

DOCUMENTS

TRIALS AND TRIBULATIONS

The Latest Twists in the Long Quest for Justice for the Cambodian Genocide

Helen Jarvis

As the fifty-seventh session of the UN General Assembly opens in New York, the question of whether or not the Khmer Rouge leaders will be brought to trial is once again in the balance. For the past seven months behind-the-scenes diplomatic activity has tried to reverse the surprise 8 February 2002 announcement by the UN Office of Legal Affairs (OLA) that it was withdrawing from negotiations to establish a Cambodian tribunal with international participation to try surviving leaders of the genocidal Khmer Rouge (KR) regime.

Not a single UN Member State has supported the OLA decision. On the contrary, all those states who have expressed an interest in the matter have urged the secretary-general to resume the talks, including the United Kingdom, the United States, the European Union, Australia, Canada, France, Sweden, India, and Japan.

In April the UN Commission on Human Rights passed resolution 2002/89, which “recognizes the need for the Government of Cambodia and the United Nations to cooperate, appeals to the parties to resume discussions on the establishment of a tribunal for such a purpose and also appeals to the international community to provide assistance in this regard” — a resolution that is now on the agenda for the current session of the UN General Assembly.

Japan took the initiative in May 2002 to reestablish direct communications between the two parties, and at the end of June Cambodian prime minister Hun Sen wrote to Secretary-General Kofi Annan affirming his government’s commitment to the trials and to working in good faith with the United Nations toward this end. Annan responded by saying that he would resume talks only if he receives a mandate from the Security Council or the General Assembly.

Member States sympathetic to the resumption have reacted positively to seeing the two sides communicating again, but have expressed puzzlement as to why the resolutions of the five previous sessions of the General Assembly do not constitute such a mandate. There seems to be general optimism that a sixth resolution, along the lines of the draft from the Commission on Human Rights, would be overwhelmingly passed. Perhaps it could be worded even more clearly as an instruction to the secretary-general to follow the will of the General Assembly on this matter. No member state seems to think it advisable to pursue the matter in the Security Council for a number of reasons, including the fact that the issue is not perceived as relating to a current threat to peace, and that it is thought that China may choose to exercise its veto, although that is by no means clear, as China's expressed position is that this is a matter for Cambodia alone to decide.

The UN withdrawal in February came after four and a half years of efforts by the Cambodian Government to obtain international assistance in order to conduct a trial of the KR leaders who bear the greatest responsibility for the deaths of up to a quarter of Cambodia's population during less than four years of rule, from 1975 to 1979. In June 1997 the then co-prime ministers Norodom Ranariddh and Hun Sen wrote to the secretary-general requesting UN assistance. A Committee of Experts was then appointed (chaired by Australia's Sir Ninian Stephen), whose report was presented to the General Assembly and the Security Council in March 1999. The report proposed a trial held entirely outside the country, with no Cambodians participating, except as defendants and witnesses. Hardly surprisingly, the Cambodian government rejected this recommendation, declaring that it had the primary obligation to prosecute under Article 6 of the Genocide Convention, and would proceed with a trial within the domestic courts, but restated its request for international assistance, preferably through the United Nations. Senior Minister Sok An was given the task of leading the Cambodian Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders.

In the latter half of 1999, negotiations between the Cambodian Task Force and the United Nations, with active behind-the-scenes diplomacy by the United States, resulted in agreement on the creation of an unprecedented legal formation: "extraordinary chambers" within the Cambodian court system that would include foreign judges, a compromise between the UN desire for an internationally controlled trial and the Cambodian determination that international assistance not infringe Cambodian sovereignty.

In early 2000 the government handed over to the National Assembly a bill to set up the extraordinary chambers and define the crimes to be judged. The bill was modified following further negotiations with the United Nations, including during two visits in March and July 2000 by Hans Corell, the deputy secretary-general for legal affairs and head of the Office of Legal Affairs.

The result of these prolonged efforts was a complex arrangement providing for a Cambodian majority of judges at all levels of the court, but moderated by the requirement for a "super-majority" requiring at least one of the foreign

judges to participate in any judgment; each side was to have an autonomous prosecutor and investigating judge who were to have equal status, and a mechanism (a pre-trial chamber) had been devised to resolve any disputes between them; the tribunal was to follow Cambodian procedure, with the possibility of drawing from international procedure in cases of lacunae; its jurisdiction would involve both domestic and international law; and the government had written into the Draft Law a commitment not to seek any pardons or amnesties.

“The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea” was passed by the National Assembly and the Senate in January 2001. Cambodia’s Constitutional Council then objected to one article that it feared could be read to imply the possibility of capital punishment, which is prohibited by the country’s constitution. Amendments to satisfy these objections were introduced and passed, and King Norodom Sihanouk signed the law in August.

At this point, the Cambodian government expected that the United Nations would send Hans Corell or another representative to finalize Articles of Cooperation covering the specifics of UN involvement in the trial and the remaining areas of disagreement. The latter appeared to have been reduced to eleven points that Corell had raised in January and that were spelled out again in a letter to Sok An in October 2001, none of which the Cambodian side regarded as insurmountable. They felt that all could be clarified in the Articles of Cooperation.

However, Corell’s letter also insisted on the idea that an Agreement should cover all the areas already stipulated by the law, and take precedence over the law in case of any disagreement between them. The Cambodian position, as Sok An pointed out in a 23 November reply to Corell (see Document #1 below), is that there is no need to establish a hierarchy between the KR trial law and the Articles of Cooperation, since they have different functions: the law deals with the establishment, structure, and procedures of the extraordinary chambers, while the Articles of Cooperation would “determine the modalities of cooperation” between Cambodia and the United Nations (see Document #2).

This is the central disagreement that Corell used to justify UN withdrawal. At the press conference announcing the OLA decision (see Document #3), a reporter asked, “So it’s not so much the specific points of the agreement that you take issue with, it’s more of the controlling authority here?” Corell replied in one word: “Exactly.”

In response to the UN pullout, Sok An expressed “dismay at this completely unexpected announcement,” adding: “It is surprising to read that the UN Secretariat believes ‘it is not likely that we would resolve it through further negotiations,’ considering how far both parties have come precisely through the process of negotiation since the two different drafts for the law were placed onto the negotiating table two and a half years ago” (see Document #4).

Prime Minister Hun Sen has stated repeatedly that Cambodia will and can carry out the trial on its own if the international community does not wish to participate. The Law provides explicitly for three options (in this order of preference): a trial with UN participation; a trial with participation from individual

member states or “international legal personalities”; or a completely Cambodian process.

The pullout and the OLA’s demand for a new mandate are the latest twists in a tortuous road toward finding justice, which has eluded the Cambodian people for twenty-three years, since the overthrow of Pol Pot. Cambodian officials were hopeful that the United Nations would respond to the strong reaction from member states by resuming discussions. But if this does not eventuate, they were adamant that the trial will go ahead without the United Nations.

* * *

In the *New York Times* of 15 September 2002, an article by reporter Seth Mydans included the misleading assertion that the Cambodian government “has taken no part in the documentation efforts” on the history of the Khmer Rouge era. The report actually belies this statement by pointing out that “the scattered documents have been gathered from the central prison run by the Khmer Rouge, from the back rooms of government offices and from private hands.” Do the staff of the Documentation Center of Cambodia creep into the prison (now a museum administered by the Ministry of Fine Arts and Culture) or into those back rooms in other ministries in the dead of night to steal the documents? Or do the “private hands” not include government officials from all levels of the Cambodian administration? The Hun Sen government has in fact given the researchers access to and temporary custody of the hundreds of thousands of documents and photographs that provide the basis for the work of the Documentation Center and that form part of Cambodia’s archival heritage.

From my own direct experience as Documentation Consultant to Yale University’s Cambodian Genocide Program (CGP), which established the Center and funded it from 1994 to 2001, I can attest that Cambodian government cooperation has been extended in many forms — beyond access to documents — perhaps most significantly as a result of a 1995 directive to all provincial governors to assist the CGP researchers in their efforts to document the existence of genocide sites scattered throughout the country. The very existence of these sites has frequently been made known to the researchers by local officials, who have helped in determining their exact location and, on many occasions, have also provided security escorts when the researchers have needed to enter mine-infested or formerly insecure areas of the country. Government support has also been expressed in the provision of complimentary visas to foreigners involved in the work of the CGP and the Documentation Center, involvement of civil servants in the ongoing work, and in the donation of a plot of land in Phnom Penh on which the Center proposes to build a permanent home.

The Documentation Center of Cambodia is an enterprise built on the basis of substantial government and nongovernment effort, both foreign and local alike. All who have contributed to its work deserve to be recognized and encouraged to continue, for there is much still to be done to establish the record and bring to justice the perpetrators of the crimes against the Cambodian people. It is to be hoped that the United Nations will rejoin this effort.

□

Cambodia and the United Nations — Legal Documents

Ben Kiernan

On 3 February 2001, the *Washington Post* reported that on 9 January 2001, Hans Corell, UN under-secretary-general for legal affairs, had sent a strongly worded confidential letter to the Cambodian government. The letter reportedly asserted that Corell's 7 July 2000 draft of a memorandum of understanding between the United Nations and Cambodia had not been scrupulously followed in Phnom Penh's drafting of the Cambodian "Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea."

Corell declined our request for permission to publish this letter or his 10 October 2001 follow-up letter to Cambodian senior minister Sok An after Phnom Penh's promulgation of the Law in August 2001. (The text of the Law is accessible on the BCAS website at <http://csf.colorado.edu/bcas/>).

We publish below the Cambodian response to Hans Corell, dated 22 January 2002 (document #2). That response implies that Corell had raised the following eleven issues:

1. Cambodia's law should include reference to the 1973 Convention on Internationally Protected Persons.
2. That any vacancy caused by the departure of a foreign judge be filled only by a foreign reserve judge.
3. That Cambodia had inserted into its draft Law the term "judges" in place of "prosecutors."
4. That international practice should prevail over Cambodian legal procedures.
5. That defendants should have free access to counsel of their own choosing.
6. That the deputy director of the tribunal chambers should be appointed by the UN secretary-general.
7. That Cambodia provide security for all defendants.

8. According to the *Washington Post*, Hans Corell wrote on 9 January 2001: "In our discussion we were...in agreement that no one would be exempt from the scrutiny of the investigating judges and the prosecutors....For the UN this is a determining factor when it ultimately has to decide on its cooperation with the Royal Government of Cambodia." According to the *Post*, Corell also complained that Cambodia had not included a provision ensuring that "an amnesty granted to any person falling within the jurisdiction of the [court] should not be a bar to prosecution." Sok An's 22 January 2002 response to this continuing UN concern is in document #2 below. This issue in particular touched upon the pardon granted on 14 September 1996 to former DK foreign minister Ieng Sary, expunging his in absentia conviction for genocide in proceedings held in Phnom Penh in August 1979.

9. That future immunity be guaranteed for Cambodian officers of the court.

10. That Phnom Penh should not insist on translation of the court's proceedings into Russian as well as English and French.

11. That the Law include provision for replacement court officers being drawn from sources approved by the United Nations.

DOCUMENT #1: Letter from Sok An to Hans Corell

His Excellency Hans Corell
Under-Secretary-General for Legal Affairs
The Legal Counsel
United Nations

23 November 2001

Your Excellency,

Your letter of 10 October, with its sharp tone and comments on the Khmer Rouge Law as well as an attached revised draft of the Articles of Cooperation has been the subject of my attention over the past few weeks, and we are currently working on our detailed response to the points raised.

However, I would like now to raise with you a difficulty I see with your letter in its blurring of the distinction between the nature and purpose of the Law and the Articles of Cooperation. The Law, which was adopted by the Cambodian legislature under the Constitution of Cambodia, has determined the jurisdiction and competence of the Extraordinary Chambers as well as their composition, organizational structure and decision-making procedures, while the Articles of Cooperation are to determine the modalities of cooperation between the Royal Government of Cambodia and the United Nations in implementing those provisions of the Law concerning foreign technical and financial support.

While the Articles of Cooperation may clarify certain nuances in the Law, and elaborate certain details, it is not possible for them to modify, let alone prevail over, a law that has just been promulgated. Given the distinction between the two documents, there is no reason for the text of the Law to be duplicated in the Articles of Cooperation (a point I made during our July 2000 discussions). May I repeat my oft-stated reminder to you that under the Constitution of Cambodia the only official language is Khmer, and hence the only official text of the Law is the Khmer language text promulgated.

As to the draft budget you refer to in your letter, I agree that it would be best discussed between us before being submitted to interested Member States, so I would appreciate receiving a copy from you to begin our consideration. Recent reports of statements by various governments of intention of providing support provide a welcome start towards making the Extraordinary Chambers a reality.

Sincerely,

Sok An
Senior Minister in Charge of the Office of the Council of Ministers

* * *

— ⊕ —

DOCUMENT #2: Cambodian Response to the Eleven Points Raised in H. E. Hans Corell's Letter of 10 October 2001

Article 8 — We have confirmed that Cambodia is not a party to the 1973 Convention on Internationally Protected Persons, so it appeared necessary to delete it from the Draft Law to avoid a challenge to the validity of the applicable law forming the competence of the Extraordinary Chambers. Inclusion of the 1961 Vienna Convention on Diplomatic Relations, to which Cambodia is a signatory, would appear to give scope for prosecution, since *prima facie* it would seem that the Khmer Rouge did violate this Convention;

Articles 11, 21 and 27 — clearly the intention here is that foreign reserve judges and prosecutors would normally replace foreign judges and prosecutors, while Cambodian reserve judges and prosecutors would replace Cambodian judges and prosecutors. I made clear during the Senate debate on 12 January that Article 46 would govern the process of filling the positions of judges and prosecutors, and the process is outlined there quite clearly — only after all other avenues have been exhausted would Cambodian replacements for foreign positions be resorted to. This procedure can be clearly articulated in the Articles of Cooperation;

Article 18 — Cambodia does not have a separate body of professional prosecutors. The Supreme Council of the Magistracy draws from a common pool to assign judges (*juges assis*), prosecutors (*juges debouts*) and investigating judges (*juges d'instruction*) to certain courts as required. The wording of this article was therefore designed to conform to the prevailing Cambodian reality;

Articles 20, 23, 33 and 36 — The Law states clearly that the Extraordinary Chambers are established within “the existing court structure” (Article 2), and that trials are to be conducted “in accordance with existing procedures in force” (Article 33). The words “and if there are lacunae in these existing procedures” were added to these articles to avoid a potential conflict between Cambodian and other international procedures, recognising a hierarchy in which Cambodian law and procedure are relied upon before resorting to other international procedure where necessary to fill any gaps;

Articles 24, 27 and 35 — Cambodian Law on Criminal Procedure, 1993, guarantees defendants their free choice of counsel. The use of the word “unconditionally” in Article 24 is intended to emphasise that pre-existing right, which also means that, if the defendant cannot find or afford to retain a lawyer, the government must provide one. This can be clearly articulated in the Articles of Cooperation;

Article 31 — Cambodia fully understands that the Secretary-General has the right to determine appointments of UN staff. Your concern, originally raised in your letter of 9 January, was addressed, and the translation by the Council of Jurists, sent to you on 30 August, reads: “The foreign Deputy Director shall be appointed by the Secretary-General of the United Nations and assigned by the Royal Government of Cambodia .” It is our view that all administrative elements should be assigned by the Royal Government of Cambodia because the Extraordinary Chambers are established within the existing Cambodian court structure;

Article 33 — As we assured you repeatedly during our negotiations, the Royal Government of Cambodia undertakes the responsibility of providing security for all people associated with the Extraordinary Chambers, as it does for all people residing in or visiting the Kingdom of Cambodia . The word “voluntarily” was added in order to encourage Suspects to give themselves up, by emphasizing that they too would have their security assured;

This can be clearly articulated in the Articles of Cooperation;

Article 40 — I wish to point out that in our third round of negotiations this second sentence was not brought to the table as a proposed addition to our Draft Law (as indicated in your cover note to your version of the Draft Law dated 7 July 2000, presented after the conclusion of our meetings, stating “We should like to underscore that we have added a second sentence to Article 40....”).

It is of some surprise to me that you raise this point again, as I understood that our two delegations had reached consensus in March 2000, and my letter of 20 March spelled out very clearly the position of the Royal Government of Cambodia on this issue:

The Cambodian Constitution gives the right to His Majesty the King to grant amnesties (Article 27), and also to the National Assembly to make laws concerning amnesty (Article 90). So far His Majesty King Norodom Sihanouk has only exercised this right with regard to the Khmer Rouge when requested by the Royal Government of Cambodia, with a clear endorsement also by two-thirds of the members of the National Assembly.

Our Draft Law (Article 40) makes a clear statement of the government’s intent not to request an amnesty for any person who committed crimes relating to the applicable law described in Articles 3-8 of that Draft Law. This indicates our intention to make a clear break in the cycle.

The Royal Government of Cambodia could never have agreed to introduce wording into the Law that would conflict with the Constitution, and that would have invited the Law’s rejection by the Constitutional Council. However, several times during the debate in both the National Assembly and the Senate, I made clear that no person is above or outside the law;

Article 42 —The RGC confirms its assurance that immunity for “words spoken or written and all acts performed by them in their official capacity” will continue after cessation of any relationship with the Extraordinary Chambers. I wish to clarify that the sentence “Such immunity shall continue after termination of employment with the chambers” was removed because it was understood to have the potential to extend this immunity to other acts occurring after termination of employment. The immunity does not cover words and acts not directly related with the proceedings of the Extraordinary Chambers, either during the period of service to the Extraordinary Chambers or afterwards. As I understand it, the immunity provided in the Law is *ratione materiae* rather than *ratione personae* (applying only to the official acts themselves rather than to all acts performed by the person).

This can be spelled out more precisely in the Articles of Cooperation;

Article 45 — Here I would like to emphasise that the sole “official working language” of the Extraordinary Chambers is Khmer. While we have always maintained that translations and interpretation into and from Russian should be provided (along with English and French) all such translation is in order to meet the needs of the participants in the process, and we too would not want the trial to be impeded by any lack in this area. We are more than happy to consider any way to rationalise this heavy work with regard to all three foreign languages. For instance, perhaps all important court documents (notably indictments and decisions) could be translated into all three languages, and other documents translated and simultaneous interpretation provided only when needed by any of the active participants in any stage of the proceedings.

This can be spelled out more precisely in the Articles of Cooperation;

Article 46 — I stated clearly in my introductory presentation of the Draft Law to both houses of our legislature that this entire law has been drawn up in a spirit of cooperation between Cambodia and the United Nations. We have no intention of limiting the right

and opportunity for the Secretary-General to send more names to supplement the lists during the course of the proceedings, should this become necessary.

This can be spelled out more precisely in the Articles of Cooperation;

Phnom Penh

22 January 2002

* * *

**DOCUMENT #3: Daily Press Briefing by the Office of the Spokesman
for the Secretary-General**

The following is a near-verbatim transcript of today's noon briefing by Fred Eckhard, Spokesman for the Secretary-General.

8 February 2002

Good afternoon. We announced yesterday that our guest at the noon briefing would be Michael Steiner, the new Special Representative of the Secretary-General for Kosovo. That is still the case, but we have an important announcement to make on Cambodia, for which we've asked the Secretary-General's Legal Counsel, Hans Corell, to join us.

Our briefing today will consist of just one item, which Mr. Corell will present. The balance of the briefing will be put directly on the Web. Following Mr. Corell, Mr. Steiner will brief you on Kosovo. Here is the item on Cambodia.

Cambodia

The Secretary-General today instructed his Legal Counsel, Hans Corell, to deliver a letter to the Cambodian Government informing them that the United Nations will no longer negotiate with the Government on establishing a special court to try Khmer Rouge leaders for genocide and crimes against humanity for the period 1975 to 1979.

The letter gives two reasons for this decision. First, on a review of the entire process of the negotiation, the United Nations has concluded that as currently envisaged, the Cambodian court would not guarantee independence, impartiality and objectivity, which are required by the United Nations for it to cooperate with such a court.

Second, the Government rejected the United Nations proposal that the assistance that the United Nations would provide will be governed by the agreement between the United Nations and Cambodia. Cambodia insists that only its own rules would govern such assistance.

Mr. Corell is here to explain the United Nations position and to take your questions.

**Briefing by Hans Corell, Under-Secretary-General
for Legal Affairs and United Nations Legal Counsel**

Thank you, Mr. Eckhard, and good afternoon.

At the instruction of the Secretary-General of the United Nations, the United Nations will no longer continue the negotiations with the Royal Government of Cambodia towards the establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period

of Democratic Kampuchea. These are often referred to as the “Extraordinary Chambers”. The reasons for this decision are the following:

The negotiations between the United Nations and the Government originated from a request by Prince Ranariddh and Mr. Hun Sen, at the time co-Prime Ministers of Cambodia. In a letter to the Secretary-General of the United Nations of 21 June 1997, they jointly requested the assistance of the United Nations in bringing to justice persons responsible for genocide and crimes against humanity during the Khmer Rouge regime from 1975 to 1979. On 15 March 1999, an expert group appointed by the Secretary-General proposed that an international court be established. But, the scenario changed. In a letter to the Secretary-General of 17 June 1999, that is to say two years after the original request, Mr. Hun Sen, who is now the sole Prime Minister of Cambodia, modified the request; the focus was now to be on a national court with the participation of foreign judges and prosecutors.

Despite the fact that an international court was no longer requested, the United Nations was encouraged by Member States to continue the efforts of bringing the Khmer Rouge leaders to justice. Therefore, the United Nations engaged in negotiations of an agreement between the Organization and the Government. On three occasions, United Nations delegations visited Phnom Penh at the invitation of the Government. Those visits took place in August 1999, in March 2000 and in July 2000. On the last occasion, I was then head of the delegation. I departed from Phnom Penh on 7 July 2000, with the belief that there was an understanding with respect to the outcome of the negotiations. The United Nations and the Cambodian Government had subjected both the draft law that was before the National Assembly and the text of the agreement to be signed between the United Nations and the Government to a detailed scrutiny.

The negotiations between the Government and the United Nations extended far longer than expected when the discussions began more than two years ago. During much of that time, the initiative rested with the Government, despite frequent statements by senior Cambodian officials holding the United Nations responsible for delays in the process. Indeed, during much of the period following July 2000, the United Nations waited for the adoption of the law establishing the Extraordinary Chambers. This did not occur until 10 August 2001, more than a year later. The United Nations received the official translations from Khmer into English and French under cover of Senior Minister Sok An’s letter to me of 30 August 2001. During that period, the United Nations provided numerous suggestions aimed at assisting the Government in establishing a credible process and worked closely with Minister Sok An in drawing up an agreement on the establishment and operation of the Chambers.

After that long delay, it was possible for the United Nations to review the Law on the Establishment of the Extraordinary Chambers, which I will refer to as the “Law” in the future. In a letter to Minister Sok An of 10 October 2001, that is to say four weeks later, I stated that there remained for the United Nations a number of issues of concern. Principal among those issues is which document, the Law or an agreement between the Government and the United Nations, would govern the conduct of the Extraordinary Chambers in the event of a disagreement between the two documents. In a letter to me dated 23 November 2001, Minister Sok An stated, and I now quote him: “While the Articles of Cooperation may clarify certain nuances in the Law, and elaborate certain details, it is not possible for them to modify, let alone prevail over, a law that has just been promulgated”. The United Nations must take this as the final position of the Cambodian Government.

It has been the United Nations consistent position that the Organization cannot be bound by a national law, in a context like this. Therefore, the United Nations insisted throughout the negotiation, in accordance with the usual practice in concluding international agreements, that the United Nations and the Government should reach a controlling agreement. In addition, it has been the consistent position of the United Nations that the Law would have to conform to the contents of the agreement. The question of Cambodia's sovereignty is not at issue here. The matter required an agreement to be implemented under the principle, which we call in international law, *pacta sunt servanda*, which means basically that the terms of the agreement are binding on both parties.

The problem of which document would control the conduct of the Extraordinary Chambers was created by the decision of the Government to present the Law to the National Assembly before reaching an agreement with the United Nations. The United Nations reluctantly continued to discuss the agreement and the establishment of the Extraordinary Chambers with the Government despite its stated reservations about that process. This has never been merely a procedural concern of the United Nations. On the contrary, reaching such an agreement has been a necessary condition for the Organization's participation. Reducing the agreement to the status of a technical, administrative document subordinate to the Law would deprive it of its substantive role of ensuring that international standards of justice, necessary for the continued participation of the United Nations, would be maintained in the operation of the Extraordinary Chambers.

Given the Cambodian Government's position in this matter, it is not likely that the parties would resolve it through further negotiations. In addition, and having reviewed the correspondence over the last few months, including a letter which I received from Minister Sok An of 22 January 2002, the United Nations has come to the conclusion that the Extraordinary Chambers, as currently envisaged, would not guarantee the independence, impartiality and objectivity that a court established with the support the United Nations must have.

During the negotiations the United Nations maintained that international standards of justice must be met for the United Nations to participate in the Extraordinary Chambers. The United Nations has made great efforts to accommodate the concerns of the Government. At the same time, we attempted to the best of our ability to protect the integrity of the Chambers and the prosecution. The United Nations regrets that the Government was unable to address its concerns before the Law was adopted so that they could be reflected in the Law and, which is extremely important, so that the agreement would thereafter effectively govern the standards agreed to. Unfortunately, the Government acted on its own without recognizing that an agreement must be based on the consent of both parties.

Another aspect. In light of all these circumstances that I have referred to now, the United Nations has reviewed the negotiation process as it has developed from the first contacts between the United Nations and the Government in June 1997 until now. What has emerged during this period, and, in particular, since the last negotiating session in Cambodia in July 2000 has given cause for great concern on the part of the United Nations. The United Nations is especially concerned at the lack of urgency shown in the year and a half since that visit. That delay extended the time before which the aged Khmer Rouge leaders could be brought to justice. The United Nations fears that this lack of urgency could continue and affect the work of the Extraordinary Chambers, which would be vulnerable to delay.

Therefore, having carefully considered these concerns, the United Nations has concluded that the proceedings of the Extraordinary Chambers would not guarantee the international standards of justice required for the United Nations to continue to work towards their establishment and have decided, with regret, to end its participation in this process.

Recognizing the stated goal of the Cambodian Government to establish the Extraordinary Chambers without delay, this decision would enable it to make other arrangements and begin this process of bringing the leaders of the Khmer Rouge to justice.

The United Nations shares with the Cambodian people a desire to bring the Khmer Rouge era to a close in a way that contributes to national reconciliation and justice and wishes the Government well in its efforts to reach this goal.

Thank you for your attention.

Questions and Answers

Question: Can you be more specific about what particular standards and procedures, as envisaged by the Khmer Government in these trials, are of concern to the United Nations, violating its standards?

Mr. Corell: There are several concerns here. First of all, the arrangement as such is a very, very intricate arrangement. We tried in the negotiation to ascertain that in all the different steps here, there are three instances in the pretrial chamber that these standards were met. But there are several issues, which we had raised to the Government. One of them, for example, is that the accused would not be allowed to appoint counsel of their own choosing.

But there are a number of issues, and I don't think I should go into detail here, but the whole concept, and the fact that the Government is not prepared to allow the agreement to be the governing document, means that we do not know what will be the development of this matter in the future. If the United Nations is to enter into an endeavour of this magnitude, where we would have to rely on support of many Member States to finance it — we have seen our efforts in Sierra Leone — then we must be certain that the legal framework is locked in the agreement. This is not agreed to by the Government.

Question: So it's not so much the specific points of the agreement that you take issue with, it's more of the controlling authority here.

Mr. Corell: Exactly.

Question: But are there, in addition to the thing about counsel, are there many different ones that you —

Mr. Corell: Oh yes. There is a list of concerns that we have raised with them.

Question: You don't want to say anything more about what they are —

Mr. Corell: Well I mean it's a very, very cumbersome exercise that we have entered into and there are other elements that are grafted onto the procedures that we have warned them that they simply cannot be met. We cannot agree to those, and they have not accepted that.

Question: On balance, what is more important, the lack of political will of the Government which you identified in the slowness of their movements since the visit of July 2000, or these technical problems? Which is the more important? Could you envisage any circumstances under which you would return and renew cooperation with the Government on this issue?

Mr. Corell: The United Nations has been engaged in this process for four and one-half years. The first two years were focussing on the options that were examined

by a group of experts, and that led to a very clear recommendation by those. That recommendation — an international court — was not accepted. And this was noted in the Secretariat. But we were encouraged by Member States to continue the negotiations. I must confess that we had our misgivings, but we tried, as international civil servants, our best to achieve a result that could be acceptable.

Mind you, I received a lot of criticism from people who know this field of law, that we have gone too far. But we thought we could defend the result that was reached in July 2000, if that had been accepted, including if it had been accepted that the agreement between the United Nations and Cambodia would be the governing document. That was not accepted by the Government.

Whether we would return, the Secretary-General has taken this decision and this is what I am communicating to you now. I'm not going into any hypothetical questions.

Question: On the correspondence that you referred to in your statement, are those all public documents?

Mr. Corell: No, these are documents that I have exchanged with Minister Sok An. I know that some of them are available to the meeting. But the briefing that I gave you now, I will disseminate here.

Question: Was the final decision reached by the Security Council, the General Assembly or the Legal Department of the United Nations?

Mr. Corell: Certainly not by the Legal Department of the United Nations. This is a decision taken by the Secretary-General. But, the Security Council has not been involved in this matter, and I don't think that the Security Council was interested in getting involved in this matter.

The General Assembly has followed it, as the General Assembly follows these matters, and they have of course encouraged the Secretariat to engage in these negotiations. But, basically, it has been the Secretariat and the Secretary-General who have been dealing with this matter.

Question: What do you describe as a change in the Cambodian position? What exactly do you ascribe this to?

Mr. Corell: I am not going to speak on behalf of the Cambodian Government. All I want to say is that we made it clear from the very beginning that we would have to have an agreement, clearly setting out the parameters, the conditions for the establishment of these special chambers. We asked the Government not to present the Law to Parliament before we had reached an agreement. In spite of that, the Government went ahead and presented a draft law to Parliament. We discussed this with the Secretary-General, because this is in a sense a technical matter at that stage. So we decided to really try our best, so we continued the discussion, but all the time, we clearly indicated to the other delegation that ultimately, we have to conclude an agreement. And Mr. Sok An told me if there is an agreement to be concluded, it has to be ratified. Now I received a message that there is no way that the Law will be changed or amended. We can have some marginal adjustments.

But that in itself is not the ultimate issue here. The ultimate issue is that unless the whole concept of these Extraordinary Chambers is governed by an agreement between the United Nations and the Government, the United Nations cannot enter into this, because it will leave the field open to the Government in Cambodia to make whatever changes they see fit in the future. And this is not the way the United Nations would enter into an agreement with a Member State.

Question: Can you give us your assessment of the quality of justice that Cambodian people are likely to face now that the United Nations has withdrawn from this?

Mr. Corell: I refer to what I said towards the end, that Mr. Hun Sen has often complained about the United Nations dragging its feet. He said that if the United Nations is not on board, then Cambodia would go ahead on its own, maybe with the support of the interested States. I do not know.

Question: What is the concern about the lack of urgency in terms of the Khmer Rouge. Either that people will escape or grow old and die?

Mr. Corell: This process has gone on for a long time. During the process, the Cambodian Government has tried to put the focus on the United Nations — that we have been slow in responding. This is certainly not so. We are concerned at the latest development. I don't know really what they mean by this, but we simply register that it has taken an inordinate time for them to deal with the matter, since we parted in July 2000.

* * *

**DOCUMENT #4: Statement from the Royal Government of Cambodia
in Response to the Announcement of UN Pullout from Negotiations
on Khmer Rouge Trial**

I have received the letter from His Excellency Hans Corell dated 8 February in which he conveys the message that the United Nations will no longer negotiate with the Royal Government of Cambodia towards the establishment of the Extraordinary Chambers. I must express my dismay at this completely unexpected announcement.

It is surprising to read that the UN Secretariat believes “it is not likely that we would resolve it through further negotiations,” considering how far both parties have come precisely through the process of negotiation since the two different drafts for the law were placed onto the negotiating table two and a half years ago. It has by no means been an easy task to sail through uncharted waters and design an unprecedented national court with international participation. Compromises were made on both sides along the way, but I believe that the model we designed, and which was promulgated into Cambodian law on 10 August 2001, forms a sound basis. I believe that the Law establishing the Extraordinary Chambers based within the Courts of Cambodia with international participation and meeting internationally accepted standards embodies all the fundamental principles agreed to between the two sides during the negotiations.

Only three weeks ago I wrote to Excellency Hans Corell along these lines, and provided a detailed response to the eleven points he raised concerning the Law, clarifying our position and suggesting, on a number of points, that the concerns could be addressed in the proposed Articles of Cooperation to be signed by both parties — a document that we have always said would govern the international participation in the Extraordinary Chambers.

As further background to my statement here today, I am releasing my letters to Excellency Hans Corell dated 23 November 2001 and 22 January 2002, as well as other documents, including the English translation of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea. Up till now we have respected Excellency Hans Corell's wish for a “gentlemen's agreement” to keep exchanges between us confidential. However, given the present unilateral action on the side of His Excellency Hans Corell to cut off discussions, and given certain misinterpretations of Cambodia's positions that emerge from the UN

spokesman's briefing on 8 February, it seems highly desirable to place the documents on the public record at this stage.

I would like now to respond directly to the two main points in the long and complicated briefing statement given by Excellency Hans Corell on Friday 8 February:

Firstly, a general assertion is made that the Extraordinary Chambers "as currently envisaged, would not guarantee...independence, impartiality and objectivity," and there is an abstract reference to "international standards of justice" but Excellency Hans Corell does not provide a single instance in which the Law on the Extraordinary Chambers contradicts such standards.

The second major point relates to the relationship between the Cambodian Law establishing the Extraordinary Chambers and the proposed Articles of Cooperation to be signed by both parties. In my letter of 23 November I stated that in our view "the Law, which was adopted by the Cambodian legislature under the Constitution of Cambodia, has determined the jurisdiction and competence of the Extraordinary Chambers as well as their composition, organizational structure and decision-making procedures, while the Articles of Cooperation are to determine the modalities of cooperation between the Royal Government of Cambodia and the United Nations in implementing those provisions of the Law concerning foreign technical and financial support."

We see a clear distinction between the nature and purpose of the Law and the Articles of Cooperation. In no way do we wish to reduce the Articles of Cooperation "to the status of a technical and administrative document subordinate to the Law" (to use Excellency Hans Corell's words). Neither is it correct to say (as in the Spokesman for the Secretary-General's words) that the Cambodian government has "rejected the UN proposal" that the UN assistance "will be governed by the agreement between the UN and Cambodia." In fact, this is precisely what we envisage to be the role for our Articles of Cooperation, as a normal basis for cooperation between a Member State and the United Nations.

A number of Member States of the United Nations, which have been strong supporters of the negotiations towards establishment of the Khmer Rouge trial, have already expressed their keen desire for the process to continue. (Excerpts from these statements will be made available following this meeting).

Let me say clearly that on the Cambodian side the door remains open to a resumption of negotiations with the United Nations. Article 46 of our Law makes perfectly clear that primacy is given to United Nations participation in the process. It is important to understand that the Law adopted by our legislature was itself the outcome of the complex negotiations between Cambodia and the United Nations, and contains within it a number of significant compromises on our part as well as on theirs.

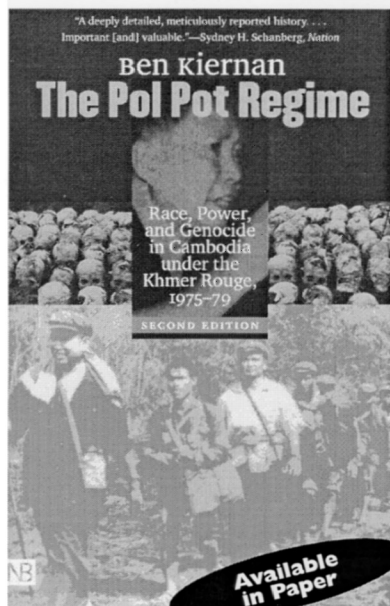
May I conclude by saying that my government remains committed to seeking justice for the crimes perpetrated by the Khmer Rouge on behalf of the Cambodian people and of humanity as a whole. We believe that the Law promulgated on 10 August 2001 provides a sound foundation for such a process based within the Courts of Cambodia with international participation and meeting internationally accepted standards, and earnestly we hope that the United Nations will be a part of this process.

Sok An

Senior Minister in Charge of the Office of the Council of Ministers,
Chairman of the Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders

Phnom Penh, 12 February 2002

□



The Pol Pot Regime

Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79
Second Edition

Ben Kiernan

“A deeply detailed, meticulously reported history. . . . Important,

valuable and worth reading. . . . Kiernan documents the killing with impressive specificity, using interviews with survivors to escort the reader to every part of the country. . . . Will be one of the most widely used reference books on the Cambodian tragedy.”

—Sydney H. Schanberg, *Nation*

“Definitive.”—*London Review of Books*

“[An] important book. Will remain the definitive work on the subject for many years.”—*Asian Thought and Society*

“This is not the first account of Pol Pot's terror. . . . But Mr. Kiernan's is perhaps **the most complete and the closest to Cambodian sources.**”—*Economist*

21 illus. \$19.95 A Yale Nota Bene paperback

Yale University Press



yalebooks.com