

A Sovereign Tribunal To Try War Crimes

by Gail G. Billington

A statement released by the Cambodian government on Jan. 13 draws out the vivid irony that the United Nations, together with the leading Western powers, provided recognition and overt protection for the genocidal Khmer Rouge regime, throughout the 1980s and much of the 1990s, but in recent years, self-righteously accuses the Cambodian government of stalling and obstructing the commencement of a tribunal for those Khmer Rouge leaders who are still alive. The Cambodian document not only counters these charges, but poses a higher issue: Justice and reconciliation far outweigh any demand for retribution or revenge. It also proposes that the model being developed, involving cooperation between the international institutions and the national sovereign government, may prove to be superior to the “externally imposed and run International Criminal Tribunals” which have existed up until now.

In the three years and eight months from April 1975 to Jan. 7, 1979, more than one in four Cambodian citizens died. Most died from disease and starvation, but were actually killed by an ideology that hated those who could read or write, or who had skills that could challenge the mind-deadening uniformity demanded by the Sorbonne University-trained leadership of “Brother #1,” Pol Pot, and his Khmer Rouge inner circle.

The first tribunal of the Khmer Rouge leadership was held in January 1979, shortly after their defeat by a combination of Cambodian irregular forces and the Army of Vietnam. The new government tried the leaders *in absentia*, on behalf of the People’s Republic of Cambodia. Not only did the UN refuse to recognize this tribunal, but it continued to seat the Khmer Rouge as the legitimate representatives of Cambodia to the United Nations until 1991. That same year, the Paris Peace Talks bestowed even greater legitimacy on the Khmer Rouge, by giving these murderers a seat on the new Cambodian ruling body, the Supreme National Council.

In June 1997, then co-Prime Ministers Hun Sen and Prince Norodom Rannariddh co-authored a letter to UN Secretary General Kofi Annan, seeking UN assistance to bring surviving Khmer Rouge leaders to trial. Talks continued until February 2002 on creation of a unique tribunal, involving international and Cambodian participation.

However, on Feb. 8, 2002, the United Nations, demanding

changes in Cambodian law regarding the Tribunal, signalled its intent to withdraw from these talks. Negotiations resumed only *after* the UN General Assembly voted on Dec. 18, 2002—with 123 nations in favor and 37 abstentions—mandating the Secretary General to again pursue negotiations.

It is in this context that the Cambodian Delegation to the United Nations issued its official statement “Regarding the Establishment of Extraordinary Chambers within the Courts of Cambodia,” on Jan. 13, 2003.

Cambodia’s Call for a Tribunal

Here are excerpts from the government statement. Subheads have been added.

On 7 January 2003, Cambodia commemorated the 24th anniversary of the overthrow of the Khmer Rouge regime, in which over a quarter of the population died. Cambodia takes seriously its obligations under the Genocide Convention to prosecute those responsible for the massive human rights violations committed by the Khmer Rouge between 1975 and 1979.

Towards this end, responding to the invitation of the Secretary-General, His Excellency Kofi Annan, a Cambodian delegation led by His Excellency Sok An, Senior Minister in Charge of the Council of Ministers, has come to New York and has engaged in seven meetings—one with the Secretary-General himself, and six with representatives of the United Nations Secretariat, led by His Excellency Hans Corell, Legal Counsel, preparing for a resumption of negotiations for Khmer Rouge Trials for these crimes, in accordance with the General Assembly Resolution 57/228 of 18 December 2002.

The Cambodian delegation wishes to take the opportunity of the conclusion of these talks to address some of the issues and concerns that have been raised in regard to this process.

1. We re-affirm emphatically that the Royal Government of Cambodia is committed to conducting the Khmer Rouge trials in compliance with international standards of justice, fairness, and due process of the law. Since 1979, when we overthrew the Khmer Rouge regime, we have struggled for ways to address these crimes. We have sought to achieve truth, justice, and reconciliation, a contradictory but necessary synthesis, without which our people cannot escape from the aftermath of the genocide and go on to build a peaceful society, developing and benefiting from our rich natural and human resources. For the first time in our contemporary history our entire country is now at peace and unified—an enormous achievement.

World Ignored 1979 Tribunal

The June 1997 request by the then Co-Prime Ministers for UN help in carrying out this task, marked the commence-

ment of the latest stage in this long search for truth, justice, and reconciliation. In 1979 we held the People's Revolutionary Tribunal—the world's first genocide trial—in which we invited international jurists to participate. Unfortunately, due in part to weaknesses in that process but, above all, due to the political isolation of our government at the time, the testimony and the verdicts were simply ignored outside our country. The Khmer Rouge continued to be recognized and to be seated in the United Nations, and we ourselves continued to find ways to address this problem. Now as we throw our efforts into this latest effort to seek justice, this time hopefully in partnership with the United Nations, we keep in our minds firmly that this must not damage the process of reconciliation.

The Paris Peace Agreements of 1991 accorded political legitimacy to the Khmer Rouge and, when UNTAC [United Nations Temporary Authority in Cambodia] left Cambodia in 1993, the new coalition government was left to face the Khmer Rouge continuing policy of civil war and destabilization. We then launched a multi-faceted strategy involving political, legal, economic, and military campaigns, including the 1994 legislation to outlaw the Khmer Rouge, and efforts to encourage its members to defect and split as part of what Prime Minister Hun Sen has described as a “win-win” policy.

By the end of December 1998 we had managed to put an end to the Khmer Rouge political and military structure, and were faced with the twin tasks of national reconciliation and justice. Cambodia can perhaps offer to others the lessons of our experience in the long and complex process of reconciliation. Today, former Khmer Rouge have put down their guns and have recommenced their lives within the general community, and the former factions have taken up the challenge of working together to develop the country.

When the Cambodian Co-Prime Ministers requested the United Nations' assistance in organizing the process for a Khmer Rouge trial, it was an appeal for assistance, but not for substitution of our institutions, which have continued to pursue these efforts. . . .

Justice Delayed

2. We have been criticized for the time these negotiations have taken. We are more than mindful that justice delayed is justice denied, and that we continue to pay a high price for every day of the 24 years delay in bringing to justice the architects and perpetrators of the crimes. For our part, the Cambodian national law establishing Extraordinary Chambers to prosecute the Khmer Rouge crimes was promulgated on August 10, 2001, just two years after the first draft was put on the table when our negotiations with the UN commenced in August 1999. This is by no means an unusual length of time for a country to take to develop legislation, particularly of an unprecedented kind, inviting foreign participation into the national courts, and on a matter of such sensitivity. The draft law was discussed by our

Cabinet on three separate occasions, debated by legislative committees and the plenary sessions of both houses of our legislature, examined by our Constitutional Council, and finally promulgated by His Majesty the King and Head of State, according to the rule of law.

Some months delay was caused by the fact that the Constitutional Council ruled that the law was insufficiently clear that the maximum penalty was life imprisonment, and, therefore, could be in conflict with our Constitution, which explicitly outlaws the death penalty. As a result, the government amended the draft and re-submitted it for debate in the National Assembly and the Senate. It is important for us to recognize that our country is now undergoing a process of democratization and that the Constitutional Council is one of the recently established institutions whose authority and decisions should be respected as part of this process.

Further, the justice we seek is restorative justice, contributing to the reconstruction and democratization of our society as a whole. To embark on a process of prosecuting crimes for genocide and other crimes against humanity is not without risk, and so we have devoted enormous efforts to gaining the support of our people for this effort.

The unanimous votes in the National Assembly and Senate for this legislation were unprecedented, and testify to the results of this effort to reinforce and not jeopardize our fragile peace. Any estimation of time taken is of course subjective, but the past three years of negotiation must be viewed as part of this 24-year historic process, and can be compared with other countries which have taken more than years or even decades to attempt to deal with crimes of this nature.

'Crimes in Our Own Country'

3. We are acutely aware of the relative weakness of the Cambodian judiciary and legal system, resulting mainly from the blows inflicted on the entire Cambodian social fabric by the Khmer Rouge. Indeed, this was one of the principal reasons that we requested assistance from the UN in 1997. We wish, however, to refute the notion that our judiciary ought not to be conferred an active and significant role in the process of seeking justice regarding the most serious crimes in our nation's history.

We point to significant efforts that our government has taken towards legal and judicial reform, whose results are beginning to be seen. . . . These reforms give us confidence that we have sufficiently qualified and competent legal professionals to play the roles required in the forthcoming Khmer Rouge trials, together with their international counterparts. Let us stress that we have requested not only international assistance but also international participation in the trials, and we have agreed to share with the international community the heavy task of judging the serious crimes committed in our own country by our own people. No decision will be taken without their full involvement and agreement.

As to our organizational capacity, Cambodia is this year

taking its first turn as the Chair of ASEAN (The Association of Southeast Asian Nations), and recently successfully hosted the ASEAN Summit and a series of associated meetings, including the Greater Mekong Subregion Summit attended by Heads of Government, Heads of State and Foreign Ministers from a number of countries. . . .

4. Some observers have questioned the credibility of the process prescribed in the Law to establish Extraordinary Chambers in Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea. . . .

During this process we have engaged seriously in the negotiations, and have reached compromises along the way to arrive at a formula that truly reflects a joint enterprise in which one cannot speak of control by one side or the other, but rather an equilibrium giving full national and international participation in all stages of the process, from prosecution, investigation, and judgement. . . .

Milestone in Humanitarian Law

5. Several years of negotiations have formulated the personal, temporal, and material jurisdiction for the Extraordinary Chambers. . . . When we commenced the negotiations in 1999, our two positions were far apart. It would be unthinkable now to return to these positions and abandon our hard-won gains in the jurisdiction.

We are confident that the Cambodian model is not only credible, but represents an historic milestone in international humanitarian law, now moving away from externally imposed and run International Criminal Tribunals as have been seen over half a century in Nuremberg and Tokyo, and more recently The Hague and Arusha, towards complementarity, encouraging each country to exercise justice at the national level in a manner that meets international standards, and accords with our responsibility under the principal instruments, especially the Genocide Convention. . . .

Following these exploratory meetings held in New York, we have invited the Secretary-General to dispatch a delegation to Phnom Penh in the near future to formalise the Agreement to be signed by both parties and to move on to the long-delayed task of bringing to account those most responsible for these most serious crimes.

We thank the 150 countries that voted for the General Assembly resolution and call on the international community to join with us in carrying out this historic task.

New York, 13 January 2003

