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Cambodia and the Khmer Rouge Trials in 2012 in review: Will the Court survive 2013?

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ABSTRACT: The United Nations-backed ‘hybrid’ tribunal, the Extraordinary Chambers in the Courts of Cambodia (ECCC), is a special internationalized court established to try senior leaders of the Communist Party of Kampuchea (CPK) (better known as the Khmer Rouge) and those most responsible for the Crimes against Humanity, Genocide and Grave breaches of the Geneva Conventions that occurred in Cambodia under the watch of the CPK-led government during the period 1975-1979. The institution has proven to be expensive and controversial.

Over 2012, the ECCC saw its first case reach its full conclusion following the final appeal of the first accused person, it endured a continuing funding crisis and the resignation of one international judge who cited “the egregious dysfunctions within the ECCC” as reason for his departure.

This commentary looks back over 2012 and places the ECCC in the social, political and legal context of today’s Cambodia and discusses what impact the ECCC is having in this wider context.

Introduction

In October 2012 the Trial Chamber of the United Nations (UN)-backed ‘hybrid’ tribunal, the Extraordinary Chambers in the Courts of Cambodia (ECCC) announced it would reduce weekly hearing days from four to three and “…due to financial constraints, a significant number of key international staff members that have vacated their positions will not be replaced”\(^1\). Lack of funds has been an ongoing problem throughout 2012. Cambodian staff worked some periods without pay.\(^2\) This reduction in hearing days exacerbates the concern both within the country and amongst ECCC staff that the octogenarian defendants may not live to see their trial’s end. Outside the ECCC, the most widely expressed concern is that the process is taking too long. David Scheffer, former United States Ambassador at Large for War Crimes Issues, and the co-prosecutor, Andrew Cayley QC, are visiting the international donor community trying to raise the $43.9 million\(^3\) required for the court’s survival throughout 2013.\(^4\)

Partial Justice

2012 was another controversial and difficult year for the court mandated to hold to account ‘senior leaders and those most responsible’ for crimes against humanity, genocide and war crimes under the Communist Party of Kampuchea’s (CPK) Democratic Kampuchean regime(DK) (April 17th 1975-January 6th 1979) in which approximately 2.3 million Cambodians died.

February 2012 saw a revised sentence for the first and only person so far convicted in the $141.1 million proceedings. Kaing Guek Eav (alias Comrade Duch\(^5\)), chairman of Tuol Sleng prison, Security Center 21 (S-21) where at least 12,000 ‘enemies of the revolution’ were sent to be “smashed” (tortured and executed), had his appeal rejected; his sentence was extended from 35 years (19 left to serve) to full life imprisonment (the maximum sentence). The change was hailed as justice, particularly by the handful of S-21 survivors still alive; if one meets the victims of torture or those whose families were murdered it is difficult to think otherwise.\(^6\) Although the vast majority of those who survived DK are not vengefully demanding eye-for-an-eye justice, the idea that a man like Duch could leave prison after serving a finite sentence is exceptionally difficult to stomach.

Duch’s case (001) will probably be the only one in the ‘most responsible’ category to be tried. Those being tried together in case 002 are all ‘senior leaders’: Khieu Samphan (President of DK); Ieng Sary (Foreign Affairs Minister); and Nuon Chea (Deputy Prime-minister). Ieng Thirith (Social Affairs Minister) was ruled mentally incapable of standing trial in 2012.

Duch’s status as lone defendant in his category inevitably raises questions. Currently five suspects are...
supposedly under investigation in preparation for Cases 003 and 004. These allegedly committed crimes similar to Duch’s (crimes against humanity, war crimes, and human rights violations resulting in thousands of deaths); like Duch, they were not in the senior leadership of the CPK. However the fate of Cases 003 and 004 is at best uncertain.

Despite officially ‘inviting’ the UN to help the state prosecute the atrocities, the ruling Cambodian People’s Party (CPP)’s preferred solution remains, as current Prime Minister (and former Khmer Rouge cadre) Hun Sen put it, to ‘dig a hole and bury the past’17. The signing of the Paris Peace Accords in 1991 legally bound the Cambodian government to uphold international law, compelling it to prosecute international crimes occurring within its own territories8. The CPP is desperate to retain control of the narrative of the DK period. Many serving government officials and senior CPP members had close ties and/or direct involvement with the KR. Indeed, the current presence of former KR in high ranking positions hinders discussion of the DK period at a grassroots level: “the victim cannot say something, but is kept silent”.9 Cambodians know their persecutors’ identities, but given that these persecutors are sometimes powerful men and women they are afraid to speak out. Pursuing cases beyond case 002 will involve uncomfortable revelations for senior figures in the ruling party, either because they are connected with defendants or would themselves become defendants on trial for international criminal offences. It is important to note that if cases 003 and 004 proceed it would theoretically open the way for the ECCC to prosecute similar crimes.

Duch is the ‘necessary scapegoat’,10 His prosecution is symbolic. Since the Vietnamese liberation in 1979, S-21 has served as a symbol of the criminality and sadism of the CPK. However, Duch was not a senior leader; nor did he sit in cabinet with the defendants of case 002. Why then has he received the maximum sentence the court can bestow? If the defendants in case 002 are found guilty, their sentences ought logically to be higher than Duch’s as they bore the principal leadership roles and instigated the policies he implemented. However, there is no higher sentence; the principle of parity of sentencing at the ECCC seems to not have been applied. Duch does not bear the same responsibility. And there are ‘other Duchs’; men and women who ran prisons, torture chambers, supervised mass murder and used slave labour. Failure to pursue them would give Duch a disproportionate role in the story of DK. It is inconsistent that he has been singled out among the lesser KR responsible for the deaths of thousands. The sentence also fails to take into account his period under illegal detention by the Cambodian military court.

Duch largely acknowledged what he did and cooperated with the court. The site of his crimes (S-21) is now that of the Tuol Sleng Genocide Museum; as such it is part of the established KR history in the heart of the capital, and part of the tourist trail. Other crime scenes are far less visible, in that they are not promoted as part of the official narrative. It is certainly possible to visit the Trappeng Tham Dam, a vast irrigation system built in DK miles away from the capital in Banteay Meanche. In the 6 months it took to construct, thousands of people enslaved by the CPK died. However, there is no memorial, no plaque, and no acknowledgement that the dam is as much part of the story as S-21. Survivors have expressed to me their desire for a memorial.11 The problem is that once such places become part of the official narrative, questions arise: about who was responsible; about who did what; and about who knew what. Given what is known about the relationship between the KR, the current makeup of the CPP, and the fears expressed by victims about naming those in charge at the time, an exploration of these questions would indicate that currently powerful figures may be responsible for crimes as grave as Duch’s. Cambodian historiography feels like a series of ‘known unknowns’12. Piling the worst of the regime on the shoulders of Duch and a few CPK leaders provides a narrative that is a partial outlet for history and justice while letting the rest of the story drift into obscurity.

Judicial Bias

It is in this context that the resignation in March of the international co-investigating Judge, Laurent Kasper-Ansermet, must be viewed. Kasper-Ansermet was a replacement for Judge Siegfried Blunk, who resigned in October 2011 claiming government statements opposing the investigations of cases 003/004 were undermining his position and calling into doubt his ability to act independently; Blunk cited the Cambodian Minister of Information’s statement that, “if they want to go into cases 003 and 004, they should just pack their bags and leave.”12. Blunk was himself a replacement appointment following Judge Marcel Lemonde’s resignation for personal reasons. Kasper-Ansermet resigned claiming that his domestic counterpart, Judge You Bunleng, was sabotaging his ability to investigate cases 003/004 by means ranging from the petty to the ‘possibly even criminal’14 such as not allowing him to place documents in the case files, withdrawing the official seal, refusing to acknowledge his legal validity to investigate and not allowing access to basic services such as interpreters and drivers to go out on investigation missions. Judge Kasper-Ansermet claimed the office of the co-investigating judges was dysfunctional and rife with irregularities15. The relationship between the two judges was conducted though hot tempered (on Judge You’s side) press releases. The UN has expressed anxieties about the impartiality of the ECCC16 17 and has accused the Cambodian government of breaching the ECCC’s foundational treaty, thus providing legal grounds for the UN to pull out.18 Judge Kasper-Ansermet was later replaced by Judge Mark Brian Harmon.
The ECCC is supposed to be ‘a model court’ in a country with few legal resources and where judicial independence is seriously compromised by backroom financial deals and political interference. Corruption is endemic in Cambodia. One source involved in judicial capacity building since the early 1990s quoted a figure of $100,000 that had to be paid to ‘the right people’ for a Cambodian to become a judge. Simply to become a member of the Bar Association costs tens of thousands of dollars; only those few rich enough can become lawyers tasked with defending human rights and fighting corruption.

Judicial independence is compromised through the considerable overlap between senior legal professionals and the ruling CPP. Over 2012, there have been several highly political prosecutions. The most prominent involved women forcibly removed from their homes by a government eager to sell the land to massive commercial ‘land development’ projects - culminating in the deeply shocking (in the cultural context of Cambodia) public arrest and manhandling by police of a human rights campaigning monk, Ven. Sovath Louen21, speaking out in the women’s interest. (Ironically, the ECCC has focused for most of this year on the forcible mass movement of the Citizens of Phnom Penh from their homes to the countryside by the Khmer Rouge in 1975, described as a crime against humanity). In October the Phnom Penh Municipal Court sentenced Mam Sonando, founder of Beehive Radio, which broadcasts programs critical of government policy, to twenty years in prison, after a trial in which no evidence was presented supporting the charges of “secessionism” he faced.22 The Cambodia judiciary is historically corrupt, even prior to DK. The legal system was destroyed under the KR; 80% of legal experts died (by execution, starvation or disease) under the CPK regime23. The Vietnamese installed a ‘judiciary’ based on the Soviet model; the trials of this period were show trials. It consisted of panel of Judges and ‘lay-judges’ – party members to watch the Judges and ensure they made the right decision. The judiciary of the 1980s was an arm of the Party; the Party runs the country today (though the name changed in 1991). Today’s senior legal figures, trained in this system as Party tools, are now supposed to establish the independent judiciary demanded by the democratic constitution adopted in 1993. It is questionable whether many Cambodian judicial professionals have ever seen an independent, unpolticised judiciary or how it functions.24 As ‘model court’, the ECCC is the training ground for a new generation of legal professionals. If it can function independently, its legacy will be positive; if, however, it accedes to rampant corruption and political interference, the implications for the future are disturbing.

International Response

Apart from those who have resigned and the defence teams, the internationals have stayed silent throughout scandals undermining the credibility of the court. In 2008 several Cambodian staff blew the whistle on a kick/back scheme whereby they were asked to pay to keep their jobs.25 The UN Office of Internal Oversight Services (UN-OIOS) carried out an investigation; their report, however, remains secret, at the Cambodian government request.

Some domestic judges’ appointments would be unacceptable in any other court. All the domestic judges, for example, are old enough to have been KR victims or to have had family die in DK. Inability to try the KR impartially is an obvious argument against them. However, practically speaking, in Cambodia the vast majority of people who survived the 1970s were victims; judges unaffected by the KR period do not exist. However, more troubling are examples of serious concerns regarding the suitability of domestic judges, such as the allegations of bias in relation to Judge Ney Thol in the pre-trial chamber. He was a former member of the CPP central committee and has presided over highly political trials concerning the opposition parties that were condemned as far below international standards. Or there is the President of the Trial Chamber, Judge Nil Nonn, who admitted to a reporter that he took bribes26 when he was a judge at a provincial court: ‘... [i]t’s like you are rewarding him for his bad behaviour...How do you expect that person tomorrow to follow the constitution if he can say “Well, the internationals felt I was qualified, they didn’t have a problem with the way I do things” ’27;

Given the serious nature of the allegations, particularly those from Kasper-Ansermet, the absence of an official, international investigation is surprising. The question hovering over the internationals, in particular the two international Judges in the trial chamber, Judge Cartwright and Judge Lavergne (the other three are Cambodian judges ), is whether their silence is complicit with the interference. Should they confront their colleagues even if they would be overruled?

All the ECCC has is its legacy. Justice almost 40 years after the end of the regime is symbolic, and while symbolism is important, it is not enough. For the first time in Cambodian history there is an opportunity to have an independent judicial institution - this is ‘it’28 for this generation.

The internationals, particularly the judges, are in a position to confront problems at least by making occasional dissenting decisions. Judges and other international staff could aggressively assert themselves as guardians of judicial independence by condemning the interference of Hun Sen when he selected the domestic judges, or when he makes statements about the guilt of the accused29, or that he will not allow
cases 003/004 to be pursued.30

Michiel Pestman (Co-Lawyer for Nuon Chea) asked Judge Cartwright and Judge Lavergne whether they believe the Trial Chamber will ever take a decision against the wishes of the Cambodian Government.31 It is a significant question. While a trial of the CPK leaders is symbolically important, at what point does a process of a standard that would be unacceptable in the ICC imply a UN seal of approval on corruption and political molestation of the judiciary? If this court is an example for the future, then it must be a good one. There is a risk that the symbolic process will become tainted to a point, rather than symbolizing some justice for the KR victims, the ECCC becomes a symbol of an institution that has contributed to the long term degradation of human rights in Cambodia.

Will the donor community continue to support a process with so many uninvestigated allegations of corruption and interference? It is worth speculating that this may be a reason for a lack of forthcoming funds.

Over 2012, the Cambodian government has consistently shown what small regard it has for due process or human rights; what the CPP wants, it gets. The ECCC is not just an institution dealing with the past, but will have a role in shaping the future. At present, the opposition leader (Sam Rainsy) lives in exile, Mam Sonando rots in prison, and land seizures persist. The UN could stand up for real justice by refusing to acquiesce in a tainted political process in the ECCC: but it is for the internationals at the ECCC to act.

Theary Seng, a lawyer, former civil party at the ECCC and a Cambodian Human Rights activist imprisoned by the KR when she was a child, whose family were murdered by the regime, wrote in a commentary piece on the Ki Media website (a site Cambodian servers block) that the UN should pull out. She argues this would show that the UN prioritizes justice over politics; she added that no trial is better than a political farce.32

As though to compound 2012s problems Michiel Pestman and Andrew Ianuzzi, co-defense counsel for Nuon Chea, resigned on December 21, one day after I originally submitted this commentary piece citing government interference inhibiting their ability to pursue a defence and calling on the UN to withdraw from this “…trial Chamber working from a script, with cues and stage directions…. the proceedings taking on all the dignity of a very bad ‘Gilbert and Sullivan’.”33

I believe the ECCC will survive 2013. Money problems have persisted ever since its inception and the court has always pulled together enough funds. To fail on the basis of financial problems alone would be a colossal humiliation for all the donors that have spent millions so far, and for the UN itself. However, the court’s long term legitimacy depends on a full and independent investigation into Cases 003 and 004; unless there is tangible progress this year, the real question that will hang over the court will be: is the ECCC’s survival of any benefit to Cambodia?

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