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The Legacy of Cambodia's Hybrid Court: Promoting Fair Trial Rights?

Legacy Pengadilan Hibrida di Kamboja: Memajukan Peradilan yang Bebas dan Tidak Memihak?

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ABSTRACT: The mandate of the Extraordinary Chambers in the Courts of Cambodia (ECCC) concluded in 2022, marking the end of its nearly two-decade presence in Cambodia. Established as a hybrid court through a collaboration between the Cambodian government and the United Nations, the ECCC operated under a unique framework combining foreign and domestic laws, personnel, and judges. While the caseload of the court ended in early 2022, there are remaining legacies for Cambodians. This research investigates the legacy of the ECCC concerning fair trial rights and examines how national staff apply their experiences from the ECCC in the national courts. The article relies on document analysis and in-depth interviews with seven former and current Cambodian domestic court staff who worked at the ECCC to analyze three elements of fair trial rights: the right to adequate time and facilities to prepare a defense, the right to legal representation and to be present at trial, and the right to presumption of innocence. This paper argues that the legacy of the ECCC lies in its contribution to build the national staff's capacity on fair trial rights in domestic courts in Cambodia. However, significant challenges remain, as the fair trial rights envisioned and put in place in the ECCC cannot be currently delivered by Cambodian domestic judicial system.

***ABSTRAK**: Misi Extraordinary Chambers in the Courts of Cambodia (ECCC) berakhir pada tahun 2022, setelah hadir di Kamboja selama hampir dua dekade. Pengadilan ini dikembangkan sebagai pengadilan hibrida oleh Pemerintah Kamboja dan Perserikatan Bangsa-Bangsa. Pengadilan ini menggunakan kombinasi hukum, staf, dan hakim internasional dan domestik. Meskipun telah berakhir pada awal tahun 2022, masih ada warisan yang disisakan bagi warga Kamboja. Penelitian ini mempertanyakan apa legacy ECCC terkait hak peradilan yang bebas dan tidak memihak dan bagaimana staf nasional ECCC menerapkan pengalaman mereka dari ECCC di pengadilan nasional? Artikel ini menggunakan analisis dokumen dan wawancara mendalam dengan tujuh mantan dan staf pengadilan domestik Kamboja saat ini yang memiliki pengalaman di ECCC untuk menganalisis tiga elemen hak atas peradilan yang bebas dan tidak memihak: hak atas waktu dan fasilitas yang memadai dalam mempersiapkan pembelaan, hak atas perwakilan hukum dan untuk hadir di persidangan, serta hak atas praduga tak bersalah. Artikel ini berpendapat bahwa warisan ECCC adalah kontribusinya dalam membangun kapasitas staf nasional terkait hak atas peradilan yang bebas dan tidak memihak di pengadilan domestik di Kamboja. Namun, tantangan yang signifikan tetap ada, karena hak atas peradilan yang bebas dan tidak memihak yang dibayangkan dan ditetapkan dalam ECCC saat ini tidak dapat diwujudkan oleh pengadilan dalam negeri.*

Keywords:
ECCC; transitional justice; judiciary

Kata Kunci:
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1. Introduction

The Khmer Rouge Regime, ruling Cambodia from 1975 to1979 under the name "Democratic Kampuchea" is one of the darkest periods in Cambodian history, marked by the deaths of more than 1.5 million people.[1] The regime collapsed on 7 Jan 1979 and civil war continued till Paris Peace Agreement and UNTAC intervention in 1991. This agreement led Cambodia to conduct the first election in 1993 assisted by the United Nations after the Khmer Rouge Regime.

War destroyed the education system, and the country's judicial system and overall human resources remain weak despite Cambodia's recent years of peace. Due to the weakness of the judicial system, the government of Cambodia requested support from the United Nations (UN) in 1997 in establishing new courts known as the Extraordinary Chambers in the Courts of Cambodia (ECCC) to help build the capacity of judicial officers and improve domestic courts to a better standard and strengthen the rule of law.[2] After a long process of negotiation on elements such as the location of the court, human resources, funding and administrative set-up, the ECCC was finally built in 2006, using the hybrid method that hoped to serve as a model for future courts. The process of the courts was ensured by the Law on the Establishment of the ECCC and was later followed by internal rules and regulations. Internal rules and regulations aimed to consolidate applicable Cambodian procedures for proceedings before the ECCC. In this, national staff are recruited into positions at the ECCC with financial support from the Royal Government of Cambodia, while the international side is supported by an international fund. Each department had at least one international and one national employee; and each side (international/Cambodian) could comprise up to two-thirds of the total number of staff in a department. For example, the pre-trial chamber had seven judges (reserve included) –four Cambodian and three international[3]—reflecting its hybrid nature.

Despite its ambitious mandate, the ECCC's progress highlights both achievements and challenges. In total there were four cases with proceedings at the ECCC, with the last one ending in 2022. [4] Case 001 had one accused person who was the chairman of the KR S-21 security center in Phnom Penh. Case 002 has been split into two cases known as Case 002/01 and Case 002/02 because of the case's large size and multiple defendants.[5] Only three of these cases have completed the judicial process until the Supreme Court, and the rest (Cases 003, 004/01, and 004/2) have not been brought to trial yet.[6]

After these three cases ended, the ECCC completed their mission, but the legacy left by the court extends beyond the end-date of the mission through the capacity building of the ECCC's national staff. Previous research found that the ECCC is not perfect as a model for Cambodia's domestic courts, and influence by the external factors[7] and people's expectations of a positive legacy and impacts on the judicial system were largely disappointed. The issue of political influence on the courts was also identified[8] which is relevant to the impartiality of judges and overall independence of courts.

The concern of this article is whether the ECCC provided a positive or negative legacy through mainstream legal practice, which will be discussed in the key findings. The next section, on the future legal framework will help readers understand the legal context in Cambodia. This is followed by a methodology section before turning to discussion of the legacy of the ECCC as seen through three elements of fair trial rights: right to adequate time and facilities to prepare a defense, right to legal representation and to be present at trial and right to presumption of innocence.

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1 Extraordinary Chambers in the Courts of Cambodia, "The ECCC at a Glance," April 2014, https://www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20-%20April%202014_FINAL.pdf.

2 Extraordinary Chambers in the Courts of Cambodia.

3 Extraordinary Chambers in the Courts of Cambodia, "The ECCC," accessed April 23, 2024, https://www.eccc.gov.kh/en/node/39457.

4 Extraordinary Chambers in the Courts of Cambodia, "The ECCC at a Glance."

5 Marija Đorđeska, "The Khmer Rouge Tribunal Is Closing Its Doors: Here's What to Know About Its Final Case," December 6, 2022, https://www.justsecurity.org/84350/the-khmer-rouge-tribunal-is-closing-its-doors-heres-what-to-know-about-its-final-case/.

6 John D. Ciorciari and Anne Heindel, "Cases 003&004 - The Politics of Personal Jurisdiction: 'No Gain in Keeping, No Loss in Weeding Out,'" in *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (United States of America: University of Michigan Press, 2014), 167–201.

7 Open Society Justice Initiative, *Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia* (New York: Open Society Foundations, 2016).

8 John Coughlan, Sana Ghouse, and Richard Smith, "The Legacy of the Khmer Rouge Tribunal: Maintaining the Status Quo of Cambodia's Legal and Judicial System," *Amsterdam Law Forum* 4, no. 2 (March 1, 2012): 16, https://doi.org/10.37974/ALF.218.

To understand fair trial rights practices in Cambodia, a brief explanation of the legal framework of the judicial system is necessary. Cambodia has a legal framework that seeks to ensure that citizens get the same rights and access to justice without discrimination, at least on paper. Due to the French colonial influence, Cambodia uses the civil law system. The Cambodian Constitution governs all laws, and is followed by laws, royal decrees, sub-decrees, proclamations, decisions, circulars, and by-laws. The Constitutional Council considers international law as a source of Cambodian law, as long as it follows the Constitution.[9] The judiciary is mentioned in the Constitution in Chapter XI, which ensures it is an independent power; assures that judges must uphold impartiality, protect the rights of citizens, and ensure the rights of citizens will follow the Constitution adopted in 1993. The Constitution also mentions the independence of the judiciary in Article 132.[10]

There are three levels of courts in Cambodia: first is the Provincial, Municipal Courts or Military Courts, and the upper level consists of the Appellate Court and Supreme Court. The judges are appointed by the Supreme Council of the Magistracy and led by the King and judges should be impartial, respected, professional, and independent[11] while judges and prosecutors must also be professional.[12]

Additionally, Cambodia government has signed and ratified multiple international human rights treaties including the International Covenant on Civil and Political rights (ICCPR) as well as the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Given all of these protections on paper, it is worthwhile to explore in the next section on methodologies how research was conducted on these rights in practice in Cambodia's domestic courts to ensure that the reader understands the analysis presented in the latter half of the article.

2. Method

This article relies on two methods. Review of documents including legislation, newspapers, reports from INGOs on the ECCC and secondary literature was used to form an understanding of the overall legal framework and the domestic and ECCC systems. Second, the author conducted seven in-depth interviews in the Khmer language with people who have experience working at both the ECCC and in domestic courts. This is a small sample size, but it is a small group who overlap in both systems and focusing on their experiences allows for the exploration and contextualization of differences between national and international courts on fair trial rights. Participants were selected using a network approach and rank, age, and experiences were considered. All interviewees have at least two years of experience at the ECCC. Only two interviewees are not currently working as lawyers at the domestic court but one is working in the public sector and the one wants to be a lawyer in domestic courts in the future. The interviews and data storage followed a high ethical standard to protect interviewees identities and data. All participants are anonymized in this text.

As mentioned in the introduction the ECCC has officially ended. The question of this paper will examine how much the national judicial officers with experience at the ECCC can apply their skills into domestic court? Due to the scope of interview and limited wording thus, this paper will focus the discussion of fair trial on three rights only: **(1) Right to adequate time and facilities to prepare a defense (2) Right to legal representation and to be present at trial and, (3) Right to presumption of innocence** which are analysed in the following sections.

3. Findings and Discussion

3.1 ECCC and Fair Trial Rights

Although the judicial proceedings at the ECCC officially concluded in 2022, if we return to the time of its establishment, we can see the expectation of the ECCC goes beyond transitional justice and reaching verdicts in specific cases. It was also designed to promote the rule of law and build capacity of the local judiciary in Cambodia. Broadly speaking, according to the Office of the High Commission for Human Rights

9 Peng Hor, Phallack Kong, and Jörg Menzel, eds., *Introduction to Cambodian Law* (Phnom Penh: Konrad-Adenauer-Stiftung, 2012).

10 Constitutional of Kingdom of Cambodia, article 51, 1993

11 the Law on the Organization and Functioning of the Supreme Council of Magistracy issue by the Ministry of justice, 2014

12 Law on the Status of Judges and Prosecutors of the Kingdom of Cambodia, 2014

(OHCHR) the 'legacy' for a hybrid court refers to 'a hybrid tribunal's lasting impact on bolstering the rule of law in a particular society… The aim is for this to continue on even after the work of the court is complete.'[13] Legacy programs can encompass educational aspects (e.g. conduct training and creating guidance notes), outreach, and capacity building.[14]

Capacity building is also considered to be a primary legacy of the ECCC on the judicial system through national staff who have experience working there. This section explores key elements of fair trial rights, and the extent to which they have been respected since the establishment of the ECCC. The section is based on a literature review and interviews with national staff who have worked at the ECCC and domestic courts.

3.1.1 Right to Adequate Time and Facilities to Prepare a Defense

Right to adequate time and facilities to prepare a defense is provided for in the Code of Criminal Procedure of the Kingdom of Cambodia articles 48, 98, 145 and 319, which refer to suitable time for detention at a police station and in the pre-trial and post-trial stages.

3.1.1.1Right to Prepare a Defense

The right to prepare a defense in the international tools is also included in European Convention on Human Rights, the American Convention on Human Rights, Arab Charter on Human Rights, the Rome Statute of the International Criminal Court, ASEAN Human Rights Declaration, Charter of Fundamental Rights of Europe, and Universal Declaration of Human Rights.[15] The International Covenant on Civil and Political Rights (ICCPR) Article 14.3 (a)(b) states:

> *"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;"*[16]

Under the ECCC procedures the right to prepare a defense at the ECCC was better respected because the ECCC has a special law on organization and procedures known as the internal rules. Moreover, the ECCC was watched by national and international institutions such as donors, the UN, INGOs, local NGOs, and local and international media. For example, the ECCC process was closely watched by organizations and monitoring programs such as the KRT Monitor by the Center for Human Rights and International Justice[17] or Cambodia Tribunal Monitor.[18]

The element of the right to adequate time and facilities to prepare a defense includes the right to be informed of the charge within understandable language. Furthermore, the time has to be enough to prepare the defense including review of evidence, both documents and facts from the expert interviews need to have proper time to ensure that each party acknowledges the case files. For example, at the ECCC, lawyers have ample time to review case files or interview civil parties and witnesses. Each party can access the evidence and request relevant materials for preparing a case for trial and they also get the information about dates of the public hearings in advance. All hearings are published on the ECCC website and sent through to each party. The schedules can be revised according to the reasonable needs of each party, and timelines are generally respected. The ECCC made efforts to follow the international fair trial rights standards in Cambodia. The ECCC internal rules (last version) 81, 85, and 87 show the impartiality of the chamber president to decide whether the public hearing could proceed or be delayed based on reasonable causes.

Turning to the domestic courts, contemporary reports from local NGOs address the issue of time to prepare a defense. The concerns are primarily related to non-facilitation of making materials accessible to accused

13 Office of the United Nations High Commissioner for Human Rights, "Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts" (United Nations, 2008), 4, https://www.ohchr.org/sites/default/files/Documents/Publications/HybridCourts.pdf.

14 Extraordinary Chambers in the Courts of Cambodia, "Legacy," accessed April 23, 2024, https://www.eccc.gov.kh/en/legacy.

15 Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford, UK: Oxford University Press, 2020).

16 International Covenant on Civil and Political Rights (ICCPR), article 14 (a) (b),

17 Details here: Center for Human Rights and International Justice, "Trial Monitoring Reports & Videos," accessed April 23, 2024, https://humanrights.stanford.edu/publications-videos/trial-monitoring-reports-videos. or "About the ECCC," Khmer Rouge Trial Monitor, accessed April 23, 2024, https://krtmonitor.org/eccc/.

18 Details here: Cambodia Tribunal Monitor, accessed April 23, 2024, https://cambodiatribunal.org/.

persons currently residing outside of Cambodia.[19] The report highlights that there were cases still being assigned to lawyers on the day of the appeal – giving them no time to prepare for trial.[20] It reflects that the right to adequate time and facilities to prepare a defense are limited, despite the same report showing that the right is better than the previous period. The data of the report is limited because it derives from observation of the Court of Appeals only.

In domestic courts generally, the practice of the right to adequate time and facilities to prepare a defense is not fully respected. In the arbitrary arrests in 2022 of 49 political activists, journalists, and land rights activists, trial procedures were not enforced in the court, resulting in courts which "convicted suspects in absentia with no defense representation."[21] Late assignment of lawyers for accused persons is also a part of the right to adequate time and facilities to prepare a defense, however, it is also impacted by the court administration.

3.1.1.2Administration Challenges to Defense Team

The court's administrative department contributes to promoting fair trial rights. It is central for transferring information to each party and it impacts the time of preparation for each party. For example, a good example from the Court Management Section at the ECCC was that the section had a role to ensure that all parties received effective and efficient service in the judicial office and chambers. The duties of the department included recording, facilitation, translation service, transcription, witness and expert support.[22] Thus, each party had enough time to prepare their defense.

In the domestic court system, each level has an administrative department to ensure support and facilitate processing at the court called "Administrative Secretariat of the Court of First Instance".[23] This department facilitates and manages human resources, fnancial and technical support, reports, public relationships, and other tasks based on requirement.[24] It is similar to the ECCC system and the participants in the research wants this system transfer to domestice court. Two interviewees stated that they received information late for domestic trials – with one day's notice or less. The delay of a hearing may be an option for the party, but it still affects the rights of each party, particularly the accused person. However, it depends on the president of the chamber as they have the right to decide whether they should proceed with the trial or not.

> *"...the system of transfer of information [invitation letter from the court] we need to have. For example, for hearings, they have to issue a letter to invite them to the hearing but they never monitor whether the delivery was on time or not. Sometimes, a party didn't get any information but the court is still proceeding and sometimes they got the invitation today and hearing is tomorrow. Some people's hearing is today and they just got the invitation today." C3*

3.1.1.3Rights to Access the Evidence

The right to access the evidence for each party was a concern for the 2022 trials of the activists in absentia, who were currently residing outside Cambodia, and could not access any materials to prepare a defense for themselves.[25] However, the court procedures can even be said to be improved in this instance as in the 2022 cases the defendants tried in absentia were at least provided lawyers in each case at the court. Accessing documents or case files[26] help each party know the facts for preparing which status or regulation that can apply to the case. At the ECCC, all the public documents can be accessed by the public and each party can access documents since they are online. Despite the ECCC being present in Cambodia for almost two decades, the system of accessing documents in the domestic court system remains limited. It still uses old fashioned hard copies. Thus each party needs to make a request to the judge who is responsible for the case and ask permission to get access to the case

19 Rhona Smith, "Cambodia: UN Expert Alarmed by Reports of Mass Trial of Activists" (United Nations Human RIghts Office of the High Commissioner, November 25, 2020), https://cambodia.ohchr.org/sites/default/files/25112020%20Cambodia%20SR%20mass%20trial-EN.pdf.

20 Cambodian Center for Human Rights, "Fair Trial Rights in Cambodia Monitoring at the Court of Appeal: Annual Report (1 November 2018 – 31 October 2019)," October 2020, https://monitoring.cchrcambodia.org/en/publications/general-reports/142.

21 U.S. Department of State: Bureau of Democracy, Human Rights, and Labor, "2021 Country Reports on Human Rights Practices," April 12, 2022, https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/.

22 Extraordinary Chambers in the Courts of Cambodia, "Court Management Section," accessed April 23, 2024, https://www.eccc.gov.kh/en/office-administration/court-management-section.

23 the law organized the courts, June 16, 2014, article 10

24 The law organized the courts, June 16, 2014, article 32

25 United Nations Human Rights office of the High Commissioner, November 25, 2020.

26 The Code of Criminal Procedure of the Kingdom of Cambodia, article 259 and 319

files. Although each province has a court, having files accessible online would be an enormous time and cost saving measure, as lawyers would not need to travel to court and would have more time to prepare a defense for their clients. The interview data shows the potential legacy of the ECCC for software which facilitates each party to access materials on time and confidentially. Even though this idea has been raised, the solution has not yet been found, and there is no certainty it will be developed in the future.

> *"I don't know how it will develop in the future. It depends on the commitment of leaders in the judiciary. Actually, I think it could work when we have enough materials and we have software to provide updates and that is confidential… For example, I could not even ask for a copy of the case files…" C1*

In this case, the right to adequate time and facilities to prepare a defense is not successfully implemented in Cambodia's domestic courts because of the limitations on the information transfer system to each party, causing late assignment of lawyers for some cases and difficulties in accessing case documents for others. Although the ECCC circumvented these issues by facilitating access to documents online, this has yet to be implemented in the domestic court system. These factors are barriers for domestic courts to reach fair trial rights standards while the question of funding and human resources is different between the ECCC and domestic courts too.

3.2 Right to Legal Representation and to be Present at Trial

The right to legal representation and to be present at the trial falls under the right to counsel. Anyone who is charged with a crime has the right to choose their legal assistance, or the court can assign it for them.[27] International human rights law holds that the defendant has the right to counsel of their choice,[28] or supported financially by the state if the defendant is indigent while they also have the right to reject the assistance to defend themselves. The right to counsel applies to a criminal case during the pre-trial stage including arrest, interviews with law enforcement, and at the trial and appeals stages. In Cambodia, the right to legal representation and to be present at trial is enshrined in the Code of Criminal Procedure, which states that accused persons have the right to choose the lawyers or be provided one by the court.[29] This section focuses on the right to legal representation only at the trial stage. It starts with an example from the ECCC, before turning to the implementation in the domestic courts.

At the ECCC, the accused person has the right to choose their lawyer by themselves, or the court can appoint one for them. The defense lawyer at the ECCC was chosen by the accused person. The payment for defense attorneys for the accused persons is the responsibility of the court. The example of the ECCC has been applied into Cambodia's court system through support by the Bar Association of the Kingdom of Cambodia in 2018 to establish a group of pro bono lawyers in order to help poor people who cannot afford a lawyer. Since this group has only existed for a few years, there remain challenges in the process. One interviewee mentioned the challenges of legal aid. Firstly, there is no case management system to see how many cases need legal aid at domestic courts and secondly the financial support for lawyers to be a legal representative for defendants is not enough. Two years after the creation of the group, almost 25% of all defendants who were accused of misdemeanor crimes were not represented by a lawyer.[30] However, through the BAKC, up until 2021 the program assigned lawyers to work on 5,182 cases involving 8,425 impoverished people, including 1,453 juvenile cases.[31]

Better online systems could aid in identifying clients in need of legal aid in domestic courts. Looking back at the ECCC, case management was accessible for everyone. At the ECCC, the victims and accused person's profile was made accessible for the public but some confidential or personal information was restricted. The data, personal address, facts, and the relevant information from pre-trial to Supreme Court stage can be found by relevant departments with security clearance, or upon the request for details or from the external expert such as researchers. The concerns related to public information of both victims and accused persons should be considered if the system is established at the domestic level. However, the access could be provided to relevant parties such as court officers or pro bono lawyers only. For example, if there is a case management system provided, then it would be easier to identify which cases needed pro bono lawyers and could be managed online to determine who

27 The International Covenant for Civil and Political Rights, Article 14 (3) (b) (d)

28 ICCPR article 14 (d) Right to choose the legal representative

29 Cambodian Code of Criminal Procedure, article 300,

30 Cambodian Center for Human Rights, "Fair Trial Rights in Cambodia Monitoring at the Court of Appeal: Annual Report (1 November 2019– 31 December 2020)," November 2021, https://sithi.org/medias/files/projects/tmp/publication/ftr-annual-report-eng-20211203-141226.pdf.

31 Voun Dara, "Public Defenders Programme Expanding Legal Aid Provision," *The Phnom Penh Post*, January 18, 2022, https://www.phnompenhpost.com/national/public-defenders-programme-expanding-legal-aid-provision.

was close and available. It will help lawyers save time to access the case files, prepare for defense, and ensure that each case has lawyers to apply the fair trial right.

Even if the lawyer has the case files, they need to get the information from the accused. The lawyer needs to travel from their location to their client's place. Financial support is needed, and currently this is supported by the Bar Association, however the existing budget is limited. From the interview data, the lawyer needs to interview relevant actors face-to-face to ensure that all the facts are accurate and reliable. It also relates to the security during the interview to make sure that the interviewee provided the information without any external influence or pressure. Legal officers go to interviews with their clients at least two or three times. In this case, one interviewee said that the financial support for pro bono lawyers is not enough. Rather than salaries, they are provided between one hundred to one hundred fifty U.S. Dollars from the Bar Association. While it may not be that all lawyers think the financial support is too low, each case is different, and cases need an individual budget so that the lawyers are not out of pocket and able to help those who need it. As one interviewee remarked:

> *"We are different from other countries. Australia provides a salary to lawyers working in the legal aid department, but in Cambodia, we have only 100 dollars per case."*

The financial support to pro bono lawyer groups support and encourage lawyers to work towards more effective legal aid. However, legal aid was established very recently, thus, the awareness in society is limited. This needs to be broadcast or promoted more to ensure that everyone who needs it can access it without a fee. The interviewees did explicitly share concerns on promoting this new pro bono legal aid system, but the BAKC intends to assist more people because recently they expanded legal aid and facilitate accessibility by using the application Telegram to send digital documents during the procedures at the court. They have also increased the budget[32] whilst the number of registered pro bono lawyers increased to 2,122 in 2022.[33] Legal aid is helping to facilitate greater access to legal assistance and relevant documents needed for cases, but a properly organized system would assist each party in saving time.

As mentioned above, the right to legal representation and to be present at trial is increasing slowly. Learning from the ECCC, it needs to be improved in terms of a case management system to ensure that each case has a lawyer to represent defendants at the trial, increase the budget to support lawyers who are responsible for the court, and raise awareness of people about legal assistance (pro bono lawyers) to ensure that fair trial rights will be delivered equally.

3.3 Right to the Presumption of Innocence

Right to the presumption of innocence means that every accused is presumed innocent until proven guilty by law and through a final ruling. It applies to all the stages at the court from the pre-trial chamber until final appeal. Right to the presumption of innocence in judicial system is guaranteed by the Cambodian Constitution.[34] The Ministry of Interior (2003) issued the Prison Procedure No. 5 that means that the accused person is able to wear their own clothes in court until they are found guilty by the judge. It shows the efforts on to promote the right to the presumption of innocence in the judicial system in Cambodia. Furthermore, the media generally respects this right through the wording in their reporting, no external indicators of guilt should be attributed to the accused, no public statement concerning the guilt or innocence of an accused before verdict.[35]

However, there is evidence that this right has not been fully respected yet in domestic courts. Previous research found that in 24 out of 248 cases, or nearly 10 percent, the defendants wore the convict uniforms in court before being found guilty.[36] The report recommended to the Ministry of Interior to follow up on the defendants during the trial because they should not be forced to wear prison uniforms. These types of cases did not happen at the ECCC, since the accused persons at the ECCC were properly dressed according to their wishes during the trial.

32 Dara.

33 The Bar Association of the Kingdom of Cambodia, "Lawyer Statistics," August 3, 2022, https://bakc.org.kh/index.php/km/2020-02-02-04-06-24.

34 The Constitution of the Kingdom of Cambodia, 1993, article 38 and Law on Juvenile Justice, article 5

35 The Constitution of Kingdom of Cambodia, 1993, article 31 and 41 and the Cambodian Law on the press article 9.

36 Open Society Foundations, "Fair Trial Rights Newsletter: Prisoner Uniforms and the Presumption of Innocence," Cambodian Center for Human Rights, June 2017, https://cchrcambodia.org/storage/posts/5076/2017-06-05-CCHR-FTR-Newsletter-on-Prisoner-Uniform-and-Presumption-of-Innocence_Eng.pdf.

Unsurprisingly, at the ECCC, the right to the presumption of innocence is respected better than domestic courts during the hearing. The trial chamber from the pre-trial stage until supreme court, the accused person does not wear the convict clothes into the court. It is a part of procedure in the internal rule 21 (d) "*Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established...*" This is a good example for domestic courts and promotes fair trial rights. However, this right requires the independence of courts and impartiality of judges.

3.4 Negative Legacy from the ECCC into domestic court

Fair Trial Rights were not fully respected at the ECCC due to influence from external factors and it is a concerning negative legacy seen in the domestic courts as well. The example can be found in Case 003 and 004 at the ECCC. In these cases, there were influences from internal and external factors. As former prime minister Hun Sen, remarked: "Willing to let the hybrid court fail but not allowing the country to go to war again."[37] This public statement was seen to infuence the judicial process, particularly the Cambodian side of the ECCC as they refused to touch the two controversial cases (Case 003 and 004).[38]

Following the statement of former Prime Minister Hun Sen, the national co-prosecutor expressed concerns about peace in Cambodia if the ECCC continued these cases, while the meaning of accountability had been debated by NGOs or experts.[39] Finally, the cases were not moved to the trial chamber, instead the court was closed. The missing charges at the ECCC for cases 003 and 004 is a gap which led to undermining fair trial rights because the court was not independent on these issues. Moreover, the same research expresses concern on the lack of independence of judges due to a few factors, and pressure on the judges from the government. [40] As a hybrid court using both national and international legal frameworks as well as staff, was still under influence from political bodies, and this issue is also seen in domestic courts.

However, for domestic courts, the problem of political influence is not new. n 2023, a statement on the decision to convict three staff and two former staff from the human rights organization ADHOC had not been recognized since the court did not approve witnesses requested by the defense team.[41] Factors impacting a judge's decision can be from the context of the case, influence from those in powerful positions, or the judges themselves having a high position in a political party. However, it is hard to find evidence to prove the corruption or evaluation of judicial independence and the interviewees did not comment directly on independence of judges. One respondent expressed the opinion that the court is not really independent.

An interviewee with a long experience working in domestic courts and the ECCC explained about how he observes domestic courts when he is working on cases with influence from people in power. In his experience, the legal process in these cases carefully follows each step of criminal procedure but the decision, which depends on the judge, does not. For example, in a criminal case, the first step of the case needs to go through the police report process and then the court process starts with the investigating judge. The next step is a process whether the prosecutor charges the suspected person or not. If the prosecutor makes a charge, the case will transfer to the first trial. All the process is followed appropriately, while the decision in the case is under the control of the political body.

4. Conclusion

Through the analysis, the ECCC had limited impact on the national court system in Cambodia both positive and negative, based on the implementation of the three fair trial rights explored above. The Cambodian Government has tried to make judicial reform step by step, but change is slow.

37 "Selected Comments Samdech Techo Hun Sen, President of the Senate, at the Conference on 'Cambodia's Future without Genocide: Protection and Response through Education and Healthcare' [Unofficial Translations]," Pressocm, May 22, 2024, https://pressocm.gov.kh/en/archives/97447.

38 Kuch Naren, "Hun Sen Warns Of Civil War If ECCC Goes Beyond 'Limit,'" The Cambodia Daily, February 27, 2015, https://english.cambodiadaily.com/news/hun-sen-warns-of-civil-war-if-eccc-goes-beyond-limit-78757/.

39 John D. Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (University of Michigan Press, 2014), https://doi.org/10.3998/mpub.4773450.

40 Ciorciari and Heindel.

41 Cambodian Center for Human Rights, "Fair Trial Rights in Cambodia Monitoring at the Court of Appeal: Annual Report (1 November 2018 – 31 October 2019)."

The right to adequate time and facilities to prepare a defense has not reached the standard because of the lack of systematic case management at the court. Moreover, the limited human resources for transferring the information from the court impacts each party if they are informed late.

The right to legal representation and to be present at trial is also limited due to lack of resources, both human resources and financial support. Human resources refer to the capacity of judicial officers and the limited number of lawyers to provide legal aid. Budget for supporting field work for lawyer to meet accused persons is not enough which causes issues in case preparation.

The right to presumption of innocence is limited because of external and internal factors including political influence and the lack of impartiality of judges. The analyses above show that the ECCC had a negative influence on domestic courts through Cases 003 and 004, despite the training and education available to judicial officers. The political conditions impacted judges' decisions in the cases as those two cases were related to people in the higher echelons of power and judges faced pressure from external factors.

The limitations of human, financial, and organizational resources and the influence of powerful people all impact the right to a fair trial. Based on the research findings, I suggest the following recommendations, most of which come directly from stakeholders in the legal system. Cambodia's Ministry of Justice should build software or otherwise monitor the information of the case so that it can be delivered to each party on time. The system should be accessible electronically unless there is a request from one of the parties to get hard copies for any reason. Building software and training stakeholders and judicial officers on how to use it should be increased to ensure that everyone working at the court is fully capable of performing their duties with professionalism.

Moreover, the budget for pro bono lawyers should be increased when meeting with clients. The pro bono lawyer should be promoted in society to increase Cambodian citizens' awareness of legal aid options. Finally, the Ministry of Justice should monitor and evaluate the judicial officers to ensure that judicial ethics are respected. The monitoring team should be independent, at full capacity, and free to express their opinion. In the above ways, the judicial officers and stakeholders can find solutions rather than only define the issue and take action to promote fair trial rights in Cambodia's judicial system.

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