

How the KR Tribunal has already worked

BY ALANNA JORDE

The trials haven't even begun yet but already the Khmer Rouge Tribunal (KRT) model has been used on three different continents.

It was during tumultuous negotiations over the form of the KRT that the idea for a brand new model of international justice was first pitched.

Instead of modeling the tribunal after the popular court of the day—the ad hoc international tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)—a different kind of tribunal was proposed in the spring of 1999.

It would be established under Cambodian domestic law and based in Phnom Penh with national and international participation to try those most responsible for the deaths of nearly 2 million Cambodians from starvation, overwork, murder and disease between 1975 and 1979.

After that, other nations such as East Timor, Kosovo and Sierra Leone had an “off the shelf” blueprint for a hybrid or mixed tribunal to refer to when they were setting up their own courts, said Geoffrey Robertson, a London-based lawyer who was recently appointed to the appeals chamber of the UN Special Court for Sierra Leone.

Suzannah Linton, a Hong Kong University law professor who worked on the East Timor tribunal, said the push for mixed tribunals was due more to “the international community’s reluctance” to foot the bill for costly ad hoc tribunals than any other factor.

But besides the cost savings, there are other benefits to mixed tribunals. They have smaller bureaucracies, swifter proceedings, and, perhaps most importantly, by taking place in the country where the crimes occurred, they are more strongly tied to the societies that experienced the crimes.

Courts that are completely removed from the country where mass human rights abuses occurred “can appear to be artificial,” they tend to be poorly understood and they often result in rulings that are not accepted by the countries affected by the crimes, said the KRT’s co-investigat-

“The Cambodian tribunal could set a new standard, which would restore diplomatic faith in the justice process as a means of achieving post-war reconstruction and reconciliation.”

—Geoffrey Robertson,
UN Special Court for Sierra Leone
appeals chamber judge

ing judge Marcel Lemonde.

CONTROVERSIAL COMPOSITION

The KRT has several features that distinguish it from other mixed or hybrid tribunals—by far the most controversial being its much-maligned composition: the KRT is the first tribunal in which national judges outnumber international judges.

Some international law experts and human rights advocates have argued that the Cambodian government is influencing local judges, they may not be free to exercise independent judgment and the tribunal could be biased.

Only time and “the performance of the tribunal” will tell whether those concerns are legitimate, said Robertson.

But Roger O’Keefe, a university law lecturer and deputy director of the Lauterpacht Research Centre for International Law at Cambridge University, suggests such fears may be overstated.

Sure, there “...may be some question over the impartiality of the local judges, who may feel more political pressure to find the accused guilty and who may bring more emotional baggage to the task. But the internationals may not be wholly free of preconceptions either,” O’Keefe said in an interview.

In fact, a trend seems to be emerging in international law to cede more control to national authorities in hybrid tribunals.

Already there are plans to phase out international participation, by 2009, at the Bosnia-Herzegovina War Crimes Chamber. The tribunal was set up within the Bosnia court system

in 2005 to prosecute atrocities committed during the armed conflict from 1992 to 1995.

A NEED TO KNOW ‘WHY?’

KRT co-prosecutor Robert Petit has worked on mixed tribunals in Sierra Leone, Kosovo and East Timor as well as the ICTR. He said another peculiarity of the KRT is an almost palatable need to answer the question “why” so many Cambodians were killed.

Unlike Rwanda, for instance, where extremist Hutus carried out a protracted and deliberate campaign to exterminate ethnic Tutsis, the motives behind atrocity crimes committed during the Khmer Rouge era remain a mystery to a vast majority of Cambodians.

According to Linton, the Cambodian thirst for knowledge about its tragic past “came through quite clearly” in a 2002 survey by the Documentation of Cambodia (DC-Cam) in which 73 percent of interviewees said they wanted to know more about the Khmer Rouge organization and the Democratic Kampuchea regime.

Respondents indicated a “...desire to know the facts, why people did what they did, why things worked out the way they did and to understand the whole tragedy,” said Linton, who analyzed the results of the survey for her book *Reconciliation in Cambodia*.

Satiating the voracious appetite for knowledge about the past and establishing a credible and historical record on one of the most tragic, troubling parts of Cambodia’s history is even more important given that the KRT is, for now, the only official

venue where claims for truth and justice about Khmer Rouge crimes will be mediated.

While some nations such as Yugoslavia and Rwanda have conducted trials within their ordinary domestic court systems and others such as Sierra Leone and East Timor have convened truth and reconciliation commissions in tandem with international or mixed tribunals, there are no plans to do the same in Cambodia.

BREAKING NEW GROUND

The KRT’s model of co-prosecutors and co-investigating judges is another aspect of the KRT that is completely unprecedented in international law. No other hybrid or international tribunal to try atrocity crimes has used this structure.

Although every international court has its own unique legal culture, the KRT represents a whole “new mix of law systems,” said Lemonde, who is among the KRT jurists who have been experiencing highly publicized trials of their own over the establishment of procedural rules.

Historically, international law, in general, and international courts, in particular, have been informed primarily by common law, Lemonde pointed out.

But since the Cambodian legal system is based on the civil law model, the KRT will be influenced more than any other international court by civil law, which he suspects could very well be the more adept legal model for trying atrocity crimes.

“The common law system is not adapted as well for these kinds of crimes because they are designed for juries,” suggested Lemonde, adding that he is hopeful the civil law-inspired nature of the KRT will break new ground in international law by creating a more efficient and productive judicial process.

In addition to cutting costs and avoiding the delays that have undermined the quality of justice in other international courts, “...the Cambodian tribunal could set a new standard, which would restore diplomatic faith in the justice process as a means of achieving post-war reconstruction and reconciliation,” agreed Robertson.



FROM NUREMBERG TO THE HAGUE

CHARTING THE PROGRESS OF INTERNATIONAL LAW

The US presents its case at the Nuremberg Trials
Photo: Harry S. Truman Library

Slobodan Milosevic
International Criminal Court

Some of the accused at the Special Court of Sierra Leone

ICC Chief Prosecutor Luis Moreno-Ocampo

Prisoners on trial at Tokyo War Crimes Trial
Photo: US Army Signals Corps

Kosovo Courts "Panels 64"

Bosnia War Crimes Chamber
Photo: AFP

Extraordinary Chambers in the Courts of Cambodia

Two truth commissions have been held in Chile

International Criminal Tribunal for Rwanda

East Timor Serious Crimes Special Panel in 2000

Peruvian protesters demand follow through on truth commission
Photo: AFP

Argentines held a truth commission over forced disappearances
Photo: AFP

Former Liberian President Charles Taylor faces charges
Photo: AFP

South African Truth and Reconciliation Commission
Photo: AFP

Launch of the East Timor truth commission
Photo: AFP

Archetypes of the modern international criminal tribunal: The first-ever international criminal tribunals were held following World War II to try leaders of Nazi Germany and the Japanese empire.

Ad hoc international tribunals were set up in the former Yugoslavia (ICTY) to prosecute atrocities since 1991. The tribunal's most illustrious defendant, now-deceased former president of Yugoslavia Slobodan Milosevic, was the first sitting head of state indicted for war crimes. The tribunal for Rwanda (ICTR) delivered the first-ever judgment on the crime of genocide by an international court. Both tribunals are expected to wrap up by 2010.

Mixed or hybrid tribunals are a "middle ground" between international tribunals and wholly domestic courts because they are incorporated in the country where the crimes took place and presided over by both national and international judges.

The International Criminal Court is generally regarded as the flagship of international criminal justice. Located in The Hague, the court's mandate is to conduct investigations and prosecutions for crimes of genocide, crimes against humanity and war crimes committed after July 1, 2002. The court will only deal with crimes committed in countries that signed and ratified the Rome Statute (104 nations as of Jan. 1, 2007). The first case will likely be against former rebel leader Thomas Lubanga Dyilo from the Congo, who is accused of recruiting and conscripting child soldiers. ICC indictments have also been issued against the top leaders of the Lord's Resistance Army in northern Uganda, and an investigation was recently completed in the Darfur region of Sudan. The US, China, Israel, Iraq and Libya are among the states that have not signed on to the ICC.

Truth commissions are usually non-judicial mechanisms to uncover and reveal past wrongdoing with an aim to resolving conflict left over from the past.

Source: CW



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FOOTNOTE **IN** HISTORY?

BY ALANNA JORDE

The chief prosecutor of the International Criminal Tribunal for Rwanda (ICTR), Hassan Bubacar Jallow, can imagine a day when ad hoc tribunals such as the ICTR and Extraordinary Chambers in the Courts of Cambodia (ECCC) will be merely footnotes in history.

"You could say we are ensuring our own extinction," said Jallow of international and hybrid tribunals currently underway around the world to bring to justice those responsible for violating the most fundamental rights of humankind.

Jallow and other international criminal prosecutors who gathered last month in Cambodia said the International Criminal Court (ICC) should eliminate the need for future ad hoc tribunals except perhaps for atrocities committed prior to July 1, 2002, when the world's first independent, permanent court was established to try atrocities such as genocide, crimes against humanity and war crimes.

Earlier this month United Nations Secretary-General Ban Ki-Moon credited international criminal tribunals for Rwanda and the former Yugoslavia with pioneering the enforcement of international humanitarian law and the development of international criminal justice and for opening the door to other ad hoc courts to fight impunity under international law.

The success of these courts fed a growing sense among the international community that a more permanent forum to address the most egregious atrocities was needed and the International Criminal Court emerged as the answer, Ban said in a Dec. 3 speech at UN headquarters in New York.

Only five years after its inception, "the ICC has established itself as the centerpiece of our system of international criminal justice. It both embodies and drives a profound evolution in international culture and law. It serves notice to any would-be (Slobodan) Milosevic or Charles Taylor that their actions today may lead to international prosecution tomorrow," Ban told representatives of the 105 nations that have signed on to the court.

The ICC is designed to complement existing national judicial systems and therefore intended to be a court of last resort, intervening only when national courts are unwilling or unable to investigate or prosecute atrocity crimes. Countries are considered unwilling if they shield potential defendants from responsibility for ICC crimes and unable if their legal systems have collapsed.

This has proved a strong incentive for countries keen "to beat" referrals to the ICC and has kickstarted much-needed improvements to their legal systems, according to Stephen Rapp, prosecutor for the Special Court for Sierra Leone (SCSL).

The principle of complementarity



Photo: Khem Sovannara

Prosecutors (l-r) for the Extraordinary Chambers in the Courts of Cambodia Robert Petit, International Criminal Court for Rwanda Hassan Jallow, International Criminal Court Fatou Bensouda and Special Court for Sierra Leone Stephen Rapp met last month at ECCC headquarters.

has ensured the ICC and hybrid courts are "not the only game in town," said Rapp, who expects that as they advance, national courts will handle an increasing number of atrocity cases with assistance, if necessary, from international personnel.

The ICTY is preparing to transfer some of its indictments to domestic authorities, said Carla Del Ponte, who has since stepped down from her post as prosecutor.

The ICTR is also considering referring some of its 20 or so remaining cases to Rwanda, where more than 1 million Tutsis and moderate Hutus were exterminated in 1994 in a 100-day genocide that "exceeded in its brutality and intensity anything ever witnessed before in human history," said Jallow.

Without such referrals, the ICTR is not likely to meet its target of wrapping up all its cases, including appeals, by 2010, he added. Last month, the Tanzania-based court appealed to the UN Security Council for an extension to its mandate.

The ECCC is slated to wrap its proceedings by 2009, but co-prosecutor Robert Petit said at last month's colloquium of international prosecutors that it's doubtful the court will meet that deadline. "If we were to do that at this point I don't think we would leave a very credible process," he said.

Besides overly ambitious timetables, prosecutors at ad hoc tribunals face a number of other challenges

including protecting witnesses, apprehending suspects and, in the case of the mixed tribunals for Sierra Leone and Cambodia, raising the funds needed to carry out judicial proceedings.

While the UN funds the ICTR and ICTY, the mixed tribunals in Cambodia and Sierra Leone rely entirely on voluntary contributions.

Like the ECCC, the ad hoc tribunal underway in Sierra Leone is limited in its mandate and was set up to try only those who "bear the greatest responsibility" for atrocities committed during the civil war.

And like the ECCC, integrating national with international justice systems has proved arduous, at times, in Sierra Leone, leaving court officials with the unenviable task of managing "unrealistic expectations," said Rapp.

Still, the SCSL has managed to become the first court in history to convict war criminals of recruiting and using children under the age of 15 as soldiers in armed conflict, sexual slavery and terrorism, he added.

Like the ICTY, the Sierra Leone tribunal has proven that chiefs of state are not immune from prosecution, with the arrest and trial of former president of Liberia, Charles Taylor. Following a request by the Liberian government, Taylor was extradited to the SCSL by Nigeria, where he had been living comfortably in exile.

Taylor is accused of aiding rebel

The International Criminal Tribunal for Rwanda (ICTR) has not been as successful as prosecutor Hassan Bubacar Jallow would have liked in trying crimes of sexualized violence against women.

While the widespread rape of women continues to be dismissed as an inevitable consequence of armed conflict, Jallow called on international courts to "strive for greater success in trying sexual violence cases ... The dignity, bodies and souls of women are the shortest route to destroying the fabric of our communities," he said.

groups that murdered, enslaved and mutilated civilians during Sierra Leone's civil war. A special UN Security Council resolution was passed to allow the SCSL to try Taylor in The Hague, Netherlands after it was determined a local trial risked destabilizing the region.

While the ICC will no doubt be important in "building the fabric of international justice," Rapp believes national institutions will play a role as well in prosecuting serious violations of international criminal law.

"There is no single remedy, no single path," nor should there be, he said. (CW)

FROM CAMBODIA TO THE HAGUE

RECENT DEVELOPMENTS IN INTERNATIONAL LAW

International Criminal Tribunal for former Yugoslavia

International Criminal Court

Slobodan Milosevic

ICC Chief Prosecutor Luis Moreno-Ocampo

Thomas Lubanga

Rwanda has called on France to extradite Dominique Ntawukuriryayo, a Rwandan wanted by the ICTR for his alleged role in the country's 1994 genocide.

Noun Chea

Ieng Sary

Khieu Samphan

Ieng Thirith

Kaing Guek Eav A.K.A. Duch

Extraordinary Chambers in the Courts of Cambodia

Lord's Resistance Army, LRA, Capt. Sunday Otto, along with six others who surrendered to the UN, insisted soon after their arrival at Entebbe airport in Uganda Nov. 30 that LRA leader, Joseph Kony, currently holed-up along the Sudan-D.R. Congo border, had executed his deputy, Vincent Otti, whose whereabouts have remained a mystery for months. Both Kony and Otti are among the LRA rebels wanted by the ICC.

Some of the accused at the Special Court for Sierra Leone

Ad hoc international tribunals: Today, the ICTR is a "well-oiled machine, functioning smoothly," said chief prosecutor Hassan Bubacar Jallow. Over the past 10 years, 90 people have been indicted for organizing genocide and 76 arrested; 29, including a former head of government, senior military officials, local government officials and journalists have been found guilty and sentenced to jail terms ranging from six years to life imprisonment; and 14 are still missing. The Arusha, Tanzania-based tribunal delivered the first-ever judgment on the international crime of genocide and set a legal precedent establishing rape as a crime of genocide. Despite handing down 161 indictments, including the first sitting head of state former Yugoslavian president Slobodan Milosevic (who died in custody in 2006) to be indicted for war crimes, "the glass is still half full" for recently-retired ICTY prosecutor Carla Del Ponte because, she said, two of those alleged to be most responsible for atrocities committed in the former Yugoslavia are still at large—Bosnian Serb wartime leader Radovan Karadzic and his military chief Ratko. Indictees have ranged from common soldiers to generals and police commanders all the way to prime ministers. At least 48 have been sentenced, 11 cases transferred to local courts.

Mixed or hybrid tribunals are a "middle ground" between international tribunals and wholly domestic courts because they are incorporated in the country where the crimes took place and presided over by both national and international judges. It was during tumultuous negotiations over the form of the ECCC that the idea for a new model of international justice was first pitched and eventually spawned a mixed or hybrid court not only in Cambodia but also in East Timor, Kosovo, Bosnia and Sierra Leone. Although the ECCC operates as an independent entity within the Cambodian court structure, it is still meant to be an expression of the will of the international community and part of the machinery of international justice. But Deputy Prime Minister Sok An, who led the Cambodian team that negotiated with the UN over setting up the court, pointed out last month that the ECCC has some unique characteristics that set it apart from the other mixed or hybrid tribunals. It is made up of teams of co-prosecutors and co-investigating judges, national judges constitute a majority in all chambers but decisions must be reached according to a super-majority formula and it is the only court besides the International Criminal Court to provide for the participation of victims in criminal proceedings. In addition, as it exists within Cambodia's civil law system, the ECCC will be influenced more than any other atrocity crimes court by civil law. "What happens in this very place over the coming months and years will determine how history judges our formula, but we believe that the Cambodian model may also serve as an inspiration for other countries in their search for justice," Sok An said.

The International Criminal Court The ICC's first-ever trial will begin in March 31, 2008, the court announced last month. DR Congo militia leader Thomas Lubanga will be tried for allegedly recruiting child soldiers under 15 into the military wing of his Union of Congolese Patriots (UPC). Another suspect, Germain Katanga, is also in custody. Generally, the court will only deal with crimes committed in countries that signed and ratified its founding treaty, the Rome Statute (105 countries so far), or their citizens. It is intended to be a court of last resort, complementing national judicial systems and intervening only if national courts are unwilling or unable to investigate or prosecute. But the United Nations Security Council can refer cases to the ICC for investigation, which it did in 2005 in a resolution that required Sudan's government and all parties in the conflict to cooperate with the ICC's probe of allegations of atrocities in the Darfur region of Sudan. ICC chief prosecutor Luis Moreno-Ocampo issued a scathing assessment of Sudan's cooperation with the ICC last week, asking the UN Security Council to press Sudan to execute outstanding arrest warrants the ICC issued in May for Ahmad Muhammad Harun, former Sudanese interior minister and current humanitarian affairs minister, and former militia leader Ali Muhammad Al Abd-Al-Rahman, also known as Ali Kushayb. The Sudanese government, not a signatory to the ICC's Rome Statute, has so far refused to hand over the suspects to the ICC. Moreno-Ocampo also announced this month two new ICC investigations—identification of Harun's principal allies and supporters involved in his criminal activities and an inquiry into attacks against UN and African Union peacekeepers. ICC indictments have also been issued against five leaders of the Lord's Resistance Army (LRA) for allegedly orchestrating the killing of thousands of civilians and the enslavement of thousands more children during a 20-year civil war in northern Uganda. But the Ugandan government—which originally appealed to the ICC to investigate, and is now in the process of brokering a peace deal with the LRA—is refusing to hand over the suspects. Last month, the ICC declined to withdraw the five Ugandan arrest warrants. The LRA leaders have repeatedly demanded immunity from ICC prosecution in return for peace. The Ugandan government has also said that Kony is willing to face trial at home, but not at the ICC. Prosecutors at the Court are also currently probing the Central African Republic (CAR).

HISTORY WRITER MAKES HISTORY

BY ALANNA JORDE

Kamboly Dy, the 26-year-old author of *A History of Democratic Kampuchea (1975-1979)*, is making history by becoming the first Cambodian to write a history book about the Khmer Rouge (KR) regime.

"I am very excited to have the chance to produce this important textbook for my own people. I hope this will generate discussion about the KR period and the urgent need of genocide study in a classroom setting if Cambodia as well as the world are to prevent future genocide and other grave human rights violations," said Kamboly Dy.

The education ministry in January approved the book as a core reference material for future history textbooks but not as part of the general curriculum.

Kamboly Dy had hoped that the ministry would include his textbook "in whole or in part in the curriculum," but he said he is "OK" with the government's decision because he is convinced his book will advance the national dialogue over the need to educate Cambodian schoolchildren about the KR era.

Besides educating children about Cambodia's modern history, including lessons about the KR regime in schools could help the country move beyond its painful past.

"Writing about the bleak period of history for a new generation may run the risk of reopening old wounds for survivors of Democratic Kampuchea. Many Cambodians have tried to put their memories of the regime behind them and move on. But we cannot progress—much less reconcile with ourselves and others—until we have confronted the past and understand both what happened and why it happened. Only with this understanding can we truly begin to heal," Documentation Center of Cambodia (DC-Cam) director Youk Chhang wrote in the foreword to Kamboly Dy's book.

"It has been almost 30 years since the demise of (Democratic Kampuchea) and most Cambodians have kept silent about their painful experiences. Giving a full picture of DK in classes nationwide can help to alleviate the suffering of survivors by enabling them to talk about their experiences with their children," said Kamboly Dy.

It is important for the younger generation to learn about the past "so we do not repeat the same mistakes," he added.

Cambodian Genocide Project director Dr. Gregory Stanton agreed that education is an important prevention tool. "It is vital, particularly in countries where genocide has been committed, to know the history of the crimes, who were the perpetrators, and what ideologies they used to generate support for their crimes. Genocide cannot be committed by just a few people. It is a crime committed by many people, a group crime. So it is very important in preventing it from happening again to understand why it happened in the past."

According to Suzannah Luton, author of *Reconciliation in Cambodia*, "... understanding and coming to terms with the (ferocious cruelty and violence in Democratic Kampuchea) means that Cambodians need to find the answers for themselves. They, meaning all Cambodians of whatever faith and political perspective, need to be part of an effort to create their own record of their own past, in order to reconcile with what happened."

Coverage of the KR and Democratic Kampuchea, as Cambodia was called from 1975 to 1979, had disappeared from high school texts by 2002.

Kamboly Dy remembers learning

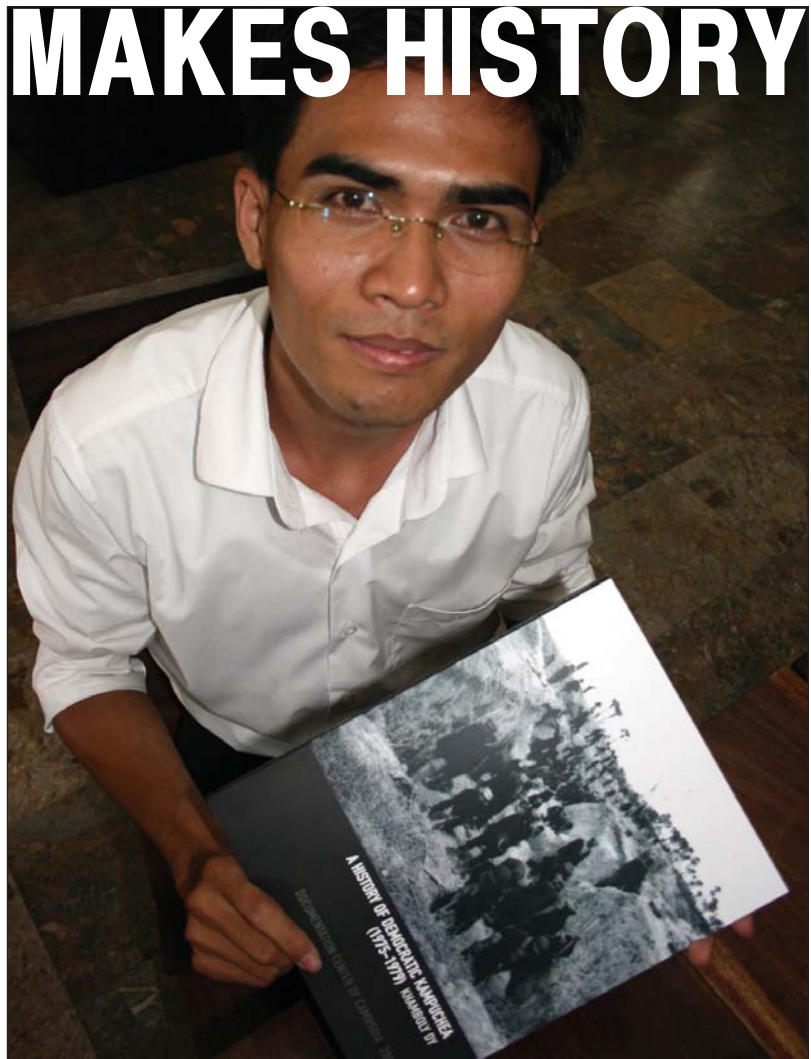


Photo: Alanna Jorde

Kamboly Dy's new textbook will be distributed for free in Khmer to educators across the country. English copies are available at DC-Cam for \$7.

about the horrific events that claimed the lives of millions of Cambodians during the KR rule when he was a schoolboy growing up in Kratie. But he said his lessons tended to be tainted with hatred and talk of revenge, which made it difficult for him to get a clear understanding about what happened.

He said he didn't begin to fully comprehend one of the darkest periods in Cambodia's past until it was revealed

to him by victims and perpetrators of the mass atrocities in their own words.

Prior to writing his book, Kamboly Dy poured over thousands of interviews with survivors, officials and lower-ranking cadre members of the KR as a cataloguer, researcher and Genocide Education Project coordinator for DC-Cam. In addition to personal interviews, he read telegrams, prisoner logs, and official communist party papers.

IN THE STREET

WHAT DO YOU KNOW ABOUT DEMOCRATIC KAMPUCHEA?

The Cambodia Weekly asked Grade 9 students and their teacher at Baktok High School what they know about Democratic Kampuchea and how they learned about the Khmer Rouge regime.



"I heard about Democratic Kampuchea (DK) and the Pol Pot regime. In that regime, a lot of Cambodian people were killed. If we compare DK with the present regime, we can know it was a dictatorship that didn't allow people to be free. I've learned about DK from my parents, television, radio, newspapers, magazines and in school."

—Meas Chanlakna, 15



"I know DK existed from 1975 to 1979 during the Pol Pot regime. I learned this from television, radio, the newspaper, my parents and what I was taught in school. In a democracy, people have the power to choose their leader and political parties that they like."

—Keo Sosreya, 15



"Democratic Kampuchea was not a monarchy. There was no king. Everyone had to work hard and there wasn't enough food to eat. I learned about DK by television, radio, the newspaper, my parents and what I was taught in school."

—Seng Kruy, 15



"In that regime my parents were still children and separated from their parents. When my parents missed their parents, they would secretly meet them. There was not enough food to eat. It was a very difficult time. My parents always say, 'please be careful and study hard. Don't spend a lot of money carelessly' because it was so much harder for them."

—Mer Chanpolydet, 15



"Democratic Kampuchea was a dictatorship that didn't allow people any rights to speak, or to travel freely. There was not enough food to eat even though people worked very hard. There was no school and there was no news media. Democracies today are very different. We can talk, we can walk, we can go to school. We have free speech."

—Poek Sotha, Grade 9 teacher