

DEVELOPMENT EDUCATION AND INTERNATIONAL CRIMINAL JUSTICE: REFLECTIONS ON THE TRIALS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (ECCC)

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Abstract: This article positions the trials at the Extraordinary Chambers in the Courts of Cambodia (ECCC) in a broader context of the conflict in Cambodia during the twentieth century and links international criminal justice and development education through their shared goals towards global justice and a fairer world order. The primary task is to examine the relations between international criminal justice and the development education sector which is actively operating in Cambodia. This article argues that international criminal justice, especially in the Cambodian scenario, shall be understood holistically and historically by development educators. There is a potential contradiction between international criminal justice and global justice when the former is utilised to address internal conflicts. Given that internal conflicts in the global South were often caused by the unsustainable social and economic policies inflicted by the global North, merely holding the local leaders responsible is not sufficient to achieve global justice and risks turning international criminal justice into a political tool.

International criminal justice is inherently selective in terms of pursuing individual accountability due to legal constraints, and it has been received with caution among Southeast Asian states. In the context of United Nations 2030 Agenda for Sustainable Development, the development education sector has a potential role to play in resolving the contradiction between international criminal justice and global justice by nurturing a stronger institutional partnership with transitional justice mechanisms and generating more support for global citizenship in both Cambodia and internationally.

Key words: International Criminal Justice; Cambodia; Khmer Rouge; Development Education; World Order.

Introduction

Cambodia is hosting one of the most significant international trials of atrocity crimes, the Extraordinary Chambers in the Courts of Cambodia (ECCC). The ECCC costs nearly US\$25 million per annum (ECCC, 2018) and is among the most expensive international intervention projects in Cambodia at present. As the trials continue, various tribunal monitoring projects and international development agencies have settled locally. This article sets out to examine the relations between international criminal justice and the development education sector which is actively operating in Cambodia. More specifically, it assesses how international criminal justice may be adequately grasped by development agencies and what role may be played by the development education sector towards assisting efforts toward peace and reconciliation in Cambodia.

This article is divided into three parts. The first part provides the backdrop to the conflict in Cambodia and the remit of the international criminal justice project that is operating in Cambodia, known as the ECCC. It points out that the function and impact of the ECCC are limited due to various legal constraints. The second part argues that international criminal justice alone is not sufficient to adequately address the impact of conflict and impunities. There is a potential contradiction between the two. In other words, global justice and the fairer world order sought by the development education sector is broader and more complex than international criminal justice. For the people in the global South who find themselves facing both domestic and foreign oppression, the two justices could work against each other. The third part of the article proposes that the development education sector could benefit from a deeper understanding of the local paradox towards international criminal justice. It concludes that development educators could assist in solving the contradiction between international criminal justice and global justice by

upholding the Sustainable Development Goals (SDGs) and generating broader partnerships with transitional justice mechanisms and the individual and institutional actors therein.

The conflict in Cambodia and the remit of the ECCC

As a protectorate of France for nearly a century, between 1863 and 1953, Cambodia's social structure and economic organisation was significantly transformed and became more connected with and vulnerable to the international market. Merchants and elites were mostly residing in Phnom Penh, while the wider society lived in rural areas depending mainly on farming and plantations (Thion, 1983).

The end of Second World War was followed immediately by the First Indochina War in Southeast Asia. The Vietnamese resistance movement, the Viet Minh, fought with France and its later North Atlantic Treaty Organisation (NATO) allies, while Cambodia was negotiating its independence with France. The conclusion of the Final Declaration of the Geneva Conference on the Problem of Restoring Peace in Indochina (the Final Declaration) on 21 July 1954 affirmed the independence of Cambodia, together with two other former French colonies, Vietnam and Laos. Vietnam was divided into the northern part under the control of the communist resistance and the southern State of Vietnam backed by the United States (US) (Richards, 2004). The conflict between north and south Vietnam continued after the Final Declaration. The Second Indochina War was fought from the late 1950s to 1975 between the communist bloc, mainly with support from China and the Soviet Union, and several US-backed local governments in Vietnam, Laos, and Cambodia.

In Cambodia, King Norodom Sihanouk remained the leader until 1970 through several national elections. The early underground socialist movement in Cambodia, the Krom Pracheachon, also participated in elections, but its members were often subjected to repression and police

harassment from Sihanouk's government. Sihanouk feared that the local resistance might be joined by the growing influence of the communist resistance in northern Vietnam and this would lead to threats to both his rule in Cambodia and the security of the country (Gottesman, 2002). In 1970, Sihanouk was overthrown by the US-backed Lon Nol government, later named the Khmer Republic. A civil war broke out between the Khmer Republic and Sihanouk's royalist followers. Around the same time, American President Richard Nixon authorised a bombing campaign in Cambodia, which started on 18 March 1969, to confront the resistance from communist Vietnam. It was estimated that more than 2.7 million tonnes of ordinance were dropped on Cambodia, exceeding the amount that the US had dropped on Japan during WWII (including Hiroshima and Nagasaki) by almost one million tonnes (Owen and Kiernan, 2006).

Both the coup and the war in neighbouring Vietnam helped the Khmer Rouge to gain domestic popularity and rise to power while Sihanouk sided with his former enemy, the communist Khmer Rouge. And the Khmer Rouge eventually seized control of the country, marked by the taking over of Phnom Penh on 17 April 1975 and the establishment of Democratic Kampuchea (DK). The rule of DK was not total isolation from foreign interference although it was claimed to be closed and secretive by observers at the time. As the war in Vietnam also ended in 1975 and north and south Vietnam were joined together, the major conflict in the region shifted to the Third Indochina War.

The Third Indochina War includes all conflicts following the Second, such as border clashes between DK and Vietnam from 1975 to 1979, the civil war among different factions in Cambodia with support from international powers until 1991, and the short war between China and Vietnam in February and March 1979. Vietnam's invasion of Cambodia brought an end to the DK era in 1979. The Khmer Rouge were forced into the jungle although domestic conflict in Cambodia did not end until the 1990s. The conclusion of the Paris Peace Accords in 1991

marked the end of the Third Indochina War and brought Cambodia to the long quest for peace and reconciliation (Findlay, 1995). One important element of the peace and reconciliation process in Cambodia is to address the accountability of the Khmer Rouge for the atrocities committed during the DK era. Thousands of execution centres and mass graves were evacuated around the whole country and pointed to individual criminal responsibilities of the Khmer Rouge leaders for crimes against humanity, genocide and war crimes (United Nations, 1999).

The Nature of the Conflict

To fully understand the conflict in Cambodia holistically and historically, it is important to not only examine atrocities committed by the Khmer Rouge but also the range of conflicts during the twentieth century which had associated themes and ideologies of anti-colonialism, nationalism and communism. This understanding involves moving beyond the mission of the Paris Peace Accords in 1991 which focused on coping with the immediate situation at the time. Meanwhile, sympathisers of the Khmer Rouge still live among the communities in Cambodia, and the country remains among the poorest and least developed in the world (UNDP, 2018). Sustainable peace and reconciliation have yet to embrace a holistic and historical point of view towards Cambodia's conflicts so that violence can be effectively detected and eradicated in the future.

Early reports of the Khmer Rouge atrocities did not seize the attention of the world because western critics took the Khmer Rouge revolution during the early 1970s as a force to resist the expansive intervention of the west in the region (Herman and Chomsky, 2002; Shawcross, 1979). The rise of the Khmer Rouge to power was accompanied by a series of policies that were envisaged and advanced since the 1960s towards a 'national people's democratic revolution' (Heder, 2012; Vickery, 1999). The Khmer Rouge revolution is rarely debated in revolutionary studies (Baker and Edelstein, 2015; Richards, 2004). However, the debate about the nature of the revolution has not

ended as demonstrated by the discourses at the ECCC which will be explained in the next section.

International law examines the nature of conflict to decide upon the applicable legal norms. The ECCC recognises that both national and international armed conflicts took place during the era of Khmer Rouge rule. However, the United Nations expert report in 1999 found that historians failed to link Khmer Rouge atrocities to the armed conflicts referring to tortures, mass executions, starvation and overwork (United Nations, 1999). Rules of armed conflict were not sufficient to address the Khmer Rouge atrocities because these atrocities were essentially violations of obligations owned by the government to the people under its authority. Accountability in that regard has to employ rationales of human rights and consider the overall situation faced by the government. Some revolutionary policies, such as population movements, might not be directly triggered by armed conflict but still have a strong connection with the general level of national security which was substantially driven by the preceding civil war and the on-going border conflicts. Establishing the criminality of a human rights catastrophe in the 1970s in the middle of armed conflicts proved to be challenging. The United Nations is on board to hold Khmer Rouge leaders accountable 30 years after the atrocities, and the ECCC is struggling to differentiate the criminal and non-criminal parts within the overall revolutionary goal of the Khmer Rouge as demonstrated by its judgments quoted in the following section.

The Remit of the ECCC

The ECCC was set up in 2003 based on an agreement between the United Nations and the government of Cambodia (The Agreement, 2003). Meanwhile, Cambodia also promulgated the ECCC Law to provide for the organisation and procedure of the trials featuring the super-majority rules between the international and national judges (The ECCC Law, 2004). Article 1 of the ECCC Law states that:

“The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979” (ECCC Law 2004).

Accordingly, the persons that can be brought to trial at the ECCC include two groups, the senior leaders of DK and those who were most responsible for human rights abuses. The senior leaders were broadly understood as members of the Standing Committee of the Communist Party of Kampuchea and its subordinate Central Committee (Jørgensen, 2018). When the trials started, Nuon Chea, Ieng Sary and Khieu Samphan were charged based on this basis. While the second group, ‘those most responsible’ for the alleged crimes, is open to different interpretations and has caused divisions between the national and international components of the ECCC. The Cambodian government only wished to prosecute the top-tier individual suspects, while the United Nations had always emphasised the need for independent and transparent investigations by the co-prosecutors and co-investigating judges (Heder, 2011). According to Steve Heder, given the social structure advanced and implemented by the Khmer Rouge, the second group of suspects should have included mid-level leaders who were heads of districts (ECCC, 2013).

Eventually, Ieng Thirith and Kaing Guek Eav, alias ‘Duch’ were included in the initial indictment. The former served as a government minister, and the latter was in charge of the most notorious Khmer Rouge prison, the S-21. The United Nations takes on board the reluctance of the Cambodian government in bringing more suspects to trial as a serious interference of justice. This disagreement has provoked tremendous distrust during the negotiation between the United Nations and the Cambodian government to set up the ECCC and once led to a halt to the

negotiations. According to the memoir of David Scheffer, who supervised negotiations to set up the ECCC, ‘international justice is the art of the possible, and nowhere was that demonstrated more profoundly than in Cambodia’ (Scheffer, 2012). This cooperation risks being further undermined if the trial chambers decide to drop further cases indicated by the international co-investigating judges.

The charged crimes at the ECCC include genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949 and violations of the Cambodian penal code of 1956. Temporary jurisdiction of the ECCC is set between 17 April 1975 and 6 January 1979. Territorial jurisdiction of the ECCC is confined to the territory of Cambodia (Jørgensen, 2018). It is evident that the remit of the ECCC does not respond to the conflict mentioned in the previous section holistically. The ECCC has been tailored to address the responsibility of one government while ignoring the pre-existing conflict context which led to the formation of that government and its policies. Accountability pursued by the ECCC is subject to a set of strictly defined criminal norms and only applies on a handful of indirect perpetrators, not to mention the amnesties and pardons awarded to direct perpetrators of the charged offences. Even though the direct responsibility of other parties to the conflict may not equal to that of the Khmer Rouge, the selective assessment of the Khmer Rouge’s liability deserves to be noted because of the risk of the trials being turned into ‘show trials’ for political exploitation (Koskeniemi, 2002).

International Criminal Justice versus Global Justice: potential contradiction

Finding the relations between international criminal justice and development education may be done through the lens of their shared goal of global justice. Justice sits in the centre of a fair, peaceful and sustainable world order. It is recognised that development education aims to enable receivers and learners to understand local and global injustice and to act towards a fairer world (Mallon, 2018). There is a wide range of specific

tools and frameworks that may be adopted to materialise that process. This part of the paper argues that there is a significant gap between the current international criminal justice framework and the general goal of global justice caused by the evolving status of international criminal law and the particular situation in which the people in the global South find themselves.

The ECCC's finding of criminal nature in the Khmer Rouge revolution

Case 002 at the ECCC deals with the responsibility of the senior leaders of the Khmer Rouge, and the charged situations cover a broad range of policies and events during the DK era. It is worth noting that the death toll during the DK period is controversial, and it is not always possible to identify the cause of death even with the exhumation of bodies from mass graves (Kiernan, 2003). Michael Vickery calculated on the basis of CIA estimations that roughly one million people died from killings, hunger, disease, and overwork. Execution accounted for about 200,000 to 300,000 of the victims and about 750,000 'deaths in excess of normal and due to the special conditions of DK' (Herman and Chomsky, 2002). Prosecution at the trials for deaths caused by population movement and overwork are controversial as they were intended as revolutionary policies. The chambers at the ECCC had to reason extensively to establish a sufficient causal link between crimes against humanity and the radical policies adopted by the Khmer Rouge.

As the accused persons are often not direct perpetrators of the charged crimes, certain legal concepts have been developed to establish the link between indirect perpetrators and the charged statutory crimes. The ECCC has adopted a mode of liability, known as the joint criminal enterprise (JCE), to hold the senior leaders accountable (Case 002/01 Judgment, 2014). The rationale of the JCE doctrine is to identify a common criminal purpose so that the individuals who share this common purpose can be held responsible even though they did not directly perpetrate the

crimes (Ambos, 2009). Several cases at the *ad hoc* and hybrid tribunals have confirmed that the identified common purpose has to be criminal (Meisenberg, 2014). And this is the point where the chambers have to debate on the nature of the revolution. Interestingly, the Trial Chamber and the Supreme Court Chamber had taken different approaches towards finding the common criminal purpose among the accused persons, who were all members of the Central Committee of the Communist Party of Kampuchea.

Regarding the purpose and nature of the revolution, the Trial Chamber is satisfied that:

“[A]t the latest, by June 1974 until December 1977, there was a plurality of persons who *shared a common purpose to “implement rapid socialist revolution through a ‘great leap forward’ and defend the Party against internal and external enemies, by whatever means necessary”*. Members of the Standing and Central Committees, government ministers, and Zone and Autonomous Sector secretaries, including NUON Chea, KHIEU Samphan, POL Pot, IENG Sary, [...] were part of this group with the specified common purpose. The evidence establishes that *this common purpose to rapidly build and defend the country through a socialist revolution, based on the principles of secrecy, independence-sovereignty, democratic centralism, self-reliance and collectivisation, was firmly established by June 1974 and continued at least until December 1977. This common purpose was not in itself necessarily or entirely criminal*” (Case 002/01 Judgment, 2014: paras. 777-778) (emphasis added by the author).

While recognising the shared common purpose, i.e. to rapidly build and defend the country through a socialist revolution, is not criminal in itself, the Trial Chamber found that the policies, referring to the population

movements, 'resulted in and/or involved the commission of crimes' (Case 002/01 Judgment, 2014: para. 804). This finding directly contradicts the JCE doctrine which requires a criminal purpose. Hence, the Supreme Court Chamber remedied the previous statement of the Trial Chamber by specifying that:

“[...] while the Trial Chamber’s findings may lack precision, there can be no doubt that it was the criminal aspect of the two policies (referring to the population movement and targeting policies) that was at the core of Case 002/01 [...] the common purpose of implementing a socialist revolution through these policies was indeed criminal. Put differently, given that the common purpose was to be achieved through the commission of crimes, as encompassed by the policies, the objective of implementing a rapid socialist revolution in Cambodia was indeed criminal” (Case 002/01 Appeal Judgment, 2016: para. 816).

The rationale of the Supreme Court Chamber’s opinion is that policies amounting to statutory crimes would absorb the other non-criminal common purposes. This is potentially problematic regarding the application of the crimes against humanity on the population movements policy because criminal intent would have to be deduced from actual results according to this rationale. Then a revolution’s nature can be only judged with hindsight. More importantly, the excessive violence in the context of conflict could be imputed to non-criminal purposes and individuals who did not agree to all specific policies at the beginning or any later stage of the revolution. This would lead to violations of fundamental criminal law principles, including the principle of legality (Meisenberg, 2014).

A similar controversy in finding the criminal nature in an identified common purpose also occurred in the trials of the rebel groups at the Special Court for Sierra Leone. The Trial Chamber in the *Brima et*

al. case, i.e. the trial of the Armed Forces Revolutionary Council, noted that ‘a rebellion is not a crime under international law’ (SCSL, 2007). The Appeal Chamber in the same case corrected and claimed that,

“[T]he criminal purpose underlying JCE can derive not only from its ultimate objective, but also from the means *contemplated* to achieve that objective. The objective and means to achieve the objective constitute the common design or plan” (SCSL, 2008) (emphasis added by the author).

The same reasoning is also found in the case against the other rebel group at the Special Court for Sierra Leone, the Revolutionary United Front. Scholars and practitioners of the law governing armed conflict have raised serious concerns about this expansive interpretation and application of the JCE doctrine (Meisenberg, 2014). This rationale might not substantially add to the punishment of the Khmer Rouge leaders because the targeting policies and the subsequent measures of torture and mass executions would be enough to prosecute them for a long time. However, if the policy results were to be taken as criminal intent, then any future government which finds itself in conflict should expect to be held responsible for crimes against humanity. Moreover, the total death toll of conflict also depends on other varying factors, which are entirely separate from the agreed ideology and policies. Michael Vickery was critical of criminal trials held in Cambodia during the 1990s and pointed out that pursuing criminal justice is in itself an injustice when one situation is scrutinised by a set of standards that are not universally applied elsewhere in the world (Vickery, 1999).

The coherence of international criminal justice has not been fully addressed in the field (Simpson, 2012). It is often contentious that international criminal tribunals present certain biased views of history especially when only selected parties of conflict are prosecuted while other responsible parties are left out of the pre-fixed jurisdiction limit

(Koskenniemi, 2002). The trials of the former Khmer Rouge leaders present another challenging example of the contemporary world effort to bring about justice.

Critique towards international criminal justice from the global South

Colonialism may mostly be part of the past, but the legacies of resisting colonial rule are far from being developed and recognised especially given the current struggles towards better governance among Southeast Asia states. As pointed out by the Third World Approaches to International Law (TWAIL) scholars, individual criminal responsibility is an important mechanism in addressing internal conflicts but it is far from sufficient, especially considering that violence in the global South has been created partially by the unsustainable economic and social policies promoted by the global North (Anghie and Chimni, 2003). Serious attempts to identify responsibility and to establish universally applicable legal regimes, should also inquire into the roles played by other powerful international actors in causing and exacerbating violent situations.

Beyond the issue of failing to investigate the role played by influential international actors, TWAIL scholars also challenge the validity of holding selective individuals accountable in situations where whole communities have in fact participated in the perpetration of acts of mass violence against each other. It is indeed the view of TWAIL scholars that:

“A legal approach that addresses the conditions under which these broad societal conflicts take place may prove more effective in quelling violence against civilians over the long term than a regime of individual accountability alone enforced through national and international courts” (Anghie and Chimni, 2003).

Both of the previously mentioned challenges against international criminal justice find their counterparts in the trials at the ECCC given the

specific environment in which the conflict unfolded. The defendants continuously refer to the threat and devastation inflicted by the US and Vietnam and emphasise the necessity and legitimacy of the revolution that should be considered differently from intentional crimes. Meanwhile, it remains controversial as to whether the intermediate cadres shall also be held responsible. If mid-level leaders were brought to trials, assessments of their specific roles would further complicate the finding of responsibility of the convicted senior leaders. The judgement in case 002 already faces criticism for its lack of specificity of the individual roles played by Nuon Chea and Khieu Samphan towards the charged offences (Cohen et al., 2015).

Empirical research on the ground shows that stakeholders tend to have different attitudes toward the ECCC in regard to international criminal justice (Killean, 2018). Most of the victims and survivors report that the worst trauma left by the conflict concerns their devastated family structures and personal life (Ratana, 2017). It is essential for the local population to find out why their families were targeted and persecuted. It is also essential for them to hear what the accused leaders of the revolution have to say (Ratana, 2017). However, both the truth-seeking effort and attempt to rationalise the revolution goes beyond the capacity of the ECCC and open a potential discussion on the alternative views of domestic governance in the face of external threats and the responsibility of the failed international actors. And questioning that boundary of domestic governance requires a human rights narrative which is much broader than international criminal justice. The gap between international criminal justice and global justice represents the Cambodian people's perceived sense of justice that cannot be fulfilled by the ECCC.

Development education and alternative mechanisms of transitional justice

International criminal justice and development education are more closely linked than their seeming separation between legal expertise and

nurturing global citizenship. The sense of justice shared by local communities in Cambodia focus on both direct and indirect perpetrators (Ratana, 2017). While only very few leaders were tried and many mid-level cadres are still living among the local communities, it remains to be seen how the concept of justice will continue evolving in future memorial projects. The ECCC has endorsed 11 projects in its judgments, including setting up a National Remembrance Day, constructing memorials and exhibitions and initiating various educational projects. The implementation of these projects relies on broader social participation, especially development educators and institutions. The legacy of the past revolution is still being retold by local actors and agendas. Peace and reconciliation experience from Northern Ireland shows that it is essentially beneficial to generate a procedure or space where local citizens could speak to the conflict legacy issues that they believe to be significant (Rooney, 2018). Given that international criminal justice is received among the locals with different attitudes and the charged senior leaders of the Khmer Rouge can only present their defences within the fixed legal framework, the development education sector could assist in filling the gap between international criminal justice and global justice by building stronger justice institutions and generating broader partnerships with alternative transitional mechanisms.

The contradictions between the pursuit of international criminal justice and global justice lie in the competing expectations held by people in the global South towards their governments. On the one hand, people rely on capable governments to improve their international status as impoverished nations. On the other hand, the governments' policies and functions have to be strictly limited in order to respect people's rights fully. Educating and promoting the understanding of the past conflict among citizens could be a very important component and function of the development education sector when it operates in post-conflict societies. Violence sits at the centre of conflicts. Transitional justice educators have developed some toolkits to assist local peace and reconciliation efforts

(Rooney, 2018). Drawing on the progress of criminal justice in the Cambodian case, different views regarding the nature of the conflict will lead to different senses of justice. The general approach to redress violence risks failing to consider the different landscape of perpetrators especially contributors to the conflict situation including foreign powers. Holding local leaders responsible for human rights abuses and ignoring the compelling international environment that contributes to the external pressure is hardly sustainable towards constructing a more just and peaceful world.

It is recognised that education about local conflict is often more controversial than education about cases elsewhere in the world (Mallon, 20). Development education in Cambodia should expect more challenges and complexity especially given the fact that causes of the past conflict are still present in the current debate regarding the country's international strategic status and political courses. Patriotism, nationalism, and desires for prosperity are still very much alive among the national ideology and ordinary citizens' hearts. It is crucial for the development education sector to strike a balance in this dilemma in Cambodia: the risks of repeating the past are not yet fully understood, and a holistic understanding of the past often presents complex lessons. The United Nations' struggle with the ECCC has demonstrated the limit of international criminal justice in achieving global justice alone. Sustainable progress lies in more proactive institutions and individuals who see themselves as global citizens, and development education has an important role to play in supporting this active citizenship.

Conclusion

This article does not intend to exonerate the atrocities committed by the Khmer Rouge, but to point out the limits of international criminal justice. The international criminal law and its implementation mechanisms as of today are still subject to the vagaries of international politics and rely heavily on powerful states. Embracing international criminal justice as an

element of development education, especially in the Cambodian scenario, requires development educators to receive the judgements at the ECCC with a holistic and historical view towards global justice. The question of whether the Khmer Rouge revolution was criminal will probably continue to divide local communities. Nationalism and patriotism are closely related to the pursuit of a fairer world order which immediately reflect on the living conditions of the most impoverished populations in the world. Besides individual accountability, the other valuable lesson to take away from the trials at the ECCC by development educators is that peace and reconciliation concern equality among nations as much as providing for human rights in the domestic sphere. Only by generating more individuals who embrace global citizenship can the challenge of internal conflicts and the goal of a better world order be truly meet.

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