

Reconciliation v. Accountability: The Extraordinary Chambers in the Courts of Cambodia

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1. Introduction

Following the International Co-Prosecutor's request that an investigation into seven additional suspects be opened before the Extraordinary Chambers in the Courts of Cambodia ('ECCC'),¹ the Cambodian Government declared these efforts to be destabilizing, likely to incite civil war and therefore "not ... allowed".² In reality, the Khmer Rouge – deposed in early 1979 by Vietnamese forces, although retaining control over portions of the country and engaged in on-going fighting until the 1990s – was politically and militarily a spent force by the time of the ECCC's creation.³ In the specific Cambodian context, this rhetoric does little beyond demonstrating the depth of official Cambodian opposition to the expansion

of the ECCC's docket beyond its first two cases.⁴ While internationalized criminal proceedings in response to Khmer Rouge atrocities posed no credible threat to peace and stability in Cambodia, the ECCC's broader impact on reconciliation and its efficacy as a mechanism of international criminal justice has received more critical scrutiny.

2. Criticisms of the ECCC

The ECCC's critics allege that its combination of defective design and disappointing outcomes are such that the UN should withdraw its support to the ECCC altogether.⁵ Certainly, it is not a model to be emulated in the future.⁶ Even if it has not threatened national stability, has the ECCC undermined efforts at international prosecution, especially in the emerging and significant area of hybrid (that is, mixed national and international) justice?

Undoubtedly, some of the criticisms of the ECCC are substantial and contain important lessons, including for future attempts at institutional design. The ECCC's two halves (international and Cambodian) resulted in parallel administrative structures, accentuating divisions between national and international personnel and creating unnecessary duplication and cost. Cambodian judges

¹ Following an official request for assistance from Cambodia, the United Nations ('UN') and the Royal Government of Cambodia signed an Agreement on 6 June 2003 which envisaged the trial of senior leaders and others most responsible for the crimes committed in Democratic Kampuchea between 17 April 1975 and 6 January 1979 ('ECCC Agreement'). The ECCC was established under Cambodian law following the promulgation of the 'Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea' ('ECCC Law') on 27 October 2004. The ECCC became operational in 2007.

² James O'Toole, "Hun Sen to Ban Ki-moon: Case 002 Last Trial at ECCC", *Phnom Penh Post*, 27 October 2010, available at www.phnompenhpost.com/national/hun-sen-ban-ki-moon-case-002-last-trial-ECCC, last accessed at 13 May 2015; Kuch Naren, "Hun Sen Warns of Civil War if ECCC Goes Beyond 'Limit'", *Cambodia Daily*, 27 February 2015, available at: <https://www.cambodiadaily.com/news/hun-sen-warns-of-civil-war-if-eccc-goes-beyond-limit-78757/>, last accessed at 13 May 2015.

³ Although the Khmer Rouge still controlled parts of the country when they were signed, the 1991 Paris Peace Accords offered a comprehensive political settlement aimed at ending the tragic conflict and continuing bloodshed in Cambodia. The Khmer Rouge finally surrendered in 1999, by which time all of its leaders had either defected to the Royal Government of Cambodia, been arrested, or had died.

⁴ The ECCC's first two cases, against Kaing Guek Eav ('Case 001') and four surviving senior leaders of the Khmer Rouge regime (Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith) ('Case 002') were not substantially opposed by the Cambodian Government.

⁵ See, for example, Open Society Justice Initiative Press Release, "UN Must Reconsider Commitment to Khmer Rouge Court", 21 March 2012, available at <http://www.opensocietyfoundations.org/press-releases/un-must-reconsider-commitment-khmer-rouge-court>, last accessed at 13 May 2015.

⁶ See, for example, <http://edition.cnn.com/2014/08/06/world/asia/cambodia-khmer-rouge-verdict-explainer/> ("an emerging consensus among legal analysts [is] that this model should not be replicated elsewhere due to these inefficiencies").

possess numerical superiority at all levels of the ECCC's hierarchy, inviting concerns that shortcomings within the national judiciary would be imported into the court, and that the ECCC would in practice be unable to withstand any attempts at political interference in its work. The safeguard against this in the ECCC's legal framework (the supermajority formulation) – useful as a diplomatic means of unblocking deadlocked negotiations leading to the creation of the ECCC – was a less suitable basis for the functioning of a criminal court.⁷ These difficulties hamstrung the ECCC in only a small number of instances;⁸ for the most part the court functioned normally, producing hundreds of interlocutory decisions and two first-instance verdicts.⁹ The ECCC's biannual budget, at around USD 35 million, is also substantially smaller than those of the *ad hoc* tribunals and the ICC, although it vastly exceeds the resources available to the Cambodian national judicial system.

3. The ECCC and National Reconciliation

While assessment of the full impact of these trials must await their conclusion, the ECCC has contributed positively to reconciliation in Cambodia.

3.1. Accountability for Serious International Crimes

Approximately a third of the Cambodian population are thought to have perished under the Khmer Rouge. Cambodia's economy, infrastructure and social fabric were also decimated, from which the country has yet to fully recover. An internationalized justice response was considered necessary in light of the Khmer Rouge era's overwhelming victimization and the lack of national capacity in its aftermath. Without international assistance, no official assessment of the culpability of the Khmer

Rouge leadership for the deaths of almost two million people would likely have occurred.¹⁰ It was the unacceptability of impunity for crimes of this magnitude that drove UN involvement in Cambodia from the beginning, and that made withdrawal psychologically and practically untenable once the ECCC had become operational, particularly as Case 002 (its core case against the surviving senior leadership of the Khmer Rouge regime) gained momentum and neared its conclusion.¹¹

When the ECCC's first trial commenced, almost 40 years later, a significant number of survivors still lacked information regarding the fate of their relatives, or reliable historical information about the nature of the Khmer Rouge regime. The effects of trauma on survivors, passage of time and lack of educational materials available in Cambodia regarding the Khmer Rouge also risked a culture of revisionism or denial emerging in relation to these events. Various systemic weaknesses in the Cambodian judiciary dating from this period have proved enduring and a widespread culture of impunity persists in Cambodia to this day. Given low public confidence in the judiciary and weak adherence to the rule of law, the impact of a highly-visible trial in-country of the senior leadership of the Khmer Rouge regime, and accountability (even if largely symbolic) for their crimes, was considerable.

3.2. Capacity-Development and Mentorship

The ECCC provides a tangible example of criminal trials that reflect Cambodian procedural requirements and embody international due process norms. The ECCC is probably the most intensive scheme of peer-to-peer judi-

⁷ Before the ECCC, decisions must be made by a supermajority – that is, majority vote plus one (Article 7, ECCC Agreement and Articles 14, 20 and 23, ECCC Law, see *supra* note 1). Intended to ensure that judicial decisions would require the assent of at least one international judge, the impact on the trial of a majority decision that has not obtained the required supermajority was often unclear.

⁸ While not numerous, these instances nonetheless proved costly to the reputation of the ECCC. The most prominent example concerns additional investigations beyond Cases 001 and 002. In the face of opposition to these investigations, the so-called Cases 003 and 004 are effectively being driven by the international side of the court alone (see *supra* notes 2 and 4).

⁹ ECCC Trial Chamber, Case 001 Judgment, 26 July 2010, E188 ('Case 001 Trial Judgment') and ECCC Trial Chamber, Case 002/01 Judgment, 7 August 2014, E313 ('Case 002/01 Trial Judgment'). Case 001 is now final, following the Supreme Court Chamber judgment on appeal (ECCC Supreme Court Chamber, Case 001 Appeal Judgment, 3 February 2012, F28). Case 002/01 – adjudicating the first phase of Case 002 – is currently under appeal. The second phase of Case 002 is ongoing before the ECCC Trial Chamber.

¹⁰ See Letter dated 21 June 1997 from Cambodia, UN Doc. A/51/930-S/1997/288, 24 June 1997) (requesting the assistance of the UN to investigate and prosecute the crimes committed during the Khmer Rouge regime, on grounds that Cambodia lacked the resources or expertise to carry out such trials).

¹¹ Criticisms of the ECCC's structure and the UN's continued support to the court once it became operational therefore confuse the nature of the choices on offer. The options confronting the UN from the outset were never between the ECCC in its present configuration and a more optimal structure. In reality, the choice was between the ECCC as it emerged and no internationalized justice response whatsoever. The ECCC is also an example of the increasingly complex interactions between international justice initiatives and civil society. One impact of frequent criticism of the ECCC by prominent civil society organizations was to render fundraising efforts on its behalf immeasurably more difficult, and the viability of the ECCC was frequently threatened on financial grounds. The practical impact of a collapse of the ECCC – given the age, physical frailty of the accused and protracted original negotiations leading to its creation – would have been impunity for Khmer Rouge era crimes; a consequence unintended by the ECCC's critics and thus an uncomfortable situation for NGOs more usually affiliated with efforts to ensure accountability.

cial mentorship attempted in Cambodia to date.¹² It bears emphasizing that a case of this size and complexity would have sorely tested any legal system. It is unsurprising that the Cambodian judiciary, severely weakened by the impact of Khmer Rouge-era atrocities, struggled to meet its demands.¹³ Despite this, the hearing of evidence before the Trial Chamber in Case 002/01 concluded within 18 months and the ECCC case law makes a substantial contribution to the *corpus* of international criminal jurisprudence.¹⁴ Its potential impact on domestic Cambodian law and practice is also considerable.¹⁵

3.3. Victim Participation and Outreach

There is a tendency to burden international criminal proceedings with a number of ambitious extraneous goals, many of which cannot readily be achieved by criminal trials. Despite being enthusiastically promoted as an innovative means of empowerment and restorative justice,¹⁶ the ambitious system of victim participation initially adopted by the ECCC is arguably an example of this type of overreach. Experience in Case 001 forced a radical retrenchment of this scheme, in the interests of safeguarding the ECCC's ability to render any timely verdict in its second, core case.¹⁷ While these reforms

successfully neutralized the trial management impact of victim participation over the course of Case 002,¹⁸ critical questions remain as to the overall impact of these measures on a tribunal already overburdened with insuperable trial management and financial challenges, and as to their efficacy in meeting the core objectives of the victims of Khmer Rouge era crimes themselves. Victims nonetheless played a visible and important role before the ECCC, and its location in-country rendered its proceedings readily accessible to the general public. An outreach programme which transported villagers from all over the country to Phnom Penh to observe the trials was popular and the public gallery on most courtroom days was full. ECCC proceedings were also broadcast country-wide on Cambodian television and radio, and discussions about the trial and the broader impact of the Khmer Rouge era were frequent in the media and throughout the country.

3.4. A Catalyst for Other, Complementary Initiatives

The ECCC also contributed to national reconciliation through its catalysing effect on other, complementary processes. Its trials gave impetus to the creation of a history curriculum for Cambodian schools, which for the first time taught key facts about the nature of the Khmer Rouge regime and its rise to power.¹⁹ Emerging largely from the ECCC's inability to adequately encapsulate allegations of sexual violence, the Cambodian Women's Hearing on Sexual Violence under the Khmer Rouge was a further initiative outside the formal processes of the ECCC that did much to empower and provide support to victims of the Khmer Rouge, and to educate the public.²⁰

tims admitted to participate in proceedings, enabling them to receive all documents at trial, summon witnesses, to be heard in court, and to seek reparations against the accused; see Case 001 Trial Judgment, paras. 635–675, *supra* note 9.

¹² See Case 002/01 Trial Judgement, paras. 1109–1164, *supra* note 9.

¹³ See http://www.dccam.org/Projects/Genocide/Genocide_Education.htm (noting that little information regarding the Khmer Rouge era was in the Cambodian school curriculum before 2009 and describing efforts by DC-Cam, a prominent Cambodian NGO, to provide educational materials on the Khmer Rouge to assist the Ministry of Education teach the regime's history), last accessed at 15 May 2015.

¹⁴ Organized by civil society in Phnom Penh in 2011, this hearing brought survivors together to hear testimonies about sexual violence under the Khmer Rouge, encouraging them to speak out and demand an end to the culture of impunity in Cambodia. It identified trafficking, forced prostitution and rape, which remain prevalent in Cambodia, as legacies of the Khmer Rouge era ("Women victims of Khmer Rouge demand transparency", available at <http://gbvkr.org/wp-content/uploads/2013/08/Women-victims-of-Khmer-Rouge-demand-transparency-Women-Network-News-16-Dec-2011.pdf>, last accessed at 15 May 2015).

¹⁵ Many countries have provided support to the Cambodian judiciary through training and other forms of direct bilateral assistance. A comparative survey measuring the impact of the ECCC against other forms of assistance to the Cambodian court system may provide invaluable guidance to policy-makers and donors in this area.

¹⁶ The conduct of these proceedings confronted additional significant challenges, due mainly to financial shortfalls and the advanced age and physical frailty of the four Case 002 accused.

¹⁷ This is particularly so regarding, amongst other things, the content and application of international criminal and humanitarian law in the early 1970s, the impact of amnesties and statutory limitations in relation to serious international crimes, and relevant standards to determine the fitness to stand trial of elderly accused.

¹⁸ Cambodia lacks a tradition of publishing judicial decisions, whereas all ECCC decisions are available online and in Khmer. Many ECCC decisions provide valuable sources of interpretation of key provisions of Cambodian law, as well as guidance on many fundamental rights whose application before Cambodian domestic courts has frequently been found wanting.

¹⁹ See, for example, Sarah Thomas and Terith Chy, "Including the Survivors in the Tribunal Process", in John D. Ciorciari and Anne Heindel (eds.), *On Trial: The Khmer Rouge Accountability Process*, Documentation Centre of Cambodia, Phnom Penh, 2009, p. 155 ("With a groundbreaking scheme for survivor participation – stretching far beyond that of the [ICC] – the [...] ECCC have the potential to succeed where other tribunals have failed"); see also Mahdev Mohan *et al.*, "Victims' Right to Remedy: Awarding Meaningful Reparations at the ECCC", Asian Business and Rule of Law Initiative, 2011 (describing the ECCC's reparations scheme as having "the potential to be the Court's most remarkable contribution to Cambodian victims and society, and the development of international law").

²⁰ This scheme initially granted individual party status to all vic-

While these initiatives were independent of the ECCC and could have occurred without it, in practice the ECCC provided vital impetus to many initiatives addressing the overall consequences of the Khmer Rouge era, and has contributed to the larger national conversation about its contribution and legacy.

4. Conclusion

While the ECCC did not always proceed as optimally as hoped, it probably went as well as could have been expected given the constraints within which it operated. If its critics appear unduly surprised at the very weaknesses that led to the ECCC's creation in the first place,²¹ the UN also arguably misjudged both its degree of influence in-country and the reputational costs of engagement.²² This pattern is unlikely to be unique as the international community continues to seek more cost-effective and localized approaches to accountability for core international crimes.

²¹ See, for example, ECCC Trial Chamber, "Decision on Ieng Sary's Application to Disqualify Judge Nil Nonn and Related Requests", 28 January 2011, E5/3, paras. 13–16 (finding no basis to conclude that Judge Nil Nonn was unable to carry out his duties in Case 002 fairly and impartially, on grounds that the motion alleged only "various systemic weaknesses which have been observed within the Cambodian judiciary dating from the [Khmer Rouge era], many of which have proved enduring. These weaknesses were well known at the time of the ECCC's creation and were among the reasons for its establishment in the first place". The Chamber nonetheless emphasized "the importance of a genuine commitment on the part of Cambodia to further develop judicial capacity and thereby fully restore public confidence in the judiciary and strengthen the rule of law".)

²² See, for example, John D. Ciorciari, "UN Credibility on Trial in Cambodia", available at <http://yaleglobal.yale.edu/content/un-credibility-trial-cambodia>, last accessed at 15 May 2015 (arguing that "Cambodia's Hun Sen embraced [a hybrid court] as a means to attract international aid and a stamp of legitimacy without losing control over the process" and that the UN "faces a credibility test [... which] may undercut [its] capacity to enforce standards on other ventures as well").

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