Special Contribution

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SPEECH OF THE GERMAN AMBASSADOR TO CAMBODIA AT THE 12TH LAW TALK

Joachim Freiherr von Marschall, German Ambassador to Cambodia, held a captivating and valuable speech during KAS' 12th Law Talk from 1st-3rd August 2014 in Sihanoukville. With his kind approval KAS is grateful to be able to publish his speech on the following pages. These consist of an introduction to Germany's role and development towards international criminal justice. Subsequently, the speech provides an explanation and evaluation of the development and procedures of the Cambodian ECCC (Extraordinary Chambers in the Courts of Cambodia) and connects Cambodia and Germany in terms of their experiences with international criminal justice.

It is a great pleasure for me to be here again as a guest of the Konrad Adenauer Foundation to give another key note speech, this time on Germany and international criminal justice. Only a few days ago I hosted a group of scholars and students who had been attending a summer school on much the same subject and who have now joined today's conference – good to see you again!

The timing of this weekend's conference could not be more appropriate: in less than a week the ECCC will give its second verdict on two of the key leaders of the Khmer Rouge regime, Nun Chea and Khieu Sampan. This will be an important landmark in the course of the court's seven year existence. The ECCC, like other courts dealing with international criminal justice, represents universal principles. And even if future perpetrators may not necessarily be deterred by the existence of such courts (those who commit crimes against humanity usually are blind to the implications of their wrongdoings), the courts and their verdicts nonetheless play a crucial role: they provide objective confirmation to survivors that they have been treated wrongfully and ideally also restore their belief in the rule of law. And they are an institutionalized reminder that there is no action without consequence. Impunity is one of the greatest curses in any society where it is prevalent. The ECCC, through its mere existence and through its rulings, delivers that message loudly and clearly.

The concept of international criminal justice is not as new as some may think. In fact, its preconditions were already established during the Age of Enlightenment at the end of the 18th century when the right of the individual began to gain wider attention in the political context and was even juxtaposed to the right of the sovereign. As time went by the sovereign himself began to be seen not any more as a supreme institution above the law but instead as an individual who ultimately could be held accountable for his actions. Without this fundamental

breakthrough in legal thinking, international criminal justice would have been inconceivable as persons at the top of a political or governmental hierarchy could not be subject to criminal law. And while today this is considered a universal principle of international law, there still is considerable reluctance in many parts of the world to accept the ultimate consequences of this approach (and I include parts of the Western world, where such thinking originated). Holding members of the ruling class of a country accountable infringes on the concept of national sovereignty and may even challenge the legitimacy of that ruling class. I would go so far as to say that unless the concept of sovereignty is universally redefined, the implementation of universal principles of international criminal justice remains imperfect. You would probably agree with me that this will not happen in our lifetime, if ever.

It took about another 100 years before awareness grew of the humanitarian catastrophes which wars bring about for both combatants and civilians. The foundation of the Red Cross in 1863 was a first important step in acknowledging the fact that warfare involved not only heroism but also tremendous human suffering. As well as the humanitarian aspect, there was also a legal aspect to this insight: the two Hague Peace Conferences of 1899 and 1907 recognized the need to establish rules governing warfare in order to avoid some of its worst excesses. These limited the hitherto unfettered freedom of combatants to use any violence at their disposal to reach victory, and thereby legitimize the means used.

While most textbooks take the military tribunals of Nuremberg and Tokyo as the starting point of modern international criminal law, it is worth mentioning that in 1919, Articles 227 to 230 of the Versailles Treaty between the allied powers of WWI and Germany, already contained provisions on the extradition and criminal persecution of German "war criminals", including the German Emperor William II and key figures of the German military command. And while eventually no criminal cases were brought against these actors, the supreme German criminal court, acting as a result of political pressure from the victors, initiated 13 criminal cases against high ranking military officers, six of which ended in sentences and six others in acquittals, while a number of accused managed to escape justice by leaving Germany. This seems to be the earliest case of war crimes being the subject of judicial procedure, albeit before a national rather than an international court.

International criminal justice was temporarily institutionalized for the first time in 1945 when the Nuremberg and Tokyo International Military Tribunals dealt with the crimes committed during the Second World War by key civilian and military figures from Germany and Japan respectively. It did not take long until the newly founded United Nations took on the idea of establishing an international criminal court in Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide (1948). In the same year, the United Nations General Assembly charged the International Law Commission (ILC) with this project. The ILC’s first meeting in 1949 confirmed that the establishment of an international criminal court was both a desirable and a viable prospect. Further efforts on the part of the United Nations faltered, however, in the face of the tensions and rivalries of the Cold War.

It was only in 1990, more than 40 years after the initial consultations, that the General Assembly renewed its mandate to the International Law Commission to review the

international criminal court project. The massive breaches of international humanitarian law in the former Yugoslavia and the genocide in Rwanda prompted the United Nations Security Council to establish, as enforcement measures under Chapter VII of the Charter of the United Nations, the two ad hoc criminal tribunals for the former Yugoslavia (Resolution 827/1993) and Rwanda (Resolution 955/1994). This also gave new momentum to the project to create a permanent international criminal court which, as you all know, eventually came into being with the entering into force of the Rome Statute on 1 July 2002. I still remember the cheers and celebration among the representatives of the signatory states at the UN General Assembly in New York on that day.

So, what role does Germany play in these events?

In the first half of the 20th century Germany had been the villain, prompting external calls for international justice rather than itself helping to maintain or restore it. In fact, it is a bit of an understatement to contend that the notion of an international criminal court was not very popular among politicians or legal experts in post-war West Germany. The ruling of the IMT had been criticized both for alleged legal flaws, most prominently for a breach of the principle of "nullum crimen sine lege", and for political reasons among those who claimed that the allied powers had instrumentalized the law against their enemy in order to add a moral to their military victory. The idea of an international criminal court therefore smacked of bias and an inappropriate mix of law and power. This, however, did not prevent the recognition by the German judiciary of the atrocities committed by the Nazi regime. From the 1960s, numerous German criminal cases had been brought against former members of the SS-units who had tortured concentration camp prisoners and been actively involved in the murder of Jewish people. It was through these court cases that the wider German population, which had largely tried to forget the terrible truths which Allied accounts and testimony at the Nuremberg trials had brought to light, was reminded that the ghosts of the past were still haunting the German post-war society and that it was time actively to enter into a debate about this past.

While German legal scholars and politicians as a whole had been somewhat averse to the idea of an international criminal court, one German academic had promulgated the idea as early as 1951: the German criminal law professor Hans-Heinrich Jescheck - I still remember him very well as he was one of my first teachers in Freiburg law school back in 1972. He was a truly impressive figure! But it took 40 more years, the end of the Cold War and German re-unification for this idea to fall on fertile ground in the new Federal Republic of Germany, thereby confirming that the time must be ripe for every big step forward in history, no matter what the prophets may say long before that time arrives.

With re-unification in 1990, Germany's political situation had fundamentally changed, and so had the world outside of Germany. To begin with, there was the question of how to deal with some of the key figures of the former East German communist politbureau who had to take responsibility for the massive intrusion into and violation of citizen's rights, notably through the omnipresent Stasi, the East German secret police who had made life miserable for thousands of East Germans, many of whom had been tortured in special prisons. This time, it was the

West Germans who assumed the role of judging key political figures of another state, i. e. the GDR, examining the crimes committed by East German politicians (which, it must be added, were mild in comparison to the Nazi atrocities). This new situation to no small degree may have helped to overcome West Germany's earlier reservations to the sort of justice which the IMT had meted out.

But there was another important external factor this time: the wars in the Balkans after Yugoslavia fell apart in the early 1990s. For the first time in German post-war history, Germany became actively involved both politically and eventually also militarily in an international conflict. Germany was no longer just an object of international developments – Germany had become an active player! One cannot overestimate the significance of this for German politics when one considers the deep fear, even resentment, of the majority of Germans of such an engagement which had emanated from Germany's role in two world wars in the first half of the 20th century. At the outset Germany viewed the situation in the Balkans quite differently from its NATO allies. I still remember being grilled by some NATO member state diplomats during a reception in Athens in 1991. Shortly before, Germany had made international headlines by being one of the first countries to recognize Croatia as an independent state. Germany at that time was still on the defensive because most of our partners felt that peace in the Balkans could best be preserved by keeping the Yugoslav Republic together and not recognizing breakaway provinces such as Croatia.

Why am I getting into history? The answer will perhaps become clearer when I point out to you that in 1993 the International Criminal Tribunal for the former Yugoslavia was established in The Hague as an answer to the crimes against humanity which had been committed in the Balkans following the breakup of Yugoslavia on a scale unprecedented in Europe since WWII. The fact that the majority of persons indicted by the ICTY's prosecutor were Serbs, among them the former Yugoslav prime minister Milosevic and the leaders of the Bosnian Serbs, Karadjic and Mladic, seemed to vindicate the German narrative that it had been Serb oppression of the other Yugoslavian ethnicities which had justified the latters' separation and legitimized their international recognition as separate sovereign states by Germany. Thus, the ICTY's role, apart from ensuring justice, was, from a German perspective, an important political one – a role, which the Nuremberg trials had served as well, but which had hitherto been resented by West Germans. Now, German politicians had the opportunity to see things from a new perspective, and they seized it.

It is important to keep these historical developments in mind in order to understand why Germany changed from a long-time sceptic to one of the most ardent supporters of the idea of an international court of criminal justice. Nonetheless, there were some initial domestic hurdles that had to be overcome. Notably, the question of whether Germany should agree to an amendment to its Basic Law, the German constitution, which stipulated that German citizens must not be extradited to stand trial before a foreign court, was an important test of Germany's commitment to the cause of international criminal justice. This question was hotly debated in public, demonstrating that sentiments were more ambivalent than at first appeared. But political resistance was eventually overcome and the German law enacting the

Statute received the consent of the Bundestag and Bundesrat in the Autumn of 2000, entering into force in December 2000. On 11 December 2000 the instrument of ratification was deposited in New York by the Permanent Representative of the Federal Republic of Germany to the United Nations.

At this point I would like to pay tribute to my colleague Hans-Peter Kaul who passed away only a few weeks ago. He worked tirelessly as a German representative on the preparation of the Rome Statute and later became one of the first judges to be appointed to the bench of the ICC. - Germany now is the ICC's largest contributor after Japan and also contributes voluntary payments to the Court's Trust Fund for Victims and Witness Protection Programme.

The German Government is convinced that the Court plays an effective role in the quest for greater justice and in the fight against the impunity with which the most serious crimes affecting the international community as a whole are committed. We believe it has gained increasingly universal importance and acceptance as a world criminal court.

Ladies and gentlemen,

Let us now turn to the ECCC. Unlike the ICC, the so called Khmer Rouge Tribunal is not an international criminal court but a special chamber of a Cambodian court with an international component which ensures that the ECCC cannot take any decision without the consent of at least one international judge (conversely the court also cannot decide without the cooperation of Cambodian judges). I do not plan to go into the details of the rather complex structure and functioning of the ECCC. Let me instead look at some of the aspects which seem to be relevant from a German perspective.

The first deliberations in 1997 about the notion of a special tribunal to deal with the atrocities committed by the Khmer Rouge coincided with the debate about the Rome Statute. The idea of the ECCC therefore fell on open ears in Germany. A response to a parliamentary inquiry by the Liberal caucus in the Deutsche Bundestag, the German parliament, in February 2007, indicates that apart from the prosecution of crimes committed by the Khmer Rouge, the restoration of the rule of law and of a legal culture were key motivating factors in Germany's support for the ECCC. German financial support for the ECCC to date amounts to USD 12,5 million and we also fund numerous judicial and technical experts, some of them are with us today. Germany is a member of both the Principal Donors Group and the Friends of the ECCC.

It was initially assumed that the court dealing with Khmer Rouge atrocities would be an international tribunal much along the lines of the ICTY and the Ruanda tribunal. But, as we know, things changed between 1997 and the final agreement on the ECCC between the UN and the Royal Government of Cambodia in 2006. Eventually, it was decided to establish a court which would combine both national and international components, the so-called "hybrid approach". The historical and political backdrop to the development of this court from 1997

was particularly colorful. This was largely because the Khmer Rouge, directly or indirectly, had at different times, enjoyed the support of a number of powers which were either regional players and/or now involved in the debate on establishing the court. It can be assumed that one of these powers would have vetoed the creation of a purely international tribunal as it would have presupposed a decision of the UN Security Council to which this power was and is a member. The Cambodian Government itself also insisted on the hybrid approach, thus ensuring control over the court's decisions – a control which has manifested itself on several occasions and indicating that, alas! It is not always easy to separate justice and power. The ECCC was the first of a series of hybrid courts – others have been created in East Timor, Lebanon, Bosnia and Kosovo (the category to which belongs the Sierra Leone tribunal not being entirely clear). Apart from the political arguments which I pointed out earlier, there also are psychological and practical advantages to such an approach. First of all, there is the aspect of ownership: it is assumed that by including the national judiciary the greater public in the country involved will be more inclined to see the trials and eventually the judgments as "homemade" and not as externally "imposed". There is no hint of "victors' justice". In the case of Cambodia this may have been of special relevance, considering that among the foreign countries which had advocated the ECCC were some which, at one point or another in more recent history, had been directly involved politically and militarily in Cambodian affairs. Secondly, it is hoped that the narrative evolving from the court's findings will be considered balanced and therefore more openly endorsed by the population of the country involved. This public endorsement, it is thought, would contribute to a public debate about the crimes which created trauma and other social damage and eventually help to overcome the latter. Thirdly, in a country with less developed judicial structures, a hybrid court opens up the opportunity for national judges to profit from a "know how" transfer from their international colleagues. And, last but not least, the financial and administrative burden of the court operations is shared between the foreign community and the national budget of the country involved. So far, so good – in theory.

I am not giving away any secrets when I tell you that the present situation of the ECCC is far from perfect. One must bear in mind, however, that is unrealistic to expect international criminal tribunals to function as efficiently as national criminal courts. Nevertheless, in my view, those concerns regarding the ECCC which cannot and must not be ignored include first the lengthiness of the procedure, caused by particularly complex procedural rules and a complicated language regime; and second, uncertainties regarding the court's financing. Time and again members of the international component of the ECCC have emphasized to me how heavily the financial uncertainties weigh on staff motivation. Employees of the national component even went on strike last year because a portion of the staff salaries was not paid for an extended period which effectively paralyzed the work of the national judges. Of course, it is one of the characteristics of a hybrid court that it is funded by voluntary contributions and not by an institutionalized budget which inevitably means a degree of uncertainty. With the increasing number of such tribunals and a limited number of donor states, funding problems for hybrid tribunals may possibly be increasing. It is therefore of paramount importance I believe that sufficient attention is being paid by all those in charge of managing these courts

to creating highly efficient structures. Also, the internal rules of the tribunal may have to be revised (notably those dealing with the determination of the crimes to be prosecuted and the collection of evidence) to speed up both the pre-trial and trial procedures. The relevance of this becomes even more evident if we consider the active timetable. According to the most recent predictions, the first part of case 002, on appeal, will be closed by 2016, the second part by 2019. The trials in cases 003 and 004 have not even begun yet and would be closed at the earliest in 2021, i.e. seven years from now. Given the age of Nuon Chea and Khieu Samphan, it is uncertain whether they will still be able to stand trial until the final judgment in case 002/02 has been made in 2019, let alone be fit to serve their sentence. As we do not know the identities of the accused in the cases 003 and 004 we can only speculate with regard to their age and fitness to stand trial. But it probably is fair to assume that, as in the case 002, the accused already have reached an age which raises questions in this regard. And while I do not want to put into question the wisdom of starting trials almost thirty years after the crimes have been committed – political circumstances probably would have made an earlier start difficult in the case of the ECCC -, I feel that all the more effort needs to be made to bring about justice swiftly and efficiently. I am aware that there is the view among legal purists that the setting of time frames and suggestions with regard to the alteration of procedural rules by external bodies runs counter to the principle of judicial independence. To me this seems to miss the point: What we all are looking for is justice, and justice is a function not only of a fair trial (which indeed presupposes judicial independence) but also of the framework in which justice is operating, i.e. the practical side of the judicial system. “Justice delayed is justice denied” - there is a deep wisdom in this sentence about the true meaning of justice. We have already experienced the frustration it has caused that two of the five people who should have stood trial dropped out. I wonder how the victims feel about this!? And how do they feel about the prospect that this may soon happen again? Let's be clear: speeding up the court's proceedings will serve justice greatly. And there is one more important aspect: it will also increase donor motivation, a fundamental prerequisite for the continuation of the court as an institution.

Ladies and gentlemen

Before finishing, I want briefly to mention an aspect of international criminal justice which is particularly close to my heart: support for the victims. To me, sustainable support for those who have suffered is an essential complement to the trials. I do not want to elaborate on the theoretical aspects of the inclusion of the victims in criminal proceedings. Much has been written about this. Suffice it to say that the ECCC has succeeded in developing rules for the victims’ participation in Case 002 which appear workable. This is no small achievement, given the huge number of people involved. In this regard, the reparations programme deserves a special mention. It is catering for the psychological and emotional needs of the victims in quite an immediate way, even though we have to be fully aware that no reparation is imaginable which could make good for the loss of human lives and for the unimaginable pain which huge numbers of victims are suffering to this day. Time may perhaps have healed some wounds but

there is still much pain. And everyone who suffers is deserving of our attention.

Linked to is the subject of outreach, by which I mean the need to inform and educate the wider public and in particular the post Khmer Rouge generations about their people's recent terrible history. We need to invest much more of our creative energy in teaching the historical facts of the Pol Pot era and encouraging public debate on the root causes of, and lessons to be learned from, these horrors. As a German, I am familiar with these issues. My country's experience handling the aftermath of the Nazi regime, dealing with victims and perpetrators was profound and painful. In the 1960s the West German government began paying reparations to the State of Israel for the holocaust which eliminated 6 million Jews and, in addition, other innocent members of groups which the Nazis considered "unworthy". Reparations were also paid to several states which had been occupied by the German army and where civilians had suffered as a result of Germany's occupation. With the establishment of the "Foundation Remembrance, Accountability and Future" in August 2000, the German government and about 6000 German companies had created a fund to the amount of € 10 billion (USD 13,4 billion) to compensate survivors of forced labour under the Nazis. Thus, both the public and private sector in Germany recognized their responsibility for the crimes committed by their predecessors during the 1930s and 1940s.

As for outreach work, in the 1970s the German education system, at first reluctantly, began to include themes relating to the Holocaust in school curricula. Gradually, and carried by a young student generation, critical of their parents' generation, difficult subjects like the Holocaust and other Nazi war crimes entered the realm of public debate. This debate was instrumental not only to fully establish Germany's international credibility as a modern democratic country, at last disconnected from an ultranationalist and racist past. Also, and equally importantly, this debate helped to reduce denial and unreflected guilt feelings in parts of the mostly older German population, opening the way to a more honest interpretation of history and, as a consequence, to a more straightforward outlook at the future.

It is always invidious to make comparisons. Each culture feels its own pain and has its own coping mechanisms when it is overwhelmed by human catastrophe. But Germany feels solidarity with Cambodia and other countries that have suffered crimes against humanity. This is why my country has assisted Cambodia in the area of victim support. Since its inception in 2008, Germany has, as the sole national donor, contributed a total of 5.2 million USD and has promised another half million this year to the VSS. We very much hope that other countries will join us and that the Royal Government of Cambodia will continue to support the reparations programme. One may even consider a foundation to aid the victims. The fate of the victims is a matter of public concern for which Cambodians themselves bear the primary responsibility. By raising public awareness of the victims' suffering, a public debate about Cambodia's civil war history will be provoked: a debate which will elicit that solidarity among Cambodian citizens, among victims and their families, a debate, I believe, which is so vital for the future of this country. Just as in Germany, there will be pain, but out of that pain will come strength and a future for Cambodia free of the evil spirits which have haunted this country for so long.

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Thank you for your attention.

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