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PEACEBUILDING GOVERNANCE – NEGOTIATING THE KHMER ROUGE TRIALS

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The domestic policies of the Khmer Rouge regime resulted in widespread human insecurity. The pursuit of justice against past atrocity crimes through the Extraordinary Chambers in the Courts of Cambodia (ECCC) trials represents an essential step in Cambodia’s rebuilding process as well as a key tool for the state to fulfil its responsibility to protect its citizens from mass atrocities. This NTS Alert examines the role of the Cambodian government in redressing past gross human rights abuses.



The Extraordinary Chambers in the Courts of Cambodia (ECCC) on the day the verdict against Kang Kek Iew, alias Duch, was pronounced.

Credit: UN Photo / Extraordinary Chambers in the Courts of Cambodia.

Contents:

- Introduction
- The ECCC
- The Relevance of the RtoP to the ECCC Trials
- Pursuit of Accountability by the Cambodian Government
- The Legacy of the ECCC
- Conclusion

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Introduction

From 1975 to 1978, under the Khmer Rouge regime, up to 1.7 million Cambodians died of extrajudicial execution, overwork, starvation and disease (Pham et al., 2009:7). As a result of the domestic policies of the Khmer Rouge, the two dimensions central to a people-centred conceptualisation of security – freedom from fear on the security front, and freedom from want on the economic and social front (UNDP, 1994:3) – were severely compromised. Cities were emptied as urban residents were forced to work in agricultural communes. Industrial production and social services such as hospitals and postal services were all suspended.

Within this context, the human security lens gains significance, extending as it does the notion of security beyond that of state survival, to encompass a host of factors that can affect the existence of communities, such as military, political, economic, societal and environmental issues (Buzan et al., 1998). Ensuring human security requires the strengthening of a state’s capacity to provide physical protection and promote the empowerment of its people. To attain

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these goals in a post-atrocity society like Cambodia, it would be important to address the need for justice and reconciliation.

In 2003, the Cambodian government and the UN reached agreement on the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) to try the most senior leaders of the Khmer Rouge and those most responsible for the deaths and sufferings during the Khmer Rouge era. The ECCC is staffed by both Cambodian and

international personnel, its hybrid nature reflecting the cooperation between the Cambodian government and the international community represented by the UN. Expenses related to the ECCC are shared, with the UN and international donors covering the majority of the costs.

As the state is considered to have primary responsibility for protecting its citizens from mass atrocities within a human security paradigm, this NTS Alert seeks to examine the efforts of the Cambodian government in holding perpetrators accountable. It is argued that, although the Cambodian government's role is often overshadowed by the more conspicuous roles of the UN and non-governmental organisations (NGOs), it has played an essential, if controversial, role in efforts to achieve redress for the past crimes.

The first section looks at the characteristics and functions of the ECCC that could have a positive impact on human security. This is further pursued in the next section which focuses on the Responsibility to Protect (RtoP) and its relevance to the ECCC trials. The following section proceeds to review the efforts of the government to ensure the accountability of the Khmer Rouge leaders for their crimes, prior to and after the establishment of the ECCC. Finally, the discussion turns to the opportunity afforded by the ECCC experience in terms of building the capacity of the domestic justice system, and whether and how this potential could be realised.

[^ To the top](#)

The ECCC

The ECCC aims to confront past human rights abuses so as to facilitate the process of social reconciliation and rebuilding. The ECCC hearings began in 2007, with Case 001 against Kang Kek Iew (alias Duch), the commander of the notorious S-21 Security Center where up to 16,000 people were tortured and killed. In July 2010, Duch was sentenced to prison for 35 years. The proceedings of Case 002 began in June 2011. Four surviving top officials of the Khmer Rouge regime were indicted for their involvement in planning and implementing the genocidal policy of social engineering.

The values underpinning the ECCC converge with the ethos of the RtoP. Introduced by the International Commission on Intervention and State Sovereignty (ICISS) in 2001, the RtoP aims to address the protection of civilians from four categories of mass atrocities, namely, genocide, ethnic cleansing, war crimes and crimes against humanity. The RtoP, in highlighting that the state holds primary responsibility for protecting its people from the threat of mass atrocities, and in noting the responsibility of the international community to assist such effort, falls within the range of human security.

The ownership of the ECCC is in line with the emphasis of the RtoP on the primacy of the role of the state in protecting people: the ECCC is owned by the Cambodian government with substantive support from the international community represented by the UN. In addition, civil society has also made significant contributions to the establishment and operation of the ECCC.

The ECCC trials, in providing victims with a platform to seek justice and emotional relief for their past sufferings, also promote another aspect of human security – the emancipation and empowerment of people (Booth, 1991; Buzan et al., 1998). Victims have the opportunity to participate as civil parties with the right to engage their own legal representatives to question the defendants and request reparation.

[^ To the top](#)

The Relevance of the RtoP to the ECCC Trials

The RtoP was first proposed as a continuum of responsibility based on the obligation of the state and the international community to prevent, to react and to rebuild in the event of the occurrence of mass atrocities (ICISS, 2001; Evans, 2008:164). However, the RtoP was



A wall of photos at the Tuol Sleng Genocide Museum, the site of infamous S-21 Security Center, documents the Khmer Rouge's brutal treatment of detainees.

Credit: UN Photo / Mark Garten.

reframed as a primarily preventive mechanism in the *2005 World Summit Outcome* (UNGA, 2005) and the 2009 report of UN Secretary-General Ban Ki-moon, *Implementing the Responsibility to Protect* (UNGA, 2009). Although the responsibility to prevent is conceived as the single most important aspect of the RtoP, the value of rebuilding after mass atrocities for the protection of people in the long run should never be underestimated.

The responsibility to rebuild a society torn apart by war or mass atrocities has four interrelated but distinct dimensions: achieving security, good governance, justice and reconciliation, and economic and social development (Evans, 2008:149). It is expected that enhancing a state's capacity in these four areas would reduce its vulnerability to the recurrence of violence. Therefore, in the 2009 RtoP report that laid out a three-pillar strategy for implementing the RtoP, post-atrocity rebuilding was placed under pillar two which highlights the responsibility of the international community to assist and the need for capacity building (UNGA, 2009: para. 48).

In 1993, Cambodia emerged from decades of civil conflicts and gross human rights abuses and started its rebuilding efforts. With assistance from the UN peacekeeping operation, the UN Transitional Authority in Cambodia (UNTAC), Cambodia restored relative peace and held democratic elections. After the departure of the UNTAC, Cambodia continued rebuilding the economy, enacting legal reforms and domestic governance, and it fared better than most analysts had predicted (Howard, 2008:176). As social injustices are considered underlying causes of social unrest and mass violence (Mani, 2008:254), the socioeconomic progress in these areas has reduced the risk of Cambodian society relapsing into conflict and thus created the environment for ensuring the human security of the Cambodian people.

As noted above, justice and social reconciliation constitutes a crucial dimension of capacity building. Measures to achieve this goal include rebuilding the criminal justice system, managing transitional justice, supporting traditional justice and managing refugee returns (Evans, 2008:150). In the context of this NTS Alert, transitional justice is the most relevant tool. Transitional justice is defined by the UN as the full range of processes and mechanisms associated with a society's attempts to deal with past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof (UNSC, 2004: para. 4). It is usually implemented in the context of transition from violence or mass violation of human rights to some more peaceful and stable condition. Moreover, transitional justice extends well beyond the courts and tribunals. Given the fragile situation in post-violence societies, a balanced approach towards accountability and the preservation of peace is needed (UNSC, 2004: para. 25). The desirable outcome of transitional justice is to reconcile a fragmented society, catalyse social transformation and support sustainable peacebuilding (Lambourne, 2009:29, 30).

The chief goal of the ECCC is to provide justice for the victims and survivors of the Khmer Rouge era and end impunity for the gross human rights abuses committed by the Khmer Rouge (ECCC, 2010:6). Although the survivors and the families of the victims would only receive collective and symbolic reparation trials according to the ECCC's internal rules, accountability and legal justice are still important to them (Lambourne, 2009:37). The prosecution of top Khmer Rouge officials provides moral reparation and emotional relief for the pains they suffered under the Khmer Rouge. Having the perpetrators acknowledge what happened is considered crucial for reconciliation in Cambodian society (Lambourne, 2009:41). For instance, Duch admitted his crimes during the trial and asked for forgiveness. The animosity towards him is slightly lower than other defendants who keep denying their involvement in the genocide (Pham et al., 2011:32). Moreover, the testimony of the defendants in Cases 001 and 002 may answer some questions lingering in the minds of victims, such as why their relatives were killed.

In addition to societal reconciliation, the ECCC trials can also contribute to promoting human security by fostering and consolidating the rule of law and respect for human rights (Mendeloff, 2004:361, 363). Holding ex-Khmer Rouge leaders accountable ends the impunity for past atrocity crimes and can stand as an impediment to irresponsible rule in the future (Gibson et al., 2010:379). Impunity undermines the effectiveness of domestic and international laws in preventing atrocity crimes as it allows criminals to go unpunished, which breeds the risk of mass atrocities. Hence, ending impunity constitutes an essential aspect of genocide prevention (10 Years After, 2004). Improvements in the justice system also benefit the people, empowering them by providing them legal support and basis when they encounter abuses.

As the state bears the primary responsibility to protect people from the threat of mass atrocities, the next section reviews and analyses how the Cambodian government has confronted past mass atrocities, and whether and how these efforts have strengthened the human security of the Cambodian people.

[^ To the top](#)

Pursuit of Accountability by the Cambodian Government

The efforts of the Cambodian government can be divided into three stages: the People’s Republic of Kampuchea (PRK) era (1979–1993), negotiations on the ECCC (1993–2003), and the establishment of the tribunal and onwards (2003 to present).

Prior to the discussions for an international tribunal to prosecute Khmer Rouge leaders for mass atrocity crimes, there was already momentum within Cambodia to ensure accountability for what happened during the Khmer Rouge era (Table 1), with mixed outcomes. The People’s Revolutionary Tribunal has been widely rejected as illegitimate because it breached certain international justice standards, such as trying the accused in absentia and operating on the presumption of guilt (Chandler, 2000:71; Luftglass, 2004:902–3). However, there are also positive aspects to the efforts of the PRK government. For instance, the statistics and information collected during this period serve as crucial evidence for prosecutions against the ex-Khmer Rouge leaders. The Choeung Ek killing fields and the National Day of Anger are still important occasions for remembrance and education. The commemorative activities condemn the past abuses, and remind the government and the public of the importance of ensuring human security and respect for human rights.



Monuments such as this cenotaph commemorating the victims of the Choeung Ek killing fields remind Cambodians of the importance of ensuring human security.

Credit: Gong Lina / Centre for Non-Traditional Security (NTS) Studies.

Table 1: Efforts by the People’s Republic of Kampuchea (PRK) government (1979–1993).

Judicial Measures	Non-judicial Measures
<ul style="list-style-type: none"> Establishment of the People’s Revolutionary Tribunal to try Pol Pot and Ieng Sary (1979). 	<ul style="list-style-type: none"> Establishment of the Research Committee (1982): <ul style="list-style-type: none"> Renakse Records (statistics on infrastructure damage, the death toll, the manner in which atrocities were committed, etc.). Exhumation of graves. Documentation of information relevant to the Khmer Rouge era. Petition to the UN to oust the Khmer Rouge.
<ul style="list-style-type: none"> Incorporation of existing international human rights standards into the Cambodian constitution, i.e., Section 31. 	<ul style="list-style-type: none"> Commemoration of the Choeung Ek killing fields: <ul style="list-style-type: none"> Erection of religious symbols, e.g., stupas. Recitation of songs and prayers in schools.
	<ul style="list-style-type: none"> Observance of <i>Tivea Chong Kamheung</i> (National Day of Anger), first held on 20 May 1984.

Source: Gordon (2007:27–8); Schulte (2007:17-20); Taum (2005:7); Ratner (1993:1); The Khmer Institute for Democracy (2006:4).

ECCC Negotiations (1993–2003)

Between 1993 and 2003, there were three noteworthy events: the submission of the request to the UN for assistance in 1997, the legislation of the law governing the operation of the ECCC in 2001 and the conclusion of the agreement on the establishment of the ECCC in 2003.

In reaching out to the UN for assistance, particularly in the matter of the legislation related to the ECCC, the Cambodian government played a proactive role. It was however criticised for its insistence on full ownership of the tribunal, as that led to a delay in the establishment of the ECCC. On this issue, our interviews with observers from NGOs and think tanks in Phnom Penh in August 2011 revealed that the general opinion was that a domestic-based tribunal which applies both international and domestic law is preferred over a completely international court in a foreign country, as the former provides a sense of belonging to the Cambodian people. Also, the application of Cambodian law which is based on French law allows victims to participate in the trials as civil parties and thus seek reparations, which is an innovation compared to the International Criminal Court (ICC) or the *ad hoc* tribunals for the former Yugoslavia and Rwanda where victims can only participate passively, for example, as witnesses. A domestic location also makes access to the trials easier for the public, in terms of transportation and media coverage.

ECCC Tribunal (2003 to present)

After the ECCC became operational in 2006, the Cambodian government provided financial and logistic support for the operation of the tribunal and court proceedings. As of 31 August 2011, Cambodia has contributed USD5.2 million as well as USD8.2 million in-kind, ranking second among all donors (ECCC, 2011a). The in-kind contribution is provided in forms such as properties and free transportation for the public to attend the hearings.

In addition to the trial process, the public affairs section of the ECCC which is managed by the Cambodian government reaches out to Cambodians throughout the country to inform them about the trials and facilitate their understanding and involvement (ECCC, 2011b). The government approved the inclusion of the history of the Khmer Rouge rule, a subject area which used to be excluded, into the school curriculum (De Launey, 2009).

Although the government has been supporting the trial process, there have been repeated accusations of political interference since the beginning of the negotiations between Cambodia and the UN (Open Society Justice Initiative, 2010). For instance, the government acquiesced to the refusal by high-ranking officials to give testimony during the investigation for Case 002 when, under its agreement with the UN, the government has the obligation to compel these officials to cooperate (Open Society Justice Initiative, 2010:16). It is also accused of interfering with the investigation of Cases 003 and 004 (Open Society Justice Initiative, 2011:11).

The role of the Cambodian government has been controversial in all the above three stages. Nevertheless, it has to be acknowledged that the government has contributed towards reconciling the past and providing some measure of redress. From the request for UN assistance to the contributions to the daily operation of the ECCC, the government has to some extent fulfilled its primary responsibility to protect its people. It has brought the perpetrators to justice, enabled the victims to participate as subjects in the trials, and provided information to the public. Physical protection and empowerment are key components of the human security paradigm. Thus, the materialisation of the ethos of the RtoP through both judicial and non-judicial measures and the empowerment of people during the trials are crucial for the promotion of human security in Cambodia.

[^ To the top](#)

The Legacy of the ECCC

The ECCC not only helps the Cambodian people come to terms with what happened three decades ago but also serves as a way to strengthen the achievements of Cambodia's rebuilding over the past years. As a hybrid tribunal that embraces international justice standards, the ECCC's legacy to the Cambodian justice system and the wider society – and thus to human security in Cambodia even after the ECCC completes its mandate – could be significant.

The ECCC's most important legacy stems from the enhancement of the understanding of the law – through the transfer of legal knowledge and skills, and through awareness-raising efforts targeted at law enforcement agencies and the public. Training courses have been provided by the ECCC to Cambodian lawyers, many of whom are working on international criminal cases for the first time (ECCC, 2011b). Moreover, Cambodian lawyers have had the opportunity to gain familiarity with the procedures of international criminal law through working in close collaboration with international law practitioners. During our field research in Phnom Penh in August 2011, one interviewee, who works closely with the ECCC Office of the Co-Prosecutors, commented that the ECCC's contribution to the Cambodian judicial system would most likely be through influencing the way Cambodian lawyers and administrative staff approach future cases.

The ECCC also promotes the awareness of the rule of law among law enforcement agencies. Police officers attend the ECCC hearings on organised visits. The exposure to international justice can serve as a preliminary lesson on the importance of law. In a survey on the ECCC

trials, 72 per cent of respondents said the Duch trial had increased their trust in the justice sector (Pham et al., 2011:30). The government and the public are more aware of their responsibility and rights. These are positive signs for the advancement of the rule of law, which represents an important guarantee of human security.



Residents from a former Khmer Rouge stronghold visit the Toul Sleng Genocide Museum as part of an outreach programme.

Credit: Extraordinary Chambers in the Courts of Cambodia (ECCC).

With regard to the wider Cambodian society, the ECCC trials provide the general public with a heightened awareness of their legal right to seek the protection of the government from mass violations of human rights, by incorporating victim participation in the proceedings, encouraging public engagement and promoting human security. In case the government fails to protect its people, or commits mass atrocities against them, the leaders most responsible will be held accountable as is happening to the defendants in Cases 001 and 002. The tribunal also has an outreach programme that organises visits to the Tuol Sleng Genocide Museum and the Choeung Ek killing fields to commemorate the victims and ensure that the dark part of Cambodian history is never forgotten. Increasing the awareness among the public of their rights is a way to empower people which, as noted earlier, is one of the key components of human security.

Despite the potential positive influence of the ECCC on Cambodian society, the pressing problem is the lack of a sound transfer system to effectively preserve the legacy of the ECCC after the conclusion of all ECCC cases. This is a concern shared by the academics, NGOs and law practitioners we interviewed in Phnom Penh in 2011. There is a lack of substantial

discussion in the Cambodian government on how to transfer the best practices of the ECCC to the domestic legal system. At the UN level, the preservation of the ECCC legacy is beyond the mandate of the tribunal. Other UN agencies such as the UN Office of the High Commissioner for Human Rights in Cambodia might be interested in undertaking the work. One possible option is to foster cooperation between relevant Cambodian government ministries (such as the Ministry of Justice) and UN agencies with the aim of establishing an appropriate transfer mechanism.

[^ To the top](#)

Conclusion

The ECCC trials are attempts to protect civilians by redressing past mass atrocities, empowering the people and increasing human security with the aim of preventing future atrocity crimes. The ECCC represents progress in the endeavour to rebuild Cambodia after the past gruesome crimes. It has also increased the human security of Cambodian people by empowering them through educational and participatory initiatives.

The RtoP highlights the primary role of the state to protect its people. Based on the above examination, the government representing the state of Cambodia has played an irreplaceable role in seeking accountability for past atrocities and bringing the ECCC into Cambodia, and thus it has to a certain extent fulfilled its responsibility to protect its people from the danger of future atrocity crimes.

However, the risk of another mass violation of human right has not been completely eliminated, as there are reports that the Cambodian government has implemented strict monitoring and supervision of some human rights activists and political opponents (Human Rights Watch, 2006). The recent draft NGO law is criticised by some NGOs interviewed by us (in Phnom Penh in August 2011) as another attempt by the government to strengthen its grip on civil society. The intolerance of the government in this respect could only increase rather than defuse social tensions. This is a concern as societies that have experienced mass atrocities are more vulnerable than normal societies to a recurrence of mass atrocities. Effective coping mechanisms and good leadership are identified as important factors for mass atrocity prevention (Evans, 2008:74).

The ECCC has provided a window for enhancing the mechanism for dealing with mass atrocity crimes. Hence, it is crucial to ensure that the fundamental values of the responsibility to protect and international criminal justice in Cambodia are not abandoned at the conclusion of the ECCC trials and that human security continues to be promoted through the empowerment of Cambodians.

[^ To the top](#)

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[^ To the top](#)

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