

# មជ្ឈមណ្ឌលឯកសារកម្ពុជា

## The Khmer Rouge Tribunal: Justice for Genocide in Cambodia?

by

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Genocide is like 'nuclear contamination' because 'you get it for the rest of your life'.

- Rithy Panh<sup>1</sup>[1]

**'Without justice we will never have peace of mind.'**

- Youk Chhang<sup>2</sup>[2]

The quest for accountability for the former Khmer Rouge is a long story of frustration and perseverance spearheaded by the international community and genocide survivors, which is finally about to come to fruition as the Extraordinary Chambers in the Courts of Cambodia (ECCC) gears up to begin prosecutions. Having achieved this remarkable milestone, what is not so clear is whether the ECCC can provide justice for genocide in Cambodia and end the culture of impunity which has pervaded Cambodian society for at least the past 30 years.<sup>3</sup>[3] This paper will consider the political challenges and complexities of pursuing accountability for the crimes of the Khmer Rouge, and will assess the extent to which the ECCC is likely to meet the needs and expectations of ordinary Cambodians for justice in the form of truth and acknowledgement which could answer the pressing question of why such crimes were committed. The ECCC will be assessed in terms of its capacity not only to provide justice for the past, but also to promote justice in the future through the rule of law and respect for human rights. This paper will go further to question the cultural assumptions of the Western legal justice provided by the ECCC and suggest the need for alternative approaches which might be more successful in promoting peace with justice in Cambodia.

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1[1] Quoted in Maguire 2005: 193.

2[2] Interviewed by Tom Fawthrop, 22 October 1997 (Fawthrop and Jarvis 2005: 253)

## *The Cambodian Context*

Cambodia was once a great nation covering much of Southeast Asia, with its own distinct Khmer culture influenced by India's two great religions, Hinduism and Buddhism. Culminating in the Angkor dynasty, the glorious Khmer Empire lasted from the seventh to the thirteenth century, after which it was progressively weakened by invasions from its neighbours Siam (now Thailand) and Vietnam. In 1863 Cambodia became a French protectorate and then colony until 1953, when King Norodom Sihanouk regained the country's independence.<sup>4[4]</sup>

After seventeen years of relative peace as an independent country, Cambodia became drawn into the Vietnam War. In 1969 the U.S. Air Force had begun secretly bombing Cambodia in an effort to eliminate the Vietnamese communist bases, and the anti-Vietnamese Lon Nol government took power in Cambodia (renamed the Khmer Republic). Sihanouk, now in self-imposed exile, forged a coalition with the communist-backed Khmer Rouge who fought a civil war with the U.S.-backed Lon Nol government. In 1975 the United States withdrew from Vietnam, Phnom Penh fell to the Khmer Rouge, and the Cambodian people were subjected to three years of the brutal Khmer Rouge regime led by Pol Pot (Democratic Kampuchea) under which an estimated one to two million Cambodians died (Kiernan 1997).

In January 1979 Phnom Penh fell to the Vietnamese, the Khmer Rouge retreated to the Thai border and the country's name was changed to the People's Republic of Kampuchea (PRK). The international community condemned the Vietnamese invasion, and the Pol Pot regime continued to be recognised by the UN as the official government of Cambodia. In 1989 the Phnom Penh government with Hun Sen as Prime Minister renounced communism and changed the country's name to the State of Cambodia, and the Vietnamese withdrew. Elections in May 1993 under the supervision of the United Nations Transitional Authority in Cambodia (UNTAC) resulted in a coalition government with Prince Ranariddh (Sihanouk's son) and Hun Sen (leader of the pro-Vietnamese Cambodian People's Party) as co-prime ministers. However, following a coup against Ranariddh and his other opponents in July 1997, Hun Sen declared himself sole Prime Minister of Cambodia. The Cambodian People's Party has remained in power since then with Hun Sen as Prime Minister.

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<sup>3[3]</sup> Etcheson (2005: 168) claims that 'impunity has been a consistent characteristic of Cambodian political life' since ancient times and that 'the rule of law has never been an important factor at any stage in Cambodian history'.

<sup>4[4]</sup> For further details on Cambodian history and the genocide, see Chandler (1996) and Kiernan (1996).

### *30 Years of Impunity*

Following the genocidal Pol Pot regime, there were no significant or effective official public processes of accountability implemented in Cambodia, despite the numerous initiatives proposed by the international community and Cambodian government.<sup>5[5]</sup> Nor were there any official international acts of condemnation or prosecution. The People's Revolutionary Tribunal of Khmer Rouge leaders, Pol Pot and Ieng Sary, held in Phnom Penh in August 1979, imposed a sentence of death in absentia for the crime of genocide, but this was not recognised internationally because of due process objections to the trial procedures and the diplomatic isolation of the PRK regime, and the sentence was never carried out (Vickery & Roht-Arriaza 1995: 246; Marks 1999; Etcheson 2005: 14-17). According to Hammer and Urs (2005: 26), by turning the trial into a tool of propaganda, the PRK 'co-opted justice in the name of politics'.

The international community was at first deterred by Cold War constraints, political priorities, and respect for state sovereignty from condemning the atrocities of the Pol Pot regime. Once the Cold War was over, the international community was still constrained by the legacy of Cold War geopolitical alliances, as well as fears that they might also be held to account for their role in supporting the Khmer Rouge. The United Nations played a significant role in rebuilding peace in Cambodia, but the issues of justice and reconciliation were not addressed in the Paris Peace Agreement of October 1991. The final agreement did not preclude the Khmer Rouge from participating in the Cambodian elections, nor did it prevent former officials of the Khmer Rouge associated with the genocide from holding office in the future.<sup>6[6]</sup> Hammer and Urs (2005) attribute the failure to pursue justice for the Khmer Rouge during these two periods to the 'politics of ideology' (1975-89) and the 'politics of reconstruction' (1989-1996). As pointed out by Etcheson (2004: 182): "issues of transitional

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<sup>5[5]</sup> Etcheson (2005: 129-39) provides a thorough analysis of the various attempts at redress or justice over the first 20 years following the fall of the Pol Pot regime, including attempts to instigate a case at the ICJ; a Cambodian lustration law adopted in 1994; various US actions including adoption of the Cambodian Genocide Justice Act also in 1994; and efforts to establish a truth commission in 1996-97. See also Fawthrop and Jarvis (2005) who include an account of the Australian initiative in 1986 to pursue international legal accountability for the genocide in Cambodia which was ultimately quashed by political pressure from the US as well as resistance from ASEAN and China (2005: 77-82).

<sup>6[6]</sup> The Khmer Rouge subsequently withdrew from the peace process and elections.

justice and accountability for serious violations of international humanitarian law are always intensely political.”<sup>7[7]</sup>

The Khmer Rouge, meanwhile, were able to maintain their strongholds in towns such as Pailin near the Thai border. They continued their guerrilla activities with impunity for the next 20 years until the organisation was formally disbanded in 1998 after the death of Pol Pot and the defections of two former Khmer Rouge leaders, Khieu Samphan and Nuon Chea (Etcheson 2005). Ieng Sary had defected after being granted amnesty in 1996, while two other former Khmer Rouge leaders, Ta Mok and Duch, were arrested by the Cambodian government in March and May 1999 respectively. Both men faced charges of treason, torture, murder and genocide as well as breaking the 1994 law banning the Khmer Rouge.<sup>8[8]</sup> Ta Mok died in 2006, but Khieu Samphan, Nuon Chea, Ieng Sary and Duch, along with Ieng Thirith, have survived to be indicted by the ECCC.<sup>9[9]</sup>

### *The Slow Path to Accountability*

The passing of the Cambodia Genocide Justice Act in the US in April 1994 and the Cambodian government’s passing of an act to outlaw the Khmer Rouge in July 1994 were turning points in the path towards accountability (Hammer and Urs 2005: 34-5). Early in 1997, the UN commenced efforts to establish an international criminal tribunal to try the Khmer Rouge leaders, and in June the Cambodian co-prime ministers, Prince Norodom Ranariddh and Hun Sen, formally requested UN assistance in setting up a tribunal. However, efforts foundered in trying to find a country willing and legally able to hold and possibly try Pol Pot. Subsequently, a UN Group of Experts’ report released in November 1998 recommended the establishment of an *ad hoc* international tribunal, and in March 1999 the UN Secretary-General submitted a proposal for an international tribunal to both the Security Council and the General Assembly.<sup>10[10]</sup>

Establishment of the tribunal was delayed, however, by the inability of the UN and Cambodian government to agree on the composition and functioning of the proposed tribunal. At one stage, Prime Minister Hun Sen formally rejected an international tribunal as

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<sup>7[7]</sup> Etcheson further documents the politics of genocide justice for the Khmer Rouge (2005: 141-66) and lists the reasons for the failure of the Cambodian government and international actors to end Khmer Rouge impunity (2005: 137-8).

<sup>8[8]</sup> “Charges Filed Against Ta Mok”, *South China Morning Post*, 10 March 1999; “Khmer Rouge Genocide Charge”, *The Australian*, 10 September 1999, p. 8.

<sup>9[9]</sup> For profiles of the former Khmer Rouge leaders see Fawthrop and Jarvis (2005: 254-69).

<sup>10[10]</sup> “Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135”, A/53/850, United Nations, New York, 16 March 1999.

being a threat to the country's fragile national reconciliation, and indicated his preference for national trials with foreign legal assistance.<sup>11[11]</sup> A number of Cambodians in addition to the former Khmer Rouge expressed the fear that a trial could result in further violence. Others dismissed the threat as propaganda promulgated by the former Khmer Rouge to protect themselves from the possibility of prosecution.

A breakthrough in negotiations occurred in April 2000 when US Senator John Kerry helped broker an agreement for a joint UN-Cambodian trial that would include both Cambodian and foreign judges and prosecutors (Langren 2001).<sup>12[12]</sup> A draft Memorandum of Understanding (MoU) was presented by the UN to the Cambodian government in July 2000, but the legislation passed by the Cambodian government in January 2001 failed to satisfy some of the key conditions of the MoU (Köchler 2003: 125). Subsequently, on 8 February 2002 the UN announced that it was abandoning negotiations with the Cambodian government because "as currently envisaged the Cambodian court would not guarantee independence, impartiality and objectivity which are required by the UN for it to cooperate with such a court".<sup>13[13]</sup> The UN and many foreign nations expressed concern that "the corrupt and poorly trained Cambodian justice system was not capable on its own of producing a fair and impartial trial and verdict".<sup>14[14]</sup>

Intense lobbying by the US government and others put pressure on the UN and Cambodian government to settle their differences and negotiations resumed in January 2003 (Chhang 2007: 165). On 6 June 2003 the UN and Cambodian government signed a draft agreement but it took another two years for funding arrangements to be negotiated and the final form of the hybrid tribunal to be agreed. The ECCC was finally established in November 2005 and by May 2006 the judges and prosecutors had been appointed.<sup>15[15]</sup> Trials were expected to begin by mid-2007, but as of December 2008 only pre-trial hearings had commenced.

### *Limitations on Justice*

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<sup>11[11]</sup> Associated Press, 4 November 1999.

<sup>12[12]</sup> Senator Kerry acted as a mediator between the UN and the Cambodian government in Phnom Penh on 28-29 April 2000 (*San Jose Mercury News*, 30 April 2000).

<sup>13[13]</sup> Associated Press, 8 February 2002.

<sup>14[14]</sup> Seth Mydans, "UN Ends Cambodia Talks on Trials for Khmer Rouge", *New York Times*, 9 February 2002

<sup>15[15]</sup> The crimes to be prosecuted include homicide, torture and religious persecution as defined in Cambodian domestic law; genocide as defined by the 1948 Genocide Convention; crimes against humanity as defined by the Rome Statute of the International Criminal Court; war crimes defined as grave breaches of the Geneva Conventions of 1949; and crimes against cultural property defined by the Hague Convention of 1954 (Fawthrop and Jarvis 2005: 221-8).

The ECCC is one of a small number of hybrid tribunals set up by the United Nations in conjunction with national governments.<sup>16</sup>[16] Because of the extraordinary delays in its establishment, the ECCC is the only internationally-backed court ever to prosecute crimes committed during the Cold War, and it is the only tribunal to begin operations since the establishment of the International Criminal Court. It faces significant challenges in obtaining sufficient funding, overcoming delays in its start-up and ongoing operations, upholding standards of fairness, and prosecuting crimes committed more than 30 years ago.<sup>17</sup>[17]

Even if it manages to meet these legal and operational demands, questions remain as to the ECCC's ability to satisfy the need for accountability and Cambodian desires for truth and justice, and most importantly, an understanding of why such crimes were committed by Cambodians against their own people.<sup>18</sup>[18] The temporal jurisdiction of the ECCC means it cannot prosecute crimes perpetrated by the Lon Nol government which preceded the Pol Pot regime, nor address the role of foreign governments in aiding and abetting the Khmer Rouge, nor crimes allegedly committed in subsequent years by Hun Sen and the Vietnamese-installed government. Its ability to end the culture of impunity still prevalent in Cambodia is bound to be only partial. The personal jurisdiction of the ECCC is limited to bringing to justice "senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations" (Meijer 2004: 214). It cannot try those Khmer Rouge leaders who have already died, including Pol Pot and Ta Mok, and it will only be able to try a small handful of the remaining key Khmer Rouge leaders. Some have argued that it would be better to use the additional resources for alleviating poverty rather than an expensive tribunal which will try only a few people.<sup>19</sup>[19] Kek Galabru, President of LICADHO, has asked whether such a tribunal would "bring justice to the Cambodian people

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<sup>16</sup>[16] The hybrid tribunals in East Timor, Kosovo, Sierra Leone and Cambodia reflect moves by these transitional states to reassert their national sovereignty rather than see their nationals tried in international courts (Roper and Barria 2006: 29). This move also attracted the support of UN member states concerned at the escalating costs of funding the ad hoc international tribunals for Rwanda and the former Yugoslavia. Established by United Nations Security Council resolutions, the ICTY and ICTR were financed as an assessed share of the UN budget. By contrast, the hybrid tribunals rely on voluntary contributions (Köchler 2003: 132).

<sup>17</sup>[17] The reliance on voluntary contributions has delayed the commencement of the ECCC trials, as pledges for funding are being sought and obtained from various countries including Japan, Germany and Australia.

<sup>18</sup>[18] Above all, Cambodians want to know why: 'Why did Khmer kill other Khmer?' (PoKempner 2005: 352).

<sup>19</sup>[19] As argued by supporters of King Sihanouk, according to Chhang (n.d.).

and to fight against the culture of impunity? Or is it just a show trial for the international community, especially to appease the donors?"<sup>20</sup>[20]

The culture of impunity which has prevailed in Cambodia is about more than the failure to prosecute the former Khmer Rouge; it is also about the continuing lack of respect for the rule of law in a country which still operates politically on a patronage system where power is more important than the law (PoKempner 2005: 339).<sup>21</sup>[21] The ECCC could build justice capacity in Cambodia, but how effective this will be will depend on the ability to train and equip Cambodians to transform the culture of impunity into a society that respects the rule of law. What is needed in terms of societal transformation is the building of a new national identity which repudiates the narrative of the past and reflects values of impartiality, legality and fairness (353). The value of the ECCC as a forum for reconstituting Khmer identity could be enhanced by accompanying the legal trials with campaigns for public education, community dialogue and reconciliation.

Human rights and other NGOs are working to ensure that ordinary Cambodians are able to learn about the ECCC and to raise issues of concern. For example, DC-Cam has undertaken an outreach program involving 5000 villagers who are being brought to Phnom Penh to visit the Tuol Sleng Genocide Museum, the Choeung Ek killing fields and the ECCC where they are able to ask questions about the upcoming trials. The plan is that these villagers will return to Phnom Penh to attend a week of a trial and that they will then hold public forums about the ECCC when they return to their villages (Chhang 2007: 172). This seems to be a marked improvement on outreach efforts associated with previous tribunals observed by this author in East Timor, Rwanda and Sierra Leone.

According to Maguire (2005: 192-3), some Cambodians have given up on punishment and 'today they simply seek acknowledgment'. Faith in the ECCC to provide truth and acknowledgement by the former Khmer Rouge is likely to be misplaced, however. There is no sign that former Khmer Rouge leaders who have been indicted by the ECCC will depart from the practice of defending their previous actions as being in the interests of the Cambodian people.<sup>22</sup>[22] Khieu Samphan, in an open letter in December 2003, admitted

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<sup>20</sup>[20] Dr Kek Galabru, President, LICADHO (Cambodian League for the Promotion and Defense of Human Rights), as quoted in "Cambodians talk about the Khmer Rouge trial", *Phnom Penh Post*, 4-17 February 2000, p. 12.

<sup>21</sup>[21] Impunity is the blatant, widespread lack of consequences or punishment for crimes or other wrongful acts.

<sup>22</sup>[22] Rather than creating a new respect for the rule of law in Cambodia, the opposite is also possible, if the former Khmer Rouge leaders use the opportunity to continue to justify their actions and policies in terms of liberating or defending the nation (PoKempner 2005: 352-3).

'systematic killings', but in his 2004 book he claimed that he 'didn't know' about Tuol Sleng and had no power to stop the atrocities (Fawthrop & Jarvis 2005: 250). Nuon Chea feels no remorse for the past (Fawthrop & Jarvis 2005: 251), admits only that the regime made some mistakes and blames the Vietnamese for the killing fields (Maguire 2005:192). Both portray themselves as patriots (Maguire 2005: 192). All blame Pol Pot.

Even if these former Khmer Rouge leaders continue to deny their culpability, the finding by the ECCC of individual guilt could provide a strong counter to this denial and the punishment meted out could satisfy the calls for retributive justice. The symbolic potential of the ECCC should not be underestimated in this regard. As described by a genocide survivor whom I interviewed in Phnom Penh in October 1999: "We have to punish [the former Khmer Rouge] ... a matter of national responsibility ... biggest case of impunity in the world and the mother of other smaller impunities in Cambodia."

Whilst a majority of ordinary Cambodians have indicated their desire for such a tribunal,<sup>23[23]</sup> others have argued against the imposition of Western-style legal justice as being alien to Khmer culture. According to Harris (2005: 80), such imposition of foreign systems and universal norms of justice 'may be read by some sectors of Khmer society [those for whom to be Khmer is to be Buddhist] as an expression of contempt for their own traditions'. Some Cambodians have responded by expressing the desire to return to a Khmer approach to counter the influences of outsiders which have in the past betrayed and neglected the needs and rights of the Cambodian people. They reject the modernist enterprise which privileges the Western rule of law approach, arguing for a need to reassert Khmer identity imbued with confidence rather than fear of the outside invader. PoKempner (2005: 354) argues, by contrast, that the insistence of Cambodians on international standards for the ECCC, far from being culturally alien, is a natural response to insist that their sufferings be considered as significant as those of Rwandans and Bosnians who were afforded the full international legal standards of an international tribunal.

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<sup>23[23]</sup> For example, in January 1999, 84,195 Cambodians signed a national petition calling for an international tribunal; 5000 Cambodians rallied in support of an international tribunal in Phnom Penh in August 1999; surveys conducted by the Khmer Journalists' Association in 1995 and the Institute of Statistics and Research on Cambodia (IFFRASORC) in 1999 both reported that 80% of the population wanted the former Khmer Rouge leaders to be prosecuted; and a survey of 7000 Cambodians conducted by DC-Cam in 2002 found that 57% wanted 'the kind of accountability that only a tribunal could bring' (Chhang: 2007: 171). Further evidence of support from ordinary Cambodians for a tribunal is also provided by indepth interviews and surveys conducted by this author (Lambourne 2002); Jaya Ramji (1999); Laura McGrew (2000); and William Burke-White (2005).

In order to transform Cambodian society, a more holistic vision of justice is required than that provided by the ECCC, one that includes elements of restorative, socioeconomic, political and psychosocial justice in addition to retributive justice.<sup>24[24]</sup> The idea of a truth commission which could have addressed more of these justice needs was rejected by Cambodians, but, I would argue, for spurious reasons. By considering only the South African model of the Truth and Reconciliation Commission, Cambodians had a limited view of what was possible. They assumed that a truth commission would not work in Cambodia because the conditions did not match those of South Africa: a Christian country with strong religious leadership, facing a political transition from a repressive regime rather than a civil war or genocide. However, there are many other types of truth commissions. The Sierra Leone truth commission dealt with mass crimes, did not include any provision for amnesties, and was operating in a society that is predominantly Muslim as well as Christian. The East Timorese truth commission engaged with local communities and incorporated traditional reconciliation processes and while East Timor had a strong Christian leader, he did not play a significant role in the truth commission.

According to a Buddhist perspective on justice, it ‘involves the “undoing” of a crime so that order might be restored’ (Harris 2005: 81) and the goal of harmonising the parties rather than consistency with abstract legal principles (2005: 85). This Buddhist perspective is consistent with ideas of restorative justice which could be pursued via a truth commission or other culturally appropriate mechanism. Dr Lao Mong Hay, Executive Director of the Khmer Institute of Democracy, has advocated national reconciliation (rather than a tribunal) as being more consistent with Buddhist philosophy, and suggested a mass public confession of guilt and request for pardon in the presence of the king (Harris 2005: 86). Harris (2005: 80) advocates the potential of a ‘truth act’ involving ‘genuine acknowledgement of moral failings or virtues’ which has ‘powerful connotations for Theravada Buddhism’.

## Conclusion

After almost 30 years, it appears that some of the key leaders of the former Khmer Rouge will finally face prosecution for the crimes they are accused of committing as part of their quest for an agrarian utopia during the Pol Pot era of 1975-1979. Despite evidence of public support for the establishment of a tribunal, it seems unlikely that the ECCC will be able to meet all of the expectations of the Cambodian people. From my field research in 1999, I concluded that Cambodians needed to know what happened during the Pol Pot era and

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<sup>24[24]</sup> See the holistic model of transformative justice presented in a forthcoming article in the

why, and they needed acknowledgement from former Khmer Rouge leaders that what they did was wrong. Ten years later, these needs remain unfulfilled. Whilst the ECCC can provide some justice in the form of international acknowledgement and punishment for the perpetrators, which is arguably better than none, it is unlikely to answer the most important question of why the genocide occurred, nor is it likely to encourage the acknowledgement of wrongdoing sought by survivors.

The ECCC is limited in its ability to fully satisfy the needs of justice for the Cambodian people and the international community. Whilst justice is an important goal, retributive justice through a tribunal without truth and acknowledgement is only partial justice and is unlikely to end the culture of impunity prevalent in Cambodian society. Further research is needed to explore the potential for some kind of restorative justice process which rebuilds relationships, strengthens Khmer identity and promotes a sustainable peace with justice for Cambodians.

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