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## **Transitional Justice in Cambodia: The Coincidence of Power and Principle**

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### **ABSTRACT:**

*More than thirty years after the Khmer Rouge was responsible for the deaths of over one and a half million people, and after two amnesties for Khmer Rouge crimes were enacted in Cambodia, the Extraordinary Chambers in the Courts of Cambodia (ECCC) has been established, ostensibly to help heal the trauma of victims of Khmer Rouge atrocities and bring about justice. This chapter outlines the key features of the ECCC and assesses its successes and failures according to its own mandate. It goes on, however, to argue that accepting the restricted mandate of the court is a mistake, as it prevents a full discussion of accountability in Cambodia. I argue that the establishment of the ECCC represents less a victory for victims or for advocates of transitional justice than it is a reflection of the interests of the Cambodian government and those international actors who collaborated with a series of repressive regimes in Cambodia, including the current Hun Sen regime. By agreeing to a limited regime of transitional justice, the government has diverted diplomatic and donor attention away from allegations of corruption and human rights abuses in the present, towards its role as 'saviour of the nation' in the past. The international community is keen (now) to promote justice in Cambodia, and has significant resources available with which to incentivise or coerce domestic actors to allow a fair and independent court, but seems unwilling to use them. Unfortunately, international principle has coincided with domestic power in a way that does little for the victims of atrocities in whose name the ECCC was established.*

### **Overview of the conflict**

Between April 17<sup>th</sup> 1975 and January 6<sup>th</sup> 1979, around one quarter of the population of Cambodia died at the hands of the Party of Democratic Kampuchea (also referred to as the Communist Party of Kampuchea, or the Khmer Rouge (KR)). The catalogue of atrocity during the period of Democratic Kampuchea (the period during which the

KR held power) is extensive. When the KR succeeded in their coup in April 1975, they declared a new start for the country – the calendar was reset to Year Zero, and the regime began to establish what it claimed to be a communist agrarian utopia. The results of this utopia were deadly. Somewhere between 1.6 and 1.9 million people died, most of them through the starvation, disease and exhaustion which were either KR policy or foreseeable consequences of it.<sup>1</sup> Up to 400,000 were tortured to death at a series of prisons set up around the country, or executed in purges.<sup>2</sup> Ethnic and racial minorities, religious leaders, professionals, educated people, government officials and people with contacts abroad were targeted in particular. 100% of the Vietnamese in the country were murdered, 50% of those of Chinese descent, 40% of the Thai and Lao and 36% of the Cham. All but 43 doctors were killed and all but 7 lawyers, along with 18,000 teachers and 10,550 students.<sup>3</sup> But as well as the loss of such a high proportion of the Cambodian population, Cambodian society was also all but destroyed. Cities were evacuated and people forced to work under armed guard on collective agricultural projects with little food and no medical care. Children were used as prison guards and spies and forced or encouraged to commit acts of appalling violence. Money was abolished, schools closed and Buddhism suppressed. An offence of ‘familyism’ was devised to punish people who showed attachments to anything other than Angka (‘the organisation’, i.e. the KR party) and marriages were forced. Angka controlled all aspects of people’s lives, and condemned many of them to death.<sup>4</sup>

The regime was finally overthrown on 7<sup>th</sup> January 1979 when Vietnam intervened (with Soviet backing), captured Phnom Penh and installed the People’s Republic of Kampuchea (PRK) government. The PRK was staffed for the most part by ex-Khmer Rouge cadres who had fled to Vietnam during the purges, and included Hun Sen – now Prime Minister of Cambodia – as Foreign Affairs Minister of the regime. The KR were driven into refugee camps along the border with Thailand, from which they

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<sup>1</sup> Ben Kiernan, ‘The Demography of Genocide in Southeast Asia’, *Critical Asian Studies*, Vol. 35, No. 4 (2003), pp. 585-597

<sup>2</sup> David Chandler, *A History of Cambodia* (Boulder Colorado: Westview Publishers, 2008) p.259.

<sup>3</sup> Tom Fawthrop & Helen Jarvis ‘Getting Away with Genocide’ (London: Pluto, 2004) pp.14-15

<sup>4</sup> Chandler, *A History of Cambodia* and Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79* (New Haven: Yale University Press, 2008) give scholarly accounts of the KR regime. Nick Dunlop, *The Lost Executioner* (London: Bloomsbury, 2005) and Haing Ngor, *Survival in the Killing Fields* (London: Robinson, 1987) are journalistic accounts.

maintained significant influence in Cambodian politics until KR leader Pol Pot's death in 1998.

The damage done to Cambodian people and their society during the period of Democratic Kampuchea was deep, long-lasting and perhaps impossible to ever remedy. Yet very little has been done to attempt to hold perpetrators accountable for their actions in the period until recently. The PRK regime held the People's Revolutionary Tribunal in 1979 which, after five days of hearings, found Pol Pot and his foreign minister Ieng Sary guilty in absentia of genocide and sentenced them to death. The Tribunal was the first ever legal body to try or convict suspects for the crime of genocide, and did attempt to bring some form of justice to victims of the prior regime, though it was widely regarded in the West as a show trial organised by Vietnam's puppet government. Between 1979 and 1997 no further trials were held and instead amnesties were issued first in 1994 to members but not leaders of the KR and second in 1996 to Ieng Sary, former deputy Prime Minister of the KR government. Only in 1997, 18 years after the fall of the KR regime and four years after the 1993 elections which mark Cambodia's transition to some form of democracy, did the co-Prime Ministers of Cambodia request help from the United Nations (UN) to set up a tribunal to try KR leaders. Lengthy negotiations followed, and it was not until March 2003 that the international community and the Cambodian government agreed a way to try those who are alleged to have committed the greatest crimes in the KR period. The Extraordinary Chambers in the Courts of Cambodia (ECCC) were set up to try '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.'<sup>5</sup> In this chapter I will first set out the key features of the ECCC, then document the successes and failures of the court, before broadening the analysis beyond the limited mandate of the court to look at the political context of efforts to bring justice in Cambodia, the actors and interests involved and the implications of the Cambodian case for recent accounts of the effects of trials on human rights and democracy. The Cambodian case is a particularly rich one in the context of the three debates outlined

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<sup>5</sup> Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006)

in the Introduction to this volume, given that efforts to bring peace (through amnesty or pardon) were replaced, once peace was established, by efforts to bring justice (through trials), and those trials have both retributive and restorative elements. There is also a tension between top-down control (through the UN and the Cambodian government) and bottom-up influence through newly formed human rights NGOs who campaign for and around the trials.

### **Key features of the ECCC**

The ECCC is a genuinely hybrid court – the first of its kind – in which domestic and international actors, money and procedures co-exist (and often clash). In many ways it can be seen as an improvement upon past international and hybrid tribunals. The Chambers are a part of the Cambodian court system rather than a stand-alone tribunal, and are located in a military compound outside Phnom Penh – close to where many of the crimes took place – instead of thousands of miles away (as is the case with the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda). Unlike the Special Court for Sierra Leone, the domestic judges at the ECCC are in the majority in each Chamber (three of five in the Pre-Trial and Trial Chambers and four of seven in the Appeals Chamber). But a balance has been struck between domestic and international influence: judges must reach a ‘super majority’ (or ‘majority plus one’) judgement on any positive decision, meaning it is not possible for the domestic judges alone to override concerns of the international judges or vice versa. The other organs of the court are also divided along domestic-international/UN lines. There are two Co-Prosecutors (one Cambodian and one international), two Co-Investigating Judges, and two Civil Party Lead co-Lawyers. Most major administrative functions of the court (for instance the Budget and Finance, Personnel and Security and Safety sections) also have co-heads. Importantly for public coverage of, and involvement in, the court, and in contrast to other war crimes trials, much of the business in trials is conducted in the domestic language (Khmer), and a Khmer translation of all proceedings is broadcast into the public gallery.

The funding for the ECCC is also hybrid, with the budget being split into national and international components. The national component for 2011 is \$9.9m, and the

international component \$30.8m.<sup>6</sup> Both components are funded by voluntary contributions, with the shares from main donors up to August 2011 being: Japan 47%; Australia 10%; Germany 6%; US 5%; France 5%.<sup>7</sup> The major donors to the national component are Japan, the UN Trust Fund and the European Union, alongside the Cambodian government, which has paid around \$5.12m into the budget as well as providing the premises for the court and paying for the detention of suspects (claimed to be an in-kind contribution of \$8.2m, making the funds contributed by Cambodia overall second only to those contributed by Japan).

Finally, the law applied by the ECCC is hybrid – mostly Cambodian and therefore mostly civil, with some elements of international criminal law used when Cambodian law does not provide sufficient guidance on an issue, and some common law practice used by judges who find it hard to learn the civil law system. The civil law system means not just that Co-Investigating Judges rather than an Office of the Prosecutor conduct investigations for cases, but also that many more people may be parties to the case than under common law systems. Anyone with a prima facie reason to be classified as a victim can be represented in cases as a Civil Party. The ECCC is the first of the international and hybrid tribunals to allow victims of alleged crimes to participate in this way.

### **Successes of the ECCC**

Perhaps the most significant and unexpected success of the ECCC is the fact that it is functioning at all. After years of negotiations, which were often at the verge of collapse, the ECCC has opened four cases. The court cannot, unfortunately, hold Pol Pot to account – he died in 1998, after having been tried by the leader of another KR faction, Ta Mok, for the murder of his second-in-command, Son Sen, and placed under house arrest in Thailand (ironic indeed that the only justice Pol Pot ever faced was from a member of his own regime – a regime which murdered almost all legal professionals in Cambodia while it held power). However, the accused persons being tried by the ECCC are of (for the most part) significant rank.

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<sup>6</sup> ECCC budget page: <http://www.eccc.gov.kh/en/tags/topic/68>

<sup>7</sup> Report: ‘Summary of Contributions To Date by Donors’ August 31 2011. Available at <http://www.eccc.gov.kh/en/about-eccc/finances/summary-contributions-date-donors-31-august-2011>

Case 001 is a single-accused case, which is now complete. After 72 days of evidence and the testimony of 24 witnesses, 9 experts and 22 Civil Parties, Kaing Guek Eav (alias Duch), the former Chairman of the Khmer Rouge S-21 Security Center in Phnom Penh (also known as Tuol Sleng) was found guilty by the Trial Chamber on 26<sup>th</sup> July 2010 of crimes against humanity (persecution on political grounds, under which extermination, imprisonment, torture and other inhumane acts were subsumed) and grave breaches of the Geneva Conventions (willful killing, torture and inhumane treatment, willfully causing great suffering or serious injury to body or health, willfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian). Around 17,000 people are estimated to have been tortured at S-21, with most of them being taken, after signing coerced confessions, to be murdered at the ‘killing fields’ of Choeung Ek.<sup>8</sup> Duch was sentenced to life imprisonment (increased by the Appeals Chamber from the 30 year sentence imposed by the Trial Chamber) and the trial is regarded as generally fair, having been conducted according to accepted standards of international due process.<sup>9</sup>

Case 002 is a more significant case, due to the status of its defendants. On 21<sup>st</sup> November 2011, the Trial Chamber began to hear evidence against: Nuon Chea, former Deputy Secretary of the Communist Party of Kampuchea; Ieng Sary, former Deputy Prime Minister for Foreign Affairs and Khieu Samphan, former Head of State.<sup>10</sup> The defendants are charged with crimes against humanity, grave breaches of the Geneva Conventions of 1949 and genocide under international law, and homicide, torture, and religious persecution within the meaning of the Cambodian Penal Code from 1956. This is the centrepiece trial of the ECCC, as the accused are alleged to be the most senior surviving leaders of Democratic Kampuchea.

Cases 003 and 004 are less progressed, and may not progress at all beyond their current state (for reasons explained below). In September 2009, the international Co-

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<sup>8</sup> The ECCC press release on the Duch verdict stated that “[a]lthough finding a minimum of 12,272 individuals to have been detained and executed at S-21 on the basis of prisoner lists, the Chamber indicated that the actual number of detainees is likely to have been considerably greater.” <http://www.eccc.gov.kh/en/articles/kaing-guek-eav-convicted-crimes-against-humanity-and-grave-breaches-geneva-conventions-1949>

<sup>9</sup> Michelle Staggs Kelsall et al, ‘Lessons Learned from the ‘Duch’ Trial’, Asian International Justice Initiative’s KRT Trial Monitoring Group, December 2009 p.6

<sup>10</sup> The fourth of the original defendants in Case 002, Ieng Thirith, former Minister of Social Affairs, has been declared unfit to stand trial at present due to her progressive degenerative Alzheimer’s disease.

Prosecutor requested the Co-Investigating Judges to initiate investigations of five additional suspects – the as-yet officially unidentified subjects of Cases 003 and 004. The accused are widely believed to be former KR military commanders Meas Muth and Sou Met (who are thought to be accused of murder, torture, unlawful detention, forced labour and persecution) in Case 003 and rumored to be KR Secretaries (district chiefs) ‘Me’ Im Chaem, ‘Ta’ An and ‘Ta’ Tith in Case 004.<sup>11</sup>

Beyond confounding expectations by actually staging trials, other important successes of the ECCC include allowing, for the first time in the history of international criminal justice, survivors to participate as Civil Parties. Though some victims feel that they are being asked to do too much (they are being given the responsibility for reconciling, when senior KR cadres are not prepared to admit they were wrong or to ask for forgiveness, and many are being shielded from prosecution instead of put in front of the court) there is a broad consensus that the inclusion of Civil Parties in war crimes trials such as this is a progressive move as it has the potential to make justice more victim-centred or restorative.<sup>12</sup>

Almost as significant as Civil Party participation is public access to the Duch trial. The ECCC has the largest public gallery of any war crimes tribunal, and 28,000 people observed some part of Case 001 (usually a maximum of half a day) – which court staff proudly cite as the largest ever attendance at any court case, anywhere in the world.<sup>13</sup> It’s not entirely clear if this is indicative of public interest – Robert Petit, the first international Prosecutor at the ECCC, noted that there were long queues to attend the first days of the Duch trial, but that attendance fell off after that, and the ECCC itself paid for the majority of the attendees to be bussed in for the trial.<sup>14</sup> However, the numbers of attendees to some extent speaks for itself – even if people

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<sup>11</sup> [http://www.soros.org/initiatives/justice/focus/international\\_justice/news/cambodia-eccc-20110429](http://www.soros.org/initiatives/justice/focus/international_justice/news/cambodia-eccc-20110429); <http://www.scribd.com/doc/52628662/Charged-Persons-of-Case-003-004-Named-in-PUBLIC-Documents-a-Compilation>; and <http://www.cambodiatribunal.org/images/CTM/pressreleaseeccc003-004may5.pdf>

<sup>12</sup> Interviews in ‘S-21 The Khmer Rouge Killing Machine’ film, directed by Pithy Pan, and interviews by the author in Cambodia March 2011.

<sup>13</sup> <http://www.eccc.gov.kh/en/articles/kaing-guek-eav-convicted-crimes-against-humanity-and-grave-breaches-geneva-conventions-1949> and interviews with senior court officials, March 2011. The total number of public visitors to the court since February 2009 has now exceeded 110,000: ‘ECCC Surpasses Milestone of 100,000 Visitors’ Press Release from ECCC January 4 2012

<sup>14</sup> Remarks made at event ‘The Khmer Rouge Tribunal and the Challenges of the Hybrid Model’, SOAS, London, June 17 2009.



did not see much of the trial or did not understand the technical argument or the context, they did still see Duch in the dock, which many found hard to believe after the KR enjoyed more than thirty years of impunity and a not inconsiderable amount of power within Cambodia. The Outreach office of the ECCC has learned from previous tribunals and invested a great deal in communicating the activities of the ECCC to the public, and international donors supported the production of a television show summarising and discussing developments in Case 001 ‘Duch on Trial’ which attracted up to three million viewers – 20% of the Cambodian population.<sup>15</sup>

Public interest in justice and the ECCC is commonly declared as a mark of success, and Cambodians have been regularly surveyed to find out their views on accountability and the court. However, the results do not tell a clear story. A nationwide survey of 1000 Cambodians published in 2009 showed that while 80% of respondents considered themselves to be victims of the KR, 85% had little or no knowledge of the ECCC (despite all five current detainees already being in custody at the ECCC at the time of the survey, and the Duch trial about to start).<sup>16</sup> The majority wanted to see those responsible for what happened during the KR regime held accountable (90%), to learn more about the KR period (85%) and to see the KR suffer (71%). Smaller majorities were in favour of the Cambodian government being in charge of the accountability process (58%) and of KR leaders and officials being held accountable (51% - versus 24% Pol Pot; 20% the KR regime as a whole; 11% the current five detainees; KR cadres and local officials 6%; foreign states who supported the KR 2%).<sup>17</sup> Trials (49%), punishment (23%) and imprisonment (12%) were far preferred to making those responsible speak the truth (5%), confess (5%), or apologise (2.5%).<sup>18</sup> Only 26% thought the ECCC likely to bring justice, but this has increased since the Duch trial, with 37% believing the ECCC would bring justice in a follow up survey in 2010.<sup>19</sup> 75% of Cambodians surveyed were aware of the ECCC in the 2010 survey, indicating success for the Outreach program, but 90% could still not name the five detainees.

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<sup>15</sup> Christopher Shay ‘Cambodia’s Trial of the Century, Televised’, *Time Magazine*, September 11<sup>th</sup> 2009.

<sup>16</sup> Human Rights Center, University of California Berkeley, ‘So We Will Never Forget’, January 2009. Available at: <http://www.law.berkeley.edu/HRCweb/pdfs/So-We-Will-Never-Forget.pdf>

<sup>17</sup> Human Rights Center, ‘So We Will Never Forget’, p.31

<sup>18</sup> Human Rights Center, ‘So We Will Never Forget’, p. 32

<sup>19</sup> Human Rights Center, University of California Berkeley, ‘After the First Trial’, June 2011.

A final likely success of the ECCC is the momentum it has helped to generate towards a broader societal debate. It is too early to know if it has or will deter future violence, but it has, it seems, enabled the violence of the past to be discussed more openly: the KR period is now (for the first time) a compulsory aspect of school curriculums.

### **Problems faced by ECCC**

The ECCC faces fundamental problems as an institution, and less over-whelming problems in its conduct of trials. The most difficult aspects of its operation are due to its hybrid structure. International staff are UN employees, with UN protection, UN paychecks and UN rights and responsibilities, which breeds resentment. Domestic staff have to rely on the largesse of the Cambodian government rather than the UN. The high level of Cambodian involvement at the court has led to a number of corruption allegations, with reports, for instance, of Cambodian staff having to pay parts of their salaries to government officials who gave them their jobs, or to Sean Visoth, ex administrative director of the ECCC.<sup>20</sup> A report by independent auditors in 2007 went as far as to recommend that because of the corruption in hiring practices at the tribunal, all Cambodian staff should be fired.<sup>21</sup> It is still accepted by many of the international staff that the majority of the Cambodian staff were appointed for their connections to government more than their qualifications for their jobs. The Cambodian judges are for the most part members of the Cambodian People's Party or otherwise connected to the Hun Sen regime. That said, it is also accepted that the domestic staff at the ECCC are often very good at their jobs – many have more senior roles in the domestic system (which they usually retain) but appreciate the salary and status benefits that a job at the ECCC offers.<sup>22</sup>

Aside from controlling the staff at the court, the government has other effects. For instance, the agreement between the UN and Cambodia specified that trials should take place in Phnom Penh, but the government preferred to locate the trials out of the centre – citing reasons of security for putting the court in a military compound 45 minutes' drive from the city. In order to square the location with the agreement, a

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<sup>20</sup> Elena Lesley, 'Court staffers confirm corruption at tribunal', *Phnom Penh Post*, February 27 2009.

<sup>21</sup> John Hall, 'Trial on Trial', *New York Times*, March 11 2009

<sup>22</sup> Interviews with senior court officials, March 2011

Royal Decree was passed to change the boundaries of Phnom Penh to include the part of Chaom Chau Commune in which the compound is found.<sup>23</sup> This has served to make the court less accessible to ordinary Cambodians (there are very rarely Cambodians present in the public gallery who are not funded to attend, or there as Civil Parties) and it may serve to intimidate witnesses who are reminded by the military insignia around the compound of the strength and capabilities of the government, but it is relatively benign compared to other examples of government interference.

The most invidious effect that the government has had has been to intimidate national staff at the ECCC, leading to an ‘unprecedented crisis of confidence [in the court] due to allegations of judicial misconduct’.<sup>24</sup> Prime Minister Hun Sen strongly opposes the international Co-Prosecutor’s determination to see the Co-Investigating Judges complete proper investigations of at least five more Khmer Rouge officials in Cases 003 and 004.<sup>25</sup> Hun Sen stated his views in April 2009: ‘I would prefer to see this court fail than for war to come back to Cambodia ... [t]hat is my absolute position ... just focus on these few people [i.e. the accused in Cases 001 and 002] ... I would pray for this court to run out of money and for the foreign judges and prosecutors to walk out. That would allow for Cambodia to finish the trial by itself’.<sup>26</sup> In September the same year he argued: ‘If you tried [more suspects] without taking national unification and peace into consideration, and if war occurred, killing between 200,000 and 300,000 people more, who would be responsible for it? ... I have achieved this work [peace]. I will not let anybody destroy it.’<sup>27</sup> And in October, he is reported to have told Ban Ki-Moon that the ECCC should shut down after Case 002.<sup>28</sup> The Prime Minister’s position on Cases 003 and 004 seems to have had significant effects on the domestic staff at the court and deep divisions have become apparent between domestic and international staff. In September 2009, international Co-Prosecutor at

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<sup>23</sup> See <http://www.eccc.gov.kh/en/articles/address-eccc-changed>

<sup>24</sup> Open Society Justice Initiative ‘Recent Developments at the ECCC’ November 2011 p.1

<sup>25</sup> Neth Pheaktra and Georgia Wilkins, ‘Judges should Focus on Current KR Suspects: Government’ *The Phnom Penh Post*, March 12 2008; Open Society Justice Initiative, ‘Political Interference at the Extraordinary Chambers in the Courts of Cambodia’, July 2010.

<sup>26</sup> Georgia Wilkins, ‘Government rejects charges of political manipulation at ECCC’, *The Phnom Penh Post*, May 29 2009.

<sup>27</sup> Ian MacKinnon, ‘Prosecutor wants to indict five more Khmer Rouge’, *Financial Times*, September 7 2009.

<sup>28</sup> Open Society Justice Initiative, ‘Recent Developments at the ECCC: December 2010 Update.’

the time, Robert Petit, requested that the Office of the Co-Investigating Judges opened investigations into five suspects not covered in cases 001 and 002. His national Co-Prosecutor, Chea Leang, objected to his request. The Pre Trial Chamber was asked to make a decision, but split national-international so could not reach a super majority. Failure to reach a decision meant that Internal Rule 71 (4) c applied, i.e. action proposed by the international Co-Prosecutor had to be executed. In 2010, Co-Investigating Judge Marcel Lemonde announced that he was moving forward with the investigations despite a lack of support from the national Co-Investigating Judge, You Bunleng, but You managed to block the investigation until Lemonde resigned. Some form of investigation was eventually conducted and the Co-Investigating Judges (with Lemonde now replaced by Siegfried Blunk) announced on 29<sup>th</sup> April 2011 that their investigation was concluded – without having interviewed the suspects or visited alleged crime sites. Andrew Cayley, the international Co-Prosecutor requested that the investigation be re-opened, and a day later Chea Leang, the Cambodian Co-Prosecutor, issued a statement recommending that Case 003 be closed without trial on the basis that the accused do not fall under the jurisdiction of the court.<sup>29</sup> On 7<sup>th</sup> June 2011 the Co-Investigating Judges rejected Cayley’s request that they continue to investigate Case 003 and later the same month a number of Blunk’s international staff resigned in protest at the premature closure of the Case 003 investigation. The crisis escalated further when Blunk resigned in October 2011, citing repeated statements by Cambodian government officials opposing Cases 003 and 004 which ‘will be perceived as attempted interference’.<sup>30</sup> Since then, Swiss Judge Laurent Kasper-Ansermet has been appointed by the UN, but the Cambodian government refuses to approve his appointment. The breakdown of national-international relations over Cases 003 and 004 is a grave threat to the court and the court has been condemned by NGOs and potential Civil Parties for seeming to bow to government pressure.<sup>31</sup>

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<sup>29</sup> The Cambodian public is also split over whether the court should try more than the current five detainees. A 2009 survey by the Documentation Center of Cambodia, found that 52% of the 1,100 people questioned supported further indictments. See ‘Indict No More’ *Voice of America*, March 25 2009 <http://www.voanews.com/khmer-english/news/a-40-2009-03-25-voa3-90171967.html>

<sup>30</sup> Press Release By the International Co-Investigating Judge October 10 2011.

<sup>31</sup> Sebastian Strangio ‘Limited liability for Khmer Rouge tribunal’ *Asia Times* May 12 2011, available at <http://www.sebastianstrangio.com/2011/05/12/limited-liability-for-khmer-rouge-tribunal/>. In November 2011 the Open Society Initiative began to call for the UN to establish an Independent Inquiry into ‘allegations of judicial misconduct, incompetence, and lack of judicial independence by the co-investigating judges’ (‘Recent Developments’ November 2011 p.2). There is no sign at present that the UN will heed this call.

The reputation the ECCC has for corruption and government tampering, and the inefficiency of the court in bringing the cases to trial has led to severe problems generating sufficient funds for the institution to continue its work. From July 2008 until the end of 2009, amid allegations of corruption, the UN Development Program froze funding from international donors to the Cambodian side of the budget, almost bankrupting the court and causing Cambodian staff to work for several months without pay.<sup>32</sup> In January 2012 the Cambodian budget was again exhausted as no new funds were pledged by donors, leaving around 300 Cambodian staff unlikely to be paid for their work in the first quarter of 2012, and with reports suggesting that Cambodian judges had not been paid since October 2011.<sup>33</sup> The court is not short of funds only because of donor reticence – it is also running substantially over budget. The court was initially expected to cost around \$60m in total, and have completed its work in three years.<sup>34</sup> Both of those figures have been exposed as significant underestimates. The total estimated expenditure for 2006-2011 is now \$150m and the ECCC website declares: ‘There is still an urgent need for funding in order to continue the work of the court. We are hoping to receive ongoing funding from donor countries as well as concerned organisations, companies, foundations and individuals.’<sup>35</sup>

There is no sense yet of whether the court will have enough money to continue even to the end of Case 002. There is also little sense of whether it should continue, given the many needs of Cambodian people. When asked in a 2008 survey what their priorities were, Cambodians’ listed jobs (83%), health (20%) and food (17%). They felt that the government should focus on the economy (56%) and building infrastructure (48%) more than justice (2%). 76% felt that the government should focus on contemporary problems rather than addressing crimes committed by the KR. 53% would rather spend money on something other than the ECCC.<sup>36</sup> Given the corruption at the court, its lack of efficiency and the low level of public support for spending so much money (despite a reasonably high appetite for accountability), it is hard to justify continuing to spend such large sums on such imperfect justice.

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<sup>32</sup> Interviews with senior court officials, March 2011.

<sup>33</sup> Bridget di Certo, ‘KRT pay freeze will linger’, *Phnom Penh Post*, January 30 2012.

<sup>34</sup> Peter Maguire, ‘Cambodia’s Troubled Tribunal’, *New York Times*, July 28 2010

<sup>35</sup> <http://www.eccc.gov.kh/en/faq/how-court-financed>

<sup>36</sup> Human Rights Center, ‘So We Will Never Forget’, p. 32

As well as facing significant structural problems, the court has faced problems connected to running trials. Case 001 ran relatively smoothly for months, assisted by the fact that the defendant, Duch, cooperated with the court, gave large amounts of information and expressed remorse at his actions.<sup>37</sup> However, on the final day of his trial, Duch announced that he should be released in the name of national reconciliation, as he was not one of the senior leaders of the KR, and could not therefore be one of those most responsible. This debate over the court's personal jurisdiction, i.e. over who counts as a senior leader of the KR or one of those most responsible (and whether by implication only senior leaders of the KR can be thought of as those most responsible) continues and is the main issue on which Duch's appeal was based. It is a loaded and divisive issue, as shown by the recent statement of the national Co-Prosecutor which states that defendants in Cases 003 and 004 fall outside the jurisdiction of the court.<sup>38</sup>

The role of victims has also presented challenges. The Victim Support Section of the ECCC and the Trial Chamber became overwhelmed by Civil Parties in Case 001 and the situation can only get more difficult to manage. In Case 001, the 90 people entitled to act as Civil Parties were divided into four groups, each with one Cambodian and one international lawyer, meaning that witnesses could be questioned by up to eight Civil Party lawyers, as well as lawyers for the prosecution and defence. More than 2000 people have applied for Civil Party status in Case 002, which has led to the court ordering that all Civil Parties coordinate their cases through two lead lawyers. This may be necessary for the efficient running of the case, but it also serves to deny Civil Parties control of their own representation, and reduce the restorative aspect of the justice offered.

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<sup>37</sup> Julia Wallace, 'The Eccentricity of Evil: A Khmer Rouge Leader Goes on Trial', *The Atlantic*, April 12 2011, available at: <http://www.theatlantic.com/international/archive/2011/04/the-eccentricity-of-evil-a-khmer-rouge-leader-goes-on-trial/237179/>

<sup>38</sup> Press Release: Statement from the National Co-Prosecutor regarding Case File 003, May 10, 2011, at <http://www.eccc.gov.kh/sites/default/files/media/5-Press%20release%20by%20the%20National%20Prosecutor-10%20May%202011-Eng.pdf>. The Appeals Chamber found in the Duch judgment that 'the term "senior leaders of Democratic Kampuchea and those who were most responsible" refers to two categories of Khmer Rouge officials which are not dichotomous ... Both categories are "suspects" subject to criminal prosecution before the ECCC.' Paragraph 9, Summary of Duch Appeals Judgment, available at: <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/03022012Summary-Eng.pdf>. This judgment is significant in that it leaves open the possibility of prosecuting those who were not 'senior leaders', e.g. the accused in Cases 03 and 04.

Civil Parties have also been deeply disappointed at the lack of imagination on the part of the Trial Chamber in awarding reparations. There is no provision for the ECCC to award reparations to individuals, but there is scope to award collective or ‘moral’ reparations. Many were suggested by Civil Parties in Case 001 – for instance naming public buildings on behalf of victims, funding victims’ visits to memorial sites, funding psychological and medical help for victims’ using some of the entrance money to the Tuol Sleng and Choeng Ek memorial sites and so on. However, the Trial Chamber found it outside its competence (for reasons which are unclear) to award any such reparations, and instead decided only to list the names of the Civil Parties in the final judgement. The Appeals Chamber clarified the position of the ECCC, but not in favour of the Civil Parties. It ruled that the Court had no jurisdiction to grant requests for reparation that would require the Cambodian authorities to act to provide the reparatory measures. It further ruled that the ECCC could only order reparations the costs of which were borne by the convicted person/s. In this case, Duch was found to be indigent, thus no reparations of any significance were awarded.<sup>39</sup>

Finally, a problem that did not emerge in Case 001, but is likely to slow down or even prevent the completion of Case 002 is the condition of the defendants. Ieng Sary is 85, Nuon Chea 84 and Khieu Samphan 79, and all have health problems. There is a genuine concern that one or more may not live to the end of the trial.

### **Assessing the ECCC**

None of the challenges faced by the ECCC are insurmountable and it has made some notable achievements. However, judging the success or failure of the court requires doing more than examining how the institution is performing according to its own mandate. For a transitional mechanism to be a success – for it to bring some sort of justice and some measure of reconciliation – it should identify and hold to account those most responsible for harms under the previous system. Yet, the ECCC works to offer impunity to the vast majority of those responsible for the destruction of Cambodia that started in the 1960s and whose effects are still felt now. To understand

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<sup>39</sup> Paragraphs 65-68 of Duch Appeal Judgment.

the challenges facing the ECCC, and judge its contribution to a Cambodian transition, the domestic and international political contexts of the KR regime, the negotiations to establish the ECCC and the contemporary operation of the court must be examined.

At the start of this chapter I noted that the KR regime was in place between 1975 and 1979. The Introduction to the ECCC page on the ECCC website confirms this story:

The Khmer Rouge regime took power on 17 April 1975 and was overthrown on 7 January 1979. Perhaps up to three million people perished during this period of 3 years, 8 months and 20 days. The end of Khmer Rouge period was followed by a civil war. That war finally ended in 1998, when the Khmer Rouge political and military structures were dismantled.<sup>40</sup>

This is factually correct, and it is the truncated narrative on which justifications for the limited scope of the ECCC rest (i.e. that the Chambers should try only the KR leadership and those most responsible for crimes committed during the four year period), but such a narrative omits too much to be allowed to stand without challenge. A more sensitive history of the period identifies many more actors who could (and should) be held to account – many of whom were and remain keen for the ECCC to be structured and operate in ways that omit consideration of their responsibility.

Few states have been so caught up in the machinations of great power politics in the second half of the twentieth century as Cambodia. The Khmer Rouge did not arise from nowhere - the instability through which it gained sufficient support and room for manoeuvre to launch a coup was aided significantly by the American bombing of North Vietnamese supply routes in Cambodia that started in earnest in 1969. The US dropped a higher tonnage of bombs onto Cambodia (a neutral state) than the total of all allied bombs used in the Second World War, in a bombing campaign that is estimated to have killed around 150,000 Cambodians and forced two million from their homes and into towns and cities.<sup>41</sup> Between 1969 and 1973, the Khmer Rouge is estimated to have grown from a movement of 10,000 to more than 200,000 troops and

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<sup>40</sup> <http://www.eccc.gov.kh/en/about-eccc/introduction>

<sup>41</sup> Actual casualties are unknown. Kiernan estimates 150,000 (*The Pol Pot Regime*, New Haven: Yale, 2002), but some estimates are upwards of 600,000 (for instance Christopher Hitchens, *The Trial of Henry Kissinger*, London: Verso, 2001).



militia, with their recruitment propaganda giving prominence to the effects of the US bombing.<sup>42</sup> The KR rise was also aided, according to one of the defendants in Case 002, by US support for the Lon Nol regime which the KR deposed: Khieu Samphan claims he realised that violence was necessary to transform Cambodia after the US supported a violent coup in 1970 to install Lon Nol.<sup>43</sup> Soon after Lon Nol took power, he declared war on the Vietnamese and their perceived communist comrades the KR, and allowed a US and South Vietnamese ground invasion of Cambodia that left 11,000 dead.

The KR organised their own violent coup to depose the widely-despised and extremely repressive US-sponsored Lon Nol regime, and embarked on their mission to create a classless society through radical revolution. But the KR did not rule alone - it relied heavily on Chinese support, with up to 15,000 Chinese technical advisors being deployed to Cambodia during 1975-79.

A cooling in Sino-Vietnamese relations coupled with KR paranoia turned the regime against the Vietnamese, who had initially been thought of as sympathetic to the revolution. Border skirmishes began to break out and in 1979 Vietnam invaded Cambodia and deposed the KR, but for reasons of realpolitik much more than humanitarianism (as reports of later Vietnamese atrocities attest). China and the US (pursuing a *détente* in their relations) worked together for the first time to try to prevent the Vietnamese installed regime being recognised as a legitimate government.<sup>44</sup> Chinese advisors in Cambodia were replaced by Vietnamese, Soviet, Cuban and East European advisors – which led the US and UK governments to block, well into the 1980s, NGO attempts to deliver emergency aid to the victims of the KR regime who desperately needed it.<sup>45</sup> In turn, the Vietnamese and Cambodians tried to block aid being sent to the refugee camps on the Thai border into which the KR (along with thousands of refugees) had been driven, and from where they regrouped and gained control of various zones. The Thai army tried to prevent the influx of

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<sup>42</sup> Ben Kiernan and Taylor Owen, 'Roots of U.S. Troubles in Afghanistan: Civilian Bombing Casualties and the Cambodian Precedent' *The Asia-Pacific Journal*, June 28, 2010. See also William Shawcross, 'Sideshow: Kissinger, Nixon and the Destruction of Cambodia' (New York: Cooper Square Press, 2002).

<sup>43</sup> 'Facing Genocide' film, directed by David Aronowitsch and Staffan Lindberg.

<sup>44</sup> Tom Fawthrop & Helen Jarvis, 'Getting Away with Genocide', (London: Pluto, 2004), p.25.

<sup>45</sup> Fawthrop & Jarvis, *Getting Away with Genocide*, p.18 and pp. 64-66.

refugees in part by driving many (40,000 in one incident alone) of those fleeing war back into Cambodia across mine fields. Thousands died this way – from mines, disease or dehydration.<sup>46</sup>

Throughout the period 1979-1993, the KR were supplied by China and Thailand, and supported by many Western states (led by the US and including the UK, Canada and Australia) who insisted that the KR delegation retain control of Cambodia's seat at the UN General Assembly long after the scale of atrocities committed by the KR was known.<sup>47</sup> From 1979: 'not upsetting China over Cambodia became a major plank in Western governments' approach to resolving the conflict, right up to the drafting and signing of the Paris Peace Agreement twelve years later'.<sup>48</sup> The international community tried to starve the PRK of power, in the hope that the regime would collapse. In order to avoid this, the PRK (by now led by Hun Sen) started a peace and reconciliation initiative with rival factions, and began calls to prosecute KR leaders as part of the peace process. However, during the two years of peace negotiations in Paris from 1989, no western states supported such trials. Japan proposed a commission of inquiry, but the US resisted on the basis that it was 'likely to introduce confusion in the international peace efforts'.<sup>49</sup> Peace was unequivocally prioritised above justice by international actors – though the commitment of the PRK to justice is doubtful. The call for trials was driven more by a desire to discredit a rival force in the civil war as it was by ethical principle, as evidenced by the PRK's pragmatic use of amnesties in the 1990s.

Vietnam unilaterally withdrew from Cambodia in 1989 and a peace was finally brokered between the warring factions in 1991, following sustained pressure by China and the US. The peace agreement did not include a mechanism to hold anyone accountable for past crimes, but rather acted to re-legitimise the KR within Cambodian politics by giving the KR delegation – led by Case 002 defendant Khieu Samphan – rights equal to those of other political parties. The United Nations Transitional Authority in Cambodia (UNTAC) was deployed in 1992 to organise elections. The elections (which were boycotted by the KR, who refused to participate

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<sup>46</sup> Haing, *Survival in the Killing Fields*, p. 414; Dunlop, *The Lost Executioner*, p.186.

<sup>47</sup> Fawthrop & Jarvis, *Getting Away with Genocide*, pp. 52-70.

<sup>48</sup> Fawthrop & Jarvis, *Getting Away with Genocide*, p. 26.

<sup>49</sup> Fawthrop & Jarvis, *Getting Away with Genocide*, p. 98.

in the new Supreme National Council) were held in May 1993, and UNTAC left only four months later, at the behest of the UN Security Council (UNSC) rather than because there were any signs that Cambodia was now at peace: '[f]or the outside world, the main objective had been achieved, namely to enable the former cold war powers to disengage from a country in which they no longer had any interest'.<sup>50</sup>

Hun Sen lost the 1993 elections, but forced his way into a power-sharing coalition by threatening a coup. He worked through the 1990s to defeat the KR politically, including passing the 1994 Law on Outlawing the Group of Democratic Kampuchea which included an amnesty clause for rank and file members of the KR, which attracted thousands of defectors to the coalition's side.<sup>51</sup> He also engineered in 1996 a controversial Royal Pardon for his 1979 conviction and immunity from prosecution under the 1994 Law for Case 002 defendant Ieng Sary in exchange for his defection along with his forces to the government.<sup>52</sup> These amnesties were useful in bringing peace and accruing power to the coalition, but did not provide for any alternative forms of accountability in lieu of trials, making them hard to categorise as transitional justice mechanisms at all.

Only in 1997, when the KR was almost a spent force, did co-prime ministers Hun Sen and Norodom Ranariddh request assistance from the UN in creating a judicial forum to bring the most senior leaders of the KR to justice. In order to avoid a Chinese veto at the UNSC, the issue was brought to the UN General Assembly, who supported the efforts to hold the KR leadership accountable (the UNGA resolution in 1997 was the first time either of the UN's principal organs had acknowledged the human rights violations of the KR regime).<sup>53</sup> The UN Secretary General responded by appointing a 'Group of Experts', who recommended that an international criminal tribunal be established on the basis that the Cambodian legal system lacked independence, skilled practitioners and the capacity to conduct trials with due process, and also because of

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<sup>50</sup> Margot Picken, 'The Beleaguered Cambodians', *New York Review of Books*, January 13 2011, p. 4.

<sup>51</sup> Kassie Neou and Jeffrey C. Gallup, 'Human Rights and the Cambodian Past: In Defense of Peace Before Justice' *Human Rights Dialogue*, Vol. 1, No. 8, (1997), p. 1.

<sup>52</sup> The ECCC Trial Chamber ruled on November 3 2011 that the 1996 amnesty and Royal Decree are inapplicable to breaches of the 1949 Geneva Conventions, genocide and crimes against humanity, reasoning that 'an emerging consensus prohibits amnesties in relations to serious international crimes, based on a duty to investigate and prosecute these crimes and to punish their perpetrators' (Trial Chamber Judgment November 3 2011 E51/15 para 53). This decision is currently under appeal.

<sup>53</sup> Fawthrop & Jarvis, *Getting Away with Genocide*, p. 124.

concerns that the KR connections of some of those in power in the country would lead to too much political interference with the court.<sup>54</sup> They recommended trials of 20-30 people, and supported a limited temporal and subject matter jurisdiction that excluded consideration of atrocities committed before or after 1975-79, or war crimes committed by other states during 1975-79 in order not to ‘detract from the unique and extraordinary nature of the crimes committed by the leaders of Democratic Kampuchea’.<sup>55</sup>

Hun Sen refused to accept a solely international court (in part to keep some level of control over it, but in part because of a deep – and mutual – distrust of the UN and international actors generally). While negotiations to establish a court were underway, Hun Sen continued his policy of de-fanging the KR, this time by welcoming Case 002 defendants Khieu Samphan and Nuon Chea to Phnom Penh as defectors in December 1998 and expressing a desire to ‘dig a hole and bury the past’ in order to avoid war (though stopping short of offering formal amnesty).<sup>56</sup> In spite of the outrage this caused, it marked the final defeat of the KR – and a corresponding decrease in Hun Sen’s appetite for an accountability mechanism, suggesting again that the threat of trials was more a tool used to end the civil war and consolidate his regime’s power than supported on the basis of justice.<sup>57</sup> After another four years of often acrimonious talks (spurred slowly onwards by domestic NGOs and international actors optimistic for success after the drafting of the Rome Statute to establish the International Criminal Court), in 2002 the UN pulled out of the negotiations on the basis that the court being proposed by Cambodia was neither independent nor impartial. Eventually a group of states led by Japan, and including the US (which had changed policy in 1994 after NGO- and Cambodian diaspora pressure had prompted the US Congress to pass the Cambodian Genocide Justice Act, which required the US government to support justice efforts in Cambodia), the UK and France as well as ASEAN pushed the UN back to the negotiating table, and a final agreement was reached in 2003.<sup>58</sup>

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<sup>54</sup> The Group of Experts for Cambodia, *Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135*, U.N. Doc. S/1999/231, A/53/850 (March 16 1999)

<sup>55</sup> Cited in Fawthrop & Jarvis, *Getting Away with Genocide*, p.127.

<sup>56</sup> Cited in Fawthrop & Jarvis, *Getting Away with Genocide*, p.135.

<sup>57</sup> Robert Petit. ‘Lawfare and International Tribunals’, *Case Western Reserve Journal of International Law*, Vol: 43, (2010), p.195.

<sup>58</sup> See Craig Etcheson, *After the Killing Fields* (Westport: Praeger, 2005) and Fawthrop & Jarvis, *Getting Away with Genocide*, for more detail on the negotiations.

This history of the context and negotiations of the ECCC demonstrates both the political and moral implications of the limited jurisdiction of the court, the shifting and often self-serving motives of the actors responsible for establishing it, and the difficulties involved in judging what success might mean given the history of internal repression and outside interference in Cambodia. Unfortunately the contemporary context of the court does not make assessment any easier – and a closer examination of the motives of both Hun Sen and international actors with regards to the ECCC suggests that the court is too much an instrument of power and misguided principle rather than justice.

The relationship of the Hun Sen government to the ECCC since its establishment has been a troubled one. To its credit, the government pushed for a tribunal to hold KR leaders to account well before the international community was willing to support such an idea. But it has not handled the court well. There are advantages to the government if the court legitimises the current regime’s narrative of rescue, reinforcing the role of Hun Sen and his senior officials in overthrowing the KR, and drawing attention away from accusations of on-going corruption and human rights. Duncan McCargo notes that ‘[p]utting ageing Khmer Rouge leaders on trial provides a convenient set of domestic scapegoats for the shortcomings of the current government; and by demonstrating an ability to undermine the goals of the tribunal’s international backers, Hun Sen may prove able further to entrench his power base and secure his own standing.’<sup>59</sup> Cooperation with the UN in establishing the ECCC also helped Cambodia to secure international aid and benefits. But the court is potentially a danger to the regime. Frequent in press coverage of the ECCC, in particular with regard to government interference in Cases 003 and 004, are remarks that refer to Hum Sen’s past as a KR cadre who was purged from the party in 1977 and fled to Vietnam.<sup>60</sup> References to his past are used to suggest that he does not want the court to prosecute more than five people because he himself could be implicated. In fact, he held a relatively low status (junior commander) within the KR and it is more likely

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<sup>59</sup> Duncan McCargo, ‘Politics by Other Means?’, *International Affairs*, Vol. 87, No.3, (2011), p.617.

<sup>60</sup> E.g. Ian MacKinnon, ‘Prosecutor wants to indict five more Khmer Rouge’, *Financial Times*, September 7 2009, <http://www.ft.com/cms/s/0/e6dc489e-9b98-11de-b214-00144feabdc0.html#axzz1Osc313nR>; <http://www.reuters.com/article/2009/03/31/us-cambodia-rouge-idUSTRE52U1IZ20090331>

that he has two concerns: that if senior ex-KR politicians or officials are implicated it will undermine his regime and disrupt his claims to have led a movement that saved Cambodians from the KR, and that the longer the ECCC continues to work, the more unwelcome interest could be generated in the role played by China – once the KR’s major patron, now the largest contributor of foreign aid and foreign direct investment to Cambodia – during the 1975-79 period.<sup>61</sup> Hun Sen publically claims to be concerned that broadening the scope of prosecutions will lead Cambodia back to civil war – a concern which incidentally also serves to justify his particular style of to-all-intents-and-purposes authoritarian government.

Hun Sen and the Cambodian People’s Party govern “with absolute power and control all institutions that could challenge their authority”.<sup>62</sup> Since overthrowing his co-Prime Minister, Norodom Ranariddh, in a coup in July 1997, and winning an election in 1998 that was marred by violence and intimidation, Hun Sen has had full control over the country. His regime has been accused of severely limiting rights of expression, association and assembly, of committing numerous human rights abuses and of allowing widespread corruption.<sup>63</sup> As Hauter explains:

‘Hun Sen and his entourage have plunged Cambodia into a kind of hell. The country has become a regime of organized pillage, a vast bazaar of plundered goods, a regional center for shady business of every kind: drugs, gambling, sex. The head of the national police, one of Hun Sen’s three closest associates, owns the largest brothel in the country.’<sup>64</sup>

Much corruption (which USAID estimates is the cause of \$500m stolen by government officials from public funds every year in Cambodia) is connected to the logging industry.<sup>65</sup> Logging was first used by the KR to gain funds and weapons from Thailand, but is now exploited by the many Cambodian politicians who have developed stakes in the industry. In 2007 Global Witness reported that:

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<sup>61</sup> As Craig Etcheson notes, as well as not wishing the details of its support for the KR to become widely known, for China ‘prosecuting the leaders of an Asian communist revolution for the deaths of millions of people during the revolution [would] be a very bad precedent, indeed’. Etcheson, *After the Killing Fields*, p.154.

<sup>62</sup> Picken, ‘The Beleaguered Cambodians’.

<sup>63</sup> Picken, ‘The Beleaguered Cambodians’.

<sup>64</sup> Francois Hauter, ‘Chinese Shadows’, *New York Review of Books*, October 11 2007, p.1.

<sup>65</sup> Joel Brinkley, ‘Cambodia’s Curse’, *Foreign Affairs*, Vol. 88, (March-April 2009), p.118.

‘Cambodia is run by a kleptocratic elite that generates much of its wealth via the seizure of public assets, particularly natural resources. The forest sector provides a particularly vivid illustration of this asset-stripping process at work ... Cambodia’s army, military police, police and Forest Administration (FA) are all heavily involved in illegal logging ... Cambodia’s most powerful logging syndicate is led by relatives of Prime Minister Hun Sen and other senior officials.’<sup>66</sup>

As well as logging, the government has been criticised for land-grabbing schemes (around 20,000 residents were ejected from their land in Phnom Penh alone in 2008) and in Sept 2009 Hun Sen withdrew from a World Bank project aimed at settling land disputes, signaling the likelihood of further forced evictions.<sup>67</sup> Land grabs are often designed to clear land for Chinese exploitation, and Western donors complain that their (weak) attempts to incentivise the Cambodian government to reform are blocked or outbid by China.<sup>68</sup> However, Japan and large Western donors continue to donate – a record \$1.1bn in 2010 – while encouraging but not requiring reform.<sup>69</sup>

There is good reason, therefore, not to trust the motives of the Cambodian government in its dealings with the court, and not to allow the court to provide legitimacy to the regime. Yet Hun Sen has been allowed to use the ECCC very well in his own interests thus far. He can claim credit for the establishment of the ECCC, and its success in Case 001 and Case 002 (assuming it runs its course), and looks likely to prevent Cases 003 and 004 from reaching the Trial Chamber. His staff are still embedded in the court, and corruption allegations have not been meaningfully confronted. If the court collapses through lack of funding or the withdrawal of the UN, he can blame the international community. And at the same time as claiming to

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<sup>66</sup> Global Witness, *Cambodia’s Family Trees*, (London: Global Witness, 2007) , p.6. Global Witness, *Country for Sale*, (London: Global Witness, 2009) documents similar corruption around oil and mineral exploitation.

<sup>67</sup> MacKinnon, ‘Prosecutor wants to indict five more Khmer Rouge’.

<sup>68</sup> In March 2006 a group of international donors promised \$600m to Cambodia, with strict anti-corruption and human rights conditions. A month later, China offered \$600m of its own – no strings attached. The 2006 attempted reforms, unsurprisingly, failed. For more on China’s relationship with Cambodia, see Hauter, ‘Chinese Shadows’ and Ian Storey, ‘China’s Tightening Relationship with Cambodia’ The Jamestown Foundation, China Brief July 1 2006, available at:

<http://www.asianresearch.org/articles/2881.html>

<sup>69</sup> <http://www.voanews.com/english/news/asia/Cambodias-Donors-Pledge-11-Billion-For-Development-95519109.html>

support justice, his government continues to pursue policies that run counter to the principles of human rights and international justice that underlie the ECCC, safe in the knowledge that little effort will be made by international actors to attach conditions to the millions of dollars' worth of external aid and investment given to Hun Sen's regime each year.

It is not clear whether external actors can help to bring justice to Cambodia. The UN was correct to insist during negotiations on a court which was impartial and independent, but the ECCC has turned out not to be, and neither the UN nor external donors have used the leverage open to them. \$825m of Cambodia's \$1.5bn national budget was supplied by foreign donors in 2010, meaning a great deal of scope for states to pressure the Hun Sen government to stop interfering in the court.<sup>70</sup> Despite Cambodia's reliance on external aid, '[n]either the UN nor state donors have vocally supported the court's judicial independence in the face of bellicose government statements.'<sup>71</sup>

It is also unclear whether external actors really want to bring justice to Cambodia. The expanded history of the KR given in this chapter should cause us to question any narrative that posits the Hun Sen regime as 'bad' and the international community as 'good' with regards to accountability in Cambodia. McCargo identifies an 'uneasy tension' between international liberalism and local authoritarianism, suggesting that, unlike liberal states, authoritarian states may choose to do business with their defeated enemies instead of or in addition to doing justice: '[t]he Hun Sen government chose to do business with Nuon Chea and other former Khmer Rouge leaders, until it became more advantageous to embrace a policy of putting them on trial.'<sup>72</sup> As outlined above, the situation is rather more complex. As well as some Cambodian victims and NGOs that support the ECCC for liberal reasons (and work alongside liberal international actors), the UN and a series of powerful, occasionally liberal, states did business with the KR and are keen to forget having done so, and/ or do business with Hun Sen and are keen to continue.

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<sup>70</sup> <http://www.state.gov/r/pa/ei/bgn/2732.htm>

<sup>71</sup> 'Observers fear Khmer Rouge court being wound down', *Bangkok Post*, May 4 2011.

<sup>72</sup> McCargo, 'Politics by Other Means?', p. 621.



Now that the ECCC has reached a crisis over Cases 003 and 004, the UN must decide whether to stay involved, and confer legitimacy onto the proceedings, or withdraw, and allow either show trials or no trials of the alleged masterminds of a genocide. If international actors withdraw from the ECCC and cause it to shut down, not only will this serve the interests of the government by ending trials, it will also reinforce the view of many in the country (and not without evidence) that the international community cannot be relied upon to protect or support them.

## **Conclusion**

It is difficult to know how to conclude, in part because ECCC proceedings are ongoing, but also because there is so little hope in the story of transitional justice in Cambodia. There have been small successes at the ECCC – the most significant of which is the completion of the trial of Case 001 and the progress made in Case 002. It remains a possibility that the existence of the ECCC will inspire reform in the Cambodian judiciary – currently heavily dependent upon the government for patronage and protection, widely seen as untrustworthy and corrupt and often poorly qualified.<sup>73</sup>

It does seem clear, however, that the Cambodian case does not support the findings of recent studies that ‘prosecutions may deter human rights violations by increasing the perception of the possibility of costs of repression for individual state officials’ and that ‘transitional justice overall has a positive effect on the change in human rights and democracy measures’.<sup>74</sup> Rather than feeling vulnerable to prosecution or being socialised into observing human rights and democracy norms, Cambodia seems to be regressing in its human rights record. Kheang finds that ‘[s]ince 2003, Cambodia has evolved into hegemonic party authoritarianism wherein the minimum criteria for democracy – freedom of expression, freedom of assembly – have been seriously curtailed while periodic elections have been maintained.’<sup>75</sup> With respect to human

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<sup>73</sup> Surya Subedi, ‘The UN Human Rights Mandate in Cambodia’, *The International Journal of Human Rights*, Vol.15, No. 2, (2011), pp.247-261.

<sup>74</sup> Kathryn Sikkink, *The Justice Cascade: How Human Rights are Changing World Politics*, (New York: W. W. Norton, 2011), p.258 and Tricia Olsen, Leigh Payne & Andrew G. Reiter ‘The Justice Balance: When Transitional Justice Improves Human Rights and Democracy’, *Human Rights Quarterly*, Vol. 32, No. 4, (2010), p.995-6.

<sup>75</sup> Kheang Un, ‘Cambodia: Moving Away from Democracy?’ *International Political Science Review*, Vol. 32, No. 5, (2011) p.547.

rights measures, based on PHYSINT data which uses a range of 0 to indicate no government respect for physical integrity and 8 to indicate full respect, Cambodia shows a significant decline from a score of five in 2002 to two in 2007. In line with the discussion above, Kheang notes that the international community has ‘settled on granting the Cambodian government its international legitimacy based on economic performance and political stability’ rather than on its observance of international norms.<sup>76</sup> The willingness of the international community to overlook the present government’s disregard of human rights standards coupled with the success of interested parties in limiting the temporal and personal jurisdiction of the ECCC so severely, means that far from signalling an end to impunity in Cambodia, the ECCC has demonstrated the power of the ruling elite to limit the ministrations of justice to those it seeks to delegitimise.

Of course no institution will be perfect – certainly not one run in an unsettled political climate, with authority split between domestic and (often uncoordinated) international actors. But what we are seeing in Cambodia is not bureaucratic incompetence, or the best available option (which will inevitably reflect the existing power hierarchy to some extent), but complicity in impunity. It might be argued that Cambodia would be worse off without the ECCC than with it, and there is no way to prove that this is not the case. It might also be argued that Cambodia would be better off with a fully international tribunal than a hybrid model, though this was never a political possibility. But to end the discussion with either argument is to renege on the responsibility that theorists of transitional justice have to imagine better options and think of creative ways to hold more actors more thoroughly to account. It may be that criminal accountability is impossible to achieve for many of those most instrumental in the suffering of Cambodians, but criminal mechanisms do not exhaust the possibilities for accountability. Legal and political mechanisms such as inquiries and commissions at the international level may be appropriate to try to capture the broader responsibilities alluded to above and to generate sufficient shame to deter actors from repeating their behaviour in future.<sup>77</sup> Certainly, those seeking to judge the ECCC should avoid accepting its limited scope and judging its successes and failures within

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<sup>76</sup> Kheang, ‘Cambodia: Moving Away from Democracy’, p.547.

<sup>77</sup> See Kirsten Ainley, ‘Excesses of Responsibility: The Limits of Law and the Possibilities of Politics’, *Ethics and International Affairs*, Vol, 25, No. 4, (2011), pp. 407-431, for further discussion of alternatives to criminal trials.

that scope, as to do so is to miss the bigger picture, and effectively to offer impunity to many who do not deserve it. The Cambodian civil war lasted at least from 1968, when the KR launched an armed struggle against the Cambodian government, until their final collapse in 1998 – it is this that the people are transitioning from and deserve justice for, not a conflict that ended thirty years ago.<sup>78</sup> And even though the civil war has ended, the repression remains. The existence of the ECCC does not seem to be stemming human rights violations in Cambodia, and is more likely instead to be bolstering the power of a government which has been allowed to control the court by external actors who cannot generate the political will to defend the rule of law.

Accountability efforts for the Cambodian genocide have fallen victim to a process in which peace was prioritised over justice, and national interest (on the part of Cambodia and an array of international actors) was prioritised over both. Leaving aside the question of whether this can be justified, it means the ECCC is in many ways a charade of accountability that does not meet the expressed needs of many of the victims of the past or the citizens of the present. It is an accountability mechanism over which many of those who should be asked to account for their actions have power. It is in the interests both of Hun Sen and the international community to limit accountability to a relatively small number of individuals. Yet it is quite probably in the interests of Cambodian victims, and all those people who may be caught up in civil strife in Cambodia in the future, for a much wider range of actors to be held accountable. This will not happen, leaving the ECCC responsible for achieving an impoverished form of justice, which is better than nothing, but not by much.

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<sup>78</sup> Etcheson, *After the Killing Fields*, pp.1-11.