

IN THE SHADOW OF THE KHMER ROUGE TRIBUNAL: THE DOMESTIC TRIALS OF NUON PAET, CHHOUK RIN AND SAM BITH, AND THE SEARCH FOR JUDICIAL LEGITIMACY IN CAMBODIA

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I. INTRODUCTION

This paper examines the Cambodian trials of three former Khmer Rouge commanders, Nuon Paet, Sam Bith and Chhouk Rin. Between 1999 and 2006, all three were prosecuted, convicted and sentenced to life imprisonment by Cambodian civilian courts for their role in a 1994 train ambush and the subsequent kidnapping and murder of three Western backpackers. The trials are unique in the history of Cambodia, and were the first time that any commanders of the Khmer Rouge had been brought into civilian court to answer for their crimes. At a time when the Cambodian government was negotiating with the international community over the structure of the proposed United Nations-backed Khmer Rouge tribunal, the competence and independence of the Cambodian judiciary and legal system came under particular scrutiny. The trials were a crucial and timely test of the Cambodian legal system, and indeed a test of the willingness and ability of the Cambodian government to bring to justice former officers of the Khmer Rouge. As such, they mark a significant moment in the legal development of Cambodia, and represent an important step towards the creation of a functioning legal system and – at least in theory – a greater respect for legal process and for the role of an independent judiciary in that country. These domestic trials are amongst the most important legal cases to have been heard by Cambodian courts, and deserve the careful attention of the international legal community, human rights scholars and practitioners,

and those interested in the rule of law and civil society generally and in Cambodia specifically.

II. THE KAMPOT TRAIN AMBUSH

On 26 July 1994, Khmer Rouge¹ guerrillas ambushed a train traveling between the Cambodian capital of Phnom Penh and the coastal city of Sihanoukville.² At about 2:15 p.m., the guerrillas detonated two mines under the rails, derailing the front of the train, and fired on the security guards with bullets and B-40 rockets.³ According to an eyewitness, “The passengers ran around and the Khmer Rouge forces besieged the train and shot.”⁴ They killed at least ten Cambodians in the attack, severely wounded three others, and took hostage over two hundred of the passengers and guards. Amongst those taken hostage were three foreign backpackers: Briton Mark Slater⁵, 28, and his friends Frenchman Jean-Michel Braquet, 27, and Australian David Wilson, 29.⁶ Though the Cambodian hostages were released within a few days after ransoms were paid by their families⁷, the three Westerners continued to be held at the nearby Khmer Rouge stronghold on Phnom Voar (“Vine Mountain”), a rain-drenched, malarial and mountainous jungle base in the province of Kampot.⁸ The Westerners found themselves pawns in the middle of an

¹ The Khmer Rouge (meaning “Red Khmer”) was a revolutionary Maoist-Stalinist movement that ruled Cambodia (known at that time as “Democratic Kampuchea” or “DK”) from 1975 to 1979 in what was one of the Twentieth Century’s most brutal and lethal regimes. Driven from power by the Vietnamese invasion of 1979, the Khmer Rouge thereafter waged a guerrilla war against the government in Phnom Penh which lasted until the mid-1990’s when the movement collapsed. See generally DAVID P. CHANDLER, *THE TRAGEDY OF CAMBODIAN HISTORY: POLITICS, WAR AND REVOLUTION SINCE 1945* (1991).

² Ker Munthit, *Ex-Khmer Rouge Chief Appeals*, THE ADVERTISER, Nov. 12, 2003; BBC News World Edition, *Cambodia Guerrilla Leader Gets Life*, Sept. 6, 2002, <http://news.bbc.co.uk/2/hi/asia-pacific/2240050.stm>.

³ Phann Ana & Kevin Doyle, *Chhouk Rin Prepares for Appeal Hearing*, CAMBODIA DAILY, Aug. 27, 2002; Court Hearing in Respect of the Murder of David Wilson, Jean Michel Braquet, and Mark Slater, PHNOM PENH MUNICIPAL COURT, trial of Nuon Paet, June. 7, 1999, transcript made by CFBT Education Services [hereinafter 1999 NP Muni Ct transcript], at 13.

⁴ 1999 NP Muni Ct transcript, *supra* note 3, at 14 (testimony of Chan Sary).

⁵ Mark Slater, who entered Cambodia just a few days before he was kidnapped, was part-way through a year-long trip to India. He made an unplanned detour to Cambodia in order to visit the beaches at Sihanoukville. Eric Unmacht, *Memories But No Justice for Hostage’s Mom*, CAMBODIA DAILY, July 20, 2000.

⁶ Ana & Doyle, *supra* note 3; BBC News, *supra* note 2; Phillipe Schwab, *Convicted ex-Khmer Rouge Commander Roams Free*, Agence France-Presse, Oct. 2, 2003; Munthit, *supra* note 2.

⁷ 1999 NP Muni Ct transcript, *supra* note 3, at 15.

⁸ BBC News, *supra* note 2; Chea Sotheacheath, *Khmer Rouge Commander is Acquitted*, Associated Press, July 18, 2000; Ana & Doyle, *supra* note 3; Reach Sambath, *Defector Dines with Former Gov’t Enemies*, CAMBODIA DAILY, Oct. 19, 1994.

internationally publicized hostage crisis.⁹ Despite ill health, Braquet, Wilson and Slater were put to work digging in paddy fields during the day and were chained during the night while the Khmer Rouge attempted to negotiate a ransom of \$150,000 in gold for their release.¹⁰ Later in the negotiations, the Khmer Rouge broadened their demands beyond money to include a halt to Australian and French military assistance to the Cambodian government.¹¹ This development – transforming an essentially straightforward demand for money into a more complex negotiation with foreign powers – may have doomed the hostages by creating an incentive for the Cambodian government to move swiftly to end the crisis in a way that would ensure that the Khmer Rouge demands were not met.¹²

⁹ Unmacht, *supra* note 5. Khmer Rouge leader Pol Pot – at that time located in Northern Cambodia but in radio contact with his forces at Phnom Voar – apparently took a special interest in the fate of the Westerners, and attempted to use them as a bargaining tool to demand that the foreign governments involved cease military assistance to the Cambodian government. See Ana & Doyle, *supra* note 3.

¹⁰ Ana & Doyle, *supra* note 3; Sambath, *supra* note 8.

¹¹ Craig Skehan, *The Long Road From Genocide to Justice*, SYDNEY MORNING HERALD, Aug. 29, 1998, available at http://www.ngoforum.org.kh/Documents/Others/Nuon_Paet_Case.htm.

¹² Some observers have raised suspicions that certain members of the Cambodian government believed that the deaths of the hostages would be beneficial. Specifically, sabotaging the ransom negotiations by launching the military offensive would result in the hostages' deaths and would lead to increases in foreign military assistance. *Id.* Jean-Claud Braquet, father of the slain French hostage, and his Paris-based lawyer Francois Zimeray contend that the hostages were used as pawns by Prime Minister Hun Sen's government in a bungled attempt to muster greater foreign military support to fight the Khmer Rouge: "One could say the hostages had been sacrificed for political interests because at this time Cambodia had interest to show the Khmer Rouge were still a threat and try to get international sympathy [and] international military help." Phann Ana & Kevin Doyle, *Chhouk Rin Verdict Due Next Week*, CAMBODIA DAILY, Aug. 29 2002. In 1994 the United States, Australia and France agreed to provide only limited military support for demining, military engineering, training programs, and other "non-lethal" aid, in part because of concerns over the well-reported abuses and illegal activities of the Cambodian army, the Royal Cambodian Armed Forces ("RCAF"). See Nate Thayer, *Govts Row Over Defectors*, PHNOM PENH POST, Issue 3/22, 4-17 Nov. 1994. Western intelligence had identified that the highly corrupt RCAF sold ammunition and weapons to the remaining Khmer Rouge guerrillas who were still fighting the government. *Id.* The RCAF was an amalgam of former battlefield enemies, including elements of the Khmer Rouge, which was operating largely free from legal restrictions. Corruption, kidnapping, politically motivated murders and assorted criminal activity by the RCAF was widespread and shielded by a culture of impunity. *Id.* One of the most infamous examples of human rights abuses by the RCAF occurred in a secret military prison in Battambang, where U.N. investigators uncovered at least 53 summary extrajudicial killings, involving mutilation and cannibalism. *Id.* Eight military officers were identified by the U.N. as having perpetrated the Battambang atrocities, but the government failed to bring any to justice. *Id.* A senior official of the U.N. Center for Human Rights, responsible for investigating the Battambang murders, was stopped at gun point and his five-year-old daughter kidnapped, shot in the thigh, and dumped on a street in Phnom Penh. *Id.* A police investigator stated: "We know who did it, but the problem is they are wearing military uniforms." *Id.*; see David Ashley, *The Nature and Causes of Human Rights Violations in Battambang Province*, in PROPAGANDA, POLITICS AND VIOLENCE IN CAMBODIA: DEMOCRATIC TRANSITION UNDER UNITED NATIONS PEACE-KEEPING 159-182 (Steve Heder & Judy Ledgerwood eds., 1996).

Attempts by the French, British and Australian governments, the families of the hostages, and even Scotland Yard, to negotiate the freeing of the three men collapsed when the Cambodian government ignored Western diplomatic requests for caution and instead ended a military standoff by beginning an artillery bombardment of the rebel base.¹³ Observers recognized that the government's decision to ignore Western requests for a negotiated settlement to the crisis was extremely – perhaps willfully – dangerous for the hostages there. In a radio interview with a British newspaper in late August, hostage Mark Slater begged for a halt to the shelling:

It is as if they were bombing to kill us. I don't think the Cambodian government wants us out of here, to tell you the truth. . . . There is no way for us to leave if the ransom is not met. . . . All the governments of our nationalities – they must if possible – must take the situation into their own hands. I am sure that's a long shot, but this may be our only chance. . . . We are already inside the coffin, since we were told that we were going to be executed a week or two ago.¹⁴

A ransom deadline passed in late September and at the end of October government troops – assisted by former rebels from Phnom Voar who had defected to the government – finally overran the guerrilla camp.¹⁵ However, most of the Khmer Rouge on Phnom Voar had by that point already defected to the government, and the handful of holdouts apparently managed to escape into the jungle.¹⁶

On November 2, 1994, representatives of the British police and the French and Australian governments, accompanied by members of the Royal Cambodian Armed Forces (“RCAF”), discovered the bodies of Braquet, Wilson and Slater in a shallow grave about 500 meters from the Khmer Rouge camp.¹⁷ Their hands had been bound with nylon string, and they had each been shot in the head.¹⁸ At the July 2000 Phnom Penh

¹³ Ana & Doyle, *supra* note 3.

¹⁴ *Hostages make Radio Contact, Reveal Dwindling Hope*, CAMBODIA DAILY, Aug. 22, 1994.

¹⁵ Unmacht, *supra* note 5.

¹⁶ *Id.*

¹⁷ APPELLATE COURT OF PHNOM PENH, Criminal Case No. 463/17.10.2000, Judgment of Appellate Court No. 11 “k”, dated Sept. 6, 2002, at 3 Embassy report [hereinafter 2002 CR App. Ct transcript]; Ana & Doyle, *supra* note 3.

¹⁸ 2002 CR App. Ct transcript, *supra* note 17, Autopsy Report; 2002 CR App. Ct. transcript, *supra* note 17, at 6 (statement of Chum Um).

Municipal Court trial of Chhouk Rin, a former Khmer Rouge guerrilla, Chum Un, described the killings:

They tied the foreigners with nylon string and the string for tying the cow. The men named Bun and San held guns and brought the foreigners to the West. After 15 minutes later, I heard 3 shootings. And at the moment later the man named "San" came to me and told be to bring the hoe to burry [sic] the foreigners. I saw 2 foreigners died by falling face down and another died by sleeping on his side. There were 4 persons who digged the hole to burry the dead body of the 3 foreigners. . . . The persons who tied the foreigners are Oa Amut, Pheap and San. The ties were in white, red and blue.¹⁹

Slater, Braquet and Wilson were not the only Western victims of the Khmer Rouge in Cambodia during 1994. In April, an Australian and two Britons had been seized from a taxi on a rural highway and almost immediately executed.²⁰ The speed of their murders, however, had minimized press coverage. In contrast, the two-month plight of the Kampot train hostages garnered extensive international media coverage.

¹⁹ 2002 CR App. Ct. transcript, *supra* note 17, at 6. Khmer Rouge defectors said that the three had been executed in late September, when ransom negotiations had fallen through and when government forces threatened to overrun the rebel base. Ana & Doyle, *supra* note 3; BBC News World Edition, *supra* note 2. It was later determined that they had been murdered early on the morning of Sep. 28, 1994. See 2002 CR App. Ct. transcript, *supra* note 17, at 13. With the Cambodian government obviously willing to launch a military offensive against Phnom Voar despite the danger it posed to the hostages, the leverage offered by keeping the backpackers alive had apparently evaporated. Thayer, *supra* note 12.

²⁰ On Apr. 11, 1994, Australian model Kellie Wilkinson, 24, and her British friends Dominic Chappell, 25, and Tina Dominy, 24, were taken at gunpoint from a taxi which was driving on Route 4 from Phnom Penh to Sihanoukville, where Chappell and Wilkinson ran a restaurant. See Mark Dodd and Ros Sokhet, *Suspect Held for Foreigners Murder*, PHNOM PENH POST, July 13, 1995. They were interrogated at a rebel camp by Sem Bo, the commander of KR Regiment 27 based at Bokor Mountain, who accused them of "putting a colonial yoke on Cambodia." *Id.* He then ordered his nephew, Chuon Samnang, and four others, to execute the "neo-colonialists." *Id.* They were marched to the banks of a small stream one kilometer from the camp, lined up and shot. *Id.* Chuon Samnang defected on Apr. 18, 1995, and joined his family in Tram Kok district, Takeo province. On May 20, 1995 he was arrested for the murders of the Westerners, and after being held in custody in military Region 3 headquarters in Kampot province for more than a month, he was transferred to Sihanoukville prison on June 23, 1995. *Id.* Chuon Samnang had defected with 200,000 Thai Baht, and, in a highly unusual twist for Cambodia, he was apparently unsuccessful in bribing his way to freedom. *Id.* In July 1995, Chuon Samnang was paraded before the press by the Sihanoukville police who promised an investigation and trial of the former guerrilla on charges of premeditated murder and conspiracy related to the highway attack. *Id.* Subsequently, and perhaps predictably, it was reported that he was no longer in custody and that his location was unknown. Skehan, *supra* note 11.

Photographs, audio cassettes and videos released from Phnom Voar showed the three increasingly ailing hostages pleading for their lives and for the ransoms to be paid on their behalf. Foreign newspapers had even been able to arrange telephone interviews with them during their captivity.²¹ Their murder inevitably generated an immediate and heartfelt international response, particularly in Europe and Australia. Representatives of the Australian, French and British governments quickly demanded that the Cambodian government do everything to bring those responsible to justice.

The identity of three surviving Khmer Rouge commanders from Phnom Voar – Nuon Paet, Sam Bith and Chhouk Rin – was no secret, and yet it was to be five years before the first, Nuon Paet, was arrested. In the meantime, all three had defected to the government and – in the case of Sam Bith and Chhouk Rin – been rewarded with senior positions in the RCAF. The subsequent prosecutions of Nuon Paet, Sam Bith, and Chhouk Rin took place against the backdrop of the extremely difficult negotiations between the Cambodian government and the United Nations about the proposed tribunal for the former leaders of the Democratic Kampuchea regime.

III. THE PROPOSED KHMER ROUGE TRIBUNAL

The history of Cambodia (known as “Democratic Kampuchea”) between 1975 and 1979 is now well known.²² The Khmer Rouge, under the leadership of Pol Pot, created a repressive regime of staggering brutality, which has been described by Ben Kiernan, the director of the Cambodian Genocide Program at Yale University, as having “probably exerted more power over its citizens than any state in world history.”²³ Exact figures for the total number of people who perished during those four years are impossible to establish, but most estimates range from 1 million to over 2 million, representing from around one-in-five to one-in-three of Cambodia’s total population.²⁴ While many segments of

²¹ Unmacht, *supra* note 5; 2002 CR App. Ct. transcript, *supra* note 17, at 3.

²² See generally, CHANDLER, *supra* note 1; DAVID P. CHANDLER, BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY OF POL POT (1999); DAVID P. CHANDLER, VOICES FROM S-21: TERROR AND HISTORY IN POL POT’S SECRET PRISON (1999); DAVID P. CHANDLER, A HISTORY OF CAMBODIA (2000); CAMBODIA 1975-1978: RENDEZVOUS WITH DEATH (Karl D. Jackson ed., 1989); BEN KIERNAN, THE POL POT REGIME: RACE, POWER AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79 (1996); KALYANEE MAM, CRIMES COMMITTED AGAINST WOMEN IN DEMOCRATIC KAMPUCHEA (Phnom Penh: Documentation Center of Cambodia 2000).

²³ KIERNAN, *supra* note 22, at 464.

²⁴ Reuters, *Khmer Rouge Denial in Murder Trial*, CNN International.com, Oct. 27, 2003, <http://edition.cnn.com/2003/WORLD/asiapcf/southeast/10/27/cambodia.trial.reut/>. Human Rights

Cambodian society suffered, it appears that the Khmer Rouge singled out for persecution ethnic minorities, including the Chams and Vietnamese, who were massacred by the thousand.²⁵ Ethnic Khmer were not immune from repression, however, as deportees from cities (the urban “new people”), intellectuals, teachers, former government officials, and those believed to have been “corrupted” by Western influence, were actively persecuted. Countless more Cambodians died during internal Khmer Rouge purges, and of disease, brutalization, overwork, and starvation, the result of a collapsed society. “Every individual in the country had members of his or her family murdered by the Khmer Rouge.”²⁶ The regime that perpetrated these crimes was driven from power by the Vietnamese invasion in 1978, yet no senior leader of Democratic Kampuchea has been brought to justice in a court of law.²⁷

For more than a decade the United Nations has sought to bring to trial perpetrators of genocide, crimes against humanity, and serious breaches of international law, and international courts for this purpose have included The International Criminal Tribunal for the Former Yugoslavia, the Tribunal for Rwanda, and the Special Court for Sierra Leone.²⁸ U.N. Secretary-General Kofi Annan has said that the crimes committed under the Khmer Rouge “were of a character and scale that it is still almost impossible to comprehend.”²⁹ Yet any progress toward bringing leaders of the Khmer Rouge to justice has been frustratingly

Watch has estimated that at least one million Cambodians died of execution, starvation and disease. Mike Jendrzeczyk, *Now Tell Gov't That KR Tribunal Must Meet UN's Terms*, CAMBODIA DAILY, Dec. 31, 2002. Ben Kiernan, the director of the Cambodian Genocide Program at Yale University, has put the figure at 1.5 million. KIERNAN, *supra* note 22, at 460. Craig Etcheson has put the figure at 2.2 million, or one-third of the population. CRAIG ETCHESON, *AFTER THE KILLING FIELDS, LESSONS FROM THE CAMBODIAN GENOCIDE* 141-42 (2005). See generally Patrick Heuveline, ‘Between One and Three Million’: Towards the Demographic Reconstruction of a Decade of Cambodian History (1970-79), in 52-1 POPULATION STUDIES 49 (1998); Patrick Heuveline, *Approaches to Measuring Genocide: Excess Mortality During the Khmer Rouge Period*, in ETHNOPOLITICAL WARFARE: CAUSES, CONSEQUENCES AND POSSIBLE SOLUTIONS 93-108 (Daniel Chirot and Martin Seligman eds., 2001).

²⁵ KIERNAN, *supra* note 22, at 460-62.

²⁶ ETCHESON, *supra* note 24, at 141.

²⁷ In 1979 the Vietnamese-orchestrated People’s Revolutionary Tribunal sentenced Pol Pot and Ieng Sary *in absentia* to death for genocide. *Id.* at 152, 159. Regarded as a show-trial, it has been dismissed as a “mere political farce.” Bora Touch, *Why Chhouk Rin’s Acquittal is Illegal*, PHNOM PENH POST, Aug. 14-17, 2000. The supposed defense attorneys, for example, agreed with all the charges and called for the death sentence. *Id.* In 1996, by royal decree, Ieng Sary was pardoned for his *in absentia* genocide conviction for genocide. *Id.*

²⁸ Konstantinos D. Magliveras, *The Unfinished Story of the Cambodia Criminal Tribunal: An Analysis of the Law of August 2001 and its Aftermath*, 12 INT’L ENFORCEMENT L. REP. 508 (2002).

²⁹ U.N. News Centre, *Annan Nominates International Judges for Cambodia’s Khmer Rouge Trial*, Mar. 8, 2006, available at www.un.org/apps/news/story.asp?NewsID=17739&Cr1.

slow, and the U.N. and the Cambodian government sparred for years in on-again off-again negotiations over almost every aspect of the proposed tribunal.

The U.N. approached Cambodia in 1997 about the possibility of establishing some form of tribunal for leaders of the former Democratic Kampuchea³⁰ after it became apparent that the Khmer Rouge continued to exert considerable influence in Cambodia and would unlikely be brought to justice absent direct U.N. involvement.³¹ Pursuant to a resolution of the U.N. Commission on Human Rights, Special Representative Thomas Hammarburg met with Cambodia's prime ministers in June 1997 to discuss the possibility of U.N. aid to address past violations of Cambodian and international law "as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability" in Cambodia.³² Following this meeting, the

³⁰ In 1994, the U.S. Congress passed the Cambodia Justice Genocide Act which established that "it is the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity committed in Cambodia between April 17, 1975, and January 7, 1979." 22 U.S.C. § 2656 (1994). This time frame, subsequently adopted by the U.N. for the proposed tribunal, does not extend to any violations of Cambodian or international law following the overthrow of the Democratic Kampuchea regime, including, for example, the 1994 Kampot train ambush. This conveniently avoids having to address those crimes committed by the Khmer Rouge after 1979 when the U.S. and the U.N. had supported Democratic Kampuchea's right to fill Cambodia's seat at the U.N. despite mounting evidence of that regime's history of mass murder. In September 1979, at the U.N. General Assembly, the United States, China, ASEAN, and their allies, adopted a recommendation from the credentials committee granting the Cambodian seat to the exiled Khmer Rouge government of Democratic Kampuchea. EVAN GOTTESMAN, *AFTER THE KHMER ROUGE: INSIDE THE POLITICS OF NATION BUILDING* (2003). Many observers believe that the U.N. compromised its moral authority over Cambodia "by its dismal record of complicity with the Khmer Rouge in the 1980s and even beyond." TOM FAWTHORP & HELEN JARVIS, *GETTING AWAY WITH GENOCIDE? ELUSIVE JUSTICE AND THE KHMER ROUGE TRIBUNAL* 131 (2004). Peter Leuprecht, the third Special Representative of the Secretary General for Human Rights in Cambodia, noted in 2002 that "the U.N. should be aware of its past record on Cambodia, a record that is not all glorious." Tom Fawthorp, *UN Aids Khmer Rouge Impunity*, ASIA TIMES, June 12, 2002 available at www.globalpolicy.org/intljustice/tribunals/2002/0613imp.htm.

Nor will the tribunal extend to the period before 1975, thereby excluding, for example, the secret B52 bombing campaign of Cambodia ordered by Henry Kissinger and President Nixon. Early in his negotiations with the U.N., Hun Sen had provocatively suggested expanding the scope of the proposed tribunal to include crimes committed before 1975 and after 1979. FAWTHORP & JARVIS, *supra* at 130. As Fawthorp and Jarvis comment, "Such a proposal taps into ideas to widen the jurisdiction of international law, holding accountable not only the easy targets among third world despots like Pol Pot and Slobodan Milosovic, but also those accused of war crimes at the top of the global power chain like the former US Secretary of State Henry Kissinger. Hun Sen was well aware of the political pressures and realities that would make any such widening of the scope of the tribunal a non-starter. But he obviously took some delight in reminding certain 'great powers' of their complicity both before 1975 and after the Pol Pot regime was toppled." *Id.*

³¹ Daniel Kemper Donovan, *Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal*, 44 HARV. INT'L L.J. 551, 561-563 (2003).

³² *Id.* at 555-56; Situation of Human Rights in Cambodia, C.H.R. Res. 1997/49, U.N. C.H.R., 53d Sess., U.N. Doc. E/CN.4/RES/1997/49 (1997).

prime ministers wrote a letter to the Secretary-General requesting the assistance of the U.N. and the international community and pointing out that Cambodia had neither the resources nor the expertise to conduct a trial of former Khmer Rouge leaders on its own.³³

In the course of the initial discussions between the Cambodian government and the U.N., Prime Minister Hun Sen maintained that his government would reject any attempts to set up a purely international tribunal, which he argued would violate Cambodia's sovereignty and Article 6 of the Genocide Convention, under which Cambodia is the primary state to act.³⁴ Instead, he argued for national trials under Cambodian law and located within the Cambodian legal system but with foreign assistance as necessary to help meet international standards of justice.³⁵ Many foreign and Khmer observers worried that the Cambodian legal system as a whole, and the judiciary specifically, was simply not adequate to fulfill the role that Hun Sen demanded it should occupy. Mike Jendrzeczyk, the Washington director for Asia at Human Rights Watch, has noted that "Cambodians have grown used to the political nature of justice in their country, where government officials do not hesitate to tell judges how to decide cases and prosecutors follow orders instead of evidence."³⁶ Since 1994, U.N. special envoys have consistently described Cambodian judges as corrupt, poorly trained, and subject to direct and indirect interference from members of the executive and Hun Sen's ruling political party.³⁷ Critics warned that granting

³³ Donovan, *supra* note 31, at 556; Situation of Human Rights in Cambodia: Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, ¶ 74, U.N. Doc. E/CN.4/1998/95 (1998).

³⁴ Hun Sen, "Aide Memoire and Analysis" and letter to Kofi Annan, Jan. 21, 1999, intended as a supplement to the June 21, 1997 Cambodian request for U.N. involvement. FAWTHORP & JARVIS, *supra* note 31, at 131.

³⁵ FAWTHORP & JARVIS, *supra* note 30, at 130.

³⁶ Jendrzeczyk, *supra* note 24.

³⁷ In 1994, the first U.N. special envoy, Justice Michael Kirby (Australia), described Cambodian judges consulting with the government-controlled Ministry of Justice on the determination of cases and accepting "gifts." He also found that the Ministry of Justice was issuing instructions to judges and prosecutors on the interpretation of laws. The second envoy, Ambassador Thomas Hammerberg (Sweden), noted in 1997 that judges and prosecutors attended meetings of the ruling Cambodian People's Party ("CPP"), and were directly and indirectly influenced by members of the executive. He concluded that "virtually all judges and prosecutors in Cambodia are members of the CPP." Asian Human Rights Commission, *Cambodia: Khmer Rouge Trial a Golden Opportunity to Advance Judicial Independence*, May 25, 2006, <http://www.hrea.org/lists/hr-headlines/markup/msg02857.html>. In 2001, the third envoy, Professor Peter Leuprecht (Austria), observed a disregard for judicial independence. In March 2006, the fourth envoy, Professor Yash Ghar (Kenya), affirmed the continued executive interference in the work of the courts and concluded that "lack of professional training, insufficient guarantees of independence and lack of perception of lack of integrity are at the heart of what needs to be addressed, both by legislation and by a change of the culture." *Id.*

Cambodian judges the dominant role in the tribunal would run the risk that the hearings would degenerate into no more than a “sham tribunal” that would effectively be under the control of the Cambodian Prime Minister.³⁸ Jendrzeczyk warned:

A tribunal that doesn't meet international standards would be an enormous setback for the Cambodian people. It would also damage the credibility of the UN and lower international standards for international justice. In the future, why would countries accept the rigorous models used for the crimes in the former Yugoslavia and Rwanda when they could demand the soft 'Cambodian model'?³⁹

The arrest and prosecution of Nuon Paet was clearly intended to ameliorate the specific demands of Australia, France and Britain over bringing to justice those responsible for the murders of their nationals. But it was more than this. In the context of the tribunal, the prosecution was also intended to counter both those critics who claimed that the Cambodian government was unwilling to prosecute former Khmer Rouge leaders, and those that claimed that the Cambodian judiciary was too ill-trained, corrupt, and lacking in independence to be entrusted with the central role in any U.N.-backed tribunal.⁴⁰

³⁸ Jendrzeczyk, *supra* note 24. See Asian Human Rights Commission, *supra* note 37.

³⁹ Jendrzeczyk, *supra* note 24.

⁴⁰ See Kelly McEvers, *Disorder in the Courts: From Highly Educated to Unschooled, Cambodian Judges are a Mixed Lot*, CAMBODIA DAILY, March 4-5, 2000. Judges who were appointed during the Vietnamese occupation typically received their legal education (if any) in Vietnam, Russia or East Germany. Not only have many of the judges in the provinces not received proper legal training – either in Vietnam or elsewhere – they often have limited primary and secondary education. In Koh Kong province for example, judges' education was reported as being as little as three and four years of basic schooling. *Id.* at 4. Sok Sam Oeun, the director of the Cambodian Defenders Project, has indicated that “Many of Cambodia's judges were trained in socialist regimes and know only socialist legal concepts, where the state's interest is more important than the freedom of the people. Most of them to some extent were trained this way, and it will take a lot of undoing to change that.” *Id.* As Kelly McEvers has noted, for judges trained in Vietnamese socialist law, the post-UNTAC Western expectation of independent courts requires an “enormous paradigmatic shift” for Cambodia's judges. *Id.*; for an explanation of UNTAC, see *infra* n.66. A few of this generation of judges appointed by the Vietnamese-controlled Ministry of Justice have attempted this paradigm shift: Kandal's Chief Judge, Hy Sophea, for example, studied law in Vietnam before returning to Cambodia in 1991, and has subsequently taken over 600 hours of Western legal courses offered by NGO and civil society organizations. McEvers, *supra*. Many of his contemporaries on the bench, however, have been less open to their new role, and it is this generation of judges who currently occupy the highest judicial positions in the Cambodian legal system. Interview with Attorney A, in Phnom Penh (Dec. 3, 2003). Younger judges, who received their legal training in a post-UNTAC Cambodian legal education system supported by international aid groups seeking to create momentum for civil society, remain a distinct minority on the bench, and are underrepresented in

IV. NUON PAET

Nuon Paet, alias “Khun Kim” and “Saom Paet,” was born in Chiey Village, Toukmeas district, Kompot province, in 1947.⁴¹ In 1994 he was the Khmer Rouge’s political commander of the Phnom Voar base whose forces had attacked the train.⁴² It was Nuon Paet who negotiated with the Cambodian government for the release of the Westerners, and it was he who had made the ransom demands.⁴³ When the government forces overran Phnom Voar in late October 1994, Nuon Paet escaped and subsequently defected to the government, but later than his Phnom Voar colleagues, Chhouk Rin and Sam Bith.⁴⁴

The Cambodian government came under intense diplomatic pressure to bring Paet to justice. The Australian government noted that it was “deeply concerned by recent reports that Nuon Paet might be enjoying some form of protection in Cambodia, official or otherwise. . . . We are maintaining consistent pressure on the Cambodian government, to make clear to all relevant Cambodian agencies their obligation with respect to the arrest of Nuon Paet.”⁴⁵ In April 1998, the Australian Ambassador “reiterated in the strongest terms to the Deputy Prime Minister and Minister of the Interior, Sar Kheng, the Australian Government’s expectation that the Cambodian government would do all in its power to arrest Nuon Paet and bring him to trial.”⁴⁶ In May 1988 the ambassadors of Australia, France and Great Britain, met personally with Hun Sen to discuss Paet, and met the following month with the Prime Minister’s senior advisors.⁴⁷

Cambodia’s highest courts. Corruption remains a systemic problem throughout all levels of the judiciary and legal system. Interview with Attorney B, in Phnom Penh Dec. 3, 2003).

⁴¹ 1999 NP Muni Ct, *supra* note 3, at 2.

⁴² Saing Soenthrith & Kevin Doyle, *Phnom Voar Shudders After Sam Bith Verdict*, CAMBODIA DAILY, Dec. 25, 2002.

⁴³ Ana & Doyle, *supra* note 3.

⁴⁴ Gina Chon stated that Nuon Paet did not defect to the government. See Gina Chon, *Verdict Disappoints Backpackers’ Families*, CAMBODIA DAILY, July 19, 2000 [hereinafter Chon, *Backpackers*]. Paet claimed that he did defect, but later than Rin or Bith, and so with Vith Vorn dead, he was “blamed for everything.” 1999 NP Muni Ct transcript, *supra* note 3, at 34; Ana & Doyle, *supra* note 3.

⁴⁵ Australian Government, Dept. of Foreign Affairs and Trade, *Cambodia: Nuon Paet*, Media Release D65, July. 22, 1998.

⁴⁶ *Id.*

⁴⁷ *Id.*

The diplomatic pressure finally pushed the Cambodian government to act, and Nuon Paet was arrested in September 1998⁴⁸ and held in prison during the investigation of his case.⁴⁹ While in prison, Nuon Paet wrote a letter directly to the families of the three Western hostages asserting his innocence and attempting to shift blame away from himself for the train attack, kidnapping and murders.⁵⁰ Paet named his former commander, Sam Bith (whom he referred to as “the butcher” for exhibiting “very savage behavior”), as having given the order for the execution of the backpackers.⁵¹ Paet further claimed that those responsible were avoiding prosecution.⁵²

⁴⁸ 1999 NP Muni Ct transcript, *supra* note 3, at 2-3; Phann Ana and Kevin Doyle, *Chhouk Rin Won't Show For Verdict*, CAMBODIA DAILY, Sept. 4, 2002.

⁴⁹ Initial criminal investigations are typically carried out by the so-called “judiciary police,” which may include, among others, prosecutors, magistrates, senior officials of the department of judiciary and economic police, directors and deputy directors of the department of terrorism, and commissioners and inspectors of municipal police. Decree No. 21 of Council of State of the State of Cambodia [hereinafter Law on Criminal Procedure] art. 36. The judiciary police “searches felonies, misdemeanors and minor offenses,” gathers evidence and arrests suspects “where they commit obvious felonies or misdemeanors caught red-handed in the act or when there is an order to appear or a warrant of arrest.” *Id.* art. 35. The judiciary police submit a report to the public prosecutor department. *Id.* at arts. 44, 45. After the assigned prosecutor has finished his own investigation, he submits an introductory charge to the presiding judge of the court, who appoints an investigating judge. *Id.* art. 67, 68. Each provincial and city court has at least one judge responsible for investigating criminal cases. *Id.* art. 68. No judge may participate in the judgment of a case in which he/she was the investigating judge. *Id.* During the investigation phase, the investigating judge is authorized to visit the scene of the crime, interview and subpoena witnesses and the complainants, interrogate the accused, decide whether the accused should be held in temporary detention or be released, and “take other actions deemed useful to the revelation of the truth.” *Id.* at arts. 76, 84, 87. The investigating judge’s completed case file is provided to the accused person’s lawyer for 24 hours, after which it is forwarded to the office of the public prosecutor. *Id.* art. 89. Three days later, the public prosecutor shall make a charge in writing, which is referred back to the investigating judge. *Id.* The investigating judge may then file a committal for trial with the court. *Id.* art. 102. Thus, by the time the case appears before a trial court judge, a detailed case file should have been completed based upon several rounds of independent investigation. This helps explain the brevity of most Cambodian criminal trials, and the suspicion that verdicts are often predetermined by the trial judge.

⁵⁰ Nuon Paet letter to families of the victims, dated Nov. 1, 1998.

⁵¹ In the letter, Nuon Paet claimed that he had not participated in the train attack as he was busy farming. *Id.* He said that Sam Bith had devised the plan for the ambush, and that Sam Bith “ordered directly to Vit Vun, Military Commander of Phnom Voar area, to gather a force of 200 soldiers in order to attack the train.” *Id.* Nuon Paet claimed that during July and Aug 1994, when the RCAF surrounded Phnom Voi, he “conducted negotiation with the force of the Royal government in order to release the three foreigners and to set a definite ceasefire.” *Id.* Paet claims that when the negotiations were successfully completed, he sent one of his men to collect the hostages from Vit Vun, only to discover that they “were killed and Vit Vun was the killer.” *Id.* Paet claimed that he confronted Vith Vun and asked him “why he dared killing the three foreigners who were (our) foreign friends.” *Id.* Vit Vun supposedly replied that Sam Bith had ordered the executions, and showed Nuon Paet the “killing order” from Bith. *Id.* Nuon Paet concluded the letter by saying that he “regretted very deeply because of the very savage brutality of Sam Bith, the butcher, who ordered the killing and placed all wrongdoing on me.” *Id.* Vit Vun (also spelled “Vith Von” and “Vith Vorn”) defected to the government forces, but was subsequently recaptured and executed by

The timing of Paet's arrest was significant, occurring after the initial U.N.-Cambodian discussions over the Khmer Rouge tribunal and just two months before the U.N. was to dispatch a fact-finding mission to assess the scope of the proposed Khmer Rouge tribunal.⁵³ The arrest of Nuon Paet signaled to the international community that the Cambodian government was willing and able to prosecute former members of the Khmer Rouge. It was also a specific signal to Australia, Britain and France that those responsible for the Kampot train ambush, or at least one of them, would indeed be prosecuted.

Paet's arrest undoubtedly raised fears among other Khmer Rouge defectors that they too might become the target of prosecution for their past activities. To quell these concerns, Prime Minister Hun Sen dispatched the Cambodian Defense Minister, Dea Banh, in early August 1998 to the former Khmer Rouge stronghold of Pailin to reassure Ieng Sary that the immunity given to him and others was not in jeopardy.⁵⁴ Sary, Pol Pot's foreign minister, had led a mass defection to the government in 1996 in exchange for a Royal Pardon requested by Hun Sen and then co-Prime Minister Prince Norodom Ranariddh.⁵⁵ Hun Sen had argued: "For the sake of the nation we had to do it. To destroy 70% of the KR forces, we needed to pay a price too – that was the amnesty provided to Ieng Sary."⁵⁶ By late 1998, Sary had "metamorphosed" into a member of Cambodia's wealthy elite thanks to his control of gem smuggling and illegal logging.⁵⁷ Some observers have expressed concern that Hun Sen may actively obstruct any attempt to prosecute Ieng Sary by the Khmer Rouge tribunal.⁵⁸

the Khmer Rouge. Nuon Paet testified that it had been Sam Bith – prior to his own defection – who had issued the order to execute Vun. 1999 NP Muni Ct transcript, *supra* note 3, at 26.

⁵² This was an important development suggesting Paet's determination not to become the lone scapegoat and proving his willingness to publicly turn on his former Khmer Rouge commander, Sam Bith, now a general in the RCAF. Perhaps Paet was hoping to raise the possible domestic consequences of his trial to a level that would prove unacceptable to Hun Sen. If so, he was to be disappointed. Under intense international pressure, the Cambodian government moved forward with the trial.

⁵³ Skehan, *supra* note 11.

⁵⁴ *Id.*

⁵⁵ FAWTHORP & JARVIS, *supra* note 30, at 137. The Royal Pardon revoked Sary's *in absentia* conviction for genocide at the Vietnamese-inspired show trial of 1979, and he also received an amnesty from prosecution under the 1994 Law to Outlaw the Khmer Rouge.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Former U.S. Ambassador to Cambodia, Kent Wiedemann, has noted, however, that "[i]n private conversations the prime minister agreed that the tribunal would lack credibility without the prosecution of Ieng Sary." *Id.*

A. *Paet's Municipal Court Trial*

The Phnom Penh Municipal Court⁵⁹ heard the case against Nuon Paet on 7 June 1999.⁶⁰ This trial was viewed by international observers, including Human Rights Watch, as “a test case for how the country’s courts would handle a high-profile trial.”⁶¹ The implication of this trial for the proposed Khmer Rouge tribunal was clear. The *Sydney Herald* suggested that the Nuon Paet trial would be “a pointer” for whether the proposed international tribunal would become “a farce At issue now is whether the Cambodian government will stage a show trial based on a confession and quick conviction, or allow independent cross-examination of key figures in the tragedy.”⁶²

Municipal Court Judge Mrs. Boninh Bunnary introduced the proceedings by noting that several individuals were implicated in crimes stemming from the 1994 Kompot train ambush, and mentioned the possibility that Sam Bith and Chhouk Rin, amongst others, might face prosecution at a later date.⁶³ As for Nuon Paet, the judge read out the charges that he had “unlawfully detained people, committed terrorism, destroyed public property, and robbed people of their property.”⁶⁴ The

⁵⁹ Cambodian provincial or municipal courts have competence in all kinds of criminal cases. See Law on Criminal Procedure, *supra* note 49, art. 96.

⁶⁰ The transcript of the hearing was made by CFBT Education Services, based on handwritten notes taken during the hearing, and are not a verbatim account. Because of the difficulties caused by the public address system in the court cutting out on occasion, the great speed at which written statements were read out and the poor quality of videotaped testimony, sections of the hearing were not transcribed. 1999 NP Muni Ct transcript, *supra* note 3, at 1. The Judge was Mrs. Boninh Bunnary, and the prosecutor was Yet Charya. *Id.* at 2. Meach Sam On represented the Wilson family; Yim Sary represented the Braquet family; and Dy Borima was defense counsel. *Id.* The family of Briton Mark Slater was not legally represented at the trial, though his mother, Dorothy, was present.

⁶¹ McEvers, *supra* note 40.

⁶² Skehan, *supra* note 11.

⁶³ 1999 NP Muni Ct transcript, *supra* note 3, at 5. In addition to Vith Vorn, Chhouk Rin, and Sam Bith, the judge identified by name the former guerrillas known as Mao, Svey, Phat, and Tuy. *Id.* at 5-6. Chhouk Rin, the judge stated, was accused of premeditated murder, terrorism, unlawfully detaining people, destroying public property, and robbery under Articles 31, 35, 36, 34, 2 and 5. *Id.* at 5. Sam Bith stood accused of being “an accomplice to kill intentionally people, destroy public property on 26/07/1994.” *Id.* The judge noted that “[o]n 06/01/99 the court sent the summons to their ministries in order to accuse them. So far, no response has been received.” *Id.* at 6. Judge Bunnary said, “[t]oday, we received a letter . . . issued by the Council of Ministers to allow for the prosecution” of Chhouk Rin, Sam Bith (for “being an accomplice to killing with intent people, destroying public property, committing terrorism and committing robbery.”) and Mao, Svey, Phat and Tuy. *Id.* The court ordered that Chhouk Rin and Sam Bith be brought to court “to make the accusation,” and noted that the case against them “will be heard at a later date.” *Id.*

⁶⁴ Nuon Paet told the judge that he was not aware of the specific accusations made against him by the prosecutor. *Id.* at 6. The judge responded that “the prosecutor accused [him] of unlawful

judge accused him of “ambushing a train, killing with intent people, destroying public property, unlawfully detaining people under Articles 35, 36, 34 [of the so-called “UNTAC Law”⁶⁵], [and articles] 2 [of the Law on Punishment of the Acts of Terrorism (1992) (“Law on Terrorism”)]⁶⁶ and 5.”⁶⁷

detention, being an accomplice to murder, robbery, destruction of public property, terrorism at Kampot province during the train ambush on 26/07/94.” *Id.*

⁶⁵ The UNTAC Law, officially titled “Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transition Period,” had been decided by the Supreme National Council (“SNC”) on Sept. 10, 1992. UNTAC LAW, Preamble, available at <http://www.cdpcambodia.org/untac.asp>. The SNC had been granted powers as the unique legitimate body and source of authority under Article 3 of the Agreement On a Comprehensive Political Settlement of The Cambodian Conflict (“Agreement”), of Oct. 23, 1991. UNTAC LAW, Preamble. Under Article 6 of the Agreement, the SNC delegated to the United Nations “all powers necessary to ensure the implementation of the Agreement.” UNTAC LAW, Preamble. By its resolution 745 (1992) the United Nations Security Council established the United Nations Transitional Authority in Cambodia (“UNTAC”) in accordance with Article 2 of the Agreement, to carry out the mandate set forth in Annex 1 to the Agreement. UNTAC LAW, Preamble. Under Article 15 of the Agreement, all parties to the Agreement explicitly recognized that “all persons in Cambodia, and all Cambodian refugees and displaced persons shall enjoy the rights and freedoms embodied in the Universal Declaration on Human Rights and other relevant international human rights instruments.” UNTAC LAW, Preamble. Further, the SNC acceded to the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) on Apr. 20, 1992 and these instruments came into force with respect to Cambodia on Aug. 26, 1992. UNTAC LAW, Preamble. It became clear to the UN that the laws and judicial structure in Cambodia were inadequate to the task of establishing order in the country. This was a serious problem, as the UN, UNTAC and the SNC were acutely aware of the urgent need “to indicate clearly to all Cambodian parties the rules of law which must be applied throughout Cambodia and the judicial procedures which must be put in place in order to ensure their effective application during the transitional period” and to “foster a politically neutral climate and to prepare for free and fair elections.” UNTAC LAW, Preamble. The UNTAC Law was intended to establish the structures, laws and judicial institutions where they were absent and to help improve them where they existed in order to bring them up to the requirements of the Agreement. UNTAC LAW, Preamble.

⁶⁶ 1999 NP Muni Ct transcript, *supra* note 3, at 6. The Law on Punishment of the Acts of Terrorism (1992) [hereinafter 1992 Law on Terrorism] was adopted by the National Assembly on Jan. 31, 1992 and promulgated by the Council of State on Feb. 7, 1992. It was part of the ongoing attempt to transition Cambodia from civil war to stability and free and fair elections, by outlawing certain acts which had been prevalent during the years of armed struggle.

⁶⁷ It is not entirely clear what the judge meant. The Law on Terrorism has no Article 5. It is possible that there was an error in the transcription, or that the judge was referring to Article 3 of that law, which provided that “[a]ny one who attempts to kill or kill people with prepared intention in the purpose of conducting terrorism shall be punished to life imprisonment regardless of any tolerance at all circumstances.” 1992 Law on Terrorism *supra* note 66, art. 3. Most likely, however, is that the judge was referring to the Law on Outlawing the Democratic Kampuchea Group (1994) [hereinafter 1994 DK Law], though Article 5 of that law refers to the six-month offer of amnesty and so would not typically be read as an article that could be criminally violated *per se*. If the judge was indeed referring to Article 5 of the 1994 DK Law, the issue presumably is Paet’s failure to defect within the 6-month amnesty period, which would then have made him liable for participation in an illegal armed group – the ‘Democratic Kampouchea group’ – as defined by that Law. If this is the case, it is unclear why he was not charged under other provisions of the 1994 DK Law. Nevertheless, this latter interpretation is most likely, as in her verdict the judge found Paet

Article 35 of the UNTAC Law defines the crime of Illegal Confinement as “Anyone who, without orders from the judicial authority, arrests, detains or illegally confines anyone.”⁶⁸ Imprisonment for Illegal Confinement was set at three to five years if the confinement was for less than one month, and ten years if it lasted longer than one month.⁶⁹ Article 36 of the UNTAC Law states that “[a]ny individual who has taken part in a formal or informal association set up for the purpose of planning one or more crimes or misdemeanors against persons or property, if specific acts of preparation of these offenses have taken place, shall be liable for a term of imprisonment of from three to fifteen years.”⁷⁰ Article 34 of the UNTAC Law, outlining the offense of aggravated robbery, provides for a term of imprisonment of from three to ten years for any person who steals from another person if the theft was accompanied by force; if the theft was committed by several persons or by breaking and entering; or if the theft was the fraudulent taking of another’s property.⁷¹

The Law on Terrorism defines “acts of terrorism” as “those acts of violence which [are] committed by one sole individual or one or many groups of persons which create panic amongst the mass of the people aiming at causing strong turmoil to the public order and security and affect the political stability.”⁷² Article 2 states that:

Any person who kidnapped or detained illegally the persons aiming at creating a subversion, extorting for money, revenge, taking as hostage or for selling, and any person who committed other acts of terrorism, shall be subjected to punishment of imprisonment from 10 to 20 years. In case if such kidnapping or illegal detention of the person(s) or such act of terrorism was made on a minor person or which caused any victim to [sic] death, such offender shall be subjected to life imprisonment regardless of any tolerance at all circumstances.⁷³

guilty of “maintaining an illegal armed group,” which presumably refers to the 1994 DK Law provisions outlawing the Khmer Rouge.

⁶⁸ UNTAC LAW, art. 35, *supra* note 65.

⁶⁹ *Id.*

⁷⁰ *Id.* art. 36.

⁷¹ *Id.* art. 34.

⁷² Law on Punishment of the Acts of Terrorism (1992), art. 1.

⁷³ *Id.* art. 2.

The court then proceeded to direct questioning of the defendant, a process which the judge actively leads in Cambodian courts.⁷⁴ Under questioning from the judge and the prosecutor, Nuon Paet admitted that at the time of the train ambush he had controlled Phnom Voar as a “political officer responsible for political affairs,” and that Vith Vorn “was chief commander of the military forces responsible for military affairs.”⁷⁵ He maintained that he was blameless for the train attack, the decision to take hostages, or for their subsequent murder. Paet testified that he had not been informed of the planned ambush and had been farming when the attack had taken place.⁷⁶ Nor was he aware of the three foreign hostages until, he claimed, two days later when Vith Vorn had brought them to his residence.⁷⁷ According to Paet, he had done everything possible to make the Westerners comfortable, even giving 20,000 Thai Baht to buy food and other supplies for them.⁷⁸ He claimed that he “chatted with them,” and urged Vith Vorn to release them quickly so they would not become ill. It had been Vith Vorn, Paet claimed, who had controlled the hostages.⁷⁹ He further claimed that he had not suggested that a ransom be paid, but that in fact it had been the government officials with whom he met who had offered a “reward” of \$50,000 for each hostage released.⁸⁰

Paet further testified that after he had previously released several other hostages – including an American, four Chinese, a translator, and two Vietnamese soldiers – he had been accused by Vith Vorn of not being

⁷⁴ A criminal trial in Cambodia theoretically follows distinct procedural phases, as laid out in the Law on Criminal Procedure (1993). Throughout the hearing, the trial judge takes an active role in obtaining information. During the first phase, the judge initially “hears the accused person about the accusations made” against him. Law on Criminal Procedure, *supra* note 49, art. 132. After listening to the oral statement of the accused, the judge can then begin to ask him questions “useful to the case.” *Id.* The parties and the prosecutor’s office can provide the judge with questions they wish him to ask the accused, or can, with the judge’s permission, pose their questions directly. *Id.* If an objection is raised to a question, the judge shall decide through a court order whether he shall ask the question. *Id.* Next, the judge will hear from and question anyone considered “civilly responsible persons” and then the plaintiff who properly submitted the complaint, during which the judge seeks evidence concerning the plaintiff’s knowledge of the facts, and evidence that shows damages. *Id.* The judge then hears witness testimony in the following order: prosecutor’s witnesses, plaintiff’s witnesses, and then defendant’s witnesses. *Id.* art. 133. Finally, the judge “successively allows the plaintiff, the civilly responsible person, the accused, the lawyer or the defender of the civilly responsible person and the last one, the lawyer or defender of the accused, to speak.” *Id.* art. 137. Up to the time that the judge has begun to read the judgment, the parties may submit to the court briefs and documents for consideration. *Id.* art. 139.

⁷⁵ 1999 NP Muni Ct transcript, *supra* note 3, at 7-8.

⁷⁶ *Id.*

⁷⁷ *Id.* at 7.

⁷⁸ *Id.*

⁷⁹ *Id.* at 8.

⁸⁰ *Id.* at 8-9, 11.

loyal to the guerrilla cause.⁸¹ Vorn's distrust of his motives, Paet testified, meant that he had been left out of the key decisions involving the Westerners.⁸² Paet testified that Sam Bith, as "Head of Regional Zone," with overall responsibility for both military and political affairs, had given the order to Vith Vorn to execute the hostages.⁸³ Bith, his former Khmer Rouge commander, was now a two-star general in the RCAF.

Witnesses introduced by the prosecution directly contradicted Paet's protestations of innocence, and their testimony tied him directly to the crime. Chan Sary, who had been one of the Royal Cambodian Railways security guards on the train, testified that while he was being held hostage at Phnom Voar, a Khmer Rouge guard told him "that Nuon Paet ordered through the radio communication to ambush the train."⁸⁴ Khem Sina, who had been deputy chief commander of a Khmer Rouge regiment, claimed that Nuon Paet had given the orders for the train attack, though he was not asked by either the judge or prosecutor how he had obtained this information.⁸⁵

Despite the charges pending against them, both Sam Bith and Chhouk Rin testified at Nuon Paet's trial.⁸⁶ Sam Bith was undoubtedly aware of the specific accusations made against him by Nuon Paet both in his letter to the Western families and in his testimony to the court.⁸⁷ By testifying now, the general was probably attempting to discredit Paet, prepare his defense, and shift blame from himself. Though Bith acknowledged that he had been chief commander of the southwest regional zone and therefore in charge of Phnom Voar, he claimed that it had been Nuon Paet who had independently made all those decisions himself and without consulting with Bith.⁸⁸ According to Bith, it had been Paet, as political officer, rather than Vith Vorn, as military commander, who, under Khmer Rouge rules, had actually been in command of Phnom

⁸¹ *Id.* at 9-10.

⁸² *Id.* at 10.

⁸³ *Id.* at 8, 12.

⁸⁴ *Id.* at 15.

⁸⁵ *Id.* at 22.

⁸⁶ Gina Chon, *supra* note 44.

⁸⁷ The trial witnesses were held in a room separate from the court before they testified, but they could hear the proceedings – including testimony of the parties and other witnesses – thanks to a loudspeaker broadcasting the trial to observers outside the courtroom. See United Nations Cambodia Office of the High Commissioner for Human Rights, *The Nuon Paet Case: Some Legal Concerns*, June 23, 1999.

⁸⁸ 1999 NP Muni Ct transcript, *supra* note 3, at 16-17.

Voar.⁸⁹ Moreover, Sam Bith claimed, he had been demoted by Pol Pot in August 1994 and “[his] role was transferred to Nuon Paet.”⁹⁰ Therefore, when the murders had occurred, it was Nuon Paet who was solely responsible. Sam Bith also denied an accusation made by Paet that he had hired two killers to murder Vith Vorn following Vorn’s defection to the government.⁹¹

Chhouk Rin was less skilled than Sam Bith in steering blame away from himself, and indeed his testimony at Nuon Paet’s trial was later used against him when he was himself brought to trial. Unlike Sam Bith, Chhouk Rin made no attempt to shift the blame to Paet. Under questioning from the judge, Rin stated that at the time of the ambush he had been commander of a regiment, and that he got his orders from Vith Vorn, who was his divisional commander.⁹² Chhouk Rin admitted that “I got an order [from Vith Vorn] to gather 200 people to ambush the train,” and that though he denied leading the attack personally (“I didn’t directly ambush the train”) he admitted that he had “gathered the people” for the attack.⁹³ Rin stated that “[he] didn’t go. But [his] troops went” and that he “[j]ust cooperated” with Vith Vorn’s forces.⁹⁴ In response to questioning from the prosecutor, he noted that 20 of his men took part in the attack, and they were all armed.⁹⁵ He also admitted that his men took things from the passengers, but was not questioned as to what they took.⁹⁶ He stated that he had not participated in the train ambush “because [his] leg was broken.”⁹⁷ Chhouk Rin testified that after the attack he escorted both the Khmer and foreign passengers to Phnom Voar “to have a rest,” and “then to Nuon Paet’s encampment.”⁹⁸ Rin claimed that he did not know how many days the foreigners were held hostage, or when they were killed, because he had defected to the government by that time.⁹⁹

After Chhouk Rin, the court heard testimony from several additional prosecution witnesses, some of whom were not present in court and whose testimony was shown on videotape. This not only denied the

⁸⁹ *Id.* at 18.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 23.

⁹³ *Id.* at 23, 25.

⁹⁴ *Id.* at 24-25.

⁹⁵ *Id.* at 24.

⁹⁶ *Id.* at 25.

⁹⁷ *Id.*

⁹⁸ *Id.* at 23.

⁹⁹ *Id.* at 25.

defense counsel an opportunity to cross examine the witnesses, but the quality of the recording was so poor that the testimony was described as being “mainly inaudible.”¹⁰⁰ Some of the most telling evidence against Nuon Paet was provided by two of these videotaped witnesses. Chum Onn, a “farmer,” claimed that he had received the order to take the three foreigners to Nuon Paet’s encampment where two people, Tuy and Oy, tied them and then took them behind Phnom Voar, and that shooting was heard immediately afterwards.¹⁰¹ Ouk Bonn’s testimony, largely inaudible, included the following statement: “As far as I know, Nuon Paet delegated to Mr. Meng alias Oy Ar Onn to kill the three.”¹⁰² There was apparently no attempt made on the tape to explain how he supposedly came by this information, and it was simply accepted as true. No explanation was provided as to why these key witnesses could not testify in person at the trial.¹⁰³ In his concluding remarks to the court, defense counsel Dy Borima condemned the use of this videotaped testimony: “Was that an appropriate investigation process? No, they were in the same room. They knew what the others said. I denied such witnesses.”¹⁰⁴

The defense counsel raised other serious legal objections to the trial. Borima noted that his client had been denied access to a lawyer for more than 18 days, in violation of the UNTAC Law.¹⁰⁵ Nuon Paet had been detained on August 6, 1998, and yet the trial had not taken place for over ten months, in violation of the UNTAC Law’s “temporary detention” provision.¹⁰⁶ It mandates that the accused must be sentenced within six months after detention, and shall be released if sufficient evidence cannot be gathered, and that if the evidence is unclear, benefit shall be given to the defendant.¹⁰⁷ The court simply ignored these arguments, and failed to respond to any of the legal issues raised by the defense.

¹⁰⁰ *Id.* at 28 (“Videotaped testimony from three witnesses . . . mainly inaudible.”).

¹⁰¹ *Id.* at 27.

¹⁰² *Id.*

¹⁰³ It is possible that Ouk Bonn was deceased, as he was recorded as “dead” by the time of Nuon Paet’s appellate hearing in September 2000. Nuon Paet’s Appellate Hearing Transcript 3 (2000) [hereinafter 2000 NP Appeal Ct transcript].

¹⁰⁴ 1999 NP Muni Ct transcript, *supra* note 3, at 31.

¹⁰⁵ *Id.* at 32. Article 10 of the UNTAC Law states that a defendant is entitled to receive legal aid, and that no one may be refused access to a lawyer for more than 48 hours after being detained. *Id.*

¹⁰⁶ *Id.* Article 14 of the UNTAC Law states that “temporary detention” must not exceed 4 months, and that this can only be extended to 6 months for a valid reason. *Id.* Paet had been detained for ten days and one day.

¹⁰⁷ *Id.*

In his final remarks to the court, Nuon Paet stated that “I defected to the government later than the others. So they blamed on me alone. Please release me.”¹⁰⁸ The trial had lasted eight hours.¹⁰⁹

B. Paet’s Municipal Court Verdict: Guilty

Judge Mrs. Boninh Bunnary took merely an hour of recess to reach and write a verdict which took her 20 minutes to read to the court.¹¹⁰ The court found that Nuon Paet cooperated with Chhouk Rin’s forces to ambush the train during which ten Cambodians were killed and three seriously injured, and three foreign backpackers were kidnapped; that the train was wrecked and public property destroyed; that Cambodian hostages were freed after paying ransoms; that

[t]he Nuon Paet forces kidnapped people for ransom including the three foreign backpackers. . . . Nuon Paet had power and authority in Phnom Voar area. The ransom was issued by Nuon Paet. In short, Nuon Paet really set up illegal armed forces. The three foreign backpackers were kept as captives by Nuon Paet forces. . . . According to the testimony of Ouk Bun, Nuon Paet gave authority to Mr. Mao to kill the three men. . . . [A]ccording to the report of the Australian and British, it was Nuon Paet who ordered his people to kill the three foreign backpackers.¹¹¹

The court imposed a sentence of life imprisonment on charges of “maintaining an illegal armed group, terrorism, illegal detention, robbery of property on under Articles 35, 34, 36, 2 and 5.”¹¹² The judge also noted that “Chhouk Rin, Sam Bith and their partners will face trial later. Vith Vorn was killed. Under Article 103 the criminal court can try only those who have been charged.”¹¹³

¹⁰⁸ *Id.* at 34.

¹⁰⁹ *Id.*

¹¹⁰ The Municipal Court transcript says it took her 90 minutes. *Id.* However, Human Rights watch indicates it took “just over one hour.” Human Rights Watch, *The Trial of Nuon Paet, Phnom Penh, Cambodia*, June 7, 1999, July 8, 1999, at 2.

¹¹¹ 1999 NP Muni Ct transcript, *supra* note 3, at 35.

¹¹² *Id.* at 36.

¹¹³ *Id.* at 35.

C. *Specific Concerns With Paet's Municipal Trial*

It is possible to identify several serious legal problems with the hearing and the verdict.

1. Excessive Pre-Trial Detention

As Paet's defense attorney noted, the accused was held for more than 10 months after his arrest before being brought to trial. This was apparently an illegal delay and a violation of Cambodian law, specifically Articles 14(4), 21(1) and 22(1), of the UNTAC Law which require the court to release individuals detained for an illegal period of time. Also, Articles 22(2) and 57 lay out severe penalties for those officials who violate individual rights with illegal detentions.¹¹⁴ The judge failed to address this issue.

2. Concern That the Verdict had Been Prepared in Advance of the Trial

Human Rights Watch, which observed the trial, noted that the trial itself did not seem to be the basis for the verdict.¹¹⁵ "While the day's proceedings did not appear to be scripted, the court verdict did."¹¹⁶ Indeed, it took the judge only about an hour's recess to produce a written decision, which then took her more than twenty minutes to read.¹¹⁷ Crucially, the verdict referred to facts and evidence not produced during the trial. For example, the verdict cited a "report of the Australian and British" that "Nuon Paet ordered his people to kill the three foreign

¹¹⁴ "The duration of a pre-trial detention must in no case exceed four months. However, upon the decision of a judge setting out the reasons, this period may be extended to six months if justified by the requirements of the investigation." UNTAC LAW, *supra* note 65, art. 14(4). "Any accused person, whether or not in detention, must be judged no later than six months after arrest." *Id.* art. 21(1). "In case of non-compliance with the procedures set out in article 10-21 that seriously interferes with the rights of defence, the accused must be immediately released." *Id.* art. 22(1). Aside from releasing Nuon Paet, the court was obligated to impose severe sanctions on those officials who had detained him illegally. "Violations by public officials of the individual rights enumerated in articles 10-21 of the present text will incur sanctions provided in article 57." *Id.* art. 22(2). "Any public agents, including police or military agents, who deliberately infringe upon rights of physical integrity and the inviolability of the home, as protected by the present text, shall be liable to a punishment of one or two years in prison." *Id.* art. 57.

¹¹⁵ Human Rights Watch, *supra* note 110, at 2; McEvers, *supra* note 40.

¹¹⁶ Human Rights Watch, *supra* note 110.

¹¹⁷ *Id.*

backpackers.”¹¹⁸ Such a report had not been mentioned in the trial or entered into evidence. According to Human Rights Watch, the verdict also referred to a different number of total hostages taken than any of the witnesses had in their testimony.¹¹⁹

3. Unclear Basis for the Verdict

Human Rights Watch noted that “[t]he trial only showed what was already known: that there was an ambush, hostages were taken, three foreigners were killed, and Nuon Paet was in charge of the negotiations with the government. Nuon Paet’s involvement in the killing of the tourists was never made clear.”¹²⁰ Evidence and witness testimony were inconclusive or contradictory, and the judge made no attempt to explain why she chose to believe some witnesses while discounting others.

4. Key Witnesses Were Not Present During the Trial or Available for Cross Examination

There was no ability for the defense to cross examine key witnesses, who were shown only on videotape. Ouk Bun, for example, was the only witness whose testimony directly implicated Nuon Paet in the murders, and statements made by Bun on November 14, 1994 were read to the court, and a video recording of him was shown. As the defense counsel argued during the trial, the value of such testimony should have been seriously limited.¹²¹ The verdict, however, relied heavily on Ouk Bun’s unsubstantiated and untested testimony.¹²²

5. Witnesses Were Able to Follow the Trial

Article 132 of the Criminal Procedure Law requires that “[t]he witnesses shall withdraw into a waiting room which was reserved for them from which they cannot see, or hear anything from the court room and in which they cannot communicate with each other.”¹²³ This

¹¹⁸ Thet Sambath & Gina Chon, *Chhouk Rin on Trial for 1994 Train Attack*, CAMBODIA DAILY, July. 18, 2000.

¹¹⁹ Human Rights Watch, *supra* note 110.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² 1999 NP Muni Ct. transcript, *supra* note 3, at 35 (“According to the testimony of Ouk Bun, Nuon Paet gave authority to Mr. Mao to kill the three men”).

¹²³ Law on Criminal Procedure, *supra* note 49, art. 132.

provision was violated during Nuon Paet's trial. Witnesses were taken as a group to the office of the Judicial Mentor next to the courtroom where they were held until called.¹²⁴ A loudspeaker had been placed in the courtyard of the court buildings, however, which broadcast the proceedings to those gathered outside.¹²⁵ The witnesses in the office of the Judicial Mentor could quite clearly hear the loudspeaker and everything that happened in the course of the trial.¹²⁶

The Nuon Paet trial was viewed by many observers as a test case for how the country's courts would handle a high-profile trial. For Human Rights Watch, the trial not only exemplified the weaknesses in the Cambodian legal system, but also showed that political influence was strong.¹²⁷ Yet Chaktriya, who was one of the prosecutors in the subsequent Chhouk Rin municipal court case in 2000, later voiced frustration with this foreign criticism: "I don't care what people from the outside say. When we make a decision, we always get criticized from the outside so let them do [that]. We have worked according to the rules."¹²⁸

Some Cambodian observers also saw evidence of political interference in the judicial process in the prosecution of Nuon Paet. The *Udom Katek Cheat* (National Ideal) dismissed the proceedings as nothing more than a "show trial" with a purpose of "legitimizing Hun Sen on the international platform."¹²⁹ Other Khmer observers questioned the "selective justice" of the trial, and noted that it had required the deaths of Westerners for the government to finally prosecute former Khmer Rouge members for their crimes.¹³⁰ The opposition newspaper *Moneaksekar Khmer* (Cambodian Conscience) asked, "Are the 13 dead Cambodians animals or humans? . . . The three white skinned victims were from countries that have economic and political power in Cambodia."¹³¹ Similarly, the *Samleng Yuvachon Khmer* (Voice of Khmer Youth) argued, "This trial shows the lives of Cambodians [are] cheap [U]nless

¹²⁴ United Nations Cambodia Office of the High Commissioner for Human Rights, *The Nuon Paet Case: Some Legal Concerns*, June 23, 1999.

¹²⁵ *Id.*

¹²⁶ *Id.* Thus, for example, Sam Bith had presumably heard Nuon Paet's testimony that it had been Bith who had given the orders to Vith Vorn to execute the hostages.

¹²⁷ McEvers, *supra* note 40.

¹²⁸ Sambath, *supra* note 118.

¹²⁹ *Cambodians Blast Selective Justice as Western Victims Seek More*, Agence France-Presse, June 8, 1999, available at http://www.apri.ac.nz/camnews_june-99.html.

¹³⁰ *Id.*

¹³¹ *Id.*

(Prime Minister) Hun Sen brings to trial other Khmer Rouge leaders for killing thousands of Cambodians then justice will never be done.”¹³²

D. Positive Attributes of Paet's Municipal Court Trial

The trial of Nuon Paet, though undoubtedly containing legal flaws, also marks an important step forward in the creation of a functioning judiciary. Several precedents were set in this trial. First, and most importantly, that Nuon Paet, the first Khmer Rouge commander to be tried in person in a Cambodian court,¹³³ could be charged with and convicted with a life sentence of murder, robbery, illegal confinement, organized crime, terrorism, and destruction of property, was a step of enormous proportion. The circumstances surrounding the trial and verdict may understandably concern Western legal observers, but the fact remains that a Khmer Rouge commander was charged by a Cambodian prosecutor, was made to answer his accusers in a Cambodian court, and was convicted by a Cambodian judge.

Second, though there is reason to believe that the verdict may well have been pre-prepared, the trial proceedings themselves do not appear to have been orchestrated into a mere “show trial” intended to do nothing more than justify the verdict.¹³⁴ Witnesses did not appear to have been intimidated, and apparently spoke freely to the court.¹³⁵ The defense counsel argued vigorously on behalf of his client, attacked the validity of the proceedings themselves, spoke vociferously about his inability to cross question key witnesses, and carried out a defense of his client; he was clearly not a stooge appointed by the government or the court to play into the hands of the prosecutor. The eight-hour trial was – by Cambodian legal standards – of unprecedented length, and the witnesses and parties were apparently able to testify without undue pressure. Cambodian trials typically last from two to four hours.¹³⁶ Finally, foreign legal observers were given full access to the courtroom and were able to observe the proceedings first hand. That the observers found the proceedings lacking should not obscure the fact that – again by Cambodian standards – this trial was an extraordinary example of judicial openness.

¹³² *Id.*

¹³³ Human Rights Watch, *supra* note 110, at 1.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

E. Paet's Appellate Court Trial

The Phnom Penh Appellate Court heard Nuon Paet's appeal on 20 September 2000.¹³⁷ The court noted that several witnesses were absent, including Sam Bith and Chhouk Rin.¹³⁸ Ouk Bon, whose videotaped testimony was damning at the Municipal Court trial, was now recorded as "dead."¹³⁹ The appellate court did not restrict itself merely to legal issues raised in the lower court, but heard the case *de novo* and questioned Paet about the underlying facts in the case.¹⁴⁰ Under questioning from Presiding Judge Samreth Sophal, Nuon Paet again rejected all six of the charges on which he had been convicted by the Municipal Court.¹⁴¹ The arguments on which he relied in the appellate court were those he had already advanced in the lower court.¹⁴² The prosecutor and attorneys for the plaintiffs questioned Paet about his role in the train attack, the kidnapping and the murders.¹⁴³ The presiding judge also offered the lawyer representing the Australian Embassy an opportunity to ask questions and to read a letter from the Wilsons' lawyer.¹⁴⁴ Similarly, the British Ambassador was allowed to read a statement on behalf of Dorothy Slater.¹⁴⁵ The judges aggressively questioned several apparently confused witnesses over radio communications that occurred at the time of the train ambush and over the subsequent execution of the Westerners, and Yim Sary, the lawyer representing the French family, complained that Nuon Paet was disrupting the witnesses by whispering to them.¹⁴⁶ The lawyers for the defense, in their summaries to the court, reiterated the same arguments that had been used at the Municipal Court: they rejected each of the six charges and they pointed out the procedural flaws with the legal process, which they argued justified dismissal of the charges, notably the excessive pretrial detention.¹⁴⁷

¹³⁷ The Presiding Judge was Samreth Sophal. The two Counseling Judges were Pol Neang and Chum Neang. The prosecutor was Nhuong Thol, and defense counsel was Puth Theavy and Dy Borama. Yim Sary represented the Braquet family. 2000 NP Appeal Ct transcript, *supra* note 103, at 1.

¹³⁸ *Id.* at 3.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 5-9, 11-12, 15-16.

¹⁴¹ *Id.* at 6.

¹⁴² *Id.* at 5-6.

¹⁴³ *Id.* at 9-11, 14.

¹⁴⁴ *Id.* at 15.

¹⁴⁵ *Id.* at 16.

¹⁴⁶ *Id.* at 24.

¹⁴⁷ *Id.* at 32.

The appeal hearing lasted six hours.¹⁴⁸ At its termination, the presiding judge announced that the court's verdict would be postponed until October 4, because the case was "very complicated [and] the Court need[ed] more time to consider" and because of the Buddhist festival of Phchum Ben.¹⁴⁹ This time, at least, critics would not be able to point to a speedy judgment as evidence of a predetermined verdict. In this, and in the verdict itself, it is clear that the appellate judges were responding to criticisms leveled against the lower court.

In its verdict, read on October 4, 2000, the Court of Appeal found reasonable the grounds of the Municipal Court's judgment and upheld as appropriate the guilty verdict of the lower court. Nuon Paet was found guilty of colluding in the offences committed during the train assault and in the subsequent intentional murder of the Westerners.¹⁵⁰ The Court of Appeals based its judgment on statements made by the defendant, witnesses, lawyers, and the victims' families.¹⁵¹ In marked contrast with the perceived inadequacy of the explanation provided by the Municipal Court judge, the Presiding Judge at the Court of Appeal was scrupulous in laying out the explicit grounds for the verdict and explaining, for example, why the court rejected the testimony of some of the witnesses:

The defendant's claim of noninvolvement . . . on the grounds that he was only the political leader [is unreasonable] . . . because the attack on such a big scale could not have been carried out without order from/through the top leadership of Phnom Voar, or decision made by them collectively The defendant's claim that he had no trust of the top Khmer Rouge leadership is unreasonable, because if that were the case, he would not have been allowed to stay in his post as political chief at Phnom Voar till the end and he would not have been assigned to negotiate with the Government. . . . The witnesses' statements made to reject Nuon Paet's involvement in the train attack, robbery . . . are not reasonable, because as a Khmer Rouge

¹⁴⁸ *Id.* at 33.

¹⁴⁹ *Id.*

¹⁵⁰ Verdict of the Nuon Paet Appeal Court transcript 3 (Oct. 4, 2000) [hereinafter NP App. Ct. verdict].

¹⁵¹ *Id.* at 2.

political chief, the defendant had leading roles in all activities.¹⁵²

The careful explanation of the reasoning and justification underlying the appellate court's verdict marks an important step towards judicial transparency, an adherence to legal reasoning, ruling on the merits of a case, and an implicit rejection of the more typical Cambodian practice of simply issuing a verdict with little or no attempt to explain or support it.

V. CHHOUK RIN

Chhouk Rin, the second of the three former Khmer Rouge commanders prosecuted for the Kampot train ambush, was born in 1954 in Trapaing Chrey, Kompong Trach of Kompot province.¹⁵³ At the time of the ambush he was the commander of a Khmer Rouge regiment stationed at Phnom Voar.¹⁵⁴ His immediate superiors at Phnom Voar were Nuon Paet and Vith Vorn, and his regional commander was Sam Bith. He defected to the government on 15 October 1994, with over two hundred of his men, after government troops had surrounded and begun shelling Phnom Voar.¹⁵⁵ His defection was hailed by the government. Within days of his defection, Chhouk Rin was dining with the Cambodian Defense Minister, Tea Chamrath, army deputy chief General Nheak Bun Chay, and other high-ranking military and government officials.¹⁵⁶ Chhouk Rin, who was reported by Agence France-Presse as "relishing" the fine food and nightlife of the town of Kampot, said: "It's very different now, because I have lived in the jungle for many years and never seen the city."¹⁵⁷ He was reported as having "earlier admitted to authorities that he led the July 26 ambush."¹⁵⁸ He claimed, however, to know nothing of the fate of the hostages, and promised to "help the government to solve the problem" and even to fight Nuon Paet, his former Khmer Rouge commander at Phnom Voar, if ordered to do so.¹⁵⁹ After Phnom Voar fell and the bodies of the hostages were discovered,

¹⁵² *Id.*

¹⁵³ *Chhouk Rin Was Freed by Court*, KOH SANTEPHEAP DAILY, July 20, 2000.

¹⁵⁴ Ker Munthit, *Ex-Khmer Rouge Chief Appeals*, THE ADVERTISER, Nov. 12, 2003.

¹⁵⁵ Ana & Doyle, *supra* note 3; Ana & Doyle, *supra* note 12.

¹⁵⁶ Sambath, *supra* note 8.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

Chhouk Rin consistently maintained that the hostages had not been killed until after he defected.¹⁶⁰ His lawyer, Puth Theavy, later claimed he could produce “more than 20” witnesses who could testify that the hostages were still alive when his client defected to the government.¹⁶¹ After the fall of Phnom Voar, however, former Khmer Rouge members indicated that the three hostages had been killed in late September, before Chhouk Rin’s defection.¹⁶² In addition, in the letter Nuon Paet had written to the families of the Western victims in November 1998, he stated that he had met with Chhouk Rin *after* the backpackers had been executed, and that Rin had demanded to know who had killed them.¹⁶³ Paet claimed that he told Rin that “Vun did kill them on order from Sam Bit, Chairman of the region.”¹⁶⁴ It was only after this conversation, according to Paet, that Chhouk Rin defected to the government with his men.¹⁶⁵ It seems likely that the murder of the foreigners galvanized him into negotiating his defection, thereby giving him the opportunity to subsequently distance himself from the backpackers’ fate. Indeed, by the time their corpses were discovered at Phnom Voar, Rin had established himself as a colonel within the RCAF, the well-publicized and warmly welcomed newfound ally of the royal government.

Chhouk Rin’s defection undoubtedly came at a crucial point in the government’s campaign against the Khmer Rouge at Phnom Voar, and the excellent treatment he received was intended as encouragement to other Khmer Rouge to follow his example.¹⁶⁶ Indeed, Chhouk Rin’s defection had national implications, contributing to the collapse of Khmer Rouge resistance at Phnom Voar, a stronghold that had never before fallen to the government.¹⁶⁷ Rin was seen by many as the person to usher peace to the Kampot area by being the first Khmer Rouge commander to

¹⁶⁰ Ana & Doyle, *supra* note 12.

¹⁶¹ Ana & Doyle, *supra* note 3.

¹⁶² *Id.*

¹⁶³ Nuon Paet, *supra* note 50.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Defense Minister Tea Chamrath publicly gave Chhouk Rin and his wife \$200 with the hope that they could “find happiness.” Sambath, *supra* note 8. Tea Chamrath applauded Chhouk Rin: “Thank you so much for bringing your fighters to cooperate with us.” *Id.* Chhouk Rin’s wife was even treated to a two-hour audience with Co-Prime Minister Norodom Ranariddh, who then paid for her visit to a hairdresser for a perm. Thayer, *supra* note 12. Chhouk Rin was quickly appointed to the rank of Colonel in the government, and donned the uniform of his recent enemy. *Id.* He reportedly “fully admitted” his role in the train ambush and was given an amnesty from prosecution. *Id.*

¹⁶⁷ Robert Matthews & Matthew Lee, *Paet ‘Ready to Defect,’ Hostages Fate Unknown*, CAMBODIA DAILY, Oct. 27, 1994.

defect to the government.¹⁶⁸ The fall of Phnom Voar marked a turning point in the history of the Cambodian Khmer Rouge movement, which itself would soon collapse from within.

The Australian, British and French governments, however, were outraged by the treatment given to Rin.¹⁶⁹ For them, Rin was less a symbol of the success of Hun Sen's policy of reintegration and national reconciliation than the military commander who had played a key role in the Kampot train ambush and subsequent murder of their nationals. Australian Foreign Minister Gareth Evans was clear in his condemnation of the Cambodian government's warm reception of the former guerrilla commander: "We have made it absolutely clear to the Cambodian authorities and will again that Australia expects those responsible for the hostage abduction to be brought to justice. We cannot and will not accept anything less."¹⁷⁰

Hun Sen (at that time briefly co-Prime Minister with Norodom Ranaridh, before overthrowing him in a coup) responded to the international criticism of the government's lenient treatment of Chhouk Rin: "[Chhouk Rin and his men] must have the right to join the national community and to be ordinary citizens. We can not take this chance to punish them as they already left the Khmer Rouge to live with the national community. So this issue should be set aside."¹⁷¹ Minister of Information Ieng Muly stated, "The Khmer Rouge who have surrendered already will be given amnesty."¹⁷² As one analyst noted, Chhouk Rin negotiated his surrender "well" and continued "to profit from a solid base."¹⁷³ In addition to being appointed a colonel in the RCAF, he was made the provincial military commander in Phnom Voar.¹⁷⁴ In this latter capacity he was in a position to establish his personal authority through a system of patronage: giving away land to hundreds of his supporters, building roads, and constructing not just a dam, but also four pagodas, a dispensary and a school.¹⁷⁵ He was credited with helping turn the area's minefields into farm fields, and having fed the population when they were

¹⁶⁸ Ana & Doyle, *supra* note 12.

¹⁶⁹ Thayer, *supra* note 12.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Schwab, *supra* note 6.

¹⁷⁴ Sotheacheath, *supra* note 8.

¹⁷⁵ Schwab, *supra* note 6.

hungry.¹⁷⁶ The former Khmer Rouge areas in Kampot remained desperately poor years after the fighting had ceased.¹⁷⁷ Despite the extreme poverty of the region – which largely lacks, for example, electricity and running water – Chhouk Rin’s supporters are clear that his continued patronage has improved their living conditions.¹⁷⁸ Former Khmer Rouge guerrilla Srei Sam, a resident of Phnom Voar, summed up this sentiment in 2002: “Without Chhouk Rin, the roads will disappear. The land grabbing will increase, nobody will be able to control [it]. Thieves will turn up and start to rob people. No one will have respect.”¹⁷⁹

A. *Rin’s Arrest*

According to one Western analyst close to the legal case against Chhouk Rin, “Rin profited from enormous protection, in particular from the military, who thought it was too dangerous to break the non-aggression pact concluded with the Khmer Rouge who defected in 1994.”¹⁸⁰ It was only the continued pressure from the countries of the foreign victims – Australia, France and Britain – that forced the Cambodian government to proceed with his prosecution.¹⁸¹ Chhouk Rin was arrested on 8 January 2000 after a warrant was issued by the Phnom Penh Municipal Court.¹⁸² The details of his arrest highlight the precautions the RCAF military police thought necessary to take Chhouk Rin into custody. He was lured from his jungle base at Phnom Voar to the town of Kampot by an invitation to attend a party hosted by Keo Samuon, the regional military commander of the RCAF, and Sao Sokha,

¹⁷⁶ Saing Soenthrith, *Chhouk Rin’s Fellow Villagers Jubilant With ‘Fair’ Verdict*, CAMBODIA DAILY, July 19, 2000.

¹⁷⁷ *Id.*

¹⁷⁸ Schwab, *supra* note 6.

¹⁷⁹ Phann Ana & Kevin Doyle, *Phnom Voar Set to Protest Chhouk Rin Verdict*, CAMBODIA DAILY, Sept. 9, 2002. This local support remained strong even after Chhouk Rin was found guilty and imprisoned, and those at Phnom Voar remained convinced that he was the innocent scapegoat of the Hun Sen regime. By late 2002, it was noted that while many former rebels were no longer interested in the fate of Nuon Paet or Sam Bith, support for Chhouk Rin remained strong in Phnom Voar. See Soenthrith & Doyle, *supra* note 42.

¹⁸⁰ Schwab, *supra* note 6.

¹⁸¹ *Id.*; Press Release, Hon. Alexander Downer, Austl. Minister for Foreign Affairs, David Wilson: Chhouk Rin Appeal (Sept. 6, 2002), available at http://www.foreignminister.gov.au/releases/2002/fa128_02.html.

¹⁸² 2002 Chhouk Rin Appeals Court transcript; Gina Chon & Van Roeun, *Chhouk Rin Verdict Sets Uncertain Precedent for Other KR*, CAMBODIA DAILY, July 20, 2000.

and national military police chief.¹⁸³ The purpose of the party, however, was to isolate Rin from his supporters and get him drunk before arresting him. It was later reported that the three men “hefted countless drinks in the air with the ease of military men well schooled in the art of carousing.”¹⁸⁴ Several hours later, when Rin was “blissfully intoxicated,” two military policemen approached him from behind, grabbed his arms, and bundled him into a car. His bodyguard, perhaps taken by surprise, failed to intervene.¹⁸⁵ The colonel was quickly driven to prison in Phnom Penh, where he was held until his municipal court trial in July 2000.

The news of Chhouk Rin’s arrest was applauded in diplomatic circles.¹⁸⁶ Among residents of Phnom Voar, however, there was shock and dismay. Cham Sareth, Chhouk Rin’s bodyguard, carried the news of the arrest to Chhouk Rin’s family and village: “People cried and made big noise. . . . We were all together. His wife did not say anything, she only cry. People came from all directions run to my home, ask me questions and cry. I am still very worried about the future of the people living here, very concerned about the village. . . . We are all his people here, and there is no leader with his ability.”¹⁸⁷ Residents of Phnom Voar, including residents of Chhouk Rin’s home village of Chamkar Bei, noted that when Chhouk Rin was arrested, construction of a new road was immediately halted.¹⁸⁸ The villagers were convinced that only Chhouk Rin had the influence and connections to get the road built and provide continued assistance to the struggling area.¹⁸⁹

B. Rin’s Municipal Court Trial

In Criminal Case No. 463 at the Phnom Penh Municipal Court, Chhouk Rin faced many of the same charges that had been leveled against Nuon Paet: Organized Crime, Theft, Murder, Illegal Confinement, Wrongful Damage to Property, and Terrorism, in violation of Articles 36, 34, 31, 35, and 52 of the UNTAC Law and Article 2 of the Law on

¹⁸³ Keo Samuon was the Military Region 3 Commander, and Sao Sokha was the National Military Police Chief. See Adam Piore, *Ex-Rebel Chief’s Arrest Tests Reintegration*, CAMBODIA DAILY, Feb. 4, 2000; Soenthrith & Doyle, *supra* note 42.

¹⁸⁴ Piore, *supra* note 183.

¹⁸⁵ *Id.*

¹⁸⁶ Australian Ambassador Malcolm Leader noted that “[t]he Australian government has consistently said it wants to see all those implicated in the deaths of the three backpackers brought to justice.” *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Soenthrith, *supra* note 176.

¹⁸⁹ *Id.*

Terrorism.¹⁹⁰ In addition to the UNTAC Law provisions with which Paet had been charged, Chhouk Rin was also accused of committing murder in violation of Article 31, which states that:

Anyone who kills or attempts to kill another person after premeditating the crime, or by preparing an ambush, or who kills or attempts to kill another person in the course of theft or rape, is guilty of murder, and shall be liable to a punishment for a term of ten to twenty years.

Premeditation is the process of conceiving and preparing an attack on another person before the actual execution of the attack. An ambush consists of lying in wait with the intention of committing an act of violence against another person.¹⁹¹

Security was heavy at Phnom Penh's Municipal Court during the Chhouk Rin trial, with dozens of military police officers inside and outside of the courtroom.¹⁹² Several family members of the victims attended the hearing.¹⁹³ Jean-Claud Braquet, father of Jean-Claud Braquet, had come from France; David Wilson's father had come from Australia;¹⁹⁴ and Dorothy Slater, mother of Mark Slater, had come from Britain.¹⁹⁵ They arrived at the court with embassy officials.¹⁹⁶ Hundreds of Chhouk Rin's supporters from Phnom Voar had intended to drive to Phnom Penh to demonstrate at the court hearing, but military police had stopped their trucks in Kampot town, and only allowed persons specifically summoned by the court to proceed to the capital.¹⁹⁷ Tensions

¹⁹⁰ 2002 CR App. Ct. transcript, *supra* note 17, at 3. The parties who joined the criminal prosecution, as permitted under Cambodian law, were the families of both Western and Khmer victims, and the Cambodian national railway: Jean Claude Braquet, Peter Wilson, Dorothy Slater, the backpackers' families; Ny Srey, Um Sopha, Chan Sary, the spouses of Cambodian victims killed during the train attack; and Soun Sarin, the representative of the Cambodian Royal Railway. 2002 CR App. Ct. transcript, *supra* note 17, at 2-3.

¹⁹¹ UNTAC LAW, *supra* note 65, art. 31.

¹⁹² Gina Chon & Van Roeun, *Chhouk Rin Walks Free in Train Attack*, CAMBODIA DAILY, July 19, 2000. [hereinafter Chon & Roeun].

¹⁹³ Sotheacheath, *supra* note 8.

¹⁹⁴ *Id.*

¹⁹⁵ Unmacht, *supra* note 5.

¹⁹⁶ Chon & Roeun, *supra* note 192.

¹⁹⁷ Phann Ana & Kevin Doyle, *Phnom Voar Set to Protest Chhouk Rin Verdict*, CAMBODIA DAILY, Sept. 9, 2002.

ran high in the packed courtroom, as relatives of the slain men and supporters of Chhouk Rin packed into the sweltering room.¹⁹⁸

Chhouk Rin, escorted by six police officers, smiled as he entered the courtroom and Municipal Court Judge Thong Ol formally read the six charges against him.¹⁹⁹ The judge's attitude and demeanor were of immediate concern to international observers in the courtroom. George Edgar, the British ambassador, later noted in a "Confidential" memo, that Thong Ol's "interventions after the introductory formalities [were] virtually confined to encouraging all concerned to get the trial over with quickly."²⁰⁰ The judge, Edgar observed, apparently made no notes and looked at no papers throughout the trial, and his behavior during the trial was in "marked contrast" to the "sometimes aggressive questioning by the judges in the Nuon Paet appeal."²⁰¹ The prosecutor's performance was described by the Ambassador as being "on all occasions . . . fairly limp."²⁰²

During Rin's examination by the court, Yet Chatkriya, who represented the prosecutor's office, asked Chhouk Rin about the train attack, but the former guerrilla answered by talking about the 1970 coup d'état which overthrew the Lon Nol regime.²⁰³ Pressed to address the issue of the train attack, Chhouk Rin repeatedly stated that he had been unaware of plans to attack the train or kill any foreigners as he had been in the hospital for a 1984 landmine injury to his leg.²⁰⁴ When Chhouk Rin smiled and showed the court his injured leg, Jean-Claude Braquet, the father of the French victim, walked over to Chhouk Rin and yelled, "I don't care about your wound! You were proud of that wound in 1994 because you fulfilled your mission."²⁰⁵ Kek Galabru, president of the local human rights organization Licadho, attempted to calm down the distressed Braquet.²⁰⁶ The court did not comment on the outburst.

Many of Chhouk Rin's former Khmer Rouge comrades from Phnom Voar were offered by the defense to corroborate his testimony, including several who claimed that they had been in prison with him

¹⁹⁸ Ana & Doyle, *supra* note 12.

¹⁹⁹ Chon & Roeun, *supra* note 192; Sotheacheath, *supra* note 8.

²⁰⁰ George Edgar, British Ambassador, letter to Simon Wilson, dated The British Embassy, Phnom Penh, Oct. 5, 2000 (marked "Restricted") (on file with author).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Chon & Roeun, *supra* note 192.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

when the attack had taken place.²⁰⁷ More than a dozen other witnesses testified during the one-day trial: among these were railway employees, and the parents of the three backpackers, who were permitted to speak after having raised their hands until called on by the judge.²⁰⁸ The parents of the victims were actively involved in the proceedings, particularly Jean-Claude Braquet, who repeatedly approached his Cambodian lawyer, Yim Sary, to point out certain evidence and offer direct guidance to his counsel.²⁰⁹

Chhouk Rin offered several defenses to the charges against him. He claimed that he had not been involved in the planning or carrying out of the attack on the train or in the subsequent murders of the foreigners; that he had been hospitalized at the time of the attack; that in fact it was his commander, Nuon Paet, who had planned the attack, and that Nuon Paet had not trusted Chhouk Rin as the pair had been involved in many quarrels prior to Chhouk Rin's defection; that Chhouk Rin had joined the government and helped its forces attack Phnom Voar "to secure the release of the three"; and that whatever had transpired during that period had occurred during a time of war, and that the loss of lives was a natural consequence.²¹⁰

At the very final moments of the trial, the defense introduced an unexpected snare by raising an entirely new defense.²¹¹ In his address to the court, defense lawyer Puth Theavy argued that even if Chhouk Rin was guilty of the offenses he had been accused of, he could not be prosecuted because of the 1994 Law Outlawing the Democratic Kampuchea Group, which had granted a broad amnesty to those Khmer Rouge members who had defected within six-month of the laws' coming into effect.²¹² Chhouk Rin had, his lawyer explained, met this requirement, and was thereby shielded from prosecution. "Don't try to

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Chon & Roeun, *supra* note 192.

²¹¹ The introduction of a new defense at this point in the trial appears not to have violated provisions of Cambodia's 1993 Law on Criminal Procedure. The fact that such a tactic would typically be rejected out of hand by American or French courts, for example, was irrelevant. In the procedurally relaxed and *ad hoc* atmosphere of a Cambodian courtroom, where judges frequently permit breaches of even established procedure, this strategy by the defence counsel can be seen as clever lawyering. The amnesty defense should not have been unanticipated, and the prosecutor and plaintiffs' attorneys had missed their opportunity to address the issue preemptively earlier in the trial. This was frustrating, particularly for the foreign counsel representing the Western plaintiffs, who understandably felt ambushed by a tactic that would not have been permitted in their own countries. Not all observers had sympathy for the "arrogant" foreign lawyers.

²¹² Chon & Roeun, *supra* note 192.

accuse my client,” Puth Theavy argued, “because everything must be done based on the law.”²¹³

The Law Outlawing the Democratic Kampuchea Group (“1994 DK Law”) had been passed by the National Assembly on July 7, 1994, just nineteen days before the train ambush had taken place in Kampot.²¹⁴ It outlawed the Khmer Rouge (the “Democratic Kampuchea Group”), and made membership in it illegal. Crucially, however, Article 5 of the 1994 DK Law established a broad amnesty for certain members of the Khmer Rouge who defected to the government within a set timeframe:

After it has been brought to force, this law allows *an amnesty period of six months* for members of the political body or belonging to the military forces of the ‘Democratic Kampuchea’ group to reintegrate, under the administration of the Royal Government, into the Kingdom of Cambodia, *without being charged for offenses they caused*.²¹⁵

The exact meaning and scope of this amnesty provision had not been tested in Cambodian courts prior to 2000.²¹⁶

²¹³ *Id.*

²¹⁴ 1994 DK Law, *supra* note 67. See Touch, *supra* note 27; Chon & Roeun, *supra* note 182.

²¹⁵ 1994 DK Law, *supra* note 67, art. 5 (emphasis added).

²¹⁶ The Statement of Causes, signed by Chea Sim, Norodom Ranaridh, and Hun Sen, which had transmitted the proposed law to the National Assembly on 27 June 1994, argued that outlawing the Khmer Rouge was justified because of that group’s continued violations of international law, the Paris Peace Agreement, the Cambodian Constitution, and law of the Kingdom of Cambodia. Statement of Causes, June 27, 1994. “Considering that this group is greedy for war which did not accept the proposal for immediate and permanent unconditional cease-fire in the whole country . . . This group still goes on very boldly to commit crimes, cause damages and serious loss of lives, properties of the citizens, natural resources and other State’s properties. Moreover, this group also made the separation of the country, which grossly violated the article 3 of the Constitution of the Kingdom of Cambodia, which is such an unpardonable act.” *Id.*

The introduction of the 1994 DK Law lays out the specific legal justifications for outlawing the Khmer Rouge: the DK had violated important provisions of the 1991 Paris Agreements, by failing to observe the cease-fire; refusing to admit officials and staff of the UN Transitional Authority to the areas under its control; refusing to implement disarmament and demobilization of its armed forces; and failing to respect human rights. 1994 DK Law, *supra* note 67, at 836. The Khmer Rouge had, moreover, conducted armed aggression towards officials and staff of the UN Transitional Authority, officials of the Royal Government, “and the lives of Cambodian citizens indiscriminately.” *Id.* The Democratic Kampuchea group had failed to register a party for the 1993 elections in violation of the 1992 UNTAC Electoral Law, and had failed to participate in any of the events provided for by the law intended to make it a legitimate political party. *Id.* It was noted that:

When defense counsel Puth Theavy raised the amnesty issue, pandemonium ensued and the father of the French victim swore at him and called him “a liar.”²¹⁷ The judge then rose from the bench to consider

As since the 1993 elections, the “Democratic Kampuchea” group have continuously committed crimes, terrorism, and genocidal acts, as have been the true characteristics of the group ever since the group seized power in April 1975, evacuated the people, made arrests and carried out slayings, and later on plundered, mined the forests and all over the places, destroyed public and private property, conducted mass killing of the people, committed acts of aggression on national territory for illegal control and sales of natural properties in violation of the sovereignty of the Kingdom of Cambodia. *Id.*

The National Assembly pointed to specific violations by the Khmer Rouge of the Constitution of the Kingdom of Cambodia: by declaring the territory under its control as being separate from the state ruled by the Royal Government, the Khmer Rouge had violated Article 3 of the Constitution, which states that “The Kingdom of Cambodia is an indivisible state.” *Id.* at 837. The Khmer Rouge had also violated Article 49 (“Every Khmer citizen shall respect the Constitution and laws.”); Article 49 (“All Khmer citizens shall have the duty to take part in the national reconstruction and to defend the homeland”); Article 50 (“Khmer citizens of either sex shall respect the principles of national sovereignty, liberal multi-party democracy”); (“Khmer citizens of either sex shall respect public and legally acquired private properties”); and Article 52 (“The Royal Government of Cambodia shall protect the independence, sovereignty, territorial integrity of the Kingdom of Cambodia, adopt the policy of national reconciliation to insure national unity, preserve the good national traditions of the country, ensure public order and security.”). *Id.* at 837

Article 1 of the 1994 DK Law outlawed the “Democratic Kampuchea” group and its military forces. *Id.* Article 2 stated that from the date the law entered into effect, all “members of the political body” and “military forces” of the DK group “shall be deemed as offenders against the Constitution, and violators of the laws of the Kingdom of Cambodia.” *Id.* Members of the political body and the military forces were defined as “only those ordering, conspiring, or directly engaging in armed conflict aimed at serving the politics of the ‘Democratic Kampuchea’ group,” and specifically excluded family members of such individuals and those “who reside under pressure” of the DK group. *Id.*

Article 3 of the 1994 DK Law specifically stated that members of the political party and the military forces of the DK group, “or anyone who has committed crimes of deliberate murder, rape, plundering people’s property, destructing public and private property, etc. *shall be condemned according to the existing criminal law.*” (emphasis added). *Id.*

Article 6 and of the 1994 DK Law clarified that the law’s amnesty provision did not apply to leadership of the Khmer Rouge: “No amnesty of the above type may be given to the leader(s) [*may deuk noam*] of the ‘Democratic Kampuchea’ group.” *Id.* at 838. The preamble to the 1994 DK Law had stated that the leaders of the Khmer Rouge could not use the Paris Agreements as a “shield to conceal their responsibility for their crimes, terrorism, and acts of genocide from the time Pol Pot seized power in 1975 to 1978. There is no statute of limitation for genocidal crime.” *Id.* at 837. Interpretation of the language of Article 6 would surface briefly in the legal debate during trials of Chhouk Rin and Sam Bith.

Article 7 of the 1994 DK Law affirmed that the Law did not undermine or alter the King’s constitutionally-mandated amnesty powers: “The King can reduce or offer amnesty according to the rights stipulated in Article 27 of the Constitution.” *Id.* at 838. Thus, the King retained the right to offer amnesties to the extent permitted under the Constitution, and, presumably, reduce those amnesties offered under the 1994 DK Law. Though not relevant in the cases of Chhouk Rin, Sam Bith or Nuon Paet – none of whom claimed to have been offered a royal pardon – this issue may be relevant in future domestic prosecutions.

²¹⁷ Chon & Roeun, *supra* note 192; Sotheacheath, *supra* note 8.

his verdict. Under Article 141 of the Law on Criminal Procedure, once the judge withdraws into his “secret chamber” for “discussion” (i.e. evaluation of the case and rendering a judgment), “neither request nor argument shall be presented to the court.”²¹⁸ Obviously taken by surprise, neither the prosecutor nor the lawyers for the plaintiffs raised a formal objection to the new defense. According to Article 139 of the Criminal Procedure Law, “[a]s long as the judge has not yet begun to read the judgment, the parties may always be allowed to submit to the court their briefs and documents they think useful.”²¹⁹ Apparently neither the prosecutor nor plaintiffs’ lawyers did so. Reflecting on the dramatic events in the courtroom, one foreign legal expert concluded that the raising of the amnesty issue by the defense counsel was “excellent lawyering” and that “[i]t was pitiful that none of the other attorneys, including the arrogant foreign ones, raised any sort of objection.”²²⁰

Municipal Court Judge Thong Ol retired to his chambers, and ruled at 2 P.M. on the same day that Chhouk Rin should be released because his 1994 defection to the government gave him immunity from prosecution under the amnesty provision of the 1994 law.²²¹ As the *Cambodia Daily* later observed, “So, in the end, it didn’t matter what evidence the prosecution had against Chhouk Rin because he couldn’t be held responsible for what he did during his years as a guerrilla commander.”²²²

As Thong Ol read out his verdict, Chhouk Rin’s relatives in the courtroom clapped their hands and wept with joy.²²³ The victims’ families shook their heads in dismay.²²⁴ Jean-Claude Braquet, the father of the French hostage, shouted, “It’s a scandal.”²²⁵ After six months in jail, Chhouk Rin walked from the courthouse a free man.²²⁶

²¹⁸ Law on Criminal Procedure, *supra* note 49, art. 141.

²¹⁹ *Id.* art. 139.

²²⁰ Interview with X, in Phnom Penh, Cambodia, (24 Nov. 2003).

²²¹ Soenthrith, *supra* note 176; *Chhouk Rin Was Freed by Court*, *supra* note 153; Sotheacheath, *supra* note 8.

²²² Chon & Roeun, *supra* note 192.

²²³ Sotheacheath, *supra* note 8.

²²⁴ Ana & Doyle, *supra* note 12.

²²⁵ Chon & Roeun, *supra* note 192.

²²⁶ Soenthrith, *supra* note 176.

C. *Reaction to Rin's Acquittal*

Chhouk Rin told the reporters who crowded around him after the trial that his acquittal showed that Cambodia's courts were fair and not swayed by political pressures.²²⁷ He stated, "I believe the courts are independent and are not subject to political pressure. Our country has a real state of law."²²⁸ His supporters from Kampot were similarly delighted, and used the verdict as proof that the Cambodian judicial system was just and fair.²²⁹ Some members of the Cambodian government were swift to draw the same conclusion, seeing the acquittal verdict in the face of international pressure for a conviction as evidence of Cambodian judicial independence. Prince Sisowath Sirirath, Co-Minister of Defense, for example, concluded, "The trial showed that democracy in our country is going well."²³⁰ Keo Samuon, of the CPP, and a three-star general in the RCAF and commander of Military region 3, which included Kampot Province, was pragmatic in his conclusions: "[I]f nobody is in prison, then nobody is angry. We should try to forget all this because of national reconciliation."²³¹ It was not only Cambodians who applauded the verdict. One unnamed Western legal expert, quoted by the *Cambodia Daily* commended the acquittal, saying that before the hearing she had fully expected an unfair trial with a pro-forma guilty verdict pre-written by the court.²³² Regarding the issue of amnesty, she opined, "This is the law. Former Khmer Rouge who have defected have immunity. The law is clear."²³³

Lawyers for the plaintiffs were "disappointed that Chhouk Rin has been allowed off on a technicality."²³⁴ Yim Sary, a lawyer for the Braquet family, said he could not comment on the trial. "It's a political issue and I can't say anything more."²³⁵ William Woodrow, the lawyer for David Wilson's family, stated that "It would have been preferable to

²²⁷ Sotheacheath, *supra* note 8.

²²⁸ Chon, *Backpackers*, *supra* note 44.

²²⁹ Soenthrith, *supra* note 176.

²³⁰ Chon, *Backpackers*, *supra* note 44.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ Sotheacheath *supra* note 8.

²³⁵ Chon, *Backpackers*, *supra* note 44.

have had the decision on the evidence rather than relying on a piece of legislation in Cambodian law which has yet to be properly analyzed.”²³⁶

Once the initial shock of the verdict had passed, international and Cambodian lawyers began to analyze the legal issues raised by the Chhouk Rin case. The Cambodian Bar Association and the U.N. Center for Human Rights organized a legal forum in Phnom Penh on August 8, 2000, at which legal scholars and practitioners debated the key 1994 DK Law.²³⁷ Skip Grant, a U.N. Judicial Mentor, applauded the prosecutors, lawyers and judges at Chhouk Rin’s trial. “I would like to congratulate the prosecutors and judges. . . . We should take this case as an example of the lawyering we should all be doing.”²³⁸ Grant contended that the decision to release Chhouk Rin was an “independent” court ruling.²³⁹ Other attendees at the forum, however, attacked the 1994 DK Law as unconstitutional. Surya Dhungel, the Chief of the U.N. Center’s Legal Assistance Unit, noted, “If we look at the preamble and some of the paragraphs, it is clear that the National assembly assumed judicial control when writing the law,” and pointed specifically to Article 2, which states that the Khmer Rouge shall automatically “be deemed offenders against the Constitution and violators of the laws of the Kingdom of Cambodia. . . . Parliament has already passed judgment, which according to the Constitution is only in the power of the judiciary.”²⁴⁰ There was also some discussion of the meaning of the term “leaders” in Article 6 and the preamble of the 1994 DK Law.²⁴¹

Still other forum attendees debated the key issue of the six month amnesty provision in the 1994 Law, and whether this excluded those crimes committed after the promulgation but before the expiration of the six month deadline.²⁴² Ultimately, this legal question would prove to be decisive in Chhouk Rin’s appellate hearings. Did the 1994 DK Law, in effect, create a six-month window of opportunity for criminal acts by members of the Khmer Rouge? Chhouk Rin’s attorney was unwavering

²³⁶ Sotheacheath, *supra* note 8.

²³⁷ Anette Marcher, *US Lawyer Praises Chhouk Rin Judgment*, PHNOM PENH POST, Aug. 18-31, 2000.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Marcher, *supra* note 237.

²⁴¹ *Id.* David Ashley, of the British government, who was present in Phnom Penh during the Assembly debate of the 1994 DK Law, has noted that the term “leaders” is as ambiguous in Khmer as it is in English, though his sense of the Assembly debates was that the MPs “intended to refer to senior leaders (Pol Pot etc), rather than battalion/division leaders. But this would be a matter of interpretation.” E-mail from David Ashley to George Cooper (Aug. 6, 2002) (on file with author).

²⁴² Marcher, *supra* note 237.

in arguing for an expansive reading of the amnesty provision. "The amnesty covers any crime committed any day. As long as it was committed before the amnesty period expired it can not be punished – even if somebody killed one million people."²⁴³ This position was rejected by most legal commentators – and ultimately by the appellate court. Some commentators argued that to include crimes committed after the law's promulgation but during the six month provision would amount to a "*carte blanche* for the KR to kill, rob and murder as long as they defected before the end of the amnesty period."²⁴⁴

Opposition politician Sam Rainsy, who had been Finance Minister in 1994 and had participated in the National Assembly debate on the 1994 DK Law, entered the public debate in 2000 by providing his personal assessment of the intent of the legislature when it adopted the amnesty provision. He argued that the law was intended to grant amnesty only for those crimes committed *before* the law was promulgated, and that the National Assembly had specifically had in mind crimes that had taken place during the period of Khmer Rouge rule from 1975 to 1979.²⁴⁵ Rainsy noted, "We [the National Assembly] did not have the kind of crime that Chhouk Rin committed in mind. This was totally outside our consideration."²⁴⁶

The acquittal of Chhouk Rin was clearly a surprise and a disappointment for the foreign governments of the three backpackers. The French government declared that it was "astonished" by the verdict, and the British Foreign Office stated that it was "disappointed."²⁴⁷ The Australian government issued a formal protest of the acquittal and sought

²⁴³ *Id.*

²⁴⁴ *Id.* Another legal commentator, Bora Touch, could not believe that the 1994 DK Law was intended to provide a blanket amnesty for crimes, and argued instead that it was intended only to offer an amnesty for the "crime" of membership of the outlawed "Democratic Kampuchea" group. "It is . . . inconceivable for the [1994 DK Law, *supra* note 67] to be meant to provide blanket amnesties for all crimes committed by former members of the KR, including murders, abductions, and illegal confinement, which have always been crimes even before the passage of the DK law. . . . Article 5 of the law allowed an amnesty period of six months for members of the KR political and military forces to defect to the government without being prosecuted for their crimes (*crimes of being a member of the Khmer Rouge*)." Touch, *supra* note 27 (emphasis added). Bora Touch's interpretation was a minority one, and ignores the language of Article 5, which stated that members of the Khmer Rouge who defected and reintegrated within six months could do so "without being charged for offenses they caused." 1994 DK Law, *supra* note 67, at 838. This language does not support Bora Touch's narrow reading of the amnesty provision as applying only to the offense of being a member of the outlawed group.

²⁴⁵ Chon & Roeun, *supra* note 182.

²⁴⁶ *Id.*

²⁴⁷ Combined from News Services, *Australia To Protest Chhouk Rin Acquittal*, CAMBODIA DAILY, July 20, 2000.

clarification of the decision.²⁴⁸ Alexander Downer, Australian Minister for Foreign Affairs, was harsh in his condemnation of the verdict:

I am deeply concerned that the trial of Khmer Rouge Commander Chhouk Rin has resulted in him being set free. We will look closely at the details of the judgment as it contains a number of technical legal issues which need careful consideration. I have instructed our Embassy in Phnom Penh to make the highest-level representations to the Cambodian authorities about the matter. I have consistently stressed to the Cambodian Government the importance of bringing to justice all of those implicated in the abduction and murder of Australian David Wilson and his British and French colleagues. During my visit to Cambodia in May, I raised this issue with Prime Minister Hun Sen, Foreign Minister Hor Namhong and other senior members of the Cambodian Government. In addition, our Embassy in Phnom Penh has made regular representations to the Cambodian authorities.²⁴⁹

The diplomatic fallout from the acquittal of Chhouk Rin was not a small matter for the Hun Sen government. Australia, France and Britain were among the most prominent donors to Cambodia, which in 2000 had relied on the international community to fund more than 40 percent of its national budget.²⁵⁰

William Wodrow, a lawyer for the Wilson family, was quick to draw a connection between the Chhouk Rin verdict and its implications for the proposed U.N.-brokered trial. "I would have no confidence in any tribunal consisting purely of a Cambodian judiciary. The international community should not be left with any doubt that an external judiciary committee should be forced on the government."²⁵¹ Similarly, Youk Chhang, director of the Documentation Center of Cambodia which had been gathering evidence for use by the proposed tribunal, commented, "This gives people no hope. If the court can't handle this trial when they

²⁴⁸ *Id.*

²⁴⁹ Press Release, Hon. Alexander Downer, Austl. Minister for Foreign Affairs, Cambodia: Chhouk Rin, (July 19, 2000), available at http://www.dfat.gov.au/media/releases/foreign/2000/fa083_2000.html.

²⁵⁰ Chon & Roeun, *supra* note 182. See Thomas Lum, *Cambodia: Background and U.S. Relations*, CONG. RES. SERVICE REP. RL32986, 6-7 (2002).

²⁵¹ Chon & Roeun, *supra* note 182.

had the evidence, plaintiffs, everything, how can they handle a bigger trial?”²⁵²

Nonetheless, some observers were more reluctant to draw a direct parallel between the Chhouk Rin verdict and the future of the tribunal. One Western diplomat cautioned that comparing the Chhouk Rin case to a trial for Khmer Rouge leaders was “like comparing apples and oranges. What is going to happen in the Khmer Rouge trial is very different than what happened in Phnom Penh [on July 18]. It’s one thing to have the government cut a deal with Chhouk Rin. It’s very different when the king grants amnesty for a prior conviction.”²⁵³ Ok Serei Sopheak, co-chair of the Cambodian Center for Conflict Resolution, agreed. “Chhouk Rin is a specific case and you must not extrapolate what happened at that trial for the Khmer Rouge trial. The Khmer Rouge trial is not only for Cambodia, it’s for humanity. It’s not a normal case.”²⁵⁴

D. *Rin’s First Appellate Court Trial*

An appeal of the Phnom Penh Municipal Court decision was heard by the Appellate Court of Phnom Penh on August 28, 2002.²⁵⁵ Chhouk Rin had requested that the trial be postponed to allow him more time to locate witnesses, but Chief Judge Samrith Sophal refused, stating that the application was unreasonable and lodged too late by Chhouk Rin’s lawyer.²⁵⁶ Neither Chhouk Rin nor his lawyer, Puth Theavy, attended the one-day Appeals Court trial.²⁵⁷ Conflicting reasons for their failure to appear were offered, and the case proceeded without them.²⁵⁸

The trial was attended by an extraordinary cross-section of the international community: diplomats (including British Ambassador

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ 2002 CR App. Ct. transcript, *supra* note 17, at 1, 15. The verdict of the municipal court was appealed by the deputy prosecutor attached to Phnom Penh municipal court, and Mr. Yim sary, the lawyer representing the French victim.

²⁵⁶ Phann Ana & Kevin Doyle, *Chhouk Rin Gets Life for Tourist Slayings*, CAMBODIA DAILY, Sept. 7-8, 2002.

²⁵⁷ Phann Ana & Kevin Doyle, *Chhouk Rin Won’t Show For Verdict*, CAMBODIA DAILY, Sept. 4, 2002.

²⁵⁸ Chhouk Rin claimed by telephone prior to the hearing that he was too ill to travel to Phnom Penh: “I will not go tomorrow because my health is not good. I have a fever and a cold. I might send my lawyer to listen instead.” Ana & Doyle, *supra* note 257. Similarly, relatives of Puth Theavy claimed that the lawyer was unable to attend because of illness. Ana & Doyle, *supra* note 12. The failure to appear was also interpreted as an apparent protest at the court’s rejection of Chhouk Rin’s request for more time to gather evidence.

Stephen Bridges and Australian Ambassador Louise Hand), legal experts, foreign and local reporters, and the father of Jean-Michel Braquet.²⁵⁹ The eyes of the world were on the court. In contrast to the at-times raucous 2000 Municipal Court hearing, the atmosphere in the Appeals Court was described as “muted.”²⁶⁰

The charges were identical to those that had been contemplated by the Municipal Court.²⁶¹ Ea Sopheap, the lawyer for the family of Mark Slater, called as a witness Chan Sary who had been a guard on the ambushed train and had been held 12 days on Phnom Voar after the attack.²⁶² Chan Sary gave testimony that contradicted Chhouk Rin’s assertion that he had been ill in the hospital on the day the attack took place, stating that he had been interrogated by Chhouk Rin for two hours after the train was ambushed, and later recognized the Khmer Rouge commander by his missing toes.²⁶³ However, upon questioning by Judge Thuong Mony, Chan Sary said that it was other prisoners on Phnom Voar who had told him that the person carrying out the interrogation was Chhouk Rin.²⁶⁴

This time, the prosecution lawyers were prepared to deal head-on with the issue of the amnesty provision of the 1994 DK Law, which had derailed their case before the Municipal Court. Advised by Paris-based French lawyer, Francois Zimeray, Braquet’s local lawyer, Touch Chheng Tech, argued that the 2004 amnesty law applied only to lower ranking members of the Khmer Rouge, and that because Chhouk Rin had been a Khmer Rouge commander the amnesty did not extend to him.²⁶⁵ However, the Khmer attorney was described as becoming “bogged down” when asked by the court to explain Chhouk Rin’s place in the Khmer

²⁵⁹ Ana & Doyle, *supra* note 12.

²⁶⁰ *Id.*

²⁶¹ 2002 CR App. Ct. transcript, *supra* note 17, at 2 (“Organized Crime, Robbery, Murder, Illegal Confinement, intentionally wrongful damage to property and Terrorism . . . article 36, 34, 31, 35, 52 of the UNTAC Law and article 2 of the Law on Terrorism”).

²⁶² Ana & Doyle, *supra* note 12.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ Ana & Doyle, *supra* note 12. This issue had been debated before the trial by the lawyers representing the Slater family. The 1994 DK Law expressly prohibited granting amnesty to DK “leaders” (“*mey deuk doam*”). Touch, *supra* note 27; e-mail from George Cooper e-mail to Steve Heder, (July 25, 2002) (on file with author) George Cooper argued that the ordinary meaning of “*maey duek noam*” “refer[s] to leaders of all kinds including lower level leaders[.]” *Id.* David Ashley, of the British government, who was present in Phnom Penh during the National Assembly debate of the 1994 DK Law, while noting that the term “leaders” is as ambiguous in Khmer as it is in English, suggested that his sense of the Assembly debates was that the legislature “intended to refer to senior leaders (Pol Pot etc), rather than battalion/division leaders. But this would be a matter of interpretation.” David Ashley e-mail, *supra* note 241.

Rouge's command structure in Kampot Province at the time of the attack.²⁶⁶

Ea Sopheap, representing the Slater family, had been advised by George Cooper, whose reading of the amnesty provision of the 1994 KR Law, and particularly the use of the term "*ban praoprit*," was that only criminal acts committed before the effective date of the law "may be forgiven by amnesty."²⁶⁷ Prior to the trial, Cooper had consulted with various legal authorities on this key issue. One such authority had responded to Cooper's email inquiry with the response, "I agree that my reading of the 1994 law supports your interpretation that it was not intended to apply to crimes committed after the law."²⁶⁸ Braquet's French lawyer, Francoise Zimeray, similarly attacked the Municipal Court's reading of the 1994 DK Law amnesty provision. "In the [Municipal Court's] interpretation . . . it is exactly as if the Khmer Rouge were allowed to commit all the crimes they wanted during the six months after the passing of the law."²⁶⁹

E. Rin's First Appellate Court Verdict: Guilty

Chhouk Rin's verdict was read by Chief Judge Somreth Sophal on September 6, 2002.²⁷⁰ Article 198 of the Criminal Procedure Act permits an appellate court to "trial [sic] the case by themselves when they overrule the decision made by the first jurisdiction."²⁷¹ The Appeals Court here rejected the verdict of the Phnom Penh Municipal Court dated July 18, 2000, and sentenced Rin to life in prison for terrorism under Article 2 of the Law on Terrorism.²⁷² In addition, Rin was found guilty of murder, intentionally wrongful damage to the property of another, and illegal confinement.²⁷³ Because the sentence for terrorism was life imprisonment, the court deemed it unnecessary to punish Rin for the other offences.²⁷⁴ The court found Rin not guilty of organized crime under Article 36 of the UNTAC Law "for reason that Khmer Rouge group

²⁶⁶ Ana & Doyle, *supra* note 12.

²⁶⁷ George Cooper e-mail, *supra* note 265.

²⁶⁸ David Ashley e-mail, *supra* note 241.

²⁶⁹ Ana & Doyle, *supra* note 12.

²⁷⁰ 2002 CR App. Ct. transcript, *supra* note 17, at 1.

²⁷¹ Law on Criminal Procedure, *supra* note 49, art. 198.

²⁷² BBC News, *supra* note 2.

²⁷³ 2002 CR App. Ct. transcript, *supra* note 17, at 14.

²⁷⁴ *Id.*

officially named ‘Democratic Kampuchea’ . . . was a political body against Royal government.”²⁷⁵

The judge laid out the facts of the case, relying on a British Embassy report (which stated that “Chhouk Rin was responsible for the train attack”); statements made by Chhouk Rin during his municipal court hearing; statements made by Nuon Paet; statements made by the prosecutor and lawyers in the case, witnesses, and the foreign and Khmer civil parties; various statements made during Chhouk Rin’s municipal court trial, as well as during the trials of Nuon Paet; evidence of radio communications to and from Phnom Voar; and upon review of the written judgment of the Phnom Penh Municipal Court in the case of Chhouk Rin.²⁷⁶

Judge Somreth Sophal found that the lower court had been in error when it had dismissed the charges against Chhouk Rin based upon the amnesty provision of the 1994 DK Law. The six month amnesty provision, the Appeals Court found, “refers only to offences which have been committed before this law comes into force.”²⁷⁷ The train attack and subsequent events had taken place after the law had been passed by the National Assembly, and so the amnesty provision did not apply.²⁷⁸

The Australian Government welcomed the 2002 guilty verdict, and promised that it would maintain diplomatic pressure to ensure that the verdict was not subsequently overturned. Australian Ambassador Louise Hand noted that her government had long pursued justice for the family of David Wilson, and added that “[it] will continue to push to get this verdict upheld.”²⁷⁹

Chhouk Rin had remained at Phnom Voar throughout the appellate trial.²⁸⁰ When Rin learned of the guilty verdict, he openly challenged the Phnom Penh authorities to come and find him, citing the strong support he enjoyed in his stronghold.²⁸¹

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 3-12.

²⁷⁷ *Id.* at 14.

²⁷⁸ Ana & Doyle, *supra* note 257.

²⁷⁹ *Id.*

²⁸⁰ BBC News, *supra* note 2.

²⁸¹ Schwab, *supra* note 6. Nevertheless he adopted a more cautious routine, and stopped sleeping in his farmhouse and went into hiding in the jungles of Phnom Voar. Ana & Doyle, *supra* note 179. According to Oueh Nuon, a long-time friend, “Chhouk Rin is being careful. . . . We don’t want to hide forever. But we must wait and see what happens. . . . It is quiet here now. If they send the military here it could cause a problem. It would inflame the problem.” *Id.* Srei Sam, a former Khmer Rouge guerrilla, noted, “We will do by the law. No one will go into the jungle. We do not fight anymore. . . . But if [the government] wants to kill us all they can, and they can bury us in one hole, because we are not afraid to protest. Chhouk Rin is a good person.” *Id.* Chhouk Rin’s

F. Rin's Appellate Court Retrial

Chhouk Rin filed a complaint of opposition, which is permitted within 15 days from the receipt of notice of default judgment,²⁸² claiming that the first appellate court had denied him sufficient time to gather witnesses.²⁸³ The petition was granted, and his retrial in the appellate court took place on October 27, 2003.²⁸⁴ This time, Chhouk Rin was present for the trial, having boasted beforehand that "I will enter . . . like a boxer without fear."²⁸⁵

The charges against Chhouk Rin remained the same, with the exception of the charge of operating an illegal group, which the prosecutor requested not be considered as it had been rejected by the first appellate court.²⁸⁶ Chhouk Rin was questioned during the morning session of the one-day trial, and stated that he knew nothing about the train ambush or the kidnapping of the three Western backpackers.²⁸⁷ "I did not get involved in the attacks. I knew nothing about it. I was in hospital."²⁸⁸ Judges Samreth Sophal and Saly Theara pointed out that Chhouk Rin's assertions were contradicted by his own prior statements. When he had testified at Nuon Paet's municipal court trial, for example, he had admitted that soldiers from his regiment had been involved in the attack on the train. "Before you said you had sent 20 men to join the attacks. Now you keep denying all charges against you."²⁸⁹ During the course of the hearing the clearly skeptical judges warned Rin that there were inconsistencies in his testimony, warning him, "Think twice. Think of the consequences for yourself."²⁹⁰ When the trial recommenced after the midday break, Rin was absent. His lawyer told the court that, "After this morning's trial, my client almost had a heart attack and is now unable

supporters began a petition stating that Chhouk Rin was innocent. *Id.* According to Chhouk Rin's lawyer, Put Theavy, 1,263 inhabitants from Phnom Voar added their thumb print to the petition which was sent to the government to "establish" Chhouk Rin's "innocence." Schwab, *supra* note 6.

²⁸² 2002 CR App. Ct. transcript, *supra* note 17, at 16.

²⁸³ Phann Ana & Christopher St. John, *Court Delays Decision on Chhouk Rin*, CAMBODIA DAILY, Oct. 28, 2003.

²⁸⁴ Phann Ana, Nov. 6, 2003.

²⁸⁵ AFP, *supra* note 281.

²⁸⁶ Appellate Court of Phnom Penh, Appeal of Criminal Case No. 463, dated Oct. 27, 2003, at 8.

²⁸⁷ Ana & St. John, *supra* note 283.

²⁸⁸ Reuters, *supra* note 24.

²⁸⁹ Ana & St. John, *supra* note 283.

²⁹⁰ Munthit, *supra* note 2.

to come to court.”²⁹¹ Rin had been, it was claimed, admitted to hospital and put on an intravenous drip.²⁹² The trial continued without him.

Nearly all of the fifteen witnesses who testified in court verified Chhouk Rin’s defense, stating that they had met him at the hospital where he claimed to have been incapacitated during the train attack.²⁹³ In his concluding remarks, Chhouk Rin’s lawyer, Puth Theavy, said that by requesting the dropping of the charge of operating an illegal armed group, the prosecutor had acknowledged that Chhouk Rin had been engaged in war and therefore could not be held accountable for the other charges.²⁹⁴

On November 5, 2003,²⁹⁵ the Appellate Court announced its verdict: “[T]he judgment . . . of the Appellate Court dated on December 06, 2002, [is] completely valid.”²⁹⁶ The French Ambassador, Andre-Jean Libourel, who was present for the verdict, said, “we are satisfied that these criminal charges have been confirmed. It is a sort of proof that justice has been done for all the victims.”²⁹⁷

²⁹¹ Ana & St. John, *supra* note 283.

²⁹² Munthit, *supra* note 2; Ana & St. John, *supra* note 283.

²⁹³ Ana & St. John, *supra* note 283.

²⁹⁴ *Id.*

²⁹⁵ The same day that a three-month post-election political standoff was decided when the three main political parties agreed to form a tripartite government with Hun Sen as Prime Minister. See Lor Chandara & Wendy Leung, *Standoff Ends with Hun Sen as PM Pick*, CAMBODIA DAILY, Nov. 6, 2003.

²⁹⁶ Appellate Court of Phnom Penh, *supra* note 286, at 11.

²⁹⁷ Ana, *supra* note 284. Chhouk Rin subsequently appealed the verdict to the Supreme Court. On February 16 2005, the Supreme Court upheld the 2003 Appeals Court decision to convict him on terrorism charges for his part in the train ambush. Cheang Sokha & Liam Cochrane, *Ex-KR Chief and Police Play Cat-and-Mouse*, PHNOM PENH POST, Feb 25, 2005. Though Rin had been convicted of six charges (organized crime, murder, robbery, illegal confinement, intentional wrongful damage to property and terrorism), the panel of five Supreme Court judges only considered the terrorism charge because it carried a life sentence, the most severe punishment allowed under Cambodian law. *Id.*

Rin did not attend the Supreme Court hearing, and was reported as being “on the run from authorities in Kampot province” after the Supreme Court issued an arrest warrant for him. *Id.* Kampot prosecutor, Uk Kimsith, issued an arrest warrant for Rin on February 22 and sent it to local authorities the same day. Sokha & Cochrane, *supra*. Chhouk Rin told Agence France-Presse during a telephone interview on February 22 that he was confident of avoiding arrest, and that he had been passing the time since his conviction collecting firewood and watching cockfights. *Id.* “I will play hide and seek with the authorities,” Rin stated, “and if they can find me they can arrest me The verdict is an injustice to me.” *Id.* In Chiva, deputy police chief in Kampot, noted, “I predict that he will not go far, but arresting him will not be easy like catching a chicken.” *Id.*

Chhouk Rin was, however, arrested and is currently serving his life sentence in prison. E-mail from George Cooper to John Hall, (June 14, 2006) (on file with author).

VI. SAM BITH

Sam Bith was the third and most senior of the Khmer Rouge commanders who was prosecuted for the events surrounding the Kampot train ambush. At the time of the attack he had been the overall regional commander for the entire “southwestern region,” which had included Phnom Voar.²⁹⁸ He defected to the government in 1996, at which time he was appointed a two-star general in the RCAF.²⁹⁹ When Chhouk Rin was arrested in January 2000, the Phnom Penh Municipal Court had sent a request to Sam Bith that he voluntarily appear for questioning by January 26.³⁰⁰ After he failed to respond, the court issued a warrant for his arrest, but the military police responsible for enforcing the warrant showed considerable reluctance to actually move against the general. Sao Sokha, the national military police chief, initially claimed to have been too busy to act on the warrant.³⁰¹ The single subsequent attempt to apprehend Sam Bith was far from convincing. Sao Sokha reported that “we went to his house near Olympic Market to bring him to court, but he was not there. That’s the last time we looked for Sam Bith.”³⁰² Clearly, while the military police would act on a warrant to arrest Chhouk Rin, a colonel in the RCAF, the situation was markedly different when the warrant was for Sam Bith, a general.

Diplomats acknowledged that apprehending the general would be far more difficult than arresting Chhouk Rin, noting that they feared that Sam Bith’s rank and influence would shield him from prosecution and arrest. The supposed inability of the military police to locate the high-profile Sam Bith was all the more implausible given that he was reported to have retained his position as an advisor to the Ministry of Defense, and to be seen periodically meeting with high-ranking officials.³⁰³ The issuance of the warrant, however, caused Sam Bith to exercise more caution, and by early July 2000, with the trial of Chhouk Rin about to begin, Sam Bith had reportedly moved to the former Khmer Rouge stronghold of Pailin in northwestern Cambodia, beyond the reach of all

²⁹⁸ Schwab, *supra* note 6; Thet Sambath, *Suspected Killer Sam Bith Sighted in Pailin*, CAMBODIA DAILY, May 13, 2002; Ana & Doyle, *supra* note 12; Ana & Doyle, *supra* note 3.

²⁹⁹ Soenthrith, *supra* note 176; Sambath, *supra* note 298; Sambath & Chon, *supra* note 118.

³⁰⁰ Sambath & Chon, *supra* note 118; Saing Soenthrith & Kelly McEvers, *Warrant Issued, But No Arrest in Sam Bith Case*, CAMBODIA DAILY, Feb. 4, 2000.

³⁰¹ Soenthrith & McEvers, *supra* note 300.

³⁰² Sambath & Chon, *supra* note 118.

³⁰³ *Id.*

but the most determined arrest attempts.³⁰⁴ Yet by mid 2001, the general faced the evaporation of his political and military protections as a result of concerted diplomatic pressure for his arrest. In June 2001, with an arrest warrant still outstanding, and with his subordinate, Nuon Paet, serving a life sentence, Sam Bith was formally relieved of his duties as advisor to the defense minister.³⁰⁵

In May 2002, the *Cambodia Daily* reported that the general had been seen eating at a restaurant next to the Pailin Municipal Police Station.³⁰⁶ Even more embarrassing for the Cambodian government, which continued to insist it was unaware of Sam Bith's location, was the *Bangkok Post* report that Sam Bith was openly living in a \$38,000 house in the area between Pailin and Battambang.³⁰⁷ Co-Minister of Defense Prince Sisowath Sirirath attempted to diffuse the effect of the reports, claiming, "This is not a new story. . . . If he is in the area, we will arrest him."³⁰⁸ Under pressure by the diplomatic community to pursue these new leads, the government acted and the military police finally arrested Sam Bith at his home on May 22, 2002.³⁰⁹ He was arraigned in the Phnom Penh Municipal Court on May 23, where the investigating judge, Mong Mony Chakriya, formally charged him with terrorism, conspiracy to murder, robbery, membership in an armed force, and destruction of property – charges that were first filed in the warrant that had been issued two years prior.³¹⁰ All the charges stemmed from the attack on the train

³⁰⁴ *Id.* Before departing from Cambodia in early July 2000, Australian Ambassador Malcolm Leader, said that he deeply regretted not seeing a conclusion of the Sam Bith case. Agence France-Presse, *Chhouk Rin Ready for Trial, Lawyer Says*, CAMBODIA DAILY, July 10, 2000. He noted, "It's been a long time now and it's a drain on the family. But from my understanding the investigation is continuing along the normal process." *Id.* The investigating judge in the Chhouk Rin municipal court case, had indicated that Sam Bith would be summoned to court for questioning. *Id.* By the time of the municipal court case in July 2000, however, it became clear that the general would not appear. *Id.* In July 17, 2000, Yet Chakriya, deputy chief of prosecutors for Phnom Penh's municipal court, said he had received new evidence from Sam Bith's lawyer, Kao Savuth, that showed that Sam Bith was not present when the three foreigners were killed. Sambath & Chon, *supra* note 118. Yet Chakriya noted, "But the document does not confirm that [Sam Bith] was not involved in the killings. That's why the investigation is still going on. We know where he is, but we need time for investigation. Now we are trying to find more documents." *Id.* Kao Savuth, Sam Bith's lawyer, claimed on July 17, 2000 that he knew of six former Khmer Rouge who were present while the backpackers were being held, who were willing to testify on behalf of his client." *Id.*

³⁰⁵ Chris Decherd, *Sam Bith Suspended From Job, Paving Way for Investigation*, CAMBODIA DAILY, June 22, 2001.

³⁰⁶ Sambath, *supra* note 298; Ana & Doyle, *supra* note 3.

³⁰⁷ Sambath, *supra* note 298.

³⁰⁸ *Id.*

³⁰⁹ Thet Sambath and Matt McKinney, *Sam Bith Arraigned, Charged with Murder*, CAMBODIA DAILY, May 24, 2002; Ana & Doyle, *supra* note 3; Sambath, *supra* note 298.

³¹⁰ Sambath & McKinney, *supra* note 309.

and the subsequent kidnapping and murder of the backpackers.³¹¹ After an initial hearing, Sam Bith was returned to Prey Sar prison, while the prosecutor's office of the Phnom Penh Municipal Court carried out its investigation and compiled the evidence against him. The prosecutor submitted his report to Sok Sethamony, the judge in the case, in October of 2002.³¹²

The pressure of the diplomatic community proved crucial in ensuring that Sam Bith was brought to trial.³¹³ Nevertheless, such pressure for justice on behalf of the families of the backpackers would not have resonated as strongly, or perhaps at all, had the Cambodian government not been vulnerable to such influence. Most obviously, in 2002, Cambodia remained heavily dependent on international aid, and the trials coincided with the Cambodian government's need to ameliorate the concerns of donor nations, who in the previous year had pledged \$615 million, about half of the national budget.³¹⁴ The decision to finally arrest Sam Bith in May 2002 came just as Cambodia was preparing for the annual Consultative Group donor meeting, to be held in Phnom Penh from June 19 to June 21.³¹⁵ This meeting was expected to be difficult for Cambodia, with the focus of donors shifting to Afghanistan and East Timor, and the government scrambling to meet the yet-unmet demands for an agreement on the tribunal and judicial reform.³¹⁶ Naly Pilorge, the

³¹¹ *Id.*

³¹² Thet Sambath, *Court Completes Its Investigation of Sam Bith*, CAMBODIA DAILY, Nov. 8, 2002. With his arrest, Sam Bith became the second-highest ranking Khmer Rouge military official in detention. Sambath & McKinney, *supra* note 309. Ta Mok, the second-in-command of the Khmer Rouge under Pol Pot, was arrested in March 1999 crossing into northern Cambodia from Thailand, and charged with genocide, crimes against humanity, and violation of the 1994 DK Law. David Lamb, *Ta Mok, 80; Key Figure in Cambodian Genocide*, LOS ANGELES TIMES, July 21, 2006, Obituaries at B11; David Kihara & Nhem Chea Bunly, *Benson Samay Makes Case for Ta Mok's Release*, CAMBODIA DAILY, Dec. 24, 2002. He was subsequently held in prison awaiting the creation of a court that could preside over his case. Kihara & Bunly. He was described by Hun Sen as the "Hitler of Cambodia" he was linked to the extermination of entire villages, forced labor, mass executions and torture centers. Lamb. In 1993, U.N. peacekeepers blamed him for the massacre of ethnic Vietnamese, including many women and babies, in a fishing village on the Tonle Sap lake. *Id.* In 1997 he took over control of the Khmer Rouge, at a time when the movement was rapidly disintegrating. *Id.* Ta Mok died in July 2006 in a Phnom Penh military hospital. *Id.*

³¹³ Chea Vannath, president of the Center for Social Development stated that the momentum for the arrest of Sam Bith came primarily from the backpackers' families and the Australian, British and French embassies in Phnom Penh. Thet Sambath, *Speculation Over Sam Bith Case Abounds*, CAMBODIA DAILY, May 28, 2002.

³¹⁴ *Id.*

³¹⁵ Sambath, *supra* note 313.

³¹⁶ Lao Mong Hay noted, "I feel that it is just a small signal that the government is serious about bringing culprits to justice . . . We can see that this is not a coincidence. At the [donor] meeting the agenda includes legal and judicial reform. The arrest just creates a climate conducive to attracting sympathy from the donors." *Id.*

director of Phnom Penh-based human rights NGO Licadho noted, “You always wonder in Cambodia . . . You always wonder. The timing, why now? Nothing is ever straightforward.”³¹⁷

At the time of Sam Bith’s trial in December 2002, the U.N., under pressure from Japan, the U.S. and Australia, restarted its negotiations with the Cambodian government over terms of the Khmer Rouge tribunal.³¹⁸ Negotiations had been stalled since February 2002 because the U.N. believed the Cambodian government was making insufficient concessions to ensure judicial fairness.³¹⁹ Notably, the Cambodian tribunal law passed in August 2001 made no provision for an independent prosecutor and omitted provisions for adequate protection of witnesses.³²⁰ Additionally, key to the Cambodian position was a determination that any tribunal must have a majority of Cambodian judges and a minority of international judges.³²¹

A. *Bith’s Municipal Court Trial*

The trial of Sam Bith offered a perfect opportunity for the Cambodian government to demonstrate that the Cambodian judiciary could indeed be trusted to hold a fair trial despite Sam Bith’s current high rank in the RCAF and the apparent protection he had previously received from the RCAF and the government. The eyes of the international community were therefore once again on the municipal courthouse in Phnom Penh.

Sam Bith was charged on six counts relating to the train ambush and subsequent events: murder, kidnapping, membership of an armed group, robbery, terrorism, and destroying public property.³²² Bith’s supporters, witnesses and relatives traveled from different parts of the country to testify at his two-day trial.³²³ Amongst them was Nuon Chea, the infamous Khmer Rouge “Brother No. 2,” once Pol Pot’s closest confidant and the most senior surviving member of the Democratic

³¹⁷ *Id.*

³¹⁸ Van Roeun & Molly Ball, *Sok An Headed to New York for KR Talks*, CAMBODIA DAILY, Dec. 25, 2002.

³¹⁹ *Id.*

³²⁰ Jendrzeczyk, *supra* note 24. See Donovan, *supra* note 31.

³²¹ Jendrzeczyk, *supra* note 24.

³²² Thet Sambath & Kevin Doyle, *Court Sentences Sam Bith to Life in Prison*, CAMBODIA DAILY, Dec. 24, 2002.

³²³ *Id.*

Kampuchea regime.³²⁴ This perhaps reflected growing unease amongst the former Khmer Rouge who saw in the prosecution of Nuon Paet, Chhouk Rin and now Sam Bith, a disturbing broadening of Khmer Rouge figures the Cambodian government appeared willing to prosecute. Nuon Chea testified that Pol Pot had been in direct control of the Phnom Voar area, because Sam Bith had been absent for medical attention throughout the period of the train ambush and murder of the hostages.³²⁵ After speaking to the “electrified court,” Nuon Chea reclined in a lawn chair and observed the trial proceedings.³²⁶ His appearance caused outrage amongst many observers, one of whom noted, “I cannot understand how a cold-blooded murderer like Nuon Chea came out to defend the perpetrators. What kind of justice is this? . . . I think that [his] presence in the court is really intended to intimidate his victims. . . . He showed that no one dares to touch him or open an investigation against him.”³²⁷ Few missed the irony that while Sam Bith was sent back to prison to await the verdict in his case, Nuon Chea went home a free man and under police protection.³²⁸

Central to Sam Bith’s defense, and supported by testimony from almost a dozen witnesses (including Nuon Chea), was the claim that he had been in a Thai hospital from July to October of 1994, when the train was attacked and the hostages killed.³²⁹ While such a claim made by someone of Bith’s rank would typically not have been disputed in Cambodian court, in this instance plaintiffs’ counsel contacted the Thai hospital to check the veracity of Bith’s assertion. Not only did the hospital have no record of ever having treating Sam Bith, but it had not

³²⁴ Brian Calvert, *Some Memorable Moments*, CAMBODIA DAILY, Dec. 31, 2002. The appearance of Nuon Chea was not a total surprise. He had earlier signed a petition gathered by Sam Bith’s wife alleging that Sam Bith had been hospitalized at the time of the train attack, and had even been interviewed by a Battambang provincial court investigating judge regarding Sam Bith’s role in the train assault and murder of the backpackers. *Nuon Chea Interviewed Over Sam Bith Case*, CAMBODIA DAILY, Sept. 26, 2002; see Thet Sambath, *Nuon Chea: Sam Bith Has Alibi in Attack*, CAMBODIA DAILY, June 25, 2002; Thet Sambath & Matt Reed, *Nuon Chea Offers Assistance with Sam Bith’s Prosecution*, CAMBODIA DAILY, Sept. 19, 2002. See Philip Rees, *Still Smiling After All Those Deaths*, NEW STATESMAN, March 18, 2002; Philip Rees, *Brother Number Two Enjoys Retirement*, BBC NEWS, March 15, 2002, available at <http://news.bbc.co.uk/1/hi/programmes/correspondent/1874949.stm> (last visited Jan. 5, 2007).

³²⁵ Phan Ana & Kevin Doyle, *Sam Bith’s Hospital Alibi Assailed in Court*, CAMBODIA DAILY, Dec. 14-15, 2002.

³²⁶ *Id.*

³²⁷ Kevin Doyle, *Researcher Urges Restrictions on KR Commander’s Travel*, CAMBODIA DAILY, Dec. 20, 2002.

³²⁸ Calvert, *supra* note 324.

³²⁹ Ana & Doyle, *supra* note 325.

even opened until November 1994.³³⁰ When the prosecutor presented this evidence to the court, it was a dramatic turning point in the case and an indicative moment in Cambodia's legal history. Far from being intimidated by the rank and power of the accused, the Khmer lawyers had sought out evidence that Sam Bith had lied to the court. At the close of the proceedings, Judge Sok Sethamony permitted Sam Bith to address the court. The general sounded like anything but the dangerous "butcher" of his reputation: "I am ailing. I am ailing. I cannot last long. . . . I will be died in another five years, or less than that."³³¹ The judge said that the verdict would be announced on December 23, 2002.³³²

On December 19, 2002, the U.N. passed its resolution requiring the Secretary-General to return to the negotiating table with the Cambodian government over the proposed tribunal.³³³ Some observers believed this to be "the last chance for credible justice for more than one million victims of the Khmer Rouge."³³⁴ For others, the process of negotiation mandated by the resolution was profoundly flawed. Amnesty International called the legal process established by Cambodia's tribunal law, the starting point for U.N.-Cambodian negotiations, "heavily compromised," and warned that restarting negotiations could undermine the quality of any future legal proceedings.³³⁵ Professor Steven Heder, one of the foremost experts on the Khmer Rouge, strongly condemned the decision to restart negotiations absent genuine flexibility from the Cambodian side, and was outspoken in his criticism of the entire process:

There cannot be real justice if the process is compromised, which according to any serious human rights-oriented analysis, it is. . . . The objective of the process, as currently designed, is neither truth nor justice, but to close the books on the case in a way that does the least possible political and diplomatic damage to current powerholders.³³⁶

³³⁰ *Id.* Also damaging to the defense was testimony from Nuon Paet, who claimed that he had met with Sam Bith in Kampot province both before and after the fall of Phnom Voar to government forces. *Id.* "When we lost the fighting in Phnom Voar we stayed together for a long time. [Sam Bith] went to hospital, I went too. But it was a couple of months later in 1995," Nuon Paet testified. *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ Bill Myers, *UN Approves Resolution on KR Trial Talks*, CAMBODIA DAILY, Dec. 20, 2002.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ Myers, *supra* note 333.

With Sam Bith's conviction, the Cambodian government would be in a position to set the tone for the resumed negotiations. The stage was set for Cambodia to confound its critics, by demonstrating to the international community that the Cambodian legal system and Cambodian judiciary were adequate to the task of successfully prosecuting senior Khmer Rouge commanders.

B. Bith's Municipal Court Verdict: Guilty

Four days after the U.N. resolution, Presiding Judge Sok Sethamony took one hour to sum up the evidence against Sam Bith, and read the verdict finding him guilty of all six charges.³³⁷ Sok Sethamony described Sam Bith as "the real mastermind" behind "the vicious acts committed against innocent civilians."³³⁸ Point by point, the judge disassembled the testimonies of former Khmer Rouge soldier-turned-witnesses who had vouched that Sam Bith had not ordered the bloody train attack in Kampot and the later executions.³³⁹ The judge declared that Sam Bith had been KR Southwestern Zone commander and was therefore responsible for all rebel activity in Kompong Speu, Takeo and Kampot provinces.³⁴⁰ The judge stated, "Sam Bith really ordered Nuon Paet to lead the forces to attack the train. . . . Sam Bith intended the attack to kill, injure and kidnap the people and take property from the train. This is a cruel act on innocent people."³⁴¹ The judge noted that Nuon Paet had testified that orders were received from Sam Bith's radio call-sign No 37 ordering the backpackers' execution.³⁴² Finally, the judge rejected Sam Bith's claim that he had been in a Thai hospital when the key events had occurred. The judge concluded that "Sam Bith, 70 years old, is punished to one life in jail for conspiring in six crimes."³⁴³

³³⁷ Sambath & Doyle, *supra* note 322.

³³⁸ Ker Munthit, *Cambodia Judge Who Sentenced Khmer Rouge Leader Slain in Phnom Penh*, ASSOCIATED PRESS, April 23, 2003.

³³⁹ Sambath & Doyle, *supra* note 322.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ Sambath & Doyle, *supra* note 322. According to Ea Sopheap, a lawyer representing the British backpacker's family, the court also ordered Sam Bith and Nuon Paet to jointly pay each of the families of the three foreign victims 50 million riel (approximately \$12,500); three Cambodian victims a total of almost \$27,000; and the state train company more than \$5,000. *Id.* The court ordered that if the money was not forthcoming, the assets of Sam Bith and Nuon Paet should be auctioned. *Id.*

Bith was visibly shaken, “a lonely figure in the courtroom that was bereft of the supporters, witnesses and relatives.”³⁴⁴ Close to collapse, he asked the prison guards for permission to sit as the verdict was being read.³⁴⁵ As he was led from the courtroom to prison, an obviously dazed Sam Bith had to contend with a crush of Cambodian and foreign photographers, reporters and television crews.³⁴⁶

The extreme danger faced by Cambodian judges who convict powerful individuals like Sam Bith was highlighted on April 23, 2003, when Sok Sethamony, the judge in Sam Bith’s municipal court trial, was assassinated.³⁴⁷ Two unidentified men on a motorcycle pulled alongside the judge’s car at an intersection in Phnom Penh and fired five shots.³⁴⁸ His body was taken to a morgue, where colleagues from the Phnom Penh Municipal Court went to pay their respects before holding a Buddhist ceremony at the court.³⁴⁹ Heng Pov, the deputy police commissioner of Phnom Penh, noted, “We are investigating the killing and looking into the motive. We think it’s likely the case involves revenge.”³⁵⁰

VII. RESOLUTION OF THE U.N.-CAMBODIA NEGOTIATIONS AND THE ESTABLISHMENT OF THE KHMER ROUGE TRIBUNAL

By the end of 2002, Nuon Paet, Sam Bith and Chhouk Rin had all been found guilty by Cambodian courts and sentenced to life imprisonment for their roles in the Kampot train ambush. In December 2002, Australia, France, Japan, and the United States, amongst others, pushed through a controversial resolution at the U.N. General Assembly requiring Kofi Annan to “resume negotiations” with the Cambodian government on the formation of a “mixed tribunal.”³⁵¹ It is clear that there was considerable pressure on the U.N. to finally reach an agreement with the Cambodian government and move forward with the long-anticipated tribunal. Critics worried that the U.N., placed in a weak

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ Munthit, *supra* note 338.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ 30 U.N. members abstained, including Canada and most members of the European Union, who were concerned about Cambodia’s apparent lack of commitment to international legal standards. Jendrzejczyk, *supra* note 24.

negotiating position by the strong language of the resolution, would be forced to accept a tribunal structure basically identical to that which had been rejected as unacceptable in early 2002, and which would not guarantee international legal standards. Mike Jendrzeczyk, of Human Rights Watch, urged member states to “refrain from exerting any further political pressure on UN officials and [they] should instead send clear signals to the Cambodian government that it must meet the UN’s terms.”³⁵² He warned:

There is now a risk that the UN will be dragged into a process that will create a sham tribunal. A tribunal that doesn’t meet international standards would be an enormous set-back for the Cambodian people. It would also damage the credibility of the UN and lower international standards for international justice. In the future, why would countries accept the rigorous models used for the crimes in the former Yugoslavia and Rwanda when they could demand the soft ‘Cambodian model?’³⁵³

The U.N. and Cambodia resumed the tribunal negotiations in January 2003.³⁵⁴ On March 17, 2003, the Cambodian and U.N. delegations reached a provisional agreement (the “March Agreement”).³⁵⁵ Despite the warnings raised by observers like Mike Jendrzeczyk about the dangers of the “soft” Cambodia model, the March Agreement did in fact largely mirror the existing Cambodian tribunal law, which had been rejected previously by the U.N., and which guaranteed a dominant role for the Cambodian judiciary in any proceedings.³⁵⁶

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ See U.N. News Centre, *U.N., Cambodia Begin Exploratory Talks on Establishing Special Khmer Rouge Court*, Jan. 6, 2003, available at <http://www.un.org/apps/news/storyAr.asp?NewsID=5803&Cr1=>; U.N. News Centre, *U.N., Cambodia Wrap Up Exploratory Talks on Special Court for Khmer Rouge*, Jan. 14, 2003, available at <http://www.un.org/apps/news/storyAr.asp?NewsID=5869&Cr=cambodia&Cr1=>; U.N. News Centre, *Cambodia: Annan Set to Dispatch U.N. Delegation to Resume Talks on Khmer Rouge Court*, Feb. 18, 2003, available at <http://www.un.org/apps/news/storyAr.asp?NewsID=6186&Cr=cambodia&Cr1=#>.

³⁵⁵ DRAFT AGREEMENT BETWEEN THE UNITED NATIONS AND THE ROYAL GOVERNMENT OF CAMBODIA CONCERNING THE PROSECUTION UNDER CAMBODIAN LAW OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA, March 17, 2003, available at <http://www.yale.edu/cgp/Cambodia%20Draft%20Agreement%2017-03-03.doc>.

³⁵⁶ The March Agreement established the future genocide tribunal squarely within the Cambodian judicial system, providing for a Trial Chamber, composed of three Cambodian judges and two international judges, and a Supreme Court Chamber, consisting of four Cambodian judges and three

In accordance with the March Agreement, in early 2006, Kofi Annan submitted to Hun Sen a list of international judges and other legal experts who could serve at the Khmer Rouge tribunal.³⁵⁷ The Cambodian government then submitted this list, along with its own of proposed Cambodian appointees, to Cambodia's Supreme Council of Magistracy.³⁵⁸ In May 2006, King Norodom Sihamoni approved the appointment of the seventeen Cambodian and thirteen U.N.-nominated foreign judicial officials officially chosen by the Supreme Council.³⁵⁹

The Cambodian judicial appointees confirmed critics' fears that Cambodian judges would be granted a dominant role under the March Agreement. In contrast to the international judges, the Cambodian appointees were of questionable competency and independence.³⁶⁰ Indeed, the poor reputation of some of the Cambodian appointees raised legitimate questions about their independence from the Cambodian government and Hun Sen, and undermined the credibility and legitimacy of the tribunal.³⁶¹ David Scheffer, a former U.S. ambassador at large on

international judges. U.N. News Centre, *supra* note 29. Under the Agreement, it will be a trial court and a Supreme Court within the Cambodian legal system which will investigate those most responsible for crimes and serious violations of Cambodian and international law between April 17, 1975 and January 6, 1979. *Id.* Furthermore, the Agreement provided that the international judges and other foreign nominees for the tribunal were to be approved and appointed by the Supreme Council of the Magistracy of Cambodia, from a list of nominees provided to the Cambodian government by the UN Secretary General. *Id.* In total, the Supreme Council was to select thirty individuals – thirteen foreign and seventeen Cambodian – for the tribunal: two to serve as prosecutors, fourteen as judges, and the rest to sit in reserve. *Id.*

³⁵⁷ UN News Centre, *supra* note 29.

³⁵⁸ Holly Manges Jones, *Asian Rights Group Doubts Credibility of Some Cambodia Judges on Khmer Rouge Tribunal*, JURIST, May 22, 2006, available at <http://jurist.law.pitt.edu/paperchase/2006/05/asian-rights-group-doubts-credibility.php>.

³⁵⁹ Ker Munthit, *Reputations of Cambodia Judges Raise Questions About Credibility of Khmer Rouge Tribunal*, ASSOCIATED PRESS, May 22, 2006, at <http://www.signonsandiego.com/news/world/20060522-0105-cambodia-delayedjustice.html>.

³⁶⁰ *Id.*; Jones, *supra* note 358.

³⁶¹ Lao Monghay, a Cambodian legal analyst with the Asian Human Rights Commission, has stated that the appointment of the Khmer judges "tarnishes right from the start the image of that tribunal, and because of that, it would lack public confidence and trust." The Cambodian appointees mainly received their legal education in Vietnam, East Germany, the Soviet Union, and Kazakhstan. Munthit, *supra* note 359. This, however, is true of most senior Cambodian judges. However, the judges chosen to serve on the tribunal include those regarded as hard-line party *apparatchiks* who have consistently served the interests of Hun Sen and the ruling Cambodian Peoples' Party. For example, one of the appointees, army general Ney Thol, is the president of the highly political military court and a member of central committee of the CPP. *Id.* He is best known for two high-profile prosecutions of political opponents of Hun Sen: in 1998, he sentenced Prince Norodom Ranaridhh, leader of the royalist Funcinpec party, to 30 years in prison for supposed weapons smuggling and conspiring with the outlawed Khmer Rouge, in a case widely believed to have been motivated by Hun Sen's attempt to "neuter" his main political rival, whom he had already ousted from his position as co-prime minister in a coup in 1997. Munthit *supra* note 359. In August 2005, the general sentenced opposition lawmaker Cheam Channy to seven years in prison, supposedly for

war crimes, noted that the performance of the Cambodian judges would have to be carefully scrutinized, and that the U.N. should end its participation rather than continue to legitimize a tribunal that fails to meet international standards:

If the performance of the judges begins to be called into question in a way that goes to the issue of their integrity, their independence . . . then you can imagine at some point the United Nations would take a serious look at that in terms of their continued participation in the process.³⁶²

Prime Minister Hun Sen has been blunt in his attack on those who question the qualifications and independence of the Cambodian judicial appointees. In a speech to law students, he reportedly likened critics of the Cambodian judges to perverted sex-crazed animals, amongst other things.³⁶³ The Asian Human Rights Commission has concluded:

The latest outburst from Hun Sen is an opportunity for reflection and discussion among international and domestic groups working on human rights and the rule of

trying to topple the government, in another trial widely regarded as politically motivated show trial. *Id.* Remarkably, during the trial the general had barred the defense from calling witnesses and from fully cross-examining prosecution witnesses. *Id.*

Another of the Cambodian appointees to the tribunal, Thou Mony, who had trained at the University of Leipzig in the former East Germany, drew condemnation from legal observers when he overturned a lower court's guilty ruling against Hun Sen's nephew for a shooting incident in 2003 in which two people were killed and two others wounded. *Id.* The car carrying Hun Sen's nephew had apparently collided with one of Phnom Penh's "cyclo" pedi-cabs, following which the occupants of the car had reportedly fired their guns at bystanders to scatter them from the scene. Thou Mony, who heard the case on appeal, overturned the lower court's guilty verdict. Upon being appointed to the tribunal, Thou Mony said, "I am very pleased to have been appointed . . . I had never dreamed of that." *Id.*

³⁶² *Id.*

³⁶³ Asian Human Rights Commission, *supra* note 37. This statement has been interpreted not just as the angry reaction of an authoritarian leader unable to tolerate any criticism, but also as the response of a communist-trained head of state genuinely unable to comprehend and unwilling to embrace the liberal democratic concept that competence, independence and impartiality are prerequisites of an effective functioning judiciary. *Id.* According to the Asian Human Rights Commission, a Hong Kong-based a regional non-governmental organization monitoring and lobbying human rights issues in Asia, Hun Sen is still wedded to the communist model of government in which where there is effectively no distinction between the legislature, judiciary and executive, and where judges do what the party wishes in all important political matters. *Id.* In that model, the function of judges is to follow instructions and maintain social stability while ensuring that party orders are properly implemented. *Id.* It has been argued that "[Hun Sen's] notion of a court is that it will condemn and punish whoever is brought before it as quickly as possible and as expected by the state. So when judges were needed for the new international tribunal, he simply nominated those that will do the job in accordance with these expectations." *Id.*

law in Cambodia. What is needed to introduce a competent, independent and impartial judiciary to Cambodia, in concept and reality? . . . [T]he best way to honour the memory of those whose lives were sacrificed in one of the greatest tragedies of the twentieth century – the Khmer Rouge’s reign of terror – is to bring an independent and competent judiciary to Cambodia. Without this, all the ado about an international tribunal will only result in more of the same from the Cambodian leadership, and for the Cambodian people.³⁶⁴

VIII. CONCLUSIONS

The domestic trials of Nuon Paet, Chhouk Rin and Sam Bith were a test of Cambodia’s notoriously inefficient, corrupt and governmentally-dominated judiciary and legal system, at a time when the appropriate role of Cambodian judges in the proposed Khmer Rouge tribunal was being hotly debated by the U.N. and the Cambodian government. The result of this test was decidedly mixed, particularly in regards to the independence of the legal system. The prosecution of Paet, Bith and Rin took place against the backdrop of the proposed Khmer Rouge tribunal, and the prosecutions and trials unfolded at a pace and in a direction which were intended to influence the U.N.-Cambodia negotiations. The trials were, from Hun Sen’s perspective, intended to provide evidence both that the Cambodian judiciary was adequate to handle the dominant role he proposed for it in the tribunal, and that the Cambodian government was active in prosecuting the Khmer Rouge.

Dismissed by some as mere “show trials” aimed at legitimizing Hun Sen on the international stage, the trials nevertheless marked a significant step forward in the development of a functioning, albeit seriously flawed, judiciary. The trials demonstrated that the Cambodian government is willing and able, in appropriate circumstances, to bring members of the Khmer Rouge to justice. The trials further highlighted the potential influence that donor nations and members of the international community can have over decisions made by the Cambodian government in this regard. The trials suggested that Cambodian courts can be made somewhat more transparent and open to foreign scrutiny. Some of the trials, Chhouk Rin’s and Nuon Paet’s municipal court trials for example, may have been resolved by the judges in a predetermined manner. Nevertheless, in response to foreign criticism, the later trials

³⁶⁴ Asian Human Rights Commission, *supra* note 37.

appear to have operated in a way that was less obviously predetermined. Indeed, the appellate courts which heard Nuon Paet's case and Chhouk Rin's retrial appear to have gone out of their way to carefully explain their verdicts and to demonstrate the process by which conclusions were reached. This was a significant advance for a judiciary generally regarded as barely moving towards international standards of honesty, professionalism and independence.

The symbolic value of the trials was extraordinary. Nuon Paet was the first commander from the Khmer Rouge to ever be prosecuted in Cambodian civilian court for his crimes. Chhouk Rin was prosecuted and ultimately convicted despite having strong popular support in Kampot and being a colonel in the Royal Cambodian Armed Forces. Even more remarkable, Sam Bith, "the butcher," was successfully brought to justice despite his position as a general in the RCAF, which most observers had assumed would shield him. The assassination of Sok Sethamony, the presiding judge in Sam Bith's municipal court trial, is a stark reminder of the personal danger members of the Cambodian legal profession are exposed to if they confront such figures, and of the personal courage required to convict in those circumstances. Paet, Rin and Bith were successfully prosecuted in a country infamous for the near total immunity enjoyed by the powerful. They were arrested, investigated, charged, tried and convicted by Cambodian prosecutors and Cambodian judges in Cambodian courts.

Though this paper focuses on the brutal killing of three young Western backpackers, it is important not to lose sight of the many Cambodians who lost their lives in events eerily similar to that of 1994, but whose deaths occurred without generating international media coverage or particular interest amongst the diplomatic community. According to Suan Sarin, a Cambodian railway official, ambushes and landmines killed 1,521 people traveling on Cambodia's two rail lines between 1979 and 1996.³⁶⁵ The three backpackers who lost their lives in 1994 were apparently the only Westerners to have died as a result of these attacks.³⁶⁶ Yet it was these three deaths, not the 1,518 others, which generated international outrage and a demand for justice. It is hard to conclude that Cambodian lives were valued by the international community as highly as those of the three young Westerners. One poignant rejection of this assumption came from Dorothy Slater, the mother of the British victim, who reduced her demand for financial compensation to match that of the families of the Cambodians who had

³⁶⁵ *Id.*

³⁶⁶ *Id.*

been killed during the train ambush.³⁶⁷ Her attorney, George Cooper, explaining the symbolism of her decision, said, “She chooses this amount therefore to say the life of her son is worth the same as all the other people killed in this attack.”³⁶⁸

This notion of the equality of all victims of the Khmer Rouge is a lesson which should not be lost on the international legal and diplomatic communities. The nationalities of Mark Slater, Jean-Michel Braquet and David Wilson explain the “selective justice” evident in the Cambodian government’s decision to prosecute those responsible for their murders, while not pursuing the perpetrators of other similar, and even far worse atrocities.³⁶⁹ It had ultimately required the deaths of Westerners and years of intense diplomatic pressure for the Cambodian government to act. While the men guilty for the three murders at Phnom Voar are now in prison, the Khmer Rouge leaders responsible for the deaths of perhaps two million Cambodians between 1975 and 1979 have gone unpunished. The trials of Nuon Paet, Sam Bith and Chhouk Rin demonstrate the ability of Cambodian judges to convict Khmer Rouge members brought before them; what remains less clear is whether the Cambodian judicial appointees to the tribunal will be capable of meeting internationally recognized standards of justice. Perhaps, if permitted by their government to do so, they will grow to meet this historic challenge. If they do not, then the trials of Paet, Bith and Rin, may prove to be the high watermark in the search for justice in Cambodia.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Cambodians Blast Selective Justice*, *supra* note 129.