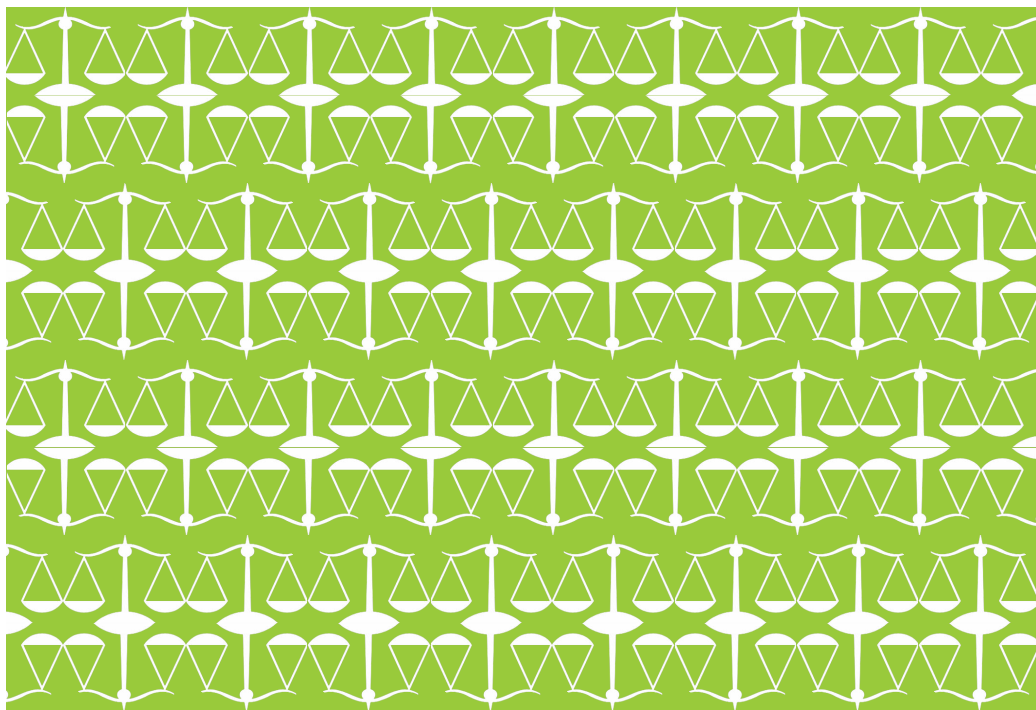


# **JUSTICE AND RECONCILIATION AFTER THE KHMER ROUGE: WHAT HAS BEEN ACHIEVED?**

**ON THE OCCASION OF THE 40TH ANNIVERSARY OF THE FALL OF PHNOM PENH**

Edited by María Lobato



WEDNESDAY 18TH FEBRUARY 2015

**On the occasion of the 40th anniversary of the fall of Phnom Penh**  
**Justice and Reconciliation after the Khmer Rouge Regime:**  
**what has been achieved?**

Venue: German Cambodian Cultural Center Meta House,  
Sothearos Avenue, Phnom Penh

**8.00h** Get together

**8.15h** Opening remarks delivered by *Ali-Al Nasani*, hbs Cambodia

**Panel I: *The international Fight against Impunity***

Chair: Ms *Chak Sopheap*, CCHR Executive Director.

**8.20h** Ms *Barbara Lochbihler*, Member of the European Parliament: The International Fight Against Impunity

**8.45h** *Maria Lobato*, Legal Advisor to the Heinrich Böll Foundation Cambodia: Lessons learnt from Latin America; *Salim Nakhjavani*, Assistant Prosecutor ECCC; The ECCC's contribution to the International Fight against impunity.

**Panel II: *Healing the Wounds***

Chair: *Theresa de Langis*, specialist on women, peace and security in conflict and post-conflict settings.

**10.25h** *Marcos Smith*, Program Coordinator, GIZ: Healing the Wounds.

**10.50h** Dr. *Sothara Muny*: Overcoming the trauma; Mr. *Tim Minea*, Executive Director, Kdei Karuna, Is there a need for a civil society truth commission?; Ms. *Kasumi Nagakawa*, Lecturer at Paññāsāstra University, Gender based violence under Khmer Rouge.

**12.20h** Concluding remarks delivered by Mr *Ali Al Nasani*, hbs Cambodia

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# Introduction

On the 40th anniversary of the fall of Phnom Penh, the Heinrich Böll Foundation organised a conference with the purpose of assessing the achievements and the shortcomings of Cambodia's transitional justice process. "Justice and Reconciliation after the Khmer Rouge Regime: What has been achieved?" took place in Meta House, Phnom Penh, on 18 February 2015, and brought together researchers and experts from a number of different disciplines.

The first panel was introduced by Ms Barbara Lochbiller, Member of the European Parliament, who referred to the fight against impunity in the context of the International Criminal Court. Ms Chak Sopheap, from the Cambodian Centre for Human Rights (CCHR), chaired the first panel integrated by Ms María Lobato, human rights lawyer and adviser at the Heinrich Böll Foundation and Mr Salim Nakhjavani, Assistant Prosecutor at the Extraordinary Chambers in the Courts of Cambodia (ECCC), who respectively analysed the contributions made by Latin American states and the ECCC to the international fight against impunity.

An introduction to the second panel was delivered by Mr Marcos Smith from Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ). The panel was moderated by Ms Theresa de Langis, senior specialist on Women, Peace and Security, and was integrated by Dr. Sothara Muny from Transcultural Psychosocial Organisation Cambodia (TPO), Mr Tim Minea, Kdei Karuna's Executive Director and Ms Kasumi Nakagawa, from Paññāsāstra University. The discussion was opened by Mr Sothara, who addressed the lessons and challenges of overcoming the trauma in Cambodian society, and followed by Mr Tim Minea analysis of whether there is a need for a civil society truth commission in Cambodia. Lastly, remarks about gender-based violence during the Khmer Rouge regime were provided by Ms. Kasumi Nakagawa.

The panellists acknowledged the importance of historical truth both for healing and in order to break the circle of impunity. For these purposes, solidarity among the community of practitioners and the creation of a coalition in civil society were underscored as imperative needs towards the construction a full historical narrative that incorporates many different voices.



## Opening remarks

*Mr Ali Al-Nasani, Heinrich Böll Foundation Cambodia, Country Director*

Distinguished guests, colleagues, friends of Heinrich Böll Foundation! Welcome to today's conference on Justice and Reconciliation after the Khmer Rouge. On the occasion of the 40th anniversary of the fall of Phnom Penh in 1975, we will discuss if and how the Khmer Rouge Tribunal has contributed to the international fight against impunity.

Impunity is understood as failing to investigate and prosecute and try persons guilty of serious violations of human rights and international humanitarian law, meaning in particular war crimes, crimes against humanity, genocide. The scope of serious crimes extends beyond the limit of the territory where they were committed. They constitute a challenge for the public conscience and result in the authors being considered enemies of humanity. Within this context, the fight against impunity forms part of the fight for international justice and constitutes a responsibility for the entire international community.

Fighting against impunity and for international justice implies resorting on strategies to incorporate direct and indirect victims, with a view to defending their rights. These include the right to know the truth about serious crimes, the right to attain justice and the right to obtain adequate redress for the damages suffered.

In numerous countries, the most serious crimes that affect the international community as a whole remain unpunished. The victims do not speak out, the perpetrators are at large, and authorities either lack the will or the means to ensure justice.

Impunity holds disastrous consequences. It allows the perpetrators to think they will not have to deal with the consequences of their actions. It ignores the distress of the victims and serves to perpetuate crime.

Impunity also weakens state institutions; it denies human values. In order to discuss the different aspects of the fight against impunity and how it contributes to healing the wounds, we have invited today numerous experts to present their views on this issue. And I know that amongst the audience there are more experts to discuss these issues with us. So I really look forward to a highly interesting debate.



## Introductory Speech on the International Fight Against Impunity

*Ms Barbara Lochbihler, Member of the European Parliament*

Good morning everyone. I was requested to focus on the international fight against impunity. And in this regard, the establishment and work of the International Criminal Court (ICC) is central to this topic. This is an issue that is really close to me. Perhaps also because I come from Germany, I see the ICC as a heritage of the Nuremberg Trials, the first time that an international military tribunal had been set up to try people accused of war crimes.

At the end of the Second World War, the Allies Powers established the International Military Tribunal, also known as the Nuremberg Tribunal and the International Military Tribunal for the Far East, known as the Tokyo Tribunal.

Leaving aside the many criticisms that both tribunals have been subject to, both tribunals rest on the notion that 'individuals have international duties which transcend the national obligations of obedience imposed by individual states'.

Concerning the Nuremberg trials, Moreno Ocampo, the first Chief Prosecutor of the ICC (2003-2012) stated: "What makes Nuremberg so important is the idea that the whole world is one society. That international law can enable us to defend human rights. This is the way we combat those responsible for the greatest possible crimes. That new idea guarantees society will continue to exist."

For me the most important achievement of the ICC is the understanding that no individual is above the law. High ranking military personnel and head of states can no longer hide behind the sovereignty of a state, in which name the person has ordered war crimes, crimes against humanity.

And of course it also carries the message of prevention: The dictators, military leaders and heads of states, currently and in the future, should know that they will be brought to justice for large scale crimes committed or ordered.

We are not driven by revenge. We, who want the law to be exercised, we are also not driven by revenge. If we promote international criminal justice, we avoid revenge. If we adopt policy that there is amnesty for those kinds of crimes, we know from other regions of the world such as Latin America that the society cannot continue and cannot find peace.

This year we commemorated 70 years after the liberation of the Nazi concentration and extermination camp Auschwitz-Birkenau, which always invite us Germans to reflect, think and reaffirm that this should never happen again. Some witnesses and victims continue to bring how important it not only to not forget, but also that that justice is done. Further, justice can contribute to heal the sufferings and to help the survivors to deal with what happened to them.

Regarding the development of international law, it was in the 1990s that international ad-hoc tribunals were established to deal with abuses in the Former Yugoslavia and Rwanda. Both of these tribunals reaffirmed the necessity of upholding responsibility to specific individuals. The tragic events in the former Yugoslavia encouraged the United Nations General Assembly in 1992 to instruct the International Law Commission to draft a statute for a permanent international criminal court.

In 1998, the United Nations convened the United Nations Diplomatic Conference on the Establishment of an International Criminal Court to negotiate the establishment of the International Criminal Court (ICC). Despite numerous unresolved issues, 120 States voted to adopt the Rome Statute of the International Criminal Court. Four years later, in July 2002, the Statute had obtained the sixty ratifications required for its entry into force. Thus, the court has jurisdiction over crimes committed after the entry into force of the Rome Statute in 2002.

To date, 123 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 34 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States.

The Preamble of the Rome Statute endorses that the most serious crimes of concern to the international community must not go unpunished and reaffirms the commitment of the international community to put an end to impunity for the perpetrators of these crimes. 15.28 Thus contributing to the prevention of such crimes. The Court may exercise jurisdiction over genocide, crimes against humanity and war crimes. These crimes are defined in detail in the Rome Statute.

However not all have been discussed in a positive way at the Conference in Rome. For example, there was no majority to include the crime of aggression in the agenda.

It was only during the Kampala Review Conference of the International Criminal Court, in Uganda in 2010 that state parties to the ICC, after a much politicised debate agreed on that, from the future on, the ICC can also have jurisdiction over the crime of aggression.

The Definition adopted in Kampala defines the individual crime of aggression as the planning, preparation, initiation or execution by a person in a leadership position of an act of aggression. The act of aggression must constitute a violation of the Charter of the UN as the use of armed force by one State against another State without the justification of self-defence or authorization by the Security Council.

This is a big step forward, in theory at the moment, since the Court will not be able to exercise its jurisdiction over the crime of aggression until at least 30 States Parties that have ratified or accepted the amendments (hopefully reached at the end of 2015) and that a decision is taken by two-thirds of States Parties to activate the jurisdiction at any time after 1 January 2017.

This also adds to the debate that the ICC is often criticised, from the Global South, because it has mainly dealt with the dictators of the small countries. And who is able to commit a crime of aggression? Those states that have sizable armies, the first world states

to put it in politically incorrect words. Those are the states that will be directly affected by this disposition. In the European Parliament we lobby very strongly so all the Members of the European Union ratify the Kampala Declaration, as not all the EU Members have ratified it yet.

The ICC is only acting in a subsidiary way. International criminal law does not replace but complements national criminal jurisdictions. Enhancing international cooperation should be in the first place directed to ensure the effective prosecution of international crimes at the national level. However, when this is not possible due to weaknesses in the local judiciary, international criminal law gives the international community tools to prevent impunity and ensure accountability for international crimes.

And this is only if the ICC has jurisdiction to do so. The court may exercise jurisdiction if the accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court (States Parties to the Rome Statute can refer cases to the Court); if the crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or if the United Nations Security Council - including the US, China and Russia, all non-state Parties of the Rome Statute - has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.

Since the ICC started to work, we have 21 cases in 9 situations that have been brought before the International Criminal Court. Four States Parties - the Democratic Republic of Congo, the Central African Republic, Mali and Ivory Coast - have referred situations occurring in their territory to the Court because they could not exercise their jurisdiction adequately. In addition, the Security Council of the UN has referred the situation in Darfur, Sudan, and the situation in Libya, which are Non-State Parties to the ICC.

To date, 21 cases in 9 situations have been brought before the International Criminal Court. To date, four States Parties to the Rome Statute - Uganda, the Democratic Republic of the Congo, the Central African Republic, Mali and Ivory Coast - have referred situations occurring on their territories to the Court. In addition, the Security Council has referred the situation in Darfur, Sudan, and the situation in Libya - both non-States Parties. After a thorough analysis of available information, the Prosecutor has opened and is conducting investigations in all of the above-mentioned situations.

On 31 March 2010, Pre-Trial Chamber II of the ICC granted the Prosecution authorisation to open an investigation in the situation of Kenya. In addition, on 3 October 2011, Pre-Trial Chamber III granted the Prosecutor's request for authorisation to open investigations into the situation in Côte d'Ivoire.

According to public and official statements, the Office of the Prosecutor (OTP) has made public that it is examining at least eight situations on four continents, including Afghanistan, Colombia, Georgia, Guinea, Honduras, Iraq, Nigeria, North Korea and Ukraine.

To date there are preliminary examinations into alleged crimes committed in Palestine, Iraq, Venezuela and South Korea. Following its conclusion in 2006, the preliminary examination in Iraq was re-opened in May 2014 after new evidence was received.

We often hear the ICC is being criticised because it has only focused on African countries. But if we speak and listen to people and Parliamentarians in Africa, they do not say this. For them, for the African, it is those who committed international crimes who represent the biggest danger, not the Western imperialisms anymore. And these people should be held accountable. So I do not think this is a justifiable criticism. We also see how the African states themselves, like the DRC and Kenya have actually turned to the international community to say: we need your assistance to deal with this. Further, we can see that the largest block of members to the Rome Statute are from Africa, 34 African State Parties/ State Member out of a total of 123 State Parties.

However, it is of course regrettable that the Organisation of the African Republic has its new President, Zimbabwe's President Mugabe, who believes that the Western World and, as such, international law, is evil. So I do not expect any progress from the regional organisation in this aspect. But I also think that the ICC should be very serious about investigating in the other cases, like in Colombia, Afghanistan, Honduras, Ukraine and Iraq to counter these criticisms.

To conclude, let me end with another trend that is not being corrected. Huge powers, the US, Russia and China have not ratified the Rome Statute. President Clinton signed the Statute in the last day of his presidency and his followers did not push for ratification to. I think this seriously weakens the ICC and we have to continue to ask those superpowers to ratify the Statute.

We can see now that within the ICC they make use of the institution of the international criminal court by referring some cases to it. I assume that it will take much more time until they will join, but it is not impossible.

If we look at ASEAN, Cambodia has ratified in 2002 and the Philippines have ratified in 2011. Thailand has signed in 2000 but ratification is still pending. But Brunei, Indonesia, Laos, Malaysia, Myanmar, Singapore and Vietnam have not done so. Part of my work is being a Parliamentarian belonging to a network of Parliamentarians who work for the support of the ICC. Whenever we travel we approach the colleagues in the Parliaments in those countries to bring it to the national level, to debate it. It is not only an issue far away, somewhere in The Hague, in case you do not have a war or a conflict in your country.

It is important that the Court gets more support. The lessons learnt of the Khmer Rouge Tribunal will also contribute to the international fight against impunity. It is not easy but it is not impossible. We, the citizens of the world, don't have a long history of being used to calling our leaders kings, military generals, on an equal footing and to say 'you committed a crime, you have to be responsible for it'.





## Lessons from Latin America

*Ms **María Lobato**, Legal Advisor to Heinrich Böll Foundation Cambodia*

Good morning everyone. Thanks Sopheap for your kind introduction. First of all, I would like to start by defining what we understand as transitional justice. While there is no unique definition or unique model for transitional justice, there are some points we can agree on. We can broadly define transitional justice as the range of measures and activities directed to serve as tools and mechanisms to deal with a legacy of human rights violations.

As Barbara previously mentioned, there is a primary responsibility of the State to address these human rights violations. In principle, it is a duty of the State to enact measures in order to tackle a past of human rights violations; failing that, there is a responsibility of the international community to respond.

What can we define as the main components of transitional justice? Primarily, truth, justice, acknowledge the suffering of victims and offer them reparations, develop guarantees of non-repetition that can serve to strengthen the rule of law, reform public institutions. This evidently requires a complex and diverse course of action, a multidisciplinary, holistic process.

In this presentation, I will bring some examples from the very diverse and still ongoing transitional justice mechanisms that have been established in Latin America since the early 1980s, which can perhaps serve us to reflect about the Cambodian transitional justice process.

During the Cold War, most states in Latin America suffered decades of internal conflicts and military dictatorships that supported a neo-capitalist approach to development, with systematic persecution against civilians perceived as 'communists' or 'socialists'. The fall of these authoritarian regimes during the 80s and 90 marked the beginning of the transition to democracy. With more or less success, most of these states - and perhaps with the only exception of Nicaragua - have enacted a variety of different mechanisms to deal with the human rights abuses committed during authoritarian rule.

While amnesty laws prevented the prosecution of the so-called 'political crimes' many states resorted to Truth Commissions. Truth is both an individual and a collective right. It is the right of a society to know what happened and why it happened. It is also the right of the victims and survivors to tell their truth. Argentina, Uruguay, Peru, Chile, Brazil, Ecuador, Colombia, Venezuela, Bolivia, Paraguay, Costa Rica, Guatemala, Honduras, El Salvador and Haiti relied on this mechanism at some stage in their transitions to democracy.

In Cambodia, the United Nations Group of Experts affirmed in their 1999 Report that, for a number of reasons, Cambodia was perhaps not prepared for a Truth Commission; and that it was the duty of the Cambodian society to debate whether there was a need for this, and under which circumstances such a Commission should be established. Not surprisingly, the recommendations were focused on the establishment of an ad-hoc tribunal modelled in the courts established to try the crimes committed in the former Yugoslavia and Rwanda. After 10 years of negotiations, the UN and the Cambodian government agreed on the establishment of an internationalised tribunal; quite different to those created in the former Yugoslavia and Rwanda, as it was conceived as a domestic institution with the assistance of the United Nations.

In Latin America, there is now general consensus that justice is an inalienable right. On this issue, it was paramount the role played by the regional mechanisms in Latin America, both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (IACHR). In the case "Barrios Altos vs Perú", the IACHR acknowledged that amnesty laws are incompatible and inadmissible with the fundamental right to justice. Based on this precedent, the Chilean Supreme Court authorised the extradition of former president Fujimori to Peru; allowing his conviction for the outrageous human right violations committed.

In the South-East Asian region, the only regional mechanism in charge of the protection of human rights is the ASEAN Commission for Human Rights, that, unlike the Latin American human rights mechanism, it does not give power to individuals to lodge complaints. While it is too early to assess the potential impact of the ASEAN Human Rights Commission on accountability for human rights violations, this appears as a step in the right direction.

Being the ECCC the only official transitional justice mechanism established in Cambodia to deal with the consequences of the human rights violations that occurred during DK, we tend to deposit too many expectations on it. We expect that the ECCC will hold perpetrators of international crimes under its jurisdiction accountable for their crimes, that it will shed light on the truth of what happened during DK, that it will endorse reparations for the civil parties and victims. We expect all this from a very volatily funded tribunal that relies on voluntary cooperation.

It stands to reason that the decision of 7 August 2014 sentencing two senior leaders of Democratic Kampuchea to life imprisonment is a milestone in the Cambodian transitional justice process. However, it is important to acknowledge that justice has not yet happened for many victims. For the Vietnamese, for the Cham, for the Khmer Krom, for the victims of forced marriage, rape and other gender crimes, part of the story remains untold. Part of the truth remains unveiled. So what would happen if the ECCC, for whatever reasons, cannot fulfil this role? Should a Truth Commission be developed to serve these purposes? Is it too late? Is it necessary that the Cambodian government be involved?

I would like to note the work of the Truth Commissions established in Brazil (1979), Bolivia, Uruguay and Paraguay, which were created only as a consequence of the collective effort of civil society; and yet played a crucial role in safeguarding the historical truth. It is also worth bringing up the work of the second Brazilian Truth Commission, established by the government almost 50 years after the beginning of the conflict in Brazil. Their report, released in December 2014, recommends the abolition of the amnesty laws that still prevent the prosecution of military officials for political claims, sparking renewed demands for justice in the Brazilian society. Is it too late for justice? Is it too late for truth? A growing sector of Brazilian society does not think so.

The ECCC is an extraordinary instance with a limited mandate. Sooner or later, completion mechanisms will have to be developed, which will require the engagement of all Cambodian institutions. Particularly, an independent, fully functioning judiciary that is able to absorb and finalise the work that the ECCC may leave incomplete. For these purposes, the role of the international community in strengthening the domestic judiciary is key to this. I would like to note the case of Guatemala, where an International Commission of Investigation against Impunity was created under an agreement between the UN and the Guatemalan government, with the aim to fortify and support the domestic judiciary.

The Commission, for example, was in charge of overseeing the trial against Efraín Ríos Montt, former de facto President, accused, among several other atrocities, of wiping out between 70 and 90 per cent of the indigenous communities in the Ixil region. In April 2013 Ríos Montt became the first head of state to be convicted by a domestic court on the grounds for genocide. Although this ruling was annulled subsequent to a controversial decision of the constitutional court, the trial restarted in January 2015. Hope for justice remains untouched.



## The ECCC's contribution to the International Fight Against Impunity

*Mr Salim Nakhjavani, Assistant Prosecutor at the ECCC*

Thank you to the HBF for once again convening what I think is a very timely discussion. In the short space of time available, I would like to mention a few points about the contribution of the ECCC to the fight against impunity.

I will begin with a statement of aspiration or hope, 15 years ago now or longer - in the same report that my former colleague María alluded to - the Report of the Group of Experts on Cambodia, which assessed the situation of prevailing impunity for Khmer Rouge leaders. The report acknowledges that during the Khmer Rouge regime various political forces, including the UN, acted together to keep Cambodia out of the international spotlight. So here is the UN, perhaps far too late, acknowledging that it did very little, if anything, during that regime. You can see that they concluded that there has been an absence of accountability so far, that Khmer Rouge officials had not been apprehended or brought before any court. That was in 1999. I think it is interesting to reflect back on this from the position where we are at now.

The report also deals squarely and directly with a claim that is still being made today: that accountability for the crimes committed during the Democratic Kampuchea destabilises Cambodia, and so is not good for the society. It is worth reviewing some of the arguments that were made 15 years ago on this subject, just to see how similar they are to the conversation that is taking place now, or whether you may find it different. Crimes such as those of the Khmer Rouge regime deserve punishment as a matter of morality, and fundamental considerations of justice. The Group of Experts goes on to say that, despite the claims that prosecution of the KR leaders will destabilise Cambodia, they could find no evidence



to support this in their consultations in Cambodia with the public and with the victims. None of them suggested that peace and trials were irreconcilable or that Cambodia saw peace as a substitute for justice.

We believe that Cambodian society will only be able to understand and move beyond its past when the individuals who committed massive atrocities are brought in front of impartial justice. Trials also serve to establish the truth for the Cambodian community.

Certainly, the ECCC has had influence and effect outside Cambodia. I will argue, though, that the four ways that the ECCC has contributed remain incomplete. A German professor of law who is an expert in international criminal law, Gerhard Werle, made a comment that the Cold War period was a paradoxical one. On the one hand, he says the law of Nuremberg had been firmly consolidated. On the other hand there was a complete absence of political will to bring the people responsible for crimes committed during that period to account.

The contribution of the ECCC to law, to international law and jurisprudence is very important, because it sheds light on the state of the law during the 1970s, which most international criminal lawyers will tell you was a dead period, the dark ages of international criminal law. The political effect of the Cold War was effectively to dampen any movement towards ending impunity and bringing to account those responsible for any human rights violations.

In particular, there was a question as to whether it a crime to forcibly move people, not outside the country, not to expel them from your country, but to move them somewhere else within your country. The Trial Chamber's jurisprudence unquestionably says yes, and clarifies the state of the law on aspects that were not so clear before. Similarly, the criminalisation of forced marriage during that time is now really out of question, and the fact that immunities do not attach for crimes committed during that time either is equally important.

One of the other significant ways that the ECCC has contributed is regarding transitional justice. The position that has been given to victims acting as civil parties to directly engage in proceedings and confront the accused and ask their questions is an important contribution, one that has had impact worldwide.

For instance, the Cambodian experience with the ECCC is having an effect now in Dakar, Senegal, where the Extraordinary African Chambers is opening its doors now to bring to trial former dictator of Chad, Hissène Habré. This tribunal is only the second domestic court established in a civil law system to bring to account these kinds of perpetrators. After many years in proceedings where victims have been participating as civil parties, the jurisprudence of the ECCC's on civil parties will be undoubtedly influential. It is only the second domestic court established in a civil law system to bring to account these kind

of perpetrators. So the Cambodian experience is having an effect in Dakar, very far away, right now.

The space that has been created for victims to directly ask questions to the accused has had a great impact on victims. This is something that victims have not been able to do quite as effectively in other courts, and it is a space created not to ask for revenge but for justice.

The ECCC's contribution to the rule of law and institution building is an interesting one. I will give two examples on this point. The ECCC has received a lot of criticism for how it has handled politically sensitive issues in Cambodia. Judges at the ECCC have stood up and said that the ECCC is insulated from the domestic system. In other words, what happens in the wider Cambodian legislative and political context certainly can make life more difficult for the ECCC, but it will not affect the fairness of proceedings. The reality is that the ECCC is insulated but not isolated. And I would like to share some ways in which the experience of the ECCC has produced unexpected results for rule of law in Cambodia.

Regarding the ECCC's contribution to social justice in Cambodia, it remains very limited. Hidden underneath the 1999 Group of Experts report and in the negotiations that led eventually to the establishment of the ECCC was the following idea: Cambodians should see that the mere fact that you are powerful does not mean that you can behave with impunity. That was the message that the international community wanted to send very strongly to Cambodia when the Court was established. There was a sense that Cambodian society today needed to see that the mere fact that you had money did not mean that you would not face justice. This is called by the Group of Experts 'the demonstration of the inevitable consequences of unacceptable conduct.' But we can see that in Cambodia unacceptable conduct continues today. And one can ask to what extent the ECCC can have a social justice impact today by holding to account former leaders of the Khmer Rouge regime.

I lastly wanted to highlight two examples of the ECCC'S very modest contribution to rule of law in Cambodia. It is well known that in Cambodia as well as in other countries it is difficult for a judiciary to find a space to be able hold the executive branch accountable. This is not a uniquely Cambodian problem. Judges do their work under difficult conditions. In 2012, the judges of the Trial Chamber - the majority of whom are Cambodian judges holding positions in the Cambodian domestic justice system at the same time that they are serving at the ECCC - faced a difficult situation. The Prime Minister of Cambodia made a personal remark about Nuon Chea, calling him a murderer and a perpetrator of genocide. This was difficult for the judges because at that time Nuon Chea was on trial and benefitted from the presumption of innocence.

The result was a unanimous decision signed by all of the judges, holding that this statement was reported in the press and that the words of the Prime Minister were a pre-judge-

ment by a senior public official of a criminal case, which it might have an impact on the public perception of Nuon Chea's culpability. The judges commented that these remarks, if accurately reported, would constitute statements incompatible with the presumption of innocence. The Trial Chamber proceeded to find that it had jurisdiction to take measures in order to counteract this offense against the administration of justice.

Such a finding concerning a powerful political leader may have been unthinkable in Cambodia only a few years ago. This is a very modest finding. This is judges saying what judges need to say all the time to protect the independence of the judicial process. But the judges of the ECCC were able to do this with no repercussions whatsoever. They did so in a public decision and faced no threat when they did so. This is a healthy example of a well-functioning justice system.

There is another decision that came out in December last year and it is a unanimous decision in an appeal to the Pre-Trial Chambers in Case 004, which has been released publically. Cases 003 and 004 are proceeding based on a disagreement between the Investigating Judges, only the International Judge is proceeding with the investigation. The Pre-Trial Chamber was asked the following question: if the International Investigating Judge issues a summons to somebody to appear in Court, is that going to be valid or not?

It is very clear that the Cambodian judges of the Pre-Trial Chamber agree with the Cambodian Co-Prosecutor that these cases should not proceed. However, the Pre-Trial Chamber --- all the judges together --- affirmed that, as it had been previously held, a summons issued by one Investigating Judge for the purpose of charging someone, is valid if the disagreement procedure has been complied with.

This shows a significant contribution to the rule of law in Cambodia. There is a recognition that even if these cases are proceeding and a certain judge feels he should not proceed personally, that judges must still follow the ECCC law and uphold the validity of the acts of one judge acting alone, as long as he has done so after registering the disagreement with the Cambodian counterpart. Again, this is a modest decision that shows very clearly the attitude towards the rule of law of the judges concerned.



## Introductory speech on healing the wounds

*Mr Marcos Smith, GIZ*

First I would like to thank Heinrich Böll Foundation for inviting me to be part of this panel on healing the wounds in the context of Justice and Reconciliation after the Khmer Rouge Regime. My name is Marcos Smith and I work for the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), which is the German Agency for International Cooperation.

At GIZ I am the program manager/coordinator of the Civil Peace Service (CPS) program. Coincidentally our program is called "Justice and Reconciliation in the context of the Khmer Rouge Tribunal" since 2007. Since 2014 we call it Justice and Reconciliation after the Khmer Rouge Tribunal because we were expecting the Tribunal to close soon, be it through a lack of funding or the death of the defendants.

GIZ works under a bilateral agreement with the Cambodian Government in the fields of Health, Land Rights and Good Governance. Usually the GIZ programs work directly in the respective ministries. The CPS program instead works with governmental institutions and Civil Society Organizations. Therefore our partners are several NGOs (like represented here in the panel), Royal University of Phnom Penh, the Victims Support Section at the ECCC – and soon the Toul Sleng Museum.

I am not talking on behalf of any NGO or the ECCC, I am talking as an observer of this transitional justice process, which from my point of view does not only include the legal proceedings at the court. As introduction to this panel I would like to say a few words about the work of the ECCC and the involvement of Civil Society in regard to dealing with the past or as we call it here healing the wounds.

On 8 August 2014 Peter Manning (Fellow at London School of Economics and Political Science) wrote an article in “the Conversation” about the verdict in case 002/1 with the title: “Guilty verdicts for Khmer Rouge killers – now let Cambodia’s wounds heal”

Can a trial and a guilty verdict heal wounds? This could be one of our questions in this panel. More than 40 years after the horror of Cambodia’s Killing Fields, two of the most senior Khmer Rouge leaders have been found guilty of crimes against humanity and sentenced to life imprisonment.

As we all know Khieu Samphan, 83, the former Khmer Rouge head of state, and Nuon Chea, 88, a leading party ideologue, were prosecuted in the ECCC for crimes committed under the “Democratic Kampuchea” regime, under which approx. 1.7 million people died of starvation, disease or were executed between 1975 and 1979.

In my Cambodian family, I am married to a Cambodian, both great grandfathers of my children died during the Democratic Kampuchea period. One became sick and did not receive any medication and the other was killed while he was trying to get some food. That’s all I know. It is not easy to receive more detailed answers if you ask continuously. One of the great grandmothers of my children was complaining to my wife (my translator) that I was asking too many questions.

From my point of view this verdict represents a moment of historic reckoning with Cambodia’s tragic past. The accused were held accountable for the crimes they committed. Victims’ groups recognized by the ECCC have met the sentences with broad approval.

The pair faces now the significant charge of genocide in case 002/02. But the poor health of the defendants means that this trial may not be completed. As Manning has observed, “the failure to do so would mean that the longstanding and thorny question of genocide recognition in Cambodia goes unanswered. This would be a blow for many Cambodians given the historic reluctance of the international community to recognize genocide in Cambodia”.

But also the specific experiences of forced marriages and the fate of minority groups under the Khmer Rouge, such as the Muslim Chams and ethnic Vietnamese, would not be acknowledged as an important part of what happened in the past. If the court cannot complete the current case - can wounds heal?

And there are even more issues we have to think of. The first relates to the mandate of the ECCC prosecutions. The ECCC can only prosecute “senior leaders” and most responsible persons. This means that large numbers of lower level Khmer Rouge perpetrators will not be prosecuted. Their role will not be examined.

Many of these lower-level ex- Khmer Rouge cadres still live among their victims. They also lost friends and relatives to the internal purges of the Khmer Rouge regime and during the following years of civil war in Cambodia.

There is one outstanding question concerning reconciliation within Cambodian communities which I would like to discuss. How can former perpetrators of atrocity have come to live in relative harmony in Cambodian society today? These are questions that the ECCC cannot answer.

Another point we should be aware of is in the meanwhile the low interest or indifference of many Cambodians toward the ECCC. The other day I witnessed a dialogue between a German colleague of mine and a young Cambodian man, who asked my colleague what he was doing in Cambodia. When my colleague answered that he works at the ECCC the Cambodian man replied: “Oh, then you must be a rich man!”

At that moment I recognized that time is working against our efforts of reconciliation and healing wounds. At the beginning in 2007 the people had more hope. This was based on the assumption that a UN supported court would bring justice to the victims of the KR and find answers of why all this could happen. The media, especially TV, was covering the case quite detailed.

Quoting Manning once more, “frustrations about the costs and delays with the court process, and the failure of the ECCC to properly account for the roles of various international actors like the US or China in Cambodia’s history of political violence has led to many Cambodians losing interest in the ECCC”

Another thought we may discuss in this round is, for us people, who are working in the field of human rights and peace building, our reluctance to recognise the legitimacy of a basic desire of many Cambodians to leave the past where it is.

Coming back to the verdicts against the accused, it was inconceivable that there could have been anything other than guilty verdicts. It is worth reminding ourselves that all international criminal proceedings will always be symbolic and incomplete. However, will all its limitations, the ECCC has offered verdicts today that will begin to help Cambodia understand a terrible period in its history.

At this point, talking about the limitations of a judicial proceeding concerning to healing wounds I would like to draw our attention to the role of Civil Society in this regard. I do not want to elaborate what is civil society in Cambodia at this point, which is very different from civil societies in other countries, Latin America for example. I would prefer to talk

about the role of NGOs, which play an important role in Cambodia and have certainly contributed to the development of this country.

Today, NGOs work in the field of justice and reconciliation in many ways. Interestingly NGOs started to intensify their work in this field when it was clear that the ECCC would start to operate in 2006. The ECCC interacted as a trigger. I still remember quite clear how I negotiated with Dr. Sotheara our first cooperation in 2006. TPO already had plans in the drawer to work together with the ECCC in order to provide psychological support to victims, witnesses and civil parties at the ECCC.

Other NGOs like Youth for peace had a project in mind how to include young people in a process of dialogue with survivors of the KR Regime. Women's Media Center started a radio program dealing with topics related to the ECCC and the past. ADHOC was prominently advocating Civil Party Participation at the proceedings. Cambodian Defenders Project started a project on Gender Based Violence during the Khmer Rouge period.

Today we can say that the inclusion of forced marriages and crimes committed against minority groups such as the ethnic Vietnamese and the Cham in case 002/2 is also the result of patient NGO work. We can say that NGOs benefited from the existence of the ECCC and the ECCC benefited from the NGOs by providing evidence of committed crimes mentioned above.

Last but not least NGOs play a very important role if it comes to collective and symbolic reparations for the victims of the KR. Together with the VSS, the Civil Party Lawyers, the Lead Co-Lawyers and the Civil Parties themselves they have planned and implemented projects which provide reparations to the victims. This reparations help to heal wounds. This process is unique and happened for the first time in the history of international Criminal courts. A milestone!

But also in this case not everything was positive. After the court approved the reparation projects in its verdict of case 002/1 a group of civil parties raised their voices and complained about the projects, which in their eyes did not serve their needs. More and more civil parties now demand individual and monetary reparations for the next case.

It is remarkable that civil parties voice their opinion. It is now important to deal with their demands in a way that they feel that they are taken seriously. Otherwise the reparation projects will do more harm than healing wounds.

Coming back to my question in the beginning – yes, I believe a court can heal wounds if you accompany the court process with non-judicial measures.



## Is there a need for a Civil Society Truth Commission in Cambodia?

*Mr Tim Minea, Kdei Karuna*

To answer that question, we first need to accept that truth is a complex concept that depends, at least in everyone's individual perception, on the perspective of each person experiencing a particular event.

This explains why it is crucial to entrust civil society with conducting a possible truth commission. Indeed, the State has been party to the conflict, and will most certainly have a very subjective look onto what it believes to be the truth. Civil society, by contrast, has the opportunity to approach the many controversial issues objectively and without any kind of prejudice.

Still, there are arguments against launching a Civil Society Truth Commission. Some say that doing so will only re-open long-forgotten wounds, or re-traumatize victims and their families. Others argue that a truth commission could, in fine, lead to more conflict and division, and run counter to what they call a "unifying narrative" in Cambodia.

On the other hand, while the Extraordinary Chamber in the Courts of Cambodia has undoubtedly contributed to the establishment of the truth, it has looked at specific aspects only. Among others, the ECCC has had no other choice but to adopt a rather general, a national perspective. A truth commission could take it up from there, and bring the truth-finding process to the local level. Thereby, civil society could help democratise and contextualise Cambodia's history, bringing truth to where it ultimately belongs: to the Cambodian society and its people. In this context, it would be a first and important step for existing civil-society projects to join forces and streamline their efforts.



There are more advantages, though. A common truth commission would allow Cambodia to store all kinds of informative documents for future generations, in a centralised manner. It would help raise awareness and, as a consequence, form active and conscious citizens.

Last but not least, victims would finally experience the support they need, and empower them against fear, silence and dependence. Therefore, civil society should start establishing a common ground, and ensure to be operative for a truth commission as quickly as possible. The international (civil-society) community should work closely with their counterparts in Cambodia.

Finally, international donors should provide financial and technical support, possibly by establishing a specific Trust Fund.



## Gender based violence under Khmer Rouge

*Ms Kasumi Nagakawa, Lecturer at  
Paññāsāstra University*

Sexual violence in conflict settings affects both men and women; due to under-reporting we can only estimate the numbers of victims. The available statistics show that women are often affected disproportionately because of the disadvantaged situation of women in

society before the conflict started. However, there is a knowledge gap in regard to sexual violence perpetrated against boys and men, and against people from sexual minority groups, so we do not know the real magnitude of GBV in conflict.

Sexual entitlement, discrimination, abuse of power and impunity all contribute towards the perpetration of such violence in a conflict setting. Rape is often used as a weapon in war as part of a military strategy to terrorise, displace and control communities.

A culture of shame and stigmatising victims leads to the silencing of survivors, which also negatively affects the cycle of violence. Women may keep silent because they are worried about their family reputation, and men keep silent because of the loss of his male identity and masculinity, or his failure to protect himself.

Gender based violence is a continuum of gender based discrimination, which is a manifestation of societal cultures and institutions that value and prioritize men, which we call patriarchy. The abuse of power and social beliefs and norms that subordinate women and marginalized groups in society are also very important factors that allow for widespread sexual violence to manifest in conflict setting.

Conflict related sexual violence includes: rape, forced pregnancy, forced abortion, trafficking, forced prostitution, sexual slavery, and forced sterilisation, sexual torture, oral rape, rape using objects, and the list goes on. Normally survivors keep silent about crimes - due to fear, stigma, self-blame, fear of being shunned by their family members and communities, to maintain reputation. So they do not speak about the sufferings they were forced to endure during the conflict.

As well as this, most perpetrators go unpunished, creating a culture of impunity - in many cases, the sexual violence was encouraged as a strategy of war, or seen as an inevitable side effect of war by many. So the formulation and development of the ICC, as Madame Barbara has introduced in the very beginning of this morning session is now contributing to change the perception of society and understanding about sexual violence in conflict

Let me talk about sexual violence during the Khmer Rouge regime. In 2005, I conducted holistic research into gender-based violence during the KR regime. When I tried to do this project in 2005, there was no ECCC. I was determined to do this research project but no one believed that survivors were still alive. A lot of activists I consulted told me: all survivors and victims of rape and sexual violence were killed; you can never interview anybody who survived. They said, even if they are alive, they would never break the silence. However I managed to do the research. And many women and men victims of sexual violence during the Khmer Rouge regime broke the silence and, for the first time, spoke about experiences of sexual violence they suffered.

The lessons learned were that survivors are willing to speak as you already know now from one of our speakers as long as there are people who listen to and that a safe environment

is created for them to speak. And this is very important, it is a key entry point that we have a safe environment for survivors who disclose their sufferings.

In 2014 I conducted another research study on sexual and gender-based violence perpetrated against sexual minority groups, we call it LGBT – lesbian, gay, bisexual and transgender. I interviewed 48 individuals from sexual minority groups and documented many untold stories of violence perpetrated against them.

It also included sexual violence against men in the KR regime, which was the first documentation of this kind. I interviewed eight gay men and many were victims of rape – oral sex – by the Khmer Rouge and non-Khmer Rouge. It also documented the phenomenon of forced marriage – Theresa has done a wonderful research with TPO on forced marriage. Mine is supplementary to her in-depth research, and I documented the forced marriage of a transgender woman who was forced to marry with a man. There are many kinds of unique types of forced marriages that I documented because of the sexual orientation of my respondents.

Now I would like to talk about the importance of addressing the sexual violence in the past. Because looking at the past is not just about the past, we are talking about transitional justice in the current Cambodian society. The failure to address sexual and gender crimes in conflict creates a culture of impunity, a vicious cycle of violence against women and men, which continues to affect safety of men, women and marginalised groups in Cambodian society. This is reflected in the latest statistics about perpetration of violence against women in Cambodia, which shows that at a very high level in Asia-Pacific, Cambodian men are perpetrating sexual and gender based violence against women. It also found out that gang rape was a particular problem in Cambodia, particularly among the young men. Failure to address sexual violence in post-conflict settings also threatens peace and security, and can feed a cycle of violence.

Perpetration of gender-based violence in the present time is, in part, a result of the normalization of violence in the community and in the home facilitated by weak legal system and limited security structures, widespread impunity, and weak community norms that do not condemn gender-based violence. Government policy and service response to current cases of sexual violence needs to acknowledge the past crimes. We all need to consider the mental health impacts and trauma and how this has permeated through the generations. Survivors need a wide range of support, and must be at the centre of responses to sexual violence in conflict.

Today is a great occasion to discuss the gender-based violence in conflict. We still need to do a lot, to create a safe environment for women and men, and all of those who suffered from gender-based violence during the KR regime, to break the silence in order to stop

the culture of impunity, and so they can heal, be empowered and act as agents for positive change.

The topic of today's seminar is justice and reconciliation after the Khmer Rouge regime, what has been achieved. I have seen the development, very rapid development, in the last ten years to create a safe environment so survivors can come to speak about their suffering, so that their stories can be documented, so the younger generation can learn the history, their own histories in this country. I have a very passion to empower survivors in many different ways. My students, very intelligent, educated young people, they always ask: what can we do? I think listening to their voices is the first step.

I think we need to create solidarity, a coalition among NGOs and civil society. I hope we can create more debate, discussions, and do more research before survivors die, in order to end the cycle of impunity.



