Chapter 2. Pairing the Court’s National and International Features

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Chapter 2
PAIRING THE COURT’S NATIONAL AND INTERNATIONAL FEATURES

All new mass crimes courts involve considerable establishment challenges, from the mundane to the extraordinary. Funds must be raised, staff must be hired, suitable premises must be equipped, basic administrative procedures and support must be developed. The court’s procedures and the scope of its jurisdiction and authority must be determined. Because foundational documents are political compromises inevitably riddled with lacunae, much of the character of a new court is created over time through practice instilled by those entrusted with decision-making power, such as administrative heads, prosecutors, and judges. Appealable rulings may take years to reach finality on key issues—time a court with a limited lifespan can ill afford.

The ECCC has faced all these difficulties and more. As the first civil-law-based mass crimes tribunal, the ECCC has been required to forge a new legal path. Compounding this challenge, its unique hybrid features raised many hurdles as Court officials worked to translate the 2003 Framework Agreement and 2004 ECCC Law into a functioning judicial institution. In particular, ECCC officials have had to manage the difficult task of “pairing” the international and domestic aspects of the Court. Although that theme pervades all of the Court’s operations, this chapter focuses on three distinct sets of challenges that the ECCC faced almost immediately after it opened its doors in the summer of 2006. First, the Court has struggled to run an efficient and transparent judicial process in an institution staffed by two pairs of officials with investigatory powers and comprising two chambers of appeal. Second, it has endeavored to pair national and international substantive laws, both of which present interpretive
challenges due to the Court’s temporal jurisdiction in the late 1970s. Third, the ECCC has had to determine what blend of national and international procedural rules to apply. The difficulty of fusing the tribunal’s various domestic and international elements has arguably resulted in the most complex, cumbersome, and challenging mass crimes process to date.

**THE ECCC’S AMBIGUOUS INSTITUTIONAL IDENTITY**

Many of the ECCC’s challenges are rooted in the fact that it was born with an ambiguous legal identity, neither fully domestic nor fully international in nature. Although the Framework Agreement set many of the terms for the ECCC, the Court was created by the ECCC Law within the national judicial system, making the ECCC the only hybrid court featuring UN involvement to be established by an act by a domestic legislature. Cambodian Deputy Prime Minister Sok An has called it “a national court with international characteristics,” noting that it is “firmly located in the national courts but involv[es] both national and international law; national and international judges, prosecutors, staff; and national and international financing.” UN Secretary-General Ban Ki-moon has described it similarly. The ECCC’s Pre-Trial Chamber (PTC) has called the Court “a special internationalized tribunal” because “[f]or all practical and legal purposes . . . [it] is, and operates as, an independent entity within the Cambodian court structure.” Likewise, the Trial Chamber has found that the ECCC “is a separately constituted, independent and internationalized court.” “Internationalized,” an ambiguous term denoting courts with both national and international legal features, obscures rather than elucidates the Court’s legal status, however, as none of the Court’s chambers has explained precisely what this appellation means.

Neither the Framework Agreement nor the ECCC Law addresses the relationship between the ECCC and other Cambodian courts. The ECCC has an independent structure and specialized jurisdiction, and it incorporates foreign staff. It is functionally autonomous, but unlike the Special Court for Sierra Leone (SCSL) and Special Tribunal for Lebanon (STL), it does not have concurrent jurisdiction with domestic courts or primacy over them. Although in practice it is unlikely that any ordinary Cambodian court would concurrently
seek to indict persons for crimes of the Khmer Rouge era, there is no legal prohibition on one doing so, nor is there provision for a jurisdictional conflict. The ECCC has neither the power to take a case away from, nor the ability to review the decisions of, other Cambodian courts. As found by the ECCC Trial Chamber, “There is no line of authority between the ECCC and other courts in the Cambodian Judicial system.”

The ECCC’s legal basis and unclear legal status distinguish it from the SCSL and STL. Although the SCSL is also a hybrid court, its Appeals Chamber ruled that it is “an autonomous and independent institution” outside of Sierra Leone’s domestic judiciary and a “new jurisdiction operating in the sphere of international law” that was “vested with juridical capacity” by a treaty between the UN and Sierra Leone. The STL—set up to address the assassination of former Lebanese Prime Minister Rafiq Hariri in 2005 and related offenses—has been characterized as primarily international in nature for similar reasons.

The ECCC’s legal status is somewhat closer to the models followed in Kosovo and Bosnia and Herzegovina, which are primarily domestic but include international participation.

The ECCC’s legal identity is potentially relevant to many issues faced by the Court, such as the choice of procedural rules to apply, the scope of its jurisdiction, and the applicability of Cambodia’s penal code to sentencing. Nevertheless, it is likely to remain ambiguous. Unlike the SCSL, no final verdict on its legal character seems possible, because of both the extreme hybridity of the Court and the intensely political nature of the question. Instead, the impact of the Court’s hybrid status on which legal principles to apply has been determined on a case-by-case basis, exposing the Court to allegations of cherry-picking laws and rules to achieve desired results.

**PAIRING CAMBODIAN AND UN INVESTIGATORS: CHALLENGES TO EFFICIENCY**

Although the ECCC is described as a mixed tribunal, it could just as accurately be described as a “divided” one. The ECCC is the only court to be split into national and international “sides” with separate hiring and reporting structures. These unique structural features were intended to accommodate Cambodian ownership of the process while insulating the Court from Cambodian politi-
chal interference and safeguarding its compliance with international standards. However, they have created a Rube Goldberg–like apparatus that at times seems designed to ensure that few of the aging accused will live until judgment. During tribunal negotiations in 2003, the UN Secretary-General argued that the ECCC was “structured and organized in a way that was highly complex and which afforded ample scope for obstruction and delay in the conduct of their proceedings.”

Former Ieng Sary defense lawyer Michael G. Karnavas wonders:

Did the people negotiating from New York actually know what they were doing? Because I think the locals did. They wanted a process in place that had all sorts of safety valves that would allow it to stall or to be controlled at the local level. And that’s a major flaw.

The ECCC is unique in having national and international Co-Prosecutors and in having national and international Co-Investigating Judges (CIJs). The ECCC’s structure grants investigatory powers to both pairs of individuals and the offices they co-lead: the Office of the Co-Prosecutors (OCP) and Office of the Co-Investigating Judges (OCIJ). Together, the Co-Prosecutors conduct preliminary investigations into crimes within the jurisdiction of the Court. Unique among hybrid courts, the ECCC retains the French-based civil law preference for giving investigative judges the primary investigatory role. The Co-Prosecutors open a judicial investigation by sending the CIJs an introductory submission outlining the facts and naming persons to be investigated. The CIJs can only investigate the facts set forth in the introductory submission unless they receive permission from the Co-Prosecutors in the form of a supplementary submission. They may also charge persons not named in a submission after “seeking the advice” of the Co-Prosecutors. The Co-Prosecutors thus control which crime sites are investigated, while the CIJs make the final decision about which persons to send to trial and for what alleged offenses.

The Framework Agreement requires the “cos” in each office to “cooperate with a view to arriving at a common approach,” but it also anticipates disagreements. If the national and international heads of the same office cannot agree, they may register the dispute and take it before the Pre-Trial Chamber (PTC). Former international CIJ Marcel Lemonde has described this as “probably the worst structure that you can imagine.”

The Court also has two distinct appel-
late bodies—the PTC and Supreme Court Chamber (SCC)—whose decisions cannot be appealed. Yet PTC decisions are final only with regard to “co” disputes; SCC decisions are final on all other matters. This duplication of authority allows challenges to be brought four or more times before resolution. PTC Judge Rowan Downing has called this remarkably complex system “a waste of time which has caused years of delay.”

Two Pairs of Two Investigators

The political decision to endow the Court with two co-equal prosecutors and investigating judges presents a serious structural challenge to judicial efficiency. Although the Co-Prosecutors’ investigation is intended to be “preliminary,” and in the civil law system may be brief, in practice the Co-Prosecutors had over one year to investigate due to the judges’ inability to finalize the Court’s rules of procedure until mid-2007. This delay is thus not attributable to conflicts within the OCP, and it appears that the national and international sides generally have had a productive relationship despite an ongoing disagreement over whether or not to charge additional suspects (discussed in chapter 6). Early difficulties in the working relations between the predominantly common law-trained staff of the OCP and the civil law-trained staff of the OCIJ have often been attributed to their different legal orientations.

Due to the secrecy of the judicial investigation, it is difficult to determine if delays in indicting the first five charged persons were the consequence of the different viewpoints or work styles of the national and international CIJs or other factors. The international CIJ at that time has noted that because there are “co” heads of the office, “[E]very decision is like negotiating a treaty. In France or elsewhere, taking a decision takes half an hour, here we need 8 days.” After receiving the Co-Prosecutors’ first introductory submission, the Co-Investigating Judges split accused Kaing Guek Eav alias Duch’s role in the S-21 detention center (Case 001) from the case against the other four charged persons (Case 002), citing the need for “expedited resolution.” The judicial investigation of Duch then took an additional 10 months to close—resulting in nearly two years of investigation of an accused who admitted to most of the facts against him. The judicial investigation against the other four charged persons, who contested their guilt, took an additional two and a half years—an investigation almost as long as the original life expectancy of the Court.
Investigating Judges and Mass Crimes Trials: Efficiency vs. Transparency

The inclusion of CIJs in the ECCC’s structure has posed challenges to the Court’s transparency and efficiency. In adversarial legal systems, the parties investigate the facts and present their versions of events orally at trial in the light most beneficial to their legal interests. In inquisitorial systems, all evidence is gathered confidentially by a public official, such as an investigating judge, and placed in an evidentiary case file for review by the trial court.\textsuperscript{29} Although all previous international and hybrid courts have been predominantly common-law oriented, in theory, the inquisitorial system could have two advantages over the adversarial system in mass crimes trials: efficiency and objectivity. An independent and neutral official “seeks the truth” by gathering both inculpatory and exculpatory evidence in a written dossier\textsuperscript{30} and presenting all information necessary for the trial judges to reach judgment. An impartial collection of facts in a case file could result in a more efficient process and greater historical accuracy than the partial view of events offered by adversarial parties.

However, there are conceptual and practical problems with following the civil law approach in mass crimes trials. Significantly, the judicial investigation—which at least according to the French model is “by far the longest part of the case”—is confidential, with the public trial intended only to verify rather than fully air the detailed findings.\textsuperscript{31} Although criminal prosecutions of individuals must be focused on particular crime sites and charges and cannot be confused with a truth commission process addressing an entire historical period, such proceedings inevitably address and establish facts within the context of larger, often politicized events. The logic of trying a few top leaders for serious crimes so that the public can witness accountability and learn why and how events occurred is undermined if the public cannot see justice in action. Clint Williamson, former UN Special Expert to advise on the UN Assistance to the Khmer Rouge Trials, argues:

The idea that having a judicial investigation process behind closed doors would speed the process was deeply flawed, because there is so much appetite from the public to hear the story… a lengthy trial phase is bound to happen.\textsuperscript{32}

The voluminous materials at issue in large-scale atrocity trials also diminish the benefits of a judge-led investigation. At the ECCC, the burden of becoming
familiar with the structure, workings, and policies of the Communist Party of Kampuchea, sifting through the plethora of existing documentary evidence, and speaking to the substantial number of potential witnesses of crimes occurring over 30 years ago is enormous. In these circumstances, placing all investigative responsibility on the shoulders of two co-judges may have offered no advantage in the goal of seeking “truth,” as the CIJs’ capacity and time was limited, and their findings inevitably selective. They simply could not be expected to conduct as exhaustive an investigation as would four separate defense teams and a prosecutor’s office, each actively seeking and contesting evidence. Moreover, because the CIJs were required to assemble a complete case to put before the Trial Chamber, their lengthy investigation created a bottleneck preventing the entire process from moving toward public trial proceedings.

Some ECCC officials expected that the Court would combine the best of civil law and common law: an efficient judge-led investigation followed by a short, somewhat adversarial trial with a few key witnesses. The first international CIJ initially estimated six months for investigation and three months for trial. However, due to his decision to not allow defense teams to confront witnesses during the investigation, the Trial Chamber’s inability to become familiar with all the information in the massive case file or apply hybrid rules consistently, and the public interest in observing the process, the Court’s trial proceedings incorporate a jumbled assortment of inquisitorial and adversarial practices undercutting the anticipated expediency of a civil law trial. Former CIJ Marcel Lemonde says the idea was to adopt a system to ensure more efficiency due to the age of the suspects. However, “the dish was not exactly what we ordered.” The ECCC has not held the first civil law mass crimes trial, he suggests, because a genuine civil law process didn’t happen.

Numerous witnesses have been heard—to all appearances both to edify the public and to familiarize the Trial Chamber with the nuances of these complex cases. Although civil law judges normally direct the questioning of parties and selected witnesses, in Case 002 the judges reduced their burden to become experts with the case file by tasking the parties with primary responsibility for questioning judicially selected witnesses. Moreover, responding to challenges to the fairness of the judicial investigation, the Trial Chamber decided that it would place greater weight on evidence supported by oral testimony. In civil law jurisdictions, and at many mass crimes courts, trial judges often rely on written witness statements in lieu of oral testimony when the statements do not speak to the acts or conduct of the accused. However, the ECCC Trial Chamber has
found that, though witness statements taken by the CIJs are “entitled to a presumption of relevance and reliability[,]”\textsuperscript{41} 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.\textsuperscript{42} These incongruous results highlight the ongoing tension between the desire for trial efficiency and the obligation to provide a fair, highly visible, public trial.

The ECCC’s procedure—two separate investigations, preparation of a dossier containing all the evidence, followed by an oral hearing of the evidence in court—is both slow and repetitive.\textsuperscript{43} International Deputy Co-Prosecutor William Smith contends that “[a] party-driven system is better for mass crimes as it is the fastest way to get to the truth,” but nevertheless believes, “[t] is important to use the local legal system so the process is relevant.”\textsuperscript{44} Cambodian CIJ You Bunleng argues that although the investigation procedures have been time-consuming, the procedures used during trial are more efficient than those of the common law system.\textsuperscript{45} Yet to most observers, the ECCC’s hybrid structure has produced the “worst possible outcome.”\textsuperscript{46} Most ECCC actors agree.\textsuperscript{47} As Trial Chamber Judge Silvia Cartwright has noted, it is indeed “anomalous” that the ECCC model necessitates a “full-length judicial investigation and a full-length trial.”\textsuperscript{48}

The Pre-Trial Chamber: A Duplicate Appeals Chamber

The ECCC’s inefficiency is due not only to the novel challenge of incorporating a judicial investigation into a mass crimes context. It also results from the incorporation of a pretrial chamber. Under the ECCC Law, the PTC’s only responsibility is to decide disagreements between pairs of national and international Co-Prosecutors or CIJs.\textsuperscript{49} However, the Internal Rules adopted by the ECCC in 2007 expanded the PTC’s jurisdiction to include appeals against orders of the CIJs. PTC decisions are not appealable, but the Internal Rules do not address the extent to which its appellate decisions bind the Trial Chamber. The Trial Chamber has held that it has “no competence to review decisions of the Pre-Trial Chamber.”\textsuperscript{50} As a consequence, before being finally resolved, core questions can be raised at least four times before different judicial bodies: the CIJs, the PTC, the Trial Chamber, and the Supreme Court Chamber.\textsuperscript{51}

For example, before Ieng Sary’s death, the effect of his pardon and amnesty was addressed by the CIJs twice, reviewed by the PTC twice on appeal, then re-
viewed de novo by the Trial Chamber before it was appealed to the SCC for final resolution. His defense counsel Michael Karnavas called this a waste of both money and effort. “Now I have to jump through four different hoops in order to be due diligent so I can say I preserved my record for appeal.”

The PTC recognized the potential overlap and in general exercised its jurisdiction narrowly. It emphasized that questions raised on appeal that are also explicitly within the jurisdiction of the Trial Chamber can “be raised and addressed fully at later stages of the proceedings[.]” For example, in response to Duch’s request for a remedy for illegal detention by the Cambodian Military Court, the PTC determined, “It would not be appropriate for the Pre-Trial Chamber to make the statements requested when another judicial body may well become seized of this case for trial and will have to make its own decisions on the basis of the evidence and the submissions made before it.” Similarly, it reportedly did not want to “pre-empt” the Trial Chamber’s ruling on the application of “Joint Criminal Enterprise” liability to ECCC proceedings.

This approach has not forestalled repeated rulings on fundamental issues, however. In assessing the impact of Ieng Sary’s 1996 pardon and amnesty on the appropriateness of his detention, the Pre-Trial Chamber focused narrowly on the Court’s ability to hold him in provisional custody and did not reach the underlying jurisdictional issue. However, when Ieng Sary again raised the question on appeal from the Closing Order, the PTC was obligated to address the heart of the matter.

The defense argued, “Such a fundamental issue as whether the ECCC has jurisdiction to try Mr. IENG Sary may not be left for resolution at a later date [by the Trial Chamber] when it can be decided now.” The PTC agreed, emphasizing that by sending Ieng Sary to trial the CIJs had implicitly confirmed the Court’s jurisdiction over him. “Concluding otherwise would deprive Ieng Sary from exercising his right of appeal on a jurisdictional issue that was properly raised before the Co-Investigating Judges but upon which the later failed to make a judicial determination.” As a consequence, it issued a ruling on this matter in the same decision in which it sent Ieng Sary before the Trial Chamber, which was immediately requested to review the issue de novo.

In this and many other instances, the ECCC’s complex hybrid structure has compromised the Court’s efficiency. As discussed in subsequent chapters, this has not prevented the Court from making decisions on sound judicial bases and
in a manner consistent with international standards. It has, however, elongated a process that has far outlived its original three-year mandate and contributed to further delays in trials that are already well overdue.

**PAIRING INTERNATIONAL AND CAMBODIAN SUBSTANTIVE LAW: JURISDICTIONAL CHALLENGES**

In addition to pairing two hybrid investigatory offices and managing a pair of appeals chambers, the ECCC has had to couple elements of domestic and international criminal law. Hybrid substantive jurisdiction is a hallmark of a mixed court like the ECCC. The ECCC has authority to try suspects for the domestic crimes of homicide, torture, and religious persecution under the 1956 Cambodian Penal Code and the well-known international offenses of genocide, crimes against humanity, and war crimes.\(^6^3\) The Court is also mandated to try the novel crimes of destruction of cultural property and attacks against diplomatic personnel; however, these have not been charged, likely because the elements of both offenses are unclear.\(^6^4\)

Applying both national and international criminal law always introduces complexity, but the ECCC faced particular challenges due to the scope of its temporal jurisdiction. It is the only hybrid court to prosecute international crimes committed in the 1970s, after the Nuremberg trials laid the foundation for modern international criminal jurisprudence but well before the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) developed international criminal law rapidly in the 1990s. As a result, the ECCC has had to do more than simply apply two bodies of law: it has had to determine the scope of criminal liability for international crimes during the 1970s and the effect of a domestic statute of limitations. The ECCC Chambers did not accept defense arguments mooting the applicability of international crimes, but disagreement between national and international judges regarding the applicability of the domestic statute of limitations has prevented conviction on the basis of national crimes.

**Jurisdiction to Apply International Crimes**

The ECCC’s ambiguous hybrid form has led to challenges to its authority, as defense teams have highlighted the Court’s national character and argued that
it lacks jurisdiction to prosecute international crimes and modes of liability. In indicting the accused in Case 002, the Co-Investigating Judges found that “[t]he question whether the ECCC are Cambodian or international ‘in nature’ has no bearing on the ECCC’s jurisdiction to prosecute [international] crimes, provided that the principle of nullum crimen sine lege [no crime without law] is respected.”

To the contrary, the defense said the issue was “fundamental” to the applicability of international crimes and forms of liability in ECCC proceedings.

Nullum crimen sine lege prohibits the retroactive application of criminal laws. The Framework Agreement, ECCC Law, and Internal Rules do not include an explicit nullum crimen prohibition, but the Agreement references Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR), which states in part: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.” In the Duch appeal judgment, the SCC explicitly recognized this provision’s applicability to the ECCC.

The ICTY has held that for international courts to conform to this principle of legality, acts that are not criminalized under either domestic or international law at the time they are committed may not be prosecuted. Moreover, the proscribed mode of responsibility or offense must have been sufficiently foreseeable and accessible to the accused. This requires that a charged person “be able to appreciate that [his or her] conduct is criminal in the sense generally understood, without reference to any specific provision.” The prohibited act may have been proscribed under either conventional or customary law, and need not have been criminalized in precisely the same terms in which it is prosecuted as long as the underlying conduct is the same. The appalling character of the act may undercut any claim by the accused that they were unaware that their acts were criminal.

Because the ECCC is the first internationalized court with a temporal jurisdiction falling between World War II and the rapid development of international criminal law after the Cold War, it is the first to authoritatively define the existence and scope of international crimes during that period. The Chambers cannot merely assume that each substantive crime and mode of liability placed within the Court’s jurisdiction by the ECCC Law complies with the nullum crimen principle, but must consider this principle with regard to each substantive crime and mode and define its elements accordingly.

Modes of liability refer to the various ways by which an individual can...
Participate in the commission of a crime, either directly or indirectly. This is a crucial concept—particularly in mass-atrocity trials targeting leadership figures who may never have personally killed or tortured anyone. At the ECCC, accused persons may be charged with either direct responsibility or their failure to exercise responsibility as a superior. Article 29 of the ECCC Law provides that direct responsibility attaches whenever an accused person “planned, instigated, ordered, aided and abetted, or committed” a crime over which the Court has jurisdiction.

In the Court’s second case the defense teams argued that, because the ECCC is a national court, in accordance with Cambodian law’s narrow definition of *nullum crimen sine lege*, it could only prosecute acts criminalized under Cambodian domestic law during the 1975–79 period. In their view, because no international crimes or modes of liability were criminalized in Cambodia’s 1956 Criminal Code, and international law is not directly applicable in Cambodia’s dualist system, the ECCC has no power to try them.

The SCC has not yet considered this Case 002 challenge, but in its Case 001 judgment it found the international *nullum crimen* principle applicable to the proceedings due to the ECCC Law’s reference to ICCPR article 15, and without elaboration followed international jurisprudence in determining that chargeable offenses may have existed under either national law or international law including treaties, custom, or general principles. However, the ICTY authority cited by the SCC specifically states that the “accessibility” requirement does not exclude reliance on customary international law “in the case of an international tribunal[.]” It therefore remains unclear on what doctrinal basis the SCC has found this approach likewise appropriate for a hybrid national court.

Addressing the defense challenge directly, the Pre-Trial Chamber found that by giving the ECCC the authority to apply international law in accordance with the ICCPR’s formulation of *nullum crimen sine lege*, Cambodia created an exception to the rule of legality under national law. It ruled: “Even if the ECCC were considered to be a simply domestic court, jurisdiction is not in question as long as a law that grants it exists and related requirements are met.” Following this reasoning, international crimes and modes of liability in existence during the temporal jurisdiction of the Court need not have been implemented by domestic Cambodian law at that time to be applied by the ECCC. The PTC thus determined that the nature of the court as national or “internationalized” has no bearing on the Court’s ability to apply international law. The issue is
currently before the Trial Chamber, which has chosen not to issue its ruling until judgment.

The defense also raised concerns with regard to the legality of prosecuting specific international crimes. Two of their arguments touch on areas of long-standing uncertainty in international law. Because of disagreement among the ECCC Chambers on the appropriate interpretation of sketchy past precedent, even when there is finality for the parties, the legal questions are likely to linger for consideration by other courts as well as legal scholars.

Because the Nuremberg Charter required a nexus between crimes against humanity and another crime within its jurisdiction (crimes against peace or war crimes), there has long been a dispute as to whether this nexus was required by international law, and if so, at what point in time the nexus was no longer a required legal element. In the Duch case, the Trial Chamber charted new territory in finding that the customary definition of crimes against humanity from 1975 to 1979 did not require the existence of a nexus with an armed conflict. However, in considering an appeal from the Closing Order in Case 002, the Pre-Trial Chamber reviewed the precedent at length and found that, due to a lack of clarity in the law, a nexus was required. Reviewing the same historical precedent, but with different emphasis, the Trial Chamber once again affirmed that no nexus was required. This issue will be finally determined by the SCC, but due to the restrictive right of interlocutory appeal, not until its review of the first Case 002 judgment.

Because the crime of rape was an enumerated crime against humanity in the statutes of post–World War II courts, the ECCC Trial Chamber found that it existed as a crime under international law during the temporal jurisdiction of the Court. Nevertheless, in Case 001 it characterized the one proved instance of rape as the crime against humanity of torture. On appeal, the SCC overturned the Trial Chamber’s finding that rape existed as a distinct crime against humanity in the 1970s, finding that “[a]lthough rape had . . . been well established as a war crime by 1975, its status as a crime against humanity under international law had not yet crystallized” until the 1990s. Nevertheless, it upheld the Trial Chamber’s finding that the rape could, and in this circumstance did, amount to the crime against humanity of torture.

In Case 002, the Pre-Trial Chamber likewise found that rape did not exist as an enumerated crime against humanity during the temporal jurisdiction of the Court and struck the charge from the indictment, instead characterizing the
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act as falling within the residual category of crimes against humanity of “other inhumane acts.”88 Because the first Case 002 trial does not include rape charges, there will be no judgment on this characterization unless a second trial is held. Differences between the Chambers on these questions do not appear to be the product of the Court’s hybrid nature but instead of the challenges inherent in assessing trends in customary international criminal law prior to its exponential development in the 1990s. Such challenges suggest that, to the extent possible, hybrid courts with a limited lifespan and tenuous funding should not be tasked with applying novel crimes—as was the ECCC with regard to crimes of destruction of cultural property and attacks against diplomatic personnel. It is incongruous to expect such courts to both act swiftly and drive the development of new law.

JURISDICTION TO APPLY INTERNATIONAL MODES OF LIABILITY

The primary controversy that the ECCC has addressed with regard to modes of liability is the appropriateness of charging the accused with “committing” crimes through their active participation in a common criminal plan, also known as a “joint criminal enterprise” or JCE. JCE is a theory of liability first articulated in ICTY jurisprudence and, though not listed in the ICTY/R or SCSL Statutes, has been found to be contained therein as a form of “commission.” It is used to connect high-level accused—the planners, organizers, and ideologues who may not be physically connected to criminal acts but were catalysts for them—to the lower-level offenders who executed the crimes at their behest. It is particularly useful in a situation such as that faced by the ECCC, where those who carried out crimes (for example, Duch in Case 001) claim they were acting under duress, and those at the top of the organizational hierarchy (the senior leaders in Case 002) claim the crimes were committed by errant or overenthusiastic lower-level cadres.

There are three JCE categories.89 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 the 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 due to the fact that the accused need not intend or play a role in the “extended” crime with which he or she is charged.

The status of JCE liability as of 1975 has never been addressed squarely in legal proceedings. In the Tadic case, the ICTY determined that JCE has existed under customary international law as of 1992. In so doing, it relied primarily on post–World War II, pre-1975 international and domestic precedent. However, its reasoning remains highly controversial.

When the issue of JCE arose in the ECCC’s first case, Ieng Sary sought to offer submissions on its applicability, even though he was not an accused in the proceedings. His defense argued, “The application of JCE liability at the ECCC fundamentally affects Mr. IENG Sary because he is alleged [in the indictment] to be part of the same ‘common criminal plan’ as Duch. In these circumstances, Mr. IENG Sary has a clear interest in the outcome of the appeal[.]”90 The PTC noted that Ieng was not a party to the case, and that neither the Internal Rules nor the Cambodian Code of Criminal Procedure provides a right for third-party intervention. Moreover, the decision would “not be directly applicable to Ieng Sary, who will still have the possibility to challenge the application of the theory of joint criminal enterprise in [the case] to which he is a party.”91 A joint intervention by co-accused Ieng Thirith, Nuon Chea, and Khieu Samphan was similarly rebuffed. The Pre-Trial Chamber reasoned:

[I]t is inherent to courts where several proceedings are pending that a decision in one case on a legal issue will guide the court in future similar cases where no new circumstances or arguments are raised. It does not result from that situation that charged persons have the right to intervene in a case file to which they are not parties to submit their views on an issue.92

This ruling was later confirmed by the Trial Chamber, which found no violation of “equality of arms,” as this principle “cannot be applied to parties in separate and distinct trials.”93
Although these decisions are based on sound precedent, they disregard the fact that the ECCC, unlike other domestic and some international courts, will try only a handful of defendants for related crimes. Moreover, Duch, who essentially pled guilty, had little motivation to argue vigorously against the applicability of JCE, yet the final ruling was likely to be followed in Case 002, in which it would have a major impact. Indeed, the Trial Chamber found that JCE-1 and JCE-2 fall within the jurisdiction of the Court both in the Duch case and also subsequently in Case 002. The Trial Chamber did not, however, make any findings about JCE-3 in Case 001. When the applicability of JCE-3 arose in the Court’s second case, the Trial Chamber agreed with the Pre-Trial Chamber that the precedent cited by the Tadić court was unclear and its legal reasoning was unconvincing. As a consequence, it ruled that JCE-3 “did not form part of customary international law and was not a general principle of law at the time relevant[,]” Although the Trial Chamber’s decision is limited to the ECCC’s temporal jurisdiction, it is a direct challenge to Tadić’s finding that JCE-3 existed in customary international law at the time that decision was handed down, and thus one of the Court’s most notable jurisprudential legacies.

In addition to direct responsibility, Article 29 of the ECCC Law allows accused persons to be held responsible as superiors for the crimes of their subordinates if they “had effective command and control or authority and control over the subordinate . . . knew or had reason to know that the subordinate was about to commit such acts or had done so, and . . . failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators.” All international and hybrid courts provide for liability for superior responsibility. However, the application of this doctrine to civilian (as opposed to military) hierarchies as of 1975 has not been litigated previously.

In the Duch judgment, the ECCC Trial Chamber found the accused, a civilian prison chief, responsible as a superior for international crimes committed by his subordinates. In Case 002, the accused have argued that superior responsibility did not exist in customary international law during the temporal jurisdiction of the Court, and if it did, it was applicable only to military commanders and war crimes. Although finding the post–World War II jurisprudence articulation of the doctrine to be “not always clear or complete” and the application of its elements “at times inconsistent and incomplete,” the Pre-Trial Chamber has
ruled that this mode of liability existed under customary law by 1975\textsuperscript{99} and extended to nonmilitary superiors.\textsuperscript{100} As the Trial Chamber has already accepted the applicability of this mode in Case 001, it is likely to uphold this ruling.

**Jurisdiction to Apply National Crimes**

The ECCC’s ability to try national crimes has been questioned on the basis of the domestic statute of limitations. Article 3 of the ECCC Law gives the Court the jurisdiction to hear cases involving the crimes of homicide, torture, and religious persecution in the 1956 Cambodian Penal Code. The inclusion of domestic offenses in a court’s jurisdiction is often highlighted as one of the key indicators of a hybrid tribunal. For example, the SCSL Statute provides for jurisdiction over domestic offenses relating to the abuse of girls under the Prevention of Cruelty to Children Act of 1926 and to the wanton destruction of property under the Malicious Damage Act of 1861. According to the Secretary-General, this authority was provided “in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law.”\textsuperscript{101}

As both the national and international crimes within the ECCC’s jurisdiction are likely to cover the same underlying acts, this was probably not the reason for which both are provided. The inclusion of national law offers a practical benefit: it allows the prosecution to charge an accused person with both international and domestic offenses with different elements, making it more likely that they will be able to secure a conviction.\textsuperscript{102} For example, even if the Co-Prosecutors were unable to establish that an accused was responsible for murder committed as part of an attack against the civilian population (a crime against humanity of murder), they might still be able to prove that he or she was responsible for simple murder under the domestic code.\textsuperscript{103}

Domestic law charges may also provide symbolic benefits. Prosecution of domestic charges demonstrates that Khmer Rouge leaders violated not only international law but also Cambodian law, possibly making the proceedings less “foreign” and therefore more meaningful to Cambodians. As noted by the Co-Prosecutors in their appeal of the Duch Closing Order, some commentators “have argued that charging national crimes will foster a sense of ‘ownership’ of the judicial proceedings for the Cambodian judiciary and the population as a whole.”\textsuperscript{104}
At the SCSL, no charges were ever brought for crimes under national law.\textsuperscript{105} Comparatively, the ECCC Co-Prosecutors charged all accused in Cases 001 and 002 with national offenses but were thwarted from pursuing them due to a split between the national and international judges on the applicability of the domestic criminal code’s 10-year statute of limitations.

**Statute of Limitations for National Crimes**

The 1956 Cambodian Criminal Code includes a ten-year statute of limitations (SOL) for indicting criminalized acts. The ECCC Law extended the SOL by thirty years,\textsuperscript{106} raising *nullum crimen sine lege* questions. If the 1956 Law’s SOL began running in 1979, the time available for prosecution would have lapsed in 1989 unless it was “toggled”—suspended because of the Khmers Rouges’ complete destruction of the Cambodian justice system. The prosecution argued that the Cambodian judiciary was incapable of prosecuting Khmer Rouge leaders from 1979 until at least 1993. If the SOL expired in 2003, its extension in 2001 would be valid, and the accused could be prosecuted for crimes under the 1956 Code without violating fair trial standards.

In Case 001, there was a strict divide between the national and international judges of the Trial Chamber on the issue, with the national judges opining that the Cambodian judiciary continued to be dysfunctional until the establishment of the Kingdom of Cambodia in 1993, and the international judges finding that the prosecution had not proved that investigation and prosecution of Khmer Rouge crimes before that time would have been impossible, not merely challenging.\textsuperscript{107} Politically this was a remarkable development, as the Government has in the past referenced with pride the 1979 *in absentia* trial of Pol Pot and Ieng Sary. Of greater legal significance, the national judges found they had no competence to review the correctness of a 2001 decision by the Cambodian Constitutional Council that “in substance” found the limitations period to be compatible with the constitution.\textsuperscript{108}

In contrast, the international judges considered the Council’s decision ambiguous and thus found it necessary to construe national law in light of international standards.\textsuperscript{109} Considering jurisprudence of the European Court of Human Rights and other national jurisdictions, as well as the recent approach of the Cambodian legislature toward statutory limitations in the domestic code, they found that the ECCC Law provided an “insufficient basis” to prosecute national crimes before the ECCC.\textsuperscript{110} In the absence of a supermajority of judges,
the Chamber found itself unable to consider the accused person’s responsibility for national crimes.111

As a consequence of the Trial Chamber’s split decision, the Co-Investigating Judges were unable to reach a consensus on how to proceed with national crimes in the Case 002 Closing Order. In order to avoid slowing down the proceedings, they did not file a dispute but instead by mutual agreement left the matter for the Trial Chamber to decide.112 However, the Trial Chamber noted that the Closing Order provided neither a description of the material facts on which the charges could be based nor the applicable modes of liability.113 For that reason it found that the Closing Order failed to inform the accused of the scope of the national charges, and they could not form the basis for trial proceedings.114 It was therefore unnecessary for them to rule again on the substance of the statute of limitations argument. As a consequence, the most national of all hybrid courts will not be prosecuting any national crimes.

The ECCC’s efforts to pair Cambodian and international criminal law reinforce the difficulty of operating an unprecedented hybrid court. Considerable time and judicial attention had to be devoted to determining the Court’s substantive jurisdiction before trials could be held. The Chambers have issued sound jurisprudence on complex issues of first impression, most notably charting their own path on the contentious topic of JCE-3. However, the Trial Chamber’s split decision on the Court’s jurisdiction over national crimes illustrates the propensity of national and international judges at the ECCC to fall into distinct camps on politically sensitive issues. Although international judges have disagreed with each other numerous times, there appears to have been only one public instance of Cambodian judges on the same bench disagreeing with each other.115 This tendency and its detrimental impact on the Court’s jurisprudence is related to the important issue of judicial independence, discussed in detail in chapter 6.

PAIRING LOCAL AND INTERNATIONAL RULES OF PROCEDURE

The ECCC faced an even greater challenge in blending domestic and international rules of procedure. The Framework Agreement and ECCC Law dictate that the ECCC’s procedure must be “in accordance with Cambodian Law,”116
with guidance from international procedural rules only where there is a lacuna, uncertainty in interpretation, or a question of consistency with international standards. This provision emphasizes the national institutional character of the ECCC and differentiates the Court from international tribunals such as the SCSL, which was mandated to apply the rules in force at the ICTR and to amend those rules or adopt new ones as necessary. However, the significance of this distinction diminished after the ECCC adopted its own Internal Rules—necessitated by the lack of existing Cambodian procedures. Like other hybrid tribunals, the ECCC generally has interpreted and applied its procedures in conformity with international precedent.

More than almost any other feature of the Court, the decision to have the Court apply Cambodian procedures—despite the lack of an authoritative code, the difficulties of adapting domestic criminal law rules to mass crimes practice, and the lack of precedent for using civil law rules in mass crimes cases—engenders the greatest criticism from Court actors. Although 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. Nevertheless, Cambodian procedures have remained a source of reference and, especially for the SCC, often a point of departure. Inconsistent practice in pairing these two sources of law by the Chambers led to uncertainty and perceptions of arbitrary or ends-driven decision-making. Michael Karnavas says, “Whenever it suits them they just create new rules” instead of first looking at what is in place in the Cambodian Code: “By judicial fiat they make these decisions. Today we’re going to apply this; tomorrow we’re going to apply that. Just tell me what the rules are so I know what to expect and how to proceed.”

Ieng Thirith Co-Lawyer Diana Ellis says that a hybrid approach to procedures is “generally not a good idea” because meshing together two different culturally based approaches into a coherent system is challenging and time consuming. Michael Karnavas believes that, in hindsight, it would have been better to have modeled the Court’s procedure on the simpler ICTY rules than to tinker with the existing system by adding adversarial features, which has cre-
ated more problems than it has solved. Civil Party Lead Co-Lawyer Elisabeth Simonneau Fort says detailed rules such as those applied by the International Criminal Court, but specifically tailored to the ECCC context, would have been most appropriate for a civil law court, and made it easier to apply international mass crimes jurisprudence. Most interviewees emphasize that domestic procedures are inappropriate for mass crimes trials and should never have been made the basis for the Court’s work.

Legal Status and Legitimacy of the ECCC Internal Rules

Unlike the core documents of the ICTY, ICTR, and SCSL, the ECCC Law does not authorize the judges to adopt or amend the Court’s rules of evidence and procedure. As originally conceived, the ECCC was intended to directly apply domestic Cambodian rules of criminal procedure and to draw on international rules only as needed. Article 12(1) of the Framework Agreement provides:

> The Procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.

Until the 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. For that reason, the ECCC judges almost immediately began drafting rules of procedure and evidence specifically tailored to ECCC proceedings.

According to the former Co-Chairman of the Inter-Governmental Support Group for the Extraordinary Chambers, the Cambodian Government took the position that Article 12(1) could be interpreted to grant the ECCC “rule-making authority as ‘effectuated guidance’ sought in internationally established procedural rules.” In the preamble to the Internal Rules, the judges state that the rules were drafted in order “to consolidate applicable Cambodian procedure for
proceedings before the ECCC, and . . . to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards.”

Since the adoption of the Internal Rules, there have been challenges to their legality. Both the civil parties and defense teams have argued that their adoption amounts to an act of legislation in violation of the Cambodian Constitution’s separation of powers. The Nuon Chea team has emphasized that the ECCC is a domestic court that must apply national legislation, with variance from Cambodian procedural rules allowed only on a case-by-case basis. Nuon Chea’s lawyers have argued that the Court’s Internal Rules go far beyond their expressed aim to “consolidate applicable Cambodian procedure” and are thus ultra vires and without legal force.

Considering the language of the Framework Agreement and ECCC Law and the Court’s status as a Cambodian court, these arguments are compelling. Unsurprisingly, however, the Trial Chamber judges (who participated in the plenary adopting the Internal Rules) have found that:

> While [the Court’s] procedure is in accordance with Cambodian law, the ECCC is entitled to adopt its own Internal Rules in compliance with international standards, which take into account the specific mechanisms necessary to adjudicate mass crimes.

The judges did not address the allegation that they lack statutory authority to convene a rule-making plenary, except to note that “[o]ther international courts” have also adopted rules targeted to complex criminal proceedings. Moreover, they found that the rules of such courts “represent prevailing international standards in relation to cases adjudicating international crimes” and are consistent with the ECCC’s obligation to conduct proceedings in accordance with international standards.

The defense also challenged specific provisions of the Internal Rules for departing too drastically from the CPC. For example, when the Rules were amended in 2008 to narrow the scope of appeal, the Defence Support Section (DSS) said, “This means that, at the ECCC, an accused now has a more limited right of appeal than at any other trial court in Cambodia.” Although the DSS accepted that the ECCC Law provided the judges authority to “supple-
ment” Cambodian procedural law in “expressly limited circumstances,” in its view the judges lacked legal authority “to depart from the Cambodian procedural law to the extent required to adopt the amendment.”

To this the judges responded by again highlighting the distinct and unique nature of the ECCC’s jurisdiction as the basis for their decision to more closely follow international practice.

The CPC is a detailed code drafted by French legal experts and only recently adopted after years of confusion about the applicable procedures in force. Moreover, it is well documented that Cambodian criminal hearings are often abbreviated and fail to comply with basic standards of fairness. Thus, in practice, the procedures that comprise the CPC are to a great extent just as novel for many Cambodian lawyers and judges as they are for the international staff. It has been notable during trial hearings that the Cambodian Trial Chamber Judges often appear more deferential to the views of New Zealand Judge Cartwright on procedural questions, including on the appropriate role of civil parties, than to those of her French counterpart Judge Lavergne. For this reason, the Nuon Chea team’s argument that the CPC “embodies the legal system [their client] is most familiar with” is not precisely true. Arguably, the decision to provide national “ownership” through the application of incipient domestic procedural law was always a matter of form over substance.

Problematically, the CPC is not even a contemporary representation of French law, which has been modified to address European Court of Human Rights criticisms and perceived weaknesses in the system—including to minimize the role of the investigating judge. Judge Lemonde says, “I regret that the French experts gave Cambodia a tool that was obsolete before it was even used.” Therefore, it bears considering that existing domestic procedure may not be the best practice or even one that domestic lawyers support. For example, in 2000, Sok Sam Oeun, Director of the Cambodia Defender’s Project, expressed concern about the incorporation of investigative judges into the ECCC structure:

[W]hat worries me most is what will happen if the tribunal law is passed and implemented before the function of the investigating judge is abolished from the justice system in general. A KR tribunal with an investigating judge will create a strong precedent and make the function of investigating judge much more difficult to remove in the future.
As highlighted by this statement, putting aside the added legal complications of applying domestic criminal procedures in the context of a mass crimes court, in practice there will be multifaceted and unanticipated interactions between a weak national legal system developing after a period of upheaval and an internationalized court. Giving precedence to fledgling national law as an end in itself is questionable, as it may mask more nuanced domestic legal controversies.

Rule-Drafting Controversies

Although both international and national judges accepted the practical need for the Court to adopt its own rules, during the drafting process there were sharp divisions on topics including the relationship between Cambodian and international law and how the ECCC would operate within the Cambodian court structure. The international judges believed that international law standards would need to be applied in many cases; however, the national judges argued that Cambodian law must have primacy because the ECCC is part of the Cambodian judicial system.

Some foreign observers believed that the Cambodian judges unified around a pro-Cambodian law position because they were ill prepared to argue the substance of the legal questions involved. Others suggested that the primary stumbling block was the reluctance of Cambodian judges “to allow international barristers to conduct a robust scrutiny of the case against the accused” due a lack of experience with vigorous defense. “After 28 years everyone thinks they know who the guilty men are. Just put them in prison.” Some, however, claimed that the Government was deliberately holding things up. For example, in the view of former Khmer Rouge soldier Lath Nhoung, “The court’s process is to show internationals that they are working to try [the Khmer Rouge leaders], but actually they will delay the process until they all die.” Most incisively, many noted that “[t]he government only wants to be part of a process it can control.”

This view may be borne out by the national judges’ apparent efforts to scuttle the power-sharing arrangement painstakingly negotiated in the Agreement and gain control over who would be tried. One of their proposals was that if a disagreement arose between the nationals and internationals about whether or not to issue an indictment, the person under investigation could appeal to the Pre-Trial Chamber for a decision and, if there were no supermajority decision, the case would not proceed. This procedure would not only have directly
contradicted the Agreement and Law, but as noted by the American Embassy, would have also given the Cambodians “total veto power” over indictments.\(^\text{153}\) The major issue of public contention was over the scope of defense rights, both with regard to the creation of an ECCC defense office and the ability of foreign defense counsel to appear in court,\(^\text{154}\) and to many it appeared that the Court would collapse over the impasse. At one point the international Co-Investigating Judge stated, “If next month the new rules are not adopted . . . then we would have to examine the possibility of the international judges asking the UN to withdraw and drop the whole process.”\(^\text{155}\)

President of the Bar Association of the Kingdom of Cambodia (BAKC) Ky Tech, who was widely seen to be acting on behalf of the Government, took the lead in attacking the draft rules. He argued that “only [BAKC] can approve the list of defense attorneys for Khmer Rouge suspects, oversee lawyers’ training and discipline them for misconduct.”\(^\text{156}\) BAKC also demanded that the ECCC Defense Unit be renamed the Office of Defense Support and Cooperation and instituted under Cambodian leadership.\(^\text{157}\) At one point the national judges argued that the rules should not provide for a defense office at all and the BAKC should administer all ECCC defense matters.\(^\text{158}\)

The issue was picked up by Deputy Prime Minister Sok An, who argued that “the administration, role, and functions” of the ECCC defense office and its relationship with the BAKC were not addressed in the Agreement, and the appointment of its international head was “insufficiently attuned to the specifics of the ECCC and its position ‘within the courts of Cambodia.’”\(^\text{159}\) He apparently sought “to reopen negotiations on the role of that office”—a request rejected by the UN.\(^\text{160}\) After months of strained discussions between the judges and political interlocutors,\(^\text{161}\) it was eventually agreed that the newly named “Defence Support Section” would consult with BAKC on procedures for assignment of lawyers and legal trainings, and that all foreign lawyers would be required to register with BAKC.\(^\text{162}\)

The final stumbling block was BAKC’s demand that foreign lawyers pay a $500 membership application fee whether or not they were selected as counsel, plus a $2,000 one-time fee and a $200 per-month fee if they were selected. Although this issue was technically outside the purview of the judges, the international judges threatened to boycott the plenary at which the rules were to be finalized if the fees were not lowered. They argued that the high fees would reduce the number of foreign counsel interested in applying and lead
hybrid justice

to defense arguments that the accused had been denied the right to counsel of
their choice.\textsuperscript{163} Ky Tech called the threat childish and said it was proof that the
foreign judges, not the Cambodian Government or the Bar Association, were
“hindering the tribunal.”\textsuperscript{164}

When the international judges threatened to exclude the BAKC entirely
from the process of organizing foreign lawyers’ participation unless the fees
were lowered, the national judges said they would not participate in the Court
under those circumstances.\textsuperscript{165} National Co-Investigating Judge You Bunleng ar-
gued, “This tribunal is not the UN’s tribunal so how can [the Bar] be cut out?
. . . When foreign lawyers come to work in a foreign country, there is interna-
tional law that they must respect the laws of their host country.”\textsuperscript{166} However,
many observers viewed the BAKC demand as a form of extortion, especially as
the Bar was unspecific about how the fees would be used.\textsuperscript{167} The BAKC even-
tually agreed that foreign lawyers could pay a flat $500 fee.\textsuperscript{168} At the final May
2007 plenary, it seemed to some present that the national judges were acting
under new, more flexible instructions, and for the first time there were “notice-
able points of disagreement among [them]—not on key issues, where all the
Cambodian judges held firm—but on less contentious matters[.].”\textsuperscript{169} With the
final hurdles overcome, the Rules were adopted in June 2007.

Debate over the Hierarchy of Rules

Although the judges acted without explicit statutory authority in adopting the
Internal Rules, the Trial Chamber has affirmed that the Rules have primacy
over the Cambodian Code of Criminal Procedure:

\begin{quote}
The Internal Rules . . . form a self-contained regime of procedural law related to
the unique circumstances of the ECCC, made and agreed upon by the plenary
of the ECCC. They do not stand in opposition to the Cambodian Criminal
Procedure Code . . . but the focus of the ECCC differs substantially enough
from the normal operations of Cambodian criminal courts to warrant a special-
ized system. Therefore, the Internal Rules constitute the primary instrument to
which reference should be made in determining procedures before the ECCC
where there is a difference between the procedures in the Internal Rules and
the CPC.\textsuperscript{170}
\end{quote}

Nevertheless, uncertainty remains regarding when it is appropriate to supple-
ment the Internal Rules by reference to the CPC. Elisabeth Simonneau Fort
says that, from a civil law perspective, the Internal Rules are not well written and lack sufficient detail to be precise. Moreover it is unclear what to do to fill the gaps, as the Court refers sometimes to civil law, sometimes common law, sometimes international law, and sometimes Cambodian law.\textsuperscript{171}

The SCC has stated that the civil law rules of interpretation require consideration of a provision’s language, its place in the system including “its relation to the main underlying principles,” and its objective.\textsuperscript{172} However, in a \textit{sui generis} system such as the ECCC, this approach necessarily leads to confusion as to how related provisions of the Internal Rules and the CPC should be reconciled, as every question is a matter of first impression.\textsuperscript{173} Indeed in the same decision the SCC found that one CPC provision provided no guidance for a similarly worded Internal Rules provision, and that a second CPC provision provided essential guidance for a differently worded Internal Rules provision.

Internal Rule 68 and CPC Article 249 both establish a four-month limit for pretrial detention upon issuance of a closing order indicting an accused. The SCC found that, despite their similar time frame, Internal Rule 68 has no equivalent in the national code with regard to when this time limit commences if there is an appeal against the closing order. Thus, even though the CPC clock starts running when the closing order is issued, the Internal Rules should be interpreted to start the clock when the appeal is actually filed, as each set of rules “must be evaluated against their systematic background.”\textsuperscript{174} In the case of the Internal Rules this background includes “the gravity of crimes and complexity of investigations, the need for greater pre-trial scrutiny over the charges and the need to broaden recourse [to appeal] by the defence” to include, for example, jurisdictional grounds.\textsuperscript{175} Consequently, “the [CPC] does not provide guidance for the matter at hand, as its provisions in the related area are not adequate for appeals designed for indictments in international crimes.”\textsuperscript{176}

In the same decision, a supermajority of the SCC determined that provisions of the Internal Rules and the CPC should be considered together with regard to when a defendant should be detained, as they both must be read “in the light of the presumption of liberty.”\textsuperscript{177} It found that Internal Rule 82(2), which provides the ECCC Trial Chamber general authority to release or detain an accused, must be interpreted in light of CPC article 306, which explicitly requires trial courts to make this decision on the basis of the statutory criteria for pretrial detention. Thus, although there is no such requirement in the Internal Rules, the SCC found that, because of the wording of CPC article 306, the
ECCC’s pretrial detention statutory criteria are incorporated into Internal Rule 82(2). Judge Noguchi dissented on this point:

Due to the special mandate, jurisdiction, and structure of the ECCC, there are many provisions in the Internal Rules which do not exist or differ from the procedures for ordinary domestic cases to be tried before ordinary domestic courts. Therefore, the context within which to interpret the Internal Rules is first and foremost the Internal Rules themselves. Otherwise, it will be difficult for readers of the Internal Rules to know precisely what the procedural rules are before the ECCC. . . . When the meaning of a particular provision of the Internal Rules is sufficiently clear in its own context, recourse to the Code of Criminal Procedure is not necessary.

This practical approach had been followed for five years by the lower chambers and relied on by the parties. The SCC’s favored interpretive process is arguably one more unnecessary complication for a very complicated tribunal. Nevertheless, in undertaking this cumbersome approach, the SCC is showing national procedures the deference they are intended to be shown under the ECCC Law and providing a potentially valuable legacy for the national judiciary.

For example, in the Case 001 appeals judgment, the SCC began discussing the criteria for civil parties by emphasizing that under the Framework Agreement and ECCC Law, “Cambodian law remains the controlling procedural law for proceedings before the ECCC, save where that law is inadequate according to the criteria specified in these provisions.” Any other approach arguably undermines respect for Cambodian law by merely assuming its inadequacy. In a country like Cambodia where compliance with the law is low, this undermines not only local confidence in national law but also faith in the rule of law generally.

Next, the Chamber considered the applicable national procedures in accordance with international standards—such as “the presumption of liberty” as discussed above—thereby demonstrating to domestic lawyers the process of applying national law in a manner that promotes fair trial rights. The SCC noted: “the ECCC, its hybrid nature notwithstanding, acts as an emanation of the State of Cambodia and is duty bound to respect international standards of justice and generally recognized human rights precepts.”

The Cambodian legal system can derive no benefit from the facial primacy of the CPC if this hierarchy is disregarded in practice. The need to grapple with
both Cambodian procedures and international procedures promotes inconsistencies in application between Chambers and uncertainty among the parties. Nevertheless, this is the hybrid system that the ECCC framers bequeathed. At its worst, this structure promotes arbitrary and seemingly ends-driven decisions. At its best, the Court’s unwieldy efforts may contribute to the future domestic application of Cambodian procedures in conformity with international fair trial principles.\textsuperscript{182}

CONCLUSION

From the start, the Court’s civil law orientation and complex structure, its responsibility to interpret and apply two sets of laws to events in the 1970s, and its lack of clear procedures targeted to mass-crimes cases presented significant barriers to its efficacy. The challenges of having “two of everything”—including prosecutors, investigating judges, appeals chambers, and sets of rules—continue to affect its functioning.

This chapter has illustrated some of the particular technical challenges the ECCC faced as it began operations and prepared for trial. The ECCC’s struggle to pair the two sides of the Court has affected its operations in other important ways as well, including a number that have received considerably more civil society and media attention. These include the challenge of administering a mixed court effectively and transparently, stewarding its resources efficiently, providing for the rights of victims and defendants, and dealing with the shadow of political interference. Those are the principal subjects of the chapters that follow.