Transitional Justice in Cambodia

I. Introduction

From 1975-1979, the ruling Khmer Rouge regime caused the death of up to 2 million people in Cambodia, over 20 percent of the country’s population. Since that time, the ability to hold the perpetrators accountable has been delayed, initially by a two-decade armed conflict in Cambodia, and then because of disagreements over how best to move the country and its people forward. Throughout the process a host of diverse actors with varying interests have weighed in and proposed various transitional options, from holding trials to simply ignoring the past. Eventually, the Cambodian government and international actors decided to establish a hybrid tribunal known as the Extraordinary Chambers in the Courts of Cambodia (ECCC). This tribunal combines elements of international and Cambodian law, and aims to bring to justice those leaders most responsible for the deaths of the late 1970s. The ECCC remains highly contentious, and debates swirl about its cost, functionality, objectivity, and independence as a transitional justice mechanism. Through it all, closure and justice have remained elusive for many Cambodians.

The experience of Cambodians with the Khmer Rouge in the 1970s, the debates surrounding the establishment of the ECCC, and the composition and procedures of the ECCC all inform a more complete understanding of transitional justice in Cambodia, as well as the court’s viability as a genuine transitional justice model for Cambodians struggling to deal with a tragic period in their history.

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II. The Khmer Rouge in Cambodia

The Khmer Rouge and its leader, Pol Pot, rose to power after two decades of post-colonial turmoil in Cambodia. The country attained independence from France in 1953 after a period of relative stability under the French protectorate, which lasted from 1863-1953. Following independence, Cambodia became involved in the regional upheaval in Southeast Asia, due in large part to its geographic location next to Vietnam.

As the conflict in Vietnam escalated between the North Vietnamese and the United States, it increasingly touched Cambodia and its people. Despite publicly declaring neutrality in 1965, Cambodia’s head of state, Norodom Sihanouk, secretly allied the country with the North Vietnamese in 1966. As a result of this alliance, the North Vietnamese kept troops in Cambodia that were armed and supplied from North Vietnam and China. When the US and South Vietnam discovered the troops in Cambodia, Cambodian officials denied the reports, thereby further straining relations with the US.

In 1970, General Lon Nol, acting with US backing, overthrew Sihanouk. Sihanouk allied himself with the insurgent communist forces as the escalating war in Vietnam spilled over into Cambodia. “The Vietnam War destabilized the Cambodian economy and drove Sihanouk from office. Had it never occurred, he would probably not have been overthrown, and Cambodia’s Communists would not have come to power.” The Communist Party of Kampuchea used the US invasion and its relentless bombing of the Cambodian countryside to recruit Cambodians to its movement. As one commentator put it, “[f]rom the ashes of rural Cambodia arose Pol Pot’s Communist Party of Kampuchea.” As the bombing by US forces continued, the Communist Party consolidated its rule and stamped out Sihanouk supporters and more moderate voices that

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3 Id. at 137.
4 Id.
5 Id. at 1.
6 Id. at 194.
7 Id.
8 CHANDLER, supra note 2, at 194.
10 Id.
11 CHANDLER, supra note 2, at 193.
12 KIERNAN, supra note 9, at 19.
13 Id.
opposed Lon Nol. In addition, it defeated the forces of Lon Nol and took control of Phnom Penh and the country in April 1975.

Upon seizing power, the Communist Party of Kampuchea (Khmer Rouge) ordered the forcible removal of over two million civilians from the cities to advance the regime’s plan for increased agricultural production in a new agrarian, socialist Cambodia. In addition, it promulgated a racial ideology and sought to subvert and eventually kill all non-ethnic Khmer Cambodians, and all those who resisted or were suspected of resisting its rule. As has been well documented, these aims and practices led to enormous suffering, starvation, torture, and murder. Indeed, even after the Vietnamese invaded in 1979 and forced the Khmer Rouge from power, the group continued to conduct an insurgency and persecute non-Khmer Cambodians it encountered in various places around the country.

III. Establishing a Transitional Justice Mechanism

After the jarring events of the late 1970s, questions about how to deal with the atrocities and how to hold the perpetrators accountable remained highly contentious and, in effect, remained unanswered for over two decades. Following the invasion of Vietnamese forces, the Khmer Rouge leadership fled to strongholds and fought an insurgency for the next twenty years. During these years it received arms and aid from Thailand and China, and support from the US and UK governments, for whom Cold War considerations outweighed any desire or obligation to hold the Khmer Rouge accountable for its crimes.

In the late 1990s, the Khmer Rouge disintegrated. Pol Pot died in 1998, and around the same time leaders such as Ieng Sary, the former foreign minister during the Khmer Rouge’s rule, were granted amnesty and allowed to live freely within Cambodia. Additionally, many

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14 Id. at 19, 23.
15 Id. at 33-34.
16 CHANDLER, supra note 2, at 210-11.
17 KIERNAN, supra note 9, at 26.
18 Id. at 460.
20 Id.
21 CHANDLER, supra note 2, at 242-43.
members of the Khmer Rouge armed forces were accepted into the Cambodian army.\textsuperscript{22} Despite international calls for justice, attempts to hold members of the Khmer Rouge accountable failed during this period.\textsuperscript{23}

Acknowledging a need for a transitional justice mechanism was a first step in the process of attaining actual accountability. Disputes soon arose over what form the transitional justice mechanism would take, who would participate, and what law would govern.

Some interested parties contended that a truth commission could effectively address and document the past atrocities.\textsuperscript{24} Proponents of the idea pointed to the flexibility a truth commission could offer Cambodia, an important factor given the volatile political situation within the country, and between the Cambodian government and international actors at the time.\textsuperscript{25} A commission could provide an outlet for the victims of past abuses to tell their stories to an independent authority and receive some sense of closure and personal relief as a result.\textsuperscript{26} Opponents argued that much was already known about the Khmer Rouge’s crimes on account of significant scholarly and media attention since 1979, and that widespread public participation seemed unlikely given political and social conditions within the country.\textsuperscript{27} The Cambodian government also lacked the political will to investigate abuses using the truth commission model, largely because many former Khmer Rouge officials were working within the government at the time.\textsuperscript{28} Moreover, lacking prosecutorial authority, a truth commission would have left persecutors untouched, a result that various domestic and international actors deemed undesirable.\textsuperscript{29} Though many of the interested parties involved articulated a desire to hold perpetrators accountable through a tribunal, commitment sometimes waned, and disagreements continued over the form of the mechanism.

\begin{itemize}
\item \textsuperscript{22} Id. at 242.
\item \textsuperscript{23} Id.
\item \textsuperscript{25} Id. at 857.
\item \textsuperscript{26} Id. at 858-60.
\item \textsuperscript{27} Id. at 857-59.
\item \textsuperscript{28} James Bair, Comment, \textit{From the Numbers Who Died to those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia}, 31 U. HAW. L. REV. 507, 518 (2009).
\item \textsuperscript{29} Klosterman, \textit{supra} note 24, at 855-63.
\end{itemize}
The Prime Minister of Cambodia, Hun Sen, himself a former Khmer Rouge officer, initially supported the idea of an international tribunal to hold the Khmer Rouge leaders accountable, but reversed himself in 1998, arguing that “Cambodians should ‘dig a hole and bury the past.’”\textsuperscript{30} Within Cambodia, popular opinion demanded some kind of accountability, however, forcing Hun Sen to renew talks with the United Nations over some kind of tribunal.\textsuperscript{31}

Strangely enough, all sides voiced concerns about the ability of a tribunal to remain independent. While Cambodian leaders sought independence from international participation and control over a transitional justice mechanism, international actors were concerned that the mechanism measure up to international standards, operate without internal Cambodian political interference, and ensure fairness.\textsuperscript{32} These competing concerns led to the establishment of a hybrid tribunal which combined elements of Cambodian law and legal procedure with international law and standards.

In January 2001, the Cambodian National Assembly and Senate adopted a law to establish the ECCC, with the aim of holding accountable those most responsible for the killings in the late 1970s.\textsuperscript{33} The UN withdrew from negotiations to create the tribunal in 2002 based on concerns over the structure of the body, but returned in 2003, whereupon both sides agreed to move forward with the process.\textsuperscript{34} After additional delays, the ECCC was organized and set up, and the first trial began in February 2009 against Kaing Gek Eav (nicknamed “Duch”), the former head of an infamous torture and prison facility under the Khmer Rouge.\textsuperscript{35}

**IV. Extraordinary Chambers in the Courts of Cambodia (ECCC)**

*Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international*

\textsuperscript{30} Human Rights Watch, \textit{supra} note 19.

\textsuperscript{31} Id.


\textsuperscript{33} Id. at 27.

\textsuperscript{34} Bair, \textit{supra} note 28, at 518-19.

humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

- Article 2, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea\textsuperscript{36}

Complexity characterizes the ECCC’s unique combination of law and procedure, which speaks to the circumstances surrounding its establishment and the institutions and leaders behind its creation. The ECCC seeks “to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”\textsuperscript{37}

The ECCC is known as a “hybrid tribunal” because it contains both international and domestic features. Officially, the ECCC resides within the Cambodian legal system, but it has a specialized function and mandate.\textsuperscript{38} The tribunal applies both Cambodian and international law, using international law to charge alleged perpetrators for crimes that are not prosecutable under Cambodian law, such as the crimes of genocide and crimes against humanity.\textsuperscript{39} Additionally, the ECCC follows Cambodian procedural rules.\textsuperscript{40}

Structurally, the ECCC consists of three Chambers: the Pre-Trial Chamber, the Trial Chamber, and the Supreme Court Chamber.\textsuperscript{41} In the Pre-Trial Chamber, three Cambodian and two international judges hear motions and appeals from parties as an investigation is being conducted by the Co-Investigating Judges.\textsuperscript{42} Decisions require an affirmative vote of four out of

\textsuperscript{37} Id. at Art. 1.
\textsuperscript{38} Cohen, supra note 32, at 28.
\textsuperscript{39} Id. at 27-28.
\textsuperscript{40} Id. at 29.
\textsuperscript{42} Id.
the five judges.\textsuperscript{43} After the investigation period, if the case goes to trial, it will be heard by the Trial Chamber, which also consists of three Cambodian and two international judges and requires a vote of four of the five to find a defendant guilty.\textsuperscript{44} Appeals of judgments rendered by the Trial Chamber go to the Supreme Court Chamber, which consists of four Cambodian and three international judges, and requires decisions to be taken by five out of the seven judges.\textsuperscript{45}

There are two Co-Investigating Judges for each ECCC case, one Cambodian and one international; they conduct preliminary investigations into matters submitted to them by the Co-Prosecutors.\textsuperscript{46} Depending on the results of their investigation, the Co-Investigating Judges will either file an indictment and send the matter to trial, or dismiss the matter altogether.\textsuperscript{47} The Co-Prosecutors, one Cambodian and one international, head the Office of the Co-Prosecutors, which employs both Cambodian and international staff.\textsuperscript{48} They remain independent of the ECCC and conduct preliminary investigations, submit cases to the Co-Investigating Judges, and prosecute the cases at all levels of the ECCC.\textsuperscript{49}

\textbf{Victim Participation in the ECCC}

The ECCC strongly emphasizes victim participation, and in so doing, highlights the importance of the tribunal as a transitional justice mechanism for the Cambodian people who suffered at the hands of the Khmer Rouge. The Internal Rules of the ECCC established a Victims Support Section to help victims bring complaints to the ECCC, join as civil parties to a case, and keep victims informed about all pertinent matters related to the tribunal.\textsuperscript{50} The ECCC allows any victim of the Khmer Rouge to submit a complaint to the Co-Prosecutors for further investigation.\textsuperscript{51} In addition, if the Co-Prosecutors decide to submit the complaint to the Co-

\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{47} Id.
\textsuperscript{49} Id.
\textsuperscript{51} Bair, \textit{supra} note 28, at 521.
Investigating Judges, other victims who suffered from the crimes alleged in the complaint may petition the Co-Investigating Judges to join the case as civil parties.\(^\text{52}\) As civil parties, victims play an active role in “supporting the prosecution.”\(^\text{53}\) Generally, the rules allow them to offer evidence, be called as witnesses, call their own witnesses, review case files, and even interrogate the accused directly.\(^\text{54}\) However, recent rulings have limited what civil parties may say and what evidence they may submit at pre-trial proceedings themselves, placing more emphasis on the direct participation of lawyers rather than of victims.\(^\text{55}\)

### V. Reactions to the ECCC and the Proceedings

The response to the ECCC from Cambodians and international observers has been mixed. Tribunals that retroactively seek to hold alleged abusers accountable for past acts are subject to rule of law critiques. The international law principle *nullum crimen sine lege* (no crime without law) stands for the proposition that if no law existed at the time the crime was committed, perpetrators of those crimes lacked notice that their acts were criminal, and thus, cannot stand trial for the acts at a later date. Any court attempting to do so, the argument goes, lacks legitimacy unless it can be shown that the acts violated either domestic laws or international customary laws in existence at the time. Indeed, the four most recent defendants at the ECCC have argued that they did nothing wrong and that the ECCC lacks legitimacy.\(^\text{56}\)

In this situation, the hybrid nature of the ECCC helps achieve accountability, because as noted, it includes domestic laws that were codified prior to the Khmer Rouge, and international laws that were widely accepted by the mid-1970s. The ECCC has said that crimes charged at the tribunal must have existed in national law, international law, or customary law at the time of the alleged violation.\(^\text{57}\) Though defendants have challenged the ability of the ECCC to try them for certain crimes based on the *nullum crimen sine lege* principle, the Pre-Trial Chamber has held

\(^{52}\) *Id.*  
\(^{53}\) *Id.* at 526.  
\(^{54}\) *Id.* at 526-29.  
\(^{55}\) *Id.* at 548-50.  
that the crimes of genocide and crimes against humanity were part of customary international law by 1975, and that Cambodia was bound by the Geneva Conventions, to which it was a party at the time, not to commit grave breaches of that Convention.\textsuperscript{58} Thus, these crimes existed and bound Cambodia in the mid-1970s, and attempts to dismiss charges based on the \textit{nullum crimen sine lege} principle have failed.

Debate continues about the timing and scope of the trials. Leading human rights advocates argue that the trials are long overdue, that perpetrators of grievous abuses remain free, and that the Cambodian government and prime minister have been obstructing the work of the ECCC.\textsuperscript{59} Furthermore, the issue of who to prosecute and how many trials to conduct remains contentious. As noted, the current Prime Minister, Hun Sen, formerly worked as a Khmer Rouge officer, as did many of his current political allies.\textsuperscript{60} Hun Sen has argued against increasing the scope of the trials, claiming that expanding its work could lead to a civil war.\textsuperscript{61} He also has opposed additional trials at the ECCC.\textsuperscript{62} Hun Sen’s commitment to the ECCC has been called into question, with observers claiming that the prime minister and his government are exerting pressure over the Cambodian members of the ECCC to push for an end to the investigations from within the tribunal.\textsuperscript{63} Indeed, the structure of the tribunal in some respects limits the prosecutorial discretion of the Co-Prosecutors, as they must submit cases to the Co-Investigating Judges, who themselves determine whether or not the evidence supports an indictment of the subjects of the initial complaint.\textsuperscript{64}

The participation of victims continues to be a controversial topic. Critics have argued that the large number of Khmer Rouge victims will create delays and backlogs at the ECCC, undercut procedural fairness, and reduce the ability of the body to investigate and prosecute in a timely manner.\textsuperscript{65} Others have applauded the inclusive efforts of the ECCC, arguing that to shut out the

\textsuperscript{58} Id. at paras. 244-58.
\textsuperscript{59} Human Rights Watch, \textit{supra} note 19.
\textsuperscript{61} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Bair, \textit{supra} note 28, at 520-21.
\textsuperscript{65} Id. at 520-23.
large number of victims would undermine the ECCC’s work and role as a transitional justice mechanism.\textsuperscript{66} They point to the Victims Support Section and the potential for combining the complaints of victims in cases resembling class actions.\textsuperscript{67} Proponents also note that increased participation of victims “ensures greater access to evidence and enhances the legitimacy of the court.”\textsuperscript{68} They contend that bringing victims into the process allows them to communicate their personal stories, thereby helping them cope with the events of the past and move forward, increasing the visibility of the ECCC proceedings, and encouraging other victims to come forward.\textsuperscript{69}

In addition to these issues of scope, structure, and participation, concerns over the costs of the ECCC and its work continue. Over the last five years the tribunal has cost $100 million.\textsuperscript{70} That figure is expected to rise to $150 million by the end of the year.\textsuperscript{71} Despite the high cost, the ECCC has held and completed just one trial and returned one conviction in that case.\textsuperscript{72} It is currently trying its second case against four defendants.\textsuperscript{73}

\textbf{VI. Conclusion}

In response to a 2009 study asking Cambodians if they thought the work of the ECCC would bring about justice and reconciliation, 75 percent of respondents thought that it would.\textsuperscript{74} However, 87 percent of respondents who lived during the years of the Khmer Rouge’s rule thought that the proceedings would bring back “painful memories.”\textsuperscript{75} Indeed, the same study found that of the 813 adults over the age of 35 surveyed, 14 percent “suffered from ‘probable post traumatic stress disorder.’”\textsuperscript{76} These figures highlight just how important the ECCC’s work remains to Cambodians, despite the great pain and difficulty that comes with revisiting the past

\textsuperscript{66} Id.
\textsuperscript{67} Id. at 523.
\textsuperscript{68} Id. at 551-52.
\textsuperscript{69} Id. at 547-49.
\textsuperscript{71} Mydans, supra note 60.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
abuses of the Khmer Rouge. They suggest that the ongoing work of the ECCC offers hope for Cambodians eager to confront the crimes committed during the late 1970s, hold the perpetrators of the crimes accountable, and move forward toward a brighter future.

Governments, international organizations, observers, commentators, and scholars all continue to assess the advantages and disadvantages of the tribunal. Its setup, cost, and mandate have all been criticized. With the second trial underway, much remains to observe, and a public debate about whether to continue the trials after a verdict is rendered will likely occur. But domestic and international actors involved in the trials should listen to the voices of the Cambodian people when that time comes. For, in many respects, the ECCC is their transitional justice mechanism. They suffered enormous pain as a result of the Khmer Rouge and by all accounts they continue to suffer. To help ease that pain, the Cambodian government and the United Nations established a court to hold the Khmer Rouge leaders responsible for their heinous crimes against the Cambodian people. Its work should continue until the Cambodian people decide the time has come to move on.