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Volume 6

The Extraordinary Chambers in the Courts of Cambodia

Assessing their Contribution
to International Criminal Law

Simon M. Meisenberg
Ignaz Stegmiller *Editors*



Springer

International Criminal Justice Series

Volume 6

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Editors

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Criminal Law

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The Extraordinary Chambers in the Courts of Cambodia

Assessing their Contribution to International Criminal Law

The Extraordinary Chambers in the Courts of Cambodia (ECCC) were established in 2006 to bring to trial senior leaders and those most responsible for serious crimes committed under the notorious Khmer Rouge regime. Established by domestic law following an agreement in 2003 between the Cambodia and the UN, the ECCC's hybrid features provide a unique approach of accountability for mass atrocities. The book entails an analysis of the work and jurisprudence of the ECCC, providing a detailed assessment of their legacy and contribution to international criminal law. The collection, providing a foreword by Judge Chung and containing twenty chapters from leading scholars and practitioners with intimate knowledge of the ECCC, discuss the most pressing topics and its implications for international criminal law. These include the establishment of the court, subject matter crimes, joint criminal enterprise and procedural aspects of the ECCC procedure.

Phnom Penh. Khmer Rouge. Killing Fields. Cambodia's bloody past before the ECCC despite all political obstacles. New terms, a different methodology and the influence of the Asian way of thinking provide fresh food for thought. The ECCC demonstrates that there is not only The Hague's understanding of our new currency, namely vigorously applied international criminal law. Apparently, distance and (not only) legal culture may also make a difference in such a hybrid court.

The editors' systematic approach grants genuine access to the history of this extraordinary court and its achievements in developing further substantive and procedural international criminal law. Impressive contributors reflect the role and in part changing opinion of judges and counsel working in this different environment. Apparently the broader the research and its legal basis the more tangible becomes the tension between the identification of customary international law since Nuremberg and adherence to fundamental principles of criminal law (e.g. *nullum crimen sine lege*).

This book is a must for all open-minded practitioners, scholars and young professionals in ICL.

Professor Wolfgang Schomburg

DCL (Durham, UK)

former Judge at the

*International Criminal Tribunal for the former Yugoslavia
and International Criminal Tribunal for Rwanda*

For almost a decade, the Extraordinary Chambers of the Courts of Cambodia (ECCC) have been investigating and trying crimes of a scale not seen since the Nuremberg Tribunal. An estimated 1.7 million Cambodians lost their lives during the Khmer Rouge regime of 1975–1979. When justice was finally promised, many doubted it could be delivered, particularly as it was born of a UN–Cambodia compromise under which national authorities would have the greater power. This volume of essays shows how the ECCC has struggled with the challenges and in varying measure has succeeded in creating a jurisprudence of global significance, a new model for adjudication of mass crimes under a civil-law and victim-participating procedure, and an evidentiary record, tested by courtroom confrontation, that for Cambodians may be its most important legacy.

Stephen J. Rapp

former international prosecutor and

former US ambassador-at-large for global criminal justice

Foreword

Since its establishment, the ECCC, as a mixed court, has proved that it can handle international crimes in accordance with international standards of due process and the rule of law. Through the participation of the Cambodian Judiciary in the ECCC proceedings, the ECCC has enhanced the sense of involvement of the Cambodian people in the court cases. By collecting and exchanging information on capacity-needs, the ECCC has strengthened the national justice system and its capacity. In this regard, the ECCC has provided the most valuable example of implementation of the Principle of Complementarity of the ICC.

Furthermore, the ECCC is the first international court to allow victims to participate as full parties in the proceedings, and has demonstrated that victims' full participation can be balanced with the rights of other parties. The ECCC's unique position to clarify the state of International Humanitarian Law prior to 1975–1979 has resulted in certain landmark decisions demonstrating the development of the International Humanitarian Law by bridging the 50 years gap between the Post-World War Courts and the UN-backed international tribunals. These achievements of the ECCC are more valuable because they have been achieved while overcoming the inherent limits arising from its mixed character such as a lack of adequate funding and complex structure.

As the only international tribunal established in Asia, the ECCC has shown vast potential for development in the areas of the rule of law and human rights throughout Asia. The legacy of the ECCC may enable the integrated and well-balanced development of the rule of law and human rights in this region. And the legacy of the ECCC could be continuously and systematically disseminated throughout Asia by establishing the Asian Court of Human Rights. Given the immense population of Asia, the fast economic growth of Asian states, and the great enthusiasm of Asian people, it is now the right time to open up discussions for the establishment of the Asian Court of Human Rights, and the experience and jurisprudence of the ECCC would be very useful for this purpose.

The ECCC is now facing challenges to provide an efficient and productive manner by which it could conclude proceedings while taking full advantage of its resources. To this end, the 11th Plenary Session of the ECCC in 2015 adopted

the amendment of the Internal Rules of the ECCC, allowing a selection and concentration process based on the representativeness of the cases. By continuously providing the ECCC with various views and solutions on how to overcome those challenges faced by the Court as we can find in this book, more meaningful and expeditious procedures and practices would certainly arise for the ECCC to complete its mission.

The Hague, Autumn 2015

Chang-ho Chung
Judge at the International Criminal Court
former United Nations International Judge at the
Extraordinary Chambers in the Courts of Cambodia

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Abbreviations

CAT	Convention against Torture (1984)
CIJ	Co-Investigating Judges, ECCC
CPK	Communist Party of Kampuchea
DC-Cam	Documentation Center of Cambodia
DK	Democratic Kampuchea
DSS	Defence Support Section, ECCC
ECCC Agreement	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 6 June 2003, promulgated as Law on 19 October 2004 and entered into force on 29 April 2005)
ECCC Law	Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006). <i>Reprinted in the Annex</i>
ECCC or the Court	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IR	Internal Rules of the ECCC
JCE	Joint Criminal Enterprise
OClJ	Office of the Co-Investigating Judges, ECCC
OCP	Office of the Co-Prosecutors, ECCC

PTC	Pre-Trial Chamber, ECCC
RPE	Rules of Procedure and Evidence
SCC	Supreme Court Chamber, ECCC
SCSL	Special Court for Sierra Leone
SPSC	Special Panels for Serious Crimes, East Timor
STL	Special Tribunal for Lebanon
TC	Trial Chamber
UN	United Nations
UNAKRT	United Nations Assistance Mission to the Khmer Rouge Trials
UNWCC	United Nations War Crimes Commission
VSS	Victims Support Section, ECCC

Chapter 1

Introduction: An Extraordinary Court

Simon M. Meisenberg and Ignaz Stegmiller

Abstract Established in 2006, the ECCC brought to trial senior leaders and those most responsible for serious crimes committed under the notorious Khmer Rouge regime. Established by domestic law following an agreement in 2003 between the Kingdom of Cambodia and the UN, the ECCC's hybrid features provide a unique approach to accountability for mass atrocities. As an introductory note to this edited book the unique challenges of the ECCC are highlighted, as are the lessons which can be learned from this exceptional and extraordinary court.

Keywords International criminal law and procedure • Genocide • Crimes against humanity • War crimes • Sexual violence • Fair trial

The work of criminal tribunals prosecuting mass atrocities is not free from generalized criticism. The moral argument of breaking cycles of impunity is no longer a satisfactory explanation for the need of international justice, as it may have been in the early 1990s. The prosecution of genocide, crimes against humanity

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and war crimes at international(ized) courts and tribunals is by now all too commonly accompanied with disapprovals over their expense, inefficiency, selectivity and politicization. Too often such tribunals are overburdened with expectations, rather than simply expecting an impartial trial establishing the criminal responsibility of an individual. Given the fact that mass crimes leave an imprint on the understanding of a nation's identity, history and its future development, there have been calls for broader goals of international justice. Such goals include primarily reconciliation, but also the need to assist a debilitated judiciary. The Extraordinary Chambers in the Courts of Cambodia (ECCC) had to master such expectations. As this volume highlights, despite all the difficulties and challenges of the Court, the ECCC has delivered a rich experience of jurisprudence that deserves scrutiny and analysis in order to explore its legacy but also as a contribution to international criminal justice. As this volume demonstrates, general criticism towards the ECCC and many aspect of international criminal law can be superficial and misses a critical assessment of the law and practice of a court such as the ECCC. It is not possible to throw a stone without hitting a problem within the framework and practice of the ECCC. This is particularly true with respect to the establishment, the jurisdiction, the definition of the crimes, the procedure and the legacy of the court. All of these topics demand a detailed analysis of the work and practice of the Court. This volume therefore attempts to contribute to a better understanding of the challenges encountered not only by the ECCC, but by international criminal justice as a whole.

On 17 April 1975 a communist armed opposition group known as the Khmer Rouge seized power in the capital of Phnom Penh. This victory was preceded by a period of protracted and violent conflict that had seen Cambodia's longstanding monarchy toppled and the countryside carpet bombed by the US air force as a measure to contain the war in neighboring Vietnam. Following the seizure of power in the Cambodian capital, the ultra-communists headed by Pol Pot moved forward to impose their ideas and ideals of a communist society, radically transforming Cambodia into an agrarian society of peasants, with total disregard of individual rights and humanity. Towns were emptied within a short period of time in order to ensure the cultivation of the rural areas. Many died on those transfer marches. Those who survived were organized into cooperatives and forced to work in labor sites. Families were torn apart, subjugated to the ideals of the new societal structure: the communist party, which was generally referred to as *Angkar*. Suspicions that traitors from within were undermining the regime arose, resulting in re-education programs which saw people being tortured and murdered in order to remove the perceived enemies. It is estimated that 1.7 million humans lost their lives under the reign of terror, either directly or through starvation, exhaustion and disease. The Vietnamese finally toppled the regime in January 1979. The hardliners under Pol Pot were able to destabilize Cambodia from their heartland in Northwestern Cambodia throughout the 1980s. The civil war only ended in 1991 with the Paris Peace Agreement. Attempts to hold perpetrators accountable only came to fruition in 2006, following yearlong negotiations between the United Nations and Cambodia.

The result of the negotiations was an internationalized court structure, placing multi-tiered chambers within the domestic Cambodian judiciary, ensuring insignnia of independence through UN participation. The official name of the ECCC refers to “chambers” and not a single “court”. The ECCC however are legally an entirely self-contained and independent entity and court. Therefore and despite the title of this book, the ECCC will be referred to as Chambers and Court interchangeably in this volume. We are in good company, as the ECCC judges have done so too. Its substantive jurisdiction is based on both national and international crimes. The international crimes include genocide, crimes against humanity, grave breaches of the Geneva Conventions, destruction of protected cultural property during armed conflict in accordance with the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict and crimes against persons enjoying international protection under the 1961 Vienna Convention on Diplomatic Relations. The national crimes include those crimes defined by the 1956 Cambodian Penal Code, enumerated in the ECCC Law as murder, torture and religious persecution.

Part I of this book deals with pertinent issues of the ECCC such as its establishment, independence and legacy. The fact that the victims of crimes perpetrated during the Khmer Rouge period waited almost four decades to eventually find a judicial forum is significant. This reality and the challenging negotiations between the UN and the Royal Government of Cambodia are vividly illustrated by Helen Jarvis in Chap. 2. As an Advisor to the Cambodian Government during the negotiations she describes the different approaches to establishing the court and also the negotiation history. Despite the difficulties and perceived weaknesses of the structure of such a court, its eventual creation sends a powerful message to future perpetrators. The echoes of this message will be heard beyond the cultural heritage of Angkor Wat, but also in Palmyra. The message is straightforward. Even if there is no legal forum for criminal trials at the time of the atrocities, even if the political powers at the time of the atrocities may be protecting the culprits, and even if such powers are able to ignore their legal obligations at the time of the crimes: tides will change. One message of the establishment of the ECCC is that whatever the circumstances at the time of the crimes, a *carte blanche* does not exist. International law is settled to address past crimes against humanity, war crimes, and genocide. This is an important achievement, despite all criticism on the weaknesses of the court.

The ECCC has so far completed the trial of the former Chairman of the notorious S-21 Security Center (Tuol Sleng) in Phnom Penh, Kaing Guek Eav alias Duch (Case 001). The second trial at the ECCC, Case 002, has been compared to the Nuremberg trials, as it initially saw the remaining Khmer Rouge elite in the dock: Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith. So far Case 002 has resulted in a trial judgment against only two of those former senior members: the former Deputy-Secretary Nuon Chea and the former President Khieu Samphan. Ieng Sary, the former Deputy Prime Minister for Foreign Affairs, died in March 2013 before the conclusion of the trial. Ieng Thirith, the former Social Action

Minister and wife of Ieng Sary, was declared unfit to stand trial and died in August 2015. The ECCC has also investigated two additional cases, Cases 003 and 004. The suspects in this case are former Navy Commander Meas Muth, forced labor camp commander Im Chaem and Ta An and Yim Tith. The handling of those two cases brought the reputation of the ECCC into considerable disrepute. Those additional investigations triggered sharp comments from the Cambodian government, indicating its dissatisfaction with additional investigations beyond Case 002. The suspicious bondage of senior Cambodian ECCC officials triggered serious questions of the independence of the court.

An analysis of the work and practice of the ECCC without a contribution on allegations of political interference would therefore simply be without candor. The Defence has tirelessly challenged the independence of the institution and the impartiality of almost all judges who have served at the ECCC, whether Cambodian or UN appointed. In Chap. 3 Shannon Maree Torrens places these serious challenges into their proper context. Questions of judicial independence were even addressed to the UN's Special Rapporteur on the Independence of Judges and Lawyers, but so far have remained unattended. Given the framework of the Court, it is clear that even the Secretary-General and the Office of Legal Affairs were anxious to ensure the independence of the Court by adopting the so called "super-majority voting rule" in Articles 14, 20, and 23 of the ECCC Law. This rule signifies at least a general discontent *vis-à-vis* the Cambodian judicial officers. Nevertheless, none of the decisions discussed by Torrens refer to that rule as a general safeguard within the ECCC framework. Rather the decisions specifically address the independence and impartiality of individual judges. Given the fact that none of the Judges were disqualified, Torrens refers to disturbing (unofficial) remarks by two international judges that generally question their previous judicial remarks.

Chapter 4 covers the unquestionable lack of independence of the first attempt to address the atrocities committed by the Khmer Rouge during the Vietnamese occupation by the so-called Revolutionary People's Tribunal. This historical analysis provides an in-depth study of early attempts of prosecutions. The pitfalls that this trial provided for the ECCC, especially with respect to the principle of *ne bis in idem*, are highlighted by Frank Selbmann.

Part I concludes with two contributions that assess the legacies of the ECCC. The question of the legacies of international criminal tribunals is a novel topic, which has gained attention and prominence within the last years. With regard to international criminal tribunals this topic usually gains prominence prior to their closure, providing an opportunity to assess the completed work. Commentators on the ECCC started to engage in this debate much earlier. Despite the usual placement of legacy studies at the end of a book such as the present one, we have deliberately chosen to address these topics in the first chapters, as questions of legacies deserve more prominent attention. More importantly it places a court in a different perspective of an institution that does not only deal with the past, but is an actor for the judicial development of a nation. Needless to say, that we as editors were significantly involved in a seminal conference on this topic in September

2012, which provided the initial idea for the present volume. We hope that future courts will be guided by the legacy discourse that the ECCC experienced in this respect. Indeed, and as raised earlier, the assistance of this discourse to the judiciary is of particular significance within the context of future hybrid courts. States involved in the establishment of hybrid courts have generally accepted the need for accountability, but were unable to guarantee effective or independent trials in accordance with recognized international standards. In Chap. 5 Jeudy Oeung provides a Cambodian perspective on the expectations of the Cambodian population *vis-à-vis* the ECCC and its accomplishments in that regards. Viviane Dittrich theorizes the construction of legacies at the ECCC in Chap. 6. She traces the interest in legacy at the ECCC and in the Cambodian context in lieu of assessing or measuring the effectiveness of the institution *per se*.

Part II of this book focuses on the ECCC's contributions to substantive international criminal law. Since its establishment in 2006, the ECCC has completed two trials, with the appeals judgment in the Case 002 against Nuon Chea and Khieu Samphan, expected in the near future. This achievement was not an easy task. The background to the completed trials is provided in Chaps. 7 and 8. Franziska Eckelmanns provides a detailed overview to the substantive questions addressed in the judgment against Kaing Guek Eav alias Duch. The substantive challenges in Case 001 with respect to crimes against humanity and war crimes, sentencing and the principle of legality are scrutinized. In addition, she provides the background to the important question of the nature of the court as part of the Cambodian legal system. This vital conclusion by the judges had a direct impact and consequence of not granting Kaing Guek Eav compensation for his illegal detention in a Cambodian military prison prior to his transfer to the ECCC detention facility. The personal jurisdiction of the ECCC is limited to "senior leaders" and "those most responsible". Similarly to the Special Court for Sierra Leone in its Brima Appeals Judgment, the ECCC Appeals Chamber does not see the need to define these terms as limitations to its jurisdiction, but rather interprets them as policy guidelines for the investigative authorities, giving them wide prosecutorial discretion without judicial oversight.

Russell Hopkins provides a similar intriguing analysis of the second case tried before the ECCC with all its challenges. His chapter offers a summary and assessment of the Case 002/01 Trial Judgment, which was issued on 7 August 2014. This chapter puts the jurisprudential relevance of the first trial judgment of Case 002 into its proper context. It provides an overview of the Trial Chamber's factual findings, highlighting the most important parts of the judgment, which might be viewed as jurisprudential stepping stones from the International Military Tribunal at Nuremberg to more recent courts and tribunals.

The Judgment in Case 002 convicted the two former Khmer Rouge senior officials for the commission of crimes, within a Joint Criminal Enterprise (JCE), as was Kaing Guek Eav in Case 001. In Case 002 it was alleged that the common purpose of the communist party leaders was to implement a rapid socialist revolution in Cambodia through a "great leap forward" and to defend the party

against internal and external enemies, by whatever means necessary. The purpose itself was not entirely criminal in nature, however its implementation resulted in or involved the commission of crimes within the jurisdiction of the ECCC. JCE is a mode of attribution controversially discussed in international criminal law, in particular its ‘extended’ category JCE III. This ‘extended’ category has attained much criticism in scholarly work for being too expansive. Significantly, the ECCC rejected this form of joint criminal enterprise for lacking legal basis in customary international criminal law and only endorsed the ‘basic’ and ‘systemic’ form. Lachezar Yanev in Chap. 9 provides a meticulous analysis of the ECCC case law, adequately describing the importance of this courageous finding by the ECCC. He places the findings within the greater context of international criminal law and provides a renewed analysis of the Nuremberg-era cases that have been cited by the modern international tribunals as evidence of the customary nature of the ‘extended’ form of JCE. His chapter demonstrates the importance of the jurisprudence of the ECCC in the development of international criminal law.

As this book demonstrates, the ECCC and the Cambodian conflict raises a myriad of legal debates, starting with the question of how to appropriately classify the atrocious crimes that were perpetrated by the Khmer Rouge between 1975 to 1979 against their own Khmer population. The number of deaths was simply too great to keep record of the estimated death toll, varying among scholars between one and three million. Given the sheer scale of the Cambodian atrocities, they are often referred to as “genocide”. The victims of such horrendous crimes look at “the crime of crimes” with undue expectations. The Convention on the Prohibition of Genocide does not estimate a number of deaths which results in genocide. Rather it has a clear definition of which groups are protected by its definition of genocide. To the disappointment of many Cambodians, genocide charges were only brought against the accused in Case 002. Moreover those charges were limited to the Muslim Cham and Vietnamese minority and did not include the Khmer populations as such. The difficulty of this debate is illustrated in Chap. 10 by Melanie Vianney-Liaud, identifying the legal constraints with respect to the legal characterization of the Khmer Rouge atrocities as a crime of genocide.

Given the difficulties with respect to genocide and the sheer scale of atrocities, crimes against humanity nevertheless provides an adequate catch-all element for such atrocities. A prominent feature of the crimes committed by the Khmer Rouge was the forced-transfer of the population from urban areas to the countryside. With the capture of Phnom Penh on the eve of the Khmer Rouge reign, this ‘Pearl of Asia’ was emptied and its population transferred to Cambodia’s hinterland. Death and despair inevitably followed. Despite the human tragedy, courts of law are tasked with rigorously adhering to undeniable standards of justice, in particular the *nullum crimen sine lege* principle. With respect to the forced transfer of people within Cambodia’s boundaries in the 1970s, the criminality of such displacement had to be established. Nathan Quick looks at this complex question in Chap. 11 and how the ECCC solved it.

In an environment of violence and inhumanity sexual and gender based violence against women and men is commonplace. History has shown that this is

a reality in all cultures and societies. The failure and the delay of the ECCC to investigate sexual crimes, despite the experience of other tribunals in this field, is disappointing. Nevertheless, the ECCC underwent a drastic development and eventually investigated and charged gender based violence. There are important lessons to be drawn from the ECCC experience in this regard. The importance of this experience is highlighted by Valerie Oosterveld and Patricia Viseur Sellars. In their exhaustive study they highlight the positive addition of the ECCC to the understanding of the crime of forced marriage in international criminal law. Expectedly, they highlight some contentious aspects of the ECCC jurisprudence, such as rape, which was not considered a specific crime against humanity in 1975 by the Supreme Court Chamber.

The relationship between international humanitarian law and international criminal law is contentious, as the latter has to be applied within the framework of the former. The jurisprudence of the ECCC and its findings on the war crimes charges in Case 001 are challenging. The ECCC found Kaing Guek Eav guilty of a range of grave breaches, including wilful killing, torture and wilful deprivation of the rights of fair and regular trial. Noëlle Quénivet provides an unrestrained analysis of the jurisprudence on the war crime of grave breaches of the Geneva Conventions in Chap. 13, challenging it for lacking solid legal support as well as for misinterpreting the law as it existed at the time of the perpetration of the crimes. This chapter provides an important analysis of the shortcomings of the jurisprudence of the ECCC with respect to war crimes within an international armed conflict.

All of the above mentioned substantive crimes could not have been prosecuted and punished if a statute of limitations would have been applicable to such crimes. In Chap. 14 David Boyle highlights the ECCC's unique contribution to the debate on the evolution over time of customary rules concerning statutory limitations.

In **Part III** the ECCC's contributions to international criminal procedure are examined. The ECCC, given its setting within the Cambodian court structure and that it is influenced by the French legal system, adopted a different procedural approach to the ad hoc international criminal tribunals. At the time of its establishment curiosity prevailed among scholars and practitioners as to whether an 'inquisitorial' procedure would provide more efficient and expeditious trials than the 'adversarial' procedures adopted at the ICTY, ICTR and SCSL. Sergey Vasiliev provides a detailed appraisal of such a claim. He stresses that the ECCC procedural legacy provides a realistic view on the abstract debates about the preference for either the adversarial or the inquisitorial approach. As his analysis demonstrates, the ECCC experience in this regard has implications for the contest between the two models of procedure. Here too the understanding of such an experience is important to draw realistic lessons for international criminal justice. The conclusion of the conquest between the two systems may be all too simple: trying mass atrocities will bring any procedural model to its limits. Such proceedings are complex and take adequate time. International criminal procedure therefore has to move away from the traditional procedural models and find an emancipated procedure that provides for the complexities of atrocity trials.

The ECCC Trial Chamber in Case 002 attempted an economical approach to international criminal procedure, when it severed charges against the Accused in Case 002. Even though the Closing Order probably did not provide a complete account of all the atrocities that occurred during the temporal jurisdiction of the Court, the sheer scale of the crimes threatened, at least in the view of the Trial Chamber, an efficient closure of the proceedings, especially given the advanced age and poor health of the Accused. Anne Heindel looks at this controversial decision in Chap. 16. She highlights the struggle of balancing the obligation to hold expeditious trials with the victims' expectation that accused will be charged comprehensively. This attempt to ensure effective and efficient trials will be a lesson for other courts dealing with similar issues. Heindel doubts that the ECCC experience may serve as guidance.

The age of the accused was not only a concern for the adoption of the severance decision. The frailty of the octogenarian accused constantly loomed over the trial. The ECCC repeatedly dealt with the issue of the Accused's fitness to stand trial and the specific accommodations necessary to ensure their meaningful participation in the proceedings. Prior to the trial in Case 002, the Accused Ieng Thirith was found to suffer from Alzheimer's disease and on the eve of the opening of Case 002 in November 2011 the national and international judges were unable to agree on the consequences of such a finding. The jurisprudence with its legal challenges and difficulties are meticulously examined by Roger Phillips in Chap. 17. He highlights that the ECCC followed well-established international standards for ascertaining fitness to stand trial. He concludes that the jurisprudence may well serve as an example to enshrine fundamental fair trial principles, such as the concept of *in dubio pro reo* and strict adherence to the requirement of meaningful participation.

Torture was a common and prominent feature during the reign of the Khmer Rouge. Torture statements were pedantically collected by the regime, providing the regime with a pretext rather than certainty of any admissions therein. The findings of the Trial Chamber in its Judgment against Kaing Guek Eav provide a detailed account of the sadistic and calculated nature of torture. The crime of torture as a crime against humanity or as a war crime is undisputed. A more difficult question during the ECCC trials was the use of such torture statements in the evidence, without corrupting and degrading the court in the process. The question of the use of torture statements even took ironic turns, albeit with considerable complex legal notions. In Case 002 the ECCC faced the awkward question of whether one who is accused of torture may adduce evidence that may have been obtained by torture as exculpatory evidence. The difficulty here is that a preliminary determination has to be made on whether torture was used to obtain such evidence. At the same time judges must nevertheless reserve the ultimate finding on the guilt of the accused for this same act of alleged torture until all evidence has been considered. Such delicate legal questions are addressed by Tobias Thienel in Chap. 18. His contribution demonstrates that the ECCC jurisprudence adheres to international standards and that its jurisprudence may be a useful guidance.

The experience gathered by the ECCC with its decision to allow victims to participate in the trials is of considerable value. Can a criminal trial succeed if

thousands of victims participate in the proceedings? Clearly innovative solutions are necessary in order to ensure an effective trial, but at the same time allow victims to raise their views at trial too. This was not always an easy task, however the rich jurisprudence of the Court will guide future tribunals through a similar endeavor in order to provide victims with a voice. A related issue is the question of reparations. Here as well the ECCC is providing guidance with its jurisprudence and its solid and realistic answers. Nevertheless, the developments have undergone considerable debate and complications which are assessed and explained in Chap. 19 by Binxin Zhang. Through a comparative examination she provides a realistic account of what such participation may and should achieve. Co-Editor Ignaz Stegmüller closes the collection of contributions in Chap. 20 with a detailed discussion of the evolution of the victim participation regime before the ECCC.

As mentioned above, the idea for the present publication was triggered by conclusions and recommendations made at a conference on the legacy of the ECCC. This conference on 13 and 14 September 2012 was initiated by the co-editors, together with our colleague and friend Michelle Staggs-Kelsall. This Conference on the “Hybrid Perspectives on Legacies of the Extraordinary Chambers in the Courts of Cambodia”, organized by the ECCC and CHRAC was visited by more than 200 participants to discuss topics presented by practitioners and well-known experts in the field of international criminal justice. A report with conclusion and recommendations was issued.¹ One of the recommendations included the jurisprudential legacies of the ECCC and its dissemination. This volume is the result of those recommendations, with the idea that a critical analysis of the jurisprudence and experience of the ECCC will contribute to international criminal law.

The need for such a critical analysis is important, as the ECCC hybrid model has gained attention as a mechanism in international criminal justice and has in fact gained followers. The African Union and Senegal reached an agreement to combine efforts to prosecute former President Hissène Habré for torture atrocities in Chad. The similarities reach further than just the name of the institution as the Extraordinary African Chambers in the Courts of Senegal. Similarities, albeit under a considerable different constructions, may be seen with the hybrid criminal courts in the Central African Republic, which are logistically assisted by the United Nations. Last but not least, the European Union has entered the field of international justice, agreeing to assist the judiciary of Kosovo to prosecute war crimes and crimes against humanity committed at the end of the Kosovo liberation war. This court too shares many similarities with the ECCC.

The notion of hybrid courts is usually hailed as a model of ownership of the affected society. However at the same time this model opens the possibility of all too easy criticism of domestic influence on local actors within such an institution. The ECCC has had this negative experience. The ECCC however is not the

¹Report Hybrid Perspectives on Legacies of the Extraordinary Chambers in the Courts of Cambodia (ECCC), December 2012, available at http://www.chrac.org/eng/CHRAC%20Documents/Conference%20Report%20on%20Legacies%20of%20the%20ECCC_English_FINAL.pdf.

creation of one entity alone and is certainly not the creation of two champions known for their effectiveness, but rather two different entities that operate in different leagues, in particular with respect to judicial standards. When judging the Court, differing standards of justice need to be considered. Nevertheless, the contributions in this book demonstrate that the ECCC was not only able to address pressing problems of international criminal justice with recognized standards, but also provides remarkable jurisprudence that may guide any future international criminal proceeding, for its achievements, but also for its failures. This is an extraordinary achievement of an extraordinary court.

Last but not least, we as the editors would like to include an acknowledgement to all contributors of this volume and also to Judge Chung for agreeing to provide a Foreword. Rather than mentioning everyone involved, we would simply state that whoever is reading these lines and has been in contact with us on issues relating to this book, the Legacy Conference in September 2012 or any discussion related to the ECCC: You have inspired this book and made it possible. However, Christopher Giogios has to be expressly mentioned for his invaluable assistance.

Part I
**Assessing the History, Establishment,
Judicial Independence and Legacy**

Chapter 2

Trials and Tribulations: The Long Quest for Justice for the Cambodian Genocide

Helen Jarvis

Abstract The ‘Cambodian model’ of the ECCC—a domestic court with international participation and assistance—emerged through years of tough negotiations between the Cambodian government and the UN, after the massive crimes had been ignored by the international community for 20 years. This contested history provided the backdrop to the work of the Court and to the judicial and non-judicial challenges it has faced, giving alternate prisms through which to assess its achievements and failings.

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