

COMMENT

THE POLICY OF TRUTH: A COMPARATIVE STUDY OF TRANSITIONAL JUSTICE BETWEEN THE RWANDAN GACACA COURT AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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You had something to hide, should have hidden it shouldn't you. Now you're not satisfied, with what you're being put through. It's just time to pay the price, for not listening to advice, and deciding in your youth on the Policy of Truth. Things could be so different now, it used to be so civilized. You will always wonder how it could have been if you'd only lied. It's too late to change events it's time to face the consequence for delivering the proof in the Policy of Truth. Never again is what you swore, the time before. Now you're standing there tongue tied, you'd better learn your lesson well, hide what you have to hide, and tell what you have to tell. You'll see your problems multiplied, if you continually decide, to faithfully pursue the Policy of Truth.- Policy of Truth by Depeche Mode.¹

INTRODUCTION

Fifteen years before Depeche Mode's 1990 single, "Policy of Truth," the Khmer Rouge, under its leader Pol Pot, committed a devastating genocide against the people of Cambodia. From 1975 to 1979, a period known then as Democratic Kampuchea,² the Khmer Rouge savagely and brutally killed an estimated 1.5 million to 3 million people.³ Comparatively, in Rwanda, and four years after Depeche Mode's single, the Hutus killed more than 800,000 Rwandans over a

1. DEPECHE MODE, *Policy of Truth*, in VIOLATOR (Mute Records 1990) [hereinafter *Policy of Truth*].

2. KHAMBOLY DY, A HISTORY OF DEMOCRATIC KAMPUCHEA (1975–1979) 1 (2007).

3. Henri Locard, *State Violence in Democratic Kampuchea (1975-1979) and Retribution (1979-2004)*, 12(1) EUR. REV. HIST. 121, 121 (2005).

100-day period in 1994.⁴ The death toll constituted approximately 70% to 80% of the Tutsi population,⁵ and 33% of the Pygmy Batwa.⁶

These tragic events in human history, similar in their senseless and reprehensible killing of innocent people, generated different mechanisms to address the devastation left behind by the respective genocides. Cambodia created the Extraordinary Chambers in the Courts of Cambodia (“ECCC”),⁷ a traditional and formal tribunal system adhering to international law and jurisdiction. Conversely, Rwanda opted for a community based, non-traditional format. In 2001, the Rwandan government instituted the Gacaca court⁸ to accommodate the hundreds of thousands of people accused of acts of genocide and crimes against humanity.⁹ Additionally, the Gacaca was established not only to convict and punish those responsible for the genocide, but also as a tool of transitional justice to further community healing and rebuilding.¹⁰

Various sectors of the international community have recently discussed the role of transitional justice to address these atrocities. Transitional justice is a combination of judicial and non-judicial measures used to combat systemic human rights atrocities.¹¹ Some transitional justice methods include, criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional

4. See, e.g., *Rwanda: How the Genocide Happened*, BBC NEWS, May 17, 2011, at 1, <http://www.bbc.com/news/world-africa-13431486>.

5. PHILIP VERWIMP, A QUANTITATIVE ANALYSIS OF GENOCIDE IN KIBUYE PREFECTURE 8 (2001).

6. See Raja Sheshadri, *Pygmies in the Congo Basin and Conflict*, ICE CASE STUD. 163 (2005), <http://mandalaprojects.com/ice/ice-cases/pygmy.htm>.

7. 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, Cambodia-UN, June 6, 2003, 2329 U.N.T.S. 117; see also G.A. Res. 57/228, Khmer Rouge Trials, at 2–3 (May 22, 2003) (approving the establishment of the ECCC).

8. Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 50 (2006) (Gacaca loosely translates into “justice amongst the grass”).

9. *Id.* at 2.

10. See Mark Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1261 (2000).

11. *What is Transitional Justice?*, INT’L CTR. FOR TRANSITIONAL JUST., <https://www.ictj.org/about/transitional-justice> (last visited Mar. 25, 2018).

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reforms.¹² They can be seen in a variety of formations, from the Truth and Reconciliation Commission in South Africa,¹³ to the Good Friday Agreement in Ireland,¹⁴ and the Special Court for Sierra Leone.¹⁵

Transitional justice is implemented when a political system transitions from a regime of violence and repression to a peaceful and stable society.¹⁶ However, transitional justice movements are directly related to a society's treatment during and after the regime change.¹⁷ Transitional justice can serve to rebuild government trust, and repair political systems that are severely damaged. Overall, these movements "comprise[] the full range of processes and mechanisms" to attain a more peaceful, certain, and democratic future.¹⁸ As utopian as transitional justice sounds for countries plagued with atrocities of genocide and crimes against humanity, scholars and analysts have raised concerns regarding its implementation. The most prevalent criticism is directed at its most utilized and prominent form: trials.

Makau W. Mutua, a Kenyan-American legal scholar, commented on the International Tribunal for Rwanda ("ICTR") and argued "the Rwanda Tribunal, no matter how successful it becomes, will never compensate for the inaction of the international community as the genocide took place in 1994."¹⁹ Furthermore, former investigator for the United Nations Security Council's Commission of Experts on Rwanda, Lyal S. Sunga, argues criminal prosecutions and truth commissions, as currently established, are conflicting; thus, preventing each other from properly carrying out their objectives.²⁰ Mr. Sunga

12. *Id.*

13. See Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.).

14. See Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998, 37 I.L.M. 751.

15. S.C. Res. 1315 (Aug. 14, 2000).

16. Lisa J. Laplante & Kelly Phenicie, *Mediating Post-Conflict Dialogue: The Media's Role in Transitional Justice Processes*, 93 MARQ. L. REV. 251, 254 (2009).

17. See *id.* at 253.

18. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 8, U.N. Doc. S/2004/616 (Aug. 23, 2004).

19. Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L. J. 167, 183 (1997).

20. See Lyal S. Sunga, *Ten Principles for Reconciling Truth Commissions and Criminal Prosecutions*, in THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL

argues truth commissions must be established under international human rights and criminal law to avoid conflicting and undermining criminal prosecutions by granting blanket amnesties to offenders of serious crimes.²¹ Instead, criminal prosecutions should be focused on human rights victims, so the government's actions are placed in a proper perspective.²²

Given these concerns and critiques, the debate within transitional justice revolves around what aspect to pursue initially: justice or peace.²³ Those emphasizing justice assert that if those accused of human rights violations are not prosecuted, the impunity for crimes will transition into the incoming regime, thereby preventing a complete transition away from the conflict.²⁴ However, those advocating for peace assert the only way to efficiently end violence is through gaining the truth via reconciliation and granting amnesties.²⁵ The stark reality is that the method of transitional justice utilized is a subjective decision, which varies from state to state. The sequence of implementing transitional justice measures directly “depends on time and the historical context of the conflict.”²⁶ Accordingly, Cambodia and Rwanda have implemented different trial functions to implement transitional justice. The international community can learn lessons about both systems as well as other international tribunals by comparing these two different examples of transitional justice measures.

This Comment attempts to understand the positive and negative impacts both systems have had in forwarding transition justice. Part I of this Comment analyzes the Gacaca Court system and outlines the Court's formation, structure, and procedures. Part II discusses the

COURT (2009) [hereinafter “Ten Principles”]; TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis Thompson eds., 2000).

21. See generally Ten Principles, *supra* note 20.

22. See LYAL SUNGA, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS* 102–03 (1992).

23. See Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003).

24. See *id.* at 78–81.

25. Ten Principles, *supra* note 20.

26. Anja Mihr & Chandra Lekha Sriram, *Rule of Law, Security and Transitional Justice in Fragile and Conflict-Affected Societies*, at 2 (Comm'n on Glob. Sec. Just. & Gov. Background Paper 2015), https://www.stimson.org/sites/default/files/Commission_BP_Mihr_Sriram.pdf.

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ECCC and analyzes the formation, structure, and procedures, while comparing and contrasting them to the Gacaca Court. Part III details the successes and failures of both court systems to evaluate if one system is preferential to the other to forward transitional justice. Finally, Part IV explains how those lessons can be applied in other transitional justice systems.

I. RWANDA AND THE GACACA COURT

A. Formation

While the Gacaca Court was initially established in 2001 as a means to mitigate the massive number of Rwandans accused of crimes that forwarded the genocide in 1994, the history of the Gacaca is rooted several hundreds of years prior.²⁷ During pre-colonial Rwanda in the seventeenth century, Kings, known as Mwami, ruled various sectors encompassing several households within an extended lineage.²⁸ The Mwami embodied justice and power and, as such, were seen as the ultimate judge, jury, and executioner.²⁹ However, before the Mwami would hear any dispute, a group of wise men, referred to as the Gacaca, would hear the matter first to restore peace and tranquility within communities.³⁰ The Gacaca would recognize and acknowledge the wrongs committed and summarily restored justice to the victims.³¹ Once the colonization of Rwanda initiated, the western systems of law and order engulfed the culture, and the newly established courts eventually phased out the Gacaca as a means to settle disputes.³²

27. Maya Goldstein Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 375 (2004).

28. Bert Ingelaere, *The Gacaca Courts in Rwanda*, in TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENCE CONFLICT: LEARNING FROM AFRICAN EXPERIENCES 25, 33 (2008).

29. *Id.*

30. Luc Huyse et al., *Traditional Justice and Reconciliation after Violent Conflict*, at 33, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE (2008), https://www.idea.int/sites/default/files/publications/traditional-justice-and-reconciliation-after-violent-conflict-learning-from-african-experiences_0.pdf. The term "Gacaca" is derived from the Kinyarwanda word "unucaca," meaning "a plant so soft to sit on that people prefer to gather on it." *Id.*

31. *Id.* at 33–34.

32. *Id.* at 34.

At the conclusion of the Rwandan genocide, Rwanda's transitioning leaders faced the difficult position of having to prosecute approximately 130,000 alleged participants of the genocide.³³ The initial method to provide justice to the victims of the Rwandan genocide was the creation of the ICTR.³⁴ However, given the vast amount of accused, the ICTR needed a system to mitigate the insufficient resources to establish First World courts as well as give local communities closure and the ability to confront the trauma suffered from the genocide.³⁵ The Gacaca court was re-implemented, like a phoenix rising from the ashes of the Rwanda's historic traditions and culture. With the rebirth of the Gacaca system, several goals were established within the Court's implementation: "[1] establish truth about what happened; [2] accelerate the legal proceedings for those accused of genocide crimes; [3] eradicate the culture of impunity; [4] reconcile Rwandans and reinforce their unity; and [5] use the capacities of Rwandan society to deal with its problems through a justice-based Rwandan custom."³⁶

B. Structure

The Gacaca's structure was based on a system of individual cells and sectors.³⁷ Each individual cell makes up a small community, and a small group of cells comprise a sector, which constitutes "a village."³⁸ Within the dichotomy of the Gacaca system, there are 9,013 cells and 1,545 sectors,³⁹ comprising 12,013 individual Gacaca courts

33. Filip Reyntjens & Stef Vandegiste, *Rwanda: An Atypical Transition*, in *ROADS TO RECONCILIATION* 110 (2005).

34. S.C. Res. 955 (Nov. 8, 1994).

35. See Outreach Programme On The Rwanda Genocide, Background Information on the Justice and Reconciliation Process in Rwanda (Mar. 2014), <http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml> (last visited Mar. 25, 2018).

36. Ingelaere, *supra* note 28, at 38.

37. Alexandra A. Miller, *From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape*, 108 PENN. ST. L. REV. 349, 352 n.29 (2003).

38. *Id.*

39. Ingelaere, *supra* note 28, at 41.

established nationwide as of April 2009.⁴⁰ Gacaca court began as a nineteen presiding judges, which make up the council, and has since reduced to five elected judges known as Inyangamugayo.⁴¹ During 2005 and 2006, data and information was collected from the accused in all of the Gacaca cells.⁴² After the initial data collection process was complete, there were 818,564 Rwandans accused of some crime relating to the genocide, of which 44,204 were not in the country, and 87,063 were deceased.⁴³

C. Categories of Crimes

At this stage, the Gacaca separated those accused into four distinct categories: 1, 2 (1st and 2nd degree), 2 (3rd degree), and 3 (4th and 5th degree).⁴⁴ These categories were generated to classify the accused into distinct categories based on the severity of their alleged crime and provide the Gacaca with sentencing guidelines.⁴⁵ The amount the sentence could be decreased depended on whether the accused confessed before or after they appeared on the list of suspects.⁴⁶

Category 1, the most severe, was reserved for those who “occupied positions of leadership, rapists, well-known murderers, torturers, or any people who committed dehumanizing acts on a body.”⁴⁷ Under this category, due to the severity of the charges and punishments dispensed,

40. 1994 *Genocide: Gacaca Trials Discharge One Million Cases So Far*, JUSTICE INFO.NET (Apr. 3, 2009), <https://www.justiceinfo.net/en/component/k2/21257-en-en-030409-rwandagenocide-1994-genocide-gacaca-trials-discharge-one-million-cases-so-far1206412064.html>.

41. Hollie Nyseth Brehm, Christopher Uggen, & Jean-Damascene Gasanabo, *Genocide, Justice, and Rwanda's Courts*, 30 J. CONTEMP. CRIM. JUST. 333, 337 (2014); see also NICOLAS A. JONES, *THE COURTS OF GENOCIDE: POLITICS AND THE RULE OF LAW IN RWANDA AND ARUSHA* (2010). The word “Inyangamugayo” is the Kinyarwanda word for a reliable or trustworthy person. *Id.*

42. PHIL CLARK & ZACHARY D. KAUFMAN, *AFTER GENOCIDE* 13 (2008).

43. Ingelaere, *supra* note 28, at 42.

44. *Id.* at 40.

45. See *id.* at 39.

46. Anne N. Kubai, *Between Justice and Reconciliation: The Survivors of Rwanda*, 16(1) AFR. SEC. REV. 53, 60 (2007).

47. Ingelaere, *supra* note 28, at 40; see also Anuradha Chakravarty, *Gacaca Courts in Rwanda: Explaining Divisions within the Human Rights Community*, YALE J. INT'L AFF. 134 (2006).

those accused of Category 1 crimes would be addressed in either the ordinary court or the ICTR.⁴⁸ Category 2 (1st and 2nd degree) was reserved for “[o]rdinary killers in serious attacks and those who committed attacks in order to kill but without attaining this goal.”⁴⁹ The Sector Gacaca holds jurisdiction and could render a sentence ranging from twenty to thirty years, with no confession, or from seven to twelve years, with a confession prior to their appearance.⁵⁰ Category 2 (3rd Degree) comprised of those who attacked others without the intention to kill.⁵¹ The Sector Gacaca also addressed the accused in this category, imposing a sentence of five to seven years, without a confession, or one to three years, with a confession prior to their appearance.⁵² Finally, Category 3 (4th and 5th Degree) accused were charged with property damage and were adjudicated by the Cell Gacaca, in which the only punishment allowed—regardless of confession—was civil reparation.⁵³

After March 2007, the Categories were adjusted to allow the Gacaca courts to generate judicial economy for the ICTR as well as gain more closure for the victims of some of the most brutal atrocities.⁵⁴ This was accomplished by shifting well-known murderers, torturers, and those committing dehumanizing acts on a dead body to be tried under what would now be deemed Category 2 (1st, 2nd, and 3rd degree).⁵⁵ In addition, a new Category 2 (4th and 5th degree) replaced the former Category 2 (1st and 2nd degree) category.⁵⁶ Furthermore, a new Category 2 (6th degree) replaced the original Category 2 (3rd degree).⁵⁷ Category 3 remained unaltered.⁵⁸ After all of the

48. Ingelaere, *supra* note 28, at 40; *see also* Chakravarty, *supra* note 47, at 134.

49. Ingelaere, *supra* note 28, at 40

50. L. Danielle Tully, *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. INT’L & COMP. L. REV. 385, 400–01 (2003).

51. Ingelaere, *supra* note 28, at 40; *see also* Chakravarty, *supra* note 47, at 134.

52. Tully, *supra* note 50, at 400–01; *see also* Chakravarty, *supra* note 47, at 134.

53. Ingelaere, *supra* note 28, at 40.

54. *Id.* at 40–41, 43; *see generally* Leo C. Nwoye, *Partners or Rivals in Reconciliation? The ICTR and Rwanda’s Gacaca Courts*, 16 SAN DIEGO INT’L L.J. 124 (2014).

55. Ingelaere, *supra* note 28, at 41.

56. *Id.*

57. *Id.*

58. *Id.*

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information was disseminated, it was determined Category 1 would adjudicate over 77,269 accused, Category 2 contained 432,557, and Category 3 was comprised of 308,739 accused.⁵⁹

D. Procedural Methods and Problems

Unlike the Gacaca proceedings during the time of the Mwami, the new procedures embodied many attributes of Rwanda's western colonial influences. The Gacaca court of the past was focused on being restorative and conciliatory, whereas the modern Gacaca was altered in design and practice.⁶⁰ The alteration that has come about, aside from the council of Inyangamugayo presiding over the court, is that much of the subjective procedural methods utilized during the trial process are not consistent with traditional Rwandan or international law.⁶¹

For example, the accused do not have the right to counsel nor the right to confront their accusers.⁶² This aspect plays a significant role in the Gacaca Court's ability to collect evidence. During pre-trial, the court is able to compile dossiers on the accused, including input from the community.⁶³ The dossiers are then corroborated before their introduction to the Gacaca.⁶⁴ Without a right to be present during the pre-trial phase, coupled with the defendant's lack of counsel, the trial proceedings are heavily weighted against the accused.⁶⁵ However, during the pre-trial phase, the accused are afforded a chance to put

59. *Id.* at 42.

60. Waldorf, *supra* note 8, at 50.

61. Chakravarty, *supra* note 47, at 132, 135.

62. Jennie E. Burnet, *The Injustice of Local Justice: Truth, Reconciliation, and Revenge in Rwanda*, 3 GENOCIDE STUD. & PREVENTION 173, 176 (2008). Although the Rwandan Constitution, the Rwandan Code of Criminal Procedure, and the International Covenant on Civil and Political Rights recognize the accused's "right to be informed of the accusations against him or her and the right to have sufficient time to prepare a defense," Gacaca courts have not always respected those rights. Kenneth Roth, *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts*, at 34, HUM. RTS. WATCH (May 31, 2011), <https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts>.

63. Chakravarty, *supra* note 47, at 135.

64. *Id.*

65. *Id.*; see also Amnesty International, *Rwanda: Gacaca—Gambling with Justice* (June 20, 2002), <http://web.amnesty.org/library/index/ENGAFR470032002>.

forward evidence to the community.⁶⁶ During this stage, “and even later on in the information gathering period, witnesses are able to testify for or against defendants.”⁶⁷

Once the trial is underway, the defendant is then informed of the charges, and at such time, is allowed to present his case.⁶⁸ As a matter of procedure, the council allows the defendant to provide additional testimony if he feels the record is incomplete in some form.⁶⁹ Furthermore, the defendant is allowed to challenge the category of the crime of which he is accused.⁷⁰

However, many defendants do not challenge their category because they have been accused of crimes they committed alongside family members or close neighbors and do not want to point the finger at other accused, which is required by the confession process.⁷¹ During trial, the council must discuss and analyze inconsistent testimonies from primary suspects, accomplices, and witnesses, which can take up to three years.⁷² Additionally, the sentence may be appealed to a Gacaca appeals court, “sometimes moving all the way up the national court system.”⁷³

66. Chakravarty, *supra* note 47, at 135.

67. *Id.*; see also Jeevan Vasagar, *Grassroots Justice*, THE GUARDIAN (Mar. 17, 2005, 9:18 AM), <https://www.theguardian.com/world/2005/mar/17/worlddispatch.rwanda>.

68. Roth, *supra* note 62, at 34. “[M]any accused did not receive the legally prescribed notice of cases pending against them, were not provided with sufficient pre-trial information about the charges against them, and were not given enough time to prepare their defenses. Many accused only learned of the real nature of the allegations against them on the day of their trial. The inability of the accused to involve a lawyer only aggravated these problems.” *Id.*

69. *Id.*

70. *Monitoring and Research Report on the Gacaca: Testimonies and Evidence in the Gacaca Courts*, at 32, PENAL REFORM INST., <https://www.penalreform.org/wp-content/uploads/2013/05/Gacaca-Report-11-testimony-and-evidence-1.pdf> (last visited Mar. 25, 2018).

71. *Id.*

72. Charlotte Hulme, *The Truth Heals: Punishment and Reconciliation at Rwanda’s Gacaca Courts*, at 10–11, Honor Thesis Collection (2014), <http://repository.wellesley.edu/cgi/viewcontent.cgi?article=1250&context=thesiscollection>.

73. *Id.*

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Although these aspects of the Gacaca courts seem to be a proper foundation for the establishment of a system rooted in transitional justice, there are various critics that believe that the Gacaca courts are stifling the progress of true transitional justice. Aside from the previously mentioned deficiency in the lack of defendant's rights, allegations of corruption have been forwarded against the Inyangamugayo.⁷⁴ Since the Inyangamugayo are unpaid, the incidents of bribery and corruption have been a continued source of contention for the Gacaca system as a whole.⁷⁵ As an extension of this concern, the level of competency of those chosen as Inyangamugayo has been a source of criticism of the Gacaca's ability to dispense effective justice.⁷⁶ The Inyangamugayo are not placed into their position for their intricate level of knowledge in the law, but rather their status as "people of integrity."⁷⁷ Training for both the Inyangamugayo and the "lawyers" within the Gacaca has been minimal at best.⁷⁸ As a byproduct of the Inyangamugayo's lack of payment and training, the Office of the Prosecutor lends a disproportionate amount of support towards the judiciary.⁷⁹ As a result, the prosecution has been given a considerable amount of weight to their side, which creates an unlevel playing field for those accused.⁸⁰

II. THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

A. Formation

In 1997, "the former First Prime Minister Norodom Ranariddh and then Second Prime Minister Hun Sen" of Cambodia appealed to the United Nations Secretary-General Kofi Annan to establish a special

74. *Rwanda: Mixed Legacy for Community-Based Genocide Courts*, HUM. RTS. WATCH, <https://www.hrw.org/news/2011/05/31/rwanda-mixed-legacy-community-based-genocide-courts> (last visited Mar. 25, 2018).

75. Jacqueline Lewis, *Mass Graves and a Thousand Hills: University Student Perspectives on the Gacaca Courts in Post-Genocide Rwanda*, at 5, INQUIRY J. (2010).

76. Burnet, *supra* note 62, at 175.

77. *Id.*

78. Lewis, *supra* note 75, at 3.

79. Vasagar, *supra* note 67.

80. *Id.*

tribunal in Cambodia.⁸¹ The purpose of the tribunal was to bring justice for the millions of individuals who suffered under the senior leadership of the Khmer Rouge regime.⁸² After several years of negotiations between Cambodia and the United Nations, an agreement was established on May 22, 2003, and was summarily endorsed by the United Nations General Assembly.⁸³ With an agreement in place, Cambodia established the Khmer Rouge Trial Task Force (“Task Force”).⁸⁴ This Task Force created both legal and judicial institutions to address the additional war criminals.⁸⁵ Meanwhile, the Cambodian government stated it would only be able to contribute limited funding because of its own deficient economic state and other prior commitments.⁸⁶ As a result, several nations including, Canada, Japan, and India all made significant contributions.⁸⁷ Despite the additional contributions, as of January 2006, there was insufficient funding to establish the tribunal.⁸⁸

Despite the lack of funding, two months later, United Nations Secretary-General Kofi Annan nominated seven judges to the

81. Kathern M. Klein, *Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia*, 4 NW. J. INT’L HUM. RTS. 549, 554 (2006). For the past 30 years, Hun Sen has served as Cambodia’s First Prime Minister and has been able to keep his position even when the regime changed from King Norodom Sihanouk to his son, and current King, Norodom Sihamoni. Stephanie Giry, *Autopsy of a Cambodia Election: How Hun Sen Rules*, 94 FOREIGN AFF. 144, 146 (2015).

82. Daniel Kemper Donovan, *Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal*, 44 HARV. INT’L L.J. 551, 551 (2003).

83. See generally, G.A. Res. 57/228 B (May 22, 2003).

84. See Teresa V. Capeleto, *Reconciliation in the Wake of Tragedy: Cambodia’s Extraordinary Chambers Undermines the Cambodian Constitution*, 17 PAC. RIM L. & POL’Y J. 103, 109 (2008).

85. *Id.*

86. See Alison Kamhi, *Private Funding for Public Justice: The Feasibility of Donations to the Cambodian Tribunal*, 48 HARV. INT’L L. J. 581, 581–82 (2007).

87. *Id.* at 584. Nearly three dozen countries contributed to the formation of the ECCC, including loans from the United Nations. For an exhaustive list of the countries and the amounts they donated, see Documentation Center of Cambodia, List of Pledging Donor Countries for U.N. Share for Establishment of Extraordinary Chambers,

https://www.eccc.gov.kh/sites/default/files/Finacial_Outlook_31%20January_%202015.pdf (last visited Mar. 25, 2018).

88. Kamhi, *supra* note 86, at 584.

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tribunal.⁸⁹ As May 2006 approached, King Norodom Sihamoni approved seventeen judges from Cambodia and thirteen international officials to preside over the tribunals.⁹⁰ All of the chosen justices were officially sworn in to serve on the tribunal in July 2006.⁹¹ However, over the following years, staff has worked without pay and has even “gone on strike following severe funding shortfalls.”⁹² As a result of the lack of funding, the U.N. General Assembly has been forced to grant the ECCC funding to ensure staff was paid.⁹³

B. Structure

Regarding the structure, the tribunal consisted of a combination of local and international judges.⁹⁴ There are three separate chambers: Pre-Trial Chamber, Trial Chamber, and the Supreme Court Chamber.⁹⁵ First, the Pre-Trial Chamber hears motions from Investigating Justices

89. *Judges Nominated*, THE PHNOM PENH POST. (Mar. 10, 2006, 7:00 AM), <http://www.phnompenhpost.com/national/judges-nominated>.

90. *King Approves List of Judges for KR Trial*, THE CAMBODIA DAILY (May 9, 2006), <https://www.cambodiadaily.com/archives/king-approves-list-of-judges-for-kr-trial-54020/>. The international officials included officials from Australia, Austria, Canada, France, Japan, New Zealand, the Netherlands, Poland, Sri Lanka, and the United States.

91. *Judges sworn in for Khmer Rouge*, BBC NEWS (last updated July 3, 2006, 9:02 AM), <http://news.bbc.co.uk/2/hi/asia-pacific/5140032.stm>.

92. Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 44 DENV. J. INT'L L. & POL'Y 169, 276 (2016).

93. *Id.*; see also U.N. Secretary-General, *Request for a Subvention to the Extraordinary Chambers in the Courts of Cambodia*, U.N. Doc. A/69/536 (Oct. 20, 2014).

94. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, ECCC (Oct. 27, 2004), https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf [hereinafter Law on the ECCC].

95. See Judicial Chambers, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <https://www.eccc.gov.kh/en/organs/judicial-chambers> (last visited Mar. 25, 2018). Both the Pre-Trial and Trial Chambers are comprised of “three Cambodian judges and two international judges;” whereas the Supreme Court Chamber contains “four Cambodian judges and three international judges.” U.N. Secretary-General, *Report of the Secretary-General on Khmer Rouge Trials*, ¶ 16, U.N. Doc. A/57/769 (Mar. 31, 2003).

who are assigned to cases with the specific purpose of determining if the case will go to trial through the submission of a closing order.⁹⁶ If the case moves forward, the Trial Chamber will hear and decide the case.⁹⁷ Finally, the Supreme Court Chamber is able to hear appeals from the Trial Chamber.⁹⁸ The Supreme Council of the Magistracy of Cambodia determines the panel of international justices, which is selected from a pool of nominations from the United Nations Secretary-General.⁹⁹ The judges retain their appointments until the entire tribunal has completed.¹⁰⁰

C. Administrative Divisions of the Court

1. Support for the Victims During the Process

Aside from actual litigation component of the tribunal, there is a separate division within the ECCC dedicated specifically to address the issues suffered by the Khmer Rouge's victims. The Victims Support Section ("VSS") is an intermediary between the victims, or their appointed representatives, and the ECCC.¹⁰¹ Victims are provided a variety of services and assistance from the VSS through different facets

96. Office of the Co-Investigating Judges, EXTRAORDINARY CHAMBERS IN THE COURT OF CAMBODIA, <https://web.archive.org/web/20110610105051/http://www.eccc.gov.kh/en/ocij> (last visited Mar. 25, 2018).

97. *Id.*

98. *Report of the Secretary-General on Khmer Rouge Trials*, *supra* note 95, at ¶ 16; *see also* Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 1), Rule 23 (Feb. 1, 2008), http://www.eccc.gov.kh/english/cabinet/fileUpload/27/Internal_Rules_Revision1_01-02-08_eng.pdf [hereinafter ECCC Internal Rules].

99. Ernestine E. Meijer, *The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal*, in INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, & CAMBODIA 207, 221 (Cesare P.R. Romano et al. eds., 2004).

100. *Id.*

101. *The Extraordinary Chambers in the Courts of Cambodia (ECCC)*, CTR. FOR JUST. & ACCOUNTABILITY, <http://cja.org/what-we-do/litigation/khmer-rouge-trials/related-resources/the-extraordinary-chambers-in-the-courts-of-cambodia-eccc/?id=454> (last visited Mar. 25, 2018).

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of the tribunal process.¹⁰² For example, victims can gain support from the VSS by directly becoming a part of the proceedings, whether it be in the role of a complainant or a civil party.¹⁰³ In addition, the VSS is charged with the duty of notifying victims about the rights they are guaranteed during the tribunal as well as providing victims with legal counsel if they require it.¹⁰⁴ Because of the functions of the VSS, victims have been given formal recognition as a party to the proceedings; thereby, becoming eligible for either individual or collective damages caused by the genocide.¹⁰⁵ In addition to providing logistical assistance, the VSS is charged with the security and protection of all the participants during the course of the proceedings.¹⁰⁶ This can take two forms: (1) providing actual physical security for those providing testimony to the ECCC or (2) counseling and psychiatric care.¹⁰⁷ However, even in 2008, the ECCC “lacked even minimal capacity to educate the public or to provide security or support to victims and civil parties.”¹⁰⁸

2. Access to Legal Counsel for Defendants

Aside from the judiciary, there are several other departments within the ECCC that seek to facilitate the processes of the tribunal and provide direct support to certain areas within the trial process. One such division of the ECCC is the Defense Support Section (“DSS”). The DSS is responsible for several functions within the ECCC, which include, providing indigent defendants with a choice of attorneys; providing support services for the attorneys advocating for the defense;

102. Victims Support Section, EXTRAORDINARY CHAMBERS IN THE COURT OF CAMBODIA, <https://www.eccc.gov.kh/en/victims-support> (last visited Mar. 25, 2018).

103. *Id.*

104. *Id.*

105. Renee Jeffery, *Beyond Repair?: Collective and Moral Reparations at the Khmer Rouge Tribunal*, 13 J. HUM. RTS. 103, 106 (2014).

106. James P. Bair, *From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia*, 31 U. HAW. L. REV. 507, 532 (2009).

107. See, e.g., ECCC Internal Rules, *supra* note 98, Rule 23.

108. Bair, *supra* note 106, at 532.

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and actively pursuing the continued usage of fair trial practices.¹⁰⁹ Furthermore, the DSS acts as the voice within the media for those accused.¹¹⁰

Additionally, the DSS has an additional component known as the Legacy Program.¹¹¹ The Legacy Program serves a two-fold purpose within the structure of the ECCC. First, the Legacy Program is utilized to further the understanding of individuals within Cambodia about the criminal trial process as well as their right to a fair trial and defense.¹¹² The second purpose is to give Cambodian judges and lawyers the opportunity to obtain valuable exposure to international law.¹¹³ The intent of these goals is to foster an environment where concrete improvements can be integrated within the Cambodian legal system; thereby, expanding the Cambodian courts' viability and capability to address future concerns as they progress.¹¹⁴

3. *A Central Office that Provides Support and Stability*

Finally, there is the Office of Administration contained within the ECCC that handles a variety of day-to-day operations.¹¹⁵ This includes everything from budget and financing, to the Court Management Office that provides audio, visual, and translation services, as well as a Public Affairs Office.¹¹⁶ All of these various offices and departments provide the ECCC with the ability to provide support and modern legal services

109. See Defence Support Section (DSS), EXTRAORDINARY CHAMBERS IN THE COURT OF CAMBODIA, <https://www.eccc.gov.kh/en/organs/defence-support-section> (last visited Mar. 25, 2018).

110. *Id.*

111. Alice Murgier, *The Legacy of the Extraordinary Chambers in the Courts of Cambodia: Why Defense Work is Essential in Shaping the Historical Narrative of the Court*, CAMBODIA TRIBUNAL MONITOR (Sept. 16, 2016), <http://www.cambodiatribunal.org/2016/09/16/the-legacy-of-the-eccc-why-defense-work-is-essential-in-shaping-the-historical-narrative-of-the-court/>.

112. *See id.*

113. See U.N. Off. of the High Comm., *Promotion of ECCC Legacy* (Sept. 28, 2015), <http://cambodia.ohchr.org/en/rule-of-law/promotion-eccc-legacy>.

114. *Id.*

115. Office of Administration, EXTRAORDINARY CHAMBERS IN THE COURT OF CAMBODIA, <https://www.eccc.gov.kh/en/organs/office-administration> (last visited Mar. 25, 2018).

116. *Id.*

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to maintain a solid working structure throughout the course of the tribunal.

D. Procedural Methods

Turning towards the manner in which the ECCC dispenses justice, we first look to the jurisdiction of the ECCC, and what crimes it is charged with adjudicating. The ECCC currently retains jurisdiction over several domestic and international crimes.¹¹⁷ These include crimes committed between 1975 and 1979 that violate the 1956 Penal Code of Cambodia,¹¹⁸ the Convention on the Prevention and Punishment of the Crime of Genocide,¹¹⁹ the Geneva Conventions (war crimes),¹²⁰ the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,¹²¹ the Vienna Convention on Diplomatic Relations,¹²² and general crimes against humanity.¹²³ If someone brought before the ECCC is found guilty, they can be sentenced to imprisonment and additionally have their property

117. Law of ECCC, *supra* note 94.

118. *Id.* art. 3.

119. *Id.* art. 4. *See, e.g.*, Convention Concerning the Punishment and Prevention of the Crime of Genocide, Dec. 9, 1948, S. Exec. Doc. O, 81-1, 78 U.N.T.S. 277

120. Law of ECCC, *supra* note 94, art. 6. *See, e.g.*, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

121. Law of ECCC, *supra* note 94, art. 7. *See, e.g.*, Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

122. Law of ECCC, *supra* note 94, art. 8. *See, e.g.*, Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

123. Law of ECCC, *supra* note 94, art. 5. *See, e.g.*, Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90. Crimes against humanity are specific “acts [] committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” *Id.* These crimes include, *inter alia*, murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, rape, enforced disappearance, apartheid, and “other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” *Id.*

forfeited.¹²⁴ Furthermore, in keeping with international humanitarian law and the tradition of other United Nations tribunals, the ECCC lacks the ability to impose the death penalty on any perpetrator no matter how egregious the crimes may be.¹²⁵ As of November 2009, the ECCC had only indicted five people, three of whom were convicted and awarded life sentences.¹²⁶

I. Role of the Victim

During the course of the proceedings within the ECCC, the role of the victim is crucial.¹²⁷ A victim is:

defined as any person or legal entity who has suffered from physical, psychological, or material harm as a direct consequence of the crimes committed in Cambodia by the Democratic Kampuchea regime between April 17, 1975, and January 6, 1979, that are under the jurisdiction of the ECCC.¹²⁸

124. Law of ECCC, *supra* note 94, art. 39.

125. Seth Mydans, *Khmer Rouge Tribunal Enters Final Phase*, N.Y. TIMES (Nov. 23, 2009), <http://www.nytimes.com/2009/11/24/world/asia/24cambo.html>.

126. *Id.* In total the ECCC has adjudicated Case 001, Case 002, and Cases 003 and 004. For a brief overview of each of the cases see, *ECCC at a Glance*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (Apr. 2014), https://www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20-%20April%202014_FINAL.pdf.

127. See Victims Support Section, *supra* note 102. Victims have the fundamental role of submitting complaints to Co-Prosecutors, “who take the interests of Victims into account when considering whether to initiate an investigation or a prosecution.” *Id.* Victims also have the ability to join Civil Parties and seek collective and moral reparations. *Id.*

128. Victims Participation, EXTRAORDINARY CHAMBERS IN THE COURT OF CAMBODIA, <https://www.eccc.gov.kh/en/victims-support/participation> (last visited Mar. 25, 2018). “Anyone who has suffered from physical, psychological, or material harm as a direct consequence of the crimes committed in Cambodia by the Democratic Kampuchea regime between 17 April 1975 and 6 January 1979 is considered to be a Victim by the ECCC. For example: if you were detained or tortured; if you suffered from forced starvation; if you were forced to leave your home and to work hard labor against your will; if your parents, grandparents, or other family members were killed, abducted, detained, or tortured; if you lost your house, your rice fields, your animals, or other property, you may be considered a Victim.” *Id.*

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One reason behind the necessity of the victim's role during the process is based upon the concept that the ECCC is an important vehicle for those affected by the genocide to come to terms with the traumatic events they endured from the atrocities the Khmer Rouge committed.¹²⁹ Neth Pheaktra, an ECCC spokesperson, emphasized the importance of the ECCC for the victims stating, "The tribunal facilitates reconciliation and at the same time provides an opportunity for Cambodians to come to terms with their history."¹³⁰

2. *Rights Granted to the Accused*

The procedure that the ECCC follows during the course of the trial is all delineated and dictated by the Internal Rules of the ECCC. Unlike the Gacaca courts of Rwanda, the ECCC is grounded in the tenets of international law and, therefore, the rights of the accused are factored into procedure far more heavily.¹³¹ Aside from the accused having a right to counsel, the Internal Rules provide guidance for the accused to have the right to be informed of their charges, the right to confront and question their accusers, a set time for the accused to prepare their case, and provisions against unwarranted searches and seizures.¹³² Furthermore, "[G]acaca courts have no procedures governing what evidence is admissible or inadmissible, who has the burden of proving that a person committed a crime, and what standard should be used to determine guilt."¹³³ Within the Internal Rules for the ECCC, there are specific rules for the intake of evidence.¹³⁴ Additionally, the judiciary

129. See Isabelle Chan, *Rethinking Transitional Justice: Cambodia, Genocide, and a Victim-Centered Model*, INT'L STUD. HON. PROJ. 3, 30 (2006).

130. Sun Narin, *No justice without remembering*, DEV. & COOPERATION (Mar. 4, 2017), <https://www.dandc.eu/en/article/legacy-khmer-rouge-still-haunts-cambodia>.

131. Michael G. Karnavas, *Bringing Domestic Cambodian Cases Into Compliance With International Standards*, 1 CAMBODIA L. & POL'Y J. 45, 47 (2014).

132. See ECCC Internal Rules, *supra* note 98.

133. *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts*, HUM. RTS. WATCH (May 31, 2011), <https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts>.

134. ECCC Internal Rules, *supra* note 98, Rule 87.

is able to reject evidence for being irrelevant or repetitious, or being impossible to obtain within a reasonable time.¹³⁵

However, one of the most stark and striking differences between the Gacaca courts and the ECCC within procedure is the manner in which judiciary matters are conducted. Unlike the Gacaca courts, which rely on having a judiciary comprised solely of individuals from the community at large,¹³⁶ the ECCC judiciary is a combination of Cambodian and international judges that were nominated by the United Nations Secretary-General, and approved by the Cambodian Supreme Council of the Magistracy.¹³⁷ This method was created so the judiciary would have less personal attachment to the cases and the ability to focus solely on the law.¹³⁸ Furthermore, the ECCC appeal process is more traditional than the Gacaca court. Within the ECCC process, there are only two grounds for appeal to the Supreme Court Chamber: “an error on a question of law invalidating the judgment or decision, or an error of fact which has occasioned a miscarriage of justice.”¹³⁹

3. Deficiencies of the ECCC

Although the ECCC may be rooted in international law, and have more provisions preventing corruption and protecting the accused, the process has still faced criticism from the international community.¹⁴⁰ First, there have been significant criticisms in how Cases 003 and 004 were completed. Case 003 involves the actions of the former Khmer Rouge army commanders Meas Muth and Sou Met who allegedly were involved in the supervision of transportations, and subsequent arrests of prisoners to the S-21 prison.¹⁴¹ The controversy within this case arose

135. *Id.*

136. Chakravarty, *supra* note 47, at 132.

137. Int’l Bar Ass’n, *Safeguarding Judicial Independence in Mixed Tribunals*, at 19 (Sept. 2011), [https://law.vanderbilt.edu/files/archive/Cambodia-report-\(Sept-2011\).pdf](https://law.vanderbilt.edu/files/archive/Cambodia-report-(Sept-2011).pdf).

138. *See id.* at 13.

139. *Id.* at 71. Additionally, a decision made within the Chamber’s discretion may be subject to immediate appeal if the decision was based on a “discernable error,” resulting in prejudice to the appellant. *Id.*

140. *Id.*

141. Open Soc’y Just. Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, at 15 (June 2011),

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when Andrew Cayley, the International Co-Prosecutor in the case, openly challenged the Co-Investigating Judges for the premature dismissal of the case insinuating that they were attempting to “bury” the case.¹⁴² In addition to Mr. Cayley’s statement, multiple judges resigned from their positions in what seemed to be a response to the actions taken regarding Case 003 and Case 004.¹⁴³ Significantly, in October 2011, German Co-Investigating Judge Siegfried Blunk resigned over the Cambodian government’s remarks opposing further prosecutions within these cases because it was “undermining his position and calling into doubt his ability to act independently.”¹⁴⁴

Not long after the resignation of Justice Blunk, Swiss Judge Laurent Kasper-Ansermet resigned unexpectedly as well.¹⁴⁵ This casted even more doubt on the courts independent ability to investigate and pursue charges against aging and ailing Khmer Rouge leaders.¹⁴⁶ Specifically, Case 004 involved three mid-level Khmer Rouge commanders: Im Chaem, Ta Ann, and Ta Tith.¹⁴⁷ These three commanders were in charge of a forced labor camp, which forced people to create a massive irrigation project, and oversaw massacres of workers within the camp.¹⁴⁸ Since the events of the Khmer Rouge, Ta Tith has established himself in Cambodia as a successful entrepreneur,

<https://www.opensocietyfoundations.org/sites/default/files/cambodia-eccc-20110614.pdf>.

142. Sovan My, *Cambodia war crimes judge threatens suit against prosecutor*, LEARNING-TEACHING SOURCES (May 13, 2011), <http://ltsources.blogspot.com/2011/05/cambodia-war-crimes-judge-threatens.html>.

143. *Judge Resigns KR Court Over Gov’t Pressure*, THE CAMBODIA DAILY (Oct. 11, 2011), <https://www.cambodiadaily.com/archives/judge-resigns-kr-court-over-govt-pressure-104822/>; see also *Press Release by the International Co-Investigating Judge*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <https://www.eccc.gov.kh/en/articles/press-release-international-reserve-co-investigating-judge> (last visited Mar. 25, 2018).

144. Tallyn Gray, Comment, *Cambodia and the Khmer Rouge Trials in 2012 in review: Will the Court survive 2013?*, 2 WESTMINSTER L. REV. (2012).

145. *Press Release by the International Co-Investigating Judge*, *supra* note 143.

146. *Id.*

147. Jared Ferrie, *Khmer Rouge crimes in legal limbo*, THE NATIONAL (last updated July 24, 2011, 4:00 AM), <http://www.thenational.ae/world/southeast-asia/khmer-rouge-crimes-in-legal-limbo?pageCount=0>.

148. *Id.*

and Im Chaem can now be found in Cambodia's Anlong Veng District as a commune chief, which adds more foundation for concerns of political pressure to drop the charges or suspend their hearings.¹⁴⁹

Additional criticisms have been raised over the financial aspects of the ECCC. From 2006 to 2016, \$293 million dollars were spent on the ECCC, with Cambodia contributing approximately \$41.5 million dollars (approximately 14% of the total finances).¹⁵⁰ The United Nations contributed the remaining \$251.5 million.¹⁵¹ This disparity continued to be apparent when analyzing the financial contributions made in certain years. By 2014, one case had come to full term, but the international community had expended over \$200 million on the ECCC.¹⁵² Additionally, the international community has accused the Cambodian government of withholding funding to prevent prosecuting of more Khmer Rouge Leaders.¹⁵³ In fact, government workers, who are supposed to be paid by the Cambodian government, have repeatedly requested their salaries to be paid and went on strike in 2013.¹⁵⁴

Neither the Gacaca nor the ECCC are infallible. However, to determine if either of these courts are providing and fostering transitional justice, the successes and the failures of both courts must be examined.

149. *Id.*

150. *ECCC Financial Outlook as of 31 October 2017*, EXTRAORDINARY CHAMBER IN THE COURTS OF CAMBODIA, <https://www.eccc.gov.kh/sites/default/files/ECCC%20Contribution%20Data%20as%20at%2031%20October%202017.pdf> (Cambodia is the second largest contributor to the ECCC behind Japan's \$69.8 million contribution).

151. *Id.*

152. Charlie Campbell, *Cambodia's Khmer Rouge Trials Are a Shocking Failure*, TIME (Feb. 13, 2014), <http://time.com/6997/cambodias-khmer-rouge-trials-are-a-shocking-failure/>.

153. *Cambodia: Government Obstructs Khmer Rouge Court*, HUM. RTS. WATCH (Sept. 5, 2013, 12:00 AM), <https://www.hrw.org/print/250989>.

154. *Id.*

III. SUCCESSES AND FAILURES OF THE GACACA AND THE EXTRAORDINARY CHAMBER IN THE COURTS OF CAMBODIA.

A. *Success of the Gacaca Court*

When analyzing the successes and failures of the Gacaca and the ECCC we must bear in mind that the focus of analysis is which system best forwards the tenets of transitional justice. The four tenets of transitional justice, as established in international human rights law, are:

[1] the State obligation to investigate and prosecute alleged perpetrators of gross violations of human rights and serious violations of international humanitarian law, including sexual violence, and to punish those found guilty; [2] the right to know the truth about past abuses and the fate of disappeared persons; [3] the right to reparations for victims of gross violations of human rights and serious violations of international humanitarian law; and [4] the State obligation to prevent, through different measures, the reoccurrence of such atrocities in the future.¹⁵⁵

Within the Gacaca system, there has been some notable success in the Rwandan people's ability to create positive working steps towards healing and reconciliation. Many in Rwanda have expressed the Gacaca has allowed communities to move forward not only through the process of bringing perpetrators to justice,¹⁵⁶ but has allowed families to discover the truth behind their loved ones' deaths.¹⁵⁷ Through this process, the environment for transition and reconciliation is developed as it allows victims to learn the truth about what happened to their loved ones, provides a sense of closure, and allows perpetrators to have the ability to confess their crimes, which leads to healing and transition.¹⁵⁸ Furthermore, the Gacaca, regardless of the critiques, has been able to provide Rwandans the ability to adjudicate far more accused.

155. Transitional Justice and Economic, Social and Cultural Rights, at 5, U.N. Doc. HR/PUB/13/5 (2014).

156. See Gabisirege, S. & Babalola, S., *Perceptions About the Gacaca Law in Rwanda: Evidence from a Multi-Method Study*, Rwanda Ministry of Justice (Apr. 2001), http://pdf.usaid.gov/pdf_docs/PNACN606.pdf.

157. See Outreach Programme on the Rwanda Genocide, *supra* note 35.

158. *Id.*

B. Success of the Extraordinary Chambers

Although there have been a host of critiques and issues with the results of the ECCC since its inception, there have been some noteworthy successes generated from the existence of the ECCC. One such success is the ECCC created a common history of the atrocities in Cambodia. However, scholars have noted many individuals within Cambodia are unaware of the extent of the Khmer Rouge's atrocities.¹⁵⁹ This unawareness is a result of the research conducted, which was taken by non-Cambodians using English and, therefore, not accessible to most Cambodian people.¹⁶⁰ This unawareness is exacerbated because, since 1999, Cambodian schools have not taught the history of the Khmer Rouge.¹⁶¹

Through the transparency the ECCC provides, the people of Cambodia are able to hear first-hand from those involved, exactly what took place during the Khmer Rouge's regime. From 2009 to 2014, between live and video mediums, over 390,000 people have viewed the proceedings of the ECCC.¹⁶² This display of interaction with the general populous furthers the ability of the ECCC to reach the Cambodian people in a manner that will allow them to assimilate and acknowledge the information about the dark time in their history. Similar to the Gacaca, this allows the people to be directly involved.

Another success is the ability to end impunity within Cambodia. Even though only five indictments have resulted from the ECCC proceedings, the ECCC has created an opportunity for the Cambodian people to hold some perpetrators accountable for the gross human rights violations.¹⁶³ However, one of the strongest successes is the ability to

159. Melanie Klinkner, *Forensic Science for Cambodian Justice*, 2 INT'L J. TRANSNAT'L JUST. 227, 238, 241–42 (2008).

160. *Id.* at 238.

161. See Erika Kinetz, *In Cambodia, a Clash Over History of the Khmer Rouge*, WASH. POST (May 8, 2007) <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/07/AR2007050701870.html>.

162. See *ECCC at a Glance*, *supra* note 126.

163. See Mary Wood, *Tribunal for Khmer Rouge War Criminals May Be Last Chance to End Cambodia's "Culture of Impunity"*, U. VA. SCH. LAW (Apr. 7, 2004), http://content.law.virginia.edu/news/2004_spr/cambodia.htm.

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develop and foster a culture of the rule of law.¹⁶⁴ The ECCC has provided training through the Legacy Program and the training of Cambodian lawyers by the ECCC.¹⁶⁵ These efforts have fostered an environment of knowledge sharing in which various projects and non-governmental organizations have traveled to Cambodia to impart their legal knowledge to the legal staff in Cambodia.¹⁶⁶ Through this practice and training, the culture of law can expand as the torch of legal knowledge is spread like wildfire throughout the legal community in Cambodia which effects not just structural but transitional justice changes as well.

C. Failures of the Gacaca Court

Turning towards the other side of the coin, we must analyze the failures of both courts to properly ascertain their place in forwarding transitional justice. The massive lack of rights for the accused and the structural deficiencies within the Gacaca system lead to increased chances for corruption, which increases the possibility of impeding transitional justice. Additionally, the Gacaca courts have been shown to have a 20% acquittal rate.¹⁶⁷ Analysts assert this rate is an indicator the cases that are presented to the Gacaca are not well structured, potentially allowing those that have committed atrocities to go free.¹⁶⁸ Further, since the Gacaca courts do not rely on traditional evidence and primarily on witness testimony, the duration from the alleged crime to the subsequent trial may skew a witness's memory; thus, possibly skewing the entire trial process.¹⁶⁹

Another failure scholars have noted is the government's decision to decline prosecuting soldiers of the current ruling party, the Rwandan Patriotic Front ("RPF").¹⁷⁰ The RPF soldiers that ended the genocide

164. Helen Horsington, *The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal*, 5 MELB. J. INT'L L. 462, 480 (2004).

165. *Id.*

166. *Id.*

167. Vasagar, *supra* note 67.

168. *Id.*

169. *Id.*

170. *Rwanda: Justice After Genocide – 20 Years On*, HUM. RTS. WATCH (Mar. 28, 2014, 6:02 AM), <https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years>.

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in July 1994 killed thousands of combatants and non-combatants.¹⁷¹ However, the law was amended in 2004 to exclude these crimes from being discussed within the Gacaca proceedings.¹⁷² As a result, long-term reconciliation will be impaired until the Rwandan government provides the Gacaca court the ability to openly discuss the entire history of atrocities.

D. Failures of the Extraordinary Chambers

Turning towards the ECCC, the major failures that are most notably critiqued are the egregiously slow process of indicting, convicting only five offenders through the process as well as the fear that the Cambodian government determines who will be tried.¹⁷³ Looking at these failures through the transitional justice lens, if the path to transitional justice is to allow individual closure and healing, the Cambodian government cannot inject its will into the proceedings of the ECCC. Given the underdeveloped ability to reach low-level offenders, the ECCC is not satisfying the tenant of direct justice to the Cambodian people. Although the foundation of the ECCC is built upon the strength of international law, if that law is not being effectuated in a manner that provides closure or unity to the Cambodian people in their reconciliation, then the benefits of transitional justice will be stifled.

IV. APPLICATION FOR FUTURE TRANSITIONAL JUSTICE SYSTEMS

After analyzing all the factors between the Gacaca and ECCC the question then must be asked, which system is a better model in forwarding transitional justice? This answer directly depends on what the state and victims need. If we are seeking a transitional justice system that focuses on justice, then we analyze which system has brought more accused to justice or punishment for their crimes,

171. *The Rwandan Patriotic Front*, HUM. RTS. WATCH, <https://www.hrw.org/reports/1999/rwanda/Geno15-8-03.htm> (last visited Mar. 25, 2018).

172. *Rwanda: Mixed Legacy for Community-Based Genocide Courts*, *supra* note 74.

173. *See generally* Tom Fawthrop, *Cambodia's Khmer Rouge Tribunal: Mission Accomplished?*, THE DIPLOMAT (July 17, 2017), <https://thediplomat.com/2017/07/cambodias-khmer-rouge-tribunal-mission-accomplished/>.

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allowing victims to gain closure. Given the simple fact that the ECCC has only indicted and convicted five people, while the Gacaca has heard 1.2 million cases throughout 12,000 community-based courts, on paper the Gacaca claims victory.¹⁷⁴ However, this focus almost becomes a numbers game, the more trials, the more accused being punished, the more justice dispensed, which is not always inherently true.

When we turn to the peace side of the dichotomy the discussion becomes more convoluted. When looking at transitional justice in this instance, we are not just looking at the healing and reconciliation of the communities at large,¹⁷⁵ but rather the impact of lasting peace with the transitioning regime.¹⁷⁶ Both the Rwandan and Cambodian government in some manner have instituted a policy or action that calls into question the legitimacy of true reconciliation and development of closure. Both governments have created amnesties, which prevent the court from punishing certain groups. At the point that takes place, true peace through transitional reconciliation is limited because the essence of healing and peace requires full disclosure and admittance. Since both systems can be shown to have taken a stance of interjection through the government, we must look to other factors to ascertain an answer.

One of the largest differences between the Gacaca and ECCC is that the ECCC has developed a firm foundation for advocating victims' rights against perpetrators in both a criminal and civil manner. The most significant difference is that the healing and peace is not just generated from the testimony presented by those on trial, or the victims sharing their sorrow, but the support provided during and after the trial via the VSS.¹⁷⁷ Both the Gacaca and ECCC allow victims and accused to share and testify their experiences to gain closure or reconciliation.

However, the ECCC is the only model that provides counseling and psychological support to victims dealing with the difficult process. Although truth can bring some closure, the price of that truth can come

174. Outreach Programme on the Rwanda Genocide, *supra* note 35.

175. David Mendeloff, *Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice*, 31(3) HUM. RTS. Q. 592, 593 (2009).

176. See Cyanne E. Loyle, *Transitional Injustice: Subverting Justice in Transition and Postconflict Societies*, 15 J. HUM. RTS. 126 (2016).

177. See Laura McGrew, *Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia*, OPEN SOC'Y JUST. INITIATIVE (2016), http://www.academia.edu/27794266/Performance_and_Perception_The_impact_of_the_Extraordinary_Chambors_in_the_Courts_of_Cambodia.

with injuries that will require a lifetime of mental support and care. The ECCC has at least established the proper foundation to provide victims with the tools necessary to take what they hear at the proceedings and cope properly with professional help along the way. Just hearing words is not enough, true peace requires the ability to understand how to deal with the emotional struggle, and channel that pain in a positive manner. Although the quantity is clearly in the Gacaca's favor, the ECCC provides more resources to forward the process with the support necessary to make effective transitional change.

CONCLUSION

Although Depeche Mode's "The Policy of Truth," mentioned at the beginning of this Article was not singing about either the atrocities in Rwanda or Cambodia, there are messages in the single that reflect the process both nations have devised to reconcile very dark times in their history. "Never again is what you swore the time before."¹⁷⁸ After the Holocaust, the mantra regarding genocide became "Never Again." Yet, the world has suffered genocide after genocide since the closure of those concentration camps. Depeche Mode also said, "[Y]ou will see your problems multiply, if you continually decide to faithfully pursue the policy of truth."¹⁷⁹ Both the Gacaca and ECCC have created their own host of critiques and problems. Nevertheless, both systems have recognized some of their structural and practical issues. The ECCC, although lacking in numbers of those indicted, has made headway in a variety of facets reconciling individual victims in Cambodia. Through victim support, production of a legal culture rooted in international law, and establishment of a common history, the ECCC has given people a means to begin to recognize and transition from the days of the Khmer Rouge.

For the accused who testify, "[I]t's too late to change events, it's time to face the consequence for delivering the proof in the policy of truth."¹⁸⁰ This is the essence of what transitional justice is. Recognizing and accepting past atrocities is critical for the community and nation as a whole to heal and move forward. Both systems have forwarded this

178. Policy Of Truth, *supra* note 1.

179. *Id.*

180. *Id.*

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concept to some extent. Each system reveals how the international community can support both victims and governments. Through this, we can finally help those affected by the tragedy of genocide and war crimes by instituting the best institutions that allow healing, peaceful transition, and reconciliation.

*Robert Theiring**

* First, I would like to thank the staff of the California Western School of Law's Law Review and International Law Journal for publishing and editing my article and allowing me to be part of the team. I would also like to thank Professor James Cooper, Dr. Elizabeth Matthews, Dr. Benjamin Nienass and Dr. Cyrus Masroori who have all been my academic "Jedi Masters." Personally, I would like to thank Marcelo Figueroa for all the selfless hours of advising me in Model United Nations some 25 years ago. If it was not for him, I would never have developed my love of international affairs. To all the shipmates I served with in the United States Navy, and to the CWSL ADR Team, all of you have become brothers and sisters to me, and your support through these last several years has been an amazing blessing. I especially want to thank my Mother Ruth, Father John, Sister Kiley, Brother Liam, Aunt Renee, and my entire family for their love and support. Last, and certainly not least, I want to thank my loving wife Sarah for her countless hours of support not just for this article, but through law school, the Navy, and our entire lives. Thank you, my love, for everything you do for our family. This article is dedicated to the reason I do everything in this world. To my amazing children, Ava and Johnathan, thank you for all your love. I know there have been many nights that I could not be home to put you to bed, but I want you to know that everything I do in life is for your betterment, and future. I love you both more than life.