

## Verdict in Cambodia: Too Little Too Late, but Still Important

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Amidst all the developments in the Middle East, we could not allow the verdict rendered by the Extraordinary Chambers in the Courts of Cambodia (ECCC) in Case 002 to go unacknowledged. Case 002 involves two surviving Khmer Rouge defendants: Khieu Samphan and Nuon Chea. As the evidence against these two was overwhelming, it comes as no surprise that the defendants were [convicted of crimes against humanity](#) and sentenced to life imprisonment—a penalty with limited meaning when it comes to octogenarian defendants. (For a fuller background on the Khmer Rouge, the ECCC, the cases, and the United States’ central role in establishing the ECCC, scroll below the fold).

In the whole scheme of things, this outcome is admittedly a small victory: for justice and for the victims of the Khmer Rouge. The judgment comes too late, says too little, and makes too small an impact on the defendants who enjoyed positions of dominance followed by years of impunity. But this disruption to their golden years and codicil on their legacies is something. Norms were affirmed and developed. No one can ever again credibly dispute that the Khmer Rouge regime was brutal and senseless. And generations of Cambodians will have a definitive account of a terrible segment of their own country’s history—no small feat given that [until several years ago](#), Cambodian textbooks simply elided over this period of their nation’s history and 70% of the populace was born after the Khmer Rouge era. Cambodia’s youth are in a better position to ensure that such crimes are not repeated—in Cambodia or elsewhere.

### Victim Participation & Reparations

In the end, however, this judgment, and any other that may be rendered, is not the most important outcome of this process of international justice. Over 4000 victims participated directly in the proceedings and over 200,000 more have visited the ECCC for hearings, having been bussed to Phnom Penh from villages and towns all over the country. Even more people participated in local discussion fora as part of outreach programs developed by the non-governmental community. A number of U.S. citizens were a part of the proceedings, [represented by the Center for Justice & Accountability](#). This broad-based involvement of the Cambodian people and diaspora—unprecedented when it comes to international, no less domestic, judicial proceedings—may actually be the most enduring legacy of the ECCC.

Declaring the acts of the KR leadership to be criminal under international law is an important first step. Focusing on the needs of the victims should come next. In its verdict, the ECCC endorsed 11 reparations projects, including memorials and exhibitions, additional educational

reforms, the publication and dissemination of adjudicated facts, and formal recognition of the civil parties. The Cambodian government, and other members of the international community, must follow through and ensure that these projects come to fruition to the benefit of victims and their communities.

The international community should also continue to support educational initiatives in Cambodia around the imperative of justice—not only with respect to the crimes of the past but also regarding human rights abuses that continue today. In this regard, DC-Cam is in the process of developing the [Sleuk Rith Institute](#), which will be a permanent educational institution dedicated to the study of genocide with the goal of contributing to the atrocities prevention movement. [Zaha Hadid](#), the first woman to be awarded the prestigious [Pritzker Prize](#) (2004), will design the new building.

### **Next Steps**

This verdict does not mark the end of the ECCC’s work. In 2011, Case 002 was severed, with the first phase addressing only the forced evacuation of Phnom Penh and the northwest zone, forced displacements, and crimes committed at Tuol Po Chrey, where soldiers of the former Lon Nol regime were executed *en masse*. There are other crucial aspects of Case 002 that remain to be addressed, including more broad-based crimes against humanity, a web of torture centers, the widespread use of forced labor at work sites, sexual violence including forced marriages, and other forms of religious and ethnic persecution. In addition, [genocide charges involving Cambodian minorities](#) (including the Cham Muslims) will finally take center stage. The trial on these additional charges is slated to start in September or October 2014. Completing Case 002 will ensure that all victims have their day in court and the full horror of the Khmer Rouge can become part of the judicial record. Because the current verdict includes many foundational findings as to the history, structure, and operations of the Khmer Rouge, subsequent phases can proceed more rapidly. In addition, the Co-Investigating judges are continuing their work on Cases 003/4 with an eye toward issuing additional Closing Orders (the equivalent of an indictment).

### **Background**

By way of background, the Khmer Rouge, otherwise known as the Party of Democratic Kampuchea, seized power in Cambodia from the American-backed Lon Nol government on April 17, 1975. The Khmer Rouge encountered a nation destabilized by a still fresh civil war, frequent invasions by neighbors, periodic *coups d’état*, and a full-scale American incursion that had dropped over 250,000 tons of bombs in an effort to disrupt the Ho Chi Minh trail during the Vietnam War. Under the leadership of Pol Pot, the Khmer Rouge immediately dismantled Cambodian society and installed a brutally repressive state. This marked “year zero” in what turned out to be a four-year campaign to create a “New Cambodia”—a radical project of social reorganization drawing upon communist and Maoist thought to construct an idealized vision of a rural proletariat.

The draconian measures instituted by the Khmer Rouge regime in the quest to remake Cambodian society included the liquidation of the Lon Nol army and members of the former

regime; the extermination of the elite and educated; a complete evacuation of the urban centers; the incineration of books, libraries, banks, places of worship, and university facilities; the criminalization of the usage of foreign languages; the abolition of money, private property, markets, and salaries; the dissolution of families and the separation of children from their parents; the execution of ethnic minorities; forced marriages; the prohibition of religious practice and education; and the systematic hunt for real and imagined political opponents.

The first stage of the revolution witnessed the brutal and systematic execution of former military officers and their families in places such as Tuol Po Chrey. In all, state agents reportedly killed 100,000 to 200,000 people during this initial purge. Khmer Rouge cadre identified their victims at check points or summoned them to their death with announcements instructing people with administrative or military experience to identify themselves. After supplying elaborate “biographies” attesting to any number of treasonous and seditious activities, these individuals and their families were executed. The regime also eliminated others who were affiliated with the previous regime, were Western-educated, or were landowners.

A fundamental tenet of Khmer Rouge ideology was that all citizens had to be proper Khmers, as defined by the revolution. This purification required the extermination or forced assimilation of all non-Khmer ethnic groups, including ethnic Vietnamese, Chinese, Cham (Khmer Muslims), Thai, and rural indigenous communities. It also required the elimination of other individuals whose perceived social, economic, and political affiliations or histories rendered them inherently impure and subject to violent exclusion from the revolutionary program of nation-building. This included individuals resident in the Eastern zones hiding “Vietnamese minds in Khmer bodies.”

Khmer Rouge leaders realized that this nationalistic and idealized vision of the “pure Khmer” as the source and beneficiary of the revolution could not be based on Khmer ethnicity alone. First, the Khmer Rouge considered many elements of the Khmer tradition to be retrograde, such as the attachment to Buddhism. These counter-revolutionary vestiges had to be excised from society. Second, many of the key members of the Standing Committee (such as Pol Pot, Nuon Chea, Sao Phim and Khieu Samphan) were of Chinese descent. To accommodate different “objective” ethnicities within the new Cambodian polity, the Khmer Rouge revived the term “Kampuchea,” even officially calling their party the Party of Democratic Kampuchea. The term dates from the 9th century and a romanticized period of the Angkor dynasty, which flourished in South East Asia for 600 years with its capital at the world-famous Angkor Wat. In the radical egalitarianism of the Khmer Rouge, all those who were proper Kampuchean were equal; all those who were not were subject to elimination. In this way, the Khmer Rouge invented an ideal type—with national, ethnic, political, and religious dimensions—against which all citizens were to be measured. Individuals who did not adhere to these multidimensional criteria were exempt from inclusion, dehumanized, and subject to execution.

Eventually, the Khmer Rouge exhausted “the other” and turned upon itself. An alleged coup attempt in 1976 prompted full-scale purges aimed at all party leaders, local officials, military officers, and citizens supposedly associated with the political “opposition.” Khmer Rouge cadres recruited a vast network of spies throughout society to identify dissidents and enemies of the state. Friends and family of the accused were instantly guilty by association, and children were encouraged to denounce their parents. The regime justified the intensified repression that

followed on the ground that the revolution was at all times in jeopardy of sabotage by counterrevolutionary forces. It confined Khmer Rouge cadres accused of sedition, treachery, and collusion with Vietnam in detention centers where they were tortured to extract putative “confessions” that led to more purges. Case 001 before the ECCC involved crimes committed at Tuol Sleng Prison (a.k.a. S-21)—the apex of the torture and extermination system—where upwards of 14,000 people were “smashed to bits.”

The Khmer Rouge regime was finally halted when Vietnam—with assistance from former Khmer Rouge functionaries—invaded Cambodia on January 7, 1979, and installed the People’s Republic of Kampuchea. By the time the Vietnamese invasion opened the killing fields for the world to see, approximately two million people had perished, some from outright execution, others from being worked to death, others from malnutrition and disease borne of starvation and want. Although the ouster of the Khmer Rouge was welcomed by many, western anti-communism tinged with lingering United States animosity toward Vietnam led the United Nations—in a lamentable expression of *realpolitik*—to allow the Khmer Rouge government to retain its seat in the U.N. General Assembly as a “government-in-exile.”

### **The Establishment of the ECCC**

The United States eventually acknowledged the venality of the Khmer Rouge. Almost two decades later, Congress passed the Genocide Justice Act (1994), which authorized the creation of a documentation center in Cambodia, later named the [Documentation Center of Cambodia \(DC-Cam\)](#), to develop the United States proposal for the establishment of an international criminal tribunal for the prosecution of those accused of genocide in Cambodia and to gather, and begin to analyze, the necessary evidence. (Disclosure: I interned with DC-Cam in 1995 and 1996 and have been a legal adviser to DC-Cam ever since). Experts hired by the State Department produced a report establishing *prima facie* evidence of the commission of crimes against humanity and war crimes.

In 1997, the co-Prime Ministers of Cambodia wrote to the U.N. Secretary-General requesting assistance with the establishment of an international tribunal to prosecute surviving members of the Khmer Rouge regime. Soon thereafter, however, the first Prime Minister, Hun Sen, staged a palace coup to vault himself into position as the sole Prime Minister; a few years later, Pol Pot, the symbolic head of the Khmer Rouge, died under mysterious circumstances; and several high ranking Khmer Rouge leaders defected from their jungle hideouts in northwestern Cambodia accompanied by great fanfare. Under these circumstances, Hun Sen eventually soured on the idea of creating an institution he could not control. Nonetheless, by then, the process had taken on a life of its own.

In the meantime, the U.N. General Assembly requested the establishment of a Commission of Experts to examine the evidence and recommend a course of conduct to end impunity in Cambodia. In [a 1999 report](#), the Commission—composed of Rajsoomer Lallah (Mauritius), Sir Ninian Stephen (Australia), and Professor Steven Ratner (United States)—recommended the establishment of another *ad hoc* tribunal, under either Chapter VI or VII of the U.N. Charter, that would be based in Thailand or elsewhere outside of Cambodia. The Commission rejected a true mixed tribunal, which had been proposed by the Cambodian government, because the

Commission was concerned about the prevalence of corruption, the risk of political influence on the judiciary, the quality of the local bar, and the ability of the local courts to meet international due process standards.

The Security Council did not act on these recommendations due in part to tribunal fatigue, however, so the Secretary–General began negotiations with the government of Cambodia to establish the quasi-international tribunal that was favored by the government. Several contentious institutional design issues emerged immediately (such as whether there would be a majority of international or domestic personnel, who would appoint key personnel, and how disputes between international and Cambodian staff would be resolved). The Secretary–General’s primary concern in these debates was that the government was attempting to create a judicial process that could be politically controlled rather than an independent and impartial tribunal meeting international standards. As these debates were underway, the Cambodian Parliament passed legislation in 2001, the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, which resolved these outstanding issues—largely in favor of the government’s position.

In the face of this *fait accompli* and continued intransigence on the part of the government, the Secretary–General withdrew from the negotiations in February 2002. For this, he drew significant ire from influential members of the General Assembly committed to seeing a tribunal in Cambodia, the U.N.’s own Special Representative for Human Rights in Cambodia, and the U.N. High Commissioner for Human Rights. Members of the NGO community split on this issue: some took the hard line against the risk of a flawed process, whereas others argued that the perfect should not be the enemy of the good. The impasse ended when the U.N. General Assembly by resolution ([U.N. Doc. A/RES/57/228](#)) requested that the Secretary–General continue the negotiations on the basis of the 2001 law. On the same day it passed this resolution, and apparently oblivious to this irony, the General Assembly passed another resolution ([U.N. Doc. A/RES/57/225](#)) expressing concern about “interference by the executive in the independence of the judiciary” in Cambodia. The General Assembly eventually approved the agreement between the United Nations and the Royal Government of Cambodia in 2003. The agreement entered into force on April 29, 2005.

### **The ECCC Proceedings**

In early 2006, the ECCC was formally established on the premises of the High Command Headquarters of the Royal Cambodian Armed Forces on the outskirts of Phnom Penh. By November 2009, the trial of one accused, Kaing Guek Eav (also known by his *nom de guerre*, “Duch”), had been completed (Case 001). Duch was in charge of the notorious torture center known as S–21, or Tuol Sleng. After being meticulously photographed, interrogated, and killed, victims were then taken to Choeung Ek (also known as “the killing fields”) and summarily executed. (Tuol Sleng, a former girl’s school, and Choeung Ek are now museums dedicated to memorializing the victims of the Khmer Rouge regime.) Duch was charged with crimes against humanity and war crimes under international law and with torture and murder under Cambodian law.

In open court, Duch, represented by both a Cambodian and international defense counsel, admitted with some equivocation his responsibility for many of the crimes alleged, and apologized for them (though many doubt the sincerity of his apology). His 72-day trial resulted in a conviction with a sentence of 35 years, shortened to reflect the fact that Duch had been detained for nine years before his trial, seven under the auspices of the Cambodian Military Court and two under the jurisdiction of the ECCC. In a ruling that could be used to challenge the prevalent use of pre-trial detention within the domestic Cambodian system, the ECCC found that Duch's detention prior to his trial violated his rights (because it exceeded the three-year limit under Cambodian law and the international right to a trial "within a reasonable period of time"), and ordered that he receive credit for time served against any sentence that may be imposed as well as additional credit to compensate him for the violation of his rights.

The other four suspects in custody (Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith) were more senior members of the Khmer Rouge. Ieng Sary, former Foreign Minister/Deputy Prime Minister and Minister of Social Affairs, has since died. His wife Ieng Thirith was one of a handful of female defendants to be prosecuted internationally, but has been declared unfit to stand trial. Nuon Chea, also known as Brother Number Two (Pol Pot was Brother Number One), was the chief political ideologist, and Khieu Samphan was Chief of State. Case 002 is proceeding in stages. This week's judgment (Case 002/01) concerned forced deportation and the execution of Khmer Rouge cadre.

Since its establishment, the ECCC has been plagued with allegations of corruption and political interference. At first, the corruption allegations were bureaucratic in nature, focusing on nepotism in hiring and allegations that Cambodian staff gave kick-backs to government officials. Most of the defense counsel filed a request asking the judges to investigate the allegations of corruption, arguing that such corruption endangered their clients' right to a fair trial. The Co-Investigating Judges dismissed the request less than two weeks after it was filed, reasoning *inter alia* that accepting the request would amount to an abuse of power as the facts alleged do not fall within the jurisdictional mandate of the ECCC.

Eventually, the corruption allegations began to touch upon the work of the tribunal itself when a dispute arose between the Cambodian and foreign Co-Prosecutors over whether to undertake additional investigations beyond the five individuals already in custody. Under the agreement establishing the ECCC, such disputes between the two Co-Prosecutors are to be resolved by the Pre-Trial Chamber and a request by one of the Co-Prosecutors to investigate a suspect may proceed in the face of objection by the other Co-Prosecutor unless the Pre-Trial Chamber rules otherwise. Canadian jurist Robert Petit argued in his submissions that the only requirement to open an investigation was the determination that there were reasonable grounds for believing that additional crimes within the jurisdiction of the ECCC had been committed. By contrast, his Cambodian counterpart, Ms. Chea Leang, argued that extra-legal factors—such as the limited nature of the ECCC's mandate, the threat of instability, and resource constraints—counseled against any expansion of charges. The Cambodian Prime Minister, Hun Sen, publicly stated that he did not want the Court to investigate or charge additional persons, leading to the charges of political interference in the judicial process.

In August 2009, the Pre-Trial Chamber deadlocked over the request submitted by Petit, and thus investigations are proceeding against five additional suspects whose names are currently under seal (Cases 003 and 004). The Pre-Trial Chamber split along national lines, the two international judges voting in favor of the investigations and the three Cambodian judges voting against. Because decisions of the Court require a supermajority (i.e. at least one international judge must be in the majority), the investigation was allowed to proceed. Subsequent to this decision, the Prime Minister stated that if additional charges were brought it would result in social unrest that could kill from 200,000 to 300,000 people. Soon after the decision was announced, Petit abruptly resigned, citing personal reasons. British Solicitor Andrew Cayley then assumed the foreign Co-Prosecutor position, although [he too has resigned](#) and is now head of the United Kingdom's Service Prosecuting Authority, which prosecutes members of the armed forces. American Nicholas Koumjian now occupies the Co-Prosecutor position. [American Mark Harmon](#), formerly of the ICTY, is the fourth international Co-Investigating Judge (three others have resigned amidst allegations of political interference). He serves alongside his Cambodian counterpart, You Bunleng.

<http://justsecurity.org/13923/verdict-cambodia-late-important/>