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Post-Genocide Cambodia: The Politics of Justice and Truth Recovery

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Interim Editors' Introduction

Issue 8.2 of *Genocide Studies and Prevention: An International Journal* will be the second and final issue edited and published by the Interim Editorial Board, consisting of Kjell Anderson, Amy Fagin, Melanie O'Brien, and Rafiki Ubaldo. We have been assisted by the guest editors of this issue, Kosal Path and Elena Lesley-Rozen. The goal of this issue was to reflect some of the different justice issues facing the Cambodians in the wake of the Cambodian genocide perpetrated by the Khmer Rouge.

We have been very appreciative of the University of South Florida for hosting this new, online and open access version of GSP, and look forward to a long future working together.

The next issue of GSP will be directed by the newly appointed Editorial Board. The members of this board are listed below. The IAGS plans to continue to build on the strong tradition of GSP by connecting to new audiences and broadening the disciplinary scope of the journal.

The Interim Editorial Board welcomes the new Editorial Board, and wishes them the best of luck at the helm of GSP.

The call for papers for Issue 8.3, on Humanitarian Technologies and Genocide Prevention, is available on the GSP website at http://scholarcommons.usf.edu/gsp/Call_for_Papers.pdf, and the call for peer reviewers for the same issue is at http://scholarcommons.usf.edu/gsp/Call_for_Peer_Reviewers.pdf.

The new Editorial Board has also opened up a call for co-editors, specifically for the rubrics of book review, film review and Internet resources. This call is available at http://scholarcommons.usf.edu/gsp/call_for_editors.pdf.

Scholars in the field and other readers of GSP are encouraged to open an account at <http://scholarcommons.usf.edu/gsp/> for news and information on new calls for papers, peer reviewing, and other GSP related activities.

Kjell Anderson, Amy Fagin, Melanie O'Brien, and Rafiki Ubaldo
Interim Editorial Board

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Introduction

The quest to address the legacy of mass violence is a politically complex endeavor that does not necessarily foreground the needs or desires of victims. Indeed, victim claims may contradict the motives of those in power or become overshadowed by the drive to establish international legal norms and regimes of justice. The international push for a tribunal to hold accountable those responsible for the deaths of some 1.7 million Cambodians from 1975-79 did not begin until after the fall of the Soviet Union. Until that time, Cold War politics shielded the former Khmer Rouge from prosecution; indeed a reconfigured Khmer Rouge coalition claimed Cambodia's place at the United Nations even after the Vietnamese drove the brutal regime from power in 1979. Co-Prime Ministers Prince Norodom Ranariddh and Hun Sen wrote to the UN in 1997 requesting the creation of a tribunal — some claim to intimidate remaining Khmers Rouge into defecting to the current government — but changed his position soon afterward. Nonetheless, international pressure for a court continued and, after a series of lengthy negotiations, the Cambodian government and United Nations reached an agreement in 2003 to establish the Extraordinary Chambers in the Courts of Cambodia (ECCC), more commonly known as the Khmer Rouge Tribunal (KRT).

Hun Sen agreed to the tribunal against a backdrop of mounting international criticism of his regime's widespread human rights abuses and corruption.¹ Dunnican McCargo refers to the ECCC as “the play-within-a-play” that characterized the political drama between Hun Sen and the international community.² From the start, Hun Sen sought to limit the scope of prosecutions to create a narrative of the Khmer Rouge regime that assigned culpability to a small group of elite actors. Members of the international community pushed for more widespread prosecutions and sought both retributive justice and truth recovery. For transnational human rights organizations and a larger international community, the KRT processes are anticipated to produce spillover effects that would transform the judicial system, and perhaps usher in a gradual regime change in this impoverished country.³ Truth recovery, they also hope, would facilitate a process of national “reconciliation,” which is mentioned in the June 2003 agreement between the United Nations and the Royal Government of Cambodia.⁴ As the KRT draws to a close, its impact on victims, politics and international norms has only begun to be debated. Thirty-five years since the crimes took place and with over \$200 million spent on two trials to date, how has this court affected justice for genocidal violence, national reconciliation, historical truth and the culture of impunity in Cambodia?

This special issue of *Genocide Studies and Prevention: An International Journal* addresses such questions through new analysis and reflection. The following essays provide an even-handed analysis of the KRT's contributions and limitations. The politics surrounding the court's establishment, political interference from the Cambodian government and a lack of resources have all constrained the tribunal's accomplishments, particularly in meeting the multitudinous needs of victims.

Alexander Hinton's article provides insight into the significance of the KRT to victims of S-21 and how the “deeply personal” struggle of healing and truth seeking does not necessarily align with the priorities of the transitional justice community. Drawing on his unique access to late S-21 survivor Vann Nath during the Duch trial, Hinton emphasizes the importance of the painter's Buddhist beliefs, arts (to educate the public through the painting of atrocities committed at S-21), his confrontation with a former S-21 guard, and his testimony against Duch.⁵ Vann Nath's unique personal journey over time led him to internalize the Buddhist precept of *karma*, a cosmic justice.⁶

Hinton argues that the tribunal's limited temporal jurisdiction puts forth “a ‘truth’ bleached of historical processes and an understanding of the factors that enable the Khmer Rouge rise to power.”⁷ Indeed, transitional justice mechanisms such as the KRT that offer sweeping promises of truth, justice, personal healing and national reconciliation, are bound to fail. Yet supporters push forward with such efforts as part of a “transitional justice imaginary.”⁸ In essence, practitioners and supporters of internationalized courts such as the KRT are incentivized to represent the court as a success both to satisfy donors and to secure their membership in the transitional justice community.⁹ In its discursive representation, this transitional justice community places greater emphasis on constructing a linear narrative of transition from a barbaric society to a modern liberal democracy. Supporters of the KRT can thus claim agency in shaping this normative discourse of human rights

and democracy, forging a sense of “shared belonging” to a larger transitional justice community.¹⁰ Throughout the KRT proceedings, complex histories of the Cambodian genocide were truncated by the court’s temporal jurisdiction and legal design to produce a “truth” that suits the transitional justice discourse. However, this kind of “truth,” as Hinton argues, “directs attention away from social praxis and the ways in which the meaning and understanding of such transitional justice processes are negotiated on the ground.”¹¹

Helen Jarvis, who served as Chief of the Victims Support Section of the ECCC (widely known as Victims’ Unit) from June 2009 to June 2010,¹² provides insight into the struggle of this small, under-resourced and under-staffed office to meet the enormous demand for victim participation in the KRT proceedings. According to Jarvis, the ECCC was “completely unprepared” for direct participation by Civil Parties¹³, a limited form of victim participation and symbolic reparations that owes its existence to a 2006 negotiated compromise between judges from the civil and common law systems.¹⁴ The office, Jarvis suggests, was unprepared for its success, as its outreach campaign received active support from at least five local civil society organizations, including the Documentation Center of Cambodia (DC-Cam).¹⁵ As Civil Parties increased from 90 victims (22 went on to testify in court) in Case 001 to 3,850 in Case 002, the financial support from the ECCC could not keep pace, leaving the Civil Party legal representation to the mercy of donors’ goodwill.¹⁶ For the sake of efficiency, the Plenary Session of judicial officers revised the court’s Internal Rules in February 2010, consolidating Civil Party representation in Case 002, a much more complex undertaking than Case 001.¹⁷ In Jarvis’ view, this new approach provided a “more coherent framework for Civil Party legal representation” because “individual Civil Parties still retained their own co-lawyers, and “the Lead Co-Lawyers gave opportunities to these co-lawyers to speak in court.”¹⁸

Referencing *The Long-Awaited Day*, a video made for the Victims’ Unit, Jarvis contends that victims who participate in the KRT are motivated by a search for justice, acknowledgement of Khmer Rouge atrocities and dissemination of historical truth for younger generations.¹⁹ The participation of some 4,000 Civil Parties may be considered one of the ECCC’s main contributions to the development of transitional justice. Yet, as Jarvis concludes, had the issue of victim participation been given “sufficient attention and weight at the time of the establishment of the court,” a great deal of anxiety, disappointment, and suspicion could have been avoided.²⁰

Wendy Lambourne makes a convincing case that despite its flaws, the ECCC does have a meaningful role to play, especially when coupled with NGO-led processes. Drawing on data gathered from interviews in 2009, she weighs the ECCC’s positive impact, particularly the “symbolic and psychological benefits of survivors of having their suffering officially acknowledge at last”²¹ with its severe limitations in transforming domestic legal capacity and the local rule of law. Echoing Jarvis, Lambourne emphasizes the importance of “official acknowledgement” by the tribunal of Khmer Rouge crimes and of victims’ suffering. However, she underscores the fact that the court is by design ill-equipped for “truth recovery” and, perhaps worse, limits opportunities for former Khmer Rouge leaders’ acknowledgement of wrongdoings, which might provide some closure to victims.²² Notably, she argues for “a more pragmatic approach to international justice that closely responds to the perceptions and expressed needs of locally affected communities.”²³ Lambourne goes on to question both the rationale and benefit of pursuing cases beyond Case 002, as many human rights organizations desire. Relying on her interviews with survivors in January-February 2009, and surveys conducted by DC-Cam around the same time, she doubts that the majority of Cambodians would welcome an expansion of the cases under investigation.²⁴

Legal scholar Randle DeFalco makes a strong case that the five suspects under investigation in Cases 003 and 004 qualify as “most responsible” for crimes committed by the Khmer Rouge. These include Meas Muth (Army General), Sou Met (Army General), Ta An (Deputy Secretary of the Central Zone), Im Chaem (District Chief), and Ta Tith (Deputy Secretary of the Northwest Zone). DeFalco uses the examples of the Special Court for Sierra Leone, International Criminal Tribunal for the former Yugoslavia and International Criminal Court to demonstrate a relatively consistent set of criteria that qualify those “most responsible” according to the suspect’s seniority and gravity and scale of offenses committed.²⁵ DeFalco suggests that political motives offer a powerful potential explanation for Cambodian resistance to Cases 003 and 004; in addition, financial concerns may be sapping the interest of foreign donors.²⁶

Donald Beachler argues that the significant limitations of the KRT are hardly surprising when one closely examines the political underpinnings of the court.²⁷ For Beachler, the confluence of *Realpolitik* considerations and vested national interests dictates against a more complete process of justice and truth recovery. Many Western governments, including the United States, lack the political will to push for trials beyond Case 002. In fact, Beachler suggests that such governments have used Hun Sen’s political interference in the court’s judicial independence as an excuse for their “non-committal” stance on the issue of whether Cases 003/004 should be pursued.²⁸

Two major world powers – namely China and the United States – are far more interested in persuading the Hun Sen government to support their strategic interests than they are in pushing for additional cases at the KRT. China needs Cambodia's support in its dispute with Vietnam and the Philippines over the South China Sea; meanwhile, the core interests of the United States and its Asian ally Japan have shifted in recent years from a focus on human rights and democracy to anti-terrorism, anti-drug trafficking, and countering China's influence.²⁹ The sobering lesson, as Beachler concludes, is that “politicians on national and international stages acted largely in their own self and national interests with regard to the ECCC. [...]. The Cambodian genocide trials are hardly the first time that the imperatives of Realpolitik triumphed over concerns for truth and justice in matters of genocide and other mass killings.”³⁰

Most contributors to this volume conclude that the KRT can reveal only partial truths relating to the Cambodian genocide and that its legal proceedings are unlikely to improve the rule of law or culture of impunity in Cambodia. Nonetheless, the court may provide symbolic and psychological benefits to victims as they seek closure, an evolving and deeply personal process. We hope these pieces will help provide insight into the impact of the KRT thus far, even though we can only begin to assess its long-term legacy.

Kosal Path, Elena Lesley-Rozen

End Notes

1. See Un Kheang, “The Khmer Rouge Tribunal: A Politically Compromised Search for Justice,” *The Journal of Asian Studies*, Vol. 72, No. 4 (November) 2013: 783-792.
2. Duncan McCargo, “Politics by other means? The virtual trials of the Khmer Rouge tribunal,” *International Affairs*, 87:3 (2011) 613-627
3. Lindsay Murdoch, “Gareth Evans Slams Abbott Government’s Dealings with Cambodia,” *Sydney Morning Herald*, March 1, 2014.
4. See Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, June 6, 2003.
5. Hinton, pp. 11-12.
6. Hinton, p. 13.
7. Hinton, pp. 6-8.
8. Hinton, p. 10.
9. Hinton, p. 10.
10. Hinton, p. 10.
11. Hinton, p. 11.
12. Jarvis’s appointment in June 2009 as Chief of the Victims’ Unit drew strong criticisms from the defense lawyers’ team, the victims organizations, and some civil societies, for her bias against the Khmer Rouge because of her strong positions in her writing, the appropriateness of an “Australian citizen” as head of the victims’ unit, and Marxism leaning beliefs. See Beachler’s discussion of political scientist and genocide survivor Sophal Ear’s criticisms against Jarvis’s appointment as Head of the Victims’ Unit in this volume.
13. Jarvis, p. 4.
14. Jarvis, p. 5.
15. Jarvis, p. 6.
16. Jarvis, p. 7.
17. Jarvis, p. 8.
18. Jarvis, p. 10.
19. Jarvis, pp. 3-4.
20. Jarvis, p. 13.
21. Lambourne, pp. 1, 11.
22. Lambourne, pp. 7, 10, 11.
23. Lambourne, p. 10.
24. Labmboure, p. 10.
25. DeFalco, pp. 9.-11.
26. DeFalco, pp. 3-4.
27. Beachler, p. 23.
28. Beachler, p. 15.
29. Beachler, p. 17.
30. Beachler, p. 24.

Justice and Time at the Khmer Rouge Tribunal: In Memory of Vann Nath, Painter and S-21 Survivor

Alexander Laban Hinton¹

Center for the Study of Genocide and Human Rights
Department of Anthropology and Division of Global Affairs
Rutgers University, Newark, NJ
<http://www.ncas.rutgers.edu/cghr>

“The historical truth will never be found in this courtroom or any courtroom for that matter because courts are not designed for the historical truth.”

Michael Karnavas, International Co-Defense Lawyer for Ieng Sary²

“Is this court trying to bury history? And why?”

Michiel Pestman, International Co-Defense Lawyer for Nuon Chea³

“I believe there will be justice. A person harvests what he has sown. According to the Buddhist religion, good actions produce good results, bad actions produce bad results.”

Vann Nath, survivor of S-21 prison⁴

Abstract: This essay explores the interrelationship of justice and time at the Extraordinary Chambers in the Courts of Cambodia [ECCC hyperlink: <http://www.eccc.gov.kh/en>] (ECCC, or “Khmer Rouge Tribunal”). In doing so, it follows the trial participation of the late Vann Nath, a survivor of S-21, a torture and detention center operated by the Khmer Rouge. From April 15, 1975 to January 6, 1979, this Maoist-inspired group of revolutionaries implemented policies resulting in the death of up to two million of Cambodia’s eight million inhabitants, almost a quarter of the population. This essay argues that, even as they seek to help post-conflict societies like Cambodia “move forward through justice” (as the ECCC slogan goes), transitional justice mechanisms like the ECCC are premised on a set of temporal assumptions that are part of a larger transitional justice imaginary. Scholars and practitioners need to attend to such assumptions as well as the sorts of “vernacular time,” or local conceptions of temporality that also mediate the understanding and responses of people like Vann Nath.

Keywords: genocide, transitional justice, tribunals, violence, Cambodia, Khmer Rouge, reconciliation, justice, Extraordinary Chambers in the Courts of Cambodia, Khmer Rouge Tribunal

I. Vann Nath at the Khmer Rouge Tribunal

Does justice for mass murder have meaning 32 years after the fact? This question was a hot topic of discussion in Cambodia in June 2011, when I attended the initial hearings that launched the trial of the four surviving, most senior leaders of the Khmer Rouge, which finally got underway at the Extraordinary Chambers in the Courts of Cambodia (ECCC). At this United Nations (UN)-backed international hybrid court, more commonly known as the Khmer Rouge Tribunal (KRT), the scales of justice appeared to be set before an hourglass, one that was quickly running out of sand.

After more than twenty-five years of delay, it took roughly three years after the June 2006 launch of the court for the first trial to begin. Only in February 2012 was the verdict finalized after the Supreme Court issued its decision on appeals, sentencing the accused, Duch, the former commandant of the regime’s central prison and interrogation center (S-21), to life imprisonment. And that was supposed to be the quick case, more or less a “slam dunk” of justice since the accused admitted his guilt and cooperated throughout the trial.

Meanwhile, the second case, involving the four most senior, surviving leaders of the Khmer Rouge -- a group of Maoist-inspired revolutionaries who enacted policies leading to the deaths of almost two million of the country’s eight million inhabitants from April 17, 1975 to January 6, 1979 -- had only more recently gotten underway, now more than thirty years after they were overthrown by a Vietnamese-backed army.

On June 27, 2011, the first morning of the initial hearing, I sat with 66 year-old artist Vann Nath, one of a handful of survivors of S-21, the Khmer Rouge security center where over 12,000 inmates perished, many after being interrogated and tortured. We were positioned just yards away from the defendants: Brother

Number Two, Nuon Chea (age 85); Pol Pot's brother-in-law and Foreign Affairs Minister, Ieng Sary (age 86); Ieng Sary's wife and Minister of Social Affairs, Ieng Thirith (age 79); and Head of State, Khieu Samphan (age 80). There was also an unspoken absence, as their leader, Pol Pot ("Brother Number One"), and other high-ranking officials such as General Ta Mok and Minister of Defense, Son Sen, have passed away or been killed.

Too much time had passed. And, by the look of things on that morning, it appeared questionable that the octogenarian defendants would all be able to participate fully or even live long enough to see the conclusion of the trial, which could last for several years.

As we gazed at the enfeebled defendants, who suffer from various ailments and at times needed help to stand, it was hard to imagine them overseeing one of the most radical experiments of social engineering in human history. Upon taking power after a brutal civil war that had led to hundreds of thousands of deaths, devastated the economy, and resulted in massive population displacements, the Khmer Rouge set out to build a new revolutionary society, one that would be purified of, as they put it, the "corrupting" influence of capitalism, feudalism, and neo-imperialism.

Money, markets, and traditional community life were replaced by cooperatives where people worked day and night in a constant state of fear and terror. Freedom of speech, movement, and assembly were severely curtailed. Buddhism was banned. Family members were forced to live and work apart for long hours and often on starvation rations. And then there were the purges and mass executions. In just 3 years, 8 months, and 20 days, the Khmer Rouge enacted policies leading to the deaths of almost a quarter of the population.

Roughly two years earlier during Duch's trial, Vann Nath had told the story of how he became swept up in the violence. It was a story that he had told before, to me and others in interviews and in a memoir, but, as he told the court that day, he was happy to do so because he wanted his testimony both to serve as a "mirror" upon which the younger generations could reflect and as a way to attain "justice for [the dead]," a justice that would be "seen by everybody."⁵ On the first day of Duch's trial, Vann Nath had told journalists, "I couldn't sleep last night. I was dreaming about my time at S-21."⁶

Vann Nath told the story of how he and his family and the rest of the population of Battambang City had been relocated to the countryside, where they, like Cambodians throughout the country, were forced to perform agricultural labor for long hours on increasingly meager rations. In the Khmer Rouge imagination, the creation of a mass agrarian work force would catalyze a "super great leap forward," one that would surpass China and Vietnam. The plan failed miserably and the population suffered the consequences both through diminished rations and from purges the Khmer Rouge leadership launched to track down the "traitors" who were subverting the revolution -- for it was inconceivable that the "all-knowing" Party Center had a deficient party line.

On December 30, 1977, Vann Nath was swept up in the purges, which were well underway, with executions taking place on the cooperative, district, provincial, and national levels. Upon his arrest, Vann Nath was taken to a pagoda that had been converted into a detention center, where he was accused of being a traitor and tortured by electric shock.

Eventually Vann Nath was trucked to S-21, located in Phnom Penh. He said that after arriving at S-21, he lost all hope upon seeing how the guards "degraded us. It's indescribable, the way they treated us, the prisoners. Sometimes...while we were asleep they suddenly woke us up and if we could not sit up on time then they used their rubber [tire] thongs to kick our heads."⁷

Vann Nath was shackled in a communal cell, where the prisoners subsisted on a few spoonfuls of rice gruel at each meal. They rapidly began to weaken, which made them more susceptible to rashes and ailments. Due to infrequent bathing, they began to smell. Over time, they barely looked human. The starving prisoners would eat grasshoppers or other insects if they could catch them, a difficult task since they were closely watched and would be beaten if they moved about or spoke to others. The prisoners "didn't care" if a companion died because "we were like animals." Vann Nath thought only of thirst and hunger, a deprivation that was so extreme that he recalled thinking "that even eating . . . human flesh would be a good meal."⁸ Meanwhile, the guards kicked and beat them without hesitation. Many inmates were interrogated and tortured; almost everyone was executed soon after arrival.

Vann Nath survived because he could paint. In 1980, he was shown an execution list that included his name, crossed out in red ink with the annotation "keep for use."⁹ While conditions were much better in



Vann Nath, age 32, at S-21 in 1978. Courtesy of the Documentation Center of Cambodia. [<http://www.dccam.org>]

the small artisan workshop where he began to work, Vann Nath frequently heard the screams of prisoners being tortured (one “got used to it”) and caught glimpses of the suffering and violence that took place at S-21, such as prisoners shackled in cells and a man strung to a pole like an animal.

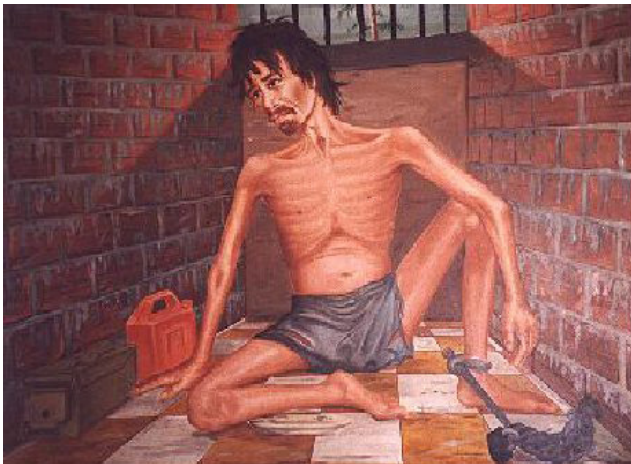
After the fall of the Khmer Rouge, Vann Nath returned to work at S-21, where a genocide museum was being built. His contribution was to paint pictures about what he had seen or heard or what other former prisoners related to him. During his testimony, his paintings were displayed, which included scenes depicting a prisoner being tortured by having his fingernails pulled out; waterboarding; and a baby being taken from a mother. These paintings are among the most powerful and iconic images at the museum that has been constructed at S-21.

As Vann Nath and I sat together at the initial hearing before the proceedings began, I asked him why he had come to the court. “For justice,” he told me. “And to see their faces.” When Nuon Chea, wearing a black and white ski cap and sunglasses, complained that he was “not happy” with the proceedings, Vann Nath just shook his head, perhaps recalling how he was imprisoned by the Khmer Rouge without rights, counsel, or due process.

As Vann Nath departed after the first morning session, he was surrounded by a large flock of journalists, eager to hear the impressions from this *de facto* spokesperson for Khmer Rouge victims.

This was the last court session Vann Nath attended. He died, after suffering from kidney disease for many years, on September 5, 2011.

Vann Nath’s death brought the issue of justice and time into stark relief. An obituary by civil society leader Youk Chhang stated that Vann Nath’s passing illustrated “the high cost that the simple passage of time



S-21 Prisoner in Cell (Tuol Sleng Museum of Genocide Crimes), painting by Vann Nath. Photograph by author.



Vann Nath speaking to journalist at the ECCC in 2011. Photo courtesy of the Documentation Center of Cambodia.

can inflict on the pursuit of justice. Sadly, this tragedy repeats itself silently throughout Cambodia, as each day victims of the Khmer Rouge pass away without having been provided any measure of justice.”¹⁰ This sentiment was echoed by others, including civil party lawyers, donors, monitoring groups, and survivors, who underscored the importance of moving the proceedings forward without further delay.¹¹

After the weeklong initial hearings in June 2011, the case had stalled once again due to a host of complications ranging from a sudden surge in civil party applications to numerous appeals by the four teams of defense lawyers. Meanwhile, it became increasingly doubtful that the aging leaders would all be able to participate fully or even live long enough to see the trial, which could last for several years, conclude.

On October 24, 2011, Ieng Sary’s lawyers notified the court that Ieng Sary, who was having trouble focusing and having to relieve himself frequently, would not testify during the proceedings.¹² He would die in 2013 before the trial ended. On November 17, 2011, the Trial Chamber found that Ieng Thirith suffers from progressive dementia and was not fit to stand trial. They ordered her release, a decision that once again highlighted the urgency of moving forward with the trial even if it was reversed on appeal on December 13, 2011.¹³ Nuon Chea and Khieu Samphan also complain of ailments, with the latter having suffered a stroke in 2007.

In response to such concerns, the Trial Chamber decided to split the complicated case into parts, the first of which focuses on population movements and crimes against humanity. This was done “in the interests of justice” so that a shorter initial verdict could be rendered, one that would thereby safeguard “the fundamental interest of victims in achieving meaningful and timely justice, and the right of all Accused in Case 002 to an expeditious trial.”¹⁴ To this end, the evidentiary proceedings began on November 21, 2011. Closing arguments would finally be held in October 2013 with a judgment expected in 2014.

II. Juridical Time

Time. It is a central motif at the ECCC. If, outside of the court, the KRT has been criticized for its glacial pace, the notion of time also figures prominently in the proceedings themselves. Here, time is directly bound up with fair trial rights, as the importance of upholding the due process rights of the defendants sometimes come into tension with the concerns of the civil parties. In this tribunal, civil parties have procedural rights almost on par with those of the prosecution and defense, including the right to see the accused tried in a timely fashion. Even so, civil party lawyers frequently complain that their clients need additional time to speak in court or that they need more time to cross-examine witnesses. Meanwhile, in the first trial, a monitoring group timed each session down the minute, noting how long the court spent in session on given matters. Here the concern is trial management, as an efficient court presumably operates in a timely manner.

Time, however, constitutes a much bigger backdrop at the ECCC and is directly linked to the ways in which truth and knowledge are produced in the court. One of the most obvious illustrations of this point is temporal jurisdiction. The ECCC is authorized to examine mass human rights violations that took place while the Khmer Rouge were in power – not before and not after. As opposed to seeking a deeply historicized understanding of the genocide, the court provides a temporally limited one.

This was evident in the first case, the trial of Duch, who ran S-21 while Vann Nath was imprisoned there. The judges did explore Duch’s work at M-13, a detention center Duch operated during the civil war and where he developed some of the torture techniques he would later employ at S-21. There was brief mention of the complex histories that enabled the Khmer Rouge to rise to power, including the Vietnam War and the U.S. carpet-bombing of Cambodia, but this information was deemed relevant only insofar as it bore upon establishing the guilt or innocence of the accused. Indeed, the trial verdict devotes a mere two pages to the discussion of the historical background of the genocide.

Nuon Chea’s defense team focused on this issue as part of a larger strategy of challenging the integrity of the court. On the first morning of the initial hearing, Nuon Chea’s international co-defense lawyer, Michiel Pestman, rose to explain why Nuon Chea was “not happy with this hearing,” arguing that “the proceedings should be terminated” due to investigative failures, political interference, lack of transparency, judicial incompetence, and temporal bias.¹⁵

In rapid order, Pestman picked up on a series of controversies at the court, including accusations the Cambodian judges were controlled by the government, the failure of the Office of Co-Investigating Judges to properly investigate Cases 003 and 004, and the subsequent resignation of the international co-investigating judge, and the unwillingness of current Cambodian government officials who were themselves former Khmer Rouge to be interviewed.

“A trial is like building a house,” Pestman explained. “It needs solid foundations, solid judicial investigation. Without a proper foundation, the trial will sooner or later collapse.”¹⁶ To avoid creating a “show trial” like the 1979 People’s Revolutionary Tribunal (PRT) that was “completely orchestrated and controlled by the Vietnamese,” Pestman continued, the court needed to “start showing its teeth [...] It is time for transparency, not for sealed envelopes.”¹⁷

Time was a central backdrop of Pestman’s comments. “Why,” he asked, “were the terrible American bombings of Cambodia ... and their lasting impact ... on the people in this country [not investigated]? And why not the dubious role played by Vietnam, the Vietnamese in this country, in Cambodia, before, during and after the Khmer Rouge years. Is this Court trying to bury history? And why?”¹⁸ Cambodians deserved “a fair trial, a proper trial aimed at establishing the truth and not simply at rubber stamping history books written in Vietnam or in America.”¹⁹

Pestman’s remarks played upon a long-standing debate about what the function of a trial should be. On the one hand a large group of people, ranging from lawyers to diplomats, have argued that such legal proceedings have an important expressive component, a claim echoed in proclamations that such transitional justice mechanisms bring a host of positive results, ranging from healing to reconciliation to revealing “the truth.”²⁰ The Duch trial, for example, did reveal new things about the operation of S-21 but, by focusing on the years of Khmer Rouge rule in Cambodia, the case ultimately produced a “truth” bleached of historical process and an understanding of the factors that enabled the Khmer Rouge to rise to power.

This was precisely the point Pestman sought to make as part of his larger strategy of calling into question the legitimacy of the court. For if one key objective of a tribunal is to reveal the truth that has been hidden by the politics of memory, then why not explore the structural and historical roots of the genocide and the ways in which it is linked to geopolitics? Indeed, the 1999 “Group of Experts” directly invoked this truth-seeking function of the court, expressing the hope that “the United Nations and 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.”²¹ The reason for this historical elision, Pestman directly implied, was politics.

Due to the Cold War and Cambodia’s attempt to find peace in the late 1990s, a trial only became a reality almost thirty years after the genocide had ended.²² The agreement to form the ECCC, which took years to broker, included a limited temporal jurisdiction (“17 April 1975 to 6 January 1979”) that would satisfy the United States and China, superpowers implicated in the origins, dynamics, and aftermaths of the conflict, and a personal jurisdiction (“senior leaders” and those “most responsible”) acceptable to Cambodian officials who wanted to avoid an expanding series of investigations that could imperil peace or even implicate current leaders, many of whom are former Khmer Rouge.

Besides eliding sociohistorical dynamics linked to the rise of the Khmer Rouge, like the Vietnam War and the U.S. bombing of the Cambodian countryside, this temporal jurisdiction erases other key events, such as the fact that, after being deposed, the Khmer Rouge were rearmed by the U.S., China, and other powers due to geopolitics. Indeed, the Khmer Rouge were even given Cambodia’s seat at the UN. It was only after the 1993 UN elections in Cambodia that many foreign government officials began to speak of the mass violence committed by the Khmer Rouge – as opposed to using euphemisms (for example, “the unfortunate events of the past”) as they had often done during the Cold War. Such events are too often omitted in juridical time, which prefers discrete intervals (the time and place of criminality), efficiency and parsimony (in terms of juridical process), and progress (toward a verdict with its attendant qualities, closure and evidentiary truth).

Counterposed to those who argue for the expressive importance of tribunals are those who foreground legalism. This position was directly laid out in Hannah Arendt’s *Eichmann in Jerusalem*, which argues that a court is first and foremost about the law. If a trial reveals something about the past, then that is fine. But a trial is ultimately about legal justice.

At the initial hearing, this position was staked out by Ieng Sary’s defense team. Responding to civil party lawyer Moch Sovannary, who had argued on the first day that the “victims need to understand the truth, the truth that they have been long waiting for, so that they can really move on with life,”²³ Ieng Sary’s international co-lawyer, Michael Karnavas, stated simply that “the historical truth will never be found in this courtroom or any courtroom for that matter because courts are not designed for the historical truth.” Because

of the temporal jurisdiction of the court, Karvanas noted, “the whole picture, the whole truth will never be revealed.”²⁴

Instead, Karnavas would argue repeatedly, the court needed to focus on the law. During arguments, Karnavas noted that he was “a fundamental believer in the power of the law. And the law has to be applied whether we like it or not. It is not a technicality. It is not something that we can just ignore when it’s convenient or when difficult decisions need to be made.”²⁵ Later, during the press conference that followed the initial hearing, Karnavas explained that his team had made numerous submissions and legal challenges in the hope that the trials would constitute a “civics lesson” on judicial procedure, one that, after the case had ended, would demonstrate how the Cambodian people should expect a court to work and thereby “contribute to the betterment of Cambodia’s future court system.”²⁶

During the initial hearings, the Ieng Sary defense team’s challenges related directly to the issue of time and justice. First, Karnavas and his Cambodian co-counsel, Ang Udom, argued that Ieng Sary could not be tried since the Peoples Revolutionary Tribunal had already convicted him in 1979. To do so would violate the international legal principle of double-jeopardy (*ne bis in idem*).

Second, Karnavas and Ang Udom argued that, because Ieng Sary had been granted an amnesty and pardon in 1996, one that was critical in leading to the demise of the Khmer Rouge, who were still waging war in the Cambodian countryside, he was immune from prosecution. And, finally, Ieng Sary’s defense lawyers argued that the statute of limitations had run out on their client’s crimes and that to *ex post facto* apply international human rights law to the situation in 1979 would violate his fair trial rights.

These issues raised fundamental questions about juridical time, ones with which courts in other countries have grappled. Are some crimes so heinous that they transcend temporal limits? Relatedly, is it possible to try someone for crimes that are viewed as universal even if they were not formally codified at the time? And can an amnesty given to promote peace be nullified?

Running in the background of these questions were other issues about Cambodian history itself. Why wasn’t an international tribunal held immediately after the Khmer Rouge were deposed? The answer, of course, was largely tied to Cold War politics. Why did the Khmer Rouge remain a viable fighting force until the late 1990s? This was partly due to geopolitical machinations that led the U.S., China, and others to support the Khmer Rouge for many years after they had fallen from power. And why was the Cambodian judiciary so incapacitated until the 1990s? Geopolitics, social instability, and international sanctions were among the reasons.

If Karnavas stressed legal process, fair trial rights, and the technicalities of law, civil party lawyers did not just support the prosecution’s claims that the arguments of the defense teams were legally untenable, instead asserting that their clients also had fair trial rights, including the right to justice, truth, and reparation.²⁷ For victims of mass human rights violations, international civil party co-lawyer Silke Studinsky argued on the second day of the initial hearing, effective remedy meant “fair, effective and prompt access to justice” as well as “prosecution and punishment.”²⁸ The victims had a right to truth, including “obtaining adequate answers to the important questions – why crimes happened and why they happened to them and their families.”²⁹ A pardon or amnesty clearly denied the victims such access to the truth and was “an affront to the pain, suffering and damages done” to the victims.³⁰

The day before, Studinsky’s international civil party lawyer colleague, Martine Jacquin, had framed these issues more broadly, asking “Can justice heal or manage the suffering – or mitigate the suffering of victims?” Answering her rhetorical question, Jacquin stated, “Justice can only restore whatever harm is reparable and whatever injury for which the victims can claim compensation. But justice cannot restore that which is beyond reparations, the physical and psychological wounds and scars that [are] borne by the victims for an entire lifetime.”³¹ “But,” she continued, “at the very least this trial can ascertain the truth, acknowledge facts, provide a sense of tranquility for victims and bring closure to their process of grieving.”

III. Time, Justice, and Healing

Can justice bring such closure to people like Vann Nath after so much time has passed? There is little doubt that the path to something like “closure” or “reconciliation” is a deeply personal one, inflected by one’s past suffering, subsequent experiences, worldview, and sense of the future. It is not a certain course and has many pathways.

One of the difficulties about transitional justice initiatives like the KRT is that they promise too much. Promises abound that the truth will be revealed as victims supposedly attain a sense of peace, justice, reconciliation, healing, and closure. Such sweeping proclamations are bound to fail. Yet they appear again and again in trials and truth commissions and thereby set up the mechanisms for failure.

There are many reasons that transitional justice practitioners and personnel make such promises. For example, they play well to the donors who enable the mechanisms. But they are also the stuff of what I have called a “transitional justice imaginary,”³² or a set of interrelated discourses, practices, and institutional forms that help generate a sense of shared belonging among a group of people – in this case, members of the transitional justice community or larger international community.

This imaginary, while not monolithic, can nevertheless be found in a variety of transitional justice contexts. It has at least four key dimensions. The transitional justice imaginary is: normative (linked to certain truth claims and moral assumptions); performative (an imagined community is constituted through enactment); and productive (it produces certain subject positions). It is also characterized by a temporality premised on linear intervals (a pre and a post-state), an orientation (war and peace), and a teleology (a straightforward movement between these two intervals or states). In particular, this “transitional justice time”³³ implicitly parses societies into a pre-state of conflict and a post-state of liberal democracy, along with a related set of binaries (violent/peaceful, chaotic/orderly, barbarism/civilization, primitive/sophisticated, irrational/rational, traumatic/healthy, and so forth). To effect this transition, history is shrunk and erased, filtering out the grey zones that disrupt this teleological narrative of past and future.

The temporal jurisdiction of the KRT highlights this point, as complicated pasts are backgrounded even as truth claims are made. This temporal foreshortening is paradoxical, for, according to its own logic, truth is required for closure yet the temporal modality of transitional justice is one of shrinkage and thus a truncated history. In the end, such insights ask us to critically reflect upon the presuppositions of transitional justice and ask what sorts of truths are produced and for what reasons. From the vantage of this “critical transitional justice studies” perspective,³⁴ one can see how time is manipulated to assert an imaginary that casts the post-conflict society into a subordinate position even as it asserts a teleology of movement toward a liberal democratic end.

One of the key dangers of this transitional justice imaginary is that it directs attention away from social practice and the ways in which the meaning and understanding of such transitional justice processes are negotiated on the ground. As opposed to attaining some sort of unilineal sense of closure or healing from the tribunal, people like Vann Nath grapple with the past in different ways through their life-course.

In his 1998 memoir, *A Cambodian Prison Portrait: One Year in the Khmer Rouge's S-21*, Vann Nath recalls meeting Him Huy, one of his former captors at S-21, in 1996. He experienced a range of emotions, including anger, before coming to pity Huy. During the Khmer Rouge period, this man was like “a savage bull, a lion. None of the prisoners, including myself, had dared to look him in the face then. Now, he was in a deadlock, with no more fangs or horns. Seeing him in this situation, somehow I felt pity for him.”³⁵

When Pol Pot, the leader of the Khmer Rouge, died two years later, Vann Nath was once again “flooded with a jumble of confused thoughts and emotions.”³⁶ On the one hand, he felt relieved because “the bloodiest master criminal had disappeared forever from this world.” On the other hand, he felt sorrow that “I would never fulfill my long-held desire to see Pol Pot standing in the dock, facing a court to answer for his crimes.”³⁷

In the end, however, Vann Nath viewed the death of Pol Pot and other leaders who died without being tried through a Buddhist frame. His book concludes, “I believe there will be justice. A person harvests what he has sown. According to the Buddhist religion, good actions produce good results, bad actions produce bad results. The peasant harvests the rice, the fisherman catches the fish. Pol Pot and his henchmen will harvest the actions they committed. They will reap what they have sown.”³⁸

Here we encounter yet another form of temporality, what we might call “vernacular time.” Vernacular time refers to the specific local understandings and temporal practices operative in a given locality. In this case, Vann Nath notes a particular Buddhist vernacular conception of time that is frequently evoked, through speech as well as through non-verbal and ritual acts, in Cambodia. From this Buddhist perspective, our being is constituted and reconstituted in a cyclical fashion. On a cosmic level, the universe is created and then degrades before being renewed. Ontologically, the Buddhist doctrine of *samsara* holds that being is fleeting, a momentary coalescence of constitutive elements. Each moment of coalescence is conditioned by what preceded it, a notion that is reflected in the doctrine of karma (*kamma*) that Vann Nath invoked in the passage above. Those who do good will receive good; those who do bad deeds will suffer the consequences. A form of cosmic justice is at work here, as punishment for bad deeds is an inevitable part of being.

This Buddhist vernacular of time, of course, stands at odds with the linearity and progressive teleology of juridical time and related conceptions in the transitional justice imaginary, which asserts a binary of trauma / ill-health as well as health / closure that is overcome through the tribunal. For if there are other ways of achieving closure, such as through Buddhist ritual belief and practices centered around the notion of meritorious and demeritorious action, one of the key justifications of the ECCC would be undermined. A similar argument could be made about related notions of Buddhist forgiving and forgetting. A more modest, yet powerful way of approaching time and healing would embrace an openness to different ways of coping with and dealing with the past, ranging from religious understanding to juridical mechanisms.

We can glimpse some of the ways in which Vann Nath sought his path forward. Buddhism was one of the cornerstones of his understanding of the world, a set of beliefs and practices that had taken shape in his youth while studying at a pagoda.³⁹ It provided him with a way to cope with his past suffering and to approach his future experiences, such as his encounter with Him Huy and his response to Pol Pot's death.

Art also seemed to provide Vann Nath with a way of grappling with the past, at first by painting images from S-21 and then later participating in painting workshops with young students.⁴⁰ This engagement with the younger generation was very important to Vann Nath. He chose not to become a civil party, foregoing a form of participation centered on rights for one that was more humanistically oriented (though clearly civil parties have a variety of motives for their participation, including humanistic ones).⁴¹ He did this in part because of health concerns but also because he did not want to assert a primacy over other survivors. He also did not want reparations, perhaps because he felt nothing could compensate for his suffering.⁴²

When asked why he still wanted to testify, Vann Nath stated that, ever since he was detained at S-21, he "determined that if one day I survived, [...] I would compile the events to reflect on what happened so that the younger generation would know [...] So I had to reveal, I had to write, I had to compile, and it can [serve] as a mirror to the younger generation of the lives of those who were accused with no reason, who committed no wrong [...] I do not want anything more than that" and a sense of justice.⁴³ Here also we find an interesting conjunction of vernacular and transitional justice time, as the Buddhist emphasis on clear understanding dovetails with juridical notions of truth and evidence.

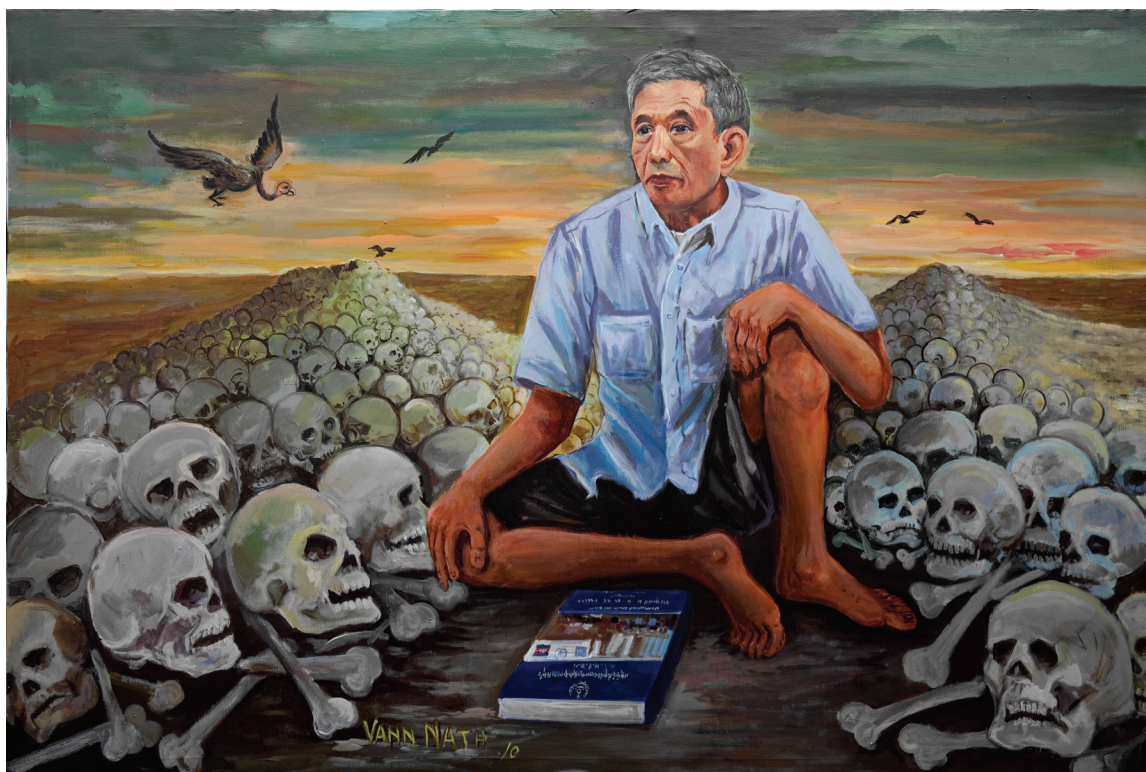
Did Vann Nath achieve this sense of justice after the Duch trial and upon seeing the surviving senior leaders of the Khmer Rouge stand trial on the first day of the initial hearing? It is impossible to know for certain, though, even if he felt some ambivalence, overall he seemed to have a positive attitude toward the court, as he indicated to me that day we attended the opening of Case 002. He also seemed pleased in some ways by the initial Duch verdict (he did not live long enough to see Duch's final sentence of life imprisonment), as illustrated by the fact that he participated in verdict distributions organized by the ECCC's Public Affairs office.

But through his paintings, public statements about the past, Buddhist practices and beliefs, engagement with the younger generation, testimony during the Duch trial, participation in court outreach events, and other activities, Vann Nath seems to have moved closer to something like healing and closure to the extent to which it can ever be attained by a survivor.



Vann Nath at Duch Verdict Distribution, August 12, 2010. Courtesy of the ECCC. [<http://www.eccc.gov.kh/en/gallery/photo/duch-verdict-distribution-8>]

Before he died, Vann Nath completed one last painting. It depicts Duch sitting between two columns of skulls and bones that recede into the distance of a gloomy horizon. Vultures circle in the sky above, perhaps a Buddhist symbol of the attachment and craving that drive people to sin. Before Duch, who gazes mournfully into the distance, lies a copy of the verdict from his trial.



Duch verdict. Painting by Vann Nath. Photo courtesy of the Documentation Center of Cambodia. Permission courtesy of Kith Eng (Vann Nath's wife).

This new painting seems familiar. After gazing at it for a while, it appears that Vann Nath may have modeled the painting on his own S-21 self-portrait. Both figures assume the same posture with the same dejected expression. The two walls of the S-21 cell have been replaced with the two columns of skulls. Instead of the iron shackles in the S-21 portrait, in the new painting Duch is “bound” by the verdict, which sentences him to imprisonment. But the new painting is also a Buddhist one, suggesting that, like a shadow, the deeds of Duch’s past trail behind him, conditioning his future. It suggests how time and justice were interlinked for Vann Nath, a fusion of juridical and Buddhist time in which Duch was now imprisoned for his bad deeds in the Khmer Rouge past, one from which Vann Nath had at last been released.

End Notes

1. Since 2009, the author has been conducting research, ranging from on-site observations to participant-observation to semi-structured interviews, on the Khmer Rouge Tribunal. This research was supported by grants from the United States Institute of Peace and Rutgers Research Council and a 2011-12 fellowship from the Institute for Advanced Study in Princeton. I'd like to thank the reviewers of this essay, the journal editors, Rafiki Ubaldó, Laura Cohen, and Nicole Cooley for their helpful suggestions on this essay.
2. Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, “Transcript of Initial Hearing – Nuon Chea, Ieng Sary, Ieng Thirith, Khieu Samphan Public,” June 28, 2011, p. 3. (Hereafter “Transcript of Initial Hearing – Day 2”).
3. Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, “Transcript of Initial Hearing – Nuon Chea, Ieng Sary, Ieng Thirith, Khieu Samphan Public,” June 27, 2011, p. 14. (Hereafter “Transcript of Initial Hearing – Day 1”).
4. Vann Nath, *A Cambodian Prison Portrait: One Year in the Khmer Rouge’s S-21* (Bankok: White Lotus, 1998), p. 113. (Hereafter, “A Cambodian Prison Portrait”).

5. Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, “Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’ Public,” Trial Day 35, June 29, 2009, p. 55-6. (Hereafter “Vann Nath Testimony”). See also “A Cambodian Prison Portrait.”
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9. *Ibid.*, p. 68.
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11. Kong Sothamarith, “Tribunal Parties Want Faster Prosecution at UN Court,” VOA Khmer, September 7, 2011 (<http://www.voanews.com/khmer-english/news/Tribunal-Parties-Want-Faster-Prosecution-at-UN-Court-129378318.html>, accessed December 13, 2011). See also Bridget Di Certo, “Health Woes Slow KRT,” Phnom Penh Post, December 8, 2011 (<http://www.phnompenhpost.com/index.php/2011120853239/National-news/health-woes-slow-krt.html>, accessed December 13, 2011).
12. Ieng Sary Defense Team, Extraordinary Chambers in the Courts of Cambodia, “Ieng Sary’s Notice to the Trial Chamber that he will not testify during Trial” October 24, 2011 (http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E101_4_EN.PDF, accessed December 6, 2011).
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14. Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, September 22, 2011 (<http://www.eccc.gov.kh/en/document/court/severance-order-pursuant-internal-rule-89ter>, accessed December 6, 2011).
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17. *Ibid.*, p. 16.
18. *Ibid.*, p. 14.
19. *Ibid.*, p. 16.
20. See, for example, United Nations, “Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135,” February 18, 1999 (<http://unakrt-online.org/Docs/GA%20Documents/1999%20Experts%20Report.pdf>, accessed December 20, 2011).
21. *Ibid.*, II.5.
22. Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea,” June 6, 2003 (http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf, accessed December 20, 2011). See also Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide: Elusive Justice and the Khmer Rouge Tribunal*. London: Pluto, 2004.
23. “Transcript of Initial Hearing – Day 1,” p. 109.
24. “Transcript of Initial Hearing – Day 2,” p. 3.
25. *Ibid.*, p. 82.
26. Author fieldnotes, Press Conference, Extraordinary Chambers in the Courts of Cambodia, Phnom Penh: Cambodia, June 30, 2011. See also: <http://vimeo.com/26064118>, accessed December 20, 2011.
27. “Transcript of Initial Hearing – Day 2,” p. 59f.
28. *Ibid.*, p. 69-70.
29. *Ibid.*, p. 71.
30. *Ibid.*, p. 75.
31. “Transcript of Initial Hearing – Day 1,” p. 115-16.
32. “The Transitional Justice Imaginary: Uncle San, Aunty Yan and Victim Participation at the Khmer Rouge Tribunal.” In *Justice for Victims: Perspectives on Rights, Transition, and Reconciliation*. Inge Vanfraeche, Antony Pemberton, and Felix Mukwiza Ndahinda, eds., p. 247-261. New York: Routledge Press, 2014. (hereafter “Transitional Justice Imaginary”).
33. Alexander Laban Hinton, “Transitional Justice Time: Uncle San, Aunty Yan, and the Khmer Rouge Tribunal.” In *Genocide and Mass Atrocities in Asia: Legacies and Prevention*. Deborah Mayerson and Annie Pohlman, eds. p. 86-98, New York: Routledge, 2013. [<http://www.ncas.rutgers.edu/select-recent-publications>]

34. Alexander Laban Hinton, ed., "Introduction: Toward an Anthropology of Transitional Justice." In *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence*, Alexander Laban Hinton, ed., p. 1-24, New Brunswick: Rutgers University Press, 2010.
35. Vann Nath, "A Cambodian Prison Portrait," p. 113.
36. *Ibid.*, p. 116.
37. *Ibid.*, p. 117.
38. *Ibid.*, p. 118.
39. Rithy Panh's homage to Vann Nath after his death, "Allocution de Rithy Panh," September 14, 2011, e-mail from Association le Cercle des Amis de Vann Nath (hereafter "Rithy Panh homage to Vann Nath").
40. Vann Nath's paintings can be found at many sites on the internet. See, for example, the webpage devoted to Vann Nath at "Vann Nath – Paint Propaganda or Die -- The Art History Archive" (<http://www.arthistoryarchive.com/arthistory/asian/Vann-Nath.html>, accessed July 5, 2012).
41. On this point, see also Youk Chhang, "Vann Nath: A Witness."
42. Vann Nath Testimony, p. 103. See also "Rithy Panh's homage to Vann Nat."
43. "Vann Nath Testimony," p. 54-55.

“Justice for the deceased”: victims’ participation in the Extraordinary Chambers in the Courts of Cambodia

Helen Jarvis

Former Chief of the Victims Support Section of the ECCC

Abstract: *The participation of victims of mass crimes is being taken to new levels in the Extraordinary Chambers in the Courts of Cambodia (ECCC) as it brings criminal prosecution for serious crimes committed during the period of Democratic Kampuchea (1975-1979). In addition to being called as witnesses to the crimes being charged, the ECCC has provided the opportunity for some 4,000 victims to play a direct role as Civil Parties. Civil Party status in a criminal trial is a feature known in various civil law systems, but has not been provided in any of the international or what are sometimes called “internationalized” criminal tribunals and so the ECCC had to develop its own procedures in its Internal Rules. Victims’ participation may be considered one of the ECCC’s main contributions to the development of international justice.*

Keywords: ECCC; Khmer Rouge; victims’ participation; transitional justice; Cambodia; United Nations; civil law

“On 7 January 1979, I never imagined that I would be sitting before the Chamber this very day. It is my great honour to sit and explain things to this huge Chamber. I want nothing else. The thing I want is intangible; it is justice for the deceased.” These are the words of Mr Vann Nath, one of the handful of survivors of the S-21 prison and one of Cambodia’s most renowned painters, who was the very first person called to give testimony before the Trial Chamber, on 29 June 2009.¹

Mr Chum Mey, another survivor of S-21, stated: “I am a victim of Tuol Sleng. I know what happened in Tuol Sleng. We have to tell our children and grandchildren in the next generation about this, and we have to tell the world about this. I come every day because I consider the court as history. I am now 79 years old, and I am doing this for the sake of the young generations to fully understand what happened.... Some people say that the court takes too much time. They just yell from the outside without knowing what is being done. They know nothing. You should consider a Khmer saying: “Cooking too long, it would be burned; cooking too little, it would be raw”²

Ms Im Sunthy, the widow of Professor Phung Ton, the Rector of the Faculty of Law and a diplomat during the 1960s, who was killed at S-21 in 1976, gave the following testimony in court: “I am here to actually pay homage to the dead souls of my husband and my father and the lost family members. Some people say that I am here to take revenge but it is not true. I am here to find justice for my husband. I am here to reveal the truth why people were killed, why these barbaric acts were inflicted onto the victims.”³

Mr Tolors Kâsim, also from Kampong Cham, explained his motivation: “First, I want the court to seek justice on behalf of our ethnic group⁴ because we represent Islam. I am concerned about the return of the religious terminators. Secondly, I want collective reparations⁵ so that we can build a school in our village as evidence to show the young generations the extreme destruction in our village caused by the Pol Pot regime. When we returned here, the village was empty; thus, this to-be-built-house or building will be the evidence.”⁶

The participation of victims of mass crimes is being taken to new levels in the Extraordinary Chambers in the Courts of Cambodia (ECCC) as it brings criminal prosecution for serious crimes committed during the period of Democratic Kampuchea (1975-1979). At the moment, when one trial has been completed and a second is now under way, it is timely to analyse the challenges, successes and failures of this experience.

As in many other national or international courts, in the ECCC victims may be called as witnesses to the crimes being charged. But the ECCC is providing another and hopefully more meaningful avenue for the victims to play a direct role as Civil Parties -- participating in the case in support of the Prosecution, with the right to their own lawyers, to propose evidence and witnesses, to make their own statements and to question the accused directly in court, and in their own right to make a civil claim for moral and collective reparations. This Civil Party status in the criminal case is a feature known in various civil law systems, but has not been provided in any of the international or what are sometimes called “internationalized” criminal tribunals.⁷

More than 8,000 people have filed complaints with the Court, describing the crimes they experienced between 1975 and 1979.⁸

In early 2012, the ECCC completed its first case (Case 001), in which Kaing Guek Eav, better known by his revolutionary name Duch, was charged with crimes against humanity, war crimes and national crimes of

murder and torture for acts resulting in the deaths of more than 12,000 people carried out while he was in charge at S-21 (often known as Tuol Sleng – the apex of Democratic Kampuchea’s system of security prisons). The Trial Chamber judgment pronounced on 26 July 2010 found Duch guilty and sentenced him to 35 years’ imprisonment. All parties appealed, and the Supreme Court Chamber’s final judgment confirmed those convictions and increased the sentence to life imprisonment.⁹

The second case (Case 002) involves four accused, alleged to be the surviving “senior leaders” of the Khmer Rouge regime and responsible for mass crimes. Following the judicial investigation (from 2007 to 15 September 2010), their trial commenced with the Initial Hearing held in late June 2011. On 17 November 2011, the Trial Chamber decided to sever one defendant (Ieng Thirith, former Minister for Social Action) from the trial on grounds of her mental unfitness. This left three accused on trial: Nuon Chea (widely known as Brother Number Two after Pol Pot, who died in 1998), Khieu Samphan (former Head of State and of the parliament), and Ieng Sary (former Foreign Minister), who died in March 2013 leaving only two standing trial for genocide, crimes against humanity, war crimes and the domestic crimes of murder, torture and religious persecution.¹⁰

The Trial Chamber also decided to sever the case into several trials, the first known as Case 002/01, focusing on the evacuations of the population in 1975 and again in 1976, and on the execution of Lon Nol officials in April 1975, concluded evidentiary hearings on July 23, 2013. Final Statements were heard in October 2013 before the Trial Chamber retired to consider its judgment, expected to be issued in the second quarter of 2014.¹¹ Also on July 23, 2013, the Supreme Court Chamber issued an order that the Trial Chamber’s hearing of further charges in Case 002 should include at least those relating to S-21 (Tuol Sleng), a work-site and a security center, as well as genocide.¹²

Meanwhile, since late 2009 the Co-Investigating Judges have been considering whether another five people should be charged, as proposed by the International Co-Prosecutor but opposed by the National Co-Prosecutor. This number fell to four when one Suspect died in mid-2013.¹³

Victim participation at the ECCC

In the first trial, of Duch, 90 victims participated as Civil Parties in the proceedings, and 22 of them testified in court.¹⁴ Some 3,850 victims have Civil Party status in Case 002,¹⁵ far exceeding the numbers in any previous trials of such mass crimes in any international/ized judicial setting.¹⁶ What were the motivations of so many Cambodian victims to give up an extended amount of time and expose themselves to public gaze, emotional turmoil and even trauma from recalling their suffering and hearing the brutal crimes described in gruesome detail day after day? Five victims who were witnesses or Civil Parties in Case 001 explained what the process means to them in a video entitled *The Long-awaited Day*, made for the Victims Support Section of the ECCC.

Mr Uch Sunlay from the province of Kratie, explains what motivated him to apply to be a Civil Party in Case 002: “I did not just think about applying to be a Civil Party yesterday or today. I have been ready for years. I was determined that once there is a court, either national or international, I will apply as a Civil Party because I have suffered from great pain; this is my first intention. Secondly, I lost a lovely father. Thirdly, I lost my wife and all my children, and all my in-laws, including my parents-in-law, brothers and sisters-in-law simply because they were accused as KGB in that regime.

“I applied as a Civil Party in order to sue the senior leaders and those most responsible in the Democratic Kampuchea regime for their killings. Firstly, I want them punished by the law for the atrocities. Secondly, I want both national and international courts as well as the whole wide world to acknowledge that there were killings, homicide and a killing field regime in Cambodia. Thirdly, I want my children who died recorded in the history for the younger generations. My beloved wife and children were all killed during this notorious regime. I was determined that whenever a court would be established, regardless of what they can do or cannot do as long as it prosecutes those leaders, I will feel relieved. The souls of the deceased ones cannot claim for justice; thus, a survivor, such as a husband, shall seek justice for his wife, children and babies. This is the reason I have applied as a Civil Party to request the court, particularly the national officials and judges, to conduct research, investigation, and prosecution.”

“I want a judgment for the establishment of a symbolic memorial for storing the remains of the victims, or the remains can be stored at a pagoda in Kratie so that we will feel relieved and those who died will also rest peacefully in heaven. And we who have rid ourselves of pain, suffering and tension from our hearts and emotions, will be ready to develop our society to be more advanced and prosperous.”¹⁷

Legal and administrative framework for victim participation

Victim participation at the ECCC has not been without controversy, rising at times to heated argument and even bitter conflict. The roles and rights of Civil Parties and the level of support extended to them have proved to be among the most difficult and ongoing problems the court has had to face as it grappled with the realities and emotions of this sensitive issue.

The whole question of victim participation as Civil Parties was considerably complicated by the fact that administratively, the ECCC was completely unprepared for any role for Civil Parties. This was one of the clearest instances in which the United Nations' Technical Assessment Mission simply applied the formulas from the ad hoc tribunals of the ICTY and ICTR and the Sierra Leone Special Court without regard to the very different legal and judicial context of Cambodia. Neither the budget nor staffing tables for the ECCC included any provision for Civil Parties. The first Deputy Director of Administration (who had previously served in the ICTR) expressed this approach clearly when she stated at the first press conference held in the new premises of the Court that "the only role for victims in the ECCC would be as witnesses".¹⁸

However, the foundation documents for the ECCC (a domestic Law and an Agreement between the Cambodian government and the United Nations¹⁹) stipulate that the Court shall utilize Cambodian criminal procedure, except in certain circumstances when such procedure is silent, internally contradictory, or when it conflicts with international standards.²⁰ And Cambodian criminal procedure includes the possibility for victims to participate as Civil Parties in criminal proceedings.

Further, while neither the Law nor the Agreement made specific mention of the role of Civil Parties, the Law did envisage victims as Parties to the cases in that Article 36 (new) stipulated the rights of victims to appeal decisions of the Trial Chamber. In its preparatory work for the establishment of the Court, the Cambodian Government Khmer Rouge Trials Task Force anticipated that one of the areas requiring early decision would be how to apply Cambodian procedure allowing victims' participation and claims for reparations in circumstances in which millions of people were victims. The first edition of *An Introduction to the Khmer Rouge Trials*, an information booklet published by the Task Force in 2004, included the following cautious formulation:

Will victims be entitled to compensation? Under the current Cambodian law on criminal procedure, victims may claim reparation in criminal cases for damages they suffered from the crimes being tried. It is not yet clear whether or how the Extraordinary Chambers will hear such claims. It is difficult to imagine how the many millions of Cambodian victims could receive anything more than symbolic compensation.²¹

A draft Internal Procedures and Regulations, developed by Dr. Gregory Stanton for and with the Task Force,²² was presented to the ECCC judicial officers (judges and co-prosecutors) in early July 2006. This draft made provisions for victims to apply to participate in the hearings (Article 89); to appoint legal representatives, even envisaging the probable need for common legal representation for groups of victims and for legal assistance for representation (Article 90); and to claim reparations, including remedies such as restitution, compensation and rehabilitation (Article 94).²³

Judges from common law systems (who constituted the majority of international judges) were adamant that full victim participation, as Civil Parties would present an impossible burden on the court in terms of finances and time. Judges from civil law systems, who were used to Civil Parties even in mass crimes, were equally adamant that the ECCC had to accommodate Civil Parties, as it had no power to limit rights that are clearly and unambiguously provided under Cambodian criminal procedure, so it seemed inevitable that some compromise would emerge, providing a limited form of victim participation and claims for reparations.

The judicial officers established a Rules Committee (which consisted solely of judges from civil law countries). Its draft of the Internal Rules presented to the November 2006 First Plenary Session provided for normal Civil Party action by victims including legal representation and claims for reparations, but including the following caveat (with an undecided adjective): "Injury may be compensated by awarding [proportionate] damages. The Chambers may also award collective or symbolic reparation."

After intense debate in many meetings of the Rules Committee, and as one of the very final matters in the Internal Rules to be resolved, the Plenary Session in June 2007 adopted a severely limited right to reparations, as follows:

Rule 23-- Civil Party action by victims [...]

11. Subject to Article 39 of the ECCC Law, the Chambers may award on

collective and moral reparations to Civil Parties. These shall be awarded against, and be borne by convicted persons.

12. Such awards may take the following forms:

- a) An order to publish the judgment in any appropriate news or other media at the convicted person's expense;
- b) An order to fund any non-profit activity or service that is intended for the benefit of Victims; or
- c) Other appropriate and comparable forms of reparation.²⁴

The Office of Administration responded by establishing a small Victims Unit (later known as the Victims Support Section), allocating unspent funds from other budget lines, and was lucky to be able to recruit an experienced staffer from the ICTY to come in as interim Deputy Head of the Unit.²⁵ However, with such a late start, and with woefully inadequate funds, the Victims Unit was very quickly overwhelmed as the enormity of its task became evident.

How to reach the unknown number of victims throughout the country, inform them of their rights to participate and encourage the filing of complaints and civil party applications was a major challenge. A working relationship was quickly developed between the Victims Unit and a number of NGOs that had already established or were ready to establish programs relating to Khmer Rouge victims. The most active of these "intermediary organizations" included the Khmer Institute for Democracy (KID), the Documentation Center of Cambodia (DC-Cam), the Cambodian League for the Promotion and Defense of Human Rights (Licadho) and the Cambodian Human Rights Action Committee (CHRAC).

While in its first year the Victims Unit had no specific resources for outreach, such funding was already flowing to the intermediary organizations from a number of donors (notably the German and French governments, and the European Union). And in early 2009 the German Government (through GTZ) made a significant direct grant to the Victims Unit.²⁶

Forums were held throughout the country, and teams assisted victims in completing the somewhat complex form the ECCC had developed for them to file a complaint and to apply for status as a Civil Party.

While under Cambodian criminal procedure, applications may be filed at any time up until the final submissions at the closure of the trial, the Internal Rules of the ECCC were more restrictive, initially providing that any application had to be lodged 10 days before the start of the trial.²⁷ As a result of the fact that Case 001 was limited to crimes relating to a single crime site (the security center of S-21 and its ancillary units) and because these procedural decisions were not made until almost the time of the Closing Order, a relatively small number of victims applied before that deadline -- 94, of whom 90 participated.

In Case 002, the Victims Unit and the intermediary organizations made a strong and concerted outreach effort, and 3,988 victims applied in Case 002.²⁸ The Co-Investigating Judges, who had the initial responsibility of deciding, recognized only some 50% of these Civil Party applicants for Case 002, but on appeal the Pre-Trial Chamber took a much more expansive approach, admitting 3,850 Civil Parties, close to 100% of those who had applied.

Legal representation

Even after adoption of Internal Rules allowing for Civil Party participation, the ECCC did not initially provide any financial support for legal representation for Civil Parties. This contrasted sharply to the Defense, which was generously supported from the international side of the budget, on the basis of the Law and Agreement provisions for legal support for any Accused deemed to be unable to afford their own lawyers.²⁹ All five Accused in Cases 001 and 002 were provided with legal teams funded through a legal aid fund administered through the Defense Support Section.

No such support from the Court was offered for Civil Parties. Lawyers, mostly funded from foreign governments through the intermediary organizations, offered legal pro bono representation. Legal teams emerged, not on the basis of inherent or identified differentiation of interest among groups of Civil Party applicants, but rather from their relationship to the intermediary organizations which had facilitated the collection of their applications for Civil Party status.

Four Civil Party legal teams were recognized by the Trial Chamber and, in a mirror image of the Defense

and Prosecution, both national and international co-lawyers were recognized for each team, meaning that eight Civil Party co-lawyers were entitled to be present in court at any one time and to speak on most issues.³⁰ As can be imagined, this presented not only logistical difficulties to the court, including space requirements, but also the difficulty of developing and arguing a coherent legal strategy, with co-lawyers often presenting repetitive or, at times, contradictory arguments. The cumbersome nature of this arrangement, with a total of six national and eleven international co-lawyers recognized for Civil Parties, was exacerbated by the fact that the team of international co-lawyers for *Avocats sans Frontières* (Lawyers without Borders) appeared on a rotating basis, and were each generally in Cambodia for only three weeks at a time.

Although the ECCC provided some administrative and logistic support, mainly through the Victims Unit, Civil Party legal representation was precarious, with co-lawyers subject to donors' goodwill to provide financial assistance, office accommodation, transport to meet their clients and the other basic requirements to discharge their professional obligations. It soon became painfully obvious that such a haphazard basis for Civil Party legal representation could not be continued in Case 002, a much more complex case in every way, and in which thousands of Civil Parties would be participating.

Accordingly, in early 2009 a working group within the ECCC³¹ began developing a proposal for the Rules Committee, considering various ways in which the Internal Rules could be amended to provide for more coordinated and assured Civil Party legal representation. Meanwhile, the Trial Chamber itself decided to stimulate a broader discussion, including with lawyers, intermediary organizations and other NGOs on the issue of how to ensure effective legal representation for Civil Parties without jeopardizing the efficient functioning of the Court, especially in the light of the large number of Civil Parties expected in Case 002.³²

Many advocates for victims' rights feared their curtailing through this process and argued vociferously against any change in such a direction.³³ Such a fear was perhaps unnecessarily stoked by the inclusion in the first drafts of the Trial Chamber's options paper the option of amending the Internal Rules to remove Civil Party participation completely, which was never really a feasible course of action, given that the ECCC was in a civil law jurisdiction.

Following lengthy discussion and hot debate, the Plenary Session of judicial officers adopted Revision 5 of the Internal Rules on February 9, 2010, extensively revising the legal representation of Civil Parties at the ECCC, by which "Civil Parties at the trial stage and beyond shall comprise a single, consolidated group, whose interests are represented by the [national and international] Civil Party Lead Co-Lawyer [...] supported by the Civil Party Lawyers [...] Civil Party Lead Co-Lawyers shall file a single claim for collective and moral reparations."³⁴

Several new articles were added, in which the role of the Lead Co-Lawyers was defined as to "ensure the effective organization of Civil Party representation during the trial stage and beyond, whilst balancing the rights of all parties and the need for an expeditious trial within the unique ECCC context"³⁵

This novel approach went into operation in Case 002 and, at least up until the end of Case 002/01, formed a more coherent framework for Civil Party legal representation, and a far more efficient functioning of the trial, without substantially curtailing their rights. While at the trial stage they were now consolidated into a single group, individual Civil Parties still retained their own co-lawyers, and the Lead Co-Lawyers gave many opportunities to these co-lawyers to speak in court, on both matters relating to their own clients and certain legal issues in which they had a particular interest or point of view.

Victims' associations

In the Cambodian situation of generalized suffering and privation of the entire population during the Khmer Rouge period, within the country there was little concept of distinguishing a separate category of "victims of the KR". During the 1980s the government undertook numerous nationwide documentation, literary, and artistic programs, and the experience of victims was taught in schools. In countries with large Cambodian refugee populations like France, the US, Canada, and Australia, community and support committees were established; their focus included psychological and medical assistance for the large number of individuals suffering trauma, as well as documentation of the crimes they experienced, as part of the campaign to seek justice.

Following the enactment of the ECCC Law and Agreement, in France an Association "Justice pour le Cambodge" (Justice for Cambodia) was formed in 2004, dedicated to promoting the rights of the victims of the Khmer Rouge and, in particular, to assisting and representing them before the ECCC. Justice for Cambodia joined with several other organizations to establish the Collective for Victims of the Khmer Rouge,

which produced a white paper on victims' rights, set up a branch in Cambodia and proceeded to find legal representation for some 59 victims who wished to participate in the coming trials. In Cambodia, at least two more victims' associations were established, and their evolution reveals the complexity of the relationship of victims to the formal process of the ECCC.

The Association of Khmer Rouge Victims in Cambodia (AKRVC)

The AKRVC describes itself as “independent of any political or religious affiliation—a network of survivors of the 1975-79 killing fields who are joined in the fellowship of suffering, in the demand for justice, and in the work for a just peace. The members of the Victims Association are from overseas and spread across the provinces and capital of Cambodia.” The AKRVC was founded by Theary C. Seng, the first Civil Party to be recognized by the ECCC in Case 002, who established the Civil Parties of Orphans Class, of whom she was one. Theary Seng, a well-known political activist, gained considerable publicity for the AVKRC and the Orphans Class before becoming disenchanted with the ECCC and withdrawing her Civil Party status in November 2011.³⁶

Ksaem Ksan (Victims Associations of Democratic Kampuchea)

Ksaem Ksan was founded in 2009. Among its leading founders are two survivors from S-21, Chum Mey and Bou Meng, as well as a number of Civil Parties in the ECCC. The Association was established to assist its members to aims to participate in all stages of the ECCC process, to provide spiritual and material support and an improved living standard to its members, and to conduct outreach to new generations so that they understand better the history of Democratic Kampuchea in order to prevent a recurrence of such a regime.

Reparations

As mentioned above, the ECCC Law's Article 39 and Internal Rule 23 provide for the award of only collective and moral reparations to Civil Parties, against and borne by convicted persons. In Case 001, the Trial Chamber interpreted the Internal Rules narrowly, ruling out almost all reparation claims filed by the Civil Parties, and awarding only the publication of their names and a compilation of apologies by Duch during the trial.

Ksaem Ksan reflected the views of most victims in a press release issued on 24 February 2012 after the Supreme Court Chamber issued its final judgment:

On behalf of Victims Association of Democratic Kampuchea “Ksaem Ksan” civil parties in Case 001, we wish to express our sadness with the so-called collective and moral reparation the ECCC has decided to grant the civil parties in the form of compiled declarations of apologies of the convicted Duch during the course of the trial. As we pointed out during our testimonies in the courtroom, we do not believe in the sincerity of the apologies made by Duch. We think that his declaration of regrets was only a way to obtain mitigating circumstances from the trial chamber. As a proof of what we stated here above, in the last day of trial, Duch has asked the court for his release and to be free from any prosecution. How could one sincerely think that a simple compilation of these declarations of Duch constitute a moral reparation for the victims? In future, we will continue to monitor the honesty of the convicted Duch during his testimony of substantial hearing in case 002.³⁷

Following widespread dissatisfaction with the ECCC's reparations regime, as it unfolded in Case 001, the judicial officers amended the Internal Rules in September 2010, allowing a much broader approach. Firstly, reparations may now include not only awards ordered against the convicted person, but also other projects “designed or identified in cooperation with the Victims Support Section and [which] have secured sufficient external funding.” Secondly, the Victims Support Section is “entrusted with the development and implementation of non-judicial programs and measures addressing the broader interests of victims. Such programs may, where appropriate, be developed and implemented in collaboration with governmental and non-governmental organizations external to the ECCC.”

The Lead Co-Lawyers for Civil Parties and the Victims Support Section have since then been working with victims associations and intermediary organizations as well as communicating with the Royal Government of Cambodia regarding certain issues that fall within its competence, to draft appropriate reparations and non-judicial programs and measures, which it is hoped will provide more meaningful recognition and response to the suffering of victims of the KR regime.

Conclusion

The process of judicial accounting embodied in the ECCC is being done late, and much has been lost in the more than 30 years since the end of the Khmer Rouge regime. Physical evidence has been washed away, documents have been lost, memories have faded and, above all, many people have died – some who should be on trial, others who should have had the chance to tell their stories in court, and millions of people who should have had the chance to see justice done.

The cost of this passage of time is being acutely felt as Case 002 unfolds. As mentioned above, one defendant (Ieng Thirith) was severed from the trial, and her husband (Ieng Sary) died, while the fragile health condition of the remaining two defendants continues to dog the proceedings. Over the same period, a number of Civil Parties and witnesses scheduled to give testimony have passed away, or become too frail to testify, while most of those who have testified have revealed limits to both their physical and mental capacities.

As mentioned above, in order to speed up the process, the Trial Chamber decided to break Case 002 into several segments, but the trial phase of the initial segment took more than two years, while a final judgment by the Supreme Court Chamber is still some years away. Whether even this first segment of Case 002 will reach a conclusion is by no means assured.

The ECCC is still in train, not yet a historical event to be evaluated. Until it finishes its work, one cannot venture to conclude whether or how well this process of judicial accounting was achieved and how it contributed to Cambodia's struggle to free itself from the weight of this brutal period in its recent history.

What can be stated unequivocally, however, is that millions of Cambodians are watching the process intently. By July 2013, more than 200,000 Cambodians had visited the court. The courtroom holds some 500 people in the public gallery, and its proceedings have been broadcast live on national television and radio. In a poll taken towards the end of Case 001, more than 80% of those surveyed reported being aware of the ongoing process, 60% having themselves seen it on television and 70% believing it is providing justice.³⁸ A flowering of public and private reflection, research and comment is under way in Cambodia, really seizing popular attention alongside the judicial process. Week after week, month after month, programs and activities are carried out throughout the country – on screen, on stage, in print, in schools, in wats, mosques and churches, at memorial sites, in meetings, forums, discussions, and therapy sessions.

Precisely because it was a pioneer among internationalised courts in providing for victim participation as Civil Parties, the ECCC had no precedents or road maps on which to rely, but had to develop its own procedures, a process that was severely impeded by the unfamiliarity of common law judges and United Nations administrators with this element of civil law. Lack of certainty, and changing rules along the way led to unease, anxiety and suspicion. Although the Internal Rules were eventually amended to provide more clarity and a broader approach to reparations, the sense of disappointment from unfulfilled expectations might have been avoided if the issue had been given sufficient attention and weight at the time of the establishment of the court. Despite all these problems, however, the participation of some 4,000 victims as Civil Parties may be considered one of the ECCC's main contributions to the development of international justice.

End Notes

1. Vann Nath, excerpt from the English transcript of testimony on 29 June 2009, in proceedings of the ECCC Trial Chamber in Case 001; Kaing Guek Eav, alias Duch, available on the ECCC web site at <http://www.eccc.gov.kh/en/documents/court/transcript-proceedings-%E2%80%9Cduch%E2%80%9D-trial-trial-day-34> (accessed 10 June 2012). It should be noted that Vann Nath did not apply for Civil Party status, testifying instead as a witness.
2. Civil Party Chum Mey interview at Tuol Sleng Genocide Museum (former S-21 prison), included in *The long-awaited day: victim participation in the ECCC*, video production by the Victims Support Section of the ECCC, 2009.
3. Civil Party Im Sunthy, excerpt from the English transcript 19 August 2009 <http://www.eccc.gov.kh/en/documents/court/transcript-proceedings-%E2%80%9Cduch%E2%80%9D-trial-trial-day-61> (accessed 10 June 2012).
4. Civil Party Tolors Kâsim is a member of the Cham minority.
5. The Internal Rules of the ECCC (Article 23) provide that Civil Parties may claim "collective and moral reparations" for harm suffered. All versions of the Internal Rules may be accessed on <http://www.eccc.gov.kh/en/document/legal/internal-rules>
6. Tolors Kâsim interview in *The long-awaited day*.
7. These include the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), all of which have more common law than civil law features.
8. For more detail on victim participation in the ECCC, see the Victims Support Section of the ECCC web site <http://www.eccc.gov.kh/en/victims-support> (accessed 10 June 2012).

9. See the ECCC web site for the text of the Supreme Court Chamber's final judgment of 3 February 2012 (Document F28) <http://www.eccc.gov.kh/sites/default/files/documents/court/court/case%20001AppealJudgementEn.pdf> and the Trial Chamber Judgment of 26 July 2010 (Document E188) <http://www.eccc.gov.kh/en/documents/court/judgement-case-001> (accessed 10 June 2012).
10. For details of the charges in the indictment, see the redacted public text of the Closing Order in Case 002 issued by the Co-Investigating Judges on 15 September 2010, (Document D427) <http://www.eccc.gov.kh/en/documents/court/closing-order> (accessed 10 June 2012).
11. For details of the conclusion of evidentiary hearings in Case 002/01, see the ECCC's Court Report, March 2014, p.4. However, as at the time of finalizing this article (early May 2014) no date had been set, and it seems likely that the delivery may be postponed into the third quarter of this year.
12. These charges were included in the Trial Chamber's Decision on Additional Severance of Case 002/02 and Scope of Case 002, issued on April 4, 2014. The Supreme Court Chamber also proposed that the Trial Chamber consider establishing a Second Trial Panel, but this option was rejected by the Trial Chamber, which went on to make preparations for hearing Case 002/02 after its judgment in Case 002/01 will be handed down, (E301/9/1 (accessed April 8, 2014). For details of the Supreme Court Chamber's decisions see its Decision on Immediate Appeals Against Trial Chamber's Second Severance of Case 002 E284/417 and its Order on a Second Trial Panel, (E284/471) (accessed 23 July 2013).
13. See Statement by the International Acting Co-Prosecutor, 8 September 2009 http://www.eccc.gov.kh/sites/default/files/media/ECCC_Act_Int_Co_Prosecutor_8_Sep_2009_%28Eng%29.pdf (accessed 11 June 2012).
14. In its judgment of 26 July 2010 (Case 001), the Trial Chamber admitted only 66 of the Civil Party applicants, ruling that the other 24 did not sufficiently establish their link to the crimes charged in this particular case. Most of these Civil Parties successfully appealed against their rejection, and were ultimately recognised in the final judgment issued by the Supreme Court Chamber on 3 February 2012.
15. See the redacted public text of the Pre-Trial Chamber Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, (Case 002), 24 June 2011, Documents D411/3/6 and D404/2/4). <http://www.eccc.gov.kh/en/document/court/decision-appeals-against-orders-co-investigating-judges-admissibility-civil-party-app> (accessed 11 June 2012).
16. There is precedent of mass Civil Party participation in domestic jurisdictions, especially in South America, but the author of this paper has yet to carry out research on which to base any comparative comments or assessment.
17. Civil Party Uch Sunlay, interview for *The long-awaited day*.
18. Michelle Lee, Deputy Director of Administration in ECCC Press Conference, 9 February 2006, as noted by the author.
19. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, promulgated on 27 October 2004 (NS/RKM/1004/006) and the Agreement Between the Royal Government of Cambodia and the United Nations Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, signed on 6 June 2003. <http://www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended> and http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf (accessed 11 June 2012).
20. Article 33 new of the Law and Article 12.1 of the Agreement.
21. *An Introduction to the Khmer Rouge Trials*, 1st edition. (Phnom Penh: Secretariat of the Royal Government Task Force, Office of the Council of Minister, 2004) with support from the Australian Government through the Australian Legal Resources International (ALRI), p.17.
22. Some funding support was extended from the Open Society Justice Initiative (OSJI). The team also included Helen Brady, Tara Gutman and Helen Jarvis.
23. Draft Internal Rules, presented to the Judicial Strategic Planning and Development Workshop, July 2006.
24. ECCC Internal Rules adopted 7 June 2007.
25. Ms Wendy Lobwein.
26. In November 2008 the Gesellschaft für Technische Zusammenarbeit (GTZ), tasked by the German Foreign Office, allocated 1.5 million euros over two years to support the work of the Victims Unit.
27. Article 23.4 of the first version of the Internal Rules adopted 7 June 2007.
28. The Internal Rules had meanwhile been changed (Revision 4, dated 11 September 2009) to further limit the time for application until 15 days after the end of the judicial investigation, in order that the status of all Civil Party applicants could be determined before the trial commenced, as their undetermined status during the trial process had been a problem in Case 001.
29. Article 35 (new) of the Law and Articles 13.1 and 17 of the Agreement.
30. The Trial Chamber did not grant the Civil Party lawyers the full range of rights accorded to the Defence and the Prosecution. For instance, they were not permitted to make an Opening Statement, nor to intervene on issues relating to sentencing or of the character of the accused. Details of the issues and the views of the Civil Party Co-lawyers may be found in the Appeal of Group 2 dated 15 September 2009 against the Trial Chamber Decision of 27 August 2009 (Document E169) <http://www.eccc.gov.kh/en/documents/court/appeal-co-lawyers-civil-parties-group-2-against-trial-chambers-decisions-exclude-civ> (accessed 11 June 2012).

31. The Working Group consisted of Tarik Abdulhak (then Senior Court Management Officer in the Court Management Section; Wendy Lobwein, Head of the Witness and Experts Support Unit; Keat Bophal (succeeded by Helen Jarvis) Head of the Victims Unit; and Constanze Uhlrich, GTZ Legal Expert in the Victims Unit.
32. Development of the Trial Chamber initiatives was steered by its international Reserve Judge Claudia Fenz.
33. Arguments presented for example in meetings with the Trial Chamber judges and with the Victims Unit, in a submission from Avocats sans Frontières dated 1 December 2009, and in a press statement by the Cambodian Human Rights Action Committee dated 1 February 2010. http://www.chrac.org/eng/CHRAC%20Statement%20in%202010/02_01_2010_CHRAC%20Press%20Release_7th%20Plenary.pdf (accessed 10 June 2012).
34. Rule 23 (revised)
35. Rule 12 ter Civil Party Lead Co-Lawyers.
36. Theary Seng not only withdrew as a Civil Party but also denounced the ECCC, referring to it as “The Extraordinary Gas Chambers for 003 Victims in the Courts of Cambodia” and depicting then international Co-Investigating Judge Siegfried Blunk as a Nazi. <http://www.thearyseng.com/columnist/32-theary-sengs-blog/294-news-coverage-press-release-appealing-eccc-decision-lodging-new-application-legal-farce-at-extraordinary-gas-chambers-toward-dismissing-case-003-ocij-statement> (accessed 10 June 2012). In a press conference on 15 November 2011, she counterposed a campaign for “poetic justice” to the judicial process, launching a series of dartboards featuring photos of the accused and other she considered to be “likely suspects”. Details can be found at various places on her web site.
37. Ksaem Ksan Press Release, “Convicted person DUCH’s apologies : a trick to avoid his conviction by ECCC”, February 24, 2012. <http://www.ksaemksan.info/index.php?nav=home&cid=25&lang=en> (accessed 10 June 2012).
38. Survey of Cambodian Public Opinion, July 31 – August 26 2009, International Republican Institute, published February 2010. <http://www.iri.org/sites/default/files/2010%20February%20%20Survey%20of%20Cambodian%20Public%20Opinion,%20July%2031-August%2026,%202009%20-%20Khmer%20and%20English%20version.pdf> (accessed 11 June 2012).

Justice After Genocide: Impunity and the Extraordinary Chambers in the Courts of Cambodia

Wendy Lambourne

Centre for Peace and Conflict Studies, University of Sydney, Australia

Abstract: After nearly 40 years, some of the key leaders of the former Khmer Rouge genocidal regime are facing trial at the Extraordinary Chambers in the Courts of Cambodia (ECCC). This paper explores the challenges and opportunities facing the ECCC in its pursuit of justice and accountability for the atrocities committed by the Khmer Rouge against the Cambodian people. It concludes that, despite the political controversies and resource constraints affecting the court in fulfilling its mandate to end impunity, victims and survivors of the Pol Pot era may still benefit psychologically from the long-overdue official acknowledgement of their suffering and the opportunity for younger generations to learn the truth of what happened. Some justice could indeed be better than none in the quest for healing and reconciliation at the individual and community level. This process may be undermined, however, if the prevailing culture of “small impunities” and the need for political and socioeconomic justice, along with psychosocial support, are not addressed.

Keywords: Cambodia, genocide, justice, reconciliation, truth, accountability, Khmer Rouge

Introduction

When I first travelled to Cambodia to conduct field research in 1999, I discovered that the lack of accountability for the former Khmer Rouge leaders responsible for the genocide of 1975-1979 was seen as the biggest impunity and the root of all the smaller impunities in Cambodian society at the time.¹ However, despite the subsequent creation of the Extraordinary Chambers in the Courts of Cambodia (ECCC) 25 years after the Pol Pot regime was deposed, this culture of impunity persists. On 12 November 2013, a female bystander was killed during a violent crackdown by riot and military police against demonstrating garment factory workers in Phnom Penh. The Cambodian Human Rights Action Committee (CHRAC) responded by highlighting the culture of impunity, which continues to prevail in Cambodia:

Impunity cannot be allowed the reign in Cambodia. With Chhouk Bandith free and still no investigation into the death of Mr. Mao Sok Chan, Cambodia's claim to be a country that respects rule of law lacks any credibility.²

This paper explores the challenges of ending impunity and pursuing justice after genocide in Cambodia, including an analysis of the historical and political context as well as the multiple justice needs and priorities of Cambodians. Drawing on field research conducted in Cambodia in 1999 and 2009,³ it concludes that, despite accusations of corruption and political manipulation, the ECCC could still contribute to peace and reconciliation because of the potential symbolic and psychological benefits for survivors of having their suffering officially acknowledged at last. What is missing in Cambodia is a greater commitment to political and socioeconomic justice, along with psychosocial support and implementation of the rule of law, which could underpin a more sustainable peace at individual, community and national levels.

Historical and Political Context

Cambodia was once a great nation covering much of Southeast Asia, with its own distinct Khmer culture influenced by India's two great religions, Hinduism and Buddhism. Culminating in the Angkor dynasty, the glorious Khmer Empire lasted from the seventh to the thirteenth century, after which it was progressively weakened by invasions from its neighbors Siam (now Thailand) and Vietnam. It was this glorious past that Pol Pot and his cohort were inspired to recreate for the people of Democratic Kampuchea by wiping out all foreign influences including the Vietnamese that were seen as undermining the pure Khmer identity.

In 1863 Cambodia became a French protectorate and then colony until 1953, when King Norodom Sihanouk regained the country's independence.⁴ After seventeen years of relative peace as an independent country, Cambodia became drawn into the Vietnam War. In 1969 the U.S. Air Force had begun secretly bombing Cambodia in an effort to eliminate the Vietnamese communist bases, and the anti-Vietnamese Lon Nol government took power in Cambodia (renamed the Khmer Republic). Sihanouk, now in self-imposed

exile, forged a coalition with the communist-backed Khmer Rouge who fought a civil war with the U.S.-backed Lon Nol government. In 1975 the United States withdrew from Vietnam, Phnom Penh fell to the Khmer Rouge, and the Cambodian people were subjected to three years of the brutal Khmer Rouge regime led by Pol Pot (Democratic Kampuchea) under which an estimated 1.67 million Cambodians (approximately 25% of the population) died.⁵

The Khmer Rouge regime started its reign of terror by forcibly evacuating all inhabitants from the capital city, Phnom Penh, and other towns to rural areas as part of its agrarian revolutionary plan. The systematic and carefully planned regime of terror, torture, hard labor and starvation was aimed at establishing a racially pure and independent Khmer state uninfluenced by the West or the trappings of wealth and privilege. The victims were identified by a political ideology that characterized the enemy as people of the elite or middle class: the educated, city dwellers, professionals, those who could write, wore glasses or spoke foreign languages. These enemies were often killed outright.

In addition to the economic and physical deprivations there was a complete denial of all social and cultural rights. Foreign and minority languages were banned; schools and hospitals were closed; the labor force was conscripted; families were separated; religions and folk cultures were destroyed, including the majority Buddhist religion.⁶ The Constitution of Democratic Kampuchea promulgated in January 1976 failed to guarantee any human rights and abolished private property, organised religion and family-oriented agricultural production, and the four-year economic plan drafted in 1976 said nothing about leisure, religion, formal education or family life.⁷

The mass killing that occurred under the Pol Pot regime is generally seen as politically and socioeconomically motivated, with particular ethnic and religious groups that were specifically targeted and almost totally eliminated, including Buddhists, the Vietnamese, Chinese and minority Cham Muslims.⁸ It was a communist-inspired class struggle taken to extremes and augmented by identity-based violence and killing. I have argued elsewhere that the extent of hatred of the Vietnamese and mission of purity extolled by Pol Pot and the Khmer Rouge indicates an identity-based or ethnic motive, rather than simply political ideology, that reinforces the label of genocide even though the majority of killings did not strictly fall under the Genocide Convention definition.⁹

Following border incursions and a previously failed full-scale invasion, Phnom Penh fell to the Vietnamese in January 1979, the Khmer Rouge retreated to the Thai border and the country's name was changed to the People's Republic of Kampuchea (PRK). The international community condemned the Vietnamese invasion, and the Pol Pot regime continued to be recognized by the UN as the official government of Cambodia. In 1989 the Phnom Penh government with Hun Sen as Prime Minister renounced communism and changed the country's name to the State of Cambodia, and the Vietnamese withdrew. Elections in May 1993 under the supervision of the United Nations Transitional Authority in Cambodia (UNTAC) resulted in a coalition government with Prince Ranariddh (Sihanouk's son) and Hun Sen (leader of the pro-Vietnamese Cambodian People's Party) as co-prime ministers. However, following a coup against Ranariddh and his other opponents in July 1997, Hun Sen declared himself sole Prime Minister of Cambodia. The Cambodian People's Party has remained in power since then with Hun Sen as Prime Minister.

Accountability for Genocide?

In the wake of the genocidal Pol Pot regime, there were no significant or effective official public processes of accountability implemented in Cambodia, despite the numerous initiatives proposed by the international community and Cambodian government.¹⁰ Nor were there any official international acts of condemnation or prosecution. The People's Revolutionary Tribunal of Khmer Rouge leaders, Pol Pot and Ieng Sary, held in Phnom Penh in August 1979, imposed a sentence of death in absentia for the crime of genocide, but this was not recognized internationally because of due process objections to the trial procedures and the diplomatic isolation of the PRK regime, and the sentence was never carried out.¹¹ According to Hammer and Urs, by turning the trial into a tool of propaganda, the PRK 'co-opted justice in the name of politics.'¹²

The international community was at first deterred by Cold War constraints, political priorities, and respect for state sovereignty from condemning the atrocities of the Pol Pot regime. Once the Cold War was over, the international community was still constrained by the legacy of Cold War geopolitical alliances, as well as fears that they might also be held to account for their role in supporting the Khmer Rouge. The United Nations played a significant role in rebuilding peace in Cambodia, but the issues of justice and reconciliation

were not addressed in the Paris Peace Agreement of October 1991. The final agreement did not preclude the Khmer Rouge from participating in the Cambodian elections, nor did it prevent former officials of the Khmer Rouge associated with the genocide from holding office in the future.¹³ Hammer and Urs attribute the failure to pursue justice for the Khmer Rouge during these two periods to the “politics of ideology” (1975-89) and the “politics of reconstruction” (1989-1996).¹⁴ As pointed out by Etcheson: “issues of transitional justice and accountability for serious violations of international humanitarian law are always intensely political.”¹⁵

The Khmer Rouge, meanwhile, were able to maintain their strongholds in towns such as Pailin near the Thai border. They continued their guerrilla activities with impunity for the next 20 years until the organisation was formally disbanded in 1998 after the death of Pol Pot and the defections of two former Khmer Rouge leaders, Khieu Samphan and Nuon Chea. Ieng Sary had defected after being granted amnesty in 1996. In March and May 1999, the Cambodian government arrested two other former Khmer Rouge leaders, Ta Mok and Duch. Both men faced charges of treason, torture, murder and genocide as well as breaking the 1994 law banning the Khmer Rouge.¹⁶ Ta Mok died in 2006, but Khieu Samphan, Nuon Chea, Ieng Sary and Duch, along with Ieng Thirith, survived to be indicted by the ECCC.¹⁷

The Extraordinary Chambers in the Courts of Cambodia

Following several years of negotiations, the UN and Cambodian government finally signed a draft agreement on 6 June 2003 for the establishment of a tribunal to try the surviving former Khmer Rouge leaders, but it took another two years for funding arrangements to be negotiated and the final form of the hybrid tribunal to be agreed.¹⁸ The ECCC was finally established in November 2005 and by May 2006 the judges and prosecutors had been appointed. The ECCC has been characterized as a hybrid tribunal because of the mix of international and Cambodian judges, but in reality it has operated as a national Court with international participation. The United Nations half of the Court has found itself with a limited capacity to control the Court’s functioning, and has seemed impotent to prevent corruption and political influence, if not interference.

The crimes being prosecuted by the Court include homicide, torture and religious persecution as defined in Cambodian domestic law; genocide as defined by the 1948 Genocide Convention; crimes against humanity as defined by the Rome Statute of the International Criminal Court; war crimes defined as grave breaches of the Geneva Conventions of 1949; and crimes against cultural property defined by the Hague Convention of 1954.¹⁹

The ECCC is instituting a unique feature of international or hybrid tribunals – the opportunity for victims to take complaints to the tribunal as civil parties. In addition to being able to appear as witnesses, victims of crimes, which fall under the jurisdiction of the court, are able to lodge complaints with the ECCC, to be represented by prosecuting lawyers and to claim collective and moral reparations.²⁰ In the beginning, civil parties were individually represented, but this was later changed to improve efficiency by requiring civil parties to be collectively represented.

On 17 February 2009 I attended the first day of the initial hearing of the first trial at the ECCC, popularly known as the Khmer Rouge Tribunal (KRT). There were crowds of foreigners and Cambodians, lining up to ensure their place in the courtroom for this historic occasion, to see Comrade Duch (Kaing Guek Eav) face charges for crimes committed whilst he was in charge of the notorious Tuol Sleng prison S-21 during the Khmer Rouge regime. In Case 001, Duch was charged with crimes against humanity, grave breaches of the Geneva Conventions of 1949, and the domestic crimes of homicide and torture. During the trial, Duch confessed, admitted responsibility and sought forgiveness for his role in the running of S-21 and the crimes that were committed there. This is an excerpt from one of Duch’s apologies from 16 September 2009:

Please allow me to offer my apology to all the victims who were subjected to the utmost suffering at this place [S-21] until the day they lost their lives or until 7 January 1979. I would like to offer my apology to the victim’s families who have been living in pain for the past 33 years without their beloved family members and who have not yet obtained justice.²¹

The verdict of Case 001 was announced in July 2010 and Duch was sentenced to 35 years imprisonment, reduced to 19 years because of time already served and compensation for prior illegal detention. Furthermore, most of the civil parties’ claims for reparations were rejected because Duch was found to be indigent. However, following appeals, the decision was made in February 2011 to increase Duch’s sentence to life

imprisonment for overseeing the deaths of approximately 15,000 people. The Supreme Court Chamber also decided on appeals from civil parties related to the Trial Chambers' ruling on their requests for collective and moral reparations, and affirmed the Trial Chamber's decision to compile and post on the ECCC website all statements of apology and acknowledgement of responsibility made by Duch during the course of the ECCC proceedings. The Court's first reparations award issued in May 2012 also provided for the names of the civil parties and immediate victims to be listed in the final judgement. Other collective reparations sought by the victims included access to free medical care and funding for educational programs about S-21 and the Khmer Rouge, as well as erection of memorials and pagoda fences.

The other four surviving senior Khmer Rouge leaders – Nuon Chea, Khieu Samphan, Ieng Sary and his wife, Ieng Thirith – were then to be tried together in a group trial as Case 002, which commenced in November 2011. The defendants were indicted on charges of crimes against humanity, grave breaches of the Geneva Conventions of 1949 and genocide. The case includes charges of forced evacuations, forced marriage, torture, executions, enslavement and genocide against ethnic Vietnamese and Cham Muslim populations. However, in light of the complexity of the case and considering the elderly, frail condition of the accused, the Court decided to proceed with the case in a series of mini-trials, starting with charges associated with the forced evacuations of the population of Phnom Penh and other major urban centres. The charges for this stage of Case 002 were later amended to include the execution of Lon Nol leaders and loyalists at Toul Po Chrey immediately after the Khmer Rouge took power in April 1975. But the more significant charges for the victims relating to enslavement, forced marriage, torture, executions and genocide will not be considered until subsequent mini-trials.

Known as Case 002/01, the first mini-trial concluded in November 2013, but only after one of the accused, former Foreign Minister Ieng Sary, had died of a heart attack in March 2013. His wife, former Minister of Social Affairs, Ieng Thirith, was judged unfit to stand trial because of dementia in 2012. Therefore only two senior Khmer Rouge leaders, 87 year old 'Brother No. 2' Nuon Chea and 82 year old former Head of State, Khieu Samphan, were tried and remain in custody awaiting the verdict which is expected in the second quarter of 2014. The timing of the second mini-trial, Case 002/02, is in question because of a lack of funding and the potential need to appoint another set of judges if it is to commence before the verdict is reached on Case 002/01.²² On both counts, there are justifiable fears that the accused may not survive to hear the verdict of Case 002/01, far less live long enough to be tried and convicted in Case 002/02. This would mean that no former Khmer Rouge leaders are, in the end, tried and found guilty of genocide. This lack of prosecution for genocide might not be easy for Cambodians to accept, given that the term genocide has been used since 1979 to describe the atrocities of the Pol Pot era. On the other hand, some evidence suggests that the details of the charges are not as important for the survivors as simply seeing their former leaders in court and behind bars.

According to Youk Chhang, genocide survivor and Director of the Documentation Center of Cambodia (DC-Cam), the fact that the senior Khmer Rouge leaders have been arrested and put on trial is profoundly significant. He suggests that the legal arguments mean little to people, but that seeing their former leaders incarcerated during the past six years has been essential: "for the public, they are [already] convicted". He adds that even if they die in jail, they will be regarded as having been "cursed by their bad karma".²³

On the other hand, Cambodians are critical of the time the trials are taking. For example, a female survivor whom I interviewed in Kampong Thom in January 2009 wondered 'why they don't make the hearings quickly, why do they keep delaying?'. It is especially hard for the victims to understand and accept the processes involved in ensuring the right to a fair trial and the presumption of innocence, the processes required to prove guilt and the money, time and energy spent on defending Nuon Chea and Khieu Samphan when the media has already "established the facts we 'know'".²⁴ Why should it take so long to come to a verdict when the crimes of the Khmer Rouge have been so thoroughly documented by genocide scholars and others including DC-Cam? For example, following the closing hearings of case 002/01, Kem Chem, aged 60 from Pursat Province, said:

I cannot agree with Nuon Chea when he says that victims are mistaken. We all know how much we suffered throughout 3 years, 8 months and 20 days. We need the truth and the respect to the victims. I think that the KR Tribunal is making true reconciliation. When I attend the court, it feels like anger is released in from my heart. I have relatives who were killed in the KR regime. I wish the court would expedite the trial so that the accused have a sentence as soon as possible.²⁵

According to my research, what may be more significant than convictions in judging the impact of the Court is the extent to which Cambodians get an answer to the ever-present question of 'Why did Khmer

kill Khmer?’ Trials are not normally the best method of finding the truth, yet survivors have shown a strong interest in hearing the accused speak about what occurred during the Pol Pot era, with the hope of finding out what happened to their family and hearing some kind of truth which could contribute to justice, reconciliation and healing.²⁶ This is also true of some of the young people who want to understand their country’s history. For example, Leng Samnang, a 21 year old university student interviewed after the closing hearings of Case 002/01, said:

I believe it is important for every Cambodian to know the truth about this horrendous time in our story. This is why I am here. I want to know the KR tribunal. I want to understand the Case 002/01 and hear Nuon Chea and Khieu Samphan.²⁷

Both Nuon Chea and Khieu Samphan have disappointed in this regard. Whilst they apologised to the people of Cambodia during the trial proceedings in May 2013, this was not an acceptance of responsibility for the crimes of which they are accused. Rather, they apologised that the Khmer Rouge revolution was “a complete disaster” and maintained that they did not have any real power and were unaware of the suffering of the people. The survivors were further disappointed when both of the accused refused to testify further because they had lost confidence in the Court providing a fair trial, and when, in their lengthy closing statements, the former Khmer Rouge leaders continued to distance themselves from responsibility:

‘It is easy to say that I should have known everything, I should have understood everything, and thus I could have intervened or rectified the situation at the time,’ Khieu Samphan defiantly told the court. ‘Do you really think that that was what I wanted to happen to my people?’ ‘The reality was that I did not have any power,’ he said. Nuon Chea also defended his actions, saying he never ordered Khmer Rouge cadres ‘to mistreat or kill people to deprive them of food or commit any genocide.’²⁸

Nuon Chea did, however, unlike Khieu Samphan, accept “moral responsibility” for the deaths: “I would like to sincerely apologize to the public, the victims, the families, and all Cambodian people,” he said. “I wish to show my remorse and pray for the lost souls that occurred by any means” during the Khmer Rouge rule. Nuon Chea’s apology evoked this response from one of the many survivors who crowded the courtroom for the final day of hearings in Case 002/01:

‘He is just trying to cheat the court so that he can be freed,’ said Bin Siv Lang, a 56-year-old woman who lost 11 relatives during the Khmer Rouge rule. ‘If he issued no orders to kill people, his subordinates would not have killed.’²⁹

Bin Siv La, from Porsat province, went on to say that she expected Nuon Chea to be found guilty and to be hanged for the suffering he had caused her and her family.

Nuon Chea’s defense lawyer argued that the evacuation of Phnom Penh ‘was done for military and practical reasons, and lacked criminal intent,’ while the former Khmer Rouge leader claimed that Cambodians left the cities of their own free will and that the evacuation was a “humane act” designed to protect them from impending US bombings and the threat of starvation.³⁰ These claims are unlikely to provide the truth sought by survivors for whom these accounts do not match their experience of the inhumane treatment they received. Nuon Chea went on further to blame the Vietnamese as well as unruly subordinates and differing factional interests among zone and district commanders for the suffering his regime caused.³¹ Khieu Samphan similarly claimed that his actions were based on good intentions: “My political conscience at that time, given the reality on the ground, whatever I did was to protect the weak; to uphold and respect their fundamental rights and to build a Cambodia that was strong, independent and peaceful.” Both men continued to maintain their innocence, and the National Co-Prosecutor Chea Leang called for the maximum penalty of life imprisonment for the alleged crimes against humanity committed by the accused.

Also at the closing hearings, lawyers for the civil parties outlined thirteen proposed reparation projects to be awarded if the accused are found guilty. The proposed projects were divided into three main categories: remembrance and memorialization, including establishment of an official remembrance day and memorial sites; rehabilitation, such as testimonial therapy and self-help groups implemented by TPO; and documentation

and education, including establishment of a Peace Study Centre and mobile exhibition project.³² If awarded, these reparations could contribute significantly to the psychosocial, symbolic and preventive aspects of transitional justice which can support individual and community, and hence national, peace and stability.³³

The survivors whom I interviewed in Cambodia in 2009 were mostly happy with the idea of collective reparations to provide services for local communities, although one male survivor did argue that because of the disability he suffers as a result of torture by the Khmer Rouge that he should receive individual compensation. He was particularly critical and bitter about the ECCC process and its likely value for him personally. Another survivor, a woman who had lost all her family during the Khmer Rouge time whom I interviewed in Kampong Thom, indicated “I think I would be peaceful in my mind if I get any support if a road to my house would be built”. So far, little in the way of substantive reparations has been provided by the ECCC, but preparations for implementation of reparations projects from Case 002/01 is underway with the participation of civil parties and ongoing efforts to secure sufficient funding.³⁴

Justice Compromised?

The ECCC has faced significant challenges in obtaining sufficient funding, overcoming delays in its start-up and ongoing operations, upholding standards of fairness, and prosecuting crimes committed more than 30 years ago. Even if it manages to meet these legal and operational demands, questions remain as to the ECCC’s ability to satisfy the goals of accountability, truth and justice, and most importantly, an understanding of why such crimes were committed by Cambodians against their own people.³⁵

The temporal jurisdiction of the ECCC means it cannot prosecute crimes perpetrated by the Lon Nol government which preceded the Pol Pot regime, nor address the role of foreign governments in aiding and abetting the Khmer Rouge, nor crimes allegedly committed in subsequent years by Hun Sen and the Vietnamese-installed government. Its ability to end the culture of impunity still prevalent in Cambodia is therefore only partial. The personal jurisdiction of the ECCC is limited to bringing to justice “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations”.³⁶ It could not try those Khmer Rouge leaders who had already died, including Pol Pot and Ta Mok, and of the five key Khmer Rouge leaders brought to trial, one has since died and one has been deemed unfit to stand trial, leaving one convicted in Case 001 and only two remaining to face the charges in Case 002.

Efforts to open a third case and try some lower level leaders have been thwarted by the Cambodian government and national ECCC prosecutors, although investigations are continuing in the hands of the international prosecution. Some have argued that it would be better to use the additional resources for alleviating poverty rather than an expensive tribunal, which will try only a few people.³⁷ Kek Galabru, President of LICADHO, has asked whether such a tribunal would “bring justice to the Cambodian people and to fight against the culture of impunity? Or is it just a show trial for the international community, especially to appease the donors?”³⁸ According to Maguire, some Cambodians had given up on punishment and ‘they simply seek acknowledgment’.³⁹

Faith in the ECCC to provide truth and acknowledgement by the former Khmer Rouge leaders is likely to be misplaced, however, except in the case of Duch who confessed and sought the forgiveness of the Cambodian people for his role in the torture and killings that took place at Toul Sleng. By contrast, as discussed above, Nuon Chea and Khieu Samphan have again portrayed themselves as patriots and defended their actions as being in the interests of the Cambodian people. Khieu Samphan, in an open letter in December 2003, admitted ‘systematic killings’, but in his 2004 book he claimed that he ‘didn’t know’ about Tuol Sleng and had no power to stop the atrocities.⁴⁰ At his trial, Nuon Chea expressed some remorse in terms of the failure of the revolution, but as in the past admitted only that the regime made some mistakes and placed the blame on the Vietnamese,⁴¹ thus somewhat ironically reinforcing the genocide ideology that justified their persecution under the Khmer Rouge. As PoKempner suggests, rather than creating a new respect for the rule of law in Cambodia, the opportunity taken by the former Khmer Rouge leaders during their trials to continue to justify their actions could have the opposite effect.⁴²

It is unfashionable to argue that the ECCC may be successfully meeting its goals, especially in the wake of criticisms of corruption and cooption of the Cambodian half of the court to meeting the political priorities of the Cambodian government, and undermining the international investigators’ attempts to bring other former Khmer Rouge leaders before the Court. However, based on evidence I collected during interviews in January-February 2009, and surveys conducted by the Documentation Center for Cambodia around the same time period, it is not necessarily clear that Cambodians would welcome a broadening of the cases under

investigation. As one female survivor interviewed in Battambang suggested to me, using a Khmer idiom similar to the idea that it would be ‘opening a can of worms’; there was fear in local communities that going beyond the five key leaders could destabilise Cambodian society. Another female survivor, also interviewed in Battambang, said she thought that there would be ‘chaos in the community’ if more were tried. Where might it end? With the trial of Hun Sen and others in the government who were associated with the crimes of the Khmer Rouge?

Of course, this conservative view could be seen as reflecting the control of the government over the population, as human rights advocates might argue, and therefore a position to be overridden in the interests of due process and the legal duty to prosecute. In other words, justice for the international community should prevail, a normative position reflecting the power and influence of the ‘justice cascade.’⁴³ On the other hand, concerns about expanding the number of trials could be interpreted as a legitimate reason for regarding the trial of only the key leaders as sufficient in terms of setting an example and providing a symbol of accountability and recognition of the suffering of Khmer people during the Pol Pot era.

Some of the Cambodians whom I interviewed in January-February 2009 indicated that they thought only the top leaders should be prosecuted because they recognized that many of the lower level former Khmer Rouge were not to blame, or they observed that there was reconciliation but not justice or accountability for the leaders who were responsible. For example, a male survivor from Kampong Thom, who was a youth at the time of the Khmer Rouge period, said: ‘In my opinion it should be the top leaders [who are tried] as the lower rank officials were led by the top leaders’. He also said that he thought that the ECCC could bring reconciliation in the community. By contrast, others thought that more former Khmer Rouge should be prosecuted. For example, a male survivor who was 25 years old at the time of the Pol Pot regime whom I interviewed in Siem Reap said “I think not only those few should be tried ... more should be tried” and he also thought the KRT would not bring reconciliation.

But for the women living in Battambang quoted above, opening the trials to more former Khmer Rouge beyond the top five leaders was seen as a threat to peace and stability. This position reflects a more pragmatic approach to transitional justice that responds to the perceptions and expressed needs of locally affected communities even when these views may seem to run counter to international human rights norms.

Cambodians also expressed legitimate concerns that Case 002 has not yet considered the charges of genocide, and that the accused may die before the second part of the trial. This concern highlights the problem of separating the charges; even though there is a greater chance of reaching a conviction for some of the crimes while the defendants are still alive, it also reduces the chances that the survivors will achieve any sense of justice in relation to the more serious crimes which generated the majority of their suffering. It also limits the opportunity for truth recovery and acknowledgement from the former Khmer Rouge leaders in relation to these crimes if the second mini-trial is postponed until after the findings are pronounced for the first mini-trial.⁴⁴

I argue that the symbolic potential of the ECCC should not be underestimated, however. As explained by a survivor whom I interviewed in Phnom Penh in October 1999: “We have to punish [the former Khmer Rouge] ... a matter of national responsibility ... biggest case of impunity in the world and the mother of other smaller impunities in Cambodia.” Similarly in 2009, I interviewed Cambodians in a number of rural areas who had lost loved ones and suffered from the hardships during the Pol Pot era, who expressed relief that finally their suffering was receiving official acknowledgement by the international community and that they at last felt a sense of justice for what had happened to them. In commenting on his experience of the closing hearings of Case 002/01, Kranh Uth, an 82-year-old genocide survivor from Kandal Province, said: “In the KR regime, I lost 12 relatives. When I see the KR leaders in trial, my emotions seem not agitated anymore. The court is helping me to find what I have lost for all these years: justice and relief.”⁴⁵ Similarly, as quoted earlier, 60-year-old Kem Chem from Pursat Province referred to how the ECCC was providing ‘a real reconciliation’ and that when attending the court he felt like anger was released from his heart. Even if the former Khmer Rouge leaders in Case 002 continue to deny their culpability, the finding by the ECCC of individual guilt could provide a strong counter to this denial and the punishment meted out could go some way towards satisfying the calls for justice as well as contributing to healing and reconciliation.

The evidence suggests that a majority of ordinary Cambodians wanted a tribunal to be established. For example, in January 1999, 84,195 Cambodians signed a national petition calling for an international

tribunal; 5000 Cambodians rallied in support of an international tribunal in Phnom Penh in August 1999; surveys conducted by the Khmer Journalists' Association in 1995 and the Institute of Statistics and Research on Cambodia (IFRASORC) in 1999 both reported that 80% of the population wanted the former Khmer Rouge leaders to be prosecuted; and a survey of 7000 Cambodians conducted by DC-Cam in 2002 found that 57% wanted 'the kind of accountability that only a tribunal could bring.'⁴⁶ Further evidence of support from ordinary Cambodians for a tribunal has also been provided by interviews and surveys conducted by this author and other researchers.⁴⁷

In 2009, when I returned after ten years to further explore Cambodian attitudes now that the ECCC had been established and the first trial was finally beginning, I found the evidence of support was less clear amongst the general population. Young people who had not experienced the Pol Pot era were sceptical and critical, or simply not interested in the court and its proceedings. Older Cambodians who had fought with the Khmer Rouge because they believed in the mission to oust the Lon Nol government and rid the country of US influence, were concerned about the ramifications of their association with the Khmer Rouge being falsely linked to the perpetration of human rights violations rather than also being seen as victims of the period. This was especially the case in relation to children who were forcefully recruited to carry out the relocation and societal reordering mandated by the Pol Pot clique.

By contrast, however, many of the Cambodians I interviewed in January-February 2009 were extremely interested in following the ECCC proceedings and some were keen to participate as civil parties. I interviewed a number of older Cambodians, some of whom were still showing signs of the trauma they had suffered, who wanted to take advantage of the opportunity to participate in the outreach activities being conducted by the Documentation Center of Cambodia (DC-Cam) and a number of human rights and peace NGOs in rural areas, and to use the opportunity to educate their children about what happened during the Pol Pot era.⁴⁸ Many young Cambodians had been impatient with their parents' unusual behavior such as hoarding food (presumably symptoms of trauma), had not believed their stories and were generally dismissive of the history of that era. A common refrain of older interviewees was that young people who were born after the Khmer Rouge era did not believe what had happened, and the observation that the ECCC would be helpful to educate young people so 'the next generation will not follow the same bad actions' (a female survivor interviewed in Kampong Thom who was a young woman during the Khmer Rouge period). A female survivor interviewed in Siem Reap mentioned that 'most children including my own are reluctant to believe'. She said that 'even though it happened a long time ago, I do not have peace in my mind ... when I sit down alone I recall past events and I cry'.

The local NGO, Youth for Peace, has been particularly active in rural communities bringing young people and older people together to learn from each other: the older generations explain about the Khmer Rouge period while the younger generations explain about the ECCC.⁴⁹ Working in conjunction with the International Center for Conciliation, Youth for Peace found that participants experienced a greater sense of community and reduced social barriers.⁵⁰ In 2012, Youth for Peace inaugurated its first Community Peace Learning Center at a memorial site in Takeo province and it continues to play a leading role in furthering understanding of the Khmer Rouge period.⁵¹ DC-Cam, meanwhile, has led efforts to introduce a new school curriculum, which accurately portrays the history of the period, in addition to its key contribution to documentation of the genocide and support for victim participation in the trials at the ECCC.

Outreach is a critical yet often undervalued aspect of transitional justice, including in Cambodia where planning for outreach was inadequate in terms of political will, funding and institutional design.⁵² Outreach is necessary for justice to be served not only for the international community, but also for the local population by ensuring that they are informed and, where appropriate, able to participate in the trial proceedings. Thanks to the efforts primarily of civil society organizations, almost 4000 civil parties were registered in Case 002 and of these thirty-one gave evidence during the first mini-trial, and more than 100,000 members of the public attended the hearings.⁵³

A parallel process, which can also enhance the effectiveness of transitional justice mechanisms such as the ECCC, is what I have called 'inreach' – obtaining ideas, opinions and feedback from local populations about their expectations and responses to the transitional justice process.⁵⁴ This two-way communication or dialogue can, I argue, increase the experience of local ownership and contribute more meaningfully to peacebuilding and conflict transformation. During my field research in 2009 I observed how DC-Cam was assisting in this process of inreach by conducting a survey to ascertain public attitudes towards the expansion of the trials to cover more than the key leaders already accused in Case 001 and Case 002.

Both those who had experienced the Khmer Rouge period and those who had not, showed a keen interest in seeing documentaries of former Khmer Rouge leaders shown at outreach sessions, and later being able to go the Court to see the former leaders facing trial.⁵⁵ Hearing others talk publicly and on film about what they had suffered seemed to be providing a sense of validity for their own experiences. In short, the psychosocial benefits of the ECCC seemed to be outweighing any dangers of retraumatization by revisiting the horrors of the past.⁵⁶ My research provided evidence of the value of the ECCC for the psychological health of victims and survivors, as well as building family and community relations. For example, a female survivor I interviewed in Prey Veng spoke of feeling 'peace in [her] heart' for the first time because of the KRT, while a male village chief interviewed in Battambang said that he would feel 'peace in [his] mind' when there was a trial of Khieu Samphan. Others showed great interest in the court and seeing those who had perpetrated the crimes against them being tried and punished, and many said that they thought the ECCC would bring reconciliation as well as justice. A female survivor interviewed in Kampot who was 15 at the time of the Khmer Rouge said she thought the top leaders "should be tried because they were treating us very badly then and because of them I became an orphan" and that she felt happy because there is a trial.

My findings have been supported and qualified by the results of research by Holmes and Ramji-Nogales⁵⁷ and Strasser et al⁵⁸ who interviewed Cambodians in relation to their experiences of Case 001. Holmes and Ramji-Nogales found that victim participation in the ECCC can provide a form of reparative healing or transformative justice,⁵⁹ but that this is limited because only a select few survivors of the Khmer Rouge regime are eligible to be civil parties.⁶⁰ They observed that those who attended trials without being able to participate as civil parties were more likely to feel retraumatized and that without adequate psychosocial support, listening to the hearings might retard rather than promote healing.⁶¹ They also found that community dialogues supported by NGOs such as DC-Cam can 'begin the process of community-wide healing' in a way that can provide a more significant and lasting impact on reconciliation than the ECCC trials themselves.⁶²

Strasser et al, meanwhile, concluded from their research in relation to Case 001 that some of the psychological dynamics of participating as civil parties were beneficial whilst others 'carry the risk of increasing victims' suffering'.⁶³ They observed that civil parties appreciated the educational and preventive benefits of participation, but that they found it very difficult and painful attending the criminal proceedings, hearing the testimonies and being reminded of their own and their relatives' suffering. Trial proceedings do not generally allow for the expression of 'emotional truth' and the rather 'dry and factual' way in which the evidence is heard does not allow survivors to access and better understand their 'individual and collective pain and suffering' in a way that can promote a healing or restorative truth, according to Strasser et al.⁶⁴ They also speculate on how Duch's requests for forgiveness could harm victims psychologically, as such forgiveness could only be contemplated by victims after truth and justice.⁶⁵ Overall though, despite these challenges, Strasser et al concluded, consistent with my earlier findings, that the psychological benefits outweighed the potential harmful effects on survivors in three primary ways: acknowledgement and condemnation; providing testimony; and psychological support services.⁶⁶ They also emphasized the critical contribution of TPO in enabling civil parties to 'deal with stressful and controversial situations typical in a criminal proceeding'.⁶⁷

On the other hand, there is evidence that many Cambodians are unaware or uninterested in the ECCC and its proceedings, although this level of knowledge has increased since the trials began.⁶⁸ According to the latest survey conducted by the Berkeley Human Rights Center in 2010, 75% of Cambodians had a limited general knowledge about the ECCC, up from 61% in 2008. However, the researchers found little evidence of Cambodians with a detailed understanding of the Court.⁶⁹ The limited outreach conducted by the ECCC to explain the capacity and functioning of the Court has made it difficult to manage expectations, which is undermining the impact of the justice achieved and has caused unnecessary distress for victims (for example, when their cases were rejected in Case 001).⁷⁰

There is a need for a more comprehensive national support strategy to provide psychosocial assistance to foster individual and collective healing and reconciliation that goes beyond the impact of the ECCC.⁷¹ The socioeconomic stresses experienced by many Cambodians also serve to undermine their ability to cope with the psychosocial impact of their suffering/trauma under the Khmer Rouge with which they are being confronted during the ECCC proceedings, supporting arguments for a more holistic and transformative approach to political as well as socioeconomic and psychosocial justice.⁷²

There are also questions about the amount of resources required for the ECCC and whether this would be better spent on socioeconomic development. Funding shortfalls have been a continuing impediment to the efficient functioning of the ECCC and therefore its ability to satisfy the expectations of victims and other

Cambodians. The Court has faced at least two funding crises in late 2011 and again in February 2013 when it ran out of money and staff were not being paid. In October 2013, both Japan and the UK made significant new funding available for the international side of the Court following the Cambodian government's announcement of bridging funds to enable the national side to complete its work in 2013.⁷³ But this still leaves uncertainty regarding funding for 2014 and the successful completion of Case 002.

Justice for the Future?

I have argued elsewhere that in order for transitional justice to be transformative it needs to address the multiple justice needs and priorities of local affected populations, to transform relationships as well as structures and institutions, and to focus on the future as well as justice for past human rights violations.⁷⁴ In order to transform Cambodian society, therefore, a more holistic and future-oriented vision of justice is required than that provided by the ECCC, one that includes elements of restorative, socioeconomic, political and psychosocial justice in addition to retributive justice.

A model of transformative justice incorporates the need not only for justice for the past, but also justice in the future. The culture of impunity, which has prevailed in Cambodia, is about more than the failure to prosecute the former Khmer Rouge; it is also about the continuing lack of respect for the rule of law in a country which still operates politically on a patronage system where power is more important than the law.⁷⁵ The ECCC is expected to contribute to the development of rule of law in Cambodia through its legacy program which will be important for assessing the value and impact of the ECCC on future law and order, peace and stability in Cambodia.

There have been mixed reactions so far to the Court's ability to meet expectations in terms of capacity building through the development of rule of law, infrastructure and training of Cambodian legal personnel. Technical transfer of knowledge and skills appears to be occurring on an individual level, but there is limited evidence that this is being transformed into systemic and procedural reform in the judicial system. The Court is demonstrating a model of fair trial proceedings, although this is being undermined to some extent by the continuing accusations of corruption and political interference, which fail to provide a good example for developing the rule of law in Cambodia. The Court's hybrid nature has led to internal conflict and affected the Court's credibility, which feeds into the likely legacy impact.

There are also those who have argued against the imposition of Western-style legal justice provided by the ECCC as being alien to Khmer culture. According to Harris, such imposition of foreign systems and universal norms of justice 'may be read by some sectors of Khmer society [those for whom to be Khmer is to be Buddhist] as an expression of contempt for their own traditions'.⁷⁶ Some Cambodians have responded by expressing the desire to return to a Khmer approach to counter the influences of outsiders, which have in the past betrayed and neglected the needs and rights of the Cambodian people. They reject the modernist enterprise which privileges the Western rule of law approach, arguing for a need to reassert Khmer identity imbued with confidence rather than fear of the outside invader.

PoKempner argues, by contrast, that the insistence of Cambodians on international standards for the ECCC, far from being culturally alien, is a natural response to demand that their sufferings be considered as significant as those of Rwandans and Bosnians who were afforded the full international legal standards of an international tribunal.⁷⁷ This argument is consistent with my observations and interviews in 2009, as well as my research in other cultural contexts where the impact of globalization and norm diffusion has led to calls for international criminal prosecutions of those accused of genocide and other mass human rights violations. Local culturally specific justice and reconciliation mechanisms may still be deemed appropriate, although not normally for the key leaders and most serious crimes. For example, a number of interviewees in 2009 mentioned the value of Buddhist philosophy for supporting reconciliation in Cambodia, although they had not experienced any specific reconciliation mechanisms in their local communities following the return of survivors and former low-level Khmer Rouge. At the same time, they were less enthusiastic about reconciliation with the former key leaders who had orchestrated the genocide, but rather considered that they should be held accountable and would, inevitably, suffer for what they had done.

According to PoKempner, what is needed in terms of societal transformation in Cambodia is the building of a new national identity, which repudiates the narrative of the past and reflects values of impartiality, legality and fairness.⁷⁸ Thus, accompanying the legal trials with campaigns for public education, community dialogue and reconciliation could enhance the value of the ECCC, as a forum for reconstituting Khmer identity. McGrew similarly argues for the need to restore dignity, identity and belonging as part of justice and reconciliation efforts in Cambodia.⁷⁹

My field research conducted in 2009 suggested that the civil society outreach efforts to support the ECCC were contributing to this identity transformation to only a limited degree, although in some instances the relationship-building included in some of these outreach activities appeared to be making a significant impact on promoting understanding and social transformation, at least at the community level, to overcome the legacies of genocide. Civil society programs have subsequently expanded, including the work of Youth for Peace in transforming mass killing sites into sites of remembrance and peace education, and DC-Cam's emphasis on community dialogues to complement its outreach (and inreach) programs in relation to the ECCC. Others are conducting Buddhist ceremonies and TPO is promoting culturally adapted psychosocial interventions.⁸⁰ McGrew proposes a "joint narrative approach" which could further complement the ECCC by providing opportunities for community dialogue between perpetrators and victims which could promote the compassion of Buddhism at the same time as satisfying the survivors' "needs and desires to know why Khmer killed Khmer"⁸¹

The ECCC seems to be having little impact, meanwhile, on the national political level of justice. Hun Sen and his government continue to rule Cambodia with little regard for human rights and the rule of law, and civil society continues to have minimal if any impact on government policies. As discussed earlier, the legacy of the ECCC has not so far had any significant impact on legal systems and experiences of justice. The governance and participation sector of peacebuilding has been left unaddressed since the UN-sponsored elections in 1993, and Cambodians do not expect that the government will respond to their needs and priorities. For example, a male survivor whom I interviewed in Phnom Penh in February 2009 said that the KRT was helping him to feel peace in his mind, but only at a low level because he was "influenced by politics". A male survivor whom I interviewed in Kampot said that "today we have corruption so powerful people can change the situation from black to white, or white to black". Transitional justice provided by the ECCC has not addressed the need for political justice in Cambodia.

Similarly, there are dissatisfactions that socioeconomic justice has not been sufficiently addressed. The reparations offered by the ECCC provide some sense of justice for past suffering and have the potential to contribute to community development, but they can do little to transform extreme social inequalities that continue to plague Cambodian society. The perception continues that while most survivors of the Khmer Rouge genocide live in poverty, the former Khmer Rouge leaders are relatively well-off economically. Even though they have been arrested and are being tried by the ECCC, the former key leaders are perceived to have better living conditions than most rural Cambodians. This continuing experience of relative deprivation, for some genocide survivors, undermines any sense of peace, justice or healing they might otherwise feel as a result of the Khmer Rouge Tribunal.

Finally, the focus on documentation of mass human rights violations through DC-Cam and criminal accountability of high level Khmer Rouge leaders through the ECCC does not address the structural and other root causes of the genocide, nor does it deal with the need for justice in relation to the many lower level Khmer Rouge perpetrators. This paper has argued for the strengthening of psychosocial interventions and promotion of reconciliation as an appropriate means of addressing the lack of justice for the mass of lower level Khmer Rouge cadre who often also perceive themselves as victims. The current approach also does not allow for truth recovery and justice in relation to the United States and its bombing of Cambodia during the Vietnam War and contribution to the ease with which Pol Pot was able to gain popular support for his revolutionary movement to oust the pro-US Lon Nol government. The policies of the US and other foreign powers helped to create the structural context, which enabled Pol Pot to carry out his revolutionary genocide. Addressing these root causes through the truth-telling functions of a truth and reconciliation commission could support a more transformative justice process and outcome in Cambodia by allowing more crimes to be addressed, as well as wider participation and access to more healing or emotional truth than is possible with the ECCC. The benefits would, as with the ECCC, be dependent on the provision of sufficient psychosocial support to assist survivors to deal with the process and reduce the chances of retraumatization.

Conclusion

After more than 30 years, the ECCC is conducting trials of some of the key former Khmer Rouge leaders, marking an important step in ending the culture of impunity in Cambodia. However, despite evidence of public support for the establishment of the tribunal, it seems unlikely that the ECCC will be able to meet all of the expectations of the Cambodian people. From my field research in 1999, I concluded that Cambodians needed to know what happened during the Pol Pot era and why, and they needed acknowledgement from former

Khmer Rouge leaders that what they did was wrong. Ten years later, my research revealed that these needs remained unfulfilled. Whilst the ECCC has subsequently provided some justice in the form of international acknowledgement and punishment for the perpetrators, which is arguably better than none, it has so far not answered the most important question of why the genocide occurred. Whilst Duch confessed and apologized repeatedly for his crimes in relation to S-21, the senior leaders who orchestrated the genocide being tried in Case 002, Nuon Chea and Khieu Samphan, only belatedly expressed some qualified regrets whilst at the same time continuing to maintain their innocence. Both leaders claimed ignorance and lack of responsibility for the atrocities, which occurred, and defended their actions as being driven by the need to rebuild the nation in the face of foreign threats and interference.

It is therefore questionable the extent to which genocide survivors will feel a sense of justice and satisfaction from Case 002, and even more so given the increasing likelihood that the two aging defendants could die before the trial is completed and the convictions recorded. On the other hand, at the time of the first trial, I found evidence that on a personal, psychosocial level, the ECCC was arguably worthwhile in terms of providing a sense of justice and peace for at least some survivors. I was less optimistic before I conducted my field research in 2009, and to some extent surprised by the feelings of inner peace and reconciliation that were being promoted because of the court's existence. My observations were consistent with the findings of other subsequent research that the psychological benefits of civil party participation in Case 001 outweighed the risks of retraumatization, at least when sufficient psychosocial support was also provided. The symbolic value of Case 002 should not be underestimated, either, as Cambodians see their former leaders being subjected to trial and imprisonment, suggesting that possibly some justice, however flawed, may be better than none.

The ECCC is nevertheless limited in its ability to fully satisfy the needs of justice for the Cambodian people and the international community, especially given the challenges of funding, high profile resignations, allegations of corruption and political interference, and slow progress. A greater emphasis on outreach and inreach could assist in improving the effectiveness of the Court, even within the constraints outlined in this paper. Even though justice through the ECCC is an important goal, retributive justice only for key individuals through a tribunal without truth and acknowledgement is only partial justice. The Court is unable to address the structural causes of the genocide, and unlikely to end the prevailing culture of impunity without a more constructive engagement with the Cambodian government in order to foster the rule of law throughout the country. Ending the bigger impunity is not necessarily contributing to ending all the smaller impunities in Cambodian society. This research suggests that other types of justice are also needed, including political and socioeconomic justice, in addition to an increased emphasis on psychosocial interventions, for Cambodians to fully benefit from the ECCC and to strengthen its contribution to long term recovery from genocide and ongoing peace and stability in the country.

End Notes

1. Impunity is the blatant, widespread lack of consequences or punishment for crimes or other wrongful acts.
2. Cambodian Human Rights Action Committee Statement, "CHRAC Demands Investigation into Violent Crackdown Against SL-Garment Factory Workers", 12 November 2013.
3. In October 1999 I interviewed twenty-two survivors and descendants of survivors of the Cambodian genocide living in the capital, Phnom Penh, as well as seven NGO and UN workers. In 2009 I returned to Cambodia and conducted interviews with a total of thirty-two survivors and former Khmer Rouge in Phnom Penh and six rural locations: Kampong Thom, Battambang, Prey Veng, Anlong Veng, Kampot and Kompong Speu. I also interviewed three staff at the ECCC, eight NGO representatives in Phnom Penh (including several members of CHRAC), attended three outreach sessions run by ADHOC and DC-Cam in rural areas, and the first day of Duch's trial at the ECCC in February 2009. Comments based on these semi-structured interviews should not be taken as representative of the views of the whole population, but should be seen as indicating the views of some individual Cambodians who can provide an insight into responses to the ECCC and other aspects of transitional justice by different sectors of the general population and the non-government sector.
4. For further details on Cambodian history and the genocide, see David Chandler *A History of Cambodia*, 2nd edn. (Boulder, CO: Westview Press, 1996) and Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79* (New Haven, Connecticut: Yale University Press, 1996).
5. Ben Kiernan, 'The Cambodian Genocide – 1975-1979' in Samuel Totten, William S. Parsons & Israel W. Charney (eds), *Century of Genocide: Eyewitness Accounts and Critical Views* (New York & London: Garland Publishing, 1997) 343.
6. Kiernan, 1994, 191
7. Chandler, 1996, 214-215. The four-year plan referred to the need to "abolish illiteracy among the population" but primary schooling was limited, and education beyond the primary level was not available until 1978. The killing of former teachers regarded as "class enemies" was not a policy consistent with the education of the masses.

8. See Kiernan 1997, 340-345 for statistical details of the minority groups targeted and the impact of the genocide on these groups.
9. Wendy R. Lambourne, *Justice and Reconciliation: Post-Conflict Peacebuilding in Cambodia and Rwanda*, PhD Thesis, University of Sydney, 2002; Kiernan 1997.
10. Etcheson provides a thorough analysis of the various attempts at redress or justice over the first 20 years following the fall of the Pol Pot regime, including attempts to instigate a case at the International Court of Justice; a Cambodian lustration law adopted in 1994; various US actions including adoption of the Cambodian Genocide Justice Act also in 1994; and efforts to establish a truth commission in 1996-97. See also Fawthrop and Jarvis (2005) who include an account of the Australian initiative in 1986 to pursue international legal accountability for the genocide in Cambodia which was ultimately quashed by political pressure from the US as well as resistance from ASEAN and China. Craig Etcheson, *After the Killing Fields: Lessons from the Cambodian Genocide* (Westport, CT: Praeger Publishers: 2005), 77-82.
11. Michael Vickery & Naomi Roht-Arriaza, 'Human Rights in Cambodia' in Naomi. Roht-Arriaza (ed.) *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995) 246; Stephen P. Marks, "Elusive Justice for the Victims of the Khmer Rouge", *Journal of International Affairs*, 52:2, Spring 1999, 691-718. Etcheson 2005: 14-17.
12. Peter J. Hammer & Tara Urs, 'The Elusive Face of Cambodian Justice', in Jaya Ramji and Beth Van Schaack (eds) *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts* (Lewiston, NY: Edwin Mellen Press, 2005) 26.
13. The Khmer Rouge subsequently withdrew from the peace process and elections.
14. Hammer & Urs, 2005.
15. Etcheson (2004: 182). Etcheson further documents the politics of genocide justice for the Khmer Rouge (2005: 141-66) and lists the reasons for the failure of the Cambodian government and international actors to end Khmer Rouge impunity (2005: 137-8).
16. "Charges Filed Against Ta Mok", *South China Morning Post*, 10 March 1999; "Khmer Rouge Genocide Charge", *The Australian*, 10 September 1999, 8.
17. For profiles of the former Khmer Rouge leaders see Fawthrop and Jarvis (2005: 254-69).
18. For an overview of the negotiations to establish the tribunal, see Wendy Lambourne, "The Khmer Rouge Tribunal: Justice for Genocide in Cambodia", refereed proceedings published online, *Whither Human Rights*, 25th Annual LSAANZ International Conference, University of Sydney, 10-12 December 2008.
19. Tom Fawthrop & Helen Jarvis, *Getting Away with Genocide? Elusive Justice and the Khmer Rouge Tribunal* (Sydney: UNSW Press, 2005). For a detailed account of the structure and functioning of the ECCC, see also John D. Ciorciari (ed.) *The Khmer Rouge Tribunal*, Phnom Penh: Documentation Center of Cambodia, 2006.
20. For an account of civil society participation in the ECCC see Christoph Sperfeldt, 'Cambodian Civil Society and the Khmer Rouge Tribunal', *International Journal of Transitional Justice*, 6, 2012, 149-160.
21. *The Court Report*, Issue 48, May 2012, 2.
22. Open Society Justice Initiative, "Planning and Leadership Now Needed at ECCC", Position Paper, November 2013.
23. Youk Chhang quoted in Robert Carmichael, "Cambodian Tribunal Ends First Trial in Key Khmer Rouge Case", *Voice of America*, 31 October 2013.
24. Justine Drennan, "Devil's Advocates at the Khmer Rouge Trial", *The Huffington Post*, 15 November 2013.
25. *The Court Report*, Issue 66, November 2013, 4.
26. Long Panhavuth, of the Open Social Justice Initiative in Cambodia, quoted in Robert Carmichael, "Cambodians await justice in Khmer Rouge trial", *Deutsche Welle*, 15 October 2013; Harvard researchers Patrick Vinck and Phuong Pham quoted in Alvin Powell, "A thirst for justice delayed: Researchers explore Cambodian attitudes towards Khmer Rouge trials", *Harvard Gazette*, 9 April 2013.
27. *The Court Report*, Issue 66, November 2013, 5.
28. Justine Drennan, "Cambodia's aging Khmer Rouge leaders issue final defense, deny genocide charges", Associated Press, 31 October 2013. Note: Case 002/01 did not include charges of genocide against the accused.
29. Drennan, 31 October 2013.
30. Carmichael, 31 October 2013; Lauren Crothers, "As Trial Ends, KR Defendants Defiant to the Very Last", *Cambodia Daily*, 1 November 2013, 1.
31. Crothers, 2013.
32. "Reparation projects", *The Court Report*, Issue 66, November 2013, 3; "Meaningful reparation for Khmer Rouge victims", ECCC website, <http://www.eccc.gov.kh>, posted 25 February 2014, accessed 28 February 2014.
33. Toni Holmes & Jaya Ramji-Nogales, 'Participation as Reparations: The ECCC and Healing in Cambodia' in Beth Van Schaack, Daryn Reicherter & Youk Chhang (eds), *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Phnom Penh: Documentation Center of Cambodia, 2011), 172-188.
34. *The Court Report*, Issue 69, February 2014, 6. This follows criticism of the ECCC's approach to reparations in a Berkeley research report, *Victims' Right to Remedy: Awarding Meaningful Reparations at the ECCC*, published in November 2011.

35. Dinah PoKempner 'The Tribunal and Cambodia's Transition to a Culture of Accountability', in Jaya Ramji & Beth Van Schaack (eds) *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts* (Lewiston, NY: Edwin Mellen Press, 2005) 333-358.
36. E. E. Meijer, "The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal" in C. P. R. Romano, A. Nollkaemper and J. K. Kleffner (eds) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford, UK: Oxford University Press, 2004) 214.
37. As argued by supporters of King Sihanouk, according to Youk Chhang, "Why the Khmer Rouge Tribunal Matters to the Cambodian Community: Justice for the Future, Not the Victims", Phnom Penh: Documentation Center of Cambodia.
38. Dr Kek Galabru, President, LICADHO (Cambodian League for the Promotion and Defense of Human Rights), as quoted in "Cambodians talk about the Khmer Rouge trial", *Phnom Penh Post*, 4-17 February 2000, 12.
39. Peter Maguire, *Facing Death in Cambodia* (New York, NY: Columbia University Press, 2005) 192-3.
40. Fawthrop & Jarvis 2005: 250
41. Maguire 2005:192
42. PoKempner 2005: 352-3.
43. Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: W. W. Norton, 2011).
44. The ECCC Trial Chamber is continuing to work towards delivery of the verdict in Case 002/01 in the second quarter of 2014, whilst at the same time preparing for the substantive hearing of Case 002/02, *The Court Report*, Issue 69, February 2014, 4.
45. *The Court Report*, Issue 66, November 2013, 5.
46. Youk Chhang, 'The Thief of History – Cambodia and the Special Court', *International Journal of Transitional Justice*, 2007, 1, 171.
47. Lambourne 2002; Jaya Ramji, "Reclaiming Cambodian History: The Case for a Truth Commission", Draft paper and survey results supplied by the author, April 1999; Laura McGrew, "Truth, Justice, Reconciliation and Peace in Cambodia: 20 Years After the Khmer Rouge", Paper presented to the Canadian Peace Research and Education Association 2000 Conference, Kingston, Ontario, 3 June 2000; William W. Burke-White, "Preferences Matter: Conversations with Cambodians on the Prosecution of the Khmer Rouge Leadership" in Jaya Ramji & Beth Van Schaack (eds) *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts* (Lewiston, NY: Edwin Mellen Press, 2005) 97-125.
48. For further details about the outreach activities conducted by Cambodian NGOs and the ECCC see Wendy Lambourne, "Outreach, Inreach and Civil Society Participation in Transitional Justice" in Nicola Palmer, Phil Clark & Danielle Granville (eds) *Critical Perspectives in Transitional Justice* (Cambridge, UK: Intersentia, 2012) 235-261.
49. Interviews conducted by the author with Youth for Peace in February 2009.
50. Johanna Herman, "Peacebuilding and Transitional Justice in Cambodia: Attempts at DDR and the rise of victim-centred justice" in Chandra Lekha Sriram, Jemima Garcia-Godos, Johanna Herman & Olga Martin-Otega (eds), *Transitional Justice and Peacebuilding on the Ground: Victims and ex-combatants*, (London/New York: Routledge, 2013), 116.
51. "Youth for Peace opens first Peace Learning Center", *The Court Report*, Issue 48, May 2012, 4.
52. Sperfeldt, 2012.
53. Extraordinary Chambers in the Courts of Cambodia, Press Release, "Closing Statements in Case 002/01 Concludes", 31 October 2013.
54. Lambourne 2012.
55. Observations during field research conducted in Phnom Penh and six rural locations in Cambodia in January-February 2009, including interviews with representatives of KID, ADHOC, CSD, YFP, DC-Cam, CHRAC and ECCC. Whilst the ECCC assisted in bringing members of the public to the Court to observe the trials, the NGOs were responsible for the majority of outreach and support for victims to participate in the proceedings. Criticisms have been made of the low priority and resources invested in outreach by the Court, the lack of legal aid and strategic coordination with civil society. Given diminishing interest from international donors, not only in funding the Court but also NGO programs, it is unlikely that support for civil parties will be sustainable for the continuation of Case 002. Sperfeldt, 2012; Lambourne 2012.
56. The NGO Transcultural Psychosocial Organization (TPO) has played a significant role in assisting the Victims Support Section of the ECCC by conducting trainings and providing psychosocial support for victims during the court proceedings, which has contributed to the avoidance of retraumatization.
57. Holmes & Ramji-Nogales, "Participation as Reparations", 2011.
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Cases 003 and 004 at the Khmer Rouge Tribunal: The Definition of “Most Responsible” Individuals According to International Criminal Law

Randle C. DeFalco

Legal Advisor to The Documentation Center of Cambodia (DC-Cam)

Abstract: *The commission of genocide and other large-scale international crimes typically involves a multitude of perpetrators acting in concert. As such, the pursuit of individual criminal accountability following the perpetration of mass crimes has involved oft-controversial decisions of whom to prosecute. This challenge is exemplified by the ongoing controversy in Cambodia concerning the proper scope of prosecutions at the Extraordinary Chambers in the Courts of Cambodia (ECCC) for the crimes of the Khmer Rouge regime from 1975-1979, as the Court’s third and fourth cases have languished amidst considerable controversy for years. This paper examines whether the presumed suspects in the two cases legally qualify as individuals “most responsible” for the crimes of the Khmer Rouge period in Cambodia by considering known information about each suspect in light of available international criminal law jurisprudence and argues that all suspects fall well within any reasonable legal definition of the term “most responsible” as each is implicated directly in extremely grave crimes. As such, it is concluded that there is no viable legal alternative available to bring the two cases to a close save for trial.*

Keywords: *Khmer Rouge, Extraordinary Chambers in the Courts of Cambodia (ECCC), International Criminal Law, Personal Jurisdiction*

Introduction

The commission of genocide and other international crimes are typically large-scale group undertakings. As a result, the selection of whom to prosecute has presented a recurring challenge for international criminal law (“ICL”) practitioners in post-atrocity situations.¹ Within ICL practice to date, prosecutors have primarily targeted individuals who held positions of significant power or were implicated in especially grave crimes.² Meanwhile, lower-profile national or military courts have been sometimes utilized to prosecute less notorious perpetrators.³

The difficulty of selecting the proper scope of prosecutions following mass atrocity crimes is exemplified by the long-simmering controversy concerning how many suspects will ultimately be prosecuted at the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), a special hybrid wing of the Cambodian judiciary created in collaboration with the United Nations (“UN”), commonly referred to as the Khmer Rouge Tribunal.⁴ The Khmer Rouge held power in Cambodia from 17 April 1975 to 6 January 1979.⁵ During this time, when the country was officially renamed Democratic Kampuchea (“DK”), extremely grave international crimes were undoubtedly committed against millions of victims by thousands of individual perpetrators. In designing the ECCC, the Cambodian government and UN agreed, following protracted negotiations, that the Court would have “personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible” for specified international and domestic crimes committed in Cambodia during the Khmer Rouge’s reign.⁶

This paper considers the meaning of the phrase “most responsible” at the ECCC in relation to highly controversial Cases 003 and 004 at the Court, which have languished in their pre-trial investigatory phases for years. More specifically, this paper argues that the term should be interpreted in accordance with prevailing ICL jurisprudence and suggests that all suspects in the two cases fall well within the purview of any reasonable legal interpretation of the term “most responsible.” As such, it is concluded that there is no legitimate legal mechanism – other than trials – available to bring Cases 003/004 to proper conclusions and thus, any effort to shutter the cases must be viewed as a product of considerations extraneous to the legal principles applicable to the ECCC.

To make this argument, a brief overview of the convoluted and controversial histories of Cases 003/004 is provided, followed by an explanation of why resort to ICL jurisprudence for the ECCC to properly interpret the term “most responsible” is warranted by both law and simple necessity. Next, an overview of relevant ICL jurisprudence concerning personal jurisdiction and relative culpability assessments, drawn from the Special Court for Sierra Leone (“SCSL”), International Criminal Tribunal for the former Yugoslavia (“ICTY”) and to a more limited extent, International Criminal Court (“ICC”) is provided.⁷ This jurisprudence is then compared

to the known facts concerning the suspects in ECCC Cases 003/004. Through this analysis it is argued that due to the extreme gravity of the criminal allegations against all suspects in both cases, combined with the apparent high degree of responsibility therein of each respective suspect, all four presumed suspects in the two cases fall squarely within the class of persons properly considered “most responsible” for the crimes committed during the DK period in Cambodia. While this conclusion may be politically and/or financially inconvenient for certain stakeholders and interested parties, from a legal standpoint this paper asserts it is essentially unavoidable and thus, should the cases be dismissed ostensibly on personal jurisdictional grounds, such action would deeply compromise the already fragile integrity of the ECCC as a legal institution. Thus, it is further concluded that should Case 003 or 004 be shuttered prior to trial, a better course would be for the ECCC, UN, Cambodian government, donors and other stakeholders to simply admit that a lack of resources and/or willpower to proceed with the cases are the cause in order to protect the overall legal integrity of the Court and by extension, any judgements reached in Cases 001 and 002.⁸

The Case 003/004 Controversy in Cambodia

The ECCC utilizes a civil law process involving an investigation instigated by the Court’s Co-Prosecutors⁹, but largely carried out by two Co-Investigating Judges (“CIJs”).¹⁰ The ECCC Co-Prosecutors are duty-bound to submit an “Introductory Submission” to the Office of the Co-Investigating Judges (“OCIJ”), triggering an official investigation of a suspect, when they develop “reason to believe” that the suspect(s) in question is implicated in crimes within the ECCC’s jurisdiction.¹¹ Once seized by an Introductory Submission, the CIJs have a “compulsory” duty to investigate the allegations contained in the submission, seeking both inculpatory and exculpatory evidence, and thereafter to issue a “Closing Order” that either commits the suspect(s) to trial and specifies which charge(s) will be adjudicated or alternatively, dismisses all charges effectively ending the case.¹² It is within this investigative phase that Cases 003/004 have languished amidst considerable controversy since being initiated by then-International Co-Prosecutor Robert Petit on 7 September 2009.¹³

There is widespread speculation that the Cambodian government is working to prevent both cases from proceeding to trial. National ECCC Co-Prosecutor Chea Leang opposed the initiation of Cases 003/004,¹⁴ leading to Petit proceeding alone with the filing of Introductory Submissions in both cases.¹⁵ One widely cited example of the government’s apparent opposition to Cases 003/004 occurred in 2010, when Cambodian Prime Minister Hun Sen reportedly “clearly affirmed that case three is not allowed” during a meeting with UN Secretary-General Ban Ki-moon.¹⁶ Although since such time, Cambodian government officials have been more equivocal when commenting on the two cases, the perception that the government monolithically opposes the two cases remains largely in place and is routinely repeated by international media outlets when discussing the cases. Such a perception undoubtedly sends powerful signals to Cambodians with some stake in either case and public perception of the wishes of elite political figures in Cambodia often strongly influences local decision-making processes. In regards to Cases 003/004, the perception that Prime Minister Hun Sen’s ruling Cambodian People’s Party continues to oppose trials is both reflected and further reinforced by the fact that Cambodian lawyers, judges and staff at the ECCC have consistently opposed efforts by their international colleagues to move either case along towards trial.

Throughout 2011, the OCIJ was subjected to a steady stream of criticism from rights groups and jurists, who accused National Co-Investigation Judge You Bunleng and then-International Co-Investigating Judge Siegfried Blunk of colluding to scuttle Cases 003/004 at the behest of the Cambodian government.¹⁷ These criticisms grew louder when the still-confidential Introductory Submissions in both cases were leaked by an online New Zealand news organization, as the two documents detailed allegations of extremely grave crimes.¹⁸ In April 2011, the Co-Investigating Judges closed the investigation into Case 003, but refrained from issuing the official Closing Order necessary to end the case or commit it for trial, leaving it in a state of legal limbo.¹⁹ Next, in August of 2011, Co-Investigating Judges You and Blunk released a list of crime sites relevant to Case 004 in a document in which both judges expressed “serious doubts whether the suspects [in Case 004] are ‘most responsible.’”²⁰ This disclosure also confirmed that the Case 004 investigation focused on crime sites widely believed to be locations where hundreds of thousands of victims were killed during the DK period.²¹

Eventually, amidst mounting criticism and allegations of investigatory misconduct, Judge Blunk resigned in October 2011, citing the appearance of political interference as his motivation.²² Blunk’s replacement, Reserve International Co-Investigating Judge Laurent Kasper-Ansermet, publicly vowed to aggressively investigate Cases 003/004,²³ but was in turn, blocked from officially removing the “reserve” tag from his title by the Cambodian Supreme Council of Magistracy, which withheld its perfunctory acknowledgment

of Kasper-Ansermet's succession.²⁴ Judge You (who incidentally, sits on the Supreme Council of Magistracy along with ECCC National Co-Prosecutor Chea Leang) also refused to work with Judge Kasper-Ansermet in any capacity, stating in a press release that Judge Kasper-Ansermet "lack[ed] legal authority" to perform any duties as an investigating judge.²⁵ Nonetheless, Judge Kasper-Ansermet began to investigate both cases and attempted to officially reopen the Case 003 investigation.²⁶ Eventually, after being stonewalled in his efforts to investigate for months, Judge Kasper-Ansermet, clearly frustrated by the efforts to block his attempts to investigate Cases 003/004, stated that he was unable to continue fulfilling his duties due to the "dysfunctional" climate within the OCIJ and tendered his own resignation.²⁷ His resignation was followed in short order by Judge Kasper-Ansermet releasing a series of decisions revealing the steps taken by national ECCC staff members to stymie his attempts to investigate Cases 003/004.²⁸ Judge Kasper-Ansermet also released two further decisions in which he opined that both suspects in Case 003 qualify as "most responsible" under ECCC Law and therefore the Case 003 investigation should continue.²⁹

The UN appealed for cooperation from the Cambodian government in appointing a new International Co-Investigating Judge³⁰ and Judge Mark Harmon was approved as the new Co-Investigating Judge on 26 October 2012.³¹ The rift between the national and international officers at the ECCC over pursuing these cases appears to remain however. On 19 December 2012 Judge Harmon unilaterally released a document detailing fourteen additional crime sites he was investigating for Case 004 without any comment from his counterpart, Judge You.³² Next, on 28 February 2013, Judges Harmon and You issued a joint press release that contained separate and diametrically opposed statements concerning Case 003 and whether the investigation was ongoing or completed.³³ Since Judge Harmon's appointment he has proceeded with his investigatory duties, while Judge You has indicated that he will not investigate either case any further.³⁴ Meanwhile, the pressing need to move forward in a timely manner was underscored in March 2013 with the death of ECCC Case 002 accused Ieng Sary and again in June 2013 with the death of presumed Case 003 suspect Sou Met. Nevertheless, even as the ECCC's flagship Case 002 nears a trial judgment the first of a planned series of discrete trials, Cases 003/004 continue to languish amidst considerable uncertainty³⁵ and subject to a fundamental divide between the Court's national and international judges and staff.³⁶

While the fate of Cases 003/004 remains tenuously uncertain, this paper argues that as the ECCC was created to provide a measure of justice for the millions of Cambodians who suffered under the Khmer Rouge regime and to also help improve the rule of law in Cambodia by serving as a model judicial institution, the only legitimate course of action at this juncture is for the Court to pursue each existing case to its proper legal conclusion, based upon a thorough review of all available evidence. As pointed out by Robert Petit's successor, now-departed ECCC International Co-Prosecutor Andrew Cayley, "the importance of [Cases 003/004] more than anything, whatever happens at the end, is that the Cambodian people see a proper legal process taking place."³⁷ This statement underscores the importance of seeing Case 003/004 through for the overall integrity of the ECCC as a legal institution, to both protect the legacy of the Court's other cases and to ensure that the Court cannot be seen as condoning the political interference and corruption that currently runs rampant throughout Cambodia's national judicial system.³⁸ Thus, whether Cases 003/004 reach their proper legal conclusions will serve to either stand against, or reinforce the current rampant subversion of the rule of law in the service of the interests of Cambodia's political elite.

An Exercise in Discretion: Interpreting the Term "Most Responsible"

a. The Duch Appeal Judgment: A "Policy Guide"

While the controversy concerning the future of Cases 003/004 has endured, key jurisprudence concerning the meaning of the jurisdictional language covering those "most responsible" and "senior leaders" in the Agreement and ECCC Law has emerged. On 3 February 2012, the ECCC's highest body, the Supreme Court Chamber ("SCC"), handed down its first judgment, in Case 001, concluding the case against accused former Khmer Rouge prison chief Kaing Guek Eav alias Duch.³⁹ In its judgment, the Chamber dismissed the defence's argument that Duch falls outside of the personal jurisdiction of the ECCC and increased his sentence from 35 years to a life term.⁴⁰ On the issue of personal jurisdiction, the Chamber held that the jurisdiction of the ECCC is limited to "senior leaders of the Khmer Rouge who are among the most responsible [and] non-senior leaders of the Khmer Rouge who are [also] among the most responsible."⁴¹ The Chamber therefore held any Khmer Rouge official considered "most responsible" is a proper prosecutorial target at the ECCC.

The Chamber retreated however, from interpreting the qualifiers "senior leaders" and "most responsible" as true justiciable jurisdictional requirements later in its judgment, holding further that:

The terms ‘senior leaders’ and ‘most responsible’ are not jurisdictional requirements [...], but operate exclusively as investigatorial and prosecutorial policy to guide the independent discretion of the [CIJs] and Co-Prosecutors as to how best to target their finite resources [...]⁴²

Concerning the phrase “most responsible”, the Chamber reasoned that the term must be interpreted as a guide to discretion rather than true jurisdictional requirement for three main reasons: (1) “[t]here is no objective method for the Trial Chamber to decide on, compare, and then rank the criminal responsibility of all Khmer Rouge officials”; (2) “the notion of comparative criminal responsibility is inconsistent” with the ban on “the defence of superior orders”; and (3) “the determination of whether an accused is ‘most responsible’ requires a large amount of discretion.”⁴³ The import of the SCC’s holding is that “an accused before the ECCC cannot object to the Trial Chamber’s jurisdiction on the basis that the [CIJs] did not limit the indictment to ‘senior leaders’ or the ‘most responsible,’ absent a showing that the [CIJs] abused their discretion.”⁴⁴ The Chamber further noted that the “power of review by the Trial Chamber [regarding personal jurisdiction decisions] is extremely narrow in scope” and requires demonstrating “bad faith, or a showing of unsound professional judgment.”⁴⁵ The Chamber also importantly noted that in the likely scenario that the two CIJs disagree and where the “reason for disagreement on the execution of an action, decision, or order is whether or not a suspect or charged person is a ‘senior leader’ or ‘most responsible’” then, absent a super-majority decision to the contrary by the appellate ECCC Pre-Trial Chamber, ‘the investigation shall proceed.’⁴⁶ The Case 001 Appeal Judgment thus renders determinations of who qualifies as “most responsible” a policy guidance tool, rather than true jurisdiction element, bounded solely by the outer limits of good-faith and sound professional decision-making.

While the Case 001 Appeal Judgment answered some of the most pressing questions concerning the meaning of the terms “senior leader” and “most responsible”, the SCC failed to indicate what factors are properly considered in making such inherently subjective determinations. As it currently stands, whether Cases 003/004 can be shuttered prior to trial without violating the ECCC’s foundational legal documents turns on the issues of the proper bounds of judicial discretion and sound professional judgment in interpreting the phrases “senior leader” and “most responsible” within the Agreement and ECCC Law. This paper argues that because the meaning of the term “most responsible” is not readily apparent, defined in the travaux préparatoires relevant to the ECCC or in any other source of law or interpretation directly applicable to the Court, guidance must be sought from international law in determining the proper factors that must be considered in order for relevant ECCC authorities to exercise sound professional judgment in determining whether a suspect before the ECCC qualifies as a “most responsible.” Furthermore, such jurisprudence dictates that to make such an assessment, the gravity of the alleged crime(s) and level of contribution thereto by the suspect in question must be considered and compared relative to other cases before the same court or tribunal. According to this process of analysis, because each of the presumed suspects in Cases 003/004 are implicated as key players in the perpetration of extremely grave crimes, involving the systematic abuse and killing of many thousands of victims, each suspect should be presumptively considered amongst those “most responsible.” Any other conclusion would be contrary to basic logic and therefore presumptively the product of bad faith and/or unsound professional judgment.

b. Interpreting ECCC Law

The Agreement establishing the ECCC is a bilateral treaty to which the UN and Cambodia are parties. The ECCC Law is legislation passed to effectuate the terms of the Agreement. As such, both documents are to be interpreted according to the Vienna Convention on the Law of Treaties, which states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁴⁷

In his departing decisions regarding personal jurisdiction and the suspects in Case 003, Judge Laurent Kasper-Ansermet noted the holdings of the SCC in Case 001 and acknowledged that the gravity of the alleged crimes and the suspect’s relative degree of responsibility therein are the two main factors to consider regarding assessing whether a suspect qualifies as “most responsible.”⁴⁸ The decisions also conform with ICL practice, as is demonstrated *infra* in this paper.⁴⁹ Scholar Steve Heder and former United States Ambassador-at-Large for War Crimes Issues and current UN Special Expert on the ECCC David Scheffer⁵⁰ have both provided detailed overviews of the negotiations and associated travaux préparatoires leading to the Agreement and ultimate formation of the ECCC.⁵¹ While both scholars offer important insights into the protracted negotiations that culminated in the Court’s creation, they both only go so far as to reach the general conclusion that at no point

was there any agreement – tacit or otherwise – between the UN and Cambodia that the ECCC would prosecute a specific, limited number of individuals or that the precise identities of whom would be prosecuted were decided prior to the formation of the Court. Heder further concludes that while the Cambodian government may have not been pleased with the necessity of ceding power to ECCC investigators, prosecutors and judges to decide who would be investigated and tried, such a concession is inherent in Cambodia's signature, as UN officials were unequivocal that suspects could not be pre-selected.⁵² Scheffer similarly concludes that determinations of which suspects qualify as “most responsible” must be made pursuant to a reasonable interpretation of the term and questions whether under any such reasonable formulation, the likely suspects in Cases 003 and 004 could properly be considered to not qualify as “most responsible.”⁵³

The conclusions of both Heder and Scheffer thus both beg the question of how ECCC lawyers and judges are to arrive at a reasonable interpretation of the term “most responsible”, especially given that the term is not explicitly defined anywhere in the Agreement or ECCC Law. The Agreement itself provides for the procedure to be utilized in precisely such an instance of interpretive lack of clarity. Article 12(1) states:

The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.

This process of interpretive guidance is echoed in the ECCC Law Articles 20 new, 23 new and 33 new, which direct the Co-Prosecutors, Co-Investigating Judges and Trial Chamber Judges respectively, to remedy uncertainty regarding interpretation or application of the procedures applicable to the ECCC by seeking guidance in procedural rules established at the international level.⁵⁴

c. The Bounds of Discretion and Sound Professional Judgment

Given that resort to the ordinary meaning of the term “most responsible” provides little guidance in the context of personal jurisdiction for international crimes and (as demonstrated by Heder and Scheffer) the negotiating history and travaux préparatoires simply establish that the precise number of suspects was never agreed upon, Article 12(1) of the Agreement clearly dictates that Cambodian law should next be canvassed for potential guidance. Personal jurisdictional regimes predicated on relative degrees of culpability, however, are inimical to the very foundation of typical domestic criminal legal regimes, as in most domestic criminal prosecutions it is assumed that any person suspected of a serious crime will be investigated and, if the evidence warrants, committed to trial. There is no space in such systems for prosecutors or judges to determine that an individual may be responsible for a very serious crime, yet is not a proper suspect to commit to trial because he or she does not fall amongst those “most responsible” for the crime in question. Instead, domestic penal codes presuppose that if there is sufficient evidence implicating an individual in a crime, they will be prosecuted without any further inquiry necessary.⁵⁵

In light of this general assumption that serious crimes will be prosecuted according to the evidence, unsurprisingly there are no provisions within Cambodian penal law that provide guidance in interpreting what individuals are properly considered “most responsible” for international crimes. Instead, the Criminal Procedure Code of the Kingdom of Cambodia, adopted and entered into force in 2007 by the Cambodian Ministry of Justice,⁵⁶ only provides limited guidance concerning the conduct of pre-trial investigatory procedures and duties and the basic boundaries of discretion in regard to these procedures. On this topic, the Code is similar in many ways to the investigatory procedures in place at the ECCC itself. The Code dictates that in domestic prosecutions, a prosecutor instigates an investigation. And via a “requisition”, the prosecutor confers mandatory jurisdiction on an investigating judge to complete an investigation.⁵⁷ In regards to investigatory discretion, Article 122 of the Code dictates that investigations are “mandatory” for felonies and “optional” for misdemeanors.⁵⁸ This limited discretion takes place when an investigating judge receives a requisition from the prosecutor and once an investigation commences, Article 127 of the Code dictates that the presiding investigating judge “shall perform all investigations that are useful to ascertaining the facts” and further, “shall have the obligation to investigate for charging or acquitting.”⁵⁹ These mandatory duties mirror those which appear in the ECCC's Internal Rules, which dictate that the Co-Prosecutors “shall” open an investigation when they have reason to believe a crime within the ECCC's jurisdiction has been committed⁶⁰ and that judicial investigations are “compulsory for crimes within the jurisdiction of the ECCC.”⁶¹

In order to conclude a domestic criminal investigation, an investigating Cambodian judge must issue a “settlement warrant”⁶² which is similar to the mandatory “Closing Order” at the ECCC.⁶³ The domestic settlement warrant forwards a case for trial or dismissal, the latter in the form of a “non-suit” order.⁶⁴ Article 247 of the Cambodian Criminal Procedure Code further states that the “investigating judge shall issue a non-suit order in the following circumstances: (1) The act committed was not a felony, misdemeanor or petty offense; (2) The perpetrators who committed acts are still not known; [or] (3) There is not enough evidence to charge the accused person.

There is no indication of other discretionary grounds upon which an investigating judge can issue a non-suit order or otherwise decline to forward a case for trial, but each settlement warrant “shall always bear reasons”⁶⁵ and is appealable to the appellate Investigation Chamber of the Cambodian judiciary. The settlement warrant procedure utilized in ordinary Cambodian criminal courts can be contrasted with Rule 67(3) of the ECCC’s Internal Rules, which states that the “Co-Investigating Judges shall issue a Dismissal Order in the following circumstances: (1) The acts in question do not amount to crimes within the jurisdiction of the ECCC; (2) The perpetrators of the acts have not been identified; or (3) There is not sufficient evidence against the Charged Person or persons of the charges.”⁶⁶

As with the Cambodian Criminal Procedure Code, nowhere in any law directly applicable to the ECCC, is it suggested that additional, discretionary grounds exist upon which the Co-Investigating Judges can choose to issue a Dismissal Order.

Article 261 of the Cambodian Criminal Code also dictates that when receiving a complaint concerning an investigation, the appellate Investigation Chamber “shall examine the regularity of the procedures and the good conduct of the proceedings [and if] a reason for annulling is found, the Investigation Chamber may discretionarily nullify the whole or parts of such proceedings.”⁶⁷ The Investigation Chamber may order further investigation if it deems such an act “useful” and can appoint one of its sitting judges to assume the authority of an investigating judge in order to do so.⁶⁸ If the Investigation Chamber takes over an investigation, the judge appointed by the Chamber conducts further investigation and the Chamber concludes the investigation in the same manner as the original investigating judge, by issuing a settlement warrant either committing a suspect to trial or directing issuance of a non-suit.⁶⁹

Consequently, Cambodian law provides scant guidance in sketching the boundaries of the discretion ECCC Co-Investigating Judges enjoy in assessing which suspects are properly considered either “senior leaders” or “most responsible” for the crimes committed during the DK period in Cambodia. For the most part, Cambodian criminal procedural law mirrors the provisions in place at the ECCC, found in the ECCC Law and ECCC Rules, which dictate that investigations are mandatory for crimes within the ECCC’s jurisdiction, all of which are clearly serious and that for such serious crimes, dismissal prior to trial is only a proper outcome when the evidence against a suspect is deficient in some way critical to a successful prosecution. Thus, if anything, a comparative analysis of Cambodian and ECCC procedural law governing investigatory powers suggests that discretion to dismiss charges against individuals who could likely be successfully prosecuted for serious crimes should be construed extremely narrowly, as such a power is not explicitly provided for in either body of law.

d. The Need for International Legal Guidance

In sum, there was no clear consensus amongst the drafters of the Agreement concerning the definition of the term “most responsible” within the Agreement and ECCC Law. Similarly, nowhere in law directly applicable to the ECCC or Cambodian penal law is there any mention of concept of discretionary investigatory trial committal powers predicated on assessments of the relative culpability amongst criminal suspects or suggesting a definition of the term “most responsible.” Indeed, this outcome is wholly unsurprising, as limited personal jurisdictional regimes over serious crimes based on relative assessments of individual culpability are solely and distinctly features of ICL.

Furthermore, resorting to the “object and purpose” of the Agreement to seek insight into the proper definition of the term, as dictated by the Vienna Convention, results in problems of circularity, as the stated object and purpose of the Agreement itself is to bring to justice “senior leaders” and others “most responsible” for the crimes of the Khmer Rouge period.⁷⁰ There is no apparent plain meaning of the term that would make any sense within criminal proceedings and because Cambodian law is predictably provides little help in defining this jurisdictional concept, both the Agreement and ECCC Law dictate that international law should be turned to for assistance in arriving at this critical determination.

As demonstrated below, while international law intentionally refrains from providing an explicit universal definition of relative levels of culpability, ICL jurisprudence does suggest what types of individuals presumptively qualify as amongst those “most responsible” and clearly dictates that any proper decision concerning the relative culpability of an individual must be based on an appraisal of the gravity of the alleged crime(s) and the suspect’s degree of responsibility therein. This assessment process must also use other suspects/accused tried by the same authority as comparative benchmarks in order to avoid inconsistent or conflicting results.

e. The Concept of “Most Responsible” According to International Criminal Law

Once one determines that it is necessary to look to international law for guidance in interpreting the term “most responsible” at the ECCC, one must next consider where to look for useful legal principles. Given that limited jurisdictional regimes based on relative culpability assessments are wholly unique to ICL, jurisprudence from this discipline appears to be good place to start. Indeed, a robust jurisprudence from the SCSL, ICTY and to a lesser extent, ICC on issues of relative culpability, personal jurisdiction and the selection of suspects, combine to offer some helpful guiding principles on the key issue of the proper process and considerations in assessing issues of relative culpability. Practice at these courts and tribunals clearly demonstrate that the two main considerations in determining culpability are the gravity of the alleged crimes and the degree of responsibility therein of the individual in question. Moreover, within existing ICL jurisprudence, gravity and responsibility are to be considered within the context of the overall historical narrative at issue and in comparison to other cases, though not in an overly formal or mathematical fashion.

The Special Court for Sierra Leone: The “Greatest Responsibility”

In 2000, the UN Security Council requested the formation of a court with “personal jurisdiction over persons who bear the greatest responsibility” for the commission of international crimes within Sierra Leone.⁷¹ The result was the SCSL, a hybrid court created pursuant to a treaty between the UN and the government of Sierra Leone with the mandate “to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.”⁷² Article 1 of the SCSL Statute confers “the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law.”⁷³

The phrase “greatest responsibility” was a topic of much debate prior to the creation of the SCSL. Then UN Secretary-General Kofi Annan stated that this language should be “understood as an indication of a limitation on the number of accused by reference to their command authority and the gravity and scale of the crimes [and] propose[d] that the more general term ‘persons most responsible’ should be used” and observed:

While those ‘most responsible’ obviously include the political or military leadership, others in command authority down the chain of command may also be regarded ‘most responsible’ judging by the severity of the crime or its massive scale. ‘Most responsible’, therefore, denotes both a leadership or authority position of the Accused, and a sense of the gravity, seriousness or massive scale of the crime.⁷⁴

Ultimately, the SCSL employed the narrower term “greatest responsibility” in its Statute and this phrase was held to operate solely as a guide to prosecutorial discretion.⁷⁵ The Court’s Appeals Chamber held the SCSL Statute, which makes the Prosecutor responsible “for the investigation and prosecution of persons who bear the greatest responsibility,” renders determinations of which individuals are suitable for prosecution a matter of prosecutorial discretion unsuitable for judicial review.⁷⁶ The Chamber emphasized the need for the Prosecutor to “act independently [and] not seek or receive instructions from any Government or from any other source” and concluded in the Prosecutor v. Brima et al. judgment that it would be:

inconceivable that after a long and expensive trial the Trial Chamber could conclude that although the commission of serious crimes has been established beyond reasonable doubt against the Accused, the indictment ought to be struck out on the ground that it has not been proved that the Accused was not one of those who bore the greatest responsibility.⁷⁷

The Chamber did note however, that a “good-faith” standard applies to the exercise of discretion by the Prosecutor.⁷⁸

The SCSL Prosecutor ultimately brought charges against a total of twelve individuals, resulting in nine convictions and the deaths of three accused prior to judgment.⁷⁹ These twelve accused held various positions in the three main parties to the Sierra Leonean conflict the SCSL was created to account for: the Revolutionary United Front (“RUF”), Civil Defence Forces (“CDF”) and Armed Forces Revolutionary Council (“AFRC”). The accused ranged from overall commanders to others who held significant positions, but were clearly subordinated to the highest echelons of power. For example, in *Prosecutor v Sesay et al.*, The SCSL Trial Chamber found that accused Augustine Gbao “was not a member of the AFRC/RUF Supreme Council [responsible for decision-making]” and remained in a single district during the period the AFRC/RUF held power.⁸⁰ Nonetheless, the “Chamber found that Gbao was an ideology instructor and that ideology played a significant role in the RUF movement [and within] RUF controlled territory, [Gbao’s unit] was responsible for the enforcement of discipline and law and order.”⁸¹ In *Prosecutor v Fofana & Kondewa*, accused Allieu Kondewa was the “High Priest” of the CDF responsible for recruitment of new members and holding ceremonies that supposedly immunized combatants from bullets prior to battles.⁸² The Appeals Chamber upheld Kondewa’s convictions, finding that as High Priest, Kondewa “had authority and power to issue oral and written directives; that he could order investigations for misconduct and hold court hearings; and that he had the legal and material ability to issue orders.”⁸³ There was no intimation by the Chamber that the SCSL Prosecutor did not act well within the bounds of good-faith in determining that Gbao and Kondewa qualified as bearing the “greatest responsibility” for crimes committed in Sierra Leone.

ICTY Rule 11bis and Referral Decisions

Neither the International Criminal Tribunal for Rwanda (“ICTR”), nor the ICTY included specific provisions in their founding documents limiting personal jurisdiction to select classes of individuals. Instead, both Tribunals were conferred the “power to prosecute persons responsible” for crimes under their respective subject matter and temporal jurisdictions.⁸⁴ As a result, the ICTR and ICTY have indicted well over two hundred suspects in total.⁸⁵ In response to the ballooning case loads of the two Tribunals, the UN Security Council passed Resolution 1503 in August of 2003, which instructed both Tribunals to “transfer[] cases involving those who may not [qualify as most senior leaders who are most responsible] to competent national jurisdictions.”⁸⁶ The procedure for effectuating such transfers, through “Referral Benches” of judges, was then outlined in Rule 11 bis in the Rules of Procedure and Evidence (“RPE”) for both Tribunals.⁸⁷ Rule 11 bis(C) of the ICTY RPE states that the “Referral Bench shall, in accordance with Security Council resolution 1534⁸⁸ (2004), consider the gravity of the crimes charged and the level of responsibility of the Accused” when determining whether transfer is appropriate.⁸⁹ The ICTR on the other hand, has no similar jurisdictional language in its version of Rule 11 bis⁹⁰ and consequently, referral decisions have instead focused on other considerations, such as fair trial and security concerns.⁹¹

The ICTY eventually referred thirteen accused to national jurisdictions, denied motions for referral concerning four accused and the prosecution withdrew its referral requests concerning five accused.⁹² ICTY Rule 11 bis referral decisions principally turned on determinations of whether the accused in each case were considered “most senior leaders . . . most responsible” for crimes under the Tribunal’s jurisdiction.⁹³ Moreover, the decision of an ICTY Referral Bench whether to refer each case proposed by the prosecutor has been interpreted as a “discretionary one.”⁹⁴

In general terms, the more grave the charged crimes and the more directly an ICTY accused is implicated therein, the more likely such accused will be found ineligible for referral.⁹⁵ However, ICTY Referral Benches struggled to determine the precise line to draw between cases of a seriousness necessitating adjudication at the Tribunal and those suitable for referral.⁹⁶ Relevant factors considered by ICTY Referral Benches include: the number of alleged victims; the duration of the alleged criminal activity; the geographic scope of alleged criminal activity; and the accused’s alleged level of authority at the time(s) relevant to the indictment, when deciding whether referral is appropriate.⁹⁷ If the alleged crimes in the indictment “do not cover a wide area and are limited in duration” then referral becomes “likely.”⁹⁸ The process of assessing the relative gravity of charges in varying cases has not proved an easy task for ICTY judges. As noted by the Referral Bench in *Prosecutor v Ademi & Norac*, it is “impossible to measure the gravity of any crime in isolation” necessitating that each referral application “must also be viewed in the context of other cases tried by [the] Tribunal.”⁹⁹ The Bench however, not explicitly compare the relevant factual allegations to any specific previous ICTY case, leaving the degree of comparison utilized unclear.¹⁰⁰

a. The Referrals of Ljubičić and Trbić

The two most serious ICTY cases referred to national jurisdictions were *Prosecutor v Ljubičić and Prosecutor v Trbić*. Paško Ljubičić held several roles within the Croatian military and at the time relevant to the indictment was allegedly a Military Police Battalion Commander in Central Bosnia.¹⁰¹ The indictment further alleged that a special “Anti-Terrorist Group,” also known as the “Jokers” was created by Ljubičić, which, along with other personnel under Ljubičić’s command, were responsible for:

a series of attacks on Bosnian Muslim towns and villages...which were carried out in January and April 1993 and resulted in the death of more than 100 civilians, detention and cruel treatment of a high number of men, destruction of villages, and religious institutions, plunder and forcible transfer of the population.¹⁰²

Ljubičić was charged with 15 total counts of crimes against humanity and war crimes based on these facts.¹⁰³ The Referral Bench found that, while Ljubičić “was a military commander and had a position of authority, in the context of other cases being tried before [the ICTY], it is not apparent that he was one of the most senior leaders who were the most responsible for the crimes within the [ICTY’s] jurisdiction” and referred his case to Bosnia and Herzegovina (“BiH”).¹⁰⁴

The Trbić case meanwhile, stands out as the only ICTY Rule 11 bis case involving genocide charges.¹⁰⁵ The indictment alleged that Milorad Trbić was “a duty officer in the [Serbian Army], holding the rank of captain” but that “[d]espite his nominal rank, it is alleged that in fact Trbić was subordinated to Lieutenant Drago Nikolić, and that he was responsible, inter alia, for helping manage the Military Police of the Zvornik Brigade.”¹⁰⁶ Trbić was charged with being a member of two separate Joint Criminal Enterprises (JCEs), the objectives of which were “the summary execution and burial of thousands of Bosnian Muslim men and boys captured from the Srebrenica enclave from 12 July 1995 until about 19 July 1995” and “the forcible removal of the Bosnian Muslim population from the Srebrenica and Zepa enclaves to areas outside the control of Republika Srpska.”¹⁰⁷ The Indictment alleged that Trbić:

assisted [...] in organising, coordinating and facilitating the detention, transportation, summary execution and burial of [] Muslim victims[and] acting individually or in concert with other members of the Joint Criminal Enterprise and Conspiracy[,] summarily execute[d] and bur[ied] the able-bodied Muslim men from Srebrenica.¹⁰⁸

Specifically, the Referral Bench found that Trbić’s most significant involvement [was] alleged to have been at the Grbavci School in Orahovac on 14 July 1995, where it is claimed that he and Drago Nikolić personally supervised the Military Police in guarding Muslim prisoners and transporting them to a nearby field to be summarily executed; the Indictment further avers that the [Trbić] executed several of these prisoners himself.¹⁰⁹ Trbić was charged with genocide, conspiracy to commit genocide, crimes against humanity and war crimes.¹¹⁰

The Referral Bench first noted that there is no official hierarchy of crimes under the ICTY’s jurisdiction, and therefore genocide charges do not necessarily render a case non-referrable.¹¹¹ Instead, the Bench opined that it “must instead look to the underlying conduct allegedly constituting a given crime, as well as the surrounding circumstances, to determine that crime’s gravity.”¹¹² The Bench then noted that the crimes charged in the Trbić indictment were the “most serious” it had examined in the context of a referral request and were “among the gravest ever charged at [the ICTY].”¹¹³ The Bench however, still referred the case to BiH, finding that among the “literally hundreds of persons involved” in the Srebrenica genocide, Trbić’s “level of responsibility was relatively low” because Trbić had no significant role in “formulating the objectives of the [two] JCEs or in planning or orchestrating how they would be brought to fruition.”¹¹⁴

b. The Denial of Referral for Milošević, Delić and Lukić

The ICTY denied referral requests made by the prosecution in regards to only four accused: Dragomir Milošević, Rasim Delić, Sredoje Lukić and Milan Lukić.¹¹⁵ In 2005, the ICTY Referral Bench denied the Prosecutor’s request to refer Dragomir Milošević’s case to BiH, holding “that the gravity of the crimes charged and the level of responsibility of the Accused, particularly when they are considered in combination, requires that the present case be tried at the [ICTY].”¹¹⁶ Milošević had been charged with fourteen counts of crimes against humanity and war crimes, all in relation to the shelling and sniping campaign in Sarajevo from 1994

to 1995.¹¹⁷ The indictment alleged that troops under Milošević's command had "shelled and sniped at civilians as they conducted their civilian activities such as tending vegetable plots, queuing for bread, collecting water, attending funerals, shopping in markets, riding on trams, riding bicycles, gathering wood, or simply walking with their children or friends."¹¹⁸ The campaign was intended to spread terror among the civilian population and also included indiscriminate aerial bombardments with modified explosives not designed for use against civilian targets.¹¹⁹

Overall, the campaign directed by Milošević was of such a scale that "[i]n addition to the death and injuries that the shelling and sniping caused, the constant threat of death and injury caused extensive trauma and psychological damage to the inhabitants of Sarajevo."¹²⁰ The Referral Bench noted that the original indictment had only charged "a small representative number of individual incidents for specificity of pleading."¹²¹

Milošević was alleged to have been the Chief of Staff of a wing of the Bosnian-Serb Army, the "Sarajevo-Romanija Corps (SRK) ... from around March 1993 and [became overall Commander of the] SRK on or about 10 August 1994."¹²² Milošević commanded over 18,000 military personnel and also "negotiated, signed and implemented an anti-sniping agreement, local cease-fire agreements, and participated in negotiations relating to heavy weapons and access ... to territory around Sarajevo."¹²³ The Bench found that, although Milošević was subordinate to the supreme military and civilian commanders of the Bosnian-Serb forces, "the phrase 'most senior leaders' used by the Security Council is [not] restricted to individuals who are 'architects' of an 'overall policy' which forms the basis of alleged crimes."¹²⁴ Such an extreme restriction would, in the opinion of the Bench, "diminish the true level of responsibility of many commanders in the field and those at staff level, [who] de jure and de facto, are alleged to have exercised such a degree of authority that it is appropriate to describe them as among the 'most senior', rather than 'intermediate.'"¹²⁵

The Bench also found that the crimes Milošević was charged with were of a gravity that "stand[s] out when compared with other cases before the [ICTY]" based on the extreme carnage wrought during the besieging of Sarajevo, which "killed and wounded thousands of civilians of both sexes and all ages' and caused extensive material destruction," over a period of fifteen months.¹²⁶ The Bench noted that the violence against civilians also escalated once Milošević assumed local command.¹²⁷ Finally, the fact that the specific crimes and underlying factual allegations contained in the indictment may have been already "fully addressed" by the ICTY in a previous case was dismissed by the Bench as "irrelevant."¹²⁸ Based on these findings, the Bench held that Milošević fell into the category of individuals Rule 11 bis "requires" be tried at the ICTY.¹²⁹

In 2007, the ICTY Referral Bench denied the Prosecutor's request to refer the case against Rasim Delić to the authorities of BiH.¹³⁰ According to the indictment, Delić was "commander of the Main Staff of the Army of [BiH] from 8 June 1993 until his retirement on 1 September 2000."¹³¹ In this position, Delić was "subordinate only to the President of [BiH]" and "exercised military command and control over all regular [Army] forces [of BiH]."¹³² In 1993, Delić also allegedly created "the 'El Mujahed Detachment', comprised of foreign volunteers who were prepared to conduct 'Holy War' against the enemies of Bosnian Muslims" and which subsequently "committed killings, maltreatment and rape of civilians and/or enemy soldiers who were captured or had surrendered."¹³³

Delić was charged with four counts of war crimes.¹³⁴ The allegations in the indictment "involve[d] around 100 victims of murder, cruel treatment and rape [...] committed in four locations in Central Bosnia and over a time-span not exceeding three months in 1993 and 1995."¹³⁵ Unlike the Milošević case, the Bench held that Delić's status as a "most senior leader" independently precluded referral, despite the fact that the charged crimes were of a similar gravity to those in previously referred cases.¹³⁶

The third case in which the ICTY denied a prosecution referral request involved cousins Milan and Sredoje Lukić, and initially ordered to be referred to BiH by the Referral Bench.¹³⁷ Milan Lukić sought to keep his case at the Tribunal and successfully appealed the Bench's decision to the ICTY Appeals Chamber.¹³⁸ Milan Lukić allegedly formed a paramilitary group known alternatively as the "White Eagles" or "Avengers" and Sredoje Lukić was alleged to have been a member of this group.¹³⁹ Both men were alleged to have, along with others, "brutally killed some 140 persons and [] severely injured others in two incidents by barricading them in houses and setting the homes on fire. Milan Lukić [was] additionally charged with having killed another 13 persons in three incidents."¹⁴⁰ The Referral Bench found these crimes "very serious" but ultimately concluded that neither accused was a "most senior leader", and ordered referral.¹⁴¹

The Appeals Chamber agreed with the Referral Bench's appraisal of gravity, but found the Bench's "conclusory" summation of Milan Lukić's degree of authority had improperly presupposed that "local" paramilitary leaders could never be considered "most senior leaders."¹⁴² The Appeals Chamber found that

“within his own sphere, [Milan Lukić] was a dominant presence” and that the Referral Bench had placed “undue emphasis on [the] geographic scope” of the alleged crimes.¹⁴³ The Chamber then noted that the White Eagles had acted with impunity and answered to no higher authority for over two years, making Milan Lukić “perhaps the most important paramilitary leader indicted at the [ICTY].”¹⁴⁴ The Appeals Chamber concluded consequently held that the case against Milan Lukić was “too significant to be appropriate for referral” and reversed the Referral Bench’s decision.¹⁴⁵

c. Prosecutorial Discretion at the ICC

The ICC has “jurisdiction over persons for the most serious crimes of international concern.”¹⁴⁶ The Rome Statute instructs the ICC Prosecutor to determine whether there are “substantial reasons to believe” that beginning an investigation would “serve the interests of justice” while “taking into account the gravity of the crime and the interests of victims.”¹⁴⁷ In 2003, the ICC Office of the Prosecutor released a Policy Paper defining its “general strategy” of evaluating potential cases for investigation, stating:

Although any crime falling within the jurisdiction of the Court is a serious matter, the [Rome] Statute clearly foresees and requires an additional consideration of ‘gravity’ whereby the Office must determine that a case is of sufficient gravity to justify further action by the Court. In the view of the Office, factors relevant in assessing gravity include: the scale of the crimes; the nature of the crimes; the manner of commission of the crimes; and the impact of the crimes.¹⁴⁸

In a subsequent publication, the Office further stated that it will “investigate and prosecute those who bear the greatest responsibility for the most serious crimes ... [encompassing] those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes.”¹⁴⁹ These two publications further confirm the general focus of scarce prosecutorial resources within ICL practice on pursuing prosecutions of individuals who are key players in the perpetration of relatively serious crimes and fall in line with personal jurisdiction jurisprudence from the SCSL and ICTY.

Themes of International Personal Jurisdictional Jurisprudence

From an overview of practice at the SCSL, ICTY and to a lesser extent, ICC, a set of qualitative legal factors to be considered in determining whether an individual is properly considered “most responsible” can be gleaned. Generally, it is clear that individuals qualify as “most responsible” when implicated in especially serious crimes. To evaluate the conduct of an individual suspect, the two most important factors to consider are the relative gravity of the crimes the suspect is implicated in and the relative importance of the suspect’s alleged role in contributing to their commission. Gravity has been assessed in terms of the number of victims affected, the impact of the crimes on victims, the duration and geographic scope of the criminal conduct and nature and manner of perpetration.

While thus far, judges have avoided engaging in grim mathematical accounting by simply comparing death tolls or the overall number of victims affected, these assessments must be made using other ICL cases as reference points, especially those prosecuted by the same court or tribunal. A suspect’s role is evaluated by considering his degree of authority over others involved in the underlying criminal conduct and whether the suspect played a part in the decision-making process that ultimately led to the perpetration of the alleged crimes. Furthermore, these two factors of gravity and responsibility have been viewed holistically, rather than cumulatively. Aside from these qualitative assessments, a clear preference for prosecution is also evident, as only the ICTY has declined to prosecute a suspect based on finding him not amongst those “most responsible” and this finding merely resulted in the suspect’s prosecution in domestic courts. This is a major distinction between the ICTY’s Rule 11 bis decisions and the fate of Cases 003/004 at the ECCC, as there is a fundamental difference between a change from an international to national prosecutorial venue and the functional cessation of criminal proceedings against a person implicated in international crimes. There has never been any suggestion that if some or all Case 003/004 suspects are not committed to trial, they may nonetheless be prosecuted by an ordinary Cambodian criminal court. Instead, should the cases be ended prior to trial at the ECCC, the suspects would escape potential criminal liability altogether. This would be a major departure from the core principle of individual responsibility that defines ICL, as to date no case at one of the major international courts or tribunals has ever been dismissed prior based on a relative assessment of culpability despite the existence of sufficient evidence to otherwise warrant a trial.

The Presumed Suspects in Cases 003 and 004

Although Cases 003/004 both continue to languish in the investigative phase and therefore the identities of the suspects in the two cases remain technically confidential, the names of all five suspects in Cases 003 and 004 have been publicly reported in numerous news articles and some reported suspects have even granted interviews to journalists.¹⁵⁰ Indeed, this public knowledge goes well beyond mere speculation, as the Initial Submissions of the Office of the Co-Prosecutor initiating each case was leaked to New Zealand-based news website Scoop, which subsequently posted the documents for open public download on its website on 27 June 2011.¹⁵¹ In light of this publically available and widespread knowledge, this paper will discuss the roles of the currently presumed suspects. Originally Case 003 concerned two suspects: Meas Muth and Sou Met and Case 004 concerned three suspects: Ta An, Im Chaem and Ta Tith. Sou Met died from complications related to diabetes sometime in June 2013.¹⁵² The following is an overview of the identities and roles within the Khmer Rouge of the four surviving probable suspects drawn from the leaked documents and other publicly available information.

Case 003: Meas Muth and Sou Met

On 16 February 2012, Case 002 accused Nuon Chea's defense counsel named Meas Muth as one of the two suspects in Case 003 during oral argument, apparently confirming the accuracy of the leaked Case 003 Initial Submission.¹⁵³ Meas Muth has also long been considered a potential suspect at the ECCC candidate, as the case against him was previewed in a book on accountability for the crimes of the Khmer Rouge authored by researcher Steve Heder and lawyer Brian Tittmore.¹⁵⁴

Heder and Tittmore allege that Meas Muth, along with his deceased co-suspect Sou Met, rose through the ranks of the Khmer Rouge's Southwest Zone hierarchy¹⁵⁵ and "held predominantly military ranks ... just below the senior level, which positioned them to implement [Khmer Rouge] policies and influence the conduct of lower-level cadre."¹⁵⁶ Meas Muth became "Secretary of Central Committee Division 164, which incorporated the [Khmer Rouge] navy" and was also the son of a prominent Khmer Rouge official named Pang, who died in 1968.¹⁵⁷ According to a report published by Human Rights Watch, Meas Muth commanded "8,000 to 10,000" troops.¹⁵⁸

Case 004: Ta An, Im Chaem and Ta Tith

Ta An, Im Chaem and Ta Tith are all named as suspects in the Third Introductory Submission of the International Co-Prosecutor leaked by Scoop. On 30 January 2012, the Nuon Chea defense also named Ta An and Im Chaem as suspects in Case 004 during questioning of Case 002 witness Prak Yut.¹⁵⁹ The names of these individuals have also repeatedly been published in news articles; along with the name of reported third Case 004 suspect Ta Tith.¹⁶⁰

Ta An is alleged to have risen to the post of Deputy Secretary of the Central Zone in 1977, where approximately 150,000 people, including large numbers of Cham Muslims, were massacred in a series of executions.¹⁶¹ Im Chaem is alleged to have become the Secretary of Preah Net Preah district in Banteay Meanchey province during the 1977 Khmer Rouge purge of the Northwest Zone, where she is reported to have "overs[een] five labor camps and prisons where nearly 50,000 people died."¹⁶² Finally, according to Khmer Rouge researcher Ben Kiernan, Ta Tith was the brother-in-law of infamous Khmer Rouge Standing Committee member and Southwest Zone Secretary Ta Mok and initially held the position of Secretary of Kirivong (District 109) in the Southwest Zone.¹⁶³ Later, Ta Tith reportedly became Deputy Secretary of the Northwest Zone, where he "had knowledge of, ordered and possibly directly participated in the torture and mutilation of prisoners."¹⁶⁴

Gravity of Crimes Implicated in Cases 003 and 004

Just as the names of the suspects in Cases 003 and 004 have been widely reported, the factual bases underlying the cases are also largely matters of public knowledge. Regarding Case 003, then-acting ECCC International Co-Prosecutor William Smith issued a press release on 8 September 2009 stating that the prosecution had "request[ed] judicial investigation of eight (8) distinct factual situations of murder, torture, unlawful detention, forced labour and persecution, [which] if proved, would constitute crimes against humanity, grave breaches of the Geneva Conventions and violations of the 1956 Cambodian Penal Code."¹⁶⁵ Former International Co-Prosecutor Andrew Cayley subsequently issued a press release providing further information relevant to Case 003 on 9 May 2011.¹⁶⁶ Then-Co-Investigating Judges You and Blunk quickly admonished Cayley for releasing this information, but confirmed that the Case 003 investigation includes:

S-21 Security Centre, Kampong Chhang Airport Construction Site, purges of the East, Central and New North Zones, and incursions into Vietnam [which were also implicated in Cases 001 and 002], as well as the following new crime sites and criminal episodes: (1) S-22 Security Centre in the Phnom Penh area; (2) Wat Eng Tea Ngnien Security Centre in Kampong Som Province; (3) Stung Hav Rock Quarry forced labour site in Kampong Som Province; (4) Capture of foreign nationals off the coast of Cambodia and their unlawful imprisonment transfer to S-21 or murder; and (5) Security Centres operated in Rattanakiri Province.¹⁶⁷

Cayley's press release also discussed Case 004, stating that the prosecution had requested "investigation of thirty-two (32) distinct factual situations of murder, torture, unlawful detention, forced labour, and persecution [which] if proved, would constitute crimes against humanity, violations of the 1956 Cambodian Penal Code and genocide."¹⁶⁸ The two judges also published a list of crime sites and topics of investigation for Case 004, which includes eighteen security centres, two prisons, six execution sites and four dam construction/forced labour sites.¹⁶⁹ The CIJs also indicated that the Case 004 investigation involves allegations of genocide perpetrated against Cham Muslims in Kampong Cham province and crimes committed during the Khmer Rouge purges of the Central and Northwest Zones.¹⁷⁰

Security Centres, Prisons and Execution Sites

Security centres were created throughout Cambodia by the Khmer Rouge and were in reality, prisons and work camps used to detain, torture and execute perceived enemies. Typically, execution sites were located near detention centres and consisted of a series of mass graves containing anywhere from several dozen to tens of thousands of victims in each. For example, the Documentation Center of Cambodia ("DC-Cam") has estimated that at Tuol Ta Phuon Prison and Execution Site, which is among the Case 004 investigation sites, there are 250 to 500 mass graves containing between 50,000 and 150,000 victims executed by the Khmer Rouge.¹⁷¹ Other prison sites under investigation related to Cases 003/004 were the sites of similarly massive killing events during the DK period.¹⁷²

Purges

Internal party purges were also a major source of death and suffering during the reign of the Khmer Rouge. The purges of the Northwest and Central Zones, within the purview of Cases 003 and 004, were two of the three largest purges (along with the 1978 purge of the Eastern Zone) and involved mass killing and misery on a shocking scale. According to Kiernan, the standard purge process adopted by the Khmer Rouge was to send trusted cadres under the command of Ta Mok or Northern Zone Secretary Ke Pauk into an area and thereafter systematically arrest and execute local officials.¹⁷³ In 1976, Ke Pauk led a violent purge of the Central Zone and in 1977 Ta Mok's forces purged the Northwest Zone.¹⁷⁴ Kiernan estimates that the death toll "probably exceeded one hundred thousand" victims in 1977 alone during the purge of the Northwest Zone.¹⁷⁵

Worksites

Worksites and forced labour camps were another feature of the Khmer Rouge regime, which caused mass death through both on-site executions and the convergence of overwork, famine, disease and complete lack of medical care.¹⁷⁶ The purview of Case 004 covers Anglong Chrey, Trapeang Thma, Spean Spreng and Prey Roneam Khmer Rouge dam construction sites.¹⁷⁷ These locations were massive worksites involving huge numbers of forced labourers. For example, according to Human Rights Watch, Case 004 suspect Im Chaem assumed responsibility for the construction of Trapeang Thma dam in mid-1977 and "[t]he very harsh conditions imposed on the laborers allegedly under her control resulted in many deaths. Some laborers were executed at the water-control work site for complaining about conditions or being unable to cope with the demands."¹⁷⁸

Genocide of Cham Muslims

In addition to the various international crimes committed at security centres, prisons, execution sites, worksites and during purges, Cases 003/004 stand out as involving allegations of genocidal killings of Cham Muslims, a minority ethno-religious group in Cambodia who died at a much higher rate than ethnic Khmer-Cambodians under the Khmer Rouge period.¹⁷⁹ Indeed, the Khmer Rouge treated Cham Muslims with particular scorn and there is ample evidence suggesting that the regime committed genocide against the Chams.¹⁸⁰ Crimes related to the alleged Khmer Rouge genocide of the Cham are included in both Cases 003 and 004 and Ta An specifically has been implicated in overseeing large-scale massacres, including many thousands of Cham Muslims.¹⁸¹

Conclusion

Based on even a brief overview of known information related to ECCC Cases 003/004, it appears that all four surviving suspects in the cases clearly qualify as “most responsible” individuals. First, it appears to be uncontradicted that all four suspects were Khmer Rouge “officials” during the period from 1975 to 1979. Second and more importantly, the alleged crimes involved – including crimes against humanity, war crimes and genocide – are amongst the most serious crimes in existence, covered large geographic areas, were committed over multiple years and involved millions of total victims, including the deaths of hundreds of thousands of victims according to former International Co-Prosecutor Robert Petit.¹⁸² Indeed, journalist Douglas Gillison has estimated through his research that between 248,990 and 295,190 deaths are involved in the Case 004 allegations alone.¹⁸³

The sheer force of these numbers makes Cases 003/004 stand out among recent prosecutions for international crimes as especially grave. The ICTY for example, found Milan Lukić, Dragomir Milošević and Rasim Delić to all qualify as being amongst those “most responsible” for crimes committed in the former Yugoslavia and declined to refer their cases to national jurisdictions for prosecution. These conclusions were despite the fact that all three cases involved far less grave crimes than ECCC Cases 003/004 in terms of duration, total numbers of victims and the death toll, even though a referral decision resulted solely in a change of venue for trial to a domestic court and not cessation of prosecutions altogether. Moreover, the SCSL Prosecutor, operating pursuant an undoubtedly narrower jurisdictional policy, brought charges against twelve accused, two more than the total of ten suspects at the ECCC and the propriety of doing so was never in any serious doubt. In particular, the Prosecutor did not exceed the bounds of jurisdictional discretion in bringing cases against Augustine Gbao and Allieu Kondewa, who appear to have been subordinated to the highest echelons of power in Sierra Leone, just as the suspects in Cases 003/004 were within the Khmer Rouge hierarchy.

Equally importantly, while the overall number of death toll of the Khmer Rouge period in Cambodia, estimated at 1.7 to 2.2 million lives, dwarfs the total number of deaths in both Yugoslavia and Sierra Leone, making grim comparisons of relative culpability based on death toll percentages between the ECCC, ICTY and SCSL impracticable, ECCC Cases 003/004 still involve far more deaths than Case 001. Indeed, presumed Case 003 suspect Meas Muth is directly implicated in some of the crimes prosecuted in Case 001, as he allegedly sent victims to S-21 prison to be tortured and executed.¹⁸⁴ In Case 001, the Trial Chamber found that “at least 12,273” victims were killed under Duch’s authority.¹⁸⁵ The ECCC Supreme Court Chamber summarily dismissed Duch’s claim on appeal that the ECCC Co-Prosecutors and/or Co-Investigating Judges abused their discretion in considering Duch a “most responsible” person and committing him to trial. Thus, it would appear to be irreconcilable for Duch to be sentenced to life in prison as a person properly considered “most responsible” for the atrocities of the Khmer Rouge by the Co-Prosecutors and Co-Investigating Judges if individuals, some of whom appear to have been Duch’s superiors, and all of whom appear to be directly implicated in equally, if not far more, grave criminal behaviour than Duch, including potential responsibility for tens of thousands more deaths, have the cases against them dismissed.

In sum, it appears former ECCC International Co-Prosecutor Robert Petit was correct in asserting that that all of the suspects in Cases 003/004 “fall well under the jurisdiction of the ECCC.”¹⁸⁶ Furthermore, Judge Laurent Kasper-Ansermet’s outgoing decisions holding that both suspects in Case 003 qualified as “most responsible”¹⁸⁷ also appears strongly supported in both law and fact and it is difficult to envision any scenario wherein sound professional judgment led to any other conclusion. As such, while trials in Cases 003/004 may be politically inconvenient for certain interested parties, trials in both cases appear to be the only defensible course of action at this juncture and any other outcome should be viewed as a product of bad faith or unsound professional judgment. Thus, while Case 002 undoubtedly remains the ECCC’s flagship case, Cases 003/004 may very well determine the Court’s credibility as a legal institution and shape its ultimate legacy.

End Notes

1. Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Regime* (Cambridge: Cambridge UP, 2005).
2. For example, the Nuremberg Tribunal was tasked with prosecuting the “Major War Criminals.” See “Charter of the International Military Tribunal,” art. 6, in Control Council of Germany, “London Agreement” (8 Aug. 1945).
3. For example, following the creation of the International Military Tribunal (“IMT”) at Nuremberg, the victorious Allied forces passed Control Council Law Number 10 (CCL 10), which “establish[ed] a uniform legal basis in Germany for the prosecution

- of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal.” “Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity,” in *Official Gazette: Control Council for Germany*, #3 (1946): 50-55.
4. The ECCC is a hybrid Court formed pursuant to a 2003 treaty between Cambodia and the United Nations (“UN”) to account for the crimes of the Khmer Rouge regime in Cambodia from 1975-1979. See “Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea,” UN-Cambodia, (6 June 2003) [“Agreement”].
 5. For a historical overview of the Khmer Rouge movement, see Khamboly Dy, *A History of Democratic Kampuchea (1975-1979)* (Phnom Penh: Documentation Center of Cambodia, 2007).
 6. Agreement, *supra* note 4, art. 2(1). Nearly identical language is contained in the Law on the Establishment of the ECCC, which outlines the jurisdiction and composition of the Court. “Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004,” ECCC Doc. NS/RKM/1004/006 (Oct. 27, 2004) [“ECCC Law”]. Article 1 states:
 - a. The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.
 7. While each international criminal tribunal and court is distinct from one another and as such, decisions from each are not binding on one another, decisions on personal jurisdiction issues relating to relative degrees of responsibility from these courts and tribunals represent the best (and sole) source of international law analyzing limited personal jurisdictional regimes in circumstances where international crimes are implicated.
 8. This conclusion largely echoes that reached by the Open Society Justice Initiative (OSJI). See, Open Society Justice Initiative, “Recent Developments at the Extraordinary Chambers in the Courts of Cambodia” (Briefing Paper) (March 2013), at 16 [“OSJI March 2013 Briefing Paper”] (Concluding that the “only fully credible solution to [the Case 003/004] dilemma is for donors to commit to fully funding the court through completion of the cases, and for donors and the UN to send a clear message to the RGC that the cases must proceed on the law and evidence alone.”).
 9. The ECCC is a hybrid institution and each position is staffed by both a Cambodian national and international officer. As such, the ECCC has both a national and international co-prosecutor of equal authority. While there have been numerous instances of disagreements between the national and international prosecutors, including whether to pursue Cases 003/004, a fulsome discussion of the relationship between the two offices is outside the scope of this paper.
 10. The ECCC follows a civil law procedure, in which investigations are initiated by the Office of the Co-Prosecutors, but carried out by two Co-Investigating Judges, who are tasked with drafting a closing order in each case, which operates as the indicting document and thus, determines which suspects and charges are committed for trial.
 11. Extraordinary Chambers in the Courts of Cambodia, “Internal Rules (rev. 8),” Rule 53(1) (revised 3 Aug. 2011) [“ECCC Rules”] (“If the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation”) (emphasis added).
 12. *Ibid.* Rule 55(1) (“A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC.”); Rule 67 (requiring a Closing Order to conclude an investigation).
 13. See ECCC International Co-Prosecutor, “Statement from the International Co-Prosecutor regarding Case File 003,” *ECCC website*, <http://www.eccc.govkh/en/articles/statement-international-co-prosecutor-regarding-case-file-003> (accessed 1 Nov. 2013).
 14. ECCC National Co-Prosecutor Chea Leang, “Press Release: Statement by the National Co-Prosecutor Regarding Case File 003” (10 May 2011) (on file with author) (opining that “the suspects mentioned the Case File 003 were not either senior leaders or those who were most responsible ...”).
 15. See ECCC Pre-Trial Chamber, Disagreement No. 001/18-11-2008, “Annex 1: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71 (English),” (18 Aug. 2009); see also ECCC Acting International Co-Prosecutor, “Statement of the Acting International Co-Prosecutor,” *ECCC website* (8 Sept. 2009), http://www.eccc.govkh/sites/default/files/media/ECCC_Act_Int_Co_Prosecutor_8_Sep_2009_%28Eng%29.pdf (accessed 1 Nov. 2013).
 16. Suy Se, “Cambodian PM says no third Khmer Rouge trial,” AFP News, 27 Oct. 2010.
 17. For an overview of this controversy, see Douglas Gillison, “Justice Denied,” *Foreign Affairs* (23 Nov. 2011); see also OSJI March 2013 Briefing Paper, *supra* note 8 at 11 (internal citations omitted).
 18. See, e.g., OSJI March 2013 Briefing Paper, *supra* note 8; see also Human Rights Watch, “Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign,” (3 Oct. 2011), <http://www.hrw.org/news/2011/10/03/cambodia-judges-investigating-khmer-rouge-crimes-should-resign> (accessed 2 Nov. 2013).
 19. ECCC Office of the Co-Investigating Judges, Case No. 003/07-09-2009-ECCC-OCIJ, “Notice of Conclusion of Judicial Investigation,” Doc. No. D13 (28 Apr. 2011).
 20. ECCC Office of the Co-Investigating Judges, “Statement by the Co-Investigating Judges Regarding Civil Parties in Case 004,” (8 Aug. 2011), <http://www.eccc.govkh/en/articles/statement-co-investigating-judges-regarding-civil-parties-case-004> (accessed 2 Nov. 2013).

21. An overview of the crimes implicated in Cases 003 and 004 is provided *infra*, at 29-32; *See also* Douglas Gillison, "Extraordinary Injustice," *The Investigative Fund* (27 Feb. 2012), <http://www.theinvestigativefund.org/investigations/international/1612/?page=2> (accessed 2 Nov. 2013).
22. Judge Siegfried Blunk, "Press Release by the International Co-Investigating Judge," (10 Oct. 2011) (on file with author) (announcing Judge Blunk's resignation).
23. Judge Laurent Kasper-Ansermet, "Press Release by the International Reserve Co-Investigating Judge," (6 Dec. 2011) (on file with author); Judge Laurent Kasper-Ansermet, "Statement by the International Reserve Co-Investigating Judge," (9 Jan. 2012) (on file with author).
24. The Supreme Council of Magistracy is the Cambodian body responsible for overseeing judicial appointments. *See* Bridget Di Certo & Sokheng Vong, "Judge Rejection 'a Breach,'" *Phnom Penh Post* (23 Jan. 2012). For an excellent summary of the progression of this issue, *see* OSJI March 2013 Briefing Paper, *supra* note 8.
25. Judge You Bunleng, "Press Statement of the National Co-Investigating Judge (unofficial translation)," (6 Dec. 2011) (on file with author); *see also* Judge You Bunleng, "Press Statement of the National Co-Investigating Judge (unofficial translation)" (9 Jan. 2012) (on file with author).
26. *See* Bridget Di Certo, "Case 004 Investigation Rolls On," *Phnom Penh Post* (1 Mar. 2012); *see also* May Titthara, Bridget Di Certo & Shane Worrell, "Ball Rolling on KRT Cases," *Phnom Penh Post* (Mar. 6, 2012).
27. Judge Laurent Kasper-Ansermet, "Press Release by the International Reserve Co-Investigating Judge" (19 Mar. 2012) (on file with author) (announcing Judge Kasper-Ansermet's resignation).
28. Judge Laurent Kasper-Ansermet, "Note of the International Reserve Co-Investigating Judge to the Parties on the Egregious Dysfunctions Within the ECCC Impeding the Proper Conduct of Investigations in Cases 003 and 004," Case File Nos. 003/07-09-2009-ECCC-OCIJ & 004/07-09-2009-ECCC-OCIJ, Doc. No. D38 (21 Mar. 2012).
29. ECCC Case No 003/07-09-2009-ECCC-OCIJ, "Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect," Doc. D48 (2 May 2012); Case No. 003/07-09-2009-ECCC-OCIJ, "Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect," Doc D49 (2 May 2012).
30. Michelle Nichols, "UN's Ban to Appoint New Judges for Cambodia Tribunal," *Reuters* (30 Mar. 2012).
31. ECCC Public Affairs Office, "Mark Harmon Sworn in as International Co-Investigating Judge" ECCC Press Release (26 Oct. 2012).
32. Judge Laurent Kasper-Ansermet, "Statement by the International Co-Investigating Judge Regarding Additional Crime Sites in Case File 004," (19 Dec. 2012).
33. Judges You Bunleng & Mark Harmon, "Statement by the Co-investigating Judges Regarding Case 003," (28 Feb. 2013). Judge You stated that he considered the Case 003 investigation closed with no indictment being issued. Meanwhile, Judge Harmon stated that he was actively investigating Case 003.
34. Laurent Crothers, "Government-Opposed KRT Investigation Proceeds," *The Cambodia Daily* (6 July 2013).
35. Anne Heindel, "Legal Commentary: Case 004 Suspect Denied Case File Access" *The Cambodia Tribunal Monitor*, <http://www.cambodiatribunal.org/2013/09/30/legal-commentary-case-004-suspect-denied-case-file-access/> (accessed 3 Nov. 2013).
36. Indeed, the national staff and judges at the ECCC have uniformly maintained the legally untenable position that the decision to even begin to investigate the suspects in Cases 003/004 has not been properly made. These individuals have consistently been of the opinion that because the National Co-Prosecutor and National Co-Investigating Judge opposed initiation of the two cases, that the cases were not truly and properly under investigation. National ECCC Pre-Trial Chamber judges have also stated that personal jurisdiction at the ECCC has yet to be finally decided, despite the ruling in the Case 001 Appeal Judgment on this issue by the Supreme Court Chamber. *See e.g.* ECCC Case File No. 004/07-09-2009-ECCC/OCIJ (PTC05), Public Redacted Version: Considerations of the Pre-Trial Chamber on [Redacted's] Appeal Against the Decision Denying his Requests to Access the Case File and Take Part in the Judicial Investigation (Opinion of Judge Prak Kimsan, Ney Thol and Huot Vuthy), para. 13, Doc. No. D12114/II4 (15 Jan. 2014) (ECCC Pre-Trial Chamber) "After being seized of the Third Introductory Submission, the Co-Investigating Judges have not yet decided to place any person under judicial investigation. In this sense, [redacted] et. al who are the suspects have not been accorded the status of the Charged Person or Accused as of now."). Furthermore, in references to Cases 003/004, the official Court Report of the ECCC states that "the international" side of the OCIJ is investigating the cases, clearly distancing National Co-Investigating Judge You Bunleng and his staff from the investigations. *See e.g.* ECCC Court Report (Feb. 2014) at 4 ("During the month of January, the international side of the Office of the Co-Investigating Judges (OCIJ) continued the investigations of Cases 003 and 004.").
37. *Quoted in* Mony Say, "With Trial Under Way, Tribunal Faces Questions of Legacy," *VOA (Voice of America) News* (5 Dec. 5, 2011), <http://www.voanews.com/khmer-english/news/With-Trial-Under-Way-Tribunal-Faces-Questions-of-Legacy-135024278.html> (accessed 2 Nov. 2013).
38. As pointed out by OSJI and other human rights organizations, the "Cambodian government regularly uses the domestic justice system to punish political opponents and secure impunity for political allies." OSJI March 2013 Briefing Paper, *supra* note 8 at 11 (internal citations omitted).
39. *Case of Kaing Guek Eav alias "Duch"*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment, Doc. No. F28 (3 Feb. 2012) (ECCC Supreme Court Chamber) ["*Duch* Appeal Judgment"].
40. *Ibid* ¶ 383 (Judges Klonowiecka-Milart and Jayasinghe dissenting).

41. *Ibid* ¶¶ 53, 57.
42. *Ibid* ¶ 79.
43. *Ibid* ¶ 62, citing ECCC Law, art. 29.
44. *Ibid* ¶ 70.
45. *Ibid* ¶ 80.
46. *Ibid* ¶ 65, quoting ECCC Law, art. 23 new (subsequent citations omitted).
47. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 31(1) (entered into force 27 January 1980).
48. See ECCC Docs D48 & D49 *supra* note 29.
49. *Ibid* Doc D49, ¶ 16 (“With regard to the gravity of the crimes alleged, relevant factors include but are not limited to: (a) the number of victims; (b) the geographic and temporal scope of the crimes; and (c) the manner in which the crimes were committed and the number of separate incidents.”) (internal citations omitted), para 21 (With regard to level of responsibility “[r]elevant factors include, but are not limited to : (a) the Suspect’s position in the hierarchical structure; (b) the procedure followed for his appointment to said position; (c) the permanency of his position; (d) the number of subordinates; (e) the Suspect’s capacity to issue orders; (f) whether the orders were in fact followed by his subordinates; (g) the Suspect’s actual knowledge that his subordinates were committing crimes, including knowledge of the number, type and scope of the crimes, the time during which they were committed, their geographic location, as well as the eventual widespread nature of the acts; (h) the Suspect’s authority to negotiate, sign or implement agreements;47 (i) the temporal scope of the Suspect’s control; (j) control of access to territory; (k) the actual role of the Suspect in the commission of the crimes; (l) whether those more senior in rank than the Suspect have already been convicted.”) (internal citations omitted).
50. Ambassador Scheffer was also deeply involved in the negotiating process leading to the creation of the ECCC.
51. See Steve Heder, “A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia,” *Cambodia Tribunal Monitor*, (2 Aug. 2011), <http://www.cambodiatribunal.org/sites/default/files/A%20Review%20of%20the%20Negotiations%20Leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf> (accessed 1 Nov. 2013) [Heder, “Review”]; David Scheffer, “The Negotiating History of the ECCC’s Personal Jurisdiction,” *Cambodia Tribunal Monitor*, 22 May 2011, http://www.cambodiatribunal.org/sites/default/files/ctm_blog_5-22-2011.pdf (accessed 1 Nov. 2013).
52. Heder, “Review,” *ibid* at 41. Noting that:
 - a. [Case 001 suspect] Duch had been added to the list more or less explicitly as an example of another most responsible, bringing the total of named suspects to six. If four or more additional suspects were to be put forward as candidates for prosecution, it was most logical to assume that they should be drawn from among as yet unidentified or publicly unnamed members of the Central Committee, DK government ministers and mid-level CPK cadre, political or military. Certainly, despite some inconsistency, neither Hun Sen nor other authoritative RGC officials had definitively ruled out the possibility that middle-echelon CPK cadre could be prosecuted, as long as early defectors like Hun Sen himself, Chea Sim and Heng Samrin were excluded. This was so even if there was much to indicate such an expansive but qualified coverage was not their preference, and thus that there was reason to doubt the sincerity of RGC statements to the effect that they were prepared to accept an interpretation of the ECCC’s personal jurisdiction including middle level CPK —leaders.
53. Scheffer, *supra* note 51 at 11. Concluding that:
 - a. It is unfortunate that Cambodian Co-Prosecutor Chea Leang publicly declared on May 10, 2011, that the unnamed additional suspects in “Case File 003 were not either senior leaders or those who were most responsible during the period of Democratic Kampuchea.” How either she or even the Co-Investigating Judges could possibly arrive at that view, given what is publicly known now from media sources about the likely suspects and the crimes allegedly committed by them, and given any reasonable interpretation of those “most responsible” within the ECCC’s personal jurisdiction in light of the negotiating history of the ECCC Law, will be grist for historians for decades to come. Is this politics or law speaking to us?
54. ECCC Law, *supra* note 6, arts. 20 new, 23 new, 33 new.
55. For example, the Cambodian Penal Code states only in article 4 that “Each person is responsible for his/her act only” and makes no further mention of predicates for criminal responsibility. Cambodian Penal Code (2009), unofficial English translation.
56. “Code of Criminal Procedure of the Kingdom of Cambodia,” adopted by the National Assembly with 83/83 votes on 7 June 2007 and adopted by the Senate with 51/51 votes and entered into force on 24 July 2007, online: Organisation for Economic Co-Operation and Development (OECD) <http://www.oecd.org/site/adboeccanti-corruptioninitiative/46814242.pdf> [“Cambodian Code of Criminal Procedure”] (English translation of original text).
57. *Ibid*, arts. 44, 124.
58. *Ibid*, art. 122.
59. *Ibid*, art. 127 (emphasis added).
60. ECCC Rules, *supra* note 11, Rule 53(1).
61. *Ibid*, Rule 55(1).
62. Cambodian Code of Criminal Procedure, *supra* note 56, art. 247.

63. ECCC Rules, *supra* note 11, Rule 67.
64. Cambodian Code of Criminal Procedure, *supra* note 56, art. 247.
65. Cambodian Code of Criminal Procedure, *supra* note 56, art. 247.
66. ECCC Rules, *supra* note 11, Rule 67(3).
67. *Ibid*, art. 261.
68. *Ibid*, art. 262.
69. *Ibid*, art. 282.
70. The circularity occurs in that it would be impossible to define a term appearing in the phrase stating the object and purpose of a treaty by resorting to the same object and purpose.
71. S.C. Res. 1315, ¶¶ 1-3, UN Doc. S/Res/1315 (14 Aug. 2000).
72. Sierra Leone-United Nations, “Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone,” art. 1(1) (16 Jan. 2002) [“SCSL Agreement”].
73. “Statute of the Special Court for Sierra Leone,” art. 1(1) [“SCSL Statute”].
74. United Nations Secretary-General, “Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone,” ¶¶ 29-30, U.N. Doc. No. S/200/915 (4 Oct. 2000).
75. The final decision on the issue was rendered by the SCSL Appeals Chamber in *Prosecutor v Brima et al.*, following disagreement between two Trial Chambers. *Prosecutor v Fofana & Kondewa*, Case No. SCSL-04-14-T, Judgment, ¶91 (Trial Chamber I, 2 Aug. 2007); *cf. Prosecutor v Brima et al.*, Case No. SCSL-04-16-T, Judgment, ¶ 653 (Trial Chamber II, 20 June 2007).
76. *Prosecutor v Brima et al.*, Case No. SCSL-2004-16-A, Judgment, ¶¶ 280-281 (22 Feb. 2008) (Holding that “[i]t is evident that it is the Prosecutor who has the responsibility and competence to determine who are to be prosecuted as a result of investigation undertaken by him.”) (internal citations omitted).
77. *Ibid* ¶¶ 280, 283, cites SCSL Statute, art. 15(1) at ¶ 280.
78. *Ibid* ¶ 282.
79. Eight Accused have been convicted by the SCSL. See *Brima et al.*, Case No. SCSL-2004-16-A, Judgment; *Prosecutor v Fofana & Kondewa*, Case No. SCSL-04-14-A, Judgment (28 May 2008); *Prosecutor v Sesay et al.*, Case No. SCSL-04-15-A, Judgment (20 Oct. 2009); *Prosecutor v Taylor*, Case No. SCSL-03-1-T, Judgment (18 May 2012). Accused Sam Bockarie and Foday Saybana Sankoh died prior to Judgment and the cases against them were dismissed. *Prosecutor v Bockarie*, Case No. SCSL-2003-04-PT, Withdrawal of Indictment (8 Dec. 2003); *Prosecutor v Sankoh*, Case No. SCSL-2003-02-PT, Withdrawal of Indictment (8 Dec. 2003). Accused Johnny Paul Koroma is widely believed to be dead, but remains under indictment pending the receipt of sufficient evidence of his death. See *Prosecutor v Koroma*, SCSL website, <http://www.sc-sl.org/CASES/JohnnyPaulKoroma/tabid/188/Default.aspx> (accessed 12 Mar. 2012) (“Koroma fled Freetown in January 2003. His fate and whereabouts are unknown, and he is considered to be at large.”).
80. *Prosecutor v Sesay et al.*, Case No. SCSL-04-15-T, Judgment, ¶ 2010 (2 Mar. 2009).
81. *Ibid* ¶ 700.
82. *Fofana & Kondewa*, Case No. SCSL-04-14-A, Judgment, ¶ 186.
83. *Ibid*.
84. ICTY Statute, art. 1; ICTR Statute, art. 1.
85. See “Report of the International Tribunal for the former Yugoslavia,” ¶ 2, U.N. Doc. A/66/210-S/2011/473 (31 July 2011); “Status of Cases,” ICTR Website, <http://unictr.org/Cases/tabid/204/Default.aspx> (accessed 16 Apr. 2012). In the case of Rwanda, another 100,000 or so lower-level suspects implicated in the 1994 genocide awaited trial in national courts during the 1990s. See William A. Schabas, “Genocide Trials and Gacaca Courts,” *Journal of International Criminal Justice* 3 (2005) 879, at 878.
86. S.C. Res. 1503, U.N. Doc. S/RES/1503 (28 Aug. 2003). Resolution 1503 was shortly followed by Resolution 1534, which called on the Tribunals to move forward “to ensure that any [subsequent] indictments concentrate on the most senior leaders suspected of being most responsible ...” S.C. Res. 1534, U.N. Doc. S/RES/1534 (Mar. 26, 2004).
87. “ICTY Rules of Procedure and Evidence,” Rule 11 *bis* [“ICTY RPE”]; “ICTR Rules of Procedure and Evidence,” Rule 11 *bis* [“ICTR RPE”].
88. Security Council Resolution 1534 called on the ICTR and ICTY “in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503.” S.C. Res. 1534, U.N. Doc. S/RES/1534 (26 Mar. 2004), para. 5.
89. ICTY RPE, Rule 11 *bis*. The ICTY also amended its Internal Rules on 6 April 2004 to provide for an initial review period whereby ICTY Bureau judges, “determine whether the indictment, *prima facie*, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal.” Indictments falling short of this standard are sent back to the Prosecutor by the ICTY President. “ICTY Rules (Rev 20),” Rule 28(A) (6 Apr. 2004).
90. The ICTR has focused instead on ensuring that transferred accused would be provided with sufficient protections and receive a fair trial, probably due to the enduring poor security in Rwanda and weakness of the country’s judiciary. ICTR RPE, Rule 11 *bis*(C).

91. See, e.g., *Prosecutor v Uwinkindi*, Case No. ICTR-2001-75-R11 bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (28 June 2011) (Ordering referral to Rwandan authorities for prosecution without any significant discussion of the accused's relative culpability, instead focusing mainly on determining whether Rwanda has sufficient personal and subject matter jurisdiction to properly prosecute the case.).
92. See "Status of Transferred Cases," ICTY website, <http://icty.org/sid/8934> (accessed 16 April 2012).
93. See, e.g., Olympia Bekou, "Rule 11 Bis: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence," *Fordham International Law Journal* 33, 723, at 735-752.
94. *Prosecutor v Rašević & Todović*, Case Nos. IT-97-25/1-AR11 bis.17 & IT-97-25/1-AR11 bis.2, Decision on Savo Todović's Appeals Against Decisions on Referral Under Rule 11 bis, ¶ 8 (4 Sept. 2006).
95. See, e.g. Bekou, *supra* note 93, at 739 *et seq.*
96. *Ibid.* at 746-747.
97. See e.g. *Prosecutor v Delić*, Case No. IT-04-83-PT, Decision on Motion for Referral of Case Pursuant to Rule 11 Bis, ¶¶14-25 (9 July 2007). ICTY Referral Benches have limited their inquiry to the indictment and assumed all facts alleged therein to be true. See, e.g., *Prosecutor v Rašević & Todović*, Case No. IT-97-25/1-PT, Decision on Referral of Case under Rule 11 Bis with Confidential Annexes I and II, ¶ 22 (8 July 2005).
98. Bekou, *supra* note 93, at 744; see also *Prosecutor v Stanković*, Decision on Referral of Case Under rule 11 Bis, Case No. IT-96-23/2-PT, ¶ 19 (17 May 2005) (Finding that "[i]n the context of offences dealt with by this Tribunal, the Indictment alleges a factual basis for the crimes which is limited in scope both geographically and temporally, and also in terms of the number of victims affected " and approving referral.).
99. *Prosecutor v Ademi & Norac*, Case No.IT-04-78-PT, Decision for Referral to the Authorities of Croatia Pursuant to Rule 11 bis, ¶ 28 (14 Sept. 2005).
100. *Ibid.*
101. *Prosecutor v Ljubičić*, Case No. IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 Bis, ¶ 10 (12 Apr. 2006).
102. *Ibid* ¶ 18.
103. *Ibid* ¶ 14.
104. *Ibid* ¶¶ 19, 53.
105. *Trbić*, Case No. IT-05-88/1-PT, Decision on Referral of Case Under Rule 11 Bis (27 Apr. 2007).
106. *Ibid* ¶ 10.
107. *Ibid* ¶ 11.
108. *Prosecutor v Trbić*, Case No.IT-05-88/I-PT, Indictment, ¶ 29 (18 Aug. 2006).
109. *Trbić*, Decision on Referral of Case Under Rule 11 Bis, ¶11.
110. *Ibid* ¶ 12.
111. *Ibid* ¶ 19.
112. *Ibid.*
113. *Ibid* ¶ 21.
114. *Ibid* ¶¶ 22-23.
115. *Prosecutor v Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 Bis (8 July 2005); *Delić*, Case No. IT-04-93-PT, Decision on Motion for Referral of Case Pursuant to Rule 11 Bis (9 July 2007); *Prosecutor v Lukić & Lukić*, Case No. IT-98-31/1-AR11 bis.1, Decision on Milan Lukić's Appeal Regarding Referral, ¶ 25 (11 July 2007).
116. *Milošević*, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 Bis, ¶ 24 (8 July 2005).
117. *Ibid* ¶¶ 8-9.
118. *Prosecutor v Dragomir Milošević*, Case No. IT-98-29/1-PT, Prosecution's Submission of Amended Indictment Pursuant to Rule 50 and Trial Chamber's Decision dated 12 December 2006, ¶ 16 (18 Dec. 2006). Note, the Amended Indictment is the only version of the indictment available. The Referral Bench cited the original indictment in its decision. These citations have been indicated where pertinent and parallel citations to the Amended Indictment are provided where useful.
119. *Ibid* ¶ 17.
120. *Ibid* ¶ 18.
121. *Milošević*, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 Bis, ¶ 9 (8 July 2005) (*quoting* original indictment, ¶ 15).
122. *Ibid* ¶ 8.
123. *Ibid* ¶ 10.
124. *Ibid* ¶ 22.

125. *Ibid.*
126. *Ibid.* ¶¶ 24, 19 (quoting original indictment, ¶¶ 4(a), 4(c)); see also Milošević, IT-98-29/1-PT, Amended Indictment, ¶ 13 (18 Dec. 2006).
127. *Ibid.*
128. *Ibid.* ¶ 20.
129. *Ibid.* ¶ 24.
130. Delić, Case No. IT-04-93-PT, Decision on Motion for Referral of Case Pursuant to Rule 11 *Bis* (9 July 2007).
131. *Ibid.* ¶ 11.
132. *Ibid.*
133. *Ibid.*
134. *Ibid.* ¶ 13.
135. *Ibid.* ¶ 19.
136. *Ibid.* ¶¶ 19, 26 (finding that while the “gravity of the crimes are not *ipso facto* incompatible with referral” nonetheless, “the alleged level of responsibility of the Accused requires that the present case be tried before the [ICTY].”).
137. *Prosecutor v Lukić & Lukić*, Case No. IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11 *Bis* with Confidential Annex A and Annex B (5 Apr. 2007).
138. *Lukić*, Case No. IT-98-31/1-AR11 bis.1, Decision on Milan Lukić’s Appeal Regarding Referral (11 July 2007).
139. *Lukić*, Case No. IT-98-32/1-PT, Decision on Referral, ¶ 13 (5 Apr. 2007).
140. *Ibid.*
141. *Ibid.* ¶¶ 29-31.
142. *Lukić*, Case No. IT-98-31/1-AR11 bis.1, Decision on Milan Lukić’s Appeal Regarding Referral, ¶ 21 (11 July 2007).
143. *Ibid.* ¶¶ 21-22.
144. *Ibid.* ¶¶ 22-26.
145. *Ibid.* ¶ 25.
146. “Rome Statute of the International Criminal Court,” art. 1, U.N. Doc.A/CONF.183/9* (17 July 1999). A case can be found “inadmissible” by the ICC if “[t]he case is not of sufficient gravity to justify further action by the Court.” *Ibid.* art. 17(d).
147. *Ibid.* art. 53.
148. ICC Office of the Prosecutor, “Report on Prosecutorial Strategy,” at 5 (14 Sept. 2006).
149. ICC Office of the Prosecutor, “Prosecutorial Strategy 2009 – 2012,” ¶ 19 (1 Feb. 2010).
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154. Stephen Heder with Brian D. Tittmore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge* (Washington: American University War Crimes Research Office, 2001), 99-113 (in the book, “Meas Muth” is spelled “Meah Mut”).
155. The Khmer Rouge officially renamed Cambodia “Democratic Kampuchea” and divided the country into a series of Zones, replacing provinces. See Dy, *supra* note 5.
156. Heder with Tittmore, *supra* note 154, at 99.
157. *Ibid.*
158. Human Rights Watch, *supra* note 18.
159. See Randle DeFalco, “Alleged Suspects in Case 004 Exposed During Case 002 Questioning: Testimony of Accused Nuon Chea and Witness Prak Yut,” *Cambodia Tribunal Monitor* (30 Jan. 30 2012).
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161. Third Introductory Submission, available at *Scoop* website, *supra* note 151; see also Sok, *supra* note 150; see also Gillison, *Extraordinary Injustice*, *supra* note 21.

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171. Documentation Center of Cambodia, “List of Democratic Kampuchea Burial” (last updated 5 Jan. 2005), http://www.dccam.org/Projects/Maps/TableList/List_of_Mass_Graves.pdf (accessed 4 Nov. 2013) (the prison and execution site is spelled as “Tuol Ta Phlorng” in DC-Cam’s report).
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174. *Ibid* at 286.
175. Kiernan, *The Pol Pot Regime*, *supra* note 163 at 244.
176. For a brief overview of famine and living conditions in DK, see Dy, *supra* note 5.
177. See “Statement by the Co-Investigating Judges Regarding Civil Parties in Case 004,” *supra* note 20.
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179. Dr. Ewa Tabeau & They Kheam, “Demographic Expert Report (Public Redacted Version),” submitted to ECCC Office of the Co-Investigating Judges, Doc. No. D140/1/1, at 70 (30 Sept. 2009) (Estimating that approximately 36% of Cambodia’s Cham population perished under the Khmer Rouge, compared to approximately 18.7% of the ethnic Khmer majority.).
180. See generally, Alexander Laban Hinton, *Why Did They Kill?: Cambodia in the Shadow of Genocide* 206-208 (Berkeley: University of California Press, 2005) (discussing the targeting and mass killing of Cambodian Cham Muslim populations during the Khmer Rouge period).
181. Sok, *supra* note 150.
182. Robert Petit, “Lawfare and International Tribunals: A Question of Definition? A Reflection on the Creation of the ‘Khmer Rouge Tribunal,’” *Case Western Reserve Journal of International Law*, 43, 189 at 198 (2010).
183. Douglas Gillison, “Crimes Scenes of the Khmer,” *The Investigative Fund* (27 Feb. 2012), http://www.theinvestigativefund.org/investigations/international/1614/crime_scenes_of_the_khmer/?page=entire (accessed 4 Nov. 2013).
184. ECCC-appointed demographic experts estimated that that total death toll during the DK period was “most likely 1.747 to 2.2” million lives. Tabeau & Kheam, *supra* note 179.
185. *Duch* Trial Judgment, ¶ 630.
186. Petit, *supra* note 182 at 198 (emphasis added).
187. See *supra* note 29.

The Quest for Justice in Cambodia: Power, Politics, and the Khmer Rouge Tribunal

Donald W. Beachler

Professor, Politics Department, Ithaca College, USA

Abstract: *The trial of the four surviving senior members of the Khmer Rouge leadership was a difficult undertaking from the start. The elderly defendants were in frail health. Illness and death reduced the number of the accused to just two. The Cambodian government, led by Hun Sen, was not eager to have any trials at all, and was determined that the trial not implicate officials who were now allied with the ruling regime. The conflicting agendas of the international judges on the hybrid court and the Cambodian government often left the court mired in disputes. The Cambodian genocide tribunal illustrates the political complexities and challenges involved in pursuing charges against perpetrators, especially when the trial is held decades after the genocide occurred.*

Keywords: *Khmer Rouge, Cambodia Genocide Trial, Nuon Chea, Ieng Sary, Khieu Samphan, Hun Sen*

The Cambodian Genocide Tribunal and the Very Slow Road to Justice

In June 2011 genocide trial opened in Phnom Penh, Cambodia that featured what were likely some of the most notorious defendants in a crimes against humanity or genocide tribunal since the Nuremberg Trials that followed World War II. The four highest-ranking living leaders of the Khmer Rouge regime were the defendants in the trial. Cambodia, also known as Democratic Kampuchea (DK) under the Khmer Rouge (KR), was the scene of one of the twentieth century's worst genocides. The KR pursued policies that resulted in the deaths of an estimated 1,700,000 Cambodians during their reign from April 1975 to January 1979.¹ The defendants were among the key decision makers of the regime, although the leader of the Khmer Rouge and General Secretary of the Communist Party of Kampuchea (CPK), Pol Pot, aka Brother Number One, had died in 1998. Nuon Chea, Brother Number Two, had held the position of Deputy Secretary of the CPK and was regarded as the chief ideologue of the regime. He had also served as president of the People's Representative Assembly. Ieng was the Foreign Minister of Democratic Kampuchea throughout its existence and remained a leading figure in the KR until he surrendered to the government of Cambodia in 1996. Ieng Thirith was married to Ieng Sary and served as Minister of Social Affairs in the DK government. At a meeting of the CPK Center in October 1975 that designated the responsibilities of the governing elite, Ieng Thirith was placed... "in charge of culture, social welfare, and foreign affairs, sharing the last field with her husband Ieng Sary."² The fourth defendant was Khieu Samphan, who served as head of state in Democratic Kampuchea and also was, according to the October 1975 meeting, in charge of the "accountancy and pricing aspects of commerce."³ Not since Nuremberg have leading officials of a regime responsible for so many deaths been subjected to a judicial proceeding.

Despite the satisfaction that some observers, foreign and domestic, derived from seeing some of the major perpetrators of the Cambodian genocide brought before a tribunal, many aspects of the trial before the court, formally known as the Extraordinary Chambers in the Courts of Cambodia (ECCC, and often called the Khmer Rouge Tribunal,) left various concerned parties immensely displeased. The trial commenced 32 years after the Khmer Rouge had been driven from power by the Vietnamese invasion of Cambodia in January 1979. Even after the principle of genocide trials for leading Khmer Rouge cadres had been agreed to in 1997, seemingly interminable haggling between the United Nations and the Cambodian government over the composition of the court and the scope of its jurisdiction, delayed the start of judicial proceedings for a dozen years. (Only a single defendant had been tried before the start of the trial of the major perpetrators in 2011.) Many human rights activists argued that there were numerous other perpetrators of genocide who should be brought before the tribunal in future proceedings. In the summer of 2012, the Cambodian government led by Prime Minister Hun Sen remained adamant in its opposition to holding more than two trials and there was little evidence that the United Nations or major donor nations to Cambodia could, or would, exert sufficient pressure to force a concession from Hun Sen that would permit more trials. Critics of the ECCC argued that it was, in essence, too little and too late.

This article explores the political circumstances that led to the two trials of Khmer Rouge genocide perpetrators that were undertaken decades after the regime's demise and the reasons why there would most likely be just five persons tried for the crimes committed during the 44 month existence of the dystopia that was Democratic Kampuchea. It will be argued that given the history of genocide trials and the national and international political imperatives at play in establishing and sustaining the ECCC, the very slow and limited judicial process was, if not inevitable, highly likely.

The Long Journey to Two Trials

The negotiations and political maneuvering that would eventually lead to the establishment of the ECCC occurred as the government of Cambodia was integrating some elements of the Khmer Rouge back into Cambodian society and politics. Because Vietnam was an ally of the Soviet Union and the Khmer Rouge had been close to the Chinese government, the West and China offered direct and indirect support to the KR until the Soviet Union collapsed in 1991. The Khmer Rouge remained a significant factor in Cambodian politics for several years after the end of the Cold War. Not least among the KR's assets in the 1990s was an armed force of roughly 10,000 troops that were part of its broader infrastructure along Cambodia's border with Thailand. When Ieng Sary defected to the government in 1996 with about 3,000 troops, he significantly weakened the Khmer Rouge. When Pol Pot sent armed soldiers to suppress the disloyal Ieng Sary and his troops, the expeditionary forces collapsed due to mass defections.⁴ The Khmer Rouge was further weakened by internal divisions, but still contained assets useful to other politicians in Cambodia. Because he controlled an armed militia, Ieng Sary was able to gain leverage as both main contenders for national power, co-Prime Ministers Prince Ranariddh Sihanouk and Hun Sen, sought Ieng Sary's support and both supported an amnesty for him.⁵

In 1997, desperate for support in his struggle for power with Hun Sen, Ranariddh agreed to an alliance with Khieu Samphan, who wished to break away from the Khmer Rouge remnants located along the Thai border.⁶ (Ranariddh and his royalist party lost their power struggle with Hun Sen and his Cambodian People's Party (CPP).) The Khmer Rouge insurgency collapsed in 1998 when only Ta Mok, once known as Brother Number Five in the KR hierarchy, and less fraternally as "the butcher" in circles not sympathetic to the Khmer Rouge, declined to reconcile with the regnant political order. Sorpong Peu observes that when Khem Ngoun, Ta Mok's chief of staff, defected from the last major KR holdout, the Khmer Rouge's insurgency was over.⁷ (Ta Mok died in prison in 2006 as he awaited trial for genocide and crimes against humanity). An important element of the truces and amnesties that occurred as the Khmer Rouge insurgency finally collapsed was the integration of many KR officials into the government and military.⁸

After accepting amnesty in 1996, Ieng Sary remained in his base area of Pailin province, and later took up residence in a prosperous neighborhood in Phnom Penh. In 1998, Nuon Chea, who was known as Brother Number Two in the CPK, and Khieu Samphan, who had served as head of state during the Khmer Rouge years in power, surrendered to the national government. Both were welcomed at Prime Minister Hun Sen's country estate. The prime minister indicated that he believed that it was time to "dig a hole and bury the past."⁹ After international and domestic criticism of his greeting the two defectors and his suggestion that perhaps the two should not be tried, Hun Sen issued an unclear "clarification" of his position, "My stance is this: the trial of the Khmer Rouge is over, but the issue still continues to exist. It is over based on the verdict of the people's court in 1979, which is still valid and acknowledged by the royal decree granting amnesty to Ieng Sary in 1996. The issue that still exists is that of the establishment of a tribunal based on the views of international and national jurists who are now doing their work."¹⁰ These comments were not Hun Sen's last ambiguous remarks on the question of trials for crimes committed by the Khmer Rouge during their years in power. In early 1999, Nuon Chea and Khieu Samphan took a government sponsored tour of Cambodia that included visits to the seaside resort at Sihanoukville and the temples of Angkor Wat.¹¹ In March 1999, Ta Mok and Kaing Guek Eav, commandant of the S-21 interrogation center, were arrested and later charged with genocide.¹² The pattern of solicitude for Khmer Rouge leaders combined with governmental agreements to some prosecutions continued from the late 1990s through 2012. The various domestic and, more significantly, international pressures for trials of Khmer Rouge leaders and the presence of many former Khmer Rouge cadre in the government, including Hun Sen himself, rendered a twisted policy path inevitable.¹³

In 1997, Hun Sen had agreed to a trial for those Khmer Rouge leaders who were deemed "most senior" and "most responsible" for the crimes that occurred between 1975 and 1979.¹⁴ Of course the concepts most senior and most responsible were left undefined. In 1998 Hun Sen asserted that the international community

should examine some additional matters. He requested that prosecutors investigate the American bombing of Cambodia that had decimated the country in the years before 1975.¹⁵ He also stated that he thought an inquiry should be made into Chinese government support for the Khmer Rouge. While both topics are surely worth examining, such investigations would most certainly have been opposed by the United States and China, respectively.¹⁶ While motive is almost always difficult to discern, these demands for an investigation of the relationships of major world powers to the Khmer Rouge were likely made to further delay and complicate arrangements for a tribunal. Still, Hun Sen was correct when he argued that some of the countries arguing for a series trial had supported the Khmer Rouge either directly or indirectly in the 1970s and 1980s.

Hun Sen first agreed to the principle trials of perpetrators of the Cambodian genocide in 1997, but negotiations about the terms of the trial dragged on for several years. In an inconsistent manner, the United Nations placed pressure on the CPP government to work out terms and conditions for establishing an international tribunal. The U.N. and members of the international community who took an interest in the matter preferred that as much control as possible be in international hands. Outside Cambodia, it was widely believed that the Cambodian judicial system lacked the resources, competence and integrity to carry out a series of trials in a manner that would be acceptable to the international community. Invoking the principles of Cambodian national sovereignty and respect for his country, Hun Sen sought as much Cambodian control over the process as possible. He also argued that permitting an unlimited number of defendants could destabilize the country. The Prime Minister resisted an international tribunal with wide-ranging jurisdiction. His major political rival, Norodom Ranariddh, joined him.¹⁷

Six years of difficult and contentious negotiations between United Nations officials and the Cambodian government passed before some basic guidelines for the Extraordinary Chambers in the Courts of Cambodia (ECCC) were established. In 2003, under an arrangement worked out by David Scheffer, the United States Ambassador at Large for War Crimes, the majority of judges in the court would be Cambodian, however, no decision would be ratified without the assent of at least one international judge. Scheffer believed that this arrangement provided for an international veto over the actions of jurists from a judicial system that was widely distrusted while preserving a measure of Cambodian sovereignty. In fact, the term Extraordinary Chambers was chosen to distinguish this tribunal from the suspect Cambodian judicial system. The Courts of Cambodia portion of the formal name of the tribunal was a nod to Cambodian sensitivities about sovereignty and acknowledgment of the role Cambodian jurists would play in the trials.

In the three years that followed the establishment of the ECCC very little progress was made in establishing a basic administrative structure for the court. In 2006, David Tolbert, an American attorney who worked at the International Criminal Tribunal for the former Yugoslavia, examined the court in Cambodia and determined that, "it had no administrative leadership, particularly with respect to court management, including translation and interpretation, and the witness-protection program. The international side had had essentially given over judicial management to the Cambodian. The Cambodian staff in charge had virtually no knowledge or experience, and most had no judicial background. And yet there were a large number of them, hundreds in fact."¹⁸ Tolbert concluded that the court was in no position to conduct a trial. Two years after Tolbert's initial visit to Cambodia, there had been little progress in establishing a functioning court. In an effort to break a decade long stalemate, U.N. Secretary-General Ban Ki-moon appointed Tolbert as an assistant secretary general with the primary task of assisting in the establishment of a viable tribunal.

While the terms that eventually permitted the ECCC to convene and eventually to begin trials were worked out, the ten-year struggle between the U.N. and the Cambodian government over the terms and conditions of the tribunal was indicative of the widely divergent agendas each party held. Hun Sen and his government were determined to keep control of the tribunal in Cambodian hands. The determination of the Cambodian Prime Minister to retain control of the tribunal, can of course, be read in more than one way. The assertion that such an international tribunal would abridge Cambodian sovereignty is undoubtedly true. The U.N. and human rights advocacy groups did not believe that the Cambodian government had the competence or the integrity to conduct a series of trials. Also because of Cambodia's widespread and deserved reputation as one of the most corrupt countries in the world. International actors were convinced that they could only achieve their means by abrogating Cambodian sovereignty, though few people would make such a bold and direct assertion in public.

The scope of the ECCC was to become the major point of contention between the Cambodian government that wanted to limit the number of cases brought before the court and the U.N. human rights groups who favored an extensive series of trials. These controversies slowed the judicial process. A dozen years elapsed

from the conception of the tribunal to the beginning of the trial of S-21 commandant Duch in 2009. The main trial of the surviving members of the Khmer Rouge elite began in the summer of 2011.

Case 001: The Trial of Comrade Duch

The first trial held by the ECCC was that of Kaing Guek Eav, better known as Duch. As commandant of S-21, or the Tuol Sleng Prison, Duch presided over the torture and murder of at least 14,000 people.¹⁹ Most of those killed there were party and government officials who were victims of the Khmer Rouge's constant search for counterrevolutionaries, many of whom consistent with Maoist doctrine, were thought to reside within the ranks of the Communist Party of Kampuchea. Duch might seem an odd figure to be prosecuted first for no other reason than that he was born a least a decade later (1942) than the four defendants in the second and possibly last of the ECCC trials. Duch was also the least politically powerful person tried by the court. While the most horrific tortures preceded the murders committed at S-21, Duch was not a policy maker and held no national office in Democratic Kampuchea. Duch was the most hands-on killer among the defendants, but was not accused of formulating the policies perpetrated. While he was not a high-ranking official of the Khmer Rouge regime, it is important to note that Duch had been a committed member of the CPK for decades. He might have made the ideal first defendant because he was willing to confess to guilt on all the counts of the indictment against him. Also because of his role as commandant at S-21, it was much easier to attribute direct responsibility for crimes to Duch than to other officials who held diversified portfolios within the government and party during the reign of the Khmer Rouge.

Duch's trial began in March 2009 (the defendant had been incarcerated for a decade) and concluded when the tribunal rendered its guilty verdict and 35-year prison sentence in July 2010. (The sentence was later reduced to 19 years because Duch has spent 11 years in pre-trial detention and because this time in pre-trial detention exceeded the maximum time permitted by Cambodian law. After an appeal by the prosecutor Duch's sentence was changed to imprisonment for life.²⁰ Duch was charged with "crimes against humanity, enslavement, torture, sexual abuses, and other inhumane acts."²¹ At the outset of his trial, Duch accepted all 260 counts of his indictment. During the course of his trial Duch would often accept responsibility for various horrific actions that occurred at S-21. His two main objections to the charges against him were that, as someone not part of the governing cabal, he was only following orders; orders he was forced to obey to protect himself and his family. While attributing the main responsibility for the atrocities at S-21 to Pol Pot, Duch also was capable of admitting his own guilt, albeit as a subordinate of the regime "...Pol Pot was a murderer and more than a million people were killed under the hand of Pol Pot. At S-21, my hand is stained with the blood of the people killed there."²² Duch's testimony was, of course, offered as part of a defense strategy to present Duch as the exemplar of contrition in the hope of obtaining a measure of leniency. Given the evidence against him and the vile nature of his crimes, such a strategy was probably the only possible legal strategy that Duch could pursue.

Duch's trial included far more evidence about S-21 than was necessary to demonstrate his guilt. The adjudication of the charges against the defendant is, however, not always the sole or even the main purpose of genocide or crimes against humanity trial. Of greater importance may be the establishment of the record of crimes committed by the genocide perpetrators and the dissemination of these findings through the media coverage that a trial often attracts. For example, the trial of Adolf Eichmann in Israel in 1961 included extensive testimony about the Nazis' genocidal Final Solution even though Eichmann stated that he did not dispute the testimony presented about the crimes committed against European Jews by the regime he served. (Eichmann, as is well known offered the defense that he was following orders, the quintessential duty of a law abiding citizen.) One purpose of the Eichmann trial was to educate the world about the Holocaust, an event about which far less was known in 1961 when the Holocaust was not a widely discussed topic in academic circles or popular literature and media.²³

Duch's trial took an unexpected turn in November 2009 when Kar Savuth, his Cambodian attorney, asked that Duch be freed because he was not among those most responsible for the crimes committed during the KR era. Because no other mid-level officials would be tried, Duch's attorney argued that his client should be released rather than serve as a scapegoat for the crimes of the Khmer Rouge. This change of strategy led to the resignation of Francios Roux, his French attorney, who felt that the contrition strategy of the defense had been undermined by a point of law that should have been raised at the outset of the trial.²⁴ Because Kar Savuth had also served as legal adviser to Hun Sen there was speculation of government collusion with the defense team that led to the change in legal strategy by the previously submissive defendant. Kar Savuth's

assertion that Duch was the only non-elite KR cadre to be charged before the tribunal was, in an odd sort of way, consistent with the views expressed by Hun Sen and the court's Cambodian co-prosecutor both of whom opposed a large number of prosecutions. The only difference between the positions of Duch and Hun Sen was that Duch did not believe that any KR officials other than the elite should be prosecuted. Hun Sen was willing to accept that one mid-level cadre (Duch) should serve a prison sentence for crimes against humanity committed by the Khmer Rouge. Stephanie Giry claims that; by the end of Duch's trial; the Cambodian government, the Cambodian co-prosecutor, and Duch's Cambodian attorney were all in agreement as to the scope of the ECCC. All of these parties took positions that implied that there should be one additional trial, that of the four leading major figures from the KR regime, and that this proceeding should conclude the work of the Khmer Rouge Tribunal.

Case 002: The Trial of the Khmer Rouge Leadership

While there were turns and twists in the trial of Comrade Duch, the trial that followed it was bound to be immensely more complex. The leadership trial promised to be a lengthy one as it involved issues of responsibility for the genocide, atrocities, and other crimes committed by the KR government. The advanced age of the defendants raised concerns that one or more of them might not survive along trial. (As of August 2011 Nuon Chea and Ieng Sary were both 85 years old, while Ieng Thirith was 79 and Khieu Samphan was 80 years old). Some also noted that because of their advanced ages, that if convicted, the defendants were unlikely to serve a significant portion of the lengthy prison sentences they would probably receive (life imprisonment was the maximum sentence that the ECCC could impose on a convicted defendant). The case against the four defendants was further complicated in late August of 2011 when, Dr John Campbell of New Zealand, a medical examiner appointed by the Tribunal, testified that Ieng Thirith suffered "significant cognitive impairment" that was most likely due to Alzheimer's disease.²⁵ Dr. Campbell indicated that he thought it would be difficult for Ieng Thirith to participate fully in her defense and also recommended that she given a more extensive medical evaluation. In September the court announced that four additional physicians would examine Ieng Thirith in an effort to reach a more conclusive assessment of her mental state.²⁶ The case against Ieng Thirith was dropped in November, 2011 on the grounds that her dementia rendered her unfit to stand trial. The ECCC recommended that she be released from custody.²⁷ The number of defendants in the second trial was reduced to two when Ieng Sary died at age 87 in March 2014.²⁸

The indictments against Nuon Chea, Ieng Sary, and Khieu Samphan were identical and were excerpted on the ECCC website:²⁹

[...] is alleged to be responsible, through his acts or omissions (committed via a joint criminal enterprise), for having planned, instigated, ordered, or aided and abetted, or being responsible by virtue of superior responsibility, for the following crimes committed between 17 April 1975 and 6 January 1979:

- Crimes against humanity (murder, extermination, enslavement, deportation imprisonment, torture, persecution on political, racial, and religious grounds and other inhumane acts)
- Genocide, by killing members of the groups of Vietnamese and Cham
- Grave breaches of the Geneva Conventions of 1949 (willful killing, torture or inhumane treatment, willfully causing great suffering or serious injury to body or health, willfully depriving a prisoner of war or civilian the rights of fair and regular trial, unlawful deportation or unlawful confinement of a civilian)
- Homicide, torture and religious persecution, as defined by the Cambodian Penal Code from 1956

Ieng Thirith was subject to a similar indictment though with respect to the charge of crimes against humanity, she was alleged to have been guilty by having ordered such acts or having been guilty by "virtue of superior responsibility."³⁰ The text of the indictments and the powerful government and party positions once held by the four defendants would seem to dictate that this was the major trial of the ECCC for historical and legal purposes. Those concerned with the resolution of these matters for either purpose likely regretted that it took so long for the trial to arrive and that the defendants were at such advanced ages when the trial commenced.

The defendants raised objections to the proceedings and argued that they were not guilty of crimes against humanity, war crimes, or genocide. Three of the four defendants claimed that they were protected from prosecution by the ten-year statute of limitations of the prior Cambodian legal code. Ieng Sary claimed

that his trial by the ECCC was a case of double jeopardy because he had been tried in absentia and sentenced to death by the Vietnamese installed government of Cambodia. King Norodom Sihanouk pardoned him in 1996. On the basis of these prior legal developments, Ieng Sary claimed immunity from prosecution. As a practical matter, the procedural claims about jurisdiction, double jeopardy, and prior pardons were very likely to be overruled by the court which was constituted for the very purpose of trying defendants such as those that appeared before it in Case 002. Still, the various legal arguments about the legitimacy of the charges delayed the already very long judicial process in Case 002.

The political complexity of the ECCC proceeding was demonstrated again when Nuon Chea's three attorneys resigned saying that Cambodian government interference prevented them from presenting a vigorous defense of their client. The lawyers cited the refusal of sitting government ministers to respond to court summonses as a major impediment to their efforts to defend Nuon Chea. The lawyers' complaint was described as having a degree of merit according to an observer from the Open Society Justice Initiative. While the testimony of government ministers would not likely lead to an acquittal of Nuon Chea, the Hun Sen Regime had nothing to gain from testimony that would call attention to the roles that current government officials played in the Khmer Rouge government.³¹

Are Two Trials Sufficient?

One of the most contentious issues between the Cambodian government and international human rights groups, as well as many international prosecutors and judges, was the question of whether there should be additional cases pursued beyond Cases 001 and 002. Many transnational human rights organizations as well as international prosecutors and consultants serving at the ECCC wished to proceed with Case 003 which was widely believed to concern the actions of Meas Mut and Sou Met, who were respectively the heads of the Khmer Rouge Navy and Air Force. Both Meas Mut and Sou Met have been accused of being responsible for the deaths of thousands of purged KR cadres. Hun Sen consistently opposed any efforts to expand the scope of the ECCC beyond the five defendants in the first two cases. His statements on this matter were consistently unequivocal. In October 2010, Hun Sen told Ban Ki-moon that Case 002 would be the final ECCC trial and that further cases were "not allowed."³² Khieu Kanharith, a spokesman for the government, warned the ECCC foreign staff against pursuing further cases and said of these staff, "If they want to go into Case 003 or 004, they should just pack their bags and return home."³³ On the issue of whether there should be any trials after Case 002, there was no obfuscation by the Cambodian government.

The Cambodian Prime Minister argued that further trials would cause civil unrest and possibly civil war in the country. Hun Sen claimed that he would prefer that the ECCC fail in its mission rather than permit additional trials that would produce civil war.³⁴ His opposition to expanded proceedings by the tribunal was supported by Cambodian judges on the tribunal as well as Cambodian co-prosecutor Chea Leang, who had long been clear about her opposition to further trials. When international co-prosecutor Andrew Cayley said the alleged crimes in Case 003 had not been fully investigated and deserved further examination; his Cambodian counterpart did not support him. Disputing Cayley's assertion, Chea Leang argued that the suspects in Case 003 were not within the court's jurisdiction because they were not senior officials of the Khmer Rouge government and were not "most responsible" for the crimes committed from 1975 to 1979.³⁵

There was considerable speculation that a series of cases would result in many current Cambodian government officials being summoned as witnesses. It is worth recalling that Hun Sen himself was once Khmer Rouge official, albeit of low rank, before he defected to Vietnam.³⁶ The revelation that significant numbers of former KR cadres held positions in the government, while well known in Cambodia and among those who closely follow events in the country, would have been a source of some international embarrassment for Hun Sen's government. Since it is likely that a considerable number of Cambodians had served in the government in some capacity under the KR, there was probably some popular support in Cambodia for limiting the scope of the ECCC tribunals.³⁷ To the extent that Hun Sen secured the surrender of recalcitrant Khmer Rouge soldiers and leaders by informal pardons and classic political patronage, trials that exposed these dealings had the potential to destabilize the regime and perhaps, Cambodian society as a whole. For those benefiting from the status quo, there was nothing to be gained by extensive probing into the past actions of government officials on the part of the ECCC or anyone else for that matter.

Human rights advocates were adamant that Case 003 had to proceed if justice was to be done in Cambodia. Anne Heindel, legal advisor for the research organization Documentation Center of Cambodia,³⁸ argued that if the ECCC were perceived as capitulating to Cambodian government pressure by blocking

further investigation of Case 003, its credibility on Cases 001 and 002 would be suspect as well. In Heindel's words, "There's no way you can separate Case 003 out from what's come before."³⁹ In April 2011, the co-investigating judges of the ECCC, Sigfried Blunk of Germany and You Bunleng of Cambodia, announced they were closing their investigation with regard to Case 003. Citing political interference by the Cambodian government in the proceedings of the ECCC, Blunk resigned his position in October 2011.⁴⁰ Laurent Kasper-Ansermet of Switzerland, another international judge, resigned from the ECCC in March 2012. He asserted that his Cambodian colleague You Bunleng was blocking the court from investigating additional suspects.⁴¹

The decision not to proceed with further investigation of Case 003 was widely seen as a step towards the eventual closure of the case without any indictments of the suspects. Critics claimed that the judges conducted only a cursory investigation in the case and further alleged that political influence may have been brought to bear in a successful effort to forestall any action on the case. The Open Society Justice Initiative (OSJI), a U.S. based organization founded by George Soros, called for a U.N. investigation of the ECCC alleging that Case 003 raised issues of "judicial independence, misconduct, and competency."⁴² The OSJI statement also contained the stinging allegation that, "the court itself is on the verge of embracing impunity" for the various crimes of the Khmer Rouge.⁴³ Several members of the legal staff resigned from the ECCC to protest the decision to discontinue the investigation of Case 003. Among those resigning their positions at the tribunal was Stephen Heder, a prominent historian of the Khmer Rouge era based at the School of Oriental and African Studies at the University of London, who had served as a consultant to the investigating judges. In his resignation letter, Heder claimed that the ECCC judges' office was "professionally dysfunctional."⁴⁴ The judges were equally strident in a response to the resignations of court personnel, issuing a statement that welcomed the departure of those staff, "who ignore the sole responsibility of the co-investigating judges" with regard to Case 003.⁴⁵

It is also important to note that representatives of several western governments were non-committal on the issue of whether Case 003 should be pursued. Some responded by emphasizing the importance of Case 002. The United States Ambassador at Large for War Crimes Issues, Stephen Rapp, asserted his belief that the ECCC must be free of interference from the Cambodian government. Rapp also offered statements that, however, showed a degree of understanding for those who wished to limit the number of investigations and prosecutions. According to Rapp, "it's a question of the mandate, but it's also a question of resources as well. We expect people to be making decisions that you can't pursue every case. We want them to make them on a proper basis, with an understanding that resources are limited and they need to prioritize."⁴⁶ While such a statement is neutral on its face, it had to be disappointing to those who wished for more than two trials and viewed international pressure as the only means of achieving their objective. Hun Sen and others opposed to additional trials must have been pleased by the views of Rapp and others who took similar positions.

The ECCC and the Politics of Graft

In addition to other problems and controversies plaguing the tribunal, the ECCC was also the subject of allegations of corruption by Cambodian administrators in charge of the large court staff. In 2008, several employees alleged to U.N. staff members that they were forced to pay 30 percent of their salaries to their superiors to obtain and retain their positions. While the results of a subsequent U.N. investigation were not released to the public, a report for *Cambodia Tribunal Monitor* indicated that there was considerable evidence in support of the corruption allegations.⁴⁷ Moreover, the cost of the trial has consistently exceeded projections and the tribunal has seemed on many occasions to be on the verge of insolvency. Corruption and cost are not the main concern of a court conducting genocide trials, but in the case of the ECCC they contributed to an already growing perception of a court in disarray.

The allegations of cost overruns and outright corruption that have plagued the ECCC should come as no surprise to those who have followed Cambodia's pattern and practice in this regard. Stanford Journalism professor Joel Brinkley has argued that virtually every institution in Cambodian society is a site of bribery, blackmail, or embezzlement. Brinkley includes education, health care, natural resource extraction, the police, and judicial system as among the Cambodian institutions where kleptomania seems to be the reigning ethos. For good measure, Brinkley informs us that babies available for foreign adoption from Cambodia were often separated from their mothers by deceit, force, and in some cases, outright theft.⁴⁸ French journalist Francois Hauter vividly offers his view of Cambodia under Hun Sen, "The country has become a regime of organized pillage, a vast bazaar of plundered goods, a regional center for shady business of every kind: drugs, gambling, sex. The head of the national police, one of Hun Sen's closest associates, owns the largest brothel in the country. Many officials enrich themselves at the peasants' expense."⁴⁹

Transparency International (TI), an NGO that monitors private and public sector corruption, has long cited Cambodia as a society and a government replete with various forms of corruption. For example, in 2006 TI completed a national study that included some trenchant remarks about Cambodia. The report concluded, "The NIS Study of Cambodia found that corruption has pervaded almost every sector of the country. The payment of unofficial fees is necessary to secure any range of services, including medical care, education credentials and even birth certificates. A degree of political will for reform exists within the government, but the reality is that those in power have little reason to change a system that has secured them much power and personal wealth."⁵⁰ It should be no surprise that in a poor country with a corrupt government, a tribunal that dispenses large sums of money would find itself enmeshed in allegations of corruption. In fact one value of the ECCC to the government might well have been as a source of patronage and graft. In any event, the frequent allegations of bribery and waste further sullied the ECCC's reputation and could not have been helpful as it pursued its core mission.

Strategic Interests and International Influence in the Tribunal

If justice delayed is really justice denied then the Cambodian case is best viewed as justice largely denied. The Khmer Rouge regime, as has been mentioned previously, was deposed from power by the Vietnamese invasion of Cambodia in January 1979. By the time Case 002 against the four elderly Khmer Rouge officials began in the summer of 2011, the Khmer Rouge had been out of power for more than 32 years. Of course the strategic calculations of the Cold War kept the Khmer Rouge in the Cambodian seat at the United Nations until 1991. Because Vietnam was allied with the Soviet Union during the latter decades of the Cold War, China and the United States condemned the 1979 invasion and had no interest in pursuing judicial action against the perpetrators of the genocide in Cambodia.⁵¹ In fact, the official position of the United States was that the genocidal Khmer Rouge were the rightful rulers of Cambodia. The Vietnamese installed regime, while not democratic, ended the mass killings in Cambodia. The fact that the government that assumed power as a result of the Vietnamese invasion ended the genocide was not a major concern for those who believed that geopolitical considerations outweighed any human rights issues.⁵² Zbigniew Brzezinski, President Jimmy Carter's National Security Advisor, told journalist Elizabeth Becker that while the United States could not openly cooperate with someone as morally reprehensible as Pol Pot, the U.S. did encourage the Chinese and Thai governments to support the Khmer Rouge because it continued to resist the Vietnamese proxy government in Phnom Penh.⁵³ The very notion of bringing the Khmer Rouge leaders to trial was only possible with the collapse of the Soviet Union in 1991 and the subsequent reordering of global politics.

A number of political circumstances may lead to a rapid and seemingly comprehensive trial of defendants charged with genocide or other crimes against humanity. The most obvious case is that of the Nuremberg trials that followed World War II. Nazi Germany had been completely defeated militarily and was occupied by the four powers that conducted the first and, most famous of the tribunals. The vanquished Germans had absolutely no say in what would happen to leading Nazis in the immediate aftermath of the war. In 1945-1946, France, the Soviet Union, the United Kingdom, and the United States had a common interest in further vindicating their positions in the war by prosecuting leading officials from various institutions of the Nazi regime.⁵⁴ The International Military Tribunal (IMT) conducted the first trial of those labeled major war criminals. While not above criticism as victor's justice, the IMT was able to function quite smoothly because there was a general consensus among the occupying powers on trying those regarded as major figures in the various organs of the Nazi government.

An interesting contrast to the IMT is provided by the trial and ultimate fate of the defendants in the Einsatzgruppen trial conducted by the United States in 1947-48. The Einsatzgruppen were the mobile killing squads that murdered at least one million Jews by mass shootings, primarily in the Soviet Union (as it was constituted in 1941).⁵⁵ Twenty-four officers of the Einsatzgruppen were charged with mass murder and 22 of the defendants were found guilty of crimes against humanity. Fourteen of the convicted officers were sentenced to death by hanging and two others to life imprisonment. In the end, only four of the convicted leaders of the mass murder squads were executed (all in 1951), and as a result of commutations and pardons, all of the surviving convicted Einsatzgruppen leaders had been released from incarceration by 1958. Given the vast number of murders that these men had committed and the indisputable evidence of their personal guilt, all but four of them might be regarded as having in the end been treated with extreme lenience. The change in the treatment of Nazi officials convicted of even the most serious crimes is likely rooted in the imperatives of the Cold War. The Federal Republic of Germany (West Germany) had been established in 1949 and contained

about 75 percent of the German population. West German was an ally of the Western powers in their struggle against the Soviet Union and it was thought that too many executions and other harsh punishments of Nazi criminals would demoralize the German population that the United States wished to rally to its side as it confronted its former ally, the Soviet Union. International politics played a major role in determining the fate of the genocidal killers who commanded units of the *Einsatzgruppen*.⁵⁶

For human rights advocates to obtain the broader prosecution of genocide perpetrators in Cambodia they desired, there would have had to be a concerted effort by major powers to overcome the corruption and the strong resistance of the Cambodian government. It is not always necessary to have a deeply vested interest on the part of a powerful country or group of countries to operate a genocide tribunal, as the case of the International Criminal Tribunal for Rwanda (ICTR) demonstrates. In Rwanda, the exile Tutsi led Rwandan Patriotic Front (RPF) won the four year war against the Hutu government in 1994 and ended the three month long genocide perpetrated against Tutsis residing in Rwanda. After the war, the RPF had both the motive and the power to assist in a trial of Hutu perpetrators of the Rwandan genocide.

Another aspect of the terrible events of 1994 in Rwanda has not been placed before the ICTR. Credible research indicates that the RPF may have killed tens of thousands of Hutu civilians in the course of its struggle for power in Rwanda.⁵⁷ Still prosecutors, most notably Carla Del Ponte, failed in their efforts to gain cooperation from Rwandan President Paul Kagame (a Tutsi and former RPF military commander) and his RPF regime to pursue judicial actions against RPF officials who may have committed massacres of Hutus. Little international pressure was brought to bear on the recalcitrant Rwandan government. The United States and Britain were the two external powers with the greatest capacity to influence the Kagame government. While he argues that sympathy for the plight of the Rwandans and guilt about the West's indifference during the 1994 genocide generated support for the RPF, Victor Peskin claims that strategic calculations were a major factor in determining British and American policy with respect to the ICTR. In Peskin's words, "In light of their strategic goals in Rwanda, Washington and London had little interest in pressing the Kigali regime to cooperate with investigations of RPF atrocities. Nor did the United States have an interest in shining a spotlight on the wave of post-1994 RPF atrocities against Hutu genocidaires and innocent civilians who had fled to Congo."⁵⁸ Peskin argues that the RPF led Rwandan government was a major source of Anglo-American influence in the resource rich and strife ridden Congo.⁵⁹ The slaughter of Tutsis at the behest of Hutu Power advocates was indubitably the major component of the Rwandan genocide of 1994. ICTR prosecuted many of those directly responsible for the genocide of the Tutsis, but the political interests of various governments dictated the parameters of the trial.

Because roughly half of its national budget is derived from grants provided by foreign governments and international agencies, Cambodia is obviously vulnerable to a considerable measure of international pressure. Should donors care to exert influence on a matter such as genocide trials?⁶⁰ In the absence of any concerted and vigorous external pressure by major powers, the United Nations was unlikely to intervene in a forceful way. After the June 2011, resignation of Stephen Heder, a spokesperson for U.N Secretary General Ban Ki-moon issued a statement affirming the work of the ECCC and asserting its impartiality.⁶¹ Ban also denied that the U.N. had any role in instructing tribunal judges to not pursue additional cases.⁶² On the issue of whether there should be additional cases brought against anyone other than the five original defendants, Anne Heindel, legal advisor to the DC-CAM blamed the U.N. for not pressing for an expanded series of trials. According to Heindel, "The Cambodian government has been forthright all along that there would be no new trials...it's the failure of the United Nations to act that's been surprising."⁶³ Had she considered the motives and interests of nations such as the United States, China and Japan in Southeast Asia, Heindel might have been less surprised by the lack of U.N. support of a more expansive tribunal.

In a survey of Cambodia in 2010 written for an academic journal, Professor Heder noted that while relations with the U.N. remained fraught in 2010, Cambodia improved its standing with two of the world's major powers. The United States and Cambodia agreed on a plan to use Cambodian territory to train Asian troops for peacekeeping operations.⁶⁴ Margo Picken claims that counterterrorism training for Cambodian troops has been an increased focus of the U.S. government in recent years. In early 2012, Political scientist Kheang Un offered a similar view with regard to American interests in Cambodia "...the U.S. has shifted its Cambodian engagement from demanding respect for human rights and democracy to focusing on anti-terrorism, anti-drug trafficking, and countering China's influence."⁶⁵ While the United States might, in principle, be in favor of bringing justice to more perpetrators of the Cambodian genocide, such a matter ranked very low on the list of foreign policy concerns confronting the United States in the first eleven years of the 21st century.⁶⁶

China had a much more sustained and extensive relationship with the Cambodian regime than did the United States. Heder notes that between 2006 and 2010 China received approval for \$6 billion of investment in Cambodia. Among the most important of these Chinese investments was the development of hydroelectric power projects designed to increase Cambodia's capacity to export agricultural projects. There are, of course, benefits to both China and Cambodia in these deals.⁶⁷ In 2007, journalist Francois Hauter argued that the Chinese government supported and protected Hun Sen's corrupt regime in return for the right to develop Cambodian natural resources.⁶⁸

China also had a strategic interest in maintaining a cordial relationship with the Hun Sen government. China is involved in disputes with several other Asian nations about sovereignty over areas of the South China Sea, which is thought to contain large reserves of oil and natural gas. China and several other Asian nations claim sovereignty over the uninhabited Spratly Islands and their possible oil and gas deposits. Half the world's merchant shipping tonnage passes through the South China Sea. Perhaps hoping to check Chinese power in East Asia, U.S. Secretary of State Hilary Clinton stated that the resolution of territorial disputes in the South China Sea was in America's national interest.⁶⁹ China's commitment to modernize and expand the Cambodian port at Sihanoukville on the Gulf of Thailand should enhance China's capacity to project naval power into disputed regions and to assert this power in the event of a conflict that threatened vital shipping lanes including the extremely important Strait of Malacca.⁷⁰ Given its commercial and geo-political interests, there was no political imperative for the Chinese government to exhibit anything other than indifference to the ongoing battles over the scope of the ECCC trials. It is difficult to think of a country that has ever sacrificed what it perceived as vital national interests to promote something as insignificant to it as the ECCC trials were to China. (China's long history of support for the Khmer Rouge probably also helped make it a less than enthusiastic advocate of a comprehensive judicial airing of the crimes of Democratic Kampuchea.)

Picken describes Japan, a major donor to the ECCC, as generally supportive of Hun Sen and the CPP.⁷¹ As a nation competing with China for influence in the region, there is no real political or economic incentive for the Japanese government to pressure or antagonize the government of Cambodia by engaging in disputes about the number of trials that should be held for former Khmer Rouge officials.

With Cold War tensions long gone and Vietnam far more concerned about its much larger regional rival, China, the relationship between Cambodia and Vietnam has grown stronger as commercial ties deepened. In 2009, Vietnam reached an agreement with Cambodia, which would permit the Vietnamese to grow about a quarter million acres of rubber in Cambodia.⁷² By 2010, trade between Cambodia and Vietnam totaled \$1.2 billion.⁷³ Given the prospect of further commercial agreements between the two nations, there was little reason for the Vietnamese to pressure Hun Sen into proceeding with a trial in any direction that he did not wish to permit as he maneuvered through and around the long enduring ECCC negotiations and trials.

Vietnam's main geo-political interest was defending its claims to portions of the South China Sea. There was little political or economic incentive for the Vietnamese government to disrupt its relationship with Cambodia by concerning itself with the trial of the elderly leaders and other functionaries of a regime it had driven from power more than three decades ago, especially when the Hun Sen government was seen as a close partner of Vietnam.

Beyond Guilt and Innocence: The ECCC and Regime Change

To some human rights organizations the trial of fact and law with regard to Khmer Rouge defendants was a secondary purpose of the Cambodia Tribunal. Duncan McCargo argues that retributive justice is one of only several goals that some external NGOs have for the ECCC.⁷⁴ (Retributive justice in the Cambodian context is simply punishment for those guilty of atrocities and genocide during the reign of the Khmer Rouge). McCargo suggests that international organizations and advocacy groups had a number of objectives including the far reaching objective of incremental regime change.

One of these goals was to provide an example of a well-run trial in a nation where according to a study by the Nordic Institute for Asian Studies, many criminal trials lasted less than 20 minutes. It was hoped that the ECCC would have a contagion effect that would improve the Cambodian criminal justice system. Closely related to the goal of transforming the judicial processes of Cambodia was the aim of altering the culture of impunity that allowed powerful people to plunder, steal and literally get away with murder in Cambodia. Some analysts and advocates argued that the source of this lawlessness by the rich and powerful was rooted in the fact that the Khmer Rouge leaders had never been punished for their crimes. The hope was that the imposition of legal processes and punishment against key Khmer Rouge cadre would undermine the culture of impunity in Cambodia.⁷⁵

The ultimate objective of some human rights advocates was indeed gradual regime change. The obstacles to achieving this very ambitious objective were at once enormous and should have been obvious from the outset of the process of establishing a tribunal. The Hun Sen CPP government was, as evidenced by its conduct over more than a decade, interested in a far less expansive outcome. (In any nation the incumbent regime is not likely to be interested in regime change). The conditions that the Cambodian government was able to place on the various aspects of the ECCC meant that from the outset of the proceedings broad transformative goals were unlikely to be achieved. The lack of a sustained commitment to goals as far reaching as judicial process contagion or transforming the entire Cambodian political system by any nations possessing global or regional power, made achieving such ambitious aims a virtual impossibility from the outset. (Regime change is, of course, by no means guaranteed even when there is much greater international commitment than was evident in Cambodia.)

Politics, Justice, and Genocide Tribunals

The question of legal, political, and moral responsibility for genocide is always enmeshed in various political and strategic calculations. The case of Turkish government denial of the Armenian genocide is quite well known and a good example of the politics of genocide recognition. While there is, of course, no possibility of holding a trial, in the traditional sense, for perpetrators of a genocide that occurred in 1915, the government of Turkey has not been willing to admit that there was a genocide of the Armenians residing in Anatolia⁷⁶. Some foreign governments have geopolitical motives that inhibit criticism of official Turkish unwillingness to acknowledge what is now a well-documented genocide. For example, the United States has been allied with Turkey; a member of NATO since 1952, for several decades and the U.S. government has been unwilling to officially use the word genocide when referring to the fate of the Ottoman Armenians. The State of Israel has long refused to use the term genocide in reference to the fate of the Ottoman Armenians. Israel has, until quite recently, had quite close relations with Turkey.⁷⁷ This relationship was especially important to Israel because Turkey has a 98 percent Muslim population. Neither Israel nor the United States was prepared to place strategic interests at risk for the goal of recognizing an historical truth.

Genocide in the past or present may also be neglected out of indifference rather than strategic calculation. At most times, small countries like Cambodia do not figure all that prominently in the concerns of politicians and foreign policy elites in many countries. In the summer of 1991, the administration of President George H.W. Bush was little concerned about events in the Balkans as the region descended into communal violence. Secretary of State James Baker's view of the United States' role in attempting to resolve the deadly conflicts that erupted after the disintegration of Yugoslavia in 1991 was captured by his remark that, "we do not have a dog in this fight."⁷⁸ As for the president, National Security Advisor Brent Scowcroft reported that, "The President would say to me once a week: 'Tell me again what this is all about.'"⁷⁹ Even a president with a long resume in foreign policy and a noted preference for acting in the international rather than the domestic policy arena, was not easily engaged by the outbreak of ethnic violence in the former Yugoslavia.

In an opinion piece in *The New York Times* in 2010, Professor Ear gave his bitter assessment of the trial to that date. "Plagued by corruption, the tribunal was essentially hijacked to advance domestic and international political agendas. For domestic politicians...to reduce its scope by limiting the number of individuals it could indict (five) while currying international favor addressing, superficially at least, crimes against humanity... Cambodians have learned their lesson: Don't believe in international promises; they are not kept."⁸⁰ While it would be difficult to argue against Ear's moving conclusion, his findings are not so surprising. Politicians on the national and international stage acted largely in their own self and national interests with regard to the ECCC. It would have been quite shocking if much political capital had been expended on overcoming Cambodian government resistance to a series of trials of leaders of a genocidal government that had been deposed three decades ago. The Cambodian genocide trials are hardly the first time that the imperatives of realpolitik triumphed over concerns for truth and justice in matters of genocide and other mass killings.⁸¹ The Khmer Rouge Tribunal is also unlikely to be the last time such hard political calculations trump the desires of victims for more comprehensive justice.

End Notes

1. The prominent Cambodia scholar Ben Kiernan calculates that between 1.671 million and 1.871 million people perished as a result of Khmer Rouge policies. Ben Kiernan, "The Demography of Genocide in Southeast Asia: The Death in Cambodia, 1975-1979 and East Timor, 1975-1980." *Critical Asian Studies*, 35(4), 2003, 585-598.

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4. The last years of the Khmer Rouge are discussed in David Chandler, *Brother Number One: A Political Biography of Pol Pot*, revised edition. (Boulder: Westview Press, 1999).
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17. Langran, "Cambodia in 1999."
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Cambodia's Curse: the Modern History of a Troubled Land, **by Joel Brinkley, New York: Public Affairs Books, 2011. 386 pp.**

Reviewed by Donald W. Beachler

Professor, Politics Department, Ithaca College

Joel Brinkley, a Pulitzer Prize winning journalist, former *New York Times* reporter, and Stanford University professor, has written a book on Cambodia that is every bit as gloomy as its title and subtitle indicate. The small Asian country has been afflicted by war and genocide and their traumatic aftermaths. In recent decades Cambodia has been beset by frequent political strife that has turned violent at times. The nation is so riddled with corruption that Brinkley reports that \$18 billion dollars in foreign aid has done little to alleviate the suffering of impoverished Cambodians who constitute a large majority of the population. Cambodia has one of the highest rates of domestic violence in the world and it is a major center of sex tourism for pedophiles. While Brinkley provides interesting reporting and analysis on all these matters, this review will focus on concerns most likely to interest readers of *Genocide Studies and Prevention* - his extensive coverage of issues related to the Cambodian genocide.

The chapter of *Cambodia's Curse* that may be of greatest interest to readers of this journal is the 25-page narrative that Brinkley provides on the Khmer Rouge Tribunal officially known as the Extraordinary Chamber in the Courts of Cambodia (ECCC). The establishment of a tribunal was a long and convoluted process that involved a measure of international pressure and a considerable degree of resistance from the government of Prime Minister Hun Sen. The issues that complicated the process, which eventually resulted in the trial of some Khmer Rouge leaders, are explained well. Brinkley writes about the trial of Comrade Duch who was in charge of the notorious Tuol Sleng (S-21) detention center where perhaps 15,000 prisoners were murdered after undergoing horrific torture. As delineated in an article in this issue by this reviewer, the ECCC also indicted the four highest-ranking members of the Khmer Rouge regime. Brinkley does an excellent job of analyzing the political motives of the Hun Sen regime in delaying the trial and in limiting the number of defendants who could be tried. The reader comes away with the distinct impression that this is a court that most of the world simply did not care about, and of those who did care, most preferred that it not exist. In any event, Brinkley's chapter on the Khmer Rouge Tribunal is indispensable reading for anyone wishing to understand the contentious politics of the genocide trials.

Brinkley informs the reader about a topic that has received little attention in the popular press when he discusses the lasting psychiatric impact of the Khmer Rouge years on large segments of the Cambodian population. Brinkley references academic research that claims that millions of survivors suffer from Post Traumatic Stress Disorder (PTSD). According to a study cited by psychiatrist Muny Sothara, a survey in Kampong Chan province indicated that 47 percent of the residents suffered from PTSD or other psychotic disorders. Muny Sothara and California psychologist Nigel Field both claim that parents often pass PTSD to their children.

Brinkley cites the work of professional researchers on topics such as PTSD, noting that quotes without reference refer to personal interviews he conducted. Still, when Brinkley cites someone discussing academic research on important matters, it would be helpful to have some reference to the relevant materials. Furthermore, while this is a work of journalism rather than an academic treatise, it would be useful to have a citation that would allow the reader to follow up on assertions made by various scholars. Indeed, the entire book would do with more bibliographic material. The bibliography at the back of the book consists of a list of 14 books and contains no works by noted scholars of the Khmer Rouge such as Ben Kiernan or Steve Heder. David Chandler's important book on S-21 and his biography of Pol Pot are also not included in the bibliography. Readers coming to some of these topics for the first time would especially benefit from a more robust list of sources.

Other parts of the book that concern the rise, reign and fall of the Khmer Rouge will be familiar to those who have some knowledge of this horrific era in Cambodian history. The skepticism about claims of Khmer Rouge atrocities (during the years the Cambodian Communists were in power) held by many critics of U.S. military involvement in Indo-China is discussed as is the support offered by the U.S. government for the

Khmer Rouge regime after it had been driven from power by Vietnam in 1979. For American policy makers, Cold War strategic calculations clearly trumped any concern for human rights. These issues will be interesting to the general reader while those versed in the politics of this era will find little that is new.

Brinkley recounts the role of Norodom Sihanouk and his successor, the American ally, Lon Nol, in helping to create conditions that facilitated the ultimate triumph of the Khmer Rouge. Brinkley departs from those who are inclined to absolve Sihanouk from responsibility for the horrors that befell Cambodia from 1975 to 1979. He rejects the views of William Shawcross on the impact of American bombing of Cambodia, expressed in the well-known book, *Sideshow: Nixon, Kissinger, and the Destruction of Cambodia*. While not absolving Lon Nol and the U.S. of all blame for the rise of the Khmer Rouge, Brinkley holds Sihanouk more responsible by arguing that, when the deposed prince allied with the Cambodian Communists and advocated that his former subjects support them, he set Cambodia on the road to genocide.

It is when he deals with controversial issues, such as the impact of American bombing, that Brinkley's lack of sourcing detracts from the power of his book. He claims that "more recent scholarship has suggested that the American bombing for all its wanton, deadly results, so disrupted the nation that it delayed the Khmer Rouge's ultimate victory until after the B-52 campaign had ended in August, 1973." (p. 32). Brinkley is essentially claiming that scholarship indicates that it was the halt in the U.S. bombing, a goal of American leftists and liberals (a group to which Brinkley claims to be a quondam member) that permitted the final victory of Pol Pot and his murderous comrades. Yet, the curious reader in search of this scholarship will receive no help at all from Brinkley - for there are no references to support his claims about revisionist scholarship on the impact of American bombing. Surely, when dealing with such a controversial matter, mere assertion does not suffice as proof.

Despite this reviewer's reservations about the lack of adequate sourcing of some claims offered by Brinkley, this book is a valuable read for those interested in modern Cambodia. The insightful presentation of the political and social context of present legal and political efforts to deal with the ongoing impact of the killings of the 1970s make this book a valuable resource for those concerned about the fates of the perpetrators and victims of the Cambodian genocide.

**War, Genocide and Justice: Cambodian American Memory Work,
by Cathy J. Schlund-Vials, University of Minnesota Press 2012, 243 pp.**

Reviewed by Amy Fagin
20th Century Illuminations

For Cambodian Americans, the challenges of identity, as individuals and community, whose recent past embodies the societal fragmentation and the trauma of war, genocide and relocation is the raw material for “memory work” in Cathy J. Schlund-Vial’s publication *War, Genocide and Justice: Cambodian American Memory Work*.

This volume brings to the forefront the deep reckoning with history and memory manifest through the intimacies and perplexing challenges faced by the “1.5 generation” of Cambodian Americans through contemporary cultural expressions in film, literature, rap music and dramatic performance.¹ The thrust of Schlund-Vials’ theoretical framework is revealed through her analytical treatise of these forms of cultural expression, which she evaluates in couched terms as an “attempt to remember a history of U.S. imperialism, Khmer Rouge authoritarianism, and involuntary refugee dispersal.” The clarity and depth of critical analysis that Schlund-Vials attends to with each example is impassioned, thorough, multi layered and illuminating for the otherwise uninitiated reader to the complexities and trials of survivors and their descendants in the Diaspora of the “Khmer Rouge Reign of Terror.”

The introduction sets the stage for the content of the work as an “interdisciplinary investigation into how Cambodian American cultural producers analogously (yet divergently) labor to rearticulate and re-imagine the Killing Fields era vis-à-vis three distinct and unfixated modes of negation: dominant-held erasures, refugee-oriented ruptures, and juridical open-endedness.” Schlund-Vials lays out, in no uncertain terms, the “problematic terrain” of justice in contemporary, post genocide Cambodia (and American geopolitics) through a provocative recapitulation of the political dynamics of the current Cambodian administration as well as the various US government administrations’ “politicized memory of a preventative humanitarianism” that “revises the script of the Vietnam War era to fit a humanitarian, not militaristic, end.”

The revelations in the first chapter, entitled “Atrocity Tourism” enlightens the reader to the “juridical mode of collected memory fixed to Vietnamese-oriented statecraft” in the critical analysis of the *Tuol Sleng Prison and Choeung Ek Killing Fields* which, in Schlund-Vials’ compassionate observation, “fail to provide Cambodians with viable spaces for commemoration.” And more egregiously have become a “place where they use the bones of the dead to make business.” So begins Schlund-Vials’ quest for “contemplative commemoration: (through) Cambodian American memory work.”

The next chapter sets out on a crossing of sophisticated and politically revelatory chronicling of two American-produced cinematic portrayals: The Academy Award winning film *The Killing Fields* (Roland Joffe, director) and *New Year Baby* (Socheata Poouv, author). Joffe’s film, and the back-story of the friendship between American journalist Sydney Schanberg and Dith Pran, former U.S. Army translator turned foreign press assistant is, on its surface, “a story of two friends separated by (the realpolitik of) forces beyond their control”. But under Schlund-Vials’ tenacious scrutiny the “reframing” of failed U.S. policy in South East Asia, through this film, is transformed into an “exceptionalist narrative of reunion, salvation and redemption [through a] master narrative of cold war victimhood” that reconciles American military aggression through the trauma and redemption of the friendship, “forged in the interstices of war...literally screened, strategically staged and tactically projected by way of guilt, apology and reconciliation.” Poouv’s autobiographical film, based in the “Cambodian American present” is portrayed sympathetically as a “documentary-reliant on survivor memory instantiated by intergenerational inquiry (which) militates against familial silences and strives to connect survivors and their children by way of historical reclamation, collected family stories, and collective remembrance.” Schlund-Vials’ understandably impassioned assessment of *New Year Baby* is nonetheless accurate and deeply instructive. In fact, the contextual structure for evaluation of *New Year Baby*, a restructuring of an “unfinished memory work that grapples with intergenerational, familial silences and... partial knowledge of this past” serves as the template for exploration in the following chapters, that is, to “rationalize contemporary family frames” (through Cambodian American Memory Work) of the “1.5 generation” of Cambodian Americans.

Chapter 3 investigates “Cambodian American Life Writing” through the publications and reception politics of Loung Ung’s memoir: *First They Killed My Father: A Daughter of Cambodia Remembers* and Chanrithy Him’s memoir: *When Broken Glass Floats: Growing Up under the Khmer Rouge*. This moving chapter expresses the “anti-forgetting...labor of (Cambodian American) memory to expose catastrophic U.S. policy, lay bare international indifference, and underscore contemporary juridical inaction.” A clear rebuilding of identity of the Diaspora Cambodian American survivor evolves through this chapter, which masticates the constructs and narratives of each work. The directive of Schlund-Vials in-depth considerations of Cambodian Life Writing, in this chapter is aimed at remembering the “politics of representing mass-scale loss... and the necessarily politicized act (of the memoir) that break(s) potent silences...in a largely un-reconciled milieu of competing national agendas (in the U.S and Cambodia).”

Chapter 4 crafts the fascinating trajectory of Cambodian American Hip Hop artist Prach Ly aka praCh’s up-bringing in “Cambodia Town” Long Beach California and the transnational strength of his lyrics and musical compositions. Schlund-Vials expression and analysis of praCh’s career and work “emblematically remembers a fractured genocidal history, a forgotten post conflict imaginary, and a ruptured Cambodian-American selfhood” and is decidedly upbeat. “Locating Who We Are and Where We Came From” develops thematically through clear and inspiring explorations of several albums; the lyrics and remix of traditional Cambodian musical instruments through original, contemporary compositions. Schlund-Vials predicates on praCh’s work which traces the “rapper’s evolving Cambodian American consciousness...and restive potential of Cambodian American selfhood.”

The epilogue chapter narrates the creative work of poet / performer/ visual artist Anida Yoeu Ali’s epic composition “Visiting Loss” which, in Gordon Fraser’s words: “employs a stream-of-consciousness narration evident in en-jambéd lines, imagistic stanzas, and affective vignettes” and engages the central aims of Cambodian American memory work that “brings into dialogue genocide remembrance, collected memory and juridical activism.” Consecutively the installation “Palimpsest for Generation 1.5” activates the performance of Ali’s back as canvass upon which “intergenerational grievances are inscribed and summarily erased.” Through dress, gesture, and erased inscription, the performance artistry of Ali is an act of “re-memory” reminiscent of “nineteenth-century American slave narrative” that re-assembles a “communal memory without the luxury of justice at the level of the nation-state.” This potent closure to *War, Genocide and Justice: Cambodian American Memory Work* succinctly expresses the impactful narrative of this revelatory volume of the legacy of the Khmer Rouge era on today’s Cambodian Americans. Their contributions to contemporary society, on an international scale, and woven from the raw material of “memory work” have undoubtedly added vital contributions to the color, texture and weave of the fabric of remembrance in the face of annihilation.

End Notes

1. The term **1.5 generation** refers to people who immigrate to a new country before or during their early teens.

***Genocide and the Geographical Imagination:
Life and Death in Germany, China and Cambodia,***
by James Tyner, Plymouth: Rowman and Littlefield Publishers, 2012,
181 pp. US \$49.95 (hbk)

Reviewed by Jeff Stonehouse
University of British Columbia

Genocide and the Geographical Imagination: Life and Death in Germany, China and Cambodia is James Tyner's most recent scholarly contribution to a relatively undeveloped niche of comparative genocide studies. Previously only a smattering of journal articles¹, the odd book², and a special issue of the journal *Space and Polity*³ have attempted to merge the concept of genocide with the discipline of geography. Tyner has recognized this conceptual vacuum, seeing it as an opportunity to probe genocides and unravel the "spatial stories" they represent. His first book length attempt looked at a single case of genocide from a geographic perspective in *The Killing of Cambodia: Geography, Genocide and the Unmaking of Space*.⁴ Here he first develops the notion of the "geographic imagination."

His stated thesis in *Genocide and the Geographical Imagination* is that, "mass violence results from the imposition of state sanctioned normative geographical imaginations that justify and legitimate unequal access to life and death."⁵ In other words, genocide and other exterminatory policies are conducted through a spatially oriented framework, or geographic imagination. Tyner argues that through the various mechanisms of the sovereign state, who is allowed to live and who must die are both determined via a process of valuation.

This process is informed, Tyner emphasises, by geographic considerations. As such, his purpose here is to discern what genocide might say about sovereignty and the spatiality of life and death. He defines spatiality as "the purposefully organized space of social interactions." By introducing the notion of sovereignty to this mix Tyner hopes to draw our attention to how the geographic imaginations of the sovereign state are manifested in the day-to-day lives of the subject populations. In addition, staying true to his thesis, he wants to show how particular valuations of human lives are informed by these geographic imaginations. He describes how the various spatial practices of sovereignty impact a population's continued physical existence, be it by allowing it to live, by outright killing, or by 'letting it die.' With these ends in mind, Tyner looks at three cases of genocide: Germany, China and Cambodia. He wants to focus upon "the practices [...] by which governments rule and regulate, discipline and control, the populations within their territorial domains."⁶ Stated differently, Tyner wishes to chart the habits and patterns of a sovereign's valuations that determine life or death.

In the second chapter, Tyner reckons that, "The Holocaust was composed of *state sanctioned* violent practices that stemmed from a basic geographic imagination: to construct a pure living space for one population through the elimination of another population."⁷ Racial and geopolitical theories on eugenics and lebensraum undergirded a system of valuation which, through the mindset of a particular geographic imagination, determined who might live and who must die. This leads, Tyner argues, to a, "geopolitically informed eugenics policy [that] demanded the identification of 'inferior' and 'degenerate' bodies, those whose lives threatened the security of race and state."⁸

Tyner uses the early years of the Nazi regime to argue that laws such as the Marital Law and the Sterilization Law were initial attempts to determine who was to be included and excluded from the German *volk*. Gradually the emphasis on sterilization was refocused onto euthanasia, first of defective infants and children, then to adults not considered worthy of living. Tyner affirms that, "This valuation of life, however, was not directed at any given individual, but rather at populations — entire groupings of people: the mentally ill, the physically deformed, homosexuals, criminals, the Sinti and Roma, the Jews." Tyner traces the evolution of Nazi valuations of life and death from sterilization to euthanasia and beyond, whereupon, death camps emerge as "the endpoint of a series of policies, programs, and practices that all revolved around the Nazis' will to *lebensraum*."⁹

Tyner next moves on to the famine in China (1958–1961). He acknowledges that the Famine is both legally and academically a contested example of 'genocide.' He counters that "identifiable policies and practices initiated by the state" created the famine, and resulted in the deaths of tens of millions through starvation. They were not directly slaughtered, as in the Nazi case, but 'allowed' to die. The core of his argument is that the policy of "letting die" is the moral equivalent of direct killing. In China, while the state did not directly

cause the deaths of those who died of starvation, it was still morally culpable because it knowingly allowed people to die.

Mao attempted to build a communal utopia framed by a particular geographic imagination. To implement these plans, Mao introduced a series of structural conditions that substantially contributed to the famine, including the communes and collectivization, the wasteful backyard smelting and ruinous engineering programs. It is through this particular geographic imagination, and the policies through which it was enacted, that day-to-day decisions of life or death were made. In addition, Tyner contends that there was a 'culture of impunity' in Chinese social relations. This resulted in the collective blame for the pain and suffering of the peasantry being attributed, not to the state, but back upon the peasantry. The deaths from starvation, say apologists for the state, were the result of "irrational peasant behavior" specifically resulting from hiding food, overeating or lying to authorities on production output. Tyner shows how through this particular geographic imagination millions died due to starvation, or were allowed to "let die," a theme he continues into the final chapter.

The final case that Tyner focuses upon is Cambodia and this chapter draws substantively on his previous writings and experiences. He reiterates much of his argument from *The Killing of Cambodia* and focuses upon the "erasure" of Cambodia and the "writing" of Democratic Kampuchea. In brief, Tyner argues that the Khmer Rouge aimed to erase all vestiges of society from before Angkor [Angkor refers to the communist state while "Angkor" is the historical kingdom.] and in its place impose, through their own geographic imagination, a new revolutionary space. Next, Tyner identifies the promotion of social conformity through practices of violence that are based upon a system of moral inclusion and exclusion. Those who expressed difference were eliminated outright, just as in the Nazi case. Alternately, as he discussed in reference to the famine in China, those populations were "allowed to die."

At times it seems as though we can sense Tyner's enthusiasm from having discovered uninhabited conceptual territory. Tyner's heavy use of post-modern/post-structuralist theorists may be reflected in this enthusiasm, as in the course of the book he presents an avalanche of intermingling concepts that occasionally emerge as confusing, overlapping or occasionally lacking a clear empirical referent. While poststructuralist language definitely serves to shed light upon previously unrecognized vistas, Tyner brings forth too many imported ideas at once. Conversely, his chapter conclusions are very concise and the use of post-structuralist concepts mostly absent. These concluding paragraphs would have been an ideal location to tie together and make sense of the numerous ideas Tyner discusses in relation to the evidence provided. In addition, conspicuously absent from the chapter conclusions are attempts to tie both theory and the history back to the notion of the geographic imagination. Moreover, there is little effort to systematically compare the various geographic imaginations. While rigorous comparison was not his explicit purpose, it would have served to show the value of the geographic imagination as an analytical tool that could be used to interpret and understand other instances of genocide.

These are, however, small flaws and Tyner ought to be applauded for his enthusiasm and his courage. Very few scholars have given consideration to genocide's conceptual terra nullius and Tyner has approached this uncharted territory with alacrity and a keen sense of direction.

End Notes

1. Examples include: W. B. Wood, "Geographic aspects of genocide: a comparison of Bosnia and Rwanda," *Transactions of the Institute of British Geographers*, 26(1), pp. 57–75. and C. Dahlman, "Geographies of genocide and ethnic cleansing: the lessons of Bosnia–Herzegovina," *The Geography of War and Peace: From Death Camps to Diplomats* (New York: Oxford University Press, 2004), pp. 174–197.
2. For instance, Allan Cooper, *The Geography of Genocide* (Lanham: University Press of America, 2009).
3. See for instance the special issue of *Space and Polity* Volume 13, Issue 1, 2009 focused on the 'Geographies of Genocide.' Significantly, Tyner also contributes a thematically related piece.
4. James Tyner, *The Killing of Cambodia: Geography, Genocide and the Unmaking of Space* (Hampshire: Ashgate Publishing, 2008).
5. Tyner (2012), 25. Italics in original.
6. Tyner (2012), 18.
7. Tyner (2012), 35. Italics in original.
8. Tyner (2012), 43.
9. Tyner (2012), 70.

Authors Biographies

GSP 8.2

Alexander Hinton is Director of the Center for the Study of Genocide and Human Rights (<http://www.ncas.rutgers.edu/cghr>), Professor of Anthropology and Global Affairs, and UNESCO Chair in Genocide Prevention at Rutgers University, Newark (<http://www.ncas.rutgers.edu/unesco-chair-genocide-prevention>). He is the author of the award winning *Why Did They Kill? Cambodia in the Shadow of Genocide* (California, 2005) and nine edited or co-edited collections, *Colonial Genocide in Indigenous North America* (Duke, forthcoming in 2015), *Mass Violence: Memory, Symptom, and Response* (Cambridge, forthcoming in 2015), *Hidden Genocide: Power, Knowledge, Memory* (Rutgers, 2014), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (Rutgers, 2010), *Genocide: Truth, Memory, and Representation* (Duke, 2009), *Night of the Khmer Rouge: Genocide and Democracy in Cambodia* (Paul Robeson Gallery, 2007), *Annihilating Difference: The Anthropology of Genocide* (California, 2002), *Genocide: an Anthropological Reader* (Blackwell, 2002), and *Biocultural Approaches to the Emotions* (Cambridge, 1999). He is currently working on several other book projects, including a book on the Khmer Rouge Tribunal. In recognition of his work on genocide, the American Anthropological Association selected Hinton as the recipient of the 2009 Robert B. Textor and Family Prize for Excellence in Anticipatory Anthropology. He was recently listed as one of Fifty Key Thinkers on the Holocaust and Genocide (Routledge, 2011) and is also the immediate past President of the International Association of Genocide Scholars (2111-13). From 2011-13, Professor Hinton was a Member/Visitor at the Institute for Advanced Study at Princeton. For more information visit <http://www.ncas.rutgers.edu/center-study-genocide-conflict-resolution-and-human-rights/alex-hinton>

Donald W. Beachler (PhD Cornell) is an Associate Professor of Politics at Ithaca College. Professor Beachler has also taught courses and written journal articles in the field of genocide studies. In 2011 he published the book *The Genocide Debate: Politicians, Academics, and Victims* (Palgrave Macmillan). In addition to co-authoring two books on American presidential elections in 2004 and 2008, he has published journal articles and book chapters on many aspects of American politics and public policy. He has also taught courses that cover the roles of business and labor in the political system of the United States.

Amy Fagin is a U.S. based visual artist specializing in the traditional art form of manuscript illumination. Her body of work has forged a meta-modernist contribution to the materials, techniques and theoretical principals used in manuscript illumination as a re-mediated visual art form for contemporary consideration. She is author of *Beyond Genocide*; an emerging series of contemporary illuminations narrating a visual arts perspective on global historical legacies of genocide and mass annihilation. *Beyond Genocide* is designed as a universally accessible visual arts experience. Ms. Fagin is also an independent scholar in genocide studies and conducts research, seminars and advisory work on global initiatives of memory and memorialization through individual and collective arts expression and the museum experience.

Elena Lesley-Rozen has worked as both a researcher and journalist in Cambodia. She first came to the country in 2004 on a Henry Luce Scholarship, reporting for *The Phnom Penh Post*, and returned in 2008 on a Fulbright to write and blog about the Khmer Rouge tribunal. Most recently, she conducted research in the country for her master's thesis, a comparative study of memorialization in Cambodia and Rwanda. Lesley-Rozen has a BA from Brown University in Political Science and an MS from Rutgers University in Global Affairs. She works as a research specialist at a center run through Princeton's Woodrow Wilson School and will begin working toward her PhD in Anthropology at Emory University starting the fall of 2014. Lesley-Rozen also serves as Publications Coordinator for the Center for the Study of Genocide and Human Rights at Rutgers.

Helen Jarvis holds both Australian and Cambodian nationality. She has worked on issue relating to genocide in Cambodia since the mid-1990s. From 1994-2001 she was Consultant on Documentation for Yale University's Cambodian Genocide Program; since 1999 she has worked with the Cambodian Task Force for the Khmer Rouge Trials; between 2006 and 2010 she was Chief of Public Affairs and then Chief of the Victims' Support Section at the Extraordinary Chambers in the Courts of Cambodia (ECCC). She was a member of the panel of judges at the December 2013 People's Tribunal on Sri Lanka in Bremen, Germany, dealing with the crime of genocide against the Eelam Tamils. Her publications include *Getting Away with Genocide? Elusive Justice and the Khmer Rouge Trials* (co-author with Tom Fawthrop), the Cambodia section of ABC-Clio's *Modern Genocides* database, the *Cambodia* volume in the World Bibliographical Series; and 'Mapping Cambodia's "killing fields"', in *Materiel Culture: the archaeology of 20th century conflict*.

Jeff Stonehouse is a graduate student from the University of British Columbia. He is presently working on his MA thesis on the strategies of mass violence in Rwanda and is studying under the supervision of Professor Adam Jones.

Kosal Path is Assistant Professor of Political Science at Brooklyn College, City University of New York. He received his Ph.D. in International Relations from the University of Southern California (USC). He was lecturer of international relations at USC (2009-2011). In 2011-2012, he was a research fellow at the Center for Khmer Studies & the USC Shoah Foundation Institute. Between 1997 and 2000, he served as Deputy Director of the Documentation Center of Cambodia, a Phnom Penh based research institute, which houses the world largest archive on the Khmer Rouge regime. His current research focuses on two specific topics: the triangle relations between China, Vietnam, and the Soviet Union during the Cold War; and social rehabilitation in post-genocide Cambodia.

Randle DeFalco holds a JD from Rutgers School of Law at Newark and an LLM from the University of Toronto. He was a 2009-2010 Fulbright Fellow in Cambodia and has served as a legal advisor to the Documentation Center of Cambodia since 2010. Currently, Mr. DeFalco is an Articling Student-at-Law with the Ontario Ministry of the Attorney General – Criminal Division. Upon completion of his articles, Mr. DeFalco will be a member of both the US (New Jersey) and Canadian (Ontario) bars. In September 2014, he will commence his doctoral law degree (SJD) at the University of Toronto. His research interests include international criminal law; international modes of liability; the Khmer Rouge period in Cambodia; transitional justice; and the treatment of famine and other forms of indirect violence within the international criminal and transitional justice movements.

Wendy Lambourne is Deputy Director and Academic Coordinator, Centre for Peace and Conflict Studies, University of Sydney. Her research on transitional justice, reconciliation and peace building after genocide and other mass violence has a regional focus on sub-Saharan Africa and Asia/Pacific where she has conducted field research in Rwanda, Burundi, Cambodia, Timor Leste and Sierra Leone. Recent publications include chapters in *Transitional Justice Theories* (Routledge, 2014), *Critical Perspectives in Transitional Justice* (Intersentia, 2012) and *The Development of Institutions of Human Rights* (Palgrave Macmillan, 2010), as well as articles in the *Journal of Peacebuilding and Development*, *International Journal of Transitional Justice* and *African Security Review*. Dr Lambourne has served as co-convenor of the Reconciliation and Transitional Justice Commission of the International Peace Research Association since 2006. In addition to her PhD from the University of Sydney, Dr Lambourne holds postgraduate degrees in International Relations and International Law from the Australian National University, and an Honours degree in Psychology from the University of Melbourne.