

# The Khmer Rouge Tribunal: successes and failures of an innovative form of justice

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► **To cite this version:**

Maud Salber. The Khmer Rouge Tribunal: successes and failures of an innovative form of justice. Political science. 2013. dumas-00951111

**HAL Id: dumas-00951111**

**<https://dumas.ccsd.cnrs.fr/dumas-00951111>**

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Institut d'Etudes Politiques de Grenoble

Maud SALBER

## **The Khmer Rouge Tribunal**

### **Successes and Failures of an Innovative Form of Justice**



Year 2012/2013

Master: International Organisations

Under the supervision of Prof. Franck Petitievile



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Public gallery of the ECCC. Source: ECCC website

\*Cover picture: A Cambodian monk looks at photos of victims of the Khmer Rouge regime on display at the Toul Sleng Genocide museum in Phnom Penh, Cambodia (Paula Bronstein/ Getty Images)

## List of Abbreviations

CNRP	Cambodian National Rescue Party
CPK	Communist Party of Kampuchea
CPP	Cambodian People's Party
DK	Democratic Kampuchea
ECCC	Extraordinary Chambers in the Courts of Cambodia
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
PRK	People's Republic of Kampuchea
PTSD	Post-Traumatic Stress Disorder
UN	United Nations
UNTAC	United Nations Transitional Authority in Cambodia
US	United States of America

Shortcuts for the ECCC: the “Court”, the “Tribunal”, the “hybrid”.

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## INTRODUCTION

On 14 March 2013, Ieng Sary, co-founder of the Khmer Rouge regime and brother-in-law of Pol Pot, died at the age of 87, thereby avoiding accountability for war crimes, crimes against humanity and genocide.<sup>1</sup> After having lived comfortably for years in Pailin, north-western Cambodia, and in a luxurious villa in Phnom Penh, he had been eventually arrested in 2007 and was standing trial before the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”), the United Nations-backed Court responsible for trying the most senior members of the Khmer Rouge regime that held power between 1975 and 1979 and is blamed for the death of about 1.7 million people. Ieng Sary’s responsibility for the regime’s crimes derived from his position as a Permanent Member of the Khmer Rouge Standing Committee, which formulated policy and oversaw its nationwide implementation.<sup>2</sup>

The passing of Ieng Sary dashed the victims’ hopes for truth and justice and revived widespread frustrations at the slow pace of the UN-backed court. Indeed, since the ECCC’s establishment in 2006, the only former Khmer Rouge leader to have been successfully convicted is Kaing Guek Eav, alias Duch, who was sentenced to life imprisonment for his role in running the notorious Tuol Sleng prison (also known as S-21), where thousands of inmates were tortured and killed.<sup>3</sup>

Ieng Sary was one of the accused in the second case brought before the ECCC, known as Case 002, along with former head of state Khieu Samphan, chief ideologue Nuon Chea and Ieng Thirith, Sary’s wife, who was ruled mentally unfit to stand trial in 2012.<sup>4</sup> 81-year old Khieu Samphan and 86-year old Nuon Chea are therefore the two only remaining defendants in current Case 002, and Ieng Sary’s death has heightened long-standing fears that they will also die of natural causes before being held accountable for their crimes.

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<sup>1</sup> “Ieng Sary dies”, *Phnom Penh Post*, 15 March 2013, <http://www.phnompenhpost.com/national/ieng-sary-dies>

<sup>2</sup> HEDER Steve and TITTEMORE Brian, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*, War Crimes Research Office (American University) & Documentation Center of Cambodia, 200, p.5

<sup>3</sup> Supreme Court Chamber, “Summary of Appeal Judgment against Kaing Gueak Eav”, Document No. F26/3, 3 February 2012

<sup>4</sup> Supreme Court Chamber, “Decision on Immediate Appeal against the Trial Chamber’s Order to unconditionally release the Accused IENG Thirith”, Document no. E138/1/10/1/5/7, 14 December 2012.

Two further cases (Case 003 and 004) are currently in the investigation phase. Yet, due to dwindling funding and proven government attempts to stall their progress, it is likely that these cases will never go to trial.

Thus, as many court monitors voice concerns over the future of the Tribunal, it is time to reflect on its achievements and failures and to investigate how these came about. This paper will seek answers in its analysis of the *essential, specific nature* of the tribunal as a hybrid court placed within the Cambodian legal system but with international participation. Indeed, compared to other international criminal tribunals, the ECCC has significant inherent specificities and has employed many procedural novelties, all of which need to be taken into account and thoroughly analysed in order to better assess the tribunal's record. Moreover, by building on the unique matrix of factors dominating Cambodia's post-conflict society, this paper aims at deepening understanding of the complexities of the Cambodian transitional justice model.

Before starting such an analysis and in order to better understand what is at stake, it is necessary to (1) reiterate, briefly, the history of the Khmer Rouge period; (2) examine the complexities and ambiguities of modern Cambodian history; and (3) define what is meant by a "successful" tribunal.

### **The Rise and Fall of the Khmer Rouge**

To fully understand the importance within Cambodian society of a tribunal to try Khmer Rouge leaders, it is necessary to reiterate, briefly, the history of the Democratic Kampuchea period and its part in Cambodia's complex and tragic history since 1970.

A Cambodian communist movement first emerged during the country's struggle against the French colonial protectorate in the 1940s and was fuelled by the first Indochina war in the 1950s. The movement grew further as a leftist opposition party to Prince Norodom Sihanouk's government. In 1962, the Communist Party of Kampuchea (PCK), led by Tou Samouth, was created. Tou Samouth was arrested and disappeared and Pol Pot was subsequently designated as the leader of the PCK in 1963. With the PCK's most radical members fleeing to the north-eastern jungles of Cambodia as a result of growing pressure from Sihanouk, the party slowly developed into an armed guerrilla

revolutionary force.

The overthrow of Prince Sihanouk in a US-backed military coup in 1970 by his military head Lon Nol represented a turning point in the Khmer Rouge's struggle. Sihanouk, in exile in China, leaned on the Khmer Rouge for support despite having previously fought against the communists. The communists resistance groups suddenly grew in popularity, as average Cambodian peasants took up arms to restore their beloved 'King Father' Sihanouk and Cambodian independence instead of what they saw as an illegitimate and corrupt government backed by the "American imperialists". Interestingly enough, Sihanouk's alliance with the Khmer Rouge would be brief and he would spend much of the Khmer Rouge's rule under house arrest upon his return from China.

Meanwhile, Cambodia became a secondary theatre of the Vietnam War, with American and Vietnamese troops clashing in Cambodian territory. In 1969-1970, in particular, the United States (US), led by Nixon and Kissinger, launched a secret massive bombing campaign against North Vietnamese bases on Cambodian soil. "*Anything that flies on anything that moves*" was the leitmotiv.<sup>5</sup> About half a million tons of bombs were dropped on Cambodia, which may have killed as many as 300,000 people.<sup>6</sup> These events helped Khmer Rouge guerrillas to recruit resentful survivors, whom they misled, claiming that "*the killing birds came from Phnom Penh*".<sup>7</sup> As Khmer Rouge forces increasingly took control over more and more territory and American bombings continued, the communists presented themselves as a party for peace and succeeded in mobilising mass support in the countryside. By early 1973, about 85 per cent of the country was in the hands of the Khmer Rouge.<sup>8</sup>

On 17 April 1975, the Khmer Rouge captured Phnom Penh, which was momentarily seen by some as liberation from years of foreign intervention, bombardments and civil war. But soon the forced evacuations of all city dwellers from Phnom Penh and other

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<sup>5</sup> See The Kissinger Telcons, National Security Archive, Washington, D.C. accessed June 21, 2013: [www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB123/](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB123/) President Nixon to Kissinger on the phone on December 9, 1970: "*That damned Air Force can do more about hitting Cambodia with their bombing attacks...I want a plan where every goddamn thing that can fly goes into Cambodia and hits every target that is open ... everything. I want them to use the big planes, the small planes, everything they can.*"

<sup>6</sup> See "Historical Overview of the Khmer Rouge", Cambodia Tribunal Monitor. <http://www.cambodiatribunal.org/history/khmer-rouge-history#TheRiseoftheKhmerRouge>; and KIERNAN Ben, "The American Bombardment of Kampuchea, 1969-1973", *Vietnam Generation*, vol.1(1), Winter 1989, pp. 4-41

<sup>7</sup> KIERNAN Ben, "Recovering History and Justice in Cambodia," *Comparativ*, vol. 4, 2004, p. 78

<sup>8</sup> "Historical Overview of the Khmer Rouge", Cambodia Tribunal Monitor, *op.cit.*

major urban centres to the countryside soon began, coercing “city people” to agricultural work and other forms of forced labour.<sup>9</sup>

To the end of establishing a self-sufficient rural and “pure” Khmer society, anyone who stood in the way of the regime was targeted for elimination. All social, economic and legal institutions were abolished. Former government officials, so-called intellectuals and certain minorities were targeted as enemies of the regime. Such policies led to food shortages, lack of sanitation, medical care and medication. Torture and execution centres, which were tasked to eradicate “enemies” of the revolution, killed several thousands of people.

The regime was finally ousted on 7 January 1979 when Vietnam invaded (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 – the current Prime Minister of Cambodia – as Foreign Affairs Minister of the regime. Many Khmer Rouge fled into jungles along the border with Thailand, from which they played a significant role in Cambodian politics until Pol Pot’s death in 1998.

Since the fall of the DK regime, research has continued to deepen our understanding of the extent of Khmer Rouge brutality and the number of lives that were lost. Although there can be no certainty of the number of people who died under the Khmer Rouge, the current consensus is that the death toll was *at least* 1.7 million persons (21% of the country's population), who died either from hunger, overwork, disease or execution. Yet some argue convincingly that this figure is far higher, at 2.2 million.<sup>10</sup> How many died through *execution* as such is very uncertain - the figure fluctuates between 100,000 and one million.<sup>11</sup>

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<sup>9</sup> CHANDLER David, *The Tragedy of Cambodian History*, Silkworm Books, Bangkok, 1993, p. 246

<sup>10</sup> OSBORNE Milton, “Pol Pot’s terrifying legacy”, *Far Eastern Economic Review*, 6 June 1980. When Ben Kiernan reviewed the issue in the *The Pol Pot regime*, in 1996, he arrived at a figure of ‘at least’ 1.5 million, pp 456-60. A slightly higher figure of 1.7 million was generally accepted by 2000. See, the extended discussion in Craig Etcheson, *After the killing fields: lessons from the Cambodian genocide*, Westport CT, 2005, pp 117-19. David Chandler has recently written of ‘perhaps as many as two million’ Cambodians having died between 1975-79. See, “Cambodia deals with its past”, in *Totalitarian movements and political religions*, 2008.

<sup>11</sup> Continuous research is undertaken on this point, particularly into the provincial prisons that operated during the DK period and which are thought to have tortured and executed in a fashion similar to the Phnom Penh-based S-21. There are thus solid grounds to believe that the number is

## **The ambiguities of modern Cambodian history**

Almost every aspect of modern Cambodian political history is disputed terrain. This makes the need for truth and justice in contemporary Cambodia even more pressing.

There is one first historical debate over the degree of influence exerted by the central Phnom Penh command over regional and local branches of the Khmer Rouge under the regime.<sup>12</sup> Many accept that the central command did not *directly* control the workings of many of the regional and local sub-branches of the party. However, it is generally accepted that the central command in Phnom Penh exercised a loose form of control over the hierarchical Khmer Rouge structure and purged the ranks of regional and local branches of any Khmer Rouge officials considered to be failing to implement its principles. Numerous documents obtained from Tuol Sleng prison in Phnom Penh reflect a large number of tortures and murders of Khmer Rouge members: it is estimated that four out of five people killed at Tuol Sleng prison were Khmer Rouge personnel. These issues are problematic in the context of determining culpability concerns, regarding which members of the Khmer Rouge should be subject to the tribunal's jurisdiction.

Another ambiguity of Cambodian modern history lies in the diverging opinions that are held about the former king, 'King Father' Norodom Sihanouk, who died in October 2012.<sup>13</sup> In short, Sihanouk has first been a sworn enemy of the left - including in the late 1960s when he ordered the summary execution of hundreds of communists without trial,

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much higher than 100,000. See OSBORNE Milton, *The Khmer Rouge Tribunal: an Ambiguous Good News Story*, Lowy Institute for International Policy (Sydney), 2007.

<sup>12</sup> See Report of the Group of Experts for Cambodia Established pursuant to General Assembly Resolution 52/135 (1999), p. 17 <<http://www1.umn.edu/humanrts/cambodia-1999.html>> at 1 October 2004 (hereinafter: "Report of the Group of Experts"). The UN Group of Experts was established pursuant to Situation of Human Rights in Cambodia, GA Res 52/135, UN GAOR, 53rd sess, 70th mtg, UN Doc A/RES/52/135 (1997).

<sup>13</sup> Sihanouk reigned from 1941 until his abdication in 1955; was prime minister and chief of state of the kingdom between 1955 and his overthrow in 1970; was the nominal leader of the forces ranged against the Phnom Penh regime between 1970 and 1975, forces dominated by the Cambodian communists; was nominally head of state of Democratic Kampuchea before being discarded from that role and living as prisoner under house arrest between 1976 and 1979; was head of the Coalition of the Government of Democratic Kampuchea for much of the 1980s, and so again was closely linked with the forces of the Khmer Rouge; and finally after the Cambodian peace settlement of 1991 returned in 1993 to be Cambodia's king once again before abdicating in 2004 in favour of his son, the current King Norodom Sihamoni.

before becoming a nominal leader of communist forces between 1970 and 1975 and allying with the Khmer Rouge to overthrow the then government in Phnom Penh. He had continued over the past decades to retain former members of the Khmer Rouge on his personal staff.<sup>14</sup> Though one can argue that he has been a victim of circumstances, his life and career encapsulates the ambiguities and contradictions of the history of his country.

Ambiguity is no less present with regard to the contemporary Cambodian leadership's background. Since the overthrow of Democratic Kampuchea, various members of the Khmer Rouge have been reabsorbed into Cambodian society and government. In February 1999, the Cambodian government incorporated much of what was left of the Khmer Rouge into the Royal Cambodian Armed Forces. The principal political parties have close links with the Khmer Rouge, with some of their members having been drawn from the former ranks of the regime. Many of the current senior Cambodian figures in the ruling Cambodian People's Party (CPP) were once active mid-level - if not senior - members of the Khmer Rouge. This is true, notably, of Prime Minister Hun Sen, and of CPP and Cambodian Senate Chairman, Chea Sim. This does not mean that there is evidence of their having engaged in crimes against humanity, but it makes no doubt that both did have some awareness of the nature of the regime they served for two years or more. Moreover there is abundant evidence that in the Cambodian government, and very certainly in the broader administration today, many people have once worked in the Pol Pot regime. These facts, above all else, explain the "induced amnesia" that became state policy in the years following the atrocities<sup>15</sup> and provides grounds to the historical reticence of the contemporary Cambodian government to develop mechanisms to prosecute those responsible for the atrocities committed.

Nothing makes the policy of avoiding the past more obvious than the reluctance of the Cambodian government to have the Khmer Rouge era studied at school or university. It is only in 2009 that the government included a textbook on the DK period in its high school curriculum<sup>16</sup> - before this, the official textbooks contained a mere five lines.

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<sup>14</sup> OSBORNE Milton, *Sihanouk: Prince of Light, Prince of Darkness*, Sydney, 1994

<sup>15</sup> CHANDLER David, "*Cambodia deals with its past*", *op.cit.*

<sup>16</sup> DC-CAM, *A History of Democratic Kampuchea (1975-1979)*, 2007: [http://www.dccam.org/Projects/Genocide/DK\\_Book/DK\\_History--EN.pdf](http://www.dccam.org/Projects/Genocide/DK_Book/DK_History--EN.pdf)

It is worth noting, moreover, that the role of foreign powers during the DK-era has been ambiguous. The same Vietnamese leadership that overthrew the Khmer Rouge in 1979 had supported the Khmer Rouge forces in their fight against the Lon Nol regime between 1970 and 1975. To a great extent, it was the Vietnamese who had trained and armed the Khmer Rouge and turned them into an effective military force. China's stance over the past decades is no less ambiguous, as it backed the Khmer Rouge both before and after its victory in 1975. An estimated one thousand Chinese advisers were assisting the Khmer Rouge government when ruling the country. China continued to support forces opposing the Vietnamese-backed regime in the 1980's before slowly changing its policies after 1993 to become, as Hun Sen describes it ten years later, Cambodia's "most trusted friend".<sup>17</sup>

Finally, it should be noted that both the ruling CPP and the opposition (the Cambodia National Rescue Party, CNRP) have repeatedly employed the Khmer Rouge rhetoric as one of their strategies to win people's votes during election times and that an unprecedented sense of genocide denial emerged during the recent campaign.<sup>18</sup> In May 2013, opposition leader Kem Sokha reportedly commented in a public gathering that the very existence of S-21 prison was a stage and that evidence of torture and execution inside this notorious centre was fabricated by Vietnam to justify its invasion of Cambodia. Kem Sokha further explained that the Khmer Rouge would not have been "so stupid" to keep Tuol Sleng for the world to condemn and would have demolished the buildings in order to destroy evidence. Although he later denied these statements and accused the government of manipulating the recording of his speech, his reported comments angered the Khmer Rouge victims, especially S-21 survivors.<sup>19</sup>

Thus, all these uncertainties and ambiguities make the need for truth and justice all the more pressing. Cambodians have waited thirty years for justice, much longer than the victims of atrocities in Yugoslavia and Rwanda, and are still waiting for an accurate, comprehensive, historical record to be made. It is worth highlighting at this point that Cambodians suffer from widespread post-traumatic stress disorder (PTSD), a mental health disease with severe reaction of unprocessed trauma. Alarming, a study by the

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<sup>17</sup> OSBORNE Milton, *op.cit.* p. 10

<sup>18</sup> KHAMBOLY Dy, "Khmer Rouge History on the Trouble Spot", *Dc-Cam Magazine: Searching for the Truth*, August 2013.

<sup>19</sup> The survivor Chum Mey unsuccessfully appealed for apology from Kem Sokha and later led an allegedly politically motivated (by the ruling party) demonstration attended by over 20,000 people.



Cambodian psychiatrist Muny Sothara found PTSD or symptoms of other psychotic disorders “in 47 percent of the population”.<sup>20</sup> What is more, the disorder is being passed from one generation to the next.

### ***Defining a ‘successful’ international criminal tribunal***

Before applying it to the Cambodian case, a clearly defined standard of what international criminal tribunals are expected to achieve must be established as a yardstick against which to measure their successes and failures.

The 1990s have witnessed significant advancements in international criminal law with the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). These tribunals later influenced the establishment of the ECCC and their successes and failures ultimately became the basis for the debate over the need for a permanent international criminal institution (resulting in the creation of the International Criminal Court, ICC).

There is no internationally accepted standard for measuring the effectiveness or success of these *ad hoc* institutions<sup>21</sup>. Given the magnitude of the crimes involved, it is no surprise that there are vastly different standards to assess their success. Nor is it surprising that many observers find that the tribunals have not fulfilled their mandate. These tribunals are often seen as “*harbingers of salvation to post-conflict societies*”, and are thereby expected to simultaneously “*achieve justice, peace, reconciliation, the rule of law, and a plethora of social goods*”.<sup>22</sup> International criminal tribunals have purported to fulfil numerous objectives, including: to produce reliable historical records of crimes committed, to satisfy victims, to promote a sense of accountability for gross human rights violations, to make advances in international criminal law, and to stop on-going

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<sup>20</sup> This study was conducted in 2004, over a panel of households in Kampong Cham province, see BRINKLEY Joel, *Cambodia’s Curse: The Modern History of a Troubled Land*, New York and Collingwood, Victoria, Public Affairs Books and Black Inc., 2011.

<sup>21</sup> BARRIA Lilan and ROPER Steven, “How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR”, *The International Journal of Human Rights*, vol. 9 (3), September 2005, p. 349

<sup>22</sup> SCULLY Seeta, “Judging the Success and Failures of the Extraordinary Chambers of the Courts of Cambodia”, *Asian-Pacific Law and Policy Journal*, Vol 13 (1), 2011 p. 303

conflicts.<sup>23</sup> These courts' agenda is thus overly demanding, although it is becoming self-evident that "*international tribunals cannot be everything to everyone*".<sup>24</sup>

One can attempt to gather these various and far-ranging goals into two categories, matching two general schools of thought: (a) tribunals as *judicial processes*, and (b) tribunals as *social healing*.

The former is primarily about punishing the perpetrators while providing justice to the victims. In Cambodia, this means holding individuals responsible for crimes that were committed some thirty years ago, which presents significant legal and procedural challenges. The idea of providing reparations to the victims, as will be discussed in further detail in this paper, will also be of particular importance. The concept of *providing justice* does not go without protection of the rights of the accused and the upholding of international fair trial rights and due process standards. This is of utmost importance since any prosecution that fails to meet international fair trial standards is itself violating international law, and would lose credibility in its efforts to provide for international justice.<sup>25</sup>

The second approach – *social healing* – involves the broader concepts of national reconciliation, capacity building and truth telling. A war crimes tribunal shall not only be judged by its judicial record and procedural perfection, but also by its long-term social impacts and the legacy it leaves long after it closes its doors.<sup>26</sup> A war crimes tribunal thus shall seek long-term improvement of the national justice system and create a culture of justice and accountability. By this standard, a tribunal is successful when it 'teaches people to fish' by engaging in capacity building and fostering a culture of the rule of law.

All these aspects will be analysed in more detail and be addressed from the perspective of the Cambodian case. Providing a thorough analysis of the successes and failures of

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<sup>23</sup> DAMASKA Mirja, "Problematic Features of International Criminal Procedure", in CASSESE Antonio et al. (eds.), *The Oxford Companion to International Criminal Justice*, New York, Oxford University Press, 2009, p. 175

<sup>24</sup> SCULLY Seeta, *op.cit.*

<sup>25</sup> SAFFERLING Christoph, *Towards an International Criminal Procedure*, London, Oxford University Press, 2003, p. 46

<sup>26</sup> HIGONNET Estelle, "Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform", *Arizona Journal of International and Comparative Law*, Vol. 23, 2006

the ECCC implies to be constantly drawing on the tension between these two schools of thought, therewith shedding light on the complexity of the Cambodian transitional justice model.

In a **first chapter**, this paper will examine the long-running process towards the establishment of the Court, seeking to address the grounds for this delay and show that the ECCC is creature of great compromise. An in-depth analysis of the inherent specificities of the Court will also be conducted, allowing for a better understanding of its shortcomings and failures. These will be addressed in a **second chapter**, which, by adopting a judicial approach, will focus on the poor judicial record of the Court and its notable judicial bias. Using a rather social approach, a **third chapter** will temper these negative aspects and attempt to outline the laudable (though insufficient) achievements the Court can claim.

## CHAPTER 1 – 30 YEARS OF IMPUNITY

This chapter examines the long-running process towards the establishment of the Court and addresses the grounds for this delay, before providing an in-depth description of the specificities of the Tribunal.

### 1. The slow path to accountability (1975-1997)

Considerable time passed between the day the Khmer Rouge were ousted and the moment when the first positive step towards the establishment of a proper tribunal was taken. The reasons for this delay are to be found in a set of elements amalgamating Cold War tensions, features of the Cambodian post-Khmer Rouge context and the Vietnamese political agenda.

- **Victor’s justice and mock trial: the pro-Vietnamese “People’s Revolutionary Tribunal” (1979)**

The ECCC is not the first attempt to try senior DK leaders. Indeed, in August 1979, the People’s Republic of Kampuchea (PRK), the protégé regime installed by the Vietnamese after they invaded Cambodia, convened a ‘People’s Revolutionary Tribunal’ to try senior Khmer Rouge leaders Pol Pot and Ieng Sary. At the time, both men were in the Cambodian jungle leading the Khmer Rouge in a struggle to regain power and were therefore tried *in absentia*.<sup>27</sup> After five days of hearing, the two leaders were convicted of genocide and crimes against humanity and sentenced to death.

This initiative can be praised for being the first attempt to try and convict suspects of the crime of genocide as provided in the UN Convention of Genocide,<sup>28</sup> as well as for bringing some form of justice to victims of the DK regime. However it was widely

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<sup>27</sup> The concept of being tried *in absentia* is recognized by the Cambodian system, as it is heavily influenced by the French system, but is alien to the *common law* system on which international law is mostly based.

<sup>28</sup> De NIKE J et al. (eds.), *Genocide in Cambodia.. Documents from the Trial of Pol Pot and Ieng Sary*, Philadelphia, University of Pennsylvania Press, p. 17

regarded as a show trial organised by Vietnam's puppet government. Although the tribunal was staffed by both Cambodian and international lawyers, the tribunal showed indubitable signs of impartiality, with Vietnam misusing the tribunal as a propaganda tool to justify its military actions against the Khmer Rouge regime and fustigate Maoist China - at the time Vietnam's bitter enemy - for having supported it. As a judicial exercise, the revolutionary trial failed on many counts, as it was conducted without any proper legal system in place and with no real opportunity for the defense to mount a defence.

The atmosphere of the trial's proceedings was replete with Cold War rhetoric and ideological resonances, while “[defence] *counsel for Pol Pot and Ieng Sary were instructed to not defend their ‘clients’ but rather to present a picture of the regime’s horrendous character while focusing on the role of the Chinese government in supporting it.*”<sup>29</sup> This is well captured in the statement of American defence lawyer Hope Stevens who, supposedly on behalf of the absent defendants, fustigated the “*manipulators of world imperialism, the profiteers of neo-colonialism, the fascist philosophers, the hegemonists, who are supporting Zionism, racism, apartheid and reactionary regimes in the world*”, before condemning the “*false socialist leaders of Fascist China*” and concluding that “*Pol Pot and Ieng Sary were criminally insane monsters*”.<sup>30</sup> Thus, one can wonder whether the defence counsel was in fact at the pay of the prosecution, thereby clearly contravening due process and fair trial rights standards.

The US was also fustigated throughout the proceedings, particularly for the fact that it was supporting the DK's occupying the Cambodian seat at the UN and developing support for Cambodian forces opposed to the PRK.

Another major shortcoming of the revolutionary tribunal lies in the fact that both the Vietnamese and their protégés did not move subsequently to hold trials of others of the well-known DK leadership, who by then were living either in exile from Cambodia or in the Khmer Rouge redoubts within the country, which were maintained throughout the

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<sup>29</sup> OSBORNE Milton, *The Khmer Rouge Trial: an Ambiguous Good News Story*, op.cit., p. 6

<sup>30</sup> GOTTESMAN Eva, *Cambodia After the Khmer Rouge: Inside the Politics of Nation Building*, New Haven CT, Yale University Press, 2004, p. 65

1980s and into the 1990s. A clear reason for this failure to act was that leading members of the Cambodian Vietnam-backed regime had been members of the DK administration before defecting to Vietnam. This is still true to some extent for the current regime. As outlined above, current Prime Minister Hun Sen was part of the DK administration before defecting to Vietnam in 1977, and so was current chairman of the CPP Chea Sim. In 1979, due to human resources shortage, the newly established government had little choice but to employ many of those who had worked in the DK administration, particularly in the provinces.<sup>31</sup> While not of all them should be presumed to have overseen and/or committed crimes against humanity, many undoubtedly did.

- **12 years of UN-sponsored silence**

The Khmer Rouge cadres in exile in the provinces and in Thailand were recognized as the only legitimate representative of Cambodia at the UN until the end of the Cold War, in 1990-1991. The Cambodian Vietnam-backed regime was indeed considered as an occupation regime and was therefore deemed illegitimate by the international community. It was moreover a communist regime backed by the Soviets and was thus condemned by the West, headed by the United States. This obviously postponed the moment when the United Nations would tackle the issue of Khmer Rouge gross human rights violations.

A few initiatives towards the achievement of international justice were taken, but all were eventually nipped in the bud. A first initiative, notably, was stemming from an American researcher, Gregory Stanton, who founded the *Cambodian Genocide Project* at Yale in 1981 and since then has been a driving force to bring the Khmer Rouge to justice. The Project convened a 200-page dossier ready to be presented to the International Court of Justice (ICJ) in 1986, but the American government exerted pressure for it to never make it to the Court.<sup>32</sup> Such reticence from the Americans to bring the Khmer Rouge to trial is certainly linked to the fear that American bombings during that period would be brought to the fore.<sup>33</sup> Gregory Stanton subsequently gave his initiative a second go by turning to the Australian government. The latter however

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<sup>31</sup> OSBORNE Milton, *op. cit.* p. 7

<sup>32</sup> FAWTHROP Tom and JARVIS Helen, *Getting Away with Genocide? Elusive Justice and the Khmer Rouge Tribunal*, London, Pluto Press, 2004, p. 71.

<sup>33</sup> *Ibid.* p. 112

refused to bring the case before the ICJ, allegedly because it would paradoxically legitimate the Khmer Rouge regime by granting it state recognition – seeing as the ICJ is competent to settle legal disputes between States only, not governments.<sup>34</sup> Yet, American political pressure on Canberra as well as Australia’s desire to preserve the Association of South-East Asian Nation (ASEAN)’s unity - Thailand and Singapore did not want Vietnam to be granted any sort of legitimacy - certainly influenced Australia’s decision.<sup>35</sup>

If not through the ICJ, the United could have taken action under Article VIII of the UN Convention on the Prevention and Punishment of the Crime of Genocide. Yet, despite tenuous lobbying from international and national NGOs as well as inquiries from survivors of the genocide who indicated to the UN that the Khmer Rouge remained a threat to their country, the international community kept silent.<sup>36</sup>

It is only on 23 October 1991 that the UN granted official recognition to the new government of Cambodia, when the Paris Peace Agreement were signed, aiming at ending the “*tragic conflict and continuing bloodshed in Cambodia*”.<sup>37</sup> The Vietnamese had withdrawn their troops two years earlier, opening a window of opportunity for the different factions (government and resistance, including the Khmer Rouge) to reach a political settlement.<sup>38</sup> The Paris Peace Agreement, gave the UN full authority to supervise a ceasefire, repatriate the displaced Khmer Rouge along the border with Thailand, disarm and demobilize the factional armies, prepare the country for free and fair elections and foster a culture of human rights and rule of law.<sup>39</sup>

## 2. The establishment and structure of the ECCC (1997-2006)

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<sup>34</sup> Article 34-1, Statute of the International Court of Justice, 1945

<sup>35</sup> FAWTHROP Tom and JARVIS Helen, *op.cit.*

<sup>36</sup> *Ibid*, p. 81

<sup>37</sup> UNITED NATIONS, *Agreements on a Comprehensive Political Settlement of the Cambodia Conflict*, Paris, 23 October 1991 <[http://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/agree\\_comp\\_pol\\_10231991.pdf](http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/agree_comp_pol_10231991.pdf)>

<sup>38</sup> FINDLAY Trevor, *Cambodia: The Legacy and Lessons of UNTAC*, New York, Oxfors University Press, 1995, p. 5

<sup>39</sup> RATNER Steven, “The Cambodian Settlement Agreements”, *American Journal of International Law*, vol. 87 (1), October 1993, p. 1; KELLER Lucy, “UNTAC in Cambodia – from Occupation, Civil War and Genocide to Peace”, in PLANCK Max, *Yearbook of United Nations Law*, vol. 9, 2005, p. 149

From the mid-1990s, the climate was much more favourable for the investigation of Khmer Rouge crimes to be carried out. Firstly, the Vietnamese troops had withdrawn since 1989, and a large fringe of the Khmer Rouge guerrilla had capitulated in 1996, easing the country's transition towards peace and democracy and its ability to deal with its past. Moreover, international criminal justice had made significant progress - the ICTY and ICTR were established and the ICC was on its way, setting important legal precedent. Further, the new government of Cambodia, embarrassed by its former Khmer Rouge ties, knew it had to distance itself from the Khmer Rouge regime in order to gain international legitimacy and was thus ready to make an effort. What arguably played the most significant role, however, is the pardon granted to Ieng Sary by King Norodom Sihanouk in 1996, in exchange for the Khmer Rouge guerrilla to turn in the guns and officially recognize the new government of Cambodia. Thereby, the UN realized how much political clout the Khmer Rouge still had in the country and acknowledged the necessity to act and try the former Khmer Rouge leaders.<sup>40</sup> In 1997, the UN Human Rights Commission passed a resolution requesting the Secretary General to quickly address any inquiry made by Cambodia with regard to the establishment of a potential tribunal.<sup>41</sup> Responding to this invitation, the Cambodian government first approached the United Nations for their assistance in 1997, leading to a seven-year period of intense negotiations and quarrel over the nature and form the tribunal should take.

- **Seven years of laborious negotiations between the Cambodian government and the UN**

On 21 June 1997 the then co-Prime Ministers Norodom Ranariddh and Hun Sen wrote a letter to UN Secretary-General Kofi Annan requesting the assistance of the United Nations and international community in bringing to justice those persons responsible for the genocide and/or crimes against humanity during the rule of the Khmer Rouge from 1975-1979. This letter stated the following:

*„[...] We are aware of similar efforts to respond to the genocide and crimes against humanity in Rwanda and the former Yugoslavia, and ask that similar assistance be given to Cambodia. Cambodia does not have*

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<sup>40</sup> DONAVAN Daniel, "Joint UN- Cambodia efforts to establish a Khmer Rouge Tribunal", *Harvard International Law Journal*, vol. 44, Summer 2003, p. 555.

<sup>41</sup> UNITED NATIONS HUMAN RIGHTS COMMISSION, Situation of human rights in Cambodia, , E/CN.4/RES/1997/49, 11 April 1997



*the resources or expertise to conduct this very important procedure. [...] We believe that crimes of this magnitude are of concern to all persons in the world, as they greatly diminish respect for the most basic human right, the right to life. We hope that the United Nations and the international community can assist the Cambodian people in establishing the truth about this period and bringing those responsible to justice. Only in this way can this tragedy be brought to a full and final conclusion.”<sup>42</sup>*

By drawing a parallel with the ICTY and ICTR, this letter appears to be a promising invitation to create an international tribunal sponsored by the UN.<sup>43</sup> However, this official request is misleading and does not reflect the government’s true intentions, as it actually never planned to acquiesce to a predominantly international tribunal.<sup>44</sup> It is important to note, moreover, that Hun Sen’s motives for requesting assistance are highly questionable. Indeed, a few weeks after the letter, Hun Sen’s CPP staged a bloody military coup to oust Prince Norodom Ranariddh’s Funcipec party from the shaky coalition that had been in place since the UN sponsored the elections in 1993. More than forty political opponents were killed during the coup.<sup>45</sup> There are solid grounds to believe that Hun Sen advocated international prosecution with a view to gain international credibility and divert attention from this event.

The UN General Assembly subsequently adopted a resolution representing the UN’s commitment to assisting the Cambodian government with the Khmer Rouge trials and giving the mandate to a UN Group of Experts (the “Experts”) to examine the situation in Cambodia and investigate possible means of holding the Khmer Rouge accountable. The Experts travelled through Cambodia from July 1998 until February 1999, interviewing government and non-governmental officials, current Cambodian citizens and some survivors of the Khmer Rouge regime. Despite the difficulty with finding surviving witnesses who could recall the events of over twenty years past and the problem of gathering physical evidence, the Experts found ample evidence of, *inter alia*, crimes of genocide, crimes against humanity and war crimes. The Experts examined the various options available to proceed with the prosecution of Khmer Rouge leaders: (1) a

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<sup>42</sup> Letter from Norodom Ranariddh, Cambodian First Prime Minister, and Hun Sen, Cambodian Second Prime Minister, to Secretary General Annan (June 21, 1997) (see Annex 2)

<sup>43</sup> LUFTGLASS Scott, “Crossroads in Cambodia: The United Nation’s Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge”, *Virginia Law Review*, vol. 90, May 2004, p. 906

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.* p. 907

tribunal established under Cambodian Law, (2) a United Nations tribunal, (3) a Cambodian tribunal under United Nations administration (through a bilateral agreement between the United Nations and Cambodia), (4) an international tribunal established by multilateral treaty and (5) trials in states other than Cambodia.<sup>46</sup>

Acknowledging that the Cambodian judiciary, which had not recovered from its decimation by the Khmer Rouge, was particularly weak and pervasively corrupt, the Experts concluded that the most prudent option was to establish an ad hoc UN tribunal seated *near*, but not *in*, Cambodia. As such, the Expert's recommendations revolved around cloning the existing ad hoc tribunals (ICTY and ITCR), advising for a tribunal composed of a majority of foreign judges and an international prosecutor. The Experts recommended the personal jurisdiction of the tribunal to be limited to those most responsible for the serious violations of human rights committed during the DK-era, and its temporal jurisdiction to be limited to the period of Khmer Rouge rule, from 17 April 1975 to 7 January 1979. Interestingly enough, moreover, the Experts advocated in favour of the establishment of a truth commission in parallel to the tribunal.<sup>47</sup>

Hun Sen dismissed this proposal integrally and refused to consider a predominantly international tribunal as a viable option, invoking Cambodia's national sovereignty.<sup>48</sup> It is noteworthy that the UN's former support of the Khmer Rouge in exile against the Vietnamese occupant played a role in Cambodia's dismissal of this proposal, as the Cambodian government claimed it had reasons not to trust the UN's promises. The UN itself was conscious that "[it] *should be aware of its past record on Cambodia, a record that is not all glorious.*"<sup>49</sup>

Hun Sen thus warned Kofi Annan that UN engagement shall be restricted to three options: provide a legal team and participate in a tribunal conducted in Cambodia's existing courts; provide a legal team to act only in an advisory capacity to the tribunal; or withdraw from the tribunal completely.<sup>50</sup> This followed the 18 September 1999 statement by some former Khmer Rouge members, who were then part of the

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<sup>46</sup> Group of Experts Report, *op.cit.*,

<sup>47</sup> DONAVAN Daniel, *op.cit.*, p. 573

<sup>48</sup> POISSONIER Ghislain, "Les chambres extraordinaires au sein des tribunaux cambodgiens. Une nouvelle forme de justice internationale", *Journal de Droit International*, vol. 1, Janvier 2007, p. 88.

<sup>49</sup> FAWTHROP and JARVIS, *op. cit.*, p. 131

<sup>50</sup> HORSINGTON Helen "The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal", *Melbourne Journal of International Law*, vol. 5, 2004

Cambodian government, providing that the establishment of a Khmer Rouge tribunal would lead to further civil unrest. Although it is difficult to determine precisely how this statement impacted on the attitude of the Cambodian government with regards to the creation of a tribunal, it surely has had some effect as the negotiations between the UN and Cambodia subsequently “*limped along without ever coming to a resolution for the following two and a half years.*”<sup>51</sup>

It should be noted that the UN could have bypassed Hun Sen’s objections by establishing an ad hoc tribunal through a resolution from the Security Council.<sup>52</sup> However, China was threatening to veto such a resolution, obliging the UN to make compromises over the nature of their involvement in the future tribunal.

In March 1999, working towards such compromises, Secretary General Kofi Annan conceded that the UN would agree to the establishment of a *joint*, or *hybrid*, tribunal (rather than an *ad hoc* tribunal),<sup>53</sup> but only if it had a majority of international judges and an independent international prosecutor,<sup>54</sup> thereby following the leitmotiv “*domestic in form, but international in character*”.

In April 2000, US Senator John Kerry helped broker an agreement for a joint UN-Cambodian trial that would include both Cambodian and foreign judges and prosecutors. A draft Memorandum of Understanding (MoU) was presented by the UN to the Cambodian government in July 2000, but the legislation passed by the Cambodian government in January 2001 failed to satisfy some of the key conditions of the MoU. Subsequently, on 8 February 2002 the UN announced that it was abandoning negotiations with the Cambodian government because “*as currently envisaged the Cambodian court would not guarantee independence, impartiality and objectivity which are required by the UN for it to cooperate with such a court*”. The UN and many foreign nations expressed concern that “*the corrupt and poorly trained Cambodian justice*

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<sup>51</sup> DONOVAN Daniel, *op.cit.*, p. 560

<sup>52</sup> The ICTY, for instance was created by Resolution No. 827, dated 25 Mai 1993, and the ICTR by Resolution No. 955, dated 8 November 1994

<sup>53</sup> FAWTHROP and JARVIS, *op.cit.*, p. 133.

<sup>54</sup> DOCUMENTATION CENTER OF CAMBODIA, History of the Negotiations on the Khmer Rouge Tribunal between the United Nations and Cambodia (2002) <[http://www.dccam.org/Documents%20and%20Microfilm/History\\_of\\_the%20negotiations.htm](http://www.dccam.org/Documents%20and%20Microfilm/History_of_the%20negotiations.htm)>; Royal Government of Cambodia, Chronology of the Developments relating to the KR Trial (2002) <<http://www.ocm.gov.kh/chrono.htm>> at 1 October 2004.

*system was not capable on its own of producing a fair and impartial trial and verdict”.*<sup>55</sup>

The UN and Cambodian government were pressured to settle their differences and negotiations resumed in January 2003. On 6 June 2003 the UN and the Cambodian government signed a draft agreement (the “ECCC Agreement”) but it took another two years for funding arrangements to be negotiated and the final form of the hybrid tribunal to be agreed upon. The ECCC was finally established in November 2005 and commenced proceedings in 2006.

Before outlining the structure of the ECCC as it was finally decided upon, it is worth highlighting that Hun Sen’s vehement opposition to an international tribunal coupled with his status as a former member of the Khmer Rouge casts a questionable light on his sincerity with regard to bringing the former leaders of the Khmer Rouge to justice. Hun Sen’s critique of the Khmer Rouge lacks some effect due to the fact that he only defected as a soldier of the party when one of the many purges of the Khmer Rouge began to focus on his own ranks.<sup>56</sup> Additionally, there is evidence that Hun Sen’s requests for international assistance with establishing a tribunal may have been strategic ploys to divert attention from the bloody military coup he staged against Norodom Ranariddh. Thus, Hun Sen’s motives, which appear to lack good faith, combined with his proven ability to interfere in the trials, cast considerable doubt over the appropriateness of a hybrid tribunal.

- **The final compromise: an unprecedented model of international criminal justice**

In 1999, the UN Experts cautioned that “*the unique agglomeration of political forces renders the Cambodia context impervious to simple solutions*”.<sup>57</sup> The solution that has been eventually reached is, indeed, unique, with most features of the ECCC proving to be a novelty in the area of mass crimes prosecution.

At the time when the ECCC was set up, the international community had been increasingly relying on hybrid tribunals to prosecute alleged international criminals, as

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<sup>55</sup> MYDANS Seth, “UN Ends Cambodia Talks on Trials for Khmer Rouge”, *New York Times*, 9 February 2002

<sup>56</sup> SHENON Philip, “UN Plans Joint War Crimes Tribunal for Khmer Rouge”, *New York Times*, 12 August 1999 <<http://www.globalpolicy.org/security/issues/cambodia/99-08-12.htm>>

<sup>57</sup> Report of Group of Experts, *op.cit.*

shown in the cases of East Timor, Kosovo and Sierra Leone. Hybrid tribunals aim to redress the deficiencies of international tribunals on the one hand and domestic courts on the other. They incorporate national laws, judges and prosecutors, thereby contributing to the capacity building of the domestic judiciary and legal system, while also including international norms and personnel, thereby conferring legitimacy, resources, experience and technical knowledge. Such tribunals were set up amidst a climate of “tribunal fatigue”<sup>58</sup>, arising after the “*lacklustre*” performance of the ICTY and the ICTR, the mixed results of truth and reconciliation commissions and the uncertainties surrounding the ICC.<sup>59</sup>

Thus, the ECCC is a genuinely hybrid court in which domestic and international actors, funding and procedures all co-exist. What better defines the ECCC when compared to other hybrid courts is that it is a primarily Cambodian court, though *internationalised*.

All organs of the Court are divided along domestic-international lines. There are two Co-Prosecutors (one Cambodian and one international), two Co-Investigating Judges, and two Civil Party Lead co-Lawyers. The Judicial Chambers (Pre-trial Chamber, Trial Chamber and Supreme Court Chamber) are composed of a majority of domestic judges (eleven) and a minority of international judges appointed by the UN (eight), with a majority of domestic judges in each Chamber (three of five in the Pre-Trial and Trial Chambers and four of seven in the Supreme Court Chamber).<sup>60</sup> However, the ECCC Agreement provides that, for each decision, the judges must reach a ‘super majority’ judgment including at least one international judge. This idea stemmed from US Senator John Kerry and was implemented with a view to overcome the concerns about the weakness of the domestic judiciary and possible political interference from the Cambodian government. Domestic judges are in the majority but international judges are granted a sort of “veto power” preventing the domestic judges alone from overriding their concerns.<sup>61</sup> Most major administrative functions of the Court (for instance the

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<sup>58</sup> The term “tribunal fatigue” was first used by D. Scheffer, then Senior Counsel and Advisor to the United States Permanent Representative to the United Nations, see CASSESE Antonio, “International Criminal Law”, in EVANS Malcolm (ed), *International Law*, London, Oxford University Press, 2004, p. 734

<sup>59</sup> COSTI Alberto, “Hybrid Tribunals as a Valid Alternative to International Tribunals for the Prosecution of International Crimes”, *Human Rights Research Journal*, vol. 3, p. 12

<sup>60</sup> See ECCC website, <http://www.eccc.gov.kh/en/judicial-chamber>

<sup>61</sup> LEMONDE Marcel, *Un juge face aux Khmers Rouges*, Paris, Editions du Seuil, 2013, p. 27

Budget and Finance, Personnel and Security and Safety sections) also have co-heads.<sup>62</sup>

An original characteristic of the ECCC is that it is located inside the country where the crimes took place. This allows for a better outreach and a greater involvement of the Cambodian victims and/or citizens. To that extent, it can be seen as an improvement upon past international and hybrid tribunals.<sup>63</sup> The Special Court for Sierra Leone is located domestically as well, but the difference lies in the fact that the ECCC functions with a majority of domestic judges, while the Special Tribunal for Sierra Leone is primarily international.

Importantly for public coverage of and involvement in the Court's proceedings, and in contrast to other war crimes trials, much of the business in trials is conducted in the local language (Khmer) and a Khmer translation of all proceedings is broadcasted into the public gallery when not.

The funding for the ECCC is also hybrid, with the budget being split into national and international components. Both components, national and international, are funded by voluntary state contributions, and not by the UN's budget as it is the case for the ICTR and ICTY, which puts the ECCC in a very precarious situation.<sup>64</sup> Japan, the European Union and the UN Trust Fund are the major donors to the Cambodian side of the budget, alongside the Cambodian government. Japan has also donated almost fifty per cent of all international contributions to the Court,<sup>65</sup> with other major donations coming from Australia, the United States, Germany, the United Kingdom and France.<sup>66</sup>

The ECCC is mostly applying Cambodian law, though it calls upon elements of international criminal law when Cambodian law does not provide sufficient guidance on an issue. Cambodian law and procedures are largely modelled on the French-based civil law system. Interestingly enough, the ECCC is the first internationalized tribunal using the *civil law* system, as opposed to the Anglo-Saxon *common law* model. One important

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<sup>62</sup> For a better understanding of the organizational structure of the ECCC, see Annex 3

<sup>63</sup> AINLEY Kirsten, "Transitional justice in Cambodia: the coincidence of power and principle", in: JEFFERY Renee, (ed.) *Transitional justice in the Asia-Pacific*. Cambridge, Cambridge University Press, p. 4

<sup>64</sup> LEMONDE Marcel *op.cit.*

<sup>65</sup> Japan's major involvement can be explained by the country's will to affirm its position as a major regional player, but also by its intention to bring to light China's historical support to the Khmer Rouge. See LEMONDE Marcel, *op.cit.*

<sup>66</sup> See *ECCC Financial Outlook*, 31 July 2013 <[http://www.eccc.gov.kh/sites/default/files/Financial%20Outlook%20-%2031%20July%202013\\_final.pdf](http://www.eccc.gov.kh/sites/default/files/Financial%20Outlook%20-%2031%20July%202013_final.pdf)>

aspect implied by the civil law system is that investigations for cases are conducted by Co-Investigating Judges rather than prosecutors. The absence of international legal precedent with this regard surely does not ease the proceedings at the ECCC, where international judges with a common law background sometimes find it hard to adapt.<sup>67</sup>

Another aspect implied by the civil law system, and perhaps the main innovation of the ECCC compared to other international or hybrid courts prosecuting mass crimes, is the right of victims of alleged crimes to participate as civil parties at the trial. This greater recognition of victims was achieved as a means of fulfilling the Court's mandate to assist the Cambodian people's pursuit of justice and "national reconciliation".<sup>68</sup> Any natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC is considered a "victim".<sup>69</sup> Those who have suffered physical, moral or material harm as a direct consequence of the crimes investigated by the Court can stand as civil parties and therewith seek "moral and collective" reparations. Thereby, the civil parties have a clear and direct interest in seeing the accused convicted of the specific crimes that caused their own suffering in order to found their exercise of civil action for damages. Whereas other international courts have mostly adopted a purely utilitarian perspective on victims (who were involved as mere witnesses in support of the Prosecution), this system of civil party participation regards them as real subjects of law and full participants throughout the legal proceedings.<sup>70</sup> This is a complete novelty in the area of international criminal justice. However, as will be addressed further below, considering the overwhelming amount of victims as well as the lack of international legal precedent with this regard, the management of civil parties is inevitably extremely challenging and has proved to be problematic on many levels.

Thus, this first chapter has shown that the ECCC is a creature of compromise, as clearly demonstrated by the history of tense and protracted negotiations that led to its eventual creation. Many in the international community feel that the UN compromised *too much* in allowing itself to be affiliated with the ECCC in its present form. Human Rights

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<sup>67</sup> LEMONDE Marcel, *op.cit.*, p. 28

<sup>68</sup> Preamble to the Agreement between the United Nations and the Royal Government of Cambodia, 2004

<sup>69</sup> ECCC Internal Rules, glossary: "*Victim: refers to a natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC.*"

<sup>70</sup> FIDH, *Victims' Rights Before the ECCC. A Mixed record for Civil Parties*, November 2012, p. 7

Watch argued that nation states pressured the UN to capitulate and make unprincipled concessions on the basis that this was the last chance to bring the Khmer Rouge leaders to justice, and that consequently, “*politics and expediency appear to have won out over principles.*” From the outset, critics have had concerns about the ECCC based on perceived inadequacies in the Court’s founding documents - such as insufficient reference to international law and overly limited jurisdiction. Additional concerns have also arisen after evidence of political interference, judicial bias and corruption emerged. These will be addressed in a second chapter.



## CHAPTER 2 - JUDICIAL PERSPECTIVE: THE ECCC'S FAILURES AND SHORTCOMINGS

Building upon the judicial perspective considered in the introduction, this chapter outlines the blatant failures and shortcomings the ECCC is marred by. Indeed, it becomes self-evident that the Court can only deliver partial, elusive and symbolic justice to the victims of the Khmer Rouge, while the ECCC's reputation is clearly sullied by scandals of corruption and proven government interference in the proceedings. This only comes to confirm the fears that were put forward by the international community when rejecting the idea of a hybrid tribunal located inside the country in the first place.

### 1. Elusive justice

Due to its narrow temporal and personal jurisdiction, justice rendered at the ECCC is doomed to be elusive and merely symbolic. As a matter of fact, with only one case completed to date, a second one struggling to achieve meaningful justice, and a third and fourth ones strongly opposed by the government, the ECCC's historical record will provide — at best — an extremely limited account of how Khmer Rouge atrocities were committed and victims of the DK regime will not all be granted official recognized of the harm they endured.

- **Case 001: Duch, the perfect villain to blame?**

As mentioned above, the only case that has led to a conviction so far is the one of Duch, former commander of infamous S-21 prison. His conviction was mainly regarded as a success, particularly by the handful of S-21 survivors still alive. Duch largely acknowledged what he did and cooperated with the Court. His conviction had a high symbolic impact, as since the Vietnamese liberation in 1979, S-21 has served as a symbol of the criminality and sadism of the Khmer Rouge. However, Duch has been coined a mere “scapegoat” of the Khmer Rouge Tribunal.<sup>71</sup> Indeed, Duch was not a senior leader and did not sit in cabinet with the defendants in Case 002. To exaggerate somewhat, one can say that convicting Duch without convicting the masterminds of the

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<sup>71</sup> GIRY Stéphanie, “Necessary Scapegoats? The Making of the Khmer Rouge Tribunal”, *The New York Review of Books*, New York, July 2012

Khmer Rouge regime is like convicting the commander of Auschwitz without convicting the Nazi leadership. Duch received the maximum sentence the Court can bestow (life imprisonment) on appeal.<sup>72</sup> If the defendants in Case 002 are found guilty, their sentences ought logically to be higher than Duch's as they bore the principal leadership roles and instigated the policies he implemented. Yet there is no higher sentence. This puts into question whether the principles of parity and proportionality of sentencing have been properly applied. Moreover, there are many 'other Duchs' - men and women who ran prisons, torture chambers, supervised mass murder and used slave labour. Failure to pursue them indubitably gives Duch a disproportionate role in the DK history. Piling the worst of the regime on the shoulders of Duch and a few Khmer Rouge leaders provides a narrative that is only a partial outlet for history and justice.

- **The severance of proceedings in Case 002, dashing hopes for a meaningful and representative justice**

Recent developments in the management of Case 002 epitomize acutely the difficulties faced by the ECCC. Of the four defendants, one was ruled unfit for trial due to her degenerative mental illness (Ieng Yirith), and one has died (Ieng sary). The two remaining defendants (Khieu Samphan and Nuon Chea) are aging and there are great fears that they will become unfit or die before being held responsible for their alleged crimes. They were accused individually, as well as part of a joint criminal enterprise, of the following crimes:<sup>73</sup>

- Crimes against humanity: extermination, murder, enslavement, deportation (of Vietnamese), imprisonment, torture, persecution on political, racial and religious grounds, rape (as a result of forced marriage) and other inhumane acts (forcible transfer of population, forced marriage, forced disappearance and "attacks against human dignity"), in the context of an attack against the entire population of Cambodia.
- Grave breaches of the Geneva Conventions of 12 August 1949: willful killing, torture, inhumane treatment, willfully causing great suffering or serious injury to

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<sup>72</sup> Supreme Court Chamber, *Kaing Guek Eav alias Duch, Appeal Judgment (Case 001)*, Document No. F28, 3 February 2012

<sup>73</sup> Trial Chamber, "Closing Order (Indictment) in Case 002", Document No. D427, 15 September 2010 <http://www.eccc.gov.kh/en/documents/court/closing-order>

body or health, willfully depriving a prisoner of war or civilian the rights of fair trial, unlawful deportation or confinement of civilians, against protected persons in the context of an international armed conflict with Vietnam.

- Genocide of the Cham and of the Vietnamese.<sup>74</sup>

Unlike Duch, Nuon Chea and Khieu Samphan do not cooperate with the Court and refuse to answer questions and testify, using their right to remain silent. Khieu Samphan has always denied involvement in criminal activities under the DK regime, claiming that his position as Head of State was merely symbolic and honorific. Nuon Chea likewise long tried to evade responsibility for the crimes committed, before eventually expressing remorse: *“I feel remorseful for the crimes that were committed intentionally or unintentionally, whether or not I had known about it or not known about it,”* he said, while claiming that he was not aware of all of the Khmer Rouge's action in his role overseeing propaganda and education.<sup>75</sup>

Case 002 has been coined one of the most complex human rights trial since Nuremberg. Therefore, in order to speed up proceedings, the Trial Chamber has decided to split the current Case 002 into smaller, more easily manageable sub-trials, each addressing specific legal and factual issues.<sup>76</sup> The Court is now addressing the first “mini-trial” under this line of proceedings, known as Case 002/1. Despite strenuous arguments by the Prosecution to broaden it and objections by the Defence and Civil Party lawyers, the scope of this first mini-trial is narrowed to very few criminal charges. Of the four criminal charges contained in the Indictment, only one is at stake: the forced movement of population. In other words, the gravest breaches to the Geneva Convention including allegations of executions, torture, forced marriages, and, most importantly, allegations of genocide (against the Muslim Chams and the Vietnamese minorities) have been postponed to future trials. Yet, considering the slow pace of the first mini-trial, the

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<sup>74</sup> The Indictment originally contained offenses under the Cambodian Criminal Code from 1956 but these were eventually ruled out by the Trial Chamber

<sup>75</sup> “Khmer Rouge leader expresses remorse over killings”, *Phnom Penh Post*, 31 May 2013

<sup>76</sup> See Trial Chamber, ‘Severance Order pursuant to Internal rule 89ter’, Document Number E124, 22 September 2011: <http://www.eccc.gov.kh/en/document/court/severance-order-pursuant-internal-rule-89ter>. The decision has been challenged by a series of appeals by both Prosecution and the Defence and overturned by the Supreme Court Chamber. In spite of this, the severance was eventually confirmed by the Trial Chamber. See Trial Chamber, ‘Decision on Severance of Case 002/1 following Supreme Court Chamber of 8 February 2013’, Doc. Number E284, 26 April 2013: <http://www.eccc.gov.kh/en/document/court/decision-severance-case-00201-following-supreme-court-chamber-decision-8-february-201>

advanced age of the accused and the Court's funding concerns, the likeliness of such trials occurring is slim *at best*.

For many, by excluding the gravest charges, the severance is contravening the victims' demands for representative and meaningful justice. The crime of forced marriage (and related crimes of sexual violence), for example, is most likely to never be addressed. Yet *"the use of forced marriage [...] was systematic and widespread [under the DK rule], employed by the regime to secure loyalty to the Government by breaking family bonds and taking [the] major life decision [of] who to marry out of the hands of citizens and entrusting it to the State"*.<sup>77</sup> Due to the lack of adequate research in this area, the number of victims is largely unknown. However, given that such marriages were organized throughout the country in nearly every cooperative, that the age range for selection as a potential spouse was between 15 to 35 years, that it affected cadres and civilians from all social groups, and that unmarried as well as formerly married women and men were counted among the victims, one can begin to get a picture of the magnitude of this practice and thus its relevance to the current proceedings. Stigma of such practice certainly endures today.<sup>78</sup> Out of the nearly 4,000 civil parties registered in proceedings in Case 002, more than 600 have been admitted as victims of forced marriage, thereby comprising the second largest group of civil parties in number.<sup>79</sup> Yet, the severance of Case 002 may regrettably deprive them of their right to an effective remedy for the harm they have suffered.

The allegations of religious persecutions and genocide, moreover, have been deferred to uncertain future trials. Although these allegations strictly refer to the targeted elimination of religious and ethnic groups such as the Vietnamese and Cham Muslim minorities, they are highly emblematic of the DK policies and go to the heart of how the regime is perceived.<sup>80</sup> It is worth highlighting that the Cham and Vietnamese minorities

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<sup>77</sup> Ms Zainab Hawa Bangura, the special representative to the UN Secretary General on Sexual Violence in Conflict in a statement issued on 1 March 2013: <http://www.un.org/apps/news/story.asp?NewsID=44264&Cr=sexual+violence&Cr1=#.UhmKBGSvGRI>

<sup>78</sup> See documentary: SUON Guillaume and CHAN Lida, *Red Wedding*, Cambodia/France, 2012, 58 mins

<sup>79</sup> AFP, "Heartache of Khmer Rouge forced marriage victims", 23 March 2011

<sup>80</sup> For this reason, the Nuon Chea Defence Team has objected the severance of Case 002 and argued for the inclusion of the charge of genocide, notably, as it is the "most notorious" charge and the one that the most "wrongfully" encapsulates the Khmer Rouge regime: only the inclusion of the genocide charge would enable Nuon Chea to defend himself against "wrongful allegations".

living in Cambodia today are still struggling to consolidate their place in Cambodian society and face widespread discriminations although having lived in the country for generations. Thus, addressing the genocide charge would enable them to be officially recognized as victims and reconstruct their identity. Popular anti-Vietnamese sentiment, in particular, was stoked throughout the recent election campaign, with opposition leader Sam Rainsy being criticised for using racially charged rhetoric.<sup>81</sup> Focusing on their plight under the DK regime could translate into greater attention for the prejudices they face today. For the reasons stated above, this is, however, unlikely to happen.

- **The uncertain fate of Cases 003 and 004**

Cases 003 and 004 were brought into being in 2009, when international prosecutors requested the investigation of five additional suspects beyond cases 001 and 002. Although not named officially by the ECCC, the identities of the two former officials suspected in Case 003 have been widely reported as being Khmer Rouge air force commander Sou Met, who died in July 2013 and will thus never be prosecuted, and navy commander Meas Muth, who is said to have had regular contact with senior leaders and sent prisoners to S-21, leading to their execution.<sup>82</sup> Case 004 involves three Khmer Rouge regional officials – Aom An, Yim Tith and Im Chem – accused of committing genocide and crimes against humanity in their areas of command.<sup>83</sup> Regrettably, due to political interference and dwindling funding, these two cases face a premature end.

In the autumn of 2010, Prime Minister Hun Sen informed UN Secretary-General Ban Ki-moon that “*Case 003 will not be allowed...[t]he court will try the four senior leaders successfully and then finish with Case 002.*”<sup>84</sup> This statement by the Prime Minister was the latest in a series of public comments made by senior Cambodian government officials bearing the same message: the ECCC would shut down after Case 002 was

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<sup>81</sup> “Vietnamese Embassy Official Criticizes CNRP Racial Rhetoric”, *Cambodia Daily*, 27 July 2013: <http://www.cambodiadaily.com/elections/vietnamese-embassy-official-criticizes-cnrps-racial-rhetoric-36951/>

<sup>82</sup> HEDER and TITTEMORE, *op.cit.*

<sup>83</sup> <http://www.cambodiatribunal.org/blog/2011/10/big-news-eccc>

<sup>84</sup> OPEN SOCIETY JUSTICE INITIATIVE, “Salvaging Judicial Independence: the Need for a Principled Completion Plan for the Extraordinary Chambers in the Courts of Cambodia,” November 2010, p. 4, citing James O’Toole, “Hun Sen to Ban Ki-moon: Case 002 Last Trial at ECCC,” *Phnom Penh Post*, 27 October 2010.

completed.<sup>85</sup> Government officials, notably, claimed that prosecution of these cases would lead to civil unrest.

Two international investigating judges have resigned (see below) because of Cambodian government political interference, or “perceived” interference, in their work. Meanwhile, Cases 003 and 004 have been in a state of limbo. Moreover, the critical funding constraints faced by the ECCC raises serious concerns that Cases 003/004 will not be completed.

## **2. Judicial bias: a failure of credibility**

It is assumed that all internationalized tribunals will diligently apply international standards of fair trial and due process to their judicial proceedings. However, this assumption is not always correct, and this is highlighted by the ECCC’s record. The fact that the ECCC employs Cambodian and international judges and is located inside the country where the crimes occurred is an untested and highly risky approach to war crimes prosecution. In that respect, unlike the Yugoslavia and Rwanda ad hoc tribunals, the ECCC lacks the safeguards and neutrality provided for by a strictly international tribunal. The hybrid ECCC places a heavy burden on Cambodia’s underdeveloped judicial system and arguably relinquished too much power to the Cambodian government, which suffers from a history of systematic corruption and lack of rule of law. It is worth reiterating that the Cambodian judiciary was completely decimated by the Khmer Rouge and has still not recovered from it. The ECCC is consequently highly vulnerable to political interference and is undermined by the corruption of the domestic judiciary.

- **Corruption of judges**

Cambodia is ranked 157th on 176 on Transparency International’s 2012 Corruption Perception Index and the judiciary is seen as the most affected institution.<sup>86</sup> The ECCC

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<sup>85</sup> OPEN SOCIETY JUSTICE INITIATIVE, “Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: November 2011,” pp. 11-13, available at:

[http://www.soros.org/initiatives/justice/articles\\_publications/publications/cambodia-court-20111114](http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-court-20111114)

<sup>86</sup> See Transparency International, [http://www.transparency.org/country#KHM\\_PublicOpinion](http://www.transparency.org/country#KHM_PublicOpinion)

is not spared by this pervasive phenomenon. Corruption allegations at the ECCC have been circulating since the beginning of proceedings in 2006, with cases of corruption being recorded notably amongst the high-ranking judges. The ECCC has already seen two major scandals involving claims of corruption.

One first scandal emerged following allegations that Cambodian staff at the ECCC are involved in a kick-back scheme where they must pay up to 30 per cent of their monthly salary to government officials to obtain and retain their jobs.<sup>87</sup> In late summer 2008, several Cambodian staff members approached UN staff members with specific corruption allegations, which were referred to the UN Office of Internal Oversight Services (OIOS), which opened a confidential review in early August 2008. While the results of the OIOS report remain confidential, it is believed to have found the corruption allegations, including those implicating high-ranking officials, to be credible.<sup>88</sup>

No sooner had the scandal over kickbacks receded than another scandal emerged when Judge Nil Nonn, Presiding Judge of the Trial Chamber, publicly admitted to have accepted bribes in the past,<sup>89</sup> which clearly contravenes international standards protecting the integrity and independence of the judiciary. In spite of this, requests to disqualify Judge Nil Nonn from the ECCC were met with a unanimous refusal by the Trial Chamber, which insisted that even if judges exhibited bias or engaged in misconduct in previous cases, this should not disqualify them from the case at hand.

- **Political interference**

This leads us to wider concerns about the lack of independence of Cambodian courts, and their lack of ability to provide fair and independent trials. It is noteworthy that Cambodian judges at the ECCC are appointed by the Supreme Council of the Magistracy, which consists of nine members appointed by the King, and has been criticized in the past for functioning as an auxiliary of the ruling party.

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<sup>87</sup> “Kickback Claims Stain the KRT,” *Phnom Penh Post*, 23 February 2007, <http://www.phnompenhpost.com/national/kickback-claims-stain-krt>

<sup>88</sup> NIELSEN Elizabeth, “Corruption Allegations at the ECCC: Fair Trial Implications”, *Documentation Center of Cambodia Magazine: Searching for the Truth*, Debate Section, August 2009

<sup>89</sup> “KRT judge accused of taking bribes”, *Phnom Penh Post*, 19 September 2010

These were the concerns that prompted the UN Group of Experts to reject the idea of a domestic court in the first place, stating that: “*the level of corruption in the court system and the routine subjection of judicial decisions to political influence would make it nearly impossible for prosecutors, investigators and judges to be immune from such pressure in the course of what would undoubtedly be very politically charged trials*”<sup>90</sup> and concluding that “*it would be difficult to find a judge free of the appearance of bias or prejudice.*”<sup>91</sup> These early concerns about the lack of judicial independence of Cambodian ECCC judges from the Cambodian executive branch have unfortunately proven legitimate, with the above-mentioned controversy that arose over investigations in Case 003 and 004.

On 8 October 2011, international Co-Investigating Judge Siegfried Blunk submitted his resignation from the ECCC because of perceptions of “attempted interference” by government officials into Case 003 and 004, citing the Cambodian Minister of Information’s statement that, “*if they want to go into cases 003 and 004, they should just pack their bags and leave.*”<sup>92</sup> His replacement, Laurent Kasper-Ansermet, later resigned in March 2012 for similar reasons, claiming that his domestic counterpart, Judge You Bunleng, was sabotaging his ability to investigate Cases 003/004 by means such as not allowing him to place documents in the case files, withdrawing the official seal, refusing to acknowledge his legal validity to investigate and not allowing access to basic services such as interpreters and drivers to go out on investigation missions.<sup>93</sup> The UN has subsequently expressed concerns over the impartiality of the ECCC and has accused the Cambodian government of breaching the ECCC’s foundational treaty, thus providing legal grounds for the UN to pull out.<sup>94</sup>

Another blatant sign of the government attempt to undermine efforts to bring former Khmer Rouge leaders to justice is the Cambodian government’s refusal to pay local staff

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<sup>90</sup> Report of Group of Experts, *op.cit.* para. 133

<sup>91</sup> Report of Group of Experts, *op.cit.*, para. 127

<sup>92</sup> Statement by Judge Blunk, 10 October 2011: <http://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge>

<sup>93</sup> Press Release from the International Reserve Co-Investigating Judge Laurent Kasper-Ansermet, 19 March 2012: <http://www.eccc.gov.kh/en/articles/press-release-international-reserve-co-investigating-judge>

<sup>94</sup> Statement attributable to the Spokesperson for the Secretary-General on the Extraordinary Chambers in the Courts of Cambodia, New York, 30 March 2012; UN News Center, “UN voices concern as second judge resigns from Cambodia genocide court”, 19 March 2012; UN News Center, “UN calls on Cambodia to appoint international judge to genocide court”, 20 January 2012



at the ECCC. Cambodian interpreters and translators who had not been paid since November 2012 went on strike for two weeks, forcing a halt on proceedings. In September 2013, about 200 local staff were striking again over months of unpaid wages, further threatening to shut down the ECCC's entire operation.<sup>95</sup> These events have unavoidably slowed down the proceedings and both times the international side of the Khmer Rouge tribunal had to transfer funding to the Cambodian side so that it can continue its operations.<sup>96</sup> This is however clearly not a sustainable solution and the Cambodian government has legal obligation to fund the national component of the Court.<sup>97</sup>

Despite all these serious allegations and stalling tactics used by Hun Sen's government, international donors have played along. Some human rights activists and commentators have asked the donors and the UN to withdraw, holding that no trial at all would be better than a political farce.<sup>98</sup>

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<sup>95</sup> HUMAN RIGHTS WATCH, "Cambodia: Government Obstructs Khmer Rouge Court", News, 5 September 2005, <http://www.hrw.org/news/2013/09/05/cambodia-government-obstructs-khmer-rouge-court>

<sup>96</sup> See Statement Attributable to the Spokesperson for United Nations Assistance to the Khmer Rouge Trials on a loan for payment of national salaries at the ECCC (18 September 2013) <<http://unakrt-online.org/articles/statement-attributable-spokesperson-united-nations-assistance-khmer-rouge-trials-loan>>

<sup>97</sup> Article 15 of the ECCC Agreement clearly spells out that "*Salaries and emoluments of the Cambodian judges and Cambodian personnel shall be defrayed by the Royal Government of Cambodia*".

<sup>98</sup> See statement of Khmer Rouge victim Theary C. Seng, "Time is Prime for UN to Withdraw from KRT", *KI Media*, 27 January 2012

## CHAPTER 3

### SOCIAL PERSPECTIVE: MIXED SUCCESSES

Building on the social perspective addressed in the introduction, this chapter aims at describing the successes of the Court, especially in terms of victims' participation, outreach and capacity-building/legacy, which are all stemming from the specific, hybrid form and in-country location of the Tribunal. However, although it is too soon to paint a comprehensive picture of the achievements of the Court, these successes are mixed and it is doubtful whether they can outweigh the failures and shortcomings outlined in the second chapter. Thus, this third chapter then proceeds to reflect on more holistic approaches to transitional justice that could have been taken into account.

#### 1. Mixed Successes

Notwithstanding the many critiques of the ECCC described above, the Court has arguably facilitated many laudable achievements within Cambodian society. Namely, the ECCC has played a valuable role in the creation of a common history; ending impunity; capacity building amongst the Cambodian judiciary; rebuilding Cambodian faith in domestic institutions through extensive outreach about the court; and allowing victim participation in the proceedings as civil parties. However, as will be addressed in the following sections, each of these aspects is debatable and can be tempered.

- **Creating a common history**

The ECCC serves an important function in creating a common history for the Cambodian people. While knowledge of the Khmer Rouge regime and its atrocities may be common outside of Cambodia, much of the research about this period was conducted by non-Cambodian researchers in the English language, and is widely inaccessible to Cambodians themselves.<sup>99</sup> As a result, many Cambodians, especially in rural areas, still struggle to understand what happened under the Khmer Rouge regime and why. The

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<sup>99</sup> KLINKNER Melanie, "Forensic Science for Cambodian Justice", *International Journal of Transitional Justice*, vol. 2, June 2008, pp. 227, 238

government policy of “induced amnesia” mentioned in the introduction does not help in that respect. Due to political controversy over the way it was described, Khmer Rouge history only entered Cambodian school curriculums in 2007. The ECCC provides an opportunity to dispel myths about the Khmer Rouge era and create an accurate history about what happened, so that Cambodians—as well as the international community—can learn from the experience and prevent such a tragedy from happening again. Duch’s trial, in that respect, provided vivid testimony about what happened under the DK regime and why and how the atrocities were committed.<sup>100</sup>

How much the ECCC is living up to the expectation of creating a common history is however a matter of debate, particularly in the context of the severance of Case 002 which has deferred the most emblematic Khmer Rouge policies to future trials that will most likely never take place. It is hard to establish an accurate account of facts without addressing crimes of religious persecutions, genocide or forced marriage, as they all epitomize the DK-era. Moreover, unlike Duch who fully cooperated with the Court, both Nuon Chea and Khieu Samphan have constantly refused to answer questions and testify, thereby exercising their right to remain silent. This makes it hard for the Court to fulfil its mandate to establish the historical truth.

- **Ending impunity**

Like building a common history, accountability is also important to the victims of Khmer Rouge crimes as well as the Cambodian society as a whole. When asked about their feelings towards the trials, Cambodians primarily mentioned: “(1) *the lack of justice [they] have long felt, not only in terms of the crimes committed by the Khmer Rouge but also the lack of justice in their society as a whole; (2) their overwhelming desire for accountability; and (3) their need to participate in their own legal system.*”<sup>101</sup> Interviews by the Documentation Center of Cambodia have likewise made it clear that the Cambodian public wants the perpetrators to be held responsible for their crimes.<sup>102</sup> However, only five people indicted and only one convicted so far, and with the vast majority of the actual perpetrators having been allowed to walk free, it is hard to assert

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<sup>100</sup> OPEN SOCIETY JUSTICE INITIATIVE, Recent Developments at the ECCC, August 2009 [http://www.soros.org/initiatives/justice/articles\\_publications/publications/eccc\\_2009112](http://www.soros.org/initiatives/justice/articles_publications/publications/eccc_2009112)

<sup>101</sup> CHHANG Youk, “The Thief of History — Cambodia and the Special Court”, *International Journal of Transitional Justice*, vol. 1(1), 2007, p. 169

<sup>102</sup> *Ibid.* p. 170

that the Court has fully fulfilled its mandate in that respect.

- **Capacity building/ legacy**

Perhaps the most commonly cited benefit of the ECCC is its role in capacity building amongst the Cambodian judiciary. The *in situ* status of the ECCC offers a unique opportunity to enhance domestic capacity-building by contributing physical infrastructure and building skills of national personnel. With domestic lawyers and judges working hand in hand with international legal professionals on a daily basis, it is hoped that a culture of the rule of law may be fostered in Cambodia. National staff working at the hybrid court and trained to international standards, when returning to work within the local system, are expected to “infuse it with [their] skills and knowledge”.<sup>103</sup> Moreover, the ECCC appears particularly well-positioned to impact the national judicial system as its Internal Rules are based on the Cambodian Criminal Procedure Code. As a result of this unique connection, ECCC criminal practice is easily transferable into the domestic system.<sup>104</sup> Thereby the Court can offer precedents to the much-needed domestic legal and judicial reform. Many legacy-related projects are being implemented by state as well as non-state actors.

The ECCC is thus expected to serve as a “model court”. It has done so, to a certain extent. The Court’s proceedings have drawn attention to a number of fair trial standards, such as the presumption of innocence, equality of arms, need for consistent and transparent procedures, and importance of clear legal justification for pre-trial detention and sentencing, all of which are clearly being ignored by the current Cambodian domestic system.<sup>105</sup>

Yet, these positive aspects are somewhat counterbalanced by the scandals of corruption and political interference outlined above, which may regrettably put the legacy of the Court at risk, or even reinforce negative realities in the domestic system.<sup>106</sup>

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<sup>103</sup> HIGONNET Estelle, “Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform”, *Arizona Journal of International and Comparative Law*, vol. 23 (2), 2006, pp. 347-368

<sup>104</sup> BIALEK Tessa, *Legacy at the Extraordinary Chambers in the Courts of Cambodia: Research Overview*, Yale Law School/ DC-Cam, 2013

<sup>105</sup> CIORCIARI John and HEINDEL Anne, “Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal”, *Michigan Journal of International Law*, 4 June 2013

<sup>106</sup> CIORCIARI John and HEINDEL Anne, *op.cit.*, p.71, citing an interview with Michael G. Karnavas, former Co-Lawyer for Ieng Sary, Phnom Penh (May 19, 2012): “Are we not teaching additional skills

- **Reaching out to the victims and the public**

One of the main arguments in favour of in-country hybrid tribunals is that they facilitate robust public involvement, and help connect survivors to the criminal process.<sup>107</sup> This has been one of the clearest functional advantages flowing from the Court's in-country setting, its large component of domestic personnel, and its unique opportunities for direct survivor participation (as Civil Parties, see below).

Learning from the failures of the ad hoc tribunals in this respect, as well as from the experience in Sierra Leone, the drafters of the ECCC decided to create a "public affairs section" ("PAS") with staff specifically dedicated to public outreach and disseminating information about the Court's work.<sup>108</sup>

The PAS has been extremely active in arranging for public visits to the courtroom gallery and tribunal premises, arranging for free public transport to the premises or partnering with civil society groups. The simple fact that the trials are conducted in the local language goes a long way with regard to the public's involvement. The ECCC has the largest public gallery of any war crimes tribunal (with around 500 seats), and more than 31,000 people attended the public hearings in Case 001– which the Court had proudly cited as the largest ever attendance at any court case, anywhere in the world.<sup>109</sup> This level of public interest was however surpassed by Case 002, with 98,670 persons attending the 212 days of trial.<sup>110</sup>

International donors supported the production of a television show summarising and discussing developments in Case 001, 'Duch on Trial', which attracted up to three

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*to our local counterparts on how to avoid the application of the rule of law? I think that this is going to be the darkest part of this legacy"*

<sup>107</sup> Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, U.N. Doc. S/2004/616, 23 Aug. 2004, para. 44 (writing that hybrid in situ tribunals have important benefits, "including easier interaction with the local population ... and being more accessible to victims")

<sup>108</sup> PENTELOVITCH Norman, "Seeing Justice Done: The Importance of Prioritizing Outreach Efforts at International Criminal Tribunals", *Georgetown Journal of International Law*, vol. 39 (3), March 2008, 2009

<sup>109</sup> <http://www.eccc.gov.kh/en/articles/kaing-guek-eav-convicted-crimes-against-humanity-and-gravebreaches-geneva-conventions-1949>

<sup>110</sup> ECCC, "Closing statements in Case 002/01 to commence at 9 October 2013", <http://www.eccc.gov.kh/en/articles/closing-statements-case-00201-commence-9-october-2013>

million viewers – 20% of the Cambodian population.<sup>111</sup>

However, public outreach activities have been the first to suffer from the Court's financial crisis, as core judicial functions have always been prioritised.<sup>112</sup> Moreover, scandals of corruption and political interference have provided strong incentives for Court officials to reduce transparency.<sup>113</sup> This contributed to an impression that the ECCC seeks to prevent unflattering information from emerging about the tribunal, which diminishes the credibility of the PAS communications work.<sup>114</sup>

A Victim Support Section was created along the PAS to inform and assist victims who want to participate in the proceedings as civil parties.<sup>115</sup> As a consequence of financial constraints, however, out of the millions of victims who might have chosen to participate in ECCC proceedings, only a small fraction were informed of their right to take part. A large majority of those learned of their rights through NGOs, which served as their primary connections to the Court.<sup>116</sup>

Public interest in the ECCC is still commonly declared as a mark of success. However, opinion poll 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 Khmer Rouge, 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>117</sup> Although recent studies on public opinion show increased knowledge,<sup>118</sup> it has been proven that while an impressive number of people

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<sup>111</sup> SHAY Christopher, "Cambodia's Trial of the Century, Televised", *Time Magazine*, 11 Sept 2009.

<sup>112</sup> COHEN David, "Hybrid Justice in East Timor, Sierra Leone, and Cambodia: Lessons Learned and Prospects for the Future", *Stanford Journal of International Law*, vol. 43, 2007, p. 36 (calling outreach and legacy "among the most seriously under funded [areas] at all the tribunals" and arguing that "[w]ithout effective outreach, many of the courts' stated goals cannot be achieved").

<sup>113</sup> HUMAN RIGHTS WATCH, *Courting History*, New York, Human Rights Watch, 2008, p. 117 (warning the ICC and other courts to resist the temptation to produce "propaganda" or "one-sided information")

<sup>114</sup> CIORCIARI John and HEINDEL Anne, *op.cit.*, p. 57

<sup>115</sup> See VSS, <http://www.eccc.gov.kh/en/victims-support/victims-support-section>

<sup>116</sup> CIORCIARI John and HEINDEL Anne, *op.cit.*, p. 58

<sup>117</sup> PHAM PN et al., "So We Will Never Forget. A Population-based Survey on Attitudes About Social Reconstruction and the ECCC", Human Rights Center, University of California Berkeley, January 2009. <http://www.law.berkeley.edu/HRCweb/pdfs/So-We-Will-Never-Forget.pdf>

<sup>118</sup> PHAM PN, VINCK P, BALTHAZARD M, HEAN S, *After the First Trial: A Population-Based Survey on Knowledge and Perceptions of Justice and the Extraordinary Chambers in the Courts of Cambodia*. Human Rights Center, University of California, Berkeley, 2011.

have witnessed Court proceedings and know the Court exists, there is little (if any) evidence that outreach efforts lead participants to understand the process in any depth. The public and the victims often appears have unrealistic expectations about what the tribunal can achieve.<sup>119</sup>

- **Civil Party Participation**

The participation of victims as civil parties is anchored at the heart of the ECCC's mandate and is what makes it unique when compared to other mass crimes tribunal. Civil Party participation views victims as real subjects of law, equal to the Prosecution and the Defence. Not only is this the most advanced form of victim participation authorized by criminal procedure, but this is also the first time it has been applied before hybrid and/or international courts.<sup>120</sup>

The purpose of civil party action before the ECCC is two-fold: a) Support the prosecution in conducting criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC (*public action*); and b) seek collective and moral reparations (*civil action*).<sup>121</sup>

A total of 93 Civil Parties participated in the proceedings in Case 001,<sup>122</sup> and this figure has swollen to 3,872 in Case 002.<sup>123</sup>

While an important step in the area of victim rights, the inclusion of Civil Parties in the criminal proceedings at the ECCC did raise important questions regarding the balance to be made between the right of victim's to participate and the right of the defendant to a fair and expeditious trial.<sup>124</sup> Indeed, the questioning of victims clearly lengthens and weighs down the court proceedings. These tensions came to the fore during the Duch trial and clearly intensified with the start of Case 002, due to the unprecedented number

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<sup>119</sup> *Ibid*; KIRCHENBAUER N., BALTHAZARD M., KY L., VINCK P., PHAM P. N., *Victims Participation before the Extraordinary Chambers in the Courts of Cambodia*, Cambodian Human Rights and Development Association and Harvard Humanitarian Initiative, 2013

<sup>120</sup> FIDH, *Victims Participation at the ECCC: A Mixed Record for Civil Parties*, Paris, 2011, p. 7

<sup>121</sup> ECCC Internal Rule 23(1), as revised on 9 February 2010

<sup>122</sup> FIDH, *op.cit.*, p. 11

<sup>123</sup> Statistics: Civil Party applicants per Case File, <http://www.eccc.gov.kh/en/statistics-civil-party-applicants-case-file>

<sup>124</sup> KHAN Karin and RUDY Daniella, "The right of the Civil Parties to participate v. the right of the Accused to a fair and expeditious trial: challenges at the ECCC?", Oxford Transitional Justice Research Working Paper Series, 10 June 2010, p. 1

of civil parties included in the process.

The ECCC's experience shows that "*however meaningful individual civil party participation may be to those who participate, it is unlikely to be practicable in mass crimes proceedings.*"<sup>125</sup> Indeed, in an effort to simplify and speed up court proceedings, victims' rights have been gradually scaled down - to the point where many observers suggest the Court should perhaps even stop calling its victim participants "civil parties."<sup>126</sup> The most frustrating step for many victims came when civil party participation was "consolidated" in early 2010.<sup>127</sup> Thereafter, it was decided that civil parties will no longer participate *individually* at trial due to the personal injury they have suffered (as they did in Case 001), but form a "collective" or group of civil parties who are jointly represented by the Civil Party Lead Co-Lawyers, while the victims' personal lawyers would not be able to speak. Moreover, the civil parties can only seek collective reparations.<sup>128</sup> Thus the system is now functioning more efficiently, but it is questionable whether civil parties in Case 002 are still accorded the rights of "parties".

Another blow to victims was struck when the Trial Chamber decided to sever Case 002, as outlined above. Out of the 3,872 victims joined to the case, only about 750 were admitted due to harm related to crimes at issue in the first sub-trial (which, as discussed at length above, will likely be the last).<sup>129</sup> As a result, the vast majority of Civil Parties whose harm is not connected to forced evacuations, such as alleged victims of genocide or forced marriage, did not get their day in court. Although they might be included in the final collective reparation project, it is clearly different to being enabled to express one's personal suffering in court and/or receive judicial acknowledgment of the harm suffered on a personal level. Indeed, for many, being in Court and experiencing participation is more important than legal nuances.<sup>130</sup>

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<sup>125</sup> CIORCIARI John and HEINDEL Anne, *op.cit.*, p.60

<sup>126</sup> *Ibid.*

<sup>127</sup> ECCC Internal Rule 12

<sup>128</sup> This change was a direct response to the civil party system's chaotic first outing during the Duch trial, which saw the case's 90 civil parties divided into four groups, each of which was led by multiple foreign and Cambodian lawyers. Lawyers for all four groups were granted the right to speak in open court, raising concerns over equality of arms and making it difficult for judges to effectively manage the trial. Given that nearly 4,000 victims were admitted in Case 002, it was obvious that something had to change.

<sup>129</sup> Lead Co-Lawyers, "Urgent Request on the 19 October 2011 Hearing Following the Chambers' Memorandum", Document No. E125, 7 October 2011, para. 12-13.

<sup>130</sup> CIORCIARI John and HEINDEL Anne, *op.cit.*, p. 64



## 2. Towards a more holistic approach to justice

It is generally accepted that a single institution on its own is unlikely to bring about a peaceful, stable, and restored nation. Arguably, in order to really transform Cambodian society and achieve wider goals of national reconciliation, a more holistic vision of justice of that sort was required: one that includes elements of restorative, socioeconomic, political and psychosocial justice, in addition to the retributive justice delivered at the existing court.<sup>131</sup> Given that the vast majority of perpetrators are allowed to walk free and escape accountability, such a more holistic approach could have helped facilitate a process of truth-seeking and national reconciliation that cannot possibly be satiated with only five persons indicted by the current ECCC. While the idea of a truth and reconciliation commission (TRC), based on the South African model, has been rejected, many have argued in favour of other reconciliation or truth-telling initiatives grounded in the indigenous Buddhist culture.

- **A truth and reconciliation commission for Cambodia?**

Recognizing the limitations of their own criminal tribunals, several countries such as Sierra Leone and East Timor have implemented truth and reconciliation commissions (TRCs), based on the South African model, in addition to their international criminal courts. The first and general aim of TRCs is to officially investigate and provide an accurate record and analysis of the broader pattern of abuses committed during repression and/or civil war.<sup>132</sup> Inherent to this investigation is the hearing of victims and perpetrators. In that sense a truth commission can also be seen as a non-judicial approach to achieve some form of justice to victims as it provides a forum for victims (as well as perpetrators) to give evidence of human rights abuses.

As victims were allowed to fully participate in proceedings and testify at court, many predicted that the specific nature of the ECCC trial proceedings would in fact be more like a TRC than an internationalised criminal tribunal. One commentator remarked: *“Given the informal rules of evidence that apply, and the different method of questioning*

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<sup>131</sup> LAMBOURNE Wendy, “The Khmer Rouge Tribunal: Justice for Genocide in Cambodia?”, Center for Piece and Conflict Studies, University of Sydney, December 2008, p. 9

<sup>132</sup> PAAVANI Reddy, Truth and Reconciliation Commissions Instruments for ending Impunity and Building Lasting peace, United Nations Chronicle (online edition), issue 4, 2004

*the witnesses, the trial will resemble a truth commission much more than previous tribunals.*"<sup>133</sup> The significant involvement of civil parties and the hearing of character evidence<sup>134</sup> at the same time as factual evidence indeed contributed to create a unique process.

Nevertheless, some have argued that a formal and broad-based TRC would have complemented the work of the rather narrow focus of the ECCC, especially considering how the rights of the victims, as argued above, have been scaled down.

The idea of creating a TRC in Cambodia has been raised and considered as a possible substitute for (or, at least, a complement to) the on-going legal proceedings at the ECCC by the UN Group of Experts in 1999, but was eventually rejected. The Experts raised three concerns: it was not clear that Cambodians would be willing to participate in a TRC; they were not sure whether Cambodian political environment had reached the level of national reconciliation needed for a TRC; and they considered that any TRC may impede the fair operation of a criminal trial.<sup>135</sup> These concerns still exist today, especially with regard to the lack of political will. A truth commission would need the participation of everyone in the society, including government officials, and it is hard to believe that members of the government would be willing to testify.

A widespread view against the establishment of a TRC in Cambodia is it would be alien to Khmer culture. As Youk Chhang, the Director of the Documentation Centre of Cambodia, puts it: "*Cambodia is not a Christian country based on forgiveness, so the same truth commission model used in predominantly Christian countries cannot be applied directly. Forgiveness in a Christian world is linear, in a Buddhist world it's circular – one must respect culture of the region for survivors.*"<sup>136</sup> Another point is that the crimes that occurred in Cambodia are of a much larger scale than those committed in South Africa.

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<sup>133</sup> SKILBECK Rupert, "Defending the Khmer Rouge", *International Criminal Law Review*, vol. 8, 2008, p. 444

<sup>134</sup> Character evidence refers to the proof or attestations about an individual's moral standing, general nature and reputation in the general community

<sup>135</sup> See Group of Experts Report, paras 202-208.

<sup>136</sup> BATES Alex, *Transitional Justice in Cambodia: Analytical Report*, British Institute of International and Comparative Law, October 2010, p. 80

It can be argued that, however, by considering only the South African model of TRC, those who rejected the idea had a limited view of what was possible. There are indeed many other types of TRCs. The Sierra Leone truth commission, for instance, dealt with mass crimes and was operating in a society that is predominantly Muslim as well as Christian. The East Timorese truth commission engaged with local communities and incorporated traditional reconciliation processes and while East Timor had a strong Christian leader, he did not play a significant role in the truth commission.<sup>137</sup>

- **Other mechanisms of transitional justice**

Given the political and economic infeasibility of a TRC per se, Cambodia could have established other informal mechanisms of transitional justice to supplement its tribunal and further national reconciliation. Anything that could have provided an outlet for the victims of past abuses to tell their stories and receive some sense of closure and personal relief as a result.<sup>138</sup> Perpetrators, as well, may want to be offered a forum to confess their crimes and receive some relief.

An appropriate venue for a Cambodian-style public forum would be Buddhist pagodas, with involvement from monks. A detailed examination of the guiding principles of Buddhism and their impact on society in general and criminal justice in particular is outside the scope of this paper, but it is worth noting that in Buddhist culture, concepts such as acceptance, tolerance, and compassion often overshadow notions like accountability. This favours a view on justice that focuses on reconciliation rather than retribution.

As Harris argues, events such as public “acts of truth” – in essence a truth-telling ceremony – could have great resonance within Cambodia, especially if they are led by respected monks who are generally thought of as being above the corruption and patronage prevalent in the rest of Cambodian politics and society.<sup>139</sup>

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<sup>137</sup> LAMBOURNE Wendy, *op.cit.* p.9

<sup>138</sup> KLOSTERMAN Theresa, “The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?”, 15 *Arizona Journal of International and Comparative Law*, vol. 15 (3), 1998, pp. 858-860

<sup>139</sup> HARRIS Ian: “Onslaught on Beings: A Theravada Buddhist Perspective on Accountability for Crimes Committed in the Democratic Kampuchea Period”, in RAMJI J. and VAN SCHAAK B. (eds),

It makes no doubt that such alternative strategies would never totally replace the measures currently being taken by the ECCC and justice and human rights NGOs, but there certainly appears scope for a complementary role.

## CONCLUSION

Perhaps the main success of the ECCC is the fact that it is functioning at all. The first chapter of this paper has shown that the ECCC is a creature of great compromise, as demonstrated by the history of lengthy negotiations between Hun Sen's government and the UN. The Cambodian government has been successful in defending its sovereign rights against a wide body of international opinion that doubted the existence of a properly functioning and independent legal system in the country, casting doubt over the appropriateness of an in-country hybrid tribunal. All the concerns that prompted the UN Group of Experts to reject the idea of a hybrid tribunal in the first place – lack of judicial independence, risk of corruption, lack of capacity – have regrettably proven legitimate, as demonstrated in the second chapter. Since Case 003 and 004 will most likely never go to trial, be it because of government obstruction tactics, insufficient funding or simply the death of the indicted persons, it can be hoped that three people, *at best*, will be held responsible for one of history's darkest moments, while the majority of the people linked to the DK regime are allowed to walk free and are not offered any tribune where they could confess to their crimes. What is more, given the severance of Case 002, there are strong grounds to believe that Nuon Chea and Khieu Samphan, who are the only "senior leaders" before the ECCC, will only be convicted for forced movement, escaping responsibility for crimes related to genocide, forced marriage and worksites, which all epitomize the DK-era. Thus the justice that will be rendered at the ECCC will unavoidably be elusive. Further, the ECCC has been mired in controversy over political interference and corruption of high-level judges, thereby clearly affecting the Court's legitimacy and raise serious doubts over the worth of the hybrid.

For all these reasons, there is widespread agreement among legal analysts, human rights lawyers and UN circles that the ECCC is a mistake that should never be repeated elsewhere. When judged from a strictly judicial and procedural perspective, the ECCC certainly has major shortcomings and is far from being a success. Nevertheless, the ECCC has arguably met with success in other domains such as the creation of a common history, the development of local capacity, public outreach and victim participation, laying groundwork for lasting change in the Cambodian society and judicial system. It can be argued that all these social goods are more valuable than procedural perfection

and the full adherence to fair trial rights standards. The ECCC definitely has the virtue of having fostered, for the first time in international criminal justice, victims' full participation in proceedings and large-scale public outreach. However, as shown in the third chapter, it seems that these social goods are only mixed successes and are blemished by the overall lack of judicial independence and scandals of corruption. Thus, to a significant extent, the ECCC has fallen short of the victims' expectations and has failed to fulfil its mandate to deliver justice and set an accurate historical account of facts. A fair and speedy trial of Nuon Chea and Khieu Samphan would allow the Court to keep some of its promises to the victims and temper these concerns. However, as argued at length in this paper, this seems out of reach, as justice will remain partial and elusive.

Thus, it seems that the ECCC's successes, from a social perspective, do not outweigh the major shortcomings and irregularities the Court's is marred with. Against this background, it can be argued that the hybrid ECCC is not a model to be cloned. However it should be noted that the failures and success of any hybrid court would depend to a great extent on the national government involved in the process. The hybrid model of international justice offered by the ECCC could still prove efficient and successful if set up in a country where the government, unlike the one of Hun Sen, shows genuine political will to achieve justice. Indeed, to put it simply, all the potential social goods offered by the ECCC are being diminished by a strong lack of political support from the Cambodian government.

While the ECCC is, to a great extent, falling short of the victims' expectations, it seems that justice and remembrance shall be pursued elsewhere, through extra-judicial means to help survivors express the harm they endured and seek recognition (forums, memorials, education, etc.). In a country where the Khmer Rouge era appeared in Cambodian textbooks in 2009 only and where most Cambodians born after the DK-era still have very little knowledge of the atrocities committed, it is of the utmost importance that, contrary to what Hun Sen once announced to Khieu Samphan and Nuon Chea over a toast of champagne, Cambodia doesn't "bury the past".

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