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Serious Flaws: Why the U.N. General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement

The draft agreement between the United Nations and the Cambodian government for the establishment of a "mixed tribunal" based in Cambodia is deeply flawed. The General Assembly and its Third Committee should not approve the draft agreement to prosecute "senior leaders of Democratic Kampuchea and those who were most responsible" for genocide, war crimes, and crimes against humanity unless and until a number of substantive provisions have been amended and a number of omissions and ambiguities are addressed.

Human Rights Watch strongly favors a tribunal meeting international standards of justice, fairness, and due process to bring surviving Khmer Rouge members to justice. However, the present draft contains such fundamental structural, technical and political flaws that it is unlikely to provide a measure of justice to the millions of victims of the Khmer Rouge. Nor will it serve as the foundation of justice for the Cambodian people or provide answers about the motives and workings of a regime that committed some of the most serious and systematic human rights violations in history.

There is little doubt that so long as the Cambodian government continues to exercise direct control over the Cambodian judiciary—and there is no prospect of fundamental change in the foreseeable future—any tribunal with a majority of Cambodian judges and a Cambodian co-prosecutor will fail the most basic test of credibility with Cambodians and the international community.

The draft agreement does not provide guarantees of judicial or prosecutorial independence, fails to clarify the applicable law, sets up an unworkable and confused process for reaching decisions, fails to establish a viable witness protection program or specify how court personnel will be protected, and does not resolve the legal status of a previous pardon for a key potential defendant.

Cambodian human rights organizations have consistently called on the United Nations and the Cambodian government to create a tribunal that meets international standards, while opposing any tribunal that would be subject to political manipulation by the Cambodian authorities. The draft agreement fails to address these concerns.

United Nations Secretary-General Kofi Annan expressed many of the same concerns in an extraordinarily candid March 31, 2003 report to the General Assembly on the draft agreement:

> I cannot but recall the reports of my Special Representative for human rights in Cambodia, who has consistently found there to be little respect on the part of Cambodian courts for the most elementary features of the right to a fair trial. I consequently remain concerned that these important provisions of the draft agreement might not be fully respected by the Extraordinary Chambers and that established international standards of justice, fairness and due process might therefore not be ensured. Furthermore, in view of the clear finding of the General Assembly in its resolution 57/225 that there are continued problems related to the rule of law and the functioning of the judiciary in Cambodia resulting from interference by the executive with the independence of the judiciary, I would very much have

preferred that the draft agreement provide for both of the extraordinary Chambers to be composed of a majority of international judges.[1]

Significantly, he went on to say that, "Doubts might still remain as to whether the provisions of the draft agreement relating to the structure and organization of the Extraordinary Chambers would fully ensure their credibility, given the precarious state of the judiciary in Cambodia ... any deviation by the Government from its obligations could lead to the United Nations withdrawing its cooperation and assistance from the process."

The United Nations has worked very hard over the past five years to create a credible tribunal. The U.N. has been thwarted by the government of Cambodian Prime Minister Hun Sen and a number of key U.N. member states, which have cynically attempted to portray the U.N. as an obstacle to accountability in Cambodia, when the opposite has been the truth. The U.N. has almost singularly stood for principle in the process of negotiating an agreement.

Double standards have been applied to Cambodia, in spite of the fact that the crimes committed by the Khmer Rouge are often described as among the worst of the 20th century. In the same week in February 2003 that U.N. member states applauded U.N. legal affairs chief Hans Corell (and themselves) at The Hague as Corell presided over the inauguration of the International Criminal Court (ICC) and its newly enshrined standards for international justice, many of the same states pressured Corell to go to Phnom Penh to sign a deeply flawed agreement.

The irony was apparently lost on these countries. None has offered an explanation why Cambodians should receive justice of a different quality than Rwandans or citizens of the former Yugoslavia. Cambodia itself has signed and ratified the ICC, thereby accepting the new court's standards as part of international law. Instead of insisting that Cambodia adhere to these standards, member states such as France, Japan, the United States, Australia and India have supported the Cambodian government's position and consistently pressured the United Nations to make unprincipled concessions—and then argued that the U.N. must capitulate since the Cambodian position represented the "last chance" for justice for the Cambodian people. In the end, politics and expediency appear to have won out over principles.

Because of the serious problems with the agreement, instead of celebrating the agreement the Secretary-General is already contemplating the circumstances in which the United Nations may be compelled to withdraw. The General Assembly and the Third Committee should heed this warning and authorize the United Nations to renegotiate the agreement so that problems can be solved now, in advance of any trials, instead of risking that either a sham process takes place or the United Nations is ultimately left with no option but to withdraw.

Separate sections of this briefing analyze seven critical defects in the draft agreement. The briefing then provides a brief history of attempts to establish a Khmer Rouge tribunal, demonstrating that the draft agreement falls far short of what had long been considered the most minimal criteria for a credible process. Human Rights Watch believes that the draft agreement, if endorsed by the General Assembly and Third Committee in its current form, would produce a deeply flawed, even counterproductive process in Cambodia. The results are likely to undermine rather than further prospects for holding leaders of the Khmer Rouge accountable for their crimes, and to damage the credibility of the U.N.'s work in the area of transitional justice more generally.

[1] Report of the Secretary-General on Khmer Rouge Trials, March 31, 2003, A/57/769, page 11.

Some Improvements, but a Seriously Flawed Agreement

The draft agreement does represent a modest improvement over the previous position of the Cambodian government. Most important, Cambodia agreed that the agreement with the United Nations would take precedence over Cambodian law and have the effect of a treaty under the Vienna Convention on the Law of Treaties, which requires the parties to act in good faith and not to claim that domestic law requires them to violate the treaty.[2] This addresses the concern that Cambodia may later amend its domestic law creating the Khmer Rouge tribunal to make it inconsistent with the agreement. Cambodia has also agreed to amend its domestic law to make it consistent with the agreement.

The agreement also clarifies that defendants will have the right to counsel of their own choosing, including foreign counsel, and that the United Nations will be responsible for remuneration of defense counsel. It also stipulates the right of the accused to a fair and open hearing. That these points even had to be negotiated demonstrates the lack of commitment of Cambodia to basic standards of due process.

The agreement also clarifies that the death penalty will not be imposed, although this was already provided for in the Cambodian constitution. A final but important improvement is the change suggested by the U.N. from a three-tier system of trial, appellate and supreme court chambers to a two-tier system. This should result in a more expedited procedure, while retaining the fundamental right of appeal.

In spite of these modest improvements, many significant problems remain:

1. Lack of a majority of international judges

Given the poor state of the Cambodian judiciary, Human Rights Watch has consistently supported the position of Kofi Annan and the U.N. in favor of a majority of international judges.

To ensure the integrity of a mixed tribunal with a majority of Cambodian judges it is the executive, not the judiciary, that must first be reformed. The Cambodian judicial system is characterized by political interference by the executive, a low level of competence (due to low professional standards and a lack of training and education among judges), and systematic corruption. Each of the nineteen reports of the Special Representative of the Secretary-General for Human Rights since the office was created in 1993 has documented these problems. Many studies by donors and nongovernmental organizations (NGOs) have come to the same conclusion. Indeed, the Cambodian government has admitted to these problems in reports it has filed as a party to the International Covenant on Civil and Political Rights (ICCPR) and in submissions to donors for assistance. The Cambodian judiciary is held in extremely low repute by the Cambodian public, with the result that Cambodians regularly turn to other forms of dispute resolution to resolve legal problems.

It is thus hard to understand why U.N. member states have pushed so hard to set up a process that will depend almost entirely on the Cambodian judiciary for its integrity and success. Even those countries most supportive of the supermajority system admit to a lack of confidence in the Cambodian judiciary. The annual country reports on human rights issued by the U.S. State Department speak frankly about the problems with the judiciary, yet the U.S. insists that somehow the judiciary will behave differently in a Khmer Rouge tribunal. No evidence is offered to support this except a claim that international scrutiny will force a different outcome.

[2] Vienna Convention on the Law of Treaties, UN Doc A/Conf 39/28 (1969), entered into force January 27, 1980.

But this has not been the case in any of the high profile political trials that have taken place in recent years, such as the trials of political opponents like Prince Norodom Ranariddh, Prince Norodom Sirivudh, and Sin Sen or of journalists such as Yim Sokha and Thun Bun Ly. These cases were clearly decided in advance of the actual court proceedings. The United Nations Transitional Authority in Cambodia (UNTAC) also had a Security Council mandate, agreed by the Cambodian People's Party (CCP), to oversee the whole administrative and judicial system, but the party still managed to maintain control over the courts—and continues to do so.

In Cambodia judges do not have the physical or professional security to simply decide to behave differently. Judges complain openly about receiving instructions in cases from the highest political authorities and threats to their safety if they do not rule as instructed. Physical attacks on courts have occurred frequently since 1993. In late April 2003 a prominent judge was assassinated in broad daylight on a Phnom Penh street as he was driving to work.

There is no sign that the executive has learned that it does not have the right to control the judiciary. Indeed, it is that control that has been at the heart of the long, drawn-out negotiations with the United Nations. Having successfully maintained control of the process, there is little reason to believe that the Cambodian government will stand aside and allow the judiciary to act independently.[3]

2. No independent, international prosecutor

No position in the tribunal will be more important than the prosecutor. The prosecutor's office will be responsible for conducting pre-indictment investigations, studying the available documentary evidence, and interviewing potential witnesses in order to determine whether to file charges against an individual. If the prosecutor does not bring charges, cases will not proceed. A lack of vigor or political interference can result in impunity for persons against whom charges should otherwise be filed.

Instead of appointing an independent, international prosecutor, Cambodia insisted and the U.N. ultimately agreed on the appointment of co-prosecutors, one international and one Cambodian. The Cambodian prosecution service is characterized by the same problems afflicting Cambodia's judges: crude political interference, low levels of professionalism, and pervasive corruption.

An independent prosecutor with a professional investigative team to undertake investigations wherever the evidence leads is indispensable. Prosecutors must also be able to carry out their work without fear of physical or professional reprisals. It is extremely unlikely that a Cambodian prosecutor will be able to simply follow the evidence in determining whom to indict. Instead, the practice of the CPP-controlled prosecution service is to seek approval from political authorities before filing important cases. Even in cases with large numbers of eyewitnesses, charges have not been filed if the potential defendant has been a senior government or ruling party official.

[3] It is worth noting that with the necessary commitment and foresight of the Cambodian government and the international community it did not have to turn out this way. If the participation of Cambodian judges and prosecutors was a necessary feature of a tribunal, consideration could have been given to a program of training and protection that would have allowed Cambodian jurists to spend the past few years in The Hague receiving intensive training, after which they could have returned to Cambodia with U.N. protection and a U.N. salary to perform their functions. This group of judges and prosecutors could then have become the core of a proper judicial system. This is exactly what Thomas Hammarberg, U.N. Special Representative for Human Rights in Cambodia, had in mind when he first proposed a mixed tribunal in May 1999.

A Cambodian prosecutor (or investigating judge) under orders to slow down the process could paralyze the tribunal by refusing to cooperate with his or her international counterpart. Under article 7 of the agreement, when the international and Cambodian prosecutors or investigating judges disagree they can appeal to a special panel. For each disagreement a special panel of judges, deciding by supermajority, must be convened, with three judges chosen by Cambodia's Supreme Council of Magistracy and two by the Secretary-General. Each prosecutor or investigating judge involved in the case must then "submit written statements of facts and the reasons for their different positions." If the Cambodian government wants to paralyze the process it simply has to instruct the Cambodian members of the tribunal to challenge all decisions of international prosecutors and investigating judges.

3. Flawed supermajority formula

There is no precedent for the supermajority formula in the draft agreement. It was conceived by U.S. officials in October 1999. Until that point the U.S. had been the most ardent proponent of an international tribunal. In the face of Hun Sen's obstinacy, the U.S. changed tack (without informing or consulting with the United Nations or Cambodian civil society) and proposed that decisions be taken by a supermajority of the judges of any given panel. In this way the Cambodian majority could not make decisions without the assent of at least one international judge. This formula offers some protection against political interference. But it means that the decisions of the tribunal will only be as strong as its weakest international member.

An extremely important flaw in the supermajority provisions in the agreement concerns the process for reaching verdicts. The procedure laid down for decision making in article 4 of the agreement does not state in which circumstances a supermajority is necessary to reach a decision, i.e., for a conviction or an acquittal. No procedure is specified when a supermajority is not reached. Relying on American legal practice, the United States has suggested that the result would be a "hung jury" and there would be a retrial. But there is no such procedure in Cambodian law (or the civil law system on which the Cambodian system is modeled). The result is likely to be confusion and gridlock. The U.N. repeatedly raised this issue with Cambodia and offered solutions, but Cambodia refused to make any changes.

Given the structure of the tribunal, such an outcome is likely in at least some cases, with the Cambodian judges ruling one way and the international judges the other. If a prominent Khmer Rouge leader is eventually put on trial and no decision is reached, the result may be chaos.[4]

Inherent in this formula is an admission that Cambodian judges cannot be counted upon to follow the evidence in making decisions, and that a complicated system needs to be created to avoid the likelihood that they would be able to exercise their majority position to issue inappropriate acquittals. But while the supermajority provisions in the draft agreement may provide a check on such outcomes, it offers no guidance about the way forward in cases in which the Cambodian and international judges take opposing positions.

Another problem with the supermajority system is that it applies to all decisions by the court, investigating judges, and prosecutors. Dozens or even hundreds of decisions may be taken in the course of a single case by judges, investigating judges and prosecutors, all of which can be appealed if the co-prosecutors or co-

[4] Defense counsel may also argue that the principle of double jeopardy requires dismissal of the charges. This is a weak argument under international law in cases in which no final verdict is reached, but is a subject on which there is no jurisprudence under Cambodian law.

investigating judges disagree with how to proceed in a case. Interlocutory decisions and even decisions about who to investigate can become the subject of this cumbersome process.

4. Unclear role of co-investigating judges

This unique tribunal establishes the positions of co-investigating judges, one international and one Cambodian. Cambodia argued that since the Extraordinary Chambers will operate as part of the Cambodian legal system, its practice of using investigating judges should be included in the agreement.

Under article 5 of the agreement, the co-investigating judges are "responsible for the conduct of investigations." This may appear straightforward and may work well in other civil law jurisdictions, but in Cambodia this institution has been a source of major controversy. Leading legal organizations in Cambodia have called for the practice of using investigating judges to be abandoned.

In Cambodia it has been unclear in practice where the role of the prosecutor ends and the role of the investigating judge begins. In many cases investigating judges have ordered prosecutors to end their investigations once charges have been filed, but then refused to conduct investigations themselves. It is a necessary and common practice for prosecutors to continue their investigations even after charges have been filed in order to find additional evidence and witnesses. It is unclear either under Cambodian law or practice or the draft agreement whether prosecutors will be able to do so. It is also unclear what value the investigating judges will bring to the process. This is likely to be just another part of a cumbersome process likely to delay justice.

5. Unclear and inconsistent applicable law

In keeping with the domestic nature of the proceedings, article 12 of the draft agreement states that:

> The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.

This provision was included because Cambodian criminal law and criminal procedure is confused, inconsistent, internally contradictory and full of important omissions. Yet the agreement offers virtually no guidance about how to solve these problems.

There are many sources of criminal law and procedure in Cambodia. During the UNTAC period (1991-93), the Supreme National Council (SNC), the organ created by the Paris Peace Agreements to be the sole repository of domestic authority and sovereignty during the U.N. peacekeeping mission, adopted a criminal law and criminal procedure provisions (drafted by UNTAC). These provisions attempted to establish international norms for crimes and due process in Cambodian law. The ruling CPP was upset by this decision and hastily approved its own criminal procedure code. The legal basis for this code is doubtful, but both the SNC law and the CPP law have been used since 1993. Judges, prosecutors and lawyers have complained about the many conflicting provisions in the two laws.

In addition, usually at the instruction of the government, cases have been filed under the 1986 "Decree-Law 27, Concerning Arrests, Holding in Custody, Temporary Detention, Release, and Search of Domicile, Possessions, and the Person" and the 1980 "Decree-Law 2 Against Betraying the Revolution and Other Offenses." Neither law meets even the most rudimentary requirements of due process, yet each is still considered by the Cambodian government and Cambodian judiciary to be part of current Cambodian law.

There is little clarity or consistency as to when one of the many laws is used. Practices vary from province to province and case to case. The 1986 and 1980 decree-laws have been used in political cases when the government believed that the UNTAC and SNC laws would not assure a conviction.

The Cambodian government has been working since 1982 on a comprehensive criminal code. Since 1993 a draft criminal law and a draft criminal procedure law have been promised to donors as part of a broader law reform program, but because of a lack of commitment from the government the drafts have made little progress towards approval.

The formulation in article 12 (quoted above) of the draft agreement is a recipe for confusion. It is unclear which "procedural rules established at the international level" should be used to clarify weaknesses in Cambodian law. The Rome statute of the ICC? The statute of the International Criminal Tribunal for the former Yugoslavia? The statute of the International Criminal Tribunal for Rwanda? It is likely that the effect of the agreement's vague language will be to introduce large room for arbitrariness, instead of establishing consistent standards.

The lack of clarity about the substantive law may make it impossible to offer due process to defendants. Any agreement between the U.N. and Cambodia should specify the exact criminal law and criminal procedure provisions in the text. As Cambodia is a party to the ICC, there is no reason why its provisions should not be incorporated into the text of the agreement. Competent defense counsel will be able to raise constant objections based on the lack of clarity of the substantive law. Judges may then find themselves with no choice but to dismiss indictments or require them to be re-filed.

Another risk with the formulation in article 12 is that different legal standards may be applied in different cases. There is also the risk that if Cambodia passes a new criminal law or code of criminal procedure there will be confusion about whether the new law should be applied to new cases or even to cases already filed or at trial.

The vagueness and contradictions of article 12 will offer an unnecessary opportunity to construct defenses to a poorly worded law, as well as for manipulation by government-controlled court officials and international staff subject to diplomatic influence.

6. Inadequate provisions for protection of witnesses and court personnel

The protection of victims, witnesses and court personnel from physical or other retaliation is essential, particularly given the decision to base the tribunal in Cambodia. One of the main reasons that the U.N. Group of Experts gave for urging that the tribunal be located outside Cambodia is the high likelihood of coercion and intimidation of witnesses. This point has been lost in negotiations to date.

The draft agreement mentions the subject of protection only in passing. Article 23 places responsibility for the protection of witnesses and victims with the co-investigating judges, co-prosecutors and the Extraordinary Chambers. The only tools it suggests are the possibility "of *in camera* proceedings and the protection of the

identity of a victim or witness." Article 24 requires the government of Cambodia to "ensure the security, safety and protection of persons referred to in this agreement."

This is wholly insufficient. In light of Cambodia's recent history of acute political violence, a system of protection that embraces every participant must be instituted and managed by the United Nations. Given the Cambodian government's dismal record in addressing political attacks, assassinations, and massacres, it is untenable to expect it can provide credible protection. The suggestion that protection will be provided by domestic authorities is more likely to scare people and intimidate them than to provide a sense of security.

The General Assembly should mandate a U.N. protection program for the security of all participants, including witnesses, victims, judges, lawyers, investigators, defendants and prisoners. This protection must be made available from the earliest investigatory stage through the post-trial period. Such measures must not prejudice the rights of suspects and accused. The General Assembly could look to rule 75 of the International Criminal Tribunal for Yugoslavia (ICTY) for an example of more detailed protection measures. Any such measures adopted should include measures for the physical security of persons who have been attacked or threatened.

7. Failure to resolve the status of the pardon of Ieng Sary

While Prime Minister Hun Sen has privately told some donors that former Khmer Rouge Foreign Minister Ieng Sary will not be exempt from prosecution, he has publicly stated on several occasions that he will not allow the prosecution of Ieng Sary. The United Nations insisted throughout the negotiations that the royal pardon granted to Ieng Sary on September 14, 1996 after his defection to the government should not serve as a bar to prosecution if the evidence established his responsibility for crimes during the Khmer Rouge period. However, Cambodia insisted that the draft agreement not include a provision explicitly ruling out the pardon as a bar to prosecution. Instead, article 11 of the draft agreement states that "the United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers."

This is an unacceptable outcome. As a condition of participation in the mixed tribunal in Sierra Leone, the United Nations insisted that amnesties that had already been agreed as part of the Lomé peace agreement could not be used as a defense. This principle should be included in the agreement for Cambodia, as there is a risk that the Extraordinary Chambers could rule that Ieng Sary may not be prosecuted under the terms of his earlier pardon. Any legal immunity in Cambodia for crimes of this magnitude would call into question the legitimacy of the mixed tribunal.

8. Transparency and Reporting

If the General Assembly and the Cambodian government approve the draft agreement it will be important for the General Assembly to require regular and public reporting by the United Nations about the implementation of the mixed tribunal. In particular, the United Nations should report on any interference in the prosecutorial or judicial process by the Cambodian government any other limitations on fairness, justice and due process. The agreement should also contain explicit provisions for monitoring by local and international NGOs.

BACKGROUND: A BRIEF HISTORY OF ATTEMPTS TO CREATE A KHMER ROUGE TRIBUNAL

A tribunal meeting international standards should have been created many years ago. But after the Khmer Rouge was forced from power by Vietnam in 1979, the United States and China led an international effort to

call for the withdrawal of Vietnamese forces from Cambodia and to continue to recognize the Khmer Rouge as the legal government of Cambodia. Though the nature of the humanitarian and human rights disaster of the Khmer Rouge period was quickly known, the United States led a successful effort for the Khmer Rouge to maintain Cambodia's U.N. seat, which it held in coalition with other anti-Vietnamese forces until 1991.

No formal progress on the establishment of a mechanism to bring the Khmer Rogue to justice took place until June 21, 1997, when Cambodia's co-Prime Ministers, Prince Norodom Ranariddh and Hun Sen, sent a letter to United Nations Secretary-General Kofi Annan requesting the

> assistance of the United Nations and international community in bringing to justice those persons responsible for the genocide and/or crimes against humanity during the rule of the Khmer Rouge from 1975-1979 ... We are aware of similar efforts to respond to the genocide and crimes against humanity in Rwanda and the former Yugoslavia, and ask that similar assistance be given to Cambodia. Cambodia does not have the resources or expertise to conduct this very important procedure… We believe that crimes of this magnitude are of concern to all persons in the world, as they greatly diminish respect for the most basic human right, the right to life. We hope that the United Nations and the international community can assist the Cambodian people in establishing the truth about this period and bringing those responsible to justice. Only in this way can this tragedy be brought to a full and final conclusion.[5]

The next month Hun Sen staged a coup against Prince Ranariddh. For the next year Cambodia was in a state of extreme political instability, so the U.N. moved cautiously.

In July 1998 Kofi Annan appointed a group of experts to offer suggestions about how to proceed. The group of experts considered the possibility of international, mixed and domestic tribunals, as well as locating a tribunal in Cambodia or abroad. In a lengthy and thoughtful report issued on February 18, 1999, the group of experts considered and dismissed either mixed or domestic tribunals because of widespread reports of, among other things, interference by the Cambodian government and the ruling CPP with the independence of the judiciary, including intimidation and threats, the low competence level of the Cambodian judiciary, and widespread reports of corruption. The report also ruled out holding trials in Cambodia because of security concerns, lack of proper facilities, and fears of political interference with the operations of the tribunal.[6]

Prime Minister Hun Sen responded by essentially repudiating his June 21, 1997 letter and ruling out an international tribunal, citing national sovereignty. Most observers believed that the main reason was a desire to control the process, including who would be indicted and convicted.

China publicly opposed the creation of an international tribunal, apparently out of fear that its role in supporting the Khmer Rouge would be publicized. The threat of its veto at the Security Council made it impossible for the Council to act to establish an international tribunal. The United States strongly and publicly supported an international tribunal at this point.

In May 1999, the U.N. Special Representative for Human Rights in Cambodia, Thomas Hammarberg, proposed a "mixed tribunal," with a majority of international judges and an international prosecutor. Cambodian judges and prosecutors would also participate, but in numbers that would not allow the Cambodian government to control and manipulate the process. One purpose of their participation was the educative effect that

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[5] See http://www.ngoforum.org.kh/aboutcambodia/Resource_Files/Tribunal/letter_from_co-prime_ministers.htm for text of letter.

[6] Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135.

professionally conducted trials would have for the Cambodian judiciary and public that could then contribute to overall reform of the Cambodian judiciary.

Hun Sen refused this proposal in meetings with Kofi Annan at the United Nations in September 1999. To break the deadlock, in October 1999 the United States, formerly the country most ardently in favor of an international tribunal—though from the beginning it had insisted that for monetary reasons any tribunal should only take up a handful of cases—proposed a mixed tribunal with a majority of Cambodian judges and co-prosecutors. This proposal was reportedly made without consulting the United Nations or Cambodian civil society. To mitigate the influence of Hun Sen and the Cambodian government, the U.S. proposed that decisions would be made by a complicated "super-majority" formula in which decisions would require a majority plus one of the judges. The rationale offered by the U.S. was that this would mean that all decisions would require the assent of at least one foreign judge.

The already questionable commitment of Hun Sen to justice was deepened on December 25, 1998 when Hun Sen shocked Cambodians by receiving Nuon Chea, formerly second in command to Pol Pot who allegedly held command responsibility for the infamous Tuol Sleng torture center in Phnom Penh (in which more than 16,000 prisoners entered and only seven came out), and Khieu Samphan, the former head of state, at his home. Both had been in hiding in Cambodia and Thailand since the Khmer Rouge splintered in 1998. Instead of having them arrested, Hun Sen received the two as visiting dignitaries. Hun Sen announced that Cambodians should "dig a hole and bury the past and look to the future." Cambodians and members of Hun Sen's own party were stunned by this spectacle, which was broadcast on national television and radio. For many it confirmed the impression that Hun Sen had pursued justice for the Khmer Rouge only as a tactic to defeat the movement.

The United Nations feared that the supermajority formula would be both unworkable and still permit the Cambodian government to effectively make all important decisions by issuing instructions to the Cambodian judges and prosecutors. Other critical components of a credible tribunal were still missing. It also feared that such a structure would set a dangerous precedent for ad hoc international justice mechanisms that, in spite of the July 1998 signing of the Rome treaty establishing the International Criminal Court, would persist.

On February 8, 2000, Secretary-General Kofi Annan issued a statement in which he said the United Nations would only agree to a mixed tribunal that had four components: 1) a majority of international judges; 2) an independent, international prosecutor; 3) guarantees for the arrest by the Cambodian authorities of all indictees on Cambodian soil; and 4) no pardons would be a bar to prosecutions (including that of Ieng Sary by King Sihanouk in 1996.)

Instead of supporting the United Nations, an informal coalition of states, including the United States, France, Japan, Australia and India, worked to overturn the UN's position over the course of the next two years.

In January 2001 Hun Sen convened the Cambodian parliament to pass a law creating "Extraordinary Chambers" for the trial of "senior leaders and those most responsible for the most serious violations of human rights" during the Khmer Rouge period. The law, which included the supermajority formula, contained the many problematic provisions outlined above.

For a tribunal to be created under this law, an agreement between the United Nations and Cambodia would have to be signed. A major sticking point between the two sides was whether the Cambodian law or the U.N. agreement would take precedence. Cambodia argued that sovereignty required the law to trump the agreement, while the U.N. insisted on the superiority of the agreement to ensure that the law could not be amended to

weaken the agreement's provisions. This was a clear indication of the lack of trust the U.N. had in its Cambodian negotiating partners.

On February 8, 2002, the United Nations announced that it was withdrawing from negotiations. Human Rights Watch supported the U.N.'s decision. The U.N. cited a series of important but largely technical problems for refusing to sign an agreement. But the principal reason was a conclusion that Hun Sen and Cambodia were not negotiating in good faith, showed little interest in creating a tribunal, and without a majority of international judges and an independent, international prosecutor, any agreement was likely to be undermined and manipulated in practice. This created justified fears within the U.N. that it would be accused of participating in a sham process. This was a principled decision, made in the face of the opposition of powerful member states.

Japan and France reacted by sponsoring a resolution in the General Assembly requesting the U.N. to resume negotiations with Cambodia based on prior negotiations to establish a tribunal. This was adopted on December 18, 2002. At Cambodia's request, France and Japan included provisions that departed from international norms by requesting the U.N. to conclude an agreement based on "international standards of justice, fairness and due process of law, as set out in articles 14 and 15 of the ICCPR." No other international or mixed tribunal has been created on such a narrow legal basis. Previous resolutions on Cambodia had referred to the entire ICCPR, which includes important pre-trial rights in article 9 and other fundamental rights that may be implicated in a tribunal, such as the rights to freedom of expression, association and assembly. In theory, the omission of article 9 and other articles should not affect a tribunal in Cambodia since Cambodia is a party to the ICCPR. However, in the unpredictable world of Cambodian justice, Cambodian judges may interpret the agreement as superseding Cambodia's existing legal obligations.

Hans Correll then met with Sok An, leader of the Cambodian delegation, six times in January 2003, but no progress was made. The U.N. proposed an agreement based on a majority of international judges and an independent, international prosecutor, as well as a variety of measures to correct technical flaws in the agreement. The Cambodian side demanded adherence to the supermajority formula. Negotiations ended with little prospect for agreement.

But in February six member states—France, Japan, the United States, Australia, India and the Philippines—reportedly met with Kofi Annan and Hans Corell and pressed the U.N. to return to Phnom Penh to conclude negotiations on the terms demanded by Cambodia.

The U.N., led by Corell, returned to Cambodia on February 13. The U.N. reiterated the proposals made in January, but, as the March 31 report of the Secretary-General points out with unusual candor, "certain Member States … had made it clear to me that they expected me not to seek any changes to the structure and organization of the Extraordinary Chambers … The Government of Cambodia was obviously aware that this position had been communicated to me and acted accordingly." The Cambodians dismissed the U.N. team's proposals for a more robust international component, secure in the knowledge that the party demanding adherence to principles would have to capitulate to the side demanding partisan political control over the process. In the end, politics and pragmatism won out over principles. On March 17, Corell and Sok An initialed a draft agreement on the creation of a mixed tribunal operating on the basis of the supermajority formula.