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Laws, Sausages, and Creating Tribunals

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Review of: Craig Etcheson, *Extraordinary Justice: Law, Politics, and the Khmer Rouge Tribunals* (New York: Columbia University Press, 2019). 488 pp. ISBN 978-0-231-19424-2.

Otto von Bismarck purportedly said that if you love laws and sausages, you should not watch them being made – a quote Etcheson cites in the introduction to his book[1] conveying disenchantment over what he witnessed during the set-up of the Extraordinary Chambers in the Courts of Cambodia (ECCC), a tribunal to try the crimes of the Khmer Rouge between 1975–1979.

And that is precisely the disenchantment anyone reading the book should be prepared for, for the process appears to be fraught with compromises, often made to the lowest common denominator. There were attempts, it appears, by advocates to negotiate matters not so much in the interest of justice, as to further the political motives of their affiliations – clearly a bias a realist expects in the patron-employee relationship, but which never fails to disappoint when exposed. Thus, under the guise of wishing to eschew civil war, the Cambodian Premier Hun Sen initially thwarted attempts at setting up the tribunal as it was of no benefit to his political position, having already succeeded in dismantling the remaining Khmer Rouge faction. Clearly, the impunity of former Khmer Rouge leaders was not a concern, as he opted instead to 'forgive and forget'. Hun Sen's erstwhile involvement as a member of the Khmer Rouge, and hence his hand in its crimes, may also explain resistance to outside scrutiny.

Before continuing, it must be pointed out that Etcheson was Chief Investigator in the Office of Co-Prosecutors at the Khmer Rouge Tribunal, and staff member at the United Nations Assistance to the Khmer Rouge Tribunal (UNAKRT) from 2006 to 2012, and was therefore at the intersection and heart of the tension that arose in the negotiating process. This thoroughly documented and researched work should also be looked upon as a memoir of Etcheson's perspectives and experiences. It lies within the wealth of literature on the workings of the ECCC, with Rachael Kilean's *Victims, Atrocity and International Criminal*

1 Craig Etcheson, *Extraordinary Justice: Law, Politics, and the Khmer Rouge Tribunals* (New York: Columbia University Press, 2019), p. 3.

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Justice: Lessons from Cambodia, covering the failures and successes of victim participation in the trial process, critiquing the involvement of the UN and the Royal Government of Cambodia's roles in moulding the mandate of the ECCC, and Rebecca Gidley's *Illiberal Transitional Justice and the Extraordinary Chambers in the Courts of Cambodia* where the clash between liberal values and the reality of government control that led up to the creation of the ECCC, is discussed.[2]

The crux of the protracted debates that lasted almost ten years between parties during the set-up of the ECCC was as follows: while the UN and the US did not want their reputation tarnished by affiliating themselves to a sham trial, Cambodia put up resistance against an assault to its sovereignty and self-respect by the interference of an external power. Debate over the hybrid nature of the tribunal (certainly unique on the international scene) hinged upon drawing a fine line between upholding the sovereignty of Cambodia and incorporating the right measure of international laws and principles to give the tribunal, its process and judgments, international legitimacy and credibility. All the while Hun Sen fought to whittle down the power of foreign/international bodies over the ECCC, while the opposing side of course vied for more.

Etcheson re-ignites the perennial debate on the dynamics between law and politics, a debate raised by Ronald Dworkin, familiar to every student of jurisprudence and legal theory. The debate functions in forcing us to re-assess whether law is (or ought to be) merely an instrument in the hands of politics, and if so, whether the extent of its deference in a given scenario is justified.[3] As a reminder, Dworkin in Law's Empire, through the mouthpiece of Hercules, a hypothetical idealised judge, opined that it would be better if judicial decisions and hence legal precedents were based on principles of fairness, justice and equality rather than policy or political objectives. By introducing this debate at the beginning of his work, Etcheson transforms it into a lens, or a framework of comparison in interpreting the dynamics between the US, the UN and Cambodia. According to Etcheson, the ideology of classical legalism dominated UN decisions in the set-up of the ECCC, instrumental legalism epitomised the Cambodian approach, while the US seemed wedged between the two into what is identifiable as

2 Rachael Kilean, *Victims, Atrocity and International Criminal Justice: Lessons from Cambodia* (New York: Routledge 2018); Rebecca Gidley's *Illiberal Transitional Justice and the Extraordinary Chambers in the Courts of Cambodia* (Cham: Palgrave Macmillan, 2019).

3 Etcheson, pp. 7–8.

strategic legalism.[4] For example, Etcheson marks out the supermajority voting system, unique to the ECCC, and devised by Scheffer (UN Special Expert on the ECCC) and Rosenstock (a US Legal Counsel), as a manifestation of strategic legalism that saved the day by securing the approval of political opponents, namely Hun Sen and his party on one hand, and the UN on the other.[5] These negotiations and compromises were essential attributes of the hybridity that characterised the ECCC. As Etcheson says: the challenge was to 'blend the classical legalism of the internationals with the instrumental legalism of the national lawyers'.[6] Briefly, classical legalism signifies that law should and does trump politics; strategic legalism that law and politics are inextricably linked, so that decisions cannot be made with only one of them in mind; and instrumental legalism that law is at all times subjected to the whims and fancies of politics and political objectives.

Delays in setting up the tribunal, delays therefore in justice, resulted in the frustration of witnessing Khmer Rouge perpetrators grow old; old enough to check themselves successfully in hospitals (Khieu Samphan, Nuon Chea), be unfit for trial (Ieng Thirith), or die, sometimes in custody without being condemned for their crimes (Ta Mok, Ieng Sary), together with pathetic excuses and cover-ups for the commission of previous crimes.[7] Another event contributing to the delay were Cambodia's National Assembly elections in July 2003, which led to a near frustration of all negotiations. Etcheson also discusses the discontentment that arose from a jurisdiction limiting itself both to the status of the perpetrator ('Senior', 'most responsible'), and to a timeframe (1975–1979), that spared from prosecution 'not-so-senior' perpetrators as well as other State Parties involved in perpetrations during that period. In the meantime, another contentious matter was the challenge of holding genocide perpetrators in custody without adequate laws in place to charge and prosecute them.[8] Issues pertaining to funding – whether it would be mandatory or voluntary – also added to the delay,[9] with the US refusing to make contributions to a 'broken system […] incapable of delivering justice for human rights abuses', to which Powell

4 Etcheson, p. 62.
5 Ibid., p. 75.
6 Ibid., p. 176.
7 Ibid., p. 101.
8 Ibid., p. 64.
9 Ibid., pp. 118–9, 130–1.

eventually conceded, saying it 'was the only judicial game in town'.[10] Etcheson recounts how this was followed by a political turmoil in which the minority winning parties (in the local National Assembly elections) formed a coalition, and sought to lobby against the ruling party to oust Hun Sen from premiership, delaying the process by another year.[11] The deadlock that ensued once again hampered further negotiations for the set-up of the tribunal. Other matters that emerged revolved around the location of the tribunal,[12] the staffing of the ECCC,[13] the Raken Affair which involved a dispute over the choice of a trial venue to prosecute members of the Khmer Rouge,[14] and other technical details.[15]

It is noteworthy that Hun Sen's furtive attempts at controlling the process almost culminated in the UN's withdrawal from all negotiations in February 2002. The rift between the standards proposed by Cambodian authorities in applying national law over the legal process, and those required by the UN was too wide for the upper echelons of the UN to concede. Eventually the US took a low profile on the matter and made room for other countries such as Japan, France, India, Korea and the Russian Federation to step in and resume the process.[16] Regarding this matter, Etcheson seems to conclude that the UN made more than the usual number of concessions to give in to the will and sovereignty of the Cambodian government, especially in terms of retaining Cambodia's upper hand over the judicial decision-making process, and the funding of the ECCC.[17]

The first half of the book deals with the process leading up to the creation of the tribunal, while the second tackles the running of it. Both segments however display the perverse nature of the conflicts raging between local and international factions, especially as the latter contested the corrupt-laden practices of the former. At all times, however, it seemed there was a real threat of total collapse of both, prior to the set-up of the tribunal and during its existence.

Other matters discussed in the second half of the book pertain to the controversy surrounding the law on procedure (e.g., whether

10 Etcheson, p. 132.
11 Ibid., p. 136.
12 Ibid., pp. 140, 145–8.
13 Ibid., pp. 148–162.
14 Ibid., pp 133–6.
15 Ibid., pp 162–170.
16 Ibid., p. 117.
17 Ibid., p. 120

to continue prosecution after a charge by the local military court or start fresh ones in the ECCC), which once again ended up clogging the process of setting up the tribunal.[18] The book also gives an account of the debate over the number of Senior Leaders/the most responsible of the Khmer Rouge to appear before the tribunal; a question that did not require much debate and was quite settled, says Etcheson, because very few were alive.[19] Collusions between the Cambodian government and key organisations such as the Cambodian Bar Association (supposedly an independent body), to cause delays through bargaining and obstructions are also discussed.[20] Moreover, it seems that Cambodian surveillance of the international team became a common practice during that period, revealing mistrust between local and international forces.[21] Negotiations between the East and the West in setting up a hybrid tribunal included pandering to numerology (in choosing an appropriate date to file submissions) as a tactic deployed to stall for time.[22] Another complication that arose was the last-minute decision taken to delete the name of a suspect from a voluminous document that tied him to other suspects in a joint criminal enterprise.[23]

All in all, it was obvious that the Cambodian personnel was involved in delaying the trial proceedings in a practice locally known as 'grilling the elephant'.[24] Everything went to show that this tactic and others, were aimed at dissuading donors and sponsors from investing in the running of the ECCC. Perhaps this became the reason for the resilience of the international factions to not lose the battle.[25] As Etcheson explains, the trial process was also severely burdened by a series of resignations of key personnel. The US withdrew funding in the first few years of the ECCC and cautiously released them with the condition that corruptible practices of local authorities be kept under control.[26] Budget deficiencies arose in 2013 when some members of the staff were cut back, while others went on strike to protest non-payment of salaries, with the problem reaching a peak in 2017.[27] Moreover, Hun

18 Etcheson., pp. 178–9.
19 Ibid., pp. 198-199.
20 Ibid., p. 211.
21 Ibid., pp. 219-22.
22 Ibid., p. 221.
23 Ibid., p. 223.
24 Ibid., p. 239.
25 Ibid., p. 259.
26 Ibid., p. 315.
27 Ibid., pp. 317-9.

Sen's continued interference in the process gave succour to potential defendants to be defiant and act as if they were above the law (evident through Etcheson's account of how Meas Muth and Im Chaem reacted to the possibility of facing trial).[28]

Etcheson's work is a demonstration of what happens when people with vested interests and embroiled in a tornado of debates, petty gossip and clashing egos gather in a single space to negotiate laws and align objectives. The process leading up to the formation of the ECCC and its aftermath clearly involved cherry-picking ideas, laws, doctrines and principles from several different legal systems, casting lingering suspicion on the legitimacy of the tribunal and its judgments.

What ought to be borne in mind when studying this work is that although the author may have penned the UN, the US and Cambodia neatly in the three categories of legalism, in reality matters were more fluid than that, with parties hopping from one type of legalism to the next, and/or back again. Proof of this is Etcheson's own assertion that the UN, a usual observer of classical legalism, switched over to strategic legalism in making funding a legal requirement at some point.[29] In applying international standards in the ECCC, it was also evident that with the many different jurisdictions/countries involved, it was impossible to hold a monolithic view of what these international standards constituted. This would also mirror Etcheson's other observation in the introduction of the book that the binary distinction made between first world and third world nations is in truth suspect, for much of the first world and its people, as demonstrated by recent global affairs, are guilty of 'third world behaviour'.[30]

Etcheson concludes that it was through strategic legalism that there was a meeting of minds between the East and the West, insisting that the ECCC was not wholly a plaything of instrumental legalism.[31] Instead it also provided important nuances in terms of results, and had more legitimacy than the PRT (People's Revolutionary Tribunal) or the Stalinist Show Trials. It was unfortunate however, that only five members of the Khmer Rouge, all in their 80s, were prosecuted.[32]

Ultimately, says Etcheson, one can't escape the truth that 'law is suffused with politics', and the process leading up to the creation

28 Etcheson, p. 325.
29 Ibid., p. 139.
30 Ibid., p. 3.
31 Ibid., p. 344.
32 Ibid., p. 345.

and running of the ECCC was an added confirmation of that.[33] In the final part of his magnum opus, Etcheson segues into an account of the court's negative and positive legacy, laying down points that are obviously yet to be determined (and which could therefore be the subject of another research project). Etcheson mentions, among others, that material collected during that period has not entirely been made accessible to the public.[34] On the positive side, Etcheson notes that outreach activities made it possible for Cambodian civilians to broach the once taboo topic on the atrocities of the Khmer Rouge, adding that references to this difficult but important period of Cambodian history were eventually inserted in school textbooks.[35]

Certainly a unique and essential contribution to literature on the Khmer Rouge, this book deserves praise for its preoccupation with details, as well as the effort and perspicacity of its author in ploughing through and summarising the panoply of debates confronting the UN, the US, and Cambodia in the gargantuan task of setting up the ECCC.

33 Etcheson, p. 345.
34 Ibid., p. 348.
35 Ibid., p. 351.

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