



Communicating Justice: Cambodian Press Coverage of the ECCC's Final Judgment

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Abstract

This article explores Khmer-language media reporting of the final appeal judgment at the Extraordinary Chambers in the Courts of Cambodia (Case 002/02). Media reports are interesting for two reasons. First, as a source of opinions expressed in Cambodia's official language (Khmer), which often remain beyond purview of international observers. Second, as one of the few sources of information about the ECCC available to the Cambodian public now that official Court outreach has largely ceased. Yet, free media is significantly curtailed in Cambodia, and reporting on the ECCC is likely to be shaped by what is politically safe to print, as well as what is deemed publicly interesting. Against this backdrop this article explores: the press's tendency to downplay Cambodian political interference in the ECCC proceedings; its (mis)representation of the ECCC's genocide findings; its reporting on the prosecution of sexual and gender-based crimes; and its use of 'justice for victims' rhetoric.

Keywords

Cambodia – genocide – Khmer Rouge Tribunal – media – political interference – sexual and gender-based crimes – translation – victims

1 Introduction: ‘Closing the Dark Chapter’

The Extraordinary Chambers in the Courts of Cambodia (ECCC) is a hybrid court established and operated through cooperation between the United Nations and the Cambodian government.¹ Situated in Phnom Penh, the Court has the power to prosecute crimes under both international and Cambodian law. It operates in Cambodia’s official language (Khmer) as well as two of the official languages of international law (English and French). All key roles, such as that of the prosecutor and the investigating judge, are shared between a ‘national’ appointee chosen by the Cambodian government, and an ‘international’ appointee recruited by the UN.

On 22 September 2022, the ECCC’s appellate chamber upheld the conviction of 91-year-old Khieu Samphan for atrocities perpetrated during the Cambodian Party of Kampuchea’s reign in Cambodia (CPK or ‘Khmer Rouge’) between 1975 and 1979.² This concluded the ECCC’s largest trial and brought the Court’s sixteen years of investigating and prosecuting ‘senior leaders’ and ‘those most responsible’³ for the Khmer Rouge’s crimes to an end. As a Cambodian government spokesperson expressed on the day that judgment was announced, this historic decision represented an attempt to ‘close a dark chapter for our Cambodian people.’⁴

1 United Nations, *Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea*, 6 June 2003.

2 ECCC, *Co-Prosecutors v. Nuon Chea and Khieu Samphan*, Case No. 002/19-09-2007- ECCC /SCC, ECCC Supreme Court Chamber, Transcript of Appeal Judgment (Public), 22 September 2022. Full appeal judgment published on 23 December 2022, see ECCC, *Co-Prosecutors v. Nuon Chea and Khieu Samphan*, Case No. 002/19-09-2007- ECCC /SCC, Supreme Court Chamber, Appeal Judgement, 23 December 2022. Note: the names of the parties are included as stipulated in the journal style guide, but at the ECCC, which is a civil system, cases are identified by number rather than party name.

3 This personal jurisdiction was established in Article 1 of the ECCC Agreement, *supra* note 1.

4 Royal Government of Cambodia, Office of the Council of Ministers, សន្និសីទសារព័ត៌មាន ក្រោយប្រកាសសាលាដំកំរើញបណ្តឹងសាទុកុខរបស់ លោក ខៀវ សំផន ក្នុងសំណុំរឿង ០០២/០២ (Press conference after the announcement of the judgment on Khieu Samphan’s appeal in Case 002/02) (22 September 2022), available online at www.youtube.com/watch?v=wxVYIAzofK8&t=40s (accessed 27 April 2023).

The ECCC has since announced a three-year ‘residual phase,’ during which a skeleton staff will finalise remaining tasks, such as preserving and de-classifying court documents, managing Khieu Samphan’s detention, conducting outreach, and monitoring victim reparation projects.⁵ However, the delivery of the final judgment is a significant milestone. There are no more cases to be decided, no more witnesses to testify, no more monks, students or survivors arriving to watch the trials unfold.⁶ Indeed, there is no more courtroom: Cambodia has returned the ECCC compound to the military, with no apparent plans to convert it into a memory site as has happened with some war crimes tribunals.⁷ In these concrete ways, this long-running justice process is over.

The conclusion of the ECCC’s judicial proceedings presents an opportune moment to reflect on the Court’s successes, failures, and legacy in Cambodia. Controversies, critiques, and academic commentary have accompanied the Court throughout its judicial operations. Recurring themes of particular relevance to this article have included credible allegations of political interference,⁸ concerns over its failure to address sexual and gender-based crimes,⁹ the legal application of the crime of ‘genocide’ in a context where ‘genocide’ is understood as something experienced by an entire population,¹⁰ and both praise for and criticism of its innovative civil party participation

5 UN General Assembly, *Addendum to the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea on the Transitional Arrangements and the Completion of Work of the Extraordinary Chambers* (A/RES/75/257B).

6 Over 50 000 people attended the proceedings during Case 002. See ECCC, *ECCC surpasses 50,000 visitors to the Case 002 trial*, available online at www.eccc.gov.kh/en/gallery/photo/eccc-surpasses-50000-visitors-case-002-trial (accessed 27 April 2023).

7 E.g., Nürnberg, *Memorium Nuremberg Trials*, available online at museums.nuernberg.de/memorium-nuremberg-trials/ (accessed 13 April 2023).

8 E.g., S.M. Torrens, ‘Allegations of Political Interference, Bias and Corruption at the ECCC’, in S.M. Meisenberg and I. Stegmiller (eds.), *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Law* (T.M.C. Asser Press, The Hague, 2016), pp. 45–75; R. Gidley, *Illiberal Transitional Justice and the Extraordinary Chambers in the Courts of Cambodia* (Palgrave Macmillan, London, 2019).

9 E.g., S. Studzinsky, ‘Neglected Crimes: The Challenge of Raising Sexual and Gender-Based Crimes before the Extraordinary Chambers in the Courts of Cambodia’, in S. Buckley-Zistel and R. Stanley (eds.), *Gender in Transitional Justice* (Palgrave MacMillan, London, 2012), pp. 88–112; E. Palmer and S. Williams, ‘A “shift in attitude”? Institutional Change and Sexual and Gender-Based Crimes at the Extraordinary Chambers in the Courts of Cambodia’, 19(1) *International Feminist Journal of Politics* (2017) 22–38.

10 E.g., M. Vianney-Liaud, ‘Legal Constraints in the Interpretation of Genocide’ in S. Meisenberg and I. Stegmiller (eds.), *The Extraordinary Chambers in the Courts of Cambodia* (T.M.C. Asser Press, The Hague, 2016), pp. 255–290; M. O’Brien, *From Discrimination to Death: Genocide Process Through a Human Rights Lens* (Routledge, London, 2022).

model, which allows civil parties (victims with legal standing) to participate in the Court's proceedings, access legal representation, and apply for reparations.¹¹

Although Cambodian scholars are increasingly publishing work on the ECCC in English,¹² the bulk of English-language academic commentary has come from international scholars and organisations, who typically have greater educational privileges, publishing connections, and English language proficiency than Cambodian scholars have had the opportunity to attain. Furthermore, while various studies have explored the opinions of survivors and the general Cambodian population, many of these took place in the earlier years of the Tribunal.¹³ Any assessment of the Court's success and legacy in its afterlife will require ongoing engagement with how the Court is discussed and debated in Cambodia itself. Often, this discourse is expressed in the Khmer language, which can remain beyond purview of international observers.

In this article, we explore one slice of Khmer-language discourse on the ECCC by analysing Khmer-language media reports on the final 2022 appeal judgment. As long-time legal scholars of the Court's work, we critically reflect on the themes that emerge, or are notably absent, from these sources, drawing

11 *E.g.*, M. Elander, *Figuring Victims in International Criminal Justice: The Case of the Khmer Rouge Tribunal* (Routledge, Abingdon, 2018); J. Bernath, *The Khmer Rouge Tribunal: Power, Politics and Resistance in Transitional Justice* (University of Wisconsin Press, Madison, WI, 2023).

12 *See, e.g.*, Swisspeace, *Working Paper Series (Cambodia Series)*, available online at www.swisspeace.ch/publications/working-papers/ (accessed 27 April 2023).

13 P. Pham, P. Vinck, S. Hean and E. Stover, *So We Will Never Forget: A Population-Based Survey on Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (Human Rights Center, University of California, Berkeley, CA, 2009); P. Pham, P. Vinck, M. Balthazard and S. Hean, *After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia* (Human Rights Centre, University of California, Berkeley, CA, 2011); E. Stover, M. Balthazard and K. Koenig, 'Confronting Duch: Civil Party Participation in Case 001 at the ECCC', 93 *International Review of the Red Cross* (2011) 1–44, p. 31; N. Kirchenbauer, M. Balthazard, L. Ky, P. Vinck and P. Pham, *Victims Participation before the Extraordinary Chambers in the Courts of Cambodia: Baseline Study of the Cambodian Human Rights and Development Association's Civil Party Scheme for Case 002*, available online at www.eccc.gov.kh/sites/default/files/Victims-participation-before-ECCC-Baseline-Study-Jan-2013.pdf (accessed 27 April 2023); J. Herman, *Local Voices in Internationalised Justice: The Experience of Civil Parties at the Extraordinary Chambers in the Courts of Cambodia* (Centre on Human Rights in Conflict, University of East London, 2014); R. Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia', 16(1) *International Criminal Law Review* (2016) 1–238; T. Williams et al., *Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process* (Swisspeace, Bern, 2018).

on the academic scholarship that has blossomed around the Court's practice. Our familiarity with the ECCC cases, and our grounding in feminist legal scholarship and critical victimology, enable this kind of critical engagement. Considering the status of Khieu Samphan's appeal as the Court's last judgment and the subsequent closure of the Court, we explore how this judgment was reported, the broader reflections it prompted about the ECCC's closure and legacy, and the extent to which these final reflections align with themes frequently repeated in international discourse.

We consider this analysis important for two reasons. First, as noted above, Khmer-language commentary is often rather sidelined in the substantial scholarship on the ECCC. Yet is a crucial source of information about how the Court's successes, failures, and legacy are depicted and discussed within Cambodia itself. Whether Khmer-language discourse aligns or differs from dominant themes found in international scholarship and commentary is a valuable line of inquiry for those interested in the Court's legacy. Secondly, the winding down of Court outreach over the course of Case 002, and the increasing restrictions placed on civil society organisations operating in the country,¹⁴ means that the media is one of the few sources of information that remains available to the Cambodian public. This amplifies its importance in shaping the Court's legacy in the months and years following the end of judicial proceedings. The media reports that we analysed are, of course, not representative of the views of all Cambodians. And yet, examining these reports provides a sense of how the ECCC's final judgment and imminent closure has been portrayed to the Khmer-speaking public, and therefore, how the Court might be perceived within Cambodia.

However, the media is a tightly controlled source of information. Cambodia is ranked 142 of 177 countries in the World Press Freedom Index published by Reporters Without Borders.¹⁵ The country is developing a reputation for jailing journalists who speak out against the Cambodian People's Party (CPP), which has been in power since the fall of the Khmer Rouge in 1979.¹⁶ The nation's

14 A. Kent, 'Outsourcing Outreach: 'Counter-translation' of Outreach Activities at the Extraordinary Chambers in the Courts of Cambodia', 41(1) *Journal of Current Southeast Asian Affairs* (2022) 106–134.

15 Reporters Without Borders, 2022 *World Press Freedom Index*, available online at rsf.org/en/index (accessed 1 March 2023).

16 UN Office of the High Commissioner for Human Rights, *State of Press Freedom in Cambodia, August 2022*, available online at www.ohchr.org/sites/default/files/2022-08/press-freedom-cambodia-en.pdf (accessed 2 March 2023); The Editorial Board, 'Cambodia Silences another Voice of Democracy', *The Washington Post* (19 February 2023), available online at www.washingtonpost.com/opinions/2023/02/19/cambodia-voice-of-democracy-hun-sen/ (accessed 2 March 2023).

media is almost entirely owned by the state or by close allies of the CPP. More recent media crackdowns include the shutdown of the popular Cambodia Daily in 2017,¹⁷ the sale of the Phnom Penh Press to a CPP-friendly Malaysian investor in 2018,¹⁸ and the revocation of Voice of Democracy's broadcasting licence in 2023.¹⁹ As such, the Khmer-language sources reflect both what it is deemed politically safe to publish, and what is deemed to be of public interest. This reality has significant implications for how the Court's legacy will be shaped and understood within Cambodia.

2 Background and Method

Over the last two decades, the ECCC has completed just three trials, at the cost of over 300 million US dollars. The first trial ('Case 001') concerned crimes perpetrated by Kaing Guek Eav, alias 'Duch', the former head of S-21 prison where an estimated 12 000 men, women and children were detained and tortured during Khmer Rouge times.²⁰ Duch's guilty verdict was upheld on appeal;²¹ he died in prison in 2020. The second case ('Case 002') initially concerned four senior leaders of the Khmer Rouge: Nuon Chea (Deputy Secretary of the CPK), Khieu Samphan (CPK Head of State), Ieng Sary (CPK

17 R. Paddock, 'The Cambodia Daily to Close (After Chasing One Last Big Story)', *The New York Times* (3 September 2017), available online at www.nytimes.com/2017/09/03/world/asia/cambodia-daily-newspaper.html (accessed 10 March 2023).

18 S. Forsdick, 'Editor and 13 staff quit Cambodia's Phnom Penh Post after new owner calls for article about him to be removed', *Press Gazette* (14 May 2018), available online at pressgazette.co.uk/news/editor-and-13-staff-quit-cambodias-phnom-penh-post-after-new-owner-calls-for-article-about-him-to-be-removed/ (accessed 1 March 2023); R. Ratcliffe, 'Dictator Hun Sen shuts down Cambodia's VOD broadcaster', *The Guardian* (13 February 2023), available online at www.theguardian.com/world/2023/feb/13/dictator-hun-sen-shuts-down-cambodias-vod-broadcaster (accessed 2 March 2023).

19 UN Office of the High Commissioner for Human Rights, *Cambodia: UN Experts Call for Reinstatement of Voice of Democracy, Say Free Media Critical Ahead of Elections*, 20 February 2023, available online at www.ohchr.org/en/press-releases/2023/02/cambodia-un-experts-call-reinstatement-voice-democracy-say-free-media (accessed 27 April 2023).

20 ECCC, *Co-Prosecutors v. Kaing Guek Eav alias Duch*, Case No.001/18-07-2007/ ECCC /TC, ECCC Trial Chamber, Trial Judgement, 26 July 2010.

21 ECCC, *Co-Prosecutors v. Kaing Guek Eav alias Duch*, Case No.001/18-07-2007/ ECCC /TC, ECCC Supreme Court Chamber, Appeal Judgement, 2 March 2012; National Co-Prosecutor, ECCC, *Press Release by the National Co-Prosecutor on the Passing of the Convicted Person KAING GUEK EAV alias DUCH*, available online at www.eccc.gov.kh/en/articles/press-release-national-co-prosecutor-passing-convicted-person-kaing-guek-eav-alias-duch (accessed 27 April 2023).

Minister for Foreign Affairs) and Ieng Thirith (CPK Minister of Social Affairs).²² However, Ieng Thirith was found unfit to stand trial in 2011,²³ and Ieng Sary's case concluded with his death in 2013.²⁴

The complexity of the Case 002 indictment led to a decision to split this case into two sequential trials.²⁵ The first trial ('Case 002/1') focused on crimes associated with the forced movement of the population into rural worksites, for which Nuon Chea and Khieu Samphan were convicted in 2014.²⁶ This conviction was upheld in 2016.²⁷ The second trial ('Case 002/2') concluded in 2018, convicting both accused of forced labour, the torture and execution of suspected dissidents, crimes targeting ethnic, political and religious groups, and the regime's role in orchestrating a policy of forced marriage.²⁸ Although both men appealed, Nuon Chea died before his appeal could be heard,²⁹ leaving Khieu Samphan as the sole surviving defendant at the time of the final appeal judgement in 2022.³⁰

To understand how that final judgment was represented to the Cambodian public, we worked with two bilingual (Khmer and English) research assistants to collate all identifiable Khmer-language media reports (television, YouTube and radio broadcasts, and online print) about the ECCC's final judgment from the day of the judgment, the two days preceding, and the week after. Eighteen reports were identified. Given the shrinking media freedoms in Cambodia, it was unsurprising that most of the reports were published by

22 ECCC, *Co-Prosecutors v. Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith*, Case No. 002/19-09-2007- ECCC-OCIJ, Office of the Co-Investigating Judges, Closing Order, 15 September 2010.

23 ECCC, *Co-Prosecutors v. Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith*, Case No. 002/19-09-2007/ ECCC /TC, Trial Chamber, Decision on Ieng Thirith's Fitness to Stand Trial, 17 November 2011.

24 ECCC, *Co-Prosecutors v. Nuon Chea, Ieng Sary and Khieu Samphan*, Case No. 002/19-09-2007/ ECCC /TC, Trial Chamber, Termination of the Proceedings Against the Accused Ieng Sary, 14 March 2013.

25 ECCC, *Co-Prosecutors v. Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith*, Case No. 002/19-09-2007- ECCC /TC, Trial Chamber, Severance Order Pursuant to Internal Rule 89ter, 22 September 2011.

26 ECCC, *Co-Prosecutors v. Nuon Chea and Khieu Samphan*, Case No. 002/019-09-2007/ ECCC /TC, Trial Chamber, Case 002/01 Trial Judgment, 7 August 2014.

27 ECCC, *Co-Prosecutors v. Nuon Chea and Khieu Samphan*, Case No. 002/19-09-20-EC/SC, Supreme Court Chamber, Case 002/01 Appeal Judgment, 23 November 2016.

28 ECCC, *Co-Prosecutors v. Nuon Chea and Khieu*, Case No. 002/19-09-2007/ ECCC /TC, Trial Chamber, Case 002/02 Trial Judgment, 16 November 2018.

29 ECCC, *Accused Person Nuon Chea Dies*, www.eccc.gov.kh/en/articles/accused-person-nuon-chea-dies (accessed 27 April 2023).

30 Case 002/02 Appeal Judgment, *supra* note 2.

government-friendly outlets: the state-owned National Television of Cambodia (TVK)³¹ and the Office of the Council of Ministers Press;³² Bayon Television (BTV), which is owned by CPP Prime Minister Hun Sen's daughter;³³ PNN TV Cambodia, which is owned by a CPP Senator;³⁴ Thmey Thmey, which maintains connections with the CPP;³⁵ Fresh News Cambodia, a private company that has been described as a 'government mouthpiece';³⁶ Koh Santepheap Daily, which critics have described as a 'CPP affiliated paper';³⁷ and Vayo FM, owned by the wife of a senior CPP official.³⁸ A few reports came from outlets with greater independence from the Cambodian government (albeit funded by the United States government), namely Radio Free Asia and Voice of America.³⁹ Both have had to shut down their Cambodia office and operate from abroad, and the Cambodian government previously blocked both outlets' websites in the days surrounding the 2018 national election, a pattern that was repeated in the most recent 2023 elections.⁴⁰

31 DBpedia, *About: National Television of Cambodia*, available online at dbpedia.org/page/National_Television_of_Cambodia (accessed 1 March 2023).

32 See Office of the Council of Minister, *Home*, available online at ressocm.gov.kh/en/ (accessed 1 March 2023).

33 Media Ownership: Cambodia 2017, *Hun Mana*, available online at cambodia.mom-gmr.org/en/owner/individual-owners/detail/owner/owner/show/hun-mana/ (accessed 1 March 2023).

34 X. Chen, 'CPP tycoon launches Kingdom's latest media venture', *Phnom Penh Post* (13 July 2015), available online at www.phnompenhpost.com/business/cpp-tycoon-launches-kingdoms-latest-media-venture (accessed 1 March 2023).

35 Cambodian Ministry of Information, *H.E. Khieu Kanharith Receives Founder Of Thmey Thmey Media*, available online at www.information.gov.kh/articles/64808 (accessed 27 April 2023); CFI Media Development, *Thmey Thmey at the Forefront of the Cambodian Media*, available online at cfi.fr/en/news/thmey-thmey-forefront-cambodian-media (accessed 27 April 2023).

36 N. Chheng and A. Nachemson, 'Fresh News Compiles Book on 'Revolution'', *Phnom Penh Post* (20 March 2018), available online at www.phnompenhpost.com/national/fresh-news-compiles-book-revolution (accessed 1 March 2023).

37 Media Ownership Monitor: Cambodia 2017, *New Players: Koh Santepheap Daily*, available online at cambodia.mom-gmr.org/en/media/detail/outlet/koh-santepheap-daily/ (accessed 2 March 2023).

38 Media Ownership Monitor: Cambodia 2017, *Vayo Media Group Co., Ltd*, available online at cambodia.mom-gmr.org/en/owner/companies/detail/company/company/show/vayo-media-group-co-ltd/ (accessed 27 April 2023).

39 US Global Agency for Media, *Financial Year 2023: Congressional Budget Justification*, available online at www.usagm.gov/wp-content/uploads/2022/03/USAGMBudget_FY23_CBJ_03-25-22-FINAL.pdf, p. 59–65 (accessed 1 March 2023); Voice of America, *Inside VOA*, available online at www.insidevoa.com/p/5831.html (accessed 1 March 2023).

40 UN Office of the High Commissioner for Human Rights 2022, *supra* note 33, pp. 16, 20–21; S. Narin and A. Chhengpor, 'Government Confirms Blocking 15 Independent News

These 18 reports were translated by our bilingual Khmer colleagues, who share a pre-existing knowledge of the ECCC: one a former ECCC translator, the other a legal researcher who has co-authored studies on the ECCC. We (the authors) then analysed these translations, triangulating the human translations with translation software where ambiguities arose. We used predominantly deductive thematic analysis, analysing for specific themes drawn from our prior research on the ECCC's jurisprudence and practice, while remaining alert to additional themes outside those we might expect. As feminist legal scholars, we aimed to be attentive to 'gaps and silences': to notice, and critically reflect upon, both the stories that are told and those that are *not* told in legal texts, in court decisions, and in the everyday practice of law.⁴¹ This is an approach shared with our other theoretical grounding. Drawing from critical victimological approaches to international criminal law, we have long been interested in questions around whose victimisation is recognised (or not), and what this recognition entails.⁴² From these theoretical starting points we identified four themes, common in academic commentary, that presented interesting themes through which to analyse the media sources: the Khmer press's tendency to downplay Cambodian political interference in the ECCC proceedings; its (mis)representation of the ECCC's genocide findings; its reporting on the prosecution of sexual and gender-based crimes; and its use of 'justice for victims' rhetoric. These are explored in the following sections.

Sites Over Poll "Disruption", *Voice of America*, available online at www.voacambodia.com/a/government-confirm-blocking-fifteen-independent-news-sites-over-poll-disruption/4503739.html (accessed 2 March 2023); 'Cambodia: Access to Independent Media Blocked' *Human Rights Watch* (2 August 2023), available online at www.hrw.org/news/2023/08/02/cambodia-access-independent-media-blocked#:~:text=The%20action%20was%20taken%20under,%20%20Bof%20the%20Ministry%20of (accessed 5 August 2023).

41 *E.g.*, H. Charlesworth, 'Feminist Methods in International Law', 93(2) *American Journal of International Law* (1999) 379–394.

42 S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', 76 *Law and Contemporary Problems* (2013) 235–262; K. McEvoy and K. McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame', 22 *Social and Legal Studies* (2013) 489; E. Haslam and R. Edmunds, 'Victim Participation, Politics and the Construction of Victims at the International Criminal Court', 14 *Melbourne Journal of International Law* (2013) 727–747.

3 'Immense Pride and Glorious Achievement': Obscuring Political Interference

One foreseeable result of the tight government control of the media in Cambodia was the absence of any reference to the political concerns that have shadowed the creation and operation of the ECCC. What also emerged from our analysis was a (similarly foreseeable) tendency amongst state-affiliated media sources to promote a pro-government version of history, as well as distinctions between 'official' media accounts of the Court and social media commentary from members of the Cambodian public. To contextualise these observations, this section outlines these political concerns, before examining the silences on this issue in the reports and the counter narrative(s) that emerged instead.

Relations between the ECCC's two creators, the UN and the Cambodian government, have been vexed since the Court's inception. It took over a decade of negotiations before Cambodia enacted a law establishing the ECCC in 2004. During these negotiations, the UN threatened to withdraw several times, mostly over disagreements about the extent of the Cambodian government's control over the Tribunal.⁴³ The US also sought to shape the ECCC in its favour, for example by framing the temporal jurisdiction to exclude its own carpet bombing of the Cambodia/Vietnam border from the Tribunal's jurisdiction.⁴⁴ Thus, the negotiations were highly politically charged.

A key point of tension was the composition of the Judicial Chambers. Wary of the UN (which had failed to prevent the Khmer Rouge's atrocities and allowed it to occupy Cambodia's UN seat until the early 1990s), and seeking to ensure domestic control over the court, Cambodia insisted that national judges outnumber the UN-appointed judges.⁴⁵ In response, the UN insisted on a 'super majority', meaning key decisions cannot be made by a bare majority (such as three judges against two), but required support from at least one additional judge. In theory, the 'super majority' rule was intended to prevent the Cambodian side from unilaterally blocking cases. Prime Minister Hun Sen had already signalled that he would not allow the ECCC's caseload to expand

43 C. Etcheson, *Extraordinary Justice: Law, Politics, and the Khmer Rouge Tribunals* (Columbia University Press, New York, NY, 2020), pp. 63–121; R. Killean, *Victims, Atrocity and International Criminal Justice* (Routledge, London, 2018), pp. 40–63.

44 D. Scheffer, *All The Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, Princeton, NJ, 2011), pp. 378, 382.

45 See Etcheson, *supra* note 43; Killean, *supra* note 43.

beyond what he and his government considered palatable.⁴⁶ Seemingly concerned that prosecuting lower-level Khmer Rouge would cause ‘instability’ (many are now senior CPP officials), he and other government officials insisted that five suspects would be limit.⁴⁷

In practice, the supermajority rule did not prevent allegations of political interference. For example, attempts to investigate and progress Cases 003 and 004 (which concerned individuals lower in the CPK hierarchy) were characterised by a lack of cooperation and in some instances, acts of sabotage and procedural irregularity.⁴⁸ In the end, the ECCC’s appellate chamber (the ‘Supreme Court Chamber’) had to terminate those cases because there were no enforceable indictments.⁴⁹ Concerns about political influence also arose in Case 002, when defendant Nuon Chea sought to call as witnesses four men holding leadership roles in Cambodia’s current government and military. The international trial judges approved the request, but were outnumbered by their national counterparts, in what critics viewed as an attempt to distance Cambodia’s current leadership from any association with Khmer-Rouge crimes.⁵⁰ In his appeal against the Case 002/2 judgment, Nuon Chea cited this

46 N. Naidu and S. Williams, ‘The Function and Dysfunction of the Pre-Trial Chamber at the Extraordinary Chambers in the Courts of Cambodia’, 18 *Journal of International Criminal Justice* (2020) 665–688, p. 669.

47 J.D. Giocriari and A. Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (University of Michigan Press, Ann Arbor, MI, 2014), pp. 167–201.

48 ECCC, *Co-Prosecutors v. Meas Muth and Sou Met and Co-Prosecutors v. Ao An, Im Chaem and Yim Tith*, Case No. 003/07-09-2009- ECCC -OCIJ and 004-07-09-2009- ECCC -OCIJ, Office of the Co-investigating Judges, Note of the International Reserve Co-Investigating Judge to the Parties on the Egregious Dysfunctions within the ECCC Impeding the Proper Conduct of Investigations in Cases 003 and 004, 21 March 2012; ECCC, *Co-Prosecutors v. Meas Muth and Sou Met*, Pre-Trial Chamber, Opinion of [PTC] Judges Downing and Chung on the Disagreement between the Co-Investigating Judges pursuant to Internal Rule 72, 10 February 2012.

49 ECCC, *Co-Prosecutors v. Meas Muth*, Case No. 0003-08-10-2021- ECCC /SC(05), Supreme Court Chamber, ‘Decision on the International Co-Prosecutor’s Appeal of the Pre-trial Chamber’s Failure to send Case 003 to Trial as Required by the ECCC’s Legal Framework’, 17 December 2021; ECCC, *Co-Prosecutors v. Yim Tith*, Case No. 004/23-09-2021- ECCC /SC(06), Supreme Court Chamber, ‘Decision on the International Co-Prosecutor’s Appeal of the Pre-trial Chamber’s Failure to send Case 004 to Trial as Required by the ECCC’s Legal Framework’, 28 December 2021.

50 ECCC, *Co-Prosecutors v. Nuon Chea*, Case No. 002/19-09-2007- ECCC /TC, Trial Chamber, ‘Nuon Chea’s Urgent and Consolidated Request to Expedite Two Already-Requested Witnesses and Summons Four Additional Witnesses Regarding the Treatment of the Cham’, 29 September 2015, paras 2–7. See also L. Crothers, ‘Defense Once Again Seeks Government Witnesses at KR Tribunal’, *The Cambodia Daily* (31 July 2014), available online at english.cambodiadaily.com/news/defense-once-again-seeks-govt-witnesses-at-kr-tribunal-65397/ (accessed 27 April 2023).

example, among others, to argue that the Trial Chamber's findings were tainted by 'prejudgment, bias, and/or lack of independence from the Cambodian government.'⁵¹ However, his death left these complaints unresolved.

These indications of political interference were either invisible or actively countered in the Khmer media following the ECCC's final judgment. As one might expect, none of the state-owned or state-affiliated outlets directly mentioned the issue. Instead, some proposed a preposterously positive counter-narrative. For example, the National Television of Cambodia reported that the final verdict showed the 'good cooperation' between Cambodia and UN,⁵² and the press release by Standing Deputy Prime Minister Bin Chhin commended the ECCC for having 'managed to maintain judicial independence and to avoid any external party's interference'.⁵³ Contrasting fair trials in the ECCC with Khmer Rouge times, he continued:

These are immense pride and glorious achievements as opposed to the brutal, unjust and inhumane treatment of the Khmer Rouge regime, which never recognised the fundamental rights of individuals.⁵⁴

Most of the reports made no mention of Cases 003 and 004, reflecting the government's insistence that these cases never come to be. Other reports alluded briefly to Cases 003 and 004 but did not link their closure to government interference. For example, *Thmey Thmey* named the suspects in Cases 003 and 004, but simply noted that these cases had closed.⁵⁵ *Koh Santepheap Daily* likewise named the suspects in Cases 003 and 004, stating that these cases did not proceed due to a lack of consensus between the international and national judges. Its report noted that the national prosecutor and judges, like the Royal Government of Cambodia, saw Cases 001 and 002 as the endpoint of the ECCC's

51 ECCC, *Co-Prosecutors v. Nuon Chea*, Case No. 002/19-09-2007- ECCC /TC, Trial Chamber, 'Nuon Chea's Notice of Appeal Against the Trial Judgment in Case 002/2', 1 July 2019.

52 'សម្តេចតេជោ ហ៊ុន សែន ៖ អំពើហិង្សាជនសាសន៍ មិនគួរកើតមានជាមុនិៗទៀត ទេវ៌កុំឱ្យអង្គការតុលាការស្ថិតិស្ថាន MN ធាតិៗទៀតឡើយ' ('His Excellency Hun Sen: Genocide must not happen again'), *TVK* (24 September 2022), available online at www.tvk.gov.kh/news/7688 (Item 5) (accessed 24 September 2022).

53 C. Bin, 'Remarks on the ECCC Proceedings in the pronouncement of the ECCC Supreme Court Chamber's Appeal Judgment in Case 002/02 against KHIEU Samphan', 22 September 2022 (Item 16).

54 *Ibid.*

55 N. Tep, 'ប្រសាកម្មរបស់តុលាការខ្មែរក្រហម «ដល់ទីបញ្ចប់ហើយ»' ('The mission of the Khmer Rouge Tribunal "is ended"'), *Thmey Thmey* (20 September 2022), available online at www.thmeythmey.com/?page=detail&id=119365 (Item 10) (accessed 27 April 2023).

work.⁵⁶ But it included no suggestion of political interference. Painting a rather glowing picture of the ECCC’s fair trial standards, Koh Santeheap Daily also reported that ‘all the process followed the international standard. It should be a sample for domestic court all level.’⁵⁷ The report noted some criticisms of the ECCC, including its long delays, the fact that many senior Khmer Rouge leaders had died before they could be prosecuted, and the fact that the Tribunal did not prosecute leaders of other countries that supported the Khmer Rouge.⁵⁸ Such criticisms may be deemed more palatable than explicit references to government interference.

The US-funded Voice of America hinted obliquely at the issue. Its broadcast noted that the ECCC had previously identified other suspects, but these suspects were not charged due to differences in opinion between the national and international judges.⁵⁹ However, the broadcast made no explicit mention of political interference, adopting the language used by the national prosecutor and judges, that ‘[t]he court ruled that they were not among the highest responsible officials to be brought to justice.’⁶⁰ Within a month of the judgment, this story had 96,000 views on Facebook. It was the only source with reader comments available. Going further than the original broadcast, several comments made accusations against Cambodia’s current leadership, suggesting that some Khmer-speakers remain unpersuaded by

56 S. P. Muth, ‘កាត់ទោស ខ្មែរក្រហម ៖ ដំណើរការ ស្មុគ្រ ស្មាញ រយៈ ពេល ១៦ ឆ្នាំ បាន បញ្ចប់’ (‘Khmer Rouge trial: 16 years of complex process over’), *Koh Santepheap Daily* (22 September 2022), available online at kohsantepheapdaily.com.kh/article/1603027.html (Item 14) (accessed 27 April 2023). (‘នៅ តុលាការ ខ្មែរក្រហម នេះ ក៏ នៅ មាន សំណុំរឿង ០០៣ និង ០០៤ ដដែល មាន ជនសង្ស័យ ជា អតីត មេដឹកនាំ ខ្មែរក្រហម បួន រូប គឺ ប៉ូឡុន វ៉ាន់ និង ភូមីភាគ ដទៃ នៅ រដ្ឋបាល មានជីវិត ដល់ សព្វថ្ងៃ ដូច ជា មាស មុត យី ម ទី គុយ អរោ អាង និង ឆឹម ថេម ជាដើម ។ ប៉ូឡុន វ៉ាន់ សំណុំរឿង ០០៣ និង ០០៤ នេះ មិន មាន ការ ឯកភាព គ្នា រវាង ភាគី អន្តរជាតិ និង ភាគី ជាតិ ឡើយ ។ ក្នុង សំណុំរឿង បន្តិច ទៀត គឺ លី ឈី ឈី ឈី ឈី សហ ព្រះរាជអាជ្ញា និង សហ ព្រះរាជ អន្តរជាតិ ចង់ បន្ត ចៅ ប្រកាន់ និង តា មក កាត់ទោស ទៀត ប៉ូឡុន វ៉ាន់ សហ ព្រះរាជអាជ្ញា និង សហ ព្រះរាជ អន្តរជាតិ បាន យល់ ឃើញ ដូច គ្នា ថា ក្រុម ប្រឹក្សា កម្ពុជា ដឹង ពី បញ្ហា សំណុំរឿង កាត់ ទោស អតីត មេដឹកនាំ ខ្មែរក្រហម គុំមត វ៉ាន់ សំណុំរឿង ០០១ និង សំណុំរឿង ០០២ ដដែល មាន អតីត មេដឹកនាំ ខ្មែរក្រហម កំពុង រើ ខ្ពស់ បំណុល ទោស’).

57 *Ibid.* (‘យ៉ាងណា ក៏ ដោយ ដំណើរការ និង វិធាន ក្នុង តុលាការ ចម្បង នេះ បាន ផ្តល់ ឱ្យ យើង តាម ស្តង់ដារ អន្តរជាតិ ហើយ គួរ តែ គួរ បាន យក មក អនុវត្ត នៅ ក្នុង សវនាការ ដំបូង ទៅ នា ខែ កុម្ភៈ ឆ្នាំ ២០២១ តុលាការ គួរ ជាប់ ទោស នៅ ប្រទេស កម្ពុជា យើង ។ ពេល គឺ សវនាការ បរិកចំហរ អាច ឱ្យ សាធារណជន អន្តរ កម្ម សង្កេត ការណ៍ និង អន្តរកាល តាមដាន ការ កាត់ក្តី និង យក វិធាន បាន ពេញ លេញ ។’).

58 *Ibid.*

59 N. Sun and S. Khan, ‘លោក ខៀវ សំផន ជាប់ពន្ធនាគារអស់មួយជីវិត ក្នុងទីបញ្ចប់នៃដំណើរការកាត់ក្តី’ (Khmer Rouge trials end after Khieu Samphan sentenced to life imprisonment’), *VOA* (22 September 2022), available online at www.facebook.com/watch/?v=501399638041879&_rdc=1&_rdr (Item 7) (accessed 27 April 2023).

60 *Ibid.*

government-friendly narratives about the ECCC. One user wrote that Prime Minister Hun Sen was also a key figure in the Khmer Rouge regime,⁶¹ another that Hun Sen and (National Assembly President) Heng Samrin should have been summoned as witnesses.⁶² Such comments highlight the differences that can emerge between public and more ‘official’ commentary on the ECCC and indicate some public scepticism around the stories being told about the Court.

Other user comments echoed the argument that the ECCC should have exposed countries that enabled the Khmer Rouge. We identified a particular suspicion of Vietnam, whose communist politics under Ho Chi Minh are widely believed to have influenced the Khmer Rouge,⁶³ and China, which allegedly financially supported and armed the Khmer Rouge.⁶⁴ For example:

It is unfair that foreigners invaded Cambodia, causing Cambodians to have internal conflicts.⁶⁵
 which countries helped the Khmer Rouge in 1975?⁶⁶
 why the ECCC did not call the Vietnamese to explain what happened?⁶⁷
 Now Vietnam and China are sitting and laughing because our Cambodians are ignorant, they are foolish, they are accusing, killing and imprisoning patriots using puppets.⁶⁸
 China and Vietnam were deeply involved in the Khmer Rouge regime.⁶⁹
 Foreigners killed Khmer and escaped.⁷⁰

61 ហ៊ុនសែន ក៏ដដែល ជាអ្នក សម្ងាត់ ក្នុងរបប ខ្មែរក្រហម.

62 គួរតែរោះហៅហងសរិនហើយហ៊ុនសែនជាសាក្សីទើបគ្រឹមត្រូវលើបញ្ហាទាំងនេះ.

63 Although it has proven difficult to establish the exact terms of their relationship. See, e.g., D. Mosyakov, ‘The Khmer Rouge and the Vietnamese Communists’ in S.E. Cook (ed.), *Genocide in Cambodia and Rwanda* (Routledge, London, 2006), pp. 45–77.

64 A.C. Mertha, *Brothers in Arms: Chinese Aid to the Khmer Rouge, 1975–1979* (Cornell University Press, Ithaca NY, 2014).

65 អញគិតមិនណាស់សម្ងាត់ខ្មែរទេ។ បរទេសមកឈ្នួលបានខ្មែរម្តងទៀត ខ្មែរម្តងមានធម្មលោះផ្តុំទុក្ខនឹងរហូតមានការកាប់សម្លាប់គ្នាដោយគោលបំណងកម្ទេចតំបន់សេ ក្រហមសម្លាប់គ្នាមិនដឹងចាញ់ឈ្នះក៏មានបរទេសដដែលចេញមុខដោះស្រាយថែមទាំងបង្កកើតគុណាការកាត់ក្តីលើខ្មែរម្តងទៀត តើនេះជាអ្វី? នេះគេហៅថាទេសជាតិស្លាប់ក្រុមមីស្វាច

66 បរទេសណាខ្លះជួយខ្មែរក្រហមក្នុងឆ្នាំ១៩៧៥សូមយកមកកាត់ទោសផង

67 គុណាការមិនមែនជប់ចោទទាញយកអ្វីមិនហៅយួនមកបំភ្លើ

68 ពេលនេះយួននិងចិននាំគ្នាអង្កេតយស៊ីចរោះខ្មែរយើងល្ងង់ចាញ់កលញ្ញា ចោត ចាប់ សំលាប់ដាក់គុកអកុសលឡាញ ជាតិគ្មានឯងដោយប្តូរក្រុមអាជីវ

69 ខ្សៀវ សំផន ជាប់គុក ឬមិនជាប់គុក តើមានអ្វីខុសគ្នា? សំខាន់ ការពិត នៅតែជាអាទិកំហែង ជារៀងរហូត ។ របបវាលពិឃាត គឺជារៀងរាជ្ជវ័យយោងយោហ្វូស៊ីស៊ីយ ដល់មតិភាគច្រើនសង្ឃឹមថា ចិន ហើយនិងយួននៅពីក្រោយខ្លួន ។ ចិន និងយួន ពាក់ព័ន្ធជុំវិញណាស់ ក្នុងរបបខ្មែរក្រហម ។

70 បរទេស សម្លាប់ខ្មែរ រួចខ្លួនដដែល។.

These remarks align with previous research which indicates that Cambodian youth want ‘in-depth stories’ of the Khmer Rouge period, such as ‘who was behind the killing?’.⁷¹ While this desire for further information is understandable, it may also be connected to growing xenophobia in Cambodia, discussed further below.

Radio Free Asia, another US government-funded outlet, was the only source to explicitly consider political interference by Cambodia. Its report included comments from former Khmer Rouge soldiers who expressed regrets that the ECCC could not bring current CPP officials to justice. One stated ‘វា អយុត្តិធម៌ សម្រាប់ គាត់ ។ លោក សង្កតេ យើង ថា សាលា ក្នុង ខ្មែរ ក្រហម អនុវត្ត ការងារ គុមាន ឯករាជ្យ ភាព ឡើយ ព្រោះ ភាគី ពាក់ព័ន្ធ ឬ បុគ្គលិក ដល់ មាន តួនាទី ក្នុង រដ្ឋប្រតិបត្តិ ជាប់ ពាក់ ព័ន្ធ គឺ គុមាន ការ ចូលរួម ដោះ ស្រាយ ឡើយ ។ លោក យល់ ថា សាលា ក្នុង គ្រាន់ តែ ជា ឆាក លុខោន បង្កប់ កិច្ច ដើម្បី ចោទ ប្រកាន់ អតីត មជ្ឈឹក ខ្មែរ ក្រហម ទទួល ទោស ហើយ លុបលាង ទ្រង់ ទ្រង់ កំហុស មួយ ចំនួន របស់ មជ្ឈឹកនាំ សព្វ ថ្ងៃ ប៉ុណ្ណោះ’; which translates roughly to mean that the ECCC lacks independence because government officials are involved, and is a stage or performance aimed at punishing the Khmer Rouge leaders while forgetting or concealing the guilt of current leaders.⁷²

Our media review also revealed a government-friendly orientation in relation to other aspects of the ECCC’s work, as detailed below. However, nowhere was this more evident than in the press’s approach to political interference. The examples shared here demonstrate the ways in which the CPP continue to shape a pro-government narrative about the Court within Cambodia; this is in keeping with their general approach towards controlling the media and minimising dissenting voices in the country. However, the Facebook comments also demonstrate the range of perspectives (including some critical perspectives) that exist amongst the population more broadly, as well as a continued desire for more in-depth information about the Court’s functioning and decisions.

71 B. Tann and K. Tim, ‘Duty Not to Forget’ the Past? Perceptions of Young Cambodians on the Memorialization of the Khmer Rouge Regime’, *Swisspeace* (2019), available online at www.swisspeace.ch/assets/publications/downloads/Working-Papers/5d40c8e716/WP-1-Cambodia-Series-d.pdf, p. 23 (accessed 5 August 2023).

72 C. So, ‘អតីត កងទ័ព ខ្មែរ ក្រហម រស់ ខ្មែរ យើង សាលា ក្នុង ខ្មែរ ក្រហម ចំពោះ សម្រេច សាលា ក្នុង ខ្មែរ ក្រហម’ (‘Former Khmer Rouge soldiers in Pailin regret the Khmer Rouge tribunal’s decision’), *REA* (22 September 2022), available online at <https://www.rfa.org/khmer/news/krt/former-khmer-rouge-reacted-to-verdict-against-khieu-samphan-09222022163952.html> (Item 8) (accessed 5 August 2023).

4 ‘The Most Serious International Crimes’⁷³: Representing and Misrepresenting Genocide

In 2018, the ECCC convicted Nuon Chea and Khieu Samphan of the crime of genocide against the ethnic Vietnamese population, additionally finding Nuon Chea guilty of genocide against the Cham (an Islamic minority group in Cambodia). Both appealed, but Khieu Samphan’s appeal failed, Nuon Chea died before judgment was rendered, and the genocide allegations in Cases 003 and 004 never made it to trial.⁷⁴ Consequently, the ECCC’s only finalised genocide conviction was Khieu Samphan’s conviction for genocide against the ethnic Vietnamese. In this section, we explore how the media reported Khieu Samphan’s conviction for genocide. We analyse media sources against the backdrop of a history of discord and contestation between international legal definitions of genocide and the Cambodian population’s own understanding of its violent history.

Our media review revealed significant confusion around the specifics of Khieu Samphan’s conviction. Two sources, Koh Santepheap Daily and Voice of America, accurately identified the genocide conviction as relating to the Vietnamese.⁷⁵ But most others—state-owned and US-funded—misrepresented the ECCC’s genocide findings. The most common error was the claim that Khieu Samphan had also been found guilty of genocide against the Cham. For example, VAYO stated ‘He was found guilty by the Trial Chamber of the [ECCC] on charges of crimes against humanity, grave breaches of the Geneva Conventions of 1949 and genocide against the Vietnamese and Cham people.’⁷⁶ And Radio Free Asia reported that the appeal judgment ‘upheld the

73 “Today’s verdict underscores that the international community is ready and committed to ensuring accountability for the most serious international crimes committed many decades ago.” UN Under-Secretary-General and Director for Legal Affairs, Stephen Mathias, quoted in B, Sek, ‘តុលាការកំពូលសាលាក្រឹមីខ្មែរដាក់កម្រហម វត្តមានការផ្ដន្ទាទោសដាក់ពន្ធនាគារ លេខាក ខៀវ សំផន អស់មួយជីវិត’ (‘Khmer Rouge tribunal upholds Khieu Samphan life sentence’), *REA* (23 September 2022), available online at www.youtube.com/watch?v=q6d3FYf-5lE (Item 2) (accessed 27 April 2023).

74 Case 002/02 Trial Judgment, *supra* note 42, paras. 2067–2216; Case 002/02 Appeal Judgement, *supra* note 2, paras. 1592–21638.

75 ‘Khmer Rouge Court Upholds Khieu Samphan’s Life Imprisonment Judgment’, *Koh Santepheap Daily* (22 September 2022) (Item 18); Sun and Khan, *supra* note 59.

76 Yeun Seyha, ‘សាលដីកា ចុងក្រោយ! អ. វ. ត. ក សម្រេច ដាក់ ពន្ធនាគារ លេខាក ខៀវ សំផន អស់ មួយជីវិត’ (‘Final Verdict! ECCC Rules to Put Khieu Samphan in Prison for Life’), *VAYO* (22 September 2022) (Item 15) (លេខាក គូសបាទ អង្គ ជំនុំ ជំ ម្រះ សាលា ជំបូង នៃ អង្គជំនុំជម្រះ វិសាមញ្ញ តុលាការ កម្ពុជា បាន រកឃើញថា មាន ឱទ្ធភាព ក្នុង បទ ចោទ ខក្រិដ្ឋកម្ម ប្រឆាំង មនុស្សជាតិ ការរំលោភ យ៉ាង ធ្ងន់ធ្ងរ លើ អនុសញ្ញា ទីក្រុង ហ្សឺណែវ ១៩៤៩ និង អំពើ ប្រល័យពូជសាសន៍ ប្រឆាំង ជនជាតិ វៀតណាម និង ជនជាតិ ចាម ខណៈ លេខាក គី ធា អតីត បុគ្គលិក នៃ របប កម្ពុជា ប្រជាធិបតេយ្យ ឬ របប ខ្មែរក្រហម ។)។

Trial Chamber's original decision on the charges in Case ០០២/០២ regarding the genocide of Cham and Vietnamese.⁷⁷ In fact, Khieu Samphan was found guilty of the crime against humanity of 'extermination' in relation to the Cham (i.e., killing multiple Cham people, but without the intent to wipe out the Cham group). However, the trial and appeal judges were unable to find him guilty of 'genocide' against the Cham (unlike 'extermination', the 'genocide' charge required proof of a specific intent to destroy the Cham group, in whole or in part).⁷⁸

Other sources drew attention to the charge of genocide against the Cham that was initially laid against Khieu Samphan without noting that he had been acquitted of that charge at trial.⁷⁹ While technically correct, this information is incomplete. It could lead readers who are not versed in the distinction between a 'charge' (an allegation that is yet to be established by the prosecution) and a 'conviction' (a finding by the judges of guilt beyond reasonable doubt) to assume that Khieu Samphan was found guilty of genocide against the Cham. Other sources made no reference to Khieu Samphan's genocide conviction whatsoever,⁸⁰ or mentioned that his conviction for 'genocide' had been upheld without specifying any targeted group.⁸¹

These confusions and/or absences across a range of media sources resonate with a theme that has been noted frequently in English-language scholarship around the ECCC: that the legal nuances of the Court's genocide jurisprudence are often lost in translation, or overlooked, in Cambodia. Analysing the media sources through this lens assists in identifying some of the reasons that their reporting on this point may be ambiguous or lacking in detail.

Popular understandings of 'genocide' in Cambodia do not accord with the ECCC's definition of genocide, i.e. the definition under international law, namely:

77 Sek, *supra* note 73.

78 Case ០០២/០២ Trial Judgement, *supra* note 42, paras 33០8, 43០8, 4319, 4329, 4337.

79 *E.g.*, Sun and Khan, *supra* note 59.

80 R. Hul, 'ជំហាន បន្ទាប់ ក្នុងការ សាងក្រឹត្យ ខ្មែរក្រហម បញ្ចប់ ការ ដំណើរការ: ការ សម្រេច ទប់ ស្មក់ អំពើ ឃោរឃៅ ។ ('Next Steps after the Khmer Rouge Tribunal Concludes Trial: Education to Deter Atrocities'), *VOA* (23 September 2022), available online at <https://khmer.voanews.com/a/next-step-for-khmer-rouge-tribunal-to-genocide-prevention-education-/676០០93.html> (Item 17) (accessed 27 April 2023).

81 *TVK* (Item 5), *supra* note 57; V. Chea and M. Leng, 'ការ ផ្តន្ទាទោស ដាក់ក្តក សំ មួយ ជីវិត និង ប្រគល់សង្គម របស់ ស្រី ឈាម ខ្មែរ សំផន អតីត ប្រមុខរដ្ឋ របប ខ្មែរក្រហម' (Life imprisonment and a brief history of Khieu Samphan, former head of the Khmer Rouge'), *RFA* (22 September 2022), available online at <https://www.rfa.org/khmer/news/krt/final-verdict-and-profile-of-former-democratic-kampuchea-state-leader-khieu-samphan-០9222០22152652.html> (Item 6) (accessed 27 April 2023).

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁸²

The requirement of a specific intent and the limitation to specific groups are critical to the conception of genocide in international law. The crime was defined in the response to the Nazis' attempts to obliterate the Jewish people and other groups that they considered a threat to 'German blood,' the word literally means the killing ('cide') or a race or tribe ('genos'), as opposed to the killing of a large but disparate mass of individuals.⁸³ The ECCC Statute followed this definition, meaning the Tribunal was unable to find 'genocide' for the vast majority of killings, perpetrated on political grounds.⁸⁴

By contrast, Cambodia's 'Revolutionary People's Tribunal', which indicted Khmer Rouge leaders Pol Pot and Ieng Sary for 'genocide' in 1979, defined the crime without reference to special intent or protected groups. Instead, genocide was defined in terms more akin to modern understandings of crimes against humanity:

planned massacres of groups of innocent people; expulsion of inhabitants of cities and villages in order to concentrate them and force them to do hard labor in conditions leading to their physical and mental destruction; wiping out religion; destroying political, cultural and social structures and family and social relations.⁸⁵

82 UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United National Treaty Series, vol. 78, Article 2.

83 R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation—Analysis of Government—Proposals for Redress* (Carnegie Endowment for International Peace, Washington, DC, 1944).

84 S. Williams, 'Symposium on the ECCC: Narrating History at the ECCC—A Tale of Two Trials', *Opinio Juris* (31 October 2022), available online at opiniojuris.org/2022/10/31/symposium-on-the-eccc-narrating-history-at-the-eccc-a-tale-of-two-trials/ (accessed 5 August 2023).

85 The People's Revolutionary Council of Kampuchea, *Decree Law No 1 of 15 July 1979, Phnom Penh, 15 July 1979*, Article 1, available online at law.scu.edu/wp-content/uploads/Decree_Law_No._1.pdf (accessed 5 August 2023).

The 1979 proceedings were broadcast across Cambodia, helping to plant the seeds for a popular understanding of the regime as genocidal.⁸⁶ This broader formulation of ‘genocide’ has been reinforced over the decades through commemorative activities,⁸⁷ school curricula,⁸⁸ and government state building initiatives.⁸⁹ Two well-known examples are the Tuol Sleng Genocide Museum and Choeung Ek Genocidal Center; which contain detailed exhibitions about Khmer Rouge crimes, but do little to unpack the legal differences between ‘genocide’ against specific ethnic groups and ‘crimes against humanity’ against the population at large.⁹⁰

Some have argued that linguistic differences may also play a role in shaping local understandings of ‘genocide.’ The Khmer language term for genocide is *prolai pouch-sas*. As explained by a former ECCC translator:

It comes from Pali and Sanskrit words mostly used in the Theravada Buddhist world. Pralay means ‘destruction, extinction or demise’. Pouch means ‘race or ethnicity’. Sas means religion or religious teaching. So, it literally means ‘destruction or extinction of race and religion.’⁹¹

The phrase has also been translated as ‘to eliminate the lineage of a people or a nation’, ‘to eliminate the race (or the seed) of the nation’, and to ‘destroy

86 R. Hughes, C. Sperfeldt and M. Elander, ‘Cambodians await crucial tribunal finding into 1970s brutal Khmer Rouge regime’, *The Conversation* (15 November 2018), available online at theconversation.com/cambodians-await-crucial-tribunal-finding-into-1970s-brutal-khmer-rouge-regime-106078 (accessed 27 April 2023).

87 P. Manning, *Transitional Justice and Memory in Cambodia: Beyond the Extraordinary Chambers* (Routledge, London, 2017).

88 K. Dy, ‘Challenges of Teaching Genocide in Cambodian Secondary Schools’, Paper 4, *Policy and Practice: Pedagogy about the Holocaust and Genocide Papers* (2013), available online at cambodiatribunal.org/wp-content/uploads/2013/08/commentary_130101.pdf (accessed 27 April 2023); F. Ngo, ‘Revision for Rights? Nation-Building through Post-War Cambodian Social Studies Textbooks, 1979–2009’, in J. Willimas (ed.) *(Re)Constructing Memory* (Sense Publishers, Rotterdam, 2017), pp. 153–169.

89 E. Gottesman, *Cambodia After the Khmer Rouge: Inside the Politics of Nation Building* (Yale University Press, New Haven, CT, 2003).

90 See C. Lawther, R. Killean and L. Dempster, ‘Making (In?)Visible: Selectivity, Visibility and Authenticity in Cambodia’s Sites of Atrocity’, 24(1), *Journal of Genocide Research* (2022) 45–70; P. Manning, ‘Governing Memory: Justice, Reconciliation and Outreach at the Extraordinary Chambers in the Courts of Cambodia’, 5(2), *Memory Studies* (2012) 165–181.

91 Report by former ECCC translator, April 2023, on file with authors.

from the root' or 'kill the seed of the race.'⁹² To our eyes, these translations largely accord with the international definition of genocide, insofar as they focus on the elimination or destruction of a group of individuals with a shared identity. However, in practice this Khmer term is associated with a broader understanding of harm.⁹³ As explained by Youk Chhang, the director of the Documentation Centre of Cambodia, the word is often used to capture a range of losses under the Khmer Rouge regime:

For the victims: it's about killing their family members; it's about separation; it's about being forced to work in the rice fields; it's about killing their wife or husband ... The word 'genocide' has been widely used in that context, and that is how people refer to it.⁹⁴

A similar view was expressed by a former ECCC translator:

From my understanding, when I heard this word for the first time, I did not know what it exactly meant. I only thought of mass killings and murders of many people in the country. [...] In our Khmer dictionary, the word 'Pralay Pouch Sas' meaning destruction of race and religion is very well and clearly defined. However, a large majority of ordinary people, civil servants, professionals, and experts in Cambodia still see 'genocide' as 'destruction or extinction of the whole population in the country.'⁹⁵

It may be that, for most Cambodians, the symbolism of guilty verdicts for the crime of 'genocide' carries more importance than the technical detail contained in the ECCC judgments. Certainly, previous research with members of the Cham community suggests that even amongst members of the targeted groups, there may be a belief that similar crimes were perpetrated against the entire population.⁹⁶ For the participants interviewed in that study, the desire

92 S. Giry, 'The Genocide That Wasn't', *New York Review of Books* (25 August 2014); IRIN, *Did the Khmer Rouge commit genocide?*, available online at www.refworld.org/docid/55f6a1d64.html (accessed 13 April 2023); B. Brady, 'Cambodia Confronts the "G" Word', *FP* (8 January 2010), available online at foreignpolicy.com/2010/01/08/cambodia-confronts-the-g-word/ (accessed 13 April 2023).

93 *Ibid.*

94 IRIN, *supra* note 92.

95 *Supra* note 91.

96 R. Hickey and R. Killean, 'Property Loss and Cultural Heritage Restoration in the Aftermath of Genocide: Understanding Harm and Conceptualising Repair', 15(3) *International Journal of Transitional Justice* (2021) 468–489.

to have their harm recognised did not necessarily translate to a desire for recognition that their harms differed from others.

However, research has highlighted that for other survivors, the limiting of genocide charges to Cham and Vietnamese groups was galling, and suggested that ‘history had not been understood.’⁹⁷ This perspective was not reflected in the media sources we analysed, but is evident in civil parties’ previous requests that genocide against the majority ethnic group (the Khmer) be investigated,⁹⁸ and the ECCC Cambodian Judge You Ottara’s separate opinion, which critiqued the ‘narrow ... overly formalistic, and entirely unrealistic, approach to the definition and identification of genocides.’⁹⁹

The erroneous reporting on Khieu Samphan’s genocide conviction also obscures the fact that in the end, the only genocide finding that received a ‘definitive judgement’ in the ECCC¹⁰⁰ was that perpetrated against the Vietnamese. While the crimes perpetrated against the Vietnamese are well documented,¹⁰¹ local recognition of this genocide has been complicated by the ‘difficult relationship between the Khmer majority and the Vietnamese minority in Cambodia.’¹⁰² As Lyma Nguyen, a lawyer who represented the Vietnamese civil parties, noted:

I can say that when I first came to Cambodia the sentiment, even amongst Cambodian Civil Party Lawyers, was that the Vietnamese could never be seen as victims of crime, and that goes back to the entrenched hostilities and sentiments against this group by mainstream Cambodian society.¹⁰³

97 Giry, *supra* note 92; T. Forster, *The Khmer Rouge and the Crime of Genocide* (Dike Verlag, Zurich, 2012).

98 ECCC, *Co-Prosecutors v Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith*, Case No. 002/19-09-2007- ECCC /OCIJ, Office of the Co-Investigating Judges, ‘Sixth Investigative Request of Co-Lawyers for Civil Parties Concerning the Charge of Genocide Against the Khmer Nationals’, 4 February 2010; ECCC, *Co-Prosecutors v Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith*, Case No. 002, Order on Civil Parties Request Concerning the Charge of Genocide Against the Khmer Nationals’, Co-Investigating Judges, 24 February 2010.

99 Case 002/02 Trial Judgment, *supra* note 42 (You Ottara Separate Opinion).

100 Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, Article 35 new.

101 B. Kiernan, ‘The Pol Pot Regime’s Simultaneous War Against Vietnam and Genocide of Cambodia’s ethnic Vietnamese Minority’, 53(3) *Critical Asian Studies* (2021) 342–358.

102 L. Nguyen and C. Sperfeldt, ‘Victim Participation and Minorities in Internationalised Criminal Trials: Ethnic Vietnamese Civil Parties at the Extraordinary Chambers in the Courts of Cambodia’, 14 *Macquarie Law Journal* (2014) 97–126.

103 R. Hughes, M. Elander, C. Sperfeldt, H. Jarvis, W. Smith, L. Nguyen and W. Lobwein, ‘Achievements and Legacies of the Khmer Rouge Trials: Reflections from Inside the Tribunal’, 44(2) *Australian Feminist Law Journal* (2018) 303–324.

Vietnamese civil parties struggled to garner support for their requests for reparation,¹⁰⁴ the classification of the crimes against the Vietnamese as ‘genocide’ has been contested by Khmer scholars,¹⁰⁵ and some survivors have argued that the Court is overlooking the supposed role of the Vietnamese in perpetrating atrocities.¹⁰⁶ In an ‘increasingly xenophobic political climate’ where the Vietnamese have struggled to receive the status of ‘victim,’ it is perhaps unsurprising that media sources have not foregrounded the Supreme Court Chamber’s affirmation of the Vietnamese genocide.¹⁰⁷

It is hard to imagine that those who read media reports on the final appeal judgment will grasp the legal distinctions between Khieu Samphan’s crimes against the Vietnamese and crimes against other groups. With the ECCC’s residual phase designed in part to cement the legacy of the Court through outreach activities, and with civil society turning its mind to how the Court’s work might be incorporated into Cambodia’s education systems,¹⁰⁸ it may be that these legal complexities are further unpacked over time. However, our research suggests that such nuances ultimately matter less to survivors than receiving recognition, affirmation, and reparation for their experiences of harm (returned to below), and that ultimately, the legal distinctions between genocide and crimes against humanity are of greater importance to international criminal lawyers than journalists and survivors of the regime.

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- 104 C. Sperfeldt, ‘Nationality as Reparation? The Case 002/02 Trial Judgment at the Extraordinary Chambers in the Courts of Cambodia’ (forthcoming, on file with authors).
- 105 T. Thun and D. Keo, ‘Ethnic Vietnamese and the Khmer Rouge: The Genocide and Race Debate’, 53(3) *Critical Asian Studies* (2021) 325–341.
- 106 J. Bernath, ‘Civil Party Participation and Resistance at the Khmer Rouge Tribunal’, in B. Jones and J. Bernath (eds.), *Resistance and Transitional Justice* (Routledge, London, 2017), pp. 103–122; K. Path, ‘Multivocal Resistance to Transitional Justice in Post-Genocide Cambodia’, in B. Jones and J. Bernath (eds.), *Resistance and Transitional Justice* (Routledge, London, 2017), pp. 123–141.
- 107 R. Hughes, C. Sperfeldt and M. Elander, ‘Cambodians Await Crucial Tribunal Finding Into 1970s Brutal Khmer Rouge Regime’, *The Conversation* (15 November 2018), available online at theconversation.com/cambodians-await-crucial-tribunal-finding-into-1970s-brutal-khmer-rouge-regime-106078 (accessed 5 August 2023). See also C. Sperfeldt, ‘Minorities and Statelessness: Social Exclusion and Citizenship in Cambodia’, 27(1) *International Journal on Minority and Group Rights* (2020) 94–120.
- 108 S. Kum and B. Tann, ‘Symposium on the ECCC: Legal Education—ECCC’s Failed or Missing Attempt?’, *Opinio Juris* (16 November 2022), available online at <http://opiniojuris.org/2022/11/16/symposium-on-the-eccc-legal-education-ecccs-failed-or-missing-attempt/> (accessed 5 August 2023).

5 ‘Forced Marriages and Rapes Throughout the Country’: Sexual and Gender-Based Crimes

As feminist legal scholars, we were curious to see how the Khmer press covered the ECCC’s approach to prosecuting sexual and gender-based crimes. In English-language scholarship, the ECCC has been widely criticised for failing to prosecute rapes committed against women and girls in Khmer Rouge prisons and worksites, despite evidence indicating that rapes were widespread. There has also been critique of its scant, belated attention to sexual violence against men and people who identify as *phed ti bey*, a locally understood third gender identity.¹⁰⁹ Khieu Samphan’s appeal judgment is an important part of the Court’s legacy in this regard, as it includes important recognition of both men’s and women’s experiences of forced sexual intercourse in the context of forced marriage. To understand what the media missed in this regard, a brief sketch of the ECCC’s track record in prosecuting sexual violence crimes is necessary.

Thousands of court hours have been devoted to unearthing, legally characterising, and establishing criminal responsibility for sexual crimes committed during the Khmer Rouge era. There has been a turnaround since the ECCC’s early years, when sexual crimes seemed at risk of being sidelined.¹¹⁰ That concern first arose following a 2007 press release by the ECCC prosecutors announcing that ‘[T]wenty-five distinct factual situations of murder, torture, forcible transfer, unlawful detention, forced labor [*sic.*] and religious, political

¹⁰⁹ T. De Langis, ‘This Is Now the Most Important Trial In the World’: A New Reading of Code #6, the Rule Against Immoral Offenses Under the Khmer Rouge Regime,’ 3 *Cambodia Law and Policy Journal* (2014) 61–78; M. Elander, ‘Prosecuting the Khmer Rouge Marriages,’ 42(1) *Australian Feminist Law Journal* (2016) 163–175; R. Killean, ‘An Incomplete Narrative Prosecuting Sexual Violence Crimes at the Extraordinary Chambers in the Courts of Cambodia,’ 13(2) *Journal of International Criminal Justice* (2015) 331–352; V. Oosterveld and P. Sellers, ‘Issues of Sexual and Gender-Based Violence at the ECCC,’ in S.M. Meisenberg and I. Stegmiller (eds.), *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Criminal Law* (T.M.C Asser Press, The Hague, 2016), pp. 321–351; Studzinsky, *supra* note 21; S. Williams and E. Palmer, ‘The Extraordinary Chambers in the Courts of Cambodia: Developing the Law on Sexual Violence?’, 15(3) *International Criminal Law Review* (2015) 452–484; R. Grey, ‘Seen and Unseen: Sexual and Gender-Based Crimes in the Khmer Rouge Tribunal’s Case 002/02 judgment,’ 25(3) *Australian Journal of Human Rights* (2019) 466–487; R. Grey, ‘Translating Gender Diversity In International Criminal Law: An Impossible But Necessary Goal,’ 47(2) *Australian Feminist Law Journal* (2022) 163–186.

¹¹⁰ Palmer and Williams, *supra* note 21.

and ethnic persecution' had been referred to the investigating judges.¹¹¹ Absent from that list was rape, sexualised torture, and other sexual and gender-based crimes that had been discussed in the 1979 trial and several Khmer- and English-language memoirs and studies since.¹¹²

This apparent omission was part of a longer problem in international criminal law. The post-World War II Nuremberg and Tokyo Tribunals and the international criminal tribunals for the former Yugoslavia and Rwanda had each been criticised for overlooking sexual and gender-based crimes.¹¹³ In the same year that the ECCC published that ominous press release, the prosecutor of the International Criminal Court (ICC) was critiqued for failing to include charges of sexual violence in the ICC's first case.¹¹⁴

Concerned that this pattern of overlooking sexual crimes was at risk of being repeated, between 2007 and 2009 a group of lawyers for the civil parties filed numerous submissions requesting additional investigations. They sought accountability for the rape of women and girls in prisons and worksites; for the regime's practice of organising mass marriages in which men and women who barely knew one other (if at all) were paired up and required to vow to produce children for the state; and for the resultant forced pregnancies endured by women in those marriages.¹¹⁵ The first survivor of forced marriage identified by the civil party lawyers was a *phed ti bey* or third sex person, who had been forced by the regime to live as a man and to marry a woman, in violation of their sexual orientation and gender identity.¹¹⁶ Over the next few years, the civil party lawyers and investigating judges identified numerous other survivors of rape, forced marriage, and other sexual crimes committed in Khmer Rouge times.¹¹⁷

In the end, only a fraction of those crimes was formally charged. In Case 001, the charges included just one incident of rape by a male guard against a female detainee in the S-21 (Tuol Sleng) prison. In Case 002, the indictment excluded

111 ECCC, *Statement of the Co-Prosecutors 17 July 2007*, available online at www.eccc.gov.kh/sites/default/files/media/Statement_of_Co-Prosecutors_18-July-2007_.pdf (accessed 27 April 2023).

112 R. Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court: Practice, Progress, and Potential* (Cambridge University Press, Cambridge, 2019).

113 R. Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law,' 46 *McGill Law Journal* (2000) 217–240.

114 Grey (2019), *supra* note 109, pp. 128–142.

115 Studzinsky, *supra* note 21; Grey (2019), *supra* note 109.

116 M. Elander, 'In Spite: Testifying to Sexual and Gender-Based Violence During the Khmer Rouge Period,' in D. Otto (ed.), *Queering International Law* (Routledge, Abingdon, 2018), pp. 110–127; Grey (2022), *supra* note 26.

117 Studzinsky, *supra* note 21.

all sexual assaults committed by Khmer Rouge authorities in worksites and prisons because, according to the Co-Investigating Judges, the absence of an official policy to commit rape precluded the regime's leaders from being held accountable for these crimes.¹¹⁸ This outcome was widely criticised by feminist legal scholars and human rights lawyers in Cambodia and internationally.¹¹⁹ There were also no charges for forcing *phed ti bey* people to abandon their sexual orientation and gender identity, nor any charges for violations of reproductive autonomy, such as forcing men to impregnate their assigned wives, or forcing those wives to endure pregnancy, childbirth and post-partum injuries.¹²⁰

The only relevant charges in Case 002 were two counts of the crime against humanity of 'other inhumane acts': one for forcing men and women into marriages; and one for the subsequent forced sexual intercourse in those marriages. In 2018, the Trial Chamber convicted Nuon Chea and Kheiu Samphan on both counts, although the judgment specified that the conviction for forced sexual intercourse related only to *women* in forced marriages.¹²¹ That exclusion of male victims was appealed by the prosecutors, who urged the Supreme Court Chamber to find that forced sexual intercourse caused grave suffering and seriously violated the dignity of *both* spouses in forced marriages. In its 2022 judgment, the Supreme Court Chamber granted this appeal.¹²²

Despite being a key aspect of the appeal judgment, the Khmer media reports captured none of those details. Only four of the eighteen reports mentioned sexual violence, rape, or forced marriage at all. These were the two US-funded outlets (Voice of America and Radio Free Asia), the Cambodian outlet Koh Santepheap Daily, and an ECCC press conference broadcast by Cambodia's Office of the Council of Ministers. Of these four, none explained that Khieu Samphan had only been charged and convicted of sexual violence within forced marriages. For example, Voice of America reported that in Case 002/2, Khieu Samphan was charged with 'forced marriages' and 'rapes', among other crimes¹²³ and Radio Free Asia listed Kheiu Samphan's crimes as including 'forced marriages and rapes throughout the country.'¹²⁴

However, none explained that most widely documented rapes, i.e., those occurring in prisons and worksites, entirely evaded prosecution. In the past, this failure to prosecute a wider range of sexual and gender-based crimes had

118 Case 002 Closing Order, *supra* note 7, paras 1426–1429.

119 De Langis, *supra* note 109; Oosterveld and Viseur Sellers, *supra* note 109, p. 321.

120 Grey (2019), *supra* note 109.

121 Case 002/02 Trial Judgment, *supra* note 42, paras 3695–3701.

122 Case 002/02 Appeal Judgment, *supra* note 2, paras 1214–1246.

123 Sun and Khan, *supra* note 59.

124 Sek, *supra* note 73.

garnered significant attention in Cambodian media, or at least, in the English-language Cambodian press.¹²⁵ Likewise, English-language Cambodian media was alert to the absence of any charges for forced pregnancy in the ECCC.¹²⁶ But by the time of the final judgment, this story had receded from view. We would argue that media's failure to mention this 'silence' significantly downplays the importance of those overlooked crimes, and the significance of the final judgment.

It was also notable to see how little interest the Khmer-language press showed in male experiences of sexual violence. The issue was foregrounded by the prosecutors during the ECCC's post-judgment press conference, understandably given that they prevailed on this ground of appeal. National prosecutor Chea Leang opened her remarks by commending the Supreme Court Chamber for recognising male victims of rape in forced marriages, stating that although it was 'strange' to think about men as victims of sexual violence, that was what the witness testimony revealed.¹²⁷ International prosecutor Fergal Gaynor gave further details, stating that in most cases, international courts have focussed on female victims of sexual violence.¹²⁸ The only Khmer-language media outlet to pick up on this issue was Koh Santepheap Daily, which noted that: 'in Case 002, crimes against humanity in the form of sexual violence were considered as forced sex in the context of forced marriages involving male victims.'¹²⁹ This gap in reporting is surprising,

125 *E.g.*, M. Wallström, 'The Forgotten Khmer Rouge Victims', *Phnom Penh Post* (29 May 2012), available online at gbvkr.org/the-forgotten-khmer-rouge-victims-phnom-penh-post/ (accessed 27 April 2023); A. Cayley, 'Khmer Rouge's female victims not forgotten', *Phnom Penh Post* (1 June 2012), available online at www.phnompenhpost.com/national/krouge%E2%80%99s-female-victims-not-forgotten (accessed 27 April 2023); S. Soworn and S. Studzinsky, 'Tribunal has failed victims of sex crimes', *Phnom Penh Post* (11 June 2012), available online at www.phnompenhpost.com/national/tribunal-has-failed-victims-sex-crimes (accessed 27 April 2023); R. Petit, 'Gender-based violence far from overlooked', *Phnom Penh Post* (6 July 2012), available online at www.phnompenhpost.com/national/gender-based-violence-far-overlooked (accessed 27 April 2023).

126 *E.g.*, E. Handley, 'Forced Pregnancy Will Not Be Part of KRT's Case 004', *Phnom Penh Post* (17 June 2016), available online at www.phnompenhpost.com/national/forced-pregnancy-will-not-be-part-krts-case-004 (accessed 27 April 2023).

127 'សន្ទនីស៍ទស្សនៈ ក្រោយប្រកាសសាលាដីកាដោះស្រាយលើក្តីស្តីពីស្ត្រីរងគ្រោះក្នុងស្ថានភាពរាងកាយមិនត្រូវបានគ្រប់គ្រង' ('Press conference: After the announcement of the court order on the appeal of the former head of state'), *Press OCM* (22 September 2022), available online at www.youtube.com/watch?v=VpvNdGsPN-g (Item 12) (accessed 27 April 2023).

128 *Ibid.*

129 Koh Santepheap Daily (Item 18), *supra* note 111.

given that this was a major issue in the appeal, indeed the prosecution's only grounds of appeal.¹³⁰

The media's silence on this issue is unfortunate, given the broader problem of overlooking men's experiences of sexual violence in international criminal law.¹³¹ The recognition of male rape victims could potentially have been a real point of interest for the media, a story of the ECCC's success and role in breaking new legal ground. The court's recognition of male victims of sexual violence, if communicated effectively to the public, might also help men and boys to report experiences of sexual violence in Cambodia today, by providing a vocabulary for this experience, acknowledging that it is a serious wrong, and showing that legal redress is available. It is hoped that the ECCC's findings about men's experience of sexual violence are more prominent in education initiatives within Cambodia, and in the ECCC's residual activities, than they were in the Khmer-language press.

6 'Justice for Victims': The Reproduction of Victim-Centric Rhetoric

The final theme that emerged in this media analysis was the dominance of 'justice for victims' rhetoric when discussing the ECCC's achievements. In this final section, we explore how this rhetoric was used, and how the media sources understood and represented 'justice.' We also highlight the absence of a more holistic assessment as to the extent to which the Court delivered on this rhetoric. To do so, we draw on the substantial scholarly literature and range of studies conducted with victims who participated in the Court's proceedings. In so doing, we seek to demonstrate how media reports of the Court's final judgment exclude victims' voices and overlooked the lived experience of many victims, replicating practices of exclusion frequently observed in commentary surrounding international justice mechanisms.

'Justice for victims' rhetoric predominantly emerged from quotes from Cambodian government and ECCC officials. For example, Standing Deputy Prime Minister Bin Chhin stated:

¹³⁰ *E.g.*, Grey (2019), *supra* note 109; Oosterveld and Sellers, *supra* note 109; J. Rémond Tiedrez, 'On the Rapes of Men in the Context of Forced Marriages at the Extraordinary Chambers in the Courts of Cambodia', *Ejil:Talk!* (1 April 2023), available online at www.ejiltalk.org/on-the-rape-of-men-in-the-context-of-forced-marriages-at-the-extraordinary-chambers-in-the-courts-of-cambodia/ (accessed 4 August 2023).

¹³¹ S. Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', 18(2) *European Journal of International Law* (2007) 253–276.

We all believe that the trials of all the ECCC casefiles, including the delivery of the Case 002/02 appeal judgement now may share some of your pain and suffering ... Justice delivered to the victims has contributed to the strengthening of peace, stability and national unity and ensuring the non-recurrence of such tragedies here in Cambodia or elsewhere in the world.¹³²

Similarly, CPP politician Hun Many was quoted on BTV News celebrating the Court's deliverance of justice to 'victims who passed away' and 'reconciliation to survivors'.¹³³ ECCC Spokesman Pheaktra Neth was quoted by PNN TV claiming that: '[t]he result is very valuable for Cambodian victims; survivors and victims who have passed away can get justice from it.'¹³⁴ Similar sentiments were expressed by the prosecutors and lead civil party lawyers during the press conference broadcast by the Office of the Counsel of Ministers.¹³⁵ Other achievements and goals were also attributed to the court, including educating young people about the past,¹³⁶ building domestic Court capacity,¹³⁷ and contributing to national reconciliation.¹³⁸

The ECCC has always been expected to deliver a range of social goals beyond those usually associated with a criminal court, and to be 'closer to the victims and the general population of Cambodia'.¹³⁹ However, the prominence of 'justice for victims' rhetoric reflects the dominant role this rhetoric has played in justifying the Court since its inception. As early as 1999, the UN Group of Experts appointed to explore justice options for the Khmer Rouge crimes called for 'accountability' in the form of prosecutions as 'a statement to the millions of Cambodian victims and their relatives and friends that their cries

132 Bin, *supra* note 58.

133 ឯកឧត្តម ហ៊ុន ម៉ាណី៖ ការចំណាយពេលជាង ១៦ ឆ្នាំ យុត្តិធម៌ត្រូវបានផ្តល់ជូនជនរងគ្រោះនៃវៀតកុងរបបខ្មែរក្រហម ('His Excellency Hun Many: spent 16 years, Justice delivery to victims of Khmer Rouge regime'), *BTV* (22 September 2022), available online at www.btv.com.kh/article/15554 (Item 4) (accessed 27 April 2023).

134 'ប្រកាសសាលដីកាលើសំណុំរឿងចុងក្រោយរបស់ជនជាប់ចោទ ខៀវ' ('Decision on Khieu Defendant's Latest Case'), *PNN* (22 September 2022), available online at www.facebook.com/watch/?v=2268035746686226&ref=sharing (accessed 27 April 2023 (Item 3)).

135 Press OCM (Item 12), *supra* note 131.

136 *BTV* (Item 4), *supra* note 137.

137 *Muth* (Item 14), *supra* note 61.

138 Press OCM (Item 12), *supra* note 131.

139 B. Zhang, 'Recognising the Limits of Victim Participation,' in S. Meisenberg and I. Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (T.M.C. Asser Press, The Hague, 2016), pp. 515-535, 521.

have at last been heard, providing the survivors with a sense of justice and some closure on the past.¹⁴⁰

Victim-centric rhetoric is apparent across UN statements about the ECCC,¹⁴¹ in public statements made by ECCC practitioners¹⁴² and donor state representatives,¹⁴³ and in ECCC -related fund-raising campaigns.¹⁴⁴ Research conducted with Court practitioners demonstrates that for many, the belief that their work contributed to 'justice for victims' was an important personal motivation.¹⁴⁵ This centrality of 'justice for victims' rhetoric is not unique to the ECCC, being central to international criminal tribunals' practice and public-facing materials.¹⁴⁶ Yet these courts, including the ECCC, have been critiqued for using the rhetoric of 'justice for victims' without adequate consideration as to what victims themselves might regard as 'justice'.¹⁴⁷

Justice is an 'essentially contested concept', meaning it 'inevitably involve[s] endless disputes about [its] proper uses on the part of [its] users'¹⁴⁸ and is open to 'periodic revision' according to the context.¹⁴⁹ Nevertheless, studies amongst victims of atrocities have suggested that for many, justice involves both 'procedural justice' (such as participation, representation and voice) and

140 *Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135 (A/53/850)*, 16 March 1999.

141 *E.g., UNGA Resolution (A/RES/57/228)*.

142 *E.g., ECCC, Opening Speech by the Plenary's President Judge KONG Srim 13 September 2010*, available online at www.eccc.gov.kh/sites/default/files/media/8th_plenary_president_speech_EN.pdf (accessed 27 April 2023).

143 *E.g., ECCC, Statement by the Principal Donors Group*, available online at www.eccc.gov.kh/en/articles/statement-principal-donors-group-extraordinary-chambers-courts-cambodia (accessed 27 April 2023).

144 M. Wolfe-Robinson, 'Cambodia Court Hearing Khmer Rouge Trials Close to Bankruptcy', *The Guardian* (4 December 2012), available online at www.theguardian.com/law/2012/dec/04/cambodia-khmer-rouge-court-bankruptcy (accessed 27 April 2023).

145 Killean 2018, *supra* note 45, Ch. 6.

146 C. Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (Cambridge University Press, Cambridge, 2021).

147 S. Robins, 'Failing Victims: The Limits of Transitional Justice in Addressing the Needs of Victims of Violations', 11(1) *Human Rights & International Legal Discourse* (2017) 41–258; L. Zegveld, 'Victims as a Third Party: Empowerment for Victims?', 19(2) *International Criminal Law Review* (2019) 321–2345; McEvoy and McConnachie, *supra* n.42.

148 W.B. Gallie, 'Essentially Contested Concepts', 56 *Proceedings of the Aristotelian Society* (1955–21956) 167–2190, p. 169.

149 D. Collier, D. Fernando, and A. O. Maciuceanu, 'Essentially Contested Concepts: Debates and Applications', 11(3) *Journal of Political Ideologies* (2006) 211–2246, p. 218.

'substantive justice' (such as accountability, truth, and reparation).¹⁵⁰ Notably, the ECCC has gone further than many international tribunals in its *attempts* to deliver both forms of justice, while often falling short in its results.

Regarding procedural justice, the ECCC's civil party system has enabled several thousand victims to access legal representation, participation, voice (for some) in the proceedings, and reparations. This model has been praised as a 'historical achievement in international criminal law' which meant that victims would be 'fully involved in proceedings.'¹⁵¹ The scale of this participation was remarked upon in Koh Santepheap Daily:

During the trial hearings in Case 002, the Trial Chamber heard a total of 185 witnesses, including 114 factual witnesses, 63 Civil Party complainants and 8 expert witnesses with more than 100,000 people in total attended and monitored the hearings in person.¹⁵²

Its importance was also emphasised in the reported remarks of His Excellency Bin Chhin:

I wish to admire and thank the victims who have applied to be civil parties for giving testimonies of their bitter personal stories before the ECCC in order to seek truth and justice for all victims of the brutal Khmer Rouge regime.¹⁵³

However, entirely absent from media reporting were the political compromises that confined the ECCC's temporal and personal jurisdiction, the prosecutorial and investigative choices that shaped which crimes were prosecuted, and the judicial decisions that shaped the operation of the civil party system. Yet, each played a major role in limiting victims' ability to participate in the Court's proceedings, and its capacity to delivery of 'justice for victims'¹⁵⁴ It is of course

¹⁵⁰ S. K. Ivković and J. Hagan, *Reclaiming Justice: The International Tribunal for the Former Yugoslavia and Local Courts* (Oxford University Press, Oxford, 2011); Killean 2016, *supra* note 23; S. Cody and A. Koenig, 'Procedural Justice in Transnational Contexts', 58(1) *Virginia Journal of International Law* (2018) 1–230.

¹⁵¹ ECCC, *Historic Achievement in International Criminal Law: Victims of Khmer Rouge Crimes Fully Involved in Proceedings of the ECCC' Statement by the Victims Unit*, www.eccc.gov.kh/sites/default/files/media/Victim_Unit_Press_Release.pdf (accessed 27 April 2023).

¹⁵² Koh Santepheap Daily (Item 18), *supra* note 111.

¹⁵³ Press OCM (Item 12), *supra* note 131.

¹⁵⁴ R. Killean, 'Constructing Victimhood at the Khmer Rouge Tribunal: Visibility, Selectivity, and Participation', 24(3) *International Review of Victimology* (2018) 273–296.

not to be expected that media reporting would provide in-depth analysis of such issues, and as noted above, any which reflected the government in a negative light may not have been possible. However, the focus on rhetoric and the exclusion of lived experience creates an incomplete assessment of the Court's work.

References to substantive justice in the press foregrounded accountability and retribution. For example, Khieu Samphan's life sentence was considered very important, and indeed, insufficient for the civil parties quoted by Voice of America:

In my opinion, it is suitable for the acts he did. It's NOT a few people; it's millions of people [they] had used. For my location, only three cans [of rice were used to cook] in one large pan.¹⁵⁵

I think life sentence is too minimal because he is old now and I don't know whether he will die tomorrow or not [...] If I had to sentence him, he would be jailed for 100 to 200 years. I'm afraid that he would not be alive tomorrow, [so] I would handcuff him every day for 100 to 200 years.¹⁵⁶

These quotes reflect other research conducted with civil parties and the Cambodian population, which demonstrate the importance placed on criminal accountability for the Khmer Rouge's crimes.¹⁵⁷ Similarly, user comments on the Voice of America report revealed a public interest in punishing those responsible for the crimes, although several users argued that the ECCC had punished the wrong perpetrators:

Too bad and not clear, the person who plotted to kill the Khmer escaped and punished the chicken in the cage.¹⁵⁸

The story of the Khmer murder of Khieu Samphan is unfair, and the commander behind him is free.¹⁵⁹

The media reports contained little consideration of the other aspects of substantive justice. In particular, the media was largely silent on the ECCC's reparation awards, despite these being an important and innovative aspect of

155 Sun and Khan, *supra* note 59.

156 *Ibid.*

157 Killean, *supra* note 43, Chapter 8; Williams *et al.*, *supra* note 23.

158 យ៉ូតកេហាវី យមិនល្អអមិនច្បាស់លាស់ នាក់ដដែលដាក់ជនសម្បូរលាប់ខ្ញុំម្តង បង្ការខ្ញុំខ្លួន ដាក់ទោសមាន់ក្នុងខ្ញុំផង.

159 រឿងសម្បូរលាប់ ខ្ញុំម្តង កាត់ក្នុងលាវី ខ្សែស្រវឹង ម្នាក់ អត់ យុត្តិធម៌ ឯអ្នកបញ្ជាទោស ទៅពីក្រោយ រួចខ្លួន រឿងណឹងស្អុរ យួន ច្បាស់ជាងគេ វាជឿរឿងណឹង ពីរដង.

the Court's work.¹⁶⁰ In fact, the ECCC made twenty-four 'moral and collective' reparation awards, encompassing art projects, psychosocial support initiatives, educational tools and exhibitions.¹⁶¹ Due to the indigence of the accused and absence of institutional funding, these projects were donor funded and delivered by civil society organisations, and had often been completed by the time they were recognised as 'reparations' by the ECCC. These projects can be critiqued for having little connection to the civil parties' specific harms or those responsible for them, for failing to deliver a sense of recognition and symbolic significance, and for often lacking connection to the wishes expressed by victims throughout the ECCC process.¹⁶² Nevertheless, many victims and survivors appreciated the opportunity to benefit from these projects. Given the centrality of reparations to the ECCC's ability to facilitate 'justice for victims', the media's silence on this aspect of the Court's work was striking.

References to the ECCC's contribution to 'truth telling' were limited to the Koh Santeheap Daily's critique that the Court had not considered the role of international actors (discussed above), and a Voice of America reference to the Court's creation of '3 million pages of judicial and historical records for Cambodia.'¹⁶³ Yet, there is evidence that the truth is hugely important to survivors and subsequent generations of Cambodians.¹⁶⁴ Reflecting existing literature on the right to truth, Cambodians have expressed the desire to understand not only what happened, but why, and by whom.¹⁶⁵ It seems the Court is perceived as somewhat incomplete in this regard,¹⁶⁶ as reflected in a user comment on Voice of America's broadcast to the effect of 'Khieu Samphan: imprisoned or not imprisoned, what's the difference? Importantly the truth remains a mystery.'¹⁶⁷ This is consistent with empirical research which has highlighted how criminal courts' conceptions of truth are often significantly

160 C. Sperfeldt, *Practices of Reparations in International Criminal Justice* (Cambridge University Press, Cambridge, 2022).

161 C. Sperfeldt and R. Hughes, 'The Projectification of Reparation', 12(3) *Journal of Human Rights Practice* (2020) 545–565.

162 R. Killean and L. Moffett, 'What's in a Name? 'Reparations' at the Extraordinary Chambers in the Courts of Cambodia', 21(1) *Melbourne Journal of International Law* (2020) 115–143.

163 Hul, *supra* note 85.

164 Tann and Tim, *supra* note 76.

165 J. Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart, Portland, 2008).

166 P.N. Pham, M. Balthazard, N. Gibbons and P. Vinck, 'Perspectives on Memory, Forgiveness and Reconciliation in Cambodia's post-Khmer Rouge Society', 101(1) *International Review of the Red Cross* (2019) 125–149.

167 ខ្សែវីដេអូ សំរេង ជាប់គុក ឬមិនជាប់គុក តើមានអ្វីខុសគ្នា? សំខាន់ ការពិត ឬក៏ជាអារម្មណ៍ក៏ប៉ង.

narrower than that of victims.¹⁶⁸ Considering the judgment's status as the last to be given by the ECCC, we might have expected greater reference to its contribution to truth-telling in Cambodia.

Overall, media reports did little to highlight the varied perspectives on whether the ECCC delivered 'justice for victims' in procedural or substantive terms. This may be because very few featured the voices of survivors themselves. Whether this is interpreted as an indication of waning media and/or public interest in the ECCC, or simply a matter of the journalists' access to civil parties, it mirrors a tendency observable at the ECCC and in other justice mechanisms: to give space for professionals to speak the language of 'justice for victims', but not necessarily to offer the same space to victims to speak for themselves.¹⁶⁹

7 Conclusion

In this article we have offered a glimpse into how the ECCC's final judgment, and its overall legacy, was presented in Cambodia's Khmer-language media in the days following the judgment's pronouncement. In doing so, we have sought to share some observations that may not be easily accessible to English-language scholars, while analysing the sources using themes and histories that have emerged as consistently central in the commentary surrounding the Court. Undoubtably, further in-country research is needed to provide a more comprehensive view into the perceived strengths and shortcomings of this long-running justice experiment. As we have explored, media in Cambodia is significantly curtailed by government control, and the reports we have assessed therefore represent the information that was deemed safe, as well as newsworthy, to publish. Our brief analysis of public commentary on Facebook already illustrates the range of views that exist amongst the Cambodian population and suggests that a deeper analysis of social media commentary on the Court would be fruitful. Our close reading suggests that if a more critical perspective is to emerge within Cambodia, it will not come from the

168 K. McEvoy and L. Mallinder, 'Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy', 39(3) *Journal of Law and Society* (2012) 410–440.

169 M. Dembour and E. Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials', 15(1) *European Journal of International Law* (2004) 151–177; R. Killean and L. Moffett, 'Representation, Agency and Voice: Victim Legal Representation before the ICC and ECCC', 15(4) *Journal of International Criminal Justice* (2017) 713–740.

mainstream news, but perhaps from social media, or iteratively, and probably hesitantly, through community discussions that are not mediated by the state.

The media review also revealed that legal nuances and debates that greatly interest international criminal lawyers may be largely irrelevant to local journalists, or perceived to be irrelevant to their readers. In particular, the intricacies of the ECCC's findings regarding genocide and sexual violence were often absent from the Khmer-language reporting. Analysing this media absence alongside existing literature suggests that these findings seem to have made little impact on the public's understanding of the Khmer Rouge period to date. That does not render the ECCC's legal analysis useless. To the contrary, the ECCC's previous judgments recognising 'forced marriage' as a crime against humanity have already been influential in the ICC,¹⁷⁰ and its more recent findings about the gravity of men's experiences of sexual violence will hopefully also be followed in future. For the Cambodian public, the legal analysis may in time inform future jurisprudence, and may be used in legal and history education across its schools and universities. However, the fact that *some* Khmer Rouge leaders were convicted for *some* acts of genocide and sexual violence may ultimately be more important to the wider public than the details that were litigated and adjudicated by the Court.

Finally, our analysis suggests that in the wake of the final judgment, the rhetoric of 'justice for victims' remained largely untroubled in the media, creating an overly simplistic media account of what the ECCC has achieved for participating victims and other survivors. Notably, the sources we analysed featured very little engagement with survivors themselves. We hope that in the Court's residual years, survivors will have a significant role in evaluating its impact and its legacy. Following Bernath, Kum and Tann, we argue that:

With the ECCC winding down, civil parties' views should remain at the heart of assessments of this unprecedented experiment.¹⁷¹

¹⁷⁰ ICC, *Prosecutor v Ongwen*, Case No. ICC-02/04-01/15-2022-Red, Appeal Chamber, Appeal Judgment, 15 December 2022, paras. 995 and 1019.

¹⁷¹ J. Bernath, S. Kum and B. Tann, 'Symposium on the ECCC; Victim Participation at the ECCC—Final Justice for the Victims of the Khmer Rouge?', *Opinio Juris* (2 November 2022), available online at opiniojuris.org/2022/11/02/symposium-on-the-eccc-victim-participation-at-the-eccc-final-justice-for-the-victims-of-the-khmer-rouge/ (accessed 5 August 2023).

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