

**An Introductory Note on
Reflections on Transitional Justice:
The ‘Hybrid’ Perspectives on Transitional Justice at the ECCC**
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As we speak, efforts are underway to initiate truth commissions and courts of special jurisdiction in Colombia, Sri Lanka, and Tunisia. Mindful of the teachings from the past, this online symposium reflects on experiences from past transitional justice mechanisms that could contribute to the transitional justice systems being implemented in these three countries.

As an opening to the symposium, I have been asked to introduce the readers to the topic and share my reflections from a system of transitional justice that I know well. I will briefly present the questions posed to the guest contributors to this symposium, and I will then share my reflections on the experiences that could be learned from the Extraordinary Chambers in the Courts of Cambodia, where I sat as a Judge.

A. The symposium and the Case Studies

Experts, jurists and practitioners who have experience in previous systems of transitional justice were asked to answer a common line of inquiry in relation to the three case studies of Colombia, Sri Lanka and Tunisia.² To help readers navigate through the pieces of the symposium, this is a brief introduction to the situation of each of the three case studies:

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² The following questions were presented to the guest contributors:

What is the right balance between flexibility and accountability in transitional justice processes? How do choices of transitional justice mechanisms affect human rights and democracy? And how can transitional justice institutions and advocates in fraught political environments balance the needs of justice and the requirements of the Rome Statute against political realities? What can human rights advocates and lawyers do to advance the goals of truth, justice, and reconciliation in such contexts? What lessons learned from past internationalized tribunals and truth commissions might apply to these situations?

1. Description of the Case Study of Colombia

On November 24, 2016, the Colombian government reached a peace agreement with the Revolutionary Armed Forces of Colombia – People’s Army (FARC-EP).³ The agreement was approved by the Colombian Congress on November 30, 2016⁴ in a special procedure which the Constitutional Court declared constitutional on December 13, 2016.⁵ ICC Prosecutor Mme. Fatou Bensouda had previously labelled the closing of the peace talks as a “historic achievement” and a “critical step towards ending this protracted conflict during which numerous atrocities were allegedly committed by all parties.”⁶

One of the sections of the agreement proposes a system of transitional justice under the name “Holistic System for Truth, Justice, Reparation, and non-Repetition.” This system is composed of three parts working “in an articulated and complementary manner”⁷ – (1) the Commission for the Elucidation of Truth, Coexistence, and Non-Repetition; (2) the Special Unit for the Search for Disappeared Persons; and (3) the Special Jurisdiction for Peace (SJP).⁸ The SJP will be composed of national judges who will be advised by foreign jurists. There will be 38 national judges and 10 foreign jurists in all chambers of the SJP.⁹ The committee in charge of appointing the foreign jurists includes former President of the Inter-American Court of Human Rights, Judge Diego García-Sayán, former Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Mr. Juan Méndez, and former Commissioner for Human Rights of Council of Europe, Mr. Álvaro Gil-Robles.¹⁰ It has already selected the national judges and is yet to appoint the foreign jurists.¹¹

³ *Final Agreement for the End of the Conflict and the Construction of a Stable and Durable Peace* [Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera] (Colom.) (Nov. 24, 2016), <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>.

⁴ Reuters, *Colombian peace deal passed by Congress, ending 52-year war* (30 Nov. 2016), <http://www.reuters.com/article/us-colombia-peace-idUSKBN13P1D2>.

⁵ El Tiempo, *Corte aprueba el ‘fast track’ para implementar el acuerdo de paz* [Court approves fast-track procedure to implement peace agreement] (13 Dec. 2016), <http://www.eltiempo.com/politica/justicia/corte-constitucional-aprueba-el-fast-track-para-nuevo-acuerdo-de-paz/16772050>.

⁶ International Criminal Court Office of the Prosecutor, *Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People’s Army* (Sept. 1, 2006), <https://www.icc-cpi.int/Pages/item.aspx?name=160901-otp-stat-colombia>.

⁷ Final Agreement, *supra* note 3, at 112, 115.

⁸ *Id.*, at 113, 117.

⁹ *Id.*, at 167–168, 191.

¹⁰ See, e.g., ICTJ, ICTJ Names Human Rights Leader Juan E. Méndez to Colombia Justice Committee, <https://www.ictj.org/news/ictj-human-rights-juan-m%C3%A9ndez-colombia-justice>. See also *Elección Visible. Jurisdicción Especial para la Paz*, <http://eleccionvisible.com/index.php/jep>.

¹¹ See Comité de Escogencia, *Sistema Integral de Verdad, Justicia, Reparación y No Repetición, Comunicado 18. Lista de Seleccionados(as) del Tribunal para la Paz, las Salas de la JEP y la Dirección de la Unidad de Búsqueda de Personas Dadas por Desaparecidas (UBPD)*, (Sept. 26, 2017), <http://www.comitedeescogencia.com/>

2. *Description of the Case Study of Sri Lanka*

In 2015, six years after the end of the Sri Lankan Civil War, the United National Party and the Sri Lanka Freedom Party, traditional political rivals, joined forces to form a unity government.¹² The government's plan for pursuing justice and accountability was first articulated by the Foreign Minister in an address to the Human Rights Council in September 2015. The Foreign Minister explained that the Government was committed to securing truth, justice, accountability, and reconciliation, and that it would create four transitional justice mechanisms in pursuit of these goals: a Commission for Truth, Justice, Reconciliation, and Non-recurrence; an Office of Missing Persons; a judicial mechanism with a special counsel; and an Office for Reparations.¹³

These commitments were confirmed in a Human Rights Council resolution, co-sponsored by Sri Lanka and adopted on October 1, 2015.¹⁴ The Human Rights Council expressly “[w]elcome[d] . . . the proposal by the Government to establish a commission for truth, justice, reconciliation and non-recurrence, an office of missing persons and an office for reparations.”¹⁵ The Council further “affirm[ed] that these commitments, if implemented fully and credibly, will help to advance accountability for serious crimes by all sides and to achieve reconciliation.”¹⁶

In January 2016, the government created the Consultation Task Force, composed of members of civil society, to lead the process of national consultations on transitional justice.¹⁷ It also created Zonal Task Forces to conduct simultaneous regional consultations.¹⁸ In January 2017, the Consultation Task Force released its final report.

3. *Description of the Case Study of Tunisia*

In January 2011, Tunisian president Zine al-Abidine Ben Ali had to step down and flee the country.¹⁹ Immediately following the success of the uprising, Tunisian civil society began to call for the implementation of a transitional justice mechanism as part of the country's democratic transition. A number of new transitional justice-focused associations were formed, and a National Dialogue on Transitional Justice was launched on April 14, 2012.²⁰ On December 15, 2013, Tunisia's post-revolutionary National

¹² Deutsche Welle, *Sri Lanka sets up national unity government to speed up reforms*, March 22, 2015, <http://www.dw.com/en/sri-lanka-sets-up-national-unity-government-to-speed-up-reforms/a-18333225>.

¹³ Mangala Samaraweera, Foreign Minister of Sri Lanka, Address to the 30th session of the Human Rights Council, Geneva (Sept. 6, 2015).

¹⁴ Human Rights Council, *Promoting reconciliation, accountability, and human rights in Sri Lanka*, UN Doc. A/HRC/RES/30/1 (Oct. 14, 2015).

¹⁵ *Id.*, ¶ 4.

¹⁶ *Id.*

¹⁷ Accountability & Reconciliation in Sri Lanka: Dr. Saravanamutthu and Ms. Manori Muthettuwegama to Head the Task Force, Sri Lanka Brief (Jan. 15, 2016), <http://srilankabrief.org/2016/01/accountability-reconciliation-in-sri-lanka-dr-saravanamutthu-and-ms-manori-muthettuwegama-to-head-the-task-force/>.

¹⁸ Secretariat for Coordinating Reconciliation Mechanisms, *Frequently Asked Questions*, <http://www.scrm.gov.lk/faqs-consultations>.

¹⁹ David D. Kirkpatrick, *Tunisia Leader Flees and Prime Minister Claims Power*, NY TIMES, January 14, 2011, http://www.nytimes.com/2011/01/15/world/africa/15tunis.html?pagewanted=all&_r=0

²⁰ See, e.g., Amin Al-Ghali, *The journey of transitional justice in Tunisia: From civil movement to legislation*, UNDP Regional Bureau for Arab States, Sep. 26, 2016, <http://www.arabstates.undp.org/content/dam/rbas/doc/Compendium%20English/Part%202/32%20Amine%20Ghali%20EN.pdf>; ICTJ Welcomes Tunisia's Historic Transitional Justice Law, ICTJ, Dec. 16, 2013,

Constituent Assembly passed the Organic Law on Establishing and Organizing Transitional Justice by a vote of 125-1.²¹ The law sets out a comprehensive approach to addressing past human rights abuses and creates a Truth and Dignity Commission, a Fund for the Dignity and Rehabilitation of Victims of Tyranny, and special chambers to hear cases of human rights violations.²² The commitment to transitional justice was also enshrined in the Tunisian Constitution of 2014.²³

The Truth and Dignity Commission was formally launched in June 2014 by then-President Mouncef Marzouki.²⁴ Its mandate covers human rights violations committed between 1955 and December 2013, and is authorized to employ judicial and non-judicial mechanisms to investigate gross human rights violations and provide compensation and rehabilitation to victims.²⁵ The Commission, which was given a four-year deadline to complete its work, with the possibility of a one-year extension,²⁶ soon began receiving testimonies of victims, and by the cut-off registration date of June 2016, it had received over 62 thousand submissions.²⁷ The Commission held its first public hearing November 17, 2016.²⁸

B. My reflections from the Extraordinary Chambers in the Courts of Cambodia (ECCC)

Probably the best takeaway from the ECCC is its widespread positive impact in different fields, including the Cambodian judiciary and international humanitarian law, as well as its impact on Cambodians themselves and the Asian community more generally. Since its establishment, the ECCC, as a hybrid court, through the participation of the Cambodian Judiciary in the ECCC proceedings, has enhanced the sense of involvement of the Cambodian people in the court cases. And by collecting and exchanging information on capacity needs, the ECCC has strengthened the national justice system and its capacity. In this regard, the hybrid character of the ECCC and its international jurisprudence have provided the most unique and valuable example of the

<https://www.ictj.org/news/ictj-welcomes-tunisia's-historic-transitional-justice-law>

²¹ICTJ, *ICTJ Welcomes Tunisia's Historic Transitional Justice Law*, Dec. 16, 2013,

<https://www.ictj.org/news/ictj-welcomes-tunisia's-historic-transitional-justice-law>.

²² See Tunisian Organic Law on Establishing and Organizing Transitional Justice, available at

<http://www.ohchr.org/Documents/Countries/TN/TransitionalJusticeTunisia.pdf>

²³ Constitution of Tunisia (2014), art. 148(9),

https://www.constituteproject.org/constitution/Tunisia_2014.pdf (“[t]he state undertakes to apply the transitional justice system in all its domains and according to the deadline prescribed by the relevant legislation.”)

²⁴ United Nations Development Program, *Tunisia Launches Truth and Dignity Commission*, June 9, 2014,

<http://www.undp.org/content/undp/en/home/presscenter/articles/2014/06/09/tunisia-launches-truth-and-dignity-commission.html>

²⁵ *Id.*

²⁶ Tunisian Organic Law, *supra* note 21, art. 18.

²⁷ Salwa El Gantri, In Tunisia, 62,000 Voices Call Out for Justice, ICTJ, Dec. 19, 2016,

<https://www.ictj.org/news/tunisia-justice-dignity-truth>.

²⁸ Videos of the public hearings, with English translations, are available at,

<https://www.ictj.org/news/tunisia-public-hearings-TDC-december-16>.

implementation of transitional justice.²⁹

1. Impacts on Domestic Court Proceedings

Considering the fact that the ECCC's judicial procedure is very much connected with the Cambodian judicial procedure, the ECCC's international jurisprudence must have a domestic impact. In particular, such principles as admissibility of evidence, credibility and assessment of evidence, transparency, party rights, standards for judicial independence and impartiality have real application in the domestic courts regardless of the nature of those proceedings.³⁰ The ECCC and many NGOs, for instance, have already started many transitional justice projects for this purpose, and some of them are at their final stages of implementing those outcomes into the Cambodian domestic system with the cooperation of the relevant Cambodian authorities.³¹ International Judges and staff members of the ECCC, moreover, have also achieved great transitional justice outcomes not only by rendering decisions in the Court's cases, but also by performing personal outreach activities, such as attending seminars, giving special lectures or connecting the Cambodian judiciary with the judiciaries of other countries.³² Therefore, the domestic impact should always be a fundamental concern of any transitional justice project.

Furthermore, the Pre-Trial Chamber (PTC) of the ECCC has produced a meaningful decision in relation to the ECCC's character as a hybrid court. As conflicts or disagreements arising from its hybrid character during judicial investigation are supposed to be filed before the PTC, the PTC has faced many unique situations that other UN-backed courts had never experienced before. And yet, the PTC has handled those situations in accordance with the international standards and jurisprudence.³³

2. Impacts on the jurisprudence of international humanitarian law (IHL)

At the outset, the ECCC's temporal jurisdiction is limited to a period between 1975 and 1979, which precedes the International Criminal Tribunal for the Former Yugoslavia (ICTY) by more than a decade.³⁴ For this reason, international jurisprudence from courts whose jurisdiction starts much later, such as the ICTY, the International Criminal Tribunal for Rwanda (ICTR), Special Court of Sierra Leone (SCSL), Special Tribunal for

²⁹ See Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Oct. 27, 2004, NS/RKM/1004/06 [hereinafter, ECCC Law] arts. 9, 4, https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

³⁰ *Id.*, art. 33 new, 35 new.

³¹ See, e.g., ICTJ, Cambodia. ICTJ's Role, <https://www.ictj.org/our-work/regions-and-countries/cambodia>.

³² See, e.g., Extraordinary Chambers in the Courts of Cambodia (ECCC), New video outlines outreach at universities and high schools (Sept. 25, 2012), <https://www.eccc.gov.kh/en/articles/new-video-outlines-outreach-universities-and-high-schools>.

³³ See, generally, Case 004, Case No. 004/19-01-2012-ECCC/PTC, Opinion of the Pre-Trial Chamber Judges Downing and Chung on the Disagreement between the Co-Investigating Judges pursuant to Internal Rule 72, (ECCC Pre-Trial Chamber, Feb. 23, 2012); Case 003, Case No. 003/16-12-2011-ECCC/PTC, Opinion of the Pre-Trial Chamber Judges Downing and Chung on the Disagreement between the Co-Investigating Judges pursuant to Internal Rule 72, (ECCC Pre-Trial Chamber, Feb. 10, 2012).

³⁴ See ECCC Law, *supra* note 28, art. 1.

Lebanon (STL) and the International Criminal Court (ICC), is of limited relevance to the ECCC in areas such as the interpretation of procedural matters or as the initial reference point concerning customary international law. Thus, as the ECCC's decisions must be based on the state of international law prior to 1975-1979 in determining legality and the elements of the crimes, the International Military Tribunal's Judgment, the Nuremberg Subsequent Judgments, and the Tokyo Judgments have served as the primary body of law upon which the ECCC may rely.

The ECCC's unique position to clarify the state of IHL prior to 1975-1979 has resulted in certain landmark decisions challenging the jurisprudence of the ICTY and other international courts. For example, the May 2010 Decision on Joint Criminal Enterprise (JCE) by the Pre-Trial Chamber found that the third form of JCE violated the principle of legality insofar as it was not customary international law prior to 1975-1979.³⁵ This kind of different perspective arising from a different timeframe demonstrates the development of IHL by bridging the 50 years gap between the post-World War II courts and the ICTY.

Moreover, the hybrid character of the ECCC has been an effective solution to harmonize the criminal law of domestic legal systems and international jurisprudence of IHL. An important point to note is that the lessons learned at the ECCC will assist the ICC and future courts in selecting the aspects from diverse legal systems that better advance the pursuit of justice in IHL. The ECCC, as a system whose criminal law is modelled on French law, for instance, adds more civil law to the field of modern IHL in comparison with the common law-based tribunals, such as the ICTY, ICTR and SCSL. Thus, the ECCC also provides a bridge between the common law system and the civil law system in the field of IHL.

3. *Impacts on Cambodian People*

As the ECCC is located in Cambodia where the crimes were committed, Cambodian people, especially victims, are able to attend all the hearings and witness not only the realization of justice but also the application of due process and the rule of law over the whole court procedure.³⁶ The Court has received more than 150,000 visitors for the public hearings.³⁷ In this regard, the ECCC works with local NGOs to ensure that Cambodians from poor and rural villages are also able to attend hearings and learn about the work of the Court.³⁸ The number of Cambodians who “considered that justice would be a likely positive impact of the ECCC” increased after the first trial from two to thirty-seven percent.³⁹ Furthermore, the ECCC is the first international court to allow

³⁵ See Case 002, Case No. 002/19-09-2007-ECCC-OCIJ (PTC37), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), D97/17/6, ¶¶ 87, 88 (ECCC Pre-Trial Chamber, May 20, 2010) (restricting its applicability to international crimes).

³⁶ See ECCC Law, *supra* note 28, art. 2.

³⁷ See ECCC, Distribution ceremony for Appeal Judgement in Case 001 (Aug. 3, 2012), <https://www.eccc.gov.kh/en/articles/distribution-ceremony-appeal-judgement-case-001>.

³⁸ Interview by World Movement for Democracy with Youk Chhang, Director of Documentation Center of Cambodia, <https://web.archive.org/web/20140204011052/http://www.wmd.org/resources/whats-being-done/memory-projects/interview-youk-chhang-director-documentation-center-cambo> (last visited Sept. 24, 2017).

³⁹ Phuong Pham et al., After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia 29 (UC Berkley Hum

victims to participate as full parties in the proceedings and has demonstrated that victims' participation could be balanced with the rights of other parties.⁴⁰

4. *Impacts on Asia*

As the only international tribunal established in Asia, the ECCC has shown vast potential for transitional justice and development of the rule of law and human rights throughout Asia. The legacy of the ECCC may enable the integrated and well-balanced development of the rule of law and human rights protection in this region.

Furthermore, the transitional justice experience of the ECCC could be continuously and systematically disseminated throughout Asia by establishing the Asian Court of Human Rights. Given the immense population of Asia, the fast economic growth of Asian states, and great enthusiasm of Asian people, it is now the right time to open up discussions for the establishment of the Asian Court of Human Rights.⁴¹ During the discussion process, Asian states will have the opportunity to share their experiences, and this could enable Asian states to evaluate, compare and even improve their own human rights protection systems.

C. Overall Reflection to Open this Symposium

In recent decades, the establishment of transitional justice institutions—such as truth commissions as well as national, international or hybrid tribunals—has become a regular occurrence following the end of armed conflicts or the fall of authoritarian regimes. As long as systems of transitional justice address “unimaginable atrocities that deeply shock the conscience of humanity,”⁴² we the peoples, as human beings, have the duty and the right to demand accountability. We, however, shall defer to local efforts to adjudicate atrocity crimes under domestic systems of justice.⁴³ This will encourage local efforts to reach peaceful settlements to armed conflicts and transitions into the rule of law. This balance between accountability and peace is essential to the idea of transitional justice addressed today in this symposium.

The Cambodian experience, as others discussed in this symposium, is one that could serve as example for Colombia, Sri Lanka and Tunisia. In Cambodia, all members of the ECCC and all the Cambodian people supporting the court have played a great role in developing transitional justice in accordance with international standards, in spite of the inherent challenges apparent in its hybrid character. These efforts and achievements of the ECCC and its transitional justice outcome should not be overlooked.

an Rights Center, June 2011), <http://www.law.berkeley.edu/11994.htm>).

⁴⁰ See ECCC Law, *supra* note 28, art. 36 new. See also ECCC, Internal Rules, Rule 23.

⁴¹ See Chang-ho Chung, *The Emerging Asian-Pacific Court of Human Rights in the Context of State and Non-State Liability*, 57 *Harvard International Law Journal*, 44–47, 2016, http://www.harvardilj.org/wp-content/uploads/Chung_0615.pdf.

⁴² Rome Statute of the International Criminal Court, Preamble, 2187 U.N.T.S. 90, entered into force July 1, 2002.

⁴³ See *id.*, Preamble (“the International Criminal Court established under [the Rome] Statute shall be complementary to national criminal jurisdictions.”).