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Abstract

This paper will examine the effectiveness of the Extraordinary Chambers in the Courts of Cambodia at providing some measure of transitional justice to the victims of the Khmer Rouge regime. It delves into an expanded role of tribunals that extends beyond the courtroom and seeks to highlight faults and success of the ECCC as lessons for future iterations of international courts and tribunals.

Keywords

transitional justice, cambodia, khmer rouge, genocide, international law, international courts, khmer rouge tribunal

Extraordinary Chambers in the Courts of Cambodia: An Extraordinary Success or an Ordinary Failure?

Vamika Jain | University of Toronto '22

“They killed men with sticks, tied them up by the neck, and burned them alive... one could no longer drink the water because there were so many corpses floating on the surface... Every day we lived in fear, in poverty, in grief, in a tragedy that we had never before known.”

Pech Tum Kravel spoke these words in a witness statement, testifying to the inhumanity of the Khmer Rouge at the 1979 People’s Revolutionary Tribunal (PRT) in Cambodia.¹ Along with Kravel’s deposition, the tribunal itself has remained obscure for decades, dismissed from both domestic and international attention. The fledgling PRT marked the beginning of a long struggle for transitional justice in Cambodia.² The most recent iteration of this campaign is the Extraordinary Chambers in the Courts of Cambodia (ECCC), a hybrid tribunal intended to prosecute leaders of the genocidal Khmer Rouge regime for their blatant violations

¹ “Mr. Pech Tum Kravel,” in *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary*, eds. Howard De Nike, John Quigley, and Kenneth J. Robinson (Philadelphia: University of Pennsylvania Press, 2000), 102.

² Rachel Hughes, “Ordinary Theatre and Extraordinary Law at the Khmer Rouge Tribunal,” *Environment and Planning D: Society and Space* 33, no. 4 (2015): 717-9.

of both Cambodian and international law. The tribunal offered the Cambodian people an opportunity for “moving forward through justice”—but after twenty-three years, has it delivered on its promises?³ Such questions on the effectiveness of this long and expensive tribunal deserve to be addressed. The present study will argue that while the ECCC has certainly failed in delivering the most fundamental conceptions of material justice—including truth, accountability, and appropriate punishment—it has also achieved remarkable success in supporting victim participation, generating public deliberation, and encouraging national reconciliation. Highlighting these areas of success, the article looks at the expanded role of tribunals extending beyond the courtroom and seeks to illustrate the perceptions of justice that exist beyond a court’s verdict.

Theoretical Framework

Examining the ECCC’s effectiveness requires a robust analytical framework. In order to provide theoretical grounding for such a framework, this paper identifies the hybrid tribunal as a form of transitional justice, which the International Centre for Transitional Justice broadly defines as “ways countries emerging from periods

³ “It’s Time for the Record to be Set Straight” (poster printed by Extraordinary Chambers in the Courts of Cambodia, March 3, 2011), <https://www.eccc.gov.kh/en/publication/its-time-record-be-set-straight>.

of conflict and repression address large-scale or systematic human rights violations.”⁴ Prominent legal scholar Ruti Tietel narrows this definition by arguing that it applies specifically to ideas of “justice associated with periods of political change,” such as regime changes or shifts in authority, and primarily involves addressing the “wrongdoings of repressive predecessor regimes” through various legal responses such as prosecutions, truth commissions, reparations, and political reform.⁵ As a tribunal established by both the United Nations and the Royal Government of Cambodia to prosecute violations of humanitarian law by its predecessor regime of Democratic Kampuchea, the ECCC fits this definition.⁶ Policy scholar David Crocker has identified eight primary goals for such mechanisms of transitional justice: “truth, a public platform for victims, accountability and punishment, the rule of law, compensation to victims, institutional reform and long-term development, reconciliation, and public deliberation.”⁷ Here these

⁴ “What is Transitional Justice?” International Centre of Transitional Justice, <https://www.ictj.org/about/transitional-justice>.

⁵ Ruti G. Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003): 69; Michael Newman, *Transitional Justice: Contending with the Past* (Cambridge, UK: Polity Press, 2019), 27-47.

⁶ *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*, United Nations-Cambodia, June 6, 2003, 2329 UNTS 117.

⁷ David A. Crocker, “Reckoning with Past Wrongs: A Normative Framework,” *Ethics & International Affairs* 13 (1999): 43-64.

eight goals will be used as the basic structure for measuring the ECCC's success. However, Crocker's goals are occasionally simplistic and blind to relevant historical narratives. Moreover, they are specific to liberal and democratic political transitions, and are intended to ambiguously apply to all forms of transitional justice, not just tribunals. Conversely, scholars such as Theresa Squatrito et al. and Gutner and Thompson have developed analytical frameworks that apply specifically to international organizations and tribunals, while historians such as Rebecca Gidley have altered these models to the distinctive context of Cambodian history.⁸ This article will employ research in political theory and historical narratives from Gidley and Squatrito et al. to modify Crocker's goals, overcome some of their limitations, and adapt them to a framework appropriate for the assessment for the ECCC.

⁸ Theresa Squatrito, Oran R. Young, Andreas Follesdal, and Geir Ulfstein, "A Framework for Evaluating the Performance of International Courts and Tribunals," in *The Performance of International Courts and Tribunals*, eds. Theresa Squatrito, Oran R. Young, Andreas Follesdal, and Geir Ulfstein (Cambridge: Cambridge University Press, 2018), 3-36; Tamar Gutner and Alexander Thompson, "The Politics of IO Performance: A Framework," *Review of International Organizations* 5, no. 3 (2010): 227-248; Rebecca Gidley, *Illiberal Transitional Justice and the Extraordinary Chambers in the Courts of Cambodia* (Cham, Switzerland: Springer International Publishing, 2019).

Historical Background: Democratic Kampuchea

In April 1975, the French-educated revolutionary Pol Pot led the rebel forces of the Communist Party of Kampuchea (CPK), also known as the Khmer Rouge, as they took over Cambodia and proclaimed the new state of “Democratic Kampuchea.”⁹ While numerous factors contributed to the radicalization that spurred on the Khmer Rouge, a primary reason was the U.S. government’s secret bombing campaign against Vietnamese troops in Cambodia in the latter years of the Vietnam War.¹⁰ Further destabilizing the nation’s already-weakened regime and alienating large communities of Cambodians, these falling bombs were the last straw required by the Khmer Rouge to break government defences and take control of Phnom Penh.

What followed was the attempted establishment of absolute control and a subsequent devastation of Cambodian lives. As recorded in endless pages of harrowing testimony, soldiers forcibly deported Cambodians to the countryside, “sieved [intellectuals and civil servants] from the population,” punished disobedience with brutal executions—typified by “the naked body of a man, nailed to a door”—and regularly committed mass killings, one of which counted “one hundred fifty-seven persons, which included women

⁹ Aaron Fichtelberg, *Hybrid Tribunals: A Comparative Examination* (New York: Springer, 2015), 2-4.

¹⁰ Fichtelberg, *Hybrid Tribunals*, 3.

eight months pregnant.”¹¹ The Khmer Rouge remained in power until a Vietnamese invasion in January 1979. Estimates suggest that between 1.5 to 2.25 million Cambodians died under the four-year regime due to “targeted killings, starvation, overwork, and lack of sanitation and medical care.”¹² The wounds carved onto Cambodian bodies and the Cambodian nation, however, are much larger in number, and the process to deliver justice to victims took decades to begin.

The Extraordinary Chambers in the Courts of Cambodia

“The creation of the Cambodia Tribunal—spanning 1997 to 2006—took longer than the creation of any other international or hybrid criminal tribunal in the post-Cold War era,” recalled David Scheffer, former U.S. Ambassador-at-Large for War Crimes Issues.¹³ Notably, it took nearly eighteen years from the fall of Democratic Kampuchea in 1979 for this process to even begin at

¹¹ “Mrs. Yasuko Naito,” in *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary*, eds. Howard De Nike, John Quigley, and Kenneth J. Robinson (Philadelphia: University of Pennsylvania Press, 2000), 96-101; Peter Manning, *Transitional Justice and Memory in Cambodia* (London: Routledge, 2019), 39.

¹² Ben Kiernan, “The Demography of Genocide in Southeast Asia: The Death Tolls in Cambodia, 1975–79, and East Timor, 1975–80,” *Critical Asian Studies* 35: 585-597; Rachel Hughes and Maria Elander, “Justice and The Past,” in *The Handbook of Contemporary Cambodia*, eds. Katherine Brickell and Simon Springer (Abingdon, England: Routledge, 2016), 42.

¹³ David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2011), 343.

an international level. This was because, for most of the 1980s and early 1990s, the Khmer Rouge was protected by the geopolitical dynamics between China, America, and the Soviet Union, remaining key political players in the Cambodian government.¹⁴ This made their prosecution impossible; any minor attempts at justice, such as at the People's Revolutionary Tribunal of 1979, were soon dismissed due to their lack of public and international support.¹⁵ It was only in 1996 when Ieng Sary, co-founder of the Khmer Rouge, agreed to disarm remaining rebel troops in exchange for amnesty that his faction's political influence began to falter.¹⁶ Coinciding with the party's weakened grip on power and growing international interest in action against its leaders, the co-prime ministers of Cambodia finally wrote a letter to the United Nations Secretary General in 1997, requesting support in "bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge."¹⁷ The process that this letter began remained slow, hindered by domestic red tape and international power politics. The UN and the Cambodian government engaged on multiple points of contention,

¹⁴ Fichtelberg, *Hybrid Tribunals*, 32-33.

¹⁵ Hughes, "Ordinary Theatre and Extraordinary Law," 717-19.

¹⁶ Fichtelberg, *Hybrid Tribunals*, 35-36.

¹⁷ Gidley, *Illiberal Transitional History*, 109; United Nations General Assembly, "Letter Dated 21 June 1997 from the First and Second Prime Ministers of Cambodia Addressed to the Secretary-General," A/51/930, 24 June 1997.

such as the precise composition of the ECCC and the court's standing with respect to the Cambodian legal system.¹⁸ After multiple rounds of negotiations, the UN General Assembly passed the final agreement on the ECCC on 22 May 2003, with conditions and concessions on both sides. The years immediately after were spent fundraising and laying administrative framework until, in July 2006, the judges for the court were sworn in and the ECCC was officially functional.¹⁹

Structure of the Court

The ECCC has jurisdiction over crimes committed between 17 April 1975 and 6 January 1979.²⁰ The crimes that the court can adjudicate are genocide, crimes against humanity, and breaches of the Geneva Convention. The persons that it can prosecute are carefully defined as the “senior leaders of Democratic Kampuchea and those who were most responsible.”²¹ The structure of the court

¹⁸ Fichtelberg, *Hybrid Tribunals*, 40-41.

¹⁹ Fichtelberg, *Hybrid Tribunals*, 44-45.

²⁰ *Agreement Between the United Nations and the Royal Government of Cambodia*, art. 1; Ernestine 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 *Internationalized Criminal Courts and Tribunals: Sierra Leone, Kosovo and Cambodia*, eds. Cesare P. R. Romano, André Nollkaemper, and Jann K. Kleffner (Oxford: Oxford University Press, 2004), 211.

²¹ *Agreement Between the United Nations and the Royal Government of Cambodia*, art. 9, 2; Meijer, “The Extraordinary Chambers,” 212-14.

itself is two-tiered, with a Trial Chamber and a Supreme Court Chamber that serves as both “appellate chamber and final instance.” The court’s composition is a unique hybrid model wherein the Trial Chamber consists of three Cambodian and two international judges, and the Supreme Court Chamber consists of four Cambodian and three international judges. Judges must seek unanimity in their decisions but, when impossible, a supermajority of at least four judges in the Trial Chamber and five judges in the Supreme Court Chamber is acceptable.²² Finally and most importantly, the Cambodian government has an obligation to provide support, enforce decisions, and make arrests “without undue delay” based on requests made by the ECCC.²³

Critical Assessment: Truth

Having established the foundations of the ECCC’s history and mandate, it is now essential to assess its effectiveness. The first measure for examining the performance of this delayed and carefully constructed hybrid tribunal is the goal of “truth.” According to David Crocker, this involves investigating, establishing, and disseminating a true record of past atrocities and

²² *Agreement Between the United Nations and the Royal Government of Cambodia*, art. 3, 4; Meijer, “The Extraordinary Chambers,” 217-21.

²³ *Agreement Between the United Nations and the Royal Government of Cambodia*, art. 25.

their consequences, allowing victims and future generations to engage with an accurate public account of how various occurrences have shaped their past and present.²⁴ Crocker indicates that the ability to arrive at such a record is dependent on the process of investigation.²⁵ Therefore, to assess the ECCC, this article expands Crocker's definition to include the measure of "process performance." Proposed by Squatrito et al., this refers to demonstrated procedural fairness and efficiency standards in court and tribunal proceedings.²⁶ Therefore, the ECCC's performance under the goal of "truth" is measurable at two levels: the process performance of the court as a justice-seeking mechanism, and the successful dissemination of an accurate historical record.

The first measure under process performance is procedural fairness. Unfortunately, despite the painstaking process of negotiating the ECCC's composition, multiple allegations of political interference by the Cambodian government in defence of certain Khmer Rouge leaders have mired its proceedings.²⁷ The most serious of these allegations pertain to Cases 003 and 004 at the ECCC, wherein the defendants are former mid-level leaders of

²⁴ Crocker, "Reckoning," 49-50.

²⁵ Crocker, "Reckoning," 51-52.

²⁶ Squatrito et al., "A Framework," 16.

²⁷ Tomas Hamilton and Michael Ramsden, "The Politicisation of Hybrid Courts: Observations from the Extraordinary Chambers in the Courts of Cambodia," *International Criminal Law Review* 14, no. 1 (2014): 115.

the CPK. The Cambodian judges of both chambers and team of Cambodian prosecutors have consistently prevented the proceedings from moving forward in court, and the Cambodian police has not issued arrest warrants, leading international co-prosecutor Andrew Cayley to claim that the government had planned to protect the cases' defendants.²⁸ These allegations of political interference significantly undermine both the investigation and the alleged veracity of its produced historical record. Furthermore, the continued prevalence of former Khmer Rouge leaders and combatants in Cambodian political life means that allegations of corruption are rampant against all levels of the ECCC's administration.²⁹ While the veracity of these claims has not been established, the sheer number of them certainly casts a shadow on procedural fairness.

On efficiency, moreover, the ECCC has only succeeded in convicting three defendants over the course of seventeen years, with an expenditure of more than \$300 million.³⁰ Its hybrid nature and the inherent conflict between national and international interests has caused its proceedings to move at a painstakingly

²⁸ Kheang Un, "The Khmer Rouge Tribunal: A Politically Compromised Search for Justice," *The Journal of Asian Studies* 72, no. 4 (2013): 78.

²⁹ Hamilton and Ramsden, "The Politicization of Hybrid Courts," 129-131.

³⁰ Seth Mydans, "11 Years, \$300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?" April 10, 2017, *The New York Times*.

slow pace, with an exceptionally inefficient use of resources.³¹ The record of truth that the ECCC is making available to the public is thus heavily limited in comparison with what could be possible with a more efficient usage of time and resources.

The second level of assessment, examining the court's ability to make available an accurate public record of the historical wrongdoings suffered by Cambodians, reveals further failures and concerns. Craig Etcheson, former chief of investigations at the ECCC's Office of Co-Prosecutors, describes how the court's remarkably rich archival record of testimony and trial-proceedings is inaccessible to the Cambodian public, to scholars, and to international parties alike. He states that while the government has established a Legal Documentation Centre, it has not been updated beyond a partial documentation of Case 001. The state remains hesitant to provide any further access.³² More significantly, scholars are worried that under the hybrid nature of this court the Cambodian government will seize all documentation after the completion of the ECCC's mandate. This would mean that "printed documents could be selectively destroyed, and the electronic

³¹ Mikkel Jarle Christensen and Astrid Kjeldgaard-Pedersen, "Competing Perceptions of Hybrid Justice: International v. National in the Extraordinary Chambers of the Courts of Cambodia," *International Criminal Law Review* 18, no. 1 (2018): 127-53.

³² Craig Etcheson, *Extraordinary Justice: Law, Politics and the Khmer Rouge Tribunals* (New York: Columbia University Press, 2019), 348.

version could be subtly altered,” completely falsifying the record of truth being established by the court.³³

Therefore, assessing the ECCC’s progress towards the goal of “truth” reveals significant failures of process performance, challenged fairness, inefficient proceedings, and an unreliable production of historical records that are largely inaccessible to Cambodians.

Public Platform for Victims

Crocker’s second goal for transitional justice is the provision of a public platform for victims of past atrocities to describe their experiences.³⁴ When applying this measure to the ECCC, however, it is important to note that these proceedings are taking place nearly three decades after the fall of the Khmer Rouge. This adds distinctive challenges to both the process of reaching out to victims and asking them to relive harrowing memories from a generation ago.

The ECCC has a dedicated section for Victim Support that engages in regular legal outreach, inviting victims to participate in trial proceedings. Victim Support must ensure the protection of victim interests by effectively disseminating relevant information,

³³ Grant Peck, “Experts Weigh the Record of Cambodia’s Khmer Rouge Tribunal,” *Associated Press*, November 17, 2018.

³⁴ Crocker, “Reckoning,” 52-53.

ensuring legal representation, and acting as a bridge between the co-prosecutors and the victims.³⁵ Estimates suggest that this branch has contacted “more than half a million Cambodians within Cambodia, and some thousands in the diaspora,” overcoming the challenges of lost time since the fall of the Democratic Kampuchea.³⁶ Outreach to diaspora Cambodians indicates that even those who have moved away from the immediate proximity to the proceedings and their consequences have received the opportunity to reckon with and seek justice for past sufferings.

Victim participation in the proceedings operates under two primary mechanisms. The first is the process of filing a “complaint,” wherein victims can submit information to the court. Investigators and prosecutors may use this information and may call the complainant to present evidence at trial.³⁷ The second option for victims is participating in the proceedings as a “civil party,” having demonstrated that they directly suffered due to the crimes committed by the defendants. Civil parties have co-lawyers to represent them and have specific rights within the trial, such as

³⁵ “Victims Support Section,” Extraordinary Chambers in the Courts of Cambodia, <https://www.eccc.gov.kh/en/victims-support-section>.

³⁶ Hughes and Elander, “Justice and the Past,” 49.

³⁷ Hughes and Elander, “Justice and the Past,” 47; “EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA INTERNAL RULES (REV.9),” Extraordinary Chambers in the Courts of Cambodia, Phnom Penh, January 16, 2015.

the right to call witnesses or to make submissions, appeals, and closing statements. While only ninety civil parties participated in Case 001, around 4,000 parties did so in Case 002, representing the success of Victim Support’s legal outreach and the ECCC’s ability to provide a platform to victims.³⁸ While victim rights at trial have certainly seen restrictions in recent years, including the consolidation of multiple civil rights claims and the distribution of the case into mini-trials, the rate of victim participation and the degree of outreach conducted remain remarkable.³⁹ Furthermore, described as ground-breaking legal precedent by international legal scholars, the ECCC is one of the first international courts to implement civil party participation at such a scale.⁴⁰ This indicates that under the goal of providing a public platform for victims, the ECCC demonstrates significant success.

Accountability and Punishment

According to Crocker, successful mechanisms of transitional justice must be able to hold those responsible for historical

³⁸ Hughes and Elander, “Justice and the Past,” 48.

³⁹ Mélanie Vianney-Liaud, “Emerging Voices: Victim Participation in ICC and ECCC’s Proceedings,” *Opinio Juris*, August 20, 2015.

⁴⁰ Sarah Thomas and Terith Chy, “Including the Survivors in the Tribunal Process,” in *On Trial: The Khmer Rouge Accountability Process*, eds. John D. Ciorciari and Anne Heindel (Phnom Penh: Documentation Center of Cambodia, 2009), 214.

atrocities accountable for their crimes and must deliver appropriate punishment to such individuals.⁴¹ Expanding on this definition, Squatrito et al. argue that the ability of tribunals to successfully hold defendants accountable is dependent on the court's ability to successfully resolve judicial disputes and arrive at decisions.⁴² Therefore, to prove effective at the goal of accountability and punishment, the ECCC must show demonstrated success at dispute resolution and at delivering appropriate punishments to those who are responsible for the horrifying scale of suffering under the Khmer Rouge.

The hybrid nature of the court, with a mix of international and national judges, prosecutors, and investigators at each level of the system, results in a consistent conflict of interests among the primary decision-makers of the process.⁴³ Etcheson narrates how tension between these duelling perspectives is present at foundational levels of the process, recalling how “internationals were focused on procedure and process, while the nationals were focused on politics and product” at every step.⁴⁴ Since decision-making requires either unanimity or supermajority, this binary cleavage has significantly disabled the court's ability to make

⁴¹ Crocker, “Reckoning,” 53-54.

⁴² Squatrito et al., “A Framework,” 14.

⁴³ Christensen and Pederson, “Competing Perceptions,” 144-45.

⁴⁴ Etcheson, *Extraordinary Justice*, 341.

efficient progress in the prosecution and punishment of criminals on trial.⁴⁵ The necessity for a supermajority, in conjunction with the binary divide within the judges, also means that the likelihood of the dismissal of conflicts without decision is extremely high.⁴⁶ These drawbacks in the ECCC's dispute resolution and decision-making capacities significantly reduce its ability to successfully agree upon the accountability and punishment of various defendants that stand trial within it.

Furthermore, the ECCC's scope is limited to a strict definition of the most "senior leaders" of the Khmer Rouge—i.e., those who were most responsible for committing crimes. Defining this category, however, is fraught with subjective claims of leadership and responsibility. The Cambodian government's resistance towards prosecuting Case 003 and Case 004 is partly because the defendants were not part of the top echelon of Khmer Rouge leadership.⁴⁷ Prosecuting them would then open the doors for the widespread prosecution of several other officials at a similar level in the regime. Nevertheless, in spite of their non-seniority, the defendants were responsible for approximately 40,000 deaths, and therefore bear a massive burden of

⁴⁵ Christensen and Penderson, "Competing Perceptions," 144-45; Etcheson, *Extraordinary Justice*, 340-343.

⁴⁶ Meijer, "The Extraordinary Chambers," 217-21.

⁴⁷ Un, "The Khmer Rouge Tribunal," 78.

responsibility for the genocide and crimes against humanity committed.⁴⁸ The challenges faced by the court in the prosecution of cases such as 003 and 004 are indicative of limitations on its capacity to hold prominent criminals responsible for their actions. Additionally, hurdles faced by the ECCC include the fact that its proceedings are underway more than three decades after the crimes were committed. Not only does this mean that many of the most responsible leaders have died without punishment, but it also makes the process of tracing and identifying such individuals additionally difficult.⁴⁹

Therefore, these limitations encumber the ECCC's effectiveness under the goal of holding wrongdoers accountable for their crimes and assigning them appropriate punishment.

Rule of Law

Crocker's fourth goal of transitional justice states that, in reckoning with past wrongs, compliance with the rule of law is necessary, as is the attempt to lay groundwork for the future development of law. Squatrito et. al. applies a similar framework when assessing the effectiveness of international courts and tribunals. They identify the "[facilitation of] compliance with

⁴⁸ Christensen and Penderson, "Competing Perceptions," 151.

⁴⁹ Duncan McCargo, "Politics by Other Means? The Virtual Trials of the Khmer Rouge Tribunal," *International Affairs* 87, no. 3 (2011): 614-15.

international law” and the “clarification of law” as two important measures for the outcome performance of court systems such as the ECCC.⁵⁰

The hybridity of the ECCC makes it a unique legal precedent formed within the confines of Cambodian law, but with roots situated in an agreement signed between the United Nations and the Cambodian government.⁵¹ On the one hand, its definitions of the crimes within its scope draw heavily from international conventions such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1998 Rome Statute of the International Criminal Court.⁵² On the other, the chambers themselves exists within the Courts of Cambodia; the Cambodian government enforces the tribunal’s decisions and administrators draw most procedural rules from the national legal system.⁵³ Consequently, the tribunal has the striking position of facilitating compliance with, establishing precedent for, and clarifying both international law and domestic law simultaneously. Importantly, it

⁵⁰ Squatiro et al., “A Framework,” 10-11.

⁵¹ Anne Heindel, “Overview of the Extraordinary Chambers,” in *On Trial: The Khmer Rouge Accountability Process*, eds. John D. Ciorciari and Anne Heindel (Phnom Pneh: Documentation Center of Cambodia, 2009), 85.

⁵² *Agreement Between the United Nations and the Royal Government of Cambodia*, art. 9, 2.; Meijer, “The Extraordinary Chambers,” 212-14.

⁵³ *Agreement Between the United Nations and the Royal Government of Cambodia*, art. 25; Heindel, “Overview,” 85-107.

also sets further precedent for future tribunals seeking similar hybrid models.

While the ECCC is not the only hybrid tribunal in contemporary history, its model for victim participation was certainly unprecedented when first established, replicated only partly at the International Criminal Court at The Hague. Never before had victims for mass human rights violations “been accorded such a highly visible role as ‘civil parties’ in the criminal proceedings against their oppressors.”⁵⁴ The ECCC goes a step beyond simple participation by affording victim rights to civil parties at trial proceedings, and has since engaged with these rights on multiple occasions, both restraining and expanding them.⁵⁵ This creates a wealth of replicable legal procedures future international courts and tribunals that might be established in the future.

Unfortunately, since most of the ECCC’s proceedings are still ongoing and public access to documentation on trial proceedings and decisions remains limited, it is not yet evident what the court’s holistic role in clarifying or advancing international and domestic law has been.⁵⁶ However, its striking

⁵⁴ Thomas and Chy, “Including the Survivors,” 286.

⁵⁵ Ken Gee-kin Ip, “Fulfilling the Mandate of National Reconciliation in the Extraordinary Chambers in the Courts of Cambodia (ECCC) – An Evaluation through the Prism of Victims’ Rights,” *International Criminal Law Review* 13, no. 4 (2013): 865-94.

⁵⁶ Etcheson, *Extraordinary Justice*, 346.

placement at a cross-section of international and domestic law, and its unprecedented employment of victim participation mechanisms indicate that it is well-placed to leave a measurable impact on both.

Compensation to Victims

Crocker's fifth goal for transitional justice is that all victims of human rights violations must receive appropriate compensation, "in the form of income, property, medical services or educational and other opportunities."⁵⁷ Once again, the timing of the ECCC's proceedings complicates the direct application of this goal. While identifying and verifying victims after the significant gap of time is already a challenging process, to appropriately measure and allocate material compensation would be nearly impossible. The court's internal rules have consequently established that victims can only seek "collective and moral" reparations from its proceedings.⁵⁸ To assess whether the ECCC is able to demonstrate any success at this goal, it is important to examine whether such non-material and non-individualistic reparations are acceptable to the victims. A population-based survey conducted after a successful conviction at the ECCC's first trial asked participants what they thought would be the best way to offer individual

⁵⁷ Crocker, "Reckoning," 57.

⁵⁸ "EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA INTERNAL RULES (REV.9)," rule 23.

reparations to victims of the Khmer Rouge. While more respondents recommended that victims and families should receive social services such as education and healthcare, the second most popular recommendation was for “trials and punishment of wrongdoers.”⁵⁹ This indicates that while the ECCC’s moral reparations might not be the most desirable option, they are certainly a close second for contemporary Cambodians. Therefore, while the ECCC is unable to offer any material compensation to victims of the Khmer Rouge, its efforts at prosecuting the greatest culprits certainly offer some form of restitution to those who have suffered most at its hands.

Institutional Reform and Long-Term Government

Crocker defines his sixth goal for transitional justice as the prevention of recurring conflict and human rights violations through the establishment of stronger institutions and economic development.⁶⁰ As a tribunal, the ECCC plays little to no role in the advancement of economic development. Furthermore, since the ECCC involves multiple international actors, concerns over

⁵⁹ Phuong Pham, Patrick Vinck, Mychelle Balthazard, and Sokhom Hean, *After the First Trial: A Population-Based Survey on Knowledge and Perceptions of Justice and the Extraordinary Chambers in the Courts of Cambodia* (Berkeley, CA: University of California Press, 2011), 35.

⁶⁰ Crocker, “Reckoning,” 59-60.

national sovereignty limit the degree to which the government allows it to participate within it. However, a fair assessment of the court's role in institution building in Cambodia must examine its impact on the health of Cambodian legal institutions.

Since the 1997 letter from the co-prime ministers of Cambodia to the UN Secretary General, international and national staff have worked together at various levels to build, operate, and sustain the ECCC.⁶¹ Scholars, lawyers, administrators, lobbyists, diplomats, and journalists from around the world have spent decades working with the Cambodian government to ensure the sustenance of this tribunal. Gidley describes how the International Bar Association has conducted training sessions in international law for Cambodian lawyers, and how the Defence Support and Victim Support sections have provided relevant training programs to law students, while Etcheson reflects on the possibility of skill-transfer after decades of collaboration.⁶² Two-way exchanges of knowledge and experience are inevitable, and this heavy engagement with international bodies will act as a model of best practices for Cambodian institutions, making them robust enough to survive periods of political unrest.⁶³

⁶¹ Etcheson, *Extraordinary Justice*, 345-46.

⁶² Gidley, *Illiberal Transitional Justice*, 165; Etcheson, *Extraordinary Justice*, 345.

⁶³ Gidley, *Illiberal Transitional Justice*, 164-65.

Given these circumstances, the ECCC has contributed significantly, within the confines of its role, to the strengthening of domestic institutions in Cambodia.

Reconciliation

Crocker's seventh goal is the ideal of national reconciliation, or the ability for former enemies to work toward greater social cohesion.⁶⁴ While the ECCC's proceedings are far from complete and its full impact on the social and psychological underpinnings of Cambodian life is yet to be seen, the tribunal's public proceedings have caused Cambodians to directly confront the horrors of their past. For decades, victims of inhumane suffering persisted through a political system that continued to place their oppressors in positions of power.⁶⁵ Growing accustomed to this suppressed history, only 64% of respondents to a population-based survey in 2008 indicated that truth and justice were important steps towards reconciliation. However, as the first trial ended, this figure jumped to 81% of respondents in 2010, indicating that the trial and its outreach system were allowing Cambodians to recognize the importance of confronting their past, their trauma, and their former enemies.⁶⁶ Additionally, a vast spectrum of local and international

⁶⁴ Crocker, "Reckoning," 60.

⁶⁵ Hughes, "Ordinary Theatre and Extraordinary Law," 717-19.

⁶⁶ Phuong Pham, *After the First Trial*, 3-6.

NGOs, some trained and supported by the United Nations and others developing grassroots support, have emerged around the ECCC, particularly its Victim Support Section. These organizations have developed a significant number of operations such as reconciliation walks, public forums of discussion, documentation laboratories, therapy centres, informal hearings, and more to advance outreach and reconcile Cambodian victims.⁶⁷ The impetus for these efforts and much of the initial support they received would have been impossible without the ECCC. Therefore, while history will observe the ECCC's broader impact on national reconciliation in upcoming decades, the tribunal has effectively sparked the process within Cambodian society.

Public Deliberation

Crocker's final goal states that any attempt at transitional justice must generate active engagement in the public sphere, open deliberation, and marked interest in its progress.⁶⁸ Not only does this ensure the wider dissemination of its goals and incentives, it also generates greater transparency and public investment in its sustained success. Remarkably, the Khmer Rouge tribunal has commanded an unprecedented degree of international and national

⁶⁷ Samphoas Huy, *Translating Global Norms: The Role of NGOs in Transitional Justice in Cambodia* (Basel: Swisspeace, 2019), 21-26.

⁶⁸ Crocker, "Reckoning," 61.

public engagement for the entirety of its ongoing duration. By September 2017, nearly 550,000 people had attended hearings from the courts' public galleries.⁶⁹ The ECCC outreach program, assisted by donors from around the world, disseminated regular television broadcasting, radio shows, podcasts, media coverage, and school lectures to bring the debates around the ECCC to every household around the country, and many across the world.⁷⁰ As Cambodians in the hundreds of thousands tune in to watch daily broadcasts, such a level of public engagement is unprecedented within genocide trials.⁷¹ Consequently, it is evident that levels of public deliberation associated with the ECCC are remarkably effective.

Conclusion

Drawn-out over decades, inefficient and limited, the Extraordinary Chambers in the Courts of Cambodia have failed in delivering Cambodians the reliable truth about their history under the Khmer Rouge. As a hybrid tribunal, it has even failed at effectively holding the perpetrators of heinous human rights violations accountable, has been unable to deliver appropriate punishments,

⁶⁹ Tom Fawthorp, "Cambodia's Khmer Rouge Tribunal: Mission Accomplished?" *The Diplomat*, July 17, 2017.

⁷⁰ Etcheson, *Extraordinary Justice*, 351.

⁷¹ Fawthorp, "Cambodia's Khmer Rouge Tribunal."

and can only offer limited moral reparations to their victims. However, in spite of these glaring failures, the ECCC has not been entirely ineffective. With unprecedented success at victim participation, support for stronger institutions, a kickstart at national reconciliation, and immense public deliberation, the tribunal has allowed Cambodians to confront the atrocities of their past and to take steps towards recovery. This analysis has demonstrated an expanded definition of justice and effectiveness that allows for an emphasis on these underlying successes of the ECCC. In doing so, it has enabled the identification of modellable characteristics within the tribunal for improvement, adaptation, and implementation around the world. The ECCC's motto says, "moving forward through justice." While the tribunal may have failed to deliver material justice to the victims of the Khmer Rouge, it has had important success in helping Cambodians take steps towards "moving forward."

Bibliography

Primary Sources

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. United Nations- Cambodia, June 6, 2003, 2329 UNTS 117.

“EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA INTERNAL RULES (REV.9).”
Extraordinary Chambers in the Courts of Cambodia.
Phnom Penh, January 16, 2015.
https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf.

Fawthrop, Tom. “Cambodia’s Khmer Rouge Tribunal: Mission Accomplished?” July 17, 2017, *The Diplomat*.
<https://thediplomat.com/2017/07/cambodias-khmer-rouge-tribunal-mission-accomplished/>.

“It’s Time for the Record to be Set Straight.” Poster printed by the Extraordinary Chambers in the Courts of Cambodia on March 3, 2011. <https://www.eccc.gov.kh/en/publication/its-time-record-be-set-straight>.

Manning, Peter. *Transitional Justice and Memory in Cambodia*. London: Routledge, 2019.

Meijer, Ernestine E. “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 *Internationalized Criminal Courts and Tribunals: Sierra*

Leone, Kosovo and Cambodia. Edited by Cesare P. R. Romano, André Nollkaemper, and Jann K. Kleffner, 207-32. Oxford: Oxford University Press, 2004.

“Mr. Pech Tum Kravel.” In *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary*. Edited by Howard De Nike, John Quigley, and Kenneth J. Robinson, 101-103. Philadelphia: University of Pennsylvania Press, 2000.

“Mrs. Yasuko Naito.” In *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary*. Edited by Howard De Nike, John Quigley, and Kenneth J. Robinson, 96-101. Philadelphia: University of Pennsylvania Press, 2000.

Peck, Grant. “Experts Weigh the Record of Cambodia’s Khmer Rouge Tribunal.” *Associated Press*, November 17, 2018. <https://apnews.com/article/a9dc655746d940bc87410b2ed4a435a0>.

Scheffer, David. *All the Missing Souls: A Personal History of the War Crimes Tribunals*. Princeton, NJ: Princeton University Press, 2011.

United Nations General Assembly. “Letter Dated 21 June 1997 from the First and Second Prime Ministers of Cambodia Addressed to the Secretary-General.” A/51/930, 24 June 1997. <http://www.unakrt-online.org/documents/letter-dated-21-june-1997-first-and-second-prime-ministers-cambodia-addressed-secretary>.

“Victims Support Section.” Extraordinary Chambers in the Courts of Cambodia. <https://www.eccc.gov.kh/en/victims-support-section>.

Secondary Sources

Christensen, Mikkel Jarle, and Astrid Kjeldgaard-Pedersen.

“Competing Perceptions of Hybrid Justice: International v. National in the Extraordinary Chambers of the Courts of Cambodia.” *International Criminal Law Review* 18, no. 1 (2018): 127-53.

Crocker, David A. “Reckoning with Past Wrongs: A Normative Framework.” *Ethics & International Affairs* 13 (1999): 43-64.

Fichtelberg, Aaron. *Hybrid Tribunals: A Comparative Examination*. New York: Springer, 2015.

Gidley, Rebecca. *Illiberal Transitional Justice and the Extraordinary Chambers in the Courts of Cambodia*. Cham, Switzerland: Springer International Publishing, 2019.

Gutner, Tamar and Alexander Thompson, “The Politics of IO Performance: A Framework,” *Review of International Organizations* 5, no. 3 (2010): 227-48.

Hamilton, Tomas, and Michael Ramsden. “The Politicisation of Hybrid Courts: Observations from the Extraordinary Chambers in the Courts of Cambodia.” *International Criminal Law Review* 14, no. 1 (2014): 115-47.

Heindel, Anne. “Overview of the Extraordinary Chambers.” In *On Trial: The Khmer Rouge Accountability Process*. Edited by John D. Ciorciari and Anne Heindel, 85-125. Phnom Penh: Documentation Center of Cambodia, 2009.

Hughes, Rachel. “Ordinary Theatre and Extraordinary Law at the Khmer Rouge Tribunal.” *Environment and Planning D: Society and Space* 33, no. 4 (2015): 714-31.

Hughes, Rachel and Maria Elander. “Justice and The Past.” In *The Handbook of Contemporary Cambodia*. Edited by Katherine Brickell and Simon Springer, 42-52. Abingdon: Routledge, 2016.

Huy, Samphoas. *Translating Global Norms: The Role of NGOs in Transitional Justice in Cambodia*. Basel: Swisspeace, 2019.

International Centre of Transitional Justice. “What is Transitional Justice?” <https://www.ictj.org/about/transitional-justice>.

Ip, Ken Gee-kin. “Fulfilling the Mandate of National Reconciliation in the Extraordinary Chambers in the Courts of Cambodia (ECCC) – An Evaluation through the Prism of Victims’ Rights.” *International Criminal Law Review* 13, no. 4 (2013): 865-94.

Kiernan, Ben. “The Demography of Genocide in Southeast Asia: The Death Tolls in Cambodia, 1975-79, and East Timor, 1975-80.” *Critical Asian Studies* 35 (2003): 585-97.

McCargo, Duncan. “Politics by Other Means? The Virtual Trials of the Khmer Rouge Tribunal.” *International Affairs* 87, no. 3 (2011): 613-27.

Mydans, Seth. “11 Years, \$300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?” *The New York Times*, April 10, 2017.
<https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html>.

- Newman, Michael. *Transitional Justice: Contending with the Past*. Cambridge: Polity Press, 2019.
- Pham, Phuong, Patrick Vinck, Mychelle Balthazard, and Sokhom Hean. *After the First Trial: A Population-Based Survey on Knowledge and Perceptions of Justice and the Extraordinary Chambers in the Courts of Cambodia*. Berkeley, CA: University of California Press, 2011.
- Squatrito, Theresa, Oran R. Young, Andreas Follesdal, and Geir Ulfstein. "A Framework for Evaluating the Performance of International Courts and Tribunals." In *The Performance of International Courts and Tribunals*. Edited by Theresa Squatrito, Oran R. Young, Andreas Follesdal, and Geir Ulfstein, 3-26. Cambridge: Cambridge University Press, 2018.
- Teitel, Ruti G. "Transitional Justice Genealogy." *Harvard Human Rights Journal* 16 (2003): 69-94.
- Thomas, Sarah and Terith Chy. "Including the Survivors in the Tribunal Process." In *On Trial: The Khmer Rouge Accountability Process*. Edited by John D. Ciorciari and Anne Heindel, 214-94. Phnom Penh: Documentation Center of Cambodia, 2009.
- Un, Kheang. "The Khmer Rouge Tribunal: A Politically Compromised Search for Justice." *The Journal of Asian Studies* 72, no. 4 (2013): 783-92.
- Vianney-Liaud, Mélanie. "Emerging Voices: Victim Participation in ICC and ECCC's Proceedings." *Opinio Juris*, August 20, 2015. <http://opiniojuris.org/2015/08/20/emerging-voices-victim-participation-in-icc-and-ecccs-proceedings/#:~:text=Thus%2C%20according%20to%20R>

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