

Khmer Rouge Crimes: The Elusive Search for Justice

by Brian D. Tittmore*

In presenting his 1999 Annual Report to the UN General Assembly this past September, UN Secretary-General Kofi Annan proclaimed that the "core challenge" to the United Nations, and specifically to the Security Council, in the next century will be to "forge unity behind the principle that massive and systematic violations of human rights—wherever they may take place—should not be allowed to stand." No situation illustrates the grave implications of international ambivalence on this issue more starkly than the 20-year failure to bring officials of Cambodia's former Khmer Rouge regime to account for their crimes. The Khmer Rouge ruled Cambodia from April 17, 1975, to January 7, 1979, during which time an estimated 1.7 million people were executed or died from disease and starvation as a result of the regime's policies. Since that time, calls from both inside and outside Cambodia for trials for genocide and other crimes against humanity have gone unanswered, and those officials responsible for some of the most egregious and widespread human rights abuses since World War II continue to enjoy complete impunity.

Cambodia Under the Khmer Rouge

The Communist Party of Kampuchea (CPK), more widely known as the Khmer Rouge, seized control of the government of Cambodia in April 1975, when it ousted the ruling Khmer Republic government and renamed the country Democratic Kampuchea. The Khmer Rouge governed Cambodia until 1979, when Vietnamese military forces drove it out of power. During its rule over Cambodia, the Khmer Rouge, under the political and ideological leadership of Pol Pot, strove to build a socially and ethnically homogeneous society by abolishing all pre-existing economic, social, and cultural institutions, and transforming the population of Cambodia into a collective workforce.

In pursuing this objective, the CPK displaced between 2 million and 3 million Cambodians, and subjected them to forced labor and inhumane living conditions, including physical exhaustion, starvation, and disease. Contemporaneously, it endeavored to purge perceived ideological enemies from inside and outside of the party through methods that included torture and extra-judicial executions, targeting particular ethnic minorities, religious leaders, teachers, students, and other educated groups.

Following the collapse of Democratic Kampuchea in 1979 and the installation of the Vietnamese-supported People's Republic of Kampuchea, many of the remaining Khmer Rouge leaders fled and re-established themselves on the Cambodian-Thai border. For the next ten years, the Khmer Rouge continued to battle the People's Republic of Kampuchea and retained a degree of control over parts of Cambodia, as well as Cambodia's seat at the United Nations. It was not until approximately 1993 that the Khmer Rouge ceased to be an active fighting force. Since that time, many Khmer Rouge members have returned to civilian life and now live freely in parts of Cambodia. The Cambodian government has integrated other members into the Cambodian national army and granted them immunity from prosecution under a 1994 Cambodian law that criminalized membership in the Khmer Rouge.

The UN Group of Experts and Prospects for an International Criminal Tribunal for Cambodia

Internal defections within the Khmer Rouge throughout the 1990s and the corresponding re-emergence of its members in Cambodian society presented the Cambodian government with the controversy of whether and how to prosecute former Khmer Rouge officials for crimes committed during the period of CPK rule. Most significantly, in early 1998, the press reported that Pol Pot's Khmer Rouge compatriots arrested him and tried him for treason. Detailed information concerning Pol Pot's situation remained limited, and on April 15, 1998, Thai officials reported that Pol Pot had died, apparently from a heart attack. Furthermore, in December 1998, Nuon Chea, the former deputy secretary of the Central Committee of the CPK, and Khieu Samphan, Central Committee member and former Democratic Kampuchea state president, surrendered to the Cambodian government. Nuon Chea and Khieu Samphan, who are reported to be living freely in western Cambodia with other Khmer Rouge defectors, are leading candidates for prosecution for crimes committed during the CPK regime. In the spring of 1999, the Cambodian government apprehended two additional well-known Khmer Rouge figures. It arrested Ta Mok, former Khmer Rouge military commander of the south-west region and member of the CPK Central Committee, on March 6, 1999, and Kaing Guek Iev, better known as Duch, the former Khmer Rouge chief of police, who

directed the notorious prison and torture center at Tuol Sleng, on May 9, 1999. The Cambodian government detained Ta Mok and Duch, unlike many other former Khmer Rouge officials, apparently singling them out for prosecution for genocide and other crimes allegedly committed during the CPK regime.

The Cambodian government initially responded to these developments by acknowledging its inability

to convene proper trials for the Khmer Rouge members and looked to the United Nations for assistance. In a letter to Secretary-General Annan dated June 21, 1997, then-Cambodian First Prime Minister Prince Norodom Ranariddh and Second Prime Minister Hun Sen requested the assistance of the United Nations and the international community in "bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979." In so doing, the Cambodian leaders stated that "Cambodia does not have the resources or expertise to conduct this very important procedure." Citing the *ad hoc* tribunals for the former Yugoslavia and Rwanda, they asked that "similar assistance be given to Cambodia." They added, "We believe that crimes of this magnitude are of concern to all persons in the world, as they greatly diminish respect for the most basic right, the right to life. We hope that the United Nations and the international community can assist the Cambodian people in establishing the truth about this period and bringing those responsible to justice. Only in this way can this tragedy be brought to a full and final conclusion."

On December 12, 1997, in UN General Assembly Resolution 52/135, the UN Member States requested that the Secretary-General examine the Cambodian government's appeal and

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consider the possibility of appointing a Group of Experts to evaluate how the United Nations could assist Cambodia. In July 1998, pursuant to this request, the Secretary-General appointed a three-member Group of Experts, comprising Chairman Sir Ninian Stephen (Australia), Judge Rajsoomer Lallah (Mauritius), and Professor Steven R. Ratner (United States). The Group of Experts had three principal tasks: to evaluate existing evidence to determine the nature of the crimes Khmer Rouge leaders committed in the years 1975 to 1979; to assess the feasibility of apprehending, detaining and extraditing, or surrendering Khmer Rouge leaders; and to explore options for bringing Khmer Rouge leaders to justice before an international or national tribunal.

After the Group of Experts completed its investigation, which included a trip to Cambodia and Thailand from

November 14 to 24, 1998, it delivered its Report to the Secretary-General (Report) on February 18, 1999. The Group of Experts concluded that serious crimes under international and Cambodian law had been committed during the period of CPK rule. They found these crimes to include genocide and other crimes against humanity, war crimes, and other acts incurring individual responsibility, in particular forced labor, torture, and crimes against internationally protected persons.

The Group of Experts also found that domestic trials organized under Cambodian law could not meet international standards of due process and the United Nations should not support them through financing or the involvement of trained personnel. They based this finding on their informed opinion that Cambodia "still lacks a culture of respect for an impartial criminal justice system," and concerns that domestic prosecutors, investigators, and judges may be subject to political pressure and influence. The Group of Experts concluded that the Cambodian judiciary presently lacks three key criteria for a fair and effective judiciary: a trained cadre of judges, lawyers and investigators; an adequate infrastructure; and a culture of respect for due process. Organizations inside and outside of Cambodia expressed similar concerns. For example, a coalition of legal aid organizations in Cambodia declared in a public statement on October 22, 1999, that judicial independence in trials for former Khmer Rouge leaders could be achieved only if a neutral body appointed all court officials, and that the United Nations, not the Cambodian government, is best suited for this responsibility.

The Group of Experts' apprehensions regarding judicial independence and the potential for political interference with trials also caused the Group to reject the prospect of a tribunal established under Cambodian law but subject to the control and oper-



Young children at the "Killing Fields" memorial, located at the outskirts of Phnom Penh.

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ation of the United Nations. Instead, the Group of Experts recommended that the Security Council or the General Assembly establish an *ad hoc* tribunal. The tribunal would limit its temporal jurisdiction to the period of the Democratic Kampuchea's rule, and the tribunal's subject matter jurisdiction would encompass crimes against humanity and genocide, with consideration given to adding forced labor and torture. The tribunal's personal jurisdiction would target "those persons

most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea." According to the Group of Experts, this would include senior leaders with responsibility over the abuses, as well as those at lower levels who are directly implicated in the most serious atrocities. The Group refrained from offering a numerical limit on the number of such persons who could be targets of investigation.

The Group of Experts' Report, therefore, constituted a significant step forward in the effort to bring the Khmer Rouge leaders

to justice. Not only did a specialized UN body investigate and sustain a basis for Khmer Rouge accountability, it also endorsed the creation of an international criminal tribunal for Cambodia.

Recalcitrance by the Cambodian Government

No sooner had the United Nations floated the prospect of an international criminal tribunal for Cambodia than the Cambodian government deflated its feasibility. In his letter of March 15, 1999, transmitting the Group of Experts' Report to the Security Council and General Assembly, Secretary-General Annan reported that the Cambodian government, which was now under the exclusive leadership of Hun Sen following a coup on July 5 and 6, 1997, had considered the Group of Experts' recommendations. The Hun Sen government responded that the Cambodian courts were "fully competent" to conduct trials of former Khmer Rouge

officials. The Hun Sen government also emphasized that any decision to bring Khmer Rouge leaders to justice must take into account Cambodia's need for peace and national reconciliation, and expressed concerns that implementing the Group of Experts' recommendations might cause panic among former members of the

Khmer Rouge and lead to a renewal of guerrilla war.

Since March 1999, various efforts have been undertaken to develop a mechanism that will accommodate the concerns of both the Cambodian government and the international community, so far without success. From August 25 to August 31, 1999, Ralph Zacklin, UN Assistant Secretary-General for Legal Affairs, headed a UN Secretariat delegation to Phnom Penh to discuss with the Cambodian government the possibility of creating a "joint" or "mixed" tribunal. The United Nations contemplated that such a

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tribunal would be established under Cambodian law, but would allow UN-appointed foreign judges and prosecutors to participate in the trials of former Khmer Rouge officials. The two parties, however, did not reach an agreement during the visit. One of the primary reasons for this disagreement was the refusal of the Hun Sen government to accept the UN proposal that a majority of the judges on the tribunal be internationally appointed. The Cambodian government also informed the Secretary-General that it had decided to try Ta Mok before a Cambodian court under Cambodian law, and to "accept foreign assistance and expertise to that end." On September 8, 1999, a Cambodian military court charged Ta Mok with genocide.

In October 1999, following discussions between Prime Minister Hun Sen and Secretary-General Annan, the Hun Sen government appeared to harden its position. It indicated that it would not allow the United Nations to take an active role in Khmer Rouge trials, but rather would limit the United Nations to providing advisers and technical assistance. The Hun Sen government also suggested that if the United Nations did not participate, it would still invite individual nations to contribute advisers, and possibly judges and prosecutors.

Most recently, it was reported that in October 1999, the Cambodian government endorsed a proposal from the United States aimed at breaking the United Nations-Cambodia deadlock. According to press reports, the U.S. proposal would create a mixed panel of foreign and Cambodian judges that would have a Cambodian majority, but would require at least one foreign judge's agreement to pass rulings. The U.S. proposal also apparently provided for the involvement of both Cambodian and foreign prosecutors and investigating magistrates, although it is not clear who would appoint judges and prosecutors. Other aspects of the U.S. plan reportedly call for UN monitoring of the tribunal, limiting the scope of prosecutions, and creating a special chamber within the existing Cambodian court system to try the Khmer Rouge. As of this writing, details of the proposal officially had not been revealed. The Cambodian government has indicated that it will present a plan to the United Nations this November, which is expected to incorporate aspects of the U.S. proposal.

The Uncertain Path Ahead

Cambodia's repudiation of the Group of Experts' Report, together with its plans for domestic trials of certain Khmer Rouge officials, have introduced further complications and uncertainties into the prospects for genuine accountability for atrocities committed under the CPK regime. Most significantly, as matters currently stand, there is continuing concern that the Cambodian government will prosecute select Khmer Rouge officials through domestic trials that fail to conform to international standards of fairness, a development that would result in additional serious violations of international law.

It is well established under international law that criminal trials, including those for serious violations of international humanitarian law, must comply with minimal standards of due process. According to the International Covenant on Civil and Political Rights (ICCPR), to which Cambodia became a party on May 26, 1992, due process standards include the right to a fair and public

hearing by a competent, independent, and impartial tribunal established by law (Article 14(1)) and the right to have adequate time and facilities for the preparation of a defense (Article 14(3)(b)). It also includes the right not to be held guilty of any criminal offense on account of any act or omission that did not constitute a criminal offense, under national or international law, at the time when it was committed (Article 15(1)). It is axiomatic, therefore, that states comply with international due process standards while they fulfill their obligations under applicable treaty and customary law to prosecute certain serious violations of international humanitarian law, such as genocide and torture.

It is notable in this regard that the Statutes of the International Criminal Tribunals for the former Yugoslavia (Article 10) and Rwanda (Article 9) specifically recognize that domestic trials for acts constituting serious violations of international law will not, under the double jeopardy rule, preclude subsequent international prosecutions for the same acts, where those prior domestic trials were not impartial, independent, or diligently

prosecuted, or where they were designed to shield the accused from international criminal responsibility.

It is hoped that an acceptable compromise between the United Nations and the Cambodian government will yet be reached. Considering the fundamental nature of the United Nations's due process concerns, however, collaboration between the United Nations and Cambodia does not appear to be forthcoming, absent a significant change in Cambodia's position. Should Cambodia maintain its current stance, the possibilities for the international community to prosecute Khmer Rouge officials without the cooperation of the Cambodian government remain uncertain. Of the options available, the most effective alternatives are the creation of an *ad hoc* tribunal by the Security Council, or alternatively, trials convened before competent tribunals in UN Member States other than Cambodia.

The Group of Experts' preference—an *ad hoc* tribunal established by the Security Council as an enforcement measure under Chapter VII of the United Nations Charter—is attractive because this approach would clothe the tribunal with significant legal authority. It would also overcome any objection that the tribunal's creation or functions contravene the principle under Article 2(7) of the UN Charter that prohibits intervention in matters that are "essentially within the domestic jurisdiction of any state." In order to invoke this option, however, the Security Council would have to determine that the situation in Cambodia represents a threat to international peace and security. The prospect of such a finding under current circumstances is questionable.

Another possible prospect for independent action by the international community is prosecuting Khmer Rouge officials in countries outside of Cambodia. Indeed, it has been reported that a Belgian magistrate issued an international arrest warrant for Kaing Guek Iev in May 1999. In its Report, the UN Group of Experts endorsed prosecutions in states other than Cambodia as a viable, but subsidiary, means of securing the accountability of Khmer Rouge officials. Some former Khmer Rouge officials are believed to be living in Thailand and other Southeast Asian states, thereby raising the possibility that suspects could be captured and prosecuted outside of Cambodia. Consequently, the

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affront to China's sovereign claim over Tibet. In addition, the retrenchment of assistance is an attempt to stem the overpopulation of Tibetan settlements. According to a 1998 country report on India by USCR, "Because India has no legal framework for determining refugee status, it deals with refugees on an *ad hoc* basis, which has led to refugees being used as 'pawns in regional geopolitics.'" Basing refugee policy on domestic or foreign policy contradicts the purpose of the Refugee Convention.

Conclusion

India has an important role in the treatment of refugees because of its position as a leader in South Asia, setting an example for other states in the region, and it shelters one of the largest refugee populations in the world. India's lack of clear standards for the treatment of refugee groups, however, is resulting in violations of the international norms for the treatment of refugees.

Its policies are discriminatory and inequitable, even to members of the same group. Although Tibetan refugees who arrived prior to 1980 received adequate assistance from the Indian government, assistance to the Tibetan refugees who arrived after 1980 has declined greatly, forcing them to live in inhumane conditions. These inconsistent policies demonstrate that India should adopt basic standards of treatment for the refugees living inside its borders. In order for India to bring its refugee law into conformity with the international community, only improving its domestic laws is insufficient because it will continue to reject international assistance and monitoring of refugee groups. India should reform its refugee policies and accede to the Refugee Convention or its Protocol. ☉

**H. Knox Thames is a joint J.D./M.A. candidate at the Washington College of Law and the School of International Service at American University.*

prospect of trials outside of Cambodia should not be discounted, and UN Member States should remain receptive to future opportunities to arrest former Khmer Rouge officials.

The possibility of domestic courts in states other than Cambodia prosecuting Khmer Rouge officials has complications. As the Group of Experts noted, securing custody over Khmer Rouge officials located in Cambodia is particularly problematic given the dearth of Cambodian extradition treaties and the fact that the surrender of officials, by extradition or otherwise, will ultimately require the consent of the Cambodian government, which it will unlikely give.

While the international community must remain conscious of these alternatives, the most likely prospect for Khmer Rouge accountability currently entails prosecutions before a joint or mixed tribunal, which would be established under Cambodian law but would involve international support and participation. In considering this option, the international community must continue to question the serious weaknesses identified in Cambodia's justice system as presently constituted, and must be cautious not to become a party to further serious violations of Cambodia's international human rights obligations through unfair trials. Both the international community and the Government of Cambodia should also bear in mind that Cambodian prosecutions of Khmer Rouge officials for acts that constitute serious violations of international humanitarian law in proceedings that do not meet international standards of impartiality and independence will not necessarily preclude the United Nations or its Member States from subsequently trying Khmer Rouge officials for the same acts in appropriate international or domestic trials. Nevertheless, hope remains that the Cambodian government and the United Nations will succeed in

finding an appropriate balance between the need for minimal guarantees of due process and Cambodia's desire to assume primary responsibility for trying the atrocities committed by the Khmer Rouge against its people.

Conclusion

The recent impasse between the United Nations and the Hun Sen government of Cambodia is one in a series of setbacks and frustrations surrounding the quest for Khmer Rouge accountability. The difficulties are not insurmountable, however, and the United Nations must persevere in its attempts to reach an acceptable arrangement with the Cambodian government. The most feasible prospect at present involves prosecutions by a joint or mixed tribunal under Cambodian law with international participation and support, and it is hoped that the interests of concerned parties inside and outside of Cambodia can be reconciled through this mechanism. At the same



The Genocide Center outside Phnom Penh.

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time, adherence to minimal standards of due process must remain a fixed condition of any acceptable solution, and the international community should remain conscious of alternative means of prosecuting Khmer Rouge officials that do not necessitate Cambodia's voluntary cooperation, should negotiations with the Cambodian government ultimately fail. ☉

**Brian D. Tittlemore, LL.M. '95, is a staff attorney at the Inter-American Commission on Human Rights and a senior research associate at the War Crimes Research Office at the Washington College of Law. The opinions expressed are those of the author and not necessarily those of the Organization of American States or its organs, or the War Crimes Research Office.*