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How many are too many defendants at the KRT? Try a reasonable number limited by long-term resource availability.

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THERE was a steady drumbeat from the beginning of the negotiations in 1997 that the ECCC would focus on "senior Khmer Rouge leaders" and those "most responsible" for the atrocity crimes of the Pol Pot regime. The Cambodian, UN and American negotiators never limited the pool of suspects to be charged and brought to trial to five or six individuals, although it was no secret that some Cambodian officials desired a small number, which would exclude current government and military officials. Yet there was no serious negotiation expressly to embrace that Cambodian view as that would have been an intolerable position for the non-Cambodian negotiators to accept and it would have fatally undermined the integrity of the court.

In my own many long negotiations with Cambodian and UN authorities, negotiators typically spoke of up to 15 or so individuals ultimately being prosecuted. We were very aware of much higher numbers being proposed by researchers and domestic and international nongovernmental organisations. UN negotiators at times spoke of 20 to 30 potential defendants, but within the negotiations we knew and expressed a more likely maximum figure of 15 or so candidates for prosecution. We knew that resource constraints and political realities, as well as aging individuals, would keep the number on the relatively low end, but not so low as to be de minimis.

No literal definition

As negotiators and drafters, we never tried to establish a literal definition of "senior leaders and those most responsible" as that would have been a foolhardy exercise. In fact, it was UN and US negotiators who pressed for a high bar of "those most responsible" rather than a Cambodian preference for the broader category of "those responsible" at one critical late stage in the negotiations. One effort to raise the bar even higher to "those with the greatest responsibility", which had just been negotiated for the Statute of the Special Court for Sierra Leone in mid-2000, was rejected in favor of the long-standing and somewhat broader concept of "those most responsible." What is transpiring now between the co-prosecutors and their filing with the Pre-Trial Chamber was anticipated in the negotiations and strikes me as demonstrating that the ECCC is working its will as it was designed to do. I actually am encouraged that the process is being tested, although the publicly-expressed discretionary statements of the Cambodian co-prosecutor would give any judge pause to consider the purpose behind the objection. The two primary reasons negotiators thought the co-prosecutors might disagree would be either 1) based on the merits of any particular individual being charged, or 2) because one of the co-prosecutors appears politically influenced and the other seeks the ruling of the Pre-Trial Chamber to ensure the integrity of the ECCC. Obviously, during the negotiations concerns about political influence were dealt with delicately, but everyone knew we were building a dispute settlement mechanism to overcome either a merits or political disagreement if either ever occurred. The real test is not the actual filing by

the co-prosecutors, which the court is designed to accommodate, but whether the judges in the Pre-Trial Chamber step up to the plate and do their duty with the highest degree of judicial integrity. We can all assess that when their decision is rendered.

Better for donors

Ultimately, expanding the number charged from five to 10 or 15 individuals probably would make the case for long-term financial support of the ECCC easier to advocate because it would demonstrate the integrity and credibility of the court. That is the key that unlocks the international money, not some argument that the number of defendants must be limited to satisfy a domestic political agenda. Once political intrigue or corruption swamps the court's work, the international money will dry up very fast and completing the trials of the original five defendants will become much more difficult to finance and properly staff. The solution to this latest episode in the ECCC's history is for each side of the debate to accept the same compromise that the negotiators did, namely, not too few defendants and not too many, but a reasonable number limited by long-term resource availability and a reasoned application of the requirement that defendants be "senior leaders of Democratic Kampuchea and those who were most responsible" for the atrocity crimes of the Pol Pot regime. I am hopeful that the judges will see it that way too.