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## Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal

John D. Ciorciari

*University of Michigan, Gerald R. Ford School of Public Policy, johncior@umich.edu*

Anne Heindel

*Documentation Center of Cambodia*

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

*John D. Ciorciari and Anne Heindel<sup>1</sup>*

I.	INTRODUCTION .....	370
II.	CHALLENGES TO JUDICIAL EFFICIENCY .....	374
	A. <i>Two Pairs of Two Investigators</i> .....	374
	B. <i>A Repetitive Structure for Appeals</i> .....	377
III.	JURISPRUDENCE .....	380
	A. <i>Applicability of Joint Criminal Enterprise Liability</i> ...	380
	B. <i>Illegality of Duch’s Military Court Detention</i> .....	382
	C. <i>Impact of Ieng Sary’s Domestic Pardon and         Amnesty</i> .....	384
IV.	FAIRNESS TO THE PARTIES.....	387
	A. <i>Effect of the Co-Investigating Judges</i> .....	387
	B. <i>Effect of Reliance on Local Procedural Rules</i> .....	391
V.	JUDICIAL INDEPENDENCE .....	393
	A. <i>Politically Sensitive Topics</i> .....	393
	B. <i>Procedures Intended to Safeguard Against Political         Interference</i> .....	400
	1. <i>Acting Alone</i> .....	400
	2. <i>Supermajority Rule</i> .....	403
VI.	MANAGING A DIVIDED COURT .....	406
	A. <i>Integrity Concerns</i> .....	409
	1. <i>Early Shortcomings in Human Resources             Management</i> .....	409
	2. <i>Corruption Allegations</i> .....	411
	B. <i>Barriers to Administrative Efficiency</i> .....	415
	C. <i>Financial Instability</i> .....	417
VII.	CONNECTING TO VICTIMS .....	420
	A. <i>Outreach</i> .....	420
	1. <i>Public Affairs Section</i> .....	421
	2. <i>Victim Support Section</i> .....	424
	B. <i>Civil Party Participation</i> .....	425
VIII.	CAPACITY BUILDING AND THE RULE OF LAW .....	431
IX.	CONCLUSION .....	437

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1. John D. Ciorciari is an assistant professor at the Gerald R. Ford School of Public Policy at the University of Michigan and senior legal advisor to the Documentation Center of Cambodia (DC-Cam). Anne Heindel is a legal advisor to DC-Cam. The authors would like to thank the numerous officials and civil society leaders who participated in interviews about the Khmer Rouge tribunal as part of the research for this project.

## I. INTRODUCTION

Important experiments in international criminal justice have been taking place at the Extraordinary Chambers in the Courts of Cambodia (ECCC or Court), a tribunal created by the United Nations and Cambodian Government to adjudicate some of the most egregious crimes of the Pol Pot era.<sup>2</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 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, Extraordinary African Chambers (EAC), 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>3</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 popula-

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2. 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* ELIZABETH BECKER, *WHEN THE WAR WAS OVER: CAMBODIA UNDER THE KHMER ROUGE REVOLUTION* (1986); DAVID P. CHANDLER, *THE TRAGEDY OF CAMBODIAN HISTORY: POLITICS, WAR, AND REVOLUTION SINCE 1945* 236-72 (1993); CRAIG ETCHESON, *THE RISE AND DEMISE OF DEMOCRATIC KAMPUCHEA* (1984); BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79* (2d ed. 2002). Physical remains, documents, survivor accounts, and other sources of information point to widespread and often systematic violations of international criminal law. *See* STEPHEN HEDER & BRIAN D. TITTEMORE, *SEVEN CANDIDATES FOR PROSECUTION* (2d ed. 2004); John D. Ciorciari & Youk Chhang, *Documenting the Crimes of Democratic Kampuchea*, in *BRINGING THE KHMER ROUGE TO JUSTICE* 221, 240-86 (Jaya Ramji & Beth Van Schaack eds., 2005).

3. 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).

tions, build host government capacity, and deliver credible justice at a lower cost than fully international proceedings.<sup>4</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>5</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>6</sup>

The ECCC, which is governed by a 2003 UN-Cambodian agreement outlining a framework for cooperation (the “Framework Agreement”)<sup>7</sup> and subsequent 2004 domestic law establishing the Court (the “ECCC Law”),<sup>8</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 preceding hybrid courts in important ways, however. Human rights lawyer James Goldston has called it “an extraordinary experiment in transitional justice.”<sup>9</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>10</sup> and is the first

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4. See Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295, 302-07 (2003); Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT’L & COMP. L. 347, 352-371 (2006); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 332-34 (3d ed. 2013); RATNER ET AL., *supra* note 3, at 248.

5. Suzannah Linton, *Putting Cambodia’s Extraordinary Chambers into Context*, 11 SING. Y.B. INT’L L. 195, 204-08, 223-26 (2007); Higonnet, *supra* note 4, at 390-400.

6. See Suzannah Linton, *Cambodia, East Timor, and Sierra Leone: Experiments in International Justice*, 12 CRIM. L. FORUM 185, 199-202 (2001); RATNER ET AL., *supra* note 3, at 253; Cohen, *supra* note 3, at 36-37.

7. 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, U.N.-Cambodia, June 6, 2003, 2329 U.N.T.S. 117 [hereinafter Framework Agreement].

8. 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, art. 1 (NS/RKM/1004/006) (Cambodia). [hereinafter ECCC Law] available at [http://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf).

9. James Goldston, *An Extraordinary Experiment in Transitional Justice*, JUST. INITIATIVES (Open Soc’y Just. Initiative, New York, NY), Spring 2006, at 1.

10. The ECCC is the only U.N.-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.

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 international judges.<sup>11</sup> Second, the ECCC is the only hybrid court to divide national and international personnel into distinct “sides.” The Court has national and international Co-Prosecutors and Co-Investigating Judges and splits its Office of Administration into separate Cambodian and U.N. components, each of which has independent funding, hiring practices, and reporting lines. Third, due to the influence of French civil law on the Cambodian domestic system, the ECCC includes more pronounced civil law features than any previous hybrid court.<sup>12</sup> In particular, it includes a role for investigating judges that supersedes party-driven investigations and an innovative scheme for victims to participate as civil parties in the criminal proceedings.

The civil party scheme was designed in the ECCC’s Internal Rules, which were drafted by judges to govern evidentiary and procedural matters at the Court after the ECCC began operations.<sup>13</sup> However, most of the ECCC’s novel institutional features represented accommodations to Cambodian sovereignty during lengthy negotiations between U.N. and Cambodian officials to create the tribunal. The U.N. 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 U.N. member states eventually pressed the U.N. Secretary-General and Office of Legal Affairs to compromise on an

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ECCC Law, *supra* note 8, arts. 2 new-8. Importantly, the Court applies Cambodian criminal procedure, looking to international standards only where lacunae appear. *Id.* art. 33 new.

11. 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 7, art. 4; ECCC Law, *supra* note 8, art. 14 new. As discussed below, however, the supermajority rule has been largely ineffective at curbing political interference. See *infra* Part V.B.2.

12. See, e.g., Kathia Martin-Chenut, *Procès International et Modèles de Justice Pénale*, in *DROIT INTERNATIONAL PÉNAL* 847, 862 (Hervé Ascensio et al. eds., 2d ed. 2012). The Statute of the Extraordinary African Chambers, inaugurated in February 2013, shares similar civil law features. See *Accord sur la Création de Chambres Africaines Extraordinaires au sein des Juridictions Sénégalaises*, Afr. Union-Sen., Jan. 31, 2012, available at <http://www.chambresafriaines.org/pdf/Accord%20UA-Senegal%20Chambres%20africaines%20extra%20Aout%202012.pdf>. Though the document is officially available in French, Human Rights Watch has made an unofficial English translation available. See Human Rights Watch, *Statute of the Extraordinary African Chambers* (Sept. 2, 2013), available at <http://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers>.

13. The Court’s internal rules were completed in mid-2007 and have since been revised a number of times. Internal Rules of the ECCC (Aug. 2011) [hereinafter ECCC Internal Rules (rev. 8)]. For some key provisions on civil parties, see *id.* rr. 12-12 *ter*, 23-23 *quinques*.

arrangement closer to Cambodian preferences.<sup>14</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>15</sup> Nevertheless, the ECCC's unique features were understood to be risky from the outset and indeed have proven to be problematic in practice.

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 evidentiary hearings in a truncated 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>16</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 U.N. 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.

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14. On the tribunal negotiations, see generally JOHN D. CIORCIARI & ANNE HEINDEL, *HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* 14-40 (2014); TOM FAWTHROP & HELEN JARVIS, *GETTING AWAY WITH GENOCIDE? ELUSIVE JUSTICE AND THE KHMER ROUGE TRIBUNAL* 155-209 (2004) (chronicling the tribunal formation negotiations between the United Nations, its member states, and Cambodia); DAVID SCHEFFER, *ALL THE MISSING SOULS* 341-405 (2012) (recounting one negotiator's experience during the negotiation process to form the tribunal); John D. Ciorciari, *History and Politics behind the Khmer Rouge Trials*, in *ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS* 33 (John D. Ciorciari & Anne Heindel eds., 2009).

15. David Scheffer, *Why the Cambodia Tribunal Matters to the International Community*, *CAMBODIA TRIBUNAL MONITOR* 3-4, Sept. 2007, [http://www.cambodiatribunal.org/sites/default/files/resources/CTM\\_Scheffer\\_Essay\\_September\\_2007.pdf](http://www.cambodiatribunal.org/sites/default/files/resources/CTM_Scheffer_Essay_September_2007.pdf) (last visited Feb. 24, 2014) (arguing, as a key official involved in the negotiations to create the ECCC, that "[t]here is no question that the ECCC is an experiment, but one for which there really was no viable alternative after years of negotiations").

16. 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 March 2013. Ben Bland, *Ieng Sary Dies During Khmer Rouge Trial*, *FINANCIAL TIMES* (Mar. 14, 2013, 10:50 AM), <http://www.ft.com/intl/cms/s/0/a5fb02bc-8c52-11e2-8fcf-00144feabdc0.html#axzz2qJXNvpJu>. For detailed accounts and analyses of each of the ECCC's cases, see generally CIORCIARI & HEINDEL, *supra* note 14, chs. 4-6.

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>17</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 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 difficulty of combining personnel from diverse backgrounds are obstacles to efficiency in any mass crimes tribunal.<sup>18</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. The Framework Agreement and ECCC Law established four investigatory posts at the Court: two Co-Prosecutors and two Co-Investigating Judges (CIJs). Under the ECCC's Internal Rules, the Co-Prosecutors conduct preliminary investigations into alleged crimes falling within the Court's jurisdiction.<sup>19</sup> They then send an

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17. Interview with William Smith, Deputy Int'l Co-Prosecutor, ECCC, in Phnom Penh, Cambodia (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").

18. See, e.g., ALEX BATES, ATLAS PROJECT, TRANSITIONAL JUSTICE IN CAMBODIA: ANALYTICAL REPORT ¶ 134 (2010), available at [http://projetatlas.univ-paris1.fr/IMG/pdf/ATLAS\\_Cambodia\\_Report\\_FINAL\\_EDITS\\_Feb2011.pdf](http://projetatlas.univ-paris1.fr/IMG/pdf/ATLAS_Cambodia_Report_FINAL_EDITS_Feb2011.pdf) (noting difficulties in work between the largely common law-trained staff in the OCP and largely civil law-trained staff in the OCIJ); Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL'Y 87, 94-95 (2001) (noting the need for extensive judicial training at the ICTY); Richard Dicker & Elise Keppler, *Beyond the Hague*, GLOBAL POL'Y FORUM (Jan. 2004), <http://www.globalpolicy.org/component/content/article/163/28276.html> (noting similar challenges across international criminal tribunals).

19. ECCC Internal Rules (rev. 8), *supra* note 13, r. 50(1).

introductory submission to the CIJs outlining the facts and persons to be investigated.<sup>20</sup> Following the French civil law tradition, the CIJs conduct the bulk of the investigation before deciding whether to indict any of the named suspects by issuing a “closing order.”<sup>21</sup> Both the existence of investigating judges and the two-headed nature of the Office of the Co-Prosecutors (OCP) and Office of the Co-Investigating Judges (OCIJ) have contributed to efficiency problems.

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>22</sup> and the extra time afforded by the judges’ delay in completing the Internal Rules.<sup>23</sup> The Co-Investigating Judges (CIJs) have also undertaken lengthy investigations, slowed in part by the bifurcated nature of the office. The first international CIJ, Marcel Lemonde, recalls that, “every decision is like negotiating a treaty. In France or elsewhere, taking a decision takes a half hour, here we need 8 days.”<sup>24</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>25</sup> The OCIJ then investigated Duch for another ten months.<sup>26</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

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20. *Id.* r. 53(1).

21. The CIJs may only investigate people or facts outside of the scope of the introductory submission if the Co-Prosecutors file a supplementary submission. *Id.* 55(2)-(3). The CIJs retain the power to charge additional persons after “seeking the advice” of the Co-Prosecutors. *Id.* r. 55(4).

22. See Interview with William Smith, *supra* note 17 (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).

23. See Case No. 001/18-07-2007-ECCC-OCIJ, Closing Order Indicting Kaing Guek Eav alias Duch, ¶ 4 (Aug. 8, 2008) (noting that the Co-Prosecutors began their preliminary investigation in July 2006 and filed their introductory submission in July 2007). Despite their differences over Cases 003 and 004, the two sides of the OCP have reportedly established a generally productive working relationship.

24. BATES, *supra* note 18, ¶ 131 (quoting Judge Lemonde). See also *Quelles leçons tirer du procès des Khmers rouges?* 2011 REVUE DE SCIENCE CRIMINELLE 597 (featuring an interview with Lemonde, translated from French by the authors, in which he notes 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 to decide) [hereinafter *Quelles leçons*].

25. Case No. 002/14-08-2006, Separation Order, 2 (Extraordinary Chambers in the Cts. of Cambodia Sept. 19, 2007).

26. See Case No. 001/18-07-2007-ECCC-OCIJ, Closing Order Indicting Kaing Guek Eav alias Duch, ¶¶ 5, 7 (Aug. 8, 2008) (noting that the CIJs considered the investigation concluded in May 2008, three months prior to the closing order’s issuance).

took another two and a half years,<sup>27</sup> resulting in a two-part investigation that lasted 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>28</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>29</sup>

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>30</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 U.N. Special Expert to Advise on the U.N. 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>31</sup>

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27. See Case 002/19-09-2007-ECCC-OCIJ, Closing Order, ¶ 13 (Sept. 15, 2010) (noting that the CIJs had completed the investigation eight months before the closing order's issuance).

28. See BATES, *supra* note 18, ¶ 133; CASSESE, *supra* note 4, at 356-58; Göran Sluiter, *Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers*, 4 J. INT'L CRIM. JUST. 314, 324 (2006).

29. Judge Marcel Lemonde, Remarks at the Conference on "The Contribution of Criminal Proceedings before the ECCC to Cambodian Law" held at the Royal University of Law and Economics in Phnom Penh (Dec. 4, 2012) (on file with the authors) [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 13, rr. 82(1), 104(4). Lemonde initially estimated the need for six months of investigation followed by a three-month trial. Interview with Michiel Pestman, former co-lawyer for Nuon Chea, in Phnom Penh, Cambodia (June 9, 2012). One of the authors also heard this from the international CIJ upon her arrival in Phnom Penh in mid-2007.

30. See CASSESE, *supra* note 4, at 356-57.

31. Telephone Interview with Clint Williamson, former U.N. Special Expert to advise on the U.N. Assistance to the Khmer Rouge Trials and former U.S. Ambassador-at-Large for War Crimes Issues (June 27, 2012). See also Interview with Anta Guissé, co-lawyer for Khieu Samphan, in Phnom Penh, Cambodia (Nov. 15, 2012) (noting that because civil law trials are so short, the common law system may better suit mass crimes proceedings); Interview with

Lengthy trials have occurred indeed, incorporating many aspects of common law practice in the legitimate interests of educating the public and helping the Trial Chamber judges manage complex cases. Numerous witnesses have been 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>32</sup>

Moreover, the Court's Internal Rules do not allow defense teams to confront witnesses during the investigation,<sup>33</sup> leading defense lawyers to issue extensive challenges to material in the case file. In response to those challenges, the Trial Chamber has found that although witness statements taken by the CIJs are "entitled to a presumption of relevance and reliability[,]""<sup>34</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>35</sup>

Lengthy common law-style trials will almost always be necessary in mass crimes cases, leaving little need for investigating judges. Most Court analysts and officials agree that from an efficiency standpoint, the ECCC's structure has produced the "worst possible outcome"<sup>36</sup> of a "full-length judicial investigation and a full-length trial."<sup>37</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 dis-

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Panhavuth Long, Program Officer, Cambodian Justice Initiative, in Phnom Penh, Cambodia (July 6, 2012) (noting that if the investigation were more public the trial could be shorter).

32. See Interview with Michael G. Karnavas, former co-lawyer for Ieng Sary, in Phnom Penh, Cambodia (May 19, 2012) (arguing that judges are "abdicating their role" because they "haven't read the [case] file").

33. Internal Rule 60(2) provides in part: "Except where a confrontation is organised, the [CIJs] or their delegates shall interview witnesses in the absence of Charged Persons . . . or their lawyers[.]" ECCC Internal Rules (rev. 8), *supra* note 13, r. 60(2). The exclusion of defense from witness questioning derives from Cambodian procedures based on obsolete French law. See CRIM. PROC. CODE art. 153 (Cambodia) [hereinafter CPC] ("The investigating judge questions witnesses separately, without any presence of the charged person and any civil party. The investigating judge may also arrange a confrontation between the charged person, civil parties and witnesses.").

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

35. *Id.* ¶ 27; Anne Heindel, *Admissibility of Witness Statements In Lieu of Oral Testimony*, CAMBODIA TRIBUNAL MONITOR (July 31, 2012), <http://cambodiatribunal.org/sites/default/files/CTM%20Heindel%2012-07-31.pdf>.

36. See, e.g., Telephone Interview with Rupert Skilbeck, former head of the ECCC Defense Support Section (June 7, 2012); BATES, *supra* note 18, ¶ 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).

37. BATES, *supra* note 18, ¶ 133 (quoting Trial Chamber Judge Silvia Cartwright).

agreements between the Co-Prosecutors or between the CIJs,<sup>38</sup> but the judge-drafted Internal Rules 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>39</sup> Thus, questions can be raised at least four times—before the CIJs, PTC, Trial Chamber, and appellate Supreme Court Chamber—before being resolved.<sup>40</sup> For example, prior to Ieng Sary’s death, the effect of his 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 Supreme Court Chamber.<sup>41</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>42</sup>

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38. ECCC Internal Rules (rev. 8), *supra* note 13, r. 73(a); Telephone Interview with Hans Corell, former U.N. Legal Counsel (Nov. 15, 2012) (saying his team invented the PTC only for that purpose).

39. Case No. 002/19-09-2007/ECCC/TC, Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, ¶ 21 (Feb. 16, 2011), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E50\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E50_EN.pdf). The Internal Rules are silent on this question.

40. Ang Udom & Michael Karnavas, *The Diligent Defense of Ieng Sary is not a Delaying Tactic*, CAMBODIA DAILY, July 11, 2011, at 34, available at [http://www.michaelkarnavas.net/files/11\\_July-CamDaily-The\\_diligent\\_defense\\_of\\_Ieng\\_Sary\\_is\\_not\\_a\\_delaying\\_tactic.pdf](http://www.michaelkarnavas.net/files/11_July-CamDaily-The_diligent_defense_of_Ieng_Sary_is_not_a_delaying_tactic.pdf).

41. A supermajority of the Supreme Court Chamber found the appeal inadmissible under its narrow interlocutory jurisdiction. See Case No. 002/19-09-2007-ECCC-TC/SC(11), Decision on Ieng Sary’s Appeal Against Trial Chamber’s Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne Bis In Idem* and Amnesty and Pardon), (Mar. 20, 2012). Due to the termination of the case against Ieng Sary there will be no final determination of this question.

42. Interview with Michael G. Karnavas, *supra* note 32. See also Telephone Interview with Craig Etcheson, former investigator at the ECCC Office of the Co-Prosecutors (Oct. 22, 2012) (emphasizing that “[t]he amount of staff and lawyer time required [to address these repeated challenges] is quite remarkable”). In an effort to minimize repetitious litigation, the PTC has sought to exercise its jurisdiction narrowly. See, e.g., U.S. EMBASSY IN PHNOM PENH, 08PHNOMPENH947, KHMER ROUGE TRIBUNAL: ROCKY ROAD FOR NEW CASES, STEADY PATH FOR TRIAL OF FIVE KR LEADERS ¶ 6 (Nov. 28, 2008), available at <http://www.wikileaks.org/cable/2008/11/08PHNOMPENH947.html> (noting that “[t]he PTC is reportedly conscious of its jurisdictional boundaries and does not want to pre-empt the trial chamber’s rulings on such a fundamentally important topic as ‘joint criminal enterprise’”). For example, the PTC declined to rule on certain issues pertaining to Duch’s pre-trial detention because the Trial Chamber would later consider them anew. See Case No. 001/18-07-2007-ECCC/OCIJ (PTC01), Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias Duch, ¶ 63 (Dec. 3, 2007), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/PTC\\_decision\\_appeal\\_duch\\_C5-45\\_EN\\_0\\_0.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/PTC_decision_appeal_duch_C5-45_EN_0_0.pdf) (noting that “[i]t would not be appropriate for the Pre-Trial Chamber to make the statements requested when another judicial body . . . will have to make its own decisions on the basis of the evidence and the submissions before it”). However, this approach has not prevented redundant rulings on important topics. Compare Case No. 001/19/09-2007/ECCC/OCIJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE) (May 20, 2010) (analyzing the applicability of the joint criminal enterprise (JCE) doctrine at the ECCC), with Case No.

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. This 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 002/01, focusing only 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>43</sup> Case 002/01 did not address many of the crimes alleged in the Case 002 closing order, including genocide, crimes committed at worksites and cooperatives, forced marriage, and torture and killing at internal security sites unrelated to forced migration. It also addressed only two of the five broad criminal policies of which the senior Khmer Rouge leaders are accused.<sup>44</sup>

The limited scope of Case 002/01 will lessen the impact of its 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 cast doubt on the legacy of the Court's "centerpiece" case.<sup>45</sup> Beyond forced evacuation and one site where members of the former regime were executed, it is unlikely that key criminal policies of the Khmer Rouge will be addressed in a final verdict.<sup>46</sup>

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002/19/09-2007/ECCC/TC, Decision on the Applicability of Joint Criminal Enterprise (Sept. 12, 2011) (retracing the PTC's non-binding legal analysis).

43. See Case No. 002/19-09-2007/ECCC/TC, Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, ¶ 4 (Apr. 26, 2013), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-04-26%2016:43/E284\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-04-26%2016:43/E284_EN.pdf).

44. The closing order accused the senior Khmer Rouge leaders of participation in a joint criminal enterprise featuring five 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. See Case 002/19-09-2007-ECCC-OCIJ, Closing Order, ¶ 1525 (Sept. 15, 2010). The Trial Chamber has said that Case 002/01 addresses only the first and the third of these policies. See Case No. 002/19-09-2007/ECCC/TC, Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, ¶ 118 (Apr. 26, 2013), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-04-26%2016:43/E284\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-04-26%2016:43/E284_EN.pdf) (responding to a Supreme Court Chamber decision in February 2013 that annulled the 2011 severance order and all subsequent related decisions).

45. See Sebastian Strangio, *How a Brutal Khmer Rouge Leader Died 'Not Guilty'*, THE ATLANTIC (Apr. 1, 2013, 9:13 AM), <http://www.theatlantic.com/international/archive/2013/04/how-a-brutal-khmer-rouge-leader-died-not-guilty/274508/>.

46. In April 2014 the Trial Chamber ruled on the scope of Case 002/02, which will include a few security centers and worksites, a cooperative, and the crimes of genocide and forced marriage including rape in that context. See generally Case 002/19-09-2007-ECCC/TC, Decision on Additional Severance of Case 002 and Scope of Case 002/02 (Apr. 4, 2014). The prosecution had previously estimated that a portion of the selected charges would require 12-

### 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>47</sup> Political interference has indeed been a major problem with respect to the Court’s investigation of suspects beyond the five persons on selected issues,<sup>48</sup> but on most judicial matters the ECCC has functioned much like a fully international court—open to legitimate legal challenges and demonstrating a good faith effort to follow established norms of accountability and due process.<sup>49</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, ICTR 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

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18 months of evidentiary hearings, if the accused remain in good health and the trial proceeds expeditiously. See Case 002/19-09-2007-ECCC/TC, Transcript of Trial Proceedings (Dec. 12, 2013), at 38, 42. Factoring in a few months of preparation before the start of substantive hearings, and the minimum of a year to draft an eventual judgment, even this best-case scenario suggests that no final verdict in Case 002/02 could be reached until 2017, at which time Nuon Chea would be 91 and Khieu Samphan would be 86.

47. See, e.g., Human Rights Watch, *UN: Khmer Rouge Tribunal Flawed*, GLOBALPOLICY.ORG (Apr. 30, 2003), <https://www.globalpolicy.org/component/content/article/163-general/28872.html> (quoting Mike Jendrzeczyk, Director of the Human Rights Watch’s Asia Division, who argues that “with Cambodia’s judiciary at the center of the tribunal, the agreement ensures that it will be politics and not law that will 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 U.N.-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, 53d Sess., ¶ 137, U.N. Doc. A/53/850 (Mar. 16, 1999).

48. See *infra* Part V.

49. See, e.g., Case No. 002/19-09-2007-ECCC/OCIJ (PTC05), Decision on Appeal Concerning Contact Between the Charged Person and his Wife, ¶¶ 18, 21 (Apr. 30, 2008), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/A104\\_II\\_7\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/A104_II_7_EN.pdf) (finding that the Co-Investigating Judges had not explained why limiting contact between husband and wife accused was a “necessary and proportional measure to protect the interests of the investigation” and granting them the right to meet in accordance with their right “to be treated with humanity”). 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. See, e.g., BATES, *supra* note 18, ¶ 81.

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>50</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-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 of the three categories 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 in international law as of 1975 has never been addressed squarely in legal proceedings. In the seminal *Tadić* 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>51</sup> and in Case 002.<sup>52</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 *Tadić* Appeals Chamber”<sup>53</sup> and found that the precedent cited by the *Tadić* court was unclear and its legal reasoning was unconvincing.<sup>54</sup> This

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50. See generally Prosecutor v. *Tadić*, Case No. IT-94-1-A, Judgment, ¶¶ 226-28 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

51. Prosecutors v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶¶ 511-12 (July 26, 2010).

52. Case No. 002/19/09-2007/ECCC/TC, Decision on the Applicability of Joint Criminal Enterprise, ¶ 22 (Sept. 12, 2011) (noting the previous finding in the Duch judgment).

53. 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*, IENG SARY DEFENCE 32 (2010), <http://www.iengsarydefence.org/wp-content/uploads/2012/12/MichaelGKarnavasJCEattheECCC.pdf>.

54. See generally Case No. 002/19-09-2007/OCIJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), ¶¶ 77-85 (May 10, 2010), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D97\\_15\\_9\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D97_15_9_EN.pdf).

view was then adopted by the Trial Chamber.<sup>55</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>56</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, 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>57</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 criminal courts.”<sup>58</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>59</sup> At final judgment, the Trial Chamber therefore subtracted five years from Duch’s sentence.<sup>60</sup>

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

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55. Case No. 002/19/09-2007/ECCC/TC, Decision on the Applicability of Joint Criminal Enterprise, ¶¶ 30-37 (Sept. 12, 2011).

56. *Id.* at 16.

57. See Case 001/1/-07/2007/ECCC/TC, Decision on Request for Release, ¶ 14 (June 15, 2009); Case No. 001/18-07-2007-ECCC/OCIJ (PTC01), Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias Duch, ¶ 21 (Dec. 3, 2007).

58. Case 001/1/-07/2007/ECCC/TC, Decision on Request for Release, ¶ 15 (June 15, 2009). 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>.

59. Case 001/1/-07/2007/ECCC/TC, Decision on Request for Release, ¶¶ 35-36 (June 15, 2009).

60. Prosecutors v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 627 (July 26, 2010).

importance. The Cambodian judges joined in unanimous recognition that Duch's human rights had been violated, 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>61</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>62</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>63</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>64</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, "[T]he 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>65</sup> To former Defence Support Section (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>66</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 adequate remedy."<sup>67</sup> In their view, this re-

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61. BATES, *supra* note 18, ¶ 232.

62. CAMBODIAN CENTER FOR HUMAN RIGHTS, THIRD BI-ANNUAL REPORT: FAIR TRIAL RIGHTS — ONE YEAR PROGRESS 45 (2012), available at [http://www.cchrcambodia.org/admin/media/report/report/english/CCHR\\_Third\\_Bi-annual\\_Report\\_Fair\\_Trial\\_Rights\\_One\\_Year\\_Progress\\_January\\_2012\\_ENG.pdf](http://www.cchrcambodia.org/admin/media/report/report/english/CCHR_Third_Bi-annual_Report_Fair_Trial_Rights_One_Year_Progress_January_2012_ENG.pdf).

63. BATES, *supra* note 18, ¶ 146.

64. Prosecutors v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/SC, Appeal Judgment, ¶ 399 (Feb. 3, 2012).

65. Cambodia: Khmer Rouge Judgment Welcome, but Raises Human Rights Concerns, AMNESTY INT'L (Feb. 3, 2012), <http://www.amnesty.org/en/news/cambodia-khmer-rouge-judgment-welcome-raises-human-rights-concerns-2012-02-03>.

66. Interview with Richard Rogers, former Head of the ECCC Def. Support Section, in Phnom Penh, Cambodia (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).

67. Prosecutors v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/SC, Appeal Judgment (Klonowiecka-Milart, J. & Nihal Jayasinghe, Chandra, J., partially dissenting), ¶ 17 (Feb. 3, 2012).

quired that the ECCC both acknowledge Duch's illegal confinement and reduce his sentence accordingly<sup>68</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>69</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 Rouge 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>70</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 Kampuchea Group, raising obvious tensions with international norms against granting amnesty for crimes such as genocide.<sup>71</sup>

As the ECCC is an “internationalized” court,<sup>72</sup> its obligation to recognize the validity of the Ieng Sary amnesty was debated since negotiations

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68. *Id.* ¶ 20.

69. *Id.* ¶ 30.

70. Unlike the Genocide Convention and ECCC Law, the 1979 tribunal decree 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, art. 1 (July 15, 1979) (People's Republic of Kampuchea), available at [http://law.scu.edu/wp-content/uploads/Decree\\_Law\\_No.\\_1.pdf](http://law.scu.edu/wp-content/uploads/Decree_Law_No._1.pdf).

71. 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.

72. “Internationalized” is an ambiguous term used to denote courts comprising both national and international legal characteristics.

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>73</sup> There is wide, though by no means universal, agreement that domestic amnesties for serious international crimes are invalid under international law.<sup>74</sup> Acceptance of their invalidity is broadest with regard to crimes for which a state has a treaty obligation to prosecute or extradite.<sup>75</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>76</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>77</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 perpetrators. Notably, it found that the creation of the ECCC and other hybrid courts evinced states' determination that serious crimes should not go unpun-

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73. ECCC Law, *supra* note 8, art. 40 new; Framework Agreement, *supra* note 7, art. 11(2).

74. This principle is based on the notion that states have a duty to prosecute the most serious international crimes. *See, e.g.*, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 945 (M. Cherif Bassiouni ed., 2d ed. 2012); CASSESE'S INTERNATIONAL CRIMINAL LAW 312 (Antonio Cassese et al. eds., 3d ed. 2013). There is no explicit international treaty provision invalidating domestic amnesties for such crimes, however. The applicable law is based on a patchwork of treaties, case decisions, nonbinding resolutions, and scholarly analyses of leading jurists, which leaves scope for continuing debates over the extent to which amnesties are valid. *See* Louise Mallinder, *Amnesties*, in HANDBOOK OF INTERNATIONAL LAW (William Schabas & Nadia Bérnáz eds., 2010). The provision of amnesties remains common despite—and to some extent because of—the strengthening of international legal norms mandating prosecution. Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law*, 43 VA. J. INT'L L. 173, 179 (2002).

75. *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 (Mar. 13, 2004).

76. Case No. 002/19-09-2007-ECCC/TC, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis In Idem* and Amnesty and Pardon), ¶ 39 (Nov. 3, 2011).

77. *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, ¶ 82 (Special Ct. for Sierra Leone Mar. 13, 2004) (finding a "crystallising international norm that a government cannot grant amnesty for serious violations . . . under international law"); U.N. Secretary-General, *Rep. of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 22, U.N. Doc. S/2000/915, (Oct. 4, 2000) (discussing the amnesty clause in the Lomé Peace Agreement).

ished.<sup>78</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 to set them aside or limit their scope should they be deemed incompatible with international norms.”<sup>79</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>80</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 was charged.<sup>81</sup>

The Trial Chamber did not make this finding on the basis of the ECCC’s hybrid character, but rather ruled solely on the basis of Cambodia’s state obligations. The decision thus strongly affirms the obligation of fully-domestic Cambodian courts 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 Sary 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>82</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>83</sup> However, a Supreme Court Chamber supermajority ruled that there could be no final determination until judgment because the issue fell outside the narrow scope of its interlocutory review authority.<sup>84</sup> Although it is troubling that the Court failed to resolve

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78. Case No. 002/19-09-2007-ECCC/TC, Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne bis In Idem* and Amnesty and Pardon), ¶¶ 47-50 (Nov. 3, 2011).

79. *Id.* ¶ 53.

80. *But see* David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in 3 INTERNATIONAL CRIMINAL LAW 219, 232 (M. Cherif Bassiouni ed., 3d 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 still would be subject to prosecution for the Pol Pot era crimes”).

81. *See* Case No. 002/19-09-2007-ECCC/TC, Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne bis In Idem* and Amnesty and Pardon), ¶ 55 (Nov. 3, 2011). Moreover, the Trial Chamber ruled that because the 1979 tribunal was not independent and impartial, the judgment against Ieng Sary “can not be characterised as a genuine judicial decision” and “is therefore incapable of producing valid legal effects” subject either to a pardon or to the principle of *res judicata* in the CPC. *Id.* ¶¶ 30-31.

82. 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.

83. *See* Case No. 002/19-09-2007-ECCC/TC, Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne bis In Idem* and Amnesty and Pardon), ¶¶ 2, 16-17 (Nov. 3, 2011).

84. *See* Case No. 002/19-09-2007-ECCC-TC/SC(11), Decision on Ieng Sary’s Appeal Against Trial Chamber’s Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne Bis In Idem* and Amnesty and Pardon), Judgment, (Mar. 20, 2012). Two international judges dis-

this fundamental jurisdictional question before trial and that Ieng Sary died without knowing if the Court had the competence to try him in the first place, the lower Chambers' decisions on this topic were reasonable and 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. There are many potential advantages to a judicial investigation. In mass-crimes cases, defense counsel often has 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 also has the potential to 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>85</sup> the inclusion of investigating judges has raised fairness concerns. Investigating judges have enormous discretionary power, which has led France and other national judicial systems to limit or eliminate their role.<sup>86</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 ca-

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sented, arguing the Supreme Court Chamber 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*, CAMBODIA TRIAL MONITOR (July 12, 2012), <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

85. See *supra* Part II(A).

86. Interview with Jeanne Sulzer, former Legal Officer, Civil Party Lead Co-Lawyers Section, in Phnom Penh, Cambodia (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).

capacity of this novel institutional feature to meet the needs of a mass-crimes process.<sup>87</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>88</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>89</sup> They may also request that the CIJs undertake any investigative action they consider “useful for the conduct of the investigation.”<sup>90</sup>

Because the CIJs act independently, they have broad discretion to decide whether or not an investigative act is useful.<sup>91</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>92</sup> Fewer than twenty percent of the Nuon Chea team’s investigative requests were carried out.<sup>93</sup> “You tie our hands, and then you don’t go out and do what you are supposed to do,” lamented Ieng Sary’s former co-lawyer, Michael Karnavas.<sup>94</sup>

At tribunals where there is no investigative judge, prosecutors are not expected to be neutral, so there is no presumption that their witness statements will be disinterested, it is difficult to challenge their integrity, and a successful challenge is unlikely to taint the entire investigation. In contrast,

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87. See also *id.* (noting that investigating judges from national systems are unaccustomed to leading teams on mass crimes cases).

88. See ECCC Internal Rules (rev. 8), *supra* note 13, r. 55(5).

89. Case No. 002/19-09-2007-ECCC-OCIJ, Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, ¶ 14 (June 19, 2009).

90. ECCC Internal Rules (rev. 8), *supra* note 13, r. 55(10).

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

92. See, e.g., Case No. 002/19-09-2007-ECCC/OCIJ (PTC 67), 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 Charged Persons’ Knowledge of the Crimes, ¶ 68 (Sept. 27, 2010) (in which the PTC reviews the request due to the CIJs’ “failure to meet their obligation to provide reasoned orders”); Case No. 002/19-09-2007-ECCC/OCIJ (PTC 10), Decision on Ieng Sary’s Appeal Regarding the Appointment of a Psychiatric Expert, ¶ 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”).

93. Interview with Andrew Ianuzzi, former Legal Consultant to Nuon Chea, in Phnom Penh, Cambodia (May 29, 2012). One defense lawyer argues that by shutting parties out of the process, Judge Lemonde created the defense “monster” that continually challenged his work. *Id.*

94. Interview with Michael G. Karnavas, *supra* note 32.

at the ECCC the CIJs have near-total investigative discretion,<sup>95</sup> and thus the fairness of the entire process, is dependent on their perceived independence and impartiality.<sup>96</sup> The CIJs and some investigators provided easy targets for multiple personal bias challenges.<sup>97</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 also arguably carries an inherent bias toward the prosecution's case—at least when it involves complex mass crimes—because the prosecutors furnish vast amounts of information in the initial submission. Khieu Samphan's co-lawyer Anta Guissé said, "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>98</sup> The CIJs essentially acknowledged this when they 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>99</sup>

Investigating judges have limited capacity to digest a vast introductory submission and pursue extensive further investigation. Former DSS head Richard Rogers said that due to the complexity of Case 002, the CIJs were unable to examine carefully all the documents referenced in the Co-Prosecutors' introductory submission, let alone develop exculpatory evidence.<sup>100</sup> Karnavas asserted, "[The CIJs] never did an investigation; they

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95. See Case No. 002/19-09-2007-ECCC/OCIJ (PTC 24), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, ¶ 22 (Nov. 18, 2009) (affirming its prior finding that the CIJs "are independent in the way they conduct their investigation").

96. See Interview with Anta Guissé, *supra* note 31 ("Investigative Judges are so powerful, if they are good it is perfect; if they are bad it is very bad.").

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

98. Interview with Anta Guissé, *supra* note 31. *But see* Telephone Interview with Craig Etcheson, *supra* note 42 (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).

99. Case No. 002/19-09-2007-ECCC-OCIJ, Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, ¶ 6 (June 19, 2009). 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. Case No. 002/19-09-2007-ECCC/OCIJ (PTC 24), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, ¶¶ 36-37 (Nov. 18, 2009).

100. Interview with Richard Rogers, *supra* note 66 (arguing further that formal investigatory requests cannot compensate for the absence of client instructions regarding potential lines of inquiry).

only did a validation. The investigation was done for them by the prosecution.”<sup>101</sup> 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>102</sup> Employing investigators from diverse legal traditions may exacerbate this tendency. Arguably, “[i]t’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>103</sup> Guissé noted that unlike the practice in France, the CIJs delegated their power to investigators without a standardized methodology or code of conduct: “[t]he [CIJs] need to take more control over investigators.”<sup>104</sup>

The confidentiality of a judicial investigation makes it difficult for the public—and even the parties—to assess its quality.<sup>105</sup> Former Nuon Chea co-lawyer Michiel Pestman argued that confidentiality did not require secrecy from the parties.<sup>106</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>107</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>108</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>109</sup> Moreover, interviews were riddled with leading questions, were not consistently

101. Interview with Michael G. Karnavas, *supra* note 32.

102. *Id.*

103. *Id.* See also Interview with Anta Guissé, *supra* note 31 (“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.”).

104. Interview with Anta Guissé, *supra* note 31.

105. 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 13, r. 56(1).

106. Interview with Michiel Pestman, *supra* note 29. See also Interview with Jeanne Sulzer, *supra* note 86 (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).

107. See, e.g., Case No. 002/14-08-2006, Order on Breach of Confidentiality of the Judicial Investigation, ¶ 2 (Extraordinary Chambers in the Cts. of Cambodia Mar. 3, 2009) (quoting Letter from the Ieng Sary Defense Team to Deputy Director Rosandhaug and the Co-Investigative Judges (Dec. 18, 2008)).

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

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

recorded, and some interviewees were questioned on multiple occasions, suggesting no line of questioning had been developed in advance.<sup>110</sup>

Karnavas noted 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>111</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*

Fairness concerns also arise from the awkward mix of procedural rules applied by the ECCC. The Framework Agreement and ECCC Law dictate that the Court’s procedure must be “in accordance with Cambodian Law,”<sup>112</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>113</sup> This provision emphasizes the national institutional character of the ECCC and differentiates the Court from international tribunals, which adopt their own rules.<sup>114</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. Notably, those French reforms included minimizing

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110. Interview with Michael G. Karnavas, *supra* note 32. 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*, CAMBODIA TRIBUNAL MONITOR (Dec. 13, 2012), <http://www.cambodiatribunal.org/sites/default/files/CTM%20Heindel%2012-12-13.pdf>.

111. Interview with Michael G. Karnavas, *supra* note 32.

112. Framework Agreement, *supra* note 7, art. 12(1). *See also* ECCC Law, *supra* note 8, arts. 20 new, 23 new, 33 new (stating that “existing [Cambodian] procedures” shall be used during various stages of the proceedings). 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.” Statute of the Special Court for Sierra Leone, U.N.-Sierra Leone, app. Art. 14(2), Jan. 16, 2002, 2178 U.N.T.S. 149 [hereinafter SCSL Statute]. 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*, Case No. SCSL-2003-12-PD, Decision on the Urgent Defense Application for Release from Provisional Detention, ¶ 27 (Nov. 21, 2003), <http://www.sc-sl.org/LinkClick.aspx?fileticket=8YCFpOGNCdM%3d&tabid=153>.

113. *See* Framework Agreement, *supra* note 7, art. 12(1). *See also* ECCC Law, *supra* note 8, arts. 20 new, 23 new, 33 new.

114. *See, e.g.*, SCSL Statute, *supra* note 112, art. 14.

the role of the investigating judge.<sup>115</sup> Judge Lemonde said, “I regret that the French experts gave Cambodia a tool that was obsolete before it was even used.”<sup>116</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.

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 more criticism from Court actors than almost any other feature of the Court. Although the ECCC is formally part of the Cambodian judicial system, as it grew and evolved through practice, it acted 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. In the absence of statutory guidance for many of the novel topics faced by this special court, the only available precedent was the practice of the heavily common law-oriented international tribunals, at which numerous international ECCC staff had previously worked.<sup>117</sup>

The Trial Chamber has affirmed that the Internal Rules have primacy over the CPC.<sup>118</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 Lead Co-Lawyer Elisabeth Simonneau Fort says that personalities play an important role as the Court swerves between “some civil

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115. See, e.g., Interview with Jeanne Sulzer, *supra* note 86; Judge Lemonde Remarks, *supra* note 29 (saying the CPC is “a copy and paste” of the French Code before 2000 and is “not adapted to the 21st century” as the old French code has gaps and fairness issues that have been sanctioned by the ECHR).

116. Judge Lemonde Remarks, *supra* note 29.

117. See, e.g., You Bunleng, Response to Questionnaire from the Authors, June 25, 2012 (Kimsroy Sokvisal trans.) (highlighting the challenge of applying Cambodian procedures in a court comprising staff and judges from diverse legal traditions); Judge Lemonde Remarks, *supra* note 29 (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, in Phnom Penh, Cambodia (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); Telephone Interview with Craig Etcheson, *supra* note 42 (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”).

118. Case No. 002/19-09-2007/ECCC/TC, Decision on Nuon Chea’s Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, ¶ 7 (Aug. 8, 2011), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E51\\_14\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E51_14_EN.pdf) (citing Case No. 002/19-09-2007-ECCC/OCIJ (PTCO6), Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, ¶ 14 (Aug. 26, 2008)).

law, some common law, and then some civil law again.”<sup>119</sup> Guissé said the reason the rules are constantly changing has less to do with the mix of civil law and common law and more to do with the judges, who lack experience working in other international jurisdictions.<sup>120</sup> Karnavas called the trial process “chaotic” and contended, “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>121</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>122</sup> Although these concerns have not irreparably tainted the Case 002 proceedings, they pose serious risks to its legacy.

## 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, U.N. 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 of each of the Court’s judicial chambers<sup>123</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

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119. Interview with Elisabeth Simonneau Fort, *supra* note 117.

120. Interview with Anta Guissé, *supra* note 31 (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”).

121. Interview with Michael G. Karnavas, *supra* note 32; Interview with Andrew Ianuzzi, *supra* note 93 (stating that the trial judges appear to be making up rules as they go).

122. See, e.g., Case No. 002/29-09-2007-ECCC/TC, Resp. to the “Co-Prosecutors’ Request to Put Before the Chamber Two Letters by Amnesty Int’l Addressed to KHIEU Samphan and IENG Sary,” ¶¶ 6-21, 29 (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”).

123. See Framework Agreement, *supra* note 11.

Rules 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>124</sup> The Trial and Supreme Court Chambers have similar authority, which they may exercise at their discretion.<sup>125</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>126</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>127</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 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>128</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 individual to provide statements.”<sup>129</sup> The CIJs found that an investigation into government interference was unwarranted,<sup>130</sup> and back on appeal, the PTC was unable to reach a 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 wilfully interfered

124. ECCC Internal Rules (rev. 8), *supra* note 13, r. 60(1) (emphasis added), r. 55(5)(a),(d).

125. *Id.* rr. 87(4), 104 *bis*.

126. *See, e.g.*, Letter from CIJ Marcel Lemonde to H.E. Hor Namhong (Sept. 25, 2009); Case No. 002/19-09-2007-ECCC/OCIJ (PTC 51), Decision on NUON Chea’s and IENG Sary’s Appeal Against OCIJ Order on Requests to Summon Witnesses, ¶ 3 (June 8, 2010).

127. Case No. 002/19-09-2007-ECCC/OCIJ (PTC 51), *supra* note 126, ¶ 8 (quoting Note of International Investigating Judge Marcel Lemonde at 3 (Jan. 11, 2010)).

128. *Id.* ¶¶ 69-71.

129. *Id.* ¶ 68. For example, government spokesperson Khieu Kanharith was reported to say: “[T]hough the individuals could appear in court voluntarily, the government’s position was that they should not give testimony. He said that foreign officials involved in the court could ‘pack their clothes and return home’ if they were not satisfied with the decision.” Sebastian Strangio & Cheang Sokha, *Govt Testimony Could Bias KRT: PM*, PHNOM PENH POST (Oct. 9, 2009), <http://www.phnompenhpost.com/national/govt-testimony-could-bias-krt-pm>.

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

with witnesses who may give evidence before the CIJs.”<sup>131</sup> However, due to the lack of supermajority agreement, by default the joint 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>132</sup> After leaving office, Judge Lemonde said these witnesses “clearly had something to say, because they were aware of events and facts for which their testimony was important.”<sup>133</sup> Nevertheless, Pestman’s prediction that the requested government witnesses would not be called has proven true.<sup>134</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>135</sup> According to international precedents, “senior leaders” is not a fixed term referring only to those in the highest echelons of power,<sup>136</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 grave crimes.<sup>137</sup> These criteria 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>138</sup> The PTC took nearly a year to decide the dispute; however, an affirmative vote by four of the Pre-Trial Chamber

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

132. Interview with Michiel Pestman, *supra* note 29 (noting, for example, that requested witness 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. See *Heng Samrin Urges Opposition to Negotiate, Join Parliament*, CAMBODIA HERALD (Oct. 10, 2013, 11:02 AM), <http://www.thecambodiaherald.com/cambodia/detail/1?page=11&token=NGZkZjc2MTdhNGI>.

133. *Quelles leçons*, *supra* note 24 (authors’ translation from the original French).

134. Interview with Michiel Pestman, *supra* note 29 (noting that the list remained tentative throughout trial, providing the defense no opportunity to object to their exclusion).

135. Framework Agreement, *supra* note 7, art. 1; ECCC Law, *supra* note 8, art. 2 *new*.

136. See, e.g., Prosecutors v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/SC, Appeal Judgment, ¶ 76 (Feb. 3, 2012).

137. 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).

138. See Press Release, ECCC International Co-Prosecutor Robert Petit (Apr. 24, 2009).

Judges could not be reached. The three Cambodian judges voted against the investigations and the two international judges voted in favor.<sup>139</sup> This was the first of many Case 003/004 PTC decisions all of which were divided on national or international lines.<sup>140</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>141</sup> Acting international Co-Prosecutor Bill Smith forwarded the two new introductory submissions to the CIJs, emphasizing that he had "no plans to conduct any further preliminary investigations into additional suspects at the ECCC."<sup>142</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>143</sup> Prime Minister Hun Sen expressly told visiting U.N. Secretary-General Ban Ki-moon that Case 002 would be the last trial as "case three is not allowed."<sup>144</sup> Nevertheless, in this instance the "co" dispute mechanism worked as intended,<sup>145</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>146</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

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139. See Case No. 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71 (Aug. 18, 2009).

140. Telephone Interview with Craig Etcheson, *supra* note 42 (calling the dispute between the Co-Prosecutors the "seed of paralysis in Cases 003 and 004").

141. ECCC Law, *supra* note 8, art. 20 new. See also ECCC Internal Rules (rev. 8), *supra* note 13, 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").

142. Press Release, Statement of the Acting International Co-Prosecutor, Submission of Two New Introductory Submissions (Sept. 8, 2009), available at [http://www.eccc.gov.kh/sites/default/files/media/ECCC\\_Act\\_Int\\_Co\\_Prosecutor\\_8\\_Sep\\_2009\\_\(Eng\).pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC_Act_Int_Co_Prosecutor_8_Sep_2009_(Eng).pdf).

143. See, e.g., Ek Madra, *Cambodian PM Rejects Wider Khmer Rouge Trials*, REUTERS (Mar. 31, 2009, 5:23 AM), <http://www.reuters.com/article/2009/03/31/us-cambodia-rouge-idUSTRE52U1IZ20090331>; Seth Mydans, *Efforts to Limit Khmer Rouge Trials Decried*, N.Y. TIMES, Jan. 31, 2009, at A8, available at [http://www.nytimes.com/2009/02/01/world/asia/01cambodia.html?\\_r=0](http://www.nytimes.com/2009/02/01/world/asia/01cambodia.html?_r=0).

144. See Suy Se, *Cambodian PM Says No Third Khmer Rouge Trial*, AGENCE FRANCE-PRESSE (Oct. 27, 2010), <http://www.google.com/hostednews/afp/article/ALeqM5gfMxTJQOX0D7isKyTU7ySNopDnMg?docId=CNG.e3cbbf9f1076ed9b3efd06509091aa95.821>.

145. See, e.g., David Scheffer, *Opinion: How Many Are Too Many Defendants at the KRT?*, PHNOM PENH POST (Jan. 8, 2009), <http://www.phnompenhpost.com/national/how-many-are-too-many-defendants-krt> (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").

146. Telephone Interview with Craig Etcheson, *supra* note 42 (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").

investigations; however, Judge You delayed authorizing them.<sup>147</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>148</sup> Neither Blunk nor You explained his reasoning, though they later publicly expressed “serious doubt” on whether the Case 004 suspects—and presumably the Case 003 suspects—qualified as senior Khmer Rouge leaders or others “most responsible” for serious crimes of the DK era.<sup>149</sup> That apparent rationale was highly problematic, since the Court had exercised jurisdiction over Duch, and the CIJs had done little investigation to determine whether the Case 003 and 004 suspects could also be considered “most responsible” based on the gravity of their alleged crimes.<sup>150</sup>

Noting that the CIJs had not even spoken to the suspects or examined all crime scenes, former international Co-Prosecutor Andrew Cayley publicly stated his view “that the crimes alleged . . . have not been fully investigated[.]”<sup>151</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>152</sup> Blunk reportedly threatened his staff with disciplinary ac-

147. See Letter to Marcel Lemonde, International Co-Investigating Judge, from Judge You Bunleng (June 8, 2010) (discussing cases 003 and 004) (on file with author).

148. See Press Release, ECCC, Statement from the Co-Investigating Judges (Apr. 29, 2011).

149. *Judges Have “Serious Doubts” About New Khmer Rouge Case*, RADIO NETH. WORLDWIDE (Aug. 8, 2011, 2:34 PM), <http://www.rnw.nl/international-justice/article/judges-have-serious-doubts-about-new-khmer-rouge-case>. In May 2011, Chea Leang issued a public statement asserting her view that the Case 003 suspects did not meet the Court’s jurisdictional criteria. See Press Release, ECCC, Statement by the National Co-Prosecutor Regarding Case File 003 (May 10, 2011).

150. Before closing the case the CIJs had interviewed only a small number of witnesses, including Duch, who confirmed that the suspects in Case 002 were his equal in rank and had been responsible for sending people to S-21. See Case No. 003/07-09-2009-ECCC-OCIJ, Decision and Referral to the Supreme Council of Magistracy on the Judicial Misconduct of National Co-Investigating Judge You Bunleng, ¶ 12 (May 4, 2012). Ultimately, is not clear why Judge Blunk joined with Judge You to bury Case 003. The popular view was that his actions stemmed from troubling idiosyncrasy and a poorly managed effort to implement what he perceived to be the desire of a weary United Nations. See, e.g., Douglas Gillison, *Justice Denied*, FOREIGN POLICY, Nov. 23, 2011, available at [http://www.foreignpolicy.com/articles/2011/11/23/cambodia\\_court\\_justice\\_khmer\\_rouge](http://www.foreignpolicy.com/articles/2011/11/23/cambodia_court_justice_khmer_rouge).

151. Press Release, ECCC, Statement by the International Co-Prosecutor Regarding Case File 003 (May 9, 2011). See also Gillison, *supra* note 150 (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”).

152. Case No 003/07-09-ECCC/OCIJ (PTC02), Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill, ¶¶ 5, 9-15 (Oct. 24, 2011) (Opinion of Judges Lahuis and Downing), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D11\\_2\\_4\\_4\\_Redacted\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D11_2_4_4_Redacted_EN.pdf) (addressing, among other irregularities, the fact that the CIJs replaced a defective civil party rejection order while challenges to the defects were on appeal).

tion for disloyalty when they raised concerns with the U.N. Secretary-General.<sup>153</sup> When the U.N. took no action, all six U.N. legal officers in the OCIJ quit.<sup>154</sup>

In October 2011, Judge Blunk shocked everyone by abruptly resigning.<sup>155</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>156</sup> Nevertheless, Kasper-Ansermet was hindered from taking office. Although the U.N. 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 ethical 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>157</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>158</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>159</sup> Judge Kasper-Ansermet claimed to be

153. See, e.g., Douglas Gillison, *UN Legal Team Walk Out on Stymied KR Cases*, CAMBODIA DAILY, June 13, 2011, at 1, 26.

154. See *id.*; Case No. 003/07-09-2009-ECCC-OCIJ, Decision and Referral to the Supreme Council of Magistracy on the Judicial Misconduct of National Co-Investigating Judge You Bunleng, ¶ 14 (May 4, 2012).

155. Press Release, ECCC, Statement by the International Co-Investigative Judge (Oct. 10, 2011).

156. ECCC Law, *supra* note 8, art. 27 new ("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.").

157. See 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. 13, 2012), available at <http://www.akp.gov.kh/?p=15088>; see also Douglas Gillison, *Cambodia Rejects UN Genocide Judge*, THE INVESTIGATIVE FUND (Jan. 15, 2012, 11:21 AM), [http://www.theinvestigativefund.org/blog/1601/cambodia\\_rejects\\_un\\_genocide\\_judge](http://www.theinvestigativefund.org/blog/1601/cambodia_rejects_un_genocide_judge). 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*, ¶ 24, U.N. Doc. A/HRC/15/46 (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").

158. See generally Case No. 003/07-09-2009-ECCC-OCIJ, Decision and Referral to the Supreme Council of Magistracy on the Judicial Misconduct of National Co-Investigating Judge You Bunleng, ¶ 12 (May 4, 2012). But see Bridget Di Certo, *Judge's Exit Shakes KR Tribunal*, PHNOM PENH POST (Mar. 21, 2012) (quoting Judge You Bunleng saying, "I did not obstruct him, I just did not recognise his work").

159. Press Release, ECCC, Press Statement of the Nat'l Co-Investigating Judge (Jan. 9, 2012), available at <http://www.eccc.gov.kh/sites/default/files/media/5-PRESS%20Statement%20from%20National%20Co-Investigating%20Judge%20English.pdf>. See also Press Release,

impeded by the national side at every turn.<sup>160</sup> For example, on instructions from Judge You, the national 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>161</sup> Frustrated by the obstruction and a complacent U.N. administration, he resigned in May 2012.<sup>162</sup>

The SCM swiftly appointed a fourth international CIJ, Mark Harmon, who has since unilaterally reaffirmed Kasper-Ansermet's authority to act (including his re-opening of the Case 003 investigation and notification to all suspects of their right to counsel) and unilaterally informed potential witnesses and civil parties of new crime sites he is investigating in Case 004.<sup>163</sup> However, these actions were taken without the support of his Cambodian counterpart, the national side of the Office is not assisting his investigative efforts, and the Pre-Trial Chamber judges remain split down

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ECCC, Press Statement of the Nat'l Co-Investigating Judge (Dec. 6, 2011), *available at* <http://www.eccc.gov.kh/sites/default/files/media/5-Corrected%20English%20version%20of%20Press%20Statement%20National%20CIJ%20December%206%20Final.pdf>; Press Release, ECCC, Press Statement by the Nat'l Co-Investigating Judge (Feb. 10, 2012), *available at* <http://www.cambodiatribunal.org/sites/default/files/Statement%20from%20National%20Co-Investigating%20Judge%20English.pdf>.

160. *See generally* Case No. 003/07-09-2009-ECCC-OCIJ, Decision and Referral to the Supreme Council of Magistracy on the Judicial Misconduct of National Co-Investigating Judge You Bunleng, ¶ 12 (May 4, 2012).

161. *See* Case No. 003/07-09-2009-ECCC-OCIJ, Decision and Referral to the Supreme Council of Magistracy on the Judicial Misconduct of National Co-Investigating Judge You Bunleng, ¶¶ 40-66 (May 4, 2012); Case No. 003/07-09-2009-ECCC-OCIJ and 004/07-09-2009-ECCC-OCIJ, 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, ¶¶ 33-54 (Mar. 21, 2012). *See also* Press Release, ECCC, Press Statement by Nat'l Co-Investigating Judge (Mar. 26, 2012) *available at* <http://khmernews.wordpress.com/2012/03/30/press-statement-by-national-co-investigating-judge/> (acknowledging that he had told national staff not to follow the directions of Judge Kasper-Ansermet).

162. *See* Press Release of the Reserve Int'l Co-Investigating Judge (May 4, 2012), *available at* <http://www.eccc.gov.kh/en/articles/press-release-reserve-international-co-investigating-judge>; Julia Wallace, *From Phnom Penh with Love*, INT'L JUST. TRIB., Mar. 28, 2012, at 1, *available at* <http://sites.rnw.nl/pdf/ijt/IJT148.pdf>.

163. *See* Press Release, ECCC, Statement by the Co-Investigating Judges (Feb. 28, 2013), *available at* <http://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-case-003>; Case No. 004/07-09-2009-ECCC-OCIJ, Decision on Motion and Supplemental Brief on Suspect's Right to Counsel, ¶ 57 (May 17, 2013); Press Release, ECCC, Statement by the International Co-Investigating Judge Regarding Additional Crime Sites in Case 004 (Dec. 19, 2012), *available at* <http://www.eccc.gov.kh/sites/default/files/media/ECCC%20OCIJ%20PR%20-%20Case%20004%20Crime%20Sites%2019%20Dec%202012%20-%20EN.pdf>. Harmon has also unilaterally granted case file access to Case 003 and 004 civil party lawyers, but denied this right to suspects' counsel. *Compare* Case No. 003/07-09-2009-ECCC-OCIJ, Lawyers Recognition Decision Concerning All Civil Party Applications on Case File No. 003, ¶ 13 (Feb. 26, 2013) *with* Case No. 004/07-09-2009-ECCC-OCIJ, Lawyers Recognition Decision Concerning All Civil Party Applications on Case File No. 004 (Apr. 1, 2013), *with* Case No. 004/07-2009-ECCC-OCIJ, Decision on the [REDACTED] Defense Requests to Access the Case File and Take Part in the Judicial Investigation, ¶ 62 (July 31, 2013).

national or international lines.<sup>164</sup> As of February 2014, Cases 003 and 004 have languished in the OCIJ for nearly four and a half years, and there is no indication that they are likely to proceed to trial.

### 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.

#### 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, U.N. negotiators fell back on a simple mechanism to allow one Co-Prosecutor or CIJ to act alone when political disputes arose. However, as elaborated in the Internal Rules, the dispute procedures are intricate, creating opportunities for disparate interpretations of their effect.

The Internal Rules state that both “co”s share joint responsibility in carrying out their duties and are expected to work by consensus.<sup>165</sup> Nevertheless, “[e]xcept for action that must be taken jointly under the ECCC Law and these [Internal Rules],” the Co-Prosecutors and CIJs “may delegate power to one of them, by a joint written decision, to accomplish such action individually.”<sup>166</sup> The only provisions that appear to require joint action govern the Co-Prosecutors’ and CIJs’ ability to release public information about otherwise confidential actions.<sup>167</sup> Thus every other action may potentially be delegated to one Co-Prosecutor or one CIJ acting alone.

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164. See, e.g., EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, THE COURT REPORT: OCTOBER 2013 5 (2013), available at <http://www.eccc.gov.kh/sites/default/files/articles/The%20Court%20Report%20Oct%202013%20FINAL.pdf> (reporting that “the International side of the [OCIJ] continued the investigations of Case Files 003 and 004”). See also Case No. 003/07-09-2009-ECCC/OCIJ (PTC 05), Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant [REDACTED] (Feb. 13, 2013) (describing additional irregularities in the administration of Case 003, which the national judges remain unwilling to acknowledge and remedy); Abby Seiff, *Wanted: Lawyers for Hot Cases*, PHNOM PENH POST (May 15, 2013), <http://www.phnompenhpost.com/national/wanted-lawyers-hot-cases> (discussing Judge Harmon’s efforts to recruit Cambodian lawyers to assist the international side of the office).

165. See, e.g., ECCC Law, *supra* note 8, arts. 16, 23 new.

166. ECCC Internal Rules (rev. 8), *supra* note 13, rr. 13(3), 14(4) (addressing the Co-Prosecutors and CIJs, respectively).

167. *Id.* rr. 54, 56.

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 thirty 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>168</sup> For example, the CIJs recorded a disagreement related to the timing of the Case 003/004 investigations on June 9, 2010.<sup>169</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 own authority.<sup>170</sup> In specified exceptional cases, the PTC must decide *before* unilateral action may commence, but even in such cases, one “co” may proceed thirty days after a disagreement is recorded if the opposing “co” did not put the dispute before the PTC.<sup>171</sup>

Although “either or both of [the ‘co’s] may record the exact nature of their disagreement,”<sup>172</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>173</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 “[t]he Co-Investigating Judges are under no obligation to sei[z]e the Pre-Trial Chamber when they do not agree on an issue before them, the default position being that the ‘investigation shall proceed’[.]”<sup>174</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

168. *Id.* rr. 71(3), 72(3) (noting that during the dispute settlement period, the disputed action “shall be executed”).

169. See Press Release, ECCC, Statement from the Co-Investigating Judges (June 9, 2010), available at <http://www.eccc.gov.kh/sites/default/files/media/PROCIJ%28JUne2010.pdf>.

170. See *id.*

171. 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 13, rr. 71(3), 72(3). See also Case No. 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, ¶ 16 (Aug. 18, 2009) (“[O]nly in 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.”).

172. ECCC Internal Rules (rev. 8), *supra* note 13, rr. 71(1), 72(1).

173. Case No. 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, ¶ 27 (Aug. 18, 2009).

174. Case No. 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary’s Appeal Against the Closing Order, ¶ 274 (April 11, 2011).

PTC Judges. In May 2011, former international Co-Prosecutor Andrew Cayley, acting on his own, filed a request for additional investigative actions in Case 003 in an effort to ensure that the case would not be dismissed without a proper investigation.<sup>175</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 disagreement.<sup>176</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 disagreements is not mandatory but rather optional. In other words, it is a matter of discretion as to whether the disagreement procedure is utili[z]ed by either or both Co-Prosecutors and to what extent a matter is taken.<sup>177</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>178</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>179</sup> To the contrary, Judge Kasper-Ansermet and the international PTC judges have emphasized that his actions are "fully enforceable."<sup>180</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 will be officially recognized ex-

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175. See Case No. 003/07-09-2009-ECCC/OCIJ, Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, ¶ 1 (June 6, 2011).

176. 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).

177. Case No. 003/07-09-2009-ECCC/OCIJ (PTC 04), 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, ¶ 3 (Nov. 2, 2011) (separate Opinion of Judges Downing & Lahuis).

178. *Id.*, ¶ 12 (separate Opinion of Judges Prak, Ney, & Huot).

179. See, e.g., Case No. 003/07-09-2009-ECCC-OCIJ and 004/07-09-2009-ECCC-OCIJ, 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, ¶ 34 (Mar. 21, 2012).

180. See Letter from Laurent Kasper-Ansermet, Reserve International Co-Investigating Judge to Judge You Bunleng, National Co-Investigating Judge (Mar. 5, 2012), available at [http://www.worldcourts.com/eccc/eng/decisions/2012.03.16\\_Co-Prosecutors\\_v\\_Personal\\_Juris\\_diction\\_2.pdf](http://www.worldcourts.com/eccc/eng/decisions/2012.03.16_Co-Prosecutors_v_Personal_Juris_diction_2.pdf); Case No. 003/16-12-2011-ECCC/PTC, Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement Between the Co-Investigating Judges Pursuant to Internal Rule 72, ¶ 50 (Feb. 10, 2012).

cept those adopted by Judge Harmon. As Judge Kasper-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>181</sup> Former U.N. Legal Counsel Hans Corell argues, “The [Court’s main structural] problem isn’t the investigating judge or prosecutor; it’s the ‘cos.’”<sup>182</sup>

## 2. Supermajority Rule

The supermajority rule, intended to serve as an additional bulwark against government interference, was a prerequisite for U.N. 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>183</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: “potential for delay and judicial deadlock,” and “ineffectiveness in critical circumstances.”<sup>184</sup> Even more worrisome, it appears to have had the antithetical effect of shielding political decision making from accountability.

When the two Co-Prosecutors or two CIJs file a disagreement 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>185</sup> However, even in its first “successful” application in the Co-Prosecutor dispute, PTC disagreement reportedly led to a four-month postponement in announcing the split decision,<sup>186</sup> resulting in a one-year delay in sending it to the OCIJ.

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181. See BATES, *supra* note 18, ¶ 79 (noting that although the dispute settlement rule “ensures that any undue political interference upon the Cambodian Co-Prosecutor or Co-Investigating Judge could not de-rail the initial stages of the prosecution or investigation, this cannot ensure that national staff in either office will cooperate or contribute to the work of their international colleagues”).

182. Telephone Interview with Hans Corell, *supra* note 38. Cf. *Quelles leçons, supra* note 24 (arguing that the “co” system is inefficient and that the dispute settlement procedure is unworkable on a day-to-day basis).

183. U.S. EMBASSY IN PHNOM PENH, 09PHNOMPENH648, KHMER ROUGE TRIBUNAL: FIVE MORE FOR PROSECUTION ¶ 1 (Sept. 1, 2009), available at <http://www.wikileaks.org/cable/2009/09/09PHNOMPENH648.html>.

184. OPEN SOCIETY JUSTICE INITIATIVE, POLITICAL INTERFERENCE AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 11 (2010).

185. Framework Agreement, *supra* note 7, art. 7; ECCC Law, *supra* note 8, arts. 20 new, 23 new.

186. U.S. EMBASSY IN PHNOM PENH, 09PHNOMPENH264, KHMER ROUGE TRIBUNAL: DONORS CHART A MORE UNIFIED COURSE ¶¶ 3-4 (Apr. 24, 2009), [hereinafter Cable 09PHNOMPENH264], available at <http://www.wikileaks.org/cable/2009/04/09PHNOMPENH264.html> (reporting that the national judges convinced the international judges not to release the decision until “the time was right”).

Efforts by the international Co-Prosecutor to seek investigative action and by civil party applicants to participate during Judge Blunk's tenure were 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>187</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>188</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 supermajority rule is that "UN judges will behave perfectly."<sup>189</sup>

When Blunk's successor Judge Kasper-Ansermet sought to revive Case 003, the Cambodian PTC president prevented the full 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 Judge Kasper-Ansermet's lack of legal authority.<sup>190</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

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187. See Case No. 003/07-09-ECCC/OCIJ (PTC06), Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor's Appeal Against the Decision on the Re-Filing of Three Investigative Requests (Nov. 15, 2011) (Opinion of Judges Lahuis and Downing); Case No 003/07-09-ECCC/OCIJ (PTC02), Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill ¶¶ 5, 9-15 (Oct. 24, 2011) (Opinion of Judges Lahuis and Downing). See also Case No 003/07-09-ECCC/OCIJ (PTC03), 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 (Oct. 24, 2011).

188. Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, *supra* note 80 at 246. See also Douglas Gillison, *Genocide Judges Duel It Out in Phnom Penh*, THE INVESTIGATIVE FUND (Dec. 7, 2011, 1:40 PM), [http://www.theinvestigativefund.org/blog/1586/genocide\\_judges\\_duel\\_it\\_out\\_in\\_phnom\\_penh/Most%20Read](http://www.theinvestigativefund.org/blog/1586/genocide_judges_duel_it_out_in_phnom_penh/Most%20Read) (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").

189. Gillison, *supra* note 188.

190. Press Release, International Reserve Co-Investigating Judge, Statement by the International Reserve Co-Investigating Judge (Feb. 9, 2012) (quoting from the President's memorandum). See also Memorandum from Judge PRAK Returning the Document Communicated to Pre-Trial Chamber by the Office of Administration (Feb. 3, 2012).

consent and had refused their request to withdraw his memorandum.<sup>191</sup> Judge Prak said that the national judges thought the matter was administrative and fell outside the jurisdiction of the PTC.<sup>192</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>193</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>194</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>195</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>196</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.

Potential for delay, deadlock, and obstruction are not the only concerns that parties have had with the supermajority rule. Many contend that 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>197</sup>: "The sad truth is that through inaction, or in the spirit of being

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191. Case No. 003/16-12-2011-ECCC/PTC, Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement Between the Co-Investigating Judges Pursuant to Internal Rule 72, ¶ 14-15 (Feb. 10, 2012).

192. See Press Release, ECCC, Clarification of the National Judges of the Pre-Trial Chamber on the Note of Mr. Laurent Kasper-Ansermet, D38, dated 21 March 2012 (Mar. 28, 2012).

193. *Id.*

194. Case No. 003/16-12-2011-ECCC/PTC, Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement Between the Co-Investigating Judges Pursuant to Internal Rule 72, ¶¶ 15, 28-39, 50 (Feb. 10, 2012).

195. Framework Agreement, *supra* note 7, art. 4; ECCC Law *supra* note 8, art. 14 new(1); ECCC Internal Rules (rev. 8), *supra* note 13, r. 98(4).

196. Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, *supra* note 80, at 246.

197. Interview with Michael G. Karnavas, *supra* note 32. See also Michael Karnavas, Op-Ed., *It's Time to Salvage the Khmer Rouge Tribunal's Legacy*, CAMBODIA DAILY, Dec. 12, 2012 ("The ECCC is failing as a model court because the international judges have not

diplomatic, the international judges have been . . . complicit in[ ] re-enforcing certain systemic weaknesses embedded in the Cambodian courts.”<sup>198</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>199</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>200</sup> Instead, it has a two-headed Office of Administration with a Cambodian Director and international Deputy Director, each entrusted to manage affairs on his or her side of the office.<sup>201</sup> Beneath them are several administrative sections, and in practice, staff in each section report up through their respective sides.<sup>202</sup> David Tolbert, former U.N. Special Expert to Advise on the U.N. Assistance to the Khmer Rouge Trials, calls this the “worst possible design” for effective

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been robust in insisting on the uncompromising application of international standards and best practices.”).

198. Karnavas, *supra* note 197.

199. *Cf. Quelles leçons*, *supra* note 24 (authors’ translation from the French).

200. 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), *supra* note 13, 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, at 1-2.

201. ECCC Law, *supra* note 8, 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 7, art. 8(4).

202. 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. 24, 2014). *See also* John A. Hall, *Court Administration at the ECCC*, in ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS 181 (John D. Ciorciari & Anne Heindel eds., 2009).

Court administration,<sup>203</sup> and a private report by two U.N.-appointed experts came to a similar conclusion.<sup>204</sup>

Each side of the ECCC receives independent streams of voluntary funding from donor states,<sup>205</sup> and more than thirty-five states have contributed, led by Japan (easily the largest donor at nearly forty percent), several European donors, the United States, and Australia.<sup>206</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 U.N. Secretariat.<sup>207</sup> Over time, as allegations of mismanagement and corruption surfaced, the U.N. Office of Legal Affairs became more involved, and the United Nations brushed off Cambodian opposition and created a much-needed “Special Expert” position to serve

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203. Telephone Interview with David Tolbert, former U.N. Special Expert for advising on the U.N. Assistance to the Khmer Rouge Trials (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).

204. 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.

205. The ECCC Law requires each side to bear certain expenses. ECCC Law, *supra* note 8, arts. 44(1)-(4). The ECCC’s reliance on voluntary funding is similar to the scheme used for the SCSL. SCSL Statute, *supra* note 112, art 6. This differentiates both of those hybrid courts from the ICTY and ICTR, which receive funds from the U.N. general budget. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 32, S.C. Res. 827, Annex, U.N. Doc. S/RES/827/Annex (May 25, 1993), *as amended* by S.C. Res. 1877, U.N. Doc. S/RES/1877 (Sept. 24, 2009); Statute of the International Criminal Tribunal for Rwanda, art. 30, S.C. Res. 955, Annex, U.N. Doc. S/RES/955/Annex (Nov. 8, 1994), *as amended* by S.C. Res. 1901, U.N. Doc. S/RES/1901 (Dec. 16, 2009). The ICC is funded primarily by assessed contributions from parties to the Rome Statute, though it may also accept voluntary contributions. Rome Statute of the International Criminal Court arts. 115-16, July 17, 1998, 2187 U.N.T.S. 90.

206. *ECCC Financial Outlook*, ECCC (Sept. 30, 2013), <http://www.eccc.gov.kh/sites/default/files/Financial%20Outlook%20-%2030%20Sept%202013%20FINAL.pdf>. Donors include 25 states, the European Union, a multi-donor U.N. Trust Fund left over from the U.N. Transitional Authority in Cambodia in 1991-93, and several private contributors. *Id.* More than 35 states have supported the Court either through bilateral or multilateral channels. *How Is the Court Financed?*, ECCC, <http://www.eccc.gov.kh/en/faq/how-court-financed> (last visited Feb. 24, 2014).

207. The U.N. Controller was given initial oversight rather than the Office of Legal Affairs, 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 Office of Legal Affairs 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. Telephone Interview with David Tolbert, *supra* note 203. In 2005, the United Nations created a project called the U.N. Assistance to the Khmer Rouge Trials (UNAKRT), which its spokesman emphasized was “here to help, not to lead.” Erika Kinetz, *Officials Stand by Structure of KR Tribunal*, CAMBODIA DAILY, Oct. 3, 2007. This initial U.N. involvement treated the ECCC like an ordinary technical assistance project.

as a point person for Court oversight.<sup>208</sup> Nevertheless, the United Nations has taken what one senior ECCC official calls a “hands-off” approach,<sup>209</sup> interpreting its mandate narrowly in the face of a structure designed specifically to limit the scope for U.N. control.<sup>210</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>211</sup> the ECCC has relied primarily on a relatively informal “Friends of the ECCC” group consisting of donor, ECCC, and Cambodian officials.<sup>212</sup> For a time, the U.N. Development Program administered donor funds to the national side of the Court and participated in a “Project Board” designed to provide some oversight, but over time donors have provided more funds directly to the Cambodian Government,<sup>213</sup> and the UNDP ceased its role in 2009. Overall, the ECCC’s divided management and oversight have accommodated Cambodian

208. Former ICTY Deputy Prosecutor David Tolbert was the first Special Expert to advise on U.N. 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. Telephone Interview with Clint Williamson, *supra* note 31.

209. Confidential Interview with Senior ECCC Staff Member, in Phnom Penh, Cambodia (Nov. 2012).

210. Former U.N. 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.” Telephone Interview with Larry Johnson, former U.N. Assistant Secretary-General for Legal Affairs (June 21, 2012).

211. SCSL Statute, *supra* note 112, art. 7; U.N. Secretary-General, *Second Report of the Secretary-General Submitted Pursuant to the Security Council Resolution 1757*, ¶¶ 25-29, U.N. Doc. S/2008/173 (Mar. 12, 2008).

212. 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. U.S. EMBASSY IN CANBERRA, 05CANBERRA1215, AUSTRALIA DOES NOT SUPPORT MANAGEMENT COMMITTEE FOR KHMER ROUGE TRIBUNAL ¶ 2 (July 18, 2005), available at <http://www.wikileaks.org/cable/2005/07/05CANBERRA1215.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. U.S. EMBASSY IN PHNOM PENH, 07PHNOMPENH429, FRIENDS OF THE ECCC OR RGC? (Mar. 16, 2007), [hereinafter Cable 07PHNOMPENH429], 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. Telephone Interview with Clint Williamson, *supra* note 31. 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.

213. John Hall, *Donors Should Adopt a Balanced Approach to Funding ECCC*, CAMBODIA DAILY, July 21, 2008.

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 Law gave authority to each side of the Court to hire its own staff,<sup>214</sup> and soon after the ECCC opened its doors, monitors from the Open Society Justice Initiative (OSJI) expressed concerns about the opaqueness of hiring practices on the OA's Cambodian side,<sup>215</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>216</sup> The tribunal's weak oversight mechanisms contributed to the problem. The Director of the Court's Office of Administration was chair of the Project Board—intended to oversee the Office's activities—which the UNDP audit rightly identified as a potential “conflict of interest.”<sup>217</sup> The Friends of the ECCC group also did little to address the hiring concerns, reportedly “due to presence of ECCC staff throughout the meetings.”<sup>218</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

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214. ECCC Law, *supra* note 8, art. 22 new.

215. OPEN SOCIETY JUSTICE INITIATIVE, MEMORANDUM TO THE GROUP OF INTERESTED STATES: PRIORITY ISSUES FOR THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (ECCC) 14 (2006), available at [http://www.soros.org/sites/default/files/cambodia\\_20061004.pdf](http://www.soros.org/sites/default/files/cambodia_20061004.pdf). Office of Administration Director Sean Visoth rejected this claim in a meeting with the Friends Group shortly afterward. U.S. EMBASSY IN PHNOM PENH, 06PHNOMPENH1983, RECENT ECCC DEVELOPMENTS ¶ 4 (Nov. 2, 2006), [hereinafter Cable 06PHNOMPENH1983], available at <http://dazzlepod.com/cable/06PHNOMPENH1983>.

216. U.N. Dev. Program, Office of Audit and Performance Review, *Audit of Human Resources Management at the Extraordinary Chambers in the Courts of Cambodia (ECCC)*, 18-19, RCM0172 (June 4, 2007) [hereinafter UNDP Audit], available at <http://jurist.law.pitt.edu/pdf/ecccudit.pdf>.

217. *Id.* at 6, 20.

218. Cable 07PHNOMPENH429, *supra* note 212.

were inadequate, and that Cambodian salaries were too high.<sup>219</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>220</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>221</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>222</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 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>223</sup>

U.N. officials implicitly agreed. UNAKRT spokesman Peter Foster argued that the U.N. could take a stronger “leadership role . . . within the current system” by offering “greater assistance and greater advice to our Cambodian colleagues.”<sup>224</sup>

The audit catalyzed a number of remedial steps. In March 2007, the Office of Administration produced a Personnel Handbook for the Cambodian side of the Court including guidelines on recruitment, pay,

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219. UNDP Audit, *supra* note 216, at 3-4, 12-15, 18 (evaluating twenty nine personnel files). The audit noted that U.N. and Cambodian officials initially agreed that Cambodians would be paid at 50 percent 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. *Id.* at 9-11.

220. *Id.* at 5-6.

221. Similar issues arose at the Special Court for Sierra Leone. See OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS., RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: MAXIMIZING THE LEGACY OF HYBRID COURTS 27 (2008), available at <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf>.

222. Erika Kinetz & 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).

223. UNDP Audit, *supra* note 216, at 5-6. See also Kodama, *supra* note 212, at 57, 77.

224. Rory Byrne, *UN Reports Call for Changes in Structure of Khmer Rouge Tribunal*, VOICE OF AM., <http://www.voanews.com/content/a-13-2007-10-05-voa8/336274.html> (last updated Nov. 1, 2009, 6:28 AM). See also Hall, *supra* note 202, at 186 (noting U.N. reluctance to reopen negotiations about the Court’s structure and risk further delays).

promotion, and performance evaluation.<sup>225</sup> The Project Board noted in September that it was working to “boost the ECCC’s capacity,”<sup>226</sup> and a review by the international auditing firm of Deloitte and Touche in early 2008 found major improvements.<sup>227</sup> UNDP and European Commission officials added their commendations.<sup>228</sup> At least two key Cambodian appointees have since been appointed without the competitive recruitment required by the new rules,<sup>229</sup> but overall the Cambodian side of the ECCC has managed human resources more transparently and effectively with regular input from international colleagues.<sup>230</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>231</sup> Cambodian officials denied the allegations, accused OSJI of “bad faith and bias,”<sup>232</sup> and considered closing OSJI’s

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225. The handbook was revised after the UNDP audit’s release. EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, PERSONNEL HANDBOOK (NATIONAL) (2d ed. 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).

226. U.N. Dev. Program, UNDP Statement—Cambodia (Sept. 25, 2007), <http://content.undp.org/go/newsroom/2007/september/undp-statement-cambodia-20070926.en>.

227. DELOITTE TOUCHE TOHMATSU INDIA PVT. LIMITED, REPORT ON THE SPECIAL HRM REVIEW 3-4 (Apr. 25, 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).

228. UNDP Statement on the ECCC Human Resources Management Review by Jo Scheuer, UNDP Country Director (Apr. 25, 2008) (noting that UNDP was “quite satisfied” with reforms); Editorial, *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”).

229. 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).

230. See U.S. EMBASSY IN PHNOM PENH, 09PHNOMPENH316, KHMER ROUGE TRIBUNAL “FRIENDS GROUP” MEETS FOR FIRST TIME IN A YEAR: SOLID JUDICIAL PERFORMANCE MEETS EXTERNAL SHOCKS ¶ 4 (May 14, 2009), [hereinafter Cable 09PHNOMPENH316], available at <http://dazzlepod.com/cable/09PHNOMPENH316>.

231. Cat Barton, *Kickback Claims Stain the KRT*, PHNOM PENH POST (Feb. 23, 2007), <http://www.phnompenhpost.com/national/kickback-claims-stain-krt>; Hall, *supra* note 202, at 187-88; Press Release, OSJI, Corruption Allegations at Khmer Rouge Court Must Be Investigated (Feb. 14, 2007), available at <http://www.opensocietyfoundations.org/press-releases/corruption-allegations-khmer-rouge-court-must-be-investigated-thoroughly>.

232. Erika Kinetz & Pin Sisovann, *ECCC Cools to NGO after Kickback Charge*, CAMBODIA DAILY, Feb. 19, 2007; Mean Veasna, *ECCC Denies Allegations of Pay Kickbacks*,

local office.<sup>233</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>234</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>235</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>236</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 address the specific allegations.”<sup>237</sup> International judges at the ECCC also believed it was beyond their purview to intervene.<sup>238</sup> In mid-2008, after further reports of corruption at the Court,<sup>239</sup> the U.N. took action. UNDP froze the funds it administered to the Cambodian side.<sup>240</sup> Special Expert David Tolbert requested a confidential “review” of the allegations by the UN’s Office of Internal Oversight Services,<sup>241</sup> and in September he sent a confidential report to the Cambodian Government finding the allegations credible and recommending an RGC investigation.<sup>242</sup> Cambodian officials continued to deny the charges<sup>243</sup> but did create a new anti-corruption

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VOICE OF AM. (KHMER) (Feb. 16, 2007) <http://www.voacambodia.com/content/a-40-2007-02-16-voa2-90157657/1353602.html>.

233. U.S. EMBASSY IN PHNOM PENH, 07PHNOMPENH422, THE ECCC AND OSJI ¶¶ 2-5 (Mar. 15, 2007), available at <http://dazzlepod.com/cable/07PHNOMPENH422>.

234. *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).

235. *Id.* ¶¶ 6, 8.

236. *Id.* ¶¶ 8-9.

237. U.N. Dev. Program, *supra* note 226.

238. U.S. EMBASSY IN PHNOM PENH, 07PHNOMPENH826, ECCC PASSES INTERNAL RULES ¶ 10 (June 15, 2007), available at <http://dazzlepod.com/cable/07PHNOMPENH826>.

239. 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).

240. Douglas Gillison, *ECCC Funding Delayed Over Graft Claims*, CAMBODIA DAILY, Aug. 6, 2008.

241. Telephone Interview with David Tolbert, *supra* note 203 (noting that a formal investigation would likely have exceeded the United Nations’ legal purview).

242. Georgia Wilkins, *KR Court Graft Review Unfairly Names and Shames Gov’t Says*, PHNOM PENH POST (Sept. 22, 2008), <http://www.phnompenhpost.com/national/kr-court-graft-review-unfairly-names-and-shames-govt-says>.

243. Sopheng Cheang, *Cambodian Genocide Lawyer Hits at Corruption Issue*, ASSOC. PRESS, Apr. 3, 2009, available at <http://www.victoriaadvocate.com/news/2009/apr/03/bc-as-cambodia-genocide-trial2nd-ld-writethru/?news>.

committee<sup>244</sup> and appoint two Cambodian “Ethics Monitors” to receive complaints and report to Sok An. Most importantly, Sok An agreed to the United Nation’s request to remove Office of Administration Director Sean Visoth, reported to be a key figure in the kickback scheme.<sup>245</sup> In November, Sean Visoth went on extended medical leave and did not return to the tribunal.<sup>246</sup>

In early 2009, Sok An and U.N. Assistant Secretary General Peter Taksoe-Jensen agreed to establish a new scheme for reporting corruption at the Court.<sup>247</sup> Taksoe-Jensen argued that Cambodian staffers should be able to lodge complaints with U.N. officials, but Sok An insisted that the national and international complaint mechanisms should be separate<sup>248</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>249</sup> donors were eager to avoid delays in the *Duch* trial and pressed both sides to compromise.<sup>250</sup> Japan and Australia injected ad-

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244. Mean Veasna, *Tribunal Staff Sets Up Anti-Corruption Team*, VOICE OF AM. (KHMER) (Aug. 15, 2008), <http://khmernz.blogspot.com/2008/08/tribunal-staff-sets-up-anti-corruption.html>.

245. Telephone Interview with David Tolbert, *supra* note 203 (noting that under pressure from Tolbert, Sok An agreed to remove Sean Visoth “on my timetable, not yours”); U.S. EMBASSY IN PHNOM PENH, 08PHNOMPENH841, 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 U.S. EMBASSY IN PHNOM PENH, 08PHNOMPENH883, SOK AN ON THE KHMER ROUGE TRIBUNAL ¶¶ 6-7, 9, 13 (Nov. 3, 2008), available at <http://dazzlepod.com/cable/08PHNOMPENH883>.

246. *The Court on Trial*, ECONOMIST, Apr. 2, 2009, available at <http://www.economist.com/node/13415814>. After his departure from the ECCC, Sean Visoth reportedly began working for Sok An in the Council of Ministers. Kong Sotharith, *Absence of Tribunal Administrator Raises Concerns*, VOICE OF AM. (KHMER) (June 23, 2010), <http://www.voacambodia.com/content/absence-of-tribunal-administrator-raises-concerns-96980264/1360061.html>.

247. See Royal Government of Cambodia and United Nations, *Joint Statement* (Feb. 23, 2009), available at [http://www.eccc.gov.kh/sites/default/files/legal-documents/Joint\\_Statement\\_EN%5B1%5D.pdf](http://www.eccc.gov.kh/sites/default/files/legal-documents/Joint_Statement_EN%5B1%5D.pdf).

248. Seth Mydans, *Accusations of Corruption Cast a Shadow Over the Khmer Rouge Trials in Cambodia*, N.Y. TIMES, Apr. 9, 2009, at A10, available at <http://www.nytimes.com/2009/04/10/world/asia/10cambo.html>; U.S. EMBASSY IN PHNOM PENH, 09PHNOMPENH168, DONORS URGE RESUMED FUNDING, MORE NEGOTIATION ON KHMER ROUGE TRIBUNAL ANTI-CORRUPTION MECHANISM ¶ 3 (Mar. 17, 2009) [hereinafter Cable 09PHNOMPENH168], available at <http://dazzlepod.com/cable/09PHNOMPENH168>.

249. U.S. EMBASSY IN PHNOM PENH, 09PHNOMPENH243, KHMER ROUGE TRIBUNAL: UN FORMALIZES OWN ANTI-CORRUPTION MECHANISM AS SOK AN MULLS OVER UN PROPOSAL ¶¶ 1, 11 (Apr. 10, 2009), available at <http://wikileaks.org/cable/2009/04/09PHNOMPENH243.html>.

250. 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.” See Cable 09PHNOMPENH168, *supra* note 248, ¶¶ 6, 10-12. See also Cable

ditional funds to keep the Cambodian side afloat financially, reducing pressure on the RGC.<sup>251</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>252</sup> After a series of discussions with donor representatives,<sup>253</sup> the United Nations and RGC announced in August that Auditor General Uth Chhorn would fill the role.<sup>254</sup> Uth had a record of poor transparency as chief auditor of a notoriously corrupt and opaque government,<sup>255</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>256</sup> and was "likely Cambodia's first corruption-free court."<sup>257</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

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09PHNOMPENH264, *supra* note 186, ¶¶ 5-6, 11 (recalling the statement of U.S. Ambassador Carol Rodley, that "[W]e believe it is time for the Cambodians to make some concessions, but also believe the UN must be seen as engaged.").

251. See Susan Postlewaite & Sopheng Cheang, *Long-delayed Khmer Rouge Genocide Trial to Begin*, WASH. TIMES, Mar. 29, 2009, available at <http://www.washingtontimes.com/news/2009/mar/29/long-delayed-khmer-rouge-genocide-trial-to-begi-1/?page=all>; see also Cable 09PHNOMPENH264, *supra* note 186, ¶ 3 (noting that Australia asked UNDP to release some of its frozen funds to the ECCC).

252. U.S. EMBASSY IN PHNOM PENH, 09PHNOMPENH333, KHMER ROUGE TRIBUNAL: S/WCI AMBASSADOR WILLIAMSON BEGINS TALKS ON ANTI-CORRUPTION MECHANISM ¶¶ 4, 6 (May 22, 2009) [hereinafter Cable 09PHNOMPENH333], available at <http://wikileaks.org/cable/2009/05/09PHNOMPENH333.html>.

253. See, e.g., U.S. EMBASSY IN PHNOM PENH, 09PHNOMPENH343, KHMER ROUGE TRIBUNAL: SOK AN ENTHUSIASTIC ABOUT PROPOSED ANTI-CORRUPTION MECHANISM ¶¶ 3-14 (May 28, 2009), available at <http://wikileaks.org/cable/2009/05/09PHNOMPENH343.html> (noting discussion on the importance of an independent appointee).

254. Press Release, Office of Legal Affairs, Joint Statement on Establishment of Independent Counsellor at Extraordinary Chambers in Courts of Cambodia, U.N. Press Release L/3146 (Aug. 12, 2009).

255. See Sophal Ear, *Cambodian 'Justice'*, WALL ST. J. (Sept. 1, 2009, 4:10 AM), available at <http://online.wsj.com/news/articles/SB10001424052970203946904574301583107436174> (noting that Uth's National Audit Authority had not made an audit public since beginning work in 2002); see also Douglas Gillison & Neou Vannarin, *Government Auditor Named New ECCC Graft Monitor*, CAMBODIA DAILY, Aug. 13, 2009.

256. U.S. SECRETARY OF STATE, 09STATE15565, DEMARCHE REQUEST: U.S. CANDIDATE FOR UN SPECIAL EXPERT FOR THE KHMER ROUGE TRIBUNAL ¶ 4 (Feb. 10, 2010), available at <http://wikileaks.org/cable/2010/02/10STATE15565.html>.

257. U.S. EMBASSY IN PHNOM PENH, 09PHNOMPENH564, KHMER ROUGE TRIBUNAL: SOK AN SIGNS AGREEMENT ON ANTI-CORRUPTION MECHANISM, ¶ 9 (Aug. 7, 2009), available at <http://wikileaks.org/cable/2009/08/09PHNOMPENH564.html>.

ECCC's split administrative and oversight structures, which slowed and weakened U.N. 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 United Nations to compromise so that trials could proceed.<sup>258</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>259</sup>—by which he presumably meant the successful completion of criminal trials. Donors' interest in proceeding with trials was entirely legitimate, but it had the adverse side effect of weakening the United Nations' leverage and contributing to another Cambodian negotiating victory and made an investigation unlikely.<sup>260</sup>

The new anti-corruption scheme has been of questionable effectiveness. Anecdotal reports of corruption continue,<sup>261</sup> and some ECCC staffers report privately that the main change since 2009 is that senior Cambodian officials have found ways to deter public revelations of corruption more effectively.<sup>262</sup> In early 2010, Uth announced that he would publish a report of his work, but several months later he said that U.N. officials had instructed him to keep his report confidential.<sup>263</sup> Only in October 2012 did Uth begin holding office hours at the ECCC to hear staff concerns.<sup>264</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

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258. See Cable 09PHNOMPENH333, *supra* note 252, ¶ 5 (noting that "Sok An referred to the mediating role the U.S. had played" in breaking impasses in both 1999-2003 and 2009).

259. Cable 09PHNOMPENH316, *supra* note 230, ¶ 1.

260. See OPEN SOCIETY JUSTICE INITIATIVE, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: MAY 2009 UPDATE 11, 13 (2009) [hereinafter OSJI MAY 2009 REPORT].

261. See OPEN SOCIETY JUSTICE INITIATIVE, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: DECEMBER 2010 UPDATE 16 (2010).

262. Confidential Interviews with ECCC Cambodian Staff Members, in Phnom Penh, Cambodia (2012).

263. James O'Toole, *UN Keeps Corruption Probe Confidential*, PHNOM PENH POST (Oct. 18, 2010), <http://www.phnompenhpost.com/national/un-keeps-corruption-probe-confidential>.

264. EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, THE COURT REPORT: OCTOBER 2012 2 (2012), available at <http://www.eccc.gov.kh/sites/default/files/articles/October%202012%20Court%20Report.pdf>.

and video equipment,<sup>265</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>266</sup> The ECCC's divided Office of Administration and split funding channels have caused inefficiency as well. The Cambodian and international sides must prepare budgets separately and shuttle them from one side to another for comments and modification as they are reconciled.<sup>267</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>268</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>269</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>270</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>271</sup> Again, interests in

265. Heindel, *supra* note 200 at 34. 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).

266. See Framework Agreement, *supra* note 7, arts. 14, 17(b) (requiring the RGC to “provide at its expense the premises . . . [and] utilities, facilities and other services necessary for their operation,” but stating that the United Nations bears the “costs for utilities and services.”). Moreover, U.N. officials saw their role as “guarantors of ‘international standards’” as a basis for oversight on facilities, contributing to regular interventions, confusion, and delays. See also Kodama, *supra* note 212, at 55-56.

267. Telephone Interview with David Tolbert, *supra* note 203 (calling the budget preparation and adjustment process “very inefficient”).

268. Similar challenges have faced other tribunals with multiple working languages, including the ICTY and ICC (English and French), STL (English, French, and Arabic), and Special Panels in East Timor (English, Portuguese, Bahasa Indonesia, and Tetum). See CATHERINE S. NAMAKULA, LANGUAGE AND THE RIGHT TO FAIR HEARING IN INTERNATIONAL CRIMINAL TRIALS 21-23 (2013); Wald, *supra* note 18, at 92-93 (on the ICTY); DAVID COHEN, INDIFFERENCE AND ACCOUNTABILITY: THE UNITED NATIONS AND THE POLITICS OF INTERNATIONAL JUSTICE IN EAST TIMOR 20-21, 26-28 (2006) (describing translation problems at the Special Panels in East Timor).

269. OPEN SOCIETY JUSTICE INITIATIVE, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: OCTOBER 2008 UPDATE 4 (2008) [hereinafter OSJI OCT. 2008 REPORT]. This limitation remains true today. See, e.g., Decision on Co-Prosecutors' Request to Establish Procedure Regarding Admission of Documents Not Translated in all ECCC Languages (E233/2/6) and Lead Co-Lawyers Response to Trial Chamber Directives on Tendering Civil Party Statements and Other Documents (E223/2/7 and E/223/2/7/1), ¶ 7 (June 17, 2013), available at [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-06-21%2008:40/E223\\_2\\_6\\_1\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-06-21%2008:40/E223_2_6_1_EN.pdf) (extending the deadline for translation of admitted documentary evidence until the filing of closing briefs in Case 002/01).

270. Cable 09PHNOMPENH316, *supra* note 230, ¶ 3; Anne Heindel, *Expert Commentary on Legal Filings: Playing “Telephone”: Relay Interpretation in Case 002*, CAMBODIA TRIBUNAL MONITOR (Aug. 15, 2012), <http://www.cambodiatribunal.org/sites/default/files/CTM%20Heindel%2012-08-15.pdf>.

271. Respondent No. 2, Confidential Questionnaire to Cambodian ECCC Staffers (June 2012) [hereinafter ECCC Respondent No. 2] (on file with authors). See also Telephone

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>272</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>273</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.

### C. *Financial Instability*

The ECCC’s experience shows that hybrid courts with substantial U.N. 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 the Court spent approximately \$209 million by the end of 2013—\$157 million by the international side and \$52 million by the national side.<sup>274</sup> The ECCC’s total is much less than the ICTY (approximately \$2.3 billion to date) and ICTR (roughly \$1.8 billion) and comparable to the SCSL (approximately \$300 million),<sup>275</sup> but with just one final judgment issued in Case 001, the ECCC has cost more than any of those tribunals per individual indicted or case completed. Since only two other individuals are currently standing trial, that fact will likely remain true.<sup>276</sup> From a financial perspective, the ECCC has been

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Interview with Craig Etcheson, *supra* note 42 (calling translation “immensely time-consuming”).

272. See, e.g., Case No. 002/19-07-2007/OCIJ, Decision on Khieu Samphan’s Appeal against the Order on Translation Rights and Obligations of the Parties (Extraordinary Chambers in the Cts. of Cambodia Feb. 20, 2009) (rejecting Khieu Samphan’s request for translations of all materials into French on efficiency grounds); Interview with Anta Guissé, *supra* note 31 (asserting that some translations include important mistakes).

273. Telephone Interview with Craig Etcheson, *supra* note 42; see also Confidential Interview with Senior ECCC Staff Member, *supra* note 209 (noting that some staff call French the “third superfluous language”).

274. *ECCC Financial Outlook*, *supra* note 206.

275. Authors’ estimates, based on Stuart Ford, *How Leadership in International Criminal Law is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts*, 55 ST. LOUIS U. L.J. 953, 971, 973, 976 (2010-11) (providing data and sources for each court’s cost as of end-2010 and 2011 ICTY and ICTR budgets); *Second performance reports for the biennium 2012-2013 and proposed budgets for the biennium 2014-2015 of the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Residual Mechanism for Criminal Tribunals* ¶ 2, U.N. Doc. A/68/642 (Dec. 5, 2013) (detailing costs of the ICTY and ICTR in 2012 and 2013); SPECIAL CT. FOR SIERRA LEONE, NINTH ANNUAL REPORT: JUNE 2011 TO MAY 2012 28 (with 2011 and 2012 budgets); SPECIAL CT. FOR SIERRA LEONE, TENTH ANNUAL REPORT: JUNE 2012 TO MAY 2013 32 (with the 2103 budget through end-September).

276. The ECCC’s current cost per individual indicted is approximately \$42 million, much higher than the figures at the ICTY (roughly \$14 million for each of the 161 persons indicted), ICTR (an average of about \$20 million for 95 persons indicted), or SCSL (roughly

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.<sup>277</sup> However, the ECCC's funding architecture, which creates separate channels to finance each side of the Court, has rendered it vulnerable to underfunding. Unlike the ICTY and ICTR, the ECCC's national side is funded through voluntary contributions rather than assessed contributions from the general U.N. budget. Under the Framework Agreement and ECCC Law, the Cambodian Government is responsible for expenses and salaries on the national side,<sup>278</sup> but it has relied heavily on foreign donor contributions and has provided just seventeen percent of the funds for its side through 2013.<sup>279</sup>

The Cambodian Government has been able to use the Court's hybrid structure to secure contributions of donors keen to see the process continue. As Council of Ministers spokesman Ek Tha said during a funding crisis in early 2013, "the international side will not be able to work without assistance from the Cambodian side."<sup>280</sup> Nevertheless, the Court has struggled through successive budget crises as donors balk at the costs of proceedings or withhold funds to express disapproval of developments at the Court—usually on the Cambodian side.<sup>281</sup>

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\$23 million for each of the 13 persons indicted). See Int'l Crim. Tribunal for Yugoslavia, *Key Figures of the Cases*, ICTY, <http://www.icty.org/sections/TheCases/KeyFiguresoftheCases> (last visited Feb. 24, 2014); Int'l Crim. Tribunal for Rwanda, *Status of Cases*, ICTR, <http://www.unicttr.org/Cases/StatusofCases/tabid/204/Default.aspx> (last visited Feb. 12, 2014); Special Court for Sierra Leone, *About*, SCSL, <http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx> (last visited Feb. 24, 2014). Even if the ECCC renders judgments against Nuon Chea and Khieu Samphan in Case 002/01, its average cost per individual convicted or acquitted will be over \$70 million by mid-2014, much higher than the ICTY, ICTR, or SCSL. Only the ICC, which to date has completed just a few cases after amassing large start-up costs, has been more costly on this metric.

277. David Cohen, *Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?*, 61 ASIA-PAC. ISSUES, Aug. 2002, at 5-6.

278. Framework Agreement, *supra* note 7, art. 15; ECCC Law, *supra* note 8, art. 44(1).

279. *ECCC Financial Outlook*, *supra* note 206.

280. Kong Sotharith, *Tribunal Staff Walkout Could Shutter Whole Operation, Cambodia Says*, VOICE OF AM. (KHMER) (Feb. 15, 2013), <http://www.voacambodia.com/content/tribunal-staff-walkout-could-shutter-operation/1604021.html>.

281. See Joel Brinkley, *Justice Squandered: Cambodia's Khmer Rouge Tribunal*, WORLD AFF. J., Sept.-Oct. 2013, available at <http://www.worldaffairsjournal.org/article/justice-squandered-cambodia%E2%80%99s-khmer-rouge-tribunal> (asserting that "by all accounts donor fatigue has set in alongside disillusionment with Cambodian corruption and obstructionism"); Colin Meyn, *Unpaid National Staff at KR Tribunal Strike for Second Time*, CAMBODIA DAILY, Sept. 2, 2013 (quoting U.N. Special Expert David Scheffer as saying that donors "facing their own budget crises at home, have been focusing their limited funding capabilities on the international budget"). Somewhat ironically given its initial opposition to the Special Expert position, the Cambodian Government has had to turn to U.N. Special Expert David Scheffer, who has led such efforts for the U.N. side, to help it raise funds to survive 2013.

Successive funding shortfalls have strained morale and resulted in extended periods in which national staff members have worked without pay. This has led to cutbacks in vital sections of the Court<sup>282</sup> and even required the ECCC to reduce temporarily the number of trial days each week for Case 002/01.<sup>283</sup> In March 2013, approximately twenty Cambodian translators and interpreters went briefly on strike after three months without pay, which delayed the Case 002 proceedings by more than a month.<sup>284</sup> Yet another pay suspension led a majority of the national staff to go on strike in September 2013 for three weeks until the U.N. side of the Court lent more than \$1 million to the Cambodian side to cover employees' back pay for the summer months.<sup>285</sup>

In January 2014, with the crucial judgment in Case 002/01 approaching, the United Nations and Cambodian government issued a statement affirming their commitment to fund the Court, and the Cambodian government promised to provide \$1.1 million to fund national staff salaries for the first quarter of 2014.<sup>286</sup> However, there is little reason to expect that this will put an end to the Court's funding challenges. Moreover, some donors have reportedly pressed 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>287</sup>

The ECCC's ability to marshal more than \$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

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282. Telephone Interview with Craig Etcheson, *supra* note 4242; Respondent No. 3, Questionnaire to Cambodian ECCC Staffers (June 2012) (on file with authors); Justine Drennan, *Court Lost in Translation*, PHNOM PENH POST (Mar. 5, 2013), <http://www.phnompenhpost.com/national/court-lost-translation> (discussing how staffers in the translation unit were the first to go on strike as a result of unpaid wages).

283. *Trial Chamber Reduces Number of Weekly Hearing Days in Case 002/1*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA (Oct. 23, 2012, 2:13 PM), <http://www.eccc.gov.kh/en/articles/trial-chamber-reduces-number-weekly-hearing-days-case-0021>.

284. *Strike Suspends Khmer Rouge Trial*, BANGKOK POST (Mar. 4, 2013, 2:49 PM), <http://bangkokpost.com/lite/breakingnews/338739/cambodia-knmer-rouge-trial-suspended-due-to-strike>.

285. Stuart White, *UN Loan to Bring End to Strike*, PHNOM PENH POST (Sept. 19, 2013), <http://www.phnompenhpost.com/national/un-loan-bring-end-strike>.

286. Joint Statement by the Royal Government of Cambodia and the United Nations high-level Delegation Regarding the Extraordinary Chambers in the Courts of Cambodia (Jan. 28, 2014), available at <http://www.unakrt-online.org/articles/joint-statement-royal-government-cambodia-and-united-nations-high-level-delegation> (also noting that the United Nations is currently considering a special subvention from its general budget to support the ECCC).

287. Confidential Interview with Senior ECCC Staff Member, *supra* note 209; see also Telephone Interview with Hans Corell, *supra* note 38 (arguing that in addition to the danger of financial uncertainty and instability, "it's hard to have a credible institution with voluntary contributions").

could, partly due to its cumbersome structural features.<sup>288</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.

### 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>289</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>290</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 out-

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288. 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 Interview with Senior ECCC Staff Member, *supra* note 209.

289. See, e.g., U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of Secretary-General*, ¶ 44, U.N. Doc. S/2004/616 (Aug. 23, 2004) (explaining that hybrid *in situ* tribunals have important benefits, "including easier interaction with the local population . . . and being more accessible to victims").

290. Cohen, *supra* note 3, 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").

reach—focusing on public information and a broad audience of donors, NGOs, and the general population.<sup>291</sup> The VSS has primarily taken a “micro” approach of facilitating participation by civil parties and complainants in the Court proceedings.<sup>292</sup>

### 1. Public Affairs Section

Like other mass crimes courts, the ECCC’s initial budget provided scant funding for outreach activities and it was assumed that the Court would lean heavily on local civil society organizations throughout the process to spread word about the tribunal.<sup>293</sup> Although this approach had its drawbacks,<sup>294</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>295</sup> The Court’s first radio program was suspended after only a year due to a lack of funds.<sup>296</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

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291. INT’L CENTER FOR TRANSITIONAL JUSTICE, OUTREACH STRATEGIES IN INTERNATIONAL AND HYBRID COURTS: REPORT OF THE ICTJ-ECCC WORKSHOP 5 (2010) [hereinafter ICTJ Report]; Correspondence with Peter Foster, former UNAKRT Public Affairs Officer (June 13, 2012).

292. Correspondence with Peter Foster, *supra* note 291.

293. *Id.* See also Norman Henry Pentelovitch, Note, *Seeing Justice Done: The Importance of Prioritizing Outreach Efforts at International Criminal Tribunals*, 39 GEO. J. INT’L L. 445, 465-80 (2008).

294. See, e.g., Christoph Sperfeldt, *Cambodian Civil Society and the Khmer Rouge Tribunal*, 6 INT’L J. TRANSITIONAL JUST. 149, 152-53 (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).

295. Pentelovitch, *supra* note 293, at 466 (arguing that the printed materials “missed the mark” of educating ordinary survivors).

296. EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, THE COURT REPORT: JANUARY 2013 6 (2013). It was re-launched for Case 002/01 closing arguments. EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, THE COURT REPORT: SEPTEMBER 2013 10 (2013).

viewing gallery among mass crimes tribunals, with nearly 500 seats.<sup>297</sup> Between the start of the *Duch* trial in 2009 and the end of 2011, an impressive 111,543 people visited the Court, either to see live proceedings or as part of a study tour.<sup>298</sup> In all, nearly 100,000 people attended the 212 days of Case 002 trial hearings held from November 21, 2011 to July 23, 2013.<sup>299</sup> Of these, over eighty three percent were Cambodians who availed themselves of the ECCC's provision of free transportation for group visits.<sup>300</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>301</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 members of the public only understand general facts about the Court and have difficulty following complex factual and legal issues "even [if] they are in the courtroom."<sup>302</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>303</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>304</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

297. Cf. HUMAN RIGHTS WATCH, JUSTICE IN MOTION 32 (2005), available at <http://www.hrw.org/sites/default/files/reports/sierraleone1105wcover.pdf> (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).

298. Extraordinary Chambers in the Cts. of Cambodia, *ECCC Surpasses 100,000 Visitors Milestone*, ECCC (Nov. 11, 2013), <http://www.eccc.gov.kh/en/articles/eccc-surpasses-100000-visitors-milestone> (last updated Nov. 11, 2013, 3:54 PM).

299. See EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, THE COURT REPORT: AUGUST 2013 1-2 (2013).

300. See *id.*

301. Interview with Huy Vannak, former ECCC Public Affairs Officer, in Phnom Penh, Cambodia (June 11, 2012).

302. ECCC Respondent No. 2, *supra* note 271.

303. Interview with Huy Vannak, *supra* note 301. Cf. U.S. EMBASSY IN PHNOM PENH, 09PHNOMPENH58, 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.").

304. 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 (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 (2011); NADINE KIRCHENBAUER ET AL., VICTIMS PARTICIPATION BEFORE THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (2013).

the ECCC's work often have unrealistic expectations about what it can achieve. Some Cambodians hope that international participation in 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 decisions that shape the scope of what will be addressed at trial and affect the participatory rights of victims.<sup>305</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>306</sup> When controversies have arisen, the PAS has reflected the broader division between the two sides of the Court. The UN-appointed press officer is entitled only to speak for the international side, while the national press officer is authorized to speak for the Court but is seen as speaking only for the Cambodian side when conflicts arise.<sup>307</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>308</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 have provided strong incentives for Court officials to defend the institution and reduce transparency.<sup>309</sup> These events have contributed to an impression that the ECCC seeks to prevent unflattering information from emerging about the tribunal, which risks undermining the credibility of the Court's communications as a whole.<sup>310</sup>

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305. Interview with Panhavuth Long, *supra* note 31.

306. Correspondence with Peter Foster, *supra* note 291 (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").

307. OPEN SOCIETY JUSTICE INITIATIVE, PROGRESS AND CHALLENGES AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: JUNE 2007 14 (2007), available at [http://www.opensocietyfoundations.org/sites/default/files/cambodia\\_20070627.pdf](http://www.opensocietyfoundations.org/sites/default/files/cambodia_20070627.pdf).

308. ICTJ Report, *supra* note 291 (noting that the two-sided nature of the Court had "created some confusion" in relation to outreach).

309. See Krista L. Nelson, *Protecting Confidential Investigations or Gagging the Press? Freedom of Expression and Interference with the Administration of Justice at the Extraordinary Chambers in the Courts of Cambodia*, 35 SEATTLE U. L. REV. 265, 298-99 (2011). Cf. HUMAN RIGHTS WATCH, COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT'S FIRST YEARS 117 (2008), available at <http://www.hrw.org/sites/default/files/reports/icc0708webwcover.pdf> (warning the ICC to resist the temptation to produce "propaganda" or "one-sided information").

310. See, e.g., Interview with Youk Chhang, Director of the Documentation Center of Cambodia, in Phnom Penh, Cambodia (July 10, 2012) (saying the Court created PAS to hide

## 2. Victim Support Section

Like the PAS, when the VU was created it had few resources to conduct outreach to potential victim participants.<sup>311</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>312</sup>

Over time, the VSS has been increasingly nationalized.<sup>313</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 said, “They understand the issues of victims, they know their audience.” At the same time, he noted that the nationals have no independent capacity—planning, skills, or will—to deal with the enormous number of victims.<sup>314</sup> There is no U.N. expert on victim participation and reparations 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>315</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>316</sup> Judge Silvia Cartwright said non-judicial measures “will be a major legacy of this Tribunal.”<sup>317</sup> The Open Society Justice Initiative explained:

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its mistakes, but public respect is undermined when PAS information is inconsistent with what they hear from sources outside of the Court).

311. OPEN SOCIETY JUSTICE INITIATIVE, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: FEBRUARY 2008 13 (2008) (noting that the draft 2008 budget lacked funds for outreach trips or legal representation for victims).

312. 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); 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. RED CROSS 503, 515-16 (2011).

313. See, e.g., THE EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, PROPOSED BUDGET FOR 2012-2013 40 (Feb. 2012), available at <http://www.eccc.gov.kh/en/about-eccc/finances/eccc-budget-2012-2013> (reporting that as of October 2012, the office had one international consultant but no U.N. presence); THE EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, ECCC REVISED BUDGET REQUIREMENTS — 2012-2013 (Jan. 29, 2013) (allocating one slot for a U.N. Associate Information Systems Officer to support the national side of the VSS in the revised budget).

314. Interview with Panhavuth Long, *supra* note 31.

315. See, e.g., Interview with Jeanne Sulzer, *supra* note 86.

316. See, e.g., Judge Silvia Cartwright, Int'l Vice President, Opening Speech ECCC 7th 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”). See also Internal Rules of the ECCC (rev. 5) (revised Feb. 9, 2010), r. 12 *bis* [hereinafter ECCC Internal Rules (rev. 5)].

317. Cartwright, *supra* note 316.

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>318</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>319</sup> The unit has since put its stamp of approval on a few NGO-initiated projects,<sup>320</sup> but it appears to have little role in their implementation. 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 internationalized mass crimes court to follow the civil law practice of including victims as parties in the proceedings.<sup>321</sup> 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 U.N. 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 however meaningful individual civil party participation may be to participants, 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 re-

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318. OPEN SOCIETY JUSTICE INITIATIVE, RECENT INITIATIVES AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: MARCH 2010 26 (2010).

319. Julia Wallace, *New Report Questions KRT Administration*, CAMBODIA DAILY, Feb. 24, 2012. See also OPEN SOCIETY JUSTICE INITIATIVE, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: FEBRUARY 2012 33 (2012) (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”).

320. 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*, TRANS-CULTURAL PSYCHOSOCIAL ORG., <http://tpocambodia.org/index.php?id=134> (last visited Feb. 24, 2014).

321. The Extraordinary African Chambers, much like the ECCC, will include civil parties based on a domestic civil law model. See EAC Statute, *supra* note 12, art. 14.

sources of the ECCC far too limited to address the individual needs, including the award of reparations, for so many victims.<sup>322</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>323</sup> and to participate in the proceedings as full parties.<sup>324</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>325</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 extent over time, but for the most part they worked independently. The lack of coordination resulted in repetitive questioning, not only with the prosecution, but also amongst the teams.<sup>326</sup> Judge Silvia Cartwright called the process “cumbersome.”<sup>327</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

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322. Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, *supra* note 80, at 253.

323. Anyone who witnessed, was a victim of, or has knowledge of an alleged crime within the jurisdiction of the ECCC can lodge a complaint. ECCC Internal Rules [rev. 8], *supra* note 13, r. 49(2). However, unlike under domestic law, a victim cannot initiate a criminal action at the ECCC. *Compare id.* r. 49(1) (“Prosecution of crimes within the jurisdiction of the ECCC may be initiated only by the Co-Prosecutors”), with CPC, *supra* note 33, art. 5 (providing a mechanism for victims to forward claims to criminal court).

324. Internal Rules of the ECCC, (June 12, 2007), r. 23(6)(a) (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.

325. See MICHELLE STAGGS KELSALL, ET AL., ASIAN INTERNATIONAL JUSTICE INITIATIVE'S KRT TRIAL MONITORING GROUP, LESSONS LEARNED FROM THE ‘DUCH’ TRIAL: A COMPREHENSIVE REVIEW OF THE FIRST CASE BEFORE THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 33 (2009) (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”).

326. See, e.g., BATES, *supra* note 18, ¶ 109 (noting “the often repetitious and irrelevant questioning from Civil Party lawyers” in the Duch case).

327. Judge Silvia Cartwright, Int'l Deputy President of the ECCC Plenary Speech to the ECCC Plenary Session (Sept. 7, 2009), available at [http://www.eccc.gov.kh/sites/default/files/media/ECCC\\_Plenary\\_7\\_Sep\\_2009\\_SC.pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC_Plenary_7_Sep_2009_SC.pdf).

of inadequate planning and preparation on the Court's behalf with regard to the civil party process as a whole."<sup>328</sup>

The judges changed the Internal Rules prior to Case 002 to require all civil parties to join a single consolidated group at trial.<sup>329</sup> International Civil Party Lead Co-Lawyer Elisabeth Simonneau Fort has said the change "can permit a kind of coherent and strategical defence, avoiding opposite positions or repetitive pleadings."<sup>330</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>331</sup>

However practicable this change, as a result civil parties no longer participate as individuals in the trial proceedings<sup>332</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 Lead Co-Lawyer,<sup>333</sup> who "represent[ ] the interests of the consolidated group," not individual civil parties.<sup>334</sup> 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 Lead Co-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

328. STAGGS KELSALL ET AL., *supra* note 325, 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").

329. See ECCC Internal Rules (rev. 5), *supra* note 316, r. 23(5).

330. Julia Wallace, *Losing Civil Parties in Cambodia*, 143 INT'L JUST. TRIB. at 1, 2 (Jan. 18, 2012). See also Interview with Nushin Sarkarati, civil party lawyer, in Phnom Penh, Cambodia (Nov. 15, 2012) (noting that with the 11 civil party legal teams in Case 002 often disagreeing among themselves, the lead co-lawyer system promotes coherence and efficiency).

331. Interview with Jeanne Sulzer, *supra* note 86. See ICC Assembly of States Parties, ICC-ICC-ASP-11/Res.7, ¶ 5, Victims and Reparations (Nov. 21, 2012) ("[R]equest[ing] the Bureau to prepare, in consultation with the Court, any amendments to the legal framework for the implementation of a predominantly collective approach in the system for victims to apply to participate in the proceedings."). 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). See also *Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings*, ICC-ASP/11/22, 1, 10 (Nov. 5, 2012) (considering a range of options for dealing with victims' applications, including a "fully collective application process leading to collective participation in proceedings").

332. Cf. Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11, Decision on Victims' Representation and Participation, ¶¶ 56-58 (Oct. 3, 2012) (limiting the right of individual participation to a few victims in the ICC proceedings for crimes against humanity in Kenya).

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334. ECCC Internal Rules, *supra* note 13, rr. 12 *ter.*(4)-12 *ter.*(5).

Case 002 were accorded the rights of “parties,” or had 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 ninety-two civil parties who participated throughout trial, twenty-four 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>335</sup> Although admissibility standards applied by the Chamber were in conformity with the Internal Rules and Cambodian procedures, apparently they were 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>336</sup>

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>337</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>338</sup> Judge Marchi-Uhel dissented in part from this decision, arguing that the ruling was legally inappropriate and 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>339</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

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335. See *Prosecutors v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶¶ 645-49 (July 26, 2010). 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., *Prosecutors v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/SC, Appeal Judgment, ¶¶ 445-50, 558-63 (Feb. 3, 2012) (admitting two brothers after finding it plausible that they had special bonds of affection with an uncle who died at S-21).

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

337. *Pre-Trial Chamber Overturns Previous Rejection of 98% of Appealing Civil Party Applicants in Case 002*, ECCC (June 24, 2011, 5:12 PM), <http://www.eccc.gov.kh/en/articles/pre-trial-chamber-overturns-previous-rejection-98-appealing-civil-party-applicants-case-002>.

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

339. *Id.*, Separate and Partially Dissenting Opinion of Judge Marchi-Uhel, ¶ 4.

during the first trial . . . has no impact on the nature of Civil Party participation at trial[.]”<sup>340</sup>

However, out of the 3,864 victims joined to the case, only about 750 were admitted due to harm related to crimes at issue in Case 002/01.<sup>341</sup> The amended Internal Rules imply that the PTC’s admissibility decisions are final,<sup>342</sup> and the Trial Chamber is allowing nearly all applicants to participate by default.<sup>343</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 group therefore appears prescient.<sup>344</sup> Nevertheless, Simonneau Fort believes that civil party participation in Case 002/01 was still meaningful if civil parties were 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>345</sup>

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340. Case No. 002/19-09-2007-ECCC/TC, Severance Order Pursuant to Internal Rule 89ter, ¶ 8 (Sept. 22, 2011) [hereinafter 2011 Severance Order]. *See also* Case No. 002/19-09-2007/ECCC/TC, Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, ¶ 157 (Apr. 26, 2013), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-04-26%2016:43/E284\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-04-26%2016:43/E284_EN.pdf).

341. *See* Lead Co-Lawyers Urgent Request on the 19 October 2011 Hearing Following the Chambers’ Memorandum E125, ¶¶ 12-13 (Trial Chamber, Oct. 7, 2011), *available at* [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E125\\_1\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E125_1_EN.pdf) (reporting this estimate out of the 3,872 civil parties admitted at that time). By 2012, there were eight fewer civil parties participating in the case. *See, e.g., VSS to Hold 4th Regional Forum in 2012 for 200 Civil Parties in Case 002 in Preah Sihanouk Province*, ECCC (Nov. 13, 2012), <http://www.eccc.gov.kh/en/articles/vss-hold-4th-regional-forum-2012-200-civil-parties-case-002-preah-sihanouk-province> (reporting a total of 3,864 civil parties participating in Case 002).

342. *Compare* Internal Rules of the ECCC, r. 23(4) (March 6, 2009) [hereinafter ECCC Internal Rules (rev. 3)] (providing for Trial Chamber consideration of civil party admissibility) *with* ECCC Internal Rules (rev. 5), *supra* note 316, r. 23 bis(2)-(3) (providing for Pre-Trial Chamber consideration of civil party admissibility).

343. Case No. 002/19-09-2007/ECCC/TC, Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, ¶ 157 (Apr. 26, 2013), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-04-26%2016:43/E284\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-04-26%2016:43/E284_EN.pdf) (“[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.”).

344. *See, e.g.,* Interview with Jeanne Sulzer, *supra* note 86 (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), <http://www.cambodiadaily.com/archive/mini-trials-mixed-blessing-for-khmer-rouge-victims-2875/>.

345. Interview with Elisabeth Simonneau Fort, *supra* note 117. *Cf.* Interview with Nushin Sarkarati, *supra* note 330 (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).

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>346</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>347</sup> Case 001 civil parties requested several forms of reparation, including statements of apology from Duch, access to free health care, educational programs about S-21 and the Khmers Rouges, memorials for victims, and the inclusion of civil parties’ names in the judgment.<sup>348</sup>

The Trial Chamber found that Duch was indigent, however, and that the Court lacked the power to supplement his assets to fund reparations. It also found many civil party reparation requests too vague and indeterminate to be awarded, especially in light of Duch’s indigence. It therefore rejected most civil party requests. It awarded only the inclusion of the names of civil parties and immediate victims of Duch’s crimes in the final judgment, as well as the compilation and publication of all of Duch’s statements of apology during the trial.<sup>349</sup> Former Ieng Sary co-lawyer Michael Karnavas, like many others, believes that the civil parties got almost nothing and calls the reparations regime “a mockery.”<sup>350</sup> The absence of a funding mechanism for reparations at the ECCC made that outcome very likely.

In anticipation of the ECCC’s second trial, 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>351</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 essen-

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346. *But see* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures to Be Applied to Reparations, ¶ 178 (Aug. 7, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf> (agreeing with the ICC 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”).

347. *See* ECCC Internal Rules (rev. 3), *supra* note 342, r. 23(11).

348. *See* Case No. 001/18-07-2007-ECCC/TC, Civil Parties’ Co-Lawyers’ Joint Submission on Reparations, ¶¶ 11-30 (Sept. 14, 2009).

349. *Prosecutors v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶¶ 664-75 (July 26, 2010).

350. Interview with Michael G. Karnavas, *supra* note 32.

351. ECCC Internal Rules (rev. 6), (Sept. 17, 2010), r. 23 *quinquies*(3)(b).

tially allowing concerns over the implementation of an award to belie an appropriate judgment on reparations. I hope no [other] court adopts this system.”<sup>352</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>353</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>354</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 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>355</sup> In 2003, Kofi Annan forecast

352. Interview with Nushin Sarkarati, *supra* note 330. At the behest of the Trial Chamber, the Lead Co-Lawyers identified a prioritized list of reparations projects, which have been accepted by the Chamber “in principle” if sufficient funding is secured in advance. See Trial Chamber Memorandum, *Trial Chamber’s Response to the Lead Co-Lawyers’ Initial Specifications of Civil Party Priority Projects as Reparations Pursuant to Rule 80 bis(4) (E218/7/1)* (Aug. 1, 2013). According to Simonneau-Fort, shortly before closing arguments there were only “a very small number of [financial] sponsors” for the requested projects, creating uncertainty about their recognition in the judgment. An unnamed advisor to a mental health NGO collaborating with the VSS on a reparations project says the problem lies “in part” with VSS: “There are no staff [there] who are actually experienced enough to deal with project management . . . proposal writing, dealing with donors and all that[.]” Stuart White, *Little Time for Reparations at KRT*, PHNOM PENH POST (Aug. 7, 2013), <http://www.phnompenhpost.com/national/little-time-reparations-krt>.

353. ECCC Internal Rules (rev. 8), *supra* note 13, r. 23 *quinquies* (1).

354. Case No. 002/19-09-2007/ECCC/TC, Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, ¶ 158 (Apr. 26, 2013), [http://www.eccc.gov.kh/sites/default/files/documents/courtdec/2013-04-26%2016:43/E284\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdec/2013-04-26%2016:43/E284_EN.pdf).

355. See generally Office of the U.N. High Comm’r for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, U.N. Doc HR/PUB/08/2 (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 at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice*

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>356</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>357</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 Defence Support Section to “[o]rganize training for defence lawyers in consultation and cooperation with the [Bar Association of the Kingdom of Cambodia].”<sup>358</sup> By mid-2010 the ECCC had established a Legacy Advisory Group within the Office of Administration to discuss issues related to the Court’s legacy and a Legacy Secretariat, in part to address capacity-building issues,<sup>359</sup> but neither group has been very active.<sup>360</sup> Some international personnel seek to engage in legacy initiatives, but senior U.N. administrators have treated legacy issues largely as a national responsibility.<sup>361</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>362</sup>

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*in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results*, Annex I, at ¶¶ 1-5, 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).

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

357. CHANDRA LEKHA SRIRAM, *GLOBALIZING JUSTICE FOR MASS ATROCITIES: A REVOLUTION IN ACCOUNTABILITY* 105 (2005); 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); Laura A. Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 NEW ENG. L. REV. 1059, 1068-70 (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* 169, 199-201 (James E. Fleming ed., 2011) (citing similar problems in East Timor); Mohamad Suma, *The Charles Taylor Trial and Legacy of the Special Court of Sierra Leone*, INT’L CTR. FOR TRANS. JUST. 2 (Sept. 2009), [www.ictj.org/sites/sites/default/files/ICTJ-SierraLeone-Special-Court-2009-English.pdf](http://www.ictj.org/sites/sites/default/files/ICTJ-SierraLeone-Special-Court-2009-English.pdf) (concluding that the SCSL had “fallen far short of expectations in contributing to national legal development”).

358. ECCC Internal Rules (rev. 8), *supra* note 13, r. 11(2)(k).

359. See BATES, *supra* note 18, at 75. In 2010, the U.N. Office for the High Commissioner for Human Rights also created a Legacy Officer position to work with the ECCC.

360. Confidential Interview with Senior ECCC Staff Member, *supra* note 209 (saying the Advisory Group “is more or less set up to fail,” having completed only a twelve-page procedural memorandum by late 2012).

361. Interview with Panhavuth Long, *supra* note 31.

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

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>363</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>364</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>365</sup> Etcheson argues that although “organizational change 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>366</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>367</sup> Office of Administration 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>368</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>369</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>370</sup> and a

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363. Confidential Interview with Former National Staff Member, in Phnom Penh, Cambodia (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.”).

364. Telephone Interview with Rupert Skilbeck, *supra* note 36; Telephone Interview with Karim A.A. Khan QC, Civil Party Co-lawyer in Case 001 (June 5, 2012).

365. Telephone Interview with Craig Etcheson, *supra* note 42 (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 National Staff Member, *supra* note 363 (noting that weekly OCP happy hours “built team spirit” despite the sometimes “different agenda[s]” of the Co-Prosecutors).

366. Telephone Interview with Craig Etcheson, *supra* note 42.

367. 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).

368. Interview with Huy Vannak, *supra* note 301.

369. BATES, *supra* note 18, ¶ 145.

370. Response to questionnaire from Co-Investigating Judge You Bunleng, June 25, 2012. See also David Boyle & Buth Reaksmeay Kongkea, *Court Extension, a First Step to Reform*, PHNOM PENH POST (Oct. 11, 2012), <http://www.phnompenhpost.com/national/court->

judicial registry to manage administrative matters and publish decisions online.<sup>371</sup>

The ECCC has done less to train Cambodians outside of the Court,<sup>372</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>373</sup> Beyond internships, which have been helpful to aspiring Cambodian legal professionals, the ECCC has offered a modest number of workshops, conferences, and lectures.<sup>374</sup> The OCP has offered training sessions to local prosecutors,<sup>375</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 Office of the High Commissioner for Human Rights and civil society groups to train Cambodian law students and the public about fair trial rights.<sup>376</sup>

The ECCC has begun working on an informational legacy by building a physical repository for ECCC records and entering negotiations to create a “Virtual Tribunal” that would include digital copies of Court and NGO documents and educational materials.<sup>377</sup> The United Nations has deferred to national leadership with respect to the Virtual Tribunal,<sup>378</sup> which raises concerns about the Cambodian Government’s ability to control the content of the site and perhaps to exclude valuable information. Perhaps partly for that reason, funds have not been forthcoming. The

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extension-first-step-reform (reporting the Court of Appeal’s incorporation of the ECCC case database management system); Interview with Panhavuth Long, *supra* note 31.

371. Interview with Panhavuth Long, *supra* note 31.

372. See OPEN SOCIETY JUSTICE INITIATIVE, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: AUGUST 2009 10-11 (2009) (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.”)

373. Bialek, *supra* note 362, at § III(1); Email Correspondence 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.”)(on file with authors).

374. Telephone Interview with Rupert Skilbeck, *supra* note 36 (arguing that capacity-building will not be a success without considerably more institutional priority and resources).

375. 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).

376. Extraordinary Chambers in the Cts. of Cambodia, *Legacy*, <http://www.eccc.gov.kh/en/dss/legacy> (last visited Feb. 24, 2014); EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, THE COURT REPORT: MAY 2011 7 (2011).

377. See EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, PROPOSED BUDGET FOR 2012-2013 65 (2012), <http://www.eccc.gov.kh/sites/default/files/ECCC%20Budget%202012-2013.pdf> (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).

378. *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.

Court requested \$905,000 for legacy activities in its original 2012-2013 budget proposal, but its final budget included no funds at all for legacy.<sup>379</sup>

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 a “model court.”<sup>380</sup> In some respects, that may be true. The Court’s proceedings have drawn attention to a number of fair trial concepts, such as the presumption of innocence, equality of arms,<sup>381</sup> need for consistent and transparent procedures, and importance of clear legal justification for pre-trial detention and sentencing.<sup>382</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>383</sup>

One Cambodian staffer anticipates that domestic courts might follow the ECCC’s example by holding an initial hearing before the facts are

379. EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, ECCC REVISED BUDGET REQUIREMENTS—2012-2013 5-6, 18 (2013).

380. See, e.g., Case No. 002/19/09-2007/ECCC/TC, Decision on IENG Sary’s Application to Disqualify Judge Nil Nonn and Related Requests, ¶ 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*, ¶ 19, U.N. Doc. E/CN.4/2004/105 (Dec. 20, 2004), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=E/CN.4/2004/105](http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/2004/105) (“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.”); Joint Press Statement, H.E. Deputy Prime Minister Sok An & U.N. Assistant Secretary-General Patricia O’Brien (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”); Press Release, Ministry of Foreign Affairs of Japan, Statement by Press Secretary/Director-General for Press and Public Relations on the Adoption of the Internal Rules of the Khmer Rouge Trials in Cambodia (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.”).

381. The principle of “equality of arms” is a fundamental human rights law principle guaranteeing equal treatment of parties to enable a fair trial. See generally Charles Chernor Jalloh & Amy DiBella, *Equality of Arms in International Criminal Law: Continuing Challenges*, in THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL CRIMINAL LAW: CRITICAL PERSPECTIVES 251, 252-62 (William Schabas et al. eds., 2013).

382. See, e.g., E-mail Response from National VSS Staff (June 5, 2012) (on file with authors); Coughlan et al., *supra* note 375, 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, 6:10 PM), <http://www.aljazeera.com/indepth/features/2012/02/20122314324225196.html> (quoting Chak Sopheap of the Cambodian Center for Human Rights: “[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”).

383. 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 authors); Michael G. Karanvas, *Bringing Cambodian Domestic Cases into Compliance with International Standards: Applicability of ECCC Jurisprudence and Procedural Mechanisms at the Domestic Level*, CAMBODIA L. & POL’Y J., Jan. 2014, at 29, available at [http://cambodiasri.org/research/pdf/CLPJ\\_ISSUE\\_01\\_JANUARY\\_2014.pdf](http://cambodiasri.org/research/pdf/CLPJ_ISSUE_01_JANUARY_2014.pdf).

presented.<sup>384</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>385</sup> Others note that President Nil Nonn is widely respected for the authoritative manner in which he leads the Trial Chamber’s proceedings, and that his pronouncements in Khmer have made him a positive role model.<sup>386</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>387</sup> judicial corruption remains endemic. In 2013, Cambodia placed 160th out of 177 countries in the annual Transparency International rankings on corruption perceptions<sup>388</sup>—a ranking that has not changed appreciably in recent years. Catalyzing systemic reform is a great deal to ask of a temporary hybrid tribunal court given the miniscule resources of local courts,<sup>389</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>390</sup> and the near-term payoffs of the ECCC are likely to be small.<sup>391</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 oc-

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384. Respondent No. 4, Confidential Questionnaire to Cambodian ECCC Staffers (June 2012) (on file with authors).

385. Interview with Panhavuth Long, *supra* note 31.

386. Interview with Huy Vannak, *supra* note 301.

387. *Cambodian Legislature Passes Anti-Corruption Law*, ASIAN CORRESPONDENT (Mar. 11, 2010, 11:51 PM), <http://asiancorrespondent.com/29742/cambodian-legislature-passes-anti-corruption-law/>.

388. *Corruption Perceptions Index 2013*, TRANSPARENCY INTERNATIONAL, <http://cpi.transparency.org/cpi2013/results/> (last visited Feb. 24, 2014).

389. Compare BATES, *supra* note 18, 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 Interview with Panhavuth Long, *supra* note 3131 (emphasizing that legacy doesn’t have to be expensive; instead, measures can be practical and realistic).

390. See, e.g., Judge Lemonde Remarks, *supra* note 29 (“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, 2000) <http://www.audijournal.com/judges.html> (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”).

391. ECCC Respondent No. 2, *supra* note 271 (arguing that “there will be an impact, but very little,” because systemic change requires dealing with corruption); Cambodian League for the Promotion and Def. of Human Rights, *Human Rights in Cambodia: The Charade of Justice 1* (2007), available at <http://www.licadho-cambodia.org/reports/files/113LICADHOReportCharadeJustice07.pdf> (noting the dogged presence of corruption and political interference despite two decades of rule of law programs in Cambodia).

cur “without a fundamental shift in the government’s commitment to the rule of law.”<sup>392</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 use of the 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>393</sup>

## 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>394</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.

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392. Clancy McGillian & Van Roeun, *UN Office Starts Project to Transfer Court Skills*, CAMBODIA DAILY (Oct. 1, 2010), [http://www.cambodiatribunal.org/sites/default/files/news/Un\\_Office\\_Starts\\_Project\\_to\\_Transfer\\_Court\\_Skills\\_10\\_01\\_10.pdf](http://www.cambodiatribunal.org/sites/default/files/news/Un_Office_Starts_Project_to_Transfer_Court_Skills_10_01_10.pdf).

393. Interview with Michael G. Karnavas, *supra* note 32 (“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 375, at 28-33 (referring to these as the Achilles’ heel of the Court’s legacy efforts); Zsombor Peter, *Sonando Verdict Tests KR Tribunal’s Legacy*, CAMBODIA DAILY, Oct. 4, 2012; Jackie Mulryne, *Legacy of the Khmer Rouge Tribunal*, THE PLATFORM (Dec. 17, 2011), available at <http://www.the-platform.org.uk/2011/12/17/khmer-rouge-tribunal/>.

394. 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), <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”); Hans Corell, Keynote Address at the Robert H. Jackson Center: Reflections on International Criminal Law over the Past 10 Years, at 4 (Aug. 27, 2012) (on file with authors) (arguing that “the ECCC should not be used as a model for any future effort of this nature”). The Cambodian Government disagrees, and Deputy Prime Minister Sok An has called 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 by Secretary-General Ban Ki-moon, Oct. 27, 2010, available at <http://agencekkampuchepress.blogspot.com/2010/10/he-dr-sok-deputy-prime-minister-speaks.html>.

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>395</sup> Former U.N. Legal Counsel Hans Corell, who objected to a split structure with a Cambodian-majority bench during the negotiations for the Court,<sup>396</sup> asserts that "everything I warned against has been happening" and that he would "immediately discourage anything like [the ECCC]" in the future."<sup>397</sup> He argues that many of the ECCC's problems "could have been avoided with a majority of international judges and a single prosecutor and investigating judge."<sup>398</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>399</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

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395. Indeed, the supermajority rule arguably exacerbates the problem by embedding expectations of political interference as an inherent part of the process.

396. Mike Eckel, *Cambodia's Kangaroo Court*, FOREIGN POLICY, July 20, 2011, available at [http://www.foreignpolicy.com/articles/2011/07/20/cambodias\\_kangaroo\\_court#sthash.Edjm440p.dpbs](http://www.foreignpolicy.com/articles/2011/07/20/cambodias_kangaroo_court#sthash.Edjm440p.dpbs) (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").

397. Telephone Interview with Hans Corell, *supra* note 38. 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).

398. Telephone Interview with Hans Corell, *supra* note 38.

399. *Quelles leçons*, *supra* note 24, 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.

chambers of the STL and ICC, consuming scarce resources and elongating the trials.

The ECCC's bifurcated administration and oversight also have also 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 efficiency and accountability.<sup>400</sup> Corell puts the case simply: “you have to have somebody who makes decisions.”<sup>401</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.

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>402</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 has 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 procedure.<sup>403</sup> The awkward mix of civil and

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400. See, e.g., Cable 06PHNOMPENH1983, *supra* note 215 (noting Tolbert's recommendation to that effect); Heindel, *supra* note 200.

401. Telephone Interview with Hans Corell, *supra* note 38.

402. 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 24, 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.

403. Interview with Diana Ellis, co-lawyer for Ieng Thirith, in Phnom Penh, Cambodia (Nov. 11, 2012) (arguing that a hybrid approach to procedures is “generally not a good idea”

common law elements in the ECCC's Internal Rules and their inconsistent application have led to accusations of cherry-picking and arguably to violations of fair trial rights. Although heavy reliance on local procedures can help to refine those procedures—a form of capacity building<sup>404</sup>—ordinary criminal codes are not tailored to mass crimes proceedings.<sup>405</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>406</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 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 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>407</sup>

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because meshing together two different culturally based approaches into a coherent system is challenging and time consuming).

404. Interview with William Smith, *supra* note 17 (“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.”); Interview with Panhavuth Long, *supra* note 31.

405. Martin-Chenut, *supra* note 12, at 861-62 (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”).

406. Most Court officials agree. Interview with Michael G. Karnavas, *supra* note 32 (arguing that using the simpler ICTY rules would have been preferable); Interview with Elisabeth Simonneau Fort, *supra* note 117 (arguing that tailoring the ICC rules would have been most appropriate for a civil law court dealing with mass crimes).

407. 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*

The best way to do so is to fund a tribunal through assessed contributions, which will help ensure U.N. ownership, and to concentrate oversight authority in a dedicated U.N. office with expertise in managing mass crimes cases—an office that does not yet exist despite twenty years of U.N. 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 structured 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 would not work, you would be hard pressed to find a better model.<sup>408</sup>

Corell agrees, insisting on the importance of “listen[ing] closely to persons with courtroom experience.”<sup>409</sup> Experience is also crucial in court appointments.<sup>410</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 will be an expanded universe of experienced individuals from whom to choose.<sup>411</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>412</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

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*Chance to Salvage Justice?*, iLAWYER: A BLOG ON INTERNATIONAL JUSTICE (Dec. 17, 2012), <http://ilawyerblog.com/khmer-rouge-tribunal-last-chance-to-salvage-justice/> (accusing the U.N. of “strong words” but a “lackluster response” to Cambodian interference in cases 003 and 004); *Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign*, HUMAN RIGHTS WATCH (Oct. 3, 2011), <http://www.hrw.org/news/2011/10/03/cambodia-judges-investigating-khmer-rouge-crimes-should-resign> (accusing the U.N. of “burying its head in the sand” over cases 003 and 004).

408. Gregory Townsend, *Structure and Management*, in INTERNATIONAL PROSECUTORS 171, 302-03 (Luc Reydamas et al. eds., 2012) (quoting an interview with Petit).

409. Telephone Interview with Hans Corell, *supra* note 38.

410. *Id.* (asserting that it is “absolutely necessary” that judges “have courtroom experience”). See also Baylis, *supra* note 357, at 18 (noting that some mixed courts have found it difficult to recruit experienced judges).

411. Baylis, *supra* note 357, at 18-20.

412. Telephone Interview with Rupert Skilbeck, *supra* note 36.

framed as technical matters rather than core political concerns. If it has those effects, perhaps its institutional experiments will not have been in vain.