

# មជ្ឈមណ្ឌលឯកសារកម្ពុជា

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## Examining Models of Justice in Post-Genocidal Cambodia

I went to Cambodia to research the question of justice in post-genocidal Cambodia. I looked at various models of transitional justice and how they could be applied to the current situation in Cambodia. Specifically, I spoke with former members of the Khmer Rouge regime and with victims of the regime, and attended the ongoing trials of senior Khmer Rouge leaders at the Extraordinary Chambers in the Courts of Cambodia (ECCC) in the outskirts of Phnom Penh. After listening to the stories from both the victims and the perpetrators of the horrors of the regime, I realized that no amount of legal prosecution, punishment, forgiveness, and truth-telling can ever compensate for the torture, the starvation, the fear, and the killings that defined this period in Cambodian history.

“Justice,” as a concept, implies fairness, and is therefore an impossible goal after a genocide. Youk Chhang, the director of the Documentation Center of Cambodia (DC-Cam), said, “You can think of the most severe punishment in the world and it wouldn’t be fair.” (Youk Chhang Interview 8). It would not be “justice.” “Justice” in its highest, ideological form is unattainable. However, “models of

justice” can be utilized to approximate “justice” and facilitate reconciliation. I propose that a combination of the retributive and restorative models of justice and well-designed social programs can be used to achieve reconciliation for Cambodia on an international, national, communal, and individual level. I examine the strengths and weaknesses of each model and social program and how each are currently being implemented in Cambodia and how each can be improved to better promote reconciliation and restore normalcy.

### *Retributive Justice: the ECCC*

The retributive model of justice is widely supported as an effective and required model for addressing crimes and administering “justice.” The retributive model calls for the accounting of wrongdoings (crimes) through the legal process (courts) and suggests that the state should hold accountable and punish the wrongdoers (criminals) (Amstutz 2006:165). The United Nations has repeatedly called for and/or endorsed the use of the retributive model in cases where international law and, in particular, international human rights law, has been violated. Cambodia is no exception.<sup>1</sup> The U.N. has worked with the Cambodian government (under the leadership of President Hun Sen) to create a “mixed tribunal”, known as the ECCC, to address the crimes of the Khmer Rouge. The ECCC is designed “to hold top leadership accountable for crimes against humanity, war crimes, and grave breaches of the Geneva Convention” and to punish those

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<sup>1</sup> It is important to note that the U.N. was seriously delayed in its response to the Cambodian genocide for reasons that will be discussed later.

convicted with a maximum sentence of life in prison and a minimum sentence of five years in prison (“An Introduction to the Khmer Rouge Trials” 2008:5).<sup>2</sup> To achieve its goals, the ECCC has formed an investigative committee, a prosecution team, and a defense team, whose arguments will be heard by a panel consisting of three Cambodian judges and two international judges. The trials began in March 2009.

The strength of the trials lies in the mutual cooperation and coordination between the U.N. and the Cambodian government (through the “mixed tribunal”).<sup>3</sup> Cambodia lacks rule of law so it is the role of the U.N. to ensure that the ECCC meets international legal standards regarding criminal/human rights proceedings (“An Introduction to the Khmer Rouge Trials” 2008:3). It is important that the ECCC meet these standards so that the international community can accept the verdicts of the trials as legitimate. The international community has a stake in successful proceedings because trials that are perceived as transparent and fair set international precedents for establishing an international court, bringing the accused to court, seeking the truth through the trial process, enforcing international law, and finally, punishing those in violation. At the same time, it is important to involve the Cambodian government to give Cambodia ownership over the trial process. Cambodia has a history of domination by foreign powers and complete U.N. control over the trial process could be viewed as another attempt to infringe upon Cambodian sovereignty. Similarly, the trials will more likely serve their goal of

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<sup>2</sup> Capital punishment was abolished with the signing of the 1993 Constitution of the Kingdom of Cambodia.

<sup>3</sup> The “mixed tribunal” is the first of its kind.

providing “justice” (or relief and reconciliation) to the Cambodian people if they are conducted in Cambodia with the involvement of the Cambodian government and people, instead of in another country, which has been done in other international trials involving genocide.<sup>4</sup>

Another potential, but significant benefit resulting from the joint cooperative participation of the U.N. and the Cambodian government is the strengthening of the national rule of law in Cambodia and the weakening of Cambodia's “culture of impunity” (Etcheson 2003:171). The Cambodian government can learn from the ECCC trial process in which the accused, judges, lawyers, witnesses, experts, and evidence are all given a fair hearing before a verdict is reached. This valuable experience could ultimately improve the often corrupt, ill-respected, inconsistent, and unpredictable, domestic judicial system currently in Cambodia. Former Secretary-General of the U.N., Kofi Annan, affirms that “[The ECCC] will leave Cambodia with a positive legacy for its continuing efforts in strengthening the rule of law” (“An Introduction to the Khmer Rouge Trials” 2008:3). In summary, the ECCC is a positive development both for the international community and for the nation of Cambodia because it simultaneously creates a system for establishing a precedent for seeking international justice and for improving rule of law in Cambodia. Accessible courts reliant on fair and consistent procedures are a necessary first step towards achieving international and national reconciliation.

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<sup>4</sup> The International Criminal Tribunal for Rwanda, for example, is taking place in Arusha, Tanzania.

In terms of achieving communal and individual reconciliation, however, the ECCC is less satisfactory. News coverage of the trials by local and international press is not disseminated widely into all areas of Cambodia, especially into the rural areas. When I spoke to villagers in different provinces, many of them knew nothing of the trials beyond the fact that they were indeed taking place. A study conducted by the University of California, Berkeley, reflects my experience, reporting that 85 percent of Cambodians interviewed had little or no knowledge of the ECCC (Berkley 2009:1). Furthermore, many Cambodians, especially those living in remote areas, are unfamiliar with traditional Western law and practice (Etcheson 2003:150). For example, one of my interviewees, Kongsuor, a former Buddhist monk from the Eastern province, was offended by the idea of lawyers in court defending Khmer Rouge leaders whom he knew to be guilty (Kongsuor Interview 2009). The concepts of the right to a defense and of innocence until proven guilty are not part of the judicial experience in Cambodia. There is also a high level of distrust of the judicial system among the majority of Cambodians largely due to incompetent bureaucrats, confusing laws, insufficient resources, and high levels of corruption (Etcheson 2003:171). The Berkeley study reported that 62 percent of Cambodians interviewed believed going to court meant paying bribes to judges (Berkeley 2009:33). In my interview with Nouchhay, a Khmer Rouge survivor from the Central Province, he identified corruption as the biggest problem facing Cambodia. With the majority of Cambodians having little knowledge of the ECCC, a limited understanding of the trial process itself, and little trust in the

judicial system in general, it is unlikely that the ECCC and retributive justice can achieve reconciliation for individuals and for communities.

The 30-year delay in the start of the ECCC trials has also severely compromised both the judicial and reconciliation processes. The delay in the trials can be attributed to the domestic chaos that followed the defeat of the Khmer Rouge and to the Cold War mentality of the era. Although the reign of the Khmer Rouge regime ended in 1979 when it was ousted by the Vietnamese, the ensuing domestic chaos, which lasted until 1998, did not allow the luxury of conducting free and fair trials.<sup>5</sup> Perhaps more significantly, however, it was the Cold War mentality, (in which the United States and China, both of which were enemies of the Vietnamese, supported the Khmer Rouge as the legitimate government of Cambodia), that thwarted any international attempts to prosecute the Khmer Rouge.<sup>6</sup> During the 30-year delay, time took its toll on memories, locations, health, and emotions. Many of the most important players died, including Pol Pot, who was arguably the “most responsible” for the atrocities of the Khmer Rouge. Fawthrop and Jarvis states, “Weariness from the slow pace and constant let downs...prompted an increasingly negative media coverage that reflected and

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<sup>5</sup> “In August 1979, Pol Pot and Ieng Sary were tried in absentia by the Vietnamese-backed government in Cambodia, the “People’s Republic of Kampuchea”, (PRK), and were found guilty of the crime of genocide. However, Pol Pot and Ieng Sary did not appear in court and did not serve their sentences. The verdicts of the PRK trials were not recognized by the international community. (Linton 2002:41).

<sup>6</sup> With the support of the U.S. and China, the Khmer Rouge was allowed to represent Cambodia at the U.N. until 1991. When the Cold War ended, however, the U.S. changed its policies toward the Khmer Rouge, withdrew its diplomatic support of the regime, and pushed for trials of Khmer Rouge leaders. China, on the other hand, adamantly opposed any kind of trials of the Khmer Rouge regime (Ciorciari).

itself helped engender a general loss of confidence in the [trial] process” (Fawthrop and Jarvis 2004:233).

The 30-year delay means that the majority of present-day Cambodians had not yet been born during this brutal time in their country’s history. Although 85 percent of young Cambodians surveyed in the Berkeley study said that they would like to learn more about their country’s history, most are more concerned with improving their own lives (health care and food), strengthening the economy, and building infrastructure.<sup>7</sup> Only 2 percent of respondents mentioned justice for the Khmer Rouge as a priority (Berkeley 2009:2). Older individuals who survived the Khmer Rouge may have never even imagined seeking legal justice, much less expected a formal trial by the highest courts. The long delay of the trials validates their feelings that there is no justice in Cambodia. Kongsuor (mentioned above) said that the more the trials are delayed, the less meaningful they will be because the victims are getting older or dying, and may not live to see justice delivered from the ECCC trials (Kongsuor Interview 2009).<sup>8</sup> These differing attitudes by the young people and by the old people suggest that the majority of the Cambodian people have little vested interest or hope that justice will be served through the ECCC trials. Linton argues, “Cambodians want to...move together towards a better future.

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<sup>7</sup> I interviewed a high school student, Sreng Sroeur, who stated that he was more interested in learning English than learning about the Khmer Rouge regime (Sroeur Interview 2009).

<sup>8</sup> Kongsuor also suggested that perpetrators found guilty by the ECCC should be required to pay reparations to the victims (Kongsuor Interview 2009). The ECCC “may order the confiscation of property or money that the defendant has acquired unlawfully or by criminal conduct”, but it will ...”be turned over to the state” and not necessarily to the victims (An Introduction to the Khmer Rouge Trials 2008:7).

It seems no longer to be a personal issue between victim and perpetrator, but of doing what is necessary for all to have a better life” (Linton 2002:226).

Despite its limitations, there are other significant gains to be made from the retributive model of justice via the ECCC such as:

- validating the grievances, sufferings, and losses of the victims in an international and national arena,
- acknowledging the complexity of the role of the perpetrator,
- creating and stimulating a national and international discussion on the issue of human rights violations, and in particular, of genocide (Etcheson 2003:150),
- sending a powerful international message to those who are violating or who might violate human rights or commit genocide,
- establishing a fact-based historical record of the Khmer Rouge period (Linton 2002:140),
- and teaching current and future generations about respecting international law and procedures, especially in regards to basic humanity and morality (Youk Chhang Interview 4).

The international community and a significant portion of the Cambodian community do vigorously support the work of the ECCC in seeking the truth and in prescribing punishment for the senior leaders. Several recent surveys show that between 75 and 85 percent of Cambodian respondents were in favor of ECCC trials of senior Khmer Rouge leaders (Etcheson 2003:150). Surprisingly, however, the typical Cambodian villagers whom I interviewed, were, more often than not, adamantly opposed to prosecuting perpetrators at mid and lower levels who might now be



their neighbors. Instead, a typical, observant Buddhist villager relies on karma, not the ECCC, to even the score, supporting the idea that the ECCC is less relevant on a local level.<sup>9</sup>

Recently, there are accusations of corruption in the ECCC. These accusations (especially if proven to be true) could seriously undermine achieving justice and reconciliation on every level, but especially on the international and national levels. If the ECCC is found to be corrupt, the trials and its verdicts will not be viewed as legitimate in the eyes of the international or Cambodian communities. Loss of credibility at these trials could validate the naysayers who believe that justice on an international level is unattainable because there is no “World Police” or “Supreme Leader” to ensure that every participant (or in some cases, entire countries) acts with the highest level of professionalism. A failure of the ECCC to complete legitimate, untainted trials could seriously hinder the implementation of similar mixed tribunals in the future. Furthermore, ECCC corruption will undermine any possibility of establishing rule of law in Cambodia. The ECCC will not leave a positive legacy as Kofi Annan had hoped. The likelihood that these accusations of corruption are true are beyond the scope of my research (as the accusations are recent and there is no comprehensive investigation of these accusations). However, possible corruption charges are another important reason why Cambodian reconciliation should not rely solely on the ECCC and the retributive model of justice.

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<sup>9</sup> One important Buddhist saying is: “Vindictiveness is ended by not being vindictive” (Linton 2002:23).

### *Restorative Justice: Recognition and Forgiveness of Crimes*

The restorative model of justice can be used as an adjunct to the retributive model of justice to overcome some of the weaknesses in the retributive model at the individual and communal levels. The restorative model generally includes the recognition of and the forgiveness of crimes, which can facilitate reconciliation at the local level (Amstutz 2006:153). Amstutz states that the term “reconciliation” commonly “denotes the renewal of friendship and the reestablishment of community” (Amustutz 2006:154). The Khmer Rouge systematically destroyed the traditional bonds of family, friendship, and community, replacing these bonds with absolute obedience and loyalty to the “Angkar” (Linton 2002:59). Testimonies from survivors reveal that failure to obey the orders of the Khmer Rouge resulted in torture, starvation, and death of the offender. For this reason, legally prosecuting and punishing those who complied with the Khmer Rouge out of fear may actually hurt the reconciliation process by further disrupting family and community life. Locking up all “perpetrators” will break up families, leaving wives without husbands, children without parents, etc. Because the retributive model is counterproductive on an individual and communal level, the restorative model is paramount to achieving reconciliation for individuals, families and communities.

The Cambodian government has chosen to implement the restorative model of justice by condemning the Khmer Rouge regime as a whole (recognizing the

crimes), but also electing to forgive (not seeking legal prosecution and punishment of) mid and lower level perpetrators. In a published statement, President Hun Sen acknowledged the Khmer Rouge's guilt in the loss of three million Cambodian lives between 1975-1979 " (Introduction to the Khmer Rouge Trials 2008:1). He also declared that the "crimes of the Khmer Rouge period were committed not just against the people of Cambodia but against all humanity" and promised to "build a culture that will prevent the recurrence of such crimes anywhere" (Introduction to the Khmer Rouge Trials 2008:1). President Hun Sen's recognition and condemnation of the Khmer Rouge regime is critical in validating the grievances, sufferings, and losses of the victims and their families, and, in reassuring the Cambodian people, "Never again." Many members of the Cambodian government, including President Hun Sen himself, were at some point Khmer Rouge members (either by choice or through intimidation) (Fawthrop and Jarvis 2006:141). It is therefore important that they disavow their previous loyalty to the Khmer Rouge regime and condemn its actions as not only criminal, but immoral, through statements such as the one made by President Hun Sen.

The second part of the restorative model implemented by the Cambodian government is the forgiveness of mid and lower level perpetrators. An ECCC publication states "the Cambodian government and the U.N. decided that the court should limit prosecutions to the senior leaders of [the Khmer Rouge]...those *most responsible* for committing serious crimes" [Emphasis added] ("An Introduction to the Khmer Rouge Trials 2009:6). By forgiving mid and lower perpetrators and focusing on the prosecution of senior leadership, the Cambodian government and

the U.N. avoid the difficult task of discerning who is a victim and who is a perpetrator as many “perpetrators” were victims themselves. I witnessed this gray area between victim and perpetrator first hand in my interview with former S-21 Prison Guard Kiev Peou. Peou explained that he was taken by the Khmer Rouge when he was 12 years old and was trained as a child soldier before being sent to work at S-21 Prison at age 15 (Peou Interview 2009). Veneciano explains, “Cambodian children [were] trained to carry out Khmer Rouge orders, no matter how brutal and cruel” (Veneciano 2007:30). Several of my interviewees felt that legal prosecution and punishment of “perpetrators” living in their community was unnecessary for this reason.<sup>10</sup> One interviewee, a neighbor of Him Huey, (a notorious S-21 operating leader), said he did not believe Huey should be punished because he was following orders out of fear for his life (Taim Interview 2009).<sup>11</sup>

Forgiveness has the potential to restore a peaceful community life. It is not only a mechanism for reuniting and keeping families together (by not jailing perpetrators), but is also a mechanism for

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<sup>10</sup> Another interviewee, Ang, from the Eastern province, said she felt the legal prosecution and punishment of a Khmer Rouge medic who harmed her during the regime was unnecessary. She said her belief in Buddhism demanded she not seek vengeance for the medic’s treatment of her (Ang Interview 2009). Of the few interviewees who answered yes to the question regarding the expansion of the trials, none could name any other members of the Khmer Rouge (besides those already on trial) whom they felt should be tried by the ECCC.

<sup>11</sup> Prak Khan, another S-21 Prison Guard, also said he acted out of fear for his life, stating “If I [didn’t] work hard and well, I was afraid I might be accused as [an] internal enemy. So I worked hard to gain the trust [of the Khmer Rouge] in me...I slept with nightmares fearing they might one day [take] me. It was a terrifying situation when one by one my colleagues disappeared everyday.” (Prak Khan Interview 2).

- eliminating community-wide stress and panic caused by fear of legal prosecution and punishment,
- preventing further hostilities resulting from disagreements over the facts of individual cases (conflicting testimonies or memories),
- discouraging the seeking of vengeance, which is unlikely to provide “justice” and is not in line with Buddhist teaching (Amstutz 2006:158),
- cultivating empathy and compassion for the perpetrators, many of whom share the same grievances, sufferings, and losses of the victims (Amstutz 2006:158-159),
- encouraging forward-thinking or “moving on” mentality,
- repairing broken relationships,
- and finally, promoting a return to normalcy.

Critics of state forgiveness claim that it is a deliberate effort by current government officials to evade legal prosecution and punishment for their own role in the Khmer Rouge regime. They also claim that forgiveness exacerbates Cambodia’s “culture of impunity.” Craig Etcheson, explains, “The root of the problem of impunity leads to people beginning to ask themselves the question: Any crimes I could commit will be less than those committed by the Khmer Rouge. They got away with it, so why should I also not do as I wish?” (Etcheson 2003:171). Etcheson raises a serious concern. However, the likelihood that forgiveness will result in individual and communal reconciliation is higher than the likelihood that total accountability will reverse Cambodia’s deeply-rooted “culture of impunity.” Furthermore, holding every Cambodian who committed a crime during the Khmer Rouge regime

accountable is not realistic or practical in terms of time and resources. Holding accountable *those most responsible* (the senior leadership of the Khmer Rouge) through legal prosecution is already underway and could combat Cambodia's "culture of impunity." In other words, there can be accountability and forgiveness through the simultaneous use of the retributive and restorative models of justice.

### *Policy Prescriptions: Retributive and Restorative Models of Justice*

The U.N. and the Cambodian government can take steps to improve the use of both the retributive and restorative models of justice. Well-designed social programs can improve and enhance each model's ability to achieve reconciliation for Cambodians. The Documentation Center of Cambodia (DC-Cam) has been instrumental in developing a variety of social programs, which aid in the reconciliation process. Some of DC-Cam's social programs involve efforts to preserve and to translate Khmer Rouge documents, to distribute textbooks of the history of the Khmer Rouge to Cambodian schools, to document the testimonies of survivors, to provide (to the ECCC) evidence of the atrocities committed by the Khmer Rouge, and, to build a permanent research center, library, museum, and memorial site dedicated to the victims of the Khmer Rouge. However, Cambodia needs more than the efforts of DC-Cam to successfully achieve reconciliation. The international community and the Cambodian government should coordinate with DC-Cam (and other organizations) in developing, funding, implementing, and expanding different kinds of social programs.

Social programs, which enhance the retributive model of justice should be designed to:

- increase direct victim participation in the trial process by providing transportation for Cambodians to attend the trials and by helping victims file formal grievances with the ECCC against the Khmer Rouge to be used as evidence in the court. DC-Cam has designed a social program to this effect, the Victims Participation Project (VPA). VPA should receive more funding and should be expanded to reach more victims.<sup>12</sup>
- increase indirect victim participation in the trial process by educating citizens about the rule of law and by making information available and accessible to all Cambodians, especially those in the remote areas. This can be accomplished through pamphlets, radio broadcasts, community leaders, television, and in the schools.
- publicize and emphasize apologies through widespread press. For example, Duch, the director of S-21 Prison, took responsibility and apologized in court for his role in the Khmer Rouge regime. Informing Cambodians about his admission of guilt and his apology can help with individual and communal healing.
- publicize and emphasize convictions through widespread press. Convictions will end the long-delay in obtaining legal justice and hopefully deliver a measured degree of closure.
- provide reparations. Any accused Khmer Rouge leaders found guilty by the ECCC who have monetary or other assets should be required to give up those assets. These assets should then be used to fund memorializing

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<sup>12</sup> My interviewee, Kongsuor, filed a criminal complaint against the Khmer Rouge with the ECCC through the VPA. He said he was glad to file the complaint and was willing to testify at the court (Kongsuor Interview 2009).

efforts, social welfare programs for victims, education about the Khmer Rouge period, etc.<sup>13</sup>

Social programs, which enhance the restorative model of justice should be designed to:

- publicize the government's acknowledgement of the crimes committed down to the local level (through pamphlets, radio broadcasts, television, local leaders, and in schools, in order to inform all Cambodians)
- formally educate the Cambodian population about the Khmer Rouge period by mandating a curriculum for schools, by providing textbooks, and by training teachers how to teach about this period in Cambodian history. DC-Cam has already designed a social program to this effect, but it needs to be expanded and better funded.
- develop healing programs based on Buddhist teaching. 95 percent of Cambodians are Buddhists (Veneciano 2007). The teachings of Buddhism can help followers cope with and overcome anger and suffering as well as promote reconciliation.

No single model of justice is sufficient to reconcile the entire Cambodian population. 70 percent of Cambodians are under the age of 25 and have no memory of the Khmer Rouge period. The younger generation therefore needs to be reconciled in ways that are different than those of the older generation, which suffered first hand. It is important that the reconciliation process be multi-faceted and involve opportunities to not only remember the past, but to positively impact

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<sup>13</sup> See Footnote 8.



the future. Establishing rule of law in Cambodia through the ECCC, and ensuring that this will never happen again, through education and social programs, may not be “justice” for genocide, but perhaps could be reconciliation for the tortured past and hope for a peaceful future.

## Work Cited

- Amstutz, Mark R. "Restorative Justice, Political Forgiveness, and the Possibility of Political Reconciliation." *The Politics of Past Evil: Religion, Reconciliation, and the Dilemmas of Transitional Justice* (2006): 151-189.
- An Introduction to the Khmer Rouge Trials*. Extraordinary Chambers of the Courts of Cambodia. United Nations. 2008. Print.
- Ciorciari, John D.. "Great Power Posturing and the the Khmer Rouge Tribunal." *Documentation Center of Cambodia* Web.1 Jul 2009.  
<[http://www.dccam.org/Tribunal/Analysis/Great\\_Power\\_Posting.htm](http://www.dccam.org/Tribunal/Analysis/Great_Power_Posting.htm)>.
- Etcheson, Craig. *After the Killing Fields: Lessons from the Cambodian Genocide*. Westport, CT: Praeger Publishers, 2003.
- Fawthrop, Tom, and Helen Jarvis. *Getting Away with Genocide? The Elusive Justice and the Khmer Rouge Tribunal*. UK: Pluto Press, 2004.
- Interview with Prak Khan Transcript*. Documentation Center of Cambodia. Phnom Penh.
- Interview with Youk Chhang Transcript*. Documentation Center of Cambodia. Phnom Penh.
- Kongsuor. Personal Interview. 4 June 2009. Interview.
- Ang. Personal Interview. 4 June 2009. Interview.
- Linton, Suzanna. *Reconciliation in Cambodia*. Phnom Penh: Documentation Center of Cambodia, 2002.
- Nouchhay. Personal interview. 3 June 2009. Interview.
- Peou, Kiev. Personal interview. 4 June 2009. Interview.
- Phuong, Pham, Patrick Vinck, Mychelle Balthazard, Sokhom Hean, and Eric Stover. "So We Will Never Forget." Human Rights Center University of California Berkeley (2009).
- Sroeurn, Sreng. Personal interview. 8 June 2009. Interview.
- Taim, Tam. Personal interview. 8 June 2009. Interview.
- Veneciano, Jorge Daniel. *Night of the Khmer Rouge*. NJ: Paul Robeson Gallery, 2007.