

**EXPERIMENTS IN INTERNATIONAL CRIMINAL JUSTICE:  
LESSONS FROM THE KHMER ROUGE TRIBUNAL**

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## ABSTRACT

*A number of important legal and institutional experiments have been undertaken at the Extraordinary Chambers in the Courts of Cambodia (ECCC), a UN-backed tribunal established to try some of the most egregious crimes of the Pol Pot era. The ECCC is the first UN-supported hybrid criminal tribunal to mandate a majority of national judges and to divide key legal and administrative offices and funding mechanisms into distinct national and international sides. It also draws more heavily than any prior internationalized mass crimes process from the civil law tradition, including expansive roles for investigating judges and an ambitious mechanism permitting certain survivors to join the proceedings as civil parties. These experimental features – most of which were accepted reluctantly by the United Nations during difficult negotiations with the Cambodian government – have sometimes compromised the ECCC’s capacity to conduct fair, expeditious proceedings and carry out its administrative functions efficiently and transparently. This article traces some of the effects of the ECCC’s unique institutional features on various aspects of its performance and draws lessons that can help inform the design and management of mass crimes proceedings going forward.*

## I. INTRODUCTION

Important experiments in international criminal justice are underway in Cambodia at the Extraordinary Chambers in the Courts of Cambodia (ECCC), a tribunal created by the United Nations and Cambodian government to adjudicate some of the most egregious crimes of the Pol Pot era.<sup>1</sup> The tribunal opened its doors in 2006, and although its work continues, its first seven years of operations provide an opportunity to evaluate its performance and judge the

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<sup>1</sup> Between April 1975 and January 1979, an estimated 1.7 million people perished under Khmer Rouge rule. The Kafkaesque Pol Pot regime, known to the people only as *Angkar* (the Organization), evacuated the cities, defrocked the monks, and split nuclear families to weaken traditional bonds that could impede the revolution. The regime forced people of all ages to toil in the factories or fields, denied them basic human rights, and detained and executed myriad suspected enemies of the revolution without trials. See generally BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79* (2d ed. 2002); CRAIG ETCHESON, *THE RISE AND DEMISE OF DEMOCRATIC KAMPUCHEA* (1984); DAVID P. CHANDLER, *THE TRAGEDY OF CAMBODIAN HISTORY: POLITICS, WAR, AND REVOLUTION SINCE 1945* 236-72 (1993); ELIZABETH BECKER, *WHEN THE WAR WAS OVER: CAMBODIA UNDER THE KHMER ROUGE REVOLUTION* (1986). Physical remains, documents, survivor accounts, and other sources of information point to widespread and often systematic violations of international criminal law. See STEPHEN HEDER WITH BRIAN D. TITTEMORE, *SEVEN CANDIDATES FOR PROSECUTION* (2d ed. 2004); John D. Ciorciari with Youk Chhang, *Documenting the Crimes of Democratic Kampuchea*, in *BRINGING THE KHMER ROUGE TO JUSTICE* (Jaya Ramji & Beth Van Schaack, eds., 2005), at 240-86.

extent to which legal and institutional experiments at the ECCC have been successful to date. This article will show that, in general, the ECCC's most unique and unprecedented features have been among the most problematic, providing useful lessons to help guide the reform and design of future mass crimes proceedings.

The ECCC is part of a family of hybrid courts—which includes the Special Court for Sierra Leone (SCSL), Special Tribunal for Lebanon (STL), Bosnian War Crimes Chamber (WCC), Regulation 64 Panels in Kosovo, and former Special Panels for Serious Crimes in East Timor—that blend national and international laws, procedures and personnel. The hybrid model emerged in the late 1990s, largely to address perceived shortcomings of the International Criminal Tribunals for Yugoslavia and Rwanda (ICTY and ICTR) and International Criminal Court (ICC).<sup>2</sup> Hybrid courts were created in the hope that they would better accommodate sovereignty concerns, promote local ownership and legitimacy, connect trials to local survivor populations, build host government capacity, and deliver credible justice at a lower cost than fully international proceedings.<sup>3</sup> Yet hybrid courts have downsides. They are highly vulnerable to domestic political interference—which is particularly acute in countries like Cambodia with weak records of judicial independence.<sup>4</sup> They are also susceptible to confusion and inefficiency as they merge multiple legal systems and personnel with disparate backgrounds, training, and approaches to justice.<sup>5</sup>

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<sup>2</sup> One key rationale for hybrid courts was “donor fatigue” among sponsors of the ICTY and ICTR. STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 246 (3d ed. 2009); David Cohen, “Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future, 43 STAN. J. INT’L L. 1, 1-6 (2007). Sovereignty was another concern, particularly for developing countries fearful of Western impositions of politically-motivated justice. RATNER ET AL., *supra*, at 252. The distant locations of the *ad hoc* courts also made investigations more cumbersome, arguably weakened deterrence, and reduced the tribunals’ opportunities for capacity-building and outreach programs. M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 578 (2003).

<sup>3</sup> See Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295, 302-07 (2003); Ethel Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice*, Yale Law School Legal Student Scholarship Papers 6 7-24, 45-46 (2005); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 332-34 (2d ed. 2008); RATNER ET AL., *supra* note 2, at 248.

<sup>4</sup> See Suzannah Linton, *Putting Cambodia’s Extraordinary Chambers into Context*, 11 S.Y.B.I.L. 195, 204-08, 223-26 (2007).

<sup>5</sup> Suzannah Linton, *Cambodia, East Timor, and Sierra Leone: Experiments in International Justice*, 12 CRIM. L. FORUM 185 (2001); RATNER ET AL., *supra* note 2, at 253; Cohen, *supra* note 2, at 36.

The ECCC, which is governed by a 2003 UN-Cambodian agreement outlining a framework for cooperation (the “Framework Agreement”)<sup>6</sup> and subsequent 2004 domestic law establishing the Court (the “ECCC Law”),<sup>7</sup> has much in common with other hybrid tribunals. Like most of its kin, it has the advantage of being located in the country where the alleged crimes occurred, offering potential advantages in outreach, capacity-building, efficiency, and affordability. Its inclusion of both local and international personnel offers opportunities for matching complementary skills and expertise. The ECCC also shares certain disadvantages common to hybrid courts, such as the challenge of mixing local and foreign practices and personnel and the involvement of a host government with weak judicial capacity.

The ECCC differs from other hybrid courts in important ways, however. Human rights lawyer James Goldston has called it “an extraordinary experiment in transitional justice.”<sup>8</sup> In fact, the Court has a number of distinctive, experimental features. One is its preponderantly domestic character. The ECCC has a strong basis in domestic law<sup>9</sup> and is the only mixed tribunal with a majority of domestic judges. Its Pre-Trial Chamber and Trial Chamber are each comprised of three Cambodian and two international judges, and its appellate Supreme Court Chamber has four Cambodian judges and three internationals.<sup>10</sup> Second, the ECCC is the only hybrid court to divide national and international personnel into distinct “sides.” The Court has

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<sup>6</sup> Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (June 6, 2003) [hereinafter Framework Agreement].

<sup>7</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended and promulgated on Oct. 27, 2004, NS/RKM/1004/006 [hereinafter ECCC Law], art. 1.

<sup>8</sup> James Goldston, *An Extraordinary Experiment in Transitional Justice*, JUST. INITIATIVES (Spring 2006), at 1.

<sup>9</sup> The ECCC is the only UN-backed hybrid court created by an act of the domestic legislature (the ECCC Law). It is empowered to try suspects for the international offenses of genocide, war crimes, and crimes against humanity, as well as three domestic crimes under Cambodia’s 1956 Penal Code—torture, homicide, and religious persecution—and two novel international offenses pertaining to attacks on cultural property and diplomatic personnel. ECCC Law, *supra* note 7, arts. 2 new-8. Importantly, the Court applies Cambodian criminal procedure, looking to international standards only where lacunae appear. *Id.* art. 33 new.

<sup>10</sup> To mitigate concerns about possible domestic political control of the proceedings, the ECCC features an unprecedented supermajority rule in which four of five Pre-Trial or Trial Chamber judges must join in any affirmative decision and five of seven Supreme Court Chamber Judges must do the same. Framework Agreement, *supra* note 6, art. 4; ECCC Law, *supra* note 7, art. 14 new. As discussed below, however, the supermajority rule has been largely ineffective at curbing political interference. *See infra* SV(B).

national and international Co-Prosecutors and Co-Investigating Judges and splits its Office of Administration into separate Cambodian and UN components, each of which has independent funding, hiring practices, and reporting lines. Third, the ECCC includes more pronounced civil law features than any previous hybrid court<sup>11</sup>—particularly by creating a role for investigating judges that supersedes party-driven investigations, and by establishing an innovative scheme for victims to participate as civil parties to the proceedings.

With the exception of the civil party scheme, which was designed by judges after the ECCC began operations,<sup>12</sup> most of the ECCC’s novel institutional features represented accommodations to Cambodian sovereignty during lengthy negotiations between UN and Cambodian officials to create the tribunal. The UN team, led by Legal Counsel Hans Corell, pushed for a court like the SCSL with a majority of international judges, an international prosecutor, and an international head of administration. The Royal Government of Cambodia (RGC) insisted on political control, however, and its custody of principal suspects and support from China and other key governments made its consent essential. Influential UN member states eventually pressed the UN Secretary-General and Office of Legal Affairs to compromise on an arrangement closer to Cambodian preferences.<sup>13</sup> They had good reasons for doing so; without the ECCC, the chances for credible justice following some of history’s worst offenses would have been considerably lower.<sup>14</sup> Nevertheless, the ECCC’s unique features were understood to be risky from the outset and indeed have proven to be problematic in practice.

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<sup>11</sup> Kathia Martin-Chenut, *Proces International et Modeles de Justice Penale*, in DROIT INTERNATIONAL PENAL 848, 862 (Hervé Ascensio et al. eds., 2d ed. 2012).

<sup>12</sup> The civil party scheme was set forth in the Court’s internal rules, which were completed in mid-2007 and have since been revised a number of times. Internal Rules of the ECCC, *rev’d* Aug. 3, 2011 [hereinafter ECCC Internal Rules (rev. 8)]. For some key provisions on civil parties, see *id.* rr. 12-12ter, 23-23quinques.

<sup>13</sup> On the tribunal negotiations, see generally DAVID SCHEFFER, *ALL THE MISSING SOULS* ch. 12 (2012); TOM FAWTHROP & HELEN JARVIS, *GETTING AWAY WITH GENOCIDE? ELUSIVE JUSTICE AND THE KHMER ROUGE TRIBUNAL* chs. 9-10 (2004); John D. Ciorciari, *History and Politics behind the Khmer Rouge Trials*, in *ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS* (John D. Ciorciari & Anne Heindel eds., 2009).

<sup>14</sup> David Scheffer, *Why the Cambodia Tribunal Matters to the International Community*, *CAMBODIA TRIBUNAL MONITOR* (Sept. 2007), <http://www.cambodiatribunal.org/why-the-cambodia-tribunal-matters-to-the-international-community> (arguing, as a key official involved in the negotiations to create the ECCC, that “there is no question that the ECCC was an experiment, but one for which there really was no viable alternative after years of negotiations.”).

The Court has completed its first case against Kaing Guek Eav *alias* Duch, the former head of the infamous secret prison at Tuol Sleng (“Case 001”) and is now in the midst of a second trial against a pair of senior surviving Khmer Rouge leaders (“Case 002”)—former deputy secretary of the Communist Party of Kampuchea Nuon Chea and former president of the state presidium Khieu Samphan.<sup>15</sup> Although the ECCC has had some important successes—such as issuing numerous sound judicial decisions, featuring zealous prosecution and defense, and conducting relatively effective outreach—its novel institutional features have added to the challenge of delivering a credible and efficient accountability process. The preponderance of national judges and split “sides” of the Court has left the United Nations with a good deal of responsibility for the ECCC’s work but limited capacity to control it. That has contributed to half-hearted UN ownership of the process and relatively weak international responses to evidence of corruption and judicial interference on the Cambodian side. The Court’s bifurcated structure has also undermined decisive leadership, reduced efficiency, and facilitated political polarization on sensitive issues, such as the scope of the tribunal’s personal jurisdiction. The ECCC’s inclusion of investigating judges and a civil party system have also been problematic, delaying the process, adding to confusion, and at times jeopardizing the fairness of the proceedings.

Of course, structure is not entirely responsible for the ECCC’s performance. The agency of ECCC personnel and key stakeholders—particularly the Cambodian Government, United Nations, and major donor states—have also been fundamental determinants of the Court’s successes and failures.<sup>16</sup> A tribunal’s institutional design can make its functional success more or less difficult, however, and in Cambodia design flaws have added to the difficulty of running an efficient and effective hybrid court. In the remainder of this article, we examine how the ECCC’s experimental features have influenced its ability to manage the judicial process efficiently, deliver sound jurisprudence and fair trials, maintain judicial independence, administer funds and personnel effectively, engage survivors, and leave a positive institutional

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<sup>15</sup> Case 002 initially involved four charged persons, but Minister for Social Affairs Ieng Thirith was severed from the proceedings in 2011 due to a lack of fitness arising from dementia, and former deputy prime minister and foreign minister Ieng Sary died in early 2013.

<sup>16</sup> Interview with William Smith, ECCC deputy international Co-Prosecutor, Phnom Penh (June 5, 2012) (emphasizing that the Court operates within a structure that results from political compromise, but within that frame, “everything comes down to people”).

legacy for the rule of law in Cambodia. We conclude by drawing lessons that can help in the reform or design of more effective mass crimes courts in the future.

## II. CHALLENGES TO JUDICIAL EFFICIENCY

The complexity of mass crimes cases and the difficulty of combining personnel from different legal traditions are obstacles to efficiency in any mass crimes tribunal.<sup>17</sup> In theory, hybrid courts hold advantages in efficiency due to their proximity to crime sites and survivors and reliance on lower-paid national personnel. However, several of the ECCC's novel features—including judges with paramount investigative authority, co-equal national and international chief prosecutors and investigating judges, and a pre-trial chamber with duplicative appellate jurisdiction—have undermined the potential efficiency gains arising from its setting near the *locus delicti*.

### A. *Two Pairs of Two Investigators*

The ECCC's inclusion of two pairs of investigators has led to some inevitable redundancy and gridlock. Both the existence of investigating judges and the fact that both the Office of the Co-Prosecutors (OCP) and Office of the Co-Investigating Judges (OCIJ) are two-headed have contributed to the problem. The Co-Prosecutors' investigation of the first five suspects was meant to be "preliminary" but lasted for roughly a year due to the scale of the evidence, the challenge of managing a two-headed office,<sup>18</sup> and the extra time afforded by the judges' delay in completing the Internal Rules.<sup>19</sup> The Co-Investigating Judges (CIJs) have also undertaken lengthy investigations, slowed in part by the bifurcated nature of the office. The

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<sup>17</sup> See Alex Bates, *Transitional Justice in Cambodia: Analytical Report*, Atlas Project, ¶ 134 (Oct. 2010) (noting difficulties in work between the largely common law-trained staff in the OCP and largely civil law-trained staff in the OCIJ).

<sup>18</sup> See Smith interview, *supra* note 16 (noting that it is inefficient to have two heads, though there are benefits for the Cambodian judicial system by injecting Cambodians into a proper system).

<sup>19</sup> See Closing Order Against Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007-ECCC-OCIJ ¶ 4 (8 Aug. 2008) [hereinafter *Duch* Closing Order] (noting that the Co-Prosecutors began their preliminary investigation in July 2006 and filed their Introductory Submission in July 2007). In general, despite their differences over Cases 003 and 004, the two sides of the OCP have reportedly established a productive working relationship.

first international CIJ, Marcel Lemonde, recalls that, “every decision is like negotiating a treaty. In France or elsewhere, taking a decision takes half an hour, here we need 8 days.”<sup>20</sup> After receiving the Co-Prosecutors’ first Introductory Submission, the CIJs split Duch’s role in the infamous S-21 detention center (Case 001) from the case against the four charged senior leaders (Case 002), citing the need for “expedited resolution.”<sup>21</sup> The OCIJ then investigated Duch for another 10 months.<sup>22</sup> In total, the Court spent almost two years investigating a man who admitted most of the allegations against him. The OCIJ’s investigation of the other four charged persons took another two and a half years,<sup>23</sup> resulting in an investigation longer than the original life expectancy of the Court.

Although two-headed offices were bound to reduce efficiency, including investigating judges could theoretically produce efficiency gains. In the French inquisitorial system, investigating judges conduct extensive investigations and place both inculpatory and exculpatory evidence in a case file that is then reviewed by the trial court in a relatively brief trial that aims to verify the detailed findings rather than airing them fully.<sup>24</sup> Lemonde has argued that the Court’s structure was a promising marriage between the civil and common law systems, offering the possibility of an efficient, rigorous judicial investigation followed by a somewhat adversarial, relatively short trial.<sup>25</sup>

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<sup>20</sup> Bates, *supra* note 17, ¶ 131 (quoting Judge Lemonde). See also *Quelles leçons tirer du procès des Khmers rouges?* REVUE DE SCIENCE CRIMINELLE 597 (2011) (featuring an interview with Lemonde, translated from French by the authors) (noting that the official procedure for resolving CIJ disputes, the PTC, was not viable on a day-to-day basis, because it would take weeks or months).

<sup>21</sup> Separation Order, Case No. 002/14-08-2006, at 1 (OCIJ, Sept. 19, 2007).

<sup>22</sup> See *Duch Closing Order*, *supra* note 19, ¶ 7 (noting that the CIJs considered the investigation concluded in May 2008, three months prior to the Closing Order’s issuance).

<sup>23</sup> See *Closing Order*, Case 002/19-09-2007-ECCC-OCIJ ¶ 13 (Sept. 15, 2010) [hereinafter *Case 002 Closing Order*] (noting that the CIJs had completed the investigation eight months before the closing order’s issuance).

<sup>24</sup> Bates, *supra* note 17, ¶ 133; Göran Sluiter, *Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers*, 4 J. INT’L CRIM. JUST. 314, 324 (2006); CASSESE, *supra* note 3, at 356-358.

<sup>25</sup> Judge Marcel Lemonde, remarks at the conference on “The Contribution of Criminal Proceedings before the ECCC to Cambodian Law,” Royal University of Law and Economics, Phnom Penh, Dec. 4, 2012 [hereinafter *Judge Lemonde Remarks*]. The expectation of a short trial is implicit in the Internal Rules (principally drafted by Lemonde), which provide little opportunity for immediate appeal and—unlike other mass crimes courts—no provision for periodic review of defendants’ detention during trial. See ECCC Internal Rules (rev. 8), *supra* note 12, r. 82(1), r. 104(4). Lemonde initially estimated the need for six months of investigation followed by a three-month trial. Interview with Michiel Pestman, former Co-

The French civil law approach is problematic in a mass crimes context, however. The sheer volume of potential inculpatory and exculpatory evidence in large-scale atrocity cases places an immense burden on investigating judges and can create an institutional bottleneck,<sup>26</sup> which has occurred at the ECCC. In addition, the combination of a confidential judicial investigation and abbreviated courtroom trial would undermine the legitimate aim of giving the public an opportunity to observe and learn from the proceedings. As Clint Williamson, former UN Special Expert to Advise on the UN Assistance to the Khmer Rouge Trials, argues:

The idea that having a judicial investigation process behind closed doors would speed the process was deeply flawed, because there is so much appetite from the public to hear the story...a lengthy trial phase is bound to happen.<sup>27</sup>

Lengthy trials have occurred indeed, incorporating many aspects of common law practice to educate the public and help the Trial Chamber judges manage the case. Numerous witnesses are being heard, and although civil law judges normally direct the questioning of parties and selected witnesses, in Case 002 the judges have given the parties primary responsibility for questioning judicially-selected witnesses.<sup>28</sup>

Moreover, the Court's Internal Rules do not allow defense teams to confront witnesses during the investigation,<sup>29</sup> leading defense lawyers to issue extensive challenges to material in the case file. In response, the Trial Chamber has found that while witness statements taken by

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Lawyer for Nuon Chea, Phnom Penh (June 9, 2012). One of the authors also heard this from the international CIJ upon her arrival in Phnom Penh.

<sup>26</sup> See CASSESE, *supra* note 3, at 357.

<sup>27</sup> Interview with Clint Williamson, former UN Special Expert to advise on the UN Assistance to the Khmer Rouge Trials and former U.S. Ambassador-at-Large for War Crimes Issues, via telephone (June 27, 2012). See also Interview with Anta Guissé, Co-Lawyer for Khieu Samphan, Phnom Penh (Nov. 15, 2012) (noting that because civil law trials are so short, the common law system may better suit mass crimes proceedings); Interview with Panhavuth Long, Program Officer, Cambodian Justice Initiative, Phnom Penh (July 6, 2012) (noting that if the investigation were more public the trial could be shorter).

<sup>28</sup> Interview with Michael G. Karnavas, former Co-Lawyer for Ieng Sary, Phnom Penh (May 19, 2012) (arguing that judges are "abdicated their role" because they "haven't read the [case] file").

<sup>29</sup> Internal Rule 60(2) provides in part: "Except where a confrontation is organized, the [CIJs] or their delegates shall interview witnesses in the absence of Charged Persons ... or their lawyers[.]" ECCC Internal Rules (rev. 8), *supra* note 12.

the CIJs are “entitled to a presumption of relevance and reliability[,]”<sup>30</sup> they may be entitled “to little, if any probative value or weight” if the witness does not testify at trial due to the lack of prior opportunity for confrontation.<sup>31</sup> Most Court analysts and officials agree that the ECCC’s structure has produced the “worst possible outcome”<sup>32</sup> of a “full-length judicial investigation and a full-length trial.”<sup>33</sup>

### **B. A Repetitive Structure for Appeals**

The Pre-Trial Chamber (PTC) has only added to the Court’s inefficiency. The ECCC Law gave the PTC the singular task of resolving disagreements between the Co-Prosecutors or between the CIJs,<sup>34</sup> but the Internal Rules later gave the PTC jurisdiction over appeals against orders of the CIJs as well. PTC decisions cannot be appealed, and are not binding on the Trial Chamber. Moreover, the Trial Chamber has held that it has “no competence to review decisions of the Pre-Trial Chamber.”<sup>35</sup> Thus, questions can be raised at least four times – before the CIJs, PTC, Trial Chamber, and SCC – before being resolved.<sup>36</sup> For example, the issue of Ieng Sary’s 1996 pardon and amnesty was addressed by the CIJs twice, reviewed by the PTC twice on appeal, then reviewed *de novo* by the Trial Chamber before it was appealed to the SCC prior to

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<sup>30</sup> Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, Case No. 002/19-09-2007-ECCC/TC, ¶ 26 (Trial Chamber, June 20, 2012).

<sup>31</sup> *Id.* ¶ 27. See Anne Heindel, *Admissibility of Witness Statements In Lieu of Oral Testimony* (July 31, 2012), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

<sup>32</sup> See, e.g., Interview with Rupert Skilbeck, former head of the ECCC Defense Support Section, via telephone (June 7, 2012); Bates, *supra* note 17, ¶ 132 (citing interviews with judicial staff and noting that many questions asked during 60 witness interviews and two days of pre-trial *in camera* hearings with Duch were later repeated at trial); authors’ interviews with parties.

<sup>33</sup> Bates, *supra* note 17, ¶ 133 (quoting Trial Chamber Judge Silvia Cartwright).

<sup>34</sup> ECCC Internal Rules (rev. 8), *supra* note 12, r. 73(a); Interview with Hans Corell, former UN Legal Counsel, via telephone (Nov. 15, 2012) (Saying his team invented the PTC only for that purpose).

<sup>35</sup> Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan, and Ieng Thirith, Case, Case No. 002/19-09-2007/ECCC/TC, ¶ 21 (Trial Chamber, Feb. 16, 2011). The Internal Rules are silent on this question.

<sup>36</sup> See Michael Karnavas & Ang Udom, *The Diligent Defense of Ieng Sary Is Not a Delaying Tactic*, CAMBODIA DAILY, July 11, 2011.

his death.<sup>37</sup> His former defense counsel, Michael Karnavas, argues that this was a waste of money and effort, saying he had “to jump through four different hoops in order to be due diligent so I [could] say I preserved my record for appeal.”<sup>38</sup>

All mass crimes courts struggle to manage trials efficiently without undue compromises in fairness or transparency, but the ECCC’s complex structure has made the judicial process much longer and more costly than necessary and has produced much more than unwanted costs. It has also jeopardized the Court’s ability to complete its most important case against the elderly Case 002 defendants, leading to the decision to split the indictment and hold a “mini” trial known as Case 002/1, which will focus on the April 1975 evacuation of Phnom Penh, killings at the Tuol Po Chrey execution site during the evacuation, subsequent forced transfer of hundreds of thousands of Cambodians between late 1975 and 1977, and related crimes against humanity.<sup>39</sup> Case 002/1 will not address many of the crimes alleged in the Case 002 closing order, including genocide, crimes committed at worksites and cooperatives, forced marriage,

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<sup>37</sup> A supermajority of the Supreme Court found the appeal inadmissible under its narrow interlocutory jurisdiction. Decision on Ieng Sary’s Appeal Against the Trial Chamber’s Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne Bis in Idem* and Amnesty and Pardon), Case No. 002/19-09-2007-ECCC-TC/SC(11) (SCC, Mar. 20, 2012) [hereinafter SCC *Ne Bis in Idem* and Amnesty and Pardon Decision]. Thus, the issue likely will be finally adjudicated on appeal from the trial judgment. Two international judges dissented, arguing the SCC had an obligation “to give the Appeal full consideration at the earliest possible juncture.” *Id.* Dissenting Opinion of Judges Klonowiecka-Milart and Jayasinghe ¶ 4. See also Anne Heindel, *Interpreting the Right of Appeal in the Interest of Fair Proceedings* (July 12, 2012), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

<sup>38</sup> Karnavas interview, *supra* note 28. See also Interview with Craig Etcheson, former investigator at the ECCC Office of the Co-Prosecutors, via telephone (Oct. 22, 2012) (emphasizing that “[t]he amount of staff and lawyer time required [to address these repeated challenges] is quite remarkable”). To reduce the overlap, the PTC generally has exercised its jurisdiction narrowly, emphasizing that questions raised on appeal that are explicitly within the jurisdiction of the Trial Chamber can be raised there. Decision on Appeal against Provisional Detention Order of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), ¶ 23 (PTC, Oct. 17, 2008). For example, the PTC declined to rule on certain issues pertaining to Duch’s pre-trial detention and the applicability of the Joint Criminal Enterprise (JCE) doctrine at the ECCC since the Trial Chamber would later consider them. Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias “Duch,” Case No. 001/18-07-2007-ECCC/OCIJ (PTC01), ¶ 63 (PTC, Dec. 3, 2007) [hereinafter Decision on Duch’s Detention Appeal]; Confidential Cable by the U.S. Embassy Phnom Penh, *Khmer Rouge Tribunal: Rocky Road for New Cases, Steady Path for Trial of Five KR Leaders*, Nov. 28, 2008, ¶ 6, available at <http://www.wikileaks.org/cablegate.html> (noting that the PTC did not want to “pre-empt” the Trial Chamber on JCE). However, this approach has not prevented multiple rulings on important issues, including JCE.

<sup>39</sup> Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, Case No. 002/19-09-2007/ECCC/TC, ¶ 4 (Trial Chamber, Apr. 26, 2013) [hereinafter 2013 Severance Decision].

and torture and killing at internal security sites unrelated to forced migration. It will also address only a few of the five broad criminal policies of which the senior Khmer Rouge leaders are accused.<sup>40</sup>

The limited scope of Case 002/1 will lessen the impact of any verdict. Moreover, two of the four charged persons in Case 002 have already escaped justice. Former Khmer Rouge social affairs minister Ieng Thirith was judged unfit to stand trial in November 2011, and her husband, DK foreign minister Ieng Sary, passed away in March 2013. The death of Ieng Sary, one of the chief figures in Democratic Kampuchea, has prompted advocacy groups to press the Court to hasten the trial and casts doubt on the likelihood that the ECCC will complete the case successfully.<sup>41</sup> Beyond forced evacuation and one site where members of the former regime were executed, it is increasingly unlikely that key criminal policies of the Khmer Rouge will be addressed.

### III. JURISPRUDENCE

The majority of Cambodian judges on the bench—and their presumptive inexperience and lack of independence—led many officials and human rights advocates to doubt the ECCC’s ability to produce credible jurisprudence.<sup>42</sup> Political interference has indeed been a major problem with respect to the Court’s investigation of suspects beyond the five persons on

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<sup>40</sup> The closing order accused the senior Khmer Rouge leaders of participation in a joint criminal enterprise featuring five broad nationwide policies—forced movement; establishment and operation of cooperatives and worksites; re-education and killing of purported enemies of the regime; targeting of specific groups, in particular Cham Muslims, ethnic Vietnamese, Buddhists, and members of the previous political regime; and the regulation of marriage. Case 002 Closing Order, *supra* note 23, ¶ 1525. The Trial Chamber has asserted that it will address two of these policies—the first and the third. 2013 Severance Decision, *supra* note 39, ¶ 118 (responding to a Supreme Court Chamber decision in February 2013 that annulled the 2011 severance order and all subsequent related decisions).

<sup>41</sup> See Sebastian Strangio, *How a Brutal Khmer Rouge Leader Died ‘Not Guilty,’* THE ATLANTIC (Apr. 2013).

<sup>42</sup> See, e.g., Human Rights Watch, *UN: Khmer Rouge tribunal flawed* (Apr. 30, 2003) (in which Mike Jendrzeczyk argues that “with Cambodia’s judiciary at the center of the tribunal, the agreement ensures that it will be politics and not law that dominate the tribunal’s work”). Kofi Annan expressed the same concern. U.N. Secretary General, *Report of the Secretary-General on Khmer Rouge trials*, ¶ 29, U.N. Doc. A/57/769 (Mar. 31, 2003). For similar reasons, a UN-appointed Group of Experts had recommended against a mixed tribunal in 1999. Report of the Group of Experts for Cambodia, established pursuant to G.A. Res. 52/135, U.N. GAOR, 53<sup>rd</sup> Sess., Annex, ¶ 137, U.N. Doc. A/53/850, S/1999/231 (Mar. 16, 1999).

selected issues,<sup>43</sup> but on most judicial matters the ECCC has functioned much like a fully international court—open to legitimate legal challenges but demonstrating a good faith effort to follow established norms of accountability and due process.<sup>44</sup> This has been true even on some issues that present difficult legal questions or involve domestic political sensitivities. Three of the most notable examples are discussed below.

### ***A. Applicability of Joint Criminal Enterprise Liability***

The Court’s most significant international jurisprudential legacy may be its decision on Joint Criminal Enterprise Liability (JCE). JCE is a theory of liability first articulated in ICTY jurisprudence and, though not listed in the ICTY/R or SCSL Statutes, has been found to be contained therein as a form of “commission.” It is used to connect high-level accused—the planners, organizers, and ideologues who may not be physically connected to criminal acts but were catalysts for them—to the lower-level offenders who executed the crimes at their behest. It is particularly useful in a situation such as that faced by the ECCC, where those who carried out crimes (for example Duch in Case 001) claim they were acting under duress, and those at the top of the organizational hierarchy (the senior leaders in Case 002) claim the crimes were committed by errant or over-enthusiastic lower-level cadres.

There are three JCE categories.<sup>45</sup> All three involve “a plurality of persons” acting with a common purpose to commit crimes within the jurisdiction of the Court. The accused must contribute to this common plan. Each JCE category has a different mental or *mens rea* requirement. Participants in a JCE-1 or “basic” JCE must share the intent to commit a crime within the jurisdiction of the court. JCE-2, also known as “systemic” JCE, is a variant of the basic form and is characterized by existence of an organized system of ill-treatment. Thus far, it has only been found in cases involving prison camps, including the S-21 detention center. To be held liable for JCE-2, participants must have had personal knowledge of the system of ill-

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<sup>43</sup> See *infra* §V.

<sup>44</sup> In practice, international judges generally have taken the lead in drafting decisions, and Cambodian judges have deferred to their leadership on most questions, giving the Court’s jurisprudence a strong international character.

<sup>45</sup> See *generally* Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, Judgment, ¶¶ 226-28 (Appeals Chamber, July 15, 1999).

treatment and intended to further that system. An accused who participates in a basic or systemic JCE can also be held responsible for JCE-3, known as “extended” JCE, for crimes falling outside the scope of the plan if it was foreseeable that those crimes would be committed in furtherance of the plan and the accused knowingly took that risk. JCE-3 is the most contentious due to the fact that an accused individual need not intend nor play a role in the “extended” crime with which he or she is charged.

The status of JCE liability as of 1975 has never been addressed squarely in legal proceedings. In the seminal *Tadic* case, the ICTY determined that JCE existed under customary international law as of 1992, relying primarily on post-WWII, pre-1975 international and domestic precedents, but its analysis remains highly controversial. The ECCC Trial Chamber has found that JCE-1 and JCE-2 fall within the jurisdiction of the Court both in Case 001<sup>46</sup> and in Case 002.<sup>47</sup> However, when the applicability of JCE-3 arose in the Court’s second case, the Pre-Trial Chamber conducted “the most comprehensive judicial analysis of the jurisprudential bases for JCE since the notion was first articulated by the *Tadic* Appeals Chamber”<sup>48</sup> and found that the precedent cited by the *Tadic* court was unclear and its legal reasoning was unconvincing.<sup>49</sup> This view was then adopted by the Trial Chamber.<sup>50</sup> As a consequence, the Trial Chamber has ruled that JCE-3 “did not form part of customary international law and was not a general principle of law at the time relevant[.]”<sup>51</sup> Although this determination is limited to the ECCC’s temporal jurisdiction, it will have lasting legacy as the first direct challenge to *Tadic*’s finding that JCE-3 existed in customary international law before 1999. While debatable,

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<sup>46</sup> Prosecutors v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶¶ 511-12 (Trial Chamber, July 26, 2010) [hereinafter *Duch* Trial Chamber Judgment].

<sup>47</sup> Decision on the Applicability of Joint Criminal Enterprise, Case No. 002/19/09-2007/ECCC/TC, ¶ 22 (Sept. 12, 2011) [hereinafter Trial Chamber JCE Decision] (noting the previous finding in the *Duch* judgment).

<sup>48</sup> Michael Karnavas, *Joint Criminal Enterprise at the ECCC: A Critical Analysis of Two Divergent Commentaries on the Pre-Trial Chamber’s Decision Against the Application of JCE* (2010) at 32, available at <https://sites.google.com/site/iengsarydefence/articles> (last visited Jan. 29, 2013).

<sup>49</sup> See generally Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), Case No. 002/19-09-2007/OCIJ (PT35) (Pre-Trial Chamber, Sept. 19, 2007).

<sup>50</sup> Trial Chamber JCE Decision, *supra* note 47, ¶¶ 30-37.

<sup>51</sup> *Id.* ¶ 16.

the ECCC's decision was grounded in credible reasoning and showed the Court's ability to grapple with important and controversial issues in substantive law.

### **B. *Illegality of Duch's Military Court Detention***

Before it was reversed by the Supreme Court Chamber, the decision most likely to leave an immediate jurisprudential legacy for Cambodian courts was the Trial Chamber's remedy for the over eight years Duch was detained without trial by the Cambodian Military Court before being handed over to the ECCC for investigation. The issue was an important test for the Court's willingness to criticize a human rights violation by the Cambodian government. The Trial Chamber, like the Pre-Trial Chamber before it, had determined that because of the ECCC's formal and functional independence from domestic Cambodian courts and lack of connection to the Military Court proceedings, the ECCC could not be attributed with prior violations of Duch's rights.<sup>52</sup> Nevertheless, the Trial Chamber found:

The ECCC Law not only authorizes the ECCC to apply domestic criminal procedure, but also obligates it to interpret these rules and determine their conformity with international standards prescribed by human rights conventions and followed by international courts.<sup>53</sup>

Finding that Duch's prior detention was a violation of applicable Cambodian and international law, the Chamber decided that he was entitled to a remedy for this human rights violation, the nature and extent of which would be determined at sentencing.<sup>54</sup> At final judgment, the Trial Chamber therefore subtracted five years from Duch's sentence.<sup>55</sup>

Due to the existence of routine and legally excessive pre-trial detention without charge in Cambodian courts, this decision had major political importance. The Cambodian judges

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<sup>52</sup> See Decision on Request for Release, Case 001/1/-07/2007/ECCC/TC, ¶ 14 (Trial Chamber, June 15, 2009) [hereinafter Decision on Request for Release]; Decision on Duch's Detention Appeal, *supra* note 38, ¶ 21.

<sup>53</sup> Decision on Request for Release, *supra* note 52, ¶ 15. See also Anne Heindel, Amicus Brief In the Matter of the appeal by Kaing Guek Eav (Duch) against the order of provisional detention by the Office of the Co-Investigating Judges dated 31 July 2007, ¶ 24 (PTC, Oct. 4, 2007), available at <http://www.eccc.gov.kh/en/document/court/amicus-curiae-brief-anne-heindel-dc-cam>.

<sup>54</sup> Decision on Request for Release, *supra* note 52, ¶¶ 35, 36.

<sup>55</sup> *Duch* Trial Chamber Judgment, *supra* note 46, ¶ 627.

joined in unanimous recognition of Duch’s human rights violation, and the implicit censure of ECCC Pre-Trial Chamber Judge Ney Thol, who also serves as the president of the Military Court. One commentator noted, “This sort of challenge is unprecedented in modern Cambodian history and a great victory for the rule of law.”<sup>56</sup> A Cambodian NGO said, “The approach of the ECCC sets a strong precedent to the Cambodian justice system for the universal recognition of fair trial rights and how violations of such rights should be acknowledged in sentencing.”<sup>57</sup> And Judge Nil Nonn, the Trial Chamber’s president, “noted the solution used in Duch’s case, to reduce his ultimate sentence of imprisonment further for a breach of his fair trial rights, and [said] that he would seek to implement this when he returned to his national practice.”<sup>58</sup>

Unfortunately, the potential impact of the decision was substantially muted when a supermajority of the Supreme Court Chamber ruled *sua sponte* that the decision to grant Duch a remedy for the violation was an error of law.<sup>59</sup> This outcome was unexpected, as the Prosecution had not challenged the reduction and it was not briefed on appeal. International monitors viewed the outcome as a political decision calculated to please the Cambodian public. Rupert Abbott of Amnesty International said, “The decision to overturn the legal remedy for Duch’s unlawful detention and to provide no alternative may be perceived as a case of public opinion trumping human rights.”<sup>60</sup> To former DSS head Richard Rogers, it also suggested the weakness of the ECCC’s structure, which allowed a bloc of domestic judges and a single international judge to determine a politically sensitive outcome.<sup>61</sup>

Writing in dissent, two international Supreme Court Chamber judges emphasized, “[A] state which unlawfully limits an individual’s physical liberty is obligated to provide an

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<sup>56</sup> Bates, *supra* note 17, ¶ 232.

<sup>57</sup> Cambodian Center for Human Rights, *Third Bi-Annual Report: Fair Trial Rights – One Year Progress* (Jan. 2012), at 44.

<sup>58</sup> Bates, *supra* note 17, ¶ 146.

<sup>59</sup> Prosecutors v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/SC, Appeal Judgment, ¶ 399 (Feb. 3, 2012) [hereinafter *Duch Appeal Judgment*].

<sup>60</sup> Press Release, Amnesty International, *Cambodia: Khmer Rouge Judgment Welcome, But Raises Human Rights Concerns* (Feb. 8, 2012).

<sup>61</sup> Interview with Richard Rogers, former Head of the ECCC Defense Support Section, Phnom Penh (May 29, 2012) (calling Judge Noguchi’s support for the majority a “mistake” and noting that political pressure could also be brought to bear to try to “turn” a single international judge to achieve a supermajority).

adequate remedy.”<sup>62</sup> In their view, this required that the ECCC both acknowledge Duch’s illegal confinement, and reduce his sentence accordingly<sup>63</sup>:

Our remedy ensures that KAING Guek Eav’s crimes are strongly condemned and forcefully punished. It also ensures, however, that his sentence is consistent with internationally recognized standards of fairness and that this Court continues to serve as a model for fair trials conducted with due respect for the rights of the accused.<sup>64</sup>

The Trial Chamber decision made a substantial contribution toward promoting a rule-of-law culture within the national judiciary that would extend far beyond the ECCC’s limited mandate and the short period of time during which it will be in operation. The Supreme Court Chamber supermajority reversal of that decision, while comforting to many Khmer Rouges victims, was deleterious to the Court’s legacy for domestic judicial reform.

### *C. Impact of Ieng Sary’s Domestic Pardon and Amnesty*

Long before Case 002 began, analysts foresaw that the prosecution of accused Ieng Sary would pose special challenges for the ECCC. Ieng Sary and Pol Pot were convicted of genocide *in absentia* in 1979 by the People’s Revolutionary Tribunal—a special court established by the Vietnam-backed government that ousted the Khmers Rouges—which sentenced them to death and confiscation of all of their property.<sup>65</sup> Years later, as part of a 1996 deal with the successor Cambodian Government to facilitate Ieng’s defection from the still powerful Khmers Rouges with his followers, King Sihanouk issued a Royal Decree pardoning Ieng from his 1979 sentence and providing him an amnesty from prosecution under the 1994 Law to Outlaw the Democratic

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<sup>62</sup> *Duch Appeal Judgment*, *supra* note 59, Partially Dissenting Joint Opinion of Judges Agnieszka Klonowiecka-Milart & Chandra Nihal Jayasinghe, ¶ 17.

<sup>63</sup> *Id.* ¶¶ 20, 28.

<sup>64</sup> *Id.* ¶ 30.

<sup>65</sup> Unlike the Genocide Convention and ECCC Law, the 1979 tribunal defined genocide as “planned massacres of groups of innocent people; expulsion of inhabitants of cities and villages in order to concentrate them and force them to do hard labor in conditions leading to their physical and mental destruction; wiping out religion; destroying political, cultural and social structures and family and social relations.” *See Decree Law No. 1: Establishment of People’s Revolutionary Tribunal at Phnom Penh to Try the Pol Pot-Ieng Sary Clique for the Crime of Genocide* (July 15, 1979).

Kampuchea Group, raising obvious tensions with international norms against granting amnesty for crimes such as genocide.<sup>66</sup>

As the ECCC is an “internationalized” court,<sup>67</sup> its obligation to recognize the validity of the Ieng Sary amnesty has been debated since negotiations began. The ECCC framers did not address the effect of the Royal Decree on the Court’s jurisdiction, but instead gave the ECCC judicial chambers explicit authority to determine the scope of any pre-existing amnesty or pardon.<sup>68</sup> There is wide, though not universal, agreement that domestic amnesties for serious international crimes are invalid under international law. Acceptance of their invalidity is broadest with regard to crimes for which a state has a treaty obligation to prosecute or extradite.<sup>69</sup> Cambodia has treaty obligations to prosecute or extradite persons who commit grave breaches under the 1949 Geneva Conventions and genocide under the 1948 Genocide Convention, both of which have been charged in Case 002. As a consequence of these obligations, the ECCC Trial Chamber found that the 1996 Decree could not “relieve it of the duty to prosecute these crimes or constitute an obstacle thereto.”<sup>70</sup> There is also growing support for the view that domestic amnesties for other serious crimes, such as crimes against humanity, are likewise invalid under customary international law.<sup>71</sup>

The ECCC Trial Chamber examined the views of international, regional and state courts, as well as human rights bodies, and agreed that there is an emerging consensus that blanket amnesties violate states’ duty to investigate serious international crimes and punish the

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<sup>66</sup> See generally Ronald C. Slye, *The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violation of Human Rights*, 22 WIS. INT’L L. J. 99 (2004). Ieng Sary is the only Khmer Rouge leader to have received an amnesty.

<sup>67</sup> “Internationalized” is an ambiguous term used to denote courts comprising both national and international legal characteristics.

<sup>68</sup> Framework Agreement, *supra* note 6, art. 11(2); ECCC Law, *supra* note 7, art. 40.

<sup>69</sup> See, e.g., Prosecutor v. Kallon et al., Case No. SCSL-04-15-AR72(E) & SCSL-04-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶ 73 (Appeals Chamber, Mar. 13, 2004) [hereinafter SCSL Lomé Accord Amnesty Decision].

<sup>70</sup> Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne bis In Idem* and Amnesty and Pardon), Case No. 002/19-09-2007-ECCC/TC, ¶ 39 (Nov. 3, 2011) [hereinafter Decision on Ieng Sary].

<sup>71</sup> See, e.g., Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 Oct. 2000, U.N. Doc. S/2000/915, ¶ 22 (2000) (discussing the effect on the jurisdiction of the SCSL of the amnesty clause in the Lomé Peace Agreement); SCSL Lomé Accord Amnesty Decision, *supra* note 69 ¶ 82 (finding a “crystallizing international norm that a government cannot grant amnesty for serious violations under international law”).

perpetrators. Notably, it found the creation of the ECCC and other hybrid courts to evince the determination of states that serious crimes should not go unpunished.<sup>72</sup> It therefore concluded, “[S]tate practice demonstrates at a minimum a retroactive right for third States, internationalized and domestic courts to evaluate amnesties and set them aside or limit their scope should they be deemed incompatible with international norms.”<sup>73</sup> Having previously found that the Royal Decree may have been intended to grant Ieng Sary general immunity for *any* criminal acts committed before 1996,<sup>74</sup> the Trial Chamber ruled that, because this is at odds with Cambodia’s treaty obligations and the trend in customary international law, it had the discretion to find that the scope of the amnesty excludes the serious international crimes with which Ieng Sary is charged.<sup>75</sup>

The Trial Chamber did not make this finding on the basis of the ECCC’s hybrid character, but ruled solely on the basis of Cambodia’s state obligations. The decision thus strongly affirms fully domestic Cambodian courts’ obligation to prosecute and punish all persons responsible for serious international crimes, and concomitantly the accountability of all those who perpetrate them. As justice advocate Youk Chhang emphasized after Ieng was taken into detention in 2007, “The arrests of the most politically untouchable of the Khmer Rouge leaders is a powerful message to the people of Cambodia[.]”<sup>76</sup>

The Ieng Sary defense appealed the Chamber’s decision in part on the basis that it acted *ultra vires* by evaluating not only the scope but also the validity of the Decree.<sup>77</sup> However, a Supreme Court Chamber supermajority found that there could be no final determination until

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<sup>72</sup> Decision on Ieng Sary, *supra* note 70, ¶ 47.

<sup>73</sup> *Id.* ¶ 53.

<sup>74</sup> *But see* David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in INTERNATIONAL CRIMINAL LAW, 232 (M. Cherif Bassiouni ed., 3<sup>rd</sup> ed. 2008) [hereinafter Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*] (recounting how he was told in 2000 that Hun Sen claimed to have “personally drafted the pardon and amnesty for Ieng Sary in 1996 and purposely made it so that Ieng Sary would be subject to prosecution for the Pol Pot era crimes”).

<sup>75</sup> *See* Decision on Ieng Sary, *supra* note 70, ¶ 55.

<sup>76</sup> Youk Chhang, *Arrest of Ieng Sary and Wife Is an Important Victory for Victims*, CAMBODIA DAILY, Nov. 15, 2007. Chhang is the executive director of the Documentation Center of Cambodia, which has played a crucial role in preserving information about the Khmer Rouge era and promoting accountability.

<sup>77</sup> *See* Decision on Ieng Sary, *supra* note 70, ¶¶ 2, 16-17.

judgment because the issue fell outside the narrow scope of its interlocutory review authority.<sup>78</sup> Although it is troubling that Ieng Sary died before knowing whether or not the Court had the competence to try him in the first place, the lower Chambers' decisions on this topic have been based on reasonable jurisprudence and have been consistent with the trend in international practice.

#### IV. FAIRNESS TO THE PARTIES

Despite delivering reasonable jurisprudence on most of the issues it has encountered, the ECCC has faced a number of legitimate defense challenges regarding the fairness of the proceedings. Two of the Court's novel features have generated dogged fairness concerns: the decision to include a robust role for investigating judges, and the decision to have the Court apply Cambodian procedural rules.

##### A. *Effect of the Co-Investigating Judges*

Given the nationwide scope of the crimes that occurred during the Khmer Rouge era, investigating the roles and responsibility of the surviving senior leaders in Case 002 was bound to be a monumental task for the ECCC's Office of the Co-Investigating Judges (OCIJ). There are many potential advantages to a judicial investigation. In mass-crimes cases defense counsel have difficulties gathering evidence due to a lack of resources and cooperation. In theory, it would be fairer for an impartial judge to question witnesses on behalf all parties and take statements under oath that could be used as evidence at trial. A judge-led investigation should also be more professional, thorough, and balanced, preventing interviews riddled with leading questions and hearsay statements and ensuring that all inculpatory and exculpatory evidence is brought to the fore.

However, when asked to identify the ECCC's principal structural flaw, many Court officials interviewed immediately named the OCIJ. In addition to the efficiency concerns discussed above,<sup>79</sup> the inclusion of investigating judges has raised fairness concerns.

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<sup>78</sup> SCC *Ne Bis in Idem* and Amnesty and Pardon Decision, *supra* note 37.

<sup>79</sup> See *supra* §II(A).

Investigating judges have enormous discretionary power, which has led France and other national judicial systems to limit or eliminate their role.<sup>80</sup> The Case 002 defense teams have attacked the investigatory process, alleging bias, methodological failures, procedural irregularities, and a lack of transparency. Their criticisms are directed largely toward the attitudes and professionalism of specific judges but have also helped reveal intrinsic weaknesses in the capacity of this novel institutional feature to meet the needs of a mass-crimes process.<sup>81</sup>

According to the ECCC Internal Rules, the CIJs “may take any investigative action conducive to ascertaining the truth. In all cases they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory.”<sup>82</sup> The power to investigate is exclusive to the CIJs. Concomitantly, the parties are prohibited from undertaking their own investigations, though they “are entirely free to review any document from any public source in their search for evidence” and to request that the CIJs place it in the case file.<sup>83</sup> They may also request the CIJs to undertake any investigative action they consider “useful for the conduct of the investigation.”<sup>84</sup>

Because the CIJs act independently, they have broad discretion to decide whether or not an investigative act is useful.<sup>85</sup> In making this evaluation, they have no explicit duty to consult with the party requesting an investigative action before rejecting it, nor have they done so. Investigative requests have been rejected without adequate reasoning, and some were never addressed, obligating the PTC to itself review the merits.<sup>86</sup> Fewer than 20% of the Nuon Chea

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<sup>80</sup> Interview with Jeanne Sulzer, former Legal Officer, Civil Party Co-Lead Lawyers Section, Phnom Penh (June 1, 2012) (stating that France is phasing out investigative judges due to concerns that excessive power and pressure has led to errors and abuse).

<sup>81</sup> *See also id.* (noting that investigating judges from national systems are unaccustomed to leading teams on mass crimes cases).

<sup>82</sup> *See* ECCC Internal Rules (rev. 8), *supra* note 12, r. 55(5).

<sup>83</sup> Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, Case No. 002/19-09-2007-ECCC-OCIJ, ¶ 14 (June 19, 2009) [hereinafter SMD Order].

<sup>84</sup> ECCC Internal Rules (rev. 8), *supra* note 12, r. 55(10).

<sup>85</sup> Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 24), ¶ 22 (Nov. 18, 2009) [hereinafter SMD Decision].

<sup>86</sup> *See, e.g.*, Decision on Reconsideration of Co-Prosecutors’ Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the

team's investigative requests were carried out.<sup>87</sup> "You tie our hands, and then you don't go out and do what you are supposed to do," laments Ieng Sary's former Co-Lawyer Michael Karnavas.<sup>88</sup>

In most tribunals, prosecutors are not expected to be neutral, so there is no presumption that their witness statements will be neutral, it is more difficult to challenge their integrity, and a successful challenge is unlikely to infect the entire case. In contrast, at the ECCC the CIJs have near-total investigative discretion,<sup>89</sup> and thus the fairness of the entire process is dependent on their perceived independence and impartiality.<sup>90</sup> The CIJs and some investigators provided easy targets for multiple personal bias challenges.<sup>91</sup> Although none of these challenges succeeded, they contributed to doubts about the integrity of the ECCC as a whole.

A structure that relies on investigating judges arguably carries an inherent bias toward the prosecution's case—at least in a complex mass crimes case—because the prosecutors furnish vast amounts of information in the initial submission. Khieu Samphan Co-Lawyer Anta Guissé says, "In the domestic [French] system, as soon as an investigative judge is assigned, the prosecution is no longer in charge of the investigators. Here, the prosecutors had a long time to shape the case; everyone is already biased."<sup>92</sup> The CIJs essentially acknowledged this when they

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Charged Persons' Knowledge of the Crimes, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 67), ¶ 68 (Sept. 27, 2010) (in which the PTC reviews the request due to the CIJs' "failure to meet their obligation to provide reasoned orders"); Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 10), ¶ 24 (Oct. 21, 2008) (admitting an appeal due to the "failure of the Co-Investigating Judges to rule on the Request as soon as possible").

<sup>87</sup> One defense lawyer argues that by shutting parties out of the process, Judge Lemonde created the defense "monster" that continually challenged his work. Interview with Andrew Ianuzzi, former Legal Consultant to Nuon Chea, Phnom Penh (May 29, 2012).

<sup>88</sup> Karnavas interview, *supra* note 28.

<sup>89</sup> See SMD Decision, *supra* note 85, ¶ 22 (affirming its prior finding that the CIJs "are independent in the way they conduct their investigation").

<sup>90</sup> See Guissé interview, *supra* note 27 ("Investigative Judges are so powerful, if they are good it is perfect; if they are bad it is very bad.").

<sup>91</sup> See, e.g., Ieng Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde & Request for a Public Hearing, Case No. 002/19-09-2007-ECCC/OCIJ(PTC01), ¶ 29 (Oct. 9, 2009); Douglas Gillison, *Claim of Bias Made Against ECCC Judge*, CAMBODIA DAILY, Oct. 9, 2009.

<sup>92</sup> Guissé interview *supra* note 27. But see Etcheson interview, *supra* note 38 (saying that the investigating judges "largely ignored the final submission" when writing the closing order, which is problematic because the prosecution is responsible for carrying the closing order into court and may not agree with the form of the charges).

said: “The logic underpinning a criminal investigation is that the principle of sufficiency of evidence outweighs that of exhaustiveness: an investigating judge may close a judicial investigation once he has determined that there is sufficient evidence to indict a Charged Person.”<sup>93</sup>

Investigating judges have limited capacity to digest a vast Introductory Submission and pursue extensive further investigation. Former Defense Support Section head Richard Rogers says that due to the complexity of Case 002, the CIJs were unable to examine carefully all the documents referenced in the Prosecutors’ Introductory Submission, let alone develop exculpatory evidence.<sup>94</sup> Karnavas asserts, “[The CIJs] never did an investigation; they only did a validation. The investigation was done for them by the Prosecution.” When the CIJs began, they had nothing but the Prosecution’s submission, and “natural instinct says, let me rely on what has already been done.”<sup>95</sup> Employing investigators from diverse legal traditions may exacerbate this tendency. Arguably, “It’s not in the DNA of investigators from the Anglo-Saxon system to look for exculpatory evidence in the sense of the French system.”<sup>96</sup> Guissé notes that unlike the practice in France, the CIJs delegated their power to investigators without a standardized methodology or code of conduct. “The [CIJs] need to take more control over investigators.”<sup>97</sup>

The confidentiality of a judicial investigation makes it difficult for the public – and even the parties – to assess its quality.<sup>98</sup> Former Nuon Chea Co-Lawyer Michiel Pestman argues that

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<sup>93</sup> SMD Order, *supra* note 83, ¶ 6. The Pre-Trial Chamber disagreed, finding that the judges have a duty to examine all documents for which there is a *prima facie* reason to believe they may contain exculpatory evidence before assessing the sufficiency of the evidence for trial. SMD Decision, *supra* note 85, ¶¶ 36-37.

<sup>94</sup> Rogers interview, *supra* note 61 (arguing further that formal investigatory requests cannot compensate for the absence of client instructions regarding potential lines of inquiry).

<sup>95</sup> Karnavas interview, *supra* note 28.

<sup>96</sup> *Id.* See also Guissé interview, *supra* note 27 (“Investigators from different judicial backgrounds don’t have the same habits, don’t consider the consequences of what they are doing as they don’t know how the evidence will be used.”).

<sup>97</sup> Guissé interview, *supra* note 27.

<sup>98</sup> The Internal Rules provide: “In order to preserve the rights and interests of the parties, judicial investigations shall not be conducted in public. All persons participating in the judicial investigation shall maintain confidentiality.” ECCC Internal Rules (rev. 8), *supra* note 12, r.56(1).

confidentiality did not require secrecy from the parties.<sup>99</sup> Repeated refusals by the CIJs to share information raised suspicions that they invoked the “fig leaf” of confidentiality to hide their inability to manage an enormously complex investigation.<sup>100</sup>

The Ieng Sary defense unsuccessfully sought to learn if an overall strategy existed and if investigative work was being carried out according to a consistent methodology.<sup>101</sup> Among their complaints was that the “[c]ollection of witness interviews are arbitrarily placed on the Case File, often months after the interviews were conducted, with little or no explanation of how these interviews fit into the judicial investigation.”<sup>102</sup> Moreover, interviews were riddled with leading questions, and some interviewees had been questioned on multiple occasions, suggesting no line of questioning had been developed in advance.<sup>103</sup>

Karnavas notes that because the defense is not allowed to do its own investigation, the case file must be a primary source for determining which lines of investigation to request. “But over here, with a case of this magnitude, it’s virtually impossible. Especially when you don’t know what is their process, how they are going about doing it.”<sup>104</sup> This impeded the parties’ ability to participate fully in the investigation and prepare their case for trial.

## **B. Effect of Reliance on Local Procedural Rules**

Another fairness concern is the awkward mix of procedural rules applied by the ECCC.

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<sup>99</sup> Pestman interview, *supra* note 25. See also Sulzer interview, *supra* note 80 (arguing that the judges could have taken a middle ground on confidentiality and disclosed the scope of the investigation earlier to facilitate civil party admissibility).

<sup>100</sup> See, e.g., Letter from the Ieng Sary defense team to Deputy Director Rosandhaug and the Co-Investigative Judges (Dec. 18, 2008), *quoted in* Order on Breach of Confidentiality of the Judicial Investigation, Case No. 002/14-08-2006, ¶ 2 (Mar. 3, 2009).

<sup>101</sup> See generally Memorandum from the CIJs regarding Your “Request for Investigative Action” Concerning *inter alia* the Strategy of the Co-Investigating Judges in Regard to the Judicial Investigation, Case No. 002/19-09-2007-ECCC-OCIJ-D171, D130/7 & D130/7/2 (Dec. 11, 2009).

<sup>102</sup> Ieng Sary’s Third Request for Investigative Action, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 3 (May 21, 2009) (citations omitted).

<sup>103</sup> Karnavas interview, *supra* note 28. The conduct of OCIJ interviews has become a major issue of contention at trial. See, e.g., Anne Heindel, *Decision on Defense Allegations of Irregularities during the Judicial Investigation* (Dec. 13, 2012), CAMBODIA TRIBUNAL MONITOR *at* <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

<sup>104</sup> Karnavas interview, *supra* note 28.

The Framework Agreement and ECCC Law dictate that the Court's procedure must be "in accordance with Cambodian Law,"<sup>105</sup> with guidance from international procedural rules only where there is a lacunae, uncertainty in interpretation, or a question of consistency with international standards.<sup>106</sup> This provision emphasizes the national institutional character of the ECCC and differentiates the Court from international tribunals, which adopt their own rules.<sup>107</sup>

Problematically, until the French-influenced Cambodian Criminal Procedure Code (CPC) was adopted in August 2007, Cambodia lacked a comprehensive criminal procedural code for the Extraordinary Chambers to consult. The ECCC negotiators had blindly deferred to national procedures that did not yet exist and were unlikely to meet the needs of a specialized mass-crimes court. As adopted, the CPC is not even a contemporary representation of French law, which has been modified to address European Court of Human Rights criticisms and perceived weaknesses in the system—including to minimize the role of the investigating judge.<sup>108</sup> Judge Lemonde says, "I regret that the French experts gave Cambodia a tool that was obsolete before it was even used."<sup>109</sup> As a consequence, the ECCC judges almost immediately began drafting rules of procedure and evidence based on the draft CPC but specifically tailored to ECCC proceedings.

More than almost any other feature of the Court, the decision to have the Court apply Cambodian procedures—despite the lack of an authoritative code, the difficulties of adapting domestic criminal law rules to mass crimes practice, and the lack of precedent for using civil law rules in mass crimes cases—engenders the greatest criticism from Court actors. Although

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<sup>105</sup> Framework Agreement, *supra* note 6, art. 12(1). *See also* ECCC Law, *supra* note 7, arts. 20 new, 23 new, and 33 new. Comparatively, the SCSL Statute provides that in amending that court's rules the judges "may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone. SCSL Statute (Aug. 14, 2000), art. 14(2). The SCSL Trial Chamber found that this reference is only a means of guidance for the Judges ... and certainly not legally binding upon them." *Prosecutor v. Allieu Kondewa*, SCSL-2003-12-PD, Decision on the Urgent Defense Application for Release from Provisional Detention, ¶ 27 (Trial Chamber, Nov. 21, 2003).

<sup>106</sup> *See* Framework Agreement, *supra* note 6, art. 12(1). *See also* ECCC Law, *supra* note 7, arts. 20 new, 23 new, and 33 new.

<sup>107</sup> *See, e.g.*, SCSL Statute, *supra* note 105, art. 14.

<sup>108</sup> *See, e.g.*, Sulzer interview, *supra* note 80. Judge Lemonde Remarks, *supra* note 25 (saying the CPC is "a copy and paste" of the French Code before 2000 and is "not adapted to the 21<sup>st</sup> century" as the old French code has gaps and fairness issues that have been sanctioned by the ECHR).

<sup>109</sup> Judge Lemonde Remarks, *supra* note 25.

the ECCC is formally part of the Cambodian judicial system, as it grows and evolves through practice, it acts more and more like an international court applying a mixture of both civil and common law procedures, as well as procedures specific to mass crimes courts. This is because the only available precedent is the practice of the heavily common-law oriented international courts, the strong influence of the numerous international staff members who have previously worked at such tribunals, and the absence of statutory guidance for many of the novel topics this special court faces.<sup>110</sup>

The Trial Chamber has affirmed that the Internal Rules have primacy over the CPC.<sup>111</sup> Nevertheless, Cambodian procedures remain a source of reference, and for the Supreme Court Chamber, are often a point of departure. Uncertainty remains regarding when it is appropriate to supplement the Internal Rules by reference to the CPC, and inconsistent practice in pairing these two codes by the Chambers has resulted in confusion and perceptions of arbitrary or ends-driven decision-making.

Civil Party Co-Lead Lawyer Elisabeth Simonneau Fort says that personalities play an important role as the Court swerves between “some civil law, some common law, and then some civil law again.”<sup>112</sup> Guissé says the reason the rules are constantly changing has less to do with the civil law/common law mix and more to do with the judges, who lack experience working in other international jurisdictions.<sup>113</sup> Karnavas calls the trial process “chaotic” and

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<sup>110</sup> See, e.g., You Bunleng, response to questionnaire from the authors, June 25, 2012 (translated from Khmer by Kimsroy Sokvisal) (highlighting the challenge of applying Cambodian procedures in a court comprising staff and judges from diverse legal traditions); Judge Lemonde Remarks, *supra* note 25 (saying the ECCC’s civil law system was applied by actors who are not familiar with it and do not want to discover or understand it); Interview with Elisabeth Simonneau Fort, ECCC Civil Party Lead-Co-Lawyer, Phnom Penh (June 1, 2012) (noting that although the Court should apply civil law, common law lawyers tend to advance the system they know, and most mass crimes jurisprudence is rooted in common law); Etcheson interview, *supra* note 38 (noting that learning the rules, and innovation, is part of working in any *sui generis* institution, and OCP staff often felt that they were “making [it] up as [they] went along”).

<sup>111</sup> Decision on Nuon Chea’s Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, Case No. 002/19-09-2007/ECCC/TC, ¶ 7 (Aug. 8, 2011) (citing Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, Case No. 002/19-09-2007-ECCC/OCIJ (PTCO6), ¶ 14 (Aug. 26, 2008)).

<sup>112</sup> Simonneau Fort interview, *supra* note 110.

<sup>113</sup> Guissé interview, *supra* note 27 (noting that at the ICTR there was one system and people knew the rules, while at the ECCC rules are constantly changing and “it’s one document rule one day, another the next”).

contends, “They are trying to have it every which way: It’s the French system, it’s not the French system, it’s the national system, it’s the ICTY. Whenever it suits them they are constantly changing the rules as the game is being played.”<sup>114</sup> The absence of predictable rules arguably violates the basic due process rights of defendants and exposes the ECCC to charges of cherry-picking to achieve desired outcomes.<sup>115</sup> Although these concerns have not irreparably tainted the Case 002 proceedings, they pose serious risks to the case.

## V. JUDICIAL INDEPENDENCE

International officials anticipated that Cambodian personnel at the ECCC would be vulnerable to executive pressure on politically sensitive topics. Those fears have been realized, particularly in two instances. The Cambodian Government has publicly resisted defense teams’ efforts to call sitting RGC officials as witnesses at trial and opposed the investigation of additional suspects in Cases 003 and 004. During the negotiations for the Court, UN officials insisted on the adoption of rules to insulate the Court from political interference—namely the capacity of the international Co-Prosecutor or Co-Investigating Judge to act alone under certain conditions and the supermajority voting requirement on each of the Court’s judicial chambers<sup>116</sup>—but these rules have proven inadequate as means to overcome politicized gridlock and strong indications of political interference.

### A. *Politically Sensitive Topics*

Allegations of domestic political interference arose during the investigative phase of Case 002, when a major functional constraint on the ECCC became conspicuous: its apparent inability or unwillingness to call certain senior Cambodian officials to testify at the Court and the susceptibility of the Court’s domestic judges to political pressure. The ECCC Internal Rules

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<sup>114</sup> Karnavas interview, *supra* note 28; Ianuzzi interview, *supra* note 87 (stating that the Trial Judges appear to be making up rules as they go).

<sup>115</sup> See, e.g., Response to the “Co-Prosecutors’ Request to Put Before the Chamber Two Letters by Amnesty International Addressed to KHIEU Samphan and IENG Sary,” Case No. 002/29-09-2007-ECCC/TC, ¶¶ 6-21, 29 (Trial Chamber, Mar. 3, 2013) (including a description of inconsistencies in the Trial Chamber’s application of document admission rules and a request that the Chamber “[e]stablish clear and fair rules regarding the admission of new documents that would apply to all parties in a uniform manner”).

<sup>116</sup> See *supra* note 10.

give the CIJs authority to issue orders “necessary to conduct the investigation, including summonses,” and “take statements from any person whom they consider *conducive to ascertaining the truth*[,]” subject only to the right against self-incrimination of witnesses.<sup>117</sup> The Trial and Supreme Court Chambers have similar authority, which they may exercise at their discretion.<sup>118</sup> International CIJ Marcel Lemonde, acting alone, summoned several high-level officials to appear in closed session on a date when they were available.<sup>119</sup> None responded.

Lemonde, following the lead of national CIJ Judge You, justified his failure to seek enforcement on the basis that “coercive measures is (*sic*) fraught with significant practical difficulties, and, in the best-case scenario, would unduly delay the conclusion of the judicial investigation, contrary to the need for expeditiousness,” leaving it to the Trial Chamber to decide if coercive measures were warranted.<sup>120</sup> Upon review, the Pre-Trial Chamber said that the biggest hurdle was the summoned officials’ likely invocation of parliamentary immunity, which would at the very least “significantly delay” the prospect that the officials would testify at the investigation stage without substantially delaying the proceedings. It therefore agreed that the question should be deferred to the Trial Chamber, preserving the right of the accused to seek exculpatory evidence at a later date.<sup>121</sup>

Nevertheless, due to a number of uncompromising government statements reported in the press, the PTC directed the CIJ to assess “whether or not a nexus exists between RGC [Royal Government of Cambodia] discouragement and the actual failure of the summoned witnesses to provide statements.”<sup>122</sup> The CIJs found an investigation into Government interference was unwarranted,<sup>123</sup> and back on appeal, the PTC was unable to reach a

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<sup>117</sup> ECCC Internal Rules (rev. 8), *supra* note 12, r. 60(1) (emphasis added), r. 55(5)(a),(d).

<sup>118</sup> *Id.* r. 87(4), r. 104*bis*.

<sup>119</sup> See, e.g., Letter from CIJ Marcel Lemonde to H.E. Hor Namhong (Sept. 25, 2009); Decision on NUON Chea’s and IENG Sary’s Appeal Against OCIJ Order on Requests to Summons Witnesses, Case No. 002/19-09-2007-ECCC-TC, ¶ 3 (June 8, 2010).

<sup>120</sup> Note of International Investigating Judge Marcel Lemonde at 3 (Jan. 11, 2010).

<sup>121</sup> Decision on NUON Chea’s and IENG Sary’s Appeal Against OCIJ Order on Requests to Summons Witnesses, Case No. 002/19-09-2007-ECCC-TC, ¶¶ 69-71 (June 8, 2010).

<sup>122</sup> *Id.* ¶ 68.

<sup>123</sup> Order in Response to the Appeals Chamber’s Decision on Nuon Chea and Ieng Sary’s Requests to Summon Witnesses, Case No. 002/19-09-2007-ECCC-OCIJ, ¶ 5 (June 11, 2010).

supermajority decision. The international PTC judges determined that, after considering all of the allegations and their sequence, no reasonable trier of fact could fail to find it reasonable to believe that “one or more members of the RGC may have knowingly and willfully interfered with witnesses who may give evidence before the CIJs.”<sup>124</sup> However, due to the lack of supermajority agreement, by default the CIJ decision not to investigate remained in effect.

Former Nuon Chea Co-Lawyer Michiel Pestman contends that the summoned officials are important to his client’s case.<sup>125</sup> Judge Lemonde has recently said these witnesses “clearly had something to say, because they were aware of events and facts for which their testimony was important.”<sup>126</sup> Nevertheless, Pestman notes that the requested government witnesses are not on the Trial Chamber’s tentative witness list for Case 002 and believes that they will not be called for trial.<sup>127</sup>

The Court’s discussions of personal jurisdiction in Cases 003 and 004 have been even more politically fraught. The Framework Agreement and ECCC Law limit the Court’s mandate to officials who were either senior leaders of Democratic Kampuchea (DK), or persons most responsible for the crimes committed from 1975 to 1979.<sup>128</sup> According to international precedents, “senior leaders” is not a fixed term referring only to those in the highest echelons of power<sup>129</sup> and the term “most responsible” further broadens the scope of who may be prosecuted to include persons who were in less senior positions yet played a significant role in

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<sup>124</sup> Second Decision on NUON Chea’s and IENG Sary’s Appeal Against OCIJ Order on Request to Summon Witnesses, Case No. 002/19-09-2007-ECCC-PTC (Sept. 9, 2010), Opinion of Judges Downing & Marchi-Uhel, ¶ 6.

<sup>125</sup> Pestman interview, *supra* note 25 (contending that Heng Samrin was the highest-level Khmer Rouge commander in Phnom Penh during the evacuation who is still alive and was Nuon Chea’s bodyguard before the DK period). Today Heng Samrin is chairman of the National Assembly of Cambodia and honorary chairman of the ruling Cambodia People’s Party.

<sup>126</sup> *Quelles leçons*, *supra* note 20 (authors’ translation from the original French).

<sup>127</sup> Pestman interview, *supra* note 25 (noting that the list has been tentative, providing the defense no opportunity to object to their exclusion).

<sup>128</sup> Framework Agreement, *supra* note 6, art. 1; ECCC Law, *supra* note 7, art. 2 *new*.

<sup>129</sup> See, e.g., Duch Supreme Court Judgment, *supra* note 59, ¶ 76.

grave crimes.<sup>130</sup> These terms provide the ECCC prosecutors and judges with considerable discretion to investigate suspects at a “comparably” lower level than the most senior leaders.

In 2008, former international Co-Prosecutor Robert Petit decided to initiate two new judicial investigations. Unable to reach an agreement with national Co-Prosecutor Chea Leang to forward the initial submissions in these cases, Petit filed a notice of disagreement and asked the Pre-Trial Chamber to resolve it.<sup>131</sup> The Pre-Trial Chamber took nearly a year to decide the dispute; however, an affirmative vote by four of the Pre-Trial Judges could not be reached: the three Cambodian judges voted against the investigations and the two international judges voted in favor.<sup>132</sup> This was the first of many Case 003/004 PTC decisions all divided on national/international lines.<sup>133</sup> Due to the failure to reach a supermajority, the international Co-Prosecutor’s request for judicial investigation was allowed to proceed by default.<sup>134</sup> Acting international Co-Prosecutor Bill Smith forwarded the two new introductory submissions to the CIJs, emphasizing that he had “no plans to conduct further preliminary investigations into suspects at the ECCC.”<sup>135</sup>

There was a widespread perception that both Chea Leang and the national PTC judges did not act impartially in rejecting the additional cases, but instead followed the lead of the Government, which has consistently opposed charging new suspects.<sup>136</sup> Prime Minister Hun Sen expressly told visiting UN Secretary-General Ban Ki-moon that Case 002 would be the last

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<sup>130</sup> Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, U.N. Doc. A/53/850, S/1999/231, ¶ 109 (Mar. 16, 1999) (emphasis added).

<sup>131</sup> Press Release, *ECCC International Co-Prosecutor Robert Petit* (Apr. 24, 2009).

<sup>132</sup> See Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, Case No. 001/18-11-2008-ECCC/PTC (Aug. 18, 2009) [PTC Considerations on Co-Prosecutors’ Dispute].

<sup>133</sup> Etcheson interview, *supra* note 38 (calling the dispute between the Co-Prosecutors the “seed of paralysis in Cases 003 and 004”).

<sup>134</sup> ECCC Law, *supra* note 7, art. 20 new. See also ECCC Internal Rules (rev. 8), *supra* note 12, r. 71(4)(c) (providing that where there is no supermajority “the action or decision done by one Co-Prosecutor shall stand or...the action or decision proposed to be done by one Co-Prosecutor shall be executed”).

<sup>135</sup> Press Release, *Statement of the Acting International Co-Prosecutor: Submission of Two New Introductory Submissions* (Sept. 8, 2009).

<sup>136</sup> See, e.g., Seth Mydans, *Efforts to Limit Khmer Rouge Trials Decried*, N.Y. TIMES, Jan. 31, 2009; Ek Madra, *Cambodian PM Rejects Wider Khmer Rouge Trials*, REUTERS, Mar. 31, 2009.

trial as “case three is not allowed.”<sup>137</sup> Nevertheless, in this instance the “co” dispute mechanism worked as intended,<sup>138</sup> the investigation moved forward, and by all accounts the disagreement did not damage the relationship between the Co-Prosecutors or impact their ongoing work.<sup>139</sup>

Debate became increasingly acrimonious as the matter reached the Office of the Co-Investigating Judges. The first international CIJ Judge Lemonde pressed his counterpart You Bunleng to move forward with the investigations; however, Judge You refused to sign off on them.<sup>140</sup> Judge Lemonde resigned shortly after and was replaced by reserve Judge Siegfried Blunk, who quickly joined with his counterpart in summarily closing Case 003.<sup>141</sup> Noting that the CIJs had not even spoken to the suspects or examined all crime scenes, new international Co-Prosecutor Andrew Cayley publicly stated his view “that the crimes alleged ... have not been fully investigated[.]”<sup>142</sup> The international Pre-Trial Chamber judges said the CIJs’ actions had raised doubts about the impartiality of the investigation, slammed the CIJs for inconsistencies in the way they handled the investigation, and enumerated procedural irregularities in their office’s filing of documents.<sup>143</sup> Blunk reportedly threatened his staff with disciplinary action for disloyalty when they raised concerns with the UN Secretary-General.<sup>144</sup>

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<sup>137</sup> See *Cambodian PM Says No Third Khmer Rouge Trial*, AGENCE FRANCE-PRESSE, Oct. 27, 2010.

<sup>138</sup> See, e.g., David Scheffer, *Opinion: How Many Are Too Many Defendants at the KRT?* PHNOM PENH POST, Jan. 8, 2009 (stating that the prosecutorial dispute “was anticipated in the negotiations and strikes [him] as demonstrating that the ECCC is working its will as it was designed to do”).

<sup>139</sup> Etcheson interview, *supra* note 38 (noting that the OCP has “been able to isolate [the Co-Prosecutor’s dispute over Cases 003 and 004] and keep it from contaminating [their joint work on] Case 002 to a significant extent.”

<sup>140</sup> See Letter to Marcel Lemonde, *Lettre du co-juge d’instruction internationale en date du 02 juin 2010 re Dossiers 003 et 004* (June 8, 2010).

<sup>141</sup> See *Press Release from the Co-Investigating Judges* (Apr. 29, 2011).

<sup>142</sup> Press Release, *Statement by the International Co-Prosecutor Regarding Case File 003* (May 9, 2011). See also Douglas Gillison, *Justice Denied*, FOREIGN POLICY (Nov. 23, 2011) (reporting that on Blunk’s arrival, “he told his office that his inquiries would be ‘suspect-based,’ seeking first to determine the guilt or innocence of defendants before examining the facts and allegations, a backwards approach his staff said appeared designed either for a frame-up or a cover-up”).

<sup>143</sup> Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill, Case No 003/07-09-ECCC/OCIJ (PTC02), Opinion of Judges Lahuis and Downing ¶¶ 5, 9-15 (Oct. 24, 2011) [hereinafter Lahuis and Downing Opinion on Hamill] (addressing the fact that the CIJs replaced a defective Civil Party rejection order while challenges to the defects were on appeal).

<sup>144</sup> See, e.g., Douglas Gillison, *UN Legal Team Walks Out on Stymied KR Cases*, CAMBODIA DAILY, June 13, 2011.

When the UN took no action, all six UN legal officers in the OCIJ quit.<sup>145</sup>

In October 2011, Judge Blunk shocked everyone by abruptly resigning.<sup>146</sup> According to the terms of the Agreement and Law, Judge Blunk should have been automatically replaced by the reserve international Co-Investigating Judge, Laurent Kasper-Ansermet.<sup>147</sup> Nevertheless, Kasper-Ansermet was hindered from taking office. Although the UN Secretary-General selects the Court's international judges, the power of appointment resides with the Cambodian Supreme Council of Magistracy (SCM), which first refused to convene and then upon meeting failed to confirm his appointment, citing concerns about the judge's active "tweeting" during the Blunk uproar, including reposting articles critical of the way Cases 003 and 004 had been handled by his predecessor.<sup>148</sup>

The national side of the Court, following the lead of Judge You Bunleng, never recognized Judge Kasper-Ansermet's authority to act and continually interfered with his efforts to investigate Cases 003 and 004.<sup>149</sup> You Bunleng took the position that Kasper-Ansermet "does not have legal accreditation to undertake any procedural action or measure with respect to the Case Files[.]"<sup>150</sup> Judge Kasper-Ansermet claimed to be impeded by the national side at every

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<sup>145</sup> See Gillison, *UN Legal Team*, *supra* note 144; Decision and Referral to the Supreme Council of Magistracy on the Judicial Misconduct of National Co-Investigating Judge You Bunleng, Case No. 003/07-09-2009-ECCC-OCIJ, ¶ 14 (May 4, 2012) [hereinafter Decision on You Bunleng].

<sup>146</sup> See *Press Release by the International Co-Investigative Judge* (Oct. 10, 2011).

<sup>147</sup> ECCC Law, *supra* note 7, art. 27 new provides, "In the event of the absence of the foreign Co-Investigating Judge, he or she shall be replaced by the reserve foreign Co-Investigating Judge."<sup>147</sup>

<sup>148</sup> See The Office of the Council of Ministers Press and Quick Reaction Unit, Summary Report of the Meeting of the Supreme Council of the Magistracy on the Proposed Appointment of Mr. Laurent Kasper-Ansermet as International Co-Investigating Judge in the ECCC (Jan. 28, 2012); Douglas Gillison, *Cambodia Rejects UN Genocide Judge*, THE INVESTIGATIVE FUND (Jan. 15, 2012). Although a constitutionally independent judicial body, the SCM is not independent of the Government. See, e.g., Surya P. Subedi, Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, U.N. Doc. A/HRC/15/46, ¶ 24 (Sept. 16, 2010). *But see* Julia Wallace, *UN Concerned Over Dilatory Appointment of KRT Judge*, CAMBODIA DAILY, Jan. 12, 2012 (quoting a government spokesperson saying that the SCM "is very independent. Our government has nothing to do with that one, even though a number of the government people sit on that one").

<sup>149</sup> See generally Decision on You Bunleng, *supra* note 145. *But see* Bridget Di Certo, *Judge's Exit Shakes KRT*, PHNOM PENH POST, Mar. 21, 2012 (quoting Judge You Bunleng saying, "I didn't obstruct him, I just did not recognize his work").

<sup>150</sup> See *Press Statement of the National Co-Investigating Judge* (Jan. 9, 2012); see also *Press Statement of the National Co-Investigating Judge* (Dec. 6, 2011). See also *Press Statement by the National Co-Investigating Judge* (Feb. 10, 2012).

turn.<sup>151</sup> For example, on instructions from Judge You, the Case File officer refused to place Judge Kasper-Ansermet's orders in the Case File and ignored his orders to grant access to the Case 003 Case File to Civil Party applicants.<sup>152</sup> Frustrated by the obstruction and a complacent UN administration, he resigned in May 2012.<sup>153</sup>

In June 2012, the SCM swiftly appointed a fourth international CIJ, Mark Harmon, who has since reaffirmed the authority of Kasper-Ansermet's authority to act, including his unilateral re-opening of the Case 003 investigation.<sup>154</sup> However, it appears that the national side is not assisting his efforts to investigate Cases 003 and 004.<sup>155</sup> At the time of Harmon's arrival in October 2012, Cases 003 and 004 had languished in the OCIJ for more than four years.

### ***B. Procedures Intended to Safeguard Against Political Interference***

The ECCC was designed in expectation of government meddling, but its institutional coping mechanisms arguably have had the unforeseen effect of entrenching political interference as a tolerable feature of the proceedings. Moreover, in their application, rules designed to reduce the impact of political interference have been manipulated for political ends, demonstrating their inadequacy as a substitute for independent and impartial judges.

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<sup>151</sup> See generally Decision on You Bunleng, *supra* note 145.

<sup>152</sup> See Note of the International Reserve Co-Investigating Judge to the Parties on the Egregious Dysfunctions within the ECCC Impeding the Proper Conduct of Investigations in Cases 003 and 004, Case No. 003/07-09-2009-ECCC-OCIJ and 004/07-09-2009-ECCC-OCIJ, ¶¶ 33-54 (Mar. 21, 2012) [hereinafter Note of the International Reserve Co-Investigating Judge]; Decision on You Bunleng, *supra* note 145, ¶¶ 40-66. See also Press Statement by National Co-Investigating Judge (Mar. 26, 2012) (acknowledging that he had told national staff not to follow the directions of Judge Kasper-Ansermet).

<sup>153</sup> See Press Release of the Reserve International Co-Investigating Judge (May 4, 2012); Julia Wallace, *From Phnom Penh with Love*, INT'L JUST. TRIB. (Mar. 28, 2012).

<sup>154</sup> See Statement by the Co-Investigating Judges (Feb. 28, 2013). Harmon has also unilaterally granted all Case 003 and 004 Civil Party lawyers access to the case files. Lawyers Recognition Decision Concerning All Civil Party Applications on Case File No. 003, Case No. 003/07-09-2009-ECCC-OCIJ (OCIJ, Feb. 26, 2013); Lawyers Recognition Decision Concerning All Civil Party Applications on Case File No. 004, Case No. 004/07-09-2009-ECCC-OCIJ (OCIJ, Apr. 1, 2013).

<sup>155</sup> See, e.g., ECCC, THE COURT REPORT at 8 (May 2013) (reporting that "the international side of the [OCIJ] continued the investigation of Case Files 003 and 004"). See also Abby Seiff, *Wanted: Lawyers for Hot Cases*, PHNOM PENH POST, May 15, 2013 (discussing Judge Harmon's efforts to recruit Cambodian lawyers to assist the international side of the office).

## 1. Acting Alone

The United Nations wanted the ECCC, like other internationalized courts, to have only one international prosecutor to ensure that government interference would not inhibit investigations. When the Cambodian government refused, UN negotiators fell back on a mechanism to allow one Co-Prosecutor or CIJ to act alone when political disputes arose. However, as described in the Internal Rules, the dispute procedures are complex, creating opportunities for disparate interpretations of their effect.

The ECCC Internal Rules state that both “co”s share joint responsibility in carrying out their duties and are expected to work by consensus.<sup>156</sup> The ECCC core documents provide authority for one to act alone under certain circumstances; but the scope of that authority in practice is not always clear. According to the Internal Rules, “Except for action that must be taken jointly under the ECCC Law and these [Internal Rules],” the Co-Prosecutors/CIJs “may delegate power to one of them, by a joint written decision, to accomplish such action individually.”<sup>157</sup> The only provisions that mandate joint action govern the Co-Prosecutors’ and CIJs’ ability to release public information about otherwise confidential actions.<sup>158</sup> Thus every other action may potentially be delegated to one Co-Prosecutor or one CIJ acting alone.

When delegation is not possible because of a disagreement between the “co”s, Internal Rules 71 and 72 govern the authority to act alone. The “co”s may record the nature of the disagreement and within 30 days may bring it to the Pre-Trial Chamber for resolution. Even when a disagreement is recorded, one “co” normally may act alone without going to the PTC, or while waiting for the PTC to rule on a recorded dispute.<sup>159</sup> For example, the CIJs recorded a disagreement related to the timing of the Case 003/004 investigations on June 9, 2010.<sup>160</sup> Although this disagreement was never brought before the PTC, a Rogatory Letter to investigate in Case 003 was signed only by Judge Lemonde, who proceeded with the investigation on his

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<sup>156</sup> See, e.g., ECCC Law, *supra* note 7, arts. 16, 23 new.

<sup>157</sup> ECCC Internal Rules (rev. 8), *supra* note 12, r. 13(3), r. 14(4) (addressing the Co-Prosecutors and CIJs, respectively).

<sup>158</sup> *Id.* r. 54, r. 56.

<sup>159</sup> *Id.* r. 71(3), r. 72(3) (noting that during the dispute settlement period, the disputed action “shall be executed”).

<sup>160</sup> See *Statement from the Co-Investigating Judges* (June 9, 2010).

own authority.<sup>161</sup> In specified exceptional cases, the PTC must decide *before* unilateral action may commence, but even in such cases one “co” may proceed 30 days after a disagreement is recorded if the opposing “co” did not put the dispute before the PTC.<sup>162</sup>

Although “either or both of [the ‘co’s] “may record the exact nature of the disagreement,”<sup>163</sup> the PTC has found that, because of the presumption to move forward with the subject of a disagreement, the obligation to record it logically falls on the disagreeing party.<sup>164</sup> This fact, together with the use of the word “may,” suggests that a decision to record is discretionary. If no disagreement is filed, the party seeking to investigate or prosecute may act alone toward that goal. Indeed, the entire PTC has found that “the Co-Investigating Judges are under no obligation to seize the Pre-Trial Chamber when they do not agree on an issue before them, the default position being that the ‘investigation shall proceed’[.]”<sup>165</sup>

Despite this unanimous jurisprudence, in politically charged Case 003, the ability of a prosecutor or investigative judge to act alone was flatly rejected for the first time by Judges Blunk and You and all the national PTC Judges. In May 2011, international Co-Prosecutor Andrew Cayley, acting on his own, filed a request for additional investigative actions in Case 003 in an effort to ensure the case would not be dismissed without a proper investigation being conducted.<sup>166</sup> The CIJs rejected Cayley’s request, finding that the Internal Rules “leave no room for ... solitary action” except by delegation of power or after the registration of a

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<sup>161</sup> *See id.*

<sup>162</sup> Co-Prosecutors may not act unilaterally if the dispute relates to an Introductory Submission, Supplemental Submission relating to new crimes, Final Submission, or a decision relating to an appeal. CIJs may not act unilaterally if the dispute features a decision that would be open to appeal by the Charged Person or a Civil Party, a notification of charges, or an arrest and detention order. ECCC Internal Rules (rev. 8), *supra* note 12, r. 71(3), r. 72(3). *See also* PTC Considerations on Co-Prosecutors’ Dispute, *supra* note 132, ¶ 16 (“[O]nly cases of major concern specifically identified in the Internal Rules would a disagreement prevent one [“co”] from proceeding with a given action pending a decision by the Pre-Trial Chamber.”).

<sup>163</sup> ECCC Internal Rules (rev. 8), *supra* note 12, r. 71(1), r. 72(1).

<sup>164</sup> PTC Considerations on Co-Prosecutors’ Dispute, *supra* note 132, ¶ 27.

<sup>165</sup> Decision on Ieng Sary’s Appeal Against the Closing Order, *supra* note 130, ¶ 274.

<sup>166</sup> *See* Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, Case No. 003/07-09-2009-ECCC/OCIJ (June 6, 2011).

disagreement.<sup>167</sup> On appeal, the international PTC Judges reaffirmed the Court's previous rulings in a split decision:

The Internal Rules indicate that the use of the procedure provided to settle disagreement is not mandatory but rather optional. In other words, it is a matter of discretion as to whether the disagreement procedure is utilized by either or both Co-Prosecutors and to what extent a matter is taken.<sup>168</sup>

However, the national Pre-Trial Chamber judges agreed with the CIJs without acknowledging or providing any reasoning for their departure from the Chamber's prior decisions.<sup>169</sup> Because there is no presumption to move forward with an investigation when there is no disagreement between the CIJs, the CIJ order dismissing the request remained in effect.

Likewise, in the dispute between Judges You and Kasper-Ansermet, Judge You argued that neither judge had the authority to put documents in the Case 003 Case File because the two "co"s must agree to file documents.<sup>170</sup> To the contrary, Judge Kasper-Ansermet and the international PTC judges have emphasized that his actions are "fully enforceable."<sup>171</sup> Although this view is legally correct, because the national side refused to acknowledge Judge Kasper-Ansermet's judicial authority, it appears that none of Judge Kasper-Ansermet's efforts, including his reopening of the judicial investigation in Case 003,<sup>172</sup> informing the Case 003 and Case 004 suspects of their right to an attorney, and findings from field investigations, would be officially recognized unless they were adopted by his replacement.<sup>173</sup> As Judge Kasper-

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<sup>167</sup> ECCC Press Release, Office of the Co-Investigating Judges, *Statement from the Co-Investigating Judges Related to Case 003 Requests from International Co-Prosecutor* (June 7, 2011).

<sup>168</sup> Considerations of the Pre-Trial Chamber Regarding the International Prosecutor's Appeal Against the Decision on Time Extension Request and Investigative Requests Regarding Case 003, Case No. 003/07-09-2009-ECCC/OCIJ (PTC 04), Separate opinion of Judges Downing & Lahuis ¶ 3 (Nov. 2, 2011).

<sup>169</sup> *Id.*, Separate opinion of Judges Prak, Ney & Huot ¶ 12.

<sup>170</sup> See, e.g., Note of the International Reserve Co-Investigating Judge, *supra* note 152, ¶ 34.

<sup>171</sup> See Public Letter from Reserve International Co-Investigating Judge, *Your Letter of 27 February 2012* (Mar. 5, 2012); Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement Between the Co-Investigating Judges Pursuant to Internal Rule 72, Case No. 003/16-12-2011-ECCC/PTC, ¶ 50 (Feb. 10, 2012) [hereinafter Downing and Chung Opinion].

<sup>172</sup> Order on Resuming the Judicial Investigation, Case No. 003/07-09-2009-ECCC-OCIJ (Dec. 2, 2012).

<sup>173</sup> Judge Harmon has informed the public that he has filed a disagreement with Judge You "concerning the validity of documents placed on Case File No.003 since the resignation of International Co-Investigating Judge Siegfried Blunk[.]" suggesting that, in his view, Case 003 documents filed during

Ansermet learned the hard way, the formal capacity to act alone does not ensure that national staff in the OCP or OCIJ will cooperate or assist in the work of their international colleagues.<sup>174</sup> Former UN Legal Counsel Hans Corell argues, “The [Court’s main structural] problem isn’t the investigating judge or prosecutor; it’s the ‘cos.’”<sup>175</sup>

## 2. Supermajority Rule

The supermajority rule, intended to serve as an additional bulwark against government interference, was a prerequisite for UN willingness to participate in a Cambodian-majority court. When a judicial investigation was opened in Cases 003/004, the U.S. Embassy called it a “vindication” of the supermajority rule.<sup>176</sup> However, in subsequent disputes the rule has been insufficient to protect the Court from political interference. The rule does not address all politically driven scenarios that have arisen. As foreseen by the Open Society Justice Initiative, the rule suffers from two potential problems that have since become realized: “the potential for delay and judicial deadlock,” and “ineffectiveness in critical circumstances.”<sup>177</sup> Even more worrisome, it appears to have had the antithetical effect of shielding political decision making from accountability.

Where the two Co-Prosecutors or two CIJs disagree about whether or not to move forward with a prosecution or investigation, if there is no supermajority agreement by the PTC in deciding the dispute, there is a presumption that the prosecution or investigation shall proceed.<sup>178</sup> However, even in its first “successful” application in the Co-Prosecutor dispute,

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Judge Kasper-Ansermet’s tenure have legal effect. Lawyer’s Recognition Decision Concerning All Civil Party Applications on Case File No. 003, ¶ 9 (CIJs, Feb. 26, 2013).

<sup>174</sup> See Bates, *supra* note 17, ¶ 79.

<sup>175</sup> Interview with Hans Corell, former UN Legal Counsel, via telephone (Nov. 15, 2012). Cf. *Quelles leçons*, *supra* note 20 (arguing that the “co” system is inefficient and that the dispute settlement procedure is unworkable on a day-to-day basis).

<sup>176</sup> Confidential Cable, U.S. Embassy Phnom Penh, *Khmer Rouge Tribunal: Five More for Prosecution* ¶ 1 (Sept. 1, 2009), available at <http://www.wikileaks.org/cablegate.html>.

<sup>177</sup> Open Society Justice Initiative, *Political Interference at the Extraordinary Chambers in the Courts of Cambodia*, at 11 (July 2010).

<sup>178</sup> Framework Agreement, *supra* note 6, art. 7; ECCC Law, *supra* note 7, arts. 20 new, 23 new.

PTC disagreement reportedly led to a four-month postponement in announcing the split national/international decision,<sup>179</sup> resulting in a one-year delay in sending it to the OCIJ.

Every subsequent effort by the international Co-Prosecutor to seek investigative action and by Civil Party applicants to participate was blocked by the CIJs and a divided PTC. This made political interference appear both conspicuous and intractable, because a joint decision by the CIJs will stand if there is no supermajority agreement by the PTC. Consequently, when Judge Blunk joined together with his counterpart Judge You to bury Case 003,<sup>180</sup> a divided PTC was incapable of overturning their eccentric and politically suspect opinions. Negotiators did not foresee the possibility that both CIJs would act together to derail an investigation “due to political or other influence.”<sup>181</sup> With similar effect, when there were serious concerns about interference with the summoning of government officials in Case 002, the international PTC judges had no power to initiate an investigation in the face of joint CIJ inaction and the opposition of their Cambodian colleagues. Thus one flawed premise of the rule is that “UN judges will behave perfectly.”<sup>182</sup>

When Blunk’s successor Judge Kasper-Ansermet sought to revive Case 003, the PTC president prevented the PTC from hearing the issue in an apparent effort to avoid the effect of the supermajority rule. After Kasper-Ansermet submitted two disputes in Case 003 to the PTC, Judge Prak Kimsan, the President of the Chamber, returned the Records of Disagreement to the Acting Director of Administration without providing an opportunity for the full Chamber to hear the issue, stating that the “‘PTC judges’ had met ... and that they had not ‘reached their consent to take into account their consideration of the substance of those documents,’” based on

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<sup>179</sup> Confidential Cable, U.S. Embassy Phnom Penh, *Khmer Rouge Tribunal: Donors Chart a More Unified Course* ¶¶ 3-4 (Apr. 24, 2009), available at <http://www.wikileaks.org/cablegate.html> (reporting that the national judges convinced the international judges not to release the decision until “the time was right”).

<sup>180</sup> See Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor’s Appeal Against the Decision on the Re-Filing of Three Investigative Requests, Case No. 003/07-09-ECCC/OCIJ (PTC06), Opinion of Judges Lahuis and Downing (Nov. 15, 2011); Lahuis and Downing Opinion on Hamill, *supra* note 143. See also Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor’s Appeal Against the Co-Investigating Judges’ Order on International Co-Prosecutor’s Public Statement Regarding Case 003, Case No 003/07-09-ECCC/OCIJ (PTC03) (Oct. 24, 2011).

<sup>181</sup> Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, *supra* note 74 at 246. See also Douglas Gillison, *Genocide Judges Duel It Out in Phnom Penh*, THE INVESTIGATIVE FUND (Dec. 7, 2011) (reporting that David Tolbert believes this shows the tribunal “did not have sufficient procedural or legal safeguards to respond effectively to a Blunk scenario and that this experience should not be repeated elsewhere”).

<sup>182</sup> Gillison, *supra* note 181.

Judge Kasper-Ansermet's lack of legal authority.<sup>183</sup> The two international PTC judges issued a joint opinion in which they disclosed that, following deliberations on the disagreement, the President had returned the documents without their knowledge or consent, and had refused their request to withdraw his memorandum.<sup>184</sup> Judge Prak said that the national judges thought the matter was "only administrative" and outside the jurisdiction of the PTC.<sup>185</sup> He blamed Kasper-Ansermet's "invalid" efforts to bring the dispute for creating "unprecedented confusing procedures before the Pre-Trial Chamber, leading to settlement irregularity[.]"<sup>186</sup> However, the international judges believed it was their judicial duty to issue a reasoned decision. Unlike their national colleagues, they found the disagreement admissible, found that Judge Kasper-Ansermet had the authority to bring it before the Chamber, and ruled that because the PTC could not reach a supermajority decision he had the authority to proceed with his investigative actions.<sup>187</sup>

If incumbent international CIJ Mark Harmon should decide to send Cases 003 and 004 forward to the Trial Chamber, there could be further obstruction. Decisions to convict must be made by supermajority.<sup>188</sup> As noted by negotiator David Scheffer, this ensures that "[w]ith respect to due process rights, no defendant will be convicted without the vote of at least one international judge."<sup>189</sup> However, while the supermajority rule may prevent the conviction of an accused against whom there is inadequate evidence, it cannot stop a Cambodian block from acquitting a culpable accused. Moreover, there is no guidance as to how a split Trial Chamber should proceed on any issue *except* conviction. Based on past experience, where such a split occurs on a politically sensitive topic, there will be no will to iron out a compromise.

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<sup>183</sup> See Memorandum to Tony KRANH from Judge PRAK, Returning the Document Communicated to Pre-Trial Chamber by the Office of Administration (Feb. 3, 2012); Press Release, *International Reserve Co-Investigating Judge* (Feb. 9, 2012) (quoting from the President's memorandum).

<sup>184</sup> Downing and Chung Opinion, *supra* note 171, ¶¶ 14-15.

<sup>185</sup> Press Release, *Clarification of the National Judges of the Pre-Trial Chamber on the Note of Mr. Laurent Kasper-Ansermet*, D38, dated 21 March 2012 (March 26, 2012).

<sup>186</sup> *Id.*

<sup>187</sup> Downing and Chung Opinion, *supra* note 171, ¶¶ 15, 28-39, 50.

<sup>188</sup> Framework Agreement, *supra* note 6, art. 4; ECCC Law *supra* note 7, art. 14 new(1); ECCC Internal Rules (rev. 8), *supra* note 12, r. 98(4).

<sup>189</sup> Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, *supra* note 74, at 246.

Potential for delay, deadlock, and obstruction aren't the only concerns that parties have with the supermajority rule. Many say it makes political interference more difficult to address, co-opting the international judges in the process. Michael Karnavas argues that the rule put pressure on the international judges to "go along to get along," with what appeared to be smaller battles early on, making it harder for them to take principled positions when larger battles arose over Cases 003 and 004<sup>190</sup>: "The sad truth is that through inaction, or in the spirit of being diplomatic, the international judges have been ... complicit in[] re-enforcing certain systemic weaknesses embedded in Cambodian courts."<sup>191</sup> Former CIJ Lemonde says:

Cambodian judges are in the majority and at any time they can remind us that we are in Cambodia, we cannot do what we want, they are at home, and believe me, they care to remind you if you forget it. So this is a permanent structural difficulty.<sup>192</sup>

## VI. MANAGING A DIVIDED COURT

In addition to carrying out criminal trials, the ECCC is a bureaucracy entrusted with managing considerable human and financial resources and carrying out a range of non-judicial functions. The ECCC is the first hybrid tribunal to split its administrative offices, funding channels, and oversight structures into distinct national and international sides. Unlike most other mass crimes courts—including the ICC, STL, and SCSL—the ECCC has no unified registry to provide administrative support to the judicial organs of the Court, and it has no court president to which a registrar would normally report.<sup>193</sup> Instead, it has a two-headed Office of Administration with a Cambodian Director and international Deputy Director, each entrusted

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<sup>190</sup> Karnavas interview, *supra* note 28. See also Michael Karnavas, Op-Ed., *It's Time to Salvage the Khmer Rouge Tribunal's Legacy*, CAMBODIA DAILY, Dec. 12, 2012 (saying "[t]he ECCC is failing as a model court because the international judges have not been robust in insisting on the uncompromising application of international standards and best practices").

<sup>191</sup> Karnavas Op-Ed, *supra* note 190.

<sup>192</sup> Cf. *Quelles leçons*, *supra* note 20 (authors' translation from the French).

<sup>193</sup> In 2007, the Internal Rules created a Judicial Administration Committee of three Cambodian and two international judges to "advise and guide" the Office of Administration, but without stronger authority, it has not been able to compensate for the absence of a court president. Internal Rules of the ECCC (rev. 8), *rev'd* Aug. 3, 2011, rr. 19(1)-(2); Anne Heindel, *Why the ECCC Office of Administration Would Benefit from Being Structured More Like a "Registry,"* SEARCHING FOR THE TRUTH (Oct. 2007).

to manage affairs on his or her side of the office.<sup>194</sup> Beneath them are several administrative sections, and in practice staff in each section report up through their respective sides.<sup>195</sup> David Tolbert, former UN Special Expert to Advise on the UN Assistance to the Khmer Rouge Trials, calls this the “worst possible design” for effective Court administration,<sup>196</sup> and a private report by two UN-appointed experts came to a similar conclusion.<sup>197</sup>

Each side of the ECCC receives independent streams of voluntary funding from donor states,<sup>198</sup> and to date approximately 35 states have contributed, led by Japan, several European donors, the United States, and Australia.<sup>199</sup> Each side of the court is subject to different oversight mechanisms. The RGC oversees the national side, while the United Nations side has been overseen by a mix of offices in the UN Secretariat.<sup>200</sup> Over time, as allegations of

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<sup>194</sup> See ECCC Law, *supra* note 7, arts. 30, 31 new. The Framework Agreement requires the two heads to cooperate but neither it nor the ECCC Law includes a mechanism for resolving disputes. Framework Agreement, *supra* note 6, art. 8(4).

<sup>195</sup> Those sections include two with Cambodian heads (Public Affairs and Court Management), two with UN-appointed heads (Information Technology, Safety and Security, and General Services), and two dual-headed sections (Personnel and Budget and Finance). ECCC, *Office of Administration*, <http://www.eccc.gov.kh/en/office-of-administration/> (last visited Feb. 5, 2013). See also John A. Hall, *Court Administration at the ECCC*, in *ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS* (John D. Ciorciari & Anne Heindel, eds., 2009), at 181.

<sup>196</sup> Interview with David Tolbert, former UN Special Expert for advising on the UN Assistance to the Khmer Rouge Trials, via telephone (June 19, 2012) (noting that administration was “totally bifurcated” with “little communication” between national and international staffers on opposite sides of the hall—an arrangement that undercut the goals of a hybrid court.)<sup>196</sup>

<sup>197</sup> Former SCSL Registrar Robin Vincent and former ICTY Chief of Administration Kevin St. Louis concluded that the ECCC’s administrative structure was “divisive and unhelpful” and “serve[d] only to constantly hinder, frequently confuse, and certainly frustrate the efforts of a number of staff on both sides of the operations.” Erika Kinetz, *Report Finds Flaws in ECCC Administration*, *CAMBODIA DAILY*, Sept. 25, 2007.

<sup>198</sup> The ECCC Law requires each side to bear certain expenses. ECCC Law, *supra* note 7, arts. 44(1)-(4). The ECCC’s reliance on voluntary funding is similar to the scheme used for the SCSL and differentiates both of those hybrid courts from the ICTY and ICTR, which receive funds from the UN general budget, and the ICC, which is funded by assessed contributions from parties to the Rome Statute.

<sup>199</sup> ECCC, *ECCC Financial Outlook* (Apr. 2012), available at <http://www.eccc.gov.kh/sites/default/files/5-Financial%20Outlook%20-%20April%202012.pdf>.

<sup>200</sup> The UN Controller was given initial oversight rather than the Office of Legal Affairs (OLA), which had negotiated the Framework Agreement. For day-to-day matters such as recruitment, the Controller relied on the Department of Economic and Social Affairs (DESA). The OLA appears to have acquiesced in this arrangement partly to “wash its hands” of a court it feared would have serious problems as a result of its structural defects. Tolbert interview, *supra* note 196. In 2005, the United Nations created a project called the UN Assistance to the Khmer Rouge Trials (UNAKRT) in 2005, which its spokesman emphasized was

mismanagement and corruption surfaced, the OLA became more involved, and the United Nations ignored Cambodian opposition and created a much-needed “Special Expert” position to serve as a point person for Court oversight.<sup>201</sup> Nevertheless, the United Nations has taken what one senior ECCC official calls a “hands-off” approach,<sup>202</sup> interpreting its mandate narrowly in the face of a structure designed specifically to limit the scope for UN control.<sup>203</sup>

Donors have also lacked a strong mechanism for overseeing either side of the Court. Unlike the SCSL and STL, which feature donor-led Management Committees entrusted by statute to provide policy direction on non-judicial matters,<sup>204</sup> the ECCC has relied primarily on a relatively informal “Friends of the ECCC” group consisting of donor, ECCC, and Cambodian officials.<sup>205</sup> For a time, the UN Development Program administered donor funds to the national side of the Court and participated in a “Project Board” designed to provide some oversight, but

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“here to help, not to lead.” Erika Kinetz, *Officials Stand by Structure of KR Tribunal*, CAMBODIA DAILY, Oct. 3, 2007. This, initial UN involvement treated the ECCC like an ordinary technical assistance project.

<sup>201</sup> Former ICTY Deputy Prosecutor David Tolbert was the first Special Expert to advise on UN Assistance to the Khmer Rouge trials. Later, U.S. funding and the appointment of former U.S. officials to the post (former war crimes ambassadors Clint Williamson and David Scheffer) led the post to be associated informally with the United States. Williamson interview, *supra* note 27.

<sup>202</sup> Confidential interview with a senior ECCC staff member, Phnom Penh (Nov. 2012).

<sup>203</sup> Former UN Assistant Secretary-General Larry Johnson asserts that the Cambodians’ insistence on “strict equality” left the United Nations with “virtually no remit over the Cambodian half” of the Court, and that the split hybrid design erected “a big brick wall that the Cambodians worked to keep up at all times.” Interview with Larry Johnson, former UN Assistant Secretary-General for Legal Affairs, via telephone (June 21, 2012).

<sup>204</sup> Statute of the SCSL, art. 7; The Secretary-General, *Second Report of the Secretary-General submitted pursuant to the Security Council resolution 1757 (2007)*, U.N. Doc. S/2008/173 (Mar. 12, 2008).

<sup>205</sup> U.S. officials proposed creating such a Management Committee in 2005, but other large donor states – including Japan, France, and Australia – resisted the idea as out of keeping with the political agreement underpinning the ECCC. Unclassified Cable, U.S. Embassy Canberra, *Australia Does Not Support Management Committee for Khmer Rouge Tribunal* ¶ 2 (July 18, 2005), available at <http://www.wikileaks.org/cablegate.html>. Instead, France and Japan led the establishment of a weaker “Friends of the ECCC” group in 2006 at the invitation of Cambodian Deputy Prime Minister Sok An. Cable 07PHNOMPENH429, U.S. Embassy Phnom Penh, *Friends of the ECCC or RGC?* (Mar. 16, 2007), available at <http://dazzlepod.com/cable/07PHNOMPENH429/>. The Friends group has met periodically and provided an informational function but has lacked the teeth of a management committee. Williamson interview, *supra* note 27. According to a former Japanese participant, the group has focused on “friendly advice” and taken an approach that is “non-coercive and non-interventional...mindful of the sovereign inviolability of the local State from which the local component of the Office of Administration derives.” Yoshi Kodama, *For Judicial Justice and Reconciliation in Cambodia: Reflections Upon the Establishment of the Khmer Rouge Trials and the Trials’ Procedural Rules 2007*, 9 L. & PRAC. OF INT’L CTS. & TRIBUNALS 107-08 (2010). A “steering group” of donor officials has also convened periodically in New York to discuss matters arising at the ECCC.

over time donors have provided more funds directly to the Cambodian Government,<sup>206</sup> and the UNDP ceased its role in 2009. Overall, the ECCC's divided management and oversight have accommodated Cambodian sovereignty concerns but have contributed to problems in administrative integrity and efficiency, as well as recurring financial crises.

### A. Integrity Concerns

Critics of the ECCC's split administrative structure feared that without clear international leadership, the Court would be vulnerable to the bureaucratic dysfunction and administrative corruption that plague Cambodia's domestic system. Those issues have surfaced indeed, and although the Court has taken steps to address them, such problems confirm some of the pitfalls of its institutional design and weak oversight mechanisms.

#### 1. Early Shortcomings in Human Resources Management

One of the first administrative problems to arise related to human resource management. The ECCC's split structure gave authority to each side to hire its own staff, and soon after the Court opened its doors, monitors from the Open Society Justice Initiative (OSJI) expressed concerns to donors about the opaqueness of hiring practices on the OA's Cambodian side,<sup>207</sup> prompting UNDP to commission an audit. The auditors issued a scathing report in June 2007. They argued that the ECCC's divided structure undermined sound management, noting that international section heads were kept away from recruiting Cambodian staffers, evaluating them, and even keeping their time sheets.<sup>208</sup> The tribunal's weak oversight mechanisms

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<sup>206</sup> John Hall, *Donors Should Adopt a Balanced Approach to Funding ECCC*, CAMBODIA DAILY, July 21, 2008.

<sup>207</sup> Open Society Justice Initiative, *Memorandum to the Group of Interested States: Priority Issues for the Extraordinary Chambers in the Courts of Cambodia (ECCC)* 14 (Oct. 2006), available at [http://www.soros.org/sites/default/files/cambodia\\_20061004.pdf](http://www.soros.org/sites/default/files/cambodia_20061004.pdf). OA Director Sean Visoth rejected this claim in a meeting with the Friends Group shortly afterward. Cable 06PHNOMPENH1983, U.S. Embassy Phnom Penh, *Recent ECCC Developments* ¶ 8 (Nov. 2, 2006), available at <http://dazzlepod.com/cable/06PHNOMPENH1983>, ¶ 4.

<sup>208</sup> United Nations Development Program, Office of Audit and Performance Review, *Audit of Human Resources Management at the Extraordinary Chambers in the Courts of Cambodia (ECCC)*, Report No. RCM0172, at 18-19 (June 4, 2007), edited to include Cambodian responses in the text and to remove individual names, available at <http://old.eccc.gov.kh/english/cabinet/OAPR.pdf> [hereinafter UNDP Audit].

contributed to the problem. The OA Director was chair of the Project Board intended to oversee the OA's activities, which the UNDP audit rightly identified as a potential "conflict of interest."<sup>209</sup> The Friends of the ECCC group also did little to address the hiring concerns, reportedly "due to the presence of ECCC staff throughout the meetings."<sup>210</sup>

The UNDP audit concluded that most Cambodian personnel evaluated "did not meet the minimum requirements" posted in the job advertisements, that "recruitment was not performed in a transparent, competitive and objective manner," that performance evaluation schemes were inadequate, and that Cambodian salaries were too high.<sup>211</sup> It also recommended that the United Nations consider withdrawing from the ECCC if the Cambodian Government did not take adequate remedial measures, such as nullifying past recruitments and starting a new hiring process under close UNDP oversight.<sup>212</sup>

Some Cambodians resented criticism of local staff pay and qualifications—a sensitive issue at any hybrid court combining local and foreign personnel with very different skills and experiences.<sup>213</sup> Secretary-General of the Cambodian Bar Association Ly Tayseng demanded equal pay for Cambodian lawyers at the ECCC, arguing that "Cambodian lawyers are more qualified than foreign lawyers who don't speak Khmer and don't understand the working culture of Cambodia."<sup>214</sup> With respect to hiring practices, Cambodian officials acknowledged "weaknesses" in initial procedures but criticized the "unbalanced" report and asserted that the auditors' recommendation of UNDP oversight was:

completely out of proportion to the issues raised in the report [and] unacceptable and non-negotiable to the Cambodian side as to implement them would essentially mean a

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<sup>209</sup> *Id.* at 6, 20-21.

<sup>210</sup> Cable 07PHNOMPENH429, U.S. Embassy Phnom Penh, *Friends of the ECCC or RGC?* (Mar. 16, 2007), available at <http://dazzlepod.com/cable/07PHNOMPENH429/>, ¶ 4.

<sup>211</sup> UNDP Audit, *supra* note 208, at 1-5, 15-16 (evaluating 29 personnel files).

<sup>212</sup> *Id.* at 9-11 (noting that UN and Cambodian officials initially agreed that Cambodians would be paid at 50% of the in-country UNDP salary scale, but Sok An had approved a tax exemption for all ECCC staff, which raised take-home pay above anticipated levels).

<sup>213</sup> Similar issues arose at the Special Panels in East Timor. Suzannah Linton, *Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor*, 25 MELB. U. L. REV. 122, 150 (2001).

<sup>214</sup> Erika Kinetz and Prak Chan Thul, *Bar Demands Same Pay for Cambodian, Int'l Lawyers*, CAMBODIA DAILY, Apr. 10, 2007 (noting a similar critique from Trial Chamber judge Thou Mony).

re-negotiation of the entire basis and character of the ECCC, as a national court with international participation and assistance already agreed in an international treaty.<sup>215</sup>

UN officials implicitly agreed. UNAKRT spokesman Peter Foster argued that the UN could take a stronger “leadership role...within the existing structure” by offering “greater assistance and greater advice to our Cambodian colleagues.”<sup>216</sup>

The audit catalyzed a number of remedial steps. In March 2007, the OA produced a Personnel Handbook for the Cambodian side of the Court including guidelines on recruitment, pay, promotion, and performance evaluation.<sup>217</sup> The Project Board noted in September that it was working to “boost the ECCC’s capacity,”<sup>218</sup> and a review by the international auditing firm of Deloitte and Touche in early 2008 found major improvements.<sup>219</sup> UNDP and European Commission officials added their commendations.<sup>220</sup> At least two key Cambodian appointees have since been appointed without the competitive recruitment required by the new rules,<sup>221</sup>

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<sup>215</sup> UNDP Audit, *supra* note 208, at 5-6. *See also* Kodama, *supra* note 205, at 57, 77.

<sup>216</sup> Rory Byrne, *UN Reports Call for Changes in Structure of Khmer Rouge Tribunal*, VOICE OF AMERICA, Oct. 5, 2007. *See also* Hall, *supra* note 195, at 186 (noting UN reluctance to reopen negotiations about the Court’s structure and risk further delays).

<sup>217</sup> The handbook was revised after the UNDP audit’s release. *Extraordinary Chambers in the Courts of Cambodia, Personnel Handbook (National) (2d ed., 2 Aug. 2007)*, available at [http://www.cambodiatribunal.org/sites/default/files/resources/Personnel\\_Handbook\\_English.pdf](http://www.cambodiatribunal.org/sites/default/files/resources/Personnel_Handbook_English.pdf).

<sup>218</sup> United Nations Development Program, *UNDP Statement – Cambodia* (25 Sept. 2007), <http://content.undp.org/go/newsroom/2007/september/undp-statement-cambodia-20070926.en>.

<sup>219</sup> Deloitte Touche Tohmatsu India Pvt. Limited, *Report on the Special HRM Review 3-4* (25 Apr. 2008), available at [http://www.cambodiatribunal.org/sites/default/files/reports/full\\_report.pdf](http://www.cambodiatribunal.org/sites/default/files/reports/full_report.pdf) (concluding that some “handholding” and “capacity building” would be needed but that “robust” systems had been implemented and national staff demonstrated a commitment to sound practices).

<sup>220</sup> Jo Scheuer, UNDP Country Director, *UNDP Statement on the ECCC Human Resources Management Review* (25 Apr. 2008) (noting that UNDP was “quite satisfied” with reforms); *Audit says management of Cambodian tribunal has improved after calls for reform*, INT’L HERALD TRIBUNE, Apr. 25, 2008 (quoting a senior EC official as saying the Court now had “a system that can work”).

<sup>221</sup> Douglas Gillison, *KR Victims Unit Officers Dismiss Questions on Appointments*, CAMBODIA DAILY, Aug. 6, 2009; Julia Wallace, *Khmer Rouge Tribunal Victims Unit Gets New Chief*, CAMBODIA DAILY, Sept. 2, 2010 (noting that Helen Jarvis and her successor, Rong Chhorn, were both appointed head of the Victims Unit without such a competition).

but overall the Cambodian side of the ECCC has managed human resources more transparently and effectively with regular input from international colleagues.<sup>222</sup>

## 2. Corruption Allegations

The Court's qualified success in addressing human resource problems contrasts with its handling of corruption allegations—arguably the most serious to have faced any internationalized mass crimes court. The issue surfaced in 2007 when media reports and an OSJI press release alleged that Cambodian staffers had to kick back a large fraction of their salaries in exchange for their jobs.<sup>223</sup> Cambodian officials denied the allegations, accused OSJI of “bad faith and bias,”<sup>224</sup> and considered closing OSJI's local office.<sup>225</sup> A video of a Cambodian ECCC official supported the claims, however, and leaked U.S. Embassy cables later suggested that international ECCC officials knew about the kickback scheme from Cambodian colleagues.<sup>226</sup> Key donors to the ECCC “expressed disappointment over how OSJI has conducted itself” and thought that OSJI should first have informed the Court.<sup>227</sup> While donors discussed OSJI's role and the concurrent drafting of the Internal Rules, a U.S. cable suggests that “the allegations over corruption and kickbacks [were] nearly forgotten.”<sup>228</sup>

The UNDP audit did not address the corruption allegations, later explaining that “[t]he audit did not find evidence [of kickbacks]...primarily because the allegations pertained to personnel beyond UNDP's jurisdiction. UNDP would have had to obtain irrefutable evidence to

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<sup>222</sup> See Cable 09PHNOMPENH316, U.S. Embassy Phnom Penh, *Khmer Rouge Tribunal “Friends Group” Meets for First Time in a Year: Solid Judicial Performance Meets External Shocks* ¶ 4 (May 14, 2009), available at <http://dazzlepod.com/cable/09PHNOMPENH316>.

<sup>223</sup> Cat Barton, *Kickback Claims Stain the KRT*, PHNOM PENH POST, Feb. 23-Mar. 8, 2007; Hall, *supra* note 195, at 187-88; Press release, OSJI, *Corruption Allegations at Khmer Rouge Court Must Be Investigated* (Feb. 24, 2007).

<sup>224</sup> Erika Kinetz and Pin Sisovann, *ECCC Cools to NGO after Kickback Charge*, CAMBODIA DAILY, Feb. 19, 2007; Mean Veasna, *ECCC Denies Allegations of Pay Kickbacks*, VOICE OF AMERICA (KHMER), Feb. 16, 2007.

<sup>225</sup> Cable 07PHNOMPENH422, U.S. Embassy Phnom Penh, *The ECCC and OSJI* ¶¶ 2-5 (Mar. 15, 2007), available at <http://dazzlepod.com/cable/07PHNOMPENH422/> [hereinafter Cable 07PHNOMPENH422].

<sup>226</sup> *Id.* ¶ 10 (noting that Cambodian staffers feared making allegations due to the lack of a “whistleblower culture” but were glad international staffers relayed the facts to OSJI).

<sup>227</sup> *Id.* ¶ 6, 8.

<sup>228</sup> *Id.* ¶¶ 8-9.

address the specific allegations.”<sup>229</sup> International judges at the ECCC also believed it was beyond their purview to intervene.<sup>230</sup> In mid-2008, after further reports of corruption at the Court,<sup>231</sup> the UN took action. UNDP froze the funds it administered to the Cambodian side.<sup>232</sup> Special Expert David Tolbert requested a confidential “review” of the allegations by the UN’s Office of Internal Oversight Services,<sup>233</sup> and in September he sent a confidential report to the Cambodian Government finding the allegations credible and recommending an RGC investigation.<sup>234</sup> Cambodian officials continued to deny the charges<sup>235</sup> but did create a new anti-corruption committee<sup>236</sup> and appoint two Cambodian “Ethics Monitors” to receive complaints and report to Sok An. Most importantly, Sok An agreed to the UN’s request to remove OA Director Sean Visoth, reported to be a key figure in the kickback scheme.<sup>237</sup> In November, Sean Visoth went on extended medical leave and did not return to the tribunal.<sup>238</sup>

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<sup>229</sup> United Nations Development Program, *supra* note 218.

<sup>230</sup> Cable 07PHNOMPENH826, U.S. Embassy Phnom Penh, *ECCC Passes Internal Rules* ¶ 10 (June 15, 2007), available at <http://dazzlepod.com/cable/07PHNOMPENH826/>.

<sup>231</sup> See, e.g., Erika Kinetz, *Report Finds Flaws in ECCC Administration*, CAMBODIA DAILY, Sept. 25, 2007 (including a staffer’s confidential allegation that he had to “hand over 25 percent of his salary for his job”); Douglas Gillison, *ECCC Reviews New Graft Allegations on Eve of Funds Drive*, CAMBODIA DAILY, July 29, 2008 (noting that Sean Visoth circulated a memo within the ECCC concerning new allegations of corruption).

<sup>232</sup> Douglas Gillison, *ECCC Funding Delayed Over Graft Claims*, CAMBODIA DAILY, Aug. 6, 2008.

<sup>233</sup> Tolbert interview, *supra* note 196 (noting that a formal investigation would likely have exceeded the UN’s legal purview).

<sup>234</sup> Georgia Wilkins, *KR Court Graft Review Unfairly Names and Shames Gov’t Says*, PHNOM PENH POST, Sept. 22, 2008.

<sup>235</sup> Sopheng Cheang, *Cambodian genocide lawyer hits at corruption issue*, ASSOCIATED PRESS, Apr. 3, 2009.

<sup>236</sup> *Tribunal Staff Sets Up Anti-Corruption Team*, VOICE OF AMERICA (KHMER), Aug. 15, 2008.

<sup>237</sup> Tolbert interview, *supra* note 196 (noting that under pressure from Tolbert, Sok An agreed to remove Sean Visoth “on my timetable, not yours”); Cable 08PHNOMPENH841, U.S. Embassy Phnom Penh, *Core Donors Updated on Khmer Rouge Tribunal are United in Addressing the Corruption Issue* ¶ 1 (Oct. 10, 2008), available at <http://dazzlepod.com/cable/08PHNOMPENH841/>. Key donors did not issue a joint demarche. *Id.* ¶ 6 (noting that the Japanese embassy saw a joint demarche as too confrontational and one-sided, and France and Australia agreed). See also Cable 08PHNOMPENH883, U.S. Embassy Phnom Penh, *Sok An on the Khmer Rouge Tribunal* ¶¶ 6, 7, 9, 13 (Nov. 3, 2008), available at <http://dazzlepod.com/cable/08PHNOMPENH883/>.

<sup>238</sup> *The Court on Trial*, ECONOMIST, Apr. 2, 2009. After his departure from the ECCC, Sean Visoth reportedly began working for Sok An in the Council of Ministers. Kong Sothanarith, *Absence of Tribunal Administrator Raises Concerns*, VOA KHMER (June 23, 2010), <http://www.voacambodia.com/content/absence-of-tribunal-administrator-raises-concerns-96980264/1360061.html>.

In early 2009, Sok An and UN Assistant Secretary General Peter Taksoe-Jensen agreed to establish a new scheme for reporting corruption at the Court.<sup>239</sup> Taksoe-Jensen argued that Cambodian staffers should be able to lodge complaints with UN officials, but Sok An insisted that the national and international complaint mechanisms should be separate<sup>240</sup>—a scheme that would likely deter Cambodian staffers from issuing complaints given the lack of domestic whistleblower protection. Although the U.S. ambassador reportedly pressed Sok An to “take the deal” Taksoe-Jensen proposed,<sup>241</sup> donors were eager to avoid delays in the *Duch* trial and pressed both sides to compromise.<sup>242</sup> Japan and Australia injected additional funds to keep the Cambodian side afloat financially, reducing pressure on the RGC.<sup>243</sup>

In May, U.S. Ambassador-at-Large for War Crimes Issues Clint Williamson helped broker a deal, supported by other donors, whereby a single Cambodian-appointed counselor would receive all complaints.<sup>244</sup> After a series of discussions with donor representatives,<sup>245</sup> the

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<sup>239</sup> See Royal Government of Cambodia and United Nations, *Joint Statement* (23 Feb. 2009), available at [http://old.eccc.gov.kh/english/cabinet/fileUpload/108/Joint\\_Statement\\_EN.pdf](http://old.eccc.gov.kh/english/cabinet/fileUpload/108/Joint_Statement_EN.pdf).

<sup>240</sup> Seth Mydans, *Corruption Allegations Affect Khmer Rouge Trials*, N.Y. TIMES, Apr. 9, 2009; Cable 09PHNOMPENH168, U.S. Embassy Phnom Penh, *Donors Urge Resumed Funding, More Negotiation on Khmer Rouge Tribunal Anti-Corruption Mechanism* ¶ 3 (Mar. 17, 2009), available at <http://dazzlepod.com/cable/09PHNOMPENH168/>.

<sup>241</sup> Cable 09PHNOMPENH243, U.S. Embassy Phnom Penh, *Khmer Rouge Tribunal: UN formalizes Own Anti-Corruption Mechanism as Sok An Mulls Over UN Proposal* ¶¶ 1, 11 (Apr. 10, 2009), available at <http://dazzlepod.com/cable/09PHNOMPENH243>.

<sup>242</sup> Some key donor officials reportedly supported Cambodia, such as the French ambassador, Japan’s Deputy Chief of Mission—who called the withholding of UNDP funds a kind of “international blackmail”—and the Australian ambassador, who said, “Cambodia is in the right.” Cable 09PHNOMPENH168, *supra* note 240, ¶ 6, 10-12. See also Cable 09PHNOMPENH264, U.S. Embassy Phnom Penh, *Khmer Rouge Tribunal: Donors Chart a More Unified Course* ¶ 5-6, 11 (Apr. 24, 2009), <http://www.wikileaks.nl/cable/2009/04/09PHNOMPENH264.html> (in which U.S. ambassador Carol Rodley said, “...we believe it is time for the Cambodians to make some concessions, but also believe the UN must be seen as engaged.”)

<sup>243</sup> *Long-delayed Khmer Rouge genocide trial to begin*, WASH. TIMES, Mar. 29, 2009; Cable 09PHNOMPENH264, *supra* note 242, ¶ 3 (noting that Australia asked UNDP to release some of its frozen funds to the ECCC).

<sup>244</sup> Cable 09PHNOMPENH333, U.S. Embassy Phnom Penh, *Khmer Rouge Tribunal: S/WCI Ambassador Williamson Begins Talks on Anti-Corruption Mechanism*, ¶ 4, 6 (May 22, 2009), available at <http://dazzlepod.com/cable/09PHNOMPENH333/>.

<sup>245</sup> See, e.g., Cable 09PHNOMPENH343, U.S. Embassy Phnom Penh, *Khmer Rouge Tribunal: Sok An Enthusiastic About Proposed Anti-Corruption Mechanism*, ¶¶ 3-14 (May 28, 2009), available at <http://dazzlepod.com/cable/09PHNOMPENH343/> (noting discussion on the importance of an independent appointee).

UN and RGC announced in August that Auditor General Uth Chhorn would fill the role.<sup>246</sup> Uth had a record of poor transparency as chief auditor of a notoriously corrupt and opaque government,<sup>247</sup> and his status as a senior government official reduced the likelihood that Cambodian staffers would feel safe issuing complaints.

Since Sean Visoth's removal and Uth's appointment, no new public allegations of administrative corruption have arisen at the Court, leading U.S. officials and others to conclude that the Court had made "considerable progress on strengthening management systems and eliminating corruption"<sup>248</sup> and was "likely Cambodia's first corruption-free court."<sup>249</sup> The Court's hybrid nature was helpful in giving domestic staff a channel through which to air grievances and catalyzing diplomatic pressure on the RGC to curb abuses and comport with international standards. Nevertheless, the corruption issue showed more problems than strengths of the ECCC's split administrative and oversight structures, which slowed and weakened UN efforts to deal with the kickback allegations and prevented a serious investigation despite considerable evidence of corruption.

The negotiations on an anti-corruption mechanism bore remarkable parallels to the talks to establish the tribunal. The Cambodian Government resisted efforts at international control, and soon donors began pushing the UN to compromise so that trials could proceed.<sup>250</sup> At a Friends group meeting in May 2009, the French ambassador reportedly said that "it is time for the ECCC to put an end to looking backward at past acts of corruption and instead look ahead to the real challenges facing the court"<sup>251</sup>—by which he presumably meant the successful

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<sup>246</sup> Joint Statement on Establishment of Independent Counsellor at Extraordinary Chambers in Courts of Cambodia, United Nations Press Release L/3146 (Aug. 12, 2009).

<sup>247</sup> Sophal Ear, *Cambodian 'Justice,'* WALL ST. J. ASIA, Sept. 1, 2009 (noting that Uth's National Audit Authority had not made an audit public since beginning work in 2002); Douglas Gillison and Neou Vannarin, *Government Auditor Named New ECCC Graft Monitor*, CAMBODIA DAILY, Aug. 13, 2009.

<sup>248</sup> Cable 09STATE15565, U.S. Secretary of State, *Demarche Request: U.S. Candidate for UN Special Expert for the Khmer Rouge Tribunal* ¶ 4 (Feb. 10, 2010), available at <http://www.cablegatesearch.net/cable.php?id=10STATE15565>.

<sup>249</sup> Cable 09PHNOM PENH564, U.S. Embassy Phnom Penh, *Khmer Rouge Tribunal: Sok An Signs Agreement on Anti-Corruption Mechanism*, ¶ 9 (Aug. 7, 2009), available at <http://dazzlepod.com/cable/09PHNOMPENH564/>.

<sup>250</sup> See Cable 09PHNOMPENH333, *supra* note 244, ¶ 5 (in which Sok An notes the U.S. role in breaking impasses in both 1999-2003 and 2009).

<sup>251</sup> Cable 09PHNOMPENH316, *supra* note 222, ¶ 1.

completion of criminal trials. Donors' interest in proceeding with trials was entirely legitimate, but it had the adverse side effect of weakening the UN's leverage and contributing to another Cambodian negotiating victory and made an investigation unlikely.<sup>252</sup>

The new anti-corruption scheme has been of questionable effectiveness. Anecdotal reports of corruption continue,<sup>253</sup> and some ECCC staffers report privately that the main change by senior Cambodian personnel has been to deter public revelations more effectively.<sup>254</sup> In early 2010, Uth announced that he would publish a report of his work, but several months later he said that UN officials had instructed him to keep his report confidential.<sup>255</sup> Only in October 2012 did Uth begin holding office hours at the ECCC to hear staff concerns.<sup>256</sup> Overall, the Court's response to corruption charges tends to validate concerns that weak international oversight structures would compromise administrative integrity.

### **B. Barriers to Administrative Efficiency**

Both the Court's split structure and its hybrid nature have posed challenges to administrative efficiency. For example, a full year after it began operations, the ECCC had not finished its courtrooms or installed audio/video equipment,<sup>257</sup> largely because the Framework Agreement left it unclear which side was responsible for managing the planning and construction of various aspects of the facilities.<sup>258</sup> The ECCC's divided Office of Administration

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<sup>252</sup> Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: May 2009 Update* 11 (2009) [hereinafter OSJI May 2009 Report].

<sup>253</sup> Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia* 16 (Dec. 2010).

<sup>254</sup> Authors' confidential interviews with ECCC Cambodian staff members, 2012.

<sup>255</sup> James O'Toole, *UN Keeps Corruption Probe Confidential*, PHNOM PENH POST, Oct. 18, 2010.

<sup>256</sup> *Independent Counsellor Holds Townhall Meeting*, COURT REPORT (Oct. 2012), at 2.

<sup>257</sup> Anne Heindel, *Why the ECCC Office of Administration Would Benefit from Being Structured More Like a "Registry,"* SEARCHING FOR THE TRUTH (Oct. 2007). See also Phillip Rapoza, *Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?* 21 AM. U. INT'L L. REV. 525, 531-32 (2005) (noting similar problems in the East Timor Special Panels).

<sup>258</sup> The Framework Agreement requires the RGC to "provide at its expense the premises... [and] utilities, facilities, and other services necessary for their operation," but the United Nations bears the costs for "utilities and services." Framework Agreement, *supra* note 6, arts. 14, 17(b). Moreover, UN officials saw their role as guarantors of international standards as a basis for oversight on facilities, contributing to regular interventions, confusion, and delays. Kodama, *supra* note 205, at 37, 56.

and split funding channels have caused inefficiency as well. Budgets must be prepared by the Cambodian and international sides separately and shuttled from one side to another for comments and modification as they are reconciled.<sup>259</sup>

Translation has been an immense burden given the Court's three official languages—English, French, and Khmer—and the fact that most of its personnel are conversant only in one or two of those languages.<sup>260</sup> The ECCC still lacks the capacity to translate all of the myriad documents generated by the parties or referred to in their submissions.<sup>261</sup> French has been a particular challenge given the scarcity of qualified Khmer-French translators, forcing the ECCC to adopt a cumbersome “relay system”—Khmer to English to French or vice versa.<sup>262</sup> One Cambodian staffer laments that translation has required “more than double” the time that would be required to proceed in a single language.<sup>263</sup> Again, interests in efficiency have bumped up against concerns of fairness, as French-speaking defense teams have lodged several complaints regarding mistakes in official translations or the lack of French translations of all written materials used by the Court.<sup>264</sup> Etcheson, like many others, notes that “from an operational perspective, it's hard to think of anyone at the Court who was [or is] solely Francophone.”<sup>265</sup> Though politically expedient, the decision to include French as an official language appears to be one of the more avoidable sources of inefficiency at the ECCC.

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<sup>259</sup> Tolbert interview, *supra* note 196 (June 19, 2012) (calling the budget preparation and adjustment process “very inefficient”).

<sup>260</sup> Similar challenges have faced other tribunals with multiple official languages, including the STL (English, French, and Arabic) and Special Panels in East Timor (English, Portuguese, Bahasa Indonesia, and Tetum).

<sup>261</sup> Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia* 3-4 (Oct. 2008) [hereinafter OSJI Oct. 2008 Report], at 4. This limitation remains true today.

<sup>262</sup> Cable 09PHNOMPENH316, *supra* note 222, ¶ 3; Anne Heindel, *Expert Commentary on Legal Filings: Playing “Telephone”: Relay Interpretation in Case 002*, CAMBODIA TRIBUNAL MONITOR, Aug. 15, 2012, at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

<sup>263</sup> Respondent no. 2, confidential questionnaire to Cambodian ECCC staffers (June 2012) (on file with the authors) [hereinafter ECCC respondent No. 2]. See also Etcheson interview, *supra* note 38 (calling translation “immensely time-consuming”).

<sup>264</sup> See, e.g., Decision on Khieu Samphan's Appeal against the Order on Translations Rights and Obligations of the Parties, Case No. 002/19-07-2007/OCIJ (PTC, Feb. 20, 2009) (rejecting Khieu Samphan's request for translations of all materials into French on efficiency grounds); Guissé interview, *supra* note 27 (asserting that some translations include important mistakes).

<sup>265</sup> Etcheson interview, *supra* note 38; confidential interview with a senior ECCC staff member, Phnom Penh (Nov. 2012) (noting that some staff call French the “third superfluous language”).

### C. *Financial Instability*

The ECCC's experience shows that hybrid courts with substantial UN participation do not necessarily deliver major cost savings vis-à-vis fully international courts, as was originally hoped. The ECCC proceedings have been much longer and more expensive than the unrealistic \$56 million price tag the Court's architects originally projected. The annual cost of its operations has risen over time, and in October 2012, the Court projected that it would spend approximately \$209 million by the end of 2013.<sup>266</sup> That total is much less than the ICTY (more than \$2 billion to date) and ICTR (roughly \$1.8 billion) and comparable to the SCSL (approximately \$300 million), but with only one final judgment issued in Case 001, the ECCC has cost more than any of those tribunals per conviction or acquittal issued. With just two other individuals currently standing trial, that fact will likely remain true.<sup>267</sup> From a financial perspective, the ECCC has been much more like an international tribunal than a domestic proceeding, which reflects the interest in recruiting qualified international personnel and the upward pressure those salaries create on national staff salaries.

The financial situation at the ECCC is an improvement on the Special Panels for Serious Crimes in East Timor, which were crippled from birth by a lack of funds. However, the ECCC's funding architecture, which relies on voluntary donor contributions to each side of the Court, has rendered it vulnerable to underfunding, and indeed the Court has struggled through successive budget crises as donors balk at either the costs of proceedings or withhold funds to express disapproval of developments at the Court (usually on the Cambodian side.)<sup>268</sup> Successive funding shortfalls have strained morale and led to a strike by unpaid national staff,

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<sup>266</sup> Extraordinary Chambers in the Courts of Cambodia, *The Court Report* 58 (Mar. 2013), at 2.

<sup>267</sup> Even if the ECCC issues final judgments against Nuon Chea and Khieu Samphan, its average cost per conviction or acquittal will exceed \$70 million by the end of 2013, far outstripping the figures at the ICTY (roughly \$16 million per individual convicted or acquitted), ICTR (approximately \$21 million), or SCSL (roughly \$30 million). Only the ICC, which has completed just a few cases after amassing large start-up costs, has been more costly on this metric.

<sup>268</sup> Somewhat ironically given its initial opposition to the Special Expert position, the Cambodian Government has had to turn to UN Special Expert David Scheffer, who has led such efforts for the UN side, to help it raise funds to survive 2013.

cutbacks in vital sections of the Court,<sup>269</sup> and even required the ECCC to reduce temporarily the number of trial days each week for Case 002.<sup>270</sup> Moreover, some donors have reportedly begun to press the Court to channel funds only to Case 002, showing that the ECCC's voluntary funding scheme increases its vulnerability both to underfunding and pressure that verges on political interference.<sup>271</sup>

The ECCC's ability to marshal nearly \$200 million is a positive, because delivering credible justice for complex mass crimes is costly. Unfortunately, the Court has not used those resources as efficiently as it could, partly due to its cumbersome structural features.<sup>272</sup> This has prevented the ECCC from devoting more funds to the vital functions of outreach and victim participation, undercutting some of its greatest potential advantages.

## VII. CONNECTING TO VICTIMS

One of the main arguments in favor of in-country hybrid tribunals is that they facilitate robust victim participation. Victims can more easily observe or participate in the proceedings, which offer them an opportunity to engage in truth-telling, contribute to the search for justice, and otherwise seek empowerment and a degree of personal and collective reconciliation. The ECCC's ability to connect with victims and the general Cambodian population has been one of the clearest functional advantages flowing from the Court's in-country setting, large component of domestic personnel, and unique opportunities for direct survivor participation.

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<sup>269</sup> Etcheson interview, *supra* note 38; Respondent no. 3, confidential questionnaire to Cambodian ECCC staffers (June 2012) (on file with the authors); Justine Drennan, *Court Lost in Translation*, PHNOM PENH POST (Mar. 5, 2013).

<sup>270</sup> ECCC, *Trial Chamber Reduces Number of Weekly Hearing Days in Case 002/1*, <http://www.eccc.gov.kh/en/articles/trial-chamber-reduces-number-weekly-hearing-days-case-0021> (visited Nov. 29, 2012).

<sup>271</sup> Corell interview, *supra* note 34 (arguing that in addition to the danger of financial uncertainty and instability, "it's hard to have a credible institution with voluntary contributions"); Confidential senior staff interview, *supra* note 202.

<sup>272</sup> One senior staff member notes that roughly 30% of the ECCC's budget goes to administration—a much higher total than other mass crimes courts. Confidential senior staff interview, *supra* note 202.

## A. Outreach

The hybrid model is premised in significant part on the notion that *in situ* proceedings with strong national participation help connect survivors to the criminal process.<sup>273</sup> However, outreach is not an automatic strength of hybrid courts. Mixed institutional design presents the same risks of political discord and ownership struggles over outreach initiatives as are evident in other aspects of hybrid courts' functions. Moreover, as with international courts, hybrid courts' budget and staffing allocations, and perceived institutional priorities, have consistently favored core judicial functions, giving short shrift to programs that share their work with the public.<sup>274</sup> The ECCC is no exception, and thus the natural advantages that its location and composition afford have been tempered by shortcomings in its institutional design, endowment, and political will.

Despite the relatively clear lessons provided by the outreach weaknesses of preceding tribunals, the ECCC was designed without explicit institutional provision for outreach. When the judges adopted the Internal Rules, they divided outreach functions and assigned responsibilities to two separate offices: the Public Affairs Section (PAS), and the Victim's Unit (VU) (later renamed the Victim Support Section [VSS]). Neither is a dedicated outreach office *per se*. Their mandates overlap, but in practice, the PAS has concentrated on what it calls the "macro" approach to outreach—focusing on public information and a broad audience of donors, NGOs, and the general population.<sup>275</sup> The VU/VSS has primarily taken a "micro" approach of facilitating participation by civil parties and complainants in the Court proceedings.<sup>276</sup>

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<sup>273</sup> See, e.g., Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, U.N. Doc. S/2004/616, 23 Aug. 2004, ¶ 44 (writing that hybrid *in situ* tribunals have important benefits, "including easier interaction with the local population ... and being more accessible to victims").

<sup>274</sup> Cohen, *supra* note 2, at 36 (calling outreach and legacy "among the most seriously under funded [areas] at all the tribunals" and arguing that "[w]ithout effective outreach, many of the courts' stated goals cannot be achieved").

<sup>275</sup> International Center for Transitional Justice, *Outreach Strategies in International and Hybrid Courts*, Report of the ICTJ-ECCC Workshop (Apr. 2010), at 5 [hereinafter ICTJ Report]; Correspondence with Peter Foster, former UNAKRT Public Affairs Officer, June 13, 2012.

<sup>276</sup> Foster correspondence, *supra* note 275.

## 1. Public Affairs Section

Like other mass crimes courts, the ECCC's initial budget provided scant funding for outreach activities and it was assumed the Court would lean heavily on local civil society organizations throughout the process to spread word about the tribunal.<sup>277</sup> Although this approach had its drawbacks,<sup>278</sup> the Court and its civil society partners together have made impressive progress in terms of the number of individuals they have reached and the range of outreach mechanisms they have designed.

The PAS created various types of written outreach materials and also maintains a website with a wealth of information and Court documents. These efforts have made information about the Court quite easy to find for literate Cambodians and foreigners with Internet access. They appear to have had a relatively small impact in the countryside, however, due to high rates of functional illiteracy, the limited numbers of booklets printed, and uneven distribution across the country.<sup>279</sup> The Court's first radio program was suspended after only a year due to a lack of funds.<sup>280</sup> A few outreach events have been instigated and organized by the Court; however, most village forums related to the ECCC process have been led by civil society organizations.

Relative to other international and hybrid courts, the ECCC has been extremely active in arranging for public visits to the courtroom gallery and tribunal premises, arranging for free public transport to the premises or partnering with civil society groups. The ECCC has the largest public viewing gallery among mass crimes tribunals with nearly 500 seats.<sup>281</sup> Between the start of the *Duch* trial in 2009 and the end of 2011, an impressive 111,543 people visited the

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<sup>277</sup> See Norman Henry Pentelovitch, Note, *Seeing Justice Done: The Importance of Prioritizing Outreach Efforts at International Criminal Tribunals*, 39 GEO. J. INT'L L. 446, 465-80 (2007-2008).

<sup>278</sup> See, e.g., Christoph Sperfeldt, *Cambodian Civil Society and the Khmer Rouge Tribunal*, INT'L J. TRANS. JUST. 1, 4-5 (2012) (arguing "the lack of an outreach strategy among the ECCC and civil society created problems with developing consistent messages about the Court," as well as managing victims' expectations).

<sup>279</sup> Pentelovitch, *supra* note 277, at 466 (arguing that the printed materials "missed the mark" of educating ordinary survivors).

<sup>280</sup> *The Court Report: Issue 56*, at 6 (Jan. 2013).

<sup>281</sup> Cf. Human Rights Watch, *Justice in Motion* 32 (Nov. 2005) (noting that the SCSL in its early years often had just 10 to 20 people in the public viewing gallery—primarily court reporters and relatives of the accused).

Court, either to see live proceedings or as part of a Study Tour.<sup>282</sup> In 2012, a reported 58,471 persons visited the Court to attend the Case 002 trial alone.<sup>283</sup> Former Cambodian Public Affairs Officer Huy Vannak says, “Villagers are proud to have been to Court; to them it’s like visiting Angkor Wat temple.”<sup>284</sup>

Of course, outreach is not only a question of numbers. One Cambodian ECCC staffer repeats a commonly heard criticism that the Court’s outreach is “only successful [in terms of] the quantity but not the quality,” arguing that the public only understand general facts about the Court but has difficulty following complex factual and legal issues “even [if] they are in the courtroom.”<sup>285</sup> Nevertheless, Huy argues that there is value in bringing large numbers of Cambodians to witness proceedings because “they feel like they own the process.”<sup>286</sup>

Although it is too early to draw definitive judgments about the ECCC’s impact on the Cambodian population, studies on public opinion show increasing public knowledge.<sup>287</sup> However, while an impressive number of people have witnessed Court proceedings and know the Court exists, there is little if any evidence that outreach efforts lead participants to understand the process in any depth. Even people who are interested in the ECCC’s work often have unrealistic expectations about what it can achieve. Some Cambodians hope that because of international participation the Court will bring “complete justice” and understanding about what happened to the country and to their families, and result in reparations and compensation. The Court has largely failed to temper these expectations by explaining why and how it makes

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<sup>282</sup> Extraordinary Chambers in the Courts of Cambodia, *ECCC Surpasses 100,000 Visitors Milestone*, <http://www.eccc.gov.kh/en/articles/eccc-surpasses-100000-visitors-milestone> (visited June 7, 2012).

<sup>283</sup> Statistics for Case 002/1, *available at* <http://www.eccc.gov.kh/en/articles/statistics-case-0021>.

<sup>284</sup> Interview with Huy Vannak, former ECCC Public Affairs Officer, Phnom Penh (June 11, 2012).

<sup>285</sup> ECCC Respondent No. 2, *supra* note 263.

<sup>286</sup> Huy interview, *supra* note 284. Cf. Cable 09PHNOMPENH58, U.S. Embassy Phnom Penh, *Khmer Rouge Tribunal: Results of Public Perception Survey* ¶ 8 (Jan. 23, 2009), *available at* <http://www.wikileaks.org/cablegate.html> (“What media cannot provide for Cambodians is a sense of participation or greater buy-in of the process through opportunities to ask questions and discuss personal accounts.”).

<sup>287</sup> See Phuong Pham et al., *So We Will Never Forget: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia* (Jan. 2009); Phuong Pham et al., *After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia* (June 2011).

decisions that shape the scope of what will be addressed at trial and affect the participatory rights of victims.<sup>288</sup>

As with other administrative offices, the PAS split Cambodian/international structure has led to problems creating a single coherent and credible message and left it acutely vulnerable to internal conflict. Tasks and authorities were vague from the outset, and “official lines of responsibility were very unclear.”<sup>289</sup> When controversies have arisen, the PAS has reflected the broader division between the two sides of the Court, with the national press officer authorized only to speak on behalf of the Cambodian side, and the UN-appointed press officer entitled only to speak for the international side.<sup>290</sup> For observers of the Court, and particularly for ordinary Cambodians, dueling press releases have caused confusion and reduced confidence and trust in the process.<sup>291</sup>

Problems related to corruption and political interference have led to an extended media focus on those issues, discouraging judges and other Court officials from participating in outreach events, and consuming time and resources that could otherwise have been used to educate the public about the ECCC’s activities. Moreover, scandals and crises provide strong incentives for Court officials to defend the institution and reduce transparency, which can undermine the credibility of its communications as a whole.<sup>292</sup> These events have contributed to an impression that the ECCC seeks to prevent unflattering information from emerging about the tribunal, which risks diminishing the credibility of the Court’s own informational functions.<sup>293</sup>

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<sup>288</sup> Long interview, *supra* note 27.

<sup>289</sup> Foster correspondence, *supra* note 275 (adding that due to the office’s hybrid structure under Cambodian leadership, he “could easily have ended up in a corner office completely shut out of any national outreach activities”).

<sup>290</sup> Open Society Justice Initiative, *Progress and Challenges at the Extraordinary Chambers in the Courts of Cambodia* 14 (2007).

<sup>291</sup> ICTJ Report, *supra* note 275 (noting that the two-sided nature of the Court had “created some confusion” in relation to outreach).

<sup>292</sup> See HUMAN RIGHTS WATCH, *COURTING HISTORY* 117 (2008) (warning the ICC and other courts to resist the temptation to produce “propaganda” or “one-sided information”).

<sup>293</sup> See, e.g., Interview with Youk Chhang, Director of the Documentation Center of Cambodia, Phnom Penh (July 10, 2012) (saying the Court created PAS to hide its mistakes, but public respect is undermined when PAS information is inconsistent with what they hear from sources outside of the Court).

## 2. Victim Support Section

Like the PAS, when the VU/VSS was created it had few resources to conduct outreach to potential victim participants.<sup>294</sup> As a consequence of financial constraints, of the millions of victims who might have chosen to participate in ECCC proceedings, only a small fraction were informed of their right to take part. A large majority of those learned of their rights through NGOs, which served as their primary connections to the Court.<sup>295</sup>

Over time, the VSS has been increasingly nationalized.<sup>296</sup> The consequence is a lack of international input, including the expertise the hybrid model was intended to offer. Long Panhavuth of the Cambodia Justice Initiative believes it is a positive that the VSS has been nationalized because it empowers national staff to be the ones taking care of victims. He says, “They understand the issues of victims, they know their audience.” At the same time, he notes that the nationals have no independent capacity—planning, skills, or will—to deal with the enormous number of victims.<sup>297</sup> There is no UN presence contributing capacity, ensuring the work meets international standards or providing checks and balances on decision-making, and the office is widely viewed as non-transparent and non-consultative.<sup>298</sup>

To counterbalance restrictions on the role of Civil Parties, discussed below, in 2010 the Judges expanded the mandate of the VSS to reach out more broadly to the general victim population.<sup>299</sup> Judge Silvia Cartwright said non-judicial measures “will be a major legacy of this

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<sup>294</sup> OSJI, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia* (Feb. 2008) (noting that the draft 2008 budget lacked funds for outreach trips or legal representation for victims.).

<sup>295</sup> Eric Stover et al., *Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia*, 93 INT’L REV. OF THE RED CROSS 14 (June 2011); Phuong N. Pham et al., *Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia*, 3 J. HUM. RTS. PRAC. 264, 273 (2011).

<sup>296</sup> See, e.g., ECCC, *Budget 2012-2013*, available at <http://www.eccc.gov.kh/en/about-eccc/finances/eccc-budget-2012-2013> (reporting that as of October 2012, the office reportedly has one international consultant but no UN presence).

<sup>297</sup> Long interview, *supra* note 27.

<sup>298</sup> See, e.g., Sulzer interview, *supra* note 80.

<sup>299</sup> See, e.g., Silvia Cartwright, Opening Speech to the ECCC 7<sup>th</sup> Plenary Session (Feb. 2, 2010) (highlighting the importance of this “enhancement,” which will allow the newly named VSS “to develop and implement programmes and measures that will benefit all victims whether they are civil parties or not”).

Tribunal.”<sup>300</sup> The Open Society Justice Initiative explained:

This development is important because ... large numbers of Cambodians who do not become formal civil parties are victims of the Khmer Rouge and have an interest in the same kinds of information and services offered by the court to civil parties.<sup>301</sup>

However, two years later, the VSS had “not yet even identified what non-judicial projects it will pursue or clearly differentiated these measures from court-ordered reparations.”<sup>302</sup> The unit has since put its stamp of approval on at least one NGO-initiated project, but it appears to have little role in its implementation.<sup>303</sup> Initial hopes that with its expanded mandate the VSS would undertake broader outreach to the general victim population during the Case 002 trial proceedings thus far remain unrealized.

## **B. Civil Party Participation**

In addition to involving victims as witnesses and complainants, the ECCC is the first and only internationalized mass crimes court to follow the civil law practice of including victims as parties in the proceedings. Unlike some aspects of the Court’s work, victim participation has not been hobbled by political feuds between its national and international sides. Rather, the ECCC’s challenges in this area reflect relative UN neglect, a tepid Cambodian commitment, and the inherent difficulty of involving myriad survivors in the process. The Court’s example suggests that an in-country mixed tribunal cannot fulfill its potential for victim participation without ample resources and advance planning. The ECCC also shows that

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*See also* Internal Rules of the ECCC (rev. 5), *rev’d* Feb. 9, 2010, r. 12bis(3) [hereinafter ECCC Internal Rules (rev. 5)].

<sup>300</sup> Cartwright, *supra* note 299.

<sup>301</sup> OSJI, *Recent Initiatives at the Extraordinary Chambers in the Courts of Cambodia* (Mar. 2010), at 26.

<sup>302</sup> Julia Wallace, *New Report Questions KRT Administration*, CAMBODIA DAILY, Feb. 24, 2012. *See also* OSJI, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia* (Feb. 2012), at 33 (highlighting that victims, Civil Parties, and NGOs have looked to the VSS for leadership on the court’s non-judicial measures mandate but that “these initiatives are stagnating”).

<sup>303</sup> *See, e.g.*, Promoting Gender Equality and Improving Access to Justice for Female Survivors and Victims of Gender-Based Violence under the Khmer Rouge Regime, *at* <http://tpocambodia.org/index.php?id=134> (last visited Jan. 24, 2013).

however meaningful individual civil party participation may be to those who participate, it is unlikely to be practicable in mass crimes proceedings.

Neither the Framework Agreement nor the ECCC Law sets forth a victim participation scheme. According to former U.S. Ambassador-at-large for War Crimes Issues David Scheffer, who helped negotiate the Framework Agreement:

[The ECCC] was never conceived by those who negotiated its creation as an instrument of direct relief for the victims[.] ... The victims' numbers are simply too colossal and the mandate and resources of the ECCC far too limited to address the individual needs, including the award of reparations, for so many victims.<sup>304</sup>

Reportedly, most of the ECCC's international judges agreed that it would be unwise to follow the French model on this question.

Despite these doubts, the Court's Internal Rules were drafted to provide victims the opportunity both to submit complaints to the Co-Prosecutors<sup>305</sup> and to participate in the proceedings as full parties.<sup>306</sup> Because the ECCC's victim participation scheme was not anticipated in the Court's framework documents, it was vulnerable from the outset to resource constraints. There was no money in the budget for civil party legal representation,<sup>307</sup> no vision of how the scheme would work in practice, and relatively few people at the Court—or in the United Nations or Cambodian government—interested in prioritizing the effort to ensure its success.

In Case 001 four Civil Party legal teams participated with at least one national and one international lawyer per team. The teams began cooperating among themselves to a greater

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<sup>304</sup> Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, *supra* note 74, at 253.

<sup>305</sup> Anyone who witnessed, was a victim of, or has knowledge of an alleged crime within the jurisdiction of the ECCC can lodge a complaint. See ECCC Internal Rules [rev. 8], *supra* note 12, r. 49. However, unlike under domestic law, a victim cannot initiate a criminal action at the ECCC. See Cambodian Criminal Procedure Code (*as adopted* Aug. 10, 2007), art. 5 [hereinafter CPC].

<sup>306</sup> Internal Rules of the ECCC, *adopted* June 12, 2007, r. 23(6)(a) [hereinafter ECCC Internal Rules (original)] (providing that, "When joined as a Civil Party, the Victim becomes a party to the criminal proceedings"). This provision has since been removed from the Rules.

<sup>307</sup> Michelle Staggs Kelsall, et al., *Lessons Learned from the 'Duch' Trial: A Comprehensive Review of the First Case Before the Extraordinary Chambers in the Courts of Cambodia*, Asian International Justice Initiative's KRT Trial Monitoring Group, Dec. 2009, at 33 (reporting the view of Civil Party lawyers in Case 001 that the VU "did not appear to have sufficient funds to facilitate adequate lawyer-client interaction and case preparation").

extent over time, but they for the most part worked independently, resulting in questioning repetitive not only with the Prosecution, but also with each other.<sup>308</sup> Judge Silvia Cartwright called the process “cumbersome.”<sup>309</sup>

Although many of the complications arising from Civil Party participation in Case 001 have been laid at the feet of the Civil Party lawyers, the Court itself was unprepared to manage their participation and addressed problems only as they arose rather than putting forethought into how the scheme would work in practice. As one Court monitor has noted: “Many of the problems that would emerge during the trial seemed to be the result of inadequate planning and preparation on the Court’s behalf with regard to the Civil Party process as a whole.”<sup>310</sup>

For Case 002, the judges changed the Internal Rules to require all Civil Parties to join a single consolidated group at trial.<sup>311</sup> International Civil Party Co-Lead Lawyer Elisabeth Simonneau Fort has said the change “can permit a kind of coherent and strategical defence, avoiding opposite positions or repetitive pleadings.”<sup>312</sup> Overloaded by the number of victims seeking to participate in its cases, the ICC appears to be moving toward a similar model due to its perceived potential for improving efficiency, reducing costs, and improving the quality of representation.<sup>313</sup>

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<sup>308</sup> See, e.g., Bates, *supra* note 17, ¶ 109 (Oct. 2010) (noting “the often repetitious and irrelevant questioning from Civil Party lawyers” in the *Duch* case).

<sup>309</sup> Judge Silvia Cartwright, Speech to the ECCC Plenary Session (Sept. 7, 2009).

<sup>310</sup> Staggs Kelsall et al., *supra* note 307, at 28. See also Sarah Thomas & Terith Chy, *Including the Survivors in the Tribunal Process*, in *ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS* 214, 261 (John D. Ciorciari & Anne Heindel, eds. 2009) (highlighting the judges “hands-off approach” and disinclination “to attempt meaningful management of civil party participation” and arguing that many of the identified problems with the original Civil Party scheme could have been easily avoided “through timely and robust judicial intervention”).

<sup>311</sup> ECCC Internal Rules (rev. 5), *supra* note 299, r. 23(3).

<sup>312</sup> Julia Wallace, *Losing Civil Parties in Cambodia*, 143 INT’L JUSTICE TRIB. (Jan. 18, 2012). See also Interview with Civil Party Lawyer Nushin Sarkarati, Phnom Penh (Nov. 15, 2012) (noting that with the 11 civil party legal teams in Case 002 often disagreeing among themselves, the co-lead lawyer system promotes coherence and efficiency).

<sup>313</sup> See, e.g., Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11, Decision on Victims’ Representation and Participation, ¶¶ 36, 43 (Oct. 3, 2012) [hereinafter *Ruto & Sang* Decision]; Sulzer interview, *supra* note 80.

However practicable this change, as a result Civil Parties no longer participate as individual parties in the trial proceedings<sup>314</sup> with a direct connection to the lawyers who represent them. “Ultimate responsibility to the court for the overall advocacy, strategy and in-court presentation” falls to one national and one international Co-Lead Lawyer,<sup>315</sup> who represent the interests of the consolidated group, not individual Civil Parties. Civil Party lawyers are now unable to represent their clients’ interests in court, such as by making oral or written submissions, without agreement from the two Co-Lead Lawyers. Concomitantly, Civil Parties are unable to determine the overall objectives of their legal representation or to participate in deciding the means of carrying out those objectives. Now the system is functioning more efficiently, but it is questionable if Civil Parties in Case 002 are still accorded the rights of “parties,” or will have the same quality of experience as those who joined Case 001.

The Court’s approach to Civil Party admissibility has likewise suffered from the lack of initial vision of the appropriate role victims should play in the proceedings. When the *Duch* verdict was announced, of the 92 Civil Parties who participated throughout trial, 24 had this status revoked when the Trial Chamber found that they had not sufficiently proved a link either to an S-21 victim or the crime site itself.<sup>316</sup> Although admissibility standards applied by the Chamber were in conformity with the Internal Rules and Cambodian procedures, they were apparently not clear to all parties in advance. According to research conducted by the Transcultural Psychosocial Organization, the day after the verdict reading, those Civil Parties who were rejected “reacted with intense emotional distress” and viewed it as shameful and a personal failure “as they could not fulfill the felt obligation to seek justice for the spirits of their relatives.”<sup>317</sup>

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<sup>314</sup> *C.f. Ruto & Sang Decision*, *supra* note 313, ¶¶ 56-58 (limiting the right of individual participation in the Kenya situation to a few victims who are selected to express their views and concerns directly to the ICC).

<sup>315</sup> *Id.*, r. 12ter(5)(b).

<sup>316</sup> *See Duch Trial Chamber Judgment*, *supra* note 46, ¶¶ 645-49. The Supreme Court Chamber upheld this criterion but disagreed with its application in specific cases by the Trial Chamber and admitted ten more persons as Civil Parties. *See, e.g., Duch Appeal Judgment*, *supra* note 59, ¶¶ 445-450, 558-63 (regarding special bonds of affection).

<sup>317</sup> Transcultural Psychosocial Organization [TPO], Report on TPO’s After-Verdict Intervention with Case 001 Civil Parties, 27 July 2010, § 2.

Comparably, in Case 002, the Pre-Trial Chamber has arguably applied the admissibility standard too inclusively, admitting most of the nearly 4,000 applicants.<sup>318</sup> The Chamber determined that it was not necessary for applicants to link their injuries to named crime sites in the indictment, which “serve only as examples in order to demonstrate how all these centres and sites functioned *throughout* Cambodia” through an alleged joint criminal enterprise.<sup>319</sup> Judge Marchi-Uhel dissented in part from this decision, arguing this was legally inappropriate, would undermine the role of the consolidated groups, frustrate Civil Parties who met the specific admissibility requirements, and disappoint wrongly admitted Civil Parties who would not have the harms they suffered discussed at trial.<sup>320</sup>

The Trial Chamber has since severed the Case 002 indictment in anticipation of holding more than one trial on the crimes charged. In making the decision to sever, the Trial Chamber stated that because Civil Parties no longer participate as individuals at trial but instead as a consolidated group with collective interests, “limiting the scope of the facts to be tried during the first trial ... has no impact on the nature of Civil Party participation at trial[.]”<sup>321</sup>

However, out of the 3,872 victims joined to the case, only about 750 were admitted due to harm related to crimes at issue in Case 002/1.<sup>322</sup> The amended Internal Rules make the PTC’s admissibility decisions final, and the Trial Chamber is allowing all 3,872 victims to participate by default.<sup>323</sup> However, if victims have not suffered harm from one of the crimes charged in the case, their inclusion as Civil Parties arguably devalues the significance of that standing. Judge Marchi-Uhel’s admonition that over-admission would undermine the role of the consolidated

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<sup>318</sup> ECCC, *Pre-Trial Chamber Overturns Previous Rejection of 98% of Appealing Civil Party Applicants in Case 002* (June 24, 2011), at <http://www.eccc.gov.kh/en/articles/pre-trial-chamber-overturns-previous-rejection-98-appealing-civil-party-applicants-case-002>.

<sup>319</sup> Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 75 (June 24, 2011). *See also id.* ¶ 72.

<sup>320</sup> *Id.*, Separate and Partially Dissenting Opinion of Judge Marchi-Uhel, ¶ 4.

<sup>321</sup> Severance Order Pursuant to Internal Rule 89ter, Case No. 002/19-09-2007-ECCC/TC, ¶ 8 (Trial Chamber, Sept. 22, 2011) [hereinafter 2011 Severance Order]. *See also* 2013 Severance Decision, *supra* note 39, ¶ 157.

<sup>322</sup> *See* Lead Co-Lawyers Urgent Request on the 19 October 2011 Hearing Following the Chambers’ Memorandum E125, ¶¶ 12-13 (Trial Chamber, Oct. 7, 2011).

<sup>323</sup> 2013 Severance Decision, ¶ 157, *supra* note 39 (“[T]he Trial Chamber has not sought to re-open admissibility decisions taken during the pre-trial phase and ... membership of the consolidated group also remains unchanged following renewed severance of Case 002.”).

group therefore appears prescient.<sup>324</sup> Nevertheless, Simonneau Fort believes that Civil Party participation in Case 002/1 still can be meaningful if Civil Parties are clearly informed that they may not hear their specific harms discussed and may not be able to speak in Court. For some Civil Parties, being in Court and experiencing participation is more important than legal nuances.<sup>325</sup>

The effort to provide reparative justice has presented the ECCC with further challenges. Like other international and hybrid courts, the ECCC is designed with a primary institutional focus on criminal trials rather than reparative measures.<sup>326</sup> Civil Party participants are entitled to pursue only “collective and moral reparations against the Accused. At the time of the *Duch* trial, the Internal Rules provided that reparations “shall be awarded against, and be borne by convicted persons.”<sup>327</sup> Because the Trial Chamber found that Duch was indigent, it rejected most Civil Party requests as either falling outside the Court’s jurisdiction or lacking sufficient specificity.<sup>328</sup> It therefore awarded only the inclusion of the names of Civil Parties and the immediate victims in the final judgment, and the compilation and publication of all statements of apology made by Duch during the trial.<sup>329</sup> Former Ieng Sary co-lawyer Michael Karnavas,

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<sup>324</sup> See, e.g., Sulzer interview, *supra* note 80 (noting with concern that because of the PTC decision admitting everyone in Case 002 and the severance decision, many victims will never have their claims discussed in court). Former Civil Party Lawyer Silke Studzinsky says, “The severance order has a huge impact on more than 70 percent of our clients...Their participation rights are moot. They cannot address the crimes and the suffering for which they are admitted [as civil parties].” Julia Wallace, “‘Mini-Trials’ a Mixed Blessing for KR Victims,” *CAMBODIA DAILY*, July 11, 2012.

<sup>325</sup> Simonneau Fort interview, *supra* note 110. Cf. Sarkarati interview, *supra* note 312 (noting that her U.S.-based clients say their main reason for participating is the opportunity to contribute to a judgment, followed secondarily by their wish to be recognized as victims).

<sup>326</sup> *But see* Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures to Be Applied to Reparations, ¶ 178 (Trial Chamber, Aug. 7, 2012) (agreeing with the Pre-Trial Chamber that “[t]he [ICC] reparation scheme ... is not only one of the Statute's unique features. It is also a key feature. In the Chamber's opinion, the success of the Court is, to some extent, linked to the success of its reparation system.”).

<sup>327</sup> See Internal Rules of the ECCC (rev. 6), *rev'd* Sept. 17, 2010 [hereinafter ECCC Internal Rules (rev. 6)], r. 23(11).

<sup>328</sup> All teams requested “at a minimum,” the compilation and dissemination of Duch’s statements of apology with Civil Party comments, access to free medical care for their clients, the funding of educational programs about the Khmer Rouge and S-21 in particular, the erection of memorials and pagoda fences, and the inclusion of Civil Party names in the final judgment. See Civil Parties’ Co-Lawyers’ Joint Submission on Reparations, Case No. 001/18-07-2007-ECCC/TC, ¶¶ 12-30 (Sept. 14, 2009).

<sup>329</sup> *Duch* Trial Chamber Judgment, *supra* note 46, ¶¶ 664-75.

like many others, argues that the Civil Parties got nothing and calls the reparations regime “a mockery.”<sup>330</sup>

In September 2010, the judges expanded the Court’s authority to provide reparations, giving the Trial Chamber the authority to recognize a specific project designed in cooperation with the VSS that has secured sufficient external funding.<sup>331</sup> Civil Party lawyer Nushin Sarkarati notes that, under the revised rules, everything proposed for reparations must be essentially completed before judgment and the ECCC will merely rubber stamp the completed project. She argues that this sets a horrible legal precedent, as reparations should be paid for either by the convicted person or by the state, not by NGOs through third-party funding. Most concerning, the Court is putting the burden on victims to design and fund reparations themselves. She says, “The Court is essentially allowing concerns over the implementation of an award to belie an appropriate judgment on reparations. I hope no [other] court adopts this system.”<sup>332</sup>

The splitting of the indictment in Case 002 has also changed the import of reparations, which are intended to “acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted” and “provide benefits to the Civil Parties which address this harm.”<sup>333</sup> However, if only Civil Parties with harms related to crimes in the severed indictment were entitled to reparations, many in the consolidated group would be excluded. At the urging of the Civil Party lawyers, the Trial Chamber has therefore decided that reparations requests that do not result in enforceable claims against a convicted person, but are instead funded externally, may benefit all Civil Parties in the consolidated group.<sup>334</sup> As a result, the implementation of this aspect of the Civil Party scheme is also moving the ECCC toward a victim participation model, and further away

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<sup>330</sup> Karnavas interview, *supra* note 28.

<sup>331</sup> ECCC Internal Rules (rev. 6), *supra* note 327, r. 23quinquies(3)(b).

<sup>332</sup> Sarkarati interview, *supra* note 312. In December 2012, the Trial Chamber asked the Co-Lead Lawyers to provide a prioritized list of projects “currently under development,” as well as the status of their funding by February 1, 2013. Memorandum from the Trial Chamber to the Civil Party Lead Co-Lawyers, *Indication of Priority Projects for Implementation As Reparation (Internal rule 80bis(4))* (Dec. 3, 2012). See generally Lead Co-Lawyers’ Indication to the Trial Chamber of the Priority Projects for Implementation As Reparations (Internal Rule 80bis(4)) with Confidential Annexes (Feb. 12, 2013).

<sup>333</sup> ECCC Internal Rules (rev. 8), *supra* note 12, r. 23 quinquies (1).

<sup>334</sup> 2013 Severance Decision, ¶ 158, *supra* note 39.

from the recognition of individual victims as “parties” to the proceedings.

### VIII. CAPACITY-BUILDING AND THE RULE OF LAW

Capacity-building is one potential benefit of a hybrid court located in Cambodia with strong national participation and a close connection to the country’s civil law system. In theory, hybrid courts can do a number of things to build the local rule of law, such as developing professional competence, leaving an informational legacy, promoting legal reform, and contributing to a culture of respect for law.<sup>335</sup> In 2003, Kofi Annan forecast that the ECCC should have “considerable legacy value, inasmuch as it will result in the transfer of skills and know-how to Cambodian court personnel.”<sup>336</sup> The ECCC and other hybrid courts have had limited success in this area, however. Resource constraints have been a consistent problem, and tribunals facing such constraints have understandably tended to prioritize handling complex criminal trials above training functions.<sup>337</sup>

The Framework Agreement and Establishment Law do not mandate the ECCC to undertake specific capacity-building activities. The Internal Rules include only one such provision, requiring the Defense Support Section (DSS) to “[o]rganize training for defense lawyers in consultation and cooperation with the [Bar Association of the Kingdom of

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<sup>335</sup> See generally OFF. OF THE UN HIGH COMM’R FOR HUM. RTS., *RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: MAXIMIZING THE LEGACY OF HYBRID COURTS* (2008). See also U.N. Secretary-General, *Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery ...*, 39-40, U.N. Doc. S/2010/394 (July 26, 2010) (noting that the reason for creating the SCSL and ECCC “includes the strengthening of the local judicial system” and citing similar goals for the hybrid courts in Kosovo, East Timor, and Bosnia).

<sup>336</sup> Report of the Secretary-General on Khmer Rouge Trials, U.N. Doc. A/59/432, ¶ 27 (Oct. 12, 2004).

<sup>337</sup> Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks*, 50 B.C. L. REV. 1, 18 (2009) (arguing that “hybrid courts have thus far failed to fulfill their promise” with respect to legacy); CHANDRA LEKHA SRIRAM, *A REVOLUTION IN ACCOUNTABILITY* 105 (2005); Mohamad Suma, *The Charles Taylor Trial and Legacy of the Special Court of Sierra Leone*, Int’l Ctr. for Trans. Just. (Sept. 2009), at 2 (concluding that the SCSL had “fallen far short of expectations in contributing to national legal development”); Laura A. Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 NEW ENG. L. REV. 1059 1068-1070 (2002-2003) (noting that poor funding and difficulty recruiting international experts hurt capacity-building in Kosovo); Jane E. Stromseth, *Justice on the Ground?: International Criminal Courts and Domestic Rule of Law Building in Conflict-Affected Societies*, in *GETTING TO THE RULE OF LAW*, at 199-201 (James E. Fleming ed., 2011) (citing similar problems in East Timor).

Cambodia]”.<sup>338</sup> In early 2010 the ECCC established a 30-member Legacy Advisory Group within the OA to discuss issues related to the Court’s legacy and a Legacy Secretariat, in part to address capacity-building issues,<sup>339</sup> but neither group has been very active.<sup>340</sup> Some international personnel seek to engage in legacy initiatives, but senior UN administrators have treated legacy issues largely as a national responsibility.<sup>341</sup> These factors have made it unclear who has the authority or responsibility to lead capacity-building activities, and as in other mass crimes proceedings, the criminal trials have left Court officials little time to focus on legacy work.<sup>342</sup>

Some capacity-building has occurred by virtue of the mixture of domestic and international personnel at the Court. International lawyers and staff have learned about the local legal system, history, and culture, while Cambodians learn about legal reasoning and drafting effective written submissions, which are not a major part of current Cambodian legal practice.<sup>343</sup> Knowledge transfer has occurred best when nationals and internationals have taken purposeful steps to overcome the split structure of the Court. That has occurred in some defense and Civil Party teams,<sup>344</sup> as well as the OCP, where the Co-Prosecutors integrated the two offices to overcome the metaphorical (and literal) “two sides of the hall” that initially separated the national and international teams.<sup>345</sup> Etcheson argues that although “organizational change

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<sup>338</sup> ECCC Internal Rules (rev. 8), *supra* note 12, r. 11(2)(k).

<sup>339</sup> See Administrative Circular on Establishment of ECCC’s Legacy Advisory Group and Legacy Secretariat (Mar. 26, 2010). In 2010, the UN Office for the High Commissioner for Human Rights also created a Legacy Officer position to work with the ECCC.

<sup>340</sup> Confidential senior staff interview, *supra* note 202 (saying the Advisory Group “is more or less set up to fail,” having completed only a 12-page procedural memorandum by late 2012).

<sup>341</sup> Long interview, *supra* note 27.

<sup>342</sup> Tessa Bialek, Documentation Center of Cambodia, *Legacy at the Extraordinary Chambers in the Courts of Cambodia: Research Overview* §II(3), §III(1) (2011).

<sup>343</sup> Confidential interview with former national staff member, Phnom Penh (June 18, 2012) (“Cambodians can learn from international work habits: independence, timeliness, and preparation. Cambodians bring familiarity with local law, local culture, the general context and history, as well as an ability to help with fieldwork”).

<sup>344</sup> Skilbeck interview, *supra* note 32; Interview with Karim Khan, ECCC Civil Party Co-Lawyer in Case 001, via telephone (June 5, 2012).

<sup>345</sup> Etcheson interview, *supra* note 38 (asserting that “both Robert Petit and Bill Smith emphasized the need for close cooperation. To a great extent, Chea Leang and [her deputy] Yeth Chakrya reciprocated that point of view”); Confidential interview with former staff member, *supra* note 343 (noting that weekly happy hours also “built team spirit” despite the sometimes “different agenda[s]” of the Co-Prosecutors).

happens on a generational scale,” “technical transfer has been quite marked” at the ECCC. For example, Cambodian judges have relied to date largely on oral traditions and their own past experience. At the ECCC, “national colleagues began to understand the need for precedents in deciding complex legal questions.”<sup>346</sup> By all accounts, Cambodian lawyers involved in the proceedings have improved their legal knowledge and skills markedly during the proceedings.

This raises the possibility that norms and practices at the ECCC will “trickle down” to the domestic judicial system.<sup>347</sup> OA Director Tony Kranh emphasizes regularly that Cambodians who work at the Court will be an asset to the Cambodian legal system when they return.<sup>348</sup> Judge Nil Nonn, president of the Trial Chamber, similarly asserts that learning from the “reasoning culture” of his international counterparts on the bench will help him train Cambodian judges in the future.<sup>349</sup> CIJ You Bunleng, who also sits on the Cambodian Court of Appeals, has reportedly introduced a witness room and computerized case file system there to “protect the rights of victims and accused”<sup>350</sup> and a judicial registry to manage administrative matters and publish decisions online.<sup>351</sup>

The ECCC has done less to train Cambodians outside of the Court,<sup>352</sup> and Court personnel have emphasized the limits on their ability to invest in capacity-building given their workloads on the main criminal cases.<sup>353</sup> Beyond internships, which have been helpful to aspiring Cambodian legal professionals, the ECCC has offered a modest number of workshops,

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<sup>346</sup> Etcheson interview, *supra* note 38.

<sup>347</sup> Jörg Menzel, *Justice Delayed or Too Late for Justice? The Khmer Rouge Tribunal and the Cambodian “Genocide” 1975-1979*, 9 J. GENOCIDE RES. 215, 227 (2008).

<sup>348</sup> Huy interview, *supra* note 284.

<sup>349</sup> Bates, *supra* note 17, at 50-51.

<sup>350</sup> Response to questionnaire from Co-Investigating Judge You Bunleng, June 25, 2012. *See also* Long interview, *supra* note 27; David Boyle & Buth Reaksmeay Kongkea, *Court Extension, a First Step to Reform*, PHNOM PENH POST (Oct. 11, 2012) (reporting the Court of Appeal’s incorporation of the ECCC case database management system).

<sup>351</sup> Long interview, *supra* note 27.

<sup>352</sup> *See* OSJI, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia* (Aug. 2009), at 10-11 (arguing that “[l]ittle has been done by the court to build the understanding or capacity of legal professionals and personnel outside of the ECCC.”)

<sup>353</sup> Bialek, *supra* note 342, at §III(1); Email response from national OCIJ staff (June 3, 2012) (“Some ECCC officials serve in the governmental judicial system. Therefore, the experiences they gained from the ECCC will have an impact on the Cambodian legal system.”).

conferences, and lectures.<sup>354</sup> The OCP has offered training sessions to local prosecutors,<sup>355</sup> and the DSS has offered training sessions for Cambodian defense lawyers who will practice at the ECCC, internal training seminars, and outreach programs with the UNHCHR and civil society groups to train Cambodian law students and the public about fair trial rights.<sup>356</sup>

The ECCC is working to leave an informational legacy by building a physical repository for ECCC records and entering negotiations to create a “Virtual Tribunal” based at that location, which would include digital copies of Court and NGO documents and educational materials.<sup>357</sup> The United Nations has deferred to national leadership with respect to the Virtual Tribunal,<sup>358</sup> but that raises concerns about the Cambodian Government’s ability to control the content of the site and perhaps to exclude valuable information.

In theory, an in-country hybrid tribunal can also promote the rule of law by becoming a model, and several officials have described the ECCC as “model court.”<sup>359</sup> In some respects, that may be true. The Court’s proceedings have drawn attention to a number of fair trial

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<sup>354</sup> Skilbeck interview, *supra* note 32 (arguing that capacity-building will not be a success without considerably more institutional priority and resources).

<sup>355</sup> John Coughlan et al., *The Legacy of the Khmer Rouge Tribunal: Maintaining the Status Quo of Cambodia’s Legal and Judicial System*, 4 AMSTERDAM L. FOR. 16, 26 (2012).

<sup>356</sup> ECCC, *Legacy*, <http://www.eccc.gov.kh/en/dss/legacy> (visited June 14, 2012); ECCC, *The Court Report: Issue 36*, at 1 (May 2011), at 7.

<sup>357</sup> See ECCC, *Proposed Budget for 2012-2013*, Feb. 17, 2012, <http://www.eccc.gov.kh/sites/default/files/ECCC%20Budget%202012-2013.pdf>, at 65. The Virtual Tribunal would be created in partnership with the Hoover Institution at Stanford University, the War Crimes Studies Center at the University of California at Berkeley, and the East-West Center in Honolulu.

<sup>358</sup> *Id.* at 11, 16 (requesting no funds for legacy on the international side of the tribunal but \$905,000 for the Cambodian side over a two-year period, “particularly related to the Virtual Tribunal”). As of this writing, this proposed budget was not approved.

<sup>359</sup> See, e.g., H.E. Deputy Prime Minister Sok An and UN Assistant Secretary-General Patricia O’Brien, Joint Press Statement, Apr. 19, 2010, <[http://www.cambodiatribunal.org/sites/default/files/reports/joint\\_press\\_statement\\_4\\_19\\_10.pdf](http://www.cambodiatribunal.org/sites/default/files/reports/joint_press_statement_4_19_10.pdf)> (asserting that the ECCC “is living up to the hope for it to be a model court”); Statement by Ministry of Foreign Affairs of Japan, June 13, 2007 (“The Khmer Rouge Trials are instrumental in realizing the rule of law and justice in Cambodia and the Trials will provide a good model for strengthening Cambodia’s judicial system”); Decision on IENG Sary’s Application to Disqualify Judge Nil Nonn and Related Requests, E5/3, ¶ 14 (Jan. 28, 2011) (noting that as a model court, the ECCC may “serve to encourage and underscore the significance of institutional safeguards of judicial independence and integrity”); Special Representative of the Secretary-General for Human Rights in Cambodia, *Situation of Human Rights in Cambodia*, at 19, U.N. Doc. E/CN.4/2005/116 (Dec. 20, 2004) (“It is hoped that the establishment of a transparent process that complies with international standards will have an educational effect on existing formal institutions and create ... further demand for a well functioning judicial system.”).

concepts, such as the presumption of innocence, equality of arms, need for consistent and transparent procedures, and importance of clear legal justification for pre-trial detention and sentencing.<sup>360</sup> None of these are characteristic features of Cambodian domestic practice, and they can help members of the local legal community work toward best practices.<sup>361</sup>

One Cambodian staffer anticipates that domestic courts might follow the ECCC's example by holding an initial hearing before the facts are presented.<sup>362</sup> Panhavuth Long notes that the Nuon Chea defense strategy, which includes criticizing the government, is unprecedented in Cambodia. He says, "If this defense happened in a national court the lawyers would be disbarred. The process teaches professionalism, and provides an example of how judges should behave."<sup>363</sup> Others note that President Nil Nonn is widely respected for the authoritative manner in which he leads the Trial Chamber's proceedings, and his pronouncements in Khmer have made him a positive role model.<sup>364</sup>

Nevertheless, there is little evidence that the ECCC is profoundly affecting the local judicial system. Although the Cambodian National Assembly passed a long-dormant anticorruption law in 2010,<sup>365</sup> judicial corruption remains endemic. In 2012, Cambodia finished 157<sup>th</sup> in the annual Transparency International rankings on corruption—a ranking that has not changed appreciably in recent years.<sup>366</sup> Catalyzing systemic reform is a great deal to ask of a

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<sup>360</sup> See, e.g., E-mail response from national VSS staff (June 5, 2012) (on file with the authors); Coughlan et al., *supra* note 355, at 23-24 (saying the strong role of defense counsel and the Internal Rules' provision of a right to silence are welcome in a society in which too few accused have even minimal fair trial rights); Mujib Mashal, *Tribunal Helps Cambodia Confront its History*, AL-JAZEERA, Feb. 3, 2012. (in which Chak Sopheap of the Cambodian Center for Human Rights argues that "[t]his court has brought about public participation and debate" and has catalyzed "a public argument about the right of fair trial for the accused").

<sup>361</sup> For examples of efforts to identify some practices relevant to Cambodian law, see David Boyle, *The Legacy of the ECCC Proceedings in Cambodian Law*, Draft Thematic Report Published by the Center of Applied Research in Law (Sept. 2012) (on file with the authors); Michael G. Karanvas, *Bringing Domestic Cases into Compliance with International Standards: Applicability of ECCC Jurisprudence and Procedural Mechanisms at the Domestic Level* (Nov. 2012) (on file with the authors).

<sup>362</sup> Confidential questionnaire to Cambodian ECCC Personnel, Respondent No. 4, June 2012 (on file with the authors).

<sup>363</sup> Long interview, *supra* note 27.

<sup>364</sup> Huy interview, *supra* note 284.

<sup>365</sup> *Cambodian legislature passes anti-corruption law*, ASIAN CORRESPONDENT, Mar. 11, 2010.

<sup>366</sup> Transparency International, *Corruption Perceptions Index 2012*, <http://www.transparency.org/cpi2012/results>.

temporary hybrid tribunal court given the miniscule resources of local courts,<sup>367</sup> the very different types of legal cases they are hearing, and powerful incentives to engage in corruption and bow to political pressure. Systemic change is a generational project,<sup>368</sup> and the near-term payoffs of the ECCC are likely to be small.<sup>369</sup> Ou Virak, President of the Cambodian Center for Human Rights, argues that even if the ECCC develops local skills and knowledge, real change in Cambodia's legal culture will not occur "without a fundamental shift in the government's commitment to the rule of law."<sup>370</sup>

Although the ECCC will not catalyze seismic legal reform in Cambodia, its impact on Cambodian personnel is likely to have some salutary effects, and its in-country location, hybrid composition, and inclusion of Khmer language make it an excellent subject of study for Cambodian students and legal personnel. Without more resources and a mandate to conduct robust training activities, the ECCC's most important capacity-building activity is to hold trials that set a positive example of due process and judicial integrity and impartiality. The Court's problems in these respects regrettably put its legacy in peril. Inconsistent application of the rules, corruption, and political interference reinforce negative realities in the local judicial system.<sup>371</sup>

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<sup>367</sup> Compare Bates, *supra* note 17, at 51 (citing Co-Prosecutor Chea Leang as saying that constraints on human and financial resources will make it challenging to transfer skills to the local judiciary), *with* Long interview, *supra* note 27 (emphasizing that legacy doesn't have to be expensive; instead, measures can be practical and realistic).

<sup>368</sup> See, e.g., Lemonde Remarks, *supra* note 25 ("The rule of law cannot be built within a day. Cambodia cannot, from one day to another, become Sweden."); Kelly McEvers & Phann Ana, *Disorder in the Courts*, CAMBODIA DAILY, Mar. 4-5, 2000 (quoting Janet King, in-country director of the University of San Francisco's Community Legal Education Center, "They're not going to change their mental mindsets by sitting in on a lot of seminars and workshops. This change will take decades.").

<sup>369</sup> ECCC Respondent No. 2, *supra* note 263 (arguing that "there will be an impact, but very little," because systemic change requires dealing with corruption); LICADHO, *Human Rights in Cambodia: The Charade of Justice* (Dec. 2007) at 1 (noting the dogged presence of corruption and political interference despite two decades of rule of law programs in Cambodia).

<sup>370</sup> Clancy McGillian & Van Roeun, *UN Office Starts Project to Transfer Court Skills*, CAMBODIA DAILY, Oct. 1, 2010.

<sup>371</sup> Karnavas interview, *supra* note 28 ("Are we not teaching additional skills to our local counterparts on how to avoid the application of the rule of law? I think that this is going to be the darkest part of this legacy."); Coughlan et al., *supra* note 355, at 28-33 (referring to these as the Achilles' heel of the Court's legacy efforts); Jackie Mulryne, *Legacy of the Khmer Rouge Tribunal*, THE PLATFORM (Dec. 17, 2011); Zsombor Peter, *Sonando Verdict Tests KR Tribunal's Legacy*, CAMBODIA DAILY, Oct. 4, 2012.

## IX. CONCLUSION

Mass crimes proceedings inevitably face challenges as they seek to optimize among various aims, such as managing resources efficiently, conducting fair trials, connecting victims to the proceedings, and building the rule of law. As this article has shown, the ECCC has had some important successes, but they have largely come in spite of its experimental institutional features. There is widespread agreement among legal analysts and human rights lawyers that *in toto*, the ECCC is not a model to be cloned.<sup>372</sup> The problems associated with the ECCC's unique structural elements carry important lessons for the reform and design of mass crimes processes going forward.

First, and perhaps most obviously, the ECCC's experience underscores the risks of hybrid arrangements controlled largely by states with dubious commitments to judicial independence and integrity. The ECCC's supermajority has proven inadequate as a way to address the risks inherent in such an arrangement.<sup>373</sup> Former UN Legal Counsel Hans Corell, who objected to a split structure with a Cambodian-majority bench during the negotiations for the Court,<sup>374</sup> asserts that "everything I warned against has been happening" and that he would "immediately discourage anything like [the ECCC]" in the future."<sup>375</sup> He argues that many of

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<sup>372</sup> Hans Corell, *Reflections on International Criminal Law over the Past 10 Years*, Keynote address at the Robert H. Jackson Center, Chautauqua, NY, Aug. 27, 2012, at 4 (on file with the authors) (arguing that "the ECCC should not be used as a model for any future effort of this nature"); Luke Hunt, *War crimes and the price of justice*, BANGKOK POST, Jan. 22, 2012 (in which Brad Adams of Human Rights Watch reports wide agreement that the ECCC is "a mistake that should never be repeated elsewhere"); Peter Maguire, *ECCC's Tarnished Legacy and the UN*, CAMBODIA TRIBUNAL MONITOR (Mar. 27, 2012), at <http://www.cambodiatribunal.org/blog/2012/03/eccc%E2%80%99s-tarnished-legacy-and-un> (calling the ECCC an "expensive, overcomplicated experiment that should never be tried again"). The Cambodian Government disagrees, and Deputy Prime Minister Sok An calls the Court "a good model not only for Cambodia, but also for internationally assisted courts that may be established in the future." See Sok An, Deputy Prime Minister, Remarks during a visit to the ECCC of UN Secretary-General Ban Ki-moon, Phnom Penh, Oct. 27, 2010, available at <http://agencekampuchepress.blogspot.com/2010/10/he-dr-sok-deputy-prime-minister-speaks.html>.

<sup>373</sup> Indeed, the supermajority rule arguably exacerbates the problem by embedding expectations of political interference as an inherent part of the process.

<sup>374</sup> Mike Eckel, *Cambodia's Kangaroo Court*, FOR. POL'Y, July 20, 2011 (quoting Corell as saying he "did not want...the U.N. emblem to be given to an entity that did not...represent the highest international standards").

<sup>375</sup> Corell interview, *supra* note 34. Some analysts also view the model as a dangerous precedent encouraging other states to demand similar control vis-à-vis the United Nations. See, e.g., S.J. Williams, *The Cambodian extraordinary chambers – a dangerous precedent for international justice?* 53 INT'L & COMP. L. Q. 227 (2004).

the ECCC's problems "could have been avoided with a majority of international judges and a single prosecutor and investigating judge."<sup>376</sup>

Judges and prosecutors do not necessarily need to be foreign to be independent, but governments unable to hold credible domestic trials often suffer from weak norms of judicial independence as well. Moreover, mass crimes cases invariably have great domestic political importance, creating high risks of political pressure on national judges, especially on questions of jurisdiction. A court does not need a national majority to possess the functional advantages of active host country involvement, and architects of future mixed courts should adopt a strong presumption in favor of international majorities on the bench. Although international appointees are not immune from political influence, they can be selected from larger pools of judges with relevant experience, many of whom come from national systems with strong norms of respect for judicial independence. If governments lacking indicia of credibility insist on majority control, key donors must support an international preponderance actively. The threat of ICC indictments (which were not an option in Cambodia due to the non-retroactivity principle) may give donors added leverage to do so.

The Khmer Rouge proceedings also demonstrate the folly of a structure splitting national and international sides of a court. The existence of Co-Prosecutors and Co-Investigating Judges has provided an additional avenue for political interference, undermined efficiency, and led to frequent impasses.<sup>377</sup> Largely to deal with those impasses, the ECCC's Pre-Trial Chamber has taken on a much more expansive role than the pre-trial chambers of the STL and ICC, consuming scarce resources and arguably breaching the rights of the accused by elongating the trials.

The ECCC's bifurcated administration and oversight also have undermined efficiency and made it difficult to deal with problems originating on the national side. Its split funding scheme has exacerbated a challenge faced by other hybrid courts—the difficulty of surviving on a diet of voluntary contributions—as donors have been particularly loath to fund the Cambodian side. A more unified structure, such as a registry, is essential to boost both

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<sup>376</sup> Corell interview, *supra* note 34.

<sup>377</sup> *Quelles leçons*, *supra* note 20, at 597 (in which former international CIJ Marcel Lemonde describes the ECCC's investigatory and judicial structure "a model of inefficiency"). Many other Court officials agree.

efficiency and accountability.<sup>378</sup> Corell puts the case simply: “you have to have somebody who makes decisions.”<sup>379</sup> Most of these design flaws would have been difficult to avoid in the Cambodian case due to the particular context for the negotiations, but the serious problems with these structural innovations can at least help the architects or managers of future mass crimes courts argue against such features in the future.

Further lessons emerge from the ECCC’s experiments with civil law features. Investigating judges have partially duplicated the prosecutors’ work, and their lengthy confidential investigations have not led to short, civil law-style trials due to the legitimate public interest in a robust courtroom vetting of the evidence.<sup>380</sup> In addition, much of the credibility of the entire judicial process has hinged on their perceived impartiality, rendering the Court vulnerable to accusations of unfairness in the investigation. Future proceedings would be wisest to rely on prosecutors and defense teams to conduct investigations, which could be both more efficient and less subject to fairness challenges.

The ECCC’s novel civil party scheme rightly put emphasis on the importance of meaningful victim participation, which is a positive aspect of the Court’s legacy, but proved overly ambitious and required significant downsizing. The ECCC’s difficulties suggest that however normatively appealing a system of direct civil party participation may be, it is impracticable at a mass crimes court. Limited participatory rights such as those granted by the STL and ICC offer a more realistic path forward, coupled with a process that ensures victims are able to share their stories as witnesses and complainants.

The civil law roots of Cambodia’s domestic system have also added to a challenge common to any hybrid court that merges national and international rules of evidence and

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<sup>378</sup> See, e.g., Cable 06PHNOMPENH1983, U.S. Embassy Phnom Penh, *Recent ECCC Developments* ¶ 8 (Nov. 2, 2006), available at <http://dazzlepod.com/cable/06PHNOMPENH1983> (noting Tolbert’s recommendation to that effect); Heindel, *supra* note 193.

<sup>379</sup> Interview with Hans Corell, former UN Legal Counsel, via telephone (Nov. 15, 2012).

<sup>380</sup> Former international Co-Investigating Judge Marcel Lemonde argues that investigating judges may still “represent the future” for international criminal trials and attributes many of the ECCC’s troubles with the OCIJ to common law lawyers who weren’t familiar with the civil law system and in some cases “had no desire to become familiar with it.” *Quelles leçons*, *supra* note 20, at 597 (featuring an interview with Lemonde, translated from French by the authors). Even if this problem could be remedied, the likelihood of a lengthy trial phase remains.

procedure.<sup>381</sup> The awkward mix of civil and common law elements in the ECCC's Internal Rules and their inconsistent application have led to accusations of cherry-picking, and arguably violations of fair trial rights. Although heavy reliance on local procedures can help to refine those procedures—a form of capacity-building<sup>382</sup>—ordinary criminal codes are not tailored to mass crimes proceedings.<sup>383</sup> The ECCC's experience shows the folly of creating special rules for a hybrid court with such a narrow mandate and limited lifespan.<sup>384</sup> One of the benefits of tribunals like the ICC and ECCC is that they contribute to a growing body of rules to govern mass crimes proceedings—rules that can serve as templates in future proceedings to avoid the need to re-invent the wheel.

Of course, not all of the lessons from the ECCC proceedings pertain to its unique institutional features. The Cambodian case also sheds light on some broader principles. The ECCC confirms some benefits of an in-country hybrid court, particularly in outreach and victim participation and to some degree in on-site capacity building. This is largely due to the ECCC's constructive partnerships with civil society organizations—a lesson of great importance to the ICC as it seeks to perform these functions at a distance. The ECCC's jurisprudential record and the performance of prosecution and defense teams also show that a hybrid court can function effectively when its political sponsors endow it with adequate resources and respect the independence of the judicial process. The ECCC's challenges also reflect generic drawbacks of hybrid courts, however, such as the difficulty of blending different legal systems to create a *sui generis* court, the predictable delays, duplication, confusion, and inconsistency that follow.

Clearly, the success of any hybrid court will depend to a great extent on the national government involved in the process. Partnering with the Cambodian government was bound

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<sup>381</sup> Interview with Diana Ellis, Co-Lead Lawyer for Ieng Thirith, Phnom Penh (Nov. 11, 2012) (arguing that a hybrid approach to procedures is “generally not a good idea” because meshing together two different culturally based approaches into a coherent system is challenging and time consuming).

<sup>382</sup> Smith interview, *supra* note 16 (“It’s better to have a process based on [domestic] civil law because Cambodia has a lot to gain from following the ECCC model, even with modifications”) Long interview, *supra* note 27.

<sup>383</sup> Martin-Chenut, *supra* note 11, at 862 (citing Rupert Skilbeck for the proposition that international trials present special challenges, making it impossible to simply transpose domestic models; hybridization is needed “despite the risk of creating monsters”).

<sup>384</sup> Most Court officials agree. Karnavas interview, *supra* note 28 (arguing that using the simpler ICTY rules would have been preferable); Simonneau Fort interview, *supra* note 110 (arguing that tailoring the ICC rules would have been most appropriate for a civil law court dealing with mass crimes).

to be difficult, and most of the Court's challenges relate in some way to domestic incapacity, interference, or obstruction. Yet the United Nations will likely face other difficult cases in which a host government refuses to accept ICC jurisdiction but welcomes some form of international involvement. If the United Nations and major donor states decide to become involved, they need to equip themselves to engage more effectively and provide stronger oversight.<sup>385</sup> The best way to do so is to fund a tribunal through assessed contributions, which will help ensure UN ownership, and concentrate oversight authority in a dedicated UN office with expertise in managing mass crimes cases—an office that does not yet exist despite twenty years of UN involvement in international criminal trials.

The ECCC's structural features, which have been the focus of this article, are closely related to questions of agency. To some extent, the ECCC's design flaws result from the fact that relatively few of its architects had experience working in a mass crimes court. Former international Co-Prosecutor Robert Petit argues:

The ECCC was...designed by people who had insufficient knowledge of the actual court process. Then it was cut up by accountants in terms of structures, staffing, and budget... [I]f you had wanted to devise a court that wouldn't work, you would be hard pressed to find a better model.<sup>386</sup>

Corell agrees, insisting on the importance of "listen[ing] closely to persons with courtroom experience."<sup>387</sup> Experience is also crucial in court appointees.<sup>388</sup> The ECCC has benefitted from a number of key personnel whose expertise in relevant areas of law, history, and administration has helped compensate for institutional defects. Where the ECCC has appointed key personnel without relevant experience, it has often paid a price. One of the benefits of future proceedings

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<sup>385</sup> Criticism of the UN's role at the ECCC has increased during the feud over cases 003 and 004. See, e.g., Rupert Abbott & Stephanie A. Barbour, *Khmer Rouge Tribunal: Last Chance to Salvage Justice?* ILAWYER (Dec. 17, 2012), <http://ilawyerblog.com/khmer-rouge-tribunal-last-chance-to-salvage-justice/> (accusing the UN of "strong words" but a "lackluster response" to Cambodian interference in cases 003 and 004); Human Rights Watch, *Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign* (Oct. 3, 2011), <http://www.hrw.org/news/2011/10/03/cambodia-judges-investigating-khmer-rouge-crimes-should-resign> (accusing the UN of "burying its head in the sand" over cases 003 and 004).

<sup>386</sup> Gregory Townsend, *Structure and Management*, in INTERNATIONAL PROSECUTORS 171, 302-03 (Luc Reydams et al., eds., 2012) (quoting an interview with Petit).

<sup>387</sup> Corell interview, *supra* note 34.

<sup>388</sup> *Id.* (asserting that it is "absolutely necessary" that judges "have courtroom experience"). See also Baylis, *supra* note 337, at 18 (noting that some mixed courts have found it difficult to recruit experienced judges).

will be an expanded universe of experienced individuals from whom to choose.<sup>389</sup> Tribunals should also invest in capacity-building at the start, immersing judges in training for several months before commencing cases, which would likely lead to subsequent savings and more credible jurisprudence.<sup>390</sup>

The design and operation of mass crimes proceedings inevitably entail complex political compromises, not just clinical efforts to engineer effective courts. Nevertheless, the Cambodian case can inform negotiations and contribute to incremental improvements, especially on issues that can be framed as technical matters rather than core political concerns. If it has those effects, perhaps its institutional experiments will not have been in vain.

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<sup>389</sup> *Id.* at 18-20.

<sup>390</sup> Skilbeck interview, *supra* note 32.