Hybridity in Transitional Justice: The Legacy of The "*Khmer Rouge* Tribunal"

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Abstract

Countries throughout the world practice several forms of transitional justice, hoping to attain peace, democratic stability and reconciliation. They apply different mechanisms to achieve these goals. This paper offers a theoretical analysis of foundation, proceedings and legacy of the Extraordinary Chambers in the Courts of Cambodia (ECCC). First, the Author examines the notion of the analysis of hybrid courts as a way of overcoming constraints that criminal justice mechanisms in post-conflict societies may face. Second, the Author explores the so-called "Khmer Rouge Tribunal". Due to the significance and controversies that surround the ECCC, its work attracts great attention. Furthermore, political will is critical, so these hybrid judicial institutions should have more international support in terms of political means, funds, dissemination of results, and complementary mechanisms of transitional justice.
Keywords: *hybrid courts, transitional justice, international criminal justice, ECCC, Cambodia.*

Intisari

Negara-negara di seluruh dunia mempraktikkan beragam bentuk keadilan transisional, dengan harapan untuk memelihara perdamaian, stabilitas demokrasi, dan rekonsiliasi. Mereka menerapkan mekanisme yang berbeda-beda untuk mencapai tujuan tersebut. Penelitian ini menyajikan analisis teori yang dilakukan terhadap landasan, proses, dan pengaruh Extraordinary Chambers in the Courts of Cambodia (ECCC). Pertama-tama, penelitian ini meninjau gagasan mengenai analisa terhadap pengadilan hibrida sebagai cara untuk mengatasi kendala yang dihadapi oleh mekanisme pengadilan pidana di masyarakat pasca-konflik, dan kedua, mengeksplorasi apa yang disebut "Pengadilan Khmer Rouge". Karena signifikansi dan kontroversi yang menyelubungi ECCC, karyanya menerima perhatian yang besar. Tekad secara politis sangat penting, sehingga pengadilan hibrida ini dapat memperoleh dukungan internasional lebih banyak dalam hal sarana politik, dana, penyebaran hasil, dan mekanisme untuk melengkapi keadilan transisional.
Kata kunci: *pengadilan hibrida, keadilan transisional, peradilan pidana internasional, ECCC, Kamboja.*

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A. Introduction

Countries throughout the world practice some form of transitional justice, seeking for truth and justice for victims of mass atrocities, hoping to attain peace, democratic stability and reconciliation, applying different mechanisms to achieve these goals. Hybrid courts, as mechanisms of transitional justice, are the most recent type of international criminal courts. They are institutions of mixed composition and jurisdiction, encompassing both domestic and international aspects, typically operating in countries in which the abuses occurred.[1] Hybrid courts have a specific mandate to adjudicate crimes from a particular conflict or over a specific period.[2] Since the beginning of the century, these judicial institutions have been created in Cambodia, Timor-Leste, Kosovo, Bosnia and Herzegovina, Sierra Leone, and Lebanon. The main idea was to suggest a fresh approach, which is to consider concerns about solely international justice on one side, and purely domestic on the other.

Given the relative novelty of hybrid courts, concept and practices are still controversial. Along with Timor-Leste, Cambodia was the pioneer in creating hybrid courts; it was the first, globally, to reflect on foreign judges, prosecutors and personnel working together with their domestic counterparts. Nevertheless, applying any mechanism of transitional justice is never a smooth process.

In January 2017, after more than a decade of active proceedings, over thousand high-schools students visited the hybrid court in Cambodia, officials pointed out how crucial this experience might be for young people who were not directly hit by the atrocities in the 1970s *Democratic Kampuchea*, since "the trials could help victims with both psychological and national reconciliation, as well as strengthen the Rule of Law and maintain peace in Cambodia".[3] However, only one month later, the so-called "*Khmer Rouge* Tribunal" dismissed the charges against the person suspected of running a forced labor camp and overseeing mass killings. Judges decided that Im Chaem, a 74-year-old woman, is not subject to the court's personal jurisdiction, since, in their opinion, she was not a senior leader or a responsible official. It was only the latest disappointment for those who have had great expectations from the processes before the Cambodian hybrid court.

Having the recent development in mind, the question that follows is: how does the initial enthusiasm for criminal trials decline with the passage of time? Seeking for an answer, the Author revisits the notion of the analysis of the hybrid courts as a way of overcoming constraints that criminal justice mechanisms in post-conflict societies may face. Thus, the Author firstly conceptualizes hybrid courts, and secondly, explores the case of the Extraordinary Chambers in the Courts of Cambodia (ECCC). The "*Khmer Rouge* Tribunal" is being observed as a part of a wider post-conflict process, specifically in Southeast Asia.

At the same time, theoretical analysis and research in transitional justice suppose a certain methodological eclecticism. Programs seeking to handle the repressive past can be judged by their declared goals, expectations of the general public, or some ideal standards of justice and truth: these programs can fail at the stage of formulation, stage of adoption, or stage of implementation.[4] Policies often lack a clear understanding of how the change works,[5] and "although empirical studies on the impact of transitional justice on democracy have become increasingly widespread, the findings

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1 United Nations, 2008, *Rule-Of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, United Nations High Commissioner for Human Rights, New York and Geneva.

2 J. Hermannn, "Hybrid Tribunals", in L.Stan and N. Nedelsky, 2013, *Encyclopedia of Transitional Justice* (vol. 1). Cambridge University Press, Cambridge, p. 37-42.

3 Extraordinary Chambers in the Courts of Cambodia, "Prey Veng Students Visit ECCC", *https://www.eccc.gov.kh/en/articles/prey-veng-students-visit-eccc*, accessed on 7th March 2017.

4 C. Kis, "Causes of Failure in Transitional justice" in Stan L. and Nedelsky N., 2013, *Encyclopedia of Transitional Justice* (vol. 1). Cambridge University Press, Cambridge, p. 123-129.

5 A. McDonald, "From the Ground Up: What does the evidence tell us about local experiences of transitional justice?", *Transitional Justice Review*, Vol. 1, No. 3, 2015, p. 72-121.

produced by these studies have been contradictory and inconclusive".[6]

In general, there are two broad customary approaches to examine these institutional mechanisms and their practices: normative and legal-doctrinal.[7] The first one is value-driven and requires an analysis of the principles underpinning the law. The second requires a review of the existing law to determine its relevance to a particular issue. While many societies seek for the right model of dealing with the past, this paper offers a systematic account on foundation, proceedings and legacies of the "*Khmer Rouge* Tribunal", contributing to an ongoing debate on what is the role of hybrid courts in transitional processes in Southeast Asia.

The paper is structured as follows: Firstly, the Author departs by conceptualizing the institution of hybrid courts, locating their position in the international criminal justice, and identifying the reasons why these judicial bodies appear. Secondly, the Author introduces the ECCC, focusing on the court's foundation, legal basis, organization, and practices. Finally, the Author discusses the hybrid approach to transitional justice, highlighting the political will as a key requirement for successful trials in the context of inherent tension between the domestic and international norms and actors.

B. Discussion

1. Conceptualizing Hybrid Courts

In this part, the Author firstly discusses the role of criminal justice in transitional societies, and secondly, introduces the hybrid approach to the criminal justice, as a mixture of domestic and international components.

Criminal justice, as the harshest form of law, refers to the system in charge of coping with acts legally defined as crimes.[8] At the international level, it aims for those considered to be the most responsible, which usually involves individuals in a position of political or military authority; those who were in a capacity to organize and conduct mass violence. On the other hand, criminal prosecution should never be understood as the solitary response by the international community. A comprehensive approach to the problem is decisive, which includes a variety of truth-seeking and victim-oriented methods, such as truth and reconciliation commission, reparation, restitution, lustration, or commemoration initiatives.

Coping with the violent past is never easy: "One of the most important political and ethical questions that societies face during a transition from authoritarian or totalitarian to democratic rule is how to deal with legacies of repression".[9] Orentlicher, for example, defends the broad trend of supporting criminal accountability for those principally responsible for mass crimes.[10] She asserts three major empirical findings met in a variety of locations: a) victims' thirst for justice and prosecutions across diverse cultures; b) impact on the countries where violence actually occurred; and c) even societies unable to build cases might gain such capacity with the passage of time, such as the case in Cambodia.

In a post-conflict atmosphere, the first impulse among many is to punish the perpetrators. It is not as simple as saying that all victims basically want the same thing, "but it is to say that many who have endured unspeakable crimes have a powerful need for justice".[11] Some might call it revenge,

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6 V. Arnould, *et al*., 2013, *Studying the Impact of Transitional Justice on Democracy: Conceptual and Methodological Challenges*, The European Consortium for Political Research, Bordeaux, p. 21.

7 Swisspeace and Oxford Transitional Justice Research, 2013, *Transitional Justice Methods Manual: An Exchange on Researching and Assessing Transitional Justice.* Swisspeace & Oxford Transitional Justice Research, Bern.

8 K. Ambos, "Criminal Justice", in Stan L. and Nedelsky N., 2013, *Encyclopedia of Transitional Justice* (vol. 1). Cambridge University Press, Cambridge.

9 A.B. De Brito, Gonzalez-Enriquez C., and Aguilar P., 2001, *The Politics of Memory. Transitional Justice in Democratizing Societies*. Oxford University Press, Oxford, p. 5.

10 D. Orentlicher, "'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency", *The International Journal of Transitional Justice*, Vol. 1, No. 1, 2007, p. 10-22.

11 *Ibid*., p. 21.

but punishment undeniably "dominates our understanding of transitional justice".[12] Criminal prosecution is indeed an "essential ingredient of any preventive effort".[13]

But why are the criminal trials in post-conflict societies so important? Many authors suggest that the role of criminal justice in democratic transition goes beyond its importance in ordinary times. Sanctions are not solely an instrument of stability, but also a tool that is potent to bring out a certain social change: they constitute a "critical response to illiberal rule through the criminal law".[14] Transitional criminal justice raises deep questions connected to the rule of law in a period of political flux, "most noticeably how to bring together desired normative change and stay loyal to conventional legality".[15] In this view, the punishment should not be considered as a largely retributive concept, but rather a transformative one. It is about a transformation from a corrupt instrument into the basis of democracy and rights. Law in a transitional society is carried out through extraordinary conditions (radical political change), and therefore punishment addresses a broader community.

Having in mind this centrality of the criminal justice, we trace the appearance of the hybrid courts as a mechanism of transitional justice.

Dawn of transitional justice could be traced back to World War I, yet the notion becomes understood as both international and extraordinary only after 1945 when tribunals in Nuremberg and Tokyo were conceived in order to address crimes committed by Nazi and Japanese leadership.[16] These tribunals fundamentally changed the system of criminal accountability by: a) ending the states' exclusive responsibility to bring out justice; and b) focusing on individual responsibility for certain grave crimes.[17] Also, they helped to define war crimes, crimes against humanity, and the principle of command responsibility.

It was not until the last decade of the 20th century that the international approach to criminal justice recurred with foundations of the *ad hoc* international criminal tribunals for mass crimes in former Yugoslavia and Rwanda (ICTY and ICTR). These courts have been criticized for several reasons, among others, for operating in remote from the communities in question, and therefore, missing a real social impact. The newest generation of international criminal justice, represented by the hybrid courts, has been welcomed with great expectations: they are presumed to combine the strengths of the international courts with the benefits of local prosecutions.[18]

Hybrid courts are typically established to ensure criminal accountability in those political and legal systems in which domestic means of prosecution are too weak, too corrupt, or too politicized to deal with high profile cases.[19] The three dimensions that hybrid courts are believed to offer solutions are: a) legitimacy, b) capacity building, and c) norm penetration.[20]

Firstly, the legitimacy of domestic courts might be questionable since the judges and prosecutors are sometimes inherited from the previous regimes, and they might be the very people who once already failed to prosecute those responsible for wrongdoings. On the other hand, the examples of ICTY and ICTR show that it is not easy to establish a broad acceptance for the

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12 R. Teitel, 2000, *Transitional Justice,* Oxford University Press, Oxford, p. 27.
13 J. Mendez, "In Defense of Transitional Justice", in J. McAdams, 1997, *Transitional Justice and the Rule of Law in New Democracies,* University of Notre Dame Press, Notre Dame, p. 8.
14 R. Teitel, 2000, *Transitional Justice,* Oxford University Press, Oxford, p. 67.
15 *Ibid.,* p. 66.
16 R. Teitel, "Transitional Justice Genealogy", *Harvard Human Rights Journal*, Vol. 16, Spring 2003, p. 69-94.
17 C. Aptel, "International Tribunals", in Stan L. and Nedelsky N., 2013, *Encyclopedia of Transitional Justice* (vol. 1). Cambridge University Press, Cambridge, p. 42-51.
18 S. Nouwen, "Hybrid courts: The Hybrid Category of a New Type of International Crimes Courts", *Utrecht Law Review*, Vol. 2, No. 2, December 2006, p. 190-214.
19 E.E. Stensrud, "New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leona and Cambodia", *Journal of Peace Research*, Vol. 46, No. 1, January 2009, pp 5-15.
20 L.A. Dickinson., "The Promise of Hybrid Courts", *The American Journal of International Law*, Vol. 97, No. 2, April 2003, p. 295-310.

international courts neither. Local communities see these institutions as something far away from them, as an image of the victors' justice and tend to claim that they exist only to prosecute one group. Furthermore, those who share group identity with perpetrators often see international prosecutions as being aimed against the whole group, while members of the victimized community tend to see the efforts of the international courts as insufficient.

Secondly, the judicial systems typically suffered during the years of conflict and bypassing the local population would neglect the need for establishing the rule of law in affected countries. Therefore, having a purely international or purely domestic justice may fail to promote local capacity building. Finally, the narrow approach would have a modest impact on the development of substantive laws criminalizing the mass atrocities.

It seems that there is widespread support for a combination of domestic and international criminal justice. Being a supporter of "a strong international duty to prosecute past abuses",[21] Orentlicher still insists "on the importance of local agency in fashioning and implementing policies of justice".[22] In similar fashion, Magret defends the legitimacy of the hybrid courts through its representational function,[23] while Kent offers a socio-cultural approach to hybridity.[24] Although it still relatively new, and despite many challenges they face, hybrid tribunals are now an established part of transitional justice.[25] In the next chapter, the Author proceed with the case of the hybrid court in Cambodia. The Author departs from the challenges post-*Khmer Rouge* Cambodia faced, and explore the foundation, legal basis, and practices of the ECCC.

2. The *Khmer Rouge* Tribunal: Crimes, Laws, Punishments

In this chapter, the Author firstly offers an insight into the challenges the post-*Khmer Rouge* Cambodia faced. Secondly, the Author explores the foundation, organization and legal basis of the ECCC. Finally, the Author overviews the cases before the hybrid court and common criticism regarding these cases.

Cambodia was a French protectorate (1863-1953) and had suffered disturbances until the last decade of the 20th century. The years after independence were marked as a period of civil war, in which several rebel groups fought against each other and the government. The most organized among them was the notorious *Khmer Rouge.* As soon as their troops marched into Phnom Penh, in April 1975, General Pol Pot proclaimed the *Democratic Kampuchea* and created a unique plan that targeted political regime, structure of society, and status of individuals.[26]

The regime committed widespread human right abuses, including torture and execution of hundreds to thousands of people. Violence was particularly directed against ethnic and religious minorities, intellectuals, and members of other political parties.[27] Through starvation and hard labor, it is believed that the regime killed around 1.7 million people (more than one-fifth of the 1975 population) before Vietnamese troops arrived in November 1978. Cambodian–Vietnamese War ended in October 1991 when The Paris Peace Accords were signed.[28] It was the first post-Cold

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21 D. Orentlicher, "'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency", *The International Journal of Transitional Justice*, Vol. 1, No. 1, 2007, p. 11.

22 *Ibid.,* p. 21.

23 F. Megret, "In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice", *Cornell International Law Journal*, Vol. 38, No. 3, p. 725-751.

24 A. Kent, "Friction and Security at the Khmer Rouge Tribunal", *SOJOURN: Journal of Social issues in Southeast Asia*, Vol. 28, No.2, July 2013, p. 299-328.

25 J. Hermannn, "Hybrid Tribunals", in Stan L. and Nedelsky N., 2013, *Encyclopedia of Transitional Justice* (vol. 1). Cambridge University Press, Cambridge, p. 41.

26 S. Luftglass, "Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge", *Virginia Law Review*, Vol. 90, No. 3, May 2004, p. 893-964.

27 J. Hermannn, "Extraordinary Chambers in the Courts of Cambodia", in L. Stan and N. Nedelsky, 2013, *Encyclopedia of Transitional Justice* (vol. 2). Cambridge University Press, Cambridge, p. 132-137.

28 United Nations, "Cambodia - 20 years on from the Paris Peace Agreements", *http://www.ohchr.org/EN/NewsEvents/Pages/Cambodia-20yearsonfromtheParisPeace.aspx*, accessed on 8th April .

War peacekeeping mission deployment, and the first occasion in which the UN took over as the government.

Pol Pot or "The Brother Number One" never faced any criminal charges. Cambodia did hold a domestic trial *in absentia*, and in 1979, so-called "People's Revolutionary Tribunal" found him guilty for genocide and sentenced to death. Nevertheless, these trials are widely regarded as illegitimate and farcical. Pol Pot fled from the capital and continued to fight against Vietnamese in remote northern areas, thus remaining free until his house-arrest in 1997. He died a year later and was never brought to justice in the Cambodian hybrid court, which was, at that time, at the initial phase of establishment.

Time has passed, but the burden of history stayed. Having in mind all the horror brought about, the trial against *Khmer Rouge* leaders is sometimes dubbed as the most important trial since Nuremberg. There are certain supports for the trials, even though in Cambodia there is no real history of a formal justice in a Western sense and no rights-based legal culture.[29] In this view, the phenomenon of regime facing justice is not just a matter of retribution as much as a way to find the answer to the elusive question: What really happened? This question troubles Cambodians, as the trials at the ECCC are proceeding.

At this point the Author need to bring the discussion to a halt and observe the exact way the Cambodian hybrid court came into the picture; to understand its foundation and its structure. In general, the elements empirically shown to be universal for hybrid courts are: a) location in the affected country, b) UN involvement, c) *ad hoc* nature, d) no duty of cooperation of the third states (UN cannot oblige countries to co-operate), and e) no obligatory contributions (costs are not borne by the UN member states).[30]

However, tThe creation of the ECCC took longer than any other international court and the final agreement reflects a compromise between the need to address impunity and the need to preserve Cambodian sovereignty.[31] Throughout the negotiations, the Cambodian officials wanted a national court with foreign help, while the UN aimed for a predominantly international tribunal. In March 1999, they announced that the best approach for accountability in Cambodia would be an institution in the mold of the tribunals, such as for Yugoslavia and Rwanda. However, six months later, Cambodian prime-minister rejected the plan. US government pressured the Cambodian side to move towards endorsing a special chamber, which was finally approved by the UN General Assembly in May 2003. The trials didn't start until 2006.

Formally speaking, the ECCC is a special court which receives international support through the UN. The Chambers have jurisdiction to prosecute individuals for serious violations of international and domestic penal law happened in April 1975 to January 1979. The court comprises a Trial Chamber consisting of three Cambodian and two international judges, and a Supreme Court of four domestic and three foreign judges.[32] This is the only hybrid court with a majority of domestic judges. The prosecution strategy is also divided between two co-prosecutors, one Cambodian and one international. They are seeking to cooperate and develop a common procedural strategy: theoretically, they should work together to initiate investigations, formulate charges, and request the opening of judicial inquiries.[33] The ECCC also include the Pre-Trial Chamber and the co-investigating judges, while the final organ is

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29 C. Etcheson, "The Politics of Genocide Justice in Cambodia", in A. Romano C., Nollkaemper, *et al*., 2004, *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford University Press, New York.

30 S. Nouwen, "Hybrid courts: The Hybrid Category of a New Type of International Crimes Courts", *Utrecht Law Review*, Vol. 2, No. 2, December 2006, p. 190-214.

31 D. Scheffer, 2008, *The Extraordinary Chambers in the Courts of Cambodia*, Cambodia Tribunal, Phnom Penh.

32 S. Williams, "Public International Law", International and Comparative Law Quarterly, Vol. 53, No.1, January 2004, p. 227-245.

33 G. Sluiter, "Legal Assistance to Internationalized Criminal Courts and Tribunals", in Romano C., Nollkaemper A., and Kleffner J., 2004, *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford University Press, New York.

the Office of Administration run by a Cambodian director and an international deputy.

The first on trial was Kaing Guek Iav, known as "The Comrade Dutch". He is the former head of the *Toul Sleng S-21* prison, a high school in Phnom Penh turned into a detention center. This is known as the Case 001. The rest of the cases are given numbers in this manner (Case 001, Case 002, Case 003, and Case 004). The overview of the cases before ECCC is provided in the table below.

Table 1. The Cases Before ECCC

Case	Accused	Crimes	Phase
001	Kaing Guek Eav (Comrade Duch)	Crimes against humanity and grave breaches of the Geneva Conventions for training, ordering and supervising the systematic torture and execution of prisoners in S-21	Life in prison (February 2012)
002	Nuon Chea Khieu Samphan Ieng Sary (died in March 2013) Ieng Thirith (unfit to stand trial)	Suspected for crimes against humanity, genocide, and grave breaches of the Geneva Conventions	Charges separated into two cases (002/1 and 002/2) in September 2011
002/1	Nuon Chea Khieu Samphan	Crimes against humanity for murder, political persecution, and other inhumane acts (forced transfers, attacks against human dignity, extermination through executions etc.)	Life in prison (August 2014)
002/2	Nuon Chea Khieu Samphan	Genocide against the Cham and the Vietnamese forced marriages and rape, internal purges, etc.	Presentation of evidence started in January 2015
003	Meas Muth Sou Met (died in 2014) Van Rith (died in 2008)	Crimes committed in S-21, Stung Tauch, Kampong Chhnang Airport, Division 801, Stung Hav Rock Quarry worksite, etc.	Charged *in absentia;* appeared before the court in December 2015
004	The identity of the three suspects confidential	Crimes against the Cham and Khmer Krom population; crimes against the East Zone evacuees; Purges of the Central and North-West Zone	No persons have been charged yet
004/1	Im Chaem	Suspected for Homicide and Crimes against humanity, for running a forced labor camp and overseeing mass killings	Dismissed (February 2017) The appeal is filed (Hearings held in December 2017)

Source: ECCC

Between the high expectations and objectively difficult tasks to deal with crimes committed decades before, the ECCC found itself in a very specific situation, after only several years of trials. Media referred to it as a "legal limbo",[34] while some international experts claimed an "outcome-driven process", which does not meet "basic requirements or adhere to international standards".[35] Trials before the "*Khmer Rouge* Tribunal" attracted more attention – domestically and internationally – than any other hybrid court in the world. It was not only due to their significance, but also numerous frictions and frequent judge resignations (mostly regarding the cases 003 and 004).

The ECCC came to the spotlight for the first time in 2010, when the French investigative

[34] J. Ferrie, "Khmer Rouge crimes in legal limbo", The National, 24th July 2014.
[35] Voice of America, "Cambodia's Khmer Rouge Tribunal Draws New Criticisms", *Voice of America*, 25th September 2011.

judge Marcel Lemonde resigned. The following year, German judge Siegfried Blunk left by saying that "his ability to withstand such pressure by government officials to perform his duties independently could always be called in doubt".[36] By 2013, Swiss investigative judge Laurent Kasper-Ansermet resigned as well, since he found himself "in a highly hostile environment with Cambodian judge You Bunleng".[37] Finally, in 2015, Mark Harmon stepped down "with considerable regret" and due to "strictly personal reasons",[38] casting more suspicion on the courts' ability to pursue cases against the former regime leaders.

Proceedings before the ECCC seem to be overshadowed by frictions and alleged external pressures. Critics came from prosecutors, defense lawyers, and observers alike. International co-prosecutor Andrew Cayley accused the co-investigating judges of closing the investigation prematurely and "attempting to bury the case".[39] Nuon Chea's defense lawyer (Case 002) boycotted the trial for a day because the statements given during the investigation were used at the trials. He is concerned that they could be overvalued "because of the emotionally powerful way they have been read in the court".[40] Finally, Anne Heindel, a legal adviser to the Documentation Center of Cambodia, commenting the Case 003, stated that "if the case ever gets to trial, it will be a new mess".[41]

Having this criticism in mind, the question concerning what will be the legacy of the ECCC arises, whether the hybrid court capable of coping with the challenges it faces or is it really such a mess. In the next chapter, the Author discusses the role of domestic and international actors within the hybrid courts and further explore the potentials and limitations of these judicial institutions.

3. Analyzing Hybridity: Justice, Politics, and Future

There are two parts discussed in this chapter. First, the matter of impunity in the context of the tensions between the domestic and international components. Second, the Author explores the legacy of the ECCC.

One of the fundamental arguments for establishing international courts is the matter of impunity. Zone of impunity is defined as a space in which criminal accountability is impossible to pursue, usually due to one of the following reasons: a) local authorities are unable or unwilling to act; b) there is no relevant court with jurisdiction over territories or individuals in question; or c) prosecutorial strategy is selective.[42] In other words, the officials engaged in criminal behavior tend to protect one another.[43]

The logic behind impunity is fairly simple: there are cases when the defeat of the previous repressive regime is just partial or temporal. Furthermore, having in mind the nature of the very crimes hybrid courts have to deal with – mass atrocities in which elites had important roles, it follows that some kind of a political will for coping with the past is critical. Some authors, such as Stensrud, argue that the narrow focus of the ECCC "fits nicely into the ruling party, CPP's, presentation of history" since the current regime consists of many former members of the *Khmer Rouge* who changed side in time.[44] It follows that it is in their interest to

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36 BBC, "Under-fire German judge quits Cambodia tribunal", BBC, 10th October 2011.

37 P. Chan Thul, "Khmer Rouge genocide: justice delayed may be justice denied", Reuters, 11th March 2013.

38 Reuters, "Judge quits Cambodia's troubled Khmer Rouge trials", Reuters, 7th July 2015.

39 Open Society Justice Initiative, "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: June 2011", *https://www.opensocietyfoundations.org/sites/default/files/cambodia-eccc-20110614.pdf*, accessed 27th March 2014.

40 Open Society Justice Initiative, "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: December 2015", *https://www.opensocietyfoundations.org/sites/default/files/recent-developments-eccc-december-2015-20151214.pdf*, accessed on 20th May 2017.

41 P. Chan Thul., "Khmer Rouge genocide: justice delayed may be justice denied", Reuters, 11th March 2013.

42 C.L. Sriram, "International versus Domestic Norms and Actors", in Stan L. and Nedelsky N., 2013, *Encyclopedia of Transitional Justice* (vol. 1). Cambridge University Press, Cambridge, p. 200-205.

43 A. Cassese, "The Role of Internationalized Courts and Tribunals in the Fight against International Criminality", in A. Romano C., Nollkaemper, *et al*., 2004, *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford University Press, New York.

44 E.E. Stensrud. "New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leona and Cambodia", *Journal of Peace Research*, Vol. 46, No. 1, January 2009, pp. 5-15.

present the atrocities solely as the crimes of a small clique, rather than an organized network.

Advocates of hybrid courts emphasize that these institutions bring together the best of domestic and international justice, but where does the tension lay at the first place? Some authors thought that the evolution of transitional justice discourse highlights a complex interaction between the dimensions of the universal and the local, while the establishment of transnational criminal accountability shifted this debate from a firm local-universal dichotomy, closer to questions of norm transmission and socialization.[45] In this view, the conspicuous distinction between international and domestic components is not as robust as it once was. However, when it comes to the ECCC, it seems that these "external" tensions are in a sense "interiorized" and do exist within one hybrid structure.

This brings us back to the case of Im Chaem (Case 004/1). As stated above, the charges against her were dismissed in February 2017. However, Closing Order was issued in July. Nevertheless, the international co-prosecutor filed an appeal. Finally, the Pre-Trial Chamber held the hearings in December, and the decision is yet to be reached. Nonetheless, as much as two years prior to this, Im Chaem's daughter told the press that she believes the prime-minister Hun Sen will not allow the case to go forward: "He is our parent, and he never lies to us".[46] Prime-minister Hun Sen, which at one point also a mid-ranking *Khmer Rouge* commander, in several occasions repeated that he does not wish for new trials. This gave a new argument for those who claim that in today's Cambodia, there is no real political will to bring the former *Khmer Rouge* leaders to justice. As a reminder, when the ECCC's domestic staff went to strike in 2013, Human Rights Watch reported that the governments' refusal to pay local personnel is just the latest attempt to disrupt the efforts of the court. They asserted that Hun Sen "spent years obstructing the trials [...] but the donors to the court have played along and continued to subsidize the seriously compromised court".

Except for the political factor, the success of any mechanisms of transitional justice relies on certain social and cultural conditions. Kent, for example, thinks that "underlying values of authoritarianism, patrimonialism and Buddhism continue to permeate the Cambodian legal system more deeply than more recently introduced ideas of the rule of law".[47] In her view, the international influences "may be filtered through and digested into entrenched values and power patterns in the receiving community, thus perhaps reinforcing pre-existing inequalities".[48] In Southeast Asia, local political geographies are often dependent on a "bewildering array of more informal institutions […] such as collective action, elite capture, […] ethnic cleavages, oligarchic families and individual behavior of local politicians".[49] It gives a new dimension to the fragile relationship between the domestic and international norms, as well as actors within the ECCC. These structural obstacles are able to seriously undermine the efforts made by the ECCC since the mechanisms of transitional justice are greatly contextualized, and their success depends on a certain communal acceptance.

Here the discussion reaches the final point: the question of the acceptance and the legitimacy of the ECCC. Ensuring a positive legacy for a new type of court is an important goal. Once a hybrid tribunal has completed its mandate, it is hoped that the national staff will return to the domestic system and raise its standards.[50] The victims' attitude

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45 See Teitel (2004) and Sriram (2013).

46 Titthara M., "Im Chaem isn't home", Phnom Penh Post, 17th March 2015.

47 *Ibid.,* p. 13.

48 A. Kent, 2012, Trying to Get it 'Just' Right: friction and security at the Khmer Rouge Tribunal in Cambodia, School of Global Studies, Gothenburg University, p. 1.

49 E. Andraisse, 2010, *Comparative Dynamics of Southeast Asia's Political Geographies*, The Southeast Asia Research Centre (SEARC), University of Hong Kong, p. 15.

50 J. Hermannn, "Hybrid Tribunals", in Stan L. and Nedelsky N., 2013, *Encyclopedia of Transitional Justice* (vol. 1). Cambridge University Press, Cambridge, pp. 37-42.

toward trials is fairly more complex. As McDonald points out, "we still have a very rudimentary understanding of how these interventions *actually* affect people in the fragile and war-affected places".[51] In Cambodia, some perceive the verdicts as too lenient, while others were disappointed with the limited reparations awarded by the court. Civil parties asked for memorials and free medical care, but the court rejected most of them (as being out of the chambers' scope). The ECCC agreed to include the names of the relatives next to the victims, including them in apology statement made by "The Comrade Dutch".

Despite the difficulties, there is a degree of popular support towards the work of the court. The ECCC announced that, as a result of extensive outreach initiatives, more than 353,000 people have observed or participated in the proceedings. Comparing the data from before and after the verdict in the Case 001, a survey suggests an overall improvement in the hybrid court's public image: "although opinions about whether the ECCC would bring justice to the KR regime had not significantly changed, the overall sentiment remains very optimistic".[52] The same survey shows that Cambodians increasingly believe the court will help rebuild trust in their country (11% increase) and would help promote national reconciliation (14% increase). Four out of five correspondents agree that the ECCC should be involved in responding to what happened during the *Khmer Rouge* regime. While justice and facing the violent past is important for the local people, their main priorities, however, are still their jobs, infrastructure improvements (electricity, roads, schools), and services to meet basic needs, including health, food and drinking water.

C. Conclusion

Applying any mechanism of transitional justice is never a smooth process. Fears in Cambodia are many and diverse. Although some differences between hybrid courts may seem intense, this does not mean that theoretically, analytically, and empirically, these institutions cannot be considered as a distinct type of criminal justice mechanism.

Despite the serious difficulties, pressures, and frictions, the establishment of the ECCC did contribute overcoming impunity: it is hard to imagine that any Khmer Rouge leader would face charges, without international involvement. However, the process of bringing the perpetrators to justice in post-conflict societies is long and painful; it requires more patience and understanding from both domestic and international actors. Although criminal trials before the ECCC are being held as means to achieve truth and justice, document the past, and contribute to reconciliation, the political will to bring the perpetrators to justice decreases over time. The public interest shifts towards issues regarding corruption, economy, and services to meet basic needs. Therefore, hybrid courts should have more international support in terms of political means, funds, dissemination of results, and complementary mechanisms of transitional justice.

Lessons learned in Cambodia provide valuable insights for future solutions of how to ensure criminal accountability and justice for victims. The principal task of hybrid courts as a mechanism of transitional justice is to judge the past atrocities and punish the perpetrators. However, the decision of their creation must be brought with forward-looking goals in mind. These judicial institutions might encourage the rule of law and bring certain social and normative change.

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[51] A. McDonald., "From the Ground Up: What Does the Evidence Tell Us About Local Experiences of Transitional Justice?", *Transitional Justice Review*, Vol. 1, No. 3, 2015, p. 72-121.

[52] University of California, 2011, *After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia,* Human Rights Center of the University of California, Berkeley, p. 29.

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