Contribution to
Special Rapporteur's thematic report on *Documentation of serious human rights violations in the context of transitional justice processes*

Dr Maria Elander, La Trobe University
Associate Professor Rachel Hughes, University of Melbourne

This contribution addresses the questions on state and civil society initiatives to register, map, collect and preserve evidence, data and testimonies of serious violations for purposes of truth seeking and accountability, by focusing on major initiatives in the 40-year period dealing with the Khmer Rouge violence in Cambodia.

The Khmer Rouge, formally known as Communist Party of Kampuchea, ruled Cambodia between 17 April 1975 and 6 January 1979. The regime was characterised by famine, forced labour and persecution, and led to the death of around one fourth of the population. Since January 1979, there have been several initiatives to document and collect evidence of the violations. These initiatives have been undertaken by a range of actors, including state and non-state, Cambodian and non-Cambodian, as well as for a range of purposes, including establishing truth, memorialisation and legal accountability.

We respond to this call for contributions on practices of documentation of serious human rights violations, by suggesting that the post-Khmer Rouge initiatives provide insights into the entire continuum of archival processes. Drawing on our extensive research into these processes, we demonstrate how a context of multiple archival actors can create fierce competition over the economic and social capital inherent in record-keeping. This kind of competition is ultimately detrimental to understanding and pluralising the past.

Tuol Sleng Genocide Museum

The archive of the Khmer Rouge security centre S-21 is well known, in part through its deposition within what is now the Tuol Sleng Genocide Museum (TSGM). During its operation, documentation and record keeping at S-21 was meticulous and included files of entering prisoners, detailed forced 'confessions', instructions on torture, and lists of prisoners and executed persons. When the Khmer Rouge fled in January 1979, the S-21 archives were left behind in a disorganised state. Work to reassemble the archive began immediately after the new authorities discovered the site.

The early archival work at TSGM had two aims. The first was to assist Cambodians who came looking for their loved ones. Given that assigned archivists did not know how the records had originally been organised, the remaining documents were reassembled to assist with victim identification. This has later been criticised, but it should be noted that archivists at the time operated under extremely limited resources. The second aim was to identify records that could

evidence crimes committed by the regime's leaders at the August 1979 People's Revolutionary Tribunal, which held leaders Pol Pot and Ieng Sary *in absentia* responsible for genocide and other crimes.

With limited resources, the archives at Tuol Sleng have gone through periods where the passing of time and the humid climate have threatened their preservation. Over the years, there have been several initiatives to preserve the records, including the collection of prisoner portrait photographs. While these initiatives have certainly assisted in the preservation of the archives, they have also meant that parts of the records have been (re)organised into new archives in Cambodia and in North America, with competing claims of control of the records. The initiatives, and the subsequent claims of control, show how, at times, archival principles such as maintaining the integrity of archives have been overlooked for purposes of protection. While protection may be afforded, physical removal from the original archive, duplication and unauthorised digitistion comes with additional detrimental effects.

In contrast, under the leadership of the current and most recent directors of TSGM, the archives have undergone significant updates, including further preservation and digitisation, in part through collaboration with UNESCO. In 2009, they were listed on UNESCO's Memory of the World International Register. Recently, in the context of the hybrid tribunal known as the Extraordinary Chambers in the Court of Cambodia (ECCC), some records removed for safe-keeping purposes in the early 1980s have been returned. It remains unclear, however, whether all such removed records have been returned.

DC-Cam

While Tuol Sleng sits under the Cambodian Ministry of Culture and Fine Arts, the Documentation Center of Cambodia (DC-Cam) is an independent, not-for-profit organisation. It is characteristic of what academic Michelle Burgis-Kasthala (2020) calls 'entrepreneurial justice', as it stepped in to fulfill a role that state actors were unable or unwilling to play. DC-Cam was established as field office of Yale University's Cambodian Genocide Program after the United States Congress passed the Cambodian Genocide Justice Act (1994). Since becoming independent in 1997, DC-Cam has continued to receive funding from various government bodies, including USAID.

DC-Cam quickly amassed a significant archive of records from the Khmer Rouge period through donations and strategic negotiations with private individuals and public officials. Its archive reportedly contains over a million documents, including both Khmer Rouge-era records and records created subsequently, such as interviews with survivors.

During the years of activism for the establishment of a tribunal, DC-Cam's archive was presented as key to any accountability measure. By the time the United Nations and the Cambodian government signed an agreement to establish the ECCC in 2003, DC-Cam enjoyed significant influence. Perhaps as a consequence of this influence, tensions ultimately arose between DC-Cam and the ECCC in relation to access and control of records.

In addition to these questions of access and control, there have also been questions regarding the legal standing of records generated by DC-Cam. During the trial in Case 002, the defence raised concerns over the Court's reliance on DC-Cam's archives, including interviews conducted by DC-Cam staff. In particular, the defence argued that the organisation of DC-Cam's records, through projects such as its 'Accountability Project', was prejudiced towards the responsibility of the accused persons. These questions were dealt with extensively and required several days of hearings. The ECCC Trial Chamber eventually found DC-Cam's methods to have been reliable and dismissed all claims to the contrary. Nevertheless, the defence questions shed light on the limits of archival work by non-governmental organisations and the care required in gathering evidence for purposes of legal accountability.

ECCC archives

Between 2006 and 2022 the ECCC operated as an extraordinary chamber within the Cambodian judicial system but with international assistance. During this period, it amassed a significant archive, including judicial documents, investigatory materials, and records of its own institutional life.

For outside observers, access to public records remained inconsistent. Most public records were uploaded to the ECCC website but not everything. After a website relaunch in late 2010s, there was no functioning search mechanism on the website. This meant difficult access for the broader public, including victims, monitors, media and academic researchers. These difficulties underscore the need to consistently invest in adequate technical resourcing to ensure access to judicial proceedings.

Legacy archives of the ECCC

Although the ECCC was established as a temporary institution, the nature and location of its records once the Court had ceased operations were long left undecided. Instead, ongoing case work was prioritised. This may have been due to budget constraints alongside UN officials' scepticism of the Cambodian government's commitment to the trials. There were occasionally public discussions on the risks of keeping the records either in Cambodia or at the UN. Within these discussions, DC-Cam continually positioned itself as the most appropriate custodian of the ECCC records. In 2015, the Cambodian government established the Legal Documentation Center relating to the ECCC (LDC-ECCC) to act as a repository and to provide access to public documents of the ECCC. Having the status of a Cambodian governmental department, the LDC received limited support from the UN side and its capacity as a repository was soon questioned.

When the ECCC ended most of its judicial proceedings in 2022 and entered a period of residual functions, questions re-emerged around the maintenance and accessibility of its archives. Rather than transferring responsibility to the LDC-ECCC or DC-Cam, the ECCC has retained its archives in a Resource Centre. In late 2024, the ECCC website was relaunched with a promise to provide easier access to ECCC records for the public. The fate of the archives after the ECCC residual phase is unknown.

Summary of lessons learnt

While this brief overview of more than 40 years of archival activities necessarily only captures some of the details and complexity of the events and relations between different actors, the following stand as important lessons learnt:

- Needs and interests in records change over time, as do the meaning attributed to the same records. Hence, care needs to be taken to ensure the integrity of archives;
- International donors have at times prioritised civil society initiatives to the detriment of building state capacity in archiving;
- Several archival institutions operating in a context of limited resources may create fierce competition between institutions and competing claims of control over records and archives. This kind of competition is unproductive;
- Record keeping, including questions of public access, duplication and the location and control of permanent repositories, needs to be addressed early in the establishment of temporary tribunals.

References

- Burgis-Kasthala M (2020) Entrepreneurial justice: Syria, the commission for international justice and accountability and the renewal of international criminal justice. *European Journal of International Law* 30(4): 1165–1185
- Elander M & Hughes R (2024) Pressing Evidence: Activating Khmer Rouge Archives. *Social & Legal Studies* 33(6): 839-862.
- Song P (2021) S-21 Documentation and the Early Development of Tuol Sleng Genocide Museum Archive in the People's Republic of Kampuchea. *Master Thesis, Royal University of Phnom Penh*