

IT'S NEVER  
ENOUGH SAID:  
THE RELATIONSHIP  
BETWEEN  
ACTION AND  
DISCOURSE AT THE  
EXTRAORDINARY  
CHAMBERS IN  
THE COURTS OF  
CAMBODIA

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- 1 The term 'internationalised tribunal' is defined as a tribunal where both 'the institutional apparatus and applicable law consist of a blend of the international and the domestic': Laura A Dickinson, 'The Promise of Hybrid Courts' (2003) 97 *American Journal of International Law* 295, 295.
- 2 ECCC, *Introduction to the ECCC* <<https://www.eccc.gov.kh/en/about-eccc/introduction>>.
- 3 ECCC, *Internal Rules (Rev. 9)* (adopted 16 January 2015) Preamble.

## I INTRODUCTION

The theme of Court of Conscience's 2017 Issue, 'Enough Said', poses a problematic framework for approaching social injustices. The theme proposes that criticism and analysis of social injustices is only useful to a certain extent, encouraging a turn away from words and towards actions. I agree that there is an essential need for effective action in addressing social injustices. However, there are two assumptions that 'Enough Said' implies, which I view as problematic: first, that action is more effective than discourse, and second, that those affected by injustices have been able to speak at all. Here, I define 'discourse' as words; synonymous with speaking, criticising and analysing. I define 'action' as doing, for example practical initiatives and activities which aim to remedy social injustices. Henceforth, I aim to unpack these assumptions through a study of the relationship between action and discourse in investigating crimes of sexual and gender-based violence ('SGBV') at the Extraordinary Chambers in the Courts of Cambodia ('ECCC'). In sum, I aim to illustrate how action and dialogue are *equally important, interdependent and continually needed* in investigating and prosecuting crimes of SGBV at the ECCC, in order to portray that when it comes to addressing social injustices, it's never 'enough said'.

### A THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

The ECCC, also known as the Khmer Rouge Tribunal, is an internationalised tribunal<sup>1</sup> established by the Royal Government of Cambodia and supported by the United Nations.<sup>2</sup> The ECCC's mandate is to prosecute the senior leaders and those most responsible for the crimes committed during the period of Democratic Kampuchea ('DK') between 1975 and 1979.<sup>3</sup> Aside from holding those most responsible accountable, the remit of the court includes rehabilitation for victims,

educating the public and strengthening the rule of law to contribute to the reconstruction of Cambodian society.<sup>4</sup>

## B CRIMES OF SEXUAL AND GENDER-BASED VIOLENCE

Sexual crimes are commonly understood as physical or non-physical acts with a sexual element, for example rape or enforced prostitution.<sup>5</sup> Gender-based crimes are acts committed against a person because of their sex or because of socially constructed gender roles.<sup>6</sup> Forced marriage was a unique practice during the Khmer Rouge, where couples were arbitrarily married without choice or consent.<sup>7</sup> Subsequently, married couples were pressured or coerced by Khmer Rouge cadre to consummate their marriage.<sup>8</sup> Through examining the treatment of SGBV crimes both inside and outside of forced marriage at the ECCC, I will illustrate that action and dialogue are equally important, interdependent and continually needed in addressing SGBV crimes.

## II EQUALLY IMPORTANT

Crimes of sexual and gender-based violence were originally not prioritised during investigation at the ECCC, due to a popular assumption that there had been little to no SGBV perpetrated during the Khmer Rouge.<sup>9</sup> This assumption was based on a culture of victim-blaming and on an official Khmer Rouge policy in which rape was a ‘immoral offense’ severely punished if perpetrated by Khmer Rouge cadre.<sup>10</sup> Indeed, Judge Sylvia Cartwright of the ECCC’s Trial Chamber noted that ‘this particular conflict is unusual [in that] it does not contain allegations of widespread violence against women’.<sup>11</sup> Palmer and Williams also attribute the all-male investigation team and lack of SGBV expertise at the Court to the failure to consider investigating such crimes.<sup>12</sup> Here, it would have been problematic to conclude that it was ‘enough said’ in regards to crimes of SGBV during the Khmer Rouge.

Instead, it is the dialogue that was facilitated by investigators in the course of their investigation that provided a platform for victims to speak about their experiences with SGBV during the DK era. Evidence that emerged in the course of conversation with witnesses included the victims of rape being punished<sup>13</sup> and civilians being coerced into consummating their forced marriages by Khmer Rouge cadre.<sup>14</sup> As a result of this dialogue, the Trial Chamber indicated that it would consider allegations of rape within forced marriage in Case 002/02.<sup>15</sup> Rape within forced marriage was characterised as an ‘other inhumane act’ of crimes against humanity.<sup>16</sup> Here, the equal importance of the action of investigation and the dialogue facilitated with witnesses and victims in bringing SGBV crimes within the ambit of the ECCC is illustrated. This is not to say that action and dialogue should be applied in equal measure, or that it is even possible to quantify such measures, but simply that both should be prioritised and present when addressing social injustices. Without the voices of those affected by SGBV crimes during the DK regime, the ECCC would not have been able to dispel the popular myth that sexual violence was not perpetrated during the DK era. In this sense, action and dialogue are of equal importance.

## III INTERDEPENDENT

The ECCC’s decision to include rape within the scope of Case 002/02 was simultaneously welcomed and criticised by academics and civil society actors.<sup>17</sup> This is because the Trial

- 4 See ECCC, *Why Are We Having Trials Now? How Will the Khmer Rouge Trials Benefit the People of Cambodia?* (2011) <<https://www.eccc.gov.kh/en/faq/why-are-we-having-trials-now-how-will-khmer-rouge-trials-benefit-people-cambodia/>>.
- 5 The Office of the Prosecutor, ‘Policy Paper on Sexual and Gender-Based Crimes’ (Policy Paper, International Criminal Court, June 2014) 3.
- 6 *Ibid.*
- 7 Transcultural Psychosocial Organization Cambodia, ECCC and Cambodian Defenders Project, *Forced Marriage, GBV under the Khmer Rouge Information Platform* <<http://gbvkr.org/gender-based-violence-under-khmer-rouge/facts-and-figures/forced-marriage/>>.
- 8 Theresa de Langis et al. “‘Like Ghost Changes Body’: A Study on the Impact of Forced Marriage under the Khmer Rouge Regime” (Report, October 2014) 28.
- 9 Rachel Killean, ‘An Incomplete Narrative: Prosecuting Sexual Violence Crimes at the Extraordinary Chambers in the Courts of Cambodia’ (2015) 13 *Journal of International Criminal Justice* 331, 334, 338–9.
- 10 *Ibid* 334–5.
- 11 Abby Seiff, ‘KR Regime an Anomaly on Gender-Based Violence’ *The Cambodia Daily* (Phnom Penh) 17–18 September 2011, 11 <<http://www.civilparties.org/?p=1843>>.
- 12 Emma Palmer and Sarah Williams, ‘A “Shift in Attitude”? Institutional Change and Sexual and Gender-Based Crimes at the Extraordinary Chambers in the Courts of Cambodia’ (2017) 19 *International Feminist Journal of Politics* 22, 26–7.
- 13 Theresa de Langis and Silke Studzinsky, ‘Briefing Paper on the ECCC, the Cambodian Women’s Hearings, and Steps for Addressing Sexual Violence under the Khmer Rouge Regime’ (Briefing Paper, May 2012) 5.
- 14 Killean, above n 9, 336.
- 15 Palmer and Williams, above n 12, 28.
- 16 ‘[T]he Trial Chamber confirmed that Case 002/02 would consider charges of “other inhumane acts” of forced marriage and sexual violence within forced marriage’: *Ibid.* The decision to consider charges of rape as an ‘other inhumane act’ of crimes against humanity has been widely criticised because it was open to the Trial Chamber to consider rape as its own enumerated crime against humanity of rape: ECCC, *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea* (adopted 2 January 2001) art 5. For a discussion of the legal arguments and the gendered nature of this decision, see Sarah Deibler, ‘Rape by Any Other Name: Mapping the Feminist Legal Discourse Regarding Rape in Conflict onto Transitional Justice in Cambodia’ (2017) 32 *American University International Law Review* 501.

- 17 See, eg, *Ibid.*
- 18 *Ibid* 511–20.
- 19 ECCC, *Press Release by the Trial Chamber Regarding Sexual Violence Crimes* (6 June 2012) <<https://www.eccc.gov.kh/en/articles/press-release-trial-chamber-regarding-sexual-violence-crimes>>.
- 20 *Ibid.*
- 21 Beini Ye, 'Transitional Justice Through the Cambodian Women's Hearings' *Cambodia Law and Policy Journal* 23, 28.
- 22 See, eg, ECCC above n 19: '[I]nternational crimes must be met by varied responses, and much of the benefit of the ECCC will be found not only in the verdicts issued, but also in the impetus they bring to other measures that serve to empower victims and alleviate their suffering'.
- 23 'In contrast [to the ECCC], the Women's Hearings captured individual narratives only from the perspective of victims without endeavouring to present an objective version of past events': Ye, above n 21, 28.
- 24 Cambodian Defender's Project, 'Report on the Proceedings of the 2011 Women's Hearings on Sexual Violence under the Khmer Rouge Regime' (May 2012) 2.
- 25 Ye, above n 21, 27.
- 26 Cambodian Defender's Project, above n 24, 16.
- 27 Nicholas Koumjian, *International Co-Prosecutor Requests Investigation of Alleged Sexual and Gender-Based Violence in Case 004* (24 April 2014), ECCC, <<https://www.eccc.gov.kh/en/articles/international-co-prosecutor-requests-investigation-alleged-sexual-and-gender-based-violence>>.

Chamber was to only consider evidence of rape within forced marriages, as opposed to evidence of rape perpetrated by Khmer Rouge cadre in other situations.<sup>18</sup> This isolated many victims whose testimony of SGBV perpetrated by Khmer Rouge cadre outside of forced marriage would not be heard in the Case 002/02 trial. Most notably, United Nations Special Representative to the Secretary-General on Sexual Violence in Conflict, Margot Wallström, criticised the legal characterisation of rape and called on the ECCC to use 'the full benefit of the court's resources and attention' in regards to crimes of SGBV.<sup>19</sup> An ECCC press release in response to Wallström's statement acknowledged that the Court had already benefited from recommendations made by SGBV experts and welcomed constructive suggestions to assist with the prosecution strategy of crimes of SGBV.<sup>20</sup> Here, the constant interaction between the action taken at the ECCC and resulting criticism and analysis reflects the interdependence of action and dialogue.

In response to the failure of the ECCC to consider witness testimony about crimes of SGBV outside of forced marriage,<sup>21</sup> and suggestions that civil society should act,<sup>22</sup> the Cambodian Defender's Project initiated a series of Women's Hearings which ran annually from 2011 to 2013. The Women's Hearings were designed as an alternative forum for women to voice their experiences of sexual violence perpetrated during the DK era free from the restrictions imposed at the ECCC.<sup>23</sup> The aim of the hearings was to provide a truth-telling forum on sexual violence, ensure that sexual violence was included in the historical account of Khmer Rouge atrocities and publicly acknowledge the suffering of survivors.<sup>24</sup> Following the hearings, all who testified reported feeling a sense of justice, relief and bonding with other survivors.<sup>25</sup> An expert panel at the hearings produced a set of recommendations for the ECCC, calling on the Court to investigate the extent, circumstances and actors of sexual violence during the DK era in future cases.<sup>26</sup> Indeed, rape as its own enumerated crime against humanity both inside and outside forced marriage has subsequently been alleged by the Co-Prosecutor in Case 004 currently under investigation at the ECCC.<sup>27</sup>

Interestingly, the Women's Hearings took the form of both action and dialogue, in that the hearings aimed to actively remedy the deficiencies of the Court by facilitating victims of SGBV crimes to speak about their experiences. It will always be essential to ask who is speaking when it comes to facilitating dialogue. In the case of Cambodia, it is increasingly important that voice be given to the nascent legal profession and academia as opposed to international non-government organisations ('NGOs'). Without criticism and analysis of the ECCC hearings, the Women's Hearings would have never taken place. And without women speaking about their experiences at the Women's Hearings, the ECCC would not have been prompted to investigate rape as an enumerated crime against humanity in Case 004. In this regard, action and dialogue are interdependent.

#### IV CONTINUALLY NEEDED

##### A SEXUAL AND GENDER-BASED VIOLENCE IN CONTEMPORARY CAMBODIAN SOCIETY

Unfortunately, the conversation facilitated about SGBV during the Khmer Rouge has not directly increased dialogue about crimes of SGBV committed in contemporary Cambodian society. While statistics on sexual violence in Cambodia are unreliable due to under-reporting and ineffective data collection, centrally placed sources such as the Ministry of Women's

Affairs believe that incidences of rape are ‘increasing and that a growing number of victims are children’.<sup>28</sup> The experience of being female in a patriarchal culture, a climate of impunity and widespread Government corruption prevent victims from being able to speak about their experiences, leaving the situation unaddressed.<sup>29</sup> Further, the silence around experiences of sexual violence in Cambodia makes it difficult for NGOs and civil society actors to effectively levy criticism and call for action. It is not enough that victims of SGBV during the Khmer Rouge are given a platform to speak; evidently there is a continual need to facilitate dialogue around experiences of SGBV in contemporary Cambodian society.

## B FREEDOM TO SPEAK IN CAMBODIAN SOCIETY GENERALLY

The continual need for dialogue extends further to the ability to speak in Cambodian society about a variety of social justice issues. Here, the Western-centric assumption that those affected by social injustices have been allowed to speak in the first place must be dispelled. In Cambodia, ‘incitement’ is a crime frequently employed by the Government to threaten, imprison or reprimand those who speak against the leaders of the Government.<sup>30</sup> Land-grabbing violations<sup>31</sup> and widespread Government corruption<sup>32</sup> are examples of social injustices which victims are often unable to speak out about without the threat of prosecution. July 2017 marked one year since popular political analyst Kem Lay was shot and killed at a Caltex petrol station just days after giving an interview with Voice of America Cambodia commenting on a new Global Witness report<sup>33</sup> which detail the alleged business empire of Cambodia’s ruling family.<sup>34</sup> Many Cambodians, including former leader of the opposition party Sam Rainsy, have since stated that this was a political assassination, and that leaders of the Cambodian Government are to blame.<sup>35</sup> Rainsy has since been tried in absentia and sentenced to jail for these comments.<sup>36</sup> Others who have made similar comments are either currently under investigation or in pre-trial detention.<sup>37</sup> It is offensive to suggest that it is ever ‘enough said’ in Cambodia when many human rights defenders are currently imprisoned indefinitely due to their attempts to speak out about social injustices.<sup>38</sup> The continual need for dialogue in Cambodian society is evident.

## C RECONCEPTUALISING DIALOGUE

In drawing out the lessons of the treatment of SGBV at the ECCC and applying them to wider issues of social injustice in contemporary Australian society, it is clear that dialogue plays a crucial role in providing victims a voice and allowing civil society to constructively criticise, analyse and improve action. In this sense, while effective action is crucial in addressing social injustices, dialogue is of equal importance. It is never ‘enough said’. It is essential to reconceptualise the role that dialogue plays in addressing social injustices. Speaking about and criticising social injustices should not play a merely preparatory role in action taken. Instead, a constant flow of dialogue must be encouraged around the injustice and the action. Dialogue is not merely a precursor to action; it is of equal importance, interdependence and continually needed.

## V CONCLUSION

As has been illustrated, the idea that it is ‘enough said’ when it comes to addressing social injustices is problematic because it perpetuates the myths that action is more effective than

28 Amnesty International, ‘Breaking the Silence: Sexual Violence in Cambodia’ (Report, March 2010) 6.

29 Ibid 39–40.

30 For example, a woman in a Facebook video pictured throwing her shoe at a sign featuring Prime Minister Hun Sen’s face was summonsed for questioning: Niem Chheng and Leonie Kijewski, ‘Woman Who Threw Shoe at CPP Sign in Video Sought’, *The Phnom Penh Post* (online), 10 April 2017 <<http://www.phnompenhpost.com/national/woman-who-threw-shoe-cpp-sign-video-sought>>.

31 See Emma Burnett, ‘I Became Victimised Because My Land was Grabbed, and Now I’ve Been Put in Prison’ on *Global Witness* (11 August 2017) <<https://www.globalwitness.org/en/blog/i-became-victimised-because-my-land-was-grabbed-and-now-ive-been-put-prison/>>.

32 See Amnesty International, above n 28, 40–1.

33 See Global Witness, *Hostile Takeover: The Corporate Empire of Cambodia’s Ruling Elite* (7 July 2016) <<https://www.globalwitness.org/en/reports/hostile-takeover/>>.

34 Sok Khemara, *An Interview with the Late Kem Lay* (13 July 2016) VOA Khmer <<https://www.voacambodia.com/a/an-interview-with-the-late-kem-ley/3415391.html>>.

35 Sek Odom and George Wright, ‘After Trial, Rainsy Accuses Government of Kem Lay Killing’, *The Cambodian Daily* (online), 17 March 2017 <<https://www.cambodiadaily.com/news/trial-rainsy-accuses-government-kem-ley-killing-126742/>>.

36 Niem Chheng, ‘Rainsy Sentenced Yet Again for Defamation’, *The Phnom Penh Post* (online), 31 March 2017 <<http://www.phnompenhpost.com/national/rainsy-sentenced-yet-again-defamation>>.

37 See, eg, Kuch Naren and George Wright, ‘Analyst Jailed over Kem Lay Comment after PM’s Threat’ *The Cambodian Daily*, 20 February 2017 <<https://www.cambodiadaily.com/morenews/analyst-jailed-over-kem-ley-comment-after-pms-threat-125417/>>; Meas Sokchea and Mech Dara, ‘Woman Arrested for Kem Lay Remarks’ *The Phnom Penh Post* (online), 13 July 2017 <<http://www.phnompenhpost.com/national/woman-arrested-kem-ley-remarks>>.

38 See Amnesty International, ‘Amnesty International Report 2016/17: The State of the World’s Human Rights’ (Annual Report, 2017) 104–5.

39 Nathan A Thompson, ‘Cambodia’s Dream of Democracy is Dying’ *CNN* (online), 5 September 2017 <<http://edition.cnn.com/2017/08/31/opinions/cambodia-press-attack-opinion-thompson/index.html>>.



- 40 Ibid.
- 41 Post Staff, 'Developing: CNRP Leader Kem Sokha Arrested for "Treason"' *The Phnom Penh Post* (online), 3 September 2017 <[http://www.phnompenhpost.com/national/developing-cnrp-leader-kem-sokha-arrested-treason?utm\\_content=buffer35158&utm\\_medium=social&utm\\_source=facebook.com&utm\\_campaign=buffer](http://www.phnompenhpost.com/national/developing-cnrp-leader-kem-sokha-arrested-treason?utm_content=buffer35158&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer)>.
- 42 Ibid.
- 43 Julia Wallace, 'Cambodia's Opposition Chief loses Immunity in Treason Case' *The New York Times* (online), 11 September 2017 <<https://www.nytimes.com/2017/09/11/world/asia/cambodia-kem-sokha.html?mcubz=0>>.
- 44 Deborah Krisher-Steele and Jodie DeJonge, 'The Cambodia Daily to Close After 24 Years' *The Cambodia Daily* (online), 4 September 2017 <<https://www.cambodiadaily.com/cambodia-daily-close-24-years/>>.
- 45 Euan Black, 'Cambodia Daily Publishers Banned from Leaving the Country' *Southeast Asia Globe* (online), 4 September 2017 <<http://sea-globe.com/cambodia-daily-publishers-banned-leaving-country/>>.
- 46 Thompson, above n 39.
- 47 Matthew Tostevin and Prak Chan Thul, 'Cambodian Paper Shuts with "Dictatorship" Parting Shot' *Thompson Reuters* (online), 4 September 2017 <<https://www.reuters.com/article/us-cambodia-media/cambodian-paper-shuts-with-dictatorship-parting-shot-idUSKCN1BE11H>>.
- 48 See, eg. Government spokesperson Phay Siphon's recent statement that "[i]f Kem Sokha is involved with foreign agents, a foreign government, to topple the Cambodian government, that is treason," he added. "During the 1960s they killed those people involved with the U.S., they shot them": Wallace, above n 43.

dialogue and that those affected by social injustices have been able to speak at all. The action of speaking to witnesses and victims affected by SGBV during the Khmer Rouge, and the dialogue facilitated during the course of these conversations, reflect that action and dialogue were of *equal importance* in bringing SGBV crimes within the ECCC's ambit. The criticism and analysis of the court's legal characterisation of rape by civil society, and the extra-judicial steps taken such as the Women's Hearings, show that dialogue and action were *interdependent* in encouraging a more comprehensive legal characterisation of crimes of SGBV in later cases at the ECCC. Unfortunately, the dialogue facilitated around SGBV crimes during the DK era has done little to increase conversations about SGBV crimes in contemporary Cambodian society, highlighting that action and dialogue are *continually needed* to address social injustices. It is therefore essential to reconceptualise the role that speaking, criticising and analysing plays in combating social injustices. Action and dialogue are not mutually exclusive. Instead, they are intertwined and inseparable. Because of this, when it comes to addressing social injustices, it is never 'enough said'.

## END NOTE

Between the time I drafted this article in June 2017 and its publication in October 2017, the situation for freedom of the press and democracy in Cambodia has deteriorated rapidly. On 24 August, independent Cambodian broadcasters including Radio Free Asia, Voice of Democracy and Voice of America were ordered to stop broadcasting 'outside programs' without authorisation.<sup>39</sup> Around the same time, changes to visa requirements made it easier for the Government to deny visas to journalists who displease them.<sup>40</sup> On 3 September, a midnight raid of the house of the leader of the opposition, Kem Sokha, resulted in his arrest, detention and being charged with treason.<sup>41</sup> The allegations involve a 2014 interview which is alleged to suggest that he received support from the US Government.<sup>42</sup> This is in defiance of his constitutionally-guaranteed parliamentary immunity.<sup>43</sup> Less than 24 hours later, one of Cambodia's most prominent and independent newspapers, *The Cambodia Daily*, was forced to shut down following extra-legal threats by the Government under the guise of tax evasion.<sup>44</sup> The *Cambodia Daily's* managing editors have been prevented from leaving the country and could well face prosecution.<sup>45</sup>

There is no wonder that the developments in Cambodia have been marked as the death of the dream of democracy<sup>46</sup> and a 'descent into outright dictatorship'.<sup>47</sup> For me, it bears all the hallmarks of the fear of US-backed 'traitors' that echoed throughout the DK era.<sup>48</sup> One thing that these developments do make clear is the inherent danger of assuming that it is ever 'enough said'. In a country like Cambodia, the right to speak, to criticise and to call for action is a transient right that evidentially can be lost in a matter of months. It is clear that the fight to be able to speak freely and without fear will be a continual one. In Australia, we are undoubtedly privileged to be able to speak about social injustices without fear of threats or prosecution. But with the thought of my not-so-lucky Cambodian colleagues in mind, I genuinely believe that in any context it is dangerous to assume that it is ever 'enough said'.