

## Extraordinary Injustice

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The UN's war crimes tribunal in Cambodia is supposed to be free from political influence. But two cases will never see the light of day — because Cambodia's prime minister won't allow it.

In August of 1977, "Ta," or "Grandfather," An, a senior Khmer Rouge cadre, visited a labor camp in Cambodia's Kampong Cham province. An then ordered his subordinates to take all of the local Cham, a mostly Muslim ethnic minority, to "their local bases," according to a witness cited by United Nations prosecutors who also saw An at the camp.

Ten days later, as part of a policy of extermination, a wave of mass killings of the Cham community began in a local district prison. At night, by the banks of the Mekong River, entire villages were emptied. Men, women, and children were marched to the prison where they were bludgeoned to death. The slaughter continued until after midnight.

A loudspeaker played revolutionary songs to cover the sounds of their screams. Small children were murdered by being slammed into tree trunks. Executioners competed to see who could kill the fastest, the same witness said, with one boasting of slaying ninety in an hour.

At one point during the killing, a boat carried a thousand Cham teenagers to their deaths. A roundup in one village was able to collect only women and children as all the men were away performing forced labor.

Further up the river, near Wat Stung Trang Prison, also allegedly under An's authority, witnesses told UN prosecutors they recalled seeing many Cham corpses, including headless children, float downstream. The bodies likely came from the five Cham villages whose inhabitants had all been detained on the opposite riverbank.

The genocide of Cambodia's Chams is little known in the rest of the world, though it is among the cruelest episodes in the four-year reign of Pol Pot, which left up to 2.2 million people dead. Some evidence indicates that two years into their rule, the Communist Party of Kampuchea had planned to eliminate Cambodia's Muslims by 1980. The regime believed that their religious practices, distinct language, and common way of life threatened their radical social engineering plan: a new Cambodia in which there were only anonymous worker collectives without religious worship or private property.

By 1979, when invading Vietnamese forces toppled the Khmer Rouge government, they were nearing their goal of exterminating the Cham in Kampong Cham province: In one district, only two people survived out of four Cham villages. Court-appointed demographers estimate that about 19 percent of Khmers, the ethnic majority, perished during the regime; in contrast, almost double, or 36 percent of Cambodia's Chams were killed.

When I met An last August, he was living in a wooden hovel close to the border with Thailand, far from the scene of the genocide. At 78, he is old and frail — but free.

At the insistence of the Cambodian government, An and four others charged with the worst crimes known to man will never face trial. The reasons for the government's opposition are uncertain, but Prime Minister Hun Sen has warned repeatedly — to general disbelief — of a return to civil war if the Khmer Rouge tribunal were to prosecute An or any other suspects beyond the five already detained in 2007.

The result is that a mere handful of defendants are facing trial for the crimes of the Khmer Rouge while others suffer little more than old age and occasional visits from reporters. Most of the atrocities in the two cases opposed by the government will never be investigated, let alone be examined at trial.

The Extraordinary Chambers in the Courts of Cambodia, as the Khmer Rouge tribunal is formally known, were jointly created in 2006 by the UN and the Cambodian government. It was meant to bring to trial "senior leaders" and those "most responsible" for the crimes of the Pol Pot era. A sticking point in the negotiations that created the court was the freedom of the court's prosecutors to determine whom and how many they could bring to trial. As recent developments show, the battle continues: Judge Laurent Kasper-Ansermet has ordered the reopening of investigations in Case 003, despite the government's resistance.

Four cases have come before the Extraordinary Chambers.

- Case 001, the trial of the commander of Pol Pot's secret police, was completed in 2009. The defendant, known as Duch, was given a life sentence in a judgment on appeal handed down on February 3.
- Case 002 is the trial of the three most senior surviving Khmer leaders accused of policies amounting to crimes against humanity, war crimes, and genocide. The trial began in June 2011 and is expected to last for several years; its elderly defendants may die before it is completed. The defendants are Nuon Chea, the former communist party deputy secretary, 85; Ieng Sary, the former foreign minister, 86; and Khieu Samphan, the former head of state, 80. (Ieng Thirith, 79, who may have Alzheimer's, is undergoing a period of care to see if she can regain the mental fitness to stand trial.)

The Cambodian government is adamantly opposed to two other cases opened by UN prosecutors in 2009:

- Case 003 involves former navy commander Meas Mut and former air force commander Sou Met. The suspects, who are charged with war crimes and crimes against humanity for policies of execution, torture, and forced labor, have not been named publicly but their identities are well-known. Since the end of Cambodia's civil war, both have been given roles in Cambodia's military establishment.
- Case 004 concerns three mid-level Khmer Rouge cadre who are charged with a wave of purges, executions, forced labor, and starvation that were among the most horrific moments between 1977 and 1979. With Ta An, Yim Tith, alias Ta Tith, and Im Chaem allegedly bear responsibility for hundreds of thousands of deaths. As with Case 003, the suspects in Case 004 have not been officially named.

The office charged with these investigations collapsed last year after an internal battle over the disposal of Cases 003 and 004. A UN judge, Siegfried Blunk, resigned after his own staff accused him of falsifying evidence but said that Cambodian officials' public remarks opposing the investigations had made his work impossible.

As the court's two co-investigating judges began the process of prematurely wrapping up investigations in these cases last April, prosecutors on the court's UN side were left with the task of challenging the dismissal of their own cases and battling for genuine and thorough investigations. This has required them to file motions which were repeatedly and summarily denied, sometimes in personally hostile terms.

Were he ever to appear in court, the case against Ta An would make him among the most important criminal defendants anywhere in the world. In addition to the genocide of the Cham, prosecutors allege that in 1977, An took control of a network of prisons in a former administrative region known as the Central Zone in which as many as 170,000 people were executed, with the bulk killed over a period of just two years. In addition, An allegedly purged the zone — which was declared "disloyal" for failing to meet goals set by the regime — of virtually all officials and their families, who were arrested and executed.

But, with the exception of one location, the 11 prisons, execution sites, and a labor camp which prosecutors lay at the feet of Ta An will never be the subject of any trial.

Of the 18 other crime scenes allegedly controlled by Tith and Chaem, only three are part of the current Khmer Rouge trial, meaning most of the victims will be denied their day in court.

As the intent to scuttle the investigations into Cases 003 and 004 became increasingly apparent over the course of 2011, disgruntled officials began to leak information to the news media, exposing just how much killing and suffering was to be swept under the rug and how many Cambodians were to experience, yet again, the fact that their courts may impose order but so often fail to seek the truth or deliver justice.

Though the crimes before the Khmer Rouge tribunal are less famous than those of the Balkan conflict or the Rwandan genocide, they dwarf virtually all the cases before the world's other atrocity courts. In the Bosnian enclave of Srebrenica, for example, the world's attention was seized by the Bosnian Serb Army's 1995 massacre of more than 8,000 men and boys, described as the worst massacre on European soil since World War II. Ghastly as it is, such a death toll is easily matched or surpassed by many individual crime scenes just in Case 004 (see "Crimes Scenes of the Khmer"), in which prosecutors allege that Ta An, Ta Tith, and Im Chaem controlled 29 prisons, execution sites, and labor camps.

None of these allegations have been proven in court. And given that none of the suspects have been arrested or even formally notified of the cases against them, they do not have defense lawyers. The prosecution's confidential introductory submissions — documents that record UN prosecutors' preliminary allegations — in cases 003 and 004, which have been widely leaked, may ultimately be shown to contain errors. The evidence establishing the suspects' effective control over crime scenes or authority in forming policies would be subject to heavy scrutiny before any indictment could be issued.

But such concerns only serve to underscore how much of the Khmer Rouge era remains to be studied 33 years after the regime's collapse and to emphasize both the urgent necessity of investigation as well as the gravity of the allegations that the investigating judges deliberately attempted to shut down their own cases.

From east to west, Cambodia's countryside is littered with the remains of Khmer Rouge victims, their skulls piled high in memorials constructed at Buddhist temples and reliquaries in the turbulent days after the fall of the regime in 1979. At Wat Baray Chan Dek, a former prison in Kampong Thom province and a Central Zone crime scene, prosecutors say a security guard witnessed the removal of livers from living people. Citing a report by the historian Henri Locard, prosecutors said the "largest collection of skulls outside Phnom Penh" is held at a memorial stupa at Tuol Ta Phlong Prison, also in Kampong Thom, where "at least" 40,000 people are believed to have been killed.

Having moldered in the monsoons for three decades, they are as much testament to the victims as they are to the destitute and traumatized world the survivors inherited. In interviews, people in Kampong Cham province confirmed prosecution allegations that when the south-westerners — or the "Niredey" in Khmer — arrived, food became scarcer, work became harder, and the killing much more frequent.

Ta An, charged with responsibility for Wat Baray Chan Dek, Tuol Ta Phlong, and the other Central Zone crimes, lives with his family in a wooden shack in Kamrieng district, at the western edge of Battambang province. He gave an interview in August to Voice of America and contracted typhoid soon after.

To give him relief from the heat, his family had moved him to an outdoor shack next to the unpaved road outside their house. Using an intravenous drip, he appeared very feeble and claimed a strenuous interview could kill him.

Ta An, 78, is old and frail — but free.

"The charge, the allegation, is not correct," he managed to say on one of several visits I made to his house in sleepy O'Da commune. Prior to falling ill, he had told Voice of America that by the time of his arrival in the Central Zone in 1977, the killing was over.

This would effectively shift blame to An's superior, the former zone secretary Ke Pork, who died in 2002, before the tribunal was created.

But visits I made to the Cambodian countryside revealed that evidence exists to support prosecution allegations, whether the tribunal will collect it or not.

Chaing Nhor, 58, now chief of Chrey Vien commune in Prey Chhor district, where An once kept his office, recalled that as a young man, he had seen An. He scoffed at An's assertion that Pork bore responsibility for the crimes charged against An: "I did not see Pork here. I had seen only An who ordered to arrest these people."

Recalling the car in which An traveled, Nhor said, "It was very scary when I saw the American jeep. They usually arrested people and tied up both hands to the back."

When An arrived in the Central Zone, he allegedly began a top-down purge of virtually all local officials, who were arrested and delivered into the hands of the secret police to be executed. He assumed control over Sector 41, a large area of Kampong Cham province, and prosecutors claim the deputy chairman of the entire Central Zone, known as Sreng — an alias for a man named Chhor Chhen — was replaced by An himself.

In an August interview, Sreng's niece, Cheng Tol, 58, told me that with her uncle, her parents, grandparents, brothers, and sisters had also been taken away by the Niredey. As the arrests happened, she hid.

"I was very scared, in hiding, and just stayed quietly, frightened each time I heard an oxcart pass by," she said, adding that a commune official later told her, "You'll be next."

In the former Khmer Rouge redoubt of Anlong Veng in northwestern Banteay Meanchey province, Im Chaem, 68, a suspect in Case 004 who is now a local government official nearing retirement, reluctantly agreed to discuss her time as chief of nearby Preah Net Preah district, where UN prosecutors allege that she oversaw five labor camps and prisons where nearly 50,000 people died.

She issued a blanket denial. "I don't know anything so I think if such things happened then it must have occurred before my mandate," she said. "If we are talking about management, it was not an easy world because it is not easy to manage a big district."

Im Chaem, Deputy Chief at Trapaing Tav Commune on August 10, 2011 at her home in Anlong Veng district, Oddar Meanchey province

But one of her former prisoners disagreed.

Kim Neou, 53, an emaciated man with a persistent cough, lives in Phnom Trayoung village, where he was once imprisoned at a labor camp at which the prosecution estimates 40,000 people died.

Prisoners were executed at the foot of a mountain near the stone quarry where the camp was. Stone is still extracted there today.

The security center at the camp was created during Chaem's tenure, said Neou. On Chaem's watch, he said, more people were executed, the work was very hard, and the food zealously rationed. Sometimes ten people succumbed to starvation in a single day.

Chaem's denials of guilt are not credible, said Neou, who claimed he witnessed a meeting between Chaem and Kan, the head of the labor camp's security office.

"She did it but she did not confess," Neou said. "I can say that she did not do it by her hand, by herself, but she put out the orders."

"She ate here and she stayed here and the former house that she lived in now is the location of the commune office," he said.

The loud insistence with which the Cambodian government has opposed the investigations has clearly not gone unnoticed by potential witnesses and victims petitioning for reparations.

Neou said he had not answered to his name when he was visited by people he suspected were court officials. "It's dangerous," he said, "that almost entire people in the village keep quiet and just pointed fingers to me, the person who speaks out about the suffering here. "

In June, people representing 550 villagers claiming to be victims of crimes committed during the construction of the Trapaing Thma dam wrote a letter (PDF) to the court's co-investigating judges, urging them to pursue their work.

The letter's five authors said victims should have been offered the chance to testify "and would like to appeal to the co-investigating judges to independently investigate without interference from outside politicians."

"We highly hope the Khmer Rouge tribunal will give justice to all of us who are victims," they wrote.

In interviews, people petitioning the court for reparations for their suffering at the dam site said they had seen a government official on television announcing that this investigation should not exist.

"When I heard that, I was really concerned for my personal security," said a woman whose lawyers asked that she not be named. "I was so angry when I heard the information that the case should not proceed," she added. "I wondered why, what's wrong with this case?"

The judges refused to answer the letter. Silke Studzinsky, a German lawyer representing the complainants, received a curt e-mail from a court clerk saying the fact that she had passed on her clients' letter, which contained "obviously false" information, was "disconcerting."

The reasons for the government's steadfast opposition to Cases 003 and 004 are doubtful. Hun Sen has repeatedly claimed that additional prosecutions will cause war. Phay Siphon, spokesperson for the government's Council of Ministers, the body which negotiated the tribunal's creation with the UN, said in an interview that the additional cases indeed represented a threat and the ruling Cambodian People's Party "doesn't want them."

It is enough for the court to demonstrate that the Pol Pot regime was "genocidal," he said, adding when pressed that unnamed persons ready to return to civil war over the court's prosecutions did in fact exist. "They are in there. They are in there," he said.

If so, they are well hidden. With the surrender of the Khmer Rouge at the close of the 1990s, many of the former rebels were integrated into Cambodia's military and society. The current ruling party is also headed by politicians who defected from the Khmer Rouge as internal purges intensified and the January 1979 collapse of the regime drew closer. Heng Samrin, the president of the National Assembly, Cambodia's lower house of Parliament, once led a Khmer Rouge military division suspected of atrocities in Vietnam. The president of the Senate, Chea Sim, was once a Khmer Rouge district chief, the same rank as that held by Im Chaem. The prime minister himself, a former military commander in the East Zone, defected to Vietnam in 1977.

Given the makeup of Cambodia's ruling class, prosecutions that venture beyond a symbolic few may be a threat to party unity — one possible reason the government is so reluctant to prosecute new cases.

Youk Chhang, who says he survived forced labor under Im Chaem, is today the director of the Documentation Center of Cambodia, a research institute and repository of Khmer Rouge archives. He believes the prospect of broader prosecutions is unsettling to people at different levels of Cambodian society. Some fear arrest and others fear embarrassment, which makes the additional cases a threat not only to the ruling party's unity but also its prestige and its ability to attract recruits and sustain allegiance.

But it is also a battle over history, and whose version prevails. The story of the ruling Cambodian People's Party and its claim to heroism arose out of its victory over the Pol Pot regime and its negotiated resolution to the civil war. The longer the trials last, the longer the public may credit the international community and not the ruling party for writing the final chapter in the Khmer Rouge saga, said Chhang, noting the bitter irony that the UN and foreign powers had all supported the Khmer Rouge for many years.

A decade ago, UN legal officers sensed these problems coming and attempted to pull out of the negotiations with the Cambodian government. The most serious concerns, according to documents unearthed this year by the historian Stephen Heder (who resigned as a tribunal consultant in May, citing its refusal to investigate), were that the government would interfere in the process and that, according to a February 2002 note to Secretary-General Kofi Annan, "the Cambodian judges and prosecutor could under pressure choose defendants based on political considerations."

UN legal officers had privately expressed similar concerns since as early as 1999, according to the confidential documents published by Heder, currently a professor at the School of Oriental and African Studies at the University of London. In a note to file in June that year, Assistant Secretary-General for Legal Affairs Ralph Zacklin wrote that a "trial of selected Khmer Rouge leaders which would shield other leaders presently situated in Cambodian territory from legal process, would be an unacceptable form of selective justice."

The UN attempted to withdraw from the negotiations in 2002 but member states refused to accept this, finding that a flawed Khmer Rouge tribunal was better than no tribunal at all. In what Brad Adams of Human Rights Watch wrote was a "shocking repudiation of international justice standards," the United States, Japan, France, and Australia engineered a UN General Assembly resolution requiring Kofi Annan to return to the negotiating table under pressure to accept the Cambodian government's terms.

Both Zacklin and his former boss, the former UN Undersecretary-General for Legal Affairs Hans Corell, maintain today that their earliest fears have been vindicated.

"This is precisely the situation that we foresaw and I have to say it's quite sad to see that it's actually happened," Zacklin said in New York, where he currently works as a consultant in international law after resigning from the UN in 2005. "It's certainly not a shining example of a justice system that the UN's name should be attached to," he said. In an e-mail, Corell expressed a similar opinion. "In my view, the tribunal should have been an international tribunal with a majority of international judges."

M. Cherif Bassiouni, a Nobel nominee and legal scholar who was a driving force behind the creation of the International Criminal Court, says that while the Cambodia tribunal "has the trappings of an actual criminal tribunal, it fails to deliver in fundamental ways upon the promise of international criminal law."

An important achievement, he wrote in an e-mail, is that the court is located in Cambodia, which has allowed victims to observe proceedings, something most international courts have not done.

But political interference by the Cambodian government and an imbalance of power between the court's two halves — its more numerous Cambodian judges and its more authoritative international ones — has had "remarkable and tragic" results in the failure to investigate cases 003 and 004.

"This is a mockery of real justice, and in a very real way a façade, a Potemkin process," Bassiouni said.

Youk Chhang, of the Documentation Center, believes that in the minds of Khmer Rouge survivors, by 2007 the court had already struck a powerful blow by detaining five suspects, one of whom, the ex-foreign minister Ieng Sary, loomed large as a government ally and had been granted a Royal Pardon and Amnesty in 1996 as the civil war came to an end.

Chhang said, "When [Ieng Sary] was arrested, you could see that for many survivors, they claimed victory."

Andrew Cayley, the British International Co-Prosecutor, has vowed to pursue the cases if for no other reason than to uphold procedure, principle, and the administration of justice. He pledged on arrival to remain at the tribunal for the duration of its existence but was short-listed last year as a candidate for the chief prosecutor job at the International Criminal Court in The Hague, a sign that he was considering work elsewhere. (The position was awarded last December to Fatou Bensouda, a Gambian lawyer who is the ICC's current deputy prosecutor.)

"We're in the presence of millions of people who have differing levels of grief, either because they were victims themselves or because they had relatives that were killed," Cayley said in an interview. "The moral burden is immense. If you believe in Heaven and Hell, God is watching what we're doing here."

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