



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

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## ABSTRACT

This paper will show in a descriptive way the work, procedure, and main features of a relatively new international criminal court: the **Extraordinary Chambers in the Courts of Cambodia**<sup>1</sup>. The thesis asks the questions whether there really was a need for the formation of the ECCC; whether the ECCC can work as it is supposed to do; whether the ECCC can achieve its main goal of giving justice. While getting more knowledge on the historical reasons of the establishment of the ECCC, it will be shown that because of its uniqueness and its “mixed-up” character the ECCC has more possibility to achieve its aim in giving justice to the Cambodian people comparing to the other courts.

In order to prove that the ECCC can be effective and even more effective than the other international criminal courts the thesis will present the main organizational and procedural differences between the ECCC and the other international criminal courts. A comparative analysis will be given of these *ad hoc* or/and permanent international criminal tribunals on the basis of their statutes in order to point out the vital differences and to emphasize that the ECCC has the possibility to work in a better way.

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<sup>1</sup> From now on ECCC or Extraordinary Chambers.

## INTRODUCTION

After the World War II., as a response to the numerous wars a strong need emerged for an effective international criminal justice system. The Nuremberg and Tokyo Tribunals were the first results. Their tasks were to prosecute and punish the leaders of the Axis Powers. During the 20<sup>th</sup> century more ad hoc tribunals were formed in order to deal with war crimes and crimes committed against humanity in a limited geographical area. In 1998 the International Criminal Court was established to prosecute and punish perpetrators.

Such perpetrators were also the members of the Khmer Rouge regime. During their reign approximately two million people died<sup>2</sup>. The Khmer Rouge regime was overthrown by a civil war in 1998; the regime ended its political and military operations in 1999. In 2001 the Cambodian National Assembly adopted a law to create a court in order to try crimes committed during and by the Khmer Rouge regime. This court is fully addressed as the **Extraordinary<sup>3</sup> Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.**

As the Cambodian legal system was still too weak to conduct the trials alone, it asked for international participation. The first party they asked for assistance was the United Nations<sup>4</sup> to participate in the establishment of the ECCC. The UN as an answer formed its program of the United Nations Assistance to the Khmer Rouge Trials<sup>5</sup> which helps the work of the ECCC and shows the participation of the international community. So the Royal Government of Cambodia and the UN have created together this special court that is independent of both of them since then.

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<sup>2</sup> This number is highly questionable; some say 2 million, some 1.7 million people. One thing is for sure: a lot of people died without any reason.

<sup>3</sup> „Extraordinary” see later.

<sup>4</sup> From now on: UN.

<sup>5</sup> From now on: UNAKRT

While thinking about the Cambodian events the questions emerge whether there really was a need for the formation of the ECCC; whether the ECCC can work as it is supposed to do and how it works; whether the ECCC can achieve its main point of giving justice to the victims of the regime after 30 years; should the victims and witnesses be disturbed – should the Tribunal tear up the scars. To find out the answers the paper will present the main attributes of the ECCC – its structure, its work and its effectiveness- and differences comparing with other international criminal courts such as the International Criminal Court in The Hague<sup>6</sup>, the International Criminal Tribunal for the former Yugoslavia<sup>7</sup>, the International Criminal Tribunal for Rwanda<sup>8</sup> and the Special Court for Sierra Leone<sup>9</sup> as these tribunals are the main important ones. **It will be shown that despite of the fact that the ECCC is a young *ad hoc* tribunal and is situated in a country where corruption in politics and justice flourishes, with its uniqueness the ECCC has more possibility to achieve its aim of giving justice than the other international criminal courts.**

The main characteristic of the ECCC is its “mixed-up” feature this is why it was named “extraordinary”: as the Cambodian Government insisted that the majority of the judges would be Cambodians, to put it simply, the ECCC is a combination of Cambodian and international judges with the former’s majority. This is the most important uniqueness of the ECCC and it is yet a question whether the ECCC can be more effective in finding out what really happened and who did it and punishing those criminals than the other tribunals.

In the first Chapter of the thesis I will give a background on the historical aspects of the ECCC – referring to the history of the Khmer Rouge regime then presenting the crimes that the regime committed and after that the negotiation period that led to the formation of the

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<sup>6</sup> From now on: ICC.

<sup>7</sup> From now on: ICTY.

<sup>8</sup> From now on: ICTR.

<sup>9</sup> From now on: SCSL.

ECCC. I will analyze the respective laws – the ECCC Law<sup>10</sup> promulgated in 27 October 2004, the UN/Cambodia Agreement<sup>11</sup> signed on 6 June 2003 and the ECCC Internal Rules<sup>12</sup> adopted on 12 June 2007 - in order to give a full description of the structure and procedure of the ECCC.

In the second part I will give a comparative analysis of the ECCC and other international tribunals – the ICC, the ICTR, the ICTY and the SCSL – on the basis of their statute<sup>13</sup>. The basic points of the comparison among others are the legal documents the tribunals were based on, the jurisdiction of the tribunals, appointment of the judges, the organization and the procedure. These points are the most important elements of a tribunal this is why the comparison will be based on them.

In the third Chapter I will summarize the national and international aspects of the ECCC and draw up the possible futures of the ECCC – because it still has a long way to go in showing real results.

The methodology in the first chapter will be description as the background information, historical facts, its organization and the way the ECCC works have to be told if one wants to understand the aims of the Tribunal. Then, in the second part the comparison has the main role: systematic comparison of the other relevant international criminal tribunals - the ICC, the ICTR, the ICTY and the SCSL - and the ECCC. In this part only the vital elements of the other tribunals (funding legal documents, the jurisdiction, the judges,

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<sup>10</sup> Law on the Establishment of the Extraordinary Chambers in the Court of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

<sup>11</sup> 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.

<sup>12</sup> Together: the „ECCC constitutive documents”.

<sup>13</sup> Statute of the ICTY adopted by the Security Council on 25 May 1993 (UN Doc. S/RES/827 (1993)); Statute of the ICTR adopted by the Security Council on 8 November 1994 (UN Doc. S/RES/955 (1994)); Rome Statute of the ICC adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998; Statute of the Special Court for Sierra Leone adopted by the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone on 16 January 2002.

institution, procedure, etc.) will be pointed out where it is needed with a reference to the ECCC.

As the ECCC is a relatively new institute, the main resources are on the Internet: the official homepage of the ECCC<sup>14</sup>, the ICC<sup>15</sup>, the ICTR<sup>16</sup>, the ICTY<sup>17</sup> and the SCSL<sup>18</sup>. It is David Scheffer<sup>19</sup> who is a well-known expert in this theme and recently wrote an article about the ECCC, which will be published this year. Other articles from the Justice Initiatives<sup>20</sup> were also very helpful in getting knowledge on the ECCC and getting familiar with the International Community's point of view on the ECCC. They are good because they integrate the human thoughts and voices into the dry legal work. As the ECCC is a new phenomenon, the book-based sources are rare and the International Community still needs time to consider its effectiveness and the ECCC needs time to begin real work<sup>21</sup>. In this sense the novelty will be the limitation of the paper as the main sources are the relevant statute of the tribunals.

As main sources the ECCC Law, the UN/Cambodia Agreement and the ECCC Internal Rules will be used. In addition to that David Scheffer's work of an abstract of the ECCC and articles in the Justice Initiatives will be also used. In the second part the statutes of the international criminal tribunals will be analyzed and compared to that of the ECCC's Statute.

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<sup>14</sup> See at: <http://www.eccc.gov.kh/english/default.aspx> , last updated: 03 March 2008, checked between: 18 February – 28 March 2008.

<sup>15</sup> See at: <http://www.icc-cpi.int/home.html> , last updated: 08 March 2008, checked between: 18 February – 28 March 2008.

<sup>16</sup> See at: <http://69.94.11.53/> . last updated: 05 March 2008, checked between: 18 February – 28 March 2008.

<sup>17</sup> See at: <http://www.un.org/icty/> , last updated: 10 March 2008, checked between: 18 February – 28 March 2008.

<sup>18</sup> See at: <http://www.sc-sl.org/> , last updated: 10 March 2008, checked between: 18 February – 28 March 2008.

<sup>19</sup> He was a U.S. Ambassador at the Large for War Crimes Issues (1997-2001), and then worked as an officer for an NGO then as a law professor; he visited Cambodia several occasions and is well aware of the situation there.

<sup>20</sup> The Justice Initiatives is a publication of the Open Society Institute; this particular issue was published in the Spring of 2006.

<sup>21</sup> The literature is a bit limited due to the short history of the ECCC and I am not including the literature on the history of the Khmer Rouge regime as that constitutes only a small part of the paper.

As I have already stated the ECCC is very young and the Trials have just begun. It is obvious that the Government invested and still will have to invest great power and energy into the establishment and working of the ECCC. The International Community will have to give all possible assistance to support the accurate working of the ECCC. It will be found that if the ECCC gets the chance with the assistance of the International Community and the full commitment of the Cambodian Government it will be possible to work in a way to achieve the goals. Of course, from both side support and commitment will be needed: the Government will have to ensure that the international standards are not just ornamental elements but are binding regulations and the International Community will have to guide and secure the ECCC.

## **CHAPTER 1. THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

### **1.1. THE FORMATION OF THE ECCC: HISTORICAL REASONS, CRIMES AND NEGOTIATION**

In this Section the historical facts as reasons, the crimes that the Khmer Rouge regime committed and the negotiation period that finally led to the formation of the ECCC will be discussed in order to be acquainted with the background and be able to understand the situation in which the ECCC was formed.

According to the United Human Rights Council<sup>22</sup> the Khmer Rouge (meaning Red Cambodians) was formed in the jungles of Cambodia of the members of the Cambodian Communist Party and of some North Vietnamese groups. Its leader was named Pol Pot<sup>23</sup>. The Khmer Rouge came into power on 17 April 1975. During their regime more than two million people died or disappeared.

The right time for the Khmer Rouge to strike down was when the American military left Vietnam: Cambodia lost its supporter, corruption flourished, chaos ruled in the country. Pol Pot's main idea was to create an agrarian community according to Mao Cedongs's Cultural Revolution example and for this aim he isolated the country, confiscated all private property, evacuated the cities and moved the city-dwellers to the countryside.

In the fields the work started from 4:00 in the morning and continued for 16-18 hours with only two small breaks. As a consequence of the inhuman working conditions mass deaths occurred: due to executions, illness, starvation and work exhaustion. Several families

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<sup>22</sup> The United Human Rights Council is a Non-Governmental organization that campaigns against governments that want to hide their history about genocide, massacres and other human rights violation. For more information see: [http://www.unitedhumanrights.org/Genocide/pol\\_pot.htm](http://www.unitedhumanrights.org/Genocide/pol_pot.htm)

<sup>23</sup> Born in 1925 as Saloth Sar, died in 1998. He had Marxist-ideas and renamed Cambodia as the Democratic Republic of Kampuchea. Started a new calendar when declared, „This year is zero” and wanted to clear the peoples from all bad.

were forced to live together in the fields but it was also common to separate the members of the family and keeping contact was punished by death penalty.

The population became a society without classes, without titles. They were forced to call each other “friend” or “comrade”. The whole country was a huge labor camp with agricultural society.

The Khmer Rouge arrested, tortured and executed those who they doomed to be enemies: those with connection to the former government or to other countries; professionals and intellectuals who implied „being literate; Vietnamese, Chinese, Christians, Muslims and Buddhist monks; homosexuals; and those city-dwellers who were forced to go to the fields but didn’t have the knowledge to harvest. In the meanwhile the Khmer Rouge kept its seat<sup>24</sup> in the United Nations and the International Community did nothing to stop this kind of “mass destruction”.

Pol Pot died in 1998 and at the end of the same year the rest of the Khmer Rouge leaders apologized for the atrocities and genocide that was committed during the regime. The Khmer Rouge regime ended with a civil war in 1998 and the regime ceased to exist in 1999.

While being in power the Khmer Rouge regime committed such crimes that justifiably ranks the period as one of humanity’s most terrible mass murders. What are these crimes? According to the 2004 Law on the Establishment of the ECCC the crimes<sup>25</sup> that are to be tried and punished can be divided into two main groups: crimes under Cambodian law and crimes under International Law. These crimes constitute the subject-matter jurisdiction of the ECCC. The penalty is to be a maximum of life imprisonment and a minimum of 5 years. The ECCC

<sup>24</sup> Although under different names: „Democratic Kampuchea” until 1982 and „Conciliation Government of Democratic Kampuchea” until 1993. The reason why it could keep its seat was that the People’s Republic of China supported the regime and it already had a veto power in the UN Security Council.

<sup>25</sup> There is only one organization that tries to keep a record of the crimes: that is the Cambodian Documentation Center (DC-Cam). During the past 10 years it collected evidence of genocide, war crimes, crimes against humanity and tried to preserve them. Kelly Dawn Askin: Prosecuting Senior Leaders of Khmer Rouge Crimes, Justice Initiative, 2006. p 75.

may also order the confiscation of personal property, money and real property gained by unlawful activities during the period of the regime. The subject of the confiscations shall be handled back to the State and a Victim Fund will be created of them.<sup>26</sup>

**Article 3** of the ECCC Law stipulates the three crimes that will be punishable according to the 1956 Cambodian Penal Code: **homicide, torture and religious persecution**.

The crimes under International Law can be found under **Articles 4-8**: crimes of genocide, crimes against humanity, grave breaches of Geneva Convention of 1949 and other crimes. The **crimes of genocide** can be any act in order to destroy a „national, ethnical, racial or religious group”<sup>27</sup>. This constitutes mass killing, causing mental or bodily harm to members of a group, separating children from their group and taking them to another, preventing births in the group. The ECCC will also try those who committed attempts of, conspiracy of and participation in acts of genocide.

Article 5 gives a wide enumeration of what could constitute **crimes against humanity**. According to this crimes against humanity is: „a widespread or systematic attack directed against any civilian population on national, political, ethnical, racial or religious grounds, such as: murder; extermination; enslavement; deportation; imprisonment; torture; rape; prosecution on political, racial and religious grounds; other inhuman acts”<sup>28</sup>. Sexual violence may also constitute crimes against humanity although it is not enumerated in the ECCC Law.

Amongst the crimes that the ECCC tries under International Law are the **grave breaches of Geneva Convention** of 1949 (war crimes) which are stipulated in Article 6. It can be willful killing, torture or causing suffering or harm on purpose, taking civilians as hostages, unlawful treatment of hostages of war.

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<sup>26</sup> Kelly Dawn Askin: Prosecuting Senior Leaders of Khmer Rouge Crimes, Justice Initiative, Open Society Institute, 2006. p 79.

<sup>27</sup> ECCC Law, Article 4.

<sup>28</sup> ECCC Law, Article 5.

Articles 7 and 8 give the ECCC power to try the **crimes of destruction of cultural property** and **crimes against internationally protected persons**. The willful damage of historical buildings, historical sites, museums, collections is punishable according to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict. Crimes against protected persons are the crimes against diplomats, which were stipulated in the Vienna Convention of 1961 on Diplomatic Relations.

Only a few know that in 1979 in the capital of Cambodia, in Phnom Penh there was a trial which is known as the „People’s Revolutionary Tribunal”<sup>29</sup>. This trial tried to try the perpetrators for the crimes committed by the Khmer Rouge and both Ieng Sary<sup>30</sup> and Pol Pot were found guilty of genocide but as they didn’t show up in the court they didn’t serve any sentence. Since then up to 1997 not much happened neither from the Cambodians’ part, neither from the International Community’s part. In addition, in Cambodia for a long time there was an opinion that “Cambodia should dig a hole and bury the past”<sup>31</sup> which shows the Government’s “real” commitment to try the crimes and leaders of the regime.

David Scheffer writes in his abstract of „The Extraordinary Chamber in the Courts of Cambodia”<sup>32</sup> that the Cambodian Government wanted to create a „panel” since a long time ago to try all the crimes committed during the Khmer Rouge regime. In 1997 when Pol Pot was arrested this will of the Government multiplied. In the same year the Government of Cambodia sent a letter to the UN for assistance and as a consequence negotiation begun between the two parties with the involvement of the USA. The main problem was that the USA officials had no legal jurisdiction for the prosecution of Pol Pot. So a co-operated USA-

<sup>29</sup> An Introduction to The Khmer Rouge Trials, 2nd edition, 2006. p. 7.

<sup>30</sup> „Brother number 3”, Deputy Prime Minister, arrested in 2007.

<sup>31</sup> Craig Etcheson: A „Fair and Public Trial”: A Political History of the Extraordinary Chambers, Justice Initiatives, Open Society Institute, spring 2006, p 8.

<sup>32</sup> David Scheffer: Abridgement of the much lengthier and footnoted book chapter: David Scheffer, The Extraordinary Chamber in the Court of Cambodia, in Cherif Bassiouni, ed.; INTERNATIONAL CRIMINAL LAW (Martinus Nijhoff Publisher, 3rd ed.; 2008 (forthcoming) . Part 1.

Cambodian or any other foreign custody was needed on foreign territory in order to make possible the USA participation. The plan was to form an International Criminal Tribunal for Cambodia (ICTC) in the Netherlands.

Although Pol Pot died in 1998 and he couldn't be tried (and won't be tried posthumously at the ECCC either) the interest in trying the former leaders of the Khmer Rouge still grew.

An expert group was formed in the UN to make a report on the situation and the possibilities. Unfortunately the UN's work is usually slow, so the „Group of Experts for Cambodia Report” was ready only in 1999. The Report stated that an international criminal court is needed to investigate the crimes and hold the leaders accountable for them. The court to be established was to have the characteristics of the ICTY and ICTR.

With the arrestment of Ta Mok<sup>33</sup> the justice came into closeness but the Cambodian Government changed its mind and wanted a national court only for Ta Mok. The UN did not agree with this idea as it was possible that with only one trial the other perpetrators might have been left unpunished.

The USA proposed that a „special tribunal” or a „special chamber” should be established to try the crimes. According to the proposal the ECCC would have been part of the Cambodian court system but international judges would have had a majority. But the outcome was right the opposite. The „special chamber” was renamed as „extraordinary chamber”. Extraordinary in many ways: Firstly, because this is the first hybrid tribunal where the international judges and prosecutors were not in majority so the ECCC may be said to be a domestic tribunal with mainly Cambodian staff and officers; secondly, this is the first tribunal that will try crimes which were committed more than thirty years ago - in general the other international criminal courts tried the crimes right after the occurrence when peace was

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<sup>33</sup> „Brother number 4”, the Final Khmer Rouge leader.

achieved - which makes the trial more complicated as the evidences might have already disappeared, the memories of people got worse or faded and the perpetrators got older, they may die; thirdly because the ECCC is “the only official venue in Cambodia where claims for truth and justice about Khmer Rouge crimes may be mediated”,<sup>34</sup>.

The Cambodian government was willing to accept the USA proposal and worked out a draft that was submitted to the UN. Unfortunately the UN lawyers had several problems with the draft. In 2000 the Cambodian regime agreed that Ieng Sary would not have immunity from the ECCC’s jurisdiction although he was granted amnesty in 1996. The UN and the Government of Cambodia decided that it would be the ECCC’s task to decide on the scope of this pardon and also declared that the Government wants no more pardon for anyone.

So altogether there were five compromises that the UN and the Royal Government of Cambodia accepted during the mediation: firstly, that international judges and personnel also participate in the ECCC’s work; secondly, that the decisions are deliberated by a “super-majority”; thirdly, there can be an international Co-Investigating Judge and an international Co-Prosecutor; fourthly, the allowance of the Pre-Trial Chamber’s work; fifthly, no amnesties and pardons.

The Cambodian National Assembly adopted and entered into force the draft ECCC Laws in January 2001. In the meantime the American interest in the trials in Cambodia fell back due to the change of government<sup>35</sup> and the UN was considering ending its participation in the procedure.

After a long period during which the Government of Cambodia sent several letters to the UN and the USA Government, the UN/Cambodian Agreement was signed and ratified in 2004. The Cambodian Supreme Council of Magistracy selected 12 international judges and

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<sup>34</sup> James A. Goldston: An Extraordinary Experiment in Transitional Justice, Justice Initiative, Open Society Institute, Spring 2006, p 3.

<sup>35</sup> At the beginning of 2001 the Clinton Administration ended, and the Bush Administration had other priorities to achieve.

prosecutors of the list of judges that the UN nominated and other 17 Cambodian judges in 2006. The Co-Prosecutors began their investigation. The ECCC Internal Rules were accepted in 2007.

## 1.2. THE STRUCTURE OF THE ECCC

Knowing the structure of the ECCC is important to be able to point out how the Tribunal works, which parts do what in order to gain justice. It is also vital from this point of view that in the second Chapter the vital elements of the other international criminal tribunals will be discussed in a way to show the differences between them and the ECCC. As there are special offices at the ECCC, which can't be found elsewhere it is advisable to present them. The seat of the ECCC is in Cambodia, a little outside of Phnom Penh and the official languages are Khmer, English and French. The ECCC has Plenary Sessions and a Rules and Procedure Committee. The parts that will be presented here are the Judges, the Co-Prosecutors and Co-Investigating Judges, the Office of Administration and other participants (Judicial Police, Investigators and Greffiers).

The ECCC has two levels: one of them is the Trial Chamber, the other one is the Supreme Court Chamber. There are altogether 17 judges in the Chambers and the majority of the judges are Cambodian. There is no jury or people's assessors at either level<sup>36</sup>.

According to Article 10 *new*, the **judges** have to be practicing judges with experience and "a high moral character, a spirit of impartiality and integrity"<sup>37</sup> and they have to be independent of any government or other source.

<sup>36</sup> For a its work see: Section of 1.4. The Legal Procedure.

<sup>37</sup> ECCC Law, Article 10 *new*.

The Supreme Council of the Magistracy<sup>38</sup> appoints seven Cambodian judges and reserve judges, and appoints the President of the Extraordinary Chambers. The Magistracy also appoints five international judges who were nominated by the Secretary-General of the UN. The Secretary-General makes a list of international judges and sends that to the Government of Cambodia. The list has to contain at least seven candidates. The Magistracy then selects the five sitting judges and two reserve judges. The reserve judges – whether Cambodian or international - replace the judges in case of their absence. The judges are selected for the period of the respective proceedings.

Cambodian and international staff helps the judges in their work. Before the selection there is an interview by the Director of the Office of Administration and a majority vote of the Cambodian judges is needed to hire somebody as a staff-member.

While deciding the sentence the judges have to have unanimity. If this can't be achieved then for the Trial Court four affirmative votes, for the Supreme Court five affirmative votes are needed. This ensures that in any case the Cambodian judges can't decide arbitrarily and at least one international judge's vote has to be part of the decision. This is called the „super-majority”<sup>39</sup>. If the “super-majority” can't be achieved the suspect has to be released which corresponds to the principle of innocent until proven guilty.

According to the main principle that Cambodian and international persons have to work together, there are two prosecutors: a Cambodian and an international one. Together they are called the “**Co-Prosecutors**”.

The Magistracy appoints the Cambodian prosecutors and reserve prosecutors as needed. The international prosecutors (one prosecutor and one reserve prosecutor) are selected from a list submitted by the Secretary-General. The „existing procedures for selection

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<sup>38</sup> From now on: the Magistracy.

<sup>39</sup> An Introduction to The Khmer Rouge Trials, 2nd edition, 2006. p 13. (“super-majority”: the majority plus one vote, in this case all the Cambodian judges and at least one international one).

of prosecutors”<sup>40</sup> have to be respected and the candidates have to have high moral character and integrity, and they have to be independent.

If there is a disagreement the prosecution may continue unless the “Co-Prosecutors or one of them requests within thirty days that the difference shall be settled”<sup>41</sup> and in this case they may handle in a paper indicating the reasons and facts of the disagreement and the difference will be decided by the Pre-Trial Chamber consisting of five judges – three Cambodian and two international. The decision has to be sent to the Director of the Office of Administration who publishes and communicates it to the Co-Prosecutors. Even if there is no “super-majority” in the Pre-Trial Chamber the prosecution may continue.

The Co-Prosecutors have the right to appeal in the Trial Chamber and in any case they may ask for the assistance of the Government. They are appointed for the period of the proceedings as well as the judges.

The Co-Prosecutors may choose deputy prosecutors and they may be assisted by Cambodian and international staff. The Director of the Office Administration is responsible for the Cambodian staff, and the Deputy Director of the Office Administration is for the international staff.

The **Co-Investigating Judges** conduct the investigations “on the basis of information obtained from any institution, including the Government, the United Nations organs, or non-governmental organizations”<sup>42</sup>. They may interrogate the suspects and the victims, may question the witnesses and obtain evidence. The Co-Investigating Judges can order the Co-Prosecutors to further interrogation. They may also get Cambodian and international staff to help.

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<sup>40</sup> ECCC Law, Article 19.

<sup>41</sup> ECCC Law, Article 20 *new*.

<sup>42</sup> ECCC Law, Article 23 *new*.

The nomination and selection of the Co-Investigating Judges are similar to that of the Co-Prosecutors and the conditions are also the same. There are also two Co-Investigating Judges – Cambodian and international. If there is a difference between them the deciding method is the same as presented at the Co-Prosecutors.

It is important to note that this is the „first hybrid tribunal to use investigating judges and primarily civil law system, as well as dual partnerships between the locals and internationals...”.<sup>43</sup>

The staff that helps and supports the judges, co-prosecutors and co-investigating judges are controlled by the **Office of Administration**. The Cambodian staff's head is the Director of the Office of Administration; the international staff's head is the Deputy Director. The Director is appointed for 2 years by the Royal Government of Cambodia and can be reappointed. He is liable for the management of the Office of Administration.

The Deputy Director is appointed by the Secretary-General and he or she is responsible for the international staff: administration, recruitment and administers the resources. The conditions for the posts include experience in court administration, and the candidate has to speak fluently one of the official languages of the court.

The Office of Administration is helped and supported by the Judicial Administration Committee. It gives guidance and advice on the judicial and administrative matters. The Office of Administration has a Defense Support Section which handles all the possible matters connected to the Defense. Within this, it maintains a list of lawyers signed up for the defense of the Suspects, maintains lists of persons who could be a member of a defense team, organize trainings for defense lawyers, etc.

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<sup>43</sup> Kelly Dawn Askin: Prosecuting Senior Leaders of Khmer Rouge Crimes, Justice Initiative, Open Society Institute, 2006. p 77.

In addition to the Defense Support Section there is a Victims Unit. Its main task is similar to the Defense Support Section's: maintaining a list of lawyers that are willing to represent the victims before the ECCC.

The ECCC Internal Rules, Rules 15, 16, 16 *bis* are about the **units** that help the functioning of the ECCC. These units contributing to the work of the ECCC are the Judicial Police, the Investigators and the Greffiers.

The **Judicial Police** give assistance to the Co-Investigation Judges, Co-Prosecutors and the Chambers in case of investigation. They can take orders only from these institutions.

The **Investigators** are the officers of the Office of Co-Investigation Judges and Co-Prosecutors and they take an oath before the Pre-Trial Chamber. The list of the Investigators has to be sent to the Ministry of Justice of Cambodia in order to accredit them.

The **Greffiers** also have to be accredited by the Ministry of Justice to whom the Office of Administration sends the list. A Greffier has to be granted to each Chamber. They have a huge role in the Procedural period.

### 1.3. THE JURISDICTION

As any other court the ECCC has temporal, personal, territorial and subject-matter jurisdiction. The **temporal jurisdiction** is quite easy to stipulate but it is very limited: it is the time period when the crimes investigated by the ECCC were committed, that is to say during the Khmer Rouge regime: from 17 April 1975 until 6 January 1979. No crimes committed before or after this period shall be subject to the jurisdiction of the ECCC.

The **personal jurisdiction** is a bit more problematic. According to this all the persons will be persecuted that are alleged perpetrators: the "senior leaders of Democratic Kampuchea

and those who were most responsible”<sup>44</sup>. This means the top leadership of the regime. On one hand, it is understandable that every victim who knows that a person killed his or her family wants that that person should be held responsible, but the ECCC as other “internationalized courts do not have the capacity to prosecute every crime.”<sup>45</sup> And the ECCC doesn’t intend to try every person who might have committed a crime. On the other hand, this also means that by this time only a small number of the responsible persons are alive. According to the Justice Initiative maybe 60 cases will be tried altogether, 10 senior leaders and 50 subordinates. In the meantime the number of senior leaders who are still alive declined to six<sup>46</sup>. The other “minor” perpetrators may or can be tried by the national courts of Cambodia.

David Scheffer who examined the constitutional structure of the ECCC states that the ECCC Law has no particular provisions for the **territorial jurisdiction**<sup>47</sup>. This is a main difference between other international criminal courts and the ECCC. The Extraordinary Chambers are part of the national court system in Cambodia, and usually without explicit provision for the extraterritorial jurisdiction a national court’s territorial jurisdiction contains only the territory of the country. In this case the territorial jurisdiction of the ECCC means that only those crimes would be investigated that were committed in the territory of Cambodia.

The **subject-matter jurisdiction** is the crimes committed by and during the period of the Khmer Rouge regime: homicide, torture and religious persecution according to the 1956

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<sup>44</sup> David Scheffer: Abridgement of the much lengthier and footnoted book chapter: David Scheffer, The Extraordinary Chamber in the Court of Cambodia, in Cherif Bassiouni, ed.; INTERNATIONAL CRIMINAL LAW (Martinus Nijhoff Publisher, 3rd ed.; 2008 (forthcoming) . Part 2. p. 12.

<sup>45</sup> Kelly Dawn Askin: Prosecuting Senior Leaders of Khmer Rouge Crimes, Justice Initiative, Open Society Institute, Spring 2006. p 80.

<sup>46</sup> Those are: *Nuon Chea* – deputy secretary of the Communist Party of Kampuchea (CPK) Central Committee; *Ieng Sary* – deputy prime minister for Foreign Affairs and Central Standing Committee; *Khieu Samphan* – State Presidium chairman of Democratic Kampuchea and Central Committee member; *Ta Mok* – zone secretary and Central and Standing Committee member, now in custody; *Sou Met* and *Meas Mut* – CPK Military Division chairmen. Steve Heder: The Senior Leaders and Those Most Responsible, Justice Initiative, Open Society, p 55.

<sup>47</sup> David Scheffer: Abridgement of the much lengthier and footnoted book chapter: David Scheffer, The Extraordinary Chamber in the Court of Cambodia, in Cherif Bassiouni, ed.; INTERNATIONAL CRIMINAL LAW (Martinus Nijhoff Publisher, 3rd ed.; 2008 (forthcoming) . Part 2. p. 12.

Cambodian Penal Code, and the crimes of genocide, crimes against humanity, grave breaches of Geneva Convention of 1949 (war crimes), crimes of destruction of cultural property and crimes against internationally protected persons according to the International Law.

#### 1.4. THE LEGAL PROCEDURE

Chapter X. of the ECCC Law concerns about the **legal procedure** of the ECCC, which is just a basic mandatory guide. According to this the trials have to be fair and expeditious. The rights of the Accused have to be respected and the ECCC has to ensure the protection of the victims and witnesses. It has to guarantee the security of the Suspects and has to take all possible measures for the arrestment of the Suspects. The trials are **open and public** except for the cases where there is a well-justified reason to close out media and public. In all cases the judgments have to be announced during a public hearing.

Article 35 *new* enumerates the **minimum guarantees** that have to be ensured to the Suspect. This includes the principle of being informed of the nature and cause of the charges; time and facilities for preparation of the defense and right to counsel; right to trying in adequate time- no delays; right to be at the trial and defend themselves; legal assistance free of charge if they can't pay it; examine the evidence against them and submit evidence on their part; free interpreter; not to be forced to confess any guilt or testify against themselves.

The more exact provisions on the procedure of the ECCC are in the **ECCC Internal Rules**. This Internal Rules will be used to give a more detailed description.

The **Prosecution** period is the first step to have a crime tried before the ECCC. Only the Co-Prosecutors can initiate a prosecution by their own decision or by a complaint. Anyone can submit a complaint who has useful knowledge of a crime. It is for the Co-Prosecutors to decide whether there will be a prosecution or not. If the Co-Prosecutors decline the complaint

it is not a *res judicata* as the Co-Prosecutors may decide the opposite way at any time but have to notify the complainant.

The Co-Prosecutors may order a **Preliminary Investigation** in order to explore the evidences and find the Suspects and witnesses, which will be carried out in general by the Judicial Police.

If the Co-Prosecutors conclude that there was a crime committed and have evidence they may initiate the **judicial investigation** with the submission of an Introductory Submission. The judicial investigations are mandatory in order to trial a crime. It includes the notification and interview of the charged person, interview of the witnesses, the search and seizure of the evidences, the issue of the Rogatory Letter that orders the Investigators and other office members to conduct an investigation and take notes on every finding.

The prosecution period may be closed with a **Final Submission** of the Co-Prosecutors in which they indicate the case as one that has to be sent before the ECCC. The Co-Investigating Judges can end this period by a **Closing Order** either discharging the person or sending him or her to the ECCC. The Co-Investigating Judges may also end the period by a **Dismissal Order** in cases where the crimes are not within the jurisdiction of the ECCC, if the perpetrator is unidentified or when there is not enough evidence against the Suspect.

The **Pre-Trial Chamber Proceedings** are usually used for the dispute settlement between the Co-Prosecutors or the Co-Investigation Judges. A written statement of the reasons and facts has to be sent to the Office of Administration. It is the Office of Administration that will summon the Chamber for the decision. In this sense, this is a difference comparing to the other courts.

The Pre-Trial Chamber may also decide on the appeals against the Co-Investigating Judges, annulations of actions of investigations, and on other appeals indicated in the ECCC Internal Rules.

The **Trial Chamber** contains 5 professional judges - three of them are Cambodians, the other two are international judges. Each Trial Chamber has a President who is one of the Cambodian judges. The President may select clerks to help the Court. The Trial Chamber period begins with the **Indictment** of the Co-Investigating Judges. The Co-Prosecutors send a list of witnesses and experts they are about to hear at the Trial to the Greffier of the Chamber who sends the list on to the parties. The parties may create an additional list of the person that weren't on the list but they consider summoning.

It is the President of the Chamber who determines the date of the trial and the Greffier notifies the parties. The notifications are to be considered as valid summons. The trial begins with an **initial hearing** where the Chamber examines the list of witnesses and experts and it may reject the list if it considers not being sufficient.

The Accused has the right to be present at the trial and he or she has to be in a detention before taken to the trial unless the Chamber allows remaining at liberty. In any case – for example if the Accused refused to participate or due to illness or other health condition – the procedure may go on without the Accused. The Accused has the right to examine the witnesses that he or she was unable to do so during the pre-trial period.

The President conducts the trial and ensures that the Accused may fully exercise his or her rights of defense. The President may order any act or proceeding excluded if he or she considers it unnecessary or it may cause unreasoned delay. He or she shall maintain the good order during the trial. The lawyer and the Co-Prosecutors may have the right to examine the case files at any time and may ask for a copy of them.

It is the Co-Prosecutors' job to prove that the Accused is guilty and they have to prove that beyond reasonable doubt. In order to do so they may use all evidence before the Chamber. The Chamber may refuse any evidence that is „irrelevant or repetitious; impossible to obtain within reasonable time; unsuitable to prove the facts it supports to prove; or not allowed under the law”<sup>48</sup>. The Chamber may take confessions also as evidence.

At the beginning of the trial the Greffier names the Accused, the Victims, the Civil Parties<sup>49</sup>, the witnesses and the experts and verifies them. The Co-Prosecutors may make a short opening statement introducing the charges and the Accused or his or her lawyer may respond to that.

**Preliminary Objections** may be taken at the initial hearing on the jurisdiction, on acts indicating the termination of the prosecution and on the invalidity of procedural acts made after the indictment was filed.

After the President informs the Accused of his or her rights the **questioning period** may begin. All judges may ask questions which have to be pertinent. After the judges, the Co-Prosecutors and the other parties may also question the Accused with the authorization of the President. The trial continues with the hearing of the witnesses and experts. Objections to the hearing of a witness or an expert may be raised. The witnesses and experts have to be in the disposition of the Chamber until it dismisses them. Any party to the trial may make **written submissions** until the closing statements. All submissions have to be signed by the Greffier.

If the Chamber finds it necessary it may order **additional investigation** during the trial. In its order it has to indicate the judge that will conduct the investigation. The appointed judge will have the power to come and go in Cambodia in order to fulfill the requirements of the investigation, may question and hear witnesses, have researches and take evidences, talk with experts and ask for opinions. He or she may also order a Rogatory Letter.

<sup>48</sup> ECCC Internal Rules, III. Procedure, E-Proceeding Before the Trial Chamber, Rule 87. (2).

<sup>49</sup> Civil Party is a victim, the Co-Investigating Judges or the Trial Chamber accepted as a Civil Party.

When all evidences have been examined and all witnesses and experts were questioned the President asks the Co-Prosecutors, the lawyers of the Accused, the Accused and lawyers for the Civil Parties to make the **closing statements**. The Greffier has to make records of the proceedings and has to sign it at the end. If one hearing for deciding the case is not enough the President may appoint a new date to adjourn the proceeding to.

While **deliberating the decision** the judges may reopen every question and may order further hearings. The decision has to be pronounced at the final hearing or may be postponed. In this case a fixed day has to be pointed for the pronouncement. The **judgment** corresponds to the facts in the Indictment: shall not go beyond it. If the facts were not proven then the Accused has to be let free. So there has to be issued a judgment of acquittal and the Accused has to be released. If the ECCC has no jurisdiction over the crimes it has to state that. If the Accused is found guilty the detention should continue. In case the Accused was not in detention during the trial the Chamber has to issue a Detention Order; and if the Accused was absent the Chamber has to issue an Arrest and a Detention Order.

The judgment has two parts: one of them has to contain the date of hearing(s) and the issuance; the name of the Judges, the Co-Prosecutors, the Greffier(s), lawyers; the name, place of residence, birth date and place and occupation of the Accused and Civil Parties; and the appellate rights and the findings, the factual and legal reason of the decision; the other is the **disposition** with the committed crime, the applicable law, the sentence and the reparations. The judgment has to be signed by all judges. If there are dissenting or separate opinions the judge writing them has to sign only his or her opinion.

It is the **Supreme Court Chamber** that decides the question of appeals, as it is the second instance and the highest level of the court system; it is the final court but is also serves

as an appellate chamber. It consists of seven judges, four of them Cambodian and three international judges.

The Supreme Court Chamber considers the facts and laws. It may confirm, annul or amend the judgments of the Trial Chamber either in whole or in part. The judgments of the Supreme Court Chamber are final and can't be sent back to the Trial Chamber.

The Co-Prosecutor, the Accused and the Civil Parties may **initiate an appeal**. The appeal has to be sent to the Greffier of the Trial Chamber who will register it and notifies the other parties on the appeal. With the appeal the appellant has to submit a short paper on the reasons of fact and law as the basis of the appeal. The deadline for the appeal is 30 days from the date of the judgment or from the date of the notification. The other parties have 15 days to submit a cross-appeal. If the appeal is filed late it is considered to be inadmissible.

The President of the Chamber decides the date of the appeal hearing and the Greffier notifies everyone of the date. The appeal has to be in a reasonable date. The President will appoint one Cambodian and one international judge as **Co-Rapporteurs** of the appeal. The Co-Rapporteurs will write a report on the case that has to contain the facts and the details of the former decision.

At the beginning of the Appeal Trial the Co-Rapporteurs read out their report to the Chamber. The Appellant may also make a statement on the grounds of the appeal. After the statements the judges may question the Accused. Then they may ask questions to the witnesses and experts. As regards to the procedure the rules of the Trial Chamber apply to the Supreme Court Chamber as well.

The Supreme Court Chamber may only examine evidences that were submitted to the Trial Chamber. New elements can't be used, but the Supreme Court Chamber may disagree with the „legal characterization of the crime adopted by the Trial Chamber”<sup>50</sup> and may change

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<sup>50</sup> ECCC Internal Rules, III. Procedure, F-Appeals from the Trial Chamber, Rule 110. (2).

it. In any case that the Appeal Chamber has reason to believe that the findings of the Trial Chamber are erroneous it may correct them. If it was the Accused that appealed the Chamber can't increase the sentence, but may change it only in the benefit of the Accused. When there is a suspicion of procedural defects and the judgment is void due to these effects the Supreme Court Chamber may hear the case again and decide as it were the Trial Chamber. The judgment of the Appeal Chamber is final and there is no further possibility for an appeal.

Although it is not an appeal, but gives hope to the alternation of the Supreme Court Chamber's decision: the **Revision of the judgment**. The rules on revision are very strict. According to Article 112 of the ECCC Internal Rules the grounds are the following: there is new evidence (which wasn't there at the time of trial, and this was not attributable to the party wanting to use the new evidence now; if it had been proved at the trial it would have changed the judgment); the main evidence, on which the judgment was mainly based is false, forged or falsified; "one or more of the judges who participated in a judicial investigation or a conviction, committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under these IRs",<sup>51</sup>.

The revision has to be requested at the Greffier. All the rules for the appeal procedure have to be applied to the procedure of the revision. The decision may only contain an answer whether the decision of the Supreme Court Chamber should be revised or not. The Chamber may not decide on other matters.

If the decision is final the Co-Prosecutors may initiate the enforcement. They have to implement the sentence as soon as possible. In order to achieve this they may ask for the assistance of the authorities of Cambodia.

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<sup>51</sup> ECCC Internal Rules, III. Procedure, F-Appeals from the Trial Chamber, Rule 112. (1).

## CHAPTER 2. COMPARISON

In the first Chapter the main attributes of the ECCC were presented in order to understand its work. It was important to show the historical background, and the structure and legal procedure were also vital to be described.

In the second Chapter comparison will be made of the ECCC and the other relevant international criminal tribunals: the International Criminal Court in The Hague, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone. It will be demonstrated that because of the special structure of the ECCC it has more chance to achieve its aim than any other court.

During the comparison I will take into account only those features that I have already described in the first Chapter as they are the main features representing the specialty of the ECCC and even just those parts that are from some point of view interesting, or different from the ECCC structure and procedure. As this paper is limited in space I have to focus and not talk about those features that are not relevant from the point of view of the thesis. So the main points are the following:

- Basic Documents;
- Time of establishment – time lapsed between the crimes and their trial;
- Jurisdiction (temporal, personal, territorial and subject-matter);
- Appointment of judges and the nationality;
- Institution – Organization of the Tribunals;
- The Pre-Trial Chamber;
- The Legal Procedure;
- The Judgments and Penalties;

- Minor Differences.

While comparing the international criminal tribunals and the ECCC I will focus mainly on these attributes. This is why it was really important to give a detailed description of the ECCC procedure – to be able to understand and point out the differences. I will go point by point over the attributes that have to be compared.

## 2.1. BASIC DOCUMENTS

As I have already described in the first Chapter the **ECCC** was based on a bilateral international agreement between the Royal Government of Cambodia and the United Nations. This document is called 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. The Agreement gives the basic information about the ECCC.

The **Special Court for Sierra Leone** is somewhat similar to the ECCC as to the basic document. It was also based on an agreement between the Government of Sierra Leone and the United Nations. A resolution of the Security Council<sup>52</sup> was first accepted in 2000 that expressed the concerns about the crimes committed in Sierra Leone. The purpose of the Court is to prosecute persons who bear the greatest responsibility for the occurrence of such crimes.

The **Rome Statute** established the **ICC** in 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. It is an international treaty and any State is welcome to accede to it. Those Parties that joined the Statute are bind by its provisions. Presently the Statute has 105 Parties. So it is an open treaty, not limited to the “founding states”.

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<sup>52</sup> From now on: SC.

The **International Criminal Tribunal for the Former Yugoslavia** and the **International Criminal Tribunal for Rwanda** are the same from this point of view as both of them was established by the UN Security Council's Resolutions<sup>53</sup>. The resolutions are based on the Chapter VII of the Charter of the United Nations. This is important as the Chapter VII is about the Peace and Security and the resolutions under this chapter are mandatory while under the other chapters only recommendations can be adopted by any UN organ.

These differences show that on many basis can an international criminal court be established, the difference is whether it is an agreement between the given State and the UN; a UN Resolution; or an international treaty.

## 2.2. TIME OF ESTABLISHMENT

From the historical background and the negotiation history of the **ECCC** it is obvious that between the crimes committed by the Khmer Rouge regime in 1975-1979 and the establishment of the ECCC 30 years has passed. It is one of the uniqueness of the ECCC as any other international criminal tribunal was established right after the conflict occurred.

The **ICTR** was established according to the Security Council Resolution 955 in 1994. The conflict that was the reason for its founding was in 1994 so in this case the SC could act quite quickly. That means that the reports and preparing resolutions were presented even during the time when the atrocities were being committed.

The **ICTY** was founded in 1993 with the SC Resolution 827. The discussion on the subject started earlier in 1991 but it was in 1993 that the SC reaffirmed its former Resolution and established the ICTY. Between the foundation and the beginning of the conflicts 3 years

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<sup>53</sup> For the ICTY Resolution 827 (1993), for the ICTR Resolution 955 (1994).

had passed which is a still relatively short time comparing to the ECCC's 30 years. It is interesting that the Resolution says nothing about the end of the conflicts so it means that when the final Resolution was accepted it wasn't exactly clear whether the atrocities were over or not.

The Agreement between the UN and the Government of Sierra Leone on the Establishment of a **Special Court for Sierra Leone** was accepted in 2002, and the crimes for the trial of which this court was established were committed from 30 November 1996. It is 6 years and it has the same characteristic as that of the ICTY that neither the Agreement nor the Statute specifies the end of the conflict; booklets<sup>54</sup> and other information brochures use simply the “during the war” expression.

The ICC is a special exception in this case as it was not established after any conflict, there was no specific reason of its founding – it is not an *ad hoc* but a permanent criminal court. After the ICTR and the ICTY were founded there was a need for a greater international criminal tribunal that could try any case. So in this case there is no time lapsed between the establishment and the occurrence of the conflict – it is just the opposite: the ICC can try only cases/crimes/conflicts that occurred after the entering into force of the Rome Statute. It can be put in a way that the ICC is like a “general” international criminal court similar to a national court: the court is already standing when the crime is being committed.

### 2.3. JURISDICTION OF THE TRIBUNALS

In the case of the ECCC – as in the case of any tribunal – distinction was made between the temporal, personal, territorial and subject-matter jurisdiction<sup>55</sup>. The temporal

<sup>54</sup> The Special Court Made Simple, Special Court for Sierra Leone Outreach Section, Copyright 2003 by the Special Court for Sierra Leone, printed by the NABs Tech, 18 Siaka Stevens Street, Freetown, p 5.

<sup>55</sup> Because of the length limit I will not talk about them again just refer to them, the first Chapter presents them in full details.

jurisdiction means the time limit, which is the 1975-1979 period during which the Khmer Rouge regime committed the crimes. The personal jurisdiction means those persons that can be tried – the „senior leaders of Democratic Kampuchea and those who were most responsible”<sup>56</sup>. The territorial jurisdiction is the territory of the Democratic Cambodia and the subject-matter jurisdiction is the crimes committed by the Khmer Rouge regime (crimes under the Cambodian Penal Code such as homicide, torture and religious persecution; crimes of genocide; crimes against humanity; breaches of the Geneva Conventions of 1949; destruction of cultural property; crimes against internationally protected persons).

Article 8 of the Statute of the **ICTY** specifies the **temporal jurisdiction**. According to this the Court’s jurisdiction extends to the period beginning from 1 January 1991. There is no ending date for the period over which the tribunal shall have jurisdiction so it may imply that when the Resolution was accepted in 1993 the conflict was still going on.

The **ICTR** has in its Statute, Article 7 the temporal jurisdiction. It is different from the ICTY but similar to the ECCC as gives a closed period: it begins on 1 January 1994 and ends on 31 December 1994. So the “investigated” period is one year; crimes committed before or after this period are not under the temporal jurisdiction of the Tribunal.

The **ICC** is the lengthiest of all of the tribunals discussed. One of the main differences between the ICC and the other tribunals, besides that it is a permanent international criminal court and the others are *ad hoc*, is that the ICC has no “real” temporal jurisdiction. There is a so called „*ratione temporis*” *jurisdiction* which means that all the crimes can be tried before the ICC that has been committed after the establishment of the ICC, after the Rome Statute has been entered into force. If a State becomes a Member then the ICC has jurisdiction over the crimes that will be committed after the accession of that State. The main point is that the

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<sup>56</sup> David Scheffer: Abridgement of the much lengthier and footnoted book chapter: David Scheffer, The Extraordinary Chamber in the Court of Cambodia, in Cherif Bassiouni, ed.; INTERNATIONAL CRIMINAL LAW (Martinus Nijhoff Publisher, 3rd ed.; 2008 (forthcoming) . Part 2. p. 12.

ICC may investigate and try crimes after their occurrence. Crimes that were committed before the establishment of the ICC cannot be tried. The ECCC is right the opposite; it has a clear temporal jurisdiction. In every particular case the time period during which the crimes were committed has to be taken into account and that is the temporal jurisdiction of the ICC.

It is interesting that neither the Agreement between the UN and the Government of Sierra Leone nor the Statute of the **Special Court** have no explicit temporal jurisdiction, there is no Article on that. In the Agreement under Article 1 and in the Statute again under Article 1 it is stated that the Special Court is established for the prosecution of those who have responsibility for the violation of international humanitarian law and Sierra Leonean law committed since 30 November 1996. So it is an open limit, only the crimes committed after this date can be tried.

The Resolution on the establishment of the **ICTY** gives just a hint on the **personal jurisdiction**. All natural persons „who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime”<sup>57</sup> are under the jurisdiction of the Tribunal. Article 7 of the Statute explains the question of the Individual Criminal Responsibility. Special attention is given to Head of State or Government, Government Official and states that these persons are to be tried and may not get relieve. Articles 5-6 of the Statute of **ICTR** give the same provisions on the personal jurisdiction.

The personal jurisdiction of the **ICC** is different as it may try everybody that committed a crime declared in the Statute. The ECCC only tries certain persons – senior leaders - not everybody. Although it is true that the ICC also gives some specifications on the persons, special attention should be given to Head of State or Government, members of Government or parliament ect., but a command or other title won't exclude the personal

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<sup>57</sup> Security Council Resolution 827 (1993), Statute of the ICTY, Article 7.(1).

liability – this is the irrelevance of official capacity. Article 24 gives the exact provision that only those can be tried who committed crimes after the Statute had entered into force. It is also interesting that the ICC Statute gives an explanation that only mentally healthy people can be tried and there are cases in which the responsibility can be excluded<sup>58</sup> and the Court has no jurisdiction over persons under eighteen at the time of the allegedly committed crime.

The **SCSL** has the same provisions on Individual Criminal Liability (Article 6) and has a negative method of defining who is under the jurisdiction of the Court. According to Article 7 those who were under fifteen at the time of the allegedly committed crime can't be tried before the Court. Those who were between 15 and 18 are to be tried with dignity and their young age must be taken into account.

Article 8 of the Statute of the **ICTY** concerns about the **territorial jurisdiction** of the Tribunal. The territory over which the Tribunal has jurisdiction is the territory of the Former Federal Republic of Yugoslavia. There is a specification: its surface, airspace and territorial waters are all included in it. This is the territory where the alleged crimes were committed.

The **ICTR** is also quite explicit on this matter: the territorial jurisdiction of the Tribunal is the territory of Rwanda, as well as its surface and airspace. As the war was not just on the territory of Rwanda and the crimes were not just committed there, Article 7 includes the territory of the neighboring States.

The **ICC** has an international legal personality and may conclude investigations and exercise its functions on the territory of the State Party to the Statute – this is the ICC's territorial jurisdiction. The ECCC may function only on the territory of Cambodia, so it is limited to one country whereas the ICC may initiate investigations wherever it decides

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<sup>58</sup> Mental disease, intoxications destroying one's capacity, self-defense, duress, threat.

appropriate – even on the territory of a non-Party State with a special agreement. So the territorial jurisdiction is any Party State.

The jurisdiction of the **Special Court for Sierra Leone** is also not quite expressed in a separate article. The only things that refer to the territorial jurisdiction of the SCSL are Article 1 of the Agreement and Article 1 of the Statute which both say that the court has jurisdictions over those crimes that were committed on the territory of Sierra Leone.

Although for first sight it seems that the Tribunals may have the same **subject-matter jurisdiction**, there are slight differences that have to be pointed out.

Article 1 of the Statute of the **ICTY** is about the competence of the Tribunal. Here there is only a vague reference to the crimes as “serious violations of international humanitarian law”<sup>59</sup>. Articles 2-5 are the provisions that explain exactly what crimes are to be tried. These are the grave breaches of the Geneva Conventions of 1949; violation of laws or customs of war; genocide; crimes against humanity – for all of them the Statute gives a lengthy explanation what is to be understood under them.

The **ICTR** has the same method for giving the subject-matter jurisdiction: Article 1 just gives a reference to crimes such as “serious violations of international humanitarian law”<sup>60</sup>. Then in Articles 2-4 it gives a wider explanation. Just as the ICTY it also has genocide, war against humanity. In Article 4 it refers only to Article 3 of the Geneva Conventions of 1949 for the Protection of War Victims and to its additional Protocol. So in this case not the whole Conventions are to be regarded only its Article 3.

According to the Rome Statute the **ICC** gives the most detailed information on the crimes that can be tried before it. Firstly, in Article 5 it gives an enumeration on the crimes (genocide, crimes against humanity, war crimes and crimes of aggression). Then in Articles 6-

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<sup>59</sup> Statute of the ICTY, Article 1.

<sup>60</sup> Statute of the ICTR, Article 1.

8 it gives descriptions of the crimes. It is interesting that for the genocide it uses no reference to any other convention as the ECCC does<sup>61</sup>. It uses the Geneva Conventions of 1949 for defining war crimes but uses his own definition on crimes against humanity. The ICC is not perfect either: there is no definition for the crimes of aggression<sup>62</sup>. ECCC doesn't give space for aggression. It can be stated that the subject-matter jurisdiction of the ICC is broader than that of the ECCC.

The **Statute of the Special Court for Sierra Leone** is a bit different on this subject from the others. It also has the crimes of crimes against humanity and the crimes violating Article 3 of the Geneva Conventions and that of the Additional Protocol II., but it also has different crimes. Article 4 is about "other serious violations of international humanitarian law"<sup>63</sup> (like directing attacks against civil population or conscripting or enlisting children under 15 age into the armed forces – which crime is in accordance with the Court's personal jurisdiction where people younger than 15 age are not under the personal jurisdiction of the Court) and crimes under the Sierra Leonean Law. In this case there is a resemblance between the ECCC and the SCSL as both uses the „penal code or national law on crimes” of the country. Under this, crimes such as abuses of girls younger than 13 age and others, setting fire to public places and buildings are to be tried by the Court too. Next to the genocide, war crimes and other crimes that all the other Tribunals have, the SCSL pays a special attention to crimes such as rape, using children as military persons or like shields.

It can be seen that the each subject-matter jurisdiction of the tribunals corresponds to the crimes committed in the respective country which means that when stipulating the jurisdiction of the given *ad hoc* tribunal special attention was given to the types of crimes

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<sup>61</sup> ECCC: genocide as defined in the Convention on the Prevention and Punishment of the Crimes of Genocide of 1948.

<sup>62</sup> There are still discussions on the definition of crime of aggression; the contracting parties has to reach an agreement on the definition that shall be adopted by the review conference of the State Parties.

<sup>63</sup> Statute of the Special Court for Sierra Leone, Article 4.

committed in that country. The ICC as a permanent tribunal has a general scope of subject-matter jurisdiction.

#### **2.4. APPOINTMENT OF JUDGES**

As was shown in the first Chapter the appointment of the judges at the **ECCC** is a result of a very special method. The main point is that the majority of the judges have to be Cambodian, which is unique, as any other international criminal tribunal has no similar formula. The conditions for the judges are almost the same everywhere: high moral character, impartiality and integrity and other important conditions concerning the qualification of the candidate.

The **ICTY** has its judges selected by the General Assembly of the UN. The first step is the SC's as it makes a list of the candidates (between 22 and 33) after the invitation of the Secretary-General and then submits the list to the General Assembly. The General Assembly has 60 days to nominate candidates. Each State may nominate two candidates. The representation of the world's legal systems has to be taken into account. The President of the SC sends the list to the President of the General Assembly and it elects 11 judges. The person who got the majority of the votes of the States is elected. If two candidates of the same nationality get the majority vote then the candidate who has the higher number of votes is elected. In this way the judges elected have a term of four years and can be re-elected.

The **ICTR** has a special tie with the ICTY as for the election of the judges. Altogether, there are 11 judges – six in the Trial Chambers and five in the Appeals Chamber. The members of the Appeals Chamber of the ICTY can be members of the Appeals Chambers of the ICTR. The method of election is practically the same, only the numbers are different. There is thirty days for the States to nominate maximum two persons, and the SC makes a list

of candidates between 12 and 18, and the General Assembly elects six judges of the Trial Chamber. The term is also for four years and the judges are re-electable.

The **ICC** has 18 judges but this number can be changed. The nomination is not tied to any country, there is no majority requirement, and the judges can be elected from any Party to the Statute. There are two lists of candidates with different conditions – if one fulfills both he or she can choose on which list he or she wants to be (9 judges from List A and 5 from List B<sup>64</sup>). While electing, the judges have to be elected in a way that there has to be a representation of the main legal systems of the world, a just geographical representation, and equality and fairness in the representation between male and female judges. The election is conducted by the Assembly of States Parties and by a secret ballot. The highest number of votes and a two-third majority of the States Parties that were present and voted are enough for being elected. One third of the judges is elected for a 9-year period and is not eligible for re-election, however, one-third of the judges are selected for 3 and 6 year-terms and the judges for 3 year-terms are eligible for re-election. This is totally the opposite of the ECCC regulation as there the judges are nominated for as long as the trials last. From any Party State to the Statute a highly qualified judge may be elected, the only restriction is that two judges may not come from the same State. If there is a vacancy among the judges a new election has to be held.

The **Sierra Leonean** method is again different though it is the closest to that of the ECCC: the Chambers there have 8-11 judges. Out of the three judges of the Trial Chamber one is appointed by the Government of Sierra Leone and two by the Secretary-General of the UN. Any State may nominate judges for those two places, especially States members of the

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<sup>64</sup> List A contains the names of the candidates who has „established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings” and List B contains the names of candidates who has „established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court” – Rome Statute of the ICC, 1998 July 17. Article 36. 3. (b) (i), (ii).

Economic Community of West African States and the Commonwealth. The Secretary General and the Government of Sierra Leone consult on the appointments. The judges for the Appeals Chamber are appointed in the same way, the difference is that there the Government appoints two judges and the Secretary-General appoints three.

## **2.5. INSTITUTION – ORGANIZATION OF THE TRIBUNALS**

The institutional structure of the given tribunals shows a slight difference as the main organization is the same: Trial Chambers, Appeals Chamber, Prosecutor and Registrar.

The **ICTY** is divided into two *Trial Chambers and an Appeals Chamber*. There is a Prosecutor and a Registry. The Tribunal has a President who presides over the proceedings and assigns the judges to the chambers. The Trial Chambers also elects a Presiding Judge who takes care of the proceedings.

The *Prosecutor* may initiate the investigation and prosecution. His or her office is a separate part of the Tribunal. The Security Council appoints the Prosecutor and it is the Secretary-General who nominates him or her. His or her term is four years long and can be re-elected.

The *Registry* is the administrative and serving organ of the ICTY. It helps the working of the Court. As the Head of the Registry the Registrar is appointed by the Secretary-General for four years and can be re-elected. The Secretary-General has to consult with the President of the Tribunal before the appointment.

The **ICTR**'s structure is the same: two Trial Chambers, an Appeals Chamber, a Prosecutor and a Registry. The work of the organs is basically the same as the work of the ICTY's organs. There is one point that has to be indicated: the Prosecutor of the ICTY may be the Prosecutor of the ICTR and may have a Deputy Prosecutor.

The **ICC**'s structure is a little bit different: there is a Presidency, an Appeals Division, a Trial Division, a Pre-Trial Division, the Office of Prosecutors and the Registry.

The main difference is the Office of the Prosecution. Although it has the same functions as the ECCC Co-Prosecutors, the power given to them is greater as it may conduct investigation on the territory of any of the countries Parties to the Statute but this comes from the ICC's wider jurisdiction. The Office of the Prosecution is also a separate organ of the ICC. There is only one "main" prosecutor who leads the Office's management and administration; and he or she has Deputy Prosecutors. It is important to point out that here there are no dual prosecutors - no national and international ones. Both the Prosecutor and the Deputy Prosecutors –from a list of candidates - are elected by secret ballot and the members of the Assembly of States Parties' absolute majority is needed. They are selected for a term of four years.

According to the Statute of the **Special Court for Sierra Leone** there is one or there can be more Trial Chambers and an Appeals Chamber, a Prosecutor and a Registry. There is a presiding judge, and the presiding judge of the Appeals Chamber is the President of the Special Court. The particularity of the SCSL is that that a second Trial Court may be created if the President of the SCSL or the Secretary-General requests so and six months already passed from the formation of the SCSL.

It is clear that one of the many uniqueness of the **ECCC** - the institution of Co-Investigating Judges and the Co-Prosecutor – are not among the organs of the other tribunals. This fact indicates its novelty and originality. This is why the ECCC is so different: even the prosecutors and the investigating judges have national and international elements. In the other tribunals this can't be found.

## 2.6. THE PRE-TRIAL CHAMBER

The **ECCC** has exact provisions on the main role of the Pre-Trial Chamber, which is to settle the disputes arisen between the Co-Prosecutors or the Co-Investigating Judges. With this the ECCC left the usual role of the Pre-Trial Chamber of administrating and servicing the Tribunal and has a novelty.

The **ICTY** has many provisions on the Pre-Trial Proceedings and the Pre-Trial Judge but has no such thing as the Pre-Trial Chamber at the ECCC. The Rules of Procedure and Evidence<sup>65</sup> of the ICTY Part V. is about the Pre-Trial Proceedings. In the light of the ICTY's interpretation the Pre-Trial Proceedings consist of the initiation of the proceedings, indictment, orders and warrants, preliminary rulings, etc. Rule 73 is about the Pre-Trial Conference which still has no same meaning as that of the ECCC's Pre-Trial Chamber. The **ICTR** has the same provisions on the Pre-trial Proceedings just as the **Special court for Sierra Leone**.

The **ICC** is also basically the same, but makes possible for the Prosecutor to initiate an investigation in case that the testimony or evidence wouldn't be accessible later on. The ICC has a Pre-Trial Chamber but it is different from that of the ECCC. In other way the ICC is the same with the others – it may issue orders and warrants, assist in the protection of victims and witnesses, issue the summons to appear.

## 2.7. THE LEGAL PROCEDURE

As each tribunal is based on the international criminal law, the legal procedure shows no huge differences between them. The **ICTY** and the **ICTR** have exactly the same

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<sup>65</sup> Rules of Procedure and Evidence of the ICTY, Part V. Pre-Trial Proceedings.

provisions on the legal procedure<sup>66</sup>. Both say that the investigation and the preparation of the indictment is the task of the Prosecutor, who has the usual powers to initiate the proceedings. He may decide *ex-officio* or based on the information obtained from different sources. Each of the Tribunals has provisions on the rights of the Accused in order to make sure that the Accused is innocent until proven guilty. This formula *expressis verbis* is contained in the Statutes<sup>67</sup>. It is the judges' job to review the indictment and decide whether it should be allowed to be tried. If he or she confirms the indictment he or she may order warrants and summons, detentions and arrestments. The Trial Chamber ensures that the trial will go in a fair and fast way without unreasoned delays. The hearings are public but the judge may close the trials. The Trial Chamber makes sure that the witnesses and the victims are well protected, if it is needed it may order *in camera* proceedings and protection of identities. The person convicted or the Prosecutor may appeal on the ground of error on a question of law, or an error of fact that resulted in the miscarriage of justice. The Appeals Chamber revises, reverses, and affirms the former decision of the Trial Chamber. There is a possibility to review the proceedings too. Also the convicted person or the Prosecutor may ask for it.

The ICC mainly has the same provisions on the matter only a bit more expanded version. Here also the Prosecutor initiates the proceedings, but his or her powers are more sophisticatedly explained. The ICC also provides for the rights of persons affected by the investigation during this period<sup>68</sup>. It is important that before the real trial begins the Pre-Trial Chamber has to confirm the charges that the person is charged with. The Trial has to be in the present of the Accused if that is possible. Article 69 contains the rules on evidence. The ICC Statute has three grounds on which the Prosecutor may appeal: procedural error, error of law, error of fact; the convicted person has an additional ground: „any other ground that affects the

<sup>66</sup> Statute of the ICTY, Articles 18-19-20, 25-26; Statute of the ICTR, Articles 17-18-19, 24-25.

<sup>67</sup> Statute of the ICTY, Article 21; Statute of the ICTR, Article 20; Statute of the ICC, Article 67.

<sup>68</sup> Statute of the ICC, Article 55.

fairness or reliability of the proceedings or decision”<sup>69</sup>. The revision of conviction or sentence may be brought by the convicted person itself, or by his or her spouse, children, parents or any person to whom he or she gave an authorization to bring such claim.

The Statute of the **Special Court for Sierra Leone** contains only a few provisions on the procedure. Article 15 is about the Prosecutor; Article 17 is about the Rights of the Accused, Articles 20 and 21 are about the Appellate and Review Proceedings. The grounds for the appealation are the same as the ICTY and ICTR reasons.

## 2.8. THE JUDGMENTS AND PENALTIES

It was also shown in the first Chapter that the judgments at the ECCC are delivered in a way that at least one international judge’s vote is needed. This was established for the reason of the International Community’s fear that the Cambodian judges may be partial. So there has to be at least one international judge who goes along with the national judges and with this the question of partiality or impartiality is solved.

The **ICTY** has the regulations on judgment in its Statute in Article 23. According to this it is the Trial Chamber that deliberates the judgments and imposes sentences. The judgments have to be delivered in public and by the majority of the judges. As the ICTY is composed of international judges there is no such requirement as that at the ECCC. The punishment – imprisonment – may be carried out in States that are willing to do so. This has to be indicated on a list to the Security Council. The Tribunal has to consider the relevant practices on punishment in the courts of Yugoslavia. The ICTY and ICTR concludes bilateral agreements on this subject with the States willing to participate in carrying out the

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<sup>69</sup> Statute of the ICC, Article 81.1(b)(iv).

punishments as neither has a system of jail. The **ICTR** and the **SCSL** have the same provisions on judgments and penalties.

The **ICC** as in any case has lengthier provisions on judgments and penalties. Article 74 says that all judges are required to be present while deliberating the decisions. The judges have to decide unanimously and only if they fail they can use the majority rule. The deliberation is secret but the sentence has to be announced in public and if it is possible in the present of the Accused.

## 2.9. MINOR DIFFERENCES

Both the **ICTY** and the **ICTR** talk about “*pardon* or commutation of sentences”,<sup>70</sup>. The **ICC** has no provisions on pardon only regulates the reduction of the sentences. The **SCSL** regulates the situation of “amnesty” which should be no bar to the investigation of the Court. In each case where there is a provision on the matter it has to be pointed out that these courts allow the convicted person to be eligible for pardon or commutation of sentence. However, in every case the State where the imprisonment is served has to notify the given international tribunal where the person was convicted and it is the given international tribunal that will decide on the question. Contrary to this, the **ECCC** has a provision on pardon and according to that the Government of Cambodia may not request for pardon for anyone.

The *expenses* are always a very fragile question. The expenses of the **ICTY** are given by the UN budget just as the expenses of the **ICTR**. The **ICC** is different from this point of view. It has two methods of paying for the expenses: one of them is through contribution that the States Parties pay; the other one is provided by the UN and approved by the General

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<sup>70</sup> ICTY Statute, Article 28, ICTR Statute Article 27.

Assembly. In addition and as a third source of the payments, the ICC may have voluntary contributions as well. The **Special Court for Sierra Leone** is also a different thing, as the expenses of the Court are borne by voluntary contributions of the International Community. It is interesting that the Secretary General might have not begun the establishment until enough money has been contributed to the establishment and 12 month operation of the Court. If the voluntary contributions are not enough other means have to be found.

As to the **ECCC**, the UN has responsibility for the remuneration of the international judges, staff, for the services and utilities, for the defense counsels, the witnesses' travel, safety and security arrangements, and ensuring the smooth operation of the ECCC. So the expenses are divided between the UN and the Cambodian Government. The Government should bear the expenses of the national judges and national staff.

The *seat* of the tribunals has to be different deriving from their different objectives, aims and territorial jurisdiction. The **ICTY** and the **ICC** are seated in The Hague. The ICTY was established in The Hague because Milosevic, who was the President of the former Yugoslavia at that time, was still in power so the Tribunal couldn't have been in the former Yugoslavia<sup>71</sup>. It is also interesting that the main center of the **ICTR** is in Arusha, Tanzania (established by Security Council Resolution 977 (1995)). The reason for this was that there was a need for a place close to where the atrocities were committed but given the situation in Rwanda it was doubtful that the Tribunal in Rwanda could have been quite fair and fast. The ICTR has a sub-office in Kigali, Rwanda. The **SCSL** and the **ECCC** are the sole tribunals that are actually in the country where the conflicts have been occurred. Both of them may have the possibility to be relocated outside of their country.

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<sup>71</sup> Milosevic was the main perpetrator of war crimes and crimes against humanity in the former Yugoslavia.

The **ICTY** and the **ICTR** are similar in the *working languages* as both use the language of English and French. The **ICC** uses the official languages of the UN, namely the Arabic, Chinese, English, French, Russian, Spanish. However, the working languages of the ICC are only the English and French. The **Special Court for Sierra Leone** uses the English as working language. The **ECCC**'s official working languages are the Khmer, French and English.

### CHAPTER 3. NATIONAL AND INTERNATIONAL SIDE OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

The First and the Second Chapters were important in order to point out the specialties and the uniqueness of the ECCC. It has the most similarities with the Special Court for Sierra Leone, as that is the other international criminal court where the Government has a word in the selection of the judges and other staff members. Although the Sierra Leonean Government didn't make it clear that the judges selected by them have to be national or not, it can be concluded that the two tribunals are in a strong tie as to the operation, organization part.

The ECCC is a mixture of the existing *ad hoc* tribunals: it has the qualities of the ICTY, ICTR, ICC and the SCSL so the international elements are present on one hand, but on the other hand, it is a national tribunal: it has national judges, staff and the Government supports the tribunal in every possible way. The fact that the Tribunal is located in Cambodia, uses the language of Khmer next to English and French; that there are references to the Cambodian Penal Code while determining the crimes committed are all the elements of a national tribunal.

Its uniqueness is its "mixture organization", that next to the national judges there are international judges, not just Cambodian staff but also international staff service the tribunal; there is one Cambodian Prosecutor who is "supported" by an international Prosecutor while both have the same power and authority. The Cambodian Investigating Judge is also "supported" by an international Investigating Judge although they also have the same power. There was a need for the international elements to ensure that the decisions would be impartial; that the Suspects or Accused persons would have a fair and fast trial. The Cambodian elements may be biased by their memories, by the pain of the people. The international elements are there to stop this. Also, the inexperience of the Cambodian judges can be supported by the professional, experienced international judges. On the other hand,

according to the Cambodians themselves, the help of the International Community was asked for because the Cambodian Government knew very well of its weakness of judiciary and the international help could give an affirmation in reaching the international standards. Also, the Government thought that the International Community would be pleased to help as a sign of their regret of supporting the Khmer Rouge in those times.

The idea of the ECCC is a new phenomenon and the International Community is glad to see a new formula like this and the “international community as a whole has an interest in seeing to it that genocide does not go unpunished”<sup>72</sup> The new structure and new organs in the ECCC are more than welcome if achieving the justice can be done by this way. The will of the Government and the cooperation of the people of Cambodia arose with the knowledge that the ECCC has national elements. This may help the effectiveness of the ECCC a lot and perhaps the Cambodian solution can “offer lessons for other post-conflict countries...”<sup>73</sup>

To see the results of this “mixed” tribunal the International Community and the Cambodians have to wait as the trials have just begun and they could last for a long time. The only barrier is the age of the Suspects and Accused as they might die before being convicted. In this sense there is a possibility that there will be no results at all. But the idea is good – it has to be let go and develop itself.

It is important that the ECCC succeeds. The people of Cambodia have been waiting for 30 years to get salvation – families, fathers and mothers, brothers and sisters. Practically every family in Cambodia lost someone in those times. They deserve justice. There are only two possibilities: either the ECCC may achieve its goals or the ECCC will be a failure.

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<sup>72</sup> James A. Goldston: An Extraordinary Experiment in Transitional Justice, Justice Initiative, Open Society Institute, p 3.

<sup>73</sup> Sok An: The Khmer Rouge Tribunal: What it Means for Cambodia, , Justice Initiative, Open Society Institute, p 26.

If the ECCC succeeds then finally Cambodia will be able to get over its past and start a new “life”. This doesn’t mean that the survivors will forget what happened and they will have a normal life – it is not sure that after an experience such as surviving mass murders one can have a normal life and it can be defined what constitutes to be “normal”; but the next generation may have a better chance to live a whole life and may not have to carry on the burdens of the past. The conviction of any leader won’t give back those hundreds of lives but the population will be assured that crimes won’t be left unpunished.

If the work of the ECCC will have no results, the procedure will be no different from that of the Cambodian courts and corruption will make sure that some persons remain unpunished and some stories remain untold. In this case there is no guarantee that Cambodia will ever be able to get over and have a successful country with working economics and satisfied population. If the ECCC fail the only thing that it managed to achieve on one hand, will be the suffering of the victims; they will have to go through the terrible events again for nothing. On the other hand the failure of the ECCC will worsen the faith of the people in the Cambodian court system – and also in the International Community.

This is what Cambodia and the International Community can’t allow to happen. The Government of Cambodia knows that for one and for all it has to pay-off with its past and the International Community has to provide assistance in order to wash off its sin of letting the Khmer Rouge regime stay in power.

## CONCLUSION

In this thesis a wide picture of the ECCC was given in order to determine whether a new *ad hoc* tribunal like the ECCC with its new structure and “mixed-up” characteristic can be more effective than other tribunals – namely the ICC, ICTY, ICTR and the SCSL. It was presented that in many ways the ECCC is different from the others and the International Community is now looking towards Cambodia waiting for the results so that it can be concluded whether this new solution for trying these crimes works or not.

I introduced the thesis with the historical background because the knowledge of the facts is indispensable to understand the reasons why there was a need for the ECCC. Within this subject I presented the crimes that fall under the jurisdiction of the ECCC – this was vital because the ECCC does not intend to prosecute every crime but only the main ones. I analyzed all the laws that are important in this field - the ECCC Law, the UN/Cambodia Agreement and the ECCC Internal Rules - to be able to give a full description on the structure and the legal procedure of the ECCC.

In the second Chapter I gave a comparative analysis of the ECCC and the other international criminal tribunals - ICC, ITY, ICTR and the SCSL. I used their statute to make this comparison and I showed that in many parts these tribunals are similar to each other – as they all try to punish similar crimes - but there are differences among their legal documents, jurisdiction, legal procedure and so on that had to be pointed out.

In the third Chapter I summarized the main points of the ECCC and gave possibilities for the future of the ECCC. Within this I pointed out that the ECCC still need the full commitment of the Royal Government of Cambodia and the assistance of the UN in order to have successful trials, punish those who deserve that and finally give salvation to the victims.

I presented the main attributes of the ECCC in order to get familiar with it and be able to compare it with other international criminal tribunals. **It has been shown that despite of the fact that the ECCC is a young *ad hoc* tribunal and is situated in a country where corruption in politics and justice flourishes, with its uniqueness the ECCC has more possibility to achieve its aim of giving justice than the other international criminal courts.** As it can be seen the “mixed-up” feature is a good element in the ECCC’s life: the national side inspires the Government and the people of Cambodia to co-operate and get confidence as the majority of the judges are Cambodians. On one hand, this gives the Cambodians the feeling that the judges are from them, they are “their men” and all those crimes that the people of Cambodia outlived, survived are judged by local men not by strangers. On the other hand they can see that the international elements give security that there will be no favoritism and those who deserve it may get their punishments<sup>74</sup>.

Personally, I think that this tribunal has a good opportunity to achieve its aims. I find it a good idea that the national judges are in majority because they are the ones who know their country; they know how things work and how the population would react to certain decisions. They might have memories if not on the killings but on the fear of the people of Cambodia. Of course, these memories and personal experiences may affect them, they might get biased but this is why the international side of the ECCC is present: so they make sure that justice would prevail; judges would not get away with their feelings and Suspects and Accused persons will have their rights.

The idea of the Co-Prosecutors and the Co-Investigating Judges are to ensure the participation of the International Community as well – without the debate on the powers of

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<sup>74</sup> To inform the Cambodian People of the Trials the Government gives out brochures about the main questions (procedure, witnesses, judges, UN assistance, ect.); see: An Introduction to The Khmer Rouge Trials, 2nd edition, 2006.

the national and international sides. This gives a fine balance between the national and international elements.

If the Government of Cambodia is really about to try the senior leaders and punish those who committed the crimes then this Tribunal may succeed. It needs a lot of commitment sometimes, maybe, desperate will both from the international and national side. The work is hard and with the passing of time it gets even harder but the structure and the organization is built in a way that it could work. It depends on those who conduct it: on the Royal Government of Cambodia and the International Community.

Due to its novelty there aren't many book-based sources on this subject which was also a limitation while writing the paper. It is true that there can be found books on the ICC, ICTY, ICTR but the SCSL and the ECCC are younger institutions and time is still needed to make conclusions on them. The procedure and the organization can be subject matters of books but for that one should use the main documents– which are the Statutes of the given tribunal - and I have done the same, I have used the statutes of the tribunals and other related legal documents.

There were however a few articles that could be used – they were good because next to the dry legal documents, voices of human people could be heard on the subject. These articles gave opinions, memories and future possibilities and helped to conclude the final points. Of course, memories can be partial so one has to handle them with huge caution, but it is unquestionable that all of them have one vital point in this particular case: the period of the Khmer Rouge regime is unforgettable for those who survived it and for the International Community that allowed the regime to continue its operations – maybe they are hard to understand but they all tell the truth from different points of views.

As the ECCC gets nearer of its aim day-by-day there is a need to analyze and conclude its works and results. From professional point of view it is vital to give reports of the ECCC as it can be a model for future tribunals or post-conflict countries. It is also important that everyday people hear about the proceedings in Cambodia: it will strengthen their faith in justice itself.

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