

# ACCOUNTABILITY BECKONS DURING A YEAR OF WORRIES FOR THE KHMER ROUGE LEADERSHIP

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The year 1999 saw a series of extraordinary developments in the search for justice in the case of Cambodia's Khmer Rouge. After twenty years during which there was little or no official movement to bring the Khmer Rouge to justice, international and domestic Cambodian momentum for genocide justice accelerated dramatically.

A suitable point of departure for a discussion of these developments would be a report delivered to United Nations Secretary-General, Kofi Annan on February 18, 1999.<sup>1</sup> Some twenty months earlier, on June 21, 1997, the Co-Prime Ministers of Cambodia, First Prime Minister Prince Norodom Ranariddh and Second Prime Minister Hun Sen dispatched a letter to the United Nations Secretary-General (UNSG) requesting international assistance in the matter of bringing the Khmer Rouge to justice.<sup>2</sup> Due in part to the very deliberate nature of United Nations processes and in part to political instability in Cambodia, the arrival of a team of United Nations experts in Cambodia to prepare recommendations pursuant to the letter of the Co-Prime Ministers was delayed more than a year. During this intervening period, the Khmer Rouge political and military organization collapsed, and most of the Khmer Rouge leadership surrendered and applied to the government for various forms of mercy. Feeling thus emboldened by his own successes in dealing with the Khmer Rouge, Hun Sen (by now the sole Prime Minister) rejected the recommendations from the United

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1. The Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135, by Ninian Stephen, Chairman, Rajsoomer Lallah, and Steven R. Ratner, dated February 18, 1999, is presented as an annex to the United Nations document, *Identical Letters Dated March 15, 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council*, U.N. GAOR, 53rd Sess., Agenda Item 110(b), U.N. Doc. A/53/850 and S/1999/231 (1999).

2. Letter from Cambodian Co-Prime Ministers Norodom Ranariddh and Hun Sen to UN Secretary General Kofi Annan (June 21, 1997) (distributed on the Internet via the Camnews news group, June 25, 1997).

Nations Group of Experts that the United Nations establish an ad hoc international tribunal drawing on the International Criminal Tribunals for the former Yugoslavia and Rwanda. This decision effectively rendered the Report of the United Nations Experts dead on arrival. It is nonetheless useful to consider the main recommendations of that report:

#### SUMMARY OF PRINCIPAL RECOMMENDATIONS

The above discussion contains, we hope, an exhaustive treatment of the issues assigned to the Group of Experts by the Secretary-General. Without attempting to restate all of our recommendations, we reiterate those of most importance. We recommend that:

1. That in response to the June 21, 1997 request of the government of Cambodia, the United Nations establish an ad hoc international tribunal to try Khmer Rouge officials for crimes against humanity and genocide committed from April 17, 1975 to January 7, 1979.
2. That as a matter of prosecutorial policy, the independent prosecutor appointed by the United Nations limit his or her investigations to those persons responsible for the most serious violations of international human rights law and exercise his or her discretion regarding investigations, indictments, and trials so as to fully take into account the twin goals of individual accountability and national reconciliation in Cambodia.
3. That the Security Council establish this tribunal or, should it not do so, that the General Assembly establish it.
4. That the tribunal comprise two trial chambers and an appellate chamber, and that the United Nations actively seek to include on the tribunal a Cambodian national whom it believes is qualified, impartial, and appropriate.
5. That the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia and of the International Criminal Tribunal for Rwanda serve as the Prosecutor of the new tribunal, with a Deputy Prosecutor specifically charged with responsibility for this tribunal.
6. That the tribunal, including the office of the Deputy Prosecutor, be established in a state in the Asia-Pacific region but not in Cambodia; that the Prosecutor establish an investigations office in Cambodia; and that the United Nations, in cooperation with the government of Cambodia, arrange for the unfettered dissemination of the proceedings in Cambodia by radio and television.
7. That the full panel of judges appointed by the United Nations not commence full-time service until at least some indictees have been arrested.
8. That the United Nations undertake special measures for the protection of physical evidence and of witnesses as necessary, and

that states with evidence and witnesses on their territory make them available to the Prosecutor.

9. That the tribunal established provide for the possibility of reparations by defendants to victims, through a Trust Fund or some other special fund, and that states holding such assets arrange for their transfer to the tribunal as required to meet the defendants' obligations in this regard.

10. That the United Nations, in cooperation with the Cambodian government and non-governmental sector, encourage a process of reflection among Cambodians to determine the desirability and, if appropriate, the modalities of a truth-telling mechanism to provide a fuller picture of the atrocities of the period of Democratic Kampuchea.

In asking for United Nations assistance, the government of Cambodia has responded to what we sense is the desire of the Cambodian people for justice and their knowledge that it is impossible to simply ignore the past. Rather, it is necessary to understand the past and move beyond it by seeing justice done for those responsible for it. This process has been too long delayed for Cambodia and the time for action is here. If these and our other recommendations are pursued by the United Nations now with the support of the government of Cambodia, we believe they will lead to a process that will truly enable Cambodia to move away from its incalculably tragic past and create a genuine form of national reconciliation for the future.<sup>3</sup>

Thus, to summarize the thrust of the Report, the Experts recommended that the United Nations, through either the Security Council or the General Assembly, clone the existing ad hoc international tribunals to create chambers for Cambodia; that the tribunal be seated near but not in Cambodia; that personal jurisdiction be limited to those "most responsible" for serious violations of international humanitarian law; and that the temporal jurisdiction of the tribunal extend from April 17, 1975 to January 7, 1979, the period of the Khmer Rouge regime. Other significant aspects of the recommendations included establishing a trust fund for reparations to victims of the Khmer Rouge, that the United Nations should arrange broadcasts of the tribunal sessions to the Cambodian people, and that Cambodia should consider establishing some form of truth-telling mechanism or truth commission as an adjunct to the judicial process.

But politics has a way of trumping justice. A senior official of the Royal Cambodian Government said that the decision to reject the recommendations of the United Nations Group of Experts was taken within days after the Group

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3. Report of the Group of Experts, *op. cit.*, pp. 59, 60.

of Experts had completed their mission to Cambodia in November 1998,<sup>4</sup> before those recommendations had even been formulated. Only later, after the capture of the last hardline Khmer Rouge holdout, General Ta Mok, did the Cambodian government decide to establish its own tribunal for the Khmer Rouge.

Even so, the United Nations was not prepared to take “no” for an answer, at least not yet. With prodding from the Secretary General’s Special Representative for Human Rights in Cambodia, Thomas Hammarberg, the Cambodian government agreed to entertain a new initiative from the United Nations. At the United Nations, the Office of Legal Affairs labored through the summer to define a new model of “international” justice, a “mixed” tribunal which would be established under Cambodian domestic law and be seated in Phnom Penh, but which would still be dominated by international personnel in order to ensure that impartial justice would be done.

On August 25, 1999, a United Nations delegation headed by Assistant Secretary General Ralph Zacklin arrived in Phnom Penh to negotiate with the Cambodian government about possible United Nations participation in a tribunal for the Khmer Rouge leadership.<sup>5</sup> The Cambodian government promptly presented the United Nations delegation with a draft charter for a tribunal which would judge the Khmer Rouge leadership on charges of genocide and crimes against humanity.<sup>6</sup> The Cambodian plan proposed what is fundamentally a national, rather than an international tribunal. Under the Cambodian draft charter, the court of first instance for prosecution of the Khmer Rouge would be the existing Phnom Penh Municipal Court (which is not known for its judicial independence). There would be two levels of appeals, also within existing Cambodian judicial structures. A majority of personnel at all levels of the judicial process would be Cambodians, and all legal personnel involved in the Khmer Rouge trials, international as well as domestic, would be appointed by the Cambodian Supreme Council of the Magistracy (which has also been accused of political taint).

In addition to the proposed institutional structures, the Cambodian draft also contains what is essentially domestic implementing legislation for the Genocide Convention. This implementing legislation crafts a new definition of genocide, one which is obviously designed to fit precisely the crimes of the Khmer Rouge and remove any legal ambiguity which may exist concerning

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4. A senior minister of the Royal Government outlined this chronology privately for the author in March 1999.

5. A more thorough analysis of this mission will be presented in the author’s new volume, Craig Etcheson, *CRIMES OF THE KHMER ROUGE: THE SEARCH FOR PEACE AND JUSTICE IN CAMBODIA*, Mellen Press (forthcoming 2000).

6. “Projet: Loi relative à la répression des crimes de génocide et des crimes contre l’humanité,” typescript, n.d., n.p. (August 26, 1999, Council of Ministers, Phnom Penh, Cambodia).

whether or not what the Khmer Rouge did was “genocide.” In and of itself, it is a progressive definition of genocide, adding political, economic, and other groups to the list of “protected groups” for purposes of enforcement. However, the Cambodian draft also specifies that this new definition will be “retroactive.” Temporal jurisdiction of the “tribunal” would be 1975 to 1979. The contours of personal jurisdiction remain slightly ambiguous in the Cambodian draft.

The United Nations delegation responded to the Cambodian proposal by saying the Secretary General’s requirement that any Khmer Rouge tribunal should be “international in character”<sup>7</sup> could not be met simply by arbitrarily grafting a few foreign lawyers onto existing Cambodian judicial institutions. Zacklin also pointed out that a new definition of genocide could not be made retroactive, if the Cambodians desired that the Khmer Rouge tribunal comply with “international standards” of justice. The Assistant Secretary argued that, in any event, there was no need for a novel definition of genocide, because any Khmer Rouge perpetrators who might evade conviction on charges of genocide, due to the restrictive wording of the Convention, could certainly be convicted of crimes against humanity for those very same acts.<sup>8</sup>

The United Nations subsequently presented its own draft charter for a Khmer Rouge tribunal, one which would involve going outside existing Cambodian legal institutions to create a special forum uniquely designed for the purposes of trying the Khmer Rouge leadership.<sup>9</sup> The new United Nations plan called for a tribunal with one trial chamber and one appeals chamber, and, like the Cambodian plan, it would prosecute genocide and crimes against humanity. This tribunal would function under the jurisdiction of Cambodian law, with appropriate implementing legislation to be promulgated prior to the convening of the court. There would be a majority of international personnel, working alongside a minority of Cambodian colleagues. The Cambodians would be welcomed to nominate their own candidates for these positions, subject to appropriate professional qualifications, and all tribunal personnel, international and domestic, would be appointed by the Secretary General. As with the Cambodian plan, temporal jurisdiction of the tribunal under the United Nations plan would be from 1975 to 1979. Personal jurisdiction would encompass

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7. Identical Letters, *supra* note 1, at 3.

8. These comments were made both in writing (*Comments on the Draft Law Concerning the Punishment of the Crime of Genocide and Crimes Against Humanity*, August 27, 1999, annex to a letter from Assistant Secretary-General Ralph Zacklin to H.E. Sok An, Minister of State, Royal Government of Cambodia) and verbally (*Aide Memoire: Second Meeting Between the Cambodian Task Force on the Khmer Rouge Tribunal and the Visiting UN Delegation*, Council of Ministers, Phnom Penh, Cambodia, August 28, 1999).

9. *Draft: Law on the Establishment of a Tribunal for the Prosecution of Khmer Rouge Leaders Responsible for the Most Serious Violations of Human Rights*, annex to a letter from Assistant Secretary-General Ralph Zacklin to H.E. Sok An, Minister of State, Royal Government of Cambodia, August 27, 1999.

those “most responsible for the most serious violations” of international humanitarian law. Funding would be through a Trust Fund designed for this special purpose.

The two proposed plans were literally a world apart, and little progress was made in bridging the gap during the week that the United Nations delegation spent in Cambodia. At the conclusion of the final negotiating session, the Cambodian team proposed another meeting with the United Nations team in New York around September 17th in conjunction with the annual opening of the General Assembly. The Cambodian side committed to prepare a second draft of their charter for the tribunal, taking into account comments on the first Cambodian draft by the United Nations side. That was agreed, but that was just about the only thing which would be agreed.

When the two sides met again in New York in the middle of September, this second Cambodian draft had not yet materialized. The negotiators achieved no progress in narrowing their differences in New York. Indeed, it appears that the gap actually got a bit wider, with the Cambodians hardening their stance on grounds of “sovereignty.”

On September 16th, Cambodian Prime Minister Hun Sen met with UNSG Kofi Annan, and delivered an aide memoire outlining his government’s position on the tribunal issue. It has to be said that it was a rather uncompromising presentation. Senior members of the ruling Cambodian People’s Party have long said they simply do not “trust” the United Nations. If any evidence of that were needed, we have it here.

In his note to the Secretary General, the Prime Minister complained about support for the Khmer Rouge through the 1980s from the international community and the

United Nations which allowed [the Khmer Rouge] to sit at the United Nations while they committed genocide from 1975-1979. This group continued to occupy the seat until 1982 and from 1982 to 1993 was part of a tripartite coalition government and legal party of the Supreme Council of Cambodia under the Paris Peace Accord.<sup>10</sup>

Turning to the substance of the tribunal negotiations between Cambodia and the United Nations, Hun Sen wrote

We must also recognize that both parties remain divided on the mechanism for the functioning of the trial. In compliance with its sovereignty, Cambodia must proceed with Cambodia’s existing

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10. Aide Memoire on the conversation between Hun Sen, Prime Minister of the Royal Government of Cambodia, and H.E. Kofi Annan, Secretary General of the United Nations, September 17, 1999, New York [unofficial translation].

national court and introduce additional legislation to allow foreign judges and prosecutors to take part in the trial. As for the United Nations legal experts, their intention to create a special tribunal, to implement special laws in Cambodia, which in reality is outside the umbrella of the Cambodian constitution and laws, will not be applicable.<sup>11</sup>

This amounted to a formal rejection of the proposal put forward by the United Nations team in August.

The Prime Minister then listed three “options of participation or non-participation” for the United Nations in a Cambodian tribunal on the Khmer Rouge:

1. The United Nations participates by providing legal expertise to help draft appropriate legislation, and by providing judges and prosecutors to take part in a trial conducted within the framework of Cambodia’s existing judiciary;
2. The United Nations provides legal expertise in helping to draft appropriate laws, but does not play a direct role in the trial, ie., the United Nations would not supply judges, prosecutors or other officials for the tribunal;
3. The United Nations ends its involvement in the process of trying Khmer Rouge leaders, and Cambodia goes on with the process as it desires.

In closing his memo, Hun Sen wrote, “Cambodia will utilize this opportunity not just to find justice for the Cambodian people, but also to make a major practical step in its efforts to end the culture of impunity, which has received no attention from anyone for more than 20 years.”<sup>12</sup> The final clause of that sentence, one last jab at the United Nations and the international community, demonstrated considerable chutzpah on Hun Sen’s part; he has led the nation for the last fifteen years, and he is often accused of being prominent among those who have given little attention to the problem of impunity. It would be an unprecedented development if Hun Sen’s government were to take this opportunity and actually strike an effective blow against impunity in Cambodia. Generally speaking, Cambodian courts have been one of the central pillars of impunity in Cambodia.

The prospects for United Nations involvement in a Khmer Rouge tribunal thus appeared increasingly remote. When the United Nations team visited Cambodia in August, they pointed out to the Cambodian side the United Nations view that (a) the Cambodian legal code does not presently contain the laws necessary to prosecute the Khmer Rouge on charges of genocide and crimes against humanity; (b) the new legislation proposed by the Cambodian

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11. *Id.*

12. *Id.*

side to remedy this problem does not comply with international legal standards; and (c) that in any event, simply adding a few foreign legal specialists to existing Cambodian judicial institutions would not satisfy the Secretary-General's requirement that the tribunal should be "international in character." Assuming that the United Nations holds to the views expressed in those negotiations, then, the first of Hun Sen's options would not be acceptable to the United Nations. The second option might still be possible, insofar as it is widely recognized that Cambodia's reservoir of legal expertise on matters of international humanitarian law is quite shallow, and they do need help. But given the apparent determination of the Cambodian government to assert their sovereignty and independence in this matter, and to proceed in defiance of the best advice the United Nations can offer, the third option, withdrawal by the United Nations -- might be the only possible choice for the world body.

After Hun Sen's meeting with the Secretary General, a United Nations spokesman observed that "the discussion was frank."<sup>13</sup> Disappointment at the United Nations with the Cambodian position was palpable, and at least some United Nations officials felt the negotiating process had reached a dead end. There has been no other public comment on this matter from the United Nations Secretariat, as they continued to await the long-promised second draft of the Cambodian charter for the tribunal.

Hun Sen is on firm legal ground in arguing that while the United Nations does not have an affirmative legal obligation to prosecute genocide, under the Genocide Convention, Cambodia does indeed have the primary duty to prosecute acts of genocide committed on its territory. By taking refuge in such legalisms, however, Cambodia exposes itself to three risks: first, having twice rejected United Nations proposals to form a tribunal for the Khmer Rouge, Cambodia opens itself to the risk that the United Nations will walk away, unwilling to thrice suffer rejection of its views; second, without the assistance of the United Nations, which has developed a deep reservoir of expertise in prosecuting the most complex crime of genocide, Cambodia risks finding itself unable, from a technical perspective to properly manage such a difficult undertaking in a way that conforms to international standards of justice; and third, the reputation of Cambodia's judicial institutions in the world is such that, even if Cambodia succeeds against the odds in carrying out a credible tribunal to judge the crimes of the Khmer Rouge, Cambodia risks finding in the end that the international community will not believe that impartial justice has been done. This would be a tragic conclusion to the search for genocide justice in Cambodia.

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13. United Nations, Read-out of the Secretary-General's Meeting with Hun Sen, the Prime Minister of Cambodia, September 16, 1999.



After his meeting with the Secretary General, Hun Sen addressed the United Nations General Assembly. In that September 20th speech, Hun Sen declared,

We are firmly resolved to do whatever is needed to provide an open trial of those responsible for genocidal crimes in the country in the past. In holding this trial we will carefully balance, on the one hand, the need for providing justice to our people who were victims of this genocidal regime and to finally put behind us the dark chapter of our national history with, on the other hand, the paramount need for continued national reconciliation and safeguarding the hard-won peace, as well as national independence and sovereignty, which we value the most.<sup>14</sup>

Hun Sen was quite right, of course, when he observed in this speech that there is a tough balancing act to be done between the conflicting imperatives of justice and national reconciliation. And in a nation which has been as gravely wounded as Cambodia, the Prime Minister's consistent appeals to themes of nationalism may be precisely calibrated to reforge the tattered bonds of national unity.

Thus, it began to dawn on interested observers that the Cambodian government intends to proceed with a genocide tribunal for the Khmer Rouge, and that Cambodia is not particularly interested in cooperating with the United Nations on the issue. This was underlined on September 29th, as Hun Sen told reporters in Cambodia, "It would be best if the United Nations should not involve itself with the trial and allow Cambodia to proceed within the framework of the country's sovereignty." Anticipating international rejection of a tribunal held in Cambodian courts, he added, "When a Cambodian court tries the Khmer Rouge and if the United Nations refuses to recognize the verdict, this will mean the United Nations recognizes the Khmer Rouge for its entire existence . . . . I am not asking anyone to recognize the court's verdicts."<sup>15</sup>

The Cambodian government continues to show signs that it intends to proceed on an independent path toward a Khmer Rouge tribunal. Among these signs has been a search for independent international legal talent, which might provide some expertise without the strings which would be attached to

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14. Remarks before the United Nations General Assembly on September 20, 1999, as excerpted in the New York Times; see Hun Sen, *U.N. Oratory: Pleas for Help, Pride in Democracy*, N.Y. Times, September 20, 1999 at A12.

15. "Hun Sen says United Nations recognition of genocide tribunal unnecessary," Associated Press, September 29, 1999.

assistance from the United Nations or Western governments.<sup>16</sup> Some of the names being bandied about in the Phnom Penh press include John Quigley, an American academic who assisted in Cambodia's 1979 People's Revolutionary Tribunal (which found Pol Pot and Ieng Sary guilty of genocide, and sentenced them to death in absentia), and who, coincidentally, is on the verge of publishing what will be a very handy compilation of documents from that trial.<sup>17</sup> Another purported prospect is French professor of public law, Claude Gour, of the University of Social Sciences in Toulouse. Gour is said to have assisted in preparing the draft Cambodian charter for a domestic tribunal presented to the United Nations delegation in August; he also assisted in drafting the new Cambodian Constitution in 1993. Another American, former United States Attorney General Ramsey Clark, has also been mentioned. Clark has distinguished himself in recent years by his vigorous denunciations of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). He has been active in the defense of a Rwandan man who has been indicted by the ICTR, attempting to prevent his extradition from Texas to the tribunal in Arusha, Tanzania. The apparently irrepressible Clark also delivered a brief to the Cambodian government some months ago, arguing that the government should not cooperate with the United Nations on a Khmer Rouge tribunal. But for now, the names of the prospective international experts approached by the Cambodian government remain shrouded in official secrecy. Cabinet Minister Sok An, who chairs the government's task force for the tribunal, recently said that a complete list of "prominent experts from several countries" would be released by the government.

Meanwhile, in the "former" Khmer Rouge zones of Cambodia, senior Khmer Rouge officials were working to stay ahead of the game. On September 2nd, Ieng Sary released a statement from his quasi-autonomous zone in western Cambodia, declaring that he "supports resolutely the [Royal Government's] idea and stance on defending national sovereignty by taking for priority the existing national tribunal in collaboration with foreign judges and prosecutors whose number is lesser than those from Cambodia."<sup>18</sup> Ieng Sary was Pol Pot's Deputy Prime Minister and Foreign Minister, and significant evidence has been amassed suggesting that he fed victims into the Khmer Rouge killing machine. Thus, he would be a prime target of any independent genocide prosecutor.

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16. See, e.g., Anette Marcher, *Go-It-Alone Tribunal Seeks Foreign Gloss*, Phnom Penh Post, October 1 - 13, 1999.

17. By coincidence, Professor Quigley participated in the International Law Weekend 99 Conference. The pending volume is *GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY*, Howard J. DeNike et al. eds, (University of Pennsylvania Press), (forthcoming 2000).

18. "Statement of the Democratic National Union Movement on the so-called 'UN Plan,'" September 2, 1999, Pailin, Cambodia; signed by Ieng Sary.

When such a figure endorses the government plan for a genocide tribunal, the red flags go up. Has some kind of deal been cut between Ieng Sary and Hun Sen? Perhaps this is what Hun Sen means when he speaks of the importance of national reconciliation. Has the Premier calculated that the residual power of Khmer Rouge leaders such as Ieng Sary remains too powerful to challenge? Has Hun Sen converted to a philosophy of forgiveness for genocidal leaders? Is it, as one member of the ruling party told me recently, a matter of "cash flow?" Or is Hun Sen preparing to double-cross Ieng Sary? Perhaps we will not have long to wait to find answers to these questions.

One observer described the current situation as a "lose-lose" scenario for Cambodia. On the one hand, after having taken such a "strong stand" in asserting Cambodia's sovereignty and arguing that Cambodian courts are capable of carrying out a genocide tribunal which would meet "international standards," for the Cambodian government to climb down from that position now would constitute a serious loss of face, especially in terms of domestic politics, where the opposition has been arguing that an internationally-controlled tribunal is the only way to achieve justice for the Khmer Rouge. On the other hand, if the Cambodian government continues along the current path and proceeds with a national tribunal for the Khmer Rouge, it is likely that little bi-lateral or multi-lateral assistance for such an undertaking would be forthcoming, making it all the more likely that the conduct of such a trial would fail to pass muster with legal analysts. Moreover, any verdicts resulting from a purely domestic tribunal would most likely be criticized by much of the international community, insofar as Cambodia's judicial underdevelopment has created a general presumption that fair trials on such a politically-loaded issue would be impossible. So either way, whether the government compromises or not, Cambodia loses. It is a rather bleak assessment, but perhaps not far from the truth.

After the talks between Cambodia and the United Nations became moribund in September 1999, the United States engaged in a flurry of diplomatic activity, attempting to bridge the gap between the Cambodian and United Nations positions. This diplomacy was pursued with an unusually high level of secrecy. But sources close to the talks claimed to be hopeful that a compromise could be found which would permit the international community to endorse Cambodia's plans for the tribunal.

The new talks appeared to find some middle ground between the two sides: a special tribunal would be established outside of existing Cambodian judicial institutions, including a court of first instance and an appeals chamber; Cambodian jurists will compose a majority of the personnel at all levels of the court, but at least one international jurist would have to concur with the decision of the majority for any decision to stand, a concept being called a "supermajority." The prosecution would be structured as a combination of the

civil and common law systems, with both an investigating magistrate, as in the French system, and a prosecutor, as in the United States system. How that amalgam might work in practice is not immediately obvious.

Still, that was progress, though some important details remained unclear: the United Nations has demanded some kind of commitment from the Cambodian government that all those indicted by the tribunal will be remanded into the custody of the court by Cambodian officials. Whether this commitment will be undertaken by the Cambodian government is not clear. In their first draft of the charter, the Cambodians proposed a unique new definition of genocide, which poses obvious problems since they intend to apply it retroactively; whether Cambodians have been dissuaded from this course is unclear. The two Khmer Rouge suspects currently in custody — military chief of staff General “Ta Mok,” and the head of the Khmer Rouge secret police, “Duch” — are being held under a 1979 instrument known as “Decree Law Number One,” a law whose probity is suspect since it was promulgated by a revolutionary regime not recognized by the United Nations. Whether the government intends to go forward charging suspects under revolutionary decrees is unclear, as is whether this would be acceptable to the United Nations.

Such details may be potential deal-killers from the United Nations perspective. Thus we are not there yet. But we should not be in suspense for very much longer, because Cambodian Prime Minister Hun Sen has declared that he will submit the new draft to the United Nations before the end of November 1999, and regardless of whether or not the United Nations approves and agrees to participate, that he intends to seek approval of the charter in the Cambodian National Assembly in December — approval which is all but certain — and proceed with the tribunal early next year. So it appears we will have a Khmer Rouge tribunal; precisely what kind of tribunal it will be, and whether it will produce credible justice, remains to be seen. But one thing seems certain: the genocide tribunal for the Khmer Rouge, whether there is United Nations involvement or not, will be quite different from the other international trials we have seen in recent years.