

The “Dark Side” of International Criminal Law: The Extraordinary Chambers in the Courts of Cambodia

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1 Introduction*

Since the end of the Cold War, societies throughout Latin America, the former Soviet Union (USSR), Eastern Europe, Africa and Asia have overthrown military dictatorships and authoritarian regimes in order to, it is argued, allow for democracy and human rights (Teitel 2000: 3). In some cases, the change has been quick and (relatively) peaceful, while in other cases it has been violent and drawn out, and characterised by conventional warfare or, in many cases, the features of so-called "new wars".¹ Sometimes the international society, mostly through the United Nations (UN), has played an important role in the transitions, while in others it has not. The UN participation in "international peacekeeping"—which can be understood as operations aiming at creating conditions that favour lasting peace—has increased dramatically since the end of the Cold War. This point can be illustrated as follows: of the 68 peacekeeping missions established since 1945, no less than 50 were initiated since 1991 (UN 2014; cf. Mayall 1996: 1).

Regardless of the type of transition or if the international society has been involved or not, a crucial question during and/or after a transition is: How should post-conflict societies deal with their "evil" past, in order to "enable the state itself to function as a moral agent" once again? (Bornemann 1977: 23, quoted in Koskenniemi 2011: 177). This question constitutes the core of what is known as "transitional justice".

The objectives of transitional justice are, according to the International Center for Transitional Justice (ICTJ 2014), as follows: (i) to seek accountability and redressing those who have suffered by providing recognition of the rights of the victims; (ii) promote civic trust; and (iii) strengthen the democratic rule of law. In the aftermath of trauma, victims today have well-established rights to see the perpetrators punished, to know the truth and, if possible, to receive reparations. In addition, a history of unaddressed violations of human rights is likely to be socially divisive; to generate mistrust between different groups and within the institutions of states; and, by extension, to hamper or slow down the achievement of various post-conflict development goals. Transitional justice includes various legal and moral components, such as international criminal law (ICL), memorialisation, institutional reforms and truth commissions, which can all be used in various ways and combinations.

According to Martti Koskenniemi (2011), the increasing usage of criminal prosecutions (in transitional justice processes) manifests a renewed urge to conceptualise international politics in terms of domestic categories. He writes:

* The financial support by the Swedish Research Council, which has allowed me to undertake research within a programme entitled the Globalization of Resistance: Influences on Democracy Advocators in Civil Society in the South (project no. 2010-2298), is gratefully acknowledged. This paper is part of this wider programme.

1 Mary Kaldor (1999) defines "new wars" as low-intensity conflicts, which involve a web of complicated global and transnational connections so that the distinctions between internal and external, regular army and irregular military, aggression and repression, local, national, transnational, international and global are difficult to sustain.

"The universalisation of the Rule of Law calls for the realisation of criminal responsibility in the international as in the domestic sphere. *In the liberal image, there should be no outside-of-law: everyone, regardless of formal position, should be accountable for their deed*"s (Koskenniemi 2011: 172, italics added).

Hence, individual responsibility and ICL constitute integral parts of the "global liberal project" (originally initiated by US President Woodrow Wilson during WWI and with the ultimate goal to make the world "safe for democracy") in general and the idea of transitional justice and the rule of law in particular. The century-old project regained new momentum after the end of the Cold War, when various peacekeeping operations, etc. were initiated. "At the same time", however, James Mayall (1996: 1) writes:

"... few of these operations have been unqualified successes, and the demands placed on the UN can equally be interpreted as evidence of spreading chaos and widespread threats to stability and international order in the wake of the collapse of familiar Cold War structures."

Since the end of the Cold War, the "fight against impunity" has been put in action by, *inter alia*, the establishment of the Yugoslavian and Rwandan war crimes tribunals in 1993 and 1994 respectively, the commencement of criminal procedures in several countries against former domestic or foreign political leaders and, not least, the establishment of the International Criminal Court on 1 July 2002. This development has been praised widely and, so far, relatively few critical voices have been heard; except from the individuals being prosecuted in various tribunals.

Seeking to respond to this challenge, by following Koskenniemi (2011), this paper will focus on the other side— what can be described as the "dark side"—of the liberal transitional justice project in general and the fight against impunity in particular. The paper will do so by discussing and analysing the transitional justice process that is currently in the making in Cambodia. The emphasis will be on the Extraordinary Chambers in the Courts of Cambodia (ECCC).

Departing from the perspective of critical international criminal law (CICL), the paper will display and discuss some of the ways by which the current rulers of Cambodia, Prime Minister Hun Sen and other high-ranked members of the Cambodian People's Party (CPP), seek to use the ECCC to direct a meta-narrative, which portrays them as the ones who did not only bring about the fall of the Khmer Rouge (KR), but also finally brought the evil movement before justice. The ultimate aim is to establish a great gap between themselves and the KR— the very movement that they themselves descend from. By this, the paper does not only contribute to a deeper understanding of the current Cambodian transitional justice process as well as the process of international criminal justice that takes place in the ECCC, but also to the growing literature on transitional justice in general and "critical international criminal law" (CICL) in particular.

The United Nations Transitional Authority in Cambodia (UNTAC), which was active during 1992 and 1993, was, at the time the most ambitious undertaking in the peacekeeping experience of the UN; the mission lasted for

18 months, deployed some 22,000 military civilian and military personnel, and cost some 1.7 billion USD. The aim of the mission was to implement the Agreements on a Comprehensive Settlement of Cambodia that was established in Paris on 23 October 1991 (henceforth, the Paris Peace Agreements) and, by this, to bring a violent conflict that dates back to at least 1970 to an end. This was the first occasion ever that the UN took over the administration of an independent state completely and ran an election (rather than only monitoring and supervising it) (Berdal and Leifer 1996: 25). The elections, in which some 90% of the eligible voters participated, were held in May 1993 and in September the same year a new Constitution was adopted. The aim of UNTAC was to build sustainable peace in Cambodia and it did not explicitly call for any accountability process against the KR. It took some four more years for such a call to materialise.

After years of inconstancy, the Royal Government of Cambodia (RGC) eventually sent a letter to UN Secretary General (SG) Kofi Annan in 1997, requesting the Organisation to assist in establishing a tribunal to prosecute the senior leaders of Democratic Kampuchea (DK), the name of Cambodia during the KR era, as well as those believed to be the most responsible for grave violations of national and international law between 17 April 1975 and 6 December 1979 (A/51/930, S/1997/488, 24 June, 1997).

Following long, drawn-out negotiations, an agreement (henceforth, the ECCC Agreement) was eventually reached in June 2003 between the UN and the RGC to establish a "hybrid" war crimes tribunal (see ECCC 2014a). The Cambodian National Assembly ratified the ECCC Agreement on 24 September 2004 and the tribunal proceedings started in mid-2007; almost three decades after Pol Pot was overthrown.

The outline of the remainder of the paper is quite straightforward. In the next section, a more elaborate discussion on CICL will be put forward. After this theoretical section, the material that was used, the delimitations of the paper and some methodological remarks are discussed. A section presenting a historical and political background to the Paris Peace Agreements and the ECCC follows these two sections. After this imperative historical and political contextualization, the paper turns to the ECCC itself, to the legal environment in which the tribunal is operating, the creation of the ECCC, as well as the configuration and credibility of it. In the second last section, the closing statements in Case 002/01 are discussed and analysed from the perspectives of Cambodia's past and present as well as CICL. In the final section, some concluding remarks are presented.

2 (Critical) International Criminal Law

Since the end of the Cold War, international law has taken a significant turn. Rather than being primarily concerned with states and interstate relations in the international society, one distinct sphere of international law—namely, ICL—now concerns the responsibility of individuals. To investigate and prosecute international crimes—including genocide, systematic and extensive violations of the 1949 Geneva conventions and other related crimes as well as crimes

against humanity—is today considered a natural component of international law and, by extension, transitional justice (May and Hoskins 2010: 1).

In spite of the landmark event to establish the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East (a.k.a. the Tokyo Tribunal) after the end of WWII, it was not until the early 1990s that we witnessed a paradigm shift regarding individual responsibility for various criminal acts. The underlying logic behind this legal doctrine, which challenges the idea of state sovereignty and state immunity, is neatly expressed by the IMT in one of their judgments:

“[T]hat international law imposes duties on and liabilities on individuals as well as upon states has long been recognised ... crimes against international law are committed by men, not by abstract entities, and only in punishing individuals who commit such crimes can provisions of international law be enforced” (Judgment of the IMT, in the Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22, 1950: 447, quoted in Duffy 2005: 74).

The establishment of the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda paved the way to the establishment of the International Criminal Court in 2002. These occurrences were of course no coincidence, but were made possible, as indicated earlier, due to the end of the Cold War and, by consequence, the vanishing opposition against the “global liberal project” in international society.

Following this development, the field of ICL did also experience a significant momentum in academic scholarship and in public debate (Schwöbel 2013: 169-170). Much of the contemporary discussion about ICL in *academia* is, however, rather limited and focuses more-or-less on the positive contribution of ICL to various projects of reconciliation and reconstruction, on peace, justice, legality, fighting impunity and individual accountability. Critique of ICL exists, but it is rather “problem-solving” in character and focuses on the effectiveness of ICL—if reconciliation and reconstruction in Cambodia is not achieved yet through tackling impunity, then there must be more accountability; if the ECCC is not functioning as well as it could be then it should be made more effective. How can this be done? What is largely missing is any substantive engagement with various blind spots and complicities of transitional justice and ICL including issues such as: ideology, imperialism, struggle over memory, exclusion, injustice and conflict (Critical Approaches to International Criminal Law Research Network, 2014). It is these, as well as other blind spots of traditional ICL that CICAL seeks to engage with. Hereby, CICAL is located at the intersection between critical (international) legal theory and ICL.

According to Christian Reus-Smit (2014: 286), a “body of critical international legal theory emerged to challenge the inherent liberalism of modern international legal thought” in the 1980s. Advocates of the approach argue that “liberalism is stultifying international legal theory, pushing it between the equally barren extremes of ‘apology’ –the rationalization of

established sovereign order—and ‘utopia’—the naive imagining that international law can civilize the world of states” (ibid; cf. Koskeniemi 2005, 2011).

Scholars who are critical of liberal legal theory emphasise at least four proposals, namely that: (i) liberal international law is internally incoherent, among other things regarding the existence of universal values; (ii) the approach operates within a too narrow intellectual discourse, limited by the liberal ideology as such and accepted public international legal argument (Reus-Smit 2014: 286; cf. Baaz 2013: 140-145). “[T]raditional international legal argument must be understood as a recurring self-referential search for origins, authority, and coherence” (Purvis 1991: 105, quoted in ibid); (iii) the purported determinacy of liberal international law is false and that it is, by extension, not possible to “find the law”, any international legal doctrine can justify not only multiple but also competing legal outcomes; and (iv) international law can only ever be self-validating (Reus-Smit 2014: 286). Put differently, critical legal scholars understand liberal international law as ideology and the normative goal of ICJL is to produce knowledge that is emancipatory (Minkinen 2013: 119).

During the Nuremberg trials, Hannah Arendt pinpointed one of the great dilemmas facing ICL; namely the problem that sometimes a tragedy may be so great that the punishing of one or a few individuals does not come close to measuring up to the atrocities. Ever since then, serious doubts have been raised against the ability of ICL to deal with various national traumas, due to their gigantic historical, political and moral significance (Koskeniemi 2011: 172). How to measure and punish the culpability of Kaing Guek Eav (the former Head of the infamous Tuol Sleng Security Prison; a.k.a Comrade Duch), an individual who oversaw the killing of at least 12,000 victims (the Guardian, 3 February 2012)? Is this “worth” 35 years of imprisonment or lifetime (The Trial Chamber of the ECCC and The Supreme Court of the ECCC, respectively, ECCC 2014b and 2014c)? Which sentence is fair to the perpetrator, to the victims, to the survivors, etc.? Does the imprisonment contribute in any substantial way to transitional justice, to reconciliation and reconstruction of the Cambodian trauma?

If the trials against Duch, Nuon Chea and Khieu Samphan should have any significance, then that significance must lie elsewhere than in punishing a few individuals. Hence, it is also often put forward that the chief goal of a tribunal is not to judge a few individuals but to establish the truth of the events. To have a gross injustice recognised publicly also contributes to the process of reconciliation (Koskeniemi 2011: 172-173). In order to secure the latter goal, the ECCC does not only focus on the perpetrators but also on the victims. Inspired by French legislation, the tribunal is generous regarding victims’ participation, including extensive rules on civil party participation.² By this,

2 “One of the major innovations of the Extraordinary Chambers in the Courts of Cambodia (ECCC) is the enhanced recognition of Victims in its proceedings. Victims of crimes that fall under the jurisdiction of the Court are given a fundamental role in the ECCC. They can submit complaints to the Co-Prosecutors, who take the interests of Victims into account when considering whether to initiate prosecution. Victims may also participate as Civil Parties. In this capacity, they are recognised as parties to the proceedings and are allowed to seek collective and moral reparations. This reflects the commitment of the ECCC to its

the ECCC, at least in theory, could serve as an important component in the Cambodian transitional justice process. If the trials are proceeded in a sensitive manner, they actually have the potential to make a vital contribution to the reconciliation and reconstruction of Cambodia.

Legal and historical truths sometimes overlap, but often they are far from identical. From a legal perspective, strictly speaking, the only relevant question is: can it be proved (beyond reasonable doubt) that the person accused for an act actually committed it? Broader questions such as the following are in principal of less, if any, interest: why did he or she do it as well as in which context was the act committed? In transitional periods, however, the debate about why persons did what they did and what is to be considered an acceptable act is contested; it is truly political. Whether an act should be considered criminal or not is dependent on which framework of interpretation is being applied. If a person is contributing to a social project based on an apprehension that it is moral, just and historically necessary, and that his or her individual contribution is essential in order to fulfil the wider goal—may it be liberation from oppression or happiness of mankind—then little, if anything at all is gained by a retrospective interpretation of the effect of the effort, some 1.7 million people losing their lives. An understanding of the inherent logic of DK and the goal to rapidly and fundamentally change the Cambodian society should include the collective process(es) located at the intersection of utopianism, ideology, nationalism and scientism driven by a revolutionary spirit and, possibly, (well-founded) suspiciousness (Koskeniemi 2011: 179-182).

It is important to remember that for all major political events there are many stakeholders and, by consequence, many truths. Put differently, memory and history is polysemic and polyvalent in nature (Hasian Jr. and Carlson 2000); and to construct a truth of events that could serve as meta-narrative for the future, to move beyond a traumatic event is, per definition, a “struggle over memory” (see further e.g. Alexander 2004; Edkins 2003, 2010). From this we can see that one of the goals, and perhaps the most important one, of the ECCC, namely to “educate Cambodia’s youth about the darkest chapter in [Cambodia’s] history”, constitutes a great challenge and is a task that requires that the parties involved take their responsibility and perform with tactfulness and finesse in order to make the process meaningful (ECCC 2014e).

3 Material, Delimitations and Methods

As previously mentioned, the actual proceedings in the ECCC started in mid-2007 when the Plenary Session of national and international judicial officers unanimously adopted the Internal Rules for the ECCC (see further ECCC 2014f) and, a bit later, when Duch was transferred from military to provisional

mandate of helping the Cambodian people in the pursuit of justice and national reconciliation, as stated in the Preamble to the [ECCC Agreement]” (ECCC 2014d).

detention under the authority of the ECCC and charged with crimes against humanity. Later the same year, four more persons—Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan—were arrested and also placed in provisional detention.

The five defendants have been divided into two separate cases: Case 001, which included only Duch (a low-ranked henchman) and Case 002, which originally included the remaining four defendants; the ones being accused of being politically responsible for what happened in DK. However, Ieng Thirith (former Minister of Social Affairs and Action as well as the Head of DK's Red Cross Society) was found unfit to stand trial in 2012 and she was released on 16 September the same year (ECCC 2014g). On 14 March 2013, her husband, Ieng Sary (former Deputy Prime Minister and Foreign Minister of DK), died and the proceedings against him were terminated the very same day (ECCC 2014h). By this, Case 002 only includes two defendants, Nuon Chea (among other things, "Pol Pot's Deputy" and President of the Standing Committee of the Kampuchean People's Representative Assembly in DK) and Khieu Samphan (former Head of State of DK) (ECCC 2014i).

It is interesting to note that Case 002 has been divided into two individual trials: Case 002/01 and Case 002/02.³ The official reason for doing so is that the prosecution is so extensive that it is not convenient to make it just one trial (see further ECCC 2014j). Case 002/01 focuses on the forced movement of the population from Phnom Penh and the execution of Khmer Republic soldiers at the Toul Po Chrey execution site immediately after the KR takeover. This case, however, also considers the role of the defendants in relation to regime policies relevant to all charges, which will provide a foundation for examining the remaining charges in future trials (ECCC 2014k). Hence what is concluded in Case 002/01 will have bearing on Case 002/02. This, of course, makes the case extra important.

The Supreme Court Chamber of the ECCC sentenced Duch to life imprisonment on 3 February 2012. This decision, which overturned the previous sentence of 35 years imprisonment imposed by the Trial Chamber on 26 July 2010, is final and cannot be appealed. Case 001 is not discussed any further in this paper, but dealt with elsewhere. In Case 002/01, the hearing of evidence ended on 23 July 2013 and the closing statements in the case were presented between 16 and 31 October 2013. This paper focuses on these closing statements, regarding what is played out during the ECCC proceedings.

3 The first trial (Case 002/01) will primarily focus on "alleged crimes against humanity related to the forced movement of the population from Phnom Penh and later from other regions (phases one and two), and [the execution] of Khmer Republic soldiers at Toul Po Chrey execution site immediately after the Khmer Rouge takeover in 1975. It also considers the roles of the Accused in relation to regime policies relevant to all charges, which will provide a foundation for examining the remaining charges in future trials". The Supreme Court Chamber of the ECCC, "has ordered that the second trial against Khieu Samphan and Nuon Chea, Case 002/02, shall commence as soon as possible". A first trial management meeting in preparation of the trial was convened on 11 December 2013 (ECCC 2014k).

Closely associated with CICL is the usage of a “critical legal method”. But what does critical actually means in this context? According to Panu Minkkinen (2013: 119):

“... ‘critical judgement’ is a generic intellectual skill that all researchers are supposed to be able to apply in relation to the object of their research --- [b]ut ‘critical analysis’ as a generic research skill ... hardly pass for what [is intended] by a ‘critical method’ --- The latter implies a more radical and focused perspective to the matter at hand.”

He continues:

“We can ... imagine a researcher who rejects the *internal* perspective that according to legal positivist H.L.A. Hart, was the ‘properly’ legal perspective. *Internally* viewed in Hart’s sense the legal system will always appear as a fundamentally legitimate way of regulating society. Like a participant in a game we are required to acknowledge the rules if we want to play. And so the researcher will be stuck with tinkering reforms that may or may not improve whatever political ends lay participation was intended to achieve. But adopting an *external* perspective, that is an approach that is not ‘properly’ legal in Hart’s sense, will emancipate the researcher from her obligations towards the law” (ibid., italics added).

Positivist (read traditional) ICL is “problem-solving”—i.e. it takes the world as it finds it and accepts the prevailing order as the given framework for action; the general aim is to make this order work smoothly by dealing effectively with particular sources of trouble. Critical theory is “critical” in a more focused and radical manner—i.e. it stands apart from the prevailing order and asks how that order came about; it does not take institutions or social and power relations for granted but calls them into question by asking about their origins and, by extension, whose interests are being served by maintaining them (Cox 1986: 208-209).

Put differently, the point of departure in this paper is partly, but not exclusively, external. It rather combines an internal and strict legal perspective, with a historical understanding and a focus on surrounding social and political practices.

More concretely, the paper is based upon a critical, immanent reading of original documents such as: various UN and Cambodian documents, the ECCC Agreement, the ECCC Law, various court documents and official transcripts of the closing statements in Case 002/01; as well as secondary sources: including books and articles on transitional justice, (C)ICL and Cambodian history and politics as well as international and Cambodian media.

The author of the paper has visited the ECCC at various occasions since 2007, and has not only listened to the proceedings but has also had the opportunity to listen to informal discussions among visitors and commentators during coffee and lunch breaks. The most recent visit to the ECCC was made in October 2013 (when the closing statements in Case 002/01 were given). Between May and August 2010, some 30 “loosely-structured” interviews with various stakeholders to the ECCC—judges, prosecutors, lawyers, investigators,

other court officials, victims, witnesses and civil parties as well as transnational and local civil society representatives who work with the supporting of victims, witnesses and civil parties with various issues at the ECCC—were conducted by the author of this paper together with Associate Professor Mona Lilja. In this paper, however, the interviews are not quoted directly—with one fundamental exception— but rather serve as a background.

4 Historical and Political Background to the Paris Peace and the ECCC Agreements

After the fall of the Angkor Empire in the mid-fifteenth century, Cambodia was ruled as a vassal by Thailand and Vietnam until the country became a French protectorate in 1863. It was not until 90 years later, in 1953, that Cambodia finally gained full independence (see further, e.g. Chandler 2008: Ch. 2-9).

The KR movement is an offspring to the Indochina Communist Party (ICP), which was born in Vietnam under French colonial rule. In 1951, the party was divided into three national parties: one Vietnamese, one Cambodian and one Laotian. The Cambodian party was given the name the Kampuchean People's Revolutionary Party (KPRP). When the party held the First Party Congress, the chief political goal was not revolution but rather independence from France (Chandler 2008: 222; Ciorciari 2009: 34; Slocomb 2003: 1-3).

France was not able to restore the same type of colonial rule after the end of WWII. By consequence, a *modus vivendi* agreement—granting autonomy to Cambodia while negotiations over the exact relationship between Cambodia and France were still in progress—was closed in January 1946. It was also decided that there should be elections held for a Constituent Assembly that would then decide on a Constitution for Cambodia. Thereafter national elections should be held. By consequence, political parties had to be formed. The first political party to be established was the Liberal Party; an anti-communist right-wing party that was clandestinely funded by France. The second political party that formed was the Democratic Party, headed by Prince Sisowath Youtévong and with close connections to the French Socialist Party. In the 1946 elections, the Democratic Party won a convincing victory (Chandler 2008: 212-213; Corfield 2009: 41-43).

In the early 1950s, the leadership of KPRP accepted that Vietnam led the struggle to liberate Indochina. King Sihanouk (who was selected by France to become king in 1941) and the French, on the other hand, strived hard to associate such anti-French resistance (in opposition to the policy of negotiated independence) with pro-Vietnamese, pro-Communist, and therefore un-Cambodian betrayal (Chandler 2008: 222-223).

As a result from “negotiations” between King Sihanouk and France, Cambodia was granted full independence in late 1953. By this, the King became the new country's hero and the Democratic Party—who had failed to deliver independence for Cambodia—lost much of their appeal. Sihanouk interpreted the situation as he had obtained mandate to govern the country as

he saw fit. In September 1955, he abdicated in favour of his father and instead took the post as Prime Minister after having obtained an overwhelming victory in the election to the Parliament. From 1955 to 1970, Cambodian politics was characterised by Sihanouk's monopoly of political power (Chandler 2008: 224-231; Corfield 2009: 49-58). During this period, opposition to Sihanouk's rule was poorly organised and ineffective. "The [Prime Minister]", David Chandler (2008: 240) concludes, "was probably almost as popular as he claimed to be".

From the beginning of its history, the KPRP have suffered from internal struggles; primarily between—on the one hand—the veterans, who believed in orthodox Marxism-Leninism, held strong loyalties to Vietnam and was partly supportive of Sihanouk, and—on the other hand—a younger generation, who had studied in France in the late 1940s and early 1950s. The younger generation, which included Saloth Sar (later known as Pol Pot) and Ieng Sary, advocated a more radical and utopian political approach than the one advocated by the veterans. Ben Kiernan (2004: 190-191) writes:

"What distinguished most French-educated radicals from the veterans of the independence struggle was ... their conception of the Sihanouk regime. The Pol Pot group tended to be implacably opposed to it, as a backward, dictatorial monarchy; as younger militants they wanted to strike back against repression, and being more middle-class in background, they were particularly infuriated by Sihanouk's 'feudal' characteristics, his personalized autocracy, and the fawning praise of him that was required by everyone in public life. The veterans, on the other hand, were much more inclined to see Sihanouk's ... increasingly anti-imperialist stance as positive factors in an Indo-China-wide struggle for socialism, while at the same time also giving the [Prime Minister] credit for maintaining the country's independence, a goal for which they themselves had sacrificed much in the past."

In 1963, Saloth Sar (Pol Pot) was elected secretary general of the party, which had changed its name in June 1960 at the Second Party Congress to the Worker's Party of Kampuchea (WPK), with Ieng Sary and Nuon Chea as his deputies (Kiernan 2004: 190; Slocomb 2003: 10).

In June 1965, Pol Pot travelled to Hanoi and held talks with high-ranking Vietnamese Politburo members. The visit was a great disappointment for him, mainly due to the fact that the Vietnamese did not approve the WPK political platform, which was putting emphasis on self-reliance and armed action against Sihanouk. Pol Pot then proceeded to China for new meetings. In Beijing he received support for his political programme by high-ranking cadres of the Chinese Communist Party, including Deng Xiaoping (Slocomb 2003: 11). This strengthened the position of the Pol Pot-Ieng Sary faction of the WPK, which, in September 1966, had its name changed to the Communist Party of Kampuchea (CPK).

In April 1967, a major peasant rebellion broke out in the province of Battambang. Sihanouk responded by accusing the communists of encouraging violence in the countryside—in particular, he charged Hou Yuon and Khieu Samphan, who, despite their communist sympathies, had both been members of *Sangkum* (i.e. the umbrella organisation or movement that constituted the political popular political base for Sihanouk during his rule between 1955 and

1970). Due to the accusations by Sihanouk, both Hou Yuon and Khieu Samphan fled to the countryside and the KR (Slocomb 2003: 13).

After a few months, the peasant rebellion was smashed and it was most likely at this point that CPK decided to end all forms of cooperation with the Sihanouk regime, to form a revolutionary army and turn to armed resistance against it (Slocomb 2003: 13). Civil war then broke out after this decision; first against Sihanouk (until March 1970 when Sihanouk was removed in a coup) and then against Lon Nol and his Khmer Republic (the name of Cambodia between 9 October 1970 and 6 January 1976). During the civil war, the relations with Vietnam deteriorated even further and in the latter half of 1971, the CPK took the decision to break away from Vietnam entirely and from then on to consider Vietnam an "acute" enemy of the Cambodian revolution (Slocomb 2003: 16).

In May 1970, Sihanouk, from exile in Beijing, proclaimed an alternative government: the Royal Government of National Union of Kampuchea (most often abbreviated GRUNK, after the French acronym of *Gouvernement Royal d'Union National du Kampuchéa*). The GRUNK was in fact an interesting collaboration effort between the former political enemies Sihanouk and the KR. As the civil war proceeded, the KR took control over the government in exile step-by-step, which, thanks to the participation of Sihanouk, had a high degree of legitimacy, domestically as well as internationally; this political marriage of convenience between the pragmatist power politician Sihanouk and the utopian KR movement, continued in various forms well into the 1990s (Corfield 2009: 74, 77; Kiernan 2004: 298).

The civil war lasted until 17 April 1975 when the KR captured Phnom Penh (see further Chandler 2008: 249-254). The take over of the capital and the securing of the first step of the communist revolution coincided with the end of the Vietnam War.⁴ When in power, the KR launched their radical political programme at once and evacuated Phnom Penh and other bigger cities in Cambodia in just a few days. The aim was to change the Cambodian society thoroughly, including the dismantling of all old political, economic, social, religious and cultural institutions (Chandler in Locard 2004: xiii-xiv; Corfield 2009: 89; Gottesman 2003: ix).

The three following official slogans grasp the very essence of the revolutionary approach taken by the KR:

1. With the *Angkar* [the Organisation or the Party], we shall make a Great Leap forward, a prodigious Great Leap forward.
2. Completely get rid of all the castoffs from imperialist, feudal, and reactionary days.
3. Everyone has to rely solely on his own strength (quoted in Locard 2004: 70, 74 and 78, respectively)

4 Even though Sihanouk strived for neutrality in the Indochina and the Vietnam War, the conflicts had a great impact on what happened in Cambodia between 1946 and 1975. However, due to the focus of this paper as well as the space available, this important dimension of Cambodia's political history is left without any further consideration.

The regime, however, was not omnipresent and the DK period was characterised by temporal as well as regional variations. In some parts of the country, the rule was relatively benign and the local cadres did their best to make life as good as possible (Slocomb 2003: 22). David Chandler (2008: 258) writes that:

“... those part of the country that had been under CPK control the longest tended to best the best equipped to deal with the programs set out by the party and the most accommodating to the new people [mainly the people forcefully evacuated from Phnom Penh and other bigger cities in April 1975]”.

Hence, the CPK and, by extension, DK was not as hierarchically organised as often assumed by posterity. To illustrate this point even further, it can be noted that Pol Pot resigned as Prime Minister of DK on 27 September 1976 following a coup attempt against him. Even in power, the CPK was thus divided into various factions. It was, however, not long before Pol Pot returned to office, and he was absolutely convinced that the people behind the coup attempt were Vietnamese agents and that Vietnam actively strived to transform Cambodia; to swallow their smaller neighbour (Chandler 2008: 266; Slocomb 2003: 28-32)

After his return to office, Pol Pot spoke in December 1976, about an “illness of the party”; he said as follows:

“We cannot locate it precisely. The illness must emerge to be examined. Because of the heat of [previous stages of revolution] was insufficient at the level of people’s struggle ... we searched for the microbes within the party without success. They are buried. As our socialist revolution advances, however, sweeping more strongly into every corner of the party, the army and among the people, we can locate the evil microbes ... Those who defend us must be truly adepts. They should have practices in observing. They must observe everything, but not so that those being observed are aware of it” (Pol Pot, quoted in Chandler 2008: 267).

The already very difficult relations with Vietnam collapsed totally and from 1977 onwards open violence between the two countries occurred and it was eventually not the Cambodian people, but the Vietnamese army that ended the KR rule on 6 December 1979 (Corfield 2009: 94; Slocomb 2003: 43).

To summarise, when the CPK took power in 1975 it was a party consisting of at least two factions. The first and dominating faction was the one led by Pol Pot, Ieng Sary and Nuon Chea. This faction was pro-China and greatly admired the Cultural Revolution, which was initiated by Chairman Mao. The second faction was pro-Vietnam and more attracted to the less radical Vietnamese socialist model, which was, in turn, inspired by the USSR and more orthodox Marxist-Leninist in character. According to some scholars, some of the old veterans, who were characterised above all by their strong support to Sihanouk, constituted a third faction. This faction, however, was small and lacked any real influence during the DK years (Slocomb 2003: 38-39).

Beginning in 1977, several KR cadres—including Heng Samrin and Hun Sen—from the Eastern zone of the DK defected to Vietnam (which later that

year launched an official strategy, which included the recruitment of representatives of the pro-Vietnamese faction within the KR, to get rid of Pol Pot and Ieng Sary) (Slocomb 2003: 43-45).

On 2 December 1978, the United Front for the Salvation Army of Kampuchea (UFNSK, or more often, FUNSK, after the French acronym of *Front d'Union nationale pour le salut du Kampuchéa*) was proclaimed by its president Heng Samrin, as an alternative government to that of Pol Pot (Slocomb 2003: 45). Speaking to his adherents, he said:

“The reactionary *Pol Pot-Ieng Sary clique* and their families have totally usurped power, betrayed the country and harmed the people ... The Chinese authorities have encouraged and backed to the hilt these traitors and tyrants” (Heng Samrin, 2 December 1978, quoted in *ibid*, italics added).

He concluded by characterising the DK regime as something that had nothing to do with socialism and that their policy should be understood as “neo-slavery” (*ibid*).

On 25 December 1978, less than a month after Heng Samrin’s speech, Vietnam invaded DK. By consequence, Pol Pot and Sihanouk fled Phnom Penh on 6 December 1979, heading for the northwestern part of the country and China, respectively. The day after, the Vietnamese reached the capital and only a few days later (on 10 January 1979) DK was renamed to the People’s Republic of Kampuchea (PRK) and a new government, headed by Heng Samrin and made up by defected KR cadres, was installed (Becker 1998: 432-433; Corfield 2009: 96).

In a speech given at the victory celebration ceremony Heng Samrin declared the stand of the new regime; he said:

“Under the watchword of ‘cooking the animal’s meat in a pot of its leather’ [the Pol Pot-Ieng Sary reactionaries] compelled *our revolution* to commit crimes against the people. They poisoned the young people and gave them taste for blood ... Such was the genocidal policy put into practice by reactionary Pol Pot-Ieng Sary clique on the orders of their master in Peking ... [Their genocidal policy] had been conceived according to the plans and on the orders of the reactionary elements within the Peking ruling circles” (Heng Samrin, quoted in Slocomb 2003: 49, italics added).

A few days prior to the speech quoted above, between 5 and 8 January 1979, Heng Samrin and his clique held the Third Party Congress (or the Congress for Party Reconstruction) according to what their (revisionist) understanding of history was. During this Congress, the Heng Samrin clique claimed that they alone were the legitimate descendant of the CPK; or, more correctly, the KPRP, as the party was renamed in 1981 (The Library of Congress, Country Studies, Cambodia, 2014).

Legal measures followed these political manoeuvres and according to Elizabeth Becker (1998: 433), “[t]he Vietnamese used the papers left behind by Ieng Thirith and other members of the regime to prosecute Pol Pot and his ‘clique’”. The trials, conducted in August 1979 and staffed by not only Cambodian and Vietnamese but also international lawyers, were held in the

Revolutionary People's Tribunal at Phnom Penh to try the Pol Pot-Ieng Sary Clique for the Crime of Genocide (Quigley 2000: 1). After proceedings that lasted for five days, both defendants were sentenced to death *in absentia* (Judgment, reprinted in de Nike, Quigley and Robinson 2000: 549). By these actions, the Cambodian revolution was considered to be back on the right—more orthodox Marxist-Leninist—track again by the new rulers in Phnom Penh (Chandler 2008: 280).

Although lacking support from the USSR, in April 1989 Hanoi declared that the Vietnamese forces should be pulled back from Cambodia in September the same year. The announcement raised the possibility that the civil war, which at the time was of a rather low intensity, would escalate. In order to avoid this, UN Secretary General Pérez de Cuellar convened a series of peace talks in Paris with the aim to establish a plan for Cambodia's future. The talks were made possible thanks to the post-1989 climate in world politics. Even though the talks failed, they constituted the beginning to the Paris Peace Agreements and the UNTAC (Ciorciari 2009: 42-43).

During this process, the KPRK officially abandoned Marxism-Leninism and changed its name to Cambodian People's Party (CPP). The name of Cambodia was also changed in the years to come, not once but twice; first to the State of Cambodia in 1989 and then to the Kingdom of Cambodia in 1993, when Sihanouk was also re-installed as King.

5 The ECCC: Environment, Creation, Configuration and Credibility

As indicated previously, the new rulers in Phnom Penh set up a war crimes tribunal named *the People's Revolutionary Tribunal at Phnom Penh to Try the Pol Pot-Ieng Sary Clique for the Crime of Genocide* (see PRK Decree Law no 1, 1979) in August 1979 to deal with the DK legacy. The ultimate goal of this measure was to gain domestic as well as international legitimacy. In spite of the fact that a number of international lawyers participated in the trial, the effects of the trial were limited for at least three reasons. Firstly, it suffered from serious procedural flaws, including the respect of the defendants' rights to be presumed innocent. Secondly, the presiding judge of the tribunal revealed his belief that the defendants were guilty prior to the trial (Ciorciari 2009: 39-40; Quigley 2000: 2). At a press conference prior to the proceedings, Judge Keo Chanda said:

“It is clear that the Pol Pot-Ieng Sary clique committed the crime of genocide not only against a particular ethnic group or against a particular social stratum of the population, but against the Kampuchean people as a whole. In its flight, the Pol Pot-Ieng Sary clique is still killing tens of thousands of innocent people. Right now, thanks to the support given it by the Peking expansionists, the Pol Pot-Ieng Sary clique is continuing its policy of treason and devastation against the Kampuchean people --- Trying the Pol Pot-Ieng Sary clique for the crime of genocide will on the one hand expose all the criminal acts that they have committed and mobilize the Kampuchean people more actively to defend and

build up the people's power, and on the other hand show the peoples of the whole world the true face of the criminals who are posing as the representatives of the people of Kampuchea" (Press Conference, 28 June, 1979, quoted in Howard, de Nike, Quigley and Robinson 2000: 48-49).

Thirdly, the Tribunal was undermined by Cold War politics and logics. At the time, the US and China had loosely aligned against the USSR and, by consequence, the PRK government was considered as a pawn of the USSR and its regional ally, Vietnam. All in all, the 1979-tribunal was considered as nothing less than a "show trial" (directed by USSR and Vietnam) and as being nakedly political in nature by a majority of the world (Ciorciari 2009: 40).

After the end of the Cold War, the US and the West pushed international society to establish a number of international and mixed tribunals aiming to, on the one hand, further spread liberal and democratic values, including the rule of law and, on the other hand, fighting impunity (Ciorciari 2009: 63). In Cambodia, the KR became more-and-more politically marginalised, but neither the UNTAC nor the CPP managed to defeat the organisation militarily. This fact made the process of accountability problematic. In spite of outside pressure, the RGC tried to secure defections from the KR rather than initiating a process of criminal justice. Put simply, peace was given priority over justice. All this changed during 1996 and 1997 and onwards; however, Ieng Sary together with some 3,000 foot soldiers defected to the government and Pol Pot was arrested by his own comrades and put in house arrest. By this, the situation was new and outside pressure to initiate a criminal process became more agreeable for the RGC, who in June 1997 sent the aforementioned letter to Kofi Annan, requesting UN support to bring former KR cadres to justice (Ciorciari 2009: 63-64). Pol Pot died in 1998, which made a complicated situation even more complicated.

During the seven years it took to establish the ECCC, for various reasons Hun Sen and the CPP performed, to put it mildly, an ambivalent rule that stretched from requesting UN support to criminally prosecute members of the evil Pol Pot-Ieng Sary clique, to welcoming defecting cadres of the organisation with "bouquets of flower" and "not with prisons and handcuffs" (Hun Sen, quoted in Ciorciari 2009: 66).

Constitutionally and theoretically, after the transformation between 1991 and 1993, Cambodia warmly embraced the principal of judicial independence and impartiality (Linton 2006: 328). In practice, however, the judiciary is not independent and the rule of law leaves much to be desired (see e.g. Cambodia Daily, 4 December 2013; the Economist 2013; Transparency International 2013). In a survey of the Cambodian legal system presented in 2009, by way of conclusion, Khean Un describes the Cambodian judiciary as "weak, dependent and corrupt". "The problems within the judicial sector", he continues:

"... are a product of the broader social, political and economic environment of post-conflict Cambodia; i.e. extended clientelism and elites' half-hearted commitment to democracy --- In many ways, the judiciary is a tool of the ruling party/parties to legitimize their actions and strengthen the executive power at the expense of the principles of checks and balances" (Un 2009: 95).

Three documents—The ECCC Law (2001), the Agreement between the RGC and the UN (2003) and the ECCC internal rules (8 rev. ed, 2011)—constitute the ECCC. From the documents it follows that the tribunal is a creation *sui generis*, it is a compromise between the civil law tradition, which uses investigating judges, and the common law tradition, which grants the prosecutor a strong position. In addition, the ECCC applies international as well as national law and the responsibilities of each office are shared between a Cambodian and a foreigner. Consequently there are two Co-Prosecutors and two Co-Investigating Judges who share the responsibilities of each office. In practice this means that the Co-Investigating Judges and the Co-Prosecutors, respectively, must act in consent (see Arts. 5.4, 6.4 and 7, the Agreement between the RGC and the UN, 2003).

A case is initiated by a written submission from the Co-Prosecutors requesting the Co-investigating Judges to open an investigation and to propose charges. The Co-investigating Judges then look into the case. During this process, parties may appeal against decisions made by the Co-Investigating Judges, apply to annul investigative action or require various sanctions against individuals who are allegedly interfering with the administration of justice. At the end of the investigation, the Co-investigating Judges write a closing order, deciding whether the person being investigated should be prosecuted or not and in the former case what the charges should be. During this process the Co-investigating Judges also decide who can be a civil party in a future trial. If the closing order concludes that an individual should be prosecuted, the case is put before the Trial Chamber that decides if the prosecuted individual is guilty or not, orders possible sentences and, if applicable, collective reparations to victims and civil parties. The Co-prosecutors, Civil Parties and the Defence can appeal the decision to the Supreme Court Chambers (SCC); decisions made by the SCC are, however, final (ECCC 2014l, 2014m, 2014n; 2014o; Eckelmanns 2012: 446-451).

6 The ECCC and Case 002/01 by Critical International Criminal Law

Using international criminal law to construct a final judgment that can help a society to move beyond trauma and towards reconstruction and reconciliation is, as indicated above, a complicated matter. To begin with, in order for international criminal proceedings to function constructively in transitional justice processes, they need to be credible. If not, they will be considered as being nakedly political in nature and as a mechanism for the implementation of “victor’s justice”. The ECCC is, as we know, not only about punishing a few individuals but also, and more importantly, about establishing the truth of events in order to contribute to an understanding of what actually took place in DK and, by extension, to construct a successful final judgment that can serve as a point of departure with the ultimate goal of reconstructing the Cambodian state as a moral agent. Seeking to fulfil such a task is not only challenging and delicate but it is also potentially downright dangerous. Careful preparations and

a balanced configuration of the criminal proceedings to come are an essential point of departure. Of utmost importance, when the tribunal is established, is also that the prosecutors and the judges perform in responsible manner and strive to stay loyal to the truth-finding ambition of the tribunal. Put differently, these stakeholders should act in good faith.

Even though the ECCC was long in making, it is difficult to reach the conclusion that the end result became a balanced one, in particular regarding influence. Hun Sen feared that an international tribunal could be used, not only by foreign powers but also the domestic opposition, to undermine the CPP's position and he was very successful during the negotiations with the UN regarding this. The end result was a "compromise", the ECCC is a hybrid tribunal—i.e. the two chambers of the tribunal are established as extraordinary chambers within the Cambodian court system (Ciorciari 2009: *passim*).

Another demand successfully put forward by the RGC was that Cambodian judges as well as other personnel in the tribunal should constitute a majority. The ECCC is accordingly established as a tribunal with a majority of Cambodia judges; however, working with a super majority provision, which means that at least one international judge is required for any judicial decision (Ciorciari 2009: 77).

On the whole, the outcome of the negotiation between the RGC and the UN must to be considered very favourable to Hun Sen and the CPP; especially if it is compared with the configuration of other hybrid tribunals such as the Special Panels of the Dili District (a.k.a. the East Timor Tribunal) (Ciorciari 2009: 78).

It was also decided that all prosecutors and judges, international as well as Cambodian, in the ECCC should finally be selected by the Cambodian Supreme Council of the Magistracy (CSCM) and appointed by the king of Cambodia. On top of this, all defence lawyers, international as well as Cambodian, must be members of the Cambodian Bar Association (CBA). Individuals closely associated with the CPP currently dominate both the CSCM as well as the CBA. These circumstances add to the overall picture given earlier in this paper, namely that the Cambodian judiciary is highly politicised and dependent. Together, this casts shadows over the ECCC and severely undermines the credibility of the tribunal.

Additionally, the Tribunal's jurisdiction is strictly limited to crimes committed during the DK period and it is only the "senior leaders and those who were most responsible" for the crimes falling within the jurisdiction that can be investigated and prosecuted (Art. 2, the ECCC Law, 2001). Hence, who it is possible to prosecute and who it is not is open for debate and is, indeed, debated between the international and Cambodian Co-Investigating Judges and Co-Prosecutors. This dilemma has come to the fore in the discussions regarding the very existence of a Case 003 and Case 004 (and, by extension, the discussions regarding which persons should be included in the two cases, respectively, if they come into operation).

The RGC has argued with emphasis that only it, and no one else, can decide who should be prosecuted (or not) at the ECCC. Khieu Kanharith, Minister of Information, has, for example, stated publicly that foreigners who wish to investigate Cases 003 and 004 should "pack their bags and leave" (quoted in Carmichael 2011). Generally speaking, Hun Sen and the CPP have had great

difficulties not trying to direct the activities of the ECCC (see further e.g. the Open Society 2010). This view is further supported by the fact that several members of the international legal staff, including prosecutors, judges as well as defence lawyers have resigned, and have explicitly referred to the political undertone of the ECCC over the years. Among the most high-ranked international staff members who have resigned over the years, we find Co-Investigating Judges Siegfried Blunk and Laurent Kasper-Ansermet as well as Co-Prosecutor Andrew Cayley. In addition, it can also be mentioned that serious allegations regarding not only corruption but also other irregularities have been directed against the ECCC ever since the very establishment of the tribunal (see further e.g. International Bar Association 2011 and 2012). To conclude, the trustworthiness and credibility of the ECCC is, from an outside perspective, questionable; even before Case 002/01 actually had started.

When scrutinised in more detail, the argument that Case 002/01 is so extensive that it needs to be divided into two trials is not entirely convincing. An alternative interpretation might be that it is necessary to divide the case into two trials in order to be able to deliver a judgment before the elderly defendants die. If they do die before a judgment is handed down, it will be very difficult to argue that the criminal process has not been an anti-climax, not to say an outright fiasco. Arguably, avoiding this seems more important than anything else; including the fairness of the trials. Given this initial analysis, let us now turn to what is actually played out in the courtroom, located some 15 kilometres from down town Phnom Penh.

When the closing statements in Case 002/01 were opened in October 2013, the floor was first given to Mr. Pich Ang, one of the lawyers representing the civil parties in the case. He began by giving an overall characterisation of the KR and what, he believed, was at stake in the trial:

“[T]he Khmer Rouge regime ... was designed to impose the vision of a utopian agricultural social order in Cambodia with record speed and remarkable disregard of the consequences on the populace—and this is underpinned by the draconian policy intended to push the “*extremely marvellous, extremely wonderful, prodigious leap forward*” --- In the rush to protect and bring to fruition the CPK’s massive work of *social engineering*, the entire population of Cambodia was forced out of their homes and into the fields to serve the Revolution --- On the basis of the evidence, Nuon Chea and Khieu Samphan are guilty of the crimes against humanity, extermination, murder, political persecution, and other inhumane acts, enforced disappearance, and attacks against human dignity, as co-perpetrators and participant in the *joint criminal enterprise*” (E1/228.1, Public Transcripts of Trial Proceedings, Trial Day 215, 16 October 2013: 4-6, italics added).

To begin, the usage of the legal doctrine of “joint criminal enterprise” (JCE)—considering each member of an organised group individually responsible for crimes committed by a group within the framework of a common plan or purpose—is, to put it mildly, controversial and contested within the field of ICL (see e.g. Karnavas 2010). In spite of widespread criticism over the years, the ECCC decided on 20 May 2010 that this particular form of liability should be applicable at the tribunal (ECCC, E100/6, 12 September 2011). The Defence of

Ieng Sary, in contrast, have argued that the JCE doctrine should not be applied, mainly because:

“... (1) it is not specified in the Establishment Law [of the ECCC]; (2) it is not part of Cambodian law; (3) it is not recognised in customary international law and even if it were today, it was not customary international law in 1975–1979, nor is customary international law directly applicable in Cambodian courts; and (4) it is not recognised by an international convention enforceable at the ECCC. Therefore applying JCE at the ECCC would violate the principle of *nullum crimen sine lege*” (Karnavas 2010: 449).

All the objections put forward by the Defence were, however, turned down by the ECCC. Following this decision, it can be concluded that the tribunal is adopting a position regarding the content and not only the form of the trial from the very outset. Regardless of whether the decision made by the ECCC to include JCE is right or wrong, it is, given the controversy surrounding this form of liability, something that further casts doubt on the impartiality of the tribunal.

The characterization of the trial, given by Mr. Pich Ang, regarding what it is about and who or, perhaps more correctly, what is on trial, was to a great extent shared by the national Co-Prosecutor, Ms. Chea Leang, who in her opening statement said as follows:

“This trial is about the criminal responsibility of Nuon Chea and Khieu Samphan for crimes that shocked the conscience of humanity. In the next three days, I and my colleague will outline how the evidence in this case has proven that Nuon Chea and Khieu Samphan each played a unique and critical role in a *criminal enterprise* that prosecuted, tortured, and killed their fellow Cambodians, millions of innocent civilians, including women, children, the elderly and most vulnerable --- [E]vidence that has been presented in this phase of the trial has shown that the crimes committed were the result of criminal policies and in furtherance of *a criminal plan* that preceded and extended throughout the period of the Democratic Kampuchea regime. The Accused ... formulated and furthered the plan and these policies, knowing these crimes would result. *What happened is what they planned*” (italics added).

Mr. William Smith, the Deputy International Co-Prosecutor followed the same line of argument, however, wording it a bit differently than his national colleague; he said:

“On the 17th of April 1975, the CPK leaders established the first *slave state* of the modern era. Every aspect of that *slave state* was run and operated under the watchful eye of the CPK Party Centre. The CPK *slave state* operated as an ongoing and continuous criminal system of persecution, enslavement, forced transfer, forced labour, inhumane treatment, and murder directed primarily at the New People [primarily the ones evacuated from Phnom Penh and other bigger cities], and that continued until the 7th of January 1979” (E1/231.1, Public Transcripts of Trial Proceedings, Trial Day 218, 21 October 2013: 63, italics added).

Echoing Heng Samrin, Mr. Smith characterises DK as a slave state. After this— it can be argued—highly biased description, the floor was given back to the national Co-Prosecutor who wanted to make a clarification, which distanced herself and her colleague from the statement made by the Civil Parties earlier:

“Let me say at the outset ... that this case is not about Communist ideology or about competing political ideas. Neither Communism, nor Socialism, nor any other political system or philosophy is on trial before this Court. This is a case about violence, enslavement, and death on a mass scale. It is about crimes inflicted on the people of Cambodia, crimes that were committed by forces and cadres commanded by Nuon Chea, Khieu Samphan, and other leaders of the Communist Party of Kampuchea” (E1/229.1, Public Transcripts of Trial Proceedings, Trial Day 216, 17 October 2013: 6).

After having read the statements made by the Prosecutors in its entirety and in spite of the clarification made, it is difficult to move beyond the impression that this is, in fact, exactly what the trial is about—to prosecute an ideology or, perhaps more correctly, a certain interpretation of this ideology. Given the ambition of establishing the truth of events, the strategy and wording applied by the Prosecutors is unfortunate, not to say improper. Mr. Victor Koppe, Nuon Chea’s international Co-Lawyer, eloquently elaborates on why this is the case. His statement contains several important dimensions and is therefore quoted in length:

“[T]he Prosecution ... tries to confuse the public and this Chamber by attaching simplistic and misleading titles to complex historical events, and no more is this strategy ... clearly on display than in the Co-Prosecutor’s fixation on their new favourite term about Democratic Kampuchea, the so called ‘*slave state*’. After six years of proceedings, the Co-Prosecutors now have the gall to say the common purpose of the CPK senior leaders was to create—and I quote—“a slave state”. Now, this term is completely useless as a means of understanding Democratic Kampuchea and most especially the intent of CPK policy. Allow me to remind the Chamber that although the proceedings against our client have been ongoing for more than 6 years, *the term ‘slave state’ entered the lexicon of this Trial less than six months ago, on 8 May 2013, during the testimony of Philip Short* --- And Mr. Short, who invented this phrase, set foot in Cambodia for the first time in 1993. He began his research on the CPK in 1999. He speaks no Khmer, he reads no Khmer. Not a single writer, observer, academic, or first-hand witness to the events in Democratic Kampuchea has ever employed this phrase. Yet the Co-Prosecutors now tell us that Philip Short’s opinion is the best description available of the CPK’s purpose, not the CPK’s own political circulars, not Pol Pot’s speeches, the uncorroborated opinion of a British journalist who appeared in Cambodia 20 years after the fact and who does not speak a word of the language. The Co-Prosecutor’s recent epiphany that the common purpose of the CPK senior leaders was to create a so called ‘slave state’ ... as such doesn’t even pretend to be genuine. In the Closing Order, issued in September 2010, the Investigating Judges alleged that—and I quote: ‘The common purpose of the CPK leaders was to implement rapid Socialist Revolution through a great leap forward and to defend the Party against internal and external enemies by whatever means necessary.’ Even the Co-Prosecutors who argued in their submissions after the

conclusions of the investigation that enslavement was one of the policies of Democratic Kampuchea, claim that the overall intent of the joint criminal enterprise was –and I quote –‘to enforce a political revolution and destroy any political opposition to the CPK’s rule.’ Now, obviously we quarrel with the way these formulations describe the CPK’s attitude towards so called enemies, but at least these formulations acknowledge that the CPK had a purpose, that the CPK had political objectives, that they were fighting for something. In the Co Prosecutor’s final trial brief and their closing submissions, all of this becomes irrelevant. Objectives no longer matter, context no longer matters. *The CPK is transformed from a political movement into a criminal one.* It becomes an entity whose purpose was to enslave as such. Now, *this is a bad faith effort to distract from the question the Chamber should be asking itself, and that question is whether Nuon Chea intended that the CPK Socialist Revolution, which was its true common purpose, would involve the commission of criminal acts.* And the clear answer to that question is that it did not --- *Have we and the Co Prosecutors been trying the same case in the same courtroom for the last two 2 years?’* (E1/232.1, Public Transcripts of Trial Proceedings, Trial Day 219, 22 October 2013: 14-17, italics added).

As highlighted by Mr. Koppe, the strategy applied by the Prosecutors in Case 002/001 is problematic on multiple grounds. This includes the fact that what will be concluded in Case 002/01 will also have bearing on Case 002/02. The strategy chosen, in fact, makes any attempt to establish the truth of events difficult; not to say impossible. The Prosecutor’s are, as argued by Mr. Koppe, not only acting in bad faith, but they are also acting in contradiction to the very aim of the ECCC and, by extension, this undermines the potential of the tribunal to serve a role in the important Cambodian reconstruction and reconciliation process.

To support their arguments, the Prosecutors have chosen to rely upon the statements of several so-called “expert witnesses”–i.e. academics and journalists, including individuals such as Stephen Heder and Phillip Short–extensively (see e.g. E1/229.1, Public Transcripts of Trial Proceedings, Trial Day 216, 17 October 2013)

On the whole the expert witnesses have been allowed to carve out an important role for themselves during the trials by being able to argue in favour of what they have written many years before. To rely on secondary sources rather than first-hand documentary and testimonial evidence in a criminal trial is very problematic. Mr. Koppe illustrates why:

“[T]he Co Prosecutor’s reliance on secondary sources instead of genuine, first-hand documentary and testimonial evidence is integral to their effort to simplify the story about Democratic Kampuchea, because *secondary sources offer pre-packaged conclusions and permit the Court to uncritically adopt the analysis of a writer no better versed in the facts than the Court itself.* And these dangers are substantially heightened in this case by the Chamber’s decision to systematically favour those so-called experts least sympathetic to the CPK. Elizabeth Becker and Philip Short, who were selected as experts, are journalists with no Khmer language skills, no academic credentials, and in Short’s case, no exposure to Cambodia prior to 1999. Becker and Short wrote a combined two books and a selection of newspaper articles about Cambodia. By contrast, the Chamber declined to call Michael Vickery, a professional academic, fluent in written and spoken Khmer, who had first arrived in Cambodia in 1961 and who

authored countless publications about Cambodia and the Khmer Rouge. *Vickery's shortcoming would seem to be ... that he is a Communist ---* [I]f this were the way to conduct a criminal trial, we could have saved a whole lot of money for the international taxpayer. We would not have had to have spent \$200 million on judges and lawyers. *Mr. Short's book is available on amazon.com for \$20.75. 'Seven Candidates for Prosecution' by Steve Heder can be purchased for \$16.50. We could have conducted this Trial for about \$41.00.* Now, Mr. President, Your Honours, we presume, or at least we hope there was a reason we did not do that" (E1/232.1, Public Transcripts of Trial Proceedings, Trial Day 219, 22 October 2013: 18-20, italics added).

Hence, not only does the tribunal seem to rely upon secondary sources, which for the reasons given above in itself is questionable, but it also seems to be biased regarding who is allowed to give an expert testimony and who is not.

All in all, Mr. Koppe continues that the Prosecutors use an "inflammatory, simplistic language to summarise and mischaracterise complex, historical events" and, *inter alia*:

"... attempt to portray the Democratic Kampuchea Government as a strictly hierarchical, top-down organization, with cadres in all zones loyal to the Party Centre, with Nuon Chea and Pol Pot at the top of a highly structured pyramid. The Co Prosecutors willingly ignore the fact that ... there were at least two equally powerful factions within the CPK --- Pol Pot's supposed paranoia was a direct reaction to a real and ongoing struggle for control within the Party. Vietnamese hegemony, and ultimately the direct involvement of the Vietnamese Government was a critical component of that struggle --- All of Pol Pot's supposed paranoia came to pass. It came to pass in exactly the way he feared that it might" (E1/232.1, Public Transcripts of Trial Proceedings, Trial Day 219, 22 October 2013: 24-27).

Mr. Koppe added to his statement by describing an even more disturbing description of the strategy applied by the Prosecutors. Again the statement deserves to be quoted in length, since it contains several important points; he said:

"... in all of these ways the Co-Prosecutor's closing submissions continue this tribunal's tradition of telling a simplistic, naïve, biased, and occasionally absurd story about Democratic Kampuchea. Yet, in some ways these failures are not even the worst of it. These failures might at least in part originate in ignorance and misguided justice. But there's of course, also something more insidious at work, a conscious effort by the stakeholders of this tribunal to deflect blame away from anyone who might share responsibility for the suffering of the Cambodian people and on to the two remaining accused seated before the Chamber. There are many targets whose culpability has never adequately been considered at this tribunal. These include the Americans, Prince Sihanouk, Lon Nol, [and] the French. But it is clear that in terms of direct relevance to these proceedings one rises above the rest and that target is, of course, the senior leaders of the Cambodian People's Party who continue not only to steal elections, land and natural resources from the Cambodian people, but also to obfuscate their direct and active role in the events for which Nuon Chea presently stands charged. If Democratic Kampuchea was a giant criminal

enterprise whose fundamental purpose was to enslave the Cambodian people then each of the three leading members of the current government bears responsibility for furthering that purpose. Prime Minister Hun Sen ... and President of the National Assembly Heng Samrin all took active roles in carrying out the policies, which the Co-Prosecutors say, today, were criminal as such. There's hardly any doubt of a simple reality. However easily these men are able to shield themselves from criminal prosecution, their liability rises and falls with our client. If Nuon Chea is guilty, so too are they. If Nuon Chea enslaved the Cambodian population, then these [two] men whose faces hang everywhere on posters in Phnom Penh, were his loyal executioners. Special mention must be made of Heng Samrin, whose role in carrying out the evacuation of Phnom Penh is of unique significance. As we have repeatedly emphasized, he is the senior most military officer still living today, to have participated in the evacuation of Phnom Penh --- The very individuals who have the most to gain from perpetuating this tribunal's convenient and simplistic narrative that criminal responsibility lies primarily with the leaders of the party are the exact same individuals who have proven their ability to directly impact the nature of the evidence placed before this tribunal. --- The government in this country does not even keep this a secret. The Prime Minister is openly opposed to this tribunal investigating the criminal responsibility of anyone other than the defendants in Case 002. He vows that no such investigations will ever go forward. How can this tribunal expect to assess our client's criminal liability under these circumstances? How could this tribunal ever be confident that it has an accurate understanding of the responsibility of cadres who supposedly reported to Nuon Chea? How could this Chamber possibly conclude that the criminal conduct of cadres lower than Nuon Chea was consistent with and not contrary to his intentions? --- The fundamental problem with the investigation in Case 002 was that it was not focused on ascertaining the truth--- The investigation was driven by procedures prejudice against the accused and its sole objective was to produce a product capable of supporting a guilty verdict" (E1/232.1, Public Transcripts of Trial Proceedings, Trial Day 219, 22 October 2013: 28-32).

The use of political rather than legal and/or functional delimitations regarding who should be prosecuted and who should not, as clearly reflected in the quote above, is problematic. Given that the United States and France played a certain role in what happened during and after the KR is beyond doubt for any observer with just a basic historical knowledge. The fact that various officials from these countries are not tried at the ECCC is to a certain degree understandable—at least on pragmatic grounds. Given that Lon Nol died in 1985 and Sihanouk in 2012 explains, at least on the surface, why they are not ordered to face the ECCC. Of course, this would be impossible. However, it does not explain why Sihanouk was not prosecuted when he was still alive. That, of course, would have been possible. The non-appearance of Sihanouk in the tribunal is noticeable. Even more noticeable, however, is that Heng Samrin and Hun Sen, both former members of the KR as well as current senior members of the CPP and the RGC (President of the General Assembly and Prime Minister, respectively), seem to have not only gained some sort of legal immunity, but have also blatantly influenced the ECCC in every respect conceivable. What is taking place in Cambodia and the ECCC at the moment is not only a moral and legal dilemma; it is outright dangerous, not

only in regard to the Cambodian transitional justice process as such, but also to the very idea of international criminal law and the fight against impunity.

7 Concluding Remarks

In power, the Heng Samrin clique of the KR set up the *Revolutionary People's Tribunal at Phnom Penh to try the Pol Pot-Ieng Sary Clique for the Crime of Genocide*. After a trial that lasted for five days, Pol Pot and Ieng Sary were, as we know, sentenced to death *in absentia*. In spite of international participation, neither the tribunal nor the judgment handed down was considered credible by the international society of its time (with very few exceptions) mainly due to the serious procedural flaw that the defendants were presumed guilty rather than innocent by the tribunal and also due to Cold War guided political considerations. The trial was considered a show trial—as being nakedly political in nature.

Based on what we have seen so far, particularly in Case 002/01, the ECCC can be criticised on the very same grounds as the 1979 tribunal. Firstly, the proceedings in Case 002/01 suffer from serious procedural flaws, something that, *inter alia*, has contributed to the decision made by the defendants not to collaborate with the tribunal. Secondly, the proceedings in Case 002/01 have been characterised by prejudice against the accused, not only by leading RGC officials, but also by the Prosecutors and Judges. In their ambition to produce a guilty verdict, the Prosecutors seriously compromise the ECCC goal of establishing the truth of the events.

The main differences between the 1979 Tribunal and the ECCC are that the latter has been far more expensive; so far it has cost some \$200 million. And the ECCC has been operating for a longer time; so far some six years compared with five days.

To conclude, after having followed the ECCC since 2007, it is difficult to move beyond the characterisation of the trials given by one of our respondents who, back in 2010, described the ECCC as being all about “Vietnamese-supported KR punishing Chinese-supported KR” (interview, civil society representative, Phnom Penh, July 2010). The only thing to be added is that this time there is wider international support rather than of the 1979 Tribunal. Hereby, right or wrong, the ECCC will, regardless of the final judgments, enjoy more credibility than its predecessor did. The question if the outcome of the proceedings really will contribute to the reconstruction and reconciliation of Cambodia remains an open one. So does the question: to what extent will the reputation of the UN be tarnished following the organisation's participation in the ECCC?

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