

Transitional Justice in Cambodia—Too Little Too Late?

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EMILY GLEESON, MAR 22 2016

The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in 2004 with the task of bringing to justice the senior leaders of Democratic Kampuchea, the Khmer Rouge-controlled state, and those who were most responsible for the mass human rights violations and genocide which resulted in the deaths of between one quarter and one third of the Cambodian population between 1975 and 1979. Taking place over 30 years after the mass killings, and accused of corruption and government interference, the ECCC tribunals have only convicted three people, while many of those who committed crimes against humanity have either since died or remain free, even in positions of power.

This essay questions what motivated the Cambodian government to pursue transitional justice so long after the fall of Democratic Kampuchea. Also why the temporal and subject matter jurisdiction of the tribunals is so limited when there were war crimes and mass human rights violations committed in Cambodia, both before and since the Khmer Rouge genocide. Understanding the events and interests that led up to the creation of the ECCC gives insight into the current government's attempts to achieve recognition as the legitimate government of Cambodia. Though neither the current leadership nor the international community have completely 'clean hands' in regard to the civil war period and involvement with the Khmer Rouge, holding a tribunal has followed the post-Cold War norm of dealing with past human rights violations, while at the same time establishing impunity for those not indicted.

The theoretical argument of this essay is that one of the reasons why states implement transitional justice measures is to outwardly comply with international norms in an attempt to gain or maintain legitimacy and impunity. Transitional justice is understood here as 'the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes'.^[1] International transitional justice—though it has the potential to result in moralistic outcomes and benefit human rights—is ultimately an outcome of politics and is therefore subject to political realities of power and international order. Sikkink and Kim identify a trend in world politics whereby more states are seeking 'individual criminal accountability for human rights violations' and call this normative shift the 'justice cascade'.^[2] The norm of individual accountability, or the 'justice cascade' is being adopted for different reasons all over the world, including internal power balances and the work of transnational and domestic advocacy networks, but this essay will focus on the exogenous explanation of norm diffusion and legitimacy.^[3] The interests of acting within international normative expectations can be seen behind why 'even the most autocratic and corrupt regimes claim to be dealing with past transgressions and prosecuting those responsible'.^[4]

Constructivist International Relations theory argues that as the international system exists in an environment of anarchy with no single world authority, actors (such as states) adopt standards of behaviour in line with their perceived identity and goals. These standards of behaviour are simplified and followed as norms.^[5] As a general rule, states tend to accept the expectations that come from global norms rather than reject or ignore them, as to do so could put their international legitimacy at stake^[6]—though, it should be noted that much like transitional justice and human rights, legitimacy itself is a normative concept. Following institutionalised expectations of how states should act in regard to dealing with past human rights violations is a way for states to gain legitimacy as international actors, and holding other actors accountable can mean impunity for the actors who carry out transitional justice.^[7] The decision for a state to pursue transitional justice may be driven by humanitarian ideals and the hard work of civil society and NGOs, but ultimately the implementation of justice measures are determined by the balance of power

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and international legitimacy. Fawthrop and Jarvis identify the 'double standards and the selectivity of international humanitarian law as 'the call for "an end to impunity" is shouted from the rooftops, political interests and global power still determine who shall be prosecuted and when'.^[8]

It is beyond doubt that massive human rights violations and genocide were committed by the Khmer Rouge between 1974 and 1979. Measured by percentage of the national population killed, the period of 'Democratic Kampuchea' was the worst mass murder of the twentieth century, with the deaths of approximately 2 million people through execution, forced labour and starvation.^[9] The Khmer Rouge (KR), led by Pol Pot came to power by overthrowing the US-backed and incompetent Lon Nol regime, in a violent *coup d'état* in April 1975. The KR aimed to create a classless, communist, agrarian utopia in Cambodia, by destroying the existing social order.^[10] Entire cities were evacuated and people were forced to work on collective farms under armed guard, where many starved or died from preventable disease. Their lives were controlled exclusively by the state, or Angka, which abolished currency, religion and the notion of family. The mass killings of the KR regime are often referred to as 'politicide', but there was certainly persecution of ethnic and racial minorities—of those who did not escape Democratic Kampuchea in time almost all of the Vietnamese were killed, 50 percent of the Chinese, 40 percent of the Thai and Lao and 36 percent of the Cham.^[11] Religious leaders, government officials, doctors, lawyers, teachers and students were also targeted, with up to 400,000 people being tortured to death in makeshift prisons like the infamous Tuol Sleng.^[12]

When questioning why the current Cambodian government requested UN assistance in setting up a tribunal for transitional justice in 1997, and then worked so hard to limit the jurisdiction of the courts, it is important to see the events and actors in the historical context of the Cold War and Cambodian Civil War. The fact is that when negotiations started between the Cambodian government and the UN for the establishment of the ECCC, the state was not transitioning to peace solely from Pol Pot's Democratic Kampuchea, but from the Civil War that had been ongoing in the country since at least 1968.^[13] The post-colonisation instability in Cambodia that allowed the Khmer Rouge to come to power began with the Vietnam War, where the United States began a campaign of bombing North Vietnamese supply routes through the neutral state of Cambodia.^[14] This violation of international law resulted in the deaths of around 150,000 Cambodians and destroyed farmland, forcing the relocation of two million people into towns and cities.^[15] Throughout the Democratic Kampuchea regime there was no intervention by Western States or the United Nations, and was supported by Chinese forces, which deployed up to 15,000 technical advisors in Cambodia between 1975 and 1979.^[16]

In 1979 Vietnamese troops invaded Democratic Kampuchea and forced Khmer Rouge leaders to flee to the Cambodian-Thai border.^[17] The Vietnamese installed the government of the People's Republic of Kampuchea, mostly made up of former Khmer Rouge functionaries that had escaped to Vietnam before Pol Pot's purges. Many of the senior politicians in Cambodia's current ruling elite, the Cambodian People's Party (CCP), began their careers this way and therefore have a history of involvement with the Khmer Rouge, including the longstanding Prime Minister Hun Sen.^[18] Due to Cold War tensions and an attempt to pursue a *détente* in US-China relations, the Vietnamese-installed regime was considered illegitimate by major powers such as the US, China, and much of Western Europe. These governments blocked attempts to deliver humanitarian aid to victims of the Khmer Rouge and civil war, and actively supported the exiled leaders, even ensuring that the KR delegation retained control of Cambodia's seat in the UN General Assembly despite widespread knowledge of the regime's atrocities.^[19]

This lack of international recognition is one of the reasons why the first Cambodian genocide tribunal—the People's Revolutionary Tribunal of 1979—failed. The domestic tribunal was held before a norm of transitional justice had fully developed, but was the first ever legal body to try suspects for the crime of genocide.^[20] Within five days of hearings the Khmer Rouge leader Pol Pot and his Deputy Prime Minister Ieng Sary were found guilty in absentia and sentenced to death. Ieng Sary was later granted amnesty and Pol Pot committed suicide in 1998, but as the tribunal did not give the men a fair trial nor abide by the rule of law, it has long been regarded by the international community as an illegitimate show trial.^[21]

With the end of the cold war, the Paris Peace Agreement of 1991 was put in place and the United Nations arranged for Cambodia's first free and fair elections to be held in 1993.^[22] It was around this time that international tribunals began in Rwanda and Yugoslavia, but when the Co-Prime Ministers in Cambodia requested help from the UN in

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1997 to set up a tribunal, they wanted a mostly domestic version of retributive transitional justice. The UN Secretary General and an appointed group of experts recommended an international tribunal for Cambodia because it was feared that the Cambodian judiciary would be ill equipped and susceptible to government interference. However, after years of tough negotiations, a compromise was struck with the creation of a 'mixed tribunal' or 'hybrid court'.^[23] This means that the ECCC is funded by UN donor countries and Cambodia, is situated just outside of Phnom Penh where locals can attend proceedings and has a mixture of Cambodian appointed and International UN appointed judges. The Cambodian judges are in the majority, but any decision making requires a 'supermajority'—meaning at least one international judge needs to support the decision.^[24]

This essay does not present doubt about the need or want for some form of transitional justice after the mass killings of the Democratic Kampuchea regime, which still affects the population deeply. It is suggested that every single Cambodian today had members of his or her family killed by the KR and thus the subject is still a highly personal and sensitive issue.^[25] A lack of education and public information about the Democratic Kampuchea period has left a desire for knowledge, and for the KR leadership to be prosecuted for their crimes. For decades there has been widespread public support for a tribunal that could provide accountability and retribution in Cambodia. Evidence of this includes a petition signed by 84,195 Cambodians presented to the UN secretary-general in January 1999. It stated: 'We, the people of Cambodia ... request the United Nations to establish an international tribunal to try the Khmer Rouge leaders for the mass killings and crimes against humanity committed during their rule from 1975 to 1979'.^[26] Etcheson claims, however, that beneath the surface of this push for retributive justice is a stronger hunger for answers and ultimately an explanation of 'why did this happen?'.^[27] Non-governmental organisations like the Documentation Centre Cambodia have worked to address the lack of public information and closure surrounding the genocide, but an accusatorial court format such as the ECCC may not hold much potential for holistic truth seeking, and end up raising more questions than it answers.^[28]

Theoretically, one of the main objectives of transitional justice is to deter or prevent future conflict and human rights violations.^[29] Though nothing today could compare to Pol Pot's genocide, the human rights situation in Cambodia has reportedly regressed since the establishment of the ECCC. Hun Sen's regime has been accused of committing numerous human rights abuses, limiting rights of expression, association and assembly.^[30] The protection of many CCP leaders close to Hun Sen who should ideally be involved in the ECCC tribunals, compounds the feeling that neither retributive nor restorative justice is being carried out, leading one Cambodian human rights lawyer to summarise: 'What the Khmer Rouge tribunal is producing now is beyond the pale of anything resembling justice. To the contrary, the farce, the deceit, is damaging and is laying the dangerous groundwork for future instability and impunity'.^[31]

Understanding what events and interests have influenced the creation of the ECCC is important in assessing whether transitional justice has or will be achieved and the effect that this has on human rights. A scrutiny of the history and motives of both Hun Sen and the CCP and the international community with regards to the ECCC suggests that the court is more successful as a tool of power and shallow legitimacy rather than of transitional justice.^[32] The ECCC has been equipped with a narrowly defined jurisdiction focused on a select group of ringleaders—many of whom have already died—at the expense of a more comprehensive examination of widespread complicity both from those currently in government and the history of international support for the Khmer Rouge regime. It is in the interests of the Cambodian government to present the Khmer Rouge human rights violations and genocide as the product of a small group of individuals and frame themselves as the force that brought these criminals to justice.^[33] Without a broader mandate for restorative justice—including truth seeking, official apology and reparations—the ECCC will only succeed at imprisoning a few dying old men, framing the current government and international community as guilt free and doing very little to improve the current human rights situation in Cambodia.

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