

Bringing the Khmer Rouge to Trial: An Extraordinary Experiment in International Criminal Law

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1	Introduction	292
2	The Rise and Fall of the KR Movement	294
3	The Long and Winding Road to the ECCC Agreement	297
4	A Structural Overview of the ECCC	305
4.1	Jurisdiction and Goals of the ECCC	307
4.2	The Organs of the ECCC	308
4.2.1	Co-Prosecutors and Co-Investigating Judges at the ECCC .	308
4.2.2	Judicial Chambers at the ECCC	309
4.2.3	Other Judicial Offices at the ECCC	309
4.3	A Summary of the Basic Judicial Process in the ECCC	312
4.4	The Various National and Legal Backgrounds of the ECCC Staff	313
4.5	The ECCC's Funding	314
5	The ECCC – An Experimental, Complex, Complicated and Contradictory Construction	314
5.1	The Road to the ECCC – Dubious Motives	315
5.2	The ECCC – a Legal Construction Sui generis	317
5.2.1	The “Cos”	318
5.2.2	International and Domestic Substantive Law	320
5.2.3	The ECCC Internal Rules	322
5.2.4	Funding Issues.....	323
5.3	The ECCC – Continued Political Interference	324
6	The ECCC – As Good as could be had?	227
	References	332

1 Introduction¹

[Generally speaking, I think that the ECCC] is a qualified success (Interview, International Co-Prosecutor Nicholas Koumjian, November 2014).

[The ECCC is] quit an amusing institution ... It encapsulates the relationship between Cambodia and the international community in a nutshell ... The West are here to “help” ... to do things right ... For a long time Hun Sen’s perspective and many Cambodian’s perspective ... has been that the Western world ... is hypocritical and have ... this lofty ideals about justice ... the way things should be done and international procedures, when they actually violated [them] at every turn [in relation] to [Cambodia] ... [in particular] when many Western countries supported the Khmer Rouge in the UN ... [All in all] it can be funny and a lot of time it puts Western hypocrisy to a higher belief (Interview, Journalist, Phnom Penh, November 2014).

It is often said that the Extraordinary Chambers in the Courts in Cambodia (ECCC) is a construction *sui generis* (see e.g. Ciorciari and Heindel 2014). Two individuals from Sweden negotiated the Court on behalf of the United Nations (UN) with representatives for the Cambodian People’s Party (CPP). The first was Ambassador Thomas Hammarberg, a diplomat and politician. The other was Hans Corell, a Judge and later the Legal Adviser in the Ministry of Foreign Affairs in his country, who negotiated the agreement through which the Court was established. The CPP is a party with roots in the Khmer Rouge (KR) movement that represents the Royal Government of Cambodia (RGC). The ECCC’s agenda is ambitious and holds several – and seemingly difficult to reconcile – transitional justice (TJ) goals. The Court constitutes an integral part of the civil law-based Cambodian court system, but is largely operated by a legal staffs that has its background in other legal systems. Several members of the international staff are educated in and have mainly practised common law, while many of the Cambodian staff have earned their degrees in Moscow, West Berlin and Hanoi and are thus trained in what is sometimes known as socialist law (Interview, Journalist, Phnom Penh, November 2014). In addition, the ECCC mixes international and Cambodian law, substantive as well as procedural law. Consequently, the Court’s main characteristic is a variety of (odd) compromises. All in all, the described uniqueness of the ECCC that is put forward by several observers does indeed seem to hit the nail on the head. The Court, also often referred to as the Khmer Rouge Tribunal or the Cambodia Tribunal, is indeed a legal institution of its own kind – it is a hybrid or mixed, not to say divided, construction. Put frankly, the ECCC is not only

1 The financial support by the Swedish Research Council, which has allowed me to undertake research within a programme that is 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 an offspring of this programme. I also would like to express my sincere gratitude to Professor Mona Lilja, not only for working together with me when collecting data in Cambodia in 2010, but even more so for providing valuable comments on an earlier draft of this paper.

an extraordinary experiment in transitional justice (TJ) but also, and perhaps even more so, in international criminal law (ICL).

The aim of this paper is to: (i) present an overview of the very first civil law-based mass-crimes hybrid court in history; (ii) provide an interpretation of the unique ECCC design by putting the Court and the negotiation process that preceded its establishment in a proper historical and political context; (iii) draw attention to some of the ways the Court works, and quite often does not work, by considering not only its unique design but also the highly politicized issues at stake and the (sometimes conflicting) interests of its various stakeholders; and (iv) by way of conclusion, discuss the lessons that could be learned from the ECCC and the question of whether the Court should serve as a future role model to achieve TJ and criminal accountability.

The paper is based on scholarly texts as well as official court documents, but also, to a lesser extent, in-depth interviews with various stakeholders to the Court and participatory observations.² It will proceed in the following way: The following two sections – section two and three – present the rise and fall of the KR movement, including the signing of the Paris Peace Agreements in 1991, and the long as well as difficult process to establish the ECCC that followed, respectively. The aim of these two sections is to place the Court in context and provide a historical, political and legal understanding of why the ECCC is designed the way it is. Next, in section four, the paper turns to the

2 In 2010, 2013 and 2014, interviews with various stakeholders to the ECCC, including judges, prosecutors, lawyers, investigators and other court officials, victims, witnesses, civil parties as well as transnational and local civil society representatives who work with supporting victims, witnesses and civil parties with various issues in the ECCC were made. The material in total includes some 50 “loosely-structured” in-depth interviews. Because some issues are sensitive, I have chosen to anonymise some of the respondents.

In addition to these interviews, Hans Corell, former Under-Secretary-General for Legal Affairs and the Legal Counsel of the UN, as well as the UN Chief Negotiator for the ECCC, was also interviewed. This was done on 26 January 2015, via Skype. The interview was conducted in Swedish and the parts quoted have been translated into English by the author of this paper and approved by Mr. Corell.

In addition to the above, I have also visited the ECCC and listened to the Court proceedings at several occasions since the proceedings started in 2007. The most recent visit to the Court was made in October 2013 (when the closing statements in Case 002/01 were presented to the Trial Chamber of the ECCC). All these visits to the ECCC have, needless to say, influenced my overall understanding of the Court.

Other primary sources used in this paper include various open Court documents. Most, if not all, of them are available at the official website of the ECCC (see: “www.eccc.gov.kh/en”).

In spite of the above, it should be emphasised that two secondary sources have been of particular importance in preparing this paper: (i) the book, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, written by John D. Ciorciari and Anne Heindel and published by the University of Michigan Press (Ann Arbor) in 2014. This book, which is heavily used and quoted in this paper, I had the honour of reviewing for the *Asian Journal of International Law* in 2015 (Baaz 2015c). (ii) Ambassador Thomas Hammarberg’s written recollections of the (initial) negotiations with the RGC for the ECCC entitled, “How the Khmer Rouge Tribunal was Agreed: Discussions between the Cambodian government and the UN” is published on the webpage of DC-Cam (see further the list of references).

structure of the ECCC *per se*. In section five, the unique and complex legal characteristics of the ECCC are discussed and analysed in more detail with a focus on, among other things, the mixture of international and domestic law, on the one hand, and the various legal traditions that are forced to coexist within the same institution, on the other. The sixth and concluding section of the paper then asks what lessons can be learned from the ECCC process and to what extent the ECCC should serve as a role model for the future.

2 The Rise and Fall of the KR Movement

A brief history of the rise and fall of the KR movement is essential when seeking to understand the positions that various key actors, domestic as well as international, eventually took in negotiating the ECCC as well as the challenges that the Court is facing today when searching for criminal accountability.

The KR movement is a descendant of the Indochinese Communist Party that was born in Vietnam under French colonial rule in the 1930s. In 1951, the old party was divided into three national branches: one Vietnamese, one Cambodian and one Laotian. In spite of the split, the Vietnamese party reserved to itself “the right to supervise the activities of its brother parties in Cambodia and Laos” (Becker 1998: 72).

The Cambodian party was named the Kampuchean People’s Revolutionary Party (KPRP) and when it held its First Party Congress, its chief political goal was independence from France – who had ruled Cambodia as a protectorate since 1863 – rather than providing a socialist revolution (Baaz 2015a: 166; Chandler 2008: 222; Ciorciari 2009: 34; Slocomb 2003: 1–3).

In late 1953, after 90 years of French supremacy, Cambodia was eventually granted full national independence. This was primarily the result of negotiations between King Norodom Sihanouk and French governmental officials and not the result of (armed) resistance by the KPRP. After having obtained an overwhelming victory in the following 1955 Parliamentary Election, the King abdicated in favour of his father and instead became Prime Minister of the newly independent nation. Between 1955 and 1970, Sihanouk more-or-less had monopoly on power in Cambodia, mainly due to a skilfully implemented *realpolitik*, on the one hand, and a poorly organised and ineffective opposition, on the other (Baaz 2015a: 167; Chandler 2008: 224–232; Corfield 2009: 49–58).

In order to fully understand the KPRP and its successors, and, by extension, what is currently being played out in the ECCC, it is of great importance to note from the very beginning that the party has suffered from internal struggles ever since its formation; basically between the old party veterans who held strong loyalties to Vietnam, believed in orthodox Marxism-Leninism and were partly supportive of Sihanouk, on the one hand, and a younger, much more radical and utopian generation that was educated in France in the late 1940s and early 1950s, which eventually became very inspired by Communism as understood by Mao Zedong in China and, to some extent, Kim Il-sung in North

Korea, on the other. (Baaz 2015a: 167, 169; Kiernan 2004: 191–193; Mamo 2013: 13–14).

At the Second Party Congress in 1963, Saloth Sar (later known as Pol Pot) was elected Secretary General of the party, which had now changed its name to the Worker's Party of Kampuchea (WPK). At the same congress, Ieng Sary and Nuon Chea were elected as his deputies (Baaz 2015a: 167; Kiernan 2004: 190; Slocomb 2003: 10). A few years later, in 1966, the party once again changed its name – this time to the Communist Party of Kampuchea (CPK). As the dominance of the Pol Pot and the more radical and utopian faction of the party increased, the willingness to cooperate with Sihanouk diminished and was eventually replaced by armed resistance and civil war (Baaz 2015a: 167–168; Slocomb 2003: 13).

Sihanouk was eventually removed in a military coup in November 1970; but this was done by Lon Nol, who was a right wing and US supported army general, and not by the CPK (Mamo 2013: 8). Following this political development, the former enemies of Sihanouk, who had proclaimed an alternative Cambodian government from his exile in Beijing, and the KR joined forces. By consequence, the on-going civil war escalated. At the same time the relationship with Vietnam also deteriorated and in the latter half of 1971, the CPK decided to break away from its eastern neighbour entirely. From then on, Vietnam was considered an “acute” enemy of the Cambodian revolution (Baaz 2015a: 168; Mamo 2013: 13; Slocomb 2003: 16).

As the civil war continued, the KR took control over the government that was in exile step-by-step, which, much thanks to the participation of Sihanouk, enjoyed a high degree of legitimacy; not only domestically but also internationally (Baaz 2015a: 168; Corfield 2009: 74, 77; Kiernan 2004: 298).

On 17 April 1975, the KR finally reached and took over Phnom Penh (see further Chandler 2008: 249–254). When in power, the KR named the country Democratic Kampuchea (DK) and launched a radical and utopian political programme, including the evacuation of Phnom Penh and other bigger cities in only a few days. Shortly after, Sihanouk was totally sidelined by the KR and was placed under house arrest (Baaz 2015a: 168).

From 1977 onwards, the already difficult relations with Vietnam went from bad to worse and developed into an open military conflict. It was, in fact, Vietnamese troops that ended almost four years of KR rule on 6 December 1979, when they secured Phnom Penh after having launched a full-scale invasion a few weeks earlier, on 25 December 1978 (Baaz 2015a: 169–170; Corfield 2009: 94; Slocomb 2003: 43). During the short rule of the KR, some 1.7 million people had lost their lives.

Only a few days after the arrival of the Vietnamese, a new pro-Vietnamese government that was made up by defected KR cadres, who were critical of the Pol Pot faction, was installed in Phnom Penh. The new rulers did not recognise the (r)evolution of the KPRP described above, including the two name changes of the party (WPK and CPK). They instead declared themselves to be the true successors of the original KPRP that was founded in 1951 and resumed the old party name (Becker 1998: 432–433; Corfield 2009: 96; *The Library of Congress, Country Studies, Cambodia*, 2014; Mamo 2013: 13; Slocomb 2003: 43–45). Cambodia was also renamed the People's Republic of Kampuchea

(PRK). Among the top leaders of the new ruling party were Heng Samrin (who, among other things, was the General Secretary of the Central Committee of the KPRP), Hun Sen (Prime Minister from 1985) and Chea Sim (first Minister of the Interior and then, since 1981, President of the National Assembly [NA] of the PRK).

Vietnam stayed in Cambodia for a decade and partly legitimised this *de facto* occupation by pointing to the crimes of the Pol Potists. During this period, Pol Pot and his followers – who had fled to the north-western parts of the country, and militarily fought the new government and the Vietnamese – continued to be recognised by the UN, as well as some major Western countries and China, as the legitimate government of Cambodia. The PRK and Vietnam, on the other hand, were, according to the logic of the Cold War, supported by the USSR (Baaz 2015a: 171–172; Baaz and Lilja 2015a; Mamo 2013: 16, 18).

Following developments on the international scene in 1989, Hanoi, however, declared that the Vietnamese forces should be pulled back from Cambodia in September of the same year. This announcement raised the possibility that the civil war in Cambodia, which at the time was of a rather low intensity, would once again escalate. In order to avoid this, the 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. Even though the talks failed, they constituted the beginning of what would later become the Agreements on a Comprehensive Political Settlement of Cambodia (henceforth, the Paris Peace Agreements) that was signed in Paris on 23 October 1991 by the KPRP, on the hand, and the Coalition Government of Democratic Kampuchea (CGDK), an anti-KPRP coalition, on the other hand. The CGDK consisted of the following parties: (i) the KR; (ii) the *Pour un Cambodge Indépendant Neutre Pacifique et Coopératif* (FUNCINPEC), a party that was originally set up by Sihanouk in Paris in 1981 with the purpose of serving as an alternative opposition party (to that offered by the KR) against the Vietnamese supported KPRP government; and (iii) the Khmer People's National Liberation Front (KPNLF), a political front with a non-socialist and non-royalist credo that was established in 1979. The Agreements also had a number of international signatories, including: China, France, Thailand, USSR, United Kingdom, USA and Vietnam (Berdal and Leifer 1996: 25–35; Ciorciari 2009: 42–43; Heininger 1994: Ch. 2; Son 2012: 166–172).

By Resolution 745, which was adopted on 28 February 1992, and following the signing of the Paris Peace Agreements, the United Nations (UN) Security Council (SC) established the UN Transitional Authority in Cambodia (UNTAC) (S/RES/745). What followed was, at the time, the most expensive and elaborate peace operation in the history of the Organization. Some 22,000 military and civilian personnel were organized at the cost of approximately 1.7 billion USD (Baaz and Lilja 2014; Berdal and Leifer 1996: 25, 36; Heininger 1994: 3).

The aim of the UNTAC was to take the lead in the agreed upon transitional justice (TJ) process and to reconstruct Cambodia – a country that had been destroyed by bad governance, decades of internal turmoil, civil war and gross violations of human rights – by supervising or controlling all aspects of the

government between March 1992 and May 1993 and, at the end of the mandate period, by holding free and fair elections that would lead to a new liberal and democratic constitution (see further the Paris Peace Agreements; Baaz and Lilja 2014; Heininger 1994: Ch. 2).

Between 1989 and 1993, the KPRP officially abandoned the Marxism-Leninist ideology in its entirety and changed its name to the Cambodian People's Party (CPP). During this period, the name of Cambodia was also changed 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 (Baaz 2015a: 171).

3 The Long and Winding Road to the ECCC Agreement

Neither the Paris Peace Agreements, nor the UNTAC mandate included any explicit provision to bring the remaining KR leaders or any other party to justice. This was because such a provision would not have been accepted by the KR, a party to the Paris Peace Agreements, or for that matter, China, a major supporter of the Pol Pot faction of the KR as well as a permanent member of the UN SC (Berry 2012: 184; Ciorciari 2009: 43).

The KR for various political and tactical reasons boycotted the UN sponsored national elections in 1993; a position that, however, contributed to the movement's increasing political marginalisation. In this regard, the UNTAC mission, at least indirectly, contributed to paving the way for a future criminal accountability process (Ciorciari 2009: 43, 62).

Without KR participation, the 1993 elections finished in almost a dead heat between the CPP and the FUNCINPEC. After some negotiations, Hun Sen, the leader of the CPP, and Norodom Ranariddh, son to the (former) king and leader of the FUNCINPEC, reached a compromise and agreed to serve as Co-Prime Ministers in Cambodia with the former King and Prime Minister Sihanouk as King (once again). The KPNLF was transformed into the Buddhist Liberal Democratic Party (BLDP) and secured no more than ten seats of 120 in the NA. The party then decided to become a junior partner to the CPP-FUNCINPEC coalition. This was probably not a very wise move, since only a few years later the BLDP was dissolved (Ciorciari 2009:62).

After the end of the Cold War and the dissolution of the USSR, the US and the West pushed the international society to establish a number of international and mixed courts that aimed to, on the one hand, fight impunity and, on the other hand, spread liberal and democratic values – in particular the rule of law. It was in the wake of this development – including the establishment of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) – that the idea of putting KR officials on trial was advanced.

Before and during the UNTAC period, the US government had been positive about including the KR in the process of reaching a peace settlement. After the 1993-elections, which, as we know, was boycotted by the KR, politicians, bureaucrats and scholars in the US slowly started turning their eyes

away from peace and order, towards justice; and it did not take very long before the US Congress had passed the Cambodian Genocide Justice Act, which states that "... it is the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity committed in Cambodia between April 17, 1975, and January 7, 1979" and that Yale University, with support from the US State Department, had established the Documentation Center of Cambodia (DC-Cam) (Sec. 572, the Cambodian Genocide Justice Act, 1994; Ciorciari 2009: 62–63).

Even though the KR was increasingly marginalised in Cambodian politics, neither the UNTAC nor the RGC had succeeded in defeating the movement militarily. Nevertheless, in late 1993, the movement was in decay mainly due to weakened foreign political and economic support, decreasing recruitment and numerous defections. In this situation, both the CPP and the FUNCINPEC sought to secure defectors from the KR by offering amnesty, military or government positions, land and money. The official justification behind these activities was that they contributed to the splintering of the KR movement and to national reconciliation. A more informal incentive of the parties was to secure support so that they could tip the delicate political balance between the two rivals that were sharing governmental power in their own favour, respectively (Ciorciari 2009: 64). To speed up this process, the Cambodian Parliament, in July 1994, voted unanimously through a decision that made it illegal to belong to the KR (Ciorciari and Heindel 2014: 20; IHT 09/10-07-94, referenced in *Asia Yearbook of International Law*, vol. 5, 1997: 395).

On 1 April 1996, Thomas Hammarberg was appointed Special Representative of the UN Secretary General for Human Rights in Cambodia. When he visited the country in June 1996 in his new capacity for the first time, he realised that the KR trauma still casted a paralysing shadow over the Cambodian society – practically, but even more so morally. The fact that no-one had been held accountable for these atrocities had clearly contributed to the creation of a culture of impunity, which, at the time, was omnipresent in Cambodia (Hammarberg 2001).

In August 1996, Hun Sen and the CPP, with the consent from Prince Ranariddh and the FUNCINPEC, successfully closed a deal with Ieng Sary, who, by consequence, together with some 3,000 soldiers defected to the government. The deal, among other things, granted the defector amnesty from future prosecution (for genocide) (Ciorciari 2009: 64). Even though the amnesty given to Ieng Sary was controversial, even within the CPP, both Prime Ministers Hun Sen and Norodom Ranariddh were at the time, for different reasons, reluctant if not totally averse to bringing the KR to justice.

But what was the UN's position on a trial? In order to clarify this, during the UN Commission on Human Rights session in April 1997, Hammarberg informally suggested that a paragraph – mentioning the possibility of international assistance to enable Cambodia to address past serious violations of human rights – should be included in the Cambodia resolution. Following this suggestion, the Commission included the following in its Cambodia resolution 1997/49, which was issued on 11 April 1997:

Requests the Secretary-General, through his Special Representative for Human Rights in Cambodia, in collaboration with the Centre for Human Rights, to examine any request by Cambodia for assistance in responding to past serious violations of Cambodian and international laws as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability (Hammarberg 2001).

In June 1997, Hammarberg discussed the implications of the resolution with the two Prime Ministers and emphasised that the UN might respond positively to a formal request for assistance in addressing the KR crimes. Following this, they changed their minds and accordingly, on 21 June 1997, formally requested the UN and the international society for assistance in promoting KR accountability for crimes committed between 1975 and 1979 (Ciorciari 2009: 64; Hammarberg 2001). The letter, sent by the two Prime Ministers to the UN Secretary General, stated that:

Cambodia does not have the resources or expertise to conduct this very important procedure. Thus, we believe it is necessary to ask for the assistance of the United Nations. *We are aware of similar efforts to respond to the genocide and crimes against humanity in Rwanda and the former Yugoslavia, and ask that similar assistance be given to Cambodia.*

We believe that crimes of this magnitude are of concern to all persons in the world, as they greatly diminish respect for the most basic human right, the right to life. We hope that the United Nations and the international community can assist the Cambodian people in *establishing the truth about this period and bringing those responsible to justice*. Only in this way can this tragedy be brought to a full and final conclusion (Hammarberg 2001; See also UN A/51/930 and S/1997/488, 24 June 1997, italics added).

When it arrived, the letter was circulated among the members of the SC and instantly it became clear that the content was controversial. The Chinese Delegation, for example, made clear that it did not want to put the question on the SC agenda (Hammarberg 2001). The Chinese position should be understood in the light of Beijing's long-standing support of the Pol Potists.

Back in Cambodia, just a few days after the letter to the UN was sent, it was clear, however, that the relationship between the two coalition partners of the government was not the best. In July 1997, the difficult relationship between the two (former) allies escalated into open violence. Hun Sen and the CPP eventually "won" the military confrontation and, by extension, declared that not only FUNCINPEC, but also the Khmer Nation Party (KNP) – an opposition party founded and led by Sam Rainsy, who was a former FUNCINPEC member and Minister of Economy and Finance (1993 to 1994) – had been ousted. In addition, the NA was closed and non-CPP television and radio stations were either taken over or closed. During July and August, the UN received and investigated several reports of FUNCINPEC military officers having been systematically killed. By consequence, the July 1997 clashes were considered by several scholars to be a coup d'état and was widely criticised abroad – not at least by the countries that were now promoting the

establishment of a war crimes court; in particular the US, who argued in favour of the establishment of a fully international court under Chapter VII of the UN Charter (Ciorciari 2009: 65; Ciorciari and Heindel 2014: 22–23; Hammarberg 2001; Kamm 1998: 242–247).

It was only after the military coup in 1997 that the relations between Beijing and Phnom Penh began to improve, most likely due to the fact that it was now clear to China that the CPP would be the dominant power in Cambodian politics once it had defeated and captured forces loyal to the FUNCINPEC. This shifting balance in power made China realise that it had to revisit its former strategy and engage with the leadership of the CPP if the country should be able to reinvigorate its crumbling relations with Cambodia. By consequence, China shortly turned into one of Cambodia's most important donors. The country's long-standing policy of non-interference aligned very well with the interests of the CPP elite. In response to the economic support, among other things, Cambodia closed down the Taipei Economic and Cultural Office in Phnom Penh; an action that should be considered as an active support of Beijing's "One China Policy" (Kung 2014).

In the meantime, the disintegration of the KR movement had sped up and in June 1997 – when Son Sen, former DK Minister of Defence, was killed together with his family on direct orders from Pol Pot – it was clear that the remaining leadership of the movement was definitely falling apart via a bitter internal struggle. Prior to his killing, Son Sen was (suspected to be) negotiating the terms of his defection with the Government in Phnom Penh. Following this incident, Pol Pot himself was "tried" by a people's court, led by Ta Mok, for the killing of Son Sen. The former leader of the once so powerful and much-feared movement was found guilty as charged and sentenced to life in house arrest (Ciorciari and Heindel 2014: 21, 23; Hammarberg 2001).

The UN responded to the letter from the RGC (mentioned above) that asked for assistance in establishing the truth about the DK years and bringing those responsible to justice, by appointing "... *a group of experts* to evaluate the existing evidence and propose further measures, as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability" (A/RES/52/135, 12 December 1997, italics added).

After less than a year in house arrest Pol Pot died on 15 April 1998. His death underscored the time aspect of bringing the former KR leaders on trial; they were getting old and some of them also had serious health issues. Against this background, only some two weeks after the death of Pol Pot, the US circulated a draft SC resolution at the UN headquarters in New York, proposing the establishment of an "International Criminal Court for Cambodia" in The Hague, similar to the ICTY. The idea was met with little interest, not only by China, but also by several other countries (Ciorciari and Heindel 2014: 23–24; Hammarberg 2001).

Ambassador Hammarberg met with Hun Sen in Phnom Penh shortly after Pol Pot's death. During this meeting the Prime Minister affirmed, in spite of the changed situation, that he still supported the request for assistance in the letter that was sent to the UN. He also said, however, that the recent US activities had made the issue more complicated. Hun Sen was also concerned that too much focus on the issue would, on the one hand, jeopardise further KR

defections and, on the other hand, disturb the campaign for the upcoming election that was to be held in July 1998. Regardless of this, he said he would welcome the group of international experts as well as appointing a group of Cambodians to discuss with them. The UN Secretary General accordingly appointed a group of experts in July 1998. Shortly after, they arrived in Cambodia, with the mission to explore the options for bringing KR leaders before an international or national court. In February 1999, the experts submitted their concluding report to the UN Secretary General and recommended that the UN – in response to the earlier request of the RGC – should establish an international ad hoc court to try KR leaders for crimes committed between 17 April 1975 and 7 January 1979. One major reason behind suggesting an international rather than a Cambodian court was the group’s opinion that the Cambodian judicial system was simply too weak to cope with such a delicate matter (Ciorciari 2009: 67; Hammarberg 2001; see further the Report of the Group of Experts for Cambodia established pursuant to UN GA Resolution 52/135).

The Report, which may be characterised as fairly detailed regarding a possible future court design, was met with negative reactions from the RGC, who had secured further defections during the latter half of 1998, including the two key leaders Noun Chea and Khieu Samphan. Following this symbolically important episode, Hun Sen suddenly argued that it was important to welcome the defectors with “bouquets of flower” and “not with prisons and handcuffs” and that “the time had come to dig a hole and bury the past” (Hun Sen, quoted in Ciorciari 2009: 66 and Hammarberg 2001, respectively).

Following these statements, Hun Sen was criticised not only by various international detractors and the national opposition, but also internally within CPP for negotiating with the UN in bad faith (Hammarberg 2001). The growing dispute between Hun Sen and the others reflected a genuine difference in emphasis between various stakeholders.

John D. Ciorciari (2009: 66) writes:

To Hun Sen and the CPP, reconciliation required breaking apart from the Khmer Rouge insurgency, bringing its leaders to heel, and securing their political allegiance ... A tribunal – or planning for a tribunal – was useful primarily in achieving these objectives. Where the interests of justice and pacification collided, Hun Sen favored the latter. To most of the UN officials involved, the two processes – weakening the Khmer Rouge movement and holding trials – were closely related and not necessarily sequential. Justice was necessary to achieve reconciliation, they reasoned, and bringing KR crimes to light would contribute to the movement’s dissolution.

He continues:

There were also clear political undertones to the dispute. To the CPP, reconciliation implied peace and stability in Cambodia under its leadership. To many international ... officials involved in the process, reconciliation meant *developing a more liberal and tolerant multiparty democracy* (italics added).

On 6 March 1999, further development that had an impact on the forthcoming negotiations followed. One of the remaining key leaders, Ta Mok – the former Secretary of the southwest zone of DK as well as second Deputy Secretary of the CPK and the one who led the trial against Pol Pot in 1997 – was arrested at the Thai border in northern Cambodia and brought to a detention centre in Phnom Penh. The week after his arrest, the Cambodian Foreign Minister travelled to New York to meet the UN Secretary General and to deliver an aide-mémoire. The document, which is dated 12 March 1999, states that the surrender of Khieu Samphan and Noun Chea, as well as the arrest of Ta Mok, meant the total collapse of the KR movement, both militarily and politically, and that the RGC will now focus on priorities other than the KR; in particular economic development and poverty alleviation. It appears, Hammarberg (2001) writes,

... that the tribunal had been considered as a means of defeating the Khmer Rouge. When this goal now had been achieved through other means, there was no need to try anyone else than the one person who had refused to surrender: Ta Mok. When referring to the process against him, international standards were not mentioned.

All in all, the above clearly displays the unofficial or true motives of the RGC to establish a war crimes court in Cambodia; Hun Sen and the CPP, put simply, considered a court to be a possible tool to secure domestic power.

A few weeks prior to the presentation of the aide-mémoire, Secretary General Annan had received the report from his groups of international experts; a report that he submitted to the UN General Assembly (GA) and SC, together with his own opinion that the KR leaders responsible for the most grave crimes should be brought to justice and tried before a court that met international standards regarding justice, fairness and due process of law, on 15 March 1999. All things considered, Annan's position was that impunity was no longer an option (Hammarberg 2011).

By now, the tensions between the RGC and some key states within the UN were profound. Relations were characterised by mutual suspicion and made the negotiations for the establishment of a court an intricate diplomatic and political task. In an interview for *Time Magazine*, made on 22 March 1999, Hun Sen added to the already difficult situation by saying:

It took me 20 years to destroy the political and military organization of the Khmer Rouge and to bring the leaders of this organization to a court of law ... When we were fighting against them, when we were demanding that the leaders of the Khmer Rouge be brought to trial, there were some people in some countries, including America, who were against us ... If foreigners have the right to lack confidence in Cambodian courts of law, we Cambodians also have the right to lack confidence in an international court of law. Why? Because those who would mandate an international court used to support the Khmer Rouge (quoted in Ciorciari and Heindel 2014: 25–26).

Hor Namhong, the Cambodian Foreign Minister, expressed a similar point of view when he met with Ambassador Hammarberg only a few days later, on 25 March; he said:

The international community talks about finding justice for the Cambodian people ... But what has the international community been doing vis-à-vis the Khmer Rouge lately? Once the genocidal Khmer Rouge regime was toppled, the so-called international community continued to support the Khmer Rouge. The so-called international community forced Cambodia to accept the Khmer Rouge as partners in the Paris Peace talks ... It said nothing about responsibility of the Khmer Rouge, let alone prosecution. But now that Cambodia has achieved peace and reconciliation, they call for an international tribunal. Can we trust them? This is the moral aspect. Now for legal aspects. We Cambodians suffered most and are those who most want justice. Article VI of the Genocide Convention does not prohibit prosecution by a national court --- We are ready to accept international assistance in order to respond to moral and legal aspects, and the desire for peace. Behind the so-called international community are one or two countries who push for an international tribunal. Some countries supported the Khmer Rouge until 1991. Do they love Cambodians more than the Cambodians themselves? (quoted in Hammarberg 2001).

The antagonism between the RGC and the international community had grown so bad that Hun Sen, who also participated in the meeting on 25 March, told Ambassador Hammarberg, that he in fact believed that the role of the UN on the KR issue had come to an end. The establishment of a court without Cambodian consent, by the adoption of a UN SC resolution, did not seem possible, since China still opposed the idea and would most likely exercise its right to veto such a proposal. Hence, the possibilities to reach an agreement seemed rather bleak in the beginning of 1999 (Ciorciari 2009: 66–68; Hammarberg 2001).

In an attempt to move beyond the resulting stalemate, some members of the international community started to consider an alternative model other than the ones considered so far; namely a “mixed” or “hybrid” court. The US Senator John Kerry, who knew Hun Sen previously, was the one that originally proposed the, so far untested, idea to Prime Minister when he visited Cambodia in April 1999. For the time being, the UN took no official position, hereby opening up for the possibility of reaching a future compromise (Ciorciari 2009: 69; Interview, Hans Corell, Skype, January 2015; Mamo 2013: 10).

At the same time, realities on the ground continued to change. In May, governmental forces arrested Kaing Guek Eav (the former Head of the infamous Tuol Sleng Security Prison; a.k.a Comrade Duch). The custody of Duch and Ta Mok along with close control over Khieu Samphan, Noun Chea and Ieng Sary – as well as the CPP’s strong domestic position and the rapidly improving positive relations with China – all added to the bargaining leverage of Hun Sen. All things considered, Cambodia’s dependence on the West was in decline. But, without UN participation, the CPP would not secure the stamp of international legitimacy. By this, the hybrid model was gradually emerging as a possible compromise for the UN as well as the CPP (Ciorciari 2009: 69; Ciorciari and Heindel 2014: 27; Hammarberg 2001).

Following usual underhanded negotiations, Hun Sen wrote a (new) letter to the UN Secretary General on 17 June 1999, requesting UN assistance to draft legislation for “a special national Cambodian court to try Khmer Rouge leaders [which] would provide for foreign judges and prosecutors to participate in its proceedings” (quoted in Ciorciari and Heindel 2014: 27). In response to the request, the UN, this time represented by the UN Office of Legal Affairs, initiated new negotiations with the RGC. The aim of the negotiations was to reach an agreement “... on how such a court would have to be organized and how it would have to function, if the United Nations was to provide or arrange assistance to help establish it and help it to function” (Ciorciari and Heindel 2014: 27; UN A/57/769, 31 March 2003).

As negotiations started in August 1999, the UN insisted that the Court should have a majority of international key personnel. This idea was, however, rejected completely by the Cambodians and in September Hun Sen met with Kofi Annan in New York and stubbornly offered three options to the UN: (i) the UN could provide legal experts to collaborate with Cambodian lawyers from other countries to assist the drafting of the necessary legislation as well as providing judges and prosecutors to participate in the trial process at the existing Cambodian court; (ii) provide legal advice without direct participation; or (iii) simply withdraw. While in New York, the Cambodians also held separate meetings with leading representatives of the US State Department, since there appeared to be more understanding between the two governments on this particular issue than between the RGC and the UN (Ciorciari and Heindel 2014: 28; Hammarberg 2001; Mamo 2013: 10).

In this situation, the US officially proposed the up and coming idea of establishing a special chamber within the Cambodian court system that would operate with a supermajority vote – that is: [i]f the Court were to have a Cambodian majority, the vote of at least one international judge would be required for any judicial decision” (Ciorciari and Heindel 2014: 28; Hammarberg 2001). In principle, the RGC welcomed the US initiative and, by consequence, US diplomats began to pressure the UN Secretary General and his legal co-workers in order to close a deal. However, Hans Corell – who at the time was Under-Secretary General for Legal Affairs and the Legal Counsel of the UN – argued that the supermajority idea was a recipe for paralysis and insisted on an international majority of judges. The question of control was also linked to the Court’s jurisdiction. Hun Sen wanted to try only four or five of the people responsible, while Corell was not interested in discussing who should be prosecuted, since, he argued, international law requires an independent prosecutor to make such decisions. Hun Sen also pointedly argued that future trials should exclude those who (like himself) had “helped to overthrow the genocide” (Ciorciari and Heindel 2014: 29–30; Interview, Hans Corell, Skype, January 2015; Hammarberg 2001).

On an overall level, Corell and the UN team remained sceptical of a court with a Cambodian majority but eventually agreed, in July 2000, that the Court would be “a Cambodian court with the participation of international judges and prosecutors”. Corell, however, continued to argue that the UN should appoint the international judges, an international Co-Prosecutor as well as two other officials, namely: a deputy international prosecutor and a deputy director of

Administration. The Cambodians had a different opinion and in January 2001, the Cambodian NA, without UN consent, approved a draft law – the 2001 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea – that established Cambodian majorities in both chambers and granted Cambodia control over all appointments. The Law was unacceptable for the UN and after unsuccessful attempts to make it acceptable, Annan withdrew Corell and his team in February 2002. The RGC responded to this quite dramatic move by boldly stating that the UN withdrawal was, in fact, “[n]o problem at all” (Ciorciari and Heindel 2014: 31–33; Interview, Hans Corell, Skype, January 2015). Hereby, the possibilities of establishing a war crimes court in Cambodia undeniably looked darker than ever before.

By proposing a UN GA Resolution requesting that the UN Secretary General resumed negotiations without any further delay to conclude an agreement with Cambodia in order to make the extraordinary chambers function promptly, in December 2002 France and Japan, however, brought the stalled process forward. The resolution passed and the UN was hereby “forced” back to the negotiating table. Even though Corell and the UN team negotiated skilfully and reached some further compromises, the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea signed in 2003, and the 2001 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended in 2004, largely turned out very favourable for Hun Sen and the CPP (Ciorciari and Heindel 2014: 33–36; Interview, Hans Corell, Skype, January 2015).

To complement this historical and political background to the KR movement and establishment of the ECCC, the next section aims to provide a structural and more detailed overview of the Court.

4 A Structural Overview of the ECCC

The ECCC is a special Cambodian court that receives international assistance, which is provided by the United Nations Assistance to the Khmer Rouge Trials (UNAKRT). The Court is, as partly indicated above, based upon and governed by three foundational documents, namely:

- (i) The 2001 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended in 2004 (henceforth the ECCC Law);
- (ii) The 2003 Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under

Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (henceforth the ECCC Agreement); and

- (iii) The 2007 ECCC Internal Rules (henceforth the ECCC Internal Rules).³

The ECCC Law spells out the objective of the Court and regulates, *inter alia*, the competence and composition of the ECCC, the work of Judges and Prosecutors, the Office of Administration, the trial proceedings in the Court, penalties, amnesty and pardons, status, rights, privileges and immunities, locations and expenses of the Court and the working languages (English, French and Khmer).⁴

The ECCC Agreement – that was signed by Sok An, Senior Minister in Charge of the Council of Ministers, on behalf of the RGC, and Corell, Under-Secretary-General for Legal Affairs and the Legal Counsel of the UN, on behalf of the UN – regulates the cooperation between the UN and the RGC in bringing those pointed out in the ECCC Law to trial and provides, among other things, the legal basis and the principles and modalities for this cooperation. Regarding criminal procedure, the ECCC Agreement states that:

The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level (Art. 12).

In addition, the document also regulates the appointment of and balance between the international and national staff, how settlements of differences between the Co-Investigating judges or the Co-Prosecutors should be handled, the jurisdiction of the Court, the rights of the accused (including instructions regarding counselling), the role and rights of witnesses and experts as well as other practical arrangements.

The ECCC Law and the ECCC Agreement provide general principles rather than detailed instructions. From this follow that the character and function of the Court has been created over time, mainly by administrative heads, judges, prosecutors and other individuals entrusted with various decision-making power. The result of this work is reported in the ECCC Internal Rules (Ciorciari and Heindel 2014: 41). The purpose of the Rules, which was adopted on 12 June 2007, is thus:

3 So far, the ECCC Internal Rules has been revised nine times since they were originally adopted on 12 June 2007. When references are made to the Internal Rules in this paper, these relates to the eighth revised edition of the Document (12 August 2011).

4 Originally the Cambodians insisted that Russian also should be included as an official Court language. This, however, Corell succeeded to avert after direct talks to the Russians (Interview, Hans Corell, Skype, 26 January 2015).

... to consolidate applicable Cambodian procedure for proceedings before the ECCC and, pursuant to Articles 20 new, 23 new, and 33 new of the ECCC Law and Article 12(1) of the ECCC Agreement, to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards (p. 6).

With the overall aim to provide an overview of the quite complicated structure of the ECCC, the remainder of this section is divided into five subsections. The first one is about the jurisdiction and (ambitious) goals of the Court. The second subsection briefly presents the key organs of the ECCC. The third presents the basic judicial steps of prosecution in accordance with the three foundational documents within the framework of the Court's civil law system. The fourth subsection displays the various national and legal backgrounds of the ECCC staff and the fifth and final one deals with the funding of the Court.

4.1 *Jurisdiction and Goals of the ECCC*

The personal and temporal jurisdiction of the ECCC is limited to senior leaders of DK and those who were most responsible for the crimes and serious violations that were committed between 17 April 1975 and 6 January 1979. The subject matter jurisdiction of the Court includes:

- (i) Homicide (Art. 501, 503, 504, 505, 506, 507 and 508), torture (Art. 500) and religious persecution (Art. 209 and 210) under the 1956 Cambodian Penal Code;
- (ii) Genocide (as defined in the Convention on the Prevention and Punishment of the Crime of Genocide, 1948);
- (iii) Crimes against humanity (including: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious ground, as well as other inhumane acts);
- (iv) Grave breaches of the Geneva Conventions (1949);
- (v) Destruction of cultural property during armed conflicts pursuant to the Hague Convention for Protection of Cultural Property in the Event of Armed Conflict (1954); and
- (vi) Crimes against internationally protected persons under the Vienna Convention on Diplomatic Relations (1961) (see Art. 1-8, the ECCC Agreement).

Given the fact that the ECCC is a Cambodian court and no extraterritorial jurisdiction has been claimed, the territorial jurisdiction of the Court is restricted to Cambodian territory (Scheffer 2008).

The chief goal of the ECCC is to provide justice to the Cambodian people – those who died and those who survived. But it is also hoped that the trials will serve “to educate Cambodia’s youth about the darkest chapter in [the] country’s history”, “strengthen the rule of law and set an example for people who disobey the law in Cambodia and for cruel regimes worldwide” and, by extension, to reconstruct the Cambodian society (ECCC 2015a). The expectations and the goals set out by the ECCC are thus fairly ambitious. Keeping this in mind, let us now turn the focus to the various organs of the Court.

4.2 *The Organs of the ECCC*

Even though the ECCC is commonly described as a hybrid court, it could, according to John Ciorciari and Anne Heindel (2014: 43), just as adequately be characterised as a “divided” court. This is simply because the ECCC is divided into two sides, one Cambodian and one international, that have, among other things, separate recruitment procedures and reporting structures. The chief idea behind this unique design, with not only national and international Judges but also national and international Co-Prosecutors, as well as national and international Co-Investigating Judges is to provide Cambodian ownership of the Court and, at the same time, to protect it from Cambodian political interference, as well as making sure that the proceedings comply with international legal procedural standards (Ciorciari and Heindel 2014: 44).

4.2.1 Co-Prosecutors and Co-Investigating Judges at the ECCC

The ECCC is unique not only for having national and international Co-Prosecutors, but also for having national and international Co-Investigating Judges. The structure of the ECCC secures investigatory powers to both the Co-Prosecutors and the Co-Investigating Judges. Together, the two Co-Prosecutors conduct preliminary investigations; prosecute cases throughout the investigative, pre-trial, trial and appellate stages; process victim complaints, and participate in judicial investigations. The Co-Prosecutors open a judicial investigation by sending the Co-Investigating Judges an introductory submission, which outlines the facts and names of the persons to be investigated. The Cambodian Co-Prosecutor is appointed by the Supreme Council of the Magistracy in Cambodia and the international Co-Prosecutor is appointed by the same body; however, upon nomination by the UN Secretary General (Ciorciari and Heindel 2014: 44; ECCC 2015b; ECCC 2015c).

The Co-Investigating Judges investigate the facts and names set out in the introductory as well as supplementary submissions from the Co-Prosecutors. After having concluded their investigation, the Co-Investigating Judges issue a closing order containing either an indictment with an order to send the case for trial or a dismissal order terminating the proceedings. During this process the Co-investigating Judges also decide who can be a “civil party” in a future trial (see further below) (ECCC 2015d).

The Co-investigating Judges cannot investigate facts that are not set out in the introductory submission unless they get permission from the Co-Prosecutors in the form of a supplementary submission. They can also, after having sought advice from the Co-Prosecutors, charge individuals not named in the introductory submission. Hence, it is the Co-Prosecutors who control which crime sites are to be investigated, while it is the Co-Investigating Judges who make the final decision regarding which individuals are to be sent to trial and for what allegations (Ciorciari and Heindel 2014: 44–46; ECCC 2015b).

4.2.2 Judicial Chambers at the ECCC

There are three Chambers in the ECCC, namely: (i) the Pre-Trial Chamber; (ii) the Trial Chamber; and (iii) the Supreme Court Chamber. The Pre-Trial Chamber's only responsibility according to the ECCC Law is to decide on disagreements between the pairs of national and international Co-Prosecutors or Co-Investigating Judges. However, this responsibility was expanded by the Internal Rules to also include appeals against orders from the Co-Investigating Judges. Three Cambodian and two international judges make up the Chamber and decisions require supermajority (ECCC 2015e; Interview, Hans Corell, Skype, January 2015).

After the investigation is concluded, if a case is being sent to trial then the trial hearings will be conducted before the Trial Chamber of the ECCC. It is the Trial Chamber that will – based on the testimonies of witnesses, collected evidence and arguments presented by the parties during trial – decide whether an accused is guilty or not, order possible sentences and, if applicable, collective reparations to victims and “civil parties”. The Trial Chamber consists of three Cambodian and two international judges and a guilty verdict requires supermajority (Baaz 2015a: 173; ECCC 2015e).

The Co-Prosecutors, the “Civil Parties” and the Defence teams can appeal judgments and decisions issued by the Trial Chamber to the Supreme Court Chamber. Four Cambodian and three international judges make up the Supreme Court Chamber. Decisions and Judgments by the Supreme Court Chamber require supermajority and are final (ECCC 2015e).

4.2.3 Other Judicial Offices at the ECCC

In addition to the Judicial Offices and Chambers referred to above, three more organs should be brought up in this overview, namely: (i) the Victims Support Section (VSS); (ii) the Defence Support Section (DSS); and (iii) the Office of Administration. The organs will be dealt with in this order. Before this, however, a brief detour on the civil party participation in the ECCC mentioned above is necessary.

In any legal system, the prosecution is the legal party that is responsible for presenting the case in a criminal trial against an individual who is accused of having violated the law on behalf of society at large. Many legal systems fail to give victims an active role within criminal proceedings and cast them merely as “witnesses”. Despite sharing a common goal, the conviction of the one(s) prosecuted, the interests of the prosecutor and the victims does not, however,

necessarily overlap entirely. A punishment that follows a successful prosecution most often results in imprisonment and/or issuing of fines. Such a punishment, however, does not redress the suffered consequences of the crimes against the victims. This exclusionary understanding of the role of the victim could cause feelings of marginalisation and disempowerment, since the prosecutions seek only to establish guilt and to punish the person who is prosecuted. Retributive justice is only a limited one-dimensional form of justice. Various needs of victims are, it is argued, often more multifaceted and require additional means to prosecution – including: individual or collective reparations, the establishment of an accurate historical understanding of the suffered wrongdoings, as well as remembrance and memorialisation for the victims – in order to establish what could be considered as justice for the victims (Thomas and Chy 2009: 215-216).

The greatest difference regarding victim participation is to be found between common law systems, on the one hand, and civil law systems, on the other hand. Common law systems adopt a restrictive approach to victim participation and consider victims as having a rather limited role to play in criminal trials, which is very much restricted to the provision of testimonies. Civil law systems, on the contrary, permit victims to play a much more active role in criminal law. Most legal systems based on the French version of the civil law model permits victims to intervene directly and as full parties to criminal proceedings with rights analogous to those of the prosecution and defence. Such victims, known as “civil parties”, may thus, for example, require investigatory actions and question witnesses, including expert witnesses, and the accused (International Federation for Human Rights 2012; Thomas and Chy 2009: 216-217).

Given Cambodia’s colonial legacy, the country’s pre-KR legal system was heavily inspired by the French interpretation of civil law. The same is true for the legal system that was developed after 1979 – in particular, after 1991. The new Cambodian Code of Criminal Procedure, for example, thus mirrors French law in allowing victims to participate in criminal proceedings as civil parties and to request individual reparations (Kong 2012: 7–8; Thomas and Chy 2009: 217).

Even though international as well as regional human rights documents have long expressed a general right to a remedy, it is only recently that victims have received specific recognition of their rights at the international level. No such provisions are, for example, to be found in either UN S/RES/827 (1993) or S/RES/955 (1994), which establishes the ICTY and the ICTR, respectively. Being heavily influenced by the common law adversarial model, these two *ad hoc* tribunals solely focus on retributive justice. The only purpose of the Courts was the prosecution of the individuals who were responsible for crimes within their jurisdiction. Even though Resolution 827 made it clear that the proceedings in the Court should not “prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law” it was clear that such compensation, as in the common law systems, must be claimed by the initiating of a separate civil action in a domestic court (Ciorciari and Chy 2009: 228–229).

It is only by the Rome Statute of the International Criminal Court – that was adopted in 1998 – that a significant step toward the realisation of victim’s rights on the international stage was taken. The Statute allows victims to participate in the proceedings before the ICC by giving them rights to be represented, present their views and concerns at stages of the proceedings where their interests are implicated, and to obtain reparations (Ciorciari and Chy 2009: 229; Art. 68 and 75, the Rome Statute, 1998).

Even though the Rome Statute should be considered an important step regarding victims’ rights, it is important to note that the rights are not unlimited, but restricted by the discretion of the Court (Art. 68:3, the Rome Statute, 1999). This model for victim participation is based on schemes found in civil law systems in general and the UN General Assembly Declaration, “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” (A/RES/60/147, 2005) in particular (Ciorciari and Chy 2009: 229–230). The 2005 UN GA Declaration is best described as a “codification” of discussions and developments regarding the participation of victims in criminal proceedings that had been going on within the international society since the 1980s.

Resulting from the decision to make the ECCC an integral part of the Cambodian legal system – and, by consequence, the applicability of Cambodian procedural law – and the general trend in ICL for the inclusion of the victims described above, the Court allows victims to participate in the proceedings. Neither the ECCC Law nor the ECCC Agreement, however, provides any explicit provisions for such participation. Such jurisprudence and practice directions have instead been left for the Court to develop and are, by consequence, to be found in the ECCC Internal Rules (Ciorciari and Chy 2009: 231).

According to the Internal Rules, the purpose of the civil party participation is to support the prosecution and to seek collective and moral reparations (Werner and Rudy 2010: 302). In theory, the victim participation scheme is very progressive and is one of the major innovations of the Court. The ECCC Internal Rules provide for three modes of participation for victims and other survivors of the KR period. Firstly, any person, organisation or other sources who witnessed or were victims of crimes within the jurisdiction of the ECCC, or those who have knowledge of such crimes, may file a complaint with the Co-Prosecutors, who then take the interests of the victims into account when deciding whether to initiate a judicial investigation or not (Art. 49:2, the ECCC Internal Rules). Secondly, victims of crimes within the jurisdiction of the ECCC are entitled to participate in the trials as civil parties. By this, they are recognised as full parties to the trial and are permitted to seek collective and moral reparations (Art. 23s, the ECCC Internal Rules). Finally, victims and other survivors may voluntarily participate in the proceedings as witnesses (Ciorciari and Chy 2009: 232).

In order to make effective victim participation in the proceedings possible, the drafters of ECCC Internal Rules provided the establishment of a victims unit, the VSS. The VSS is a central contact point between the ECCC and the victims, including their representatives. In this, the Section:

... informs Victims about their rights relating to participation and reparations, and enables them to file complaints and Civil Party applications to the ECCC if they wish to do so --- This entails the provision of assistance in obtaining legal advice or a lawyer, supporting legal representatives and facilitating the grouping and collective representation of Victims. The VSS supports the work of the Co-Prosecutors and the Co-Investigating Judges by processing complaints and Civil Party applications and preparing reports for these offices. It also maintains contact with Victims and their lawyers regarding the status of their complaints and applications, and keeps them updated regarding developments in individual cases --- Lastly, the VSS [also] ensures the safety and well-being of Victims who participate in the proceedings. This involves ensuring that Victims properly understand the risks sometimes inherent in such participation, as well as providing them with protective measures and other assistance, like psychosocial support (ECCC 2015f).

The role of the Defence Support Section (DSS) is to ensure fair trials through effective legal representation of the accused. Among other things, the Section is responsible for providing those accused with lawyers to defend them as well as providing available legal and administrative support to defence lawyers who are assigned to work on cases at the ECCC. In addition, the DSS acts as a voice for the defence in the media and at various outreach events; communicates with other courts as well as various NGOs; runs training courses; and organises internships (ECCC 2015g).

To match the Co-prosecutors, each accused has a defence team made up by two or more Co-Lawyers, at least one international and one Cambodian, who are supported by various assistants (*ibid*; see also ECCC 2015h, ECCC 2015i; ECCC 2015j; ECCC 2015k; ECCC 2015l).

Led by a Cambodian Director and an international Deputy Director, the Office of Administration was created in order to serve the aforementioned Chambers and Judicial Offices. Besides providing the overall coordination and guidance to the various organs of the ECCC, the Office is also in charge of relations with the parties to the ECCC Agreement and the donor community. Another important task of the Office of Administration is to draft and review all ECCC's official documentation (ECCC 2015m). By this, the Chambers and Judicial Offices of the Court have been introduced and discussed. Next, a brief summary of the basic judicial process in the ECCC will be presented.

4.3 *A Summary of the Basic Judicial Process in the ECCC*

Prosecution before the ECCC, in accordance with the ECCC Law, the ECCC Agreement and the ECCC Internal Rules within the framework of a civil law system, can be schematically summarised as follows.

A case is initiated by a written submission from the Co-Prosecutors requesting the Co-Investigating Judges to open a case and to propose charges. The Co-Investigating judges are only entitled to consider facts that are set out in the submission(s) from the Co-Prosecutors, including the initial submission and, if applicable, supplementary submissions and may charge any person therein. Parties may appeal against decisions of the Co-Investigating Judges,

apply to annul investigative action or request a sanction against any person allegedly interfering with the administration of justice to the Pre-Trial Chamber. After this, the Co-Prosecutors write a final submission to request that the Co-Investigating Judges indict or dismiss the case. At the end of their investigation, the Co-Investigating Judges write a closing order to decide whether to indict or dismiss charges, as well as deciding who are entitled to participate as civil parties in a coming trial. This order can be appealed to the Pre-Trial Chamber. If a case finally leads to a trial, the Co-Prosecutors, the Co-Lawyers, the accused, as well as the Civil Parties put forward and examine evidence, and witnesses before the Trial Chamber, which, by the application of a supermajority vote, present a judgment and, if appropriate, reparations to the victims. The Trial Chamber decision can be appealed to the Supreme Court Chamber. Decisions made by the Supreme Court Chamber are, however, final (ECCC 2015n).

4.4 *The Various National and Legal Backgrounds of the ECCC Staff*

The national and legal background of the ECCC staff is, put carefully, diverse. Below follows some examples to illustrate this claim. The current international Co-Prosecutor, Nicholas Koumjian, for example, is American, while his predecessor, Andrew Cayley, is British. Prior to his appointment to the ECCC, Koumjian was Senior Appeals Counsel for the prosecution of the former President of Liberia, Charles Taylor, at the Special Court for Sierra Leone. He has also represented clients in the ICC, has been head of the UN-funded Serious Crimes Unit in East Timor and has served as a trial attorney at the ICTY and the State Court of Bosnia and Herzegovina (ECCC 2015o).

The current international Co-Investigating Judge is from the US and earlier worked as senior trial attorney in the ICTY for 17 years. Mark Brian Harmon's predecessors as the Co-Investigating Judge – Siegfried Blunk and Laurent Kasper-Anserment – were educated in West Germany and Switzerland, respectively (ECCC 2015p). The current international judges in the judicial chambers originate from and are educated in, for example: Austria, France, Poland and Sri Lanka, while the defence teams include individuals from the Netherlands and France (see further, for example: ECCC 2015q; ECCC 2015r; ECCC 2015s; ECCC 2015t; ECCC 2015u).

Considering the above, it could be argued that an “entourage” of ICL is under development (Interview, Journalist, Phnom Penh, November 2014); i.e. an informal group of jurists who travel from one site to another and sometimes work as a prosecutor, while other times as a judge or even a defence counsel, but always highly paid and fairly isolated from the context in which they work. Due to the specific scope of this article, as well as other limitations, this observation and possible following consequences will not be elaborated upon any further here.

The Cambodian counterparts, most of them holding high positions within the Cambodian state and/or in the CPP, are educated not only in Cambodia but also and even more so in countries like East Germany, the USSR and Vietnam. Put differently, they are trained in socialist legal thinking; a legal system that

has a number of unique qualities, including the closeness between the State and judiciary and, by extension, the non-adversary character of the judicial process.

One very concrete result of the interaction between all these individuals – international as well as Cambodian, with their rather diverse legal background – is the ECCC Internal Rules.

4.5 *The ECCC's Funding*

The ECCC has three different sources of funding, namely: (i) the UN budget; (ii) the Cambodian national budget; and (iii) voluntary funds contributed by foreign governments. The UN bears the "... expenses of the foreign administrative officials and staff, the foreign judges, Co-investigating judge and Co-prosecutor sent by the Secretary-General", while "[t]he expenses and salaries of the Cambodian administrative officials and staff, the Cambodian judges and reserve judges, investigating judges and reserve investigating judges, and prosecutors and reserve prosecutors" is borne by Cambodia. The ECCC may also "receive additional assistance for their expenses from other voluntary funds contributed by foreign governments, international institutions, non-governmental organizations, and other persons wishing to assist the proceedings" (Art. 44 new, the ECCC Law).

The above completes the structural overview of the ECCC and the focus will now be directed towards an analysis of the Court's unique and complex character as well as some resulting consequences.

5 The ECCC – An Experimental, Complex, Complicated and Contradictory Construction

According to the official historical narrative the ECCC was, as we know, created primarily to deliver justice to the victims of the KR's radical social revolution that was carried out during their three year, eight month and twenty day rule during the latter half of the 1970s and secondarily to advance other transitional justice goals.

Seeking to fulfil such elevated goals as the ECCC has would be a challenge for any court of law, since criminal trials are in fact not designed to carry out most of the needs required to adequately address past traumas (Ciorciari and Heindel 2014: 4). Even so, criminal courts are often, and to an increasing degree, considered important parts in various societal responses that seek to handle past mass atrocities (Baaz 2015b). If they function well, criminal courts can play important roles within wider processes of transitional justice; in particular, if they are combined with other arrangements such as: truth commissions, reparations programmes and various kinds of institutional reforms (The International Center for Transitional Justice 2015). If they fail, however, they can instead quash human hope, contribute to the falsification of history and consume resources that are better used elsewhere. This is especially true if a court is established on dubious grounds, has an opaque and complex

structure, weak institutional safeguards against political interference and improper administrative behaviour. Even if agency matters, the establishment, structural design and political context of a court can make its functional success more or less likely (Ciorciari and Heindel 2014: 4; cf. Baaz 1999).

The remainder of this section is divided into three sub-sections and discusses as well as analyses the following: (i) the dubious motives behind the establishment of the ECCC; (ii) some consequences following the complex, and complicated, not to say contradictory, structure of the Court; and (iii) the (continuing) problem with political interference in the judicial process.

5.1 *The Road to the ECCC – Dubious Motives*

David Chandler (2008) has shown that there have existed a number of various official policies by the Cambodian Government in regard to the KR atrocities. The first policy, applied during the 1980s, was aimed at encouraging “hostile recollections”. Among other things, this policy included the establishment of various physical memorial sites, such as the Toul Sleng Genocide Museum and Choeung Ek Genocidal Center. The chief idea behind this policy was to “never forget” the horrors of the leaders of DK. The “extreme actions” of Pol Pot–Ieng Sary faction were also referenced in order to make the Vietnamese invasion of Cambodia legitimate and, by extension, legitimising the KPRP and PRK (Hughes 2005). All in all, the very unclear borders between the new rulers in Phnom Penh and their antagonists made it very important to, on the one hand, establish a distance between themselves and the Pol Pot–Ieng Sary faction and, on the other hand, “‘induce and cultivate negative memories’ towards the former regime”, in order to establish “a new Cambodian national history” (Brown and Millington 2015: 31). This was not only done by constructing various physical memorial sites, but also by the instigation of, for example, the *Day of Anger*, which was supposed to be celebrated annually on 20 May (Baaz and Lilja 2015a; Hughes 2005; Manning 2011: 5, 14). The PRK tried hard to make a distinction between their own “legitimate” communism and, as they understood it, the perverted, not to say fascist communism practised by the Pol Pot–Ieng Sary faction (Brown and Millington 2015: 32).

During the 1990s, Hun Sen and the CPP ambivalently, slowly and gradually changed their strategy vis-à-vis the KR legacy. Instead of focusing on never forgetting the horrors of the Pol Pot–Ieng Sary faction, the new policy aimed at promoting a policy of “collective amnesia” – the time was, as we know, now considered ripe to “dig a hole and bury the past”. The rationale underlying this strategy was, as indicated previously, that both CPP and FUNCINPEC needed to secure as many defectors as possible from the KR in order to tip the political balance in their own favour, respectively (Baaz and Lilja 2015a; Caswell 2010: 38).

In 1997, after discussions with UN representatives, Hun Sen, however, realised that putting some senior KR officials to trial could be advantageous. By this move, at least three goals could be achieved. Firstly, the CPP could not only establish a gap between themselves and the Pol Potists, but also the KR movement in its entirety. Secondly, the CPP could also establish the official

narrative of themselves as the ones who did not only established peace but also justice in Cambodia. Finally, by bringing some KR leaders to justice, the CPP could in addition satisfy the growing international demand to bring the cultural of impunity to an end. In mid-1997, all this seemed attractive to the RGC and to establish a court thus seemed to serve its purpose; at least as long as the trials could be directed by the Hun Sen and the CPP (Baaz and Lilja 2015a).

However, after Hun Sen had secured a political monopoly through the military coup in July and August 1997, Pol Pot had died in April 1998, further defections had been secured in December 1998, Ta Mok had been arrested in early 1999 and given that the political relations between Beijing and the CPP improved significantly, the RGC made a 180-degree turn. To establish an international court no longer seemed, on an overall level, to serve the interest of Hun Sen and the CPP. At the same time, Cambodia's dependence on the West was now much less than it was back in the early 1990s.

Cambodia's international legitimacy was, however, not very high, and to try the old Pol Potists domestically without international participation or not at all would, needless to say, not change this. Hence, the most favourable outcome for Hun Sen and the RGC would be to establish a hybrid court; one that they could control and use to construct the desired national meta-narrative. Such a court could satisfy the various goals of the regime simultaneously and further strengthen the CPP grip on power. This was noted by Corell, who in 1999 had already argued that: “[t]he Cambodian Government does not intend to allow a free, fair, and non-selective trial process of the all Khmer Rouge leaders living in its territory, but rather a carefully monitored process under its full political control” (Corell quoted in Ciorciari and Heindel 2014: 196).

In order to not lose the initiative globally, however, some of the major Western powers, most notably, the US, Japan and France, were willing to meet the RGC. The motives for this were complex and composed. But, on an overall level they had to do with the spread of liberalism and the individualisation of criminal responsibility. But also, of course, with the problematic past of many Western countries in Southeast Asia and Cambodia, which, among other things, included support for Pol Pot until at least 1991, which was long after the DK atrocities were well known. Put simply, many countries felt guilty conscience (Interview, Hans Corell, Skype, 26 January 2015).

Corell has concluded that there were “many involved behind the scenes”, which explains why “the UN Secretariat was obliged to accept features that have led to the difficulties that now exist” (Corell quoted in Ciorciari and Heindel 2014: 39). According to some observers, however, the result of the negotiations was the best possible outcome under difficult circumstances. Scholars Gregory H. Stanton and Peter Leuprecht capture the spirit of this position in a good way by arguing that “perfection is the enemy of justice” and “rather this tribunal than no tribunal” (quoted in Ciorciari and Heindel 2014: 35).

Supporters also believed that the ECCC Agreement gave the UN enough power to keep the ECCC on track. This misguided optimism was, as we shall see, founded on the expectations that the UN would stay active and make sure that the Court fulfilled international standards as it started to operate (Ciorciari and Heindel 2014: 35).

The negotiation result between the UN and the RGC, however, did not lack critics besides Corell. Former Co-Prosecutor Robert Petit has argued that, “the creation of the ECCC [is] probably the clearest example in International Criminal Law of a judicial process beset by political wrangling and used for other ends than justice” (Petit 2011: 190). According to Mike Jendrzeczyk, the ECCC embodies “the lowest standards yet for a tribunal with U.N. participation” as well as that “with Cambodia’s judiciary at the center of the tribunal, the agreement ensures that it will be politics and not law that dominate the tribunal’s work”. In fact, Amnesty International went as far as arguing that the ECCC would “not only threaten the integrity of the legal process for [Cambodia but also] would set a dangerous precedent that could compromise fair trial standards for any future or mixed tribunals” (quoted in Ciorciari and Heindel 2014: 35–36).

The ECCC is arguably the product of vested interests and compromises; it is an awkward and fragile legal construction, heavily dependent on a government with a dubious record, both politically and judicially, and requires the cooperation of two sides – the national and international – with a difficult history and a long record of mutual distrust. Most of the problems that the Court faces are consequences of the fact that the ECCC is a compromise; the Court was born with an ambiguous, not to say schizophrenic, legal identity – neither fully international nor fully domestic in nature. Neither the ECCC Agreement, nor the ECCC Law regulates the relationship between the ECCC and other Cambodian courts (Ciorciari and Heindel 2014: 42).

On an overall level, the ECCC structure, which will be analysed in more detail in the next subsection, has “presented even its most talented and committed personnel with an uphill battle for functional effectiveness” (Ciorciari and Heindel 2014: 40).

5.2 *The ECCC – A Legal Construction Sui generis*

Any international or hybrid court, needless to say, faces various challenges – ranging from the very simple to the extraordinary. There are many reasons for this and one of the more important has to do with the character of the foundational documents that establish these courts. Since foundational documents are political compromises and most often framework agreements, they are full of holes. Much of the *de facto* character of a new court is instead created over time, by practices installed by its staff – in particular administrative heads, prosecutors and judges, and often individuals with diverse national and legal background. Hence, applicable rules often take years to finalise; this is time that courts with short timespans do not really have.

As the first civil law-based mass-crimes court, the ECCC has been forced to establish new legal figures and solutions. In particular the Court has had to manage the difficult task of combining the international and national aspects that follow from its unique hybrid character. Below, four distinct sets of challenges will be raised and discussed: Firstly, the ECCC has struggled to manage an efficient, transparent and legitimate judicial process in a legal construction that is staffed by co-officials with investigatory power and

comprises two chambers of appeal. Secondly, the Court has wrestled with the pairing of substantive national and international law, both of which present interpretative challenges and disputes following the temporal jurisdiction of the ECCC in the late 1970s. Thirdly, the Court has been forced to decide what blend of international and domestic procedural rules to apply. Finally, the ECCC is, to a great extent, funded by external means (cf. Ciorciari and Heindel 2014: 41–42).

5.2.1 The “Cos”

The ECCC is unique in having both national and international Co-Prosecutors and Co-Investigating Judges. Both pairs of Prosecutors and Investigating Judges as well as the offices that they co-lead – the Office of the Co-Prosecutors and the Office of the Co-Investigating Judges, respectively – have investigatory powers and conduct preliminary investigations of crimes within their jurisdiction. Following the French-civil law tradition that directs the ECCC, the investigating judges are given the primary investigatory role. The Co-Investigating Judges can, as we know, only investigate facts addressed in the introductory submission unless they are given permission from the Co-Prosecutors in the form of a supplementary submission. By this, the Co-Prosecutors control which crime sites are being investigated, while the Co-Investigating Judges make the final decision on which persons to send to trial and on what charges.

In comparison with the adversarial systems, all evidence is confidentially collected by the Office of the Co-Investigating Judges and placed in evidentiary case files for review by the Court in inquisitorial systems. In practice this means that the longest part of a case is confidential. The aim of the trial is to verify rather than fully air the detailed findings. Hence, the public cannot see justice in action. Given the didactic role of the ECCC, this is a problem. Another problem with the civil law approach is that the burden of becoming familiar with the context, structure and working of the KR movement, as well as sorting and examining the vast amount of documents of potential witnesses of crimes that took place more than 30 years ago is enormous (Ciorciari and Heindel 2014: 46-47).

In seeking to deal with this difficulty, the ECCC has decided to allow the Trial Chamber to request an expert opinion on any subject deemed necessary to the proceedings (Art. 31). One such subject is the “rise and fall” of the KR movement. Accordingly, the Court has heard several historians, including David Chandler, Philip Short and Elisabeth Becker (Decision on Assignment of Experts, Case File Dossier No. 002/19-09-2007/ECCC/TC, 5 July 2012). The usage of expert witnesses in this regard is by no means unproblematic. When Chandler testified in Case 002, for example, it was clear that he, in his ambition to write a historical narrative, had to make assumptions when documentary sources were missing (Mamo 2013: 30). This, of course, fits poorly with the evidence requirements that could be demanded in criminal trials.

In this regard, it is also important to remember that for all major political events – perhaps in particular where the criminal responsibility of political

leaders is at stake – there are many stakeholders and thus multiple, often conflicting, interests and truths (Koskenniemi 2011: 180). During his testimony, Chandler also said: “I’ve never found a person who had a neutral view on Democratic Kampuchea” (quoted in Mamo 2013: 32). Put differently, memory, history and, by extension, truth are “polysemic” and “polyvalent” in nature (Hasian Jr. and Carlson 2000); thereby, to construct a truth of events that could serve as a meta-narrative for the future and to move beyond the traumatic events that the KR era undoubtedly represents is not only difficult but also characterised by conflict – regardless of whether it is possible or not and/or desirable or not – and, by consequence, this develops into a “struggle over memory” (Baaz and Lilja 2015a; Baaz and Lilja 2015b; see also Alexander 2004; Edkins 2003).

Another complication in this respect is that much of the documentary evidence used in the ECCC comes from a single institution, namely the earlier mentioned DC-Cam. Given the rationale for the creation of the institution, its neutrality has been challenged by some of the defence teams. According to the Director of DC-Cam, the institution has three objectives: (i) studying history to promote national reconciliation; (ii) teaching the history of DK to schoolchildren and the public; and (iii) creating a research centre for the future study of Cambodia (Mamo 2013: 24). One serious problem in this respect is – according to, among others, Arthur Vercken, who is Khieu Samphan’s international counsel – that the documents that have been developed by DC-Cam are integrated directly into the case files and then taken for granted by the Prosecutors. Besides the problem of biases, it should also be noted that the documents are not legal investigations and have not been conducted to such a standard (Mamo 2013: 24, 27).

According to Martti Koskenniemi (2011) there is ultimately a basic tension between the legal focus on establishing individual responsibility and historical explanations; the determination of individual responsibility demands a context for evidence and the contestation of context will, generally speaking, proceed on the level of framing, not on the level of particular facts. Contesting the frame, threatens to turn a trial like Case 002 into a circus. But preventing the frame from being questioned increases the danger of turning the trial into a show trial (cf. Baaz 2015b; Baaz and Lilja 2015b). In this lies a paradox.

[T]o convey an historical “truth” to its audience, the trial will have to silence the accused. In such case, it ends up as a *show trial*. In order for the trial to be legitimate, the accused must be entitled to speak. But in that case, he will be able to challenge the version of truth represented by the prosecutor and relativise the guilt that is thrust upon him by the powers on whose strength the Tribunal stands. His will be the truth of the revolution and he himself a martyr for the revolutionary cause (Koskenniemi 2011: 197).

Considering the above, especially in the light of the fact that one important goal of the ECCC is seeking to learn the truth about what happened in DK and why it happened, it is difficult to see the advantages of giving the principal investigatory responsibility to the investigating judges (and, by extension, the expert witnesses), since their time and capacity are limited and, by

consequence, their findings selective, in comparison with having several separate defence teams and the Office of the Prosecutor, each of which actively seeks and contests evidence. The chief idea behind the chosen structure was a belief that it would be possible to combine the best of civil and common law – that is, an efficient judge-led investigation followed by shorter and adversarial inspired trials with a few key witnesses (Ciorciari and Heindel 2014: 47).

In civil law systems trial judges often rely on written witness statements in lieu of oral ones when the statements do not speak to the acts or conduct of the accused. But in the ECCC, without questioning the relevance and reliability of the witness statements taken by the Office of the Co-investigating Judges, the Trial Chamber believes that they have little if any probative value or weight “if the witness does not testify at trial due to the lack of prior opportunity for confrontation” (Ciorciari and Heindel 2014: 48; cf. Baaz and Lilja 2015a).

To summarise: the ECCC procedure – with two separate investigations, confidential preparation of case files containing all evidences, followed by an oral hearing of the evidence – which combines full length judicial investigations (civil law) with full-length trials (common law) is repetitive and slow. International Co-Prosecutor Koumjian has said: “Most Court proceedings are like watching paint dry” (Interview, International Co-Prosecutor Nicholas Koumjian, November 2014). According to former ECCC Judge Silvia Cartwright the proceedings represents the “worst possible outcome” (quoted in Ciorciari and Heindel 2014: 48).

In addition to this, the inefficiency of the ECCC is also a result of the incorporation of a Pre-Trial Chamber. This body was originally incorporated to the Court structure for the sole purpose of self-guarding the ECCC against political interference. Under the ECCC Law, the only responsibility of the Pre-Trial Chamber is to solve disagreements between the “cos” (Interview, Hans Corell, Skype, January 2015). The ECCC Internal rules, however, expand the jurisdiction of the Pre-Trial Chamber to include appeals against orders of the Office of the Prosecutors. Pre-Trial Chamber decisions are not appealable, but the Internal Rules do not regulate the extent to which its appellate decisions bind the Trial Chamber. Consequently, before being finally resolved, it is possible for core questions to be raised at least four times before different judicial bodies: (i) the Office of the Co-Investigating Judges; (ii) The Pre-Trial Chamber; (iii) the Trial Chamber; and (iv) the Supreme Court Chambers. All in all, the hybrid, complex and inconsistent structure of the ECCC has in various ways severely compromised its operation and efficiency (Interview, Hans Corell, Skype, January 2015).

5.2.2 International and Domestic Substantive Law

Adding to the problems of pairing two hybrid investigatory offices and managing a pair of appeals chambers is the fact that the ECCC also has to combine elements of international (criminal) law and domestic Cambodian law. Applying international and domestic law simultaneously is always a challenge. The ECCC, however, faces particular challenges due to the scope of its temporal jurisdiction. It is the only international or hybrid international criminal courts to deal with crimes committed during the latter half of the

1970s, which is well after the Nuremberg trials laid the foundation for international criminal law but well before the ICTY and the ICTR rapidly developed during the 1990s. The ECCC has thus given its ambition to respect the principle of *nullum crimen sine lege*, to determine the scope of criminal liability for international crimes between 1975 and 1979 as well as the effect of a domestic statute of limitations (Ciorciari and Heindel 2014: 50–51).

The chief controversy in the ECCC in regard to international modes of liability is the possibility of prosecuting the accused with committing crimes by (active) participation in a common criminal plan, commonly known as “crime of conspiracy” but today also referred to as the doctrine of “joint criminal enterprise”. The doctrine is highly controversial and has been much debated in international criminal law ever since the establishment of the ICTY and ICTR.

The core question in the case of the ECCC is if the crime of joint criminal enterprise formed a part of customary law or was to be considered as a general principle of law in the latter half of the 1970s. In answering this question, the Court replied somewhat ambiguously, arguing that basic and systemic joint criminal enterprise (also known as joint criminal enterprise 1 and 2, respectively), but not extended joint criminal enterprise (also known as joint criminal enterprise 3) should be considered a general principle of law or part of customary international criminal law at the relevant time. This ruling is quite interesting since it, at least indirectly, challenges the ICTY judgment in the *Tadic case* (Ciorciari and Heindel 2014: 54–56). To further engage in the fascinating discussion on the doctrine of joint international criminal enterprise, however, goes beyond the scope of this paper and instead needs to be dealt with elsewhere.

To include domestic offenses in a court’s jurisdiction is often put forward as one of the key indicators of a hybrid court. On the practical side, the inclusion of domestic law allows the prosecutors to charge an accused with both international and domestic offenses, thereby increasing the likelihood of securing a conviction. On the symbolic and didactic side, including national legislation makes the trials less foreign and therefore, at least potentially, more meaningful to the locals – in a way, it contributes to the feeling of ownership (Ciorciari and Heindel 2014: 57).

The Cambodian Criminal Code from 1956, however, includes a ten-year statute of limitations for indicting criminalised acts. The ECCC Law therefore extended the status of limitations by 30 years. This extension has, just as the discussion on joint criminal enterprise, raised the issue of *nullum crimen sine lege* and divided the judges of the ECCC into two camps – one international and one domestic. In the absence of a supermajority of judges, the most national of all hybrid courts will, consequently, not be prosecuting any national crimes. Reaching this conclusion was time consuming and contributed to the reduction of the symbolic and didactical contributions of the ECCC proceedings to the Cambodian transitional justice process (Ciorciari and Heindel 2014: 58–59).

5.2.3 The ECCC Internal Rules

According to the ECCC Law, the Court's procedure should, as we know, be in accordance with Cambodian Law, with guidance from international procedural law only where there are gaps in the Cambodian Law, uncertainty in interpretation or an issue with consistency with international standards. In this regard, the ECCC has faced even greater challenges than in the case of the combining of substantive law that is discussed above.

The main issues concerning the rules of procedure are twofold. Firstly, when the ECCC Law was agreed, Cambodia in fact lacked a comprehensive criminal procedure code. Such a law – the Criminal Procedure Code of Cambodia – was not adopted until August 2007. Secondly, the Criminal Procedure Code, which was drafted by French legal experts, is out-dated and, according to former International Co-Investigating Judge Marcel Lemonde, was “obsolete before it was even used” (quoted in Ciorciari and Heindel 2014: 63). In responding to this somewhat awkward situation, the ECCC has chosen to develop and adopt its own procedural rules.

Even though the judges who adopted the Internal Rules acted without explicit statutory authority, the Trial Chamber of the ECCC has affirmed that they, in line with the Pre-Trial Chamber, have primacy over the Criminal Procedure Code of Cambodia.

The Trial Chamber ... agrees with the Pre-Trial Chamber when it noted that ... [t]he Internal Rules ... form a self-contained regime of procedural law related to the unique circumstances of the ECCC, made and agreed upon by the plenary of the ECCC. They do not stand in opposition to the Code of Criminal Procedure of the Kingdom of Cambodia (“CPC”) but the focus of the ECCC differs substantially enough from the normal operation of Cambodian criminal courts to warrant a specialised system. Therefore, the Internal Rules constitute the primary instrument to which reference should be made in determining procedures before the ECCC where there is a difference between the procedures in the Internal Rules and the CPC (Decision on Noun Chea's Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, Dossier No. 002/19-09-2007/ECCC/TC, 8 August 2011).

Former French Civil Party Lead Co-Lawyer Elisabeth Simonneau Fort has argued that “from a civil law perspective, the Internal Rules are not well written and lack sufficient detail to be precise” (referred in Ciorciari and Heindel 2014: 67). Hence, in spite of a long and complicated birth and many revisions, the Rules leave a lot to be desired. They are characterised by ignorance, compromises and as a whole, they look like a patchwork.

Michael Karnavas, former Co-lawyer for Ieng Sary (Case 002/01) and Co-Lawyer for Meas Muth (Case 003), has delivered a telling criticism against the application of the Internal Rules at the ECCC by saying that: “Whenever it suits them they just create new rules” rather than looking at what does the Cambodian rules says; “By judicial fiat they make these decisions. Today we're going to apply this; tomorrow we're going to apply that. Just tell me what the rules are so I know what to expect and how to proceed” (quoted in Ciorciari and Heindel 2014: 60).

To conclude, over and above the hybrid, complex and inconsistent structure of the ECCC, and the responsibility to interpret and apply two sets of laws to events that took place during the latter half of the 1970s, the lack of clear procedural rules has also contributed to severely compromise the operation, efficiency and, by extension, legitimacy of the Court.

Yet another problem that the ECCC has to face is in relation to the Court's dual funding or, to be more correct, the under-funding of the national side of the ECCC. This issue will be in focus in the next sub-subsection.

5.2.4 Funding Issues

The expenses and salaries of the Cambodian side of the ECCC are funded by Cambodia and, to a greater extent, by voluntary contributions by primarily foreign governments wishing to assist the proceedings.

In spite of the generous support from more than 35 countries, Cambodia has difficulties of financing the national component of the ECCC and ever since it was established the Court has faced frequent funding shortages. In 2013, several national members of staff even went on strike due to unpaid salaries and today there is still an urgent need for funding in order to continue the work of the Court (ECCC 2015v; Radio Free Asia, 18 March 2013).

Corell said regarding the funding of international criminal courts when I spoke to him in January 2015 as follows:

The Security Council did not want another expensive court in Sierra Leone ... But the Agreement between the UN and Sierra Leone should have contained a clause about assessed contributions ... the same applies to the ECCC. Courts cannot be privately financed, but should be publically financed ... otherwise it will affect their credibility. In retrospect I accuse myself in this regard (Interview Hans Corell, Skype, January 2015).

One of the many results of the lack of funds is that the didactical important VSS, which has been underfinanced and understaffed ever since the beginning and, by consequence, has been forced to struggle hard to fulfil its ambitious as well as important mandated tasks (Ciorciari and Chy 2009: 234).

According to Michelle Caswell (2010: 40), the voices of the civil parties have, in spite of the initial promise by the ECCC to break new ground, largely been omitted. In fact, civil parties have occasionally boycotted the proceedings in protest of the Court's decision that the civil party lawyers were not permitted to question the accused.

Contributing to this rather disappointing picture is some of the negative comments that I received when I interviewed victims and others who in one way or another had personal experiences from the ECCC proceedings. One victim, for example, seeking to share her memories about gender-based violence during the trial, was very negative about how the Court had met her and her story; she said: "The ECCC just cares about the violence and homicide, not about gender-based violence" (Interview, victim, Phnom Penh, July 2010). Yet another respondent, a civil society representative working with victims and civil parties, summarised his ECCC experience in the following way: "The

ECCC is about Vietnamese-supported Khmer Rouge punishing Chinese-supported Khmer Rouge” (Interview, civil society representative, Phnom Penh, July 2010).

When speaking about funding issues, it should 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 Court, including an extensive kick-back scheme, meaning that Cambodian ECCC officials, judges included, had to pay 30 per cent of their salaries to government officials so that they could keep their positions (see further e.g. Barton 2007; Doung and Ear 2009; Hamilton and Ramsden 2014: 129–132; International Bar Association 2011; International Bar Association 2012). Together, the financial problems and the allegations of corruption, needless to say, does not contribute to the efficiency and legitimacy of the ECCC.

And, as if the birth of the ECCC and the following structural, technical, practical, didactical and economic problems raised above were not enough, the Court has also continued to be plagued by continued political interference, not only from the RGC but also, to some extent, donor countries that have communicated certain views on the Court as well the proceedings.

5.3 *The ECCC – Continued Political Interference*

Analytically it is useful, as suggested by Thomas Hamilton and Michael Ramsden (2014), to separate at least two distinct but overlapping categories of political interference.

In the first category, at one extreme, political forces affect the whole picture of an international tribunal’s operation – the legal project is fundamentally political at its core – and so political interests are determinative of the creation of the court, the establishment of its jurisdiction, and the drafting of foundational texts. The working parameters of the tribunal are set even before the “show has begun”, such that any subsequent attempts of achieving “legality” and independence from political motives are overridden by the fact that the tribunal was formed with fundamentally political aims in mind. The second category describes those types of political interference that arise during proceedings of the tribunal, from political forces acting on the legal process as it operates (p. 199-120).

Above, the first category of political interference has been discussed. The other category – the one acting on the legal process as it operates – will be discussed below.

Supporters of the Court had great hopes that the ECCC Agreement would give the UN enough leverage to keep the Court on track. Underlying this hope was the expectation that the UN would continue to actively safeguard the ECCC’s observance of international legal standards. These hopes were, however, dashed rather quickly for various reasons.

As we have seen earlier in this paper, the negotiations between the RGC and the UN turned out, on an overall level, as a qualified victory for Hun Sen and the CPP. The RGC’s influence over the ECCC is, however, not simply a

question of numbers. It also relates to the general lack of judicial independence in Cambodia.

In a survey of the Cambodian legal system presented in 2009, Khean Un concludes that the Cambodian judiciary is “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; cf. Baaz and Lilja 2014).

Senior judicial appointments have and still are commonly driven by personal connections in Cambodia, including at the ECCC. The closeness between the RGC and senior Cambodian staff makes the Court vulnerable to political interference. All high-level Cambodian personnel at the ECCC continue to hold important positions in the national judicial system or the RGC itself, sometimes both, and their tenure is dependent on their loyalty to the regime. The very structure of the Cambodian legal system thus makes sure that judicial independence and professionalism cannot be obtained in practice (Ciorciari and Heindel 2014: 37; Doun and Ear 2009).

During the investigative phase of Case 002, the closeness between the Cambodian staff and the RGC became evident in the ECCC’s inability or unwillingness to call certain Cambodian officials – including Sihanouk, the former king of Cambodia, as well as high-level Cambodian governmental officials, most notably the current Prime Minister Hun Sen, the Senate President Chea Sim and the NA President Heng Samrin – to testify at the Court. The RGC resisted and the national judges supported them without reservations (Ciorciari and Heindel 2014: 146; Hamilton and Ramsden 2014: 127). These individuals, given the fact that they have been politically active since at least 1975, would beyond doubt have a lot to contribute to the ECCC proceedings; not at least regarding the important goal of educating Cambodia’s youth for the future.

The problem of political interference became even more evident in 2008, when the international Co-Prosecutor finally decided to initiate two more cases: Case 003 and Case 004. Due to disagreement with the national prosecutor in this regards, Robert Petit filed a disagreement between the two Co-Prosecutors and asked the Pre-Trial Chamber to resolve the dispute, which they eventually did. After almost a year, the Pre-Trial Chamber decided that no further investigations should be carried out – the three Cambodian judges voted against the investigations, while the two international judges voted in favour of further investigations. Most independent observers believe that the national Co-Prosecutor and the Cambodian judges in the Pre-Trial Chamber did not act impartially, but instead followed the publically expressed will of the RGC, which has frequently opposed investigations beyond Case 002 (Ciorciari and Heindel 2014: 176–177; DeFalco 2014: 2). Already in the autumn of 2001, Prime Minister Hun Sen, for example, informed Ban Ki-moon when the UN

Secretary General was visiting Phnom Penh, that “Case 003 will not be allowed ... [t]he court will try the four senior leaders successfully and then finish with Case 002” (Hun Sen quoted in Open Society 2012: 2).

In spite of the fundamental disagreement, the international Co-Prosecutor decided to carry on with the cases and open judicial investigations by sending introductory submissions to the Co-Investigating Judges. The Cambodian Co-Investigating Judge, You Bunleng, has refused to assist his international counterpart in the investigations. Despite this refusal, the International Co-Investigating Judge Mark Hammond has been able to charge several individuals recently, including Meas Muth (former commander of the navy and, most likely, a member of the Central Committee of the CPK or the Assisting Committee of the Central Committee), Im Chaem (among other things, former Secretary of the Preah Net Preah District) and Ao An (former Deputy Secretary in the Central Zone of DK), in the two long-time pending cases (Ciorciari and Heindel 2014: 176–177; ECCC 2015w; ECCC 2015x; ECCC 2015y). To further discuss this very recent and interesting development in the ECCC, however, lies beyond the scope of this paper and should instead be dealt with elsewhere. It is the long and difficult process that eventually led to charges that is interesting for now, since it clearly illustrates the problem with political interference acting on the ECCC process as it operates.

As displayed in this paper, the RGC has never wholeheartedly supported the ECCC; if so, it has only been for strategic reasons. It is, however, not only the RGC who has dubious and vested interests in the ECCC or tried to interfere – so have various individual foreign states as well as the UN. At an early stage, China opposed the Court due to its close ties to the Pol Potists. Other states like, for example, Australia, France and Japan, have, due to (political and economic) interests beyond the ECCC, refrained from criticising the RGC and instead have provided funds in critical situations when other sources of funding have been cut due to political interference (Ciorciari and Heindel 2014: 197).

Being unhappy with the outcome of the negotiations with the RGC, the UN has, contrary to what several supporters of the Court hoped, been quite unwilling to take part in the ownership and leadership of the ECCC, which restricts its engagement to rather limited, technical issues. This is a problem since, using the words of Ciorciari and Heindel (2014: 10), the greatest in-built weakness of the ECCC is ultimately “that the United Nations has too much involvement to escape responsibility but too little authority to run it”.

Former ECCC investigator and scholar Craig Etcheson has given another comprehensive and telling overall review of the Court. Reflecting upon the Court in October 2012, he said: “to a pretty large extent, this deal was about as good as could be had under the circumstances” (quoted in Ciorciari and Heindel 2014: 40).

6 The ECCC – As Good as could be had?

Sometimes it is argued that everything is about expectations. If you have high expectations then you are doomed to be disappointed; whereas the way to be pleased or happily surprised is to keep the expectations low or to not have any

at all. The expectations on the ECCC are arguably high. It is believed that not only will the Court deliver justice to a traumatised population, but it will also provide a historical account of a dark chapter in Cambodia's history, strengthen the rule of law and serve as an example for people who disobey the law in Cambodia as well as cruel regimes worldwide. Not only is the agenda ambitious, the various goals are also difficult, if not impossible, to reconcile. Speaking to several senior staff members over the years confirms this position. Some of the ECCC staff argued that beyond providing justice, the other goals of the Court is not possible to achieve and to believe so is naïve. The ECCC is about providing justice – nothing more, nothing less.

The questions that remain to be answered, after having lowered the expectations accordingly are, on the one hand, if the ECCC is as good as could be had under the circumstances and if the Court operates as good as it possibly can given the result of the negotiations and, on the other hand, what lessons can be learned from the ECCC and to what extent the Court should serve as a role model for future hybrid courts. These questions will guide this concluding section of the paper.

As displayed in detail above, the trial procedures turned out to be experiential, complex, complicated and at times contradictory, mainly due to several compromises during the negotiations for the ECCC. Simply put, too many concerns have been taken into consideration in the construction of the Court. Among other things, the ECCC structure secures investigatory power to both the Prosecutors and the Investigating Judges. This, in itself serious problem, is, however, not the main structural problem of the ECCC. According to Corell: “The [Court's main structural] problem isn't the investigating judge or prosecutor; it's the 'cos” (quoted in Ciorciari and Heindel 2014: 187).

The chief idea behind the ECCC's unique design, with not only national and international Judges but also national and international Co-Prosecutors, was in order to allow for Cambodian ownership of the Court and, at the same time, to protect it from Cambodian political interference as well as making sure that the proceedings complied with international legal procedural standards. In contrast to these, by all means worthy goals, it appears as if the UN and the RGC have together constructed a “Rube Goldberg-like apparatus that at times seems designed to ensure that few of the aging accused will live until judgement” (Ciorciari and Heindel 2014: 44).

The ECCC is, however, not simply blending international and domestic aspects of law, but also several features from the civil law, common law and, to a certain extent, socialist law systems. This blend, which, in theory, could have been effective in several regards, due to the combining of the best from different worlds, has, however, in the case of the ECCC been combined in a haphazardly way that has created a process that ends up being the worst of different worlds and which is best described as simply “schizophrenic”. More than anywhere else, this is reflected in the ECCC Internal Rules, which, as we know, have been revised no less than nine times since 2007.

Michiel Pestman, former counsel for Noun Chea, has argued that the blending of legal systems, in combination with inconsistent rule application, has led to a troubling unpredictability in the ECCC. By the same token, his colleague Karnavas have described the trial process as “chaotic” and argued

that the Court is "... trying to have it every which way: it's the French system, it's not the French system, it's the national system, it's the ICTY. Whenever it suits them they are constantly changing the rules as the game is being played". Civil Party Lead Co-Lawyer Simonneau Fort has said that the ECCC swerves between "some civil law, some common law, and then some civil law again" (all referred or quoted in Ciorciari and Heindel 2014: 187).

Khieu Samphan's defence counsel, Anta Guisse, however, has argued that the reason why the rules are constantly changing has less to do with the mix of laws and systems and more to do with the judges, who, she claims, lack experience working in other international jurisdictions (quoted in Ciorciari and Heindel 2014: 187). Irrespective of the underlying reasons, the problem with the seemingly random mix between various legal systems and/or ignorance represents a serious threat for the ECCC to "deliver justice efficiently while observing fair trial norms" as well as "attempting to develop a narrative that addresses the need and demands of survivors" (Ciorciari and Heindel 2014: 187).

Writing about hybrid courts in general, Rupert Skilbeck (2010: 452) concludes as follows:

For many, the current process of incorporating elements of the two systems is a pragmatic attempt to build a new hybrid international criminal justice, one that seeks to take the best of both worlds. But there is a risk that by adopting a 'pick and mix' approach, international courts and tribunals end up with a system that contains none of the checks and balances that bring order to a national system, instead ending up with a *Frankenstein's monster* that fails to adequately protect the rights of the defence (*italics added*).

When applied to the ECCC, this characterisation seems to hit the nail on the head.

In addition to the above, the Court has also demonstrated a well documented, both narrowly defined and disappointingly simplistic, approach to all sorts of relevant historical circumstances. In June 2011, for example, Nil Nonn, President of the Trial Chamber issued a Memorandum informing all parties that:

Background contextual issues and events outside the temporal jurisdiction of the ECCC will be considered by the Chamber only when demonstrably relevant to matters within the ECCC's jurisdiction and the scope of the trial as determined by the Chamber (quoted Ciorciari and Heindel 2014: 165).

By this, I will argue that the avenues to widen the historical discussion in necessary ways have effectively been cut off, in spite of the fact – as argued by Son Arun, Noun Chea's Cambodian counsel – that "[o]ne needs a full picture of these facts in order to properly assess the acts and intentions of the DK leaders when they came to power" (quoted Ciorciari and Heindel 2014: 165). The Trial Chamber's decisions about what to allow in the courtroom define the ground of the legal arguments (Mamo 2013: 21). The ECCC has chosen to define this ground as narrow – too narrow, given the complexity of the cases addressed – and by this, among other things, limited to allowing for the room

to manoeuvre for the accused and their counsels in ways that are hardly compatible with the standards associated with fair and just trials.

By various limitations, such as the one established by Nil Nonn, the trials in the ECCC are in fact facing the previously discussed danger of becoming turned into show trials. As put forward by Andrew Mamo (2013: 22):

... the court is weakened by its simplistic treatment of history and by its refusal to engage with factors that mark its unique context. The façade that this is an ordinary court, in which the internal legal mechanisms can be treated with minimal reference to the external concerns about truth justice, and Cambodian society, undermines its objectivity. The situation calls for a frank acknowledgement of the context, of *what makes these chambers “extraordinary”* (Italics added).

The price for “purity by limitation” does, however, not come cheap. Koskeniemi’s words – “In order for the trial to be legitimate, the accused must be entitled to speak” (2011: 197) – seem more relevant than ever before.

Not only has the ECCC failed to adequately protect the rights of the defence, it has also, Caswell (2010: 40) argues, largely omitted the voices of the civil parties, in spite of initial promises by the Court to break new ground. According to Youk Chhang, the Executive Director of DC-Cam and a KR survivor, the ECCC’s treatment of civil parties has led to victims being further traumatised. “The ECCC has”, he writes, “conducted a legal *experiment* at the victim’s expense (quoted in Caswell 2010: 40, italics added). This treatment, including dismissal and silencing of victims, could partly be explained by practical concerns. In Case 002 the number of civil parties reached almost 4,000. Practical concerns, including the problem of underfunding, however, do not explain everything in this regard. More damning for the Court is different conscious and unconscious attempts to try to silence stories that are judged not to fit into the narrative that is in-the-making. By silencing certain aspects, the possibilities of adequately addressing the needs and demands of the victims are reduced (cf. Baaz and Lilja 2015a). All in all, it seems that the ECCC is primarily not about delivering justice while observing fair trials, nor to develop a narrative that addresses the need and demands of the victims or to function a site for various speech act by the victims and witnesses, but rather for something entirely different.

Not only is the design of the ECCC determined by various political interests, national as well as international, but the Court has also continued to be plagued by political interference by various forces, national as well as international, after the show has begun. The incidents in this regard are numerous. The opinion of Pestman summarises the problem of political interference elegantly, he has said that everyone working at the Court is aware of political interference and that it taints every aspect of the ECCC’s work. He concludes as follow: “The Trial Chamber international judges have never dissented on any ruling. They must be afraid everything collapse if they point out problems” (quoted in Ciorciari and Heindel 2014: 189).

By this, we will return to the question of whether the ECCC is as good as could be had under the circumstances. In spite of what has been put forward

above, I think it is. Considering the fact that the UN team was “forced” back to the negotiating table in December 2002 with the explicit task of concluding an agreement with Hun Sen to make the ECCC becoming a reality, the UN negotiators did what was possible and they negotiated skilfully, even though their hands were tied in many respects.⁵ Regardless of this, as argued by former Co-Prosecutor Petit: “In the end, the victims of the Khmer Rouge got the tribunal that Hun Sen and his allies, including other former Khmer Rouge throughout the regime, wanted” (Petit quoted in Ciorciari and Heindel 2014: 39).

The participation of the UN was intended to make sure that the ECCC would meet international standards. At the same time, however, the Court was also designed to limit the scope of UN actions. The spilt authority of the Court between international and Cambodian leadership makes the ECCC vulnerable to political interference from the RGC. Given the structure of the ECCC, this problem is difficult for the UN to address. The structural barriers are, however, compounded by the fact that the UN have, for various reasons and since the outset, been unwilling to do what they actually can to take influence and control over a legal construction, which they pushed hard to establish. All in all, the UN has interpreted its mandate in a narrow way and has acted more like a technical assistance and less like a founding partner. The UN’s ambivalence has turned into passivity and has made the process stagnate and controlled by the RGC (Ciorciari and Heindel 2014: 201).

On the whole, the ECCC was structured in an unfortunate way. This is, however, not sufficient when seeking to understand the Court’s poor performance today; other factors need to be taken into consideration. The main

5 Since the RGC and the UN in many respects stood far apart, the negotiations to establish the ECCC were very difficult. The difficulties are clearly illustrated by Article 2 of the ECCC Agreement, in particular paragraphs 2 and 3; they read as follows:

2. The present Agreement shall be implemented in Cambodia through the Law on the Establishment of the Extraordinary Chambers as adopted and amended. The Vienna Convention on the Law of Treaties, and in particular its Articles 26 and 27, applies to the Agreement.

3. In case amendments to the Law on the Establishment of the Extraordinary Chambers are deemed necessary, such amendments shall always be preceded by consultations between the parties.

Corell wrote to me in this regard as follows:

This I absolutely unique! I have never experienced to include such provisions in an international agreement before. It is assumed that the parties should respect those absolutely fundamental rules of international treaty law ... The reason I insisted to have those paragraphs included was that my counterpart claimed that it would be their national law that should be determining. I therefore wanted that the Agreement expressly stated that this is not the case, but *that it is the Agreement that is determining* and that *the [national] law must be in conformity with the Agreement*. It was yet another attempt from my side to bring about a somewhat fairly acceptable result” (e-mail from Hans Corell to the author of the paper, 28 May 2015, emphasis in original, author’s translation from Swedish to English).

one is political interference: too little from the UN and too much from the RGC. Hence, Hun Sen and the CPP have got a legal site in which they can perform “politics by other means”, more-or-less undisturbed, due to the UN’s relatively low level of commitment (McCargo 2011: 613).

As it currently stands, the ECCC is not able to effectively bring the KR to justice, since the judiciary lacks impartiality and adequate competence, which is clearly illustrated by, among other things, recurring political influence, technical errors and well-supported allegations of corruption (Caswell 2010: 41). In fact, the trails permit Hun Sen to blame many of the problems in current Cambodia upon a small number of old, sick and dying ex-Maoists, thereby redirecting the focus from the current administration’s responsibilities, their failings and abuses (McCargo 2011: 626).

Taking into consideration that the ECCC is not only about bringing a few KR leaders to justice, but also for elements of the international legal community, a site where emerging principles of global justice could be explored, validated and normalised, the above is particularly serious (cf. McCargo 2011: 626). What is currently taking place in the ECCC does not only benefits the RGC it also, which perhaps is more serious, harms the legitimacy of the UN, the idea of TJ and the future of ICL (cf. Baaz 2015a). From this follows that the UN should not have borrowed itself to the legal farce that is currently being played out in the outskirts of Phnom Penh. This was pretty clear for several observers already when Corell and his team were forced back to the negotiating table in December 2002. If not then, it has amply been demonstrated after the beginning of Case 002/01 in 2008.

David Scheffer, one of the architects behind the ECCC, has admitted that “there is no question that the ECCC was an *experiment*, but one for which there really was no viable alternatives after years of negotiations” (quoted in Ciorciari and Heindel 2014: 262, italics added). Less positive, when asked about what he thought of the legal construction which he was “forced” to negotiate on behalf of the UN, Corell said in January 2015:

I warned for this construction ... Hun Sen changed the entire concept ... What we were discussing was completely unmanageable ... it would be a terrible bureaucracy ... Never ever should this design form a model for other courts ... This sort of thing simply should not be allowed (Interview, Hans Corell, Skype, January 2015).

Even more critical and straightforward than Corell is scholar Peter Maguire, who has argued that the UN, by realising the ECCC, in fact entered into a “Faustian” arrangement and that the mixed court model should be relegated “to the dust bin of history” (quoted in Ciorciari and Heindel 2014: 9).

Considering the criticism put forward in this paper, what lessons can then be learned from studying the ECCC? One important lesson for the future TJ project is that ICL has quite severe limitations and can only, if at all, contribute to move beyond national traumas in a limited way. Put differently, ICL is no silver bullet in TJ, not in general and certainly not in the Cambodian case.

Another important lesson from the Cambodian experiment is the obvious limitations of – even though the “the blending of law is part of ‘a move

towards a homogenous system at the international level involving procedures from both traditions to ensure they fit the realities on the” (Cartwright quoted in Ciorciari and Heindel 2014: 113) – mixing legal systems. Put straightforwardly, civil law and common law does not blend as easily in practice as they appear to do in theory.

All things considered, the ECCC – and the way the Court operates and does not operate currently – illustrates many technical problems associated with modern ICL. All this is indeed interesting and much could be learnt for the future by focusing on these issues. But we cannot stop there; more fundamental questions about ICL and the ECCC also need to be addressed; questions that substantively engage with various blind spots and complicities, questions about imperialism, power, ideology, struggle over memory, exclusion, injustice, conflict and resistance, just to give a few examples (cf. Baaz 2015b; Baaz and Lilja 2015a; Baaz and Lilja 2015b). If the ECCC is scrutinized in this deeper sense, then there is even more to be learnt for the future than commonly acknowledged; lessons that could contribute to the development of a field of ICL that is less self-congratulatory, over-confident and uncritical than it is today.

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