

Case Questions

Background and Context

Who were the Khmer Rouge? What did they do?

Who was the leader? Why isn't he involved in the story of the ECCC?

Timeline? Why did it take so long for progress to be made?

Initiation Phase

Who initiated the process?

What is puzzling about the initiation of the ECCC?

Role of international organizations?

Formulation Phase

Players in Cambodia and UN?

Narratives/worldviews for the important players?

Implementation Phase

How does the structure of the ECCC work? Is it effective?

What role have non-governmental groups played in the implementation?

What has been the effect of the ECCC in Cambodia as a whole?

Evaluative Phase

In what ways is the ECCC a failure? A success? Why?

What is the financial aspect of this story? How does financial interest affect institutions?

What are the trade-offs from the hybrid structure?

Would a different form of tribunal have been better?

Do you think a different form for the tribunal could have even been possible?

Hybrid Justice: Establishing the ECCC

No government has the right to hide behind national sovereignty in order to violate the human rights or fundamental freedoms of its peoples -Kofi Annan

The Story of Soy Sen

Soy Sen was only fourteen years old when Khmer Rouge guerillas entered his home province in the south of Cambodia and took control, sending him to prison due to his father's status as a local official. At the time, Sen did not know what awaited him at the prison, nor what the armed militias wanted from him. Upon arriving in the prison, this would become abundantly clear. Sen recalls one specific day; he was climbing a palm tree in the yard of the prison when several guards took two children and thrashed them against the trunk of the tree, killing them. This incident was the norm and not the exception in Kraing Ta Chan Prison, a place where torture, murder, and even cannibalism were common. Sen describes how "[The prison boss] was so cruel... he tortured me. One day he raped two women with an M-79 missile by putting it inside them.¹" The leader of the prison, Srei Than, went by the nickname "Small Duch", a tribute to the notorious prison boss "Duch" who ran the Tuol Sleng prison in Phnom Penh, where tens of thousands of Cambodians were tortured and killed throughout the Cambodian Genocide, one of the worst acts of genocide and crimes against humanity in the 20th century. Soy Sen is lucky to have survived his stay in Kraing Ta Chan; other members of his family and community were not as fortunate. Yet, as if the brutal conditions of the prison when he was a child were not enough, Sen's pain is compounded by the fact that Than, the very man who tortured him for years, now lives in his same village, walking free in the society he once ravaged. The reality that torturer and victim now exist as equals in Cambodia would seem to upend all notions of law, justice, and civic responsibility. How did Cambodia come to this situation, and what is being done to assuage the pain of Soy Sen and millions of other victims?

¹ "Khmer Rouge Verdict: 'I Live next to My Torturer'." BBC News, BBC, 16 Nov. 2018.

The Khmer Rouge in Cambodia

From 1975 to 1979, Cambodia was ravaged by the Khmer Rouge, a Marxist movement that killed millions through forced resettlement, famines, and purges of social elites, academics, and ethnic minorities. While this regime came to end a mere 4 years after it took power, the devastation it caused was widespread. A quarter of the population of Cambodia, renamed Kampuchea under the Khmer, had died, and whole families had been wiped out in the disastrous policy of social engineering². The country was economically and diplomatically isolated from most other nations and weakened by years of purges and forced labor³. The leader of the group, Pol Pot, had a vision for Kampuchea as a socialist agrarian utopia; this vision was never realized, as in 1979 the newly unified Vietnam invaded Cambodia, toppling the Khmer regime and installing a friendly government of defectors. The Khmer, including Pol Pot, retreated to the jungles along the Thai-Cambodian border, where they waged guerilla war for several more years⁴. This continuation of violence by the Khmer contributed to the already staggering national sense of trauma that had been inflicted on the survivors of the genocide.

When Vietnam left Cambodia in 1989, an uneasy agreement was signed between rival parties, and elections were held in 1993 for a new government⁵. Pol Pot continued to lead the Khmer insurgency until 1997, when he was captured and placed under house arrest. Without him, the organization limped along for two more years, at which point a combination of deaths, defections, or arrests ended the Khmer Rouge as a functional organization. However, the legacy of the Khmer lasted far longer than the organization; for years after the regime ceased to hold control, the purges of elites meant that there were no doctors, teachers, or professionals of any kind in the country⁶. Furthermore, PTSD and other traumas were prevalent in victims, but a lack of health infrastructure and culture of silence regarding the events of the period meant that many of these harms went untreated. The slow pace with which Cambodia opened up to the outside

² History.com Editors. "Khmer Rouge." History.com, A&E Television Networks, 12 Sept. 2017.

³ Ibid.

⁴ "The Cambodian Genocide." *United to End Genocide*, United to End Genocide.

⁵ Ibid.

⁶ Ibid.

world after this era of isolation meant that for some 20 years after the fall of the Khmer, there was no justice for the victims of the brutality.

Given the severity of the crimes committed, and the scale of trauma that appeared to have been inflicted, the need for some sort of justice seems obvious. An effort at this had been made in 1997, when Pol Pot was tried along with other high-ranking members of the regime; however, this trial was mostly for show, and allowed Pot to remain under house arrest until he died the following year⁷. For decades after this farce, the members of the Khmer Rouge filtered back into Cambodian government and society, integrating themselves into the country they had brutalized only years before. The question of justice for the victims was left unanswered during this period of time, becoming almost taboo. This seemed to change in 1997 with a letter from the prime ministers of Cambodia to the United Nations.

Prime Minister Hun Sen

In July of 1997, Co-Prime Minister of Cambodia Hun Sen, along with his counterpart Norodom Ranariddh, sent a letter to the United Nations seeking assistance in bringing the Khmer Rouge to justice⁸. In this letter, the prime-ministers state they “hope that the United Nations and the international community can assist the Cambodian people in establishing the truth about [the Khmer] period and [bring] those responsible to justice. Only in this way can this tragedy be brought to a full and final conclusion”⁹. Although nearly two decades had passed since the fall of the Khmer, this letter still was unprecedented, especially considering the long-standing wariness of international intervention in Cambodia, and the history of none other than Hun Sen. Prime Minister Sen had himself served in the Khmer up until 1977, when regime purges caused him to flee to Vietnam and begin leading rebel armies that were preparing to retake the country from the

⁷ History.com Editors. “Khmer Rouge.” History.com, A&E Television Networks, 12 Sept. 2017.

⁸ “Letter from Prime Minister Hun Sen to Mr. Kofi Annan, United Nations Secretary-General.” Drupal, ECCC.

⁹ Co-Prime Ministers of Cambodia, Letter to the Secretary General of the United Nations, 21 June 1997, https://www.un.org/ga/search/view_doc.asp?symbol=A/51/930

forces in Cambodia. After Vietnamese forces took control in 1978, Sen was installed into power, where he has stayed ever since, becoming one of the longest serving leaders worldwide¹⁰.

Why then, would a former Khmer leader-turned-rebel, whose involvement in the beginnings of the brutalization of Cambodia is well documented, request UN assistance in setting up a tribunal to try Khmer officials? According to some accounts, it can be explained by Sen's involvement in the 1997 Cambodian Coup, wherein the co-prime minister Sen ousted his counterpart and took sole control of Cambodia, killing dozens of officials in the process. This seizure of power by Sen occurred around the same time as the letter to the United Nations; some have speculated that Sen thought this could give him an edge over his rival, or that he simply wasn't thinking¹¹. Whatever the reason, the United Nations took the opportunity to pursue justice, regardless of if Sen still desired their involvement or not. While Sen's letter marks the formal beginning of the process to find justice for victims of the Cambodian Genocide, the Cambodian government was clear in seeking international aid in setting up a domestic Cambodian court to try the perpetrators, not an international court under control of the United Nations¹². Having just won a coup and secured power over Cambodia, Sen was unwilling to let himself or other Khmer members in the government be hindered by the United Nations.

The United Nations and the Group of Experts

Regardless, in February of the following year, the UN General Assembly acknowledged the suffering of Cambodia under the leadership of the Khmer, calling on “the Secretary-General, through his Special Representative for human rights in Cambodia, in collaboration with the office in Cambodia of the United Nations High Commissioner for Human Rights, to assist the Government of Cambodia in ensuring the protection of the human rights of all people in Cambodia”¹³ to begin the process to see if there was enough evidence to try those who committed crimes against humanity as a member of the Khmer. This agreement, UN Resolution

¹⁰ Erlanger, Steven. “In Phnom Penh, Vietnam's 'Puppet' Is Finding His Voice.” *The New York Times*, *The New York Times*, 27 Aug. 1989.

¹¹ UN, KHEANG. “The Khmer Rouge Tribunal: A Politically Compromised Search for Justice.” *The Journal of Asian Studies*, vol. 72, no. 4, 2013, pp. 783–792.

¹² *Ibid.*

¹³ GA Res. 52/135, 27 February 1998

52/135, lays out how this process is to be undertaken by a group of experts who would “evaluate the existing evidence and propose further measures, as a means of bringing about national reconciliation, strengthening, democracy and addressing the issue of individual accountability”¹⁴. After explaining the desire of the United Nations to make progress in this effort, the content of the resolution changes, turning instead to focus on laying out general apprehensions towards the Cambodian commitment to justice, the status of free and fair elections in the country, and other domestic factors that the General Assembly sees as potentially derailing the process. UN Resolution 52/135 makes special note of violence in early July 1997, the same violence caused by Hun Sen’s coup of his co-premier, and the lack of legal process to hold those accountable for it, among other factors that the group of experts note with “grave concern”¹⁵.

The group of experts set up by the United Nations to test the seriousness of crimes committed in Cambodia sent their findings to the General Assembly shortly after the February resolution. Given the extent and severity of the international and national crimes they found, and the status of former Khmer members in the present Cambodian government, the group advocated for an international tribunal similar to those ongoing in Rwanda at the time. The experts strongly condemned the idea of a domestic court or some sort of hybrid court in the question of the Cambodian Genocide, instead saying:

“Both principal political parties have strong connections with the Khmer Rouge and include former Khmer Rouge among their members, some of whom might be potential targets for prosecution...The level of corruption in the court system and the routine subjection of judicial decisions to political influence would make it nearly impossible for prosecutors, investigators and judges to be immune from such pressure in the course of what would undoubtedly be very politically charged trials...it would be difficult to find a judge free of the appearance of bias or prejudice.”¹⁶

According to the group, it would be best to have the court located outside of Cambodia; much of this belief came from a distrust of the Cambodian legal system along with a fear of interference from Hun Sen and his government. The government of Cambodia staunchly rejected this notion,

¹⁴ GA Res. 52/135, 27 February 1998

¹⁵ Ibid.

¹⁶ Ibid.

and it is believed that Sen wanted a domestic process that he could have more control of¹⁷. The government explained that any trial should respect the need for peace in Cambodia and the process of national reconciliation, and that an overeager court with broad sweeping jurisdiction would create panic among former Khmer officials, which could lead to a renewed guerilla war in the country, which in his own words, would kill “200,000 to 300,000 people”¹⁸.

This disconnect between the recommendation of the experts and the wishes of Hun Sen and the Cambodian government betrayed the difficulty that was to persist in the establishment of the tribunal. The United Nations fought for more influence over the courts, while the government refused to yield on the ground of national security and healing. However, agreements were reached, and several years after the first request had been submitted by Sen to the United Nations, in 2003, UN Resolution 57/228 laid out the procedures and process through which the Extraordinary Chamber in the Courts of Cambodia (ECCC), sometimes referred to as the Khmer Tribunal, would be established and operate¹⁹. This breakthrough signaled the first concrete step towards justice in Cambodia, but it also presented its own unique challenges that would become issues as the courts began operations.

The Secretary General

It was in this fledgling state that the ECCC found one of its most important supporters in the United Nations Secretary General, which at the time of founding was Kofi Annan, who served until 2006, and was succeeded by Ban Ki-moon²⁰. This position and those who fill it are able to call attention to international issues and press for positive developments, and this is what has happened in the case of the ECCC. As the Chambers were finding their feet and struggling to get off the ground, Secretary General Annan used his position to promote the justice process and encourage the ECCC to work efficiently in their pursuit of this goal. In an address to the United Nations Commission on Human Rights in April of 1999, Annan declared that “No government has the right to hide behind national sovereignty in order to violate the human rights or

¹⁷ 17. Report of the Group of Experts for Cambodia to the United Nations, 15 March 1999, <http://hrlibrary.umn.edu/cambodia-1999.html>.

¹⁸ Naren, Kuch. “Hun Sen Warns of Civil War if ECCC Goes Beyond 'Limit'.” *The Cambodia Daily*, 4 Mar. 2015.

¹⁹ UN GA Res. 57/228, 22 May 2003

²⁰ “Former Secretaries-General.” United Nations. www.un.org/sg/en/content/former-secretaries-general.

fundamental freedoms of its peoples. Whether a person belongs to the minority or the majority, that person's human rights and fundamental freedoms are sacred”²¹ Secretary General Annan was specifically referring to Kosovo and Cambodia in this speech, and he saw the value and need for investigations into the crimes that had been and were still being committed in these countries.

While it was under Kofi Annan that the Cambodian government reached out to the United Nations, Ban Ki-moon would step into the role of Secretary General during the more crucial time in the courts’ development, as it was under his watch that the ECCC began operating and trying criminals for the first time. If it had been Annan’s goal to lay the groundwork, the task of ensuring that the Chambers fulfilled their promise fell on Ban. Yet from the beginning, difficulties emerged, and the Cambodian government proved to be quite intractable in funding the courts and ensuring that domestic political pressures did not influence judicial proceedings. During his time as Secretary General, Ban and Hun Sen were increasingly at odds over the role of the ECCC; while Ban wanted to remain impartial and have the jurisdiction to try more officials, not just those at the very top, Hun Sen firmly rejected these notions and sought to ensure the courts would not expand their scope of trial, and that his influence over the courts would not be challenged.

On the 10th anniversary of Pol Pot’s death, in 2008, in the face of an ECCC that had delivered less than impressive results despite several years of operation, Ban spoke on the importance of the courts when he remarked “I would like to remind the international community of the urgent importance of bringing to closure one of history’s darkest chapters. The United Nations and the Royal Government of Cambodia remain actively engaged in efforts to hold the Khmer Rouge senior leaders and those most responsible accountable for their horrific crimes.”²² However, what the Secretary General promoted here was not in line with the goals of Hun Sen or the government of Cambodia, despite what it might have seemed early on. In his first visit to Cambodia in 2010, Ban and Hun Sen reportedly disagreed on the jurisdiction of the court and the need for further trials of Khmer officials. A spokesman for Ban relayed that "During the meeting with the prime minister and outside that meeting, the Secretary General has made clear that this

²¹ “SECRETARY-GENERAL CALLS FOR RENEWED COMMITMENT IN NEW CENTURY TO PROTECT RIGHTS OF MAN, WOMAN, CHILD -- REGARDLESS OF ETHNIC, NATIONAL BELONGING.” United Nations, United Nations, 7 Apr. 1999.

²² “‘Long-Overdue’ Justice Necessary in Cambodia, Says Secretary-General Ban | UN News.” United Nations, United Nations, 15 Apr. 2008.

is a judicial process, those are judicial decisions, and the independence of the court needs to be respected,”²³ despite what the Cambodian government insists on. Ban Ki-moon has lent credibility and renown to the ECCC, and under his leadership the United Nations has been able to facilitate the creation and establishment of the Chambers, but his appreciation for the judicial process does not exempt him from criticism he feels the courts and Hun Sen deserve. Nonetheless, his support and of his predecessor, Secretary General Annan, was important in the formation of the ECCC, which needed high-profile international supporters in the early stages.

The Extraordinary Chambers

As the ECCC struggled to get off the ground and begin trials, Khmer officials were rapidly aging and dying, leaving the window for justice ever shrinking. Given this, one might think that speed would be the goal of the early years of the chambers, but it would be three more years, in 2007, until the United Nations and Hun Sen’s government agreed to an initial roster of judges to preside over the courts²⁴ and the scope of the ECCC’s jurisdiction. Per the negotiations between the two parties, the ECCC has jurisdiction to try officials who committed crimes against humanity, war crimes, or genocide, and has a number of levels that serve to join Cambodian law and judges together with their international counterparts to accomplish these goals. The first step is in the Pre-Trial Chamber, where a panel of three Cambodian and two international judges’ rule on motions and appeals given out by the Co-Investigating Judges. If a motion passes this initial stage, it moves to the Trial Chamber, where the accused is tried for the crimes brought before them. This step involved witness testimony and evidence collected by the parties. The group of three Cambodian and two international judges determine their ruling and this decision, like the one of the Pre-Trial Chamber, requires a vote of four out of five. Finally, the Supreme Court Chamber hears appeals against the decision made in the Trial Court. Four Cambodian judges and three international ones preside over this chamber, which must get a vote of five of the members to make a ruling on an appeal²⁵.

²³ Carmichael, Robert. “Cambodia's Hun Sen Has a Blunt Message for Ban Ki-Moon” Deutsche Welle.

²⁴ “Judges Sworn in for Khmer Rouge.” BBC News, BBC, 3 July 2006.

²⁵ “Judicial Chambers.” *Drupal*, ECCC.

Aside from the Judicial Chambers themselves, the ECCC contains a number of organs that assist in the trying of Khmer officials. The aforementioned Co-Investigating Judges are a duo of a Cambodian and International judge who perform pre-trial investigations to uncover evidence and witness testimony. In the ECCC, as in the French model that it draws upon, discovery is undertaken by the Co-Investigating Judges alone, with the prosecution and defense not allowed to carry out their own investigations. They can, however, search for possible leads that can then be turned over to the Co-Investigating Judges for further research²⁶.

The Office of the Co-Prosecutors is responsible for actually prosecuting senior Khmer officials who have been found, by the office of the Co-Investigating Judges, to have committed any of the crimes that fall under the jurisdiction of the ECCC. Much like the investigative office, the Co-Prosecutors are a team of a Cambodian judge and an international one that process witness testimony and victim complaints through their process of prosecution²⁷.

This intricate balance of international and domestic judges was designed through negotiation to ensure both the following of international standards and the application of Cambodian law to the cases brought before the ECCC. However, criticism of this structure claims that the number of Cambodian judges and inherent weakness of the Cambodian judicial system means that the courts are highly susceptible to domestic political pressures, particularly from Hun Sen. This is not even mentioning the inherent inefficiency of the ECCC, whose structure ensures that cases will spend months, maybe years in pre-trial and trial chambers. This is valuable time that can not only rob victims of justice if the Khmer officials die before facing the court, but also makes the ECCC remarkably expensive.

Over a decade into the trials of Khmer Rouge officials, and the costs of the process has added up, with a 2017 racking in at upwards of \$300 million USD²⁸. The vast majority of this funding has come from the United Nations and international donors, with comparatively very little coming from the government of Cambodia. This disparity in funding has not escaped the eyes of the United Nations, which frequently is involved in fundraising and petitioning Cambodia for further contributions. In 2014, Ban Ki-moon spoke about the lack of funding when he said “It is critical for the international community to ensure that the Extraordinary Chambers

²⁶ “Office of Co-Investigating Judges.” *Drupal*, ECCC.

²⁷ “Office of Co-Investigating Judges.” *Drupal*, ECCC.

²⁸ Mydans, Seth. “11 Years, \$300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?” *The New York Times*, The New York Times, 10 Apr. 2017.

have the required financial means to ensure accountability for the shocking crimes perpetrated during the former Khmer Rouge regime. [The] financial failure of the Court would be a tragedy for the people of Cambodia, who have waited a long time for justice, and would constitute a serious setback to the international community's fight against impunity"²⁹. Since its inception, the financial aspect of the Chambers has been a source of difficulty in funding, and this is clear in the millions of dollars sunk into them. On the one hand, compared to other UN backed tribunals, such as the ones in Rwanda and the former Yugoslavia, the cost of the ECCC seems mild; those courts both spent between one and two billion dollars trying the perpetrators of atrocities. However, both the Rwanda and Yugoslavia tribunals can boast dozens of acquittals and far more sentences as a result of their work. This comparison reveals potentially the biggest criticism of the ECCC, and one that is intrinsically tied to the negotiations that established them and the influence of Prime Minister Sen; over 10 years after it was founded, and with hundreds of millions of dollars invested, the ECCC has produced only *three* sentences for Khmer officials³⁰.

First Cases

Case 001, the first to come before the ECCC after years of negotiations and difficulties in getting the actual judicial process started, began in September 2009 for Khmer Rouge official Kang Kew Iew, better known as “Comrade Duch”. Duch gained notoriety during and after the reign of the Khmer for operating the Tuol Sleng Prison (S-21), where tens of thousands of prisoners were tortured and killed. Appearing before the trial judges, the then 66-year-old Duch relived his time during the Khmer and was made to bear witness to victim accounts of their experiences in S-21. When pressed for the motive behind his actions as the head of the prison, Duch remarked that “I did not have the intention of committing crimes against my country. . . My oath was [given to serve] the people”.³¹ Of all those made to stand trial before the ECCC thus far, this statement makes Duch unique; no other Khmer official has even admitted to the charges brought against them. The decision handed down from the Trial Chamber found Duch

²⁹ “UN General Assembly approves US\$ 15.5 million funding reserve.” *Drupal*, ECCC.

³⁰ *Ibid*.

³¹ Hinton, Alexander Laban. *Man or Monster?: the Trial of a Khmer Rouge Torturer*. Duke University Press, 2016.

guilty of crimes against humanity and severe breaches of the Geneva Convention, and sentenced him to 35 years in prison; upon this announcement, both sides appealed the decision to the Supreme Court, with the prosecution seeking a longer sentence and the defense wanting a reduction on grounds of Duch's time already spent in the custody of the ECCC. Upon appeal from the Supreme Court, this sentence was extended to life in prison³². Despite difficulties, it seemed the ECCC was slowly delivering justice and fulfilling its promise to the Cambodian people.

Case 002, the next on the docket for the Chambers, differed in scope and represented a new challenge for the judicial process. This case sought to try the most senior surviving members of the Khmer regime, among them Nuon Chea, the right-hand man to Khmer leader Pol Pot, and Khieu Samphan, a powerful Khmer official who succeeded Pot when the Vietnamese invaded Cambodia to topple the regime. Also tried in this case were the duo of Ieng Sary and Ieng Thirith, husband and wife who had top roles in the government; however, Sary died in 2013 before the trial was able to be completed, and old age had made Thirith unfit to stand for hers³³. The drawn-out period of time spent in negotiations over the establishment of the ECCC had robbed the victims of these two leaders justice for the acts of genocide and war crimes that they had committed. However, both Nuon Chea and Khieu Samphan were able to stand trial and were found guilty of crimes against humanity and genocide of Vietnamese residents of Cambodia during the Khmer regime. Both men were sentenced to life in prison for their involvement, despite claims from Nuon Chea that "I was president of the National Assembly and had nothing to do with the operation of the government. Sometimes I didn't know what they were doing because I was in the assembly³⁴". With the sentencing of these two men, Case 002 was completed. This brought the ECCC to a crossroads; 001/002 had tried and sentenced the most responsible senior members of the Khmer for their involvement in the events during the 1970s, but now there were no more individuals who fit this description. The choice of whether or not to continue the trials and turn the attention of the court to mid-level officials, or to be satisfied with the results of the first two cases presented itself. This question of jurisdiction and judicial

³² "Shock for Khmer Rouge Leader Duch as His Sentence Is Increased to Life." *The Telegraph*, Telegraph Media Group, 3 Feb. 2012,

³³ "International or Hybrid Tribunal: Case 002/02." CJA.

³⁴ "Former Khmer Rouge Leader Denies Role in Genocide." *The New York Times*, The New York Times, 19 July 2007.

responsibility would come to represent the most significant challenge the ECCC would face, and nearly bring the institution to its knees.

Further Cases and Controversy

Cases 003 and 004 concern mid ranking Khmer officials who did not directly oversee the execution or torture of Cambodian citizens, but nonetheless aided in the process of this mass killing through transport or capture. Among them are naval captain Meas Muth who is accused of committing various war crimes in Cambodia during the Khmer, but even with two arrest warrants out for him, he continues to live freely in Battambang Province³⁵. The failure of the ECCC to begin the trials for 003/004 can be traced back to Prime Minister Sen, who has made it known that he opposed any more investigations or sentences for mid-level officials. In 2015, at a speech on the UN policy of “Responsibility to Protect”, Sen declared “[The court] expands the scope, nearly making the people flee back into the forest. It is so. The scope has been expanded again and again. The value of peace and the cost of human lives have to be considered. If a war occurred, how many people would be killed We have already had such an experience³⁶.” The controversy over the case and the perceived stalling by Hun Sen and the Cambodian judges on the court has led to a number of high-profile disputes and resignations that undermine the legitimacy of the ECCC and call its effectiveness into question.

Andrew Cayley is a British humanitarian lawyer who served as the international Co-Prosecutor in the ECCC from 2009 to 2013³⁷. His worked on both cases 001 and 002, but his time working in Cambodia came to end because of the issues with cases 003 and 004. In 2001, Cayley went public with his grievances over the handling of the cases by the Investigating Judges, especially German Judge Siegfried Blunk. Cayley accused Blunk and the team of Investigating Judges of not taking the time to thoroughly look through the evidence needed in case 003. Mr. Cayley claimed that Blunk had failed to look into the backgrounds of multiple former Khmer members who had a role in the death of thousands. On the matter of Case 003,

³⁵ Pazarl, Mustafa. “Cambodian Judges against Arresting War Crimes Suspect.” *Breaking News Updates*, Wayback Machine, 26 Sept. 2015.

³⁶ Ibid.

³⁷ “Mr. Andrew T Cayley.” *Drupal*, ECCC.

Cayley declared that “It affects the integrity of this institution. The investigation needs to be done properly. Justice must not only be done, but it must manifestly and undoubtedly be seen to be done. And I believe if that does not happen, it will have serious consequences for the court as a whole³⁸.” Cayley’s comments came as a shock and revealed some level of inefficiency within the ECCC and especially Case 003, which had been heavily guarded in the early stages. Criticism from government officials of Judge Blunk caused him to resign in late 2011, and in his letter, he cited government interference as the reason for his departure. The Cayley-Blunk dispute revealed the complexity surrounding Cases 003/004 and the way that Hun Sen and his government have influenced the courts despite negotiations with the United Nations to ensure the courts’ impartiality.

Co-Prosecutor Cayley would leave just two years later as the result of another controversy, this time regarding the financing of the ECCC. The hybrid nature of the Chambers mean that funding is also supposed to come from both international and domestic sources; negotiations laid out that the Cambodian government would finance the wages of the national staff. However, in 2013, the government announced that it could not afford to pay the workers of the ECCC. This in turn led to a strike by the national workers and effectively halted progress on Case 002 and investigation on Case 003. Secretary General Ban called on the international community to raise USD \$3 million funds to support the courts and some 140 workers, who had not been paid in months. This was the background to which Cayley announced his resignation, stating that “Looking at my national colleagues, it’s not just critical for the functioning of the court; it’s actually critical to their lives. These are people who haven’t been paid for several months, and they have families that need to be supported. That’s why I think it needs to be resolved as quickly as possible³⁹.” Cayley cited the lack of commitment by the Cambodian government to the process of justice through the ECCC as one of the reasons for his departure, saying that it was preventing the Chambers from fulfilling their promise to the Cambodian people. Hun Sen and his government were either unable or unwilling to support the courts to the fullest extent, and this has and continues to impact the functioning of the courts. Cayley’s

³⁸ Launey, Guy De. “Cambodia's Khmer Rouge Tribunal in Disarray.” *BBC News*, BBC, 27 June 2011.

³⁹ Carmichael, Robert. “Key Prosecutor Quits UN-Backed Cambodia War Crimes Tribunal.” *VOA*, VOA Cambodia, 9 Sept. 2013.

departure and the controversies represents just one of several controversies and road bumps that has plagued the Chambers since they were founded.

The Cambodian Context

Despite the seeming inefficiency of the Chambers and a myriad of issues revolving around the resignation of key prosecutors and judges, the ECCC enjoys a high level of domestic support and recognition in Cambodia. Sampling from the International Republican Institute in 2008, in cooperation with the USAID program, found that nearly $\frac{3}{4}$ of Cambodians were aware of the existence of the ECCC and nature of its function, and of those nearly 70% strongly agreed with taking action against former Khmer officials⁴⁰. A more recent survey from the University of California in 2012 saw that since the IRI survey, both awareness and acceptance of the Chambers has increased, with general awareness of the courts as well as trial specifics of individual cases going up by over 10%. As was the case in 2008, media outreach and the transparency of trials within the ECCC remained important, with many Cambodians hearing of the ECCC through television or radio. The 2012 survey found that over 80% of Cambodians believed the Extraordinary Chambers would bring justice, promote national reconciliation, and help rebuild trust in Cambodia⁴¹. Clearly, the domestic response to the Khmer Tribunal has been resoundingly positive, which is in and of itself a yardstick by which to measure success. This sets the ECCC apart from other UN backed tribunals, such as the one in Rwanda; while this operation initially enjoyed public support, as the trials went on this favorability fell and now has a much more mixed reception among Rwandans⁴².

Judging on this criterion, the continued success of the ECCC seems to suggest that something about the nature of the tribunal has allowed it to operate with a high level of domestic validity and positive reception. Through outreach initiatives, over 350,000 Cambodians either observed or directly participated in the function of the ECCC, with some 60,000 of those located in rural settings. This outreach has been the result of efforts on part of the Chambers themselves,

⁴⁰ Survey of Cambodian Public Opinion, *International Republican Institute*, Jan. 27 – Feb. 28, 2008.

⁴¹ Pham PN, Vinck P, Balthazard M, Hean S, (2011). *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.

⁴² Rowanda, Patrick and Buckley-Zistel, Susanne. 2017. 'Changing Patterns of Acceptance. *International Criminal Justice after the Rwandan Genocide*.'

but also on Cambodian civil society. Many Non-governmental organizations are involved in the education and dissemination of information about the Tribunal. NGOs like the Cambodian Association for Human Rights and Development, the Khmer Institute of Democracy, and Legal Aid of Cambodia have played critical roles in bringing the judicial process to the larger Cambodian population. Their efforts are seen in Case 002; almost 4,000 victims were permitted to partake in the case, and of all the civil-party applications submitted to the ECCC, over 80% were submitted through NGO intermediary offices⁴³. The involvement of civilians in the judicial process has value; one visitor to the ECCC explained how “I personally witnessed the hybrid justice proceeding live, with more than 500 people, most of them are victims. It was a moving experience and historic event for all the victims [who had] to wait more than 30 years to finally having some sort of justice.⁴⁴” These NGO actors play a vital role in facilitating this dialogue between the courts and the healing of the Cambodian population, and there is no doubt that they have contributed to the high levels of public awareness and acceptance of the ECCC.

Unfinished Justice

With the final decision of Case 002 in 2018, Nuon Chea and Khieu Samphan are the most recent members of the former Khmer to be trialed and sentenced. At the time, this decision was applauded by international human rights advocates and the current UN Secretary General, Antonio Guterres. A statement following the announcement of the sentencing from Guterres expressed that “Today’s judgment demonstrates that perpetrators of the most heinous crimes can be held accountable, even decades after those crimes were committed”⁴⁵. Since this victory though, controversy and scandal have rocked the courts, and further proceedings seem to have ground to a halt. As of now, progress in the ECCC is uncertain, with victims being forced to wait even longer for the justice the tribunal seemed to promise them.

⁴³ Christoph Sperfeldt, “Cambodian Civil Society and the Khmer Rouge Tribunal,” *International Journal of Transitional Justice* 6:1 (March 2012), pp. 1–12: 3.

⁴⁴ Fawthrop, Tom. “Cambodia's Khmer Rouge Tribunal: Mission Accomplished?” – The Diplomat, For The Diplomat, 19 July 2017,

⁴⁵ Dujarric, Stephane. “Statement Attributable to the Spokesman for the Secretary-General On the Extraordinary Chambers in the Courts of Cambodia Secretary-General.” *United Nations*, United Nations, 16 Nov. 2018.

Epilogue

The Khmer Tribunal continues to function today, although probably not for much longer; the funding and mandate for the Chambers only extends until 2020, at which point this authorization will need to be extended to allow the institution to continue operations. The odds of this extension are not great; Prime Minister Hun Sen and national Cambodian judges continue to stonewall any progress on Cases 003 and 004, and without political will from the government to expand the jurisdiction of the ECCC, it is likely that within a year the chambers will be idle⁴⁶. From the beginning, Sen voiced his opposition to the Tribunal; back in 1997, he encouraged Cambodians to “dig a hole and bury the past” with regards to the Khmer regime, and to this day he has kept this attitude towards the judicial process at the ECCC⁴⁷. With an expiring mandate and lack of momentum, the window for justice is quickly closing.

As a standalone institution, international critics lament the inefficiency of the ECCC and the hefty price tag associated with it. Yet the impact of the tribunal on broader Cambodian society should not be written off, as education and information programs in the country have increased awareness and fostered a feeling of national reconciliation. In the years before operations at the ECCC, the history of the Khmer Rouge was not even taught in Cambodian schools; now, some 75% of Cambodians are aware of the ECCC and its purpose⁴⁸.

Looking beyond Cambodia and the tribunal itself, in 2019, there are millions of people facing the threat of genocide around the world, from neighboring Myanmar and the Rohingya crisis in the north-western provinces, where some 750,000 Muslims have been displaced since the conflict began⁴⁹, to Sudan and conflicts that have left millions dead in the past decade. If the ECCC was intended to act as a signal that crimes against humanity will not be tolerated by the international community, no matter where or when they occur, then in this sense it has failed unequivocally. Clearly, in 2019, the strength of international institutions and law is not enough to prevent these heinous acts from being committed; could there come a time when it is?

⁴⁶ Meixler, Eli. “Cambodia: Genocide Ruling May Be Khmer Rouge Tribunal's Last.” *Time*, Time, 30 Nov. 2018.

⁴⁷ Johnson, Kay. “No Trial for Defectors, Hun Sen Asserts.” *The Cambodia Daily*, 6 Mar. 2013.

⁴⁸ *Ibid.*

⁴⁹ United Nations. “Rohingya Emergency.” UNHCR, 31 July 2019.

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