

THE CONTRIBUTION OF THE KHMER ROUGE TRIBUNAL TO RECONCILIATION, REMEMBRANCE AND MEMORIALISATION IN CAMBODIA

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The Extraordinary Chambers in the Courts of Cambodia (ECCC), better known as the Khmer Rouge Tribunal, has been at the forefront of international and national scientific and political debates about how much it is contributing to reconciliation, remembrance and memorialisation in Cambodia.¹ The ECCC's attempt to deliver justice for victimised Cambodians and the society at large between 1975 and 1979 continues. The recent death of the 87-year-old Ieng Sary, the former Minister for Foreign Affairs during the Khmer Rouge regime, must be seen as another setback on the long and rocky road of the ECCC's contribution to reconciliation in Cambodia.

Starting its operations in 2006 and assisted by the United Nations, the ECCC has been accused of being expensive, falling short of applying international standards and prac-



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1 | Cf. i.e. Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide? Elusive Justice and the Khmer Rouge Tribunal*, London, Pluto Press, 2004; Suzannah Linton, *Reconciliation in Cambodia*, Documentation Center of Cambodia, Phnom Penh, 2004; Alex Bates, "Cambodia's Extraordinary Chambers: Is it the Most Effective and Appropriate Means of Addressing the Crimes of the Khmer Rouge?", in: Ralph Henham and Paul Behrens (eds.), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects*, Burlington, Ashgate, 2007, 195 et seq.; Hanna Bertelman, "International Standards and National Ownership? Judicial Independence in Hybrid Courts: The Extraordinary Chambers in the Courts of Cambodia", *Nordic Journal of International Law*, 79, 2010, 341; John Coughlan, Sana Ghouse and Richard Smith, "The Legacy of the Khmer Rouge Tribunal: Maintaining the Status Quo of Cambodia's Legal and Judicial System", *Amsterdam Law Forum*, 4, 2012, 16; Jörg Menzel, "Kambodscha und der Kampf ums Recht. Eine Fallstudie zu 'Recht und Entwicklung'", *Verfassung und Recht in Übersee*, 41, 2008, 387.

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tices, and conducting investigative processes far from being complete and impartial. Despite the court's endemic weaknesses, the simple fact that former senior leaders of the Khmer Rouge Regime stand accused of the most unimaginable atrocities is a miracle and an achievement in the fight against impunity for mass human rights violations. Furthermore, the ECCC may achieve some broader goals, such as creating a common history, fighting impunity for mass crimes, legal and institutional capacity building for the Cambodian judiciary, establishing faith in legal institutions, involving the public through outreach and allowing victims to participate directly as civil parties in the proceedings. Hereby the ECCC contributes to the development of the rule of law in Cambodia.

HISTORICAL BACKGROUND

Following independence in 1953 and the initial attempt of being a neutral state, during a period when the cold war super powers fought for their ideology and influence in the region, Cambodia was nevertheless dragged into this battle and in particular the battles of the Vietnam war.² It is largely argued that the neighbouring war in Vietnam and the associated U.S. bombing campaign to weaken Vietnamese logistical lines, attempting to evade attacks on Vietnamese territory, nourished the success of communist ambitions in Cambodia and eventually the success of the Khmer Rouge Regime in April 1975, when Pol Pot and his movement overthrew the American puppet government of Lon Nol.³ The Khmer Rouge movement had a radical Maoist ideology and intended to establish a self-sufficient rural Khmer society based on a system of repression and forcing the civilian population into agriculture.⁴ To that end anyone who stood in the way of such an

2 | James Cable, *The Geneva Conference of 1954 on Indochina*, Macmillan Press, 2000, 83, 146 et seq.

3 | Ben Kiernan, *How Pol Pot came to Power*, Yale University Press, New Haven, 2004, 297 et seq., 349. It is estimated that 400.000 people died through the U.S. bombing campaign. Cf. Angela Rapp and Christiane E. Philipp, "Conflicts Cambodia/Kampuchea", in: Rüdiger Wolfrum and Christiane E. Philipp (eds.), *United Nations: Law, Policies and Practice*, Vol. I, 1995, 201.

4 | Ben Kiernan, *The Pol Pot Regime*, Yale University Press, New Haven, 2008, 159 et seq., 251 et seq.

ideology was eliminated. Consequently all social, economic and legal institutions were abolished.⁵ Former government officials, so-called intellectuals and certain minorities were targeted as enemies of the regime. Following the takeover in April 1975, the Khmer Rouge moved the population of Phnom Penh and other major cities to the countryside, coercing them to agricultural work and other forms of forced labour.⁶ Such policies led to food shortages, lack of sanitation, medical care and medication. Torture and execution centres which were tasked to eradicate “enemies” of the revolution tortured and killed several thousand people.⁷

Following the takeover in April 1975, the Khmer Rouge moved the population of Phnom Penh and other major towns to the countryside, coercing them to agricultural work and other forms of forced labour.

It is estimated that as a result, one to two million people died through killings, torture, starvation and disease during the Khmer Rouge period from April 1975 to January 1979, when the authoritarian regime was eventually ousted by Vietnamese troops.⁸ In September 1989, the Vietnamese withdrew their troops.⁹ However, only in October 1991 all warring factions (government and resistance, including the Khmer Rouge) eventually signed the so-called Paris Peace Agreement (Agreement on a Comprehensive Political Settlement of the Cambodia Conflict), which delegated all necessary powers to the United Nations for the implementation of the peace agreement.¹⁰ Therefore, this accord marked the beginning of the operations of the United Nations Transitional Authority in Cambodia (UNTAC) which was aiming to ensure such an implementation and organised elections in 1993.¹¹ This resulted in the appointment of two Co-Prime Ministers, Norodom Ranariddh (National United Front for an Independent, Neutral, Peaceful, and Cooperative Cam-

5 | David P. Chandler, *A History of Cambodia*, Westview Press, Colorado, 1996, 209.

6 | David P. Chandler, *The Tragedy of Cambodian History*, Silk-worm Books, Bangkok, 1993, 246.

7 | Judgement against Kaing Guek Eav on 26 Jul 2010, Case No. 001/18-7-2007/ECCC/TC, §§ 111, 119, 597.

8 | Exact numbers are impossible to establish and remain debated.

9 | Raoul M. Jennar, *The Cambodian Constitutions (1953-1993)*, White Lotus, Bangkok, 1995, 111.

10 | Steven Ratner, “The Cambodian Settlement Agreements”, *American Journal of International Law*, 87, 1993, 1; Lucy Keller, “UNTAC in Cambodia – from Occupation, Civil War and Genocide to Peace”, in: *Max Planck Yearbook of United Nations Law*, 9, 2005, 149 et seq.

11 | UN resolution 745 (1992).

bodia, FUNCINPEC) and Hun Sen (Cambodian People Party, CPP).¹² More than 350,000 Cambodians from Thai refugee camps returned to their home country. However, the new government did not immediately succeed in disarming the warring factions and the Khmer Rouge continued to destabilise certain areas until 1998, when the revolutionary movement finally collapsed.

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Given the magnitude of human suffering and human rights violations during the Khmer Rouge regime, it is astonishing that it took almost three decades to meaningfully address the atrocities through a judicial process.

This may be largely explained with the politics and power struggles during the cold war and the fact that communist ideologies would have been on trial. Apart from the Vietnamese mock prosecution and trial against a handful of Khmer Rouge cadres for genocide,¹³ redress for the victims was not forthcoming. In 1997, the United Nations Commission on Human Rights called for the investigation of crimes against humanity and genocide during the Khmer Rouge regime.¹⁴ It took another seven years to establish an atrocity tribunal for the prosecution of the most responsible persons for genocide, crimes against humanity and war crimes, as will be described in more detail below. As so-called intellectual people were among those targeted and eliminated by the Khmer Rouge regime, Cambodia lost the majority of persons working in legal professions.¹⁵ For this reason and due to the long civil strife until the late 1990s, the country's legal institutions are still in a process of transition and improvement today. This is one of the reasons why a fair and independent prosecution by Cambodian judicial authorities of those responsible for the crimes was

12 | John D. Ciorciari, "History and Politics behind the Khmer Rouge Khmer Rouge trials", in: John D. Ciorciari and Anne Heindel (eds.), *On Trial: The Khmer Rouge Khmer Rouge Accountability Process, Document Series no 14*, Documentation Center of Cambodia, Phnom Penh, 2009, 43.

13 | On the Vietnamese Genocide trial cf. Frank Selbmann and Dorette Wesemann, "Der Pol Pot-Ieng Sary-Prozess revisited – Anmerkung zum Prozess gegen führende Rote Khmer im Jahr 1979", *Zeitschrift für Internationale Strafrechtsdogmatik*, 2, 2010, 116-125.

14 | CHR Resolution 49/1997 (Situation of human rights in Cambodia).

15 | Judgement against Kaing Guek Eav on 26 Jul 2010, Case No. 001/18-7-2007/ECCC/TC, § 94.

not feasible. With the international assistance of the United Nations, the ECCC is expected to help bring some closure to the dark chapter of Cambodia's history and to contribute to strengthen the rule of law in Cambodia.

ESTABLISHMENT AND STRUCTURE OF THE ECCC

Following the fall of the iron curtain in the beginning of the 1990s, a paradigm change in international politics led to the establishment of international criminal courts to address accountability for mass atrocities.¹⁶ During the cold war, massive human rights violations such as those in Cambodia were considered a matter of internal affairs and remained unpunished. This changed with the establishment of criminal tribunals by the United Nations Security Council following atrocities in former Yugoslavia¹⁷ and Rwanda.¹⁸ Their establishment triggered an awakening of a dormant idea of establishing a permanent international criminal court (ICC), which was finally agreed on in July 1998.¹⁹ Its statute opened for signature and ratification in summer 1998²⁰ and, as stipulated in its Statute, only became operational after at least 60 States ratified the treaty, which was achieved on 1 July 2002.²¹ The ICC can only prosecute crimes from that date onwards and may not look into past rights violations, such as in Cambodia.²² Owing to the renaissance of international criminal justice after its true birth in Nuremberg in 1945, news spread in 1997 that Pol Pot was overthrown and incarcerated in an

The ICC can only prosecute crimes from 1 July 2002 onwards and may not look into past rights violations, such as in Cambodia.

16 | For a general overview on the evolution of modern international criminal courts: Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2008, 317 et seq.; Gerhard Werle, *Völkerstrafrecht*, Mohr Siebeck, Tübingen, 2007, 1 et seq.

17 | Established pursuant to UN Security Council resolution 827, 1993.

18 | Established pursuant to UN Security Council resolution 955, 1994.

19 | William Schabas, *Unimaginable atrocities*, Oxford University Press, Oxford, 2011.

20 | For the text see: United Nations (UN), "Rome Statute of the International Criminal Court", <http://untreaty.un.org/cod/icc/statute/finalfra.htm> (accessed 14 Mar 2013).

21 | 122 States have so far ratified the ICC Statute (as of 4 April 2013). Cambodia ratified the ICC statute on 11 April 2002.

22 | See Art. 11(1) ICC Statute: "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute."

internal coup by what appeared to be the last remnants of the Khmer Rouge who were hiding in the forest near the Thai border and continued to destabilise Cambodia.²³ This led to serious negotiations to hold Pol Pot and his henchmen accountable before an international criminal tribunal for the crimes during his reign in Cambodia. Discussions ranged from the establishment of a special chamber at the Yugoslav tribunal to a full-fledged international tribunal.²⁴ These discussions were encouraged when the Royal Government of Cambodia sought assistance in the prosecution of the Khmer Rouge.²⁵ The initial excitement stalled, however, due to the ongoing power struggles in Cambodia and because of intricate positions of the government on how such a court could, and maybe should, operate. In the end, the creation of a court was a tardy and complex affair.²⁶ The negotiations for the creation of a tribunal were complicated by two factors. First, the UN Security Council was not prepared to establish an international tribunal under Chapter VII of the UN Charter, as in the cases of the former Yugoslavia and Rwanda.²⁷ China argued that there no longer existed a threat to international peace and security, a prerequisite to a Chapter VII resolution to create such a criminal tribunal.²⁸ Second, the negotiations to establish a court with the consent of the Cambodian government were complicated and extended nearly over decades, as it was relentlessly insisted that such a court would remain under Cambodian authority and that the UN would only play an advisory role. This was a position difficult to accept for the UN who insisted on an impartial and independent court that adhered to international standards.²⁹

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23 | David Scheffer, *All the missing Souls*, Princeton University Press, Princeton, 2012, 346 et seq.

24 | *Ibid.*, 348 et seq.

25 | David Scheffer, "The Extraordinary Chambers in the Courts of Cambodia", in: M. Cherif Bassiouni, *International Criminal Law*, Martinus Nijhoff Publishers, Leiden, 2008, 221.

26 | For a detailed analysis: *ibid.*, 220-239.

27 | A draft resolution was circulated by the U.S. in June 1998. Cf. Scheffer, n. 25, 222 et seq.

28 | *Ibid.*

29 | UN, "Negotiations between the UN and Cambodia regarding the establishment of the court to try Khmer Rouge leaders", <http://un.org/news/dh/infocus/cambodia/corell-brief.htm> (accessed 15 Mar 2013); see also Hans Corell, "Forward", in: Luc Reydams et al., *International Prosecutors*, Oxford University Press, Oxford, 2012, viii.



The Court Building of the Khmer Rouge Tribunal, officially known as "Extraordinary Chambers in the Courts of Cambodia" (ECCC), in Phnom Penh. | Source: © Roger Phillips.

The eventual outcome is an unorthodox set of *sui generis* specialised and hybrid chambers within the existing Cambodian court system as is signified by its name Extraordinary Chambers *in* the Courts of Cambodia. Unlike other tribunals backed by the United Nations, the ECCC is created by domestic statute.³⁰ The agreement between the United Nations and the Royal Government of Cambodia only regulates the assistance of the former, but does not legally establish the court.³¹ The character of these special chambers has been described by the court's judges in the following terms: "[A] court of special and independent character within the Cambodian legal system [...] designed to stand apart from existing Cambodian courts and rule exclusively on a narrowly-defined group of defendants for specific crimes committed within a limited period."³² The agreement between the United Nations and the Royal Government of Cambodia simply defines the assistance role of the United Nations in those chambers.³³ In principle it follows other

30 | Law on the Establishment of the Extraordinary Chambers, with inclusions of amendments as promulgated on 27 Oct 2004 (NS/RKM/1004/006): Extraordinary Chambers in the Courts of Cambodia (ECCC), <http://www.eccc.gov.kh/en> (accessed 15 Mar 2013).

31 | See Art. 1 "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", ECCC, *ibid*.

32 | Decision on request for release of Kaing Guek Eav on 15 Jun 2009, Case No. 001/18-7-2007-ECCC-TC, § 10.

33 | Art. 1 Agreement.

hybrid criminal courts that have been established with UN assistance, such as the Special Court for Sierra Leone, the Special Panels for Serious Crimes in East Timor, a court in Kosovo, the Special Tribunal for Lebanon and others.³⁴ However, the main difference with all those courts is that the ECCC is established within the national judiciary and the judicial officers appointed by the UN cannot determine issues unilaterally. The constitutive statutes which delineate ECCC jurisdiction and operations are the ECCC Law and the Agreement. In addition, the plenary of judges adopted so-called "Internal Rules" that complement the above two instruments and serve as a procedural and evidentiary code.³⁵ The temporal jurisdiction of the ECCC extends from 17 April 1975 to 6 January 1979,³⁶ thereby excluding a full-fledged inquiry into the Cambodian conflict and crimes that continued well beyond the Khmer Rouge period.

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The personal jurisdiction is limited to the "senior leaders of Democratic Kampuchea" and those "most responsible" for the crimes under its jurisdiction, which are genocide,³⁷ crimes against humanity³⁸ and grave breaches of the Geneva Conventions of 12 August 1949.³⁹ In addition, but not playing any pivotal role in the past and current trials, the jurisdiction also extends to acts of destructing cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict,⁴⁰ crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations⁴¹ and specifically identified crimes under the Cambodian 1956 Penal Code.⁴²

34 | Generally on hybrid or mixed courts: Sarah Williams, *Hybrid and Internationalised Criminal Tribunals*, Hart Publishing, Oxford, 2012.

35 | ECCC, <http://www.eccc.gov.kh/en/internal-rules> (accessed 15 Mar 2013) (in the following called "Internal Rules").

36 | Art. 1 ECCC Law.

37 | Art. 4 ECCC Law.

38 | Art. 5 ECCC Law.

39 | Art. 6 ECCC Law.

40 | Art. 7 ECCC Law.

41 | Art. 8 ECCC Law.

42 | Art. 3 ECCC Law (new).

The court is structurally organised by an administrative office that services the judicial authorities. It is headed by a Cambodian appointed Director of Administration and a UN appointed deputy, who is also in charge

of the United Nations Assistance Mission to the Khmer Rouge Tribunals.⁴³ The court has a prosecution section, which is equally headed by two Co-Prosecutors and nominated by the Government of Cambodia and the UN respectively.⁴⁴

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The official appointment is enacted by the Supreme Council of Magistracy, which, according to the ECCC Law and the Agreement, does not possess any oversight authority with regard to the UN elected officials, but rather has to rubber-stamp the nomination according to the selection made.⁴⁵ Procedurally, following the French inquisitorial criminal procedure, any investigative act commences with the Co-Prosecutors. They conduct a preliminary investigation and then submit a final report to the Co-Investigation Judges.⁴⁶ The two Co-Prosecutors have to make unanimous decisions. If they cannot find an agreement, the matter will be referred to the Pre-Trial Chamber.⁴⁷ Upon receipt of the final report from the Co-Prosecutors, the two investigating judges, again one domestic and one foreign, will pursue an independent and impartial inquiry and prepare a closing order if they conclude that there is sufficient evidence and reasonable belief that crimes were committed by a suspect.⁴⁸ Once again any dispute between them will be settled by the Pre-Trial Chamber.⁴⁹ The Pre-Trial Chamber however does not merely settle disputes between the Co-Prosecutors and the Co-Investigating Judges, but in addition has jurisdiction to decide matters raised by the suspects, such as bail applications or challenges to the jurisdiction of the ECCC.⁵⁰ It is composed of three Cambodian judges and two judges nominated by the UN, the Cambodian side therefore being in the majority. This majority was one of the most fiercely debated issues during the negotiations. The UN in particular wanted to ensure that a final verdict

43 | Art. 8 Agreement, n. 31.

44 | Art. 16 ECCC Law.

45 | Art. 11 ECCC Law (new); Art. 3(1) Agreement.

46 | Art. 53 Internal Rules.

47 | Art. 20 ECCC Law (new).

48 | Art. 67 Internal Rules.

49 | Art. 23 ECCC Law (new).

50 | Section D Internal Rules.

and conviction would not be possible without an agreement of the UN judges. In order to alleviate those fears it was finally decided that the judges could only make a decision by a so-called supermajority vote, i.e. a two-third majority, and therefore at least one international judge has to assent with the Cambodian judges.⁵¹

Civil parties, i.e. recognised victims of crimes during the Khmer Rouge period, may participate and be legally represented in the jurisdiction as well.

Following the investigations, the Co-Investigating judges file a closing order, which serves as the indictment if there is "sufficient evidence" to proceed with charges.⁵² This procedural step triggers the jurisdiction of the Trial Chamber which will then hear the evidence in an open and public hearing with participation of the accused and his defense counsel. In addition the civil parties may also participate and be legally represented.⁵³ The participation of civil parties, i.e. recognised victims of crimes during the Khmer Rouge period, is one of the praised and positive legacies of the ECCC, even though the procedural and structural handling of their participation is controversially and critically being discussed.⁵⁴ As the Pre-Trial Chamber, the Trial Chamber is composed of three national and two international judges. Again any decision has to be reached with the so-called supermajority. Following the evidentiary hearing it hands down a verdict and may only convict if the crimes and the accused's participation is proven beyond reasonable doubt.⁵⁵ The defense and the prosecution may appeal the trial verdict. This appeal is handled by the Supreme Court Chamber, which consists of four Cambodian and three foreign judges.⁵⁶

51 | Scheffer, n. 25, 246; for a critical appraisal of the supermajority see Corell, n. 29; Silvia de Bertodano, "Problems arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers", *Journal of International Criminal Justice*, 4, 2006, 285-293.

52 | Art. 67(1), Internal Rules; Closing Order Indicting Kaing Guek Eav, Case No.001/14-08-2006, 8 Aug 2008, § 130.

53 | Art. 23, Internal Rules.

54 | David Boyle, "Rights of Victims", *Journal of International Criminal Justice*, 4, 2006, 307-313; Mahdev Mohan, "The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal", *International Criminal Law Review*, 9, 2009, 733-755.

55 | Art. 87(1) Internal Rules.

56 | Art. 9 ECCC Law (new).

This three-tier structure (i.e. Pre-Trial, Trial and Supreme Court Chamber) in addition to two investigative bodies (i.e. Prosecution and Co-Investigating Judges) is far more complex than any other sister atrocity tribunals, such as the Sierra Leone tribunal which only has one investigative authority (i.e. the Prosecution) and a two-tier system. The inflated structure contributes significantly to the expenses of the court, which are drawn from voluntary contributions. In the first five years of the court's existence it had an average budget of about 30 million U.S. dollars per year.⁵⁷ The fact that it needs to translate and interpret submissions not only into English and Khmer, but also into French, additionally contributes to the costs of a constantly financially strapped court.

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PAST, CURRENT AND FUTURE TRIALS

Since the start of the ECCC operations in 2007, five people have been charged by the ECCC to date in two separate proceedings, and there are two ongoing investigations currently being conducted by the Co-Investigation Judges. In the first case, so-called Case 001, the Trial Chamber convicted the notorious commanding torturer of the infamous torture prison Toul Sleng, which had formerly been a school and is better known as S-21, Kaing Guek Eav (alias "Duch") to 30 years detention for crimes against humanity and war crimes.⁵⁸ The trial proceedings started on 30 March 2009, and the judgement was delivered in Juli 2010. The accused Kaing Guek Eav, in his late 60s during the trial, was cooperative and confessed his crimes, even though he dismissed responsibility at the final hearing.⁵⁹ Given this largely cooperative attitude, the hearings were conducted without any major interruption. The appeals judgement increased the sentencing to lifelong imprisonment, arguing that the Trial Chamber did not sufficiently take into account the gravity of

57 | ECCC, "ECCC Financial Information", <http://www.eccc.gov.kh/en/about-eccc/finances> (accessed 15 Mar 2013).

58 | Judgement against Kaing Guek Eav on 26 Jul 2010, Case No. 001/18-7-2007/ECCC/TC; "Press Release: Kaing Guek Eav Convicted of Crimes Against Humanity and Grave Breaches of the Geneva Conventions of 1949", press release, 26 Jul 2010, <http://www.eccc.gov.kh/en/media-center/press-releases> (accessed 16 Mar 2013).

59 | Judgement against Kaing Guek Eav on 26 Jul 2010, Case No. 001/18-7-2007/ECCC/TC, § 609.

the crimes and Kaing Guek Eav's conduct.⁶⁰ His case is now final and Kaing Guek Eav is waiting to be transferred from the ECCC detention facility to a domestic prison. Case 002, the second and most important case before the ECCC,⁶¹ charges the remaining senior leaders of the former Democratic Kampuchea Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith with genocide, crimes against humanity and war crimes. The closing order was issued in September 2010⁶² and the evidentiary hearing started in November 2011.⁶³ The Trial Chamber however severed the case into segments or so called "mini-trials". The first of such segments only covers the forced movement of the population in April 1975 and associated crimes.⁶⁴ Later on the Trial Chamber added charges of a mass execution of former Lon Nol soldiers in Toul Pro Chrey to that trial.⁶⁵ All accused denied the charges. The case is mainly complicated by the health of the octogenarian accused. Ieng Thirith, the former minister for social and family affairs, was declared unfit for trial due to a severe form of Alzheimer. Her case was severed, stayed and she was released from pre-trial detention in October 2012.⁶⁶ Her husband Ieng Sary, former Minister for Foreign Affairs, died before a final verdict on 14

- 60 | Judgement of the Supreme Court Chamber against, Kaing Guek Eav on 3 Feb 2012, Case No. 001/18-7-2007-ECCC-TC; ECCC, "Kaing Guek Eav alias Duch Sentenced to Life Imprisonment by the Supreme Court Chamber", press release, 3 Feb 2012, <http://www.eccc.gov.kh/en/media-center/press-releases> (accessed 16 Mar 2013).
- 61 | Peter Maguire, "ECCC's Tarnished Legacy and the UN", Cambodia Tribunal Monitor, 27 Mar 2012, <http://cambodia-tribunal.org/blog/2012/03/eccc-s-tarnished-legacy-and-un> (accessed 16 Mar 2013).
- 62 | Closing order of the case Nuon Chea, Ieng Sary, Khieu Samphan, Ieng Thirith, 15 Sept 2010, Case No. 002/19-09-2007-ECCC-OCIJ.
- 63 | ECCC, "Trial Chamber Announces Date for Opening of the Substantive Hearing in Case 002", press release, 18 Feb 2011, <http://www.eccc.gov.kh/en/media-center/press-releases> (accessed 16 Mar 2013).
- 64 | Severance order pursuant to internal rule Art. 89, 22 Sept 2011, in case Nuon Chea, Ieng Sary, Ieng Thirith, Khieu Samphan, Case No. 002/19-09-2007-ECCC/TC.
- 65 | Memorandum, "Notification of Decision on Co-Prosecutions' request to include additional crime sites within the scope of Trial in Case 002/01 (E163) and deadline for submission of applicable law portion of Closing Briefs", 8 Oct 2012, case Nuon Chea, Ieng Sary, Khieu Samphan, Case No. 002/19-09-2007-ECCC/TC.
- 66 | "Decision on immediate appeal against the Trial Chamber's order to unconditionally release the Accused Ieng Thirith", 14 Dec 2012, Case No. 002/19-09-2007-ECCC/SCC, §§ 1-3.

March 2013 and the proceedings were consequently terminated against him.⁶⁷ Nuon Chea, deputy to Pol Pot and so called "Brother No. 2", usually excuses himself during the afternoons and follows the proceedings from a holding cell where in theory he is able to follow the proceedings via live video coverage. Khieu Samphan, former head of state of the Democratic Kampuchea, is the only accused who manages to follow the day long proceedings in spite of his age. The age of the accused and the potential risk of not completing the trial was one of the main reasons for the severance order and the mini-trials. The evidentiary phase is expected to be finalised by mid or end 2013 and a final verdict to be issued a couple of months thereafter. Should the accused still be alive after this first mini-trial and should the court have sufficient funding, it will continue with another segment of charges of the closing order. However, given the advanced age of the accused and the current pace of the trial proceedings, an orderly closure to the first segment remains uncertain.



Single cells in the torture prison S-21. Some 14,000 to 20,000 Cambodians were incarcerated in the former school complex between 1975 and 1979. | Source: © Maximilian Jürgens.

67 | ECCC, "Accused Person Ieng Sary Dies", Press Release, 14 Mar 2013, <http://www.eccc.gov.kh/en/articles/accused-person-ieng-sary-dies> (accessed 4 Apr 2013); "Prosecutor v. Nuon Chea, Ieng Sary, Khieu Samphan, Case No. 002/19-09-2007-ECCC/TC, Termination of the proceedings against the accused Ieng Sary", 14 Mar 2013.

Case 003 and 004 are the most contentious cases before the ECCC due to the alleged interference of senior officials of the Cambodian Government. The handling of those two cases will be the ultimate test for the integrity and independence of the ECCC. The suspects in these two cases have not been officially named by the court. It is speculated that the suspects are former mid-level to senior commanders of the navy in Case 003 and mid-level cadres in Case 004. Both cases are overshadowed by statements of senior government officials that reportedly oppose any further investigations by the tribunal.⁶⁸ These statements were perceived by the International Co-Investigating judge as attempted interference by Government officials into the ongoing investigations.⁶⁹ In a judicial environment with a historically strong and independent judiciary, such statements would easily be dismissed as unwise or ill-advised and surely as inappropriate.⁷⁰

The statements of high ranking government officials were aggravated by the conduct of the national Co-Investigating Judge who refused any meaningful and serious investigation into the case.

Unfortunately, the Cambodian judiciary is not known for such a strong and independent judicial culture – on the contrary.⁷¹ These statements of high ranking government officials were aggravated by allegations of the international Co-Investigating Judge that his national counterpart refused any meaningful and serious investigation into the case.⁷² The national judges of the Pre-Trial Chamber, who had to decide disputes over the initiation and conduct of the investigations into Cases 003 and 004 between the two Co-Investigation Judges, appeared to also demonstrate a vivid opposition to any meaningful investigation,

68 | For a detailed discussion see Open Society Justice Initiative, "The Future of Cases 003 and 004 at the Extraordinary Chambers in the Courts of Cambodia", Open Society Foundations, Oct 2012, http://opensocietyfoundations.org/sites/default/files/eccc-report-cases3and4-100112_0.pdf (accessed 16 Mar 2013).

69 | ECCC, "Statement by the International Co-Investigating Judge", press release, 10 Oct 2011, <http://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge> (accessed 16 Mar 2013).

70 | See decision on Rule 35 Application in the case against Nuon Chea, Ieng Sary, Ieng Thirith, Khieu Samphan on 11 May 2012, Case No. 002/19-09-2007-ECCC/TC.

71 | N. 68.

72 | "Note of the International Reserve Co-Investigation Judge to the Parties on the Egregious Dysfunctions within the ECCC Impeding the proper Conduct of Investigations in Case 003 and 004", 21 Mar 2012, Case No. 003/07-09-2009-ECCC-OCIJ and 004/07-09-2009-ECCC-OCIJ.

claiming formal errors in the appointment process of the internationally nominated Co-Investigating Judge.⁷³ Two internationally nominated investigating judges resigned over the alleged interference.⁷⁴ The appointment of a new international Co-Investigating Judge, Judge Mark Harmon, and his success in any investigations will be the ultimate quest for the ECCC to regain credibility and demonstrate its independence and sovereignty.

PERCEPTION OF THE ECCC IN CAMBODIAN SOCIETY

For the majority of Cambodians, justice for the unimaginable crimes committed more than three decades ago is not the first priority. Unsurprisingly, Cambodians individually see a higher importance in the daily challenges of their lives, such as job security, decent wages, health care, as well as improvements to the country's infrastructure that was either destroyed or not developed during the war. In a 2011 population-based survey by the University of Berkeley "Knowledge and Perceptions of Justice and the ECCC of Cambodia", 83 per cent compared to 76 per cent in 2008 of the interviewees would rather prefer spending money on something other than the ECCC.⁷⁵

Although justice is not prioritised, a 2011 population based survey indicates that since 2008, both awareness of and knowledge of the ECCC has increased.

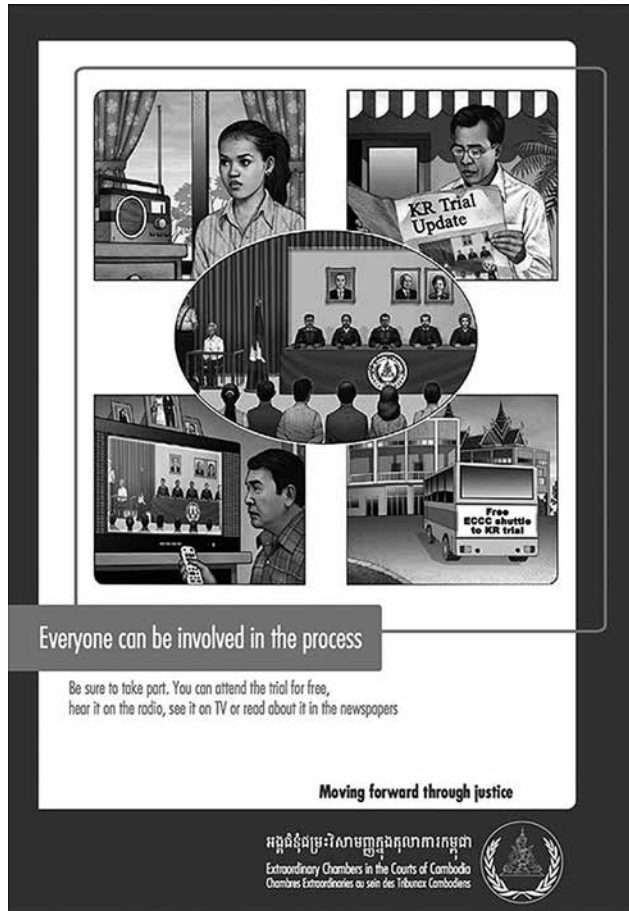
Nevertheless, although justice is not prioritised, the survey also indicates that since 2008, both awareness and knowledge of the ECCC has increased. In 2010, the percentage of the population claiming limited knowledge of the ECCC decreased among those who lived under the Khmer Rouge regime (22 per cent in 2010 compared to 34 per cent in

73 | Cf. n. 72.

74 | Cf. n. 69; ECCC, "Press Release by the Reserve International Co-Investigating Judge", press release, 4 May 2012, <http://www.eccc.gov.kh/en/articles/press-release-reserve-international-co-investigating-judge> (accessed 16 Mar 2013).

75 | Phuong Pham, Patrick Vinck, Mychele 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*, Human Rights Center, University of California, Berkeley, 2011, 3, http://peacebuildingdata.org/sites/m/pdf/Cambodia_2011_After_the_first_Trial.pdf (accessed 22 Mar 2013). The study was conducted among a sample of 1,000 individuals representative of the adult population of Cambodia. The interviews took place in December 2010, over a 20-day period. In the remainder of the report, results from the 2010 survey are compared with the results of a comparable survey of 1,000 individuals conducted by the same team in 2008.

2008) and those who did not live under the Khmer Rouge regime (33 per cent in 2010 compared to 50 per cent in 2008).⁷⁶



PR poster of the ECCC: "Everyone can be involved in the process." | Source: © ECCC.

Over the past two years, attitudes toward the ECCC have been largely positive and have become increasingly favourable on certain indicators. A vast majority of respondents believed the Court would respond to the crimes committed by the Khmer Rouge (84 per cent), help rebuild trust in Cambodia (82 per cent), help to promote national reconciliation (81 per cent) and bring justice to the victims of the Khmer Rouge regime (76 per cent). 75 per cent believed

76 | Ibid.

the Court to be impartial. Those who doubted the Courts impartiality associated their skepticism with alleged interferences from the Cambodian government (31 per cent) and the fact that the judges are working for “the government” (23 per cent),⁷⁷ which may also signify a general mistrust into state institutions in Cambodia.

It is significant that the questions of the survey concern individualised perceptions of the citizens. An individual will understandably focus on personal demands, such as job security, family welfare and health care, just to name a few. The survey unfortunately does not address broader questions of governance, such as the rule of law, accountability, national reconciliation and rehabilitation, deterrence and creating a common historical record. Besides these general figures suggesting a slight improvement in the overall knowledge about and confidence in the legitimacy and the work of the ECCC, these statistics are highly influenced by individual socialisation, personal experiences, age, political alliances and by the variety of Buddhist beliefs. Youk Chhang appropriately categorises the supporters and the opponents of the tribunal into the following four categories:

The statistics are highly influenced by individual socialisation, personal experiences, age, political alliances and by the variety of Buddhist beliefs.

1. Survivors;⁷⁸
2. Thai Boarder Refugees;⁷⁹
3. Cambodian Expatriates;⁸⁰
4. the next generation.⁸¹

Even 33 years after the tragic events, Cambodians stay divided over the trials. The majority of today's citizens have not experienced the Khmer Rouge Regime, and most of those who have experienced the pain may no longer seek retribution. The perceptions of the trials are therefore

77 | Ibid. It should be noted here however that the judges are not working for the government per se, but rather for the Cambodian judiciary.

78 | Youk Chhang, “Why the Khmer Rouge Tribunal Matters to the Cambodian Community: Justice for the Future, Not the Victims”, Cambodia Tribunal Monitor, <http://cambodiatribunal.org/why-khmer-rouge-tribunal-matters-to-cambodian-community> (accessed 22 Mar 2013).

79 | Ibid.

80 | Ibid.

81 | Ibid.

mainly influenced by the inherent need of accountability, truth seeking, establishing a collective memory and by the question of how the trials may affect the Cambodian justice system and the rule of law.

THE LEGACY OF THE ECCC

The effect of the ECCC on the Cambodian judiciary is not an intrinsic task of the ECCC. It is however one of the expectations and legacies it could leave behind.

Apart from the specific prosecution of alleged individual perpetrators, the effect of the ECCC on the Cambodian judiciary is not an intrinsic task of the ECCC. It is however one of the expectations and legacies it could leave behind, and this specific idea is in line with UN policies regarding hybrid tribunals, such as the ECCC. The United Nations Office of the High Commissioner for Human Rights defines legacy as “a hybrid court’s lasting impact on bolstering the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, *while also strengthening domestic judicial capacity*. The aim of this is for its impact to continue even after the work of the hybrid court is complete”.⁸² The ECCC itself has recently adopted this definition and appears to be actively promoting this perspective.⁸³ At the same time the OHCHR generally cautions that “it takes many years to complete even basic legal training and that reforming a malfunctional judicial system and developing a culture based on the rule of law and respect for human rights are long-term goals.”⁸⁴ Such a quasi-legacy jurisdiction could also be identified as an additional justice dividend.⁸⁵

82 | Emphasis by the author. United Nations High Commissioner for Human Rights (UNHCHR), *Rule-Of-Law Tools for Post-Conflict States. Maximizing the legacy of hybrid courts*, 2008, 4-5, <http://ohchr.org/Documents/Publications/HybridCourts.pdf> (accessed 16 Mar 2013).

83 | The Extraordinary Chambers in the Courts of Cambodia and the Cambodian Human Rights Action Committee, *Hybrid Perspectives on Legacies of the Extraordinary Chambers in the Courts of Cambodia (ECCC), Conference Report and Recommendations*, 1, 2, 47, http://www.chrac.org/eng/CHRCAC%20Statement%20in%202012/Report%20on%20Hybrid%20Perspectives%20on%20ECCC%20Legacies_2012_English.pdf (accessed 16 Mar 2013).

84 | *Ibid.*, 4.

85 | Cf. also Carla del Ponte, “The Dividends of International Justice, Carla del Ponte Address at Goldman Sachs”, London, 6 Oct 2005, http://icty.org/x/file/Press/PR_attachments/cdp-goldmansachs-050610-e.htm (accessed 16 Mar 2013).

Such a legacy mission is a challenging endeavor for the ECCC, given its systemic deficiencies and alleged outside exertion of influence, such as its dual set-up of national and international components within one organisation (the so-called hybrid structure), budgetary constraints, allegations of political interference and corruption. This is aggravated by the fact that most Cambodian officials are still part and parcel of a judiciary that is in need of improvement. But it is a reasonable and realistic chance, in which the Court should be encouraged, even though results may not be as forthcoming given the current dysfunctional status of the national legal system.

Despite these challenges the hybrid structure is also one of the ECCC's greatest assets in order to leave positive legacies behind.

Through the international assistance the tribunal exemplifies a standard desired at domestic level.

Through the international assistance the tribunal exemplifies a standard desired at domestic level. Through its outreach programmes and programmes organising visits for ordinary Cambodians to the tribunal, the exemplified criminal proceedings are disseminated to the wider public.⁸⁶ It demonstrates how a court should operate and that evidence from a state prosecutor may be questioned and challenged. In this regard, ideals of justice, the supremacy of the law and the message that such atrocious crimes may not go unpunished are echoed to a wider public. Through the national staff and lawyers working at the ECCC, knowledge will be transferred to the domestic courts. Capacity building is one of the legacies of the court. A more detailed set of legacy recommendations which the court could achieve fairly easily and without additional funding have been identified by practitioners and experts following a conference that discussed the impact and legacies of the court domestically and internationally.⁸⁷ The identified real or potential legacies may be summarised as follows:

- jurisprudential legacies in substantive and procedural criminal and human rights law;
- jurisprudential legacies regarding the participation of civil parties;

86 | ECCC, "ECCC Surpasses 100,000 Visitors Milestone", press release, 4 Jan 2012, <http://www.eccc.gov.kh/en/articles/eccc-surpasses-100000-visitors-milestone> (accessed 16 Mar 2013).

87 | N. 83, 47.

- knowledge transfer to domestic proceedings of trial monitoring;
- outreach activities;
- knowledge transfer of witness support and forensic psychological assessments;
- access to justice, in particular for women.⁸⁸

However, it is important to point out that such a legacy jurisdiction or mission should merely be seen as a derivative affect, not as an institutional imperative, which is simply to render expeditious and fair justice. If that task is achieved, the derivative affects of positive legacies will follow automatically.