
| RESEARCH ARTICLE

An Analysis of the Historiographic Tradition Surrounding the Extraordinary Chambers in the Cambodian Courts

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| ABSTRACT

From 1975 to 1979, The Democratic Kampuchea, or the Khmer Rouge, killed between one and a half to two million people, or twenty percent of the population of Cambodia through starvation, torture, and other means. This period is often cited as prime example of a genocide, yet forty years have passed and only four people have been held accountable for these crimes. In 2003, after years of negotiation with the government of Hun Sen, the prime minister of Cambodia from 1985 until the present, the United Nations and the government of Cambodia decided to establish the Extraordinary Chambers in the Courts of Cambodia for the prosecution of the people many believe responsible for the death of over a million people. Yet, from 2003 until the present, as the courts are still in operation, only four people have been prosecuted despite sixteen years and \$300 million dollars from the international community.¹ Despite the Cambodian Genocide being a prime example of genocide, the Extraordinary Chambers in the Courts of Cambodia, or ECCC, has proven to be a complete failure for the millions of dead, and the many millions more who lived through the events, and continue to live with the memory every day. Historians, lawyers, and international scholars have debated the issues surrounding why the ECCC has failed to deliver the promises of justice. Over the course of this paper we will be looking at the historiographic tradition surrounding the Extraordinary Chambers in the Cambodian Courts, dividing the works into two different camps. These two camps differ in their opinion on the fatal flaw with regard to the ECCC. These two camps of thought are, one, that political interference by the authoritarian Hun Sen government has, over the courts ten plus years of existence, used its power to prevent any real progress from being made. The other camp argues that the United Nations 2003 agreement with its international standards of justice does not fit into the national ideal of justice and that hybrid courts that attempt to balance international and national priorities have been flawed since its creation. By providing a detailed analysis of these sources the goal will be to find how the two different camps make their arguments and perhaps how scholars have proposed solutions to the difficulties of the Hun Sen government and the UN to attempt to find justice in Cambodia.

| KEYWORDS

Historiographic Tradition; Chambers; Cambodian Courts

| ARTICLE INFORMATION

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1. Introduction

1.1 Historical background to the Extraordinary Chambers in the Courts of Cambodia

In order to understand the background to the history of Extraordinary Chambers in the Courts of Cambodia, and why such a court would be set up, a quick historical background to Cambodia and the Khmer Rouge will allow us to get an impression of the trauma

¹ Maguire, Peter. *Facing Death in Cambodia*. New York: Columbia University Press, 2005. 1-6

Seth Mydans. "Was the Khmer Rouge Tribunal Worth It?" *New York Times*, 4/10/2017.

<https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html> accessed on 5/6/2019.

of the nation. Although our scholars of the historiographic tradition surrounding the Extraordinary Chambers in the Cambodian Courts mention some of this material, I have opted to use other sources whose focus is not the ECCC. Cambodian history goes back thousands of years, with the imperial height of their nation being the Khmer Empire of the ninth to fifteenth centuries. Following this the kingdom retreated inward and continued in that state until the French Empire accepted a request by the then King of Cambodia to become a French protectorate. From 1863-1953 Cambodia was part of French Indochina along with Laos, and Vietnam. While this colonial system allowed the Cambodian king to remain on his throne, his nation was not under his control and was administered by the French imperial system. Despite most experiences of colonial rule, French rule in Cambodia was invited, hence the reason the king continued to rule. King Norodom had invited the French to establish a protectorate over his kingdom in an attempt to prevent aggressive neighbors, Thailand and Vietnam, from further attacks and annexation of his land.²

In 1953, French rule slowly collapsed in Indochina after World War Two, reestablishing the Cambodia's independence as the Kingdom of Cambodia (1953–1970). This period saw rapid modernization with the government making efforts to invest in the people. For example, the period saw the number of high schools in Cambodia rise from 8 to over 200. However, the Cold War started bringing in international ideologies as movements associated with the USSR, and USA began to assert increasing influence over the region. It is was during this period the Khmer Rouge began its efforts to increase its efforts to overthrow the government. During this period, the Kingdom of Cambodia was non-aligned and was allowing the Vietcong to establish forest bases in the eastern provinces of Cambodia. In 1970, Lon Nol, head of the Cambodian military, with American approval, launched a coup bringing down the government and replacing the kingdom with a USA aligned military dictatorship. Lon Nol brought Cambodia into the Vietnam War, however American bombings undermined his regime, with the people giving the Khmer Rouge many recruits and turning the conflict into a full civil war.³

By 1975, The Khmer Rouge took Phnom Penh, the capital of Cambodia, and would establish the Democratic Kampuchea. The Khmer Rouge then enacted a radical plan to deconstruct Cambodian society back into a form of primitive communism by forcing people out of the cities into the countryside to live a peasant lifestyle. This new society would be without property, money, education, and other social aspects of Khmer life it considered a danger for the Khmer people. During this process people who were allied or associated with the Kingdom of Cambodia or the republic of Cambodia were killed. By man-made famine, mass killings, and other means the Khmer Rouge killed 1.5 million to 2 million people, or 25 percent of the population, in 4 years.⁴

Despite being allies in the international communist movement the Khmer Rouge started making raids into Vietnam, with whom China, a key backer of the Khmer Rouge, had a bad relationship with. By 1979, Vietnam had unified the nation and was able to retaliate. In 1979, the communist world was divided between those who followed the USSR's thinking and the Chinese. Vietnam, with China on its border, was supported by the USSR and would invade Cambodia in that year to overthrow the pro-Chinese Khmer Rouge and replace it with the People's Republic of Kampuchea, or PRK. The PRK was a pro-USSR regime that had a traditional communist style government and outlook, unlike the Democratic Kampuchea.⁵

With their defeat, the Khmer Rouge retreated once again to the forest and mountains of Cambodia to strengthen their movement. However, they were not alone as many different political groups formed insurgencies. Alongside the Khmer Rouge there was the royalist forces, under the United Front for an Independent, Neutral, Peaceful, and Co-operative Cambodia (FUNCINPEC), who were loyal to the Kingdom of Cambodia and the royal family and the republican forces under the Khmer People's National Liberation Front (KPNLF). These forces came together with Chinese and western aid to form the Coalition Government of Democratic Kampuchea as a government-in-exile, and with American backing took Cambodia's seat in the UN. The Coalition Government of Democratic Kampuchea was created to oppose the pro-USSR PRK, and Vietnam. The genocide of the Khmer Rouge was brushed

² Edwards, Penny. *Cambodge: The Cultivation of a Nation, 1860-1945*. Honolulu: University of Hawaii Press, 2006. Pg. 1-18

³ Kiernan, Ben. *Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79*. New Haven: Yale University Press, 2008. Pg. 1-9

Dobbins, James, Laurel E. Miller, Stephanie Pezard, Christopher S. Chivvis, Julie E. Taylor, Keith Crane, Calin Trenkov-Wermuth, and Tewodaj Mengistu. "Cambodia." *In Overcoming Obstacles to Peace: Local Factors in Nation-Building*. RAND Corporation, 2013. Pg. 30-32

Mehta, Harish C., and Mehta, Julie B. *Strongman: The Extraordinary Life of Hun Sen*. Singapore: Marshall Cavendish International (Asia) Pte Ltd, 2013. Pg. 26-28

⁴ Dobbins, James, Laurel E. Miller, Stephanie Pezard, Christopher S. Chivvis, Julie E. Taylor, Keith Crane, Calin Trenkov-Wermuth, and Tewodaj Mengistu. "Cambodia." *In Overcoming Obstacles to Peace: Local Factors in Nation-Building*. RAND Corporation, 2013. Pg. 32-40

⁵ Dobbins, James, Laurel E. Miller, Stephanie Pezard, Christopher S. Chivvis, Julie E. Taylor, Keith Crane, Calin Trenkov-Wermuth, and Tewodaj Mengistu. "Cambodia." *In Overcoming Obstacles to Peace: Local Factors in Nation-Building*. RAND Corporation, 2013. Pg. 32-40

under the table because Cold War ideologies and alliances shifted, and China and the USA needed the Khmer Rouges aid in opposing USSR Influence in Indo-China.⁶

The Cambodian Civil War continued until 1991, when the FUNCINPEC, the Khmer Rouge, KPNLF, and the PRK signed the Paris peace deal that transferred the governance of the nation to a UN authority, and within 2 years the Kingdom of Cambodia was reestablished. The Khmer Rouge, despite signing the peace deal, retreated back into the forest to continue their struggle against the government. In 1999, one year after the death of Pol Pot, leader of the Khmer Rouge, their fight ended.⁷

In 1997, the government of Cambodia and the UN started the long process to establish the ECCC. The complex history of Cambodia, post colonialism, has had major impact on how the people, and government of Cambodia have approached the idea of genocide trials. This history highlights both the need for genocide trials, and resistance to international efforts to pressure the small nation to accept conditions not favorable to Cambodia as the small nation had withstood the ideology forces of the Cold War rip it apart.⁸

2. Hun Sen and the Corruption of Justice

Hun Sen, the longtime Prime Minister of Cambodia, is a political "strongman" who has warped the national political thought to continue his rule. His leadership has had scholars focusing in on his role in the establishment of the ECCC, for his own political benefit in strengthening his rule over the small nation. In this section we will look at the following scholars work; Eli Margolis' "Trauma and the Trials of Reconciliation in Cambodia", Carlyle Thayer's "Cambodia: The Cambodian People's Party Consolidates Power", Duncan McCargo's "Politics by Other Means? The Virtual Trials of the Khmer Rouge Tribunal", Joel Brinkley's "Justice Squandered: Cambodia's Khmer Rouge Tribunal", and finally Kheang Un's "The Khmer Rouge Tribunal: A Politically Compromised Search for Justice". These scholars argue that the key failure of the ECCC is the interference of the Cambodia government, and Hun Sen, in the day to day working of the court.

It is important to give a brief introduction to who Hun Sen is, and why his government would want to interfere with the ECCC. Hun Sen's role in the politics of modern Cambodia is just as complex as Cambodia's history since independence. In 1970, with Lon Nol's coup Hun Sen joined the Khmer Rouge and its war against the republican government. Hun Sen was an important figure in the fighting as he was injured five times, and lost sight in one eye, and was appointed chief of staff to a regional commander of the Khmer Rouge forces and worked his way up during the Khmer Rouges rule to become deputy commander of a region.⁹

In 1977, Hun Sen escaped to Vietnam to avoid being killed during one of the Khmer Rouge's purges. He helped form an anti-Khmer Rouge force which he used to fight against the Khmer Rouge for two years, until the invasion by Vietnam, where they established the People's Republic of Kampuchea. Hun Sen was appointed foreign minister for the PRK government and continued to work his way up to deputy Prime minister in 1981 and getting the top job of Prime minister in 1985, which he has held onto for over 30 years. As we examine the different arguments of scholars as they point to Hun Sen's interference into the ECCC as a leading factor in its failure, two features of his rise to power will be clear in his desire to undermine the court, his own role in the Khmer Rouge's government and his ties to Vietnam.¹⁰

Published in 2007, as the ECCC was being opened and the first days of the trials begun, Eli Margolis wrote "Trauma and the Trials of Reconciliation in Cambodia". Margolis argues that despite the ECCC's goals to prosecute members of the leadership of the Khmer Rouge for their role in the deaths of well over one million people, and to give justice to the millions of survivors and their families, the courts were established to aid the Cambodian People's Party, and Hun Sen, politically. Margolis argues that despite, overwhelming support for the trials among the Cambodian people the trials would not help them recover from the years of genocide, and civil war. Margolis points to studies that show over one fourth of people in Cambodia have post-traumatic stress

⁶ Dobbins, James, Laurel E. Miller, Stephanie Pezard, Christopher S. Chivvis, Julie E. Taylor, Keith Crane, Calin Trenkov-Wermuth, and Tewodaj Mengistu. "Cambodia." *In Overcoming Obstacles to Peace: Local Factors in Nation-Building*. RAND Corporation, 2013. Pg. 32-40

⁷ Dobbins, James, Laurel E. Miller, Stephanie Pezard, Christopher S. Chivvis, Julie E. Taylor, Keith Crane, Calin Trenkov-Wermuth, and Tewodaj Mengistu. "Cambodia." *In Overcoming Obstacles to Peace: Local Factors in Nation-Building*. RAND Corporation, 2013. Pg. 32-40

⁸ Ciorciar, John D., and Heindel, Anne. *Law, Meaning, and Violence: Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*. Ann Arbor: University of Michigan Press, 2014. 1-13

⁹ Mehta, Harish C., and Mehta, Julie B. *Strongman: The Extraordinary Life of Hun Sen*. Singapore: Marshall Cavendish International (Asia) Pte Ltd, 2013. Pg. 26-32

¹⁰ Mehta, Harish C., and Mehta, Julie B. *Strongman: The Extraordinary Life of Hun Sen*. Singapore: Marshall Cavendish International (Asia) Pte Ltd, 2013. Pg. 26-32

disorder (PTSD), while one in ten had major depression and one in eight had attempted suicide. Margolis argues that the attention of the court should be on helping the Cambodia people heal, not as an end, but a means to healing.¹¹

Margolis argues that this is merely the third show trial of the Khmer Rouge, following the 1979 and 1997 show trials of Pol Pot by the PRK and Khmer Rouge. Margolis points to three facts about the trial that hint at its failure to deliver justice; the timing of the trial, delays, and Hun Sen appointed justices. Following his 1997 coup against his opposition Hun Sen sought out American firms aid to repair his image in Cambodia and around the world. Following the 1997 show trial of Pol Pot by the Khmer Rouge this firm argued that Hun Sen himself should show support for bringing the Khmer Rouge to justice as a means to seem more democratic. Hun Sen then preceded to have six years of negotiations to ensure that the ECCC, would not be a simple international UN court, but a hybrid court where the government of Cambodia had a lot to say about who was appointed to run the court, staff the offices, and oversee the cases. One such justice appointed that Margolis highlights is Ney Thol, an army general, who has a history of denying human rights to people under his control. For these reasons Margolis argues that the failure of the ECCC is left entirely in Hun Sen's hands.¹²

The next article in our analysis is Carlyle Thayer's "Cambodia: The Cambodian People's Party Consolidates Power". Published in 2009, Thayer looks at the effect of the 2008 national Cambodian election on the ECCC, and its future. The 2008 election was the fourth election held since the end of the civil war in 1993. Hun Sen's CCP won 58 percent of the vote and 90 of 123 seats in the Parliament of Cambodia. Thayer argues this has emboldened Hun Sen to slow down the ECCC's prosecutions and indictments. At the time of the election five high ranking members of the Khmer Rouge were on trial for crimes committed during the Khmer Rouge period of rule, none of them are being prosecuted for genocide. Only one of these had received a verdict at the time of the election. Kaing Guek Eav, or Duch, was the head of the interrogation unit S-21 and was found guilty of 22,000 murders. After 2008, there would be no more arrests, the four remaining individuals would be the last indictments coming from the ECCC, as of 2019, effectively ending the ECCC as a tool to bring those guilty of crimes against humanity to justice. Thayer argues this is the result of the 2008 elections were Hun Sen and the CPP gains its first majority and no longer needed to work with the royalist party to achieve its goals.¹³

Thayer's article looks at other aspects of Cambodian society in the fallout over the 2008 election victory of the CCP, including the economy. This focus on the Cambodian economy in the fallout of the 2008 election has a connection with the ECCC. After 2008, Hun Sen has made overt overtures to China for loans and other economic deals. While the author does not make this point, we can speculate that putting the aged members of the Maoist Khmer Rouge, may not be something Hun Sen wants Chinese leadership seeing in Cambodian papers. This would fall in line with Thayer's overall agreement that the 2008 election resulted in Hun Sen's consolidation of power, and the end of the need to appear tough on the Khmer Rouge.¹⁴

Duncan McCargo, in his article "Politics by Other Means? The Virtual Trials of the Khmer Rouge Tribunal", builds on the theme of identifying Hun Sen and his government as the single most important road block to the ECCC finding success in Cambodia by directly comparing the ECCC to other hybrid international tribunals. He directly challenges others who claim it was the language of the agreement or the UN that resulted in failure of the court. McCargo argues that the failures of the court are not in the agreement establishing the ECCC, but in the actions and spirits of those people Hun Sen has appointed to oversee the courts, and the justices in seeing that agreement through. The ECCC is a hybrid court that sees Cambodian, and international participates were co-prosecutors, co-defense lawyers and finally co-justices serve the court. The court has five justices on it, three Cambodian, and two international justices. However, a super-majority of four is needed to reach any final verdict. McCargo argues that this allows the Cambodian justices, who were appointed by the government, to prevent any action Hun Sen does not agree too.¹⁵

McCargo argues that Hun Sen has used the court as a high-profile attempt to aid his international image as a leader looking for justice, while using the court at home as a scapegoat of Cambodia's ills, pointing to leadership of the Khmer Rouge as the ultimate source of Cambodia's problems, and presenting himself as the solution. In 2010, during a visit to Phnom Penh, capital of Cambodia, Hun Sen informed Ban Ki-Moon, UN Secretary General, that after cases #3 and #4 the ECCC should halt its processes. Hun Sen

¹¹ Margolis, J. Eli. "Trauma and the Trials of Reconciliation in Cambodia." *Georgetown Journal of International Affairs* 8, no. 2 (2007): 153-61.

¹² Margolis, J. Eli. "Trauma and the Trials of Reconciliation in Cambodia." *Georgetown Journal of International Affairs* 8, no. 2 (2007): 153-61.

¹³ Thayer, Carlyle A. "Cambodia: The Cambodian People's Party Consolidates Power." *Southeast Asian Affairs* (2009) 85-101.

¹⁴ Thayer, Carlyle A. "Cambodia: The Cambodian People's Party Consolidates Power." *Southeast Asian Affairs* (2009) 85-101.

¹⁵ McCargo, Duncan. "Politics by Other Means? The Virtual Trials of the Khmer Rouge Tribunal." *International Affairs* (Royal Institute of International Affairs 1944-) 87, no. 3 (2011): 613-27.

withdrew of his support of the ECCC's mission had effectively ended the ECCC. While the UN agreement has a clause to end UN funding of the court in the event of government interference, UN funding has continued. McCargo argues this is because the UN does not want to concede that its efforts have failed. McCargo's article is unique as it directly argues against the idea that the UN, or the ECCC agreement is to blame for the failure of the court, and rather points the blame at Hun Sen's failure to live up to his government's agreement.¹⁶

Joel Brinkley's argues, in "Justice Squandered: Cambodia's Khmer Rouge Tribunal", that Hun Sen was against the idea of establishing the ECCC from the beginning and has used his position as Prime Minister to ensure no verdict, arrest, or other actions could be taken by the ECCC without his approval. Brinkley argues that because of Hun Sen's connection to the Khmer Rouge, being a deputy regional commander in the Khmer Rouge, along with many allies in his Cambodian People's Party he did not want to disrupt his position in power. Hun Sen is believed to have agreed to the establishment of the ECCC in 1997 because he did not have firm control over the nation until his coup later in the year. Even after the coup he still didn't have a majority in parliament and needed other political parties to remain in power. Following six years of debate the UN and Cambodia came to a watered-down agreement that conceded control of the courts to Cambodia, despite initial beliefs of UN officials that no Cambodian justice should sit on the courts because of corruption and limited qualifications.¹⁷

Once the courts were opened it took five years before any real trials started and it would take until 2018, 21 years after the initial talks began for the creation of the court that its first verdict of genocide would be ruled on. During this period only 5 people were indicted; Kaing Guek Eav, head of S-21 prison, Nuon Chea, Pol Pot's right-hand man, Ieng Sary, deputy Prime Minister of the Khmer Rouge, Ieng Thirith, senior member of the Khmer Rouge, and Khieu Samphan, Head of State of the Khmer Rouge. Kaing Guek Eav, Nuon Chea, and Khieu Samphan would be sentenced to life imprisonment for their crimes, as Ieng Sary and Ieng Thirith both died during the trial. Kaing Guek Eav is in his 70's, Khieu Samphan is in his late 80's and Nuon Chea his 90's. Brinkley argues that Hun Sen has squandered an opportunity of bringing the Khmer Rouge's leader to justice by delaying the court and allowing the leadership to die off of natural causes, and not indicting the captains and only looking to the upper leadership.¹⁸

Our last scholar looking at Hun Sen's role in the failure of the ECCC is Un Kheang's in his article "The Khmer Rouge Tribunal: A Politically Compromised Search for Justice". Un Kheang's makes the standard arguments that we have seen in the other articles, that Hun Sen has selected corrupt judges, and that the agreement was problemed from the beginning because Hun Sen's limited the scope of the court. However, Un Kheang attempts to find positives for the people of Cambodia in the court's establishment despite its failure. Un Kheang's central argument is that the creation of the ECCC has opened up a public forum where people can talk about the Khmer Rouge and the Civil War. Un Kheang points to the limited presentation the Khmer Rouge and the genocide get in the Cambodian schools' systems. The genocide is only taught at some colleges, and no high schools. In a nation where 1/4th of the adult population lives with PTSD as a result from both the genocide and the war. This is a part of Cambodian history that needs to be explained.¹⁹

These articles make the compelling case that Hun Sen in his role as Prime Minister has prevented the ECCC from making any forward progress on its goal of finding justice. These scholars rightly point out that his own history and connection to the Khmer Rouge, as a deputy regional commander, and his connection with the Vietnam imposed government, he was Prime Minister, has limited his interest in a careful study of the past crimes of the different regimes. Had Hun Sen been removed with the establishment of the Kingdom of Cambodia, or had suffered a pre-mature death, the ECCC perhaps would have found more success. These authors focused on Hun Sen's history, but I think we should also look at his goals in creating the CPP as the ruling party of Cambodia as a defacto single party state. While Hun Sen's Cambodia is becoming freer based on international markers, the political process is still dominated by him, and he is crafting Cambodia's future, and there past.

¹⁶ McCargo, Duncan. "Politics by Other Means? The Virtual Trials of the Khmer Rouge Tribunal." *International Affairs* (Royal Institute of International Affairs 1944-) 87, no. 3 (2011): 613-27.

¹⁷ Brinkley, Joel. "Justice Squandered: Cambodia's Khmer Rouge Tribunal." *World Affairs* 176, no. 3 (2013): 41-48.

¹⁸ Brinkley, Joel. "Justice Squandered: Cambodia's Khmer Rouge Tribunal." *World Affairs* 176, no. 3 (2013): 41-48.

"Accused Persons." Cambodia Tribunal Monitor. access date: 4/2/2019. <http://www.cambodiatribunal.org/history/tribunal-background/accused-persons/>.

"Khmer Rouge leaders found guilty of Cambodia genocide." BBC. Access date: 4/2/2019. <https://www.bbc.com/news/world-asia-46217896>.

¹⁹ Un, Kheang. "The Khmer Rouge Tribunal: A Politically Compromised Search for Justice." *The Journal of Asian Studies* 72, no. 4 (2013): 783-92.

3. The Failure of Hybrid Courts

On the other side of the debate surrounding why the ECCC has failed to deliver more than three convictions in sixteen years is the idea that the basic system of hybrid courts that rely on both international justices serving alongside their national counterparts are flawed. Alongside this are concerns that the international personal who came to Cambodia were unable to apply lessons learned elsewhere to the situation in Cambodia. In this second selection of works we will be looking at Roderick O'Brien's "Justice, Law, and the Proposed Tribunal for the Khmer Rouge", Scott Luftglass' "Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge", Sarah Williams' "The Cambodian Extraordinary Chambers: A Dangerous Precedent for International Justice", Ellen Emilie Stensrud's "New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia", Abe Toshihiro's "Perceptions of the Khmer Rouge Tribunal among Cambodians: Implications of the Proceedings of Public Forums Held by a Local NGO", Alexandra Kent's "Friction and Security at the Khmer Rouge Tribunal", and Eve Monique Zucker's "Trauma and Its Aftermath: Local Configurations of Reconciliation in Cambodia and the Khmer Rouge Tribunal". We will be looking at these works in chronological order as we did the others to show how this argument against the ECCC agreement shifted over time from the initial 2003 agreement to the application of the agreement.

Before the courts was established Roderick O'Brien, in "Justice, Law, and the Proposed Tribunal for the Khmer Rouge", had already noted many problems with the proposed court. O'Brien's argument is that courts are able to deliver in society different forms of justice; restorative justice, and distributive justice and retributive justice. O'Brien argues that for these international courts to succeed they need to go beyond traditional forms of justice and lend to truth and reconciliation in order to build a post-genocide nation without conflict. O'Brien concludes that given the courts limited scope of interest, only a few individuals, it seems unlikely that future courts will build on the ECCC and go forward with future cases to bring justice to a wider portion of the population. O'Brien compounds this by arguing that since the ECCC is merely a special court located within the Cambodian legal system, and not outside it, it may be swayed by government pressure.²⁰

Scott Luftglass', in "Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge", builds on O'Brien's concerns with the ECCC agreement by highlighting the courts two aims, providing retributive justice and reconciliation. Luftglass' arguments centers around the idea that Cambodia has been wrecked by civil war and will be unable to provide for either of these. Luftglass highlights a portion of the agreement that mandates that the Cambodia judges, who make up 3/5 of the judges, must have experience in "International law, including international humanitarian law and human rights law." Considering the Khmer Rouge targeted educated lawyers for murder, this has left few experienced judges left in the nation. Luftglass argues this will create a gap in the understanding of internal legal standards between the national and international sides. While Luftglass agrees that Hun Sen and the government influence could be a factor, although he does not think it will be a problem, he argues that the agreement on court structure gives too much influence on the Cambodian justices who were not trained well enough. Moving forward he argues that the UN should argue for an entirely international court or remove its role in the ECCC court rather than settle for a lesser option.²¹

Sarah Williams' article, entitled "The Cambodian Extraordinary Chambers: A Dangerous Precedent for International Justice?", looks at how the ECCC was created as a unique example of a hybrid court. Unlike other hybrid courts in Kosovo, East Timor and Sierra Leone, the ECCC does not have a Chapter VII Security Council mandate, as the court was not imposed on Cambodia by the UN. This has limited UN demands to enforce international standards of justice placing the courts entirely within the Cambodian legal system. Williams' argues that the only tool the UN has for enforcement is the withdrew of monies promised for the courts upkeep. Williams' argues that this imbalance of power between the UN and Cambodia over the court can be seen in its structure. Divided between a trial chamber and a supreme court chamber, Cambodian justices outnumber international justices three to two within the trial chamber and four to three in the supreme court chamber. With a super majority being required to deliver any decision these means both sides could derail forward movement in the courts schedule. The ECCC is the only international court to have a

²⁰ O'Brien, Roderick. "Justice, Law, and the Proposed Tribunal for the Khmer Rouge." *Journal of the Hong Kong Branch of the Royal Asiatic Society* 43 (2003): 89-104.

²¹ Luftglass, Scott. "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* 90, no. 3 (2004): 893-964.

minority of international justices and Williams highlights this as an example of how the lesser experience of domestic justices has slowed down the progress of the court.²²

Williams' argues that the 2003 agreement has failed to deliver justice to the Cambodia people by highlighting a portion of the agreement that limits the temporal and personal jurisdiction of the court. The 2003 agreement limits the court's jurisdiction to only the time period of April 17th, 1975 to January 3rd, 1979, the agreed upon time period of Khmer Rouge rule over the nation, and to only Khmer Rouge leadership. This prevents the court from looking at crimes committed by the Khmer Rouge outside its period of rule, which considering the Khmer Rouge was established in 1951 and broke apart in 1999 is most of its existence. It also prevents investigation of crimes committed by the Khmer Rouge's low level official, such as Hun Sen, and prevents the court from looking into crimes committed by the PRK, FUNCINPEC and the KPNLF. This limitation had prevented the ECCC from giving the Cambodian people form having a true account of the Civil War, and reconciliation.²³

Ellen Emilie Stensrud's article, entitled "New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia", moves the narrative forward as we now are reviewing articles that are not looking just at the text of the 2003 agreement between Cambodia and the UN, but those who are considering the agreement in practice as by 2009 the court had been working for a few years. Therefore, this article and the succeeding ones have a different perspective then the first few in looking at how the 2003 agreement has failed in Cambodia. Stensrud's article looks at the problem of legitimacy of the courts in the eyes of the population. Stensrud argues against the assumption that just because the ECCC court is located within the affected nation, that it gives the courts anymore legitimacy in the eyes of the people. Stensrud's argues that the mixed, or hybrid, international tribunal established in Cambodia, with a majority of justices coming from Cambodia, has a weakness in its system as judicial system in Cambodia is weak and is often affected by national politics. Stensrud's argues that this has undercut the courts legitimacy in the eyes of many people in Cambodia, as they are aware of the corruption in the Cambodia courts. Stensrud implies that moving forward there is little that can be done for the ECCC or Cambodia with respect to finding justice for the people, and that it should be used going forward as an example of what to avoid.²⁴

Abe Toshihiro's "Perceptions of the Khmer Rouge Tribunal among Cambodians: Implications of the Proceedings of Public Forums Held by a Local NGO", published in 2013, looks at how the ECCC is viewed among the common people of Cambodia to understand if the ECCC is viewed as a legitimate pursuit of justice. As we saw from Stensrud's work the idea behind the hybrid system was to place the court inside the home nation in order to boost its standing among the population it is intended to serve. Toshihiro's research surveyed around one thousand people in 2008 and 2010 to get their impressions on the ECCC, and its standing among the national and international community. Toshihiro found that approval of the ECCC went down over the period, and in direct questions the average Cambodian people bring up failures in the 2003 agreement, such as the limitations of only looking at the 1975-1979 years, or just high-ranking individuals. Toshihiro concludes that these failures have become part of the narrative surrounding the storied history of the courts and moving forward undermines as sense of justice the ECCC can bring for the nation and people of Cambodia.²⁵

Published in 2013, Alexandra Kent's "Friction and Security at the Khmer Rouge Tribunal" looks at the ECCC and considers the day to day problems that the court face as international justices and their staff faces as they came to Cambodia and work with their national co-workers in the ECCC. Kent uses a concept of "friction" to define global encounters and look at the language, culture, and other aspects of the interaction that may cause harm or benefit. Kent uses this to look at the interaction of the Cambodian official with international ones. Kent's analysis of the ECCC as a social interaction between national and international officials highlights problems with the ECCC no other work I found does, and that is the idea of the "Tribunal Hoppers". These international officials who often know very little about Cambodia and have no stake in the findings or decisions of the ECCC court, but rather move from one international court system to another working as international legal aids to the courts. Considering the language

²² Williams, Sarah. "The Cambodian Extraordinary Chambers: A Dangerous Precedent for International Justice?" *The International and Comparative Law Quarterly* 53, no. 1 (2004): 227-45.

²³ Williams, Sarah. "The Cambodian Extraordinary Chambers: A Dangerous Precedent for International Justice?" *The International and Comparative Law Quarterly* 53, no. 1 (2004): 227-45.

²⁴ Stensrud, Ellen Emilie. "New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia." *Journal of Peace Research* 46, no. 1 (2009): 5-15.

²⁵ Abe, Toshihiro. "Perceptions of the Khmer Rouge Tribunal among Cambodians: Implications of the Proceedings of Public Forums Held by a Local NGO." *South East Asia Research* 21, no. 1 (2013): 5-26.

barrier Kent argues these international legal aids are often isolated from their Cambodian counterparts leading to a disconnect between the end goals and day to day operation of the court.²⁶

Eve Monique Zucker, in "Trauma and Its Aftermath: Local Configurations of Reconciliation in Cambodia and the Khmer Rouge Tribunal", takes a careful look at the ideological dimension of the ECCC and if the court can deliver national reconciliation. Zucker concludes that the ideology and goals of the ECCC are not ideal for this. Zucker looks at the role former Khmer Rouge mid-level and low-level official have taken in society after leaving the movement. Zucker looks at the lives of individuals who have gone into serving as lay Buddhist as a service to the community and their karmic future. Zucker Argues that by limiting the courts ability to arrest and detain more individuals who carried out the day to day killings of the Khmer Rouge many people continue to live next to people who killed members of their family, and that future efforts to heal the nation should focus on the people. Noting the goals of the ECCC do not conflict with this idea, but the ECCC cannot achieve reconciliation in a society where murderers live next door. Zucker seems to conclude that the future reconciliation of Cambodia will occur one funeral at a time as the members of the Khmer Rouge and their victims die.²⁷

While these works look at the failure of the ECCC to deliver justice and national reconciliation because of the text or the day to day functions of the court, or perhaps because of the social and cultural reasons they point to the fundamental misstep of the UN and Cambodian government in attempting to present the ECCC as a tool to deliver justice and national reconciliation, as stated in the goals of the 2003 agreement. Forty years after the mass killings this has been presented by all the works looked at here as a missed opportunity because of a flawed system. While these failures can never aid the people of Cambodia going forward, many of whom faced mental and physical problems because of the Khmer Rouge they can be used to never allow a future international tribunal to have put in place such flawed methods to achieve these goals.

4. Conclusion

The ECCC's efforts to bring those people to justice who, in less than four years, killed well over one million people have proved a failure. Poor timing, poor execution, and poor cooperation have resulted in a missed opportunity that will never be possible again. The scholars, lawyer's journalist, and historians presented here have identified two key reasons for this failure; Hun Sen and the 2003 agreement.

While both sides acknowledge the other as part of the problem While advocates of each interpretation acknowledge that there is some truth to the claims made for the other side, both highlight and exemplify their argument and make a compelling case. Hun Sen's political interference ensured that the ECCC's priorities were the governments priorities making sure no arrest, indictment, or verdict was made that didn't fit into the narrative Hun Sen had created. The Khmer Rouge crimes were the result of only a few people and that they would be punished, but not the mid-level and low-level official who carried it out. This allowed the government to achieve a post ECCC Cambodia that presents itself as a post-conflict society without the messy business of having brought those people to justice.

The other side has successfully argued that it is the 2003 agreement that limits the ECCC's ability to bring more then high level officials or periods outside 1975-1979 to justice. While Hun Sen indeed argued for this deal, and this would count for political interference, these scholars have placed the blame in the UN and the hybrid mixed system of the ECCC that does not, in the ECCC's case, apply international standards of justice inside Cambodia. By providing a detailed analysis of these sources we have shown how the two different camps make their arguments and how scholars have proposed solutions to many of the ECCC failures of the Hun Sen government and the UN to find justice in Cambodia.

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²⁶ Kent, Alexandra. "Friction and Security at the Khmer Rouge Tribunal." *Sojourn: Journal of Social Issues in Southeast Asia* 28, no. 2 (2013): 299-328.

²⁷ Zucker, Eve Monique. "Trauma and Its Aftermath: Local Configurations of Reconciliation in Cambodia and the Khmer Rouge Tribunal." *The Journal of Asian Studies* 72, no. 4 (2013): 793-800.

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