

Dilemmas of Delayed Justice for the Crimes of the Khmer Rouge

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The pursuit of justice for the victims of the murderous Khmer Rouge has been a slow and lengthy affair, hampered over the past thirty years by both Cambodian and international politics. Seeing a former member of the Khmer Rouge, however, being led into the Pre-Trial Chamber of the Extraordinary Chambers of the Courts of Cambodia to stand trial for crimes against humanity begins to redress this delay. This represents half the battle in the search for accountability for some of the most notorious abuses of the 20th century. Ieng Thirith, 76, sister-in-law of Pol Pot, was Minister for Social Affairs during the Khmer Rouge's reign from 1975-79 and stands accused of crimes including murder, extermination and persecution. She appeared before the Extraordinary Chambers in July 2008, unsuccessfully arguing for provisional release from detention pending the commencement of her trial.

The horrific abuses committed during the late 1970s by the Khmer Rouge in its pursuit of a classless, agrarian society in Cambodia are widely-known and well-documented. Holding individual members *criminally* responsible for those acts, on the other hand, some thirty years after they were committed, presents significant dilemmas for the lawyers and judges at the Extraordinary Chambers, the tribunal established in 2003 by an agreement between the United Nations and the Government of Cambodia. The unique nature of the Khmer Rouge tribunal, in which the key posts of prosecutors, defence and judges are shared by Cambodian and international personnel, applying a mixture of international and domestic law, presents even further challenges.

The delay in the establishment of the tribunal has meant that several key Khmer Rouge members have died, most notably "Brother Number One", Pol Pot, while numerous others, including the five that are currently detained and awaiting trial, are in various states of deteriorating health. Ieng Sary, 82, who was Deputy Prime Minister in charge of foreign affairs, has allegedly suffered a heart attack and decided at one point to waive his right to a lawyer, prompting interventions that he is of "weak physical and mental capacity" and unfit to stand trial. Ieng Thirith, his wife, was half-carried into the courtroom by her nurse and guard. Nuon Chea, 82, known as "Brother Number Two", suffers from a serious heart condition and high blood pressure. A doctor, nurse and ambulance are on permanent standby in the tribunal's compound. It is likely that several of those currently awaiting trial might not live long enough to hear the verdicts.

Several acute legal issues arise from the three decade gap between the rule of the Khmer Rouge and the ongoing attempt to prosecute those most responsible for the offences committed during that period. The availability and reliability of witnesses may be adversely affected by the passage of time. The crimes over which the Extraordinary Chambers have jurisdiction include those from the 1956 Penal Code of Cambodia (homicide, torture and religious persecution) and international crimes such as genocide, crimes against humanity and war crimes. Charges on the basis of

domestic offences might not accurately reflect the reality of Khmer Rouge atrocities, while framing these as international crimes presents several dilemmas over which lawyers at the Extraordinary Chambers are bound to clash.

A fundamental principle in any criminal trial is that an accused can be charged only with crimes that were established in law at the time the alleged offences were committed. This maxim of *nullem crimen sine lege* means that the law to be applied to the Khmer Rouge trial must be as it stood in 1975. International law and the definition of crimes against humanity have developed significantly since 1975, particularly with the recent establishment of the International Criminal Court. That said, respect for the principle of legality and the fair trial rights of the accused would tend to oppose the application of current understandings of these laws. It is contested whether the requirement established by the Nuremberg Tribunal that crimes against humanity be connected with an armed conflict is met in the case of the Khmer Rouge, although scholars disagree as to when exactly this nexus requirement was abandoned under customary international law.

One of the more profound legal challenges facing the Extraordinary Chambers will be trying to establish that the mass killings committed by the Khmer Rouge meet the definition of genocide, as set out in the 1948 Genocide Convention. The death of 1.7 million people under the Khmer Rouge is popularly referred to as genocide, but satisfying the strict legal definition of the crime will prove difficult. The international crime of genocide requires that a perpetrator intended “to destroy, in whole or in part, a national, ethnical, racial or religious group as such” by means of killing or other inhuman acts. The challenge is less to do with the applicable law in 1975, as Cambodia had been a party to the Genocide Convention since 1951, or the thirty year delay since the atrocities were committed, although this will present some evidentiary and other difficulties, but rather with meeting the definitional requirements of the “crime of crimes”.

Most of those who died under the Khmer Rouge were ethnic Khmers, killed for their perceived political views, educated background or social class, although Cham Muslims, Vietnamese and Buddhist monks were also targeted. The majority were not killed for simply being members of a group defined under the Genocide Convention. Although none of the current accused is yet charged explicitly with genocide, the claim is of such emotional and political significance that it is difficult not to see the tribunal concluding that the Khmer Rouge committed genocide, particularly given the majority of Cambodia judges on the bench and the persistent allegations of governmental interference in the entire process. The requirement of a “supermajority” for decisions, where at least one international judge must concur with the majority decision, may temper any excessive judicial findings on this particular question.

A further politicised issue confronting the judges is the question of the royal pardon given to Ieng Sary in 1996 by King Sihanouk, upon his defection to the Cambodian government. Sary, along with Pol Pot, had been tried and convicted in his absence by the “People’s Revolutionary Tribunal” after the Khmer Rouge was ousted from power in 1979. Lawyers have claimed on his behalf that this is an effective amnesty which prevents their client from being tried again for the same offences. The vague definitions of the crimes and the lack of a proper defence in the 1979 process –

viewed essentially as a “show trial” – would be reason for the Extraordinary Chambers to view the pardon as no barrier to prosecution.

These issues played out in an October 2008 decision of the Pre-Trial Chamber, wherein it found that the current prosecution of Ieng Sary “might be viewed as one for different offences”, given that he is not on trial for genocide, and furthermore, that it is unclear at this stage of the proceedings if the charges relate to the same “acts” forming the basis of the 1979 conviction. Based on this finding, the Chamber felt it did not need to consider whether the 1979 trial reached minimum fair trial standards. In a short discussion of the 1996 Royal Decree, the Chamber found that the validity of the amnesty was “uncertain”, given inconsistencies in the wording and the fact that it related to crimes over which the Extraordinary Chambers do not exercise jurisdiction. The Pre-Trial Chamber has thus seemingly removed this considerable obstacle, although defence lawyers have reserved the right to raise the issue again at a later stage.

Establishing the criminal responsibility of those members of the Khmer Rouge on trial, thirty years after the event and in accordance with international human rights standards, presents serious challenges. While moral and political responsibility has already been ascribed to the five detainees, and in some cases even accepted by the accused themselves, proving their criminal guilt is a more daunting endeavour. The dilemmas created by delayed justice produce even further obstacles for the victims of the Khmer Rouge’s brutal crimes.

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