

Transitional Justice in Cambodia: Whose goals to achieve?

I. Introduction

Transitional Justice is a systematic arrangement of “trials, purge, and reparations that takes place from one political regime to another.”² In addition, transitional justice has been seen as related to justice in the political transformation period when “law is caught between past and future, between backward-looking and forward-looking, and between retrospective and prospective.”³ The conception of justice in the transformational period has been categorized into three phases: to impose international law order over the losing criminal parties in post-second world war as revealed in the Nuremberg and Tokyo tribunals, to strengthen the rule of law and to restore and reconcile the nations after the cold war in the democratization process, and to characterize the rule of law, especially the humanitarian law that has been broadly enforced⁴ in post-conflict societies. In this last phase, the United Nations (UN) is seen playing a crucial role in dealing with countries’ past atrocities, aimed at “ensuring accountability, serving justice, and achieving reconciliation.”⁵ These aims have been further divided into four commitments: (1) to reveal the historical truth of past abuses, (2) to bring the perpetrators to trial, (3) to compensate the victims, and (4) to reform the institutions so that such abuses cannot happen again.⁶

Approaches to achieve the above aims are both conceptually and practically challenging. The conceptual dilemmas lie behind how much truth we need to reveal, who should be responsible for past abuses, and what kind of justice we shall define and seek to respond to the need for societal reconciliation and strengthening the rule of law. The role of justice in transitional justice is hard to define and depends on the motive to arrange the institutional justice (legal, administrative, and political) which is influenced by different actors who have different political tactics and strategies.⁷ Responding to such dilemmas in such a transformational period, hybrid courts generally adopt similliar characteristics as seen in (1) a compromise deal between the international community and the host country, (2) a struggling effort to control the outcome between actors who are the concerned parties, and (3) a financial means either to run the court or to become an incentive to the host country.⁸

To conform to international order, the Royal Government of Cambodia (RGC) requested the United Nations (UN) to assist in bringing Khmer Rouge to trial in 1997. Yet,

¹ Chandarin is a Cambodian student doing his PhD study at the National University of Public Service. His research interest is democratization and statebuilding in post-conflict society.

² Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (New York: Cambridge University Press, 2004), p. 1.

³ Ruti G. Teitel, *Globalizing Transitional Justice: Contemporary Essays* (New York: Oxford University Press, 2014), p. 96.

⁴ *Ibid.*, pp. 49-67.

⁵ United Nations, “Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice,” *United Nations and The Rule of Law* (March 2010), available: <https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf> (accessed 17 May 2016).

⁶ Juan E. Méndez, “Constitutionalism and Transitional Justice,” in Michel Rosenfeld and Andrés Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), pp. 1171-1172.

⁷ Elster, *op. cit.*, pp. 79-84

⁸ Aaron Fichtelberg, “Hybrid Tribunals: A Comparative Examination”, *Springer Series On International Justice and Human Rights* (2015), available: <http://dx.doi.org/10.1007/978-1-4614-6639-0>. (accessed 17 May 2016).

after a long negotiation, the UN declared its withdrawal from the negotiations in 2002. However, in 2003, with a compromised agreement, an Extraordinary Chamber in the Courts of Cambodia (ECCC) was established with the hope to “bring justice to Cambodians, strengthen the rule of law in the country and promote national reconciliation.”⁹ Investigating the promising opportunities and challenges of the ECCC, critical questions were raised: What are the purposes of the Cambodian Tribunal shared among transitional agents? If the trial is aimed at restoring the society, to what extent is its role in promoting reconciliation? Or, is its role to prevent future crime and strengthen the rule of law? And if the latter, how success is the tribunal transform Cambodian judiciary?

To discuss these questions, this paper reviews a number of literatures and uses semi-structured interviews and focus group discussions done in the first round from November 2015 to January 2016 with 20 key informants and the second round from February to April 2016 with 10 informants followed by two focused group discussion, whose age range is from twenty to forty years old with the average of twenty-eight, identified on condition that they are Cambodians and young academicians who may have broader understanding of the social context. Informants, who are working directly with the ECCC or are involved with non-governmental organizations working directly or indirectly with ECCC, are excluded from this study to avoid any bias discussion. It is noted that the political climate in Cambodia after the 2013 election is still in a critical issue as a number of opposition party members and right activists are being arrested. Only few participants allow recording their voices in the interviews and majority of them ask to remain anonymous. A type of snowball sampling was used to identify key informants, who then decide their places and time. The first few individuals were approached through personal and professional networks; the individuals helped identify other potential participants. Due to the fact that political situation is quite intimidating, the selection of individuals for this study is particularly based on trust that both of the interviewees and interviewer feel safe to discuss any sensitive ideas.¹⁰ The data was transcribed and analysed to find significant concepts in relation to justice and reconciliation. The autoethnographical approach is extensively used to evaluate and discuss the finding; thus, this study is not claimed to be representative but just an indicative that invites for further discussion and debate. The author is a Cambodian, born to a Khmer Rouge survivor family and spends the entire of life in the country. This paper starts with a brief background introduction to and challenges of the ECCC and continues to identify the transitional agents who may play important roles to determine the goals of the ECCC. Finally, this follows with an assessment on the extent to which the ECCC would contribute to reconciliation and strengthen the rule of law in Cambodia.

II. The ECCC: Background and Challenges

The Pol Pot regime (Khmer Rouge) is notoriously known for atrocities in Cambodia where almost two million Cambodians were killed by forced eviction, hard labour, torture, disease and execution during its 1975-1979 genocide. Its rule ends in 1979 when the Vietnamese armed forces ousted the Khmer Rouge government and pushed its fighters west to the Cambodian-Thai border where it continued to receive foods and weapons from the United

⁹ ECCC, “Extraordinary Chambers in the Courts of Cambodia: Eccc at a Glance”, (April 2014), available: <http://www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20-%20April%202014_FINAL.pdf>. (accessed 17 May 2016).

¹⁰ See for example methodology presented in Knox, C, and R. Monaghan, “Fear of reprisal: Researching intra-communal violence in Northern Ireland and South Africa.” In *Researching violence: Essays on methodology and measurement*, ed. R. M. Lee and E. A. Stanko. (2003), pp. 1-11. New York: Routledge.

States and China.¹¹ The Paris Peace Agreement signed in 1991 by the four political and warring factions - the Khmer Rouge (Democratic Kampuchea), the Khmer People's National Liberation Front (KPNLF), the National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia with its French acronym FUNCINPEC, and the Vietnamese installed State of Cambodia led by Hun Sen - was to end the civil war and to acknowledge that "Cambodia's tragic recent past requires special measures to assure protection of human rights, and the non-return to the policies and practices of the past."¹² Conforming to this agreement, the establishment of the ECCC is an obligation of all signatory parties to provide some kind of justice to Cambodia in this transitional period.

Also formally known as Khmer Rouge Tribunal and the Cambodian Tribunal, the ECCC is the product of time-consuming negotiations between the Royal Government of Cambodia (RGC) and the United Nations (UN). The ECCC is the third generation of the international ad hoc tribunal -- the first being the International Criminal Tribunals for Rwanda (ICTR) and the International Criminal Tribunal for former Yugoslavia (ICTY), and the second, the special court for Sierra Leone (SCSL).¹³ While the ICTR and ICTY have been criticized for having "little or no impact to the local population,"¹⁴ hybrid courts that consist of both national and international involvement have been observed as a forwarding trend for both individual state and international community.¹⁵ Several advantages of a hybrid tribunal have been noticed over the "purely international tribunal" as it may take less time to indict and bring the suspect to trial; it creates a "better sense of reconciliation"; and it generates chances of getting better educational and training benefit to improve the judicial system;¹⁶ however, the lack of "legal culture" and "necessary institutions" as well as the connection between the former Khmer Rouge and the Cambodian government may even be more threatening to the promising results in the hybrid tribunal in Cambodia.¹⁷

The ECCC is not really a promising experience to bring justice, promote peace, reconcile the nation, or reform the judicial system.¹⁸ Since initiated in 1997 and fully operational in 2007, the ECCC faced a number of challenges with its design and implementation process. The challenges in the designing phase was the disagreement between the UN and the RGC over how the court was formed and operated, as each tried to deal with the Khmer Rouge according to its own agenda. The RGC rejected the UN's proposals in neither creating a tribunal under Cambodian court nor outside Cambodia with a majority of foreign personnel under the argument that the UN should provide only legal expertise and the trial proceeds with Cambodia's judicial structure.¹⁹ Local and international politics contributed to this challenge. At the beginning, Cambodian co-prime ministers, First Premier Prince Norodom Ranariddh and Second Premier Hun Sen, requested in their letter a UN's assistance to bring Khmer Rouge leaders to trial. As the letter dated 21 June 1997 implied,

¹¹ John Pilger, "Friends of Pol Pot," *Global Policy Forum*, (May 1998), available: <<https://www.globalpolicy.org/component/content/article/190/39190.html>> (accessed 14 February 2016)

¹² Terence Duffy, "UNTAC's Mission in Cambodia: Prospects for Democracy and Human Rights," *Asian Affairs*, Vol. 2, No. 4 (1994), p. 226.

¹³ Sarah Williams, "The Cambodian Extraordinary Chambers: A Dangerous Precedent for International Justice?," *The International and Comparative Law Quarterly*, Vol. 53, No. 1 (2004), p. 228.

¹⁴ Ellen Emilie Stensrud, "New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia", *Journal of Peace Research*, Vol. 46, No. 1 (2009), p. 5.

¹⁵ Lilian A. Barria and Steven D. Roper, "Providing Justice and Reconciliation: The Criminal Tribunals for Sierra Leone and Cambodia", *Human Rights Review*, Vol. 7, No. 1 (2005), p. 7.

¹⁶ *Ibid.*, pp. 23-24.

¹⁷ *Ibid.*, p. 24.

¹⁸ Stensrud, *op. cit.*, pp. 5-15.

¹⁹ 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," *Virginia Law Review*, Vol. 90, No. 3 (2004), p. 910.

Cambodia would like the same assistance as in the ICTR and ICTY.²⁰ However, after the successful coup led by the second prime minister that ousted his first prime minister from post in July 1997, the intention of the Hun Sen's government on UN support was not as the same as before. In addition, the refusal of China to submit to the UN Security Council for discussion, and the United States efforts to facilitate an agreement between the UN and the RGC contributed to a political involvement at the international level.²¹ It is doubtful whether the real intention of UN is on Human Rights and International Law while Hun Sen on sovereignty and control as both have claimed. At the end, the UN and RGC reached an agreement in 2003, highlighting the important aspect of the tribunal as holding accountable those most responsible for crimes committed in the period from 17 April 1975 to 6 January 1979. The UN's role was to assist in the establishment and the operation of the ECCC inside Cambodia under the Cambodian court structures with a majority of Cambodian judges at the three tiers of Trial, Appeal and Supreme courts under "supermajority" rule, meaning that any decision must include at least one international judge. It was argued then that such an agreement "represents less victory for the victims or for advocates of transitional justice" as there is a lack of willingness from both of the international community and the Cambodian government to uphold justice.²² Such a compromise agreement envisaged that the tribunal is not able to bring real justice to Cambodia due to the lack of qualified judicial personnel, of cultural perception toward the rule of law, and government interference.²³

The challenges in the designing phase contributed to problems in the implementation process. The hybrid structure in law, funding, and personnel were the "most difficult aspects in operation."²⁴ As noted, judges found many challenges in referring to international criminal law, which was only a supplement to where Cambodian civil and common law was insufficient to guide.²⁵ In addition, the split between national and international funding component caused trouble in processing the trials. According to the agreement, the international community, on voluntarily basis, funds the ECCC; the UN funds international personnel; and the RGC funds the Cambodian counterpart. So far, the international side did not seem to have notable concern over the funding. In contrast, the national side always faced funding crisis due to the Cambodian government's failure to secure the funding and the donors' reluctance to support because of the political interference and corruption. Many donors called for the restructuring of the ECCC, yet nothing had been improved until now. Friction had also been observed between international and national judges over the shared "attitudes, values, and identities" in processing the cases.²⁶ Probably from this friction, a number of international judges resigned: Marcel Lemonde in 2010, Siegfried Blunk in 2011, Laurent Kasper-Anserment in 2012, and Mark Harmon in 2015.

The ECCC has investigated four cases so far. Case 001 deals with Kaing Guek Eav

²⁰ ECCC, "Identical Letters Dated 23 June 1997 from the Secretary-General Addressed to the President of the General Assembly and to the President of the Security Council", (June 1997), available: <http://www.eccc.gov.kh/sites/default/files/June_21_1997_letters_from_PMs-2.pdf> (accessed 16 May 2016).

²¹ Thomas Hammarberg, "How the Khmer Rouge Tribunal Was Agreed: Discussions between the Cambodian Government and the UN," *Documentation Center of Cambodia* (2001), available: <http://www.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm> (accessed 15 May 2016).

²² Kirsten Ainley, "Transitional Justice in Cambodia: The Coincidence of Power and Principle," *LSE Research Online* (May 2012), available: <<http://eprints.lse.ac.uk/43621/>> (accessed 14 May 2016)

²³ See 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 ." *Virginia Law Review*, (2004), pp. 893-964. and Michelle Caswell, "Khmer Rouge archives: accountability, truth, and memory in Cambodia." *Springer Science+Business Media*, (2010), pp. 25-44.

²⁴ Ainley, *op. cit.* p. 9.

²⁵ *Ibid.*, p. 5.

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

(alias Duch), former chairman of the detention centre (S-21), found guilty for crime against humanity and grave breaches of the 1949 Geneva Convention. He is currently serving a life sentence in prison. It was reported that the trial is “conducted according international fair trial standards and that there had been no evidence of political interference”.²⁷ Case 002 deals with four former top Khmer Rouge leaders – Head of State Khieu Samphan; Chairman of the Democratic Kampuchea National Assembly and Deputy Secretary of the Communist Party of Kampuchea Nuon Chea; Foreign Minister Ieng Sary and his wife, Minister of Social Action Ieng Thirith. The charges against the latter two were dropped following Ieng Sary’s death and Ieng Thirith’s dementia that made her unfit to stand trial. Case 002 is further divided into mini trials – Case 002/01 and Case 002/02,²⁸ “ostensibly meant to create efficiency but...occasioned a great deal of procedural uncertainty and triggered many new trial management challenges.”²⁹ Khieu Samphan and Nuon Chea were found guilty on crime against humanity, grave breaches of the 1949 Geneva Convention, and genocide against Muslim Chams and the Vietnamese; Case 002/02 focuses on genocide against the Chams and Vietnamese, forced marriages, rapes and internal purges.³⁰ None, however, accepts the guilty verdict; all deny any direct involvement in the mass killing. Noun Chea, through his lawyer, has always urged the court to bring some current senior government officers, including Prime Minister Hun Sen, to clarify their roles. In Case 003, Meas Muth, a former Khmer Rouge naval commander, was accused of crime against humanity, genocide, grave breaches of the 1949 Geneva Convention, and violations of the 1956 Cambodian Penal Code. In Case 004, Yim Tith was charged on similar crimes. Other suspects are currently being investigated.

The two latter cases raised much concerns over the commitment of the Cambodian side to bringing all perpetrators to trial with the authority’s reluctance to arrest Meas Muth who later voluntarily appeared in the court. Prime Minister Hun Sen often made threat that the country would plunge into civil war if further investigations take place to include more Khmer Rouge besides the top 5 leaders in Case 001 and 002. Hun Sen also wished to see the international staff go away and the local counterparts closed the case. The *Cambodia Daily* reported in 2009:³¹

“I will allow this court to fail, but I will not allow Cambodia to have another war. This is an absolute stand. Please prosecute only those people,” ... “...I wish for the [ECCC] to run out of money... If funds run out, international prosecutors and judges will walk away, allowing their Cambodian counterparts to speed up the cases”, said Hun Sen.

Hun Sen always raised the issues of Cambodian peace and stability in order to discourage the court to go further with any investigation beyond Case 001 and 002. In contrast, as Cases 003 and 004 are undergoing, it appears unlikely that a civil war will break out. Most key informants believe that war will not break out unless, ironically, Hun Sen would wage it against his ruling elites, which is unlikely to happen. Although they acknowledge that the trial is necessary, they express their lack of interest in the ECCC due to the lengthy processes and the political interference from both local and international actors. Some said at first they were very much interested in the trial, but as time passed by, and even though few suspects had been found guilty, the public still do not know exactly who were

²⁷ Alex Bates, *Transitional Justice in Cambodia: Analytical Report* (Phnom Penh: Atlas Project, 2010), p. 36.

²⁸ For more information see ECCC Case 002, available: <<http://www.eccc.gov.kh/en/case/topic/2>> (accessed 27 December 2015)

²⁹ David Cohen et al., “A Well-Reasoned Opinion? Critical Analysis of the First Case Against the Alleged Senior Leaders of the Khmer Rouge (Case 002/01),” *East-West Centre* (2015), pp. 3-4, available: <<http://www.eastwestcenter.org/system/tdf/private/cohen-wellreasoned2015.pdf?file=1&type=node&id=35372>> (accessed 13 May 2016)

³⁰ For more detail see ECCC Case 002/02, available: <<http://www.eccc.gov.kh/en/case/topic/1299>> (accessed 27 December 2015)

³¹ Yun Samean, No More KR Prosecutions, Hun Sen Says, *Cambodia Daily*, March 29, 2009.

behind the genocide and why they killed people.

Did they kill because of a belief in some ideology or because of personal greed for power? Most of participants in this report want answers to these questions. This also confirms a conclusion that the needs of Cambodians to know what had happened, why it happened, and who are responsible have not yet fulfilled.³²

Owing to the mentioned challenges, it is still doubtful that ECCC can fulfil its expectation to bring justice to Cambodians, strengthen the rule of law, and promote national reconciliation as clearly stated when the ECCC was established. Thus, the questions of explicit versus implicit goals have raised much doubt among Cambodians. This article agrees that those “seeking to judge the ECCC should avoid accepting its limited scope and judging its success and failure within that scope, as to do so is to miss the bigger picture, and effectively to offer impunity to many who do not deserve it.”³³ In addition, this would argue that the success or failure of the ECCC is largely dependent on the implicit goals rather than the explicit ones in which the Cambodian government and the international community shared. Each of the actors involved in this transitional justice may define success or failure according to their own agenda while ignore the wish of the whole Cambodian people, especially the victims. To discuss the purposes of the ECCC, the paper further investigates the agents and their motivation during the genocide period of 1975-1979.

III. Agents of Conflicts

The agents of transitional justice have been classified into eight categories as “wrongdoers, victims, beneficiaries, helpers, resisters, neutrals, promoters, and wreckers; these agents may play overlapping roles.”³⁴ Wrongdoers may involve those who “issue the orders, execute the orders, intermediate links or facilitate the wrongdoings.”³⁵ Of course, in the Khmer Rouge regime – the wrongdoers are to be held accountable for what they did, but not all agents involved are examining in this article.

Some argue that the Khmer Rouge would not have come to power if the Americans had not bombed Cambodia during the Vietnam War and strategically supported the Khmer Republic – the Lon Nol regime that ousted the Sangkum Reastr Niyum of former Chief of State, Prince Sihanouk³⁶ in 1970. However, this paper posits that without the Indochinese Communist Party, the Khmer Rouge genocide would not have occurred, and this would carry the argument to post-World War II colonization and imperialism. The blame could be traced back to the fall of the Angkor Empire and even to the poor management and leadership at that time. I do not find it practical to blame any regime on the atrocity, but we must acknowledge the fact, learn from the mistake and correct it, and we must move on.

Historically, inspired and endowed by the Indochinese Communist Party in Vietnam that aimed at liberating Vietnam, Cambodia, and Laos from French colonization, a communist party in Cambodia known as People’s Revolutionary Party of Kampuchea (PRPK) or Kampuchean People’s Revolutionary Party (KPRP) was created on 5 August 1951.³⁷ Pol Pot changed the name to Communist Party of Kampuchea (CPK) in September 1966 at its secret

³² Wendy Lambourne, “Justice After Genocide: Impunity and the Extraordinary Chambers in the Courts of Cambodia,” *Genocide Studies and Prevention: An International Journal*, Vol. 8, No. 2 (2014), pp. 29-43.

³³ Ainley, *op. cit.*, pp. 25-26.

³⁴ Elster, *o.p cit.*, pp. 99-116.

³⁵ *Ibid.*, p. 119.

³⁶ L. Shelton Woods, “The Myth of Cambodia’s Recovery,” *Contemporary Southeast Asia*, Vol. 18, No. 4 (1997), p. 418.

³⁷ Philip Short, *Pol Pot: Anatomy of a Nightmare* (New York: Henry Holt and Company, LLC, 2004), under “ch. 2,” ebooks.

Congress for what he described as a way to “lessen Vietnamese influence and strengthen relations with China”.³⁸ In retrospect, the KPRP remained hidden in Cambodian politics but the Communists used Pol Pot as a link to form a new party (People’s Party) which did not get significant votes in the 1955 general election while its leader Sieu Heng defected to Prince Sihanouk’s government which later arrested and killed ninety per cent of KPRP members.³⁹ It should also be noted that the geopolitical competition during the cold war period contributed to political instability in Cambodia. Sihanouk always used his political power to manipulate and destroy opponent groups – the left and the right -- by playing the “games of neutral state”⁴⁰ at the international stage. The United States never trusted and usually considered Sihanouk as “pro-communist.”⁴¹ Sihanouk did not play his game very well. Frustrated with his poor management and close friendship with the Communist Vietnam, General Lon Nol and Prince Sirik Matak bloodlessly overthrew him from his post as Chief of State in 1970 while he was on tour abroad. After consulting with Chinese Premier Zhou Enlai and Vietnamese Premier Pham Van Dong, Sihanouk decided to lead a Communist army. He called on all Cambodians to join him and his new government to fight against the Lon Nol government.⁴² Sihanouk’s calls attracted many Cambodians in the rural area, including the current Prime Minister Hun Sen. The Cambodian Communists took the opportunity to recruit the Prince for more popular support in the country. The corrupted Lon Nol government was in power only for four years “with the American military and economic assistance and heavy bombing”⁴³ and the communists known as Democratic Kampuchea (DK)⁴⁴ took power on 17 April 1975. Thus started the genocide era.

Prince Sihanouk was labelled the Chief of State of Democratic Kampuchea until 1976 when he was forced into retirement after his closest friend Chinese Prime Minister Zhou Enlai died.⁴⁵ The DK enjoyed diplomatic relations with China, North Korea, Vietnam, Laos, Cuba, Romania, Yugoslavia, Albania, and Egypt, all of which had embassies in Phnom Penh, but their diplomats, except the Chinese, were kept restricted in their embassies.⁴⁶ Territorial dispute with Vietnam resulted in a severe division between group patronized by Vietnam and group that favoured China. Pol Pot tortured and killed many of his comrades, accused of having “Cambodian bodies but Vietnamese mind.”⁴⁷ To balance China’s power, Vietnam signed a friendship agreement with the Soviet Union and in 1978 helped set up a Kampuchean Front for National Salvation, which included Hun Sen and his colleagues, to topple the DK.⁴⁸ Vietnam overthrew the DK on 7 January 1979. Some view the date as a victory day; others see it as the day of Vietnamese invasion to Cambodia. The 7 January remains controversial issue in Cambodian politics until today.

Almost two millions people were killed in 1975-1979. It is hard for Cambodians to believe that such mass killings done by the Pol Pot regime hardly got so little or no attention from the world community, especially the superpowers with powerful intelligence agencies,

³⁸ Khamboly Dy, *A History of Democratic Kampuchea 1975 - 1979* (Phnom Penh: Documentation Center of Cambodia, 2007), p. 9.

³⁹ *Ibid.*, p. 8.

⁴⁰ I describe it as a game because while declaring Cambodia a neutral state, Sihanouk sowed confusion as his attempts to move closer to China had made it easy for North Vietnam to use Cambodian soil to attack South Vietnam during the Vietnam War, yet he still received some American aids.

⁴¹ David Chandler, *A History of Cambodia*, 4th ed. (Chiang Mai: Silksworm Books, 2008), p. 234.

⁴² *Ibid.*, p. 251.

⁴³ *Ibid.*, p. 252.

⁴⁴ DK is the name of the regime led by the communist party KPRP which later known as CPK.

⁴⁵ Chandler, *op. cit.*, p. 261.

⁴⁶ Dy, *op. cit.*, p. 56.

⁴⁷ See Ben Kiernan, “Introduction: Conflict in Cambodia, 1945-2002,” *Critical Asian Studies*, Vol. 34, No. 4 (2002), pp. 483-495, DOI:10.1080/1467271022000035893

⁴⁸ Chandler, *op. cit.*, p. 273.

such as the US, Great Britain, and China. Probably the two million lives lost were not strategically or geopolitically important. Pol Pot, although removed from the post, still enjoyed the support from the US, China, and Thailand at Cambodia's north-western border where the Khmer Rouge maintained guerrilla bases to attack the new Vietnam-backed Phnom Penh government; Vietnam received much support from the Soviet Union. The UN continued to recognize the genocide DK regime with its seat at the UN General Assembly until the Paris Peace deal. Some DK guerrilla units continued to slaughter and kidnap Cambodian villagers along the border until the DK was dissolved by defections of some senior DK leaders to the Phnom Penh government in 1998.

It is not practical for one to explicitly identify the wrongdoers, victims, beneficiaries, helpers, resisters, neutrals, promoters, and wreckers and their alternative roles between these in this complicated political environment. Yet, one thing is sure: Cambodians are the real victims -- victims of genocide and victims of great powers' ideological rivalry.

IV. Justice and Reconciliation

Justice in transitional society is struggling from “the most retributive ‘prosecutions and trials’ to a more restorative ‘truth commission and disqualification from public office’ to no justice at all ‘impunity’, which are influenced by four transitional characters”: (1) a total victory from one party to another by armed force, (2) a lost in an election of an authoritarian government, (3) an agreement between the two competing sides, and (4) a change from “a long-standing communist regime.”⁴⁹ The case in Cambodia does not fall into any clear modes above. The rhetoric of justice, peace, and reconciliation has been used to deal with Cambodian past atrocities while the real practices is contrary. To illustrate this, we shall look at how each successor claims justice and reconciliation when dealing with Khmer Rouge.

In August 1979, with the help of Vietnam, the People's Republic of Kampuchea (PRK), whose members were also former Khmer Rouge, held a revolutionary tribunal against Pol Pot and Ieng Sary. After five days of deliberation, Pol Pot and Ieng Sary were both found guilty of genocide. They were sentenced to death in absentia. The West described the trial as a show trial conducted by “Vietnam's puppet government.”⁵⁰ The two men were politically used to distinguish the new PRK regime from the old DK regime, and especially to disqualify the DK from its seat in the UN, which recognized it as the only legitimate government of Cambodia.⁵¹ The new PRK government uses 20 May to commemorate the “Day of Anger” against the pain endured by the people while others see the commemoration to serve a “political and propaganda purpose.”⁵² As the commemoration was not popular among the local people, the Day of Anger was replaced by a less aggressive ceremony sponsored by Cambodian People's Party (CPP)⁵³ to commemorate those who died under the Pol Pot regime until today. Yet, the skulls and skeletons piling at Tuol Sleng and Choeng Ek museums have been described as a

⁴⁹ Alex Boraine, “Transitional Justice,” in Simon Chesterman, Michael Ignatieff, and Ramesh Chandra Thakur (eds.), *Making States Work: State Failure and the Crisis of Governance* (Tokyo: United Nations University Press, 2005), p. 322.

⁵⁰ Ainley, *op. cit.*, p. 3.

⁵¹ Stéphanie Benzaquen, “Witnessing and Re-Enacting in Cambodia: Reflection On Shifting Testimonies,” *AI and SOCIETY*, Vol. 27, No. 1 (2012), p. 44.

⁵² Anne Yvonne Guillou, “The Living Archaeology of a Painful Heritage: The First and Second Life of the Khmer Rouge Mass Graves,” in Michael S. Falser and Monica Juneja (eds.), *Archaeologizing Heritage?* (Berlin: Springer, 2013), pp. 264-67.

⁵³ In order to compete in the elections under UN supervision in 1993, the PKR (also known as the State of Cambodia) changed its name to Cambodian People's Party and this party lost in the elections but managed to hold power until today. CPP originated from KPRP in 1951, created by the Indochinese Communist Party

political exploitation to promote intense dislike for the Pol Pot regime.⁵⁴ Although justice can be defined in many ways, it could be argued here that the justice sought by the PRK at that time was more about political revenge provoking a culture of hatred than meant to contribute to any meaningful justice and national reconciliation.

The Paris Peace Agreement in 1991 was partly not promising. The Khmer Rouge refused to obey the deal and decided not to participate in the National Election monitored by United Nations Transitional Authority in Cambodia (UNTAC); some of the Khmer Rouge cadres continued to cause trouble along Khmer-Thai border by killing, kidnaping, and torturing innocent villagers. The motivation behind this was mixed. Some Cambodians believed that the Khmer Rouge had no hope of winning the election in 1993. Others believed that this was a political tactic employed by the CPP under Hun Sen's leadership to alienate the Khmer Rouge for not observing the ceasefire measures spelled out in the Paris Peace Agreement. The latter belief was influenced by the bloody personal assault on Khieu Samphan, a Khmer Rouge titular leader and chief negotiator during the peace plan, in his Phnom Penh residence in November 1991 when he was invited by Hun Sen to visit Phnom Penh. The idea of seeking UN support to set up a tribunal in 1997 by the two Cambodian co-prime ministers was most likely a political manoeuvre by both rival parties, the CPP and the FUNCINPEC, to recruit the remaining Khmer Rouge forces (estimated around 5,000-10,000) to their respective arm force. Both prime ministers, in the name of peace and national reconciliation, requested the King to grant amnesty to Ieng Sary in 1996 to protect him from any accusation in earlier time, but the real purpose, as claimed by Hun Sen, was to encourage more defections from the Khmer Rouge.⁵⁵ It is also likely that the motive behind pushing for the trial was to "divert the attention from the coup" in July 1997 by Hun Sen (CPP).⁵⁶ Bringing the KR to trial and accusing one another of siding with the KR was a political sarcasm employed during the election campaign in 1998 by both the CPP and the FUNCINPEC parties to attract Cambodian voters.

Great powers were also actively involved in promoting and resisting the idea of setting up a tribunal under international supervision outside Cambodia. The US had approached a number of countries such as Canada, Denmark, Sweden, and Israel to host a tribunal to convict Pol Pot, but this did not materialize. Two weeks after Pol Pot died in 1998, the US delegation at the UN Security Council issued a draft resolution to establish an ad hoc tribunal at the Netherlands, but China strongly opposed.⁵⁷ The US was reluctant to push further. It decided to lend its full support to establish a supervised international tribunal. This has been explained that (1) due to its involvement in supporting the Lon Nol regime and its bombings of Cambodia in the 1960s, such "trials could refocus international attention on US Cold War policies in Indochina, and reopen the political wounds of the Vietnamese War era, adding up to a serious deterrence to many US leaders" and (2) the US had also to balance its "diplomatic cost" especially with China in war against terrorism.⁵⁸ China consistently and explicitly opposed an international tribunal by arguing that it involved Khmer sovereignty, so the Khmers themselves must decide. Yet, it was China that had concerns over the following: (1) its support for the KR in the genocide period; (2) humiliation of Maoist and Communist ideology; (3) the human rights agenda would be used to camouflage Western imperialism in

⁵⁴ Duffy, *op. cit.*, p. 225.

⁵⁵ Hammarberg, *op. cit.*

⁵⁶ Luftglass, *op. cit.* p. 907.

⁵⁷ Hammarberg, *op. cit.*

⁵⁸ John D. Ciorciari, "Great-Power Posturing and the Khmer Rouge Tribunal", *The Documentation Center of Cambodia*, available: <http://www.d.dccam.org/Tribunal/Analysis/Great_Power_Posting.htm> (accessed 17 Mary 2016).

Southeast Asia; and (4) such an international trial under the West would undermine China's entitled leadership in the region.⁵⁹

The actors highlighted so far have different agendas in initiating the ECCC while Cambodian as the victims have never been consulted or asked for comments. It is agreed that there are "unavoidable trade-offs" in seeking peace and justice in the transitional period, but the "transitional justice should be democratized" as argued by Eamon Aloyo.⁶⁰

Informants in this study relate *justice* to the equality before law and the legal code that has already been prescribed, but when asking about the overall conception that may be found in general, they believe people in general are more concerned with their own job and food than justice that is always associated with money and power. This also supports to the Berkeley report that Cambodians do not prioritize *justice*.⁶¹ Most informants believe the ECCC is a waste of time and money, albeit they acknowledge its significant role in making sure that justice is not forgotten, and those perpetrators should be living in nightmares. However, they express little hope that the ECCC would provide answer to the question of who the real perpetrators of genocide were and why they killed people. This answer is considered part of justice and reconciliation they are seeking. They express little trust in the Cambodian judiciary that is known for notorious corruption and influences by powerful people. They insist that if the ECCC aims at promoting justice and national reconciliation, a truth committee should be set up. Cambodians shall be encouraged to forgive rather than to forget or to be afraid to remember. Most informants shared the view that Cambodians seem to forget the past atrocities in the KR regime. To them Cambodian elders may have good reasons to forget the KR era as they do not want to live with the past and they want the KR perpetrators left to their Karma to face their afterlife. Informants spoke of Lord Buddha's teaching of forgiveness and compassion; however, they may have misinterpreted the concept of forgiveness and reconciliation. According to Moha Ghosannanda, a highly respected Cambodian Buddhist monk, "reconciliation does not mean that we surrender our rights and conditions but we use love to address it."⁶² Since truth is not known, and acknowledgement from all related wrongdoers is not yet made, it is hard to conclude that the victims really forgive with their kind and loving hearts, and thus, the justice and reconciliation have not been fulfilled.

V. *The Rule of Law*

There is an assumption that transitional justice will help strengthen the rule of law and improve the judiciary system. However, Cambodia is a weak state indicated as high warning in the fragile state index for more than a decade. It does not have an ultimate ability to enforce its own laws. There are good laws and good projects funded by development partners to promote effective and efficient implementation; however, there is no political will to

⁵⁹ *Ibid.*

⁶⁰ Eamon Aloyo, "Democratizing Transitional Justice: Transitional Trade-Offs and Constituting the Demos," *Global Society*, Vol. 27, No. 4 (2013), pp. 438-53.

⁶¹ Pham, P. et al., "So We Will Never Forget", *A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (2009), available: <http://www.peacebuildingdata.org/sites/m/pdf/Cambodia_2009_So_We_Will_Never_Forget.pdf> (accessed 17 May 2016).

⁶² Cited in Chea Vannath, "Reconciliation in Cambodia: Politics, Culture and Religion", *International IDEA* (2003), available: <http://www.idea.int/publications/reconciliation/upload/reconciliation_chap03cs-cambodia.pdf> (accessed 20 May 2016).

implement; this shall remain an obstacle to ensuring peace and democracy.⁶³ The patronage system rooted deeply in political and social context has been identified as a very big challenge to implement the law. The National Democratic Institute for International Affairs (NDI) identified several difficulties that impede the strengthening of the rule of law in Cambodia: (1) the lack of independence of the judiciary; (2) a lack of political will to establish an independent judiciary; (3) the political interference in judicial affairs; (4) absence of adequate laws and sub decrees; (5) weak and discriminatory enforcement of laws; (6) prevalence of corruption in the judiciary; (7) scarcity of human and financial resources available to the judiciary; (8) low level of citizens' knowledge about laws and regulations due to inadequate legal education; and (9) the reconstitution of the Supreme Council of Magistracy (SCM) that deals with recruitment, promotion, transfer and disciplinary measures of judges and prosecutors.⁶⁴

In an attempt to evaluate the legal and judicial reform initiated by the government in 2003, the Cambodian League for the Promotion and Defence of Human Rights (LICADHO) in 2006 argues that Cambodia has failed to promote the rule of law it has aimed.⁶⁵ The identified key challenge is, the Supreme Council of Magistracy and the Constitutional Council that guarantee the independence of the Judiciary and the capability of laws are not independent and non-partisan as the executive body exerts influences on them. In addition, Bertelsmann Stiftung's Transformation Index (BTI) in 2014 continues to indicate that Cambodia does not have genuine checks and balances between the three branches – executive, legislative, and the judicial body as stipulated in the Constitution.⁶⁶ The ruling Cambodian People's Party (CPP) has overruled all bodies.

Currently, the high-ranking persons in the Cambodian Supreme Court are CPP committee members. The World Justice Project ranked Cambodia 98th out of 102 countries in term of its devotion to the rule of law in the 2015 Rule of Law Index report with an overall score 0.36 (Greatest openness score 1).⁶⁷ Key indicators such as checking on government power, corruption and absence of fundamental rights, the openness of government and law enforcement, suggest that Cambodia is the worst country in comparison to other nations in the East Asia and Pacific region. Freedom House consistently ranks Cambodia 5.5 out of 7 in the freedom rating index for the last decade (2005-2015), with 1 representing the most free, and 7 the least free.⁶⁸ Freedom of expression is also a dire concern in recent years after the 2013 election.⁶⁹ Government continues to use the law to silence rights activists and members from opposition parties. Corruption remains a big challenge to the implementation of the law. Transparency International (TI) scored Cambodia 21 points out of 100 in its Corruption Perception Index in 2015.⁷⁰ This suggests that Cambodia fails to strengthen the rule of law

⁶³ Vétesy László "The Public Participation in the Drafting of Legislation in Hungary", *International Public Administration Review* 2016/4.

⁶⁴ NDI, "Forums On Strengthening the Rule of Law in Cambodia", *National Democratic Institute* (2004), available: < https://www.ndi.org/files/1846_kh_ruleoflaw_060105.pdf> (accessed 20 May 2016).

⁶⁵ LICADHO, "Legal and Judicial Reform in Cambodia", *A LICADHO Briefing Paper* (2006), available: < <https://www.licadho-cambodia.org/reports/files/79LICADHOLegalJudicialReformPaper06.pdf>> (accessed 20 May 2016).

⁶⁶ BTI, "Cambodia Country Report 2014", *Open Development Cambodia* (2015), available: <<https://data.opendevlopmentmekong.net/dataset/bti-2014-cambodia-country-report>> (accessed 20 May 2016).

⁶⁷ WJP, "Open Government Index 2015", *World Justice Project* (2015), available: <<http://data.worldjusticeproject.org/opengov/#/groups/KHM>> (accessed 20 May 2016).

⁶⁸ Freedom House, "Cambodia 2015", *Freedom in the World* (2015), available: <<https://freedomhouse.org/report/freedom-world/2015/cambodia>> (accessed 20 May 2016)

⁶⁹ More report cases on violations to the freedom of speech, see reports by Cambodian Center for Human Rights (2013), available: <http://www.ifex.org/cambodia/2013/09/20/cambodia_cchr_repression_of_expression.pdf> (accessed 20 May 2016)

⁷⁰ TI, "Corruption Perception Index", *Transparency International* (2015), available:

and ensure the equality of the law among its citizens. Impunity is always present. The judiciary, as the report says, is undermined by the corruption that the anti-corruption unit fails to do the job effectively.

This clearly indicates that the ECCC does not really have much significant contribution to the strengthening of the rule of law in Cambodia. The only two possible influences by the tribunal are the “vigorous investigation of cases” and the “autonomy of judges in dictating the content of court arrest orders and sentencing rulings.”⁷¹ Although further scrutinizing is needed on whether transitional justice policies affect the rule of law in a country like Cambodia since the introduction of the ECCC, little confidence has been found in this study to secure the claim. The majority of the informants suggest that powerful politicians have consistently violated the rule of law in Cambodia. Some laws are formulated with a political motive to suppress the civil society and the opposition party. The laws on defamation, political party, and non-governmental organization have been and being used as a tool to bring those identified as opposition party or civil society groups to prison.

VI. Conclusion

This study has explored the challenges of ECCC at both local and international levels and assess if the stated goals response to the actual outcomes. It is acknowledged that the role of the court like ECCC is not going to deal with the complicated political and historical issues in Cambodia, but the revelation may suggest we not to expect too much from the tribunal. Justice and reconciliation defined is just a rhetoric used by the transitional agents involved although they may have already defined these implicitly on behalf of the Cambodians who do not have any rights to influence over any decision made. If transitional justice is meant to democratization, the mechanism to deal through trials should also be democratized.

Although there is “inconclusive accounts” over whether or not transitional justice mechanisms can bring justice or reconciliation,⁷² and that the definition of this are subjectively defined from one society to another, Cambodians in general should be given opportunity to be heard of what they want. Participants in this particular study wish just to see more focus be put to something else which is more meaningful to reveal the truth and build relationship between the former perpetrators and the society in general rather than to invest too much hope on the tribunal. Such historical truth and relation can be built through education, but it is questionable whether school in Cambodia is ready to do that as the Khmer Rouge lessons in the school curriculum are also politicized.⁷³

More study is needed to substantiate that the tribunal like ECCC is related to the building and strengthening the rule of law. As identified, rule of law and judicial system in Cambodia remain poor and are manipulated by certain political group. This questions to the attempt to create future courts whether or not the ECCC can be a model.

<<http://www.transparency.org/cpi2015>> (accessed 20 May 2016).

⁷¹ Stephen McCarthy and Kheang Un, “The Evolution of Rule of Law in Cambodia,” *Democratization* (2015), available: <<http://dx.doi.org/10.1080/13510347.2015.1103736>> (accessed 20 May 2016).

⁷² Elin Skaar, “Reconciliation in a Transitional Justice Perspective,” *Transitional Justice Review*, Vol. 1, No. 1 (2013), pp. 54-103.

⁷³ See how lessons about KR are politically influenced here in Federick J. Ngo, “REVISION FOR RIGHTS? Nation-Building Through Post-War Cambodian Social Studies Textbooks, 1979–2009,” in J.H. Williams (ed.), *(Re)constructing Memory: School Textbooks and the Imagination of the Nation* (Rotterdam: Sense Publishers, 2014), pp. 153-69.

Acknowledgement

I am very grateful to Gaffar Peang-Meth, a retired professor from the University of Guam, and Ernst Jürgensen, a Danmission representative to Cambodia, for invaluable input, suggestions and edition. Also, this article could have never been possible to publish without the encouragement and suggestion for improvement from Dr. László Vértesy. I would also like to thank to the participants in this study for allowing me to interview and conduct group discussions. Their useful comments and suggestions are indispensable.