

## Friction and Security at the Khmer Rouge Tribunal

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A hybrid judicial tribunal was inaugurated in Phnom Penh in 2006 to try those most responsible for the mass crimes perpetrated during the period of Khmer Rouge rule in Cambodia, 1975–79. Since the inception of the tribunal, there has been regular friction between the international and national sides, some of which has led to considerable animosity. In 2012 the international Co-investigating Judge resigned after only a few months in office, claiming that he had found himself in a hostile environment and had been unable to carry out his duties. Impasses of this kind arise in the specific social context in which security has come to be configured and managed in Cambodia, in part with the complicity of foreign powers. Greater appreciation of the historical background and social context that frame the lives of court staff would enable us to have more realistic expectations of future hybrid tribunals.

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There is today burgeoning international interest in demanding accountability for those responsible for mass crimes and breaches of international law. Various models of justice have been devised, ranging from fully international courts to ad hoc hybrid tribunals, which combine national and international elements in the structure and functioning of courts and in the application of laws and standards of criminal procedure. The ongoing Khmer Rouge tribunal in Cambodia is one example of the hybrid model. It has the advantages of being located in the very state in which the crimes that it was established to adjudicate occurred. It thus promises participants ease

of access and a sense of ownership of the process. However, the accomplishments of this model are ultimately dependent upon the quality of the cooperation between the national and international participants in the process.<sup>1</sup>

In 2006 the Extraordinary Chambers in the Courts of Cambodia (ECCC) began the trials of the senior leaders and others allegedly most responsible for crimes committed during the Khmer Rouge regime of 1975–79. However, since its inception, the ECCC has been repeatedly dogged by antagonism between the international and national legal sides.<sup>2</sup> Recently hostilities became evident in early 2012, when the international Co-investigating Judge (CIJ) resigned after only a few months in office. He claimed that his “prerogatives [had been] constantly called into question by his national counterpart for no material legal reason” (ECCC 2012) and that this behaviour had prevented him from carrying out his legal duties. The judge’s statement drew attention to the problematic relationship between the Cambodian and foreign participants in the tribunal, but it begged the question of what shaped that relationship and of what might realistically be expected of a cooperative judicial venture of this kind.

The concept of friction was coined by Tsing (2004) as a means of understanding the variable nature of global encounters — encounters across difference through which cultures are continually and creatively co-produced (p. 4). As a metaphorical image friction highlights the way in which unequal encounters can affect the arrangement of culture and power; the concept of friction shifts attention away from cultural specifics of groups and towards social links and the dynamics of relationships between the global and the local. It is by examining interconnection, Tsing proposes, that we can observe how cultural forms emerge from negotiation, contestation and even conflict. However, although this productive friction may be empowering for those involved, it can also be severely compromising. “Difference can disrupt, causing everyday malfunctions as well as unexpected cataclysms” (ibid., p. 6), as in the case of the ECCC Co-investigating Judge’s abrupt resignation. How, then, are we to explore what makes resonance more likely than dissonance in encounters marked by such

friction? Eastmond argues that we need to “critically investigate the conditions under which such encounters may empower or prohibit the rebuilding of social relations of trust” (Eastmond 2010, p. 3). This article explores the conditions underlying the friction between the international and national sides at the ECCC in the spirit of such critical investigation.

By focusing on abstract discourse and adopting the language of legal-technical precision, international legal projects tend to create an illusion of their isolation from the social contexts that shape people’s lives. As Kelsall (2009a, p. 18) points out, historical, political and jurisprudential analyses of trials pay little attention to their character as social encounters. In ignoring the implications of sociocultural conditions, efforts to introduce international law into post-conflict settings invariably give rise to misunderstandings, frustrations and inappropriate expectations concerning outcomes (see, e.g., Kelsall 2009b). For this reason, some scholars have begun urging that the aims of international justice be more modest and that efforts to achieve it be more effectively contextualized (Staggs 2009).

Prompted by these scholars’ observations and by the ECCC crisis of 2012, this article explores the context from which that crisis arose. I first sketch some of the features of the social world in which the foreign staff live while working at the ECCC, contrasting their world with that of their Cambodian counterparts. I then examine how, over the past three decades, and despite political and economic reform, the Cambodian ruling elite has gained a monopoly on power and resources. This monopoly has enabled it to progressively block avenues for resistance against the actions of the ruling elite. Foreign powers have not only played various roles in destabilizing Cambodia but have also been complicit in the way in which security — by which I broadly mean social survival through protection, opportunity or even privilege — has come to be reconfigured in the country.<sup>3</sup> The resultant context has profound implications for the hopes, fears and loyalties of Cambodians today, including the country’s legal practitioners.

While working at the court, Cambodian ECCC staff can hardly be expected to ignore the reality that frames their lives. The

distribution and management of social and material resources therefore require serious attention in any consideration of the context, both historical and contemporary, in which an international legal project is implemented.

### The Tribunal Hoppers

In the settings of post-conflict tribunals, international members of the court staff move in circles quite distinct from those of their national colleagues. Like the fluid clusters of scholars who offer one another approval and backing in exchange for loyalty to their shared norms that Cribb (2005, p. 289) calls “circles of esteem”, the international ECCC staff belong to a fluctuating and mobile community of professionals. New recruits join the circle, and members may break away, perhaps because of ambition or to join another circle elsewhere. The circle offers its members valued symbolic capital (Bourdieu 1977, p. 178), such as powers and pleasures, gossip and professional information.

In her study of the cohort of international “tribunal-hopping post-conflict justice junkies” working in Sierra Leone, Elena Baylis (2008, p. 363) describes the way in which their itinerant lifestyle creates multiple connections among them. The more junior staff are often young, unattached adventure-seekers who share a somewhat compulsive approach to their job. More experienced staff may know or know of one another’s friends, families and lovers from earlier post-conflict jobs in places such as the Hague, East Timor, Rwanda, Kosovo. Baylis notes that the structural features of international interventions mean that these people experience repeated, swift immersions into consecutive post-conflict settings and that, while this experience may equip them with particular forms of transferrable knowledge and skills, it also means they are typically not very well versed in the local realities of those settings (*ibid.*, p. 390).

Baylis’s observations about the social divisions between expatriate and local court staff in Sierra Leone resonate with the situation in Cambodia. The more senior international ECCC staff, such as the defence lawyers, co-prosecutor, co-investigating judge and the

judges of the pre-trial chamber, the trial chamber and the supreme court chamber — all of whom are employed by the United Nations — come from a variety of countries. They have considerable legal experience, including work on other international tribunals or with the United Nations. More junior staff such as legal assistants and the international Civil Party lawyers may have no previous international experience.

Many of the younger international ECCC staff members had not been born at the time of the Khmer Rouge atrocities. They are motivated more by a commitment to the lofty principles of justice, the novelty of an exotic setting or the possibility of advancement in a stimulating international career rather than by any particular dedication to Cambodia. While they may be extremely knowledgeable in their field — be it human rights, gender equality, crimes against humanity or international law — they are unlikely to have studied Cambodian society in great depth prior to arriving at their posts. None of those with whom I talked spoke any Khmer. A young international lawyer told me how vexing she found it in meetings when the Cambodian lawyers lapsed into Khmer and began discussions with one another, sometimes appearing quietly to close ranks against the foreigners present. A middle-aged European lawyer told me how frustrated she felt when she first came to Cambodia and regularly encountered Cambodian behaviour that ran counter to her expectations. She said that she could not understand why her Cambodian colleagues interpreted whatever their Prime Minister said as a command or why, when she challenged a national colleague in the adversarial manner in which she was trained, it provoked a resentful silence and resulted in deadlock. “I had to learn how things work here, whether I liked it or not,” she told me, “but I wish I had known more about Cambodia before I came here.”<sup>4</sup>

Although the financial reward for these jobs may be less than that of jobs in Europe, Australia, India, or the United States, the foreigners’ salaries are more generous than those of their national counterparts. They make living comfortably in Phnom Penh possible. There the post-conflict justice enthusiasts tend to try and make the most of their sojourn in Cambodia. They often invest both time and energy

in their relationships with one another. One can find them at some of the more exclusive hotel swimming pools, on sunset boat tours along the Mekong, in each other's homes or at popular expatriate venues where gossip, frustrations and jokes, particularly about life in Cambodia and work at the court, can be aired and shared.<sup>5</sup>

International ECCC staff members' relationships with their Cambodian colleagues generally only last as long as their term in Phnom Penh, while their relationships with expatriate colleagues may outlive their stints in Cambodia, particularly if they reconvene at another justice hotspot later on. Life circumstances and language barriers mean that it is unusual for expatriates to mingle with Cambodians outside of office hours. One young British intern commented to me that the "only Cambodians present at most of the court staff parties are the ones serving the drinks".<sup>6</sup> The Cambodians are anyway busy in their free time, perhaps juggling other jobs with their tribunal work or honouring obligations to family, friends and colleagues with whom they will have to continue their relationships long after the flock of post-conflict justice addicts has moved on.

Although I heard of instances of international court staff receiving threats and while in one case a foreign legal assistant was violently robbed of his computer while travelling home on his moped at night, in general the foreigners operate in a safe zone in Cambodia. Since tourism is one of Cambodia's major sources of revenue, the government is keen for foreigners to feel safe.

In the case not only of the Khmer Rouge trials but also of other forms of foreign intervention in Cambodia, such as the World Bank's land titling scheme (see Biddulph 2010), the country's ruling elite has proven itself able to encourage continued foreign assistance while also steering outcomes. To this end it employs a "rhetorical observance of reform agendas, partial implementation and a constant calculation as to when external actors are sufficiently placated or too committed to the completion of their projects to be able to withdraw pledged aid" (Cock 2010, p. 265; also see Carmichael 2010).

This same approach has allowed the Cambodian government to benefit from continued international support for the tribunal despite reports of corruption at the court and political interference in the trials.

An international member of the ECCC staff who feels uncomfortable about working under these conditions is free to pick up and leave the country without jeopardizing the future of his or her career or family. By contrast, even Cambodians who have dual citizenship or a network of support elsewhere tend to remain connected to networks in Cambodia. National court staff who do not enjoy such advantages lead lives within relatively inflexible networks from which exclusion is attended by considerable risk.

### Cambodia's Strings of Security

The Cambodian state has been described as a hybrid of rational-bureaucratic structures and vertical patron-client relationships (Scopis 2011, p. 218) that knit together politicians, businessmen, the military, the police, the clergy and ordinary people into a nationwide network of predation and benevolence. Today, some 80 per cent of Cambodians live at subsistence levels in rural areas, while an increasingly wealthy and educated ruling elite lives in Phnom Penh. Members of the elite enjoy the benefits of their country's new political economy and of their privileged positions in networks of personalized neo-patrimonial relationships known in Khmer as *khsae* (strings). These *khsae* connections are the channels through which wealth, opportunities and protection flow in contemporary Cambodia.

On the national scale, the urban centre exploits the rural periphery. On the scale of the *khsae*, clients channel "voluntary" contributions to patrons as a form of insurance: to guarantee survival in the system, to prompt patrons' benevolence and out of fear. The big people (*neak thom*) at the centre reciprocate to some degree with conspicuous displays of largesse or by providing protection (backing or *khhnang*) for loyal clients when the latter encounter problems in this predatory climate. Although such relationships serve to bring increasing benefit to the elite and to perpetuate inequalities, clients rarely protest. They believe that, "without the resulting redistribution of resources and a powerful leader at the centre, the voracious elites would clash and put the stability of the system in jeopardy" (Scopis 2011, p. 217). And although members of the ruling class combine their gifts to the

rural poor with menace, surveillance and the enforcement of electoral loyalty, villagers are obliged to surrender because they lack safe and effective avenues for resistance (see Hughes 2006, p. 482). Refusal to participate in the system may result in one's exclusion from its benefits and reduction to the status of a "vulnerable individual adrift in a militarized society under the purview of an omniscient modern state" (ibid., p. 481).

At the pinnacle of this pyramid of patronage and exploitation is Cambodia's strongman, Prime Minister Hun Sen,<sup>7</sup> from whom networks of benevolence radiate outwards. Members of the elite are accepted into the broader ruling class arrayed under him only insofar as they do not challenge the patrimonial structures through which power is consolidated (Cock 2010, p. 243).

The Cambodian judiciary is deeply embedded in this pyramidal system of connections (Kheang Un 2005). In interviews conducted by Kheang Un and Judy Ledgerwood (2010), judges and prosecutors explained that they needed to accommodate the wishes of high-ranking government officials either out of affection — that is, reciprocation for favours granted — or out of fear. Similarly, a Cambodian ECCC lawyer to whom I spoke explained, "The foreigners are absolute and follow the letter of the law; Cambodians are more flexible, we need to think about relationships."<sup>8</sup> The current Cambodian regime works through "largely rhetorical and symbolic acquiescence to democratic norms built on the foundation of a patrimonial and highly predatory state structure" (Cock 2010, p. 243). One might therefore consider the ECCC hybrid not only because of its international/national composition but also because of the way in which formal, internationally approved legal-rational structures combine with an informal neo-patrimonial Cambodian *modus operandi* that offers security in the form of protection and privileges for the ECCC's national staff.

### The Origins of the Hun Sen Security Circle

Today's "circle of security"<sup>9</sup> in Cambodia, and with it Hun Sen's position at its hub, has evolved over the past three decades with



the acquiescence and even complicity of foreign powers, some of whom have also played active roles in destabilizing the country. The history of Cambodia's rapid descent into horror following the March 1970 coup of American-favoured General Lon Nol and the defeat of his regime by the Khmer Rouge in April 1975 does not require detailed review here.

As Khmer Rouge purging escalated in 1977–78, a number of Khmer Rouge defectors — including Hun Sen, Heng Samrin and Chea Sim — fled to Vietnam where they secured Vietnamese backing. The Vietnamese invaded Cambodia in December 1978, ousted the Khmer Rouge and subsequently appointed Hun Sen, Heng Samrin and Chea Sim as leaders of the new Kampuchean People's Revolutionary Party (KPRP). A hasty trial *in absentia* of the “Pol Pot–Ieng Sary clique” was held in 1979 by the Vietnamese but was never internationally recognized. The United Nations continued to recognize the Khmer Rouge as Cambodia's legitimate government and they retained Cambodia's UN seat.

By the late 1980s Soviet support was dwindling and the Vietnamese were withdrawing from Cambodia. In 1991 a peace agreement was signed in Paris. The UN then inserted the UN Transitional Authority in Cambodia (UNTAC). However, when the UN-organized elections were held in May 1993, the Khmer Rouge boycotted them. The Cambodian People's Party (CPP, the renamed KPRP), still led by Hun Sen, won only 38 per cent while the Royalist party FUNCINPEC, led by Prince Ranariddh, won 45 per cent. Hun Sen refused to accept defeat and rather than risk renewed unrest, the reinstated King Sihanouk proposed a power-sharing scheme for Ranariddh and Hun Sen as Co-Prime Ministers. Following the departure of UNTAC in September 1993, the government outlawed the Khmer Rouge, but offered amnesties to those willing to defect. In 1996, under Ieng Sary's leadership, a large number of Khmer Rouge troops joined the government side and in 1998 Pol Pot's death finally marked the end of the Khmer Rouge threat. The only other significant challenge to Hun Sen's CPP was the royalist party FUNCINPEC. However, in 1997, fighting broke out between armed forces loyal to the CPP and those loyal to FUNCINPEC, and the CPP faction triumphed.

From this time on the CPP has had a strong grip on power and opposition politicians have been unable to secure the networks of influence necessary to make them a viable alternative in Cambodian eyes for providing security; in the 1998 elections, the CPP won 64 seats against FUNCINPEC's 43.

### Closing the Phnom Penh Circle

Now the sole Prime Minister, Hun Sen began consolidating his image as Cambodia's "strongman" (see, e.g., Mehta and Mehta 1999). To this end, he capitalized on his role in saving the country from the Khmer Rouge, bringing stability after civil strife and encouraging inflows of foreign capital, at first from Western donor countries but later increasingly in the form of South Korean and Chinese loans and investments. Since the late 1990s, Hun Sen's CPP has projected an increasingly bold image of omnipotence. External pressure for economic liberalization and foreign aid and investment have served to reinforce the CPP's position (Cock 2010, p. 241). State power in Cambodia has been used to harness wealth and resources, to seize public assets, to craft rent-generating opportunities and to ensure that these rents are channelled to the ruling class through monopolies, concessions and the purchase of state property on favourable terms, all in the context of an ostensibly free-market economy (see, e.g., studies by Hughes 2003; Le Billon and Springer 2007; Meas Nee and McCallum 2009). Despite criticism of Cambodia's failure to address problems of impunity, land-grabbing and corruption, Western donors have nevertheless continued to provide the country with aid amounting to as much as 50 per cent of its annual budget (Carmichael 2010). Phnom Penh shows less and less concern with the views of Western donors today as Cambodia grows increasingly beholden to China for aid, loans and investment that come with no strings attached (Barta 2012; Chun 2012).

In the past decade, people close to the Prime Minister have allegedly been involved in driving almost half a million people off their land, often without compensation or consultation. Almost

half of the country's land area is reported to have been leased to private investors (Global Witness 2007; 2013). Resistance to land-grabbing is regularly suppressed with violence; the government's preoccupation with order and stability serves the interests not only of the country's elites but also of the donor community. Firmly entrenched in the neoliberal camp and despite its rhetorical appeals for greater democracy in Cambodia, the donor community, it has been argued, quietly views CPP authoritarianism as useful to its own interests (Springer 2009). A class of powerful people are as a result free to augment their wealth through predation rather than production, while enjoying unstated international consent.

Expressions of opposition have been systematically stifled since the early 1990s. Seven journalists have been murdered since 1992, with impunity in each case. The only remaining opposition party of any significance in Cambodia is the Sam Rainsy Party, whose leader is in self-imposed exile because of moves in Cambodia to try him *in absentia* for defamation. Alternative sources of moral authority, such as the monarchy and Buddhism, have also been briskly eroded. Most Cambodians regard King Sihamoni as impotent (Gray 2011)<sup>10</sup> and the Buddhist sangha has been subjected to both intimidation and co-optation by the ruling elite (Kent 2006, p. 353).

In sum, since the early 1980s and in part with foreign powers serving as enablers, Cambodia has evolved as a single-party, highly centralized state with the triumvirate of Hun Sen, Chea Sim and Heng Samrin at its core. The twenty-year-old observations of Marks (1994, pp. 54–55) to the effect that the party controls virtually all aspects of public life and leaves little room for genuine civil society still obtain. These two decades have seen Hun Sen succeed in quashing his competition and empowering his supporters to such an extent that his circle now appears uniquely equipped to ensure stability, administrative efficacy, protection and a trickle of spoils downward to loyal clients in the form of rent-seeking opportunities. The ruling elite also plays on popular fears both of the instability that would result should CPP power be threatened and of the vulnerability resulting from exclusion from its protection scheme. It is in this

context that one must understand the establishment of the ECCC and the performance of its Cambodian staff.

### The Extraordinary Chambers in the Courts of Cambodia

In the 1990s, as the Khmer Rouge threat to the ruling elite in Phnom Penh disintegrated, interest in international justice was gathering momentum in international circles. In 1996 the UN Secretary-General's representative for human rights in Cambodia, Thomas Hammarberg, arrived in Phnom Penh and expressed his determination to make up for earlier international neglect of Khmer Rouge crimes by working to bring its surviving leaders to trial. In 1997, after indications of UN interest in such trials, Cambodia's co-premiers agreed to sign a letter requesting UN assistance in holding them. This letter came at a "politically convenient time to ... show concern over Khmer Rouge impunity" (Fawthrop and Jarvis 2004, p. 121), as both the UN and the Cambodian government stood to benefit from being seen to have brought justice to Cambodia.

While UN representatives have come and gone over the past thirty years, Hun Sen has remained in place, experiencing the effects of earlier UN complicity with and of international support for the now criminalized Khmer Rouge. Unsurprisingly, this experience left him unwilling to allow the UN an upper hand in these trials. Years of wrangling about which side would dominate in the proposed hybrid tribunal preceded the conclusion of an agreement in 2003.

A novel construct of the early 2000s, the hybrid court model has been used in East Timor, Sierra Leone and Lebanon. Its design is believed to have been in part a response to the "tribunal fatigue" that the UN experienced after establishing the tribunals for the former Yugoslavia and Rwanda (Skinnider 2007, p. 18). Its adoption in Cambodia also reflected the belief that locating the Khmer Rouge trials in Cambodia might give the judicial process local anchorage, visibility, relevance and ownership even as it helped strengthen the rule of law and judicial capacity in the country. However, the Cambodian case is unique in several respects. Cambodia's court stands as the only court with distinct national and international

sides, with separate hiring and reporting structures, and as the only one with “co-” national and international prosecutors and judges. It is also the only hybrid court that allows victims to act as civil parties. Most significantly, it is the only one in which national judges predominate numerically and in which domestic criminal procedure is given primacy (McCargo 2011, p. 614).

The ECCC’s mandate is to try the senior leaders and other figures deemed most responsible for crimes against humanity committed under the Khmer Rouge regime of 1975–79. The agreement establishing the court also grants Cambodians a majority in the judicial chambers. The pre-trial and trial chambers each consist of three Cambodian and two international judges, and the supreme court chamber of four Cambodian and three international judges. All affirmative decisions made by these chambers require a so-called supermajority of four out of five judges in the trial chambers or five out of seven judges in the supreme court chamber. There are one international prosecutor and one Cambodian prosecutor (the co-prosecutors), who cooperate in conducting preliminary investigations, and, following the investigations of the CIJs (co-investigating judges) and the decision to proceed to trial, in performing prosecution of the defendants. The CIJs investigate the facts submitted to them by the co-prosecutors and then issue a Closing Order with the decision either to proceed to trial or to dismiss a case and close proceedings. Staff appointed by the UN receive their salaries from the UN, and the salaries for national staff come from a variety of international donors (see Ellis 2011, p. 19; see also Heindel 2009).

Organizations such as Amnesty International and Human Rights Watch criticized the structure of Cambodia’s hybrid tribunal from the outset as a shoddy compromise. Scholars also expressed anxiety that the arrangement would give too much power to the Cambodian side and prevent international judges from acting as protectors of judicial independence (Klein 2006, p. 566). However, some observers have argued that the UN, with its dismal record of complicity with the Khmer Rouge, was poorly placed to exercise moral authority over Cambodia (Fawthrop and Jarvis 2004, p. 131). Furthermore, having backed the Khmer Rouge throughout the eighties, China was opposed

to the trials altogether and was ready to veto the option of a fully international tribunal (*ibid.*, pp. 178–79). For these reasons, some contended, “all-or-none standards are self-defeating. Perfection is the enemy of justice” (Stanton 2003, p. 41). Pursuit of such perfection was likely to deprive ordinary Cambodians of the chance to see remaining Khmer Rouge leaders face any trial at all and to permit them to die peacefully and with impunity.

These circumstances, along with the decimation of the Cambodian legal system during the Khmer Rouge period and its reconstruction within larger structures of patronage, limit the tribunal’s potential to nurture the rule of law in the country (Kheang Un and Ledgerwood 2010, p. 5). Nevertheless, it represents the will of the international community finally to demand accountability for crimes against humanity according to international standards of due process (*ibid.*, p. 2).

At the same time the tribunal’s international legal staff and various observers have regularly complained about irregularities committed by the national side. Ever since the court’s establishment in 2006, allegations of corruption have surfaced, including reports that Cambodian staff must kick back up to 30 per cent of their salaries to government officials in order to secure their jobs at the court. These allegations have been repeatedly rebuffed. In 2010 the defence team for Ieng Sary<sup>11</sup> submitted an application for the disqualification of the president of the ECCC trial chamber, Judge Nil Nonn, for having accepted bribes when he had worked at the Battambang Provincial Court. According to one report of his reaction, Nil Nonn said, “‘I’ve settled the case for them and people feel grateful. Living conditions these days are difficult for me’, he allegedly added, noting that he earned just \$30 per month in salary at the time. ‘But if you are talking about pressuring people for bribes — no.’” (O’Toole 2010). The director of the Documentation Centre of Cambodia (DC-Cam), Youk Chhang, dismissed the defence team’s filing as designed to “invite controversy” and added that, in the words of one scholar, “the problem of bribery and petty corruption at provincial courts was common knowledge in Cambodia” (*ibid.*). Nil Nonn continues to preside over the ECCC court.

Similarly, the Nuon Chea defence team filed an application in February 2008 for disqualification of national ECCC pre-trial chamber Judge Ney Thol for judicial bias. Ney Thol is one of Cambodia's most senior judges. He is a member of the Cambodian People's Party, has served in the country's military since 1979 and now holds the rank of general. He has presided over the Military Court<sup>12</sup> since 1987. The ECCC pre-trial chamber dismissed the application, perhaps fearing the implications for the legitimacy of the entire (politically appointed)<sup>13</sup> Cambodian side.

To date, the ECCC in Cambodia has tried and convicted only one suspect, in the case known as 001. The defendant was Kaing Guek Eav (aka Duch), the notorious former director of the Khmer Rouge's S-21 prison in Phnom Penh, where some 14,000 prisoners are known to have been interrogated and gruesomely tortured prior to their execution. Duch was sentenced to life imprisonment on 3 January 2012.

Case 002 is currently in progress. The defendants, who are now in their eighties, are Khieu Samphan, the former Khmer Rouge head of state, and Nuon Chea (aka Brother Number 2 to Pol Pot's Brother Number 1). They included Ieng Sary, the former Khmer Rouge foreign minister, but he died in March 2013, before the conclusion of the trial. Ieng Sary's wife, Ieng Tirth, was also originally expected to stand trial for her role as Khmer Rouge minister of social affairs, but the finding that she was mentally unfit to stand trial led to her exemption from prosecution.

### Intervention, Investigation and Interference

Cases 003 and 004 have become major bones of contention between the Cambodian government and the United Nations. Case 003 concerns the suspects Meas Mut and Sou Met. Meas Mut is a former Khmer Rouge navy commander, and Sou Met an air force commander.

Each outranked Duch, the defendant in Case 001. It is widely known in Cambodia that these people are suspected of crimes against humanity for implementing policies of execution, torture and forced



labour. Encouraged by Hun Sen, they defected to the government in the late 1990s and received positions in his military. They remain close to Cambodia's current leadership. Case 004 concerns three mid-level Khmer Rouge cadres named Ta An, Yim Tith (aka Ta Tith) and Im Chaem. These people are said to bear responsibility for hundreds of thousands of deaths through forced labour, executions and starvation.

Hun Sen, who served as a mid-ranking Khmer Rouge officer until he fled to Vietnam to escape the Khmer Rouge's internal purges in 1978, has never been accused of any Khmer Rouge crimes but he has nevertheless said he would rather see the tribunal fail than see any but its first two cases tried. Indeed, when United Nations Secretary-General Ban Ki-moon visited Phnom Penh in late 2010, Hun Sen, reiterating statements made by other senior government officials, informed him that "Case 003 will not be allowed.... The court will try the four senior leaders successfully and then finish with Case 002" (Open Society Justice Initiative 2012, p. 2).

While some believe that Hun Sen is worried that further investigations could incriminate members of the ruling elite, it is also true that today's ruling elite are among those who endured the aggression of and isolation from the Western world from the 1960s onwards. Notwithstanding crimes that they may have committed, their suspicion of the UN and loyalty to their own domestic networks are unsurprising.

Friction between international and national court staff flared in 2011, when whistle-blowers began complaining that there was political interference in the trials. The two investigating judges — Cambodian You Bunleng and German Siegfried Blunk — closed investigations into Case 003 in April 2011. British co-prosecutor Andrew Cayley<sup>14</sup> publicized his concern that investigations had not been conducted properly. The Open Society Justice Initiative (OSJI) condemned the fact that the cases had been closed without investigations and argued that this decision should be viewed in light of Hun Sen's explicit prohibition of cases beyond Case 002 (Open Society Justice Initiative 2012, p. 2).



Judge Blunk initially responded by siding with his Cambodian counterpart against Cayley and by threatening that they would punish a disloyal staff member they suspected of leaking confidential information. Human Rights Watch then called for both of the co-investigating judges to resign for failing to perform their judicial duties (Human Rights Watch 2012). One week later, in October 2011, Blunk resigned, claiming that interference on the part of the Cambodian government had prevented him from performing his duties.<sup>15</sup> The government responded by claiming that international organizations such as Human Rights Watch and the OSJI, along with the international media, had led a sustained campaign against the ECCC. These events have made Cases 003 and 004 into test cases in what McCargo (2011, p. 618) calls a “virtual trial”: the contest between the international community and the Cambodian government over Hun Sen’s authoritarianism.

### Going It Alone

Cambodian Co-investigating Judge You Bunleng remained in place; UN Reserve Co-investigating Judge, the Swiss national Laurent Kasper-Ansermet, replaced Blunk. Kasper-Ansermet had used Twitter to publicize his determination to investigate Cases 003 and 004. As a result, the Cambodian government refused to endorse his appointment and behaved as though he simply did not exist.

International staff at the court to whom I spoke noted that Kasper-Ansermet seemed intent on digging into the material. Unacknowledged by his Cambodian counterpart You Bunleng, the new CIJ worked in isolation. He could be seen sitting alone in the staff canteen at lunchtime; even the international staff of the ECCC did not seem keen to be seen fraternizing with a person whom their Cambodian colleagues did not officially acknowledge. Tensions were quietly simmering. I heard that in one office the Cambodian staff were still being scrupulously polite but that the official rubber stamps had been disappearing, leaving the international staff member unable to put the necessary stamps on documents. An international member

of the court staff told me that it would only be a question of time before Kasper-Ansermet realized the futility of his efforts. He would soon find his efforts checked by non-compliance. He would need interpreters, drivers and the cooperation of local authorities, and they could all well drag their feet. When I asked a young Cambodian clerk as she was escorting me to the court entrance what she thought was going to happen with Cases 003 and 004, she whispered cryptically, “in Cambodia, the strongman always wins”.<sup>16</sup>

The presentation of these disagreements between the co-investigating judges to the pre-trial chamber for adjudication only widened the national/international divide. All Cambodian judges aligned themselves with the Cambodian government and Judge You Bunleng. They held that Judge Kasper-Ansermet had no authority to act, as his appointment had not been approved by the Supreme Council of the Magistracy (ECCC Law)<sup>17</sup>.

Initially unfazed by this obduracy, Kasper-Ansermet soon publicized the fact that he had accepted Rob Hamill’s<sup>18</sup> application for Civil Party<sup>19</sup> status in Case 003 — an application that his counterpart You Bunleng had previously rejected. Shortly after this development, The *Phnom Penh Post* published the news that Kasper-Ansermet had personally visited the home of Im Chaem (Case 004), who now serves as a deputy commune chief in Oddar Meanchey Province, and together with another foreigner and three Cambodians had read out the charges that she faced and notified her of her rights (Kuch Naran and Wallace 2012, pp. 1–2).

Anne Heindel, a legal adviser to the Documentation Center of Cambodia, a genocide research centre, applauded this move, saying that Kasper-Ansermet’s investigations into the stalled cases were “critical for the court’s [and, by implication, also the UN’s] legitimacy” (cited in Carmichael 2012). By contrast, a member of the Cambodian ECCC staff with whom I spoke scoffed, “People like this [Kasper-Ansermet] are working for their own careers and prestige. The foreigners can’t just come here and test their theory and then go home; we Cambodians don’t trust that it’ll all be okay after sensitive issues have been dug up.”<sup>20</sup>

On 19 March 2012, and without warning, Judge Kasper-Ansermet tendered his resignation, “firing off a final shot at the tribunal’s ‘dysfunctional situation’” (Higgins 2012). News of this event appeared in the *Phnom Penh Post* under the headline “Judge decries 003, 004 ‘sabotage’” (Di Certo 2012*b*). In an ECCC press release on 4 May 2012 the judge claimed he had found himself “in a highly hostile environment and was severely impeded in the day-to-day performance of his duties” (ECCC 2012). Cambodian government spokesman Ek Tha responded coolly that “the Royal Government of Cambodia does not see any problems with the ECCC” and called the tribunal a “model court” (cited in Bridget Di Certo 2012*b*, p. 1). The Cambodian co-investigating judge, You Bunleng, welcomed Kasper-Ansermet’s resignation, accusing him of misconduct and of having threatened tribunal staff (Di Certo 2012*c*, p. 2). These developments served to deepen the division between national and international staff at the court. These deepening divisions led DC-Cam’s Anne Heindel to conclude that the rules of the courts were not designed to cope with problems of this magnitude (Carmichael 2012).

Only a few months after Kasper-Ansermet’s resignation, the international defence team for Brother Number 2 Nuon Chea — Michiel Pestman, Jasper Pauw and Andrew Ianuzzi — also removed themselves from work on Case 002, bitterly deriding the court as a “farce” (Freeman 2012). The threesome had earned themselves a reputation for outlandish behaviour in court, including poking fun at fellow international colleagues, general rabble-rousing and continually framing issues as examples of political interference instead of presenting them on their factual merits (*ibid.*).<sup>21</sup>

### Inclusion and Exclusion

The friction described above is not an inevitable result of Cambodians’ having a radically different understanding of justice from that of their foreign colleagues. A Buddhist monk with whom I spoke was keen, for instance, to stress points of cultural convergence between the Western idea of the rule of law and the ethical principles of Buddhism.

Each recognizes the importance of impartiality, independence and moral rectitude among arbiters of disputes. However, although many Cambodian ECCC lawyers are keen to learn from the international staff (perhaps so that they can later seek international appointments), they cannot ignore the context that frames not only their professional but also their personal lives. They belong to *khsae* networks and, as one Cambodian ECCC staff member told me, they must “*skaal chet*” (know the heart) of their leaders and know when to self-censor because “in Cambodia voicing criticism is read as opposition” and thus is not tolerated.<sup>22</sup>

The story of Cambodian lawyer Kong Sam Onn illustrates this situation. In November 2008 a village in Kampot province was burned to the ground. Five villagers were left severely injured, and the others homeless. The fire followed attempts on the part of the Cambodian military to evict these villagers from land on which they had been living for a decade so that the government could let it to a private-sector concessionaire. Sam Rainsy Party parliamentarian Mu Sochua then appealed to the Prime Minister to stop the eviction but received no response. In April 2009 the Prime Minister told the villagers that, if they wanted his help, they should not approach a member of the opposition. His comments included a reference to the unbuttoning of Mu Sochua’s blouse and another reference of a sexual nature that provoked her to bring a defamation case against him (UN News Centre 2010). In late April, Mu Sochua announced her intention to sue the Prime Minister for criminal defamation. Within twenty-four hours the Prime Minister announced his intention to countersue (see World Organisation Against Torture 2009).

Kong Sam Onn served at the time as Mu Sochua’s lawyer. Hun Sen’s lawyer Ky Tech accused Kong Sam Onn too of criminal defamation and of a breach of the code of ethics of the Bar Association of the Kingdom of Cambodia. In July 2009 Kong Sam Onn backed down and apologized to Hun Sen, whereupon the Prime Minister announced, “I ordered my lawyer to drop my complaints against Kong Sam Onn. He wrote to apologise to me and offered to join the CPP” (cited in Cambodian Centre for Human Rights 2010,

p. 6). On 21 November 2011 Kong Sam Onn was rewarded with an appointment to the coveted but monitored ECCC position of defence counsel for Khieu Samphan (ECCC 2011).

Moeung Sonn, formerly director of the Khmer Civilization Fund, met a very different fate after he expressed concern in 2009 that the installation by a Chinese company of electric lights at Angkor Wat temple may have damaged the structure. He was sentenced to two years in prison and fined more than US\$3,000 for disinformation (Cheang Sokha 2011). Denied security by the Phnom Penh circle, he fled the country.

Most Cambodians try to hold on to their place in the system by toeing the line. Commenting on his foreign counterpart's legal fastidiousness, one Cambodian ECCC lawyer told me, "What she is doing is right but it is not good.... You see, what she is doing is against the government's will. We Khmers want to fight indirectly, peacefully. We don't want to make it visible or make a scandal."<sup>23</sup>

Hun Sen is recognized by many Cambodians as the provider and controller of security not only for individuals but also for the country as a whole. As one Cambodian man, whose entire family was decimated by the Khmer Rouge, explained "after all, he [Hun Sen] is the one who brought peace to Cambodia. The UN didn't.... I'm not a defender of Hun Sen — he still has problems with land, corruption, but if he deals with the land problems and reduces corruption then he'll be the Father of Modern Cambodia.... Here in Cambodia we have Facebook and you can express views. It's not like China. The way to approach Hun Sen is to recognize what he's done and ask him to do more. Don't fight him or he'll fight back."<sup>24</sup>

## Conclusion

Current global interest in retributive justice has given rise to various models of international or internationalized courts. The ad hoc hybrid tribunal model appears to offer a cost-effective and high-impact alternative to both wholly international justice and wholly local courts.

International trials exclude nationals from the process of judging their own criminals and may be too remote to feel relevant to victims, while wholly local courts may have been weakened during conflict and fear may continue to silence the population.

However, a hybrid tribunal, in which international and national staff work together, represents more than a simple judicial structure. It is also a complex social encounter that brings people from widely different backgrounds together in the co-performance justice. The terms and nature of this encounter may be expected to generate friction. While friction may, in some cases, give impetus to innovation and positive experiences for both parties, it can also lead to rancour, damaged relations and thwarted aspirations. In order to understand these dynamics, I propose that scholars look beyond legal and political factors and explore the sociocultural context in which an encounter of this kind takes place.

The way in which the lives of the national staff have come to be framed by very different concerns and considerations from those of their international colleagues, particularly in domains relating to security and social survival, merits careful consideration. In Cambodia, foreign ECCC court staff operate as members of a fluid circle of esteem. They enjoy considerable freedom during their brief immersion in life in Phnom Penh, where they socialize mainly with other foreigners and are cushioned from most of the concerns that their domestic colleagues face. They are also released from many of the norms and constraints that would govern their lives in their home countries. By contrast, the lives of the Cambodian staff are woven into the networks and relationships of dependence through which the Cambodian state — as an amalgam of party, administration, legislature and judiciary — has come to control and manage security. Should they defy the will of the leadership, they will have to live with the consequences. Unless the international community can provide an alternative guarantee of security for Cambodians, then it is surely unreasonable to expect them to behave in ways that would deprive them of the benefits and protection offered by their own state.

The configuration of security in Cambodia, as in other post-conflict countries, owes much to the way that foreign powers have treated the country historically. Clearer acknowledgement of the role of international actors in destabilizing Cambodia over the past half-century and of the fact that CPP authoritarianism is now tacitly endorsed by outsiders in the interest of securing their economic interests might prompt us to frame our expectations of internationalized law in this context more modestly.

The ECCC has drawn attention to the Khmer Rouge period in Cambodia in important ways, ways that have enabled many people to speak out after years of silence. Its outreach programme has been extensive. Although it may fall short of international standards, fruitful cooperation may still allow for the significant transfer of skills, for the achievement of judicial outcomes of value to the public,<sup>25</sup> and a positive long-term legacy for many Cambodians.<sup>26</sup> Asserting the supremacy of a “top-down” international approach and believing that the ECCC should deliver justice in isolation from local realities may therefore be both misguided and futile (Staggs 2009, p. 173). Any breakdown in cooperation that threatens to trigger an insuperable rupture between the national and international sides perhaps signals the need for greater humility on both sides (Fawthrop and Jarvis 2004, p. 248).

If, as social psychologist Tom Tyler proposes (2011, p. 13), the most significant factors in motivating people to cooperate include social connections rooted in shared attitudes, values and identities, then a mixed tribunal demands more than legal expertise. It requires strategies to engage all sides in reflection on contexts and in continually learning from and about one another. Only then will it be possible to keep dialogue open, bridge differences and generate a sense of common purpose.

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## NOTES

1. This article draws on four months of fieldwork conducted in early 2011 and early 2012. Methods included regular observation at the ECCC, following coverage of the court in the media and semi-structured interviews and informal conversations with court staff from both sides of the national/international divide at various levels of the hierarchy as well as with civil parties to cases before the ECCC and members of the general public. I also participated informally in several social events held by foreigners and Cambodians with connections to the court.
2. The term “sides” is used popularly to refer not only to the Cambodian versus international legal staff but also to the Cambodian government versus UN and international observers and commentators.
3. The term “security” is used quite differently from in the field of security studies. The UN’s rather vague 1994 definition of “human security” as freedom of the individual from want and fear has gained currency. It has also attracted considerable criticism in recent years. In this article I use the term in a more ontological spirit, to refer to a sense of safety and of a chance to thrive that individuals may derive through their relationship to society.
4. Interview, 2 March 2012.
5. Foreign lawyers representing Civil Parties at the ECCC often work on a *pro bono* basis and may only be in the country for short visits at a time while continuing to run their ordinary jobs back in their home countries.
6. Field notes, 4 March 2012.
7. Several of my informants voiced the opinion that Hun Sen has now become a puppet serving the interests of Chinese businessmen in Cambodia and described China as the real strongman of today.
8. Interview, 21 February 2012.
9. This is my own concept.



10. The double-entendre is deliberate; Sihamoni is rumoured to be homosexual and therefore unlikely to father an heir to the throne.
11. In conversations with international and national court staff, I learned that it is the foreign staff who draft filings like these while national staff more or less willingly co-sign.
12. The Military Court is responsible for dealing with cases of military offenses, offenses committed by military personnel involving military discipline or that harms military property.
13. The Cambodian ECCC judges are appointed by the “Supreme Council of the Magistracy” (Article 11 of the Cambodian Law on the Establishment of the ECCC), which is in turn a politically appointed and controlled body (see Asian Legal Resource Centre 2009).
14. Cayley’s Cambodian counterpart, Chea Leang, toed the government line by claiming that the suspects in Cases 003 and 004 would not fall within the jurisdiction of the ECCC.
15. His predecessor Marcel Lemonde had resigned after claiming that he had had to pursue investigations alone because of a lack of support from his counterpart You Bunleng.
16. Field notes, 6 February 2012.
17. Article 26 of the law on the establishment of the ECCC stipulates, “The Supreme Council of the Magistracy *shall* appoint the foreign Co-Investigating Judge for the period of the investigation, upon nomination by the Secretary-General of the United Nations” (Emphasis added; see Law on the Establishment of the Extraordinary Chambers).
18. Rob Hamill is the brother of New Zealander Kerry Hamill, who was captured in a boat off the coast of Cambodia in 1978 and detained at S-21, where he was tortured before finally being executed.
19. Cambodian Law, which is based on French civil law, permits the inclusion of crime victims as parties with full legal status. At the ECCC, they are permitted to seek collective and moral reparations.
20. Interview, 20 February 2012.
21. It could indeed be argued that the trials have been steered as much by international as by national political interests; international support might never have been forthcoming for a trial that included non-Cambodian suspects, such as Henry Kissinger or members of the Chinese leadership (see Fawthrop and Jarvis 2004, p. 246).
22. Interview, 20 February 2012.
23. Interview, 21 February 2012.
24. Interview, 6 February 2012.
25. For instance, the sentencing of Duch in Case 001 to life imprisonment was warmly received by the public.

26. The trials will, for example, yield an enormous archive of documentation. The history of the Khmer Rouge period is also now being taught in Cambodian schools after a long silence on the period in the educational curriculum.

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