. Rape, a gender-based crime including protection of consent and autonomy, undoubtedly satisfies the *nullum crimen* requirements for this element of force marriage.

Although a legal definition for rape addressing the issue of consent did not exist until the ICTR's decision in *Akayesu*, there was a "refining and elaborating upon, by way of construction, existing rules" so that rape as a crime against humanity became not a violation of a woman's dignity but a violent act committed against her in circumstances where consent could not genuinely be given. Like *C.R.* and the marital exception for rape, rape embodying the issue of consent has evolved through jurisprudence occurring after the ECCC's temporal jurisdiction. Nevertheless, the legal relevance of consent as it relates to individual autonomy is "consistent with the essence of rape."

## **2. Conjugal association and *nullum crimen***

The right to choose one's spouse was embodied in many international human rights instruments prior to the temporal jurisdiction of the ECCC. Some scholars contend that charging forced marriage "cloud[s]

important differences between forced marriages that amount to violations of international human rights law from those that constitute crimes against humanity." However, Antonio Cassese maintains that "[c]rimes against humanity [are] to a great extent predicated upon international human rights law." Because international human rights law provides clues to what constitutes a crime against humanity, surveying international human rights instruments that embody the right to choose one's spouse helps to determine whether *nullum crimen* is satisfied.

"Marriage without consent of both parties has been acknowledged as a violation of international human rights law since at least the Universal Declaration on Human Rights 1948." The Universal Declaration of Human Rights ("UDHR"), long considered "a common standard of achievement for all peoples and all nations," frames the right to freely choose one's spouse under Article 16. The UDHR articulates a core set of fundamental rights and also spurred the creation of "60 international human rights instruments, which together constitute a comprehensive system of legally binding treaties for the promotion and protection of human rights." One of these legally binding treaties is the International Covenant on Civil and Political Rights ("ICCPR") which, prior to 1975, also recognizes the right to choose one's spouse. Article 23(3) states that "[n]o marriage shall be entered into without the free and full consent of the intending spouses."

The ICCPR has been overwhelmingly supported by a vast range of countries and many of its provisions are now considered to have customary international law status. However, some states consider certain provisions of the ICCPR as contentious. One of these provisions is Article 23. Several countries have expressed reservations against Article 23 but member parties have objected to these reservations.

The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages ("Marriage Convention") Article 1(1) states that "[n]o marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed

by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law." The Marriage Convention has yet to be signed by Cambodia. It entered into force in 1964. To date, only Bangladesh has entered a reservation that challenges "the full and free consent of both parties" clause.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Article 16(1)(b) also guarantees the right to freely choose "a spouse and to enter into marriage only with... free and full consent." Although CEDAW was created specifically to protect the rights of women, it also reflects the right to consensual marriage generally. Many states, particularly those that practice arranged marriages, have entered reservations for Article 16. However, the majority of these states' reservations were not entered against the right to consensual marriage, but to the other rights outlined in Article 16.

Analyzing these international human rights instruments, most of which entered into force before the temporal jurisdiction of the ECCC, one could argue that it was foreseeable and accessible to the KR that their conduct was prohibited by the international community. Although none of the instruments examined explicitly provide for criminal liability "it is not necessary for individual criminal responsibility of the accused to be explicitly stated in a convention for the provisions of the convention to entail individual criminal responsibility under customary international law." Moreover, the egregious nature of the crime—forcing two people, sometimes at the threat of death to enter into a lifelong partnership—further supports the foreseeability element. Nevertheless, questions remain about whether criminal liability for violating an individual's right to freely choose one's spouse existed during the temporal jurisdiction of the ECCC.

### C. Conclusion

The nullum crimen barrier is a significant hurdle to surmount. It may be difficult for the Prosecution to establish that criminal liability existed for forced marriage during the temporal jurisdiction of the ECCC. Although

the force, threat of force or coercion element of forced marriage should easily pass the nullum crimen test, it may be problematic to establish that individual criminal liability existed for non-consensual marriage at the relevant time. If the Prosecution can establish that criminal liability existed, the prohibition against non-consensual marriage should pass the foreseeability/specificity and accessibility elements of nullum crimen.

### VI. Charging Forced Marriage as an Other Inhumane Act

Even if nullum crimen obstacles can be overcome, the Prosecution will have to combat arguments that forced marriage and sexual slavery are indistinguishable. In 2008, the ICC's Pre-Trial Chamber I concluded that "sexual slavery also encompasses situations where women and girls are forced into 'marriage', domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors." However, the Prosecution can legitimately address these critiques and potentially conflicting jurisprudence by pointing out the differences between forced marriage as it took place in Sierra Leone, Rwanda and Uganda, and forced marriage as it took place in Cambodia under the KR.

### VIII. Conclusion

Survivors of forced marriage who were interviewed by the writer expressed that they believed that forced marriage should be a crime because marriages pre-KR were different from forced marriages during the DK. The survivors provided numerous reasons as to why: 1) during the KR period you could not deny their order to marry because denial could lead to death; 2) often you were forced to marry someone you had never met the very day that you were informed that you were getting married; and 3) after being forced to marry, you worked so hard and had to live separately that you rarely saw your spouse. These survivors have no knowledge of international criminal law and no knowledge of the ongoing dialogue surrounding sexual slavery and forced marriage; they are articulating their experience of the harms they have suffered.

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# THE ECCC'S THREE-YEAR LIMIT ON PROVISIONAL DETENTION

*Aimee Haynes*

Four former senior leaders of the Khmer Rouge (Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith) are being held in provisional detention by the Extraordinary Chambers in the Courts of Cambodia (ECCC) on charges of genocide, crimes against humanity, and war crimes. They are expected to be tried together in the Court's second case (Case 002).

## **Time Limits for Pre-Trial Detention**

The ECCC Internal Rules state that provisional detention may be ordered "for genocide, war crimes, and crimes against humanity, for a period not exceeding 1 (one) year. However, the Co-Investigating Judges may extend the provisional detention for further 1(one) year periods." A subsequent rule states, "No more than 2 (two) such extensions may be ordered." Thus, the rules establish a maximum of three years for provisional detention.

Nuon Chea's third year of pre-trial detention expires on September 19, 2010. The other three Charged Persons' provisional detention periods expire in November 2010. If no indictment is issued before September 19, 2010, Nuon Chea will have to be

released at that time. Likewise, in November 2010, the other three Charged Persons will have to be released if there is no indictment against them. If the Charged Persons are released, there may be no legal basis for their re-detention if they are indicted at a later date unless they fail to attend trial.

In Case 001 (Duch/S-21), the trial took place before the expiration of Kaing Guek Eav alias Duch's three years of provisional detention. Because of this, the Court has yet to decide if there are circumstances under which the Internal Rules allow detention of Charged Persons for more than three years.

## **Detention after Issuance of the Closing Order**

The issuance of a closing order automatically ends provisional detention: "The Closing Order puts an end to Provisional Detention and Bail Orders once any time limit for appeals against the Closing Order have expired." However, a new provisional detention period may be ordered:

Where the Co-Investigating Judges consider that the conditions for ordering Provisional Detention or bail...are still met, they may, in a specific, reasoned



Former Khmer Rouge combatants and Hav Sophea (right) hold photos of leaders: Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith

decision included in the Closing Order, decide to maintain the Accused in Provisional Detention, or maintain the bail conditions of the Accused, until he or she is brought before the Trial Chamber.

The period of detention or bail ordered in the closing order "shall cease to have any effect after 4 (four) months unless the Accused is brought before the Trial Chamber within that time." Or, "[w]here an appeal is lodged against the Indictment, the effect of the detention or bail order of the Co-Investigating Judges shall continue until there is a decision from the Pre-Trial Chamber. The Pre-Trial Chamber shall decide within 4 months."

It may be argued that this new period of pre-trial provisional detention is not subject to Internal Rule 63's three-year time limit; the Internal Rules simply refer to a period in which the Co-Investigating Judges or the Pre-Trial Chamber may "continue to hold the Accused in Provisional Detention, or to maintain bail conditions." In an April 2010 press release, the ECCC appeared interpret the rules to allow for three years plus an additional four months of detention following the closing order, saying, if the Co-Investigating Judges issue a Closing Order prior to the end date for the respective detention periods referred to above, it will bring the current detention periods to an end. If the Closing Order includes an indictment against the Charged Persons, and the Co-Investigating Judges consider that the conditions for ordering Provisional Detention under ECCC Internal Rule 63 still are met, they may order the indicted persons to remain in Provisional Detention until they are brought before the Trial Chamber. In such a case, unless the indicted persons are brought before the Trial Chamber within four months from the date of the Closing Order, the Provisional Detention will cease to have any effect.

Significantly, the Rules also emphasize: "In any case, the decisions of the Co-Investigating Judges or the Pre-Trial Chamber to continue to hold the Accused in Provisional Detention, or to maintain bail conditions, shall cease to have any effect after 4 (four) months unless the Accused is brought before the Trial Chamber within

that time." This language appears to have been interpreted by the Court to allow a single four-month period of detention to be ordered by both the Co-Investigating Judge and the Pre-Trial Chamber. In Case 001, the Closing Order issued on August 8, 2008, said that Duch should be held until he is brought before the Trial Chamber. However, Duch was not brought before the Trial Chamber within four months. Instead, just under four months from the issuance of the Closing Order, on December 5, 2008, the Pre-Trial Chamber issued a ruling that included another order to detain Duch until he was brought before the Trial Chamber. Duch did not have his first hearing before the Trial Chamber until February 2009, well after the Co-Investigating Judges' four-month order expired. Thus, although Duch's provisional detention did not exceed the three-year maximum established in Rule 63, the Court's interpretation of the rules would appear allow a maximum of three years and eight months provisional detention before an accused is "brought before" the Trial Chamber.

Textual analysis follows a well-established international law principle called "effective interpretation." "Effective interpretation" means that the parties have written a document to have a certain effect, and that a provision should not be given an interpretation that leaves it meaningless or without effect. In criminal statutes this principle is of particular importance because a court's interpretation "give[s] effect to rights or regulate[s] the fairness of the proceedings." "The principle of effective interpretation mandates that ... Rules be read together and that they be restrictively interpreted." In an appeals judgment of the International Criminal Tribunal for Rwanda, the Kajelijeli Chamber ruled that two rules related to provisional detention "be read together' and restrictively interpreted." The prosecutor had read the two rules separately; in doing so the prosecutor allowed a suspected person to be held in prolonged state detention (where he was not notified of the charges against him or brought in front of a judge) instead of extraditing him as quickly as possible. The Appeals Chamber admonished the prosecution for reading one provision in isolation to

avoid the rules' overall intention to protect the rights of suspects during provisional detention. It found that that the period of detention during which Kajelijeli was held out of the country violated the ICTR's pre-indictment detention limits.

In interpreting its Internal Rules, the ECCC should likewise read all pre-trial detention provisions together. This approach would suggest that all pre-trial provisional detention, including periods ordered by the Co-Investigating Judges and the Pre-Trial Chamber, must be limited to a maximum of three years. Nevertheless, it is arguable that the wording of Rule 68(1), which ends one period of provisional detention and allows the start of another, may reasonably be read to allow an additional four-month period of detention in addition to Rule 63's three-year maximum. However, it is much less clear that the Rules may fairly be read to allow both the Co-Investigating Judges and the Pre-Trial Chamber to both impose separate four-month periods of detention. Instead, the plain language of Rule 68(3) suggests that four months is the maximum period of post-closing order detention that may be authorized, whether by the Co-Investigating Judges, the Pre-Trial Chamber, or both.

Therefore, even if the Co-Investigating Judges submit the Closing Order for Case 002 before the expiration of Nuon Chea's three-year provisional detention in September 2010, they may need to bring the Accused before the Trial Chamber within four months of its issuance or he will have to be released.

#### **"Brought Before" Trial Chamber**

Rule 68(3) provides that detention "shall cease to have any effect after 4 (four) months unless the Accused is brought before the Trial Chamber within that time. In the Case 001 closing order, the Co-Investigating Judges "[o]rder[ed] that [Duch] remain in Provisional Detention until he is brought before the Trial Chamber." They did not specify any time limits or define "brought before." In the Pre-Trial Chamber's decision on the appeals of the closing order, the Chamber ordered "that the Provisional Detention of the Charged Person shall continue until he appears before the Trial Chamber."

This second ruling supports a plain language reading of the words: "brought before" means "appears before" the Trial Chamber. Both expressions indicate that the Charged Person must be physically present in front of the Trial Chamber prior to the expiration of the four-month maximum for post-closing order detention.

In the ICTR Rules, the use of "brought before" likewise emphasizes physical presence: "After his transfer to the seat of the Tribunal, the suspect, assisted by his counsel, shall be brought, without delay, before the Judge who made the initial order, or another Judge of the same Trial Chamber..." The ICCPR further supports this interpretation, providing: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power..." At the ECCC, that would mean that the Trial Chamber may not merely seize itself of the case for the accused to be considered "brought before" it.

The ECCC Internal Rules provide, "The trial begins with an initial hearing." This appears to be the first public hearing held by the Trial Chamber. The Trial Chamber may also, "[i]n order to facilitate the fair and expeditious conduct of proceedings[,]...confer with the parties or their representatives...by holding a trial management meeting. Such a meeting shall be held in camera, unless the Trial Chamber decides otherwise." This meeting could include the physical presence of the accused, but would not be public.

A plain reading of the language "brought before" would require the physical presence of the accused in front of the Trial Chamber prior to the expiration of the four-month detention period allowed after the issuance of the closing order. Since the rules do not specify that being "brought before" the Trial Chamber requires a public hearing, it seems that an in camera trial management hearing could reasonably satisfy the requirement and enable the ECCC Trial Chamber to issue an order detaining the Charged Persons for the duration of trial proceedings.

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# PERSPECTIVES OF "THE KILLING FIELDS" PRODUCER

Jane Arnfield

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The film "The Killing Fields" had a huge impact on me as I was growing up and I remember sitting and watching the movie in the Student Union common room in 1984. I was embarking on my first year degree study of Theatre at Dartington College of Arts in Devon England. I have no doubt that film influenced my theatre practice to the extent it cemented my aspiration to include Cambodia as a foundation stone and as a resource for all future theatre work I was to make. The portrayal of abandonment, betrayal and reconciliation within the film were themes that I instantly felt compelled to investigate further both in the context of the Cambodian genocide and other genocides. It leads me to the formulation of two questions and these questions now lie at the heart of the theatre work I construct and devise. Firstly, in situations of abandonment what happens to the human body and spirit when it is left in isolation, when it is stripped to its core? Secondly, what does survival mean today in our world both for individuals and for communities? These two questions continue to form an integral part of my theatre practice influencing a personal quest to raise more questions as to why genocide is still ever present in our contemporary society and lives. I approached Lord Puttnam producer of the film "The Killing Fields" knowing that I couldn't think of a more qualified or appropriate person to interview now more than ever during the ECCC tribunal and forthcoming verdict of "Duch" on the 26<sup>th</sup> July 2010. Below are Lord Puttnam's answers to my four questions:

***Please could you give a synopsis of your role and duties as a member of The House of Lords?***

A working Labour Peer with particular interests in climate change, education and the creative industries. Formerly Chair of the Joint Scrutiny Committee on the Draft Climate Change Bill (2002-3) and Chair of the Joint Committee on the Draft Climate Change Bill (2007).

***Please could you describe the impact Cambodia has had on your life incorporating if possible your***

***thoughts on the potential verdict & sentencing of "Duch-Head of S-21" on July 26<sup>th</sup> 2010?***

Thirty five years on from the moment the Khmer Rouge took power, we are still seeing the fall-out. Everyone lost someone. It is hard not to be taken aback by the scale and utter futility of it all, the complete waste of life that happened in Cambodia. For many people in Britain Cambodia is a place associated with war and atrocity but, until 1974, it was a very peaceful country. It was known as an idyllic place, a place that had moved into the post-colonial era without much disruption. America dragged it into conflict. After the Vietnam War they bombed border villages because they were congregating there. When civilians were killed, it sparked an anger that allowed Pol Pot to rise up and take control. If modern Cambodia is to develop, Westerners must take responsibility for the problems they have caused and offer help. Ultimately, it was wholly Western concerns that tore the country apart. I have seen for myself the serious problems that the country still faces today. I said when I visited as UK President of UNICEF in 2003 that Britain has always had a strong tradition of taking the moral lead and we must do that again. We must live up to our reputation as a campaigning nation. In the 19<sup>th</sup> Century, when Britain was the world's leading capitalist nation, we found a way of reconciling that with championing human rights. Issues like the abolition of slavery and child protection were forced into the foreground by us. And we need to find a way of showing our compassion to others like that again. Unicef's work in Cambodia isn't easy. It isn't soft and cuddly-it is hardcore. We are dealing with children in extreme situations, children living in slums, doing drugs and selling sex. But there is a way forward. Some of the projects I saw during my visit to Cambodia for UNICEF-teenagers dedicating themselves to community work, street children being trained as chefs and offered a brighter future-have given me a glimmer of hope, a glimpse of what is

possible. The reminders of Cambodia's past are there for everyone to see. But after everything it has been through, Cambodia deserves a better future. I hope UNICEF and others can help deliver it.

***Please could you discuss the importance and relevance of the word "truth" and "remembrance" to you as an individual and as a member of The House of Lords?***

I would answer this question by referring to the emotional truths and memories, which I believe, are embedded in *The Killing Field*. That movie is testament to the very powerful impact that Cambodia has had on my life. The ramifications of that movie have kind of stayed with me. First of all it's become the phrase of choice when talking about genocide, quite extraordinary in the way, it's kind of inhabited the language. Secondly, something happened to me, a few years ago, which was quite amazing. In 1985 I was sent off by the government to Kiev, a British week in Kiev, to run *The Killing Fields* as we'd just won a clutch of Oscars and they felt it was appropriate. I'd been very badly briefed about the Ukraine-I had no understanding at all of the tensions that existed, political, religious and economic.

We ran it in some Saturday morning huge cavern of a cinema. And to a lot of, mostly young people, 2,000 of them. Terrific questions afterwards but no one mentioned Cambodia. It was all about war and problems, and very interesting questions. Ok-a year ago I bumped into the new President, Yushchenko, in Davos.

And I was introduced to him, he didn't speak particularly good English and I heard someone say, oh it's the producer of *The Killing Fields*. At which point he grabbed me and he said, aw, he said, and explained that shortly after that, I guess they pirated it, he didn't say they pirated it, lots and lots of copies of *The Killing Fields* were shown compulsory in schools all over the Ukraine. Every kid in the Ukraine has seen this film.

He said do you realize that during the orange revolution there was never any discussion, at any point at all, about a civil war. He said because we knew what civil war did. We saw what happened in Cambodia and it was not going to happen in Ukraine. And you suddenly realize the incredible power of emotional truth in cinema. I can't pretend that we knew we were going to have that effect when we were making the

movie. But I just wish people would realize what an incredibly powerful and important medium cinema is, can be, and what effect it has on people's lives.

***Please could you offer a quote from yourself or another that reflects the importance of truth and remembrance within our society today?***

I desperately want the global economy to emerge from its present "man-mad" crisis to become the bedrock upon which can be built a more successful and sustainable society; but we find ourselves living in a world of cascading and intertwined threats; threats that have the potential, at any given moment, to turn our lives upside down. In these incredibly challenging times, the ability of nations across the world to deliver better lives for all of their citizens will require, not just resources, but political will.

As I see, it my own WW2 generation has a great deal to answer for. Though their sacrifice our fathers left us a wonderful legacy upon which to begin to build a fairer society, and a better future.

Sadly, we have squandered many of the opportunities that were left to us, so much so that we're in danger of leaving behind, not just massive levels of global indebtedness, but a seriously degraded environment along with significantly depleted natural resources of just about every type—including water.

The only possible means by which we can reverse this situation is to be found in classrooms across the world, including in Cambodia; are we going to develop a generation of political leaders who have the courage and the imagination to seriously invest in the future; are we able to draw upon our unquestioned human potential for creativity and ingenuity in such a way as to offer the young people of this and every other country a far better start to their lives than any generation before them? That's to say, better informed, better equipped and better motivated.

We need to get this right, because the challenges these young people will face are colossal, and on the outcome of their efforts depends nothing less than the future of this planet.

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***Jane Arnfield is a theatre practitioner from the United Kingdom.***

# THE DEVIL OF HUMANITY: CAN THE KHMER ROUGE LEADERS BE FORGIVEN?

*Kok-Thay Eng*

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I am delighted that on September 15, the Extraordinary Chambers in the Courts of Cambodia (ECCC) announced that the four remaining senior Khmer Rouge leaders currently in custody—Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith—were indicted for crimes against humanity and genocide, among other offenses. I hope that they will be tried fairly and punished justly according to the law. What they did to the people of Cambodia was beyond hell on earth. They were the devil of humanity. But can they be forgiven by the people? The four accused invited monks to their cells to preside over an offering ceremony during the Pchum Ben holiday. This is an indication that they might be seeking forgiveness for their next lives or somebody to take care of them when they die. On Pchum Ben people send food to "Pret" (lost souls or wandering ghosts) who have committed serious sins during their lifetimes and cannot be reborn. The enormity of the crimes committed by leaders of the Khmer Rouge could make them the worst "Pret" of all who would always be hungry and wandering without destination. If they can be forgiven by survivors, their prospect for life after death could be improved.

Forgiveness does not call for release or dissolution of the ECCC. Forgiveness is a very sensitive question. It is almost a taboo to ask victims or the public to consider. But I would like them to try. Complete justice after genocide is never possible. Without such justice, people are forced to live with a sense of injustice, grudges, anger and frustration. Those mental conditions negatively affect survivors to such an extent that without measures to cope, they can destroy them from inside. Much like the Khmer Rouge's own oft-cited slogan that the most contemptible of enemies are those "burrowing from within" and must be rooted out immediately, the atrocities of the Khmer Rouge genocide created mental

conditions that have been burrowing inside survivors, for some people causing acute cases of mental disorder. On the other hand, whether admitting it or not, some people have been able to forgive the perpetrators.

During the Duch verdict announcement, I visited a remote village in Kampong Thom province in which Pin, a former Khmer Rouge and perpetrator and Pai, a survivor, have lived together for almost thirty years. Pin was involved in killing Pai's one-legged husband in 1977. Although Pin never admitted that he killed Pai's husband, simultaneous interviews with both of them revealed the chilling story of how Pai's husband died. On a cloudless afternoon in Kampong Thom, Pin and his comrade walked up Pai's house, tied her husband to its central column, interrogated him for a short time and then took him into the bush not far away from the village. Pin said Pai's husband did not resist. He and his comrade escorted him to the bush with a hoe, and he knew full well that the hoe would be used as an execution tool. Pin said Pai's husband's hands were tied behind him fairly loosely, but he did not attempt to escape. Arriving at the bush, Pai's husband was made to sit down and struck with the hoe. Pin did not describe clearly how Pai's husband was killed, he just said, "My comrade did the job." In the early 1980s, Pai excavated a shallow grave and found a one-legged skeleton with broken arms and fractured skull. Pin never said anything about the manner of his death, but judging from the trauma on the skeleton, Pai's husband died a brutal death. Pin's comrade who supposedly committed the act died many years ago. Pai witnessed Pin killing another person in the village. She saw how cold-blooded he was when taking a rifle and shooting the man like "a raging dog in full daylight."

Today Pin is living with his wife and two children. During the day he works in a pagoda to help the

monks. He is old and frailty. Pai's four children have grown up. Two of them are able-bodied men. Overall, the family is much better off than Pin's, meaning they can physically take revenge on Pin and few people in the village would consider it to be an injustice, or they could use their better social status to make Pin's life much worse than it already is. But Pai said, "I don't want to kill him and I have stopped my children from doing so. I want him to live so that he can take care of his wife and children." Pai does not want to see another woman becoming a widow and going through her same experience. Pai said that Pin is being punished by the Buddha for what he did. His mental capacity is weak and he is virtually an outcast in the village. Only the pagoda provides a haven for him.

Even though Pai never talks about forgiveness, in many respects she has forgiven Pin and has moved on with her life. Pai does not have to love Pin to forgive him. She does not have to communicate with him to forgive him. To Pai, Pin is a sad case of Buddha's example of living sin, to be rejected forever by survivors, society and his own self. Anyone falling into this category should be pitied. Perhaps one day, Pin will realize that the only way to rid himself of his sin is to continue collecting merits from the pagoda and repay Pai anyway possible. When that happens, a complete forgiveness and reconciliation may be possible. If Pin chooses the easy way by denying his crime, then complete forgiveness is not possible. For Pai, denial from Pin does not affect her, but admission increases her sense of enlightenment.

I believe this example is being lived in many other locations in Cambodia. People do not want to admit that it is happening because they would be seen as weak and surrendering to the perpetrators. Forgiveness is a very personal question. The path varies from person to person. It depends on how much harm was done, the demeanor of the perpetrators, and the life philosophy of survivors. It is possible for one to forgive entirely by oneself without interaction with the perpetrators. Also, forgiveness does not mean abandoning legal accountability. Forgiveness can be taught if one sees enough successful examples.

However, forgiving the four Khmer Rouge leaders is a different story. Will the devil of humanity be forgiven? Will Case 002 lay such a foundation for Cambodians in general to move beyond grudges? It will be a difficult test for forgiveness and reconciliation in Cambodia.

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***Kok-Thay Eng is DC-Cam's Deputy Director and Director of Research.***

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## SEARCHING FOR FATHER IN LAW

My name is Robert Tillman. My wife escaped Cambodia at the onset of the Khmer Rouge. She escaped with her Mother, 2 aunts & her grandfather. They escaped on foot from Battambang and travelled on foot to the Thai border where they lived in refugee camps there & then in the Philippines before making it to the US in 1982.

Her father was well-established and relatively wealthy for the time & location and it is believed (but not known for sure) that he was killed by the Khmer Rouge. The best information that she has indicates her father's name was Danh (Dahn?) Sithon (or Sithon Danh in American context).

She has been unable to find any information on him and has spent the last 20 yrs of her life wondering what happened to her father and wondering if he is dead or alive.

I'm sure this is like a needle in a haystack, but if you have any means of getting any information on this, I would forever be indebted to you and your organization.

Please feel free to contact me at this email address: [robert\\_tillman@verizon.net](mailto:robert_tillman@verizon.net)

# THE PRESUMPTION OF CONFIDENTIALITY AT THE ECCC: THE NEED FOR STANDARDS TO PROTECT PRIVATE INVESTIGATIONS, PROVIDE CONSISTENT PUBLIC ACCESS, AND INCREASE TRANSPARENCY

*Krista Nelson*

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## A. Background

The Extraordinary Chambers in the Courts of Cambodia (ECCC) is unique among internationalized criminal tribunals in that it functions within a domestic legal system. In light of its structure, the ECCC is to both uphold international standards of justice and serve as a model for the country of Cambodia. Following civil law practice, the ECCC operates under procedural rules far different from those of other tribunals; at the ECCC, investigating judges conduct lengthy investigations that are presumed to be confidential, with many party motions and judicial orders never made public. While the public's right to open proceedings is preserved before the Trial Chamber, absent special circumstances, hearings before the Pre-Trial Chamber-addressing primarily appeals from orders of the Co-Investigating Judges (CIJs)-are conducted in camera. As a consequence public information about pre-trial proceedings has been extremely limited.

Yet the ECCC is also required to maintain transparency and keep victims informed throughout proceedings. Long investigations, large numbers of victims, and the detention of widely-recognized Khmer Rouge officials have led to increased demands for public information. Following the Co-Investigating Judges' controversial order regarding the breach of confidentiality of the judicial investigation in 2009, and more recently, the Pre-Trial Chamber's warning to journalists for unauthorized disclosure of confidential information, questions regarding the balance of confidentiality and transparency in the ECCC remain.

First, given the unique structure of the ECCC, what are the contours of the presumption of confidentiality during the pre-trial period? Second, does the unique nature of the ECCC warrant additional measures to

ensure greater public access?

## B. Fundamental Principles of the ECCC: The Protection of Individuals, Transparency, and Inherent Specificities

Fundamental principles of the ECCC, established in Extraordinary Chambers in the Courts of Cambodia Internal Rules [hereinafter Internal Rules], Rule 21 (1) require that

*[t]he applicable ECCC Law, Internal Rules, Practice Direction and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of the proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement.*

Rule 21 thus requires that the interests of specific categories of individuals be balanced with the need to maintain legal certainty and transparency, and that these interests be considered in light of the "inherent specificity" of the ECCC. Inherent specificities is a vague reference, yet guidance can be sought from the ECCC's own articulation of its principles, which can be distilled into two interrelated goals: to apply international standards of justice and to serve as a model for domestic Cambodian courts.

The language of Rule 21 thus suggests that governing laws of the ECCC, namely the Internal Rules, ECCC Law, and the Framework Agreement, be interpreted collectively, with consideration to the underlying purposes of the ECCC, rather than in isolation. The contours of the presumption of confidentiality similarly require not only a collective interpretation of the Internal Rules, but an analysis of the purposes behind the principle, as well as guidance from international law.

### C. The Trend of Greater Public Access

Legal certainty and transparency, established in ECCC Internal Rule 21, are values shared by other international criminal tribunals. Of key distinction between these tribunals and domestic courts is their unique purpose to not only provide justice, but to facilitate national reconciliation. While confidentiality protections remain a concern at these courts, namely to protect victims and witnesses and the integrity of the investigation, as the number of international criminal tribunals has grown around the world, so too has the general trend toward greater public access.

Among international tribunals, rules regarding confidentiality are divided into two subsets: 1) those that govern the prosecutor's conduct during the investigation and 2) those that govern the chamber's disclosure of information both in documents generally and the indictment in particular. While investigations are not expressly confidential in other tribunals, the prosecutor is afforded broad discretion during the investigation stage, similar to the discretion afforded Co-Investigating Judges at the ECCC. Nonetheless, the presumption among other international criminal tribunals appears to be that investigations are public, as circumstances that warrant non-disclosure are expressly provided in the rules of procedure. While rules governing both the prosecutor and judges apply at the pre-trial phase of other courts, the ability to keep information confidential becomes more limited once the investigation is complete, as the indictment is expressly deemed public.

The practice among other international tribunals suggests that despite the ECCC Co-Investigating Judges' broad discretion to protect their investigation, there are limited justifications for keeping information confidential for that purpose, particularly once the closing order is filed.

### D. The Presumption of Confidentiality at the ECCC and the Need for Standards

Unlike other internationalized criminal tribunals, yet consistent with domestic civil law systems, the Internal Rules of the ECCC establish that judicial

investigations shall be presumed confidential. According to the Office of the Co-Investigating Judges, as a general rule, all documents and information included in the case file are confidential, even when the document includes common knowledge readily available to the public.

Despite the presumption of confidential investigations, the Office of the Co-Investigating Judges has said that the principle of confidentiality is flexible in order to provide the public with a minimum amount of information. Yet ECCC Internal Rules are silent as to standards upon which confidentiality decisions are to be based; similarly, the Office of the Co-Investigating Judges has not established any specific criteria for when it is essential to keep the public informed and has consistently remind the public that decisions are best made on a case-by-case basis.

An analysis of documents retained as confidential during the judicial investigation and those released to the public provides little guidance regarding the presumption of confidentiality. An analysis of the inconsistent nature in which pre-trial hearings are decided similarly reveals apparently arbitrary decisions by both the Co-Investigating Judges and the Pre-Trial Chamber. Yet ECCC Internal Rule 77 (14) establishes that Pre-Trial appeals shall be reasoned, providing in part, "All decisions under this Rule, including any dissenting opinions, shall be reasoned and signed by their authors." While Internal Rule 77 does not expressly require that the orders of the Co-Investigating Judges be reasoned, the Pre-Trial Chamber has ruled that like Pre-Trial decisions, orders of the Co-Investigating Judges must also be reasoned.

The Pre-Trial Chamber has reminded the Co-Investigating Judges of their need to provide reasons in their orders, stating that "all decisions of judicial bodies are required to be reasoned, as this is the international standard." The Pre-Trial Chamber has also outlined two key purposes of reasoned decisions: first, that the public and parties have rights to reasoned decisions and second, that in order to fulfill its own mandate to provide for reasoned decisions, the Office of the Co-Investigating Judges must clearly present the logic

and reasoning on which the Pre-Trial Chamber is to base its own appellate rulings.

The lack of reasoned decisions or clear standards governing confidentiality has resulted in much criticism of the ECCC, directed by parties themselves, court monitors, and the Cambodian people. Public perceptions of potentially illegitimate court operations are problematic for both domestic and international perceptions of the ECCC, decrease public investment in the tribunals, and hinder the Court's function as a domestic model. At a minimum, the establishment of confidentiality standards, even without additional measures for public access, will increase investment in the ECCC. Similarly, knowledge that the ECCC is operating under clear standards will assure the public that there is a legitimate basis for confidential information, and that even though some information is protected, justice is being fairly administered; efficiency at the ECCC will likewise increase, as should the Co-Investigating Judges deviate from the standard or fail to provide reasoned decisions, they will be accountable to the parties and the public. Moreover, greater public education about how legitimate judicial investigations function will ensure that the ECCC serves as a model for the domestic Cambodian legal system.

#### **E. Contours of the Principle of Confidentiality at the ECCC**

Due to the ECCC's lack of established rules or reasoned court decisions regarding the contours of confidentiality measures, guidance for appropriate limitations on the presumption of confidentiality requires an analysis of both the purposes of the principle of confidentiality, as articulated by the Court, as well as guidance from other international criminal tribunals. While consistency with domestic Cambodian procedure is an important factor to consider in drafting such standards, so too are the unique specificities of the ECCC.

The language of ECCC Internal Rule 56 establishes that the overarching principle behind confidentiality is to "protect the rights and interests of the parties." The Office of the Co-Investigating Judges has also consistently articulated three specific reasons for the requirement of confidential investigations in order to ensure the

quality of the judicial process: 1) the guarantee of the protection of privacy of those persons mentioned in the case file, 2) the presumption of innocence, and 3) efficiency and effectiveness in investigations.

##### **i. Confidential Documents**

The protection of victims and witnesses is the most often cited reason for restricting confidential information among international criminal tribunals. Considering the thousands of individuals who submitted complaints to the ECCC and have been incorporated into the case file, the number of persons potentially included in the privacy provision of confidentiality is expansive.

While the Co-Investigating Judges have said little regarding the protection of victims and witnesses, in practice they have limited the disclosure of information about people connected to the investigation. However given the unique nature of the ECCC, there may be situations in which protections of victims and witnesses are no longer required. In Cambodia, the number of Khmer Rouge victims totals thousands. The country's tragic history makes victims abundant and many of these more than willing to share their stories. Thus the underlying purpose of confidentiality to protect victims' privacy may no longer be necessary when those whom the provision is intended to protect voluntarily waive its application.

In the case of the ECCC, protective measures for victims and witnesses fearful of having information disclosed could be applied; however, where victims are not fearful and are willing to share their stories, there is little reason to withhold information for their protection. This proves especially true when considered in light of the ECCC's role as a model court, which requires balancing the needs of specific individuals with the court's greater obligations of legal certainty and transparency as established in Internal Rule 21.

Though Co-Investigating Judges' public orders do not expressly cite the need for protecting the rights of the accused, it appears to be the primary objective of the privacy purpose of confidentiality frequently referenced at the ECCC. Yet in many cases, absent the

discussion of witnesses or victims, or any other express reasons articulated by the court, there appears to be few reasons why the public distribution of information regarding accused persons was forbidden. A plain language reading of Rule 56, which states that the presumption of confidentiality is intended to "protect the rights and interests of the parties," suggests that individuals may waive confidentiality measures created for their protection. This may be especially true when considered in light of Internal Rule 21's mandate to balance the protection of parties with the public's right to transparent proceedings.

The terms "efficiency in investigations" and "effectiveness of investigations" have been used interchangeably by the Co-Investigating Judges as justifications for the principle of confidentiality and are also highlighted reasons for the non-disclosure of information at other international criminal tribunals. It is likely that these two purposes principally aim to ensure speedy proceedings and impartial investigations, and the number of public withholdings that could arguably fall under this purpose of confidentiality is large.

Yet while the need for efficiency and effectiveness during the investigation remains an important consideration at the ECCC, the Co-Investigating Judges have acknowledged the need to release information when it is essential to keep the public informed, particularly in instances when information was made available to civil parties and certain journalists were permitted access to the judicial investigation. Other circumstances when it is essential to keep the public informed may similarly outweigh the need for confidentiality measures.

First, given the complex nature of the cases before the ECCC, the pre-trial period during which the public may be deprived of information is far longer than in most domestic civil systems that try less complex cases. Therefore, the need for efficient and effective investigations may no longer be as pressing over time when investigations span the course of many months. Furthermore, confidentiality measures for reasons of efficiency at the ECCC may also be reduced in light of

Rule 21's interest in transparency; though the ECCC is intended to serve as a model for Cambodian courts that utilize a confidential judicial investigation, in order to fulfill its mandate, the public must have some degree of understanding as to the basic proceedings of the Court. The public interest may therefore outweigh judicial efficiency in matters beyond those articulated by the Co-Investigating Judges.

## ii. In Camera Hearings

Similar to its practices regarding document release, the Pre-Trial Chamber has not articulated any specific reasons for the presumptions of in camera hearings, nor do the Internal Rules establish any purposes behind the provision. Yet it appears that at least one underlying purpose for the presumption of in camera hearings is to uphold the integrity of confidential investigations, particularly confidentiality measures intended to protect victims and witnesses.

An established exception to the presumption of in camera hearings are circumstances in which a case may be brought to an end by a decision of the Pre-Trial Chamber. Other circumstances that may warrant a public hearing are unclear, as decisions appear to be made on a case-by-case basis. While hearings regarding pre-trial detention orders have been inconsistent, there is a growing trend at the ECCC toward holding these hearings partially in public and partially in camera.

One appropriate basis for determining whether or not to hold pre-trial hearings in camera may be the request of parties. Open proceedings are a fundamental right in a fair trial, as provided in the International Covenant on Civil and Political Rights; however, it is common practice among other international courts, including the ECCC, that the right to open proceedings does not apply during the pre-trial period. Nonetheless, as stated by the European Court of Human Rights, the public character of proceedings "protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to...a fair trial."

In compliance with Rule 21's mandate to balance the protection of accused persons and the needs for transparency, the ECCC should strongly consider public hearings when parties, especially the Defence, seek increased public scrutiny. Furthermore, allowing for public discussions of administrative matters while holding other aspects of proceedings in private would thus fulfill the ECCC's transparency obligations under Internal Rule 21, and likewise protect the rights of victims and witnesses, also a concern addressed in Rule 21 and underlying purpose for the presumption of confidentiality.

A second basis for holding public hearings at the pre-trial stage is when the purposes for confidentiality are no longer necessary, especially considering ECCC Internal Rule 21's mandate to provide for transparency whenever possible. Limiting the presumption of in camera hearings at pre-trial has support from both the Prosecution and Defence teams before the ECCC, as Defence teams have consistently advocated for more public pre-trial hearings. In comments on the Internal Rules, Court monitoring groups have also urged the ECCC to adopt procedures that require the Pre-Trial Chamber to be open to the public.

While public hearings may lengthen what are already complex and time-consuming proceedings, additional public access would not only provide the ECCC an opportunity to operate as a model for domestic courts, but would also increase public investment in the Khmer Rouge Tribunal by facilitating greater knowledge among the public. Similar to the establishment of standards governing document release, at the very least, clearly established factors for determining when pre-trial hearings may be held in public would provide the public with some sense that decisions are firmly grounded in the law.

#### **F. Conclusion**

An analysis of both the Co-Investigating Judges' release of information to the public and the Pre-Trial Chambers' allowance of public hearings reveals a seemingly arbitrary basis for granting public access to information at the ECCC. The absence of procedural rules defining the contours of the principle of confidentiality

and the lack of reasoned decisions provided by the Court evidence the need for standards to establish the confines of the presumption.

In regard to document access, the ECCC should consider lessening stringent confidentiality measures created for the purpose of protecting victims and witnesses when those individuals are willing to speak publicly about their experiences and are not in objective danger. Similarly, the ECCC should consider allowing defendants to waive confidentiality measures created for their protection. Judicial discretion in confidentiality measures created for efficient and effective investigations should likewise be limited, considering transparency requirements of the Court established in Internal Rule 21.

Moreover, considering the unique nature of the ECCC, the Pre-Trial Chamber should revisit and provide reasoning in its decisions regarding in camera hearings. Greater deference to the requests of parties and strictly construing the presumption of in camera hearings would not only protect the fair trial rights of defendants, but also ensure that the ECCC is fulfilling its mandate to provide for transparency whenever possible.

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*Krista Nelson is DC-Cam Legal Associate Summer 2010.*

## LOST RELATIVES

My name is Elfa Wong, from Hong Kong. My mom came to Hong Kong from Cambodia in the 1970s, before the massacre. But somehow, her parents, sisters, and brothers were lost during the tragedies because they did not get out from the country. My mother went back to Cambodia in 1998, trying to find her family, posting news on newspaper, but nothing were found. I would like to get any more information about my mother's family during that period. My mom's relatives who remains in Cambodia after she left: 1. Guok Mou Heng/ Guo Wu Han, 2. Guok Mou Qeng/ Guo Wu Qing, 3. Guok Mou Hein/ Guo Wu Xian, 4. Guok Ka Gim/ Guo Qiao Jin and 5. Guok Ka Eg/ Gui Qiao Yu.

If anyone have information about above names, please contact me at: [elfa226@gmail.com](mailto:elfa226@gmail.com). Thank you.

# THE POSSIBILITY OF BRINGING GENOCIDE CHARGES ON BEHALF OF THE KHMER KROM

*James C. Roberts*

## i. Executive Summary

The Khmer Krom are ethnic Khmers with historical ties to land now located within southern Vietnam who were targeted for systematic abuse by the Khmer Rouge. The question presented is whether the Khmer Krom qualify as protected group under the Genocide Convention, and if so, what standard the ECCC should adopt to determine their group status.

The jurisprudence of the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR") has demonstrated that the Genocide Convention was intended to cover permanent and stable groups and exclude mobile groups such as political or economic groups. The common criteria for protection is that membership within the group should be involuntary.

To define a group as protected, there three different approaches have been applied that all use a mix of objective and subjective evidence to determine whether a victim group is protected. Both the so-called "objective" and "subjective" approaches seek to introduce the same types of evidence to prove the existence of a protected group and its membership, essentially creating a group based on the qualities of its members. However, the objective approach does not recognize the frequent disconnect between the objective qualities of a group and the perceived qualities of its members. The subjective approach does recognize these disconnects, but risks inclusion of unstable and mobile groups who were never intended to be protected by the drafters of the Genocide Convention.

By far the most prevalent approach is one that



Khon Savin, Khmer Krom villager from Pursat talking to ECCC Co-prosecutor, Andrew Cayley

is a hybrid of the two. The "hybrid" approach, unlike the objective and subjective approaches, does not seek to determine the status of the victim group by the same analysis by which it identifies its members. The hybrid approach requires some objective factors for group determination but also recognizes that those who are targeted for destruction because of their perceived identity may not always correspond with the objective criteria of the group. Thus, the court applying this approach enters into a two-part analysis. First, it determines the status of the victim group as a protected group within the meaning of the Genocide Convention on a case-by-case basis using both subjective and objective evidence while taking in to account the relevant social political and historical context. Once it has determined that a victim group is a protected, it uses a subjective approach to identify group members. The majority of cases recognize that membership within a group is a subjective concept, and that being perceived to be a member targeted for destruction is in theory sufficient to be a considered a member of the protected group. Thus if the court determines that there is a protected group, it is sufficient that individual victims were perceived by the perpetrators to be a part of that pre-existing group to include them within the group. Any other subjective or objective ties to that group are supplemental.

Following the jurisprudence of the ICTY and ICTR, there are three ways that the Extraordinary Chambers in the Court of Cambodia ("ECCC") could categorize the Khmer Krom. First, the ECCC could classify them as their own protected group. To do this the court would have to show that the Khmer Krom were distinct enough from the Khmer majority to be their own group, and that individuals were targeted by reason of their membership within this group. Whether or not this approach has merit, it is not practically possible in Case 002 because the Khmer Krom group was not included in any of the co-prosecutor's submissions to the co-investigating judges, and such submissions define the contours of what may be investigated and charged. Second, the ECCC could use the hybrid

approach and classify the Khmer Krom victims as members of the protected Vietnamese group. To do this, the court would have to find that the perpetrators targeted the Khmer Krom victims because they subjectively perceived the Khmer Krom to be Vietnamese. Third, the court could use the targeting of the Khmer Krom as evidence to support the genocidal intent towards the Vietnamese group based on the Khmer Krom's perceived political affiliation. The evidence would have to show that the Khmer Rouge wanted to kill the Vietnamese, and by extension the Khmer Krom based on their political sympathies. This last approach, while providing formal recognition of the crimes committed against the Khmer Krom, would not characterize them as victims of genocide.

Classifying Khmer Krom as an independent ethnic group or as "Vietnamese" may have unwanted political consequences for them today in both Cambodia and Vietnam. In Cambodia, most Khmer Krom wish to be seen as Khmer and not a minority group or Vietnamese. On the other hand, Khmer Krom in Vietnam sometimes have incentives to emphasize the Vietnamese aspect of their identity to avoid being seen as a separate minority. Such concerns merit consideration by advocates seeking to advance Khmer Krom interests before the ECCC.

## 1. Introduction

Ethnic Khmers known as Khmer Krom "or lower Khmers" have inhabited the region of the Mekong Delta for many centuries, possibly as far back 550 CE. While maintaining many of the cultural aspects of Cambodians they have been heavily influenced by Vietnamese culture. Most notably they speak three Khmer dialects often heavily colored by a Vietnamese's accent. This mixed identity has precariously placed them politically and socially somewhere in-between Cambodia and Vietnam. Because of their perceived dual allegiance they were systematically targeted for abuse by the Khmer Rouge. This paper will address the question of how the Khmer Krom group should be classified by the Extraordinary Chambers of the Courts of Cambodia ("ECCC"), specifically if they can be brought

under the protection of the Genocide Convention. It will begin with an historical overview of the Khmer Krom, and a history of the atrocities committed against them. This paper will cover the relevant international jurisprudence on the standards for group determination and membership identification. Finally, this paper will address the possible ways the ECCC could use evidence of atrocities against the Khmer Krom to prove genocide charges in Case 002.

## 2. Historical background

Until around the 14th Century, the Mekong Delta was primarily populated by Khmer people, but the Vietnamese presence steadily increased. In the late 19th century French authorities included the Khmer population in the Mekong Delta in a territory called Cochinchina, making the Vietnamese people the majority in the region. Beginning in this period there was a small but steady migration of Khmer Krom to what would become present-day Cambodia. Today Khmer Krom on both sides of the French delineated border between Vietnam and Cambodia refer to the Mekong Delta area as Kampuchea Krom, expounding a claim to the land and an identity inexorably tied to the region.

This mixed and at the same time separate identity made them ideal sources for military support from both the U.S. military and anti-communist right-wing political groups within Cambodia. During the Vietnam War, U.S. special forces recruited a substantial number of soldiers from the Khmer Krom population to fight the Viet Cong. These soldiers were referred to as the "white scarves" and described themselves as a liberation movement of Kampuchea Krom. John D. Ciociari, senior legal advisor to the Documentation Center of Cambodia, notes that contemporaneously militant anticommunist movements within Cambodia, such as the Khmer Serei ("Free Khmer") movement, also enlisted many Khmer Krom as soldiers. The Khmer Serei had the primary purposes of staging a coup against the Cambodian King and repelling communist advances. Furthermore, Ciociari notes that after Marshal Lon Nol seized power in March 1970, Khmer Serei soldiers were

enlisted in the ongoing Cambodian civil war with the Khmer Rouge. While not all Khmer Krom were aligned with the U.S. military or the anticommunist movements that opposed Pol Pot in the civil war, the Khmer Krom as a group were identified as a possible political threat to the Khmer Rouge. Ciociari notes that after the Khmer Rouge took power in 1975 they had "fresh memories" of a war in which Khmer Krom soldiers had previously fought against them. They also viewed the Khmer Krom as "culturally impure" and believed their dual cultural and political identities could "complicate the business of constructing a new Cambodian state." In 1975 after the Khmer Rouge took power, relations between Cambodia and Vietnam deteriorated significantly. Khmer Krom, because of their ability to blend in with the Cambodian society and perceived dual allegiance, were identified as a conduit of Vietnamese espionage and were often treated as traitors and targeted for persecution and elimination.

## 3. Examples of targeting of the Khmer Krom

Ben Kiernan in his book *The Pol Pot Regime* makes it clear that the Khmer Krom group was singled out during the Democratic Kampuchea period ("DK") and gives several examples of its targeted persecution. The first example he provides occurred in 1976 when the Vietnamese pushed a group of 68 "white scarves" into Cambodia. The Khmer Krom soldiers sought out the local Khmer Rouge officials as allies in the fight against Vietnam. Their offer of an alliance was denied and 67 unarmed soldiers were gunned down while fleeing for their lives. A worse fate was in store for their commander who was brought to the infamous Tuol Sleng prison. Before being executed and after being tortured he confessed to being an "internal enemy of Democratic Kampuchea. This only fueled the fire of suspicion against the Khmer Krom. A few months later in Kivong district local officials boasted of killing over two thousand Khmer Krom "white scarves" as "American slaves" identified by their "longer hair" and penchant for drinking milk; both were seen as a sign of foreign influence. The Khmer Krom "White Scarves" soldiers were killed because of the possibility that they could

become future enemies of the DK. The extermination of the Khmer Krom was justified by propaganda expounded both by leaders of the DK and local cadres claiming that the Khmer Krom were not really Khmer. Khmer Krom were labeled as "Khmer bodies with Vietnamese minds" and as such they were perceived to be racially distinct. The Khmer Krom who were singled out were not limited to those from Vietnam. In the Bati district of the southwest region of Cambodia in 1976, entire families of Khmer Krom (many of whom probably had been in Cambodia for generations) were massacred in a wat; Khmer Rouge authorities claimed it was because that they could speak Vietnamese.

As the conflict with Vietnam grew worse and the grip of the Khmer Rouge on the country started to weaken, paranoia over the presence of Vietnamese agents within the country correspondingly increased. Khmer Krom were often suspect. Documents from the Kraing Ta Chan prison in Takeo show that Khmer Krom were frequent suspects of espionage and other "counterrevolutionary" activities. Ciorciari found that documents from the prison, on file at the Documentation Center of Cambodia, indicate that most prisoners at the Kraing Ta Chan facility were Khmer Krom.

In 1977 in the Bakan district of Pursat province, the provincial chief, a Khmer Krom, was accused of treason. The remaining Khmer Krom were separated from other Khmer on the basis of their heritage. Later that year they were all taken away and massacred as "traitors." Ciorciari notes that they were targeted for extermination because of their perceived connection to Vietnam. Kiernan mentions that in other areas Khmer Krom were delineated on the basis of their surnames such as Thach, Son, Nhoeng. In the Western Zone local cadres proclaimed that the "Khmer Krom had all become Vietnamese" to the Khmer Rouge as the Khmer Krom were considered contaminated by centuries of Vietnamese contact. To that effect, cadres in the same year made an announcement that any Khmer Krom who showed up in the region would be executed.

#### 4. Classifying the Khmer Krom as a protected

#### Group under the Genocide Convention

The ECCC, through article nine of the Framework Agreement between Cambodia and the United Nations, has subject matter jurisdiction for the crime of genocide as defined by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Article 4 of the law establishing the ECCC ("ECCC Law") defines genocide as "any acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children from one group to another group.

Genocide addresses the destruction or attempted destruction of certain protected groups of human beings in whole or in part. The problem, however, is determining which groups the Genocide Convention protects and if a given population fits into one of those protected groups. The Genocide Convention limits application of the crime of genocide to national, ethnical, racial or religious groups; however, the Convention fails to define those groups or establish parameters for membership within the group. The International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), which are collectively known as the "ad hoc" tribunals, have struggled with the issue of group identification and sought to apply these abstract categories to real human populations. While common sense may suggest that a given population is a "group," there are nonetheless practical difficulties in placing one within the legal framework of the Genocide Convention.

#### 5. What groups are protected?

- a. Political Groups Are Specifically Not Covered

by the Genocide Convention

**i. If Members of a Group Are Targeted Because of Their Political Affiliations, or if the Targeted Group Is Defined by Political Criteria Then the Group Is Not Protected by the Genocide Convention**

The Genocide Convention does not cover all types of groups. The ad hoc courts have consistently held that political and economic groups fall outside the protection of the Genocide Convention. The ICTR Trial Chamber in Rutaganda, upon a reading "the travaux préparatoires of the Genocide Convention, reasoned "that certain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be 'mobile groups' which one joins through individual, political commitment." Thus, if one is targeted by reason of their voluntary political affiliation they are not protected by the Genocide Convention.

Similarly, the ICTR held in Jelisi? that "the preparatory work of the [Genocide] Convention demonstrates that a wish was expressed to limit the field of application of the Convention to protecting 'stable' groups objectively defined and to which individuals belong regardless of their own desires." This ultimately means that if a group is defined and targeted only because of its political affiliations it is not protected by the Genocide Convention.

**ii. Protected Group Targeted for Additional Reasons**

The issue has arisen at the ICTR whether a protected group that is inherently tied to a political group in the eyes of the perpetrators is protected, or if the addition of a political dimension negates the protected group status. The ICTR found that the presence of additional motive for annihilation of a protected group does not negate protected status. For example, the Trial Chamber in Nahimana determined that "the association of the Tutsi ethnic group with a political agenda, effectively merging ethnic and political identity, does not negate the genocidal animus that motivated the accused." In fact the court reasoned, "the identification of Tutsi individuals as enemies of the state associated with political opposition, simply by virtue of their Tutsi

ethnicity, underscores the fact that their membership in the ethnic group as such, was the sole basis on which they were targeted.

In a subsequent case, the ICTR Trial Chamber in Ndiindabahizi considered whether a victim with a mixed heritage could be a victim of genocide. The court heard testimony to the effect that the victim, Nors, was killed because he appeared to be Tutsi. Additionally, the court heard testimony that he was killed because he was "half cast." The court decided that "the presence of additional motives for the killing of Nors (for example, because he was part-Belgian) did not displace the killers' genocidal intent."

**b. The Enumerated Groups Protected by the Genocide Convention**

The ICTY Trial Chamber in Krsti? found that the Genocide Convention's "application is confined to national, ethnical, racial or religious groups." The problem however, as the court in Rutaganda noted, is "that the concepts of national, ethnical, racial and religious groups have been researched extensively and, at present, there are no generally and internationally accepted precise definitions thereof."

Akayesu was the first case of the ICTR to address whether the Tutsi victim group qualified as a protected group within the meaning of the Genocide Convention. The court began its analysis by establishing definitions of ethnic, racial and national groups that would be later adopted by other chambers of the ICTR and the ICTY. It defined an ethnic group as "a group whose members share a common language or culture." A racial group on the other hand is "based on the hereditary physical traits often identified with a geographical region." "[A] national group is defined as a collection of people who are perceived to share a legal bond based on a common citizenship, coupled with reciprocity of rights and duties." The problem the Chamber confronted was distinguishing the victim Tutsi group from the Hutu group on the basis of these definitions, as both of the Hutus and the Tutsis share the same customs, language, and general physical characteristics. Additionally they both inhabit the same geographic area. As objectively

defined, they would both ostensibly belong to the same ethnic, racial, religious and national group.

**c. Protected Groups That Do Not Specifically Correspond to One of the Four Enumerated Groups**

To address the problem of classification of the Hutu and Tutsi, the ICTR in *Akayesu* relied on the travaux préparatoires of the Genocide Convention, which indicated "that the crime of genocide was allegedly perceived as targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups." Subsequently, the Chamber found that the Tutsi were a permanent and stable group that qualified for protection under the Genocide Convention despite that fact that the Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population. This expansive group identity, determined by the common criteria of stability, was not readily adopted by the Chambers of the ICTY and the other Trial Chambers of ICTR. While some Chambers have used the individual members' lack of mobility, or voluntary commitment, to show the intention of the Genocide Convention to limit the scope of its protection to stable and permanent groups, no subsequent decisions have tried to expand protection beyond the four enumerated groups or to adopt such a potentially broad definition of protected groups. All but one of the subsequent discussions in both the ICTR and the ICTY classify the victim group as belonging to one of the four enumerated groups.

Similar to the expansive approach used in *Akayesu*, the Krsti? Chamber at the ICTY reasoned that that "[t]he preparatory work of the Genocide Convention shows that setting out such a list [of enumerated groups] was designed more to describe a single phenomenon, roughly corresponding to ... 'national minorities,' rather than to refer to several distinct prototypes of human groups." Thus, it would be inconsistent with the purpose of the Genocide Convention to "attempt to differentiate each of the named groups on the basis of scientifically objective criteria." For this reason, the Krsti? court did not expand coverage beyond the four enumerated

groups; instead it held that for a group to be protected it need not be classified as any one of the four but can have the overlapping characteristics of any of the four. Accordingly, the Krsti? court did not attempt to classify the Bosnian Muslim group specifically as either an ethnic, racial, national, or religious group. Instead Krsti? held simply that the Bosnian Muslim population constituted a "protected group."

**6. The Ad Hoc Tribunals Standards for Defining Protected Groups for the Purposes of Genocide Have Taken the Forms of "Objective," "Subjective" and "Hybrid" Approaches**

To ascertain whether a group is a protected within the meaning of the Genocide Convention, the ad hoc tribunals have more or less broken down the inquiry into a two-step process. First, they determine if the group is protected under the Genocide Convention and second, they identify its members, or in other words, define the parameters for membership. At both stages of the analysis, various Chambers have used a combination of subjective and objective factors.

**a. "Objective" Approach**

The so-called "objective" approach was the first used by the ICTR to determine a victim group and identify its members. The use of the term "objective" is actually a misnomer. None of the courts follow a completely objective approach, but invariably look to some subjective factors such as the perceptions of the victim group. The key element of the so-called objective approach is that the group is classified or determined to be a protected group using the same objective evidence that shows proof of membership. That is, the criteria for membership within the group and determination of group status are coextensive. In fact, the objective approach looks to the objective qualities of its group members to determine whether the group qualifies as a protected group.

For example, to determine group identification, the court in *Akayesu* used the objective approach to define the group by the objective qualities of its members. The Chamber noted that the Hutus and Tutsis did not

separately fit the definition of any one of the enumerated groups because ostensibly they shared the same culture, language, religion and national identity. Nonetheless, the Chamber determined that the "intent of the drafters of the Genocide Convention ... was clearly to protect any stable and permanent group." Thus the Trial Chamber needed to show objectively within the political and ethnic conflict climate in Rwanda that the Tutsis could stand apart as a stable and permanent group. In actuality, the Chamber looked to both objective and subjective evidence. However it relied more heavily on the former, which consisted of a preexisting legal classification system imposed by the Belgian colonizers and maintained by the Rwandan government. For example, "the identity cards at the time included a reference to "ubwoko" in Kinyarwanda or "ethnie" (ethnic group) in French which, depending on the case, referred to the designation Hutu or Tutsi." The Chamber also noted that "witnesses who appeared before it invariably answered spontaneously and without hesitation the questions of the Prosecutor regarding their ethnic identity" as Hutu or Tutsi. A community's perception of its own identity in ethnic terms would later be commonly regarded as subjective evidence. The Chamber in Akayesu tried to look at this subjective self identification in an objective way, focusing not on the perceptions of the Rwandans themselves but their "spontaneous" self identification, objectively observed by the court. Thus, the Chamber presented the evidence such as a study conducted by objective observers, focusing not on what the witnesses said but how they said it. Notably, the Chamber did not say that the Tutsi were an ethnic group. It instead determined that "the Tutsi group constituted a group referred to as 'ethnic.'" The Chamber consequently held that "the Tutsi did indeed constitute a stable and permanent group and were identified as such by all."

In *Prosecutor v. Kayishema*, the ICTR again considered whether the Tutsi constituted a protected group. The Kayishema Chamber extended the meaning of ethnic group to allow for subjectively determined identity. The Chamber decided that an ethnic group

protected by the Genocide Convention could be a group "which distinguishes itself as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)." While ostensibly endorsing a subjective approach, and theoretically leaving the possibility open for group determination based solely on subjective factors, in actuality the Chamber looked to the same kinds of evidence as the Akayesu Chamber. This evidence included evidence that is commonly regarded as objective. Specifically, the Kayishema Chamber relied on government issued identity card that solidified distinct ethnic identities from what were once divisions in a class based system, and the fact that the Rwandans contemporaneously viewed themselves in these ethnic terms.

The second component of defining a group as protected is ascertaining who constitutes its members. The defining characteristic of the objective approaches used in Akayesu and Kayeshima is that these Chambers sought out objective evidence to define the parameters of the group or, in other words, to define the characteristics of membership. The Chamber in Akayesu determined that a "common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner." Thus, for example, while the existence of identity cards helped to determine the group as protected it also defined individuals as members within the group.

#### **b. "Subjective" Approach**

The so called "subjective" approach works much like the objective approach in the sense that courts seek to determine the status of a group as a protected group using the same criteria defining the parameters of membership within the group. However, following this approach, the stigmatization or subjective perception of the group both identifies the individual members and determines whether the group constitutes a protected group.

In *Jelisić*, the ICTY's first attempt to address the issue of group determination, the Trial Chamber specifically focused on the possibility of a perpetrator-defined victim group. It noted, "Although the objective determination of a religious group still remains possible...it is more appropriate to evaluate the status of a national, ethnic or racial group from the point of view of those persons who wish to single that group out from the rest of the community." The Chamber reasoned, "It is the stigmatization of a group as a distinct national, ethnic or racial unit by the community, which allows it to be determined whether a targeted population constitutes a [distinct group] in the eyes of the alleged perpetrators. *Jelisić* is the most subjective Trial Chamber decision, basing its determination that the Bosnian Muslims are a protected group primarily on the stigmatization of the victim group at the hands of the perpetrators. However, the Chamber to some extent recognized that the determination of the victim group should be limited to the four groups enumerated in the Genocide Convention "objectively defined." The decision indicates that the protected group must objectively correspond to one of the four enumerated groups. It minimally supports this proposition with some anecdotal evidence that all the victims were Muslim. While *Jelisić* without question determined group status by relying on subjective evidence, it is not entirely clear if it was proposing that a victim group could solely be defined subjectively. The dicta in the subsequent *Static* Appeals Chamber decision strongly indicates that this would be a disfavored approach.

The ICTY in *Krstić* followed the reasoning in *Jelisić* closely, extending the reach of the subjective determination to include religious groups. The Trial Chamber held, "A group's cultural, religious, ethnic or national characteristics must be identified within the socio-historic context which it inhabits...the Chamber identifies the relevant group by using as a criterion the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived...characteristics. While *Krstić* included the subjective perceptions of the perpetrators as a factor in the group determination, it

nevertheless relied on objective evidence that the group was legally recognized within the Serbian constitution. Thus, while *Krstić* appears to leave it open whether or not a group may be determined by the subjective perception of its members or perpetrators, in practice it used a mixed approach consisting of both objective and subjective evidence.

An attempt to classify a group—that is to both determine the group and define its membership—based solely on the subjective perceptions of the perpetrators or other subjective characteristics, has not expressly been prohibited but appears to have been rejected by the *Static* Appeals Chamber. *Static* held that *Krstić* and *Rutaganda* did not stand for the proposition that a group could solely be determined subjectively. Note that the Chamber did not rule on what the appropriate standard should be, it merely held that the Chambers' decisions did not stand for the proposition that a victim group could be defined solely by the subjective perception of the perpetrators.

### c. The Hybrid Approach

The hybrid approach similarly looks to both objective and subjective evidence. The key distinction of this approach is the evidence used to determine protected group status is not necessarily co-extensive with the parameters of group membership. Essentially, this approach separates the analysis of group protection and the analysis of the criteria for group membership. Following this approach a court can define a group as protected by using both objective and subjective evidence while identifying its members using only the subjective perception of the perpetrators.

For example, ICTR and ICTY Chambers have consistently held that "the correct determination of the relevant protected group must be made on a case-by-case basis, consulting both objective and subjective criteria." However, the *Brdjanin* Trial Chamber also held that the members of "the relevant protected group may be identified by means of the subjective criterion of the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnic, racial or religious characteristics." In some

instances, the victim may perceive himself or herself to belong to the aforesaid group. This shows that at least one chamber has been willing to entertain charges for genocide for victims as members of an objectively determined group who are identified and targeted solely based on the subjective perception of the perpetrators. This may happen even though the individual victims would not fall within the group objectively and may not even consider themselves part of the group.

Similarly, in Baglishima, the ICTR held that the subjective perpetrator-defined criterion for membership is paramount when identifying group members. However, like other Chambers, it said that subjective perception is not enough to determine the group status. However, once a group has been objectively determined, membership in that group should be analyzed subjectively. This approach recognizes that the people who are targeted may not necessarily correspond directly with the common characteristic of the group but are nonetheless targeted because they were perceived by the perpetrators fall within the group. As the Baglishima Chamber reasoned, "[T]he perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society. In such a case...if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group." This approach recognizes the practical difficulty in scientifically defining the parameters of a group, and the disconnect between what perpetrators of genocide may perceive and what the victims of genocide or the larger community as a whole may perceive. This approach emphasizes that the analysis for determining the existence of a group should not be the same as the one used to identify its members. As the Chamber in Rutaganda determined, "[M]embership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction ... Nevertheless, the Chamber is of the view that a

subjective definition alone is not enough to determine victim groups."

In practice, the Baglishima and Rutaganda chambers both relied on objective evidence including legally recognized divisions in the constitution. Thus the primary difference between this approach and what is labeled the "objective approach" has to do with how the evidence is analyzed. Following the objective approach, the evidence is used to both determine the group and define the parameters for its membership. Following the hybrid approach, the objective evidence is supplemental and is used to show that there is a distinct group and that the members correspond, if not directly then in the eyes of the perpetrators, to this preexisting group.

The ICTR case of Ndindabahizi offers a clear example of a case that relies solely on the subjective perception of the perpetrator to identify the victim of a protected group for the purposes of genocide. There, the victim had a Belgian father and a Rwandan mother. In a country where ethnicity is determined by the father, within the legal framework of the government he would be objectively Belgian. The Chamber, relying on Baglishima, noted that when determining membership within a protected group, "the subjective intentions of the perpetrators are of primary importance." The Chamber found that the victim was killed because "[he] was perceived to be at least in part, of Tutsi ethnicity." The evidence used to reach this finding was based solely on inferred perceptions of the perpetrators ascertained through witness testimony. In this case there was no use of objective evidence such as identity cards to show that the victim was Hutu or Tutsi. The Chamber only heard testimony that he was perceived to have some features that were considered to be Tutsi. Thus, he was found to be a victim of genocide based solely on the perceptions of the perpetrators. The Chamber found that perpetrator-defined identification of members within an objectively established victim group is not only acceptable but "of primary importance."

## 7. Why the Khmer Krom Were Targeted and the

### Implications on Group Classification

In classifying the Khmer Krom group, the first issue to be addressed is the motivation for their targeting. There are three possibilities: They were targeted because of their counter-revolutionary politics, existence as an ethnic minority, or because they were perceived to be nationally Vietnamese. One theory is that they were targeted because of their past involvement with the Khmer Serei, which opposed the communists in the civil war that preceded the Khmer Rouge regime, or because of their military involvement in the Vietnam War backed by the Americans. Under this prospective they were targeted because of their political associations. For this reason some believe that genocide charges could not be brought on their behalf because political groups are not protected by the Genocide Convention. But as noted above, politics and race are often intertwined. Ben Kiernan pertinently said, "this [readiness to suppress the Khmer Krom] was justified on racial grounds that their minds could not be controlled." Thus the "racial ideology expressed political suspicion."

To bring genocide charges behalf of the Khmer Krom, the ECCC would have to determine that they were targeted by reason of their involuntary membership in the Khmer Krom group. Any political targeting would have to be shown to be intertwined with their ethnic identity. Individual's political views would have to have been assumed on the basis of their membership within the group. The threat of political opposition may have been an underlying motive but it would have to be tied to their ethnicity. As the ICTR Chamber in Nahimana said, an ulterior motive for targeting a group does not negate the genocidal intent, rather targeting a protected group because of a presumed political agenda reinforces this intent. Thus if the Khmer Krom can be classified as a protected group either on their own or as part of the Vietnamese group then the existence of a political motive for annihilation would not negate the genocidal intent.

On the other hand, if the ECCC were to find that the members of the Khmer Krom were targeted not because of the fact that they were Khmer Krom, but

instead individual members were targeted because of their political affiliations, genocide charges would not be applicable. In that case the victims would not have been targeted on the basis of their ethnicity and a charge of crimes against humanity for persecution of a political group would be more appropriate.

There is an undisputed overlap of race and politics. The court will have to determine where on the spectrum between from ethnicity to politics the targeting of the Khmer Krom falls. The tipping point may be where the victim's politics were necessarily assumed based on their ethnic identity

### 8. Possibility of Defining Khmer Krom as a Protected Ethnic Minority within the Meaning of the Genocide Convention.

While ostensibly the Khmer Krom are ethnically the same as Khmer there is a possible argument for defining them as a distinct ethnic group, similar to the way the ICTR classified the Tutsi as their own ethnic group. In the Akayesu case, four facts consisting of both objective and subjective evidence led the ICTR chamber to find that there was sufficient evidence that the Tutsi were targeted for destruction as an ethnic group. Similar factors exist to separately define the Khmer Krom. First, at road blocks set up all over the country after the crash of the President's plane on 6 April 1994, Tutsi were separated on the basis of identity cards and facial features from Hutus and killed. Similarly in the Bati region of Cambodia Khmer Krom were separated from other Khmer based on their heredity and were killed. Although The Khmer Krom were not issued state recognized identity cards they were recognized by objective factors including their accent, clothing, and surnames.

Second, the ICTR considered evidence of the propaganda campaign by radio and print media, overtly calling for the mass killing of Tutsi, who were considered to be accomplices of the Rwandan Political Front and accused of plotting to take over the power lost during the revolution of 1959. In Cambodia, there was a massive propaganda campaign against the Vietnamese: "Phnom Penh Radio charged that entire

generations of Vietnamese had devised cruel strategies to kill the Cambodian people and exterminate them. In many instances Khmer Krom were targeted because they were believed to be Vietnamese spies. Ben Kiernan argues in his book that by 1978 there was a nationwide screening and massacring of ethnic Vietnamese and Khmer Krom.

Third, the Hutu and Tutsi were legally delineated by identity cards indicating an official governmental recognition as separate groups. While not directly comparable, the fact that in Cambodia Tuol Sleng prison regulations recognized that those who were perceived to be affiliated with Kampuchea Krom were seen as traitors indicates some official governmental recognition of the Khmer Krom as a separate group. Fourth, Rwandans identified themselves as either Hutu or Tutsi in court. In Cambodia the Khmer Krom identify themselves as Khmer Krom. Additionally, the Khmer Krom have historic ties to the land of the Mekong Delta. The ICC pre-trial chamber has used historic ties to land as evidence of an ethnic identity. In sum, some similar objective and subjective evidence of the type used by the ICTR is available from which it may be possible to classify the Khmer Krom as their own ethnic group within the meaning of the Genocide Convention.

However, there are practical limitations to classifying the Khmer Krom as an ethnic group for the purposes of bringing genocide charges in Case 002 of the ECCC. The Khmer Krom were not included in any of the co-prosecutors' submissions to the co-investigating judges, which define the scope of the investigation. Supplemental evidence of the crimes committed against them could be introduced, but not to support genocide charges brought on their behalf as an independent protected group.

### **9. Defining Khmer Krom As Ethnically or Nationally Vietnamese According to the Subjective Perception of the Khmer Rouge**

It may be possible for the ECCC to find that some Khmer Krom were viewed and targeted by the Khmer Rouge as members of the Vietnamese group.

To do this, the court would have to adopt the hybrid approach used by the ad hoc tribunals. The court must first determine that the Vietnamese are a protected group. There would likely be little difficulty in doing so. Secondly, the co-prosecutors would have to prove that the Khmer Krom victims were targeted because they were subjectively perceived to be nationally, ethnically, or racially Vietnamese. Thus they would have to demonstrate a logical connection between the victims and the Vietnamese group. The ECCC would have to find that the Khmer Krom were not perceived as politically sympathetic to the Vietnamese but as actually Vietnamese.

There is some support for this notion, as noted above. For example, in the Bati district in 1976 entire families of Khmer Krom were massacred because authorities claimed that they could speak Vietnamese. One Khmer Krom held captive after being removed from Kampuchea Krom recalls that when asked if they could speak Vietnamese, "We all said no. If we had said yes, we would have been killed. We all had to do family biographies. If we said we had any relatives still in Vietnam, we would be killed." The DK regime wanted to reclaim the Kampuchea Krom and eliminate all traces of the Vietnamese. It has been reported that in the Tram Kak district of Region 13, in late 1978 local officials said, "If the Vietnamese are all gone, the Khmer remain; if the Khmer are all gone then the Vietnamese remain." The propaganda expounded divisive language that created a threat of assured destruction if the Vietnamese threat was not eliminated. The ECCC would have to find that the Khmer Krom were targeted because they were not an extension of this threat but implicitly included in this threat as Vietnamese nationals.

### **10. Third Approach, Using Evidence of Attacks against Khmer Krom to Show Genocidal Intent Towards the Vietnamese**

A third approach would be to use the evidence of the atrocities committed against the Khmer Krom to prove genocidal intent towards the Vietnamese. This is similar to an approach used by the ICTR. The ICTR

used evidence of crimes committed against politically moderate Hutus to show the genocidal intent towards the Tutsi. This would be the simplest option for the court. However, it would serve to prosecute the senior leaders of the Khmer Rouge only for the genocide committed against the Vietnamese. Many historians look back and refer to the fact that no charges were brought on behalf of the moderate Hutus. A similar historical perspective may appear in the future if the court does not seek justice for the Khmer Krom on their own behalf.

### 11. Political Implications of Bringing Genocide Charges

As John D. Ciorciari notes, "The ECCC has an obligation to deliver justice to victims, but it has an equally important obligation to advance what the relevant court officials believe-in their best professional judgment-to be the truth." This begs the question of how far the court should go to bring genocide charges on behalf of the Khmer Krom. To do so, the co-investigating judges would first have to decide whether the Khmer Krom were persecuted because they were Khmer Krom or whether the DK regime actually sought the destruction of the group.

Even if genocide charges on behalf of the Khmer Krom as a distinct group are possible, it is not clear that they want to be legally recognized as a separate ethnic group. The Khmer Krom in Cambodia have a range of preferences on the extent to which they are perceived as Khmer or Khmer Krom. It remains to be seen whether the court's official recognition of a Khmer Krom ethnic group would change public or official perceptions at all or affect the interplay between the Khmer Krom and the Khmer.

If the ECCC were to bring genocide charges on behalf of the Khmer Krom by saying that they were subjectively perceived to be Vietnamese, it may perpetuate the idea that Khmer Krom are Vietnamese. Labeling the Khmer Krom as Vietnamese could be beneficial in some respects to Khmer Krom living in Vietnam who strive to be seen there as political and social equals; however the decision could conceivably have a negative impact on the community living in Cambodia.

Cambodia and Vietnam have had long-standing historic tensions. Labeling the Khmer Krom as Vietnamese could adversely affect their social status in Cambodia. Again, the ECCC's designation will not necessarily have a major public or official effect but could matter at the margins.

Lastly, if the court hears evidence of the atrocities committed against the Khmer Krom and uses it only to support charges brought on behalf of the Vietnamese, the Khmer Krom may feel that the court is not addressing the atrocities committed against them. Addressing the co-prosecutors' failure to investigate crimes against the Khmer Krom as a group, Means Chanthorn, a Khmer Krom victim said, "according to the law, the ECCC recognizes the death of the Cham people and the Vietnamese. Why do you not except our explanation?"

In the end, the ECCC will have to wrestle with these issues and seek to legally define the Khmer Krom, both objectively and subjectively, so that justice is served.

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*James C. Roberts is DC-Cam Legal Associate Summer 2010.*

## MISSING BROTHER

My name is Gek Ly, age 47, and now I am living in Australia. My father is Bun Duk. In 1975 he had a shoe shop called Nam Yoeung in Kampong Som.

I would like to search for my brother Bun Trach aka Chrouk (he would now be 50 years old), who left home to serve in the revolution in 1970 and other five cousins: Ing Sina (female), Ing Sipa (female), Ing Ya (male) and two younger cousins whose names I do not remember. In Sangkum Reastr Niyum, this family lived near Vimean Tip Cinema, selling shoes.

If anyone has known or heard anything about him, please contact me via phone: 012 909 770 or 012 809 880, or Gek Ly, 1 Bracknell Rd, Canley Heights, NSW 2166, Australia.

Mobile: 0402-194-182, Home: (02) 9711-7637  
Email: emmatran90@gmail.com

# REUNITING AFTER MORE THAN THREE DECADES

*Phalla Chea*

Last year, Neak Haon met her brother, Neak Thy, whom she had not seen for thirty-six years. As most youth had disappeared without a trace during the Khmer Rouge revolution, her reunion with Neak Thy is extraordinary. Neak Thy, who joined the Khmer Rouge in 1973, had always been presumed dead until 2009 when his sister, Neak Haon, found him through the Family Tracing section of the Documentation Center of Cambodia (DC-Cam)'s Searching for the Truth magazine. Neak Haon had been alone for over three decades until she found her only brother Neak Thy.



Neak Haon vividly remembers the time when her parents died. Her mother died of illness due to poor healthcare and the lack of medicine in the 1970s. Her father was shot dead by the Thieu Ky, South Vietnamese Soldiers, just after her mother died. Neak Thy was recruited to be a soldier and left home to join the Khmer Rouge revolution.

Born in the 1950s in Banteay Meas district, Kampot province, Neak Haon sadly described her life and the hardships she bore as an orphan. "My parents died when I was very young. Life was hard," said Neak Haon. Neak Haon's father, Son Yen, remarried his neighbor after her mother passed away. Neak Haon stated that another tragic moment was the death of her father. Neak Haon remembers clearly when she received the news that her father was shot dead. It was in 1973, and at the time some Vietcong soldiers (National Front for the Liberation of South Vietnam) remained active in Cambodia. On the day her father

died, Neak Haon noticed countless soldiers coming into her village. Because of this, she told her father not to climb the palm trees to get palm juice, but her father insisted on going because he had promised his customers that he would provide them with palm juice.

"My father said that he knew what to do, and he told me to tend my cattle," stated Neak Haon. However, an hour later, Haon heard gunshots from the place where her father climbed palm trees. Not long after, some villagers shouted that three Viet Cong soldiers and a villager were killed. Soon, Neak Haon found out that the villager was her father. "I cried when I heard the news," said Neak Haon. Neak Haon's father was shot to death while the three Viet Cong were stabbed and their gall bladders were pulled out.

After her father died, Haon's aunt, Saom Hieng, came to live with her and her brother to raise them. However, the three of them still could not live happily because there had always been fighting and shooting in the village. They therefore needed to relocate several times. A few months later, another aunt of Neak Haon, On Poeu, the sub-district midwife in Kampong Trach district, came and brought Neak Haon's brother to live with her. She told Haon that she would raise Thy and let him study in her village. Realizing that she had never been to school, Neak Haon was happy to let her brother leave. She separated from Thy in 1973 and did not hear from him again.

In 1975, the Khmer Rouge defeated Lon Nol and took over the country. At that time, Neak Haon was appointed to work in a mobile unit in the Touk Meas district of Kampot province. At first, she was ordered to carry piles of earth heaped up by termites to fill in rice fields; she also carried out various tasks in other villages. Later, she caught crabs, snails and fish to cook for the cooperative. After the Khmer Rouge

regime collapsed in 1979, Neak Haon went to live with her uncle in the same village hoping that her brother would come back to find her. However, she did not hear anything about him.

It was not until 2008, when DC-Cam research teams arrived in Kampot, that Neak Haon had a chance to publish an article looking for her brother in the Family Tracing section of Searching for the Truth Magazine.

Several months later, Neak Thy, who now lives in Pursat province and changed his name to Phok Kosal, noticed his sister's publication in the Searching for the Truth issue 108, December 2008, when he visited the commune office. Neak Thy called a cell phone number in the publication which belonged to a village chief, Min Chhum, where Neak Haon was living. Min Chhum was happy for the news. Later, Chhum received another call from Neak Thy, who asked him several questions about Neak Haon. "First, he [Neak Thy] did not really believe Neak Haon was his sister,



Neak Thy

and neither did Neak Haon," said the village chief. "Not long after, I decided to accompany Neak Haon to meet Thy in Pursat to solve doubts of the two. They were crying and looking at each other as they met," he added.

Neak Haon found out that Thy was really her brother, whom she had not met since 1973. She exclaimed, "I felt so happy when I heard Thy was alive. I was sure he is my brother. He looks like my father, especially his mouth."

"I am glad to meet him again, after thirty-six years," said Neak Haon with relief.

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*Phalla Chea is the Translator for Searching for the Truth Magazine.*

## LOOKING FOR MOTHER AND BROTHER

My name is Uy Chanthon called Tith. I am looking for my mother named Chum Saru and brother named Samnang, whom I lost during the Khmer Rouge regime. If my brother were alive, Samnang would be 43 years old now. My mother named Chum Saru lost without trace.

I have five siblings:

1. Mam Samkol is my oldest brother (dead)
2. Mam Sinat is my second sister (alive)
3. Mam Sina or her nickname is Khmao is my 3rd sister (dead in 1983 by sickness)
4. Samnang is my fourth brother whom I am looking for
5. Tith (myself) the youngest son

Before 1975, our family was living in Phnom Penh near Santhormok School. When the Khmer Rouge captured Phnom Penh, our family was evacuated to Tany Touk Meas in Kampot province. In late 1978, my second sister (Sinat) and I met Samnang when the Vietnamese army came in the country. We have never met Samnang again. If anyone have information about my mother and brother, please contact me at: [uychanthon@yahoo.com](mailto:uychanthon@yahoo.com) or at 077 70 70 60. Thank you.

# MOM'S TESTIMONY

*Jessica Pearson*

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I was born in Cambodia. The country is twice the size of Indiana. Most of the people are Buddhists. There were Christian people there, but I did not know them. We did not have national holidays. I never had a birthday or anniversary. There were holidays that were Buddhists celebrated. We were poor. I did not know that then. We had what we needed. My dad wasn't around that much, and as a kid I did not have the concern like my parents had.

One evening a man came to the door. And my mom asked who it was and he said "me". They asked again, and he said "me". We were sitting there eating waiting for her to open the door. She opened the door. One man in front of the other. The man in front pointed a bayonet at my mother and the other told my father and grandfather to get up. It was dark outside and they left. It was pitch black. My mom was pacing back and forth she said she knew who the one man was—a distance relative of my dad. She did not understand because if they wanted to kill them they could have. We could not see anything but we could hear footsteps. They had surrounded our house. This was in 1970 the communists had started forming. This lasted until 1975 and this is when the communists took over then. The men that came to our house were communists—they wore black uniforms.

We lived in several different places. One corner we had an alter to Buddha. She would burn the incense and pray to him. When I was little we were outside and my mom looked up to the sky and said there is a god up there who made us. My mom was in so much pain and I knew she wondered why god did not come to help her. My dad was never faithful to my mom, he was never around. I wish she would have known that the Lord had come, I wish she had known him. My grandfather came back that night. But the communists went and got my uncle. They let my

grandfather go because he was too slow and they were tired of waiting on him.

**We moved to different places—another time for that.**

There was a house we lived in, and my mother learned my uncle was alive. She went to talk to him and he said after the communists got him they went some place tied them up and threw them over board. The uncle we able to get free when he was in the water but my dad drowned. My uncle could not save him. By this time the U.S. started illegally bombing Cambodia. Some bombs were civil war and some were from the U.S. At times like this you move closer to family. Beside our house we had a bomb shelter. It was only big enough for us 5 for us to run and sit in it. There were dried food for us, but it wasn't very sturdy. If we cannot play on it, then how would the bomb keep it standing? We knew that when it was the U.S. bombing, we could hear the planes, and we ran to the bomb shelter. At first, we were not used to stay close to the bomb shelter. After a while we knew we could not live like this. After each bomb she told us to not pick up shrapnel. Well I was curious I had to look so I went looking for them. I found one in a tree but I knew if I tried to get it out and cut myself I'd be in big trouble. I never got it out.

One day I went to get ice and on my way home and a piece of paper was in the street and the words Jesus Christo was on it. I asked her what that was and she said it is an American God. And I remember being so curious of who he was. At a certain age you are dedicated. A painful way- my sister had incense burnt in between her eyes. We only went to temple because my mom went and you did not want to stay home. I did not have interest in God. It was just a time to get away and play.

In 1975 my mom ran into a distant relative of hers. They were quite wealthy. My mom was Chinese

and her family was relative. This man told my mother that his family, wife, and wife's family were leaving for Thailand. At this time everyone knew that the communists might take over. A lot of people started leaving the country. I remember talking that if they took over there'd be away to travel back and forth. They did not know what it meant when the communists took over.

They asked if my older sister and I could come live and help with the younger children. My sister did not want to because she was my mom's right hand. My mom asked me and I said yes. I remember other summers I visited friends and grandparents and I liked going away. Another reason was I was a middle child. My brother was busy with college in the city. Because of the war I did not go to school anymore. My older sister and brother were close. My younger sister was still like a baby to my mother. I felt out of place in my family. With my father gone I was more rebellious. I was worst than all my 3 siblings combined. I remember she asked my dad's brother to come talk to me and get me to not be so rebellious. Most of the time she let me do whatever I wanted because she could not control me. I acted older, bigger—at that age. I acted like I did not need her. I did not need a mom. I wanted to do what I wanted. I was so difficult. I took her for granted. So a chance to go away was good for me. I did not know for how long. The last few days I stayed with them I was so homesick. I did not know I could get that feeling. Because I was selfish I did not know I needed anybody.

I went home for one day and came back—I did not want to come back because I missed home. But I did go back and I cannot figure out why. My mother came before we left for Thailand. I wanted to tell her I changed my mind and did not want to go but I could not say anything I could not get anything out. I saw my mother take their money and I knew what that meant. It is typical in Cambodia for the family to give one family up for money to allow the others to survive. She took the money and turned around and walked away. I just could not believe it.

I did not say anything because a chance to get

away was something different. I denied what she did. One of the pilots told Kim and her husband there was one man too many on the plane.

There wasn't room for one person and I felt like that person would be me. So the pilot told Kim's husband he would stay behind. (this was the last plane out). And at that time bombing started again. He wanted to stay behind to take care of business. Kim had friends in a town and could help them. The pilot got out of plane and Kim blamed me for her husband's seat. I did not want to be there anymore but there was no way back. I started to be scared of them. Her husband



could have come by plane so we waited in this city near the border.

By this time the communists took over the country. Leave your guns they had people take their guns. They took money out of bank and bought food. They emptied the market. They threw money all over the street and said your money is No good. I remember looking at the street and the money littered the street. I just remember weeks ago we did not have money for things and now it wasn't good anymore. They went to every home and buttered you up. You look like

intelligent people what kind of education you have?

Kim's family were well to do, well dressed, educated people. They had these guys (the communists) figured out, they acted dumb like they did not know anything. The communists were not convinced of this. Soon after the people that did brag were taken out and there was a curfew—they would close a certain street and they would take people out and kill them. I remember people saying that others had disappeared. So people started getting suspicious. You would walk on those streets and see blood. And I was so scared and when I was alone I would cry out for my mother.



Jessica Pearson (second from right) and her mom (second from left)

And I still do that. I remember there were a lot of teenagers. They must have taken these boys, brain washed them and made them killers. They would not interfere with what they do next. Get rid of all these intelligent people and they won't be in their (the communists) way.

By this time Kim's family stated that some would leave for Thailand. They did not know if they would make it. Five of them with decent clothes underneath and raggy clothes on top decided to leave. They each had a fishing rod and a bucket and went

fishing and if they got caught they'd make excuses that they got lost. We did not know if they made it or not. Their goal was to get to Thailand and find someone that knew their way around the jungle. People that could speak Cambodian to talk to each other.

After they left the communists evacuated everyone out of homes. We did not know we'd be gone for good. We took what we could carry. The first day we left we went and camped, it was out in the open- farm land. The second day we started running out of food. Because we did not think we'd be gone that long. Kim and I and her friend came back to Kim's house. Kim's friend found food and took it back to the camp to give them food. We started looking through the house and the communists found us in the house. We were scared. Something about them put a fear in you. Day to day you lived in fear. They were criminal minded. They were not scared to beat you, kill you.

They had a hotel they turned into a slaughter house. They put us in a room with our hands tied around our back. We sat on the bed and the room was covered in blood... walls, floor, everywhere. There was a man next door and they whipped him all night long. At first his screaming was so loud and by morning you could not hear him anymore. We were scared to talk to each other so we just stared at each other. We kept wondering what happened to him because we could not hear him anyone. We wondered what he did to deserve that. We looked out the window and the light was shining in. We heard them come down the hall—we thought they took him away. A boy told us when we got there that the man had been there the day before.

That morning they asked us about breakfast. We did not want to eat. Lunch they brought us curry chicken and rice but we just stared at it. And the boy told us to eat. And I wondered if it was for strength for our whipping. Kim was very smart and clever. She knew some guy and she asked if she could see him. So they let us go see him. The second in command was there. Kim was praising them for their power and authority. Buttered up to them. She was telling them

how we were nothing and they were much better than us. They want to know we know where our place was. He told his man to bag us some rice, enough for us to carry. I don't remember walking so fast...fast enough before they changed their mind. We went to the camp and everyone had wondered where we had been. We knew we had to leave.

A kid and I walked around and saw some lady dead with long black hair just there. So we did not walk around much more. The next day we packed up and left. Our goal was to get to the border of Thailand. We could not get too close because then they get suspicious. The communists did not care much about the mountain people. The communists focused their destruction in the city.

Someone in the group knew the way to get to Thailand. She just knew the vicinity and she knew of a town. The homes in the town were already there so we just picked a home and stayed there. We found mountain people. We traded our clothes for food and seeds to plant a garden. If we had a garden it would show the communists we were serious about staying. We stayed there for a month. At the same time we were waiting for other family to come and save us and get us out of this country.

God saw an opportunity and helped us. We kept moving from one place to another. These men that were to find us, how would they find us? How would they know where we are? Some men asked a neighbor where Kim was. These neighbors questioned Kim what was going on. And said if you do not let us come with you we will tell the communists on you.

These men were hunters. God directed her family to find the right men that knew their way around. There were 72 people in that whole place. We knew we had to get out the next day because the night before we heard digging and knew it was our graves. Each day we lived in fear day to day.

For us we did not know to call on God's name and he would be there. But despite that He was always there.

There was a baby in the group crying all night. Someone gave the mother a sleeping pill but she was

afraid to give it to the baby. But it started raining that night.

There was a hut in the jungle with a light at the porch. But no one was inside, so we were able to cross and ran into dead people. Those guys had flashlights so we could see the trap wire. They told us not to slip or we would blow up. So we crossed the border and the Thai government had trucks waiting each morning. They picked us up and took us to camp.

From there we went to the states. After high school I had to get out of there (living with Kim and her family). They said I could stay with them until I could get an apartment. They were heavily into drugs, so it was 2 weeks later and I had to get out of there.

I moved in with Anita and Marjorie. Anita is the one that took me to church. But I still did not know what was going on. At church they played a song, Rising Again by Dalton and the Lord at that very moment something was happening in my heart. And I did not know what it was. I felt overjoyed. I'd never felt like that before. My apt was on the other side of the brick way and I felt like bouncing home. Anita read me the bible every night. Her parents sent me a bible later. And I was so dried and emptied that the word of God was so nourishing to me that I could not put it down. Anita was in a volunteer service and when her term ended she stayed in California. I met some friends and joined and two years later Greg came and that's when I met him.

Since I became a Christian- all the things you went through you were a different person. Now you are a new person in Christ. God has given me a new identity through him.

When I was a little girl my father wasn't around much. But my father is around all the time. I had a family which I miss all the time and now I belong to another family—the family of God. God continues to show me his love. Jesus Christ is a good shepherd he went the distance to find that lost sheep. I do feel home. He taught me the truth and gave me the life.

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***Jessica Pearson is a reader of Searching for the Truth magazine.***

## SEARCHING FOR MISSING CHILDREN SEPARATED ON 17 APRIL 1975

My name is Khem Sophea. I am a 68-year-old mother who currently lives in Toek La-ak II commune, Tuol Kork district, Phnom Penh, Cambodia. I am searching for my three missing children, listed below:

1. So Huong alias Hong, male, was around 15 years old when separated
2. So Sokha alias Srei, female, was around 8 years old when separated
3. So Nary alias Poeu, female, was around 4 years old when separated

In 1975, my four children and I were living with my friend (the mother of Mr. Y) near Silep Market in Phnom Penh. As far as I remember, it was around 10 p.m. the night before Phnom Penh was captured by the Khmer Rouge; I had already put the children to bed when I went to shower. After finishing, I did not see all of them. I was frightened and went downstairs with my wet clothes. I thought that my oldest child (So Huong) would take his siblings and our bags downstairs. As I reached the ground floor, though, I saw only my second child named Vanny (alive). I heard people saying that my other three children were traveling with the landlord in a Peugeot 403, and that my second child refused to get on the car as it was too full with objects and people.

I was so frustrated and confused and I did not know what to do after hearing this, so I continued on my journey hoping to find my children. I walked with my second child until I reached the Kbal Thnal Bridge. There, I met an acquaintance who told me that my three children got in the car with other people and drove past O-Russey Market. I then really wanted to return to Phnom Penh, but the Khmer Rouge did not allow us to do so. So, I continued walking until I arrived at Koh Krabei commune. There, I met another acquaintance, who told me that the car transporting my children was travelling to Ang Ta Saom in Takeo province. I did not lose hope; I asked the villagers there to allow me to get on their raft crossing the river to Koh Toch in order to reach Ang Ta Saom.

Unfortunately, once I reached Koh Toch, the Khmer Rouge did not permit us to go to Ang Ta Saom. I therefore went to Kraing Yauv so that I could continue my trip to Ang Ta Soam from there. A few days later, I arrived in Ang Ta Soam and came across a woman who informed me, "Yesterday, your children wished to come with me. But I told the oldest child (So Huong) that he must find a cart to carry his siblings with first. Now, I do not know where they went." I almost fainted hearing this. This was the last time I heard about my children. Since then, although I tried to ask everyone about them, I did not hear any news. Today, I still do not know whether my children are dead or alive. If anyone has any information about them, kindly contact me through the following phone numbers: 016 888 369 or 011 720 720; or via the Documentation Center of Cambodia. Thank you. ***Khem Sophea***





# 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)

