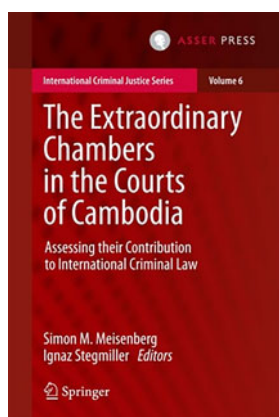


BOOK REVIEW



The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law

Simon Meisenberg and Ignaz Stegmiller (eds)*

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The Extraordinary Chambers in the Courts of Cambodia (ECCC) were established by a joint agreement between the United Nations and the Kingdom of Cambodia in 2006 to try senior leaders and those most responsible for crimes committed under international and domestic law during the era of Democratic Kampuchea from 1975 to 1979. Since its establishment, the ECCC has heard one case to completion and is currently deliberating in the second. The trial in Case 001, against Kaing Guek Eav (alias Duch), the former chairman of the S-21 security centre, closed in November 2009, and on 3 February 2012, following appeals by the accused and the co-prosecutors, the Supreme Court Chamber entered convictions against Duch for crimes against humanity and grave breaches of the Geneva Conventions of 1949,

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sentencing him to life imprisonment.¹ Case 002, initially involving the four former Khmer Rouge leaders Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith, was severed into a series of smaller trials.² Ieng Thirith was found unfit to stand trial, and Ieng Sary died on 14 March 2013.³ On 7 August 2014, in Case 002/01, Nuon Chea and Khieu Samphan were found guilty of crimes against humanity and sentenced to life imprisonment.⁴ Appeals are currently under way in the Supreme Court Chamber while the Trial Chamber deliberates on the evidence heard in Case 002/02.⁵ Cases 003 and 004, in which Meas Muth, Ao An and Yim Tith have been named as charged persons, remain in the investigation stage.

The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law, edited by Simon Meisenberg and Ignaz Stegmüller, draws together the contributions of academics and practitioners in international criminal law (ICL), many of whom have been directly involved with the ECCC at some point in the life of the Court. The book seeks to provide a positive, but appropriately critical, analysis of the often overlooked and undervalued contributions made by the ECCC to the development of ICL. In doing so, *The Extraordinary Chambers in the Courts of Cambodia* goes beyond the bare legal principles by also examining the Court's role and responsibility in Cambodian society and its broader implications for a country struggling to come to terms with its violent past and the daily realities of its challenging present.

Frequently, criticisms of the Court's composition, independence and unusual structure enable it to be dismissed from the ICL landscape. With mirrored national and international components (national and international co-investigating judges, national and international co-prosecutors) and a mixed composition of judicial officers in the three chambers,⁶ the Court has been troubled by allegations of interference and deadlocks in decision-making.⁷ Refreshingly, *The Extraordinary Chambers in the Courts of Cambodia* confronts these criticisms directly. Divided into three parts, the book first examines the history of the country, previous efforts at accountability for Khmer Rouge leaders and the challenges in establishing the Court. This introductory section is enriched by the contribution of Dr Helen Jarvis, who has long been embedded in the Cambodian landscape and witnessed first-hand the painful beginnings of the ECCC. Dr Jarvis' chapter introduces readers to the Cambodian reality and provides insight into the profound impact of the Khmer Rouge on national

1 ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, Case File/Dossier No. 001/18-07-2007-ECCC/SC, Case 001 Appeal Judgment, 3 February 2012, pp. 320–321.

2 See ECCC, *Prosecutor v. Nuon Chea, Prosecutor v. Khieu Samphan*, Case File/Dossier No. 002/19-09-2007/ECCC/TC, Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013.

3 ECCC, "Case 002", available at: www.eccc.gov.kh/en/case/topic/2 (all internet references were accessed in July 2017).

4 ECCC, *Prosecutor v. Nuon Chea, Prosecutor v. Khieu Samphan*, Case File/Dossier No. 002/19-09-2007/ECCC/TC, Case 002/01 Judgment, 7 August 2014, pp. 579–580, 595–596.

5 ECCC, "Closing Statements in Case 002/02 Conclude", 23 June 2017, available at: www.eccc.gov.kh/en/articles/closing-statements-case-00202-conclude.

6 *The Extraordinary Chambers in the Courts of Cambodia*, p. 22.

7 *Ibid.*, Ch. 3.

identity. This part goes on to provide a frank assessment of allegations of political interference, bias and corruption and the heavy weight of expectations on the Court. If occasionally repetitious, the historical background provided by the authors is effective in setting the scene for those unfamiliar with the Cambodian context. In his chapter, Jeudy Oeung does well also to highlight central issues for the Court: victim participation and legacy. Whilst acknowledging the imperfect and limited role of the civil parties in the trials to date,⁸ the authors place that participation in the context it deserves; in circumstances where there has been no truth and reconciliation commission and where former Khmer Rouge cadres still occupy places of responsibility in the country's leadership, holding the trials in the country where the atrocities took place has enabled 243,941 people to physically attend the trial in Case 001 and in the first part of Case 002.⁹ The impacts of this are recognized by the authors. In the context of legacy, this part of the book provides an intense criticism of the opportunities missed for a coherent approach by ECCC staff. It also delivers a frank assessment of capacity-building efforts to improve the Cambodian domestic legal system while recognizing the progress made and the central role of non-governmental organizations in spearheading initiatives for change.

The second part of the book considers the ECCC's substantive contributions to ICL. A thorough analysis of the trial judgments in Case 001, against Kaing Guek Eav,¹⁰ and Case 002, ultimately against Nuon Chea and Khieu Samphan,¹¹ elucidates the many legal questions ventilated, including issues of jurisdiction, the scope of joint criminal enterprise as at 1975–1979, and the legal characterization of acts as genocide. Nathan Quick's thoughtful review of the development of the law on forced transfer and deportation identifies the value of the Trial Chamber's judgment in Case 002/01 in confirming that any forced transfer is a criminal act in its own right.¹² Opportunities lost and taken to develop the law on sexual and gender-based violence at the international level are considered by Valerie Oosterveld and Patricia Viseur Sellers. Specifically, the authors examine the Court's approach to forced marriage and advances in the law, with both positive and negative elements. Recognition is given to the crucial role played by the lawyers for the civil parties in advocating for the investigation of forced marriage and forced sexual relations by the co-investigating judges. That advocacy led directly to the inclusion of the regulation of marriage as one of the five policies forming part of the common plan of a joint criminal enterprise

8 See Alain Werner and Daniella Rudy, "Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law?", *Northwestern Journal of International Human Rights*, Vol. 8, No. 3, 2010; Marie Guiraud, *Victims' Rights before the Extraordinary Chambers in the Courts of Cambodia*, International Federation for Human Rights, Paris, November 2012.

9 ECCC, "ECCC at a Glance", April 2014, p. 3, available at www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20-%20April%202014_FINAL.pdf.

10 ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, Case File/Dossier No. 001/18-07-2007/ECCC/TC, Judgment, 26 July 2010.

11 ECCC, *Chea, Samphan*, above note 4.

12 *The Extraordinary Chambers in the Courts of Cambodia*, p. 319.

in the Closing Order (indictment) for Case 002.¹³ The controversial finding that rape was not a crime against humanity in 1975 is considered, along with how that decision sits with the findings of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.¹⁴ This part also provides some stern criticism of the Trial Chamber's application of the law concerning war crimes in the context of an international armed conflict.

In the third part, the authors examine how international criminal procedure has been developed as a result of the ECCC proceedings. Central to this is the recognition that the ECCC was essentially an experiment in mass-atrocity trials conducted according to the inquisitorial process. The natural corollary is that the Court was unable to draw upon the procedural decisions of the International Criminal Court or the *ad hoc* tribunals in resolving procedural struggles. The authors recognize the difficulties and the "pure mongrel"¹⁵ inquisitorial-adversarial hybrid that came about as being very particular to the Cambodian context. Rather than attempting to draw a definitive result from the inquisitorial experiment, the authors provide valuable analysis of the strengths and weaknesses of both procedural models, ultimately suggesting that any procedural model needs to be pragmatically tailored to the context and realities on the ground.¹⁶ Pragmatism and its limitations are considered later in the book in an examination of the severance decision in Case 002. Following the Trial Chamber's decision to sever the indictment in Case 002 into a series of "mini-trials" in an effort to expedite the proceedings and enable judgment to be rendered against the octogenarian accused, the authors examine the ramifications of that decision in terms of procedure and the fair trial rights of the accused.

An issue often central to international criminal trials, and discussed further in the book, is that of the fair trial rights of aged accused. In his chapter, Roger Phillips gives important consideration to the impact of advanced age and poor health upon the accused's ability to meaningfully participate in a trial. A key procedural point also developed in this part is the approach to torture statements and the use to be made of them under international law. The attention given to this issue is fitting in light of the central role that "confessions" played as a tool for Democratic Kampuchea's control of its citizens. Appropriately, the book closes with reviews of the role of victims in international criminal trials, the practicalities and limitations of the civil party approach adopted by the ECCC, and the mechanisms available to recognize and enforce victims' rights.

The limitations of the ECCC – and there are many – are readily acknowledged by the authors of *The Extraordinary Chambers in the Courts of Cambodia*. However, rather than allowing the imperfect nature of the proceedings to obscure their value, the authors seek, and find, the lessons to be learned from the controversial tribunal. *The Extraordinary Chambers in the Courts of*

13 *Ibid.*, p. 327.

14 *Ibid.*, pp. 334–347.

15 *Ibid.*, p. 430.

16 *Ibid.*, p. 432.

Cambodia is a thought-provoking work which will generate discussion among practitioners and contribute to the diverse, nuanced landscape for international law scholars, and its underlying theme of gradual, hard-won progress is one that is certainly familiar to students of ICL. The result is a generally optimistic volume that accords the ECCC its proper status in the fight against impunity and recognizes the potential role of hybrid courts in the future of criminal justice.