

Politics by other means?

The virtual trials of the Khmer Rouge tribunal

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International tribunals are not solely in the retributive justice business. They are also concerned with shaping and reshaping local, national and global politics. Nowhere is this currently more apparent than in Cambodia, where a tribunal set up to try leaders of the Khmer Rouge has seen intense contestation between competing approaches to justice, each of which is inextricably bound up in politics.

In his 2008 study of international tribunals for Rwanda and the former Yugoslavia, Victor Peskin highlighted the importance of the political struggles behind war crimes trials. Peskin argues that courtroom trials are paralleled by ‘virtual trials’, soft power contests between the international community and the states where war crimes have taken place.¹ He terms these ‘trials of cooperation’. The current Cambodian war crimes trials are an extremely striking illustration of Peskin’s central arguments: international and local actors, supposedly working in parallel, appear to be moving in opposite political directions. The hybrid court now looks in serious danger of failure, a failure that would have dire consequences for Cambodia and would constitute a landmark setback to the recent global rise of transitional justice initiatives. If so, the virtual trial will have overshadowed the actual trials; the play-within-a-play will turn out to have been the really important drama.

From April 1975 to January 1979, the Khmer Rouge regime presided over the deaths of up to two million Cambodians, or approximately a quarter of the small South-East Asian country’s population at that time.² In terms of the scale of lives lost, the Khmer Rouge was probably the most criminal regime in modern history. Yet bringing former leading members of the hard-line Maoist movement to justice

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¹ See Victor Peskin, *International justice in Rwanda and the former Yugoslavia: virtual trials and the struggle for state cooperation* (Cambridge: Cambridge University Press, 2008), pp. 6–12.

² For standard accounts of the regime, see e.g. Ben Kiernan, *The Pol Pot regime: race, power and genocide in Cambodia under the Khmer Rouge, 1975–79* (New Haven, CT: Yale University Press, 1996); Craig Etcheson, *After the killing fields: lessons from the Cambodian genocide* (Westport, CT: Praeger, 2006).

has proved a tortuous and troubled process. In 2009 the first trial of a Khmer Rouge figure opened at a military base outside the capital city of Phnom Penh. The trial of former interrogation centre chief Kaing Guek Eav (better known as Duch) marked the culmination of years of negotiation.

The Extraordinary Chambers in the Courts of Cambodia (ECCC), the cumbersome title by which the Khmer Rouge tribunal is officially known, uses a unique hybrid system of pairing international and Cambodian colleagues: co-investigating judges, co-prosecutors, co-defence lawyers and mixed benches of judges. This system, a compromise agreed between the United Nations and the Cambodian government, allows more local involvement than in any previous comparable international tribunal—especially since Cambodian judges form the majority in each of the three chambers, pre-trial, trial and appeal. This hybrid system is a mixed blessing, however, containing within it the seeds of many conflicts that cut to the heart of the contradictions involved in new modes of global justice.

Goals of the trials

A central problem with the ECCC lies in the ambiguity and overlap of its goals. The formal objectives of the tribunal are laid out in an agreement reached between the UN and the Cambodian government in 2003, which refers both to the international community's 'vitally important concern' with addressing the violations of Cambodian and international humanitarian law during the Khmer Rouge period, and to Cambodian concerns for 'the pursuit of justice and national reconciliation, stability, peace and security'.³ In practice, a much wider range of reasons has been articulated by various stakeholders, both for the creation of the tribunal and for their participation in it; and many of them are potentially contradictory.

The most basic objective is simple retributive justice: those who were most guilty of terrible crimes during the Khmer Rouge period deserve to be punished.⁴ The arrest, trial and punishment of these individuals will serve an important national purpose. But the first difficulty here centres on the notion of the 'most guilty': how can these people be identified, more than 30 years after the fact? In a country where millions of people were both victims and perpetrators, how useful is the term 'most guilty'? In the months after the collapse of the Khmer Rouge regime in early 1979, some villagers took the law into their own hands, lynching, burning alive or chopping to pieces those whom they held responsible for the deaths of their families, friends and neighbours.⁵ But this summary justice was a haphazard and incomplete process, and many known regional and local Khmer Rouge cadres still live freely and openly. Observers such as the Open Society Institute had initially hoped that the ECCC could develop a 'completion

³ See Annex to United Nations General Assembly Resolution 57/228, A/RES/57/228 B, Preamble, 22 May 2003.

⁴ See Tom Fawthrop and Helen Jarvis, *Getting away with genocide: elusive justice and the Khmer Rouge tribunal* (London: Pluto, 2004); Richard Bernstein, 'At last, justice for monsters', *New York Review of Books*, 9 April 2009.

⁵ See Huy Vannak, *Bou Meng: a survivor from Khmer Rouge Prison S-21* (Phnom Penh: Documentation Center of Cambodia, 2010), p. 54.

plan' for local Cambodian courts to pursue retributive justice to progressively lower levels in the future—rather as the Nuremberg trials preceded decades-long actions by German courts—but recently suggested that this was no longer a credible option.⁶

A second reason for holding a trial was the desire to find out the truth concerning what happened during the Khmer Rouge regime.⁷ Trials of the Khmer Rouge leadership would help bring to light factual testimony about the period, and also emotions, feelings and frustrations that have remained buried for decades. While this is a laudable motive, there is a big difference between a criminal trial and a truth commission. Trials are concerned with quite narrow definitions of truth, and are focused on determining legal guilt rather than exploring a range of understandings.

Closely related to the desire for truth was the hope that the ECCC could begin a process of national 'reconciliation', a term mentioned in the 2003 agreement. Such a process could promote the making of amends and a sense of restorative justice. Could former Khmer Rouge cadres look their victims in the eye, acknowledge their wrongdoing and offer to dedicate themselves to healing the wounds of Cambodian society?⁸ Again, this was a laudable goal; but a criminal trial was not necessarily the best place to pursue such objectives. Peter Maguire has criticized this approach as 'therapeutic legalism', arguing that notions such as closure, truth and reconciliation are deeply problematic.⁹

A fourth purpose for the ECCC was to provide an example of a well-run and fair trial, which would set new standards for procedural aspects of justice in a country where typical criminal trials often lasted less than 20 minutes.¹⁰ The ECCC was conceived partly as a showcase for international standards of justice, one which would have a 'contagion effect' upon the wider Cambodian justice system by exemplifying best practice.

Hand in hand with this 'exemplar' notion went a fifth goal, the desire to challenge the culture of impunity. Cambodia was notorious for incidents in which well-connected and powerful people flouted the law, seized land or property, or even shot dead the innocent.¹¹ The culture of impunity, so the argument went, was based upon the failure of the Cambodian state to arraign, try and punish the Khmer

⁶ Open Society Justice Initiative, *Salvaging judicial independence: the need for a principled completion plan for the Extraordinary Chambers in the Courts of Cambodia*, Nov. 2010, p. 10, http://www.soros.org/initiatives/justice/focus/international_justice/projects/cambodia, accessed 28 Feb. 2011.

⁷ Truth-telling has been a major preoccupation of DC-CAM (the Documentation Center of Cambodia), a US government-funded NGO which has worked closely with the ECCC. DC-CAM publishes a quarterly magazine entitled *Searching for the Truth*: see http://www.dccam.org/Projects/Magazines/English_version.htm, accessed 28 Feb. 2011.

⁸ For a discussion see Johanna Herman, *Reaching for justice: the participation of victims at the Extraordinary Chambers in the Courts of Cambodia* (London: University of East London Centre on Human Rights in Conflict, Sept. 2010).

⁹ Peter Maguire, quoted in Seth Mydans, 'In Khmer Rouge trial, victims will not stand idly by', *New York Times*, 17 June 2008.

¹⁰ For a discussion, see Kheang Un, 'The judicial system and democratization in post-conflict Cambodia', in Joakin Ojendal and Mona Lilja, eds, *Beyond democracy in Cambodia: political reconstruction in a post-conflict society* (Copenhagen: Nordic Institute for Asian Studies, 2009), pp. 70–100.

¹¹ See Cambodian League for the Promotion and Defence of Human Rights (LICADHO), 'Impunity at work in Cambodia: soldiers and police escape prosecution', 15 Oct. 2008, <http://www.licadho-cambodia.org/articles/20081015/82/index.html>, accessed 28 Feb. 2011.

Rouge leadership. Once those responsible for terrible crimes against humanity had been punished, lesser violations would not be tolerated in the same way.

Alongside these five standard reasons for supporting the creation of the ECCC were at least two other motives that have received rather less attention and discussion. The first was a desire to set an international example. On some levels, establishing the ECCC was not really about the Khmer Rouge or Cambodia at all, but was part of a much wider international process: the institutionalization of the norms of international justice.¹² Under these norms, leaders and elites worldwide were becoming aware that they might face charges if they committed acts of aggression that might be viewed as crimes against humanity.¹³ From a conservative, realist perspective, Eric Posner has suggested that this ‘global legalism’ is ‘a faith, or set of assumptions, or attitude: it is not a theory grounded in a plausible reading of the evidence’.¹⁴ Prominent global justice advocate Geoffrey Robertson, by contrast, argued that, following a series of recent developments, international criminal law is ‘no longer merely a set of pious platitudes’.¹⁵ The difficult terrain of the ECCC offered an opportunity to explore how far platitudes could become solid legal precedents.

Closely related was a rarely articulated view of global justice as a gradualist form of regime change. Ciorciari argued that ‘affecting Cambodian politics’ was an important aspiration of the ECCC: ‘If they proceed well, the CPP [Cambodian People’s Party] will probably reap a modest political benefit. If the trials are botched, they may have an opposite effect. A shoddy process would likely contribute to public and international donor frustration with government—and particularly judicial—corruption in Cambodia.’¹⁶ In the context of a country where authoritarianism has been gradually normalized,¹⁷ and opposition political parties have been rendered largely ineffectual, international intervention seems an attractive means of subverting the regime and promoting political diversity. The problem with Ciorciari’s analysis is his assumption that a botched ECCC would have negative consequences for the government of Hun Sen, the incumbent prime minister. To date, the opposite appears to be true. The Cambodian government has long demonstrated that it can manipulate international aid donors, playing off one country against another and so evading political conditionalities.¹⁸ Hun Sen undoubtedly hopes to turn the ECCC into a show of strength for the regime; the

¹² Ball argues that in the twenty-first century ‘justice for victims of human rights abuses . . . [will become] the norm rather than the exception’: Howard Ball, *Prosecuting war crimes and genocide* (Lawrence, KA: University Press of Kansas, 1999), p. 240.

¹³ The Roman Polanski film *The ghost writer* (2010), in which a lightly fictionalized Tony Blair figure faces ICC war crimes charges, nicely captured the Zeitgeist.

¹⁴ See Eric A. Posner, *The perils of global legalism* (Chicago: University of Chicago Press, 2009), p. 79.

¹⁵ Geoffrey Robertson, *Crimes against humanity: the struggle for global justice*, 3rd edn (Harmondsworth: Penguin, 2006), pp. 610–11.

¹⁶ John D. Ciorciari, ‘History and politics behind the Khmer Rouge trials’, in John D. Ciorciari and Anne Heindel, eds, *On trial: the Khmer Rouge accountability process* (Phnom Penh: DC-CAM, 2009), pp. 20–21.

¹⁷ Duncan McCargo, ‘Cambodia’, in Jake Dizard, Christopher Walker and Sarah Cook, eds, *Countries at the crossroads 2010: an analysis of democratic governance* (New York and Lanham, MD: Freedom House / Rowman & Littlefield, 2010), pp. 81–2.

¹⁸ For criticism along these lines, see Global Witness, *Country for sale: how Cambodia’s elite has captured the country’s extractive industries* (London: Global Witness, 2009), pp. 54–7.

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tribunal will indeed then have affected Cambodian politics, but by consolidating rather than undermining illiberalism.

In some ways, global legalism is an emerging mode of regime change. Though assuming new forms, it emulates the spirit of Nuremberg and Tokyo, which were about reshaping political forces in defeated nations, and persuading a wider public to reject authoritarianism and embrace democracy. The Iraqi Special Tribunal, which tried and executed Saddam Hussein, was part of the same sort of process. Yet whereas Nuremberg and the Iraqi tribunal were part of the follow-up to regime change, the ECCC has the potential to subvert the Cambodian regime without recourse to invasion and military defeat. As part of the same process of contestation, the Hun Sen regime looks to the ECCC as a means of validating its own power and authority. Putting ageing Khmer Rouge leaders on trial provides a convenient set of domestic scapegoats for the shortcomings of the current government; and by demonstrating an ability to undermine the goals of the tribunal's international backers, Hun Sen may prove able further to entrench his power base and secure his own standing. As Margot Picken argues, 'He uses Pol Pot's record as the yardstick to measure progress, thereby making failure impossible.'¹⁹

Models and parallels

In the post-Cold War period, recourse to international justice has increasingly become a default option for addressing war crimes, genocide or crimes against humanity, especially when they involve leaders of developing or transitional states. The primary focus on transnational justice efforts has been the International Criminal Court in The Hague, but the ICC can only try cases where the alleged crimes were committed after 2002. Other tribunals include the ICTY (the International Criminal Tribunal for the former Yugoslavia in The Hague, which tries cases involving the former Yugoslavia), the ICTR (the International Criminal Tribunal for Rwanda in Tanzania, which tries cases relating to the Rwandan genocide) and the SCSL (Special Court for Sierra Leone in Freetown). The SCSL is the closest in structure to the ECCC, since it was the first in-country international tribunal, and uses a hybrid format combining international and local elements.

If retributive justice is the primary aim of a tribunal, an international court in a second country may be the optimal solution. In theory, a more remote trial can proceed without external interference, and the major focus can be on legal processes and the scrutiny of evidence. But in practice, as Victor Peskin argues, this lack of intervention is largely illusory; behind the courtroom trials are shadow or virtual trials of cooperation in which international agencies and foreign countries pit their will against states and governments to determine the extent of compliance with the norms of global justice.²⁰ If retributive justice is not the core focus of the trial, and other more political and transformative objectives loom larger, then the case for holding tribunals within the country concerned increases. Only

¹⁹ Margot Picken, 'The beleaguered Cambodians', *New York Review of Books*, 13 Jan. 2011.

²⁰ Peskin, *International justice*, pp. 9–10.

by holding a tribunal close to the scene of the original crimes can the proceedings have the maximum psychological impact, as the Allies understood very well when they selected Nuremberg (which had been a major focus of Nazi activity and rallies) for the trial of the Third Reich leadership. Trials of figures such as Slobodan Milošević or Radovan Karadžić before the ICTY in The Hague may be legally and technically ideal; but politically and psychologically, trials so far removed from the scene of the alleged crimes are extremely abstract. The shift away from the ICC/ICTR/ICTY model and towards hybrid bodies such as the SCSL and the ECCC partly reflects practical and financial realities: it is simply not possible or affordable for all tribunals to take place in second or third countries. But it also reflects an emerging set of aspirations by the international legal community which are profoundly political in their intent, though rarely expressed or viewed as such. Holding a war crimes trial in the country where the crimes were committed directly confronts the host regime.

Yet who is really on trial in Cambodia? On one level, this is a trial of former Khmer Rouge leaders: the individuals who will sit in the dock and face legal judgment. But on another level, the ECCC is putting Hun Sen and his regime on trial. The virtual trial represents an opportunity for elements of the international community to test the Cambodian regime's commitment to international norms of human rights, rule of law and transparency. The ECCC is not about simply ensuring that a handful of Khmer Rouge leaders do not get away with genocide; it is also about exposing Hun Sen's authoritarianism and curtailing his freedom of manoeuvre. On yet another level the creation of the ECCC allows Hun Sen to try to test the international community, especially the UN and major donors. Chigas has argued that in the late 1990s Hun Sen supported the creation of the tribunal in order to secure international legitimacy and funding.²¹ More recently, however, the Cambodian premier expressed the hope that donations to the ECCC would dry up, so bringing the tribunal's proceedings to a halt. If the tribunal collapsed because the UN withdrew from participation or donors ceased to fund it, Hun Sen would claim a victory. Similarly, if the tribunal is unable to proceed beyond Case 002, Hun Sen will have demonstrated that he is able to thwart the will of the international community. At the same time, whenever the ECCC brings a case to a successful conclusion, Hun Sen's government will be able to claim credit. The messy hybrid tribunal design and the complex internal political dynamics surrounding it mean that the major winner in all possible scenarios is the Cambodian government.

Structure of the ECCC

Petit and Ahmed describe the ECCC as 'somewhere between a purely international tribunal and a purely municipal court'.²² The official name reinforces the point

²¹ George Chigas, 'The politics of defining justice after the Cambodian genocide', *Journal of Genocide Research* 2: 2, 2000, p. 257.

²² Robert Petit and Anees Ahmed, 'A review of the jurisprudence of the Khmer Rouge tribunal', *Northwestern Journal of International Human Rights* 8: 2, 2010, pp. 166–7.

that the tribunal formally operates within the Cambodian court system. Nevertheless, decisions of the pre-trial and trial chambers have stressed the independent and 'internationalized' nature of the court. The ECCC's unique hybrid structure has been carefully developed in order to take account of the concerns and demands of the Cambodian government, but also to have the maximum exemplar effect and the greatest potential impact on Cambodian justice and politics more generally. Negotiations between the UN and the Cambodian government over the structure and procedures of the ECCC took many years. Throughout these discussions, the Cambodian government appeared to have two major objectives: preserving a veto on the number of people who would be brought to trial, and maintaining potential control over the outcome of cases by ensuring that Cambodian judges were in the majority. Yet the means by which these objectives were met involved the creation of the most thoroughly hybridized of all international tribunals to date, one where every element of the trial, ranging from the judges to the defence, prosecution and civil parties, involved parallel Cambodian and international teams working side by side. The consequence of this parallelism was to throw into sharp relief the differences between the two sides. In contrast to a conventional court, in which the adversarial dynamics exist primarily between the defence and the prosecution, the ECCC introduced an implicitly or potentially adversarial dynamic into every single component of the tribunal.

In the ECCC, Cambodians and international counterparts are paired at all levels of the proceedings. To begin with, two co-investigating judges are responsible (in the style of a civil law system) for investigating possible defendants and preparing cases against them. These cases are handed over to a team of co-prosecutors (led by an international and a Cambodian co-prosecutor), who in turn face a pair of defence lawyers for each defendant. Civil parties, who are given a unique role in the trials, are represented by both Cambodian and international lawyers. Finally, the chambers of judges are hybrid compositions in which Cambodians form the majority. The pairing system has the effect of exposing the Cambodian participants to international expectations and standards; it also has the parallel effect of grounding the international staff of the court firmly in Cambodian realities and perspectives. Much of the tension and interest around the Duch trial centred on real or rumoured internal conflicts between the teams of Cambodian and international judges, prosecutors and lawyers. One of the most dramatic moments of the whole trial came on the final day of hearings, when Duch and his Cambodian lawyer abandoned the strategy that his international defence lawyer had used from the outset.

Closely linked to this argument is the question of corruption: critics have suggested that the Cambodian side of the court has 'fragile credibility' because of pervasive evidence of corruption. Widely circulated rumours that Cambodian staff at the court were required to hand over part of their salaries to Sean Visoth, the court's administrative director (who is close to Deputy Prime Minister Sok An), reached the international media, were given extensive publicity and were never credibly rebutted. Sean Visoth took extended sick leave from the court in

2008 but he was not formally dismissed.²³ The UN seemed powerless to intervene effectively in the situation, which continued to fester for a period of years. Cambodian-born academic Sophal Ear described the ECCC as a ‘theatre of the absurd’.²⁴ The result has been growing frustration on the part of international donors. Supporters of the ECCC argue that corruption in the administration of the court does not affect the integrity of the trial process or the verdicts. This may or may not be true; it is certainly hard to see how the ECCC can help challenge the culture of impunity or change Cambodia’s political climate when it is tainted with the very same problems that affect the wider domestic justice system. At the very least, the existence of widespread corruption in the ECCC’s administration is an ominous trend which raises profound concerns about the real value of the tribunal.

To some extent, international stakeholders are motivated by their own guilt feelings about the Khmer Rouge period and the decade or so which followed. The United States has been accused of culpability in the creation of the Khmer Rouge, since the carpet-bombing of the Nixon–Kissinger era helped pave the way for the collapse of the Lon Nol regime.²⁵ The entire western community, backed by ASEAN, must share the blame for the international isolation of Cambodia during the 1980s, and for cynically allowing the Khmer Rouge to retain the country’s UN seat and to control large swathes of Cambodian territory.²⁶ Following a relentlessly anti-Vietnamese line dictated by the United States during the 1980s and early 1990s, the international community persistently failed to support the interests of the ordinary Cambodian.

The Duch trial: unreasonable expectations?

The sole defendant in ECCC Case 001 was Kaing Guek Eav (then aged 66), popularly known as Duch. Duch commanded the interrogation and torture centre S-21, and the related ‘killing fields’ site, both of which are now well-known museum and visitor locations in Phnom Penh.²⁷ Up to 20,000 detainees passed through the former high school of S-21 during the period from April to the beginning of 1979; all but a handful of them were killed, usually after writing lengthy and almost wholly fanciful confessions. These were read by Duch, who wrote neat comments on each one, and often forwarded them to his superiors before carefully filing them away. He proved extremely cooperative in giving detailed testimony, especially about his work at S-21. The logic of starting the ECCC’s deliberations with the Duch trial was clear: since he admitted his guilt from the

²³ For an extended discussion of the corruption issues, see John A. Hall, ‘Court administration at the ECCC’, in Ciorciari and Heindel, *On trial*, pp. 172–213.

²⁴ Sophal Ear, ‘Cambodian “justice”: without major personnel changes, the Khmer Rouge trial risks descending into farce’, *Wall Street Journal*, 1 Sept. 2009.

²⁵ See William Shawcross, *Sideshow: Kissinger, Nixon and the destruction of Cambodia* (New York: Simon & Schuster, 1979).

²⁶ See Nayan Chanda, *Brother enemy: the war after the war* (New York: Harcourt, 1986).

²⁷ The definitive account is David Chandler, *Voices from S-21: terror and history in Pol Pot’s secret prison* (Berkeley, CA: University of California Press, 1999).

outset and sought consistently to win over the court, he was a model defendant. His open-and-shut case was supposed to be a quick hit for the fledgling ECCC. The reality turned out to be a little different.

The prosecution was arguably the least impressive component of the Duch trial. Led by international co-prosecutor Robert Petit and Cambodian co-prosecutor Chea Leang, the team was large and unwieldy.²⁸ Both international and Cambodian sides seemed to play an uncoordinated game of musical chairs in posing questions and conducting cross-examination.²⁹ The tone was set by the lead prosecutors, both of whom barely appeared in court after the opening statements. Indeed, Petit suddenly resigned his position at the end of June 2009, less than three months before testimony in the Duch trial was completed.

The first ECCC trial clearly illustrated the high expectations raised by an international tribunal and the difficulty of living up to those expectations. A widespread view was that the ECCC epitomized all the worst features of a hybrid trial, and had little to redeem it. Even global justice optimist Geoffrey Robertson expressed misgivings about the ECCC, questioning how far it could really be considered an 'international court'.³⁰ However, veteran observer of international tribunals Thierry Cruvellier argued that actually the trial had been much more successful than expected.³¹ The sheer number and scale of the different legal, social and political objectives associated with the ECCC on one level destined the enterprise for failure; accordingly, a well-run trial which followed a broadly predictable course and produced an acceptable verdict was the best anyone could hope for. The difficulty of achieving such an outcome even with a largely cooperative defendant facing overwhelming prosecution evidence illustrated the need to scale back expectations and to focus on realistic objectives. In particular, the non-judicial objectives of truth-telling, reconciliation, ending a culture of impunity and securing domestic political change, however desirable in the long term, were excessively optimistic, if not actually misguided. As Bass argues, 'the pursuit of war criminals can only be explained with reference to domestic political norms in liberal states. Authoritarian and totalitarian powers may seek to punish defeated foes, or they may choose to do business with them.'³² The Hun Sen government chose to do business with Nuon Chea and other former Khmer Rouge leaders, until it became more advantageous to embrace a policy of putting them on trial. However, at the core of a hybrid tribunal such as the ECCC is not just a hybridized institutional and legal framework but a hybridized political construction, in which international liberalism exists in an uneasy tension with local authoritarianism.

Case 002, due to begin in 2011, involves the four surviving Khmer Rouge politburo members: Nuon Chea (Brother Number 2), aged 84; former head of state Khieu Samphan, 78; former foreign affairs minister Ieng Sary, 85; and former

²⁸ A leaflet distributed during the trial lists nine members of the prosecution team.

²⁹ This section draws on field notes from author's trial observations, 1 Sept. 2009.

³⁰ Robertson, *Crimes against humanity*, p. 327.

³¹ Interview with Thierry Cruvellier, 5 Sept. 2009.

³² Gary Jonathan Bass, *Stay the hand of vengeance: the politics of war crimes tribunals* (Princeton, NJ: Princeton University Press, 2000), p. 35.

social affairs minister Ieng Thirith, 77. All are frail, elderly and deeply unhappy to be facing trial. They will be tried together for crimes against humanity and war crimes. Unlike Duch, they have declined to cooperate with the investigating judges. While the Duch conviction was an ‘easy knockout’, Case 002 promises to be a protracted and troublesome affair.³³

The Duch trial: tensions and implications

It is easy to see much larger forces at work in the ECCC than the normal adversarial rituals of the courtroom. The development of the ECCC has extensive implications, both for Cambodian politics and for the creation of new norms and practices of international justice. Kamari Maxine Clarke has argued that recent developments in international justice are characterized by what she terms the ‘politics of incommensurability’.³⁴ New norms of global justice are not readily localized. Instead, these international norms clash strongly with domestic political realities and understandings.

In the Cambodian context, the range of different legal, political and moral games played during Case 001 meant that retributive justice was a relatively marginal element in the proceedings. The key stances adopted by different parties to the trial were essentially political rather than legal in origin. For most of the Duch trial the prosecution took a relaxed approach to the task in hand, since the accused had pleaded guilty, was cooperating fully with the court, and seemed certain to be convicted. The tensions in this trial lay elsewhere.

One set of tensions was between the judges and civil parties. Civil party legal teams sought to reorient the proceedings away from the format of a conventional trial, and towards a form of truth or reconciliation commission. They brought in witnesses who had only tenuous links to Duch or S-21, but who were able to bring home to the court the full horrors of the Khmer Rouge regime.³⁵ After tolerating—or colluding with—the tactics of the civil party lawyers for several months, the trial chamber finally issued new rules in August 2009, limiting civil parties’ participation and preventing their lawyers from examining character witnesses.³⁶ These rules had the effect of restoring the focus of the tribunal on more basic questions of crime and punishment. At the core of the clash between the judges and civil parties were competing readings of the tribunal.

Another set of tensions was between judges and other judges. A division between the Cambodian and international judges was perhaps only to be expected,

³³ See Peter Maguire, ‘Cambodia’s troubled tribunal’, *International Herald Tribune*, 28 July 2010.

³⁴ Kamari Maxine Clarke, *Fictions of justice: the International Criminal Court and the challenge of legal pluralism in sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009), p. 33.

³⁵ For example, testimony by civil party witnesses Chim Meth and Non Nam in July 2009 raised serious questions about whether they had actually been detained at S-21. See Laura MacDonald, *The trial observer*, 9 July 2009, at <http://www.cambodiatribunal.org/blog/2009/07/brother-of-s-21-survivor-was-forced-to.html>, accessed 7 Oct. 2010.

³⁶ Case of Kaing Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC-TC, Decision on civil party co-lawyers’ joint request for ruling on the standing of civil party lawyers to make submissions on sentencing and directions concerning the questioning of the accused, experts and witnesses testifying on character (9 Oct. 2009).

but who would have expected an international judge from a civil law tradition to find himself outvoted by three Cambodians and a judge from a criminal law tradition? The split between French judge Jean-Marc Lavergne and New Zealander Cartwright on the civil party issue was seen by some as evidence of successful divide-and-rule tactics by the Cambodian side of the chamber, which already constituted a majority on the bench and had now placed a dangerous wedge between the international judges. The division among the two international judges was an additional subplot in the proceedings;³⁷ the sight of Lavergne and Cartwright expressing open disagreement from the bench illustrated the emergence of tensions that went beyond the simple and often remarked civil law versus common law divide.³⁸

A third set of tensions, closely related to these, concerned the question of corruption in the court. While some observers argued that administrative corruption did not undermine the judicial integrity of the proceedings, others insisted that the corruption issue tainted and discredited the entire tribunal. Clearly, for anyone with a narrow focus on retributive justice, structural corruption in the ECCC was a secondary issue, whereas for those who wanted to stress an exemplar or multiplier effect, changing the norms of the justice system, it was of central importance—perhaps more important than the Duch trial itself. The inability of the UN to tackle the corruption issue suggested that the Cambodian side had the upper hand in the ECCC's core power relationship.³⁹ Allegations that trial chamber president Nil Nonn had himself taken bribes at earlier points in his judicial career recently resulted in a formal request for his disqualification by Ieng Sary's defence team.⁴⁰

A fourth set of tensions concerned the defence team. For nine months, Duch's French lawyer François Roux mapped out a clear and cogent defence strategy based on admitting general responsibility, while denying personal involvement in acts of torture or murder. Duch professed a growing level of remorse, and a willingness to face his victims in open court and accept the truth about his crimes. At the same time, he distanced himself from the upper echelons of the regime, insisting that he was merely a functionary rather than a member of the Khmer Rouge leadership, and had lived in constant fear of losing his own life if he were deemed to be insufficiently zealous in carrying out his duties. Roux's strategy, emulating that of Hitler's munitions minister Albert Speer at Nuremberg, was brilliantly executed.⁴¹ Sereny writes that 'the quiet, civilised Speer with his ready admission of responsibility must have seemed a godsend to the Chief US Prosecutor'.⁴² Duch sought to ingratiate himself with the court in a similar fashion.

³⁷ Author's trial field notes, 2 Sept. 2009.

³⁸ Lavergne also later dissented from the final sentence handed down to Duch.

³⁹ See John A. Hall, 'Tribunal problems loom', *Wall Street Journal*, Opinion Asia, 26 July 2010.

⁴⁰ For the legal submission, based on a documentary video recorded in 2002 and viewable at <http://www.pbs.org/frontlineworld/stories/cambodia/diary04.html>, accessed 29 March 2011, see http://www.eccc.gov.kh/english/cabinet/courtDoc/855/E5_EN.PDF, accessed 29 March 2011.

⁴¹ On Speer, see Gitta Sereny's brilliant *Albert Speer: his battle with truth* (London: Macmillan, 1995).

⁴² Sereny, *Albert Speer*, p. 585.

Throughout the trial Duch supported Roux's defence strategy, as did his Cambodian lawyer Kar Savuth, himself a former Khmer Rouge victim. Until, that is, the end. On Wednesday, 25 November 2009, Kar Savuth declared that Duch did not accept the authority of the court, and insisted that he had spent sufficient time in detention and should now be freed.⁴³ On the Thursday, Roux again insisted that Duch should be given a lenient sentence. And on Friday, 27 November, Duch supported Kar Savuth. It was a shocking moment, suggesting that all along Roux's defence strategy, reflecting his international perspective on the tribunal—and based on extensive experience—had been light years away from the real views of both his client and his Cambodian counterpart. Immediately after the trial ended, Roux attributed the move to political interference, reflecting Hun Sen's expressed hope that the tribunal would fail: 'This [Duch's appeal for release] calls into question Duch's plea of culpability, but also the competence of the court.'⁴⁴ Roux's remarks suggest that even Case 001, which has been held up as the ECCC's great success, was actually sabotaged by the Cambodian government.

A fifth set of tensions concerned the wider audience for the ECCC, which had included some 30,000 villagers bussed in to attend the proceedings by the the court's Public Affairs Unit, and millions more who followed the Duch trial on television. The wider Cambodian public was not pleased by the Duch verdict, and some distraught families of Duch's victims left the court immediately after it was announced.⁴⁵ While international lawyers and observers expressed satisfaction with the sentence handed down to Duch, for many Cambodians his final jail term of 19 years (35 years, reduced by 16 years because of his previous period of detention) seemed extremely light in comparison with his crimes.⁴⁶ The gap between the magnitude of the crimes committed at S-21 and the modest sentence received by Duch disturbed most ordinary Cambodians. While international observers were less concerned with the punitive elements of the tribunal, placing emphasis instead upon broader questions of justice and politics, most Cambodians were inclined to see the tribunal as primarily a place of punishment. At the ECCC, international notions of justice, rights and fairness were in sharp conflict with very different local understandings. An outcome that seemed positive for most of those involved in the trial process was widely seen as inappropriate within Cambodia itself. The Duch verdict had the effect of undermining the fragile legitimacy of the trial process.

⁴³ Stéphanie Giry, 'Cambodia's perfect war criminal', NYR blog, 25 Oct. 2010, <http://www.nybooks.com/blogs/nyrblog/2010/oct/25/cambodias-perfect-war-criminal/#>, accessed 28 Feb. 2011.

⁴⁴ See 'Duch asks to be set free', *Phnom Penh Post*, 27 Nov. 2009.

⁴⁵ Robert Carmichael, 'Former Khmer Rouge's prison chief found guilty of war crimes', Deutsche Welle, 26 July 2010, <http://www.dw-world.de/dw/article/0,,5839122,00.html>, accessed 28 Feb. 2011.

⁴⁶ For video footage of critical reactions from villagers in Kandal and Pailin provinces, posted in Aug. 2010, see Week 24 and Week 25 of 'Duch on trial', <http://forum.eastwestcenter.org/Khmer-Rouge-Trials/category/duch-on-trial-video/page/2/>, accessed 28 Feb. 2011.

Political interference

The ECCC is subject to a range of political pressures closely related to the detailed terms of the agreement between the UN and the Cambodian government that brought the tribunal into being.⁴⁷ Decisions by the chambers are subject to a supermajority voting principle, which requires four out of five judges in the pre-trial or trial chamber to support a decision: in other words, it prevents the three Cambodian judges from simply outvoting the two international judges.⁴⁸ In practice, however, where judges are split along national lines the absence of any supermajority simply means that no decision is reached, resulting in deadlock. In effect, the Cambodian judges can thereby prevent progress on key decisions. Cambodian judges are extremely vulnerable to political pressures, since they operate in a patronage-based, corrupt and extremely politicized domestic court system.⁴⁹ Many judges are members of the ruling CPP or have close personal connections to the ruling elite; while several of the ECCC's Cambodian judges are very well qualified, observers fear that ultimately key judicial decisions will be made for political reasons.

To date, there have been several controversies suggesting political interference in the working of the ECCC. Most of these concern the pursuit of additional trials of key leaders to follow the Duch and politburo cases. In late 2008 a dispute broke out between international co-prosecutor Robert Petit and his Cambodian counterpart Chea Leang over the submission of five additional suspects to be charged and investigated. Chea Leang refused to support Petit's actions. In March 2009 Prime Minister Hun Sen declared that charging additional suspects beyond the five currently in custody could lead to violent unrest in Cambodia. The government spokesman and Information Minister made disparaging comments about international judges, urging them to concentrate on the current trials. The pre-trial chamber, asked to rule on the question of whether additional suspects should be charged, was divided along international/national lines, and failed to achieve a supermajority on the issue. While the investigation by the international co-prosecutor was able to proceed, the Cambodian side of the court did not participate. As the Open Society Justice Initiative reported: 'It appears likely—and concerns have been raised confidentially by sources inside the ECCC—that Cambodian members of the staff will refuse to participate in the investigation and prosecution of the additional suspects in Cases 003/004.'⁵⁰ The possibility that Cambodian court staff could boycott additional cases en masse goes well beyond political pressures on individual judges, and suggests that the Hun Sen regime maintains a complete stranglehold on the ECCC's operations. Parallel concerns

⁴⁷ Annex to UN General Assembly Resolution 57/228.

⁴⁸ The same principle applies to the appeal chamber, except that here there are four Cambodian and three international judges. See Open Society Justice Initiative, *Political interference at the Extraordinary Chambers in the Courts of Cambodia*, July 2010, pp. 11–14, http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/political-interference-report-20100706, accessed 29 March 2011.

⁴⁹ See Christopher Dearing, 'An analysis of corruption, bias and the high resumption of impartiality in the Extraordinary Chambers in the Courts of Cambodia', *Searching for the Truth*, Jan. 2009.

⁵⁰ Open Society Justice Initiative, *Political interference*, p. 20.

have been raised about the investigation of witnesses for Case 002; summonses by the international co-investigating judge were not supported by his Cambodian counterpart.⁵¹

If the Cambodian government is intent on thwarting the work of the ECCC by blocking further prosecutions, preventing witnesses from being called, and enforcing boycotts by local staff, the tribunal is on course to fail. Hun Sen underlined his determination to prevail in October 2010, when he reportedly told UN Secretary General Ban Ki-Moon during a visit to Phnom Penh that the ECCC should close itself down after Case 002 and not pursue Cases 003/004.⁵² Under the terms of the 2003 agreement (article 28), the UN could withdraw from the ECCC if there is evidence that the Cambodian government is interfering in the proper functioning of the tribunal. In practice, however, despite the increasingly compelling evidence of political interference, the UN has shown little interest in pulling the plug on the ECCC: too much has been spent, too much political capital has been invested, and too much remains at stake in Case 002 for New York to take such drastic action. In the end, interference still pays. Despite raising serious concerns about political meddling, even the Open Society Justice Initiative called upon international donors to support the work of the tribunal.⁵³ In January 2011 the Japanese government pledged a further US\$11.7 million to the ECCC.⁵⁴

Conclusion

Ultimately, the ECCC is only partly about bringing Khmer Rouge leaders to justice. For elements of the international legal community, it is a site where emerging principles of global justice may be explored, validated and normalized. For those both inside and outside Cambodia interested in the rights of the victim, it is a place where new modes and higher levels of victim participation can be pioneered and developed. For critics of the Hun Sen government, the tribunal offers a means of placing pressure on the regime by exposing its track record on corruption, its interference in the judicial process and its support for a culture of impunity. For the Hun Sen government, however, the ECCC is not simply a threat, but also an opportunity. The trials provide scope for grandstanding in the long-serving Prime Minister's default mode, involving vitriolic criticism of the very same international community that provides so much aid and support to his government. The trials allow Hun Sen to blame the problems of present-day Cambodia upon a small bunch of ageing, ailing ex-Maoists, thereby diverting attention from his own administration's many failings and abuses. In these trials, the adversarial proceedings take place largely between the court's Cambodian and international staff, between the Cambodian government and the UN, between victims and judges, and between ECCC insiders and the wider Cambodian population.

⁵¹ Douglas Gillison, 'Khmer Rouge tribunal judge backs out of new inquiries', *Cambodia Daily*, 10 June 2010.

⁵² See Zsombor Perter and Phorn Bopha, 'No more Khmer Rouge trials, Premier tells Ban', *Cambodia Daily*, 28 Oct. 2010.

⁵³ Open Society Justice Initiative, *Political interference*, pp. 31–2.

⁵⁴ ECCC press release, 28 Jan. 2011, http://www.eccc.gov.kh/english/press_release.list.aspx, accessed 28 Feb. 2011.

The virtual trials of the Khmer Rouge tribunal

Cambodia has long proved highly resistant to international pressures. Hun Sen's CPP came second in the first post-Khmer Rouge elections, held under UN auspices in 1993, but played a central role in the subsequent government. Since Hun Sen ousted Prime Minister Prince Norodom Ranariddh in 1997, the CPP has won three general elections, gradually suppressing political opposition and establishing a hybrid form of electoral authoritarianism. The response of the West—and Japan—has been to provide enormous levels of foreign aid, linked to Cambodian promises of greater transparency, openness, efficiency and reform. This western support for Cambodia reflects growing anxiety about the influence of China, which has become a major donor country in the region. The ECCC represents, on one level, a form of political climate change—an attempt to subvert the legitimacy of the Hun Sen government and to promote more liberal and democratic practices and principles.⁵⁵

A crisis is looming over the progress of Cases 003 and 004, which Hun Sen appears intent on blocking. Without Cambodian government support, the tribunal would simply collapse; it is entirely dependent on local staff, and without the Cambodian security forces no further arrests of defendants could be made. Indeed, the government could even free the existing prisoners at any time. Would the UN ever call Hun Sen's bluff? A hybrid tribunal to try former Khmer Rouge leaders, even an unsatisfactory one, serves the purposes of many stakeholders. Aborted trials and the closure of an international tribunal when its work had only just begun would be a huge loss of face all round, not to mention a massive waste of money.

But at what point would no further trials look better than flawed trials? The classic liberal argument is that whatever the shortcomings of war crimes tribunals, they are still better than any of the obvious alternatives.⁵⁶ Yet where such trials are not led and managed by liberal states but partially subcontracted to authoritarian regimes, such arguments are distinctly weakened. The ECCC looks set to become the first such tribunal over which authoritarian practices and values gain a decisive upper hand. The ECCC is currently failing, and it is time the UN seriously considered withdrawing its support for this deeply flawed tribunal.

The evolution of the ECCC to date strongly illustrates Peskin's arguments concerning 'trials of cooperation', the political struggles that underpin war crimes tribunals. In the Cambodian case, parallel political 'trials' which place both the Hun Sen regime and the UN in the virtual dock are now assuming greater importance than the formal trials themselves. As a hybrid in-country tribunal, the ECCC epitomizes the contradictions, risks and opportunities surrounding international trials. The issues involved in emerging forms of global justice are too complex and important to be left solely in the hands of lawyers and academic legal specialists; they demand close scrutiny from domestic, comparative and international political perspectives.

⁵⁵ See Ciorciari, 'History and politics', pp. 20–21.

⁵⁶ For this position, see Bass, *Stay the hand*, p. 310.