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Cambodia and the pitfalls of political justice

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WILMINGTON, NORTH CAROLINA — The trial of surviving leaders of the Khmer Rouge will begin in Phnom Penh on Monday. The fact that the case has even made it this far is a minor miracle to those of us who were in Cambodia during the 1990s, when the defendants' amnesties seemed secure.

The court — the Extraordinary Chambers in the Courts of Cambodia (E.C.C.C.), better known as the “mixed tribunal” — has charged, with various counts of war crimes, the former head of state, Khieu Samphan; Nuon Chea, described as the movement's ideologue; Ieng Sary, the foreign minister; and his wife, Ieng Thirith, who was minister of social affairs.

Even a longtime critic like myself must give credit to the court and the devoted investigators who worked for decades to bring the Khmer Rouge leaders to justice. But a conflict between an E.C.C.C. prosecutor and the investigative judges over another possible trial is undermining the case.

This is the court's second case — and the most significant it will ever try. After Prime Minister Hun Sen of Cambodia announced that this trial would be the E.C.C.C.'s last, U.N. investigative judges seemed to lose interest in a third case against other high-ranking Khmer Rouge members. Internal strife ensued and some foreign members of the legal staff resigned. Next week's trial, known as Case Two, will now take place amid accusations of political interference and of U.N. incompetence.

In the wake of Hun Sen's declaration it was the British prosecutor Andrew Cayley who challenged the U.N.'s investigative judges to be more aggressive in pursuing a third trial, and the fallout led to the resignation of the staff members. Although the U.N. denies that politics played any role in their decision, no amount of procedural correctness can spare the Cambodian court from the inevitable pitfalls of political justice.

Many in the United Nations and the human-rights industry would like us to believe that a war crimes trial is a simple application of laws to facts, but nothing could be further from the truth.

From Nuremberg to Tokyo to The Hague to Arusha to East Timor, political justice was and will always be a strange admixture of law and politics that is in a constant state of flux. Anyone with even a passing knowledge of Cambodia knows that thousands of the Khmer Rouge's killers will never be brought to justice.

Neither the E.C.C.C. nor the U.N. has earned the right to act with anything but humility, given their performances to date. Not only did the U.N. allow the Khmer Rouge to hold Cambodia's General Assembly seat after it was ousted in 1979, during the 1992-3 occupation of the country by the U.N. Transitional Authority in Cambodia, the organization failed to end the civil war, capture the Khmer Rouge leaders, hold a credible election or even mention war crimes in the final treaty restoring Cambodian sovereignty.

The E.C.C.C. has not done much better: It has spent five years and approximately \$100 million to convict a single death camp commandant named Kaing Guek Eav, better known as Brother Duch, in the simplest war crimes trial since Einsatzgruppen leader Otto Ohlendorf was tried at Nuremberg in 1947-8.

Although Duch freely admitted his guilt and there was a paper trail linking him to the killings at Tuol Sleng prison, the trial still took eight months and was grossly overcomplicated by a distraction called "the victims unit." In a country where thieves are routinely beaten to death by angry mobs, many Cambodians were baffled when Duch's sentence was reduced to 19 years.

Because the E.C.C.C. and its many boosters promised things that no trial could deliver and oversold the therapeutic benefits of war crimes trials, they have run head on into the limits of the possible. There is no empirical evidence to support the idea that trials lead to "truth," "reconciliation" and "healing."

In the end, the most anyone can expect from a war crimes trial is that the guilty will be punished and the innocent exonerated. As Otto Kirchheimer pointed out in his classic study "Political Justice," "Circumstantial and contradictory, the linkage of politics and justice is characterized by both promise and blasphemy" — precisely the place where the E.C.C.C. stands today.

Even if there is no third case, a credible trial of Khieu Samphan, Ieng Sary, Noun Chea and Ieng Thirith, would make it possible to overlook the court's many failings. If Cambodia's E.C.C.C. cannot try the surviving Khmer Rouge leaders before they die, the "mixed tribunal" should be considered an expensive farce never to be tried again.

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