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The Khmer Rouge Tribunal Slowly Grinds Toward a Legacy

The Khmer Rouge Tribunal (KRT) is a hybrid internationalized court established in 2006 by Cambodia and the United Nations to judge war crimes, genocide, and other crimes against humanity. Nearing the conclusion of its mandate, and with a decidedly mixed legacy, the KRT has several complicated tasks yet to complete.

You probably have not heard much recently about the Khmer Rouge trials in Cambodia. Is that even still a thing? Why, yes, yes, it is! But now in its sixteenth year of operation, the Extraordinary Chambers in the Courts of Cambodia (or the Khmer Rouge Tribunal, as it is more commonly known) has not been much in the news lately. There are a couple of reasons why that is so. For one thing, the media business in Cambodia has undergone a striking evolution in recent years. After having tolerated what was one of the

most independent media environments in all of Southeast Asia following the 1992-93 UN peacekeeping operation there, the government of long-serving Prime Minister Hun Sen orchestrated a broad crackdown on media beginning in 2017.

This campaign began by expelling the independent *Cambodia Daily* from the country, and then organizing a take-over of the *Phnom Penh Post* by a government-friendly tycoon, resulting in an exodus of foreign journalists from the country. The government also curtailed broadcasts and reporting by the Voice of America and Radio Free Asia. Domestic Cambodian journalists soon started ending up in legal jeopardy on various pretexts. Other heretofore independent domestic media organs quickly got the message and began to tow the government line. And part of that line would appear to be that Hun Sen does not want to see very many stories about the Khmer Rouge Tribunal.

A more powerful reason that you have not heard much about the court lately, however, may be because it is in the final phases of its operations. Though considerable work remains to be done, there is not much action to be seen from the outside. The tribunal has always faced criticism from civil society observers for its relative lack of transparency; under the laws and regulations in force, judicial investigations are by their nature confidential, as are deliberations in the chambers of the courts. As a result, there is not much for outside observers to observe at the current juncture. Everything that is still going on is happening inside the principal organs of the court, including the Office of Co-Prosecutors, the Office of Co-Investigating Judges, the Pre-Trial Chamber, the Trial Chamber, and the Supreme Court Chamber.



A Long History of Cases: Pending, “Archived,” and Dismissed

One major case, denominated Case 002/02, is still pending at the court. It involves the Khmer Rouge regime’s former chief of state, Khieu Samphan. He is appealing his 2018 conviction in 002/02 for genocide and other crimes. Also convicted of genocide alongside Samphan was former Khmer Rouge “Brother Number Two,” Nuon Chea, but he died before his appeal could be completed. Both were also earlier convicted of crimes against humanity and war crimes in Case 002/01 and sentenced to life in prison. Samphan’s appeal in 002/02 stands to be very complex to adjudicate. For one thing, the Supreme Court Chamber will have to carefully review the reasoning in Trial Chamber’s judgment of the case—a judgment that is 2,387 pages long. If the past is prologue, the Supreme Court will not agree with all of the Trial Chamber’s reasoning, and so it will have to develop its own analysis of the evidence and legal elements in the case. For another, it will also have to analyze and develop legal arguments concerning the details of Samphan’s appeal, the summary of which lists many, many grounds of appeal, running to eighty-five pages. This, moreover, will have to be done with the scarce staffing which the donor community has forced upon all organs of the court, including the Supreme Court; donor fatigue set in long ago. As of this writing, the Supreme Court has estimated that they will not be able to complete the appeal judgment before the fourth quarter of 2022.

And there is more. In addition to Case 002/02, the court also has case files denominated as Cases 003 and 004. Case 003 dealt with two senior Khmer Rouge military commanders, Sous Met, who was in charge of the Khmer Rouge air force, and Meas Muth, responsible for the Khmer Rouge navy. They were both also members of the

Communist Party of Kampuchea Central Committee, and Deputy Chiefs of Staff for the Revolutionary Army of Kampuchea.

The International Co-Prosecutor lodged accusations against both men in 2008, and their cases immediately became a tangled saga. The National Co-Prosecutor opposed charging the two military leaders. In considering this dispute between the Co-Prosecutors, however, the Pre-Trial Chamber (PTC) was unable to assemble a super-majority to quash the case, so it proceeded to the Office of Co-Investigating Judges. There it languished for years. Sous Met died in 2013, extinguishing the case against him.

Then in 2018—ten years after the case was first put forward—the Co-Investigating Judges flabbergasted all concerned when they issued what I have termed “dueling closing orders.” The National Co-Investigating Judge ordered the case against Muth to be dismissed, while the International Co-Investigating Judge simultaneously ordered that the case be sent to trial. There followed an extended stand-off in the PTC, until the judges there declared in April 2021 that these conflicting closing orders were illegal under the tribunal’s rules. However, the national judges of the PTC ordered that the case be “archived,” or effectively terminated, while the international judges ordered that it be sent to trial, with neither position attaining the supermajority vote required to have the force of law. The PTC also ruled that their non-decision is not subject to appeal. So, the case of Meas Muth appeared at that juncture to be consigned to permanent legal limbo.

In late May 2021, however, the Co-Investigating Judges issued another remarkable decision, in which they effectively requested that the International Co-Prosecutor appeal their decision to the PTC, and that PTC respond to that appeal by dismissing the case against Muth.



Reacting within days, the International Co-Prosecutor announced that she would appeal to the PTC to send the case to trial. Should the PTC fail to resolve the deadlock in this round of appeals, however, the Co-Investigating Judges suggested that they would then seize jurisdiction of the case and dismiss it themselves.



Khieu Samphan on the second day of the Initial Hearing of Case 002 in Phnom Penh on June 28, 2011. Photo is in the public domain.

How the other organs of the court will respond to these unusual legal maneuvers remains to be seen, but they do have the advantage that they open potential routes to a judicial resolution of the case, which theretofore had seemed to be destined for perpetual deadlock.

Case 004 concerned three regional civilian Khmer Rouge cadres. A man named Yim Tith was a key leader in the bloody purge of the Northwest Zone, eventually being appointed as the Party Secretary of that zone. A woman named Im Chaem led the party committee of a sector in the Northwest Zone and was the Party Secretary of one district in that sector. Together, prosecutors suspected the two of having been

involved in more than 100,000 murders. A man named Ao An was the Deputy Secretary of the Central Zone, and for a time the Acting Secretary of the zone, where he was accused of committing genocide against the Cham Muslim minority, along with many other crimes. In 2008, the International Co-Prosecutor asked for all three to be charged. As with Case 003, the National Co-Prosecutor opposed this move.

These 004 cases would slowly wind their way through the tribunal's complex system for more than thirteen years, and as of this writing, none of them has reached the trial stage. The first to be resolved was Im Chaem; in 2017, the Co-Investigating Judges ruled that she did not fall within the court's jurisdiction and dismissed the case against her. Tith and An were eventually charged by the International Co-Investigating Judge, although the National Co-Investigating Judge did not join him. Then in a surprise move, in 2019, the Office of Co-Investigating Judges did something which was not anticipated by the court's rules and regulations. As was the case with Muth, the National Co-Investigating Judge moved to dismiss both the An and Tith cases, while the International Co-Investigating Judge simultaneously ordered the cases sent to trial.

The prosecution and defense both appealed this peculiar state of affairs to the PTC, where the judges found themselves unable to resolve the impasse. The national judges of the PTC in December 2019 ruled that the case against Ao An should not be continued, while the international judges of the chamber ruled that he should go to trial. Neither side achieved the requisite supermajority necessary for their respective opinion to have the force of law. Consequently, the Trial Chamber refused to take the case, prompting the International Co-Prosecutor to appeal to the Supreme Court on the grounds that their failure to take up the case amounted to an "effective termination."



The Supreme Court subsequently ruled in August 2020 that the parties to the case had a right to legal certainty on the issues raised in the case, and that insofar as their chamber was the final instance in the court, it was their duty to provide such certainty. They determined, in view of the fact the PTC had found both of the “dueling closing orders” in the case to be illegal, there was no proper indictment, and therefore there was no remaining option but to terminate the case. Ao An died of natural causes three months later, in November 2020, still a free man.

The case of Yim Tith remains to be addressed by the PTC. The trajectory of the struggle to challenge his impunity for alleged war crimes, genocide, and other crimes against humanity has run parallel to that of Ao An. The Pre-Trial Chamber has recently suggested that it will issue a ruling, or rulings, as the case may be, in the second quarter of 2021. But the ultimate outcome of the case against him appears to be foreordained, and in line with the long-standing preferences of the Cambodian government.

In 2008, even before the International Co-Prosecutor requested that charges be lodged in Cases 003 and 004, Prime Minister Hun Sen had already publicly declared that he would not allow the Khmer Rouge Tribunal to bring any charges beyond those already confirmed in Cases 001 and 002. His senior staff in the government, especially Deputy Prime Minister Sok An, were busily working with Cambodian officials at the court to make it so.

Did this constitute improper interference by the Cambodian executive in the administration of justice in the Kingdom? For those who might be inclined to answer, yes, I would suggest: Read the Cambodian Code of Criminal Procedure. Article 40 specifies that “in the case of a serious offense,” the prosecutor shall make a report to the General Prosecutor, who in turn shall report to the Minister of Justice.

No one would dispute that the offenses ascribed to the Khmer Rouge leadership were serious. And the Minister of Justice, of course, reports to the Prime Minister. Article 29 of the same Code of Criminal Procedure further specifies that the Minister of Justice can direct any prosecutor to “may make conclusions that he thinks are appropriate.” Thus it is that the powers of the executive branch in Cambodia extend over the judicial branch. There may be some foreigners who became involved with the Khmer Rouge Tribunal who did not understand how the judicial system functions there, but the mechanics of that system are clearly delineated in Cambodia’s laws. Hun Sen can shape judicial outcomes to his political preference, while remaining within the letter of the law.

Models and Legacies

Senior Cambodian officials have frequently proclaimed that the Khmer Rouge Tribunal presents a “precious model” for other countries wishing to grapple with the consequences of serious socio-political upheaval. Others, notably including Human Rights Watch, have argued precisely the opposite, urging that the “failed” Cambodian hybrid tribunal experiment should never be attempted again. Be that as it may, two hybrid judicial institutions drawing on the Khmer Rouge Tribunal model have subsequently been created. The Extraordinary African Chambers (EAC), established in Senegal in 2013, was a successful exercise incorporating multiple aspects of the Khmer Rouge Tribunal.

However, the EAC had a highly restricted mandate, focusing solely on former Chadian dictator, Hissène Habré. He was convicted in 2016 by the court on charges of war crimes and crimes against humanity and sentenced to life in prison. His conviction and sentence were confirmed on appeal the following year. In the Central African



Republic, the Special Criminal Court (SCC) was established in 2018, with a mandate to prosecute violations of international humanitarian law in the country since 2003.

Veterans of the Khmer Rouge Tribunal were deeply involved in the design of the SCC, tweaking the model in an effort to avoid some of the perceived problems afflicting the Cambodian court. Since then, the SCC nonetheless has been beset by numerous challenges, many of which flow from the facts that the country remains at war, and the writ of the central government extends little beyond the capital of Bangui. Thus far it has not launched any trials. It remains to be seen the extent to which the SCC will achieve any of its primary goals.

For good or ill, then, it appears that the influence of the Khmer Rouge Tribunal will outlive the lifespan of the court itself, reaching well beyond the borders of Cambodia. One might also expect that some of the jurisprudence produced by the judges of the tribunal may well have an impact in future international legal proceedings, in areas as diverse as modes of liability and gender-based violence. Within Cambodia, some observers—myself included—have argued that the tribunal contributed significantly to national reconciliation, in effect giving Cambodians permission to finally talk about what happened in the “Pol Pot time,” a previously taboo topic.

The tribunal has also assembled an unprecedented, massive and deeply researched archive of factual information about what happened during the terrible three years, eight months and twenty days of the Khmer Rouge regime. That will hopefully assist in informing future generations of Cambodians about their own nation’s history, as well as provide a bulwark against those who might attempt to deny the truth about the murderous madness which was the Khmer Rouge.

Other hoped for legacies of the tribunal which were touted at the outset, however, do not seem to have been realized. Some had imagined that the influence of close contact with jurists from Western countries might transform Cambodia's judicial system into something more like that seen in European countries. This was not to be.

On the issue of combatting the longstanding impunity for the crimes committed by the Khmer Rouge leadership, the record of the Khmer Rouge Tribunal is decidedly equivocal. The diplomats who designed the tribunal settled on "five to ten" defendants as a planning guideline. As it happened, the internationals at the court preferred ten, while the nationals preferred five, and the nationals prevailed in that contest. Only two trials have yet reached finality, with just three persons convicted.

In 1979's People's Revolutionary Tribunal in Phnom Penh, just two Khmer Rouge leaders were convicted in absentia. Much of the world rejected that proceeding as a farcical show trial. There is no doubt that the proceedings of the Khmer Rouge Tribunal were more robust, with due process protections for the accused, but with only three individuals brought to justice, that is not a whole lot better than the 1979 trial in terms of combatting impunity. Be that as it may, it will be fascinating to watch the waning episodes of the Khmer Rouge Tribunal, and then to observe the ensuing historical struggle over the meaning of its legacy.

Note on the Author

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