

The Investigating Judges within the ECCC

Beneficial or a bureaucratic burden?

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1. Introduction

In the landscape of international tribunals, the Extraordinary Chambers in the Courts of Cambodia (the ECCC) is a unique creation. Not fully an international court, yet neither fully national, the ECCC is described as a ‘hybrid’ or an internationalized court.¹ Cambodian judges, prosecutors and defense lawyers operate side by side with international actors in a structure designed for this specific tribunal, containing certain characteristics never seen in any other court.² The ECCC functions within the domestic legal system in Cambodia, a system roughly inherited from the French due to the long-term colonization. Unlike the majority of international tribunals, which are based on a common law foundation, the ECCC is characterized by a civil law tradition mainly found on the European Continent. A huge difference, probably even the *crucial* difference between the two systems is the mechanism of ‘investigating judges’, for which the ECCC is the first international court

¹ The hybrid structure is not unique for the ECCC. On the contrary, this is described as the new type of international, criminal courts. Though the idea of a mixed tribunal was first considered with the ECCC, in the following years, several criminal courts were set up along the same line: The Serious Crimes Panels in the District Court of Dili in East Timor, the Regulation 64 Panels in the courts of Kosovo and the Special Court for Sierra Leone are the ones generally mentioned in this regard. The model of hybrid courts were warmly welcomed and seen to address some of the concerns about the former international tribunals, seeking only international justice, and pure domestic tribunals, rarely capable of serving true justice. For more information about hybrid courts, see Sarah M. H. Nouwen, ‘Hybrid courts’, *The hybrid category of a new type of international crimes courts*, Utrecht Law Review, available at: <http://www.utrechtlawreview.org/index.php/ulr/article/viewFile/32/32>.

² As for instance the rule that a ‘supermajority’ of the votes must be reached in order for the Chambers to give a judgment, and the participation of victims as full parties, (Civil Parties).

to provide a substantial role.³ Interesting in this regard is whether such an institution is generally beneficial to a war crimes tribunal and if the mechanism faces any specific challenges in order to support the purposes of the ECCC. Through an examination of the institution of investigating judges and related features in the civil law criminal procedure⁴ and a look at the procedures governing the process in the ECCC, this paper will clarify which respectively advantages and disadvantages the institution of investigating judges may provide international tribunals as well as to the actual performance in the ECCC.

2. Examination of the role of the investigating judge

2.1. The main distinction in criminal procedure systems

Criminal law procedure systems are generally divided into two superior categories, the adversarial system and the inquisitorial system. The former has its origin in England and is primarily used by common law systems whereas the latter originates from France and Germany and generally forms the cornerstone of criminal procedure in civil law systems. To a significant extent, the terms ‘adversarial’ and ‘inquisitorial’ reflect historical developments rather than the practice of modern legal systems and they have no precise meaning.⁵ No countries today apply the strict prototype model of either system but have each a modified and modernized system. Though criminal procedure systems generally are built upon either the adversarial or inquisitorial model, elements from both models will often be found within the domestic systems. Common to both systems is the fundamental presumption of innocence until proven guilty. This puts the heaviest burden of proof upon the pros-

³ Even though the mechanism is also found in the Special Court for Sierra Leone and in the East Timor Tribunal, only the ECCC provides the judge with a decisive role.

⁴ The examination is primarily based on the present French interpretation of the civil law since this is the one being the foundation of the national Cambodian procedure and thus the procedure of the ECCC.

⁵ Australian Law Reform Commission, “*The adversarial-non adversarial debate*”, Discussion Paper 62: Review of the Federal Civil Justice System, para 2.24. Available at: <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/AdversarialNonAdversarialDebate.pdf>.

ecutor, since the guilt must be proved to an extent where the judge feels 'sure' about the guilt of the accused in order for him to pronounce a sentence.⁶ A huge difference between the systems is found in the whole setting of the prosecution, investigation and trial. Whereas the adversarial system is often described as a contest between two equal parties with the judge as the neutral and comparatively passive decision-maker or 'referee', the inquisitorial system places the responsibility for the investigation in the hands of an independent state authority, sometimes in the forms of an investigating judge, to collect all relevant evidence. The task of the *trial* judge is then to ascertain the truth and pronounce an appropriate and correct sentence on this basis. The parties are not as powerful, responsible nor active in the process in the inquisitorial system, which mainly leaves the initiative to the independent judges.

2.2. The origin of the investigating judge

The inquisitorial system was developed in continental Europe. In the early Middle Ages, the question of guilt in criminal cases was mainly resolved in a supernatural way, appealing to God to reveal the truth. When the church abandoned this process in the beginning of the thirteenth century, a fact-finding method including formal investigation was adopted. This *inquisition* was the origin of what is now called 'the inquisitorial system'.⁷ In the aftermath of the French Revolution, the revolutionaries wanted to reform and codify the criminal procedure. In this relation, a huge debate took place leading to the drafting of the 1808-penal code. The respected French jurist, Faustin Hélie, described this as a debate of two different systems, the adversarial and the inquisitorial. Whereas the pure accusatorial model consisted of two equal parties, each responsible for the collection of their own

⁶ In common law the extent of certainty is described as '*beyond reasonable doubt*', whereas civil law mainly operates with an obligation to convict if the court has '*une intime conviction*'. Whether the level of certainty is the same despite the different terms used is discussed in theory. In "*European Criminal Procedures*", edited by Mireille Delmas-Marty and J. R. Spencer, Cambridge University Press, 2005, the latter author reaches the conclusion that both concepts seek a conviction in situations where the judge is 'sure' of the guilt of the accused. See the chapter on '*Evidence*', page 601-602.

⁷ J. R. Spencer in *European Criminal Procedures*, op cit [6], see chapter on '*Instruction*', page 6-7.

evidence, the pure inquisitorial system operated with a public official to conduct the examination of the evidence, determining the truth of the facts with no regard to the parties. No public authority as well as an independent judge characterized the adversarial system, whereas the inquisitorial system had one judge to investigate and judge on basis of the collected evidence.⁸ To Hélié it was evident that the optimal criminal procedure was neither the pure adversarial nor the pure inquisitorial, but rather a mix between the two. Though the inquisitorial system with its neutral public investigator was seen to be the best way of protecting the different interest on stake, Hélié found that the investigating judge could well search, examine and analyze, but he could not judge since the judgment was *the product of personal conviction, not of science* and this conviction could arise *only in the course of the trial*.⁹ Consequently, a presentation of the investigation and the collected evidence was according to Hélié to take place during the trial as well as interrogation and defense of the accused.

This idea has been implemented into the French Criminal Procedure, where the principle of separation of functions in criminal law today is fundamental.¹⁰ Hélié's position on the 'personal conviction' has found its way into the French 'Code de procedure pénale' in which Article 427 states that the judge decides on the basis of his personal conviction, and may only base his decision on evidence put to him during the trial and discussed in an adversarial¹¹ hearing before him.¹² This principle ensures that the judge is never under an obligation to convict if he is not personally convinced of the guilt, not even following a confession.

⁸Faustin Hélié, "*Traité de L'instruction Criminelle*", 2nd ed (Paris, Henri Plon, 1866–7). Reported and cited by Sarah J. Summers, "*Fair Trials*", Hart Publishing, 2007, available at <http://www.scribd.com/doc/57592901/7/B-The-Development-of-the-%E2%80%98Accusatorial-Trinity%E2%80%99>. Page 25.

⁹*Ibid.*

¹⁰ Valérie Dervieux in *European Criminal Procedures*, op cit [6], see chapter on '*The French System*', page 232.

¹¹*Contradictoirement discutées* – it is not adversarial in the way that common-law lawyers may understand the term.

¹²"(...) *le juge décide d'après son intime conviction. Le juge ne peut fonder sa décision que sur des preuves qui lui sont apportées au cours des débats et contradictoirement discutées devant lui.*" Translated by Valérie Dervieux in *European Criminal Procedures*, op cit [10], page 233.

2.3. Main characteristics of the inquisitorial system

2.3.1. Truth-seeking

Searching for the truth is the overriding goal in the inquisitorial system. Hélie puts it this way: “*The goal is the complete manifestation of the legal truth*”,¹³ and is best found when the investigation is placed in the hands of an independent, public authority. ‘Truth’ is understood as an absolute concept, which the public authority must try to reveal, regardless of any arguments or agreements made by the prosecution and the defense about the sequence of events. The investigating judge must thus include all relevant evidence, inculpatory as well as exculpatory. On this basis, the trial judge can take every single factor into consideration when trying to determine the truth, apply the relevant law and thereby reach the correct legal conclusion. The decisive factor for the final judgment is the personal conviction of the judge(s) when having been presented with all the relevant evidence during trial. This is the case for judges as well as the jury if any, as reflected in the French Criminal Procedure Code, where the assize jurors are *only* instructed to hold guilt if they have an intimate conviction hereof.¹⁴ This principle is reflected in the lack of plea bargains in civil law criminal procedures, not only because there are no guilty pleas but also because the truth cannot be negotiated or compromised.¹⁵

In the adversarial tradition, truth is also recognized as an important factor, though the

¹³ (Author’s translation). *Ce but est la complète manifestation de la vérité judiciaire*. Faustin Hélie, “*Traité de L’instruction Criminelle*” où Théorie du Code d’instruction Criminelle, Première Partie, page 10. Available at: <http://books.google.com/books?id=HFMOAAAAYAAJ&printsec=frontcover&hl=da#v=onepage&q&f=false>

¹⁴ Art. 353. *The law does not ask judges to account for how they reached their intimate conviction, it does not prescribe rules on which the completeness and sufficiency of the evidence depend; it prescribes that they ask themselves, in silence and in meditation, to discern, through the sincerity of their conscience, what impression the evidence against the defendant and the defense has made on their rational faculties. The law merely put this one question to them, which sums up the extent of their duty: Avez-vous une intime conviction?* (Valérie Dervieux, op cit [10], page 233-234.)

¹⁵ Máximo Langer, “*From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*” Harvard International Law Journal, Volume 45, Number 1, Winter 2004, page 22.

opposite is often claimed.¹⁶ Both systems have the determination of truth as a fundamental principle but, contrary to the outcome-focused inquisitorial system, the adversarial system emphasizes process. Truth is presumed to be the outcome of a process, where to equal parties, both determined to win the case, are each presenting their evidence and facts, and in this way expound their version of the truth.¹⁷ The idea of ‘truth’ in this context is not put into an absolute term but is of a more relative character. Therefore, if the parties come to an agreement as to the facts of the case, through plea agreements or stipulations, it is less important to determine how events actually occurred.¹⁸ Put in other words, the proximate goal of serving justice is accomplished when the parties are equally treated in presenting their arguments and version of the facts. Justice is received through fair play, and thus the adversarial system is willing to compromise in the search for truth in order to uphold the rules of fair play.¹⁹

2.3.2. Challenges in this regard

A remaining challenge in the common law-attempt to determine the truth is that *the theoretical legal equality of the parties will be subverted by actual inequality of means, favouring the prosecu-*

¹⁶ Kate Melleon, “*The Legal System*”. Oxford University Press, 2007. Page 12. Available at:

http://books.google.com/books?id=-IOKqRXJecoC&pg=PA11&dq=Are+Inquisitorial+and+Adversarial+Systems&hl=da&ei=XisUTtDsAqL3mAW0ovWYDg&sa=X&oi=book_result&ct=result&resnum=2&sqj=2&ved=0CC0Q6AEwAQ#v=onepage&q&f=false

¹⁷ The Law Reform Commission of Western Australia, “1.3. Advantages and Disadvantages of the Adversarial System in Criminal Proceedings”, page 11. Available at:

<http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBUQFjAA&url=http%3A%2F%2Fwww.lrc.justice.wa.gov.au%2F2publications%2Freports%2FP92-CJS%2Fconsults%2F1-3crimadvers.pdf&rct=j&q=advantages%20and%20disadvantages%20of%20the%20adversarial%20system%20in%20crimin->

[al&ei=8jwlTvvvHsnemAWCjaHrCO&usg=AFQjCNEkb0aN_GPSWqAxGtilWNohtktTMQ&sig2=xncMptuonGHKgT2oaFIYIA&cad=rja](http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBUQFjAA&url=http%3A%2F%2Fwww.lrc.justice.wa.gov.au%2F2publications%2Freports%2FP92-CJS%2Fconsults%2F1-3crimadvers.pdf&rct=j&q=advantages%20and%20disadvantages%20of%20the%20adversarial%20system%20in%20crimin-al&ei=8jwlTvvvHsnemAWCjaHrCO&usg=AFQjCNEkb0aN_GPSWqAxGtilWNohtktTMQ&sig2=xncMptuonGHKgT2oaFIYIA&cad=rja)

¹⁸ Máximo Langer, op cit [15], page 10.

¹⁹ Hans F. M. Crombag, “*Adversarial or Inquisitorial – Do We Have A Choice?*” Printed in “*Adversarial versus inquisitorial justice: psychological perspectives on criminal justice systems*” by P. J. van Koppen and Steven Penrod. Springer, 2003, page 24. Available at:

http://books.google.com/books?id=A4DeXWHhLj0C&pg=PA2&dq=Are+Inquisitorial+and+Adversarial+Systems&hl=da&ei=XisUTtDsAqL3mAW0ovWYDg&sa=X&oi=book_result&ct=result&resnum=3&sqj=2&ved=0CDIQ6AEwAg#v=onepage&q&f=false

*tion in most cases.*²⁰ Moreover, if some facts are neither of interest to the prosecutor nor the defense, they may never be revealed.²¹ For the inquisitorial system, however, the lack of power for the defense to take active part in the forensic investigation from the beginning may cause a feeling of insecurity and possible unfairness to the accused during the process.²² Nevertheless, although an unpleasant side effect, it does not influence the quality of the investigation and thereby effectively the effort of revealing the truth and the scope of the entire system.

In the inquisitorial model, the parties hold the case in their own hands to a much lesser extent than in the adversarial system. Though the prosecutor as well as the defense can propose further investigative steps they deem relevant, the responsibility of the investigation falls on the public authority/investigating judge, and in the end, the case will be solved on the basis of his findings. In Belgium, the judge has no obligation to carry out investigative measures requested by the accused if he finds his own investigation to be sufficient. Likewise, he is not obliged to hear witnesses if he does not assume their testimonies to be helpful to establishing the truth.²³ In France, the obligations of the investigating judge in this regard were tightened up in 1993. Formerly, the judge had no obligation to even respond, let alone to accede, to requests for investigative measures submitted by the accused. After the reform, the rights of parties in the search for evidence were strengthened, and the investigating judge was enjoined to provide a reasoned ruling within one month of receiving the requests in case of dismissal.²⁴ However, while the public party (the prosecutor) could request any action he found beneficial to the search for truth, the private parties including the accused could

²⁰ Advantages and Disadvantages of the Adversarial System in Criminal Proceedings, op cit [17], page 11.

²¹ Kate Melleon, op cit [16], page 12.

²² *Ibid.* As example he might have spent time in preventative detention although ultimately acquitted.

²³ Brigitte Pesquié, “*European Criminal Procedures*”, op cit [6], see chapter on “*The Belgian system*”, page 124.

²⁴ Valérie Dervieux, op cit [10], page 262.

after the reform still only request certain specified steps.²⁵ Since then, the system has been reformed once again, and today the parties possess equality of status and are all allowed requesting any act they find beneficial for the truth seeking.²⁶

To the parties, this investigation is alpha and omega, and a firm and profound trust in the system's ability to conduct such an investigation is consequently of fundamental importance. Moreover, the fairness and legitimacy is not only of importance for the parties to believe in justice, it is fundamental for the very process to achieve the dedicated goal of revealing the objective and absolute truth.²⁷ Crucial to the success of the system is thus the state's capacity to pursue truth in an impartial manner, unaffected by partisan pressures of any interests. A weak link in this regard is a possible lack of resources. The inquisitorial process is entirely dependent on the extent of resources available to state institutions, and a tight budget will inevitably diminish the completeness of the conducted investigation as well as the faith in the outcome. The resources expended on any given prosecution are entirely outside the control of an individual accused; this does not always benefit the finding of the truth.²⁸

2.3.3 Independence of the judge

Closely connected to the need for trust in the investigation and the state's capacity to conduct such an investigation is the need for trust in the investigator himself. Self-evident is the fact that in order to deserve such trust, the investigator must act completely impartial and independent of any impro-

²⁵ The private parties could call on the investigation judge to proceed to a hearing or an interrogation, the hearing of a witness, a confrontation, a visit to the scene of the crime, request him to order any party to produce evidence useful to the investigation, or to order expert testimony.

²⁶ Code de procédure pénale Article 82-1, para 1, amended by the law of June 15, 2000, came into force on January 1, 2001.

²⁷ Criminal Justice in Europe. A Comparative Study. By Christopher Harding, Phil Fennel, Nico Jörg, Bert Swart. Oxford University Press, 2002. Page 43. Available at: http://books.google.com/books?id=IwV1OSlbiYsC&pg=PA41&dq=Are+Inquisitorial+and+Adversarial+Systems&hl=da&ei=XisUTtDsAqL3mAW0ovWYDg&sa=X&oi=book_result&ct=result&resnum=1&sqi=2&ved=0CCgQ6AEwAA#v=onepage&q&f=false

²⁸ Advantages and Disadvantages of the Adversarial System in Criminal Proceedings, op cit [17], page 14.

per or irrelevant interests. The impartiality of the judge can be divided into two categories. First, judges must be free from any personal involvement in or bias toward the case at issue, second, they must be institutionally impartial.²⁹ Especially the latter has been subject to numerous discussions in the development of criminal procedures in Europe.

Prior to the reform and codification of French criminal procedure in the early nineteenth century, both France and parts of Germany had developed a system in which one investigating judge possessed responsibility for the investigation, for the hearings in which the evidence was examined and for the pronouncement of the charge in the end.³⁰ This brought about critique from a number of legal experts and during the discussion of this institutional dependency, feelings ran high. The German, H A Zachariä, found:

*The mixture of both functions in the inquisitorial process was its main defect and the gain of a specific organ for the prosecution of crimes, the most pressing requirement for the reformation.*³¹

As mentioned above, also Hélie was a strong advocate of this separation of function. He expressed how this eased the pressure of the trial judge, who could concentrate on one sole task – to achieve justice.

*This division of powers that leaves solely the proceedings in the hand of the judge is the strongest guarantee of the investigation, since the judge through the actual independence from of his function, cannot have other interests than the one of justice.*³²

²⁹ Sarah Summers, op cit [8], page 29-30.

³⁰ *Ibid.* page 31.

³¹ (My translation). "[Die] Vermischung beider Functionen im Inquisitionsprocess war das Hauptgebrechen desselben und der Gewinn eines besondern Organs für die gerichtliche Verfolgung des Verbrechens eine der dringendsten reformatorischen Forderungen", HA Zachariä, Handbuch des deutschen Strafprozesses (Göttingen, Verlag der Dieterichschen Buchhandlung, 1861 & 1868), i, at 421, cited by Sarah Summers, op cit [8], page 31.

³² (My translation). "[C]ette division des pouvoirs, qui maintient exclusivement entre les mains du juge toute la procédure, est la plus forte garantie de l'instruction, puisque le juge, par l'indépendance même de ses fonction, ne peut avoir d'autres intérêts de la justice." F Hélie, Traité de L'instruction Criminelle, 2nd ed (Paris, Henri Plon, 1866–7), iv, at 114. Cited by Sarah Summers, op cit [8], page 32.

The separation of functions hence seemed to be an important factor to secure the impartiality and objectivity of the investigating judge. Whereas the prosecutor was now seen as the protector of the interests of society, the investigating judge was expected to be the neutral investigator, trying to ascertain the truth and thus search for all possible evidence, inculpatory as well as exculpatory. The investigating judge had then developed into an impartial figure, institutionally independent. The emphasis on the need for an independently conducted investigation, despite the fact that an adversarial hearing in front of the trial judge followed, underlined the importance of the investigation. However, it also led to restrictions on the participation of the parties during the investigative phase since the legitimacy and fairness of the proceedings were deemed sufficiently upheld solely by the impartiality of the judge.³³

An important task for the investigating judge is to prepare a written file containing all the evidence found (dossier) when concluding the investigation. Once this is done, the case may proceed to trial. In the inquisitorial system, the written dossier is the backbone of the whole process and one of its main case-management tools, from the first stage of the proceeding in which the police intervene, to the phase of appeals against the verdict.³⁴ The independence of the investigating judge is a vital component of the system since this will lead to the preparation of an independent investigation and thus an independent case file, which is vital, since the file will be largely determinative of the outcome of the case at trial. As the dossier contains basically all relevant information to the case, the accused may gain an overall picture of the evidence gathered only by studying the dossier.³⁵ More than a firm confidence in the system itself, the parties' trust in the investigating judge is crucial for the inquisitorial system. The powerlessness of the parties does not only relate to the system, but also to the personal character of the investigating judge and a known objection to

³³ Sarah Summers, op cit [8], page 34.

³⁴ Máximo Langer, op cit [15], page 14.

³⁵ Valérie Dervieux, op cit [10], page 265.

the system is the danger of placing all of the investigative power in the hands of one single person. As well functioning as the system can be when the procedure is correctly and responsibly executed, it can be equally vulnerable if the investigating judge abuses his mandate.

2.3.4. Oral trial

Whereas the investigation phase is marked by confidentiality and secrecy and provides the accused with only a limited power, the trial is public, oral and adversarial.³⁶ Already in the aftermath of the French codification of criminal procedure, certain experts stressed the importance of an oral trial. The German Feuerbach found the French courts too reliant on statements taken during the investigation phase. He complained that despite the oral and public trial, the final charge was primarily based on evidence taken before that phase and thus evidence examined and challenged in secret. To Feuerbach, it was a vital weakness of the system that the accused in this way was prevented from challenging the content of the evidence or the manner in which it had been obtained. Since no restraints such as publicity or involvement of the parties were regulating the investigation, Feuerbach considered necessary an oral presentation of the evidence to the court and an adequate opportunity for the accused to challenge it.³⁷ Another German, Carl J. A. Mittermaier, agreed with Feuerbach upon the necessity of an oral trial. However, Mittermaier reasoned primarily this from the need of the trial judge to be able to see and hear the witnesses in order to be able to ask supplementary questions and to get a better impression of the reliability of the witness' testimony.³⁸ Mittermaier thus found that the use of statements obtained during the investigative phase should only be used to assist in the decision whether or not to *prosecute*, not during trial in the decision on whether or not to convict.

Today, the sitting judge is in general to base his decision on the evidence submitted to

³⁶ For the French system, see Valérie Dervieux, op cit [10], page 244.

³⁷ Sarah Summers, op cit [8], page 56.

³⁸ *Ibid.*

the court, and *only* evidence presented during the trial and discussed in an adversarial hearing before him may form the basis of his decision.³⁹ This procedure – the investigation, preparation of a dossier containing all the evidence, followed by an oral hearing of the evidence in court – is sometimes criticized as being double work. For instance, the hearing of witnesses during trial, who has naturally already been questioned by the investigating judge, is not always deemed necessary and can consequently under the right circumstances be omitted.⁴⁰ In the Netherlands, where the hearing of witnesses is generally delegated to the investigating judge, the lack of oral witness testimony is the rule rather than the exception. However, both the prosecutor and the defense are in that case present during the interrogation.⁴¹ Although the principle of oral hearings of all evidence before the trial judge formally lies at the heart of civil law proceedings, it is in the Netherlands believed to be formally satisfied by adding the results of interrogations outside the trial to the dossier, which is presented and discussed in trial.⁴²

Unlike judges in an adversarial tradition, where all presentation of the evidence is left to the parties, civil law judges must rely on their personal conviction and thus do their absolute utmost to reveal the truth. The trial judge thus plays a much more active role in inquisitorial systems by being in charge of the presentation of evidence and leading the main questioning of witnesses.⁴³ In this regard, the dossier is a valuable and indispensable tool for the judge in order to organize the set-up of the trial, put relevant questions to the witnesses etc. Since the judge and the parties exer-

³⁹ Code de procédure pénale, Art. 427.

⁴⁰ In the lower courts in Belgium, witnesses may be heard 'if necessary'.

⁴¹ Göran Sluiter, '*Cambodian Extraordinary Chambers -- Justice at Long Last?*' (Edited by J. Cockayne). *Journal of International Criminal Justice*, May, 2006. Copyright by Oxford University Press. Page 6.

⁴² *Ibid.* However, the Dutch system is different from other inquisitorial models such as the French. Here, witnesses are questioned by either the police or the investigating judge as part of the investigation. They are heard separately and not in the presence of the person under examination.

⁴³ As is the case in the French and the Belgian systems. Before the French reforms of the criminal procedure in 2000, however, the parties could only put questions to the defendant (and witnesses) through the presiding judge. Valérie Dervieux, *op cit* [10], page 253, 258-259.

cise these powers jointly,⁴⁴ the defense and the prosecutor are less powerful during trial than in an adversarial tradition.

2.4. Main challenge of the inquisitorial system

One particular critique point is repeatedly emphasized when speaking about the weaknesses of the inquisitorial system: the capability of ensuring the rights of the accused. Particularly in the pre-trial investigative phase, the defendant has virtually no opportunity to influence the proceedings. Depending on the exact design or version of the civil law system in question, the prosecution is provided with more power than the defendant in this phase, and so authors have even gone so far as to accuse the system of not guaranteeing ‘equality of arms’.⁴⁵ The need for an open and adversarial trial is a result of this relatively powerlessness of the accused during the pre-trial phase. However, since another exhaustive (oral) examination of the evidence during trial might seem as a waste of resources,⁴⁶ the presentation of evidence is often cut down to a minimum.⁴⁷ This is possible since the dossier has given the trial judge a profound insight into the case even before the trial has begun, which helps the trial judge to pose relevant questions only and generally manage the trial in an efficient way. As this results in a much shorter trial, an extreme vigilance must be shown regarding the rights of the accused, for instance the right to have witnesses against him examined.⁴⁸

⁴⁴ Dennis Salas in “*European Criminal Procedures*”, op cit [6], see chapter on “*The role of the judge*”, page 513.

⁴⁵ Roelof Haveman, Olga Kavran and Julian Nicholls, “*Supranational International Law: A system sui generis*”, © 2003 Intersentia. Page 260. Available at: http://books.google.com/books?id=zTwRCeaT6mUC&pg=PA255&dq=inquisitorial+system&hl=da&ei=G7IWTfrsMYj-mAX5lvjtBw&sa=X&oi=book_result&ct=result&resnum=4&ved=0CDkQ6AEwAw#v=onepage&q=inquisitorial%20system&f=true

⁴⁶ Since it has already been done by the impartial investigating judge during the investigation.

⁴⁷ Advantages and Disadvantages of the Adversarial System in Criminal Proceedings, op cit [17], page 6.

⁴⁸ As guaranteed in the European Convention on Human Rights, Article 6.

3. The Co-Investigating Judges within the ECCC.

3.1. Working within the domestic judiciary

Since the ECCC operates within the domestic judiciary of Cambodia, the Cambodian model of criminal procedure is reflected in the Tribunal's procedure. Robert Petit, former International Co-Prosecutor of the ECCC, and Anees Ahmed, International Senior Assistant Prosecutor of the ECCC, have described the most spectacular characteristics of the ECCC, compared to other international Tribunals, as follows:

Special features that characterize the [Continental European Inquisitorial] system include (1) the provision for judicial investigation by "impartial" Co-Investigating Judges,(2) participation of the defendants throughout the judicial investigation,(3) substantive rights of victims to participate throughout the proceedings as "civil parties",(4) wider appellate powers, including the right to hear fresh evidence at appeal,(5) discovery of evidence being court-driven rather than party-driven,(6) liberal rules of evidence, and (7) creation of a dossier (a Case File).⁴⁹

A complete examination of the civil law features within the ECCC is beyond the scope of this paper; instead the narrow focus will be on the institution of the investigating judges and characteristics in this connection. Because the Internal Rules derive from Cambodian law⁵⁰, the power of the Co-Investigating judges at the ECCC is consistent with Article 127 of the Cambodian Code of Criminal Procedure.

⁴⁹ Robert Petit and Anees Ahmed, A Review of the Jurisprudence of the Khmer Rouge Tribunal, Copyright 2010 by Northwestern University School of Law Northwestern Journal of International Human Rights, Volume 8, Issue 2 (Spring 2010), page 169.

⁵⁰ *Whereas the Extraordinary Chambers in the Courts of Cambodia have been established under Cambodian law, and the Royal Government of Cambodia and United Nations have signed an Agreement, which has been approved by the General Assembly and ratified in Cambodia.* (ECCC Internal Rules, preambular paragraph 4).

3.2. The drafting history of the job-sharing model

As a hybrid court, the staff of the ECCC is composed of both national Cambodians and international workers. A common characteristic is that the senior roles are in theory covered by job-sharing, with national and international qualified personnel working jointly inside the offices. Thus, the three Chambers⁵¹ are made up of Cambodian judges as well as international judges appointed by the UN; the task of prosecution is undertaken by two Co-Prosecutors, a Cambodian and an international; each accused has the right to a Defense Team composed of one Cambodian and one international defense lawyer; the Civil Parties office contains two Lead Co-Lawyers, a Cambodian and an international etc. Likewise, one Cambodian judge⁵² and one international judge⁵³ jointly make up the Co-Investigating Judges.

The composition of two Co-Investigating Judges was not a solution desired by the United Nations. They sought only one judge, independent and international. However, after the proposal of two jointly responsible Co-Prosecutors, a model of two Co-Investigating Judges was suggested to reflect consistency. The following negotiations thus changed the focus to the elaboration of mechanisms to resolve possible disputes between the Co-Prosecutors or the Co-Investigating Judges.⁵⁴ On proposal from US senator John Kerry, a particular Chamber to adjudicate disputes between the Co-Prosecutors and the Co-Investigating Judges was agreed upon.⁵⁵ However, the then-secretary of the UN, Ghanaian Kofi Annan, in order to simplify the structure of the ECCC, still sought one independent Prosecutor as well as one independent Investigating Judge.⁵⁶ In this way, no disputes would arise and no Chamber to solve such disputes would be needed. In order to ensure

⁵¹ The Pre-Trial Chamber, the Trial Chamber and the Supreme Court Chamber.

⁵² Mr. You Bun Leng.

⁵³ Present Mr. Sigfried Blunk (Germany) who in December 2010 replaced Mr. Marcel Lemonde (France).

⁵⁴ David Scheffer, *International Criminal Law*, Third Edition, Volume III, International Enforcement by M. Cherif Bassiouni. Martinus Nijhoff Publishers, 2008. Page 233.

⁵⁵ *On Trial: The Khmer Rouge Accountability Process*, Edited by John D. Ciorciari and Anne Heindel, Documentation Series No. 14 – Documentation Center of Cambodia, 2009, page 74. This is also reflected in the framework agreement between the UN and Cambodia (2003), Article 5 (1).

⁵⁶ UN Doc A/57/769, Report of the Secretary-General on Khmer Rouge trials, para 16 (b).

the impartiality, independence and credibility of investigations and prosecutions, both the prosecutor and the investigative judge should be international personnel.⁵⁷ Although the Cambodian negotiation team firmly rejected almost all of the UN reform proposals regarding structure and organization of the ECCC,⁵⁸ a UN negotiation team was in 2003 sent to Cambodia. In the end, the UN team entered into compromises in the most surprising areas,⁵⁹ maintaining the job-sharing prosecutors and investigating judges.

According to 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) Article 5 (4), the Co-Investigating Judges shall cooperate with a view to arriving at a common approach to the investigation. If disagreements on whether to proceed with an investigation between the national and the international Co-Investigating Judges nevertheless appear, a request can be made to settle the difference at the Pre-Trial Chamber. If the court cannot reach a supermajority, the investigation or prosecution shall proceed.

The rules on the Co-Investigating Judges set forth in the Law on the establishment of the Extraordinary Chambers, (the ECCC law) recognize the great responsibility being put in their hands. Therefore, persons holding this position must meet extremely high requirements as expressed in the ECCC Law Article 25:

⁵⁷ *Ibid.* Art. 16 (c).

⁵⁸ Only one suggestion was met, the reduction of the number of instances from three to two, consisting of a Trial Chamber and a Supreme Chamber. The former proposal was to have a Trial Court, an Appeals Court and a Supreme Court.

⁵⁹ Most highly debated was the composition of judges; whereas the UN sought a majority to be international, the Cambodian government and Hun Sen found Cambodia's sovereignty on stake and repeatedly insisted on the need for a majority of Cambodian judges. However, the UN negotiating team gave in on this on condition that the international Co-Prosecutor would be completely independent. Instead, a supermajority voting rule were to be applied, preventing the national judges from making decisions with a simple majority over the heads of the international judges.

*The Co-Investigating Judges shall be appointed from among the currently practicing judges or are additionally appointed in accordance with the existing procedures for appointment of judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.*⁶⁰

3.3. The investigation conducted by the Co-Investigating Judges

In a compromise between the common law tradition, namely, a strong prosecutor, and the civil law tradition of investigating judges, a unique formula emerged to create both positions.⁶¹ Whereas all indictments and investigations are the responsibility of the Co-Investigating Judges, all *requests* for indictments and prosecutions are the responsibility of the Co-Prosecutors.⁶² Only the Co-Prosecutors may initiate investigation and prosecution, either *ex officio* or on the basis of a complaint.⁶³ They conduct a preliminary investigation to determine whether evidence indicates the commission of a crime and to identify suspects and potential witnesses.⁶⁴ If the Co-Prosecutors reasonably believe that crimes have been committed, they must proceed by sending an introductory submission and the case file to the OCIJ.⁶⁵ The investigation of the Co-Investigating Judges is bound by the facts set out in the Co-Prosecutors' submission.⁶⁶

The ultimate duty of the investigation is to ascertain the truth, exploring both inculpatory and exculpatory evidence, and the Co-Investigating Judges may thus take any investigative

⁶⁰ This is also reflected in the Framework Agreement, Article 5 (1) and 5 (2).

⁶¹ The relations and division of labour between the prosecution and the investigating judge differs from the Cambodian model in several ways. The Cambodian criminal procedure does not state such a clear division between the prosecution and the investigating judge who is not limited by the prosecution's acts as is the case in the ECCC. For more about the Cambodian domestic system compared to the system in the ECCC, see Suzannah Linton, Cambodia, East Timor and Sierra Leone: Experiments in International Justice, *Criminal Law Forum* 12: 185–246, 2001, *Kluwer Academic Publishers*. Page 200.

⁶² David Scheffer, Mayer, Brown, Rowe & Maw/Robert A. Helman Professor of Law Northwestern University School of Law, Chicago, Illinois, The Extraordinary Chambers in the Courts of Cambodia (Abridgement of the much lengthier and footnoted book chapter: David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in Cherif Bassiouni, ed., INTERNATIONAL CRIMINAL LAW (Martinus Nijhoff Publishers, 3rd ed., 2008) ©Northwestern University School of Law Center for International Human Rights and Documentation Center of Cambodia. Page 13-14.

⁶³ ECCC, Internal Rule 49 (1).

⁶⁴ ECCC, Internal Rule 50 (1).

⁶⁵ ECCC, Internal Rule 53.

⁶⁶ If new facts are referred to the Co-Prosecutors, they can send a supplementary submission to the OCIJ. The Co-Investigating Judges shall not investigate those facts unless they receive such an authorization.

action conducive in that regard.⁶⁷ The Co-Investigating Judges must remain impartial at all times, regardless whether the evidence is inculpatory or exculpatory.⁶⁸ Underlining the overriding goal of the system, to determine the truth, it is the obligation of the Co-Prosecutors to disclose as soon as practicable to the Co-Investigating Judges any material that in their actual knowledge may suggest the innocence or mitigate the guilt of the suspect or the charged person or affect the credibility of the prosecution evidence.⁶⁹ The actual investigation is confidential in order to preserve the rights and interests of the parties.⁷⁰ However, the Co-Investigating Judges may issue information they deem essential to keep the public informed or to rectify any false or misleading information.⁷¹ The investigation will conclude in a closing order, either indicting a charged person and sending him to trial, or dismissing the case. In this decision, the Co-Investigating Judges are not bound by the Co-Prosecutors' final submissions.⁷²

3.4. The rights of the parties during the investigation phase

At all times during the investigation, the Co-Prosecutors and the lawyers for the other parties have the right to examine and make copies of the case file.⁷³ They shall moreover have the right to consult the original case file, subject to reasonable limitations to ensure the continuity of the proceedings.⁷⁴ Regarding interviewing of witnesses, these shall be conducted in a place and manner that protects confidentiality and the charged person has no right to be present during the interviews.⁷⁵

⁶⁷ ECCC, Internal Rule 55 (5).

⁶⁸ ECCC, Internal Rule 55 (5). Moreover, the CIJs can issue such orders as may be necessary to conduct the investigation, including summonses, arrest warrants, detention orders and arrest and detention orders.

⁶⁹ ECCC, Internal Rule 53 (4).

⁷⁰ ECCC, Internal Rule 56 (1)

⁷¹ ECCC, Internal Rule 56 (2)(a).

⁷² ECCC, Internal Rule 67 (1).

⁷³ ECCC, Internal Rule 55 (6). Under the supervision of the Greffier of the CIJs, during working days and subject to the requirements of the proper functioning of the ECCC.

⁷⁴ ECCC, Internal Rule 55 (11)

⁷⁵ ECCC, Internal Rule 60 (2). Except where a confrontation is organised.

At any time during an investigation, the Co-Prosecutor, a charged person or a civil party may request the Co-Investigating Judges to take such further investigative action as they consider useful for the conduct of the investigation.⁷⁶ Even after the conclusion of the investigation by the Co-Investigating Judges, parties must have 15 days to issue any further requests if any.⁷⁷ If the Co-Investigating Judges disagree with the requests and thus decide to reject them, they shall issue a reasoned order as soon as possible and in any event, before the end of the judicial investigation. The decision is subject to appeal.

3.5.Trial phase

It is an affirmed principle that ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.⁷⁸ After the opening of the trial, the Co-Prosecutors followed by the defense may briefly present their case.⁷⁹ As common in civil law systems, the judges have the duty to raise all pertinent questions, whether these would tend to prove or disprove the guilt of the accused.⁸⁰ The judges manage the trial, and though all parties have the right to question the accused, other parties and witnesses, all questions shall be asked with the permission of the President.⁸¹ Unless provided otherwise in the Internal Rules, all evidence is admissible,⁸² and any decision of the Chamber shall be based *only* on evidence that has been put before the Chamber and subjected to examination.⁸³ However, the rules state that evidence from the case file is considered to have been put before the court if its content has been summarized or read out in court. In the Summer of 2009, the Trial Chamber judges proposed to loosen up this requirement even more to allow

⁷⁶ ECCC, Internal Rule 55 (10)

⁷⁷ ECCC, Internal Rule 66 (1).

⁷⁸ ECCC, Internal Rule 21 (a)

⁷⁹ ECCC, Internal Rule 89*bis* (2).

⁸⁰ ECCC, Internal Rule 90 (1)

⁸¹ ECCC, Internal Rules 90 (2) and 91 (2).

⁸² ECCC, Internal Rule 87 (1).

⁸³ ECCC, Internal Rule 87 (2).

documents “*appropriately identified in court*” to enter into the assessment.⁸⁴ This proposal was incorporated in an Internal Rules amendment in September 2009 along with another suggestion from the judges in their effort to optimize the efficiency:

*Where the Co-Prosecutors and the Accused agree that alleged facts contained in the Indictment are not contested, the Chamber may consider such facts as proven.*⁸⁵

However, unlike the legal framework of international tribunals, the agreement in fact neither binds the Chamber nor relieves the Co-Prosecutors’ burden of proof. The Chamber is thus free to assess what weight, if any, to give the agreed facts.⁸⁶ Consequently, a guilty plea by an accused does not lead to a changed and shortened trial.

In order to convict the accused, the Chamber must be convinced of the guilt of the accused beyond reasonable doubt.⁸⁷ Although this is the common principle in the adversarial model, it differs from the general principle in the inquisitorial system in which the trial judge shall state the guilt of the accused if he is personally convinced. It is disputed, however, whether the actual meaning varies and it can be argued that the two wordings are two sides of the same coin.⁸⁸ This is underlined by the fact that while both the Khmer and the English versions of this Internal Rule state the abovementioned; the French version retains the wording of the inquisitorial principle.⁸⁹ The Chamber has thus adopted a common approach whereupon a reasoned assessment of evidence, any doubt as to guilt was accordingly interpreted in the accused’s favour.⁹⁰

⁸⁴ Laura Macdonald in ‘Cambodia Tribunal Monitor’, “*War with Vietnam and conflicts within the ECCC*”, June 10, 2009, page 2.

⁸⁵ Ibid. Now ECCC, Internal Rule 87 (6).

⁸⁶ The Duch judgment, Case File/Dossier No. 001/18-07-2007/ECCC/TC. Page 48.

⁸⁷ ECCC, Internal Rule 87 (1).

⁸⁸ Op cit [6].

⁸⁹ Pour condamner l’accusé, la Chambre doit avoir *l’intime conviction* de sa culpabilité. (My emphasis).

⁹⁰ The Duch judgment, op cit [86]. Page 15.

4. Analysis of the mechanism of investigating judges in mass crimes tribunals

4.1. General reflections on the specific features of international tribunals

After the examination of the inquisitorial model of investigating judges and the structure and characteristics of the ECCC related to it, the remaining question is whether this inquisitorially originated mechanism of investigating judges is beneficial to tribunals such as the ECCC. Tribunals dealing with mass crimes face particular challenges unknown to domestic courts and ordinary criminal cases. Although the number of victims is enormous,⁹¹ the number of accused is limited. The ECCC has only a narrowly limited jurisdictional mandate, to prosecute the senior leaders of the Khmer Rouge and those most responsible of the crimes in the defined period and so far, only five people have been accused before the ECCC with five more people under investigation.⁹² A maximum of 10 perpetrators put on trial cannot serve justice for nearly four years of terror and 1,7 million deaths. So, the purpose of a war crimes tribunal is broader than merely punishing top leaders and that makes particular demands on the way the trials are carried out.

4.2. Purpose of the ECCC

The broader scope of the ECC is found in the drafting history. In 1996, Thomas Hammarberg was by the then UN Secretary-General, Kofi Annan, appointed as his Special Representative for Human Rights in Cambodia. During his first trip to the country, Hammarberg described how *the fact that no one had been held accountable for the mass killings and other atrocities had clearly contributed*

⁹¹ An estimated 1,7 million people perished during the Khmer Rouge era while the rest of the population suffered to an extreme extent by forced labour, movements, marriages, starvation and general live conditions, including a sustained mental state of fear for punishment, torture or death to themselves or loved ones.

⁹² The investigation of two of the additional five suspects was closed in April 2011 without indictment (Case 003). The decision has been appealed by the international Co-Prosecutor. There is moreover every indication that the last three suspects will avoid charges as well (Case 004).

to the culture of impunity which was still pervasive in Cambodia.⁹³In June 1997, the two co-prime ministers of Cambodia⁹⁴ in a letter requested:

*... For the assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979. (...). We hope that the United Nations and the international community can assist the Cambodian people in establishing the truth about this period and bringing those responsible to justice. Only in this way can this tragedy be brought to a full and final conclusion.*⁹⁵

The Cambodian focus was twofold; bringing to justice the surviving Khmer Rouge-leaders and establishing the truth about the period. This was seen as the necessary measures to bring an end to the tragic past. The drafting history of the Framework Agreement and the ECCC Law reveals how the UN sought a mechanism to meet the Cambodian *pursuit of justice and national reconciliation, stability, peace and security*, to help ensuring a fair and equitable justice system, and positively assist in the *effort to investigate the tragic history of Cambodia*.⁹⁶In the establishment of the ECCC, the UN thus sought an institution beneficial of bringing national reconciliation to Cambodia as well as serving justice to the victims.

4.3. Serving justice

4.3.1. Three aspects of justice

Assistant Professor at the Gerald R. Ford School of Public Policy at the University of Michigan and a Senior Legal Advisor to the Documentation Center of Cambodia, John Ciorciari, dissects the con-

⁹³ Ambassador Thomas Hammarberg, "How the Khmer Rouge tribunal was agreed: discussions between the Cambodian government and the UN", published in the Magazine of the Documentation Center of Cambodia, Searching for the truth – Khmer version 2001, Part 1: March 1997 – March 1999, available at: http://www.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm

⁹⁴ Prince Norodom Ranariddh and Hun Sen.

⁹⁵ Hammarberg, op cit [93].

⁹⁶ UN Doc UNGA resolution 57/228 of 18 December 2002, UN Doc CHR/89/2002. In the preamble of the final Agreement, the recognition of the *legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security* is repeated.

cept of justice that the ECCC is to serve into three elements; The *retributive* justice, the *restorative* justice and the *procedural* justice.⁹⁷ The retributive aspect of justice deals with the punishment and condemnation of the offender, the restorative aspect is about compensation or restoration of victims, and the procedural aspects addresses the holding of fair trials. Serving retributive justice is not different in a mass crimes tribunal from any other criminal court, whereas the restorative aspect is much more complex in a tribunal with an immense number of victims, and criminal tribunals tend to do less well regarding this aspect of justice.⁹⁸

4.3.2 Restorative justice and national reconciliation

The negotiators of the ECCC agreement never conceived of the ECCC as an instrument of direct relief for the victims. The victims' numbers are too overwhelming and the mandate and resources of the ECCC far too limited to address the individual needs of each victim.⁹⁹ What the ECCC instead *was* meant to do is support the ongoing process of national reconciliation in Cambodia. Cambodia's effort to achieve reconciliation can be described as twofold. One is the need for a greater sense of justice, another is the need for a broader public discussion of the history surrounding Khmer Rouge abuses.¹⁰⁰ As the drafting history shows, the possibility for the ECCC to provide Cambodians with a greater understanding of the truth was seen as an important factor for the reconciliation process.¹⁰¹ Criminal tribunals, however, cannot be confused with an effective truth commission. Whereas the sole purpose of a truth commission is truth telling and the focus on the historical period general-

⁹⁷ John D. Ciorciari, 'On Trial', op cit [55], see chapter on 'Introduction', page 16-18.

⁹⁸ John D. Ciorciari and Sok-Kheang Ly, *ibid.*, see chapter on 'The ECCC's Role in Reconciliation', page 301.

⁹⁹ David Scheffer, Mayer, Brown, Rowe & Maw/Robert A. Helman, op cit [62], page 17-18.

¹⁰⁰ John D. Ciorciari and Sok-Kheng Ly, op cit [98], page 317.

¹⁰¹ The Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135, available at: <http://www1.umn.edu/humanrts/cambodia-1999.html>, para 209. Knowledge of the truth is described as important on several levels. To meet the common wish among the Cambodian people to gain a better insight into the factual events occurred during the Khmer Rouge and trying to reach an understanding of the past, to help the young generation to be able to understand the psychological, emotional, and social challenges that a great part of Cambodians face, and public knowledge about the era can likewise be an eye-opener to the need for a just and orderly society, respectful to the rule of law. See John D. Ciorcari, op cit [96], page 18-19.

ly,¹⁰² the focus of the ECCC is on a relatively small number of indictees and a narrow set of fact relevant to these specific defendants. The ECCC is therefore not designed to provide a complete historical account of the Khmer Rouge tragedy.¹⁰³ Yet, its legal mandate to collect a wide range of evidence, its accumulated institutional manpower and expertise, and its ability to demand answers from defendants under oath all give it the capacity to add crucial information to the historical record.¹⁰⁴

In this regard, the inquisitorial system of the ECCC has an advantage as ascertaining the truth is seen as the ultimate goal. The introduction of investigating judges, whose sole purpose is to conduct an impartial investigation, examining all kinds of evidence regardless of its nature, is a better guarantee of the factual correctness of the findings than leaving the investigative responsibility with the respective parties. No facts will be hidden even though neither the defense nor the prosecutor might find a particular interest in them, and the final result and thereby the events found to have occurred should only to a very limited extent depend on the skills and capabilities of the lawyers in question but instead reflect the reality. Rather than being viewed as a dispute between parties, the inquisitorial process is thought of as an official and thorough inquiry,¹⁰⁵ and the vital role of the trial judge combined with the impartial investigation of the investigating judge ensures the best possible investigation of the virtual reality. Although the ECCC cannot serve restorative justice personally to each victim of the Khmer Rouge, the ECCC is, due to the model of independent investigating judges, able to provide the Cambodian people with a great understanding of the truth.

4.3.3. Procedural justice

The need for procedural justice will be fulfilled if fair trials are held. Although some people might

¹⁰² Report of Group of Experts, op cit [101], para 199.

¹⁰³ John Ciorciari, op cit [97], page 28.

¹⁰⁴ John Ciorciari and Sok-Kheang Ly, op cit [98], page 322.

¹⁰⁵ Roelof Haveman, Olga Kavran and Julian Nicholls, op cit [45], page 255.

find justice in the pure act of punishing the offenders, defendant's rights must be respected at the ECCC as an answer to any critics stating that such tribunals are 'victor's justice' as well as for the ECCC to be a model for justice and not a kangaroo court.¹⁰⁶ The task of ensuring the defendant's right can be conceived as particularly important in an international war tribunal, in which the guilt of the defendants to some extent is rarely disputed. Thus, few would question the complicity of the accused in the ECCC in the atrocities occurred during the Khmer Rouge. What is instead questionable is to what extent they are legally culpable for the crimes of that era, a question more complicated for the investigating judge to ascertain than a mere sequence of events. Article 33 new in the ECCC law states that trials must be fair and expeditious and conducted in accordance with the existing procedures in force, with full respect for the rights of the accused. Article 13 of the Agreement moreover states the rights of the accused:

Such rights shall, in particular, include the right: to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice¹⁰⁷; to have adequate time and facilities for the preparation of his or her defence; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her.¹⁰⁸

4.4. The rights of the accused

The European Court of Human Rights (the ECHR) has stated the principle of equality of arms as contained in the right to a fair trial.¹⁰⁹ In the elaboration of the principle of equality of arms, the ECHR has found this to be the right to an equal treatment and *that everyone who is a party to such*

¹⁰⁶ John Ciorciari, op cit [97], page 17. A key justification for the new type of international 'hybrid' courts has been the potential knowledge transfer to the domestic judiciary and procedural justice is thus important in order to achieve the wanted effect of ensuring a fair and equitable justice system in Cambodia with the ECCC as a role model. For more information on hybrid courts, see Sarah M. H. Neuwen, op cit [1].

¹⁰⁷ Each defendant has the right to a defense team consisting of a domestic and an international defense lawyer.

¹⁰⁸ All the rights in this provision are also found in Article 6 of the European Convention on Human Rights, stating the right to a fair trial. Therefore, in the interpretation of the rights, it can be helpful to have an eye to the interpretation of the ECHR.

¹⁰⁹ Gilles Dutertre, "Key Case Law Extracts, European Court of Human Rights", Council of Europe Publishing, December 2003, page 200. Available at: <http://books.google.com/books?id=q-3aPorpYpUC&printsec=frontcover&hl=da#v=onepage&q&f=false>

*proceedings shall have a reasonable opportunity of presenting his case to the court under conditions which do not place him at substantial disadvantage vis-à-vis his opponent.*¹¹⁰ As explained above, the inquisitorial system is generally criticized for not living fully up to this principle, particularly in the investigative phase in which not much space is left to the defense whereas the prosecution and the investigating judge are in a leading position to set up limits for the case. In a letter to the Nuon Chea defense team, the Co-Investigating Judges of the ECCC have clearly prohibited the defense from conducting any of its own investigations during the judicial investigation:

*Before this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties. There is no provision which authorizes the parties to accomplish investigative action in place of the Co-Investigating Judges, as may be the case in other procedural systems.*¹¹¹

Further, the Co-Investigating Judges emphasizes that *the capacity of the parties to intervene is thus limited to such preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action.*¹¹² This led the Ieng Sary defense team to claim that the Defense has *an unequal position vis-a-vis the Co-Prosecutors*, referring to the preliminary investigation conducted by the Co-Prosecutors, which in Case 002 lasted for nearly a year.¹¹³ Moreover, the Co-Prosecutors are able to provide the Co-Investigating Judges with supplementary submission if they find any further evidence related to a crime, leading the Co-Investigating Judges to investigate further. It is claimed that this system *increases the likelihood that the investigation, and accompanying case file, will be weighted toward inculpatory evidence.*¹¹⁴

¹¹⁰ *Kaufman v. Belgium*, ECHR 10938/84. On the other hand, equality of arms does not necessarily amount to the material equality of possessing the same financial and/or personal resources, *Prosecutor v. Kayishema and Ruzindana*, International Criminal Tribunal for Rwanda, Appeals Chamber, June 1, 2001, para. 63-71.

¹¹¹ Letter from the OCIJ to the NUON Chea Defence re: Response to your letter dated 20 December 2007 concerning the conduct of the judicial investigation, 10 January 2008, A110/1, ERN: 00157729-00157730, para 2.

¹¹² *Ibid.*

¹¹³ Letter from the Ieng Sary defense team to the Trial Chamber, 'The Ieng Sary's motion for a hearing on the conduct of the judicial investigation, 25 March 2011, Case no. 002119-09-2007-ECCC/TC.

¹¹⁴ Charles C. Jackson, 'Process and Problems: Defense Counsel at the Extraordinary Chambers in the Courts of Cambodia', May 2010, page 22, referring to Michael Karnavas, *Gathering Evidence in International Criminal Tribunals* –

Nevertheless, it is important to keep in mind that the Co-Prosecutors, due to the inquisitorial system they operate within, in the introductory submission following the initial investigation, must include any evidence that in their actual knowledge may be exculpatory,¹¹⁵ and that they have a duty to disclose to the Co-Investigating Judges any material that in their actual knowledge may suggest the innocence or mitigate the guilt of the Suspect or the Charged Person or affect the credibility of the prosecution evidence.¹¹⁶ It is thus doubtful whether the system itself weighs toward inculpatory evidence, and active participation of the defense is definitely not as crucial as in the adversarial system with two equal opponents, each responsible for their side of the investigation. Unlike the Co-Investigating Judges, however, the Co-Prosecutors have not been imposed with an explicit duty of actively seeking exculpatory evidence, and involvement of the defense in the investigative phase cannot therefore be completely omitted.¹¹⁷

However, it is one thing to instruct investigating judges with the duty to ascertain the truth, including all kind of evidence regardless of their culpatory character, and another for the investigating judges to carry out such an investigation before a mass crimes tribunal. Whereas ordinary criminal courts in general handle a single case at a time, the complexity and extensive character of war crimes cause an obstacle to the nature of the investigation. Case 002 addresses four people accused of numerous atrocities during an almost four-year period, starting 36 years ago. Crime sites are throughout the whole country of Cambodia and the number of victims is uncountable. Moreover, due to the mix of international and national criminal law applicable and a large range of potential defenses and arguments for mitigation employable at a trial of this size and com-

The View of the Defense Lawyer, in INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES 90-91 (Michael Bohlander ed., 2004) (citing Antonio Cassese, *Statement by the President Made at Briefing to Members of Diplomatic Missions*, Feb. 11, 1994).

¹¹⁵ ECCC, Internal Rule 53 (2).

¹¹⁶ ECCC, Internal Rule 53 (4).

¹¹⁷ In any case that would be a violation of the principle of equality of arms.

plication, the case is very legally complex.¹¹⁸ Having in mind the voluminous extent of the case files,¹¹⁹ the Co-Investigating Judges simply cannot be expected to conduct the investigation in an exhaustive manner, fully looking into the cases of both the defense and the prosecution.¹²⁰ This results in a certain risk of having a more subjective outcome than would be the case in ordinary criminal cases with a complete investigation.

In April 2009, three ECCC defense teams¹²¹ requested the Co-Investigating Judges to seek exculpatory evidence in a specific set of electronic documents known as the ‘SMD’.¹²² They submitted, that:

*... It is the duty of the Co-Investigating Judges to look into the SMD in search of exculpatory evidence. The judicial investigation does not simply consist in gathering enough evidence to send the Charged Person to trial. In its aim to ascertain the truth, the CIJs have the explicit duty to look for exculpatory evidence.*¹²³

The Co-Investigating Judges dismissed the request, referring to the impossibility of producing an exhaustive catalogue of all possible evidence. According to the Co-Investigating Judges, closure could be possible as soon as the judicial investigation had determined sufficient evidence to indict a charged person,¹²⁴ and reasoned this with reference to the right of the accused to have a trial within a reasonable time. The Co-Investigating Judges concluded on the basis of their analysis, that:

¹¹⁸ Charles C. Jackson, op cit [114], page 23.

¹¹⁹ International Co-Investigating Judge, Sigfried Blunk, has said that preparations for the trial in Case 002 have included interviews with 700 witnesses and the gathering of some 10,000 documents.

¹²⁰ Charles C. Jackson, op cit [114], page 24.

¹²¹ The defense teams of Ieng Thirith, Ieng Sary and Nuon Chea.

¹²² Shared Materials Drive. The electronic documents were made available to all parties by the Co-Prosecutor prior to the opening of the investigation of Case 002 and contained voluminous materials.

¹²³ 002/19-09-2007-ECCC-OCIJ, Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, 20 April 2009, para 19.

¹²⁴ 002/19-09-2007-ECCC-OCIJ / No: D164/2, Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, para 6.

... *In fulfilling their duty of impartiality, the Co-Investigating Judges are under no obligation to go on “fishing expeditions” in search of exculpatory materials as long as they satisfy the requirement of sufficiency.*¹²⁵

This led the Nuon Chea defense team to express distrust in the ability of the ECCC’s system to deliver a just result for their client.¹²⁶ The decision by the Co-Investigating Judges was appealed to the Pre-Trial Chamber which found that the Co-Investigating judges by *reasoning that an investigating judge may close a judicial investigation once he has determined that there is sufficient evidence to indict a charged person* had overlooked their preliminary obligation to first conclude their investigation before assessing whether the case shall go to trial or not.¹²⁷

Bearing this in mind, the system could most probably benefit from a more active defense to lighten the pressure of the Co-Investigating Judges and meet the critics regarding the guaranteeing of the rights of the accused, particularly in the context of mass crimes tribunals, handling extremely complex case files. Moreover, it would prevent any sort of miscarriage of justice for which the risk is probably greater in a war crimes tribunal where the presumption of innocence can be difficult to uphold in a personal level. It is though noteworthy that the more qualified the investigating judges are and the more independently and impartially they are able to perform their job, the less an active defense is actual necessary to ensure the fair balance. The cornerstone of the system is after all that a well-functioning investigation conducted by a talented investigating judge is a *better* insurance of the rights of the accused. Unlike the adversarial system, the accused in the inquisitorial system is to a large extent protected from the damages that insufficient finances or incompetent lawyers can cause their clients. Former French foreign minister, Madame Guigour has put it this way during a speech in the Sénat in June 1999:

¹²⁵ *Ibid.* Para 15 (5).

¹²⁶ Letter from Nuon Chea Defence Team, Re: Lack of Confidence in the Judicial Investigation, 15. October 2009.

¹²⁷ 002/19-07-2009-ECCC-OCIJ (PTC 24), No. D/164/4/13, Decision on the Appeal from the Order of the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, para 36. However, the Chamber dismissed the appeal on other grounds.

*The adversarial system is by its nature unfair and unjust. It favours the strong over the weak. It accentuates social and cultural differences, favouring the rich who are able to engage and pay for the services of one or more lawyers. Our system is better both in terms of efficiency and of the rights of the individual.*¹²⁸

In conclusion, the inquisitorial model has both advantages and disadvantages in ensuring the principle of equality of arms. Leaving the investigation to a state authority guarantees that neither the means of the accused nor the competency of the lawyers concerned play a great role in the final outcome; however, allowing assistance from the parties would be beneficial for the investigation and lighten the enormous burden that the investigation judge has been instructed. It must however be kept in mind that the defense is not totally left out in the investigation phase. They do have the ability to request further investigative requests. Yet, the internal rules do not set up any clear legal test for accepting or rejecting an investigative request. The Co-Investigating Judges thus have broad discretion in considering whether the investigative measures in question are conducive to ascertaining the truth. The Co-Investigating Judges have not managed to develop a clear standard in that regard and have used several different tests to evaluate whether a request is conducive to ascertaining the truth.¹²⁹ The Co-Investigating Judges have repeatedly denied requests by the Nuon Chea's defense team to conduct and place interviews on the case file, arguing that similar or sufficient evidence already exists in the dossier.¹³⁰ Instead of leaving the assessment of the investigative request for the Co-Investigating Judges to such a large extent, the internal rules should have dealt with this issue, trying to reach a well-defined frame for the defense to work within. The lack of a clear standard, combined with the "sufficiency" standard expressed by the Co-Investigating Judges, has with good reasons increased the concerns about the quality of the investigations, resulting in

¹²⁸ Sarah Summers, op cit [8], page 13.

¹²⁹ E.g., The Co-Investigating Judges have at times referred to a sufficiency standard (SMD), a relevancy standard, and a *prima facie* basis standard.

¹³⁰ Decision on Appeal Against the OCIJ Order on Nuon Chea's Eighteenth Request for Investigative Action, June 15, 2010. During the initial hearing of Case 002 in June 2011, the Nuon Chea Defense team voiced concerns of the lack of willingness of the Co-Investigating Judges to meet the requested investigative measures.

distrust in the impartiality of the Co-Investigating Judges and their capability to reach a fair balance between exculpatory and inculpatory evidence.

4.5. Confidence in judges

Mass crimes tribunals are often enclosed by political vigilance and interest, and the ECCC is no exception. The drafting history reveals how the Cambodian government was unwilling to let go of the majority of Cambodian judges in the chambers, and the job-sharing procedure was a compromise between two parties, both wanting to obtain the greatest possible control. During the negotiations the United Nations showed an enormous lack of confidence in the Cambodian judiciary, only reluctantly entering into compromises. Moreover, the distrust in the Cambodian judiciary is not exceptional to the UN. Trial Chamber President, Judge Nil Nonn, has in clear terms described the situation of the Cambodian judiciary as indefensible:

*We also have problems because judges aren't independent in Cambodia – [the government] threaten and put pressure on judges, the judges accept money, so all this is not very good. I will try my best to enhance the capacity to bring the independence to judges – this is my responsibility when I train the judges.*¹³¹

The Open Society Justice Initiative (OSJI) described in their 2010-report on political interference at the ECCC a deep concern for:

*... The majority of Cambodian judges in each of its chambers, a Cambodian co-investigating judge, and a Cambodian co-prosecutor chosen from a domestic judicial system that is uniformly viewed as subject to political control.*¹³²

Concerns of political interference have thus followed the ECCC along the way, culminating in the premature closure of the investigation of Case 003. The decision to conclude the investigation has

¹³¹ Alex Bates, "Transitional Justice in Cambodia: Analytical report", Atlas Project, British Institute of International and Comparative Law, October 2010, para 145.

¹³² Political Interference at the Extraordinary Chambers in the Courts of Cambodia, report by Open Society Justice Initiative, July 2010, page 10.

been made although basic investigative measures have not been undertaken.¹³³ Since Cambodian government officials, including the prime minister Hun Sen,¹³⁴ have publicly opposed Case 003, the early closing of the case and the failure to conduct a full investigation raise suspicions of political interference.¹³⁵ Stephen Heder, a well-respected Khmer Rouge historian and one of several former staff at the Office of the Co-Investigating Judges who have recently resigned, has said that the judges closed the investigation of Case 003 “*effectively without investigating it,*” and that he and others had lost confidence in the leadership of the Co-Investigating Judges who had created a “*toxic atmosphere of mutual distrust*” in “*what is now a professionally dysfunctional office*”.¹³⁶ With such suspicions it is impossible to maintain the necessary confidence in the Co-Investigating Judges. In the light of the instability of the Cambodian judiciary, it was from the beginning unlikely that a Cambodian investigating judge would be able to inspire the parties with sufficient confidence. However, even an institution of two Co-Investigating judges, one being international and UN-appointed, has turned out to be seriously concerning since the international Co-Investigating judge has not been able to safeguard the legitimacy.¹³⁷

Whereas it is questionable whether the inquisitorial system is able to ensure the rights of the accused to a sufficient extent when it comes to mass crimes tribunals, it must be taken into consideration that the actual performance of the investigating judges has raised certain concerns, and distrust in the investigating judges must not be confused with distrust in the system itself. In the

¹³³ Such as questioning the suspects, interviewing witnesses and examining crime sites. International prosecutor Andrew Cayley has in this regard requested the Co-Investigating Judges to undertake further investigative measures. For more on the criticism of the Case 003 investigation, see the June 2011 report from Open Society Justice Initiative on ‘*Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*’.

¹³⁴ Who himself has a past as a Khmer Rouge cadre.

¹³⁵ As well as Case 004 in which the investigation is still ongoing.

¹³⁶ <http://blogs.independent.co.uk/2011/06/13/a-toxic-mistrust-at-cambodias-dysfunctional-genocide-trial/>

¹³⁷ Whether the premature closure of Case 003 is due to donor-fatigue and the wish among donor-countries to speed up the process and end trials as soon as possible has also been a topic of speculation. However, such a scenario would be as destructive for the procedure as any other explanation. More than the mere confidence in the investigating judges, trust in the system’s capability of conducting the investigation is vital. Too few allocated resources make this trust impossible and undeserved.

end, any advantage of the inquisitorial model is only achieved if the investigation is carried out proficiently. The insurance of the rights of the accused in civil law system stands and falls with the competence of the investigating judge, and the personal character of the investigating judges is subsequently of most vital importance to an inquisitorial criminal procedure. When giving so much responsibility to one institution, as is still the reality in the inquisitorial system, it is ruinous to establish this institution in a way that does not inspire all parties with a huge amount of confidence.

4.6. Efficiency

4.6.1. An advantageous potential in the inquisitorial system

According to Article 9 (2) in the International Covenant on Civil and Political Rights, the accused has the right to a trial within a reasonable time.¹³⁸ In the ECCC there is yet another reason to carry out the trials expeditiously. The accused are old and will probably not make it to the judgment if the trials are lengthy and prolonged.¹³⁹ Moreover, no one benefits from lengthy trials.

Following a profound investigation, the actual *trial phase* in the inquisitorial system can potentially be very short since, theoretically, it should be possible to reach a conclusion based on the dossier alone. The European Court of Human Rights has though stated that a fair trial includes an adversarial hearing,¹⁴⁰ as a result of the right for a party to have knowledge and comment on all evidence adduced or observations filed.¹⁴¹ In this regard, an inquisitorial process that shortens down the trials by not presenting some of the evidence can be a violation of the right to a fair tri-

¹³⁸ The same is stated in the European Convention on Human Rights Article 6 and the European Court of Human Rights has underlined that the particular circumstances of the case, the complexity and the conduct of the defendant and the prosecuting and judicial authorities must be taken into consideration when assessing the reasonableness of the length of the proceedings. See Paul Mahoney, "Right to a Fair Trial in Criminal Matters under Article 6 E.C.H.R.", *Judicial Studies Institute Journal*, 2004, 4:2, page 119.

¹³⁹ Ieng Sary and Nuon Chea are in their mid-eighties, Ieng Thirith and Khieu Samphan following close behind.

¹⁴⁰ Gilles Dutertre, *op cit* [109], page 200.

¹⁴¹ *F. R. v. Switzerland*, ECHR 37292/97, para 36 and *Mantovanelli v. France*, ECHR 21497/93, para 33.

al.¹⁴² Yet, it is still unclear how detailed the presentation needs to be and the inquisitorial system has an advantage in that the trial is not a first-time-presentation of the evidence which in theory should make it possible to cut the presentation of the evidence to the bone. Additionally, because of the dossier, the trial judge has the overview and the possibility of managing the trial in an efficient way, resulting in generally short trials compared with the common adversarial-trial. Whereas the trial in the adversarial system is a full hearing of the evidence for the first time, the trial in the inquisitorial model is more a way of verification of the detailed information discovered during the judicial investigation.¹⁴³

4.6.2. Challenges for mass crimes tribunals

Mass crimes tribunals face however a special challenge in this regard. As mentioned above, the complexity of mass crimes result in dossiers much more voluminous than seen in ordinary criminal courts. For the trial judges it seems an unattainable task to become familiar with all of the evidence, and the adversarial hearing is thus necessary to give the parties an opportunity to present the case and attract attention to evidence beneficial to their side of the case. Since the judge cannot get to the bottom of the case, the adversarial hearing in mass crimes tribunals will be more than a ‘verification’ of the information discovered by the investigating judge and in fact come closer to a proper presentation. Indeed, party participation is more important than in domestic civil law criminal cases since the trial judge can impossibly take up a similar position without a thorough knowledge of the entire case file.

Despite this fact, the hearing must not be confused with an actual adversarial system hearing. The duty of the judges to get as near to the truth as possible during trial must be kept in mind, which puts the responsibility to reach a correct conclusion on the trial judges and subsequent-

¹⁴²This is not only because the judge in that case will base his decisions on other reasons than solely those presented during trial, but because the accused in that case won’t have the opportunity to comment on the evidence.

¹⁴³ Alex Bates, op cit [134], para 133.

ly results in an active participation of the judges. The contribution of the parties during the trial phase is thus still less crucial than in the adversarial system and the truth found and final decision reached depend less on the skills of the concerned lawyers.

4.6.3. The bureaucratic system in the ECCC

Many observers and participants have found the civil law system as applied by the ECCC as unnecessary bureaucratic, resulting in inefficiency, lengthy trials and inappropriate delays. Yet, it is important to have an eye for the unique system regulating the procedure in the ECCC, many aspects of which are not specifically civil law features. The system of job-sharing Co-Prosecutors and Co-Investigating Judges and the following need for a dispute resolution mechanism is from an efficiency perspective far from optimal. A UN judge has even described it as *probably the worst structure that you can imagine*.¹⁴⁴ However, the job-sharing mechanism was a necessary, and at the moment the only possible, political compromise, acceptable to all the parties. The job-sharing led to the creation of the Pre-Trial Chamber to resolve any disputes arising between either the Co-Investigating Judges or the Co-Prosecutors. The Pre-Trial Chamber was, however, given additional jurisdiction over appeals against decisions of the Co-Investigating Judges and applications to annul investigative action.¹⁴⁵ This has led to an effectively four-instance tribunal as pointed out by the defense team of Ieng Sary in the Cambodian Daily on 11 July 2011.

Another challenge is a result of the tribunal's unique structure. This structure allows for jurisdictional challenges to be raised four times, twice what would be usual in such proceedings: first before the co-investigating judges, then before the Pre-Trial Chamber, the Trial Chamber and finally the Supreme Court Chamber. (...)

¹⁴⁴ Cited by Alex Bates, *ibid.* para 135.

¹⁴⁵ ECCC, Internal Rule 73. Moreover, the Pre-Trial Chamber have jurisdiction over the appeals provided for in Rules 11 (5) and (6); 35 (6), 38 (3) and 77bis of the Internal Rules.

Pre-Trial Chamber Judge Rowan Downing has been cited as saying that this procedural system is "a waste of time which had caused years of delay".¹⁴⁶

As repeatedly emphasized by the UN Secretary-General during the drafting of the ECCC, eliminating the co-holders of offices would eliminate the need for the Pre-Trial Chamber and thus simplify the procedure considerably. Such a complex dual structure invites deadlock where there is a disagreement¹⁴⁷, and delays are thus unavoidable in an already complicated and factually difficult case complex.¹⁴⁸

Finally, it has been disputed whether parts of the delay are caused by some civil law/common law clashes in the mix of lawyers from different traditions working in the ECCC. While International Defense Counsel and French lawyer Francois Roux as well as Trial Chamber Judge Silvia Cartwright argue in that direction,¹⁴⁹ acting International Co-Prosecutor William Smith has on the other hand asserted that:

...the conflict between the civil law and common law systems was 'more myth than reality' at the international/hybrid level, in that the difficulties experienced in the cases had more to do with the large amount of evidence being presented than it did the difference between the traditions.¹⁵⁰

¹⁴⁶ Michael Karnavas and Ang Udom, 'The Diligent Defense of Ieng Sary Is Not a Delaying Tactic', Cambodian Daily on Monday, July 11, 2011, page 34.

¹⁴⁷ Alex Bates, op cit [134], para 265.

¹⁴⁸ *Ibid.* Para 137.

¹⁴⁹ Michelle Staggs Kelsall, Mary Kristerie A. Baleva, Aviva Nababan, Vineath Chou, Rachel Guo, Caroline Ehlert, Sovannith Nget and Savornt Pheak, "Lessons Learned from the 'Duch' Trial", a comprehensive review of the first case before the Extraordinary Chambers in the Courts of Cambodia. A report produced by the Asian International Justice Initiative's KRT Trial Monitoring Group, December 2009. Page 18.

¹⁵⁰ *Ibid.*

4.7. Transparency

4.7.1. Two levels of transparency

The inquisitorial system has the potential to carry out fairly efficient trials. However, since the investigation is confidential,¹⁵¹ the efficiency in the public trial is only possible at the expense of transparency. And whereas transparency is not an important component in ordinary criminal trials, lack of transparency is highly damaging to mass crimes tribunals. The relatively small number of indictees that generally characterize mass crimes tribunals cannot alone serve justice for massive atrocities. The people concerned will have to be actively involved in the process in order to take proper advantage of the trials.

However, the need for transparency in mass crimes tribunals also has another level. Unlike international tribunals situated outside of the concerned country,¹⁵² the rise of ‘hybrid’ courts has resulted in tribunals situated within the country in question, and even within the national judiciary. This has for the ECCC led to various concerns of the legitimacy of the trials and the general faith in the justice served, increasing the need for a transparent proceeding since transparency is an essential tool to defeat political interference.¹⁵³ Former ECCC prosecutor Alex Bates has put it this way:

*The principle that justice must be seen to be done is even more important in Cambodia where thirty years have passed since the crimes and where the majority of domestic criminal trials take place without a full examination of the evidence, and many without the accused being present.*¹⁵⁴

¹⁵¹ Although confidentiality might be necessary to protect the rights of witnesses who may be vulnerable and in the risk of being subject to appropriate pressure or retribution, and to the efficiency of an undisturbed investigative process, it is in some cases possible to act more transparently without jeopardizing the security of victims or witnesses. 2010 report from OSJI, op cit [136], page 27. A less confidential investigation would then result in better ways to take profit of the efficiency potential in the inquisitorial system.

¹⁵² Such as the International Criminal Tribunal for the former Yugoslavia situated in the Haag, the Netherlands and the International Criminal Tribunal for Rwanda situated in Arusha, Tanzania.

¹⁵³ OSJI report 2010, op cit [135], page 27.

¹⁵⁴ Alex Bates, op cit [134], para 133.

In order to maintain a transparent procedure, the investigation must be followed by an open and profound trial; to support the process of national reconciliation, state a model for the Cambodian judiciary and deserve the trust of the Cambodian people. In the end, this leads to a civil law system struggling from a burden of bureaucracy, having first to perform a profound investigation and then repeat the vast majority of the evidence found during a public trial. Having in mind the complexity of cases in mass crimes tribunal, such a procedure cannot be anything but extremely long-drawn-out and repetitive.

4.7.2. Transparency in the ECCC

As the first mass crimes tribunal to provide a substantive role for investigating judges, the only trial held so far in the ECCC clearly revealed the bureaucratic disadvantages. In Case 001, the judicial investigation lasted for twelve months and included among others questioning of the accused over almost 24 days, interviewing of more than 60 witnesses and two crime site visits.¹⁵⁵ This was followed by a lengthy trial in which most of this evidence had to be repeated,¹⁵⁶ and most of the judicial staff at the court blamed the *duplicative nature of investigations in the civil law system* for this lengthy process.¹⁵⁷ Whereas Case 001 only had one accused, former chief of the Tuol Sleng security prison (or torture centre), the upcoming Case 002 deals with four suspects, making the case files way more voluminous than the Case 001 file, and the bureaucracy can in this regard be an even bigger challenge. During the initial hearing in Case 002 in ultimo June 2011, Victor Koppe, Dutch lawyer in Nuon Chea's defense team, referred to the domestic Dutch civil law system, in which both parties, the prosecution and the defense, are present during the interrogation of witnesses in the

¹⁵⁵ *Ibid.* para 132.

¹⁵⁶ Due to ECCC Internal Rule 87 (2) stating that '*any decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination*'.

¹⁵⁷ Alex Bates, op cit [134], para 132. This has led to a few corrections in the internal rules as described in section 2.5 of this paper, and a time limit has been introduced to the parties when questioning witnesses or pleading in court.

investigation phase.¹⁵⁸ Such a procedure could speed up the process, since the presence and examination of witnesses during court would not be necessary in order to meet the rights of the accused, however, also another hard-hitting defeat for transparency.

*Although facilitating expeditious proceedings, the object and purpose of the prosecution of international crimes militate against hearing no or hardly any witness in court. Both truth and reconciliation are best served by transparent proceedings, of which the live appearance and hearing of witnesses constitutes an important element.*¹⁵⁹

The loss of transparency that a ‘true’ civil law system would cause would be damaging to the overall task of mass crimes tribunals such as the ECCC. It would prevent Cambodians from taking active part in the trials and bring along a profound distrust in the ECCC’s capability of conducting fair trials without any political interference. A proper inquisitorial model in which the adversarial and public hearing is short and mostly a verification of the information found is consequently not desirable in mass crimes tribunals. The need for transparency is simply too vital.

4.8. A middle course

With an eye to the International Criminal Tribunal for the former Yugoslavia, Dutch Professor Göran Sluiter has proposed a new model as a possible solution to reduce the number of witnesses questioned in court without compromising the need for transparency.

An interesting solution may be found in the ‘dossier approach’ as advanced by the ICTY Prosecution (...) This idea comes down to the compilation of dossiers containing statements from the so-called ‘crime base witnesses’, which do not concern the acts and conduct of the accused, but serve to supplement live testimony. In the ICTY context, this approach has generally been rejected, essentially on the ground that the statements cannot be challenged by the accused via cross-examination. An important advantage for the [ECCC] over the ICTY in this re-

¹⁵⁸ Though both the ECHR and the ECCC law provides an explicit right for the accused to have witnesses against him examined, this does not necessarily have to be in court. The right consists of the opportunity to examine the witnesses in *some* stage during the trial process. ECCC Internal Rule 84 (1) states that the accused shall have the absolute right to summon witnesses against him or her whom the accused had no opportunity to examine during the pre-trial stage.

¹⁵⁹ Göran Sluiter, op cit [41], page 6.

spect is the investigating judge, who may be expected to ensure the accused's right to challenge the evidence against him in the hearing of crime-base witnesses. Both the prosecution and the defence might submit questions to witnesses heard by the investigating judge. One could thus very well imagine the [ECCC] only allowing for the hearing of witnesses at trial who testify to the acts and conduct of the accused; crime-base witnesses may then be heard separately by the investigating judge. This division matches a prosecutorial policy focusing on senior leaders, avoiding the need to hear a large number of crime-base witnesses in court.¹⁶⁰

Whether this solution is the optimal approach, I will let be unanswered since that requires a thorough examination of the explicit need for transparency. It is however noticeable that this suggestion deactivates participation of the defense and instead, in order to simplify the process, provide the investigating judge with additional power. In that case, the investigating judge must fulfill his obligation to *ensure the accused's right* in a satisfactory manner which once again brings us to the starting point and the alpha and omega for the inquisitorial system; the confidence in the appointed judges. In any case, Sluiter states an example of the innovational way of thinking that eventually might result in a criminal procedure system, specifically designed to fit the nature of mass crimes tribunals and meet the particular challenges that these tribunals face in the effort to fulfilling their tasks.

5. Conclusion

The inquisitorial system as well as the adversarial system has advantages and disadvantages in governing the procedure in mass crimes tribunal. Neither one is designed to handle such complex cases with huge numbers of witnesses nor to meet the broadened scope of international tribunals compared to domestic criminal courts. Mass crimes tribunals are meant to serve more than only retributive justice, and the drafting history of the ECCC reveals a desire of an institution able to promote

¹⁶⁰ Göran Sluiter, op cit [41], page 6.

the process of national reconciliation and positively influence the Cambodian judiciary through the Cambodian staff and the power of example.

The examination of the role of the investigating judges in the ECCC reveals considerable benefits regarding promotion of the broader scope to not only serve retributive, but also restorative justice. The centralization upon the search for the truth is valuable for a society pining for a better understanding of the past with no truth commissions or the like. In the same vein, the principle of placing the responsibility of ascertaining the truth with the state authority is seen as a guarantee for a more just and factually correct result as the outcome is independent of the means available to the accused or the competency of his lawyer. However, certain concerns in a mass crimes tribunal context can also be observed. The defense teams have repeatedly questioned the capability of the inquisitorial system to guarantee the rights of the accused since this task is lying on the investigating judge instead of on the defense itself. The biggest concern is the powerlessness of the accused during the investigative phase. In mass crimes tribunals, dealing with massive case complexes, an exhaustive investigation is impossible and a certain extent of subjective selection of the evidence will thus take place. Providing the defense with a more active role would minimize the risk of basing the investigation upon unbalanced evidence and would likewise lighten the burden of the investigative judge to collect and look into an enormous amount of evidence.

Providing the state authority with a great amount of power can thus be beneficial as well as damaging, much dependent on the character of the investigating judge and the system he works within. Most damaging to the inquisitorial system is therefore mistrust and suspicions of bias or political interference. The system simply cannot work without the necessary confidence in it as well as in its actors. It is without doubt that the Cambodian judiciary faces problems in that regard. Having two Co-Investigating Judge, one Cambodian, and a dispute settlement institution with a majority of Cambodian judges has caused numerous suspicions and distrust in the system. Moreo-

ver, not even the international Co-Investigating judge, who was meant as a safeguard for the legitimacy of the investigation, could pass the test and inspire the surroundings with confidence. In the end, that has turned out to be ruinous, eliminating the necessary trust in the system and its actors.

Finally, a relevant point is the discussion of efficiency versus transparency, both vital components in mass crimes tribunals. Whereas the inquisitorial system has an efficiency potential that a mass crimes tribunal could benefit from, this is primarily possible at the expense of transparency. However, transparency is fundamental since the trial process more than simply the final outcome is beneficial to the Cambodian people. Without transparency, the public cannot be involved in the trials whose positive impact on society would then be strongly reduced, basically undermining the whole purpose of setting up the ECCC. When meeting the need of transparency, the inquisitorial system brings along double-work procedures and a system of duplicative character involving as well complex (confidential) investigations as lengthy trials repeating the evidence. In the ECCC, the problem of bureaucracy has become even greater with the job-sharing Co-Investigating Judges and thus an extra chamber to deal with any disagreements between them.

Although investigating judges have a huge potential in promoting restorative justice through a mass crimes tribunal, the system faces serious challenges in the actual performance, handling very complex cases and immense case files. The efficiency potential of the inquisitorial system is limited by the need for transparency, and a new procedure in this regard must be devised in order to optimize the system, ensuring both factors. Finally, the inquisitorial system stands and falls with a profound trust in the system, thus it can never be desirable to have this system governing a mass crimes tribunal working within a distrusted judiciary, sensitive to political interference.