RISING ASIA JOURNAL

RISING ASIA FOUNDATION

BOOK EXCERPT

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Extraordinary Justice: Law, Politics, and the Khmer Rouge Tribunals (New York: Columbia University Press, 2019).

A Long Journey Towards Genocide Justice

In just a few short years, the Khmer Rouge presided over one of the twentieth century's cruelest reigns of terror. Since its 1979 overthrow, there have been several attempts to hold the perpetrators accountable, from a People's Revolutionary Tribunal shortly afterward through the early 2000s Extraordinary Chambers in the Courts of Cambodia [ECCC], also known as the Khmer Rouge Tribunal. Extraordinary Justice offers a definitive account of the quest for justice in Cambodia that uses this history to develop a theoretical framework for understanding the interaction between law and politics in war crimes tribunals.

Craig Etcheson, one of the world's foremost experts on the Cambodian genocide and its aftermath, draws on decades of experience to trace the evolution of transitional justice in the country from the late 1970s to the present. He considers how war crimes tribunals come into existence, how they operate and unfold, and what happens in their wake. Etcheson argues that the concepts of legality that hold sway in such tribunals should be understood in terms of their orientation toward politics, both in the Khmer Rouge Tribunal and generally. A magisterial chronicle of the inner workings of postconflict justice, Extraordinary Justice challenges understandings of the relationship between politics and the law, with important implications for the future of attempts to seek accountability for crimes against humanity.

My central thesis in this work is that the law is at base an ideological enterprise, an ideology we can generically label as "legalism." But—and this is crucial—the law is not a single, unified ideology. Rather, there are several different approaches to the concept of law, and we can see the animating principles underlying those different approaches in the way that war crimes tribunals are negotiated, operated, and concluded. I call these three approaches to law classical legalism, strategic legalism, and instrumental legalism. All three are long-standing, widespread, potent, and enduring. And the outcome of struggles among proponents of these different approaches determines much about how any particular war crimes tribunal ultimately unfolds.

These varying legal ideologies are fundamentally distinguished by their respective orientations to the sphere of politics. In classical legalism, politics is seen as something separated from and, indeed, inferior to law. Classical legalism concerns applying preexisting rules without any consideration of political questions. "Legislating from the bench," that is, judges making new rules, is considered anathema. Proponents of classical legalism can be found in the halls of academia, in high courts, in institutions such as the United Nations Office of Legal Affairs, and in international human rights organizations such as Human Rights Watch and Amnesty International.

In strategic legalism, the relationship between law and politics becomes more flexible and intertwined. Here, if an existing rule is inadequate to address a policy challenge, then the rule can be reinterpreted or an entirely new rule can be created in order to solve the problem. Seen in this way, strategic legalism is what transpires when classical legalism intersects with vagaries of policy making. Practitioners thus often can be found in ministries or other organs of state charged with implementing a government's policies, among diplomats attempting to craft compromises necessary to forge agreement between sovereigns, or with bureaucrats and judges responsible for squaring the circle between abstract legal principles and the messy realities of everyday life.

Instrumental legalism turns classical legalism on its head. Politics is prioritized over the rigid strictures of law, such that law becomes infinitely malleable in order to serve the interests of power, party, or class. If a particular rule is uncongenial to the desired policy outcome, then it is simply ignored. The most well-developed example of instrumental legalism is no doubt the former Soviet Union, but that is hardly the only place this orientation to the law has been harbored. Consequently, we tend to find adherents to instrumental legalism in communist and postcommunist political systems, as well as in authoritarian and totalitarian regimes of all stripes.

The PRT

The international team that came together to organize 1979's People's Revolutionary Tribunal (PRT) included Vietnam, the Soviet Union, and the German Democratic Republic, along with support from Cuba and Syria. All of these states were practitioners of instrumental legalism, and thus the ideological character of the legal exercise would hardly be in doubt. In a press conference two weeks before the PRT convened, Presiding Judge Keo Chanda revealed his view of the case. "It is clear that the Pol Pot-Ieng Sary clique committed the crime of genocide not only against a particular ethnic group or against a particular social stratum of the population, but against the Kampuchean people as a whole," the judge declared.[1] The eventual verdict also was not in doubt.

Of course, the PRT was an in absentia trial, and thus there were no accused present from whom confessions could be extracted. But hewing closely to Vyshinsky's Doctrine of Substantive Truth, confessions were required, and so the defense attorneys stepped forward at trial and confessed

[1] Transcript from Press Conference of Keo Chanda, Minister of Information, Press, and Culture, July 28, 1979, in *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary,* ed. Howard J. DeNike, John Quigley, and Kenneth J. Robinson (Philadelphia: University of Pennsylvania Press, 2000), 48.

on behalf of their clients. "It is now clear to all that Pol Pot and Ieng Sary were criminally insane monsters carrying out a program the script of which was written elsewhere for them," thundered Hope Stevens, an American attorney assigned to the defense team.[2] Yuos Por, Cambodian co-counsel for the defense, informed the judge, "We must acknowledge the extreme seriousness of the crimes in terms of their character and their scope, and that the defendants were fully aware of their criminal acts and had the deliberate intention of committing them. These are undeniable facts."[3] Finally, Cambodian co-counsel Dith Munty concluded the defense presentation: "I have no dispute with Comrade Prosecutor regarding the criminal acts and criminal intention of the two accused."[4] Vyshinsky would have been proud.

The KRT

After the PRT, there were repeated attempts to cause the creation of a new, more robust judicial proceeding, including by the Cambodian Documentation Commission and the Cambodia Genocide Project in the 1980s, followed by the Campaign to Oppose the Return of the Khmer Rouge and the Cambodian Genocide Program in the early 1990s.[5] These civil society-driven efforts were infused with the animating spirit of classical legalism, attempting as they did to induce states to recognize the facts of the case and apply existing international law to them. Western states—the most likely to respond to appeals to classical legalism—were, however, firmly in the mode of realpolitik when it came to the "Cambodia Problem," and they ultimately refused to answer the calls from civil society actors through the

[2] DeNike et al., *Genocide in Cambodia,* 507.

[3] DeNike et al., *Genocide in Cambodia*, 509.

[4] DeNike et al., *Genocide in Cambodia,* 511.

[5] The author was the executive director of the Campaign to Oppose the Return of the Khmer Rouge, and later served as program manager and acting director for Yale's Cambodian Genocide Program.

civil war of the 1980s and into the international peace process of the early 1990s. Once the UN operation in Cambodia drew to a close in 1993, however, the calculus of key players, especially the United States, began to change. With the passage of the Cambodian Genocide Justice Act in early 1994, the United States adopted a new policy with regard to a possible Cambodian tribunal.

Hun Sen's consistent use of the genocide justice issue as a political negotiating tool is as good an illustration of the ethos underlying instrumental legalism as one is likely to find. The PRT, among its other purposes, was an attempt to decapitate the Khmer Rouge and lure second-in-command Nuon Chea to bring over the rest of the Khmer Rouge forces to join in a national unity government. A decade of civil war later, just before the negotiations for the Paris Peace Accords were to get under way, Hun Sen demanded that the Khmer Rouge leadership be brought before an international tribunal—a bold opening gambit in an international negotiation. With the 1994 Law on the Outlawing of the Khmer Rouge, Hun Sen sought to prohibit amnesty for senior leaders, a legal requirement he would ignore as soon as one of those senior leaders expressed an interest in defecting to the government. In 1995, both Hun Sen and his then-Co-Prime Minister, Norodom Ranariddh, publicly called for the establishment of an international tribunal for the Khmer Rouge. Shortly thereafter, Hun Sen demanded that Yale University's Cambodian Genocide Program draft a Cambodian law to establish an international tribunal, only to suddenly pull the draft law from consideration in the Council of Ministers when it became apparent that a deal might be made to get Ieng Sary to defect in exchange for amnesty, along with the bulk of the remaining Khmer Rouge military forces. Hun Sen also later attempted to lure Khieu Samphan to defect by announcing that if Samphan were to arrest Pol Pot on behalf of the Royal Government, then Samphan would be exempted from prosecution at any tribunal that might be formed. Next, in 1997, Hun Sen and Ranariddh asked for UN assistance in establishing a tribunal, but just as the UN Group of Experts was about to deliver its recommendation to establish such a court, he rejected the

incipient proposal because Nuon Chea and Khieu Samphan had surrendered to him and recognized his supremacy. In 2004, of course, Hun Sen overruled an order from Cambodia's Prosecutor-General to investigate Nuon Chea, Khieu Samphan, and Ieng Sary. Consistently, then, across the decades, Hun Sen used law as a political instrument, as a cudgel of sorts, to pound on his adversaries. Hun Sen does the same thing beyond the ambit of war crimes, in the ordinary domestic political context, though that story is beyond the scope of the present treatment.[6]

With the U.S. government committed to the idea of genocide justice in Cambodia beginning in 1994 and U.S. Ambassador for War Crimes David Scheffer soon on the case, the United States pursued a wide range of initiatives aimed at getting Khmer Rouge war criminals into the dock. Scheffer tried to persuade the permanent members of the UN Security Council to agree to a Chapter VII tribunal, then a Chapter VI tribunal, then a treaty-based court to be agreed upon among an alliance of states, then national prosecutions somewhere, anywhere, based on universal jurisdiction, and finally a sort of U.S.-led "snatch and grab" of Pol Pot, so he could be stashed on a Pacific island until some way was found to get him into a courtroom. All of these efforts came to naught, but by then, the UN itself was beginning to show interest in the project. Once that ball got rolling, the full mix of legal ideologies was in play, with the UN pushing classical legalism solutions, the Cambodians wedded to their instrumental legalism approach, and the United States with strategic legalism initiatives attempting to mediate between the two. As other interested state and nonstate parties pitched in on various sides of the struggle, U.S. politicians and diplomats including Scheffer, Kent Wiedemann, John Kerry, and others proposed new rules and procedures one after another—a mixed tribunal, a special chamber, co-prosecutors, supermajority voting, a pretrial chamber, the inverted supermajority, and other mechanisms—attempting to bridge

[6] But see, for example, Sebastian Strangio, *Hun Sen's Cambodia* (New Haven, CT: Yale University Press, 2014), 207–210.

the divide between the ideological proclivities of the UN Office of Legal Affairs and the ruling Cambodian People's Party.

The UN Office of Legal Affairs (OLA) fought long and hard to preserve classical legalism's separation of law from politics in the KRT negotiations. Secretary-General Kofi Annan and Under-Secretary-General Hans Corell were under no illusions as to what they were dealing with in their Cambodian interlocutors, struggling to ensure that any tribunal enjoying the benefits of the UN's imprimatur be so structured that it was sure to stay on the straight and narrow path of classical legalism. The UN's key benchmarks in this effort were a majority of international judges on the KRT bench, along with an independent international prosecutor. OLA's only deviation from pure classical legalism came in 2004, when it briefly strayed into strategic legalism with the decision to create a new rule that characterized fundraising as a "legal" requirement.

The Cambodians held firm and insisted that the tribunal should utilize Cambodia's existing "procedures in force." Those legal procedures, as we have seen, include a requirement for prosecutors to seek instructions from their political masters when dealing with "serious crimes." No one would dispute that any Khmer Rouge tribunal would be addressing "serious crimes." This was where Scheffer's strategic legalism would come to the fore, forging "extraordinary" new legal rules for what would become the Extraordinary Chamber in the Courts of Cambodia. The notion of "supermajority" voting rules for the judicial chambers of the court, in particular, riled dyed-in-the-wool partisans of classical legalism. Yet this compromise was the key achievement that allowed all of the parties to ultimately get to yes in the negotiations. However, it would not be enough to contain the determined instrumental legalism of the Cambodians.

When the situation called for it, other great powers besides the United States also did not hesitate to engage in strategic legalism. In 2003, after Secretary-General Kofi Annan led the UN Secretariat in withdrawing from the negotiations for a Khmer Rouge tribunal, the United States, France, Japan, and others forced the UN not only to return to the negotiations but

also to accept Cambodia's terms for doing so. These maneuvers had the effect of alienating Sweden and other European states more firmly wedded to traditional classical legalism. When, after being forced to resume negotiations, Corell held to his classical legalism perspective, the United States, France, Japan, India, and Australia reproached Annan and Corell, insisting that they surrender to Cambodia's ideological preferences. They had created a new rule—a resolution from the UN General Assembly—compelling the UN Secretariat to accommodate Cambodia's desires, as well as Cambodia's ideological orientation to the law.

The ruling party leadership in Cambodia devoted extraordinary amounts of time and care to selecting the judges and other senior cadres who would be assigned to leadership positions at the tribunal. All major clans within the party had to be represented in order to ensure that each clan's interests were properly protected in what they all viewed as a potentially risky undertaking. Most importantly, of course, senior national staff at the tribunal all had to be politically reliable. As a result, some of the country's best legal talent did not make the cut, and some of those who did make the cut possessed less than stellar professional credentials. As former ECCC Director of Administration Sean Visoth put it, "The judiciary in Cambodia is not based on professionalism, not based on meritocracy, but on a system of patronage."[7] On the UN side, contrariwise, selection of senior personnel for the court was very much focused on legal professionalism. At the same time, however, there was also a certain element of patronage on the UN side insofar as those states with a keen interest in the ECCC—Britain, France, the Netherlands, Germany, the United States, Japan and so on—all saw their nationals receiving appointments to key positions at the court.

[7] Author's interview with Sean Visoth, Phnom Penh, July 9, 2015.

Operations

As we have seen, the clash between classical legalism and instrumental legalism manifested itself very early on in the operational life of the KRT, surfacing during the initial judicial plenary at the beginning of July 2006. The Cambodians hoped that the newly established ECCC would simply pick up the moribund national cases of Kaing Guek Eav alias Duch and Chhit Chhoeun alias Ta Mok from where they lay languishing in the Phnom Penh Military Court, accept at face value the hopelessly incompetent judicial investigation the military investigating judges had conducted, and proceed from there. The nationals believed that this approach would protect national sovereignty—there's that word again—and would also legitimize what had been, by almost any account, a sloppy and potentially illegal set of procedures thus far applied to the two prisoners. The new international judges, however, insisted on following civil law procedures strictly, and to them, that meant the co-investigating judges could not begin work on a case until the co-prosecutors had conducted a preliminary investigation and referred cases to them. For the internationals, this approach was essential to ensure that the co-prosecutors, in the first instance, and the co-investigating judges, in the second, had complete control over the cases that would come before the court. These dueling perspectives highlighted two very different approaches to the rule of law. The internationals were focused on procedure and process, while the nationals were focused on politics and product.

This duel continued through the rule-making phase across the first year of the court.[8] Concerned that the international co-prosecutor might expand the pool of accused beyond what was acceptable to the government,

[8] Early on during the work of the Rules Committee, an international member of the committee pulled the author aside in the hallway during a break and observed, "We are not speaking the same language at all." "That is to be expected," I replied. "They speak Khmer and all of you speak English or French." "That's not what I mean," the judge said. "We are speaking the language of law, and they are speaking the language of politics." Ten years on, unfortunately, I cannot recall which judge made this comment to me.

national leaders of the court exploded the November 2006 plenary, which had originally been envisioned to finalize and adopt the draft Internal Rules for the court, railing about purported violations of Cambodia's sovereignty. The nationals then managed to throw various wrenches into the gears in an effort to slow down the process, which they did for more than six months. With an able assist from the president of the bar association, the government slow-walked the rules negotiation process, while David Scheffer attempted to intervene at the political level to devise some new rule that might resolve the impasse. The government went so far as to attempt to negotiate with the international co-prosecutor, when Director of Administration Sean Visoth approached me to discuss the question of personal jurisdiction. The assurances I was able to provide may have helped the government decide to allow the rules process to proceed. It was not entirely unexpected that Foreign Minister Hor Nam Hong was able to announce that the rules negotiations would be successful while the Rules Review Committee had not yet resolved all the outstanding issues. This was not the only time that the government knew the outcome of events in advance.

On the very last day of the year-long rules negotiations, the perennial question of "procedures in force" versus "international standards" was still on the table. The KRT's national judges attempted to compel the adoption of a rule that would legitimize nearly nine years of pretrial detention for Duch. Again, protecting the prerogatives of the sovereign was the guiding principle. However, the national judges of the Trial Chamber did rise to the occasion and exhibit a shining example of classical legalism in the Duch trial judgment when they ruled those long years of pretrial detention for Duch to be illegal. Unfortunately, that ruling was later overturned by the Supreme Court Chamber on a technicality. Though it all, the international judges of the court held fast to their classical legalism ideals.

Once the Case 002 defense teams became engaged in the judicial process, new dimensions of instrumental legalism emerged. One should recall that the "rupture" strategy actually was not invented by Khieu

Samphan's famous attorney, Jacques Vergés, as Vergés might have liked for people to believe. In fact, rupture originated with instructions from Vladimir Lenin—who was also the father of the communist version of instrumental legalism—on how communist activists arrested by the state should approach their defense. Both the rupture strategy and instrumental legalism give primacy to politics over the law. Thus they arise from the same seed and share the same inspiration. They are, as it were, peas in a pod. It might be seen as somewhat paradoxical, then, that the Cambodian government and the Nuon Chea and Khieu Samphan defense teams should have been so at odds, given their common adherence to the same legal ideology. But then, as the saying goes, where you stand depends on where you sit.

In the struggle over Cases 003 and 004, National Co-Prosecutor Chea Leang managed to remain largely within bounds of the Internal Rules in her efforts to impose the ruling party's preferred outcome on the course of events. The national judges of the Pre-Trial Chamber did so as well, at least initially. International Co-Investigating Judge Marcel Lemonde dealt with the reluctance of his national counterpart to proceed on 003 and 004 by focusing on Case 002, at least until those investigations were completed, which left his investigators idle. Finally, shortly before he departed the court, he unilaterally launched investigations of 003 and 004, though that foray did not get far.

One of the first judicial acts of Lemonde's successor, Siegfried Blunk, was to order OCIJ's international investigators to return from the field and focus on desk studies. Judge Blunk brought into play what court observers and insiders had long termed the "weakest link" theory: the supermajority rule would protect prosecutions against politically motivated interference, unless one of the international judges defected to the national view. By all indications, Blunk intended to cooperate with National Co-Investigating Judge You Bunleng to dismiss the cases against all five accused in 003 and 004 on the grounds that they did not fall within the personal jurisdiction of the court. Blunk thus had retreated to strategic legalism in his failed effort to resolve the deadlock over Cases 003 and 004. But his failure

to manage his own staff doomed that gambit, as well as his tenure at the court.

The classical legalism of International Reserve Co-Investigating Judge Laurent Kasper-Ansermet clashed strongly with the instrumental legalism of his national colleagues. In the face of Kasper-Ansermet's zeal, You Bunleng and Pre-Trial Chamber President Prak Kimsan relied upon the ultimate resort of the instrumentalist: if the rules are inconvenient to the policy, simply ignore those rules. Thus did Judge Bunleng declare that Kasper-Ansermet had no standing to carry out judicial acts. For his part, Judge Kimsan unilaterally rejected submissions from Kasper-Ansermet, drawing the incredulity of Kimsan's international colleagues on the PTC bench. The Supreme Council of the Magistracy's refusal to approve Kasper-Ansermet's appointment elicited a UN declaration that Cambodia was in breach of the UN-Cambodia agreement—yet another direct clash of instrumental and classical legalism. In the end, Kasper-Ansermet was simply trampled by his national colleagues, as he could not abide the way the nationals ran roughshod over the sanctity of the rules.

Kasper-Ansermet's successors as international co-investigating judge, Mark Harmon and Michael Bohlander, proved themselves more agile in coping with the instrumentalist conduct of their national counterparts. Despite a second clear breach of the UN-Cambodia agreement when the Ministry of Interior refused to execute his arrest orders, Judge Harmon found other means within the rules to charge and investigate the suspects. With their combined efforts, Harmon and Bohlander succeeded in bringing the judicial investigations in 003 and 004 to a conclusion, and Judge Bohlander has issued Closing Orders for those accused. Now that Judge Bohlander has ordered Ao An, Meas Muth, and Yim Tith sent for trial, while Judge Bunleng has ordered charges against them dismissed, the court faces perhaps its most momentous crisis thus far. Prime Minister Hun Sen and his government have vowed for the better part of a decade that they will not allow any of these cases to go to trial. The measures they might be willing to take to prevent that from happening may well cause the UN to finally

withdraw from the process, but however the endgame at the court plays out, the legacy of the ECCC already has been clearly defined by what has come before.

Aftermath

Judicial operations are still under way at the KRT, so it is too soon to know the extent to which legal ideologies will continue to clash in the aftermath of the court, once the proceedings have been completed and the court is disbanded. The Cambodian authorities might decide to commute the life sentences thus far earned by three KRT convicts in hopes of further burnishing national reconciliation, in an action parallel to postwar West Germany's determined efforts to free imprisoned Nuremberg convicts in the wake of the IMT. But that remains in the realm of speculation. Much less speculative, however, is that advocates of classical legalism will continue to criticize the KRT for shortcomings ranging from alleged corruption to political interference, while advocates of instrumental legalism—prominently including Cambodia's ruling party and its partisans—will continue to hail the entire exercise as a "precious model" for future exercises in postconflict retributive justice.[9] Meanwhile, advocates of strategic legalism will be able to congratulate themselves on having brought the process so far and having had at least some success in an enterprise that many insisted would be impossible from the beginning. It was the strategic legalists who were finally able to square the circle of the incommensurability problem and make East meet West, halting and uncomfortable though it was for many of those involved.

Some observers have been harsh in their assessments of the court. Journalist Nate Thayer has denounced the KRT as a "21st century version of

[9] At least two courts appear to have been inspired by Cambodia's model. The Extraordinary African Chambers (EAC) in Senegal was established on February 8, 2013, and the Special Criminal Court in the Central African Republic was approved for startup in 2018.

a Stalinist era political show trial."[10] Such extreme views fail to consider important nuances, such as the fact that Stalinist show trials never had strategic legalists attempting to forge an accommodation between classical legalists and instrumental legalists—they had only instrumental legalists. Moreover, some analysts of war crimes trials, such as Gerry Simpson, caution against the idea that a "show trial" is the antithesis of a war crimes trial in the mold of, say, the IMT. "Indeed, there are sometimes striking resemblances."[11] In both, there is sometimes an arbitrary quality to who is prosecuted and who is not, as suggested by the convoluted debates among the Allies about who should be brought before the IMT. Both, as the Nuon Chea defense would likely attest, also are "a complex ritual which produces and suppresses narrative and clarifies and obscures history."[12]

The late Cherif Bassiouni, widely seen as the father of modern international criminal justice, also delivered a harsh critique of the ECCC in a 2010 speech that, while scathing, is perhaps more on-point than Thayer's evaluation. Referring to the ECCC as a "Potemkin tribunal," he likened it to two large hamburger buns with scant meat between them. "Where's the beef?" Bassiouni demanded.[13] "How can anybody conceive of the Cambodia Tribunal, which will ultimately prosecute no more than five persons, all in their 80s," Bassiouni went on, "to be a symbol of international criminal justice is really stretching it."[14] The real problem may be, however, that in fact the KRT indeed is a symbol of international criminal justice, but a symbol that reveals essential things about the reality of the law from which

[10] Nate Thayer Facebook post dated January 22, 2015.

[11] Gerry Simpson, *Law, War & Crime* (Malden, MA: Polity Press, 2007), especially chapter 5.

[12] Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven, CT: Yale University Press, 2001), 113.

[13] Renee Dopplick, "Bassiouni 'Quite Doubtful' International Criminal Court Will Succeed—the Failures, Challenges, and Future of International Criminal Law," *Inside Justice,* March 31, 2010.

[14] Dopplick, "Bassiouni 'Quite Doubtful' International Criminal Court Will Succeed."

many dedicated to classical legalism would rather avert their eyes. This reality is that the law, in all of its ideological permutations, is suffused with politics.

Legacy

The "legacy" aspect of any internationalized tribunal is a complex and hotly contested matter, encompassing many issue areas and concerns. Will a given tribunal encourage domestic legal and judicial reform with a view to bolstering the rule of law and combating impunity? Will it strengthen the capacity of members of the domestic judiciary through skills transfer and training? What will become of the records and archives of the tribunal, and will the proceedings themselves, as well as the archives they generate, contribute to creating an objective and persuasive historical record of the crimes that gave rise to the court? There are also potential follow-on issues after the tribunal winds down, including possible pardons for those convicted, prosecutions of lower-level perpetrators in domestic courts, ongoing reparations issues, possible subsequent transitional justice activities such as a truth-telling mechanism, and the disposition of the physical assets of the tribunal. And finally, of course, there is the weighty question of outreach, public engagement, and the extent to which the tribunal contributes to national reconciliation.

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Again, anecdotally, I personally have witnessed a profound swing in public attitudes among Cambodians since the ECCC got under way. Teachers now felt free to discuss what happened in "the Pol Pot time" with their students, as new textbooks addressing the topic were integrated into primary and secondary school curricula nationwide for the first time. Parents finally began to open up to their children about their own experiences. Neighbors who perhaps had avoided the subject for decades

now shared with one another their wrack and ruin during the Khmer Rouge regime. In neighborhoods where perpetrators still live in close proximity to their former victims, mutual understanding began to emerge as former Khmer Rouge cadres explained that they knew their lives were on the line if they did not follow the orders from their leaders, however horrible. Combined, all of this amounts to Cambodia's social fabric gradually being knitted back together again. Far more than the number of criminal convictions secured, far more than any jurisprudence produced by the court, far more than the impunity that has been challenged, the contributions to reconciliation are the greatest legacy of the ECCC. While national reconciliation after a social rupture as severe as that suffered by Cambodia surely takes generations, that process has been turbocharged by the Khmer Rouge Tribunal. Those who have nurtured and supported the tribunal, despite its many flaws, should be proud of how much the KRT has done to advance reconciliation in Cambodia.

Conclusions

The various strands of legal ideologies each have dedicated practitioners spread widely across the planet, within the governmental, intergovernmental, and nongovernmental spheres. When it is proposed that an internationalized court should be established, it is highly likely that legal practitioners representing all three ideologies will engage in a struggle to shape the outcome. The results will determine the precise contours and functioning of any particular exercise in transitional justice. At Nuremberg's International Military Tribunal after World War II, the combination of classical and strategic legalism practiced by the United States, Britain, and France was sufficiently robust to largely overwhelm the instrumental legalism of the USSR. In contrast, the enthusiastic and unbridled instrumental legalism exhibited by Cambodia during the negotiations for and operations of the Khmer Rouge Tribunal, when combined with the strategic legalism seen in the efforts of the United States, France, and other

major players, served to effectively outmaneuver the classical legalism emanating from the UN's Office of Legal Affairs. The result was a court open to the influence of Cambodia's executive, as is provided for by the nation's "procedures in force."

The decision problem faced by Cambodia's ruling party in determining how to manage the Khmer Rouge Tribunal was multidimensional, and from the perspective of Cambodia's leaders, a matter of utmost importance. In the first instance, the challenge was to achieve an agreement with the UN that resulted in a tribunal structure that the ruling party could control. The respective legal ideologies of the principal actors in the establishment of the ECCC decisively shaped the outcome of the negotiations. The UN Office of Legal Affairs's steadfast adherence to classical legalism severely limited the UN Secretariat's room for political maneuver during the negotiations for the court. For the UN Secretariat, the whole thing was about the law, not about politics. Cambodia's fidelity to instrumental legalism, in contrast, afforded a very wide range of political flexibility; for the Cambodians, it was all about politics, and never about the law. The result was that the Cambodians effectively ran circles around the UN's negotiating teams at every turn. The willingness of many interested states, particularly the United States, to nudge the UN into ever more compromises sealed the deal in favor of the Cambodians, ultimately giving them a court over which they were confident they could exercise effective control. Without that assurance, it is highly unlikely Cambodia's leaders ever would have agreed to convene the KRT.

Many other issues would arise in the course of events. Early on in the life of the court, the ruling party became concerned that the independent international co-prosecutor might expand the circle of those to be prosecuted beyond the initially agreed five to ten suspects. The Cambodians consequently carried out a series of maneuvers that would slow-walk the progress of the court until they could better assess the degree of threat they were facing. Evidently, in this period, a decision also crystallized to the effect that only senior leaders should face jeopardy. That decision may have been

inspired by the ruling party's concern that their own political, military, or security subordinates might get the idea that they could be prosecuted for carrying out illegal orders. Since then, the determined opposition to the "most responsible" prong of personal jurisdiction by all Cambodian participants has meant that only international personnel have shown an interest in moving those cases forward.[15]

Preventing senior ruling party cadre from being called to testify before the court was essential for at least two reasons. If, for example, the late ruling party President Chea Sim were to have testified in the Trial Chamber that he was ordered by Pol Pot and Nuon Chea to hunt down Lon Nol officers and kill them, and to destroy Buddhism, and that he carried out those orders, then one of the founding fathers of the reborn Cambodia would have implicated himself in the crimes being tried before the ECCC. If, on the contrary, he were to have denied that any such orders were ever issued or to have testified that such orders indeed were issued but that he ignored them, in either case he would be buttressing the position of the defense. Such testimony would be a highly undesirable outcome from the perspective of the ruling party. There may also be a sense among the most senior leaders of the Cambodian People's Party that they, like the king, should be "inviolable." Thus it was imperative to avoid any possible threat to the dignity and reputation of core members of the party. It was not by accident that the Cambodian side demanded that the word "dignity" be incorporated into the ECCC's foundational documents, and that this word was subsequently deployed by the national judges of the Pre-Trial Chamber in opposing the case against Meas Muth. They had no such qualms about the dignity of Nuon Chea or Khieu Samphan, but then again, Nuon Chea and Khieu Samphan were not generals in the Royal Army of Cambodia, as were Meas Muth and Sous Met in their twilight years.

[15] Or rather, only international personnel have expressed such an interest publicly. Over the years, however, numerous national officers of the court have privately lamented to me their government's efforts to stymie the progress of Cases 003 and 004, expressing their personal preference that those cases should proceed.

It is also undeniably the case that Cambodia's leaders have more things to worry about that just genocide justice. Cambodia has only recently emerged from thirty catastrophic years of war, and in many respects, the social and political fabric of the country remains fragile. National reconciliation in Cambodia is still very much a work in progress. It is easy for an outside analyst to opine that the Khmer Rouge military is finished, and therefore there is no possibility of domestic instability if a few more Khmer Rouge leaders are brought before the court. For Cambodia's leaders, however, ensuring that the hard-won gains of peace are preserved is literally a life-and-death matter, especially for any who might die if that peace should fail. Though Hun Sen might be fairly accused of hyperbole when he warns of civil war if three or four additional Khmer Rouge suspects were brought to trial, in fact, the problem of national reconciliation presents serious challenges far short of outright civil war. Rebuilding trust and a sense of national community after such an incredible series of disasters is a delicate and long-term undertaking. Compared to the arguably much less serious question of the liberty of any particular suspect who might be prosecuted, as well as—for an instrumental legalist—the question of fidelity to the letter of the law, this was an easy decision. Thus, limiting the number of prosecutions at the KRT became a top priority for the ruling party.

The Cambodian powers that be have their own objectives in this process, and their own understanding of what is justice. These objectives and understandings are very different than those brought to the table by the international actors. Those differences are the central source of the ongoing tension surrounding the court. But though their ideological orientations to the law may well be incommensurable, these very different sets of hopes and expectations are not necessarily incompatible in practice. In a fundamental way, that has been and continues to be the most challenging aspect of the ECCC's work: to find a way to harmonize these differing ideological approaches in a fashion that will in the end respect the desires of both sides, and deliver the goods that both wish to generate.

The goods that both sides want are primarily symbolic in nature. The nationals want to generate symbols that will buttress their international political legitimacy and domestic historical legacy while preserving the hard-won gains of Hun Sen's "win-win" policy, which succeeded in bringing the Thirty Years War to an end. The internationals want to generate symbols that will further develop and instantiate a transnational system of liberal democratic justice, and further advance the jurisprudence of international humanitarian law and international criminal law. If any party pursues its objectives with wanton disregard for the larger context and for the perspectives of other players, then the whole thing can quickly turn into a train wreck. So far, that has not happened at the ECCC, although several players have come very close, indeed. All concerned continue to feel their way along the twisting, boulder-strewn road, trying to find that middle path that will allow them to ultimately arrive at their preferred destinations. It will not be perfect. What in human affairs ever is? But it can be done. Above all, it requires patience, endurance, and understanding. Fortunately, so far, there have been key people on all sides who have those qualities.

Whether that situation will endure through the final days of the Khmer Rouge Tribunal, however, remains to be seen. If there is no orderly, judicial resolution to the disputed Cases 003 and 004, the court's legacy among devotees of classical and strategic legalism is liable to be severely tarnished, more so than it already has been. Such an outcome would also seriously damage the ruling party's hope to emerge from the process with enhanced international legitimacy. But in either event, the legacy of the ECCC has provided an especially revealing new chapter in the history of modern experiments with extraordinary justice.

Note on the Author

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