

Global Peacebuilding Association of Japan (GPAJ)
Kyoto Peacebuilding Center (KPC) and ACUNS Tokyo Liaison Office (ACUNS Tokyo)

Lessons Learnt from the Completion of Cambodia Khmer Rouge Trials

Friday, February 10, 2023
20:00-21:30 p.m. (Tokyo)

Report compiled by Maciej Witek

Part I: Presentation



Mr. Motoo Noguchi
Attorney (Special Counsel) at IWATAGODO,
Former UN International Judge,
Cambodia Khmer Rouge Trials

In his speech, Mr. Noguchi revisited the Cambodian Khmer Rouge tribunal completed on 22nd September 2022. He noted that it was a form of internationalized court, legally being a part of Cambodian sovereign judicial power, co-established and cooperated by the United Nations (UN). The court started its operation in 2006 and 16 years have passed since its beginning until the last case was completed. Mr. Noguchi then presented the accomplishments of this tribunal, referring to five major points.

1. The establishment of facts through the criminal process of a criminal tribunal, based on international standards of justice, and the rule of law. Especially in the case of Cambodia, discussions of crimes committed in the Khmer Rouge era (1975-1979) were sort of taboo among the citizens. Except for a very limited volume of literature produced by historians or academics and some NGOs, none of the facts existed ever since then. In this regard, the establishment of facts through criminal procedures was quite important not only to find what was done in regard to victimization but also it made clear to some extent, the so-called chain of command in the Khmer Rouge era's national operation. As a result, collectively referred to as Khmer Rouge

crimes were kind of separated between those who were most responsible and who were not. That paved the way to national reconciliation.

2. Although a very small number of individuals were prosecuted, this was very meaningful to victims, their families, and the citizens of Cambodia. In 16 years the tribunal could prosecute only five individuals of which two passed away during trials, and before the sentence was finalized. Only three of them were convicted. This number is of course very small, much smaller than any other tribunals, including International Criminal Tribunal for the Former Yugoslavia (ICTY), and International Criminal Tribunal for Rwanda (ICTR) which prosecuted respectively over 160 and 70 individuals. One of the reasons for the small numbers was the fight between the UN and the Cambodian government as to the scope of prosecution. This was a matter of concern even from before the beginning of the court, but after the operation started, it was soon realized in the context of whether to investigate and persecute so-called cases 3 and 4 which the Cambodian government did not want, and the UN side wanted to push very strongly. These difficult discussions continued for more than a decade and finally resulted in non-prosecution. Despite these small numbers, these five individuals could be perceived as a rather clear representation of the Khmer Rouge. The accused person in the 1st case was the director of the so-called S-21 which is infamous for the notorious operation of torture and murder. And other four individuals under case 2 were so-called senior leaders of the regime. The regime is sometimes called the Pol Pot regime, headed by Mr. Pol Pot who had already died before the beginning of the court. Only number 2 of the regime, Mr. Noun Chea, and three others, including the head of state Mr. Khieu Samphan, were prosecuted by the court.

3. The Cambodian tribunal was for the first time in the history of international criminal justice conducted in the capital of the victimized country. Criminal proceedings were open to victims, their families, the community, and the nation, partly through the adoption of special proceedings of victims' participation and reparations, and partly through active outreach programs conducted collectively by the victim support section, and local and international NGOs. Hundreds of individuals, including victims, participated in and witnessed the court hearings. According to the number announced by the court, about 630000 between 2009-2020 observed the court through direct participation in the hearings as well as study tours and other outreach programs which included a wide range of programs for the young generation. The operation of the courts was also broadcasted widely by radio and tv programs that allowed a lot of citizens to closely follow the procedures for many years. As a result of these outreach and participation programs, what was conducted in the Khmer Rouge era became widely known, and finally, the government decided to include that part of the history in school textbooks. That created the atmosphere, especially among the young generation to discuss what kind of crimes were committed in this era, and what is required to prevent re-occurrence and enhance national reconciliation. In other words, all the other tribunals conducted after the 1990s, Timor-Leste being another exception, were conducted and established outside of the crime site country. As a result, they were criticized for being remote from victims and the court was not sufficient enough.

4. We cannot ignore the capacity-building effect of the court operation on the personnel and system and practice of the Cambodian judiciary. The government mentioned this capacity-building effect even during negotiations with the UN for the establishment of the court, and in fact, the Cambodian government selected very high-level individuals as judges and prosecutors of the court. They were the leaders of the Cambodian judiciary and their participation in the tribunals on the Cambodian side was very important. It was expected that they would share their experiences on the national level largely, and that would change the operation and practice as well as law as necessary. This is the legacy of the tribunal which should last much longer than the life of the court itself.

5. The contribution to international criminal justice in general. In legal terms, the Cambodian tribunal was very unique in the way it introduced the investigative judge system, based on French criminal procedure. It also adopted the participation of victims and reparations. These were unprecedented. Some of the legal issues discussed in the cases were quite important in the area of international criminal justice, including sexual and gender-based violence and related matters.

Mr. Noguchi underlined that these five major accomplishments are not necessarily legal accomplishments but also non-judicial, societal side effects of the criminal process. This side effect part is nonetheless quite significant in the case of Cambodia, especially as the Cambodian tribunal was conducted in Cambodia, the country itself. In the next part of his speech, Mr. Noguchi presented challenges and lessons learned from the trials.

1. The court proceedings took too long, especially for the victims and families. Everyday victims, witnesses, and accused persons died. That was very tragic. When the UN started this tribunal, it was supposed to be completed in total three years, but it took 16 in the end. In Mr. Noguchi's view, the single major reason for these lengthy proceedings was too much complexity of the system and procedures. This court used a lot of different categories of rules and procedures, including the agreement between the Cambodian government and the UN, and the internal rules. These rules of procedure and evidence did not exist when the court began, so judicially, the collective body of judges and prosecutors took one year to create these internal rules. The specialty of the court comes from a lot of different factors, but most importantly the fact that the court was divided in every part into two, namely the UN side, and the Cambodian side. Every part had two sides and these made the proceedings, including the decision-making process very complicated and time-consuming.

2. The adoption of the court investigating judges system also was a major reason for the lengthy process. Hearings also took very long because they fundamentally took the operation and practice of the common law system. Usually under the investigating judge system investigation takes years. But hearings, and court proceedings, complete rather quickly, in several months. That was what was expected by the UN when it considered the original plan of three years: two years of investigation and one year of court proceedings, however, it ended with a long investigation and long hearings. Why did it take longer than expected? It includes a lot of factors,

but probably the most major was that court wanted to take a common law approach to make the proceedings more visible from the eyes of victims, witnesses, and citizens.

3. Another big factor in taking long was the participation of victims and reparations to victims. These consumed a massive time and energy. The decision to have adopted victims' participation and reparations was the most difficult decision that the judicial body took when it prepared the internal rules, taking one year. The government and the UN were aware that the introduction of victims' participation and reparations which were unprecedented, would be a factor that would prolong the process, but they also placed significance on the meaning of this. In the end, when Mr. Noguchi looks back at this whole court proceedings, he thinks that the decision to have included victims' participation and reparations was right, even though it was one of the major factors that caused lengthy proceedings.

4. Financial issues, simply speaking the process was too expensive. As of August 2022, the total cost was 337 million USD in 16 years. Japan contributed 88 million USD which is about 27%. This amount was of course much larger than originally expected by the UN and the international community, the original budget for three years was 56 million USD. These financial problems brought about realistic issues including the delay of the payment of salaries for Cambodian court staff including judges or the restriction of the recruitment of the UN side of the staff. Of course, this financial problem is not particular to the Cambodian tribunal. All international criminal tribunals have suffered from financial issues without exception. Mr. Noguchi emphasized that the Japanese government's contribution financially, logistically, and politically was essential. Without that the tribunal could not even have started and continued for 16 years.

Lastly, Mr. Noguchi underlined the significance of the fact that Khmer Rouge crimes committed more than 40 years ago was finally punished, and justice was brought about, even partially. Of course, because there is no statute of limitations on war crimes or crimes against humanity, that should have a huge impact on the ongoing situation in Ukraine where countless war crimes are committed. It has become clear by the operation of this Cambodian tribunal that it is very difficult to escape the long reach of justice even after several decades. These are unfortunately useful lessons learned in this particular context of the ongoing war in Ukraine.

Part II: Comment

Mr. Anees Ahmed

Principal Rule of Law Officer with the United Nations Investigative Team to Promote Accountability for the Crimes Committed by Da'esh/ISIL

Mr. Ahmed started his speech by reiterating and confirming his assessment of Mr. Noguchi's conclusions. It is that at least justice has been done and there has been a closure in respect of crimes of the Khmer Rouge in the form of this tribunal. Mr. Ahmed noted that this court was established as a tribunal born of optimism and hope. The first trigger for this tribunal was the letter by Prime Minister Hun Sen in 1998, which was a significant year. That was also the year when the Rome Statute for the International Criminal Court was adopted. That was also the time no other national, regional, or hybrid tribunal had been established. Everything that was happening in international justice after Nuremberg and Tokyo were the fully international tribunals established by the Security Council for the former Yugoslavia and Rwanda. And with this background of hope after the fall of the Berlin Wall, and the end of the Cold War, this hope also came into the Security Council. It was the first time the SC established a justice institution as an emergency measure. With that background of hope and optimism, this Khmer Rouge tribunal was envisioned. However, it took time for it to be established because it was a robustly negotiated hybrid tribunal. The other instances of hybrid tribunals, a mix of international and national actors, were generally internationally led. This was a tribunal intensely negotiated between Cambodia and the UN. It is a positive aspect that the host country was responsible for its organizing, hosting, and then contributing many of its officials to this court.

All the entities of the court, from the prosecution to the judicial chambers either had an equal number or more national members, which made the court an institution that was nationally-led with international participation. The rules were negotiated between the national and international judges, and it had to be decided whether the Cambodian law or procedures will apply. Decisions were also made to reflect the justice system of Cambodia into the court, which resulted in delays and multiple layers of court procedures. If it was a regular tribunal, that would have been avoided, but there were also positive aspects. It was hybrid international support, yet a sovereign nation was ensuring its interest and views were represented in the make-up of the tribunal. Also, this tribunal was not the result of a Security Council mandate but was a product of more "equal" negotiations between the UN and Cambodia. It had extensive participation of victims in its procedures. Mr. Ahmed sees that it had the most extensive participation of victims like no other tribunal has ever seen. In international criminal courts, victims participate as witnesses or "participate" to the extent the judges consider that their participation is essential. But in this tribunal, the victims were "civil parties" and stood shoulder to shoulder with the prosecutor and the defense in the courtroom. This victim participation was seriously debated during the establishment of the Tribunal's rules of evidence and procedure. It probably led to delays that the tribunal faced for the reason: there were thousands of victims with the legitimate right to appear as civil parties.

Mr. Ahmed also noted that the initial promise of reparations, and then this being revised such that that they would be only symbolic and collective, led to some angst in the minds of the victims, that they might not get from the court what they initially expected. Still, we can say that the court was a harbinger in respect of victims' participation, and reparations for the crimes they suffered. Another problem that this court faced was money. But the more fundamental challenge was that there were no substantial contributions from the general budget of the UN. Most of the money was from voluntary contributions from member states. This led to situations in which there were numerous occasions that the staff was not extended, or reduced, as the concentration was more on ensuring longevity rather than concentrating on the work of the tribunal.

Speaking about the two-pronged system, the Cambodian side and the international side, Mr. Ahmed admitted that there were significant challenges in the system. There were international members like Mr. Ahmed who came unattached as international recruits from the UN and worked in the tribunal as international officials. The national officials who came to the Cambodian court were officials and employees of the Cambodian government. For several years, their independence was questioned by some independent observers. The idea that the subsequent prosecutions of cases 3 and 4 could not take place was attributed to the reason that the Cambodian judges took the position that they will not go beyond that level of prosecution, while the international judges felt that the government insisted on limiting the prosecution to top five leaders and that not doing so would undermine the independence of the tribunal. Mr. Ahmed thinks that these differences led to a fractured court. That was the perception of a number of international observers.

Mr. Ahmed finished his speech on a positive note. He noted the closure and justice that the court brought, the story it told, the facts that it established, and that it was a massive capacity-building exercise for Cambodia and its justice system. Hundreds of lawyers, prosecutors, and court officials were trained side-by-side with the national officials. And many of them now remain in the Cambodian system, where they will have a positive impact on ensuring the delivery of justice in Cambodia according to the highest possible standards. Ultimately the legacy of the court which began as a very optimistic project of international hybrid justice may not be determined just on the fact that 336 million USD were spent over 16 years ultimately leading to only three convictions. But what we should keep in mind is that those three convictions were the senior leaders of the Khmer Rouge. When the first introductory submissions (equivalent to indictments in the Commonwealth countries) for the tribunal were drafted, there was a debate amongst the prosecutors about their role in this court. Were they ordinary criminal lawyers, just seeking the prosecution of the accused of their crimes? Or maybe their larger purpose was to tell a story and establish the facts of what happened in Cambodia from 1975-1979? These approaches were somewhat distinct. The approaches of the prosecutors are generally different from those of historians, journalists, or storytellers. When these approaches were attempted to be merged in the office of the co-prosecutors, it led to a lengthy, almost 120-page long introductory submission seeking to prosecute all the representative crimes of the Khmer Rouge committed over a four-year period. The introductory

submission ultimately led to three separate cases that, according to Mr. Ahmed, likely led to delays.

It started a very optimistic positive and political message that there would be prosecution for crimes being committed around the world, especially after the end of the Cold War. But when history is written about this court, it will certainly note that it was an attempt of bringing justice as close as possible to the victims. The prosecution was conducted in the Cambodian language, based on Cambodian and international laws, with Cambodian judges and prosecutors and with the daily participation of the victims. With this somewhat positive outcome come valuable lessons learnt about the delays, expenses, questions about judicial independence etc.

Part III: Open Discussion

The discussion was moderated by Dr. Sukehiro Hasegawa, president of the Global Peacebuilding Association of Japan, who also noted that in the case of the trial in Timor-Leste, it cost only about 30 million USD, lasted about two and a half years, and included about 150-180 cases.

When asked about Prime Minister Hun Sen's view on the trial, Mr. Noguchi stated that as long as he knows PM has not made any open comment to the tribunal. Before the start, there were comments about the negative attitude of the PM, partly because he was a young soldier of the Khmer Rouge, but it was never clear to what extent Mr. Hun Sen supported the court. All the time the government was represented by somebody else from the ministerial class. Mr. Noguchi has the impression that the fact that Mr. Hun Sen did not conduct any difficult action which compromised the operation can be interpreted as providing sufficient support, as compared to the original concern on the side of the UN legal counsel. Speaking about Cambodian attitude, Mr. Ahmed noted that a famous Cambodian Mr. Youk Chhang was initially a critic of the tribunal. Mr. Chhang was the founding director of the Documentation Center of Cambodia, collecting material on Khmer Rouge, which became a substantive part of the evidence before the tribunal. Mr. Chhang had been critical of the delays and expenses of the tribunal. However, in the end he gave a somewhat favorable assessment. Extensive outreach activities are one of the positive legacies of the tribunal. In terms of public participation, the introduction of the chapter on Khmer Rouge in the history books, shows the positive impact of the work of the tribunal.

In terms of the basis on which the ICC can issue an arrest warrant for the head of a state, an example of Omar al-Bashir was invoked. Mr. Noguchi noted that al-Bashir has been arrested in the domestic judiciary system. The Sudan case was in ICC for many years, starting from 2005, and there was a little complicated jurisdiction mechanism and several different patterns in how the prosecution could be made. One of them is the referral by the UN Security Council under chapter 7 of the UN Charter. In that case, the court jurisdiction will cover the cases where the accused is a national or non-state party. Sudan's case is this one. In reality, when al-Bashir was in power he could not be arrested. After he went down from power, he was arrested but not surrendered to ICC jurisdiction yet.

Speaking about difficulties in arresting those who committed grave crimes against Cambodian citizens, Mr. Ahmed noted that the reason is very simple: no international justice institution has executive authority, even the ICC has no police of its own, it has to rely on cooperation of member states to arrest the individual.

Asking about the relationship between justice and political solutions, Mr. Ken Inoue pointed out an interesting fact. Sometimes we feel that there is no need for a complicated trial because everyone knows who is responsible for crimes. But maybe in 100 years, someone says there were no such crimes. This is why the record made in Cambodia is very important. The court staff members were not historians, but they played the role of historians. In terms of the relation between justice and political solutions, there are discussions about the arrest of Putin. Mr. Noguchi replied that this is a traditional issue called peace and justice, whether peace negotiations should come first, or criminal accountability mechanisms should be triggered without waiting for peace negotiations. The former UN Secretary-General Ban Ki-Moon said that peace and justice should go hand in hand together, so this is a very difficult question.

Mr. Noguchi also addressed the question of selectivity in the judicial procedure. Whom to investigate and put on trial? Some people just think they follow orders, and those ordinary people's crimes need to be addressed for real reconciliation too. In the case of the Cambodian tribunal, there were not many senior class leaders left alive when the tribunal started. Two of them were previously arrested and put in detention under the Cambodian military tribunal system, waiting for the tribunal to start, and one of them died before. One of the accused said that he was not one of those most responsible, he was just a director of one of the similar prisons that existed in number 300 or more at that time. Each of them allegedly killed ten thousands of people. It was difficult where to draw a line between prosecution and non-prosecution. Mr. Ahmed noted that there was a debate in the early days of the trial about whether there is a need for a prosecution strategy and whether it should tell the world who is responsible. The persons responsible were still a very broad definition. Ultimately it was decided that the strategy will not be issued because it would become too political, an issue in itself. Mr. Ahmed thinks it is very important for institutions like ICC to come up with a prosecution strategy on who will they target and who they will not. Ultimately those institutions can only target a few.

In concluding remarks, Professor Hasegawa mentioned five issues raised and discussed. First, each case is unique and different. Secondly, the role of international trials can be considered as a means of transitional justice in terms of the timing of the genocide or major war crimes that took place. Thirdly, the impact on public perception differs depending on who will be put on trial. Fourthly, the possibility of holding trials depends on the relationship between those who hold power in government and the international community. Fifthly and lastly, the relationship between peace and justice. While Bang Kim-moon and some speakers mentioned the complementarity of justice and peace, Nelsen Mandela of South Africa succeeded in separating them and demonstrated that sustainable peace can be achieved by establishing truth rather than justice.