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Chapter 3

SERVING TWO MASTERS
Dual Administration, Oversight, and Funding

International and hybrid tribunals need much more than agreed legal provisions and procedural rules to operate effectively. They also require significant funding support and functioning bureaucratic institutions subject to sound oversight. Every public judicial hearing or decision is akin to the tip of an iceberg; beneath the surface are scores of administrative tasks. These are particularly important given the complexity and high profile of many of the cases. Teams of staff investigators must travel to the field, documents must move securely around the building, records must be kept, numerous visitors must be led safely in and out of the premises, and court personnel must be paid, just to name a few necessary functions. These routine-sounding processes pose significant challenges for newly created tribunals that do not have the luxury of relying on preexisting administrative practices. Donors and court officials have to act quickly—raising money, hiring manpower, and establishing bureaucratic procedures to meet the myriad demands of administering transitional justice.

Hybrid tribunals have some potential administrative advantages. Most have been located in the country where atrocities occurred. They are thus closer to crime sites and potential witnesses, reducing the logistical difficulty and cost of mounting field investigations. They also tend to be less expensive, because national staffers generally draw lower salaries, and the cost of operations are usually lower in postconflict countries than they are in The Hague. The ECCC’s proximity to the locus delicti and involvement of Cambodian personnel offer these possible benefits.
Serving Two Masters

Hybrid courts also face serious administrative challenges, however. Each is largely *sui generis*, blending different organizational ingredients from the host country and the United Nations and opening space for jockeying between and among national and international officials about personnel, resource allocation, and procedures. The ECCC’s institutional design contains particularly serious shortcomings that would be difficult for appointed court officials to overcome. These include a split administrative structure, weak international oversight system, and shaky financial foundation. Those institutional features have adversely affected the ECCC’s function in areas including human resources, financial management, and translation.¹

THE ECCC’S MANAGERIAL AND FINANCIAL STRUCTURES

Like many of the ECCC’s institutional features, its administrative setup, oversight mechanisms, and funding structures are unique. Its administrative apparatus is divided between national and international “sides,” each funded through a separate stream and each reporting to different political masters. David Tolbert, former UN Special Expert to advise on the UN Assistance to the Khmer Rouge Trials, argues that this represents the “worst possible design” for an effective Court.²

Two-Headed Administration

At the top of the ECCC’s administrative structure is an Office of Administration (OA) responsible for providing administrative support to the various organs of the ECCC. The OA wields considerable power due to its role in allocating resources and responsibility for providing an array of non-judicial services essential for the ECCC’s work. Authority is segregated within the office. The Cambodian-appointed OA Director is the tribunal’s top administrator but does not have ultimate authority over “matters that are subject to United Nations rules and procedures.”³ That authority belongs to an international Deputy Director, who is charged with the “recruitment and administration of all foreign staff.”⁴ The Framework Agreement is silent on how to resolve any conflicts between the Director and Deputy Director,⁵ merely asserting that they “shall cooperate in order to ensure an effective and efficient functioning of the ad-
The ECCC Law also offers no guidance. In practice, Cambodian staff members have generally reported to the Director, and international staffers have treated the Deputy Director as their superior. This possibility was clearly foreseen by the drafters of the Framework Agreement and reduces the likelihood of unity and coherence in the office.

Beneath the OA are seven distinct administrative sections, each composed of a mix of national and international personnel. Cambodian appointees head Public Affairs, which manages communication, and the Court Management section responsible for records and archives, translation, witness and expert support, and related functions. UN appointees lead the units for information technology, safety and security, and “general services,” which refers to facilities management, transportation, mail, procurement, and related issues. The two remaining units—Personnel and Budget & Finance—have two heads each to manage their respective sides of the court. The ECCC also has two special stand-alone administrative units: the Cambodian-led Victims Support Section, which manages victim complaints and supports civil parties, and the UN-led Defence Support Section, which aids the various defense teams. Thus, at almost all levels of administration, the two sides of the Court have been kept separate to a significant degree.

The ECCC’s split administrative structure cuts against the established norm in international and hybrid courts. Most have followed the example of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) by establishing registries to provide administrative support for the judicial organs of the court. That model centralizes authority under a single registrar who makes decisions on personnel and budgetary matters and other administrative policies. The International Criminal Court (ICC) has a registry, as do the Special Tribunal for Lebanon (STL) and Special Court for Sierra Leone (SCSL), which both entrust administrative authority to a UN appointee. The advantages of a registry headed by a UN appointee include the efficiency gains from having a single lead administrator and added confidence that administrative practices will conform to international standards. In 2006, former ICTY deputy prosecutor David Tolbert recommended that the ECCC establish a registry atop the ECCC’s administration. The absence of a single responsible registrar has made it unclear which side of the OA has the authority to lead a particular task and who should be held accountable for it. Former UN Legal Counsel Hans Corell argues that divided administrative leadership
is not a “happy solution” for Court administration, because “you have to have somebody who makes decisions.”

The division of the ECCC’s administration accommodated Cambodian sovereignty concerns—indeed, a pair of UN-appointed experts concluded in a 2007 review of the ECCC’s administration that they perceived no good reason for the division of the Court into separate administrative sides except possibly “to protect the ‘sovereignty’ of the National Staff side.” Even before the tribunal began operations, however, critics charged that the structure made the United Nations the junior partner to a debased, opaque national judicial system and stressed the need for stronger UN oversight to safeguard the Court from corruption and political interference. In fact, U.S. officials cited this as a reason for their initial reluctance to fund the tribunal. In 2005, U.S. Ambassador-at-Large for War Crimes Issues Pierre-Richard Prosper said:

The U.S. wants to be in the position where we will be able to support this politically and financially. . . . What we want to avoid is some of the problems that exist in the ordinary judiciary being transferred to the Khmer Rouge tribunal. . . . It must be free from corruption. It must be free from political manipulation or influences and must be transparent.

Those concerns later would prove prescient.

The lack of strong UN leadership within the tribunal was accentuated by the appointment of Chinese diplomat Michelle Lee as the first OA Deputy Director. Lee lacked experience in court administration, and according to numerous sources, she took a hands-off, deferential approach to affairs within the ECCC and on the Cambodian side in particular. Soon after the Court began operations, concerned UN and donor officials began to press for her removal, which did not occur until late 2007.

Lee’s replacement, Knut Rosandhaug, has been more involved and has forged a more cooperative partnership with acting OA Director Tony Kranh, but Rosandhaug has also been criticized for being too deferential to his Cambodian counterparts. According to many staffers, Rosandhaug could have sought to play a role more akin to a registrar but has instead emphasized the limits of his power. The ECCC’s split structure has made it difficult for UN officials at the ECCC to lead, but the agency of individual appointees has also had a major impact both in the OA and throughout the Court.
A Split Financing Model

The ECCC’s funding scheme also divides its national and international sides. The ECCC Law requires that the salaries and expenses of the Cambodian judges, prosecutor, administrative officials, and staff be “borne by the Cambodian national budget,” and the Cambodian Government has provided some direct financial support. The ECCC may also receive additional voluntary contributions from foreign governments, international institutions, NGOs, or others, and in practice the Cambodian Government has relied primarily on such contributions for its share of the ECCC’s costs.

The United Nations bears the expenses and salaries of international judicial and administrative personnel as well as the remuneration of defense counsel. In addition, the United Nations agreed to fund utilities and services, witness travel, safety and security provisions, and “such other limited assistance as may be necessary to ensure the smooth functioning of the investigation, the prosecution and the Extraordinary Chambers.” The United Nations has met its financial obligations by soliciting earmarked donations from selected UN member states.

The ECCC’s structure differs considerably from the models of the ad hoc international courts and the ICC, which have been able to rely more heavily on assessed contributions. The ICTY and ICTR are both funded through assessed contributions from UN member states as part of the UN General Budget, and the General Assembly’s budget committee reviews their budgets every two years. Both may also receive additional voluntary contributions. The ICC, which was created outside of the United Nations umbrella, derives most of its funding through assessed contributions by State Parties to the Rome Statute but may also receive voluntary contributions from the United Nations and donor states. These funding schemes remain subject to shifts in donor preferences, but much less so than the ECCC model.

The funding structures for other hybrid courts have varied widely. The Kosovo Regulation 64 Panels and Special Panels for Serious Crimes in East Timor both received funds from the UN peacekeeping authorities that created them. The STL is funded 51% through voluntary contributions by UN member states and 49% by the government of Lebanon. The budget of the SCSL depends primarily on voluntary contributions from donor states. The Security Council imposed that mechanism to reduce the costs of the proceedings, de-
spite the objections of UN Secretary-General Kofi Annan, who warned that “[a] special court based on voluntary contributions would be neither viable nor sustainable.”

By comparison to its peers, the ECCC’s funding structure is most similar to that of the SCSL and has a few distinct characteristics. Like the SCSL, it relies heavily on voluntary donor contributions. The risk of that arrangement was foreseen when the tribunal was created. In 2003, before the conclusion of the Framework Agreement, Annan requested that the UN General Assembly fund the ECCC out of assessed UN member state contributions, arguing that the Court needed an “assured and continuous source of funding” to meet its mandate and that its operation “should not be left to the vagaries of voluntary contributions.” The General Assembly refused.

Corell contends reliance on voluntary contributions was a mistake. In addition to the danger of financial uncertainty and instability, “it’s hard to have a credible institution with voluntary contributions,” Corell argues. “Who is financing the court? Why?” A senior Court official adds that reliance on voluntary replenishments increases the Court’s vulnerability to pressure from donors, giving a small number of states the power to exercise undue influence. Some examples are discussed later in this chapter.

More uniquely, the ECCC’s funding structure reinforces the separation between the national and international sides of the court. International personnel are funded through UN channels, while Cambodian personnel are paid by the Cambodian Government. In theory, that distinction encourages national ownership and burden-sharing, but in practice the Cambodian Government has relied almost exclusively on foreign grants. This funding structure makes it easy for donors to target assistance to the international side of the court. That provides a source of leverage against the Cambodian Government but has also caused delays and undermined confidence in the Court’s staying power.

Weak and Separate Oversight Mechanisms

The ECCC was created without a clear internal or external institutional mechanism to oversee its administrative and financial operations. In most international and hybrid tribunals, a registrar works under the court’s president—its head judicial officer. At the SCSL, the president links the tribunal’s internal oversight to external oversight mechanisms by submitting annual reports to the UN Secretary-General and the government of Sierra Leone.
The ECCC has neither a president nor a registrar. As a partial alternative, the Internal Rules established a “Judicial Administration Committee” in 2007 composed of three Cambodian and two international judges. Under the Internal Rules:

The Committee shall advise and guide the Office of Administration concerning all activities relating to the administrative and judicial support provided to, the Office of the Co-Prosecutors, the Office of the Co-Investigating Judges and the Chambers, including the preparation and implementation of the budget.\textsuperscript{38}

The OA Director and Deputy Director participate in a “consultative capacity.”\textsuperscript{39} The Committee’s authority to “advise and guide” the OA does not, however, institutionalize its authority or grant it express supervision over the OA’s activities.\textsuperscript{40} Thus, the ECCC’s internal oversight structure remains weak relative to other institutionalized courts—reflecting the unwillingness of either side of the Court to submit to unified authority led by the other.

\textit{The United Nations: More Support than Oversight}

To a large extent, the United Nations has taken what one senior ECCC official calls a “hands-off” approach,\textsuperscript{41} accepting a supportive role rather than pushing for strong external oversight. The design of the tribunal clearly and deliberately limited the scope for UN oversight. Former UN Assistant Secretary-General Larry Johnson asserts that the Cambodians’ insistence on “strict equality” left the United Nations with “virtually no remit over the Cambodian half” of the Court, and that the split hybrid design erected “a big brick wall that the Cambodians worked to keep up at all times.”\textsuperscript{42}

From the outset, the United Nations put oversight of its side of the tribunal in the hands of the UN Controller rather than the Office of Legal Affairs (OLA), which had negotiated the Framework Agreement.\textsuperscript{43} The apparent rationale was to focus on cost reduction—one of the purported advantages of a mixed court over \textit{ad hoc} tribunals,\textsuperscript{44} but in the early years the OLA appears to have acquiesced in the Controller’s oversight partly to “wash its hands” of a court that it feared would encounter serious problems as a result of its majority-Cambodian structure.\textsuperscript{45}

For more quotidian matters, such as recruitment, the Controller relied on the Department of Economic and Social Affairs (DESA). Neither the Control-
ler nor DESA had experience running a mass crimes court, however. Rather than concentrating on judicial management, initial UN oversight treated the ECCC much like an ordinary technical assistance project—a narrow and conservative reading of the UN’s mandate. Although the OLA became more closely involved over time, the lines of oversight remained unclear.

In 2005, the United Nations established a project called the UN Assistance to the Khmer Rouge Trials (UNAKRT) to provide technical assistance to the Cambodian Government in conducting the trials. In 2006, the Cambodian Government signed a project document with the UN Development Program (UNDP), which administers international funds to the Cambodian side of the court. Among other things, that document established a “Project Board” chaired by the ECCC’s OA Director and including representatives from UNDP, DESA, and the European Community. The Project Board was ill equipped to provide strong oversight, however. It was charged with holding only one meeting per year and had no formal legal authority over the ECCC. The fact that its chair was the lead administrator at the ECCC also posed a possible conflict of interest.

In 2007, when serious questions arose about the effects of the hybrid structure on the OA’s functionality, the UNAKRT spokesperson emphasized that “the UN is here to help, not to lead,” and that its mandate to provide mere assistance did not allow for a stronger leadership role, which would “require high-level political re-negotiation of the court’s founding tenets.”

Senior UN officials became more directly involved in early 2008, following allegations of mismanagement and corruption (discussed below) and with the Court’s first trial approaching. Donors and civil society actors also applied pressure for stronger oversight mechanisms. A representative of the Japanese government, the Court’s top funder, reportedly said that the UN needed to “exercise more appropriate stewardship of the process” and that while UN staff was “hardworking and conscientious, they are not adequately supported by UN headquarters.”

Civil society observers suggested creating a special international advisory position and a committee similar to the SCSL’s Management Committee to monitor the Court’s administrative and budgetary operations.

The Cambodian side did not want “a new party to be above the court” and insisted that any such post would entitle it to a similar Cambodian position. Clint Williamson, then U.S. Ambassador-at-Large for War Crimes Issues, recalls that donors generally supported a “more proactive UN role” but were concerned about “Cambodian receptivity to it.” Some—particularly the French,
Japanese, and Australians—argued that the UN and key donors could not “shove it down the Cambodians’ throats.” The UN nevertheless went forward in March 2008, unilaterally appointing former ICTY deputy prosecutor David Tolbert as a Special Expert to UNAKRT for a period of approximately six months.

The post’s title—the “Special Expert to advise on the United Nations Assistance to the Khmer Rouge Trials”—reinforces UN caution in overstepping its bounds. Despite that initial caution, the Special Expert has become a key actor raising funds and negotiating with the Cambodian Government on sensitive issues. Craig Etcheson, a former investigator in the Office of the Co-Prosecutors, argues that it “quickly became apparent that something like [the Special Expert post] was needed” at the ECCC. Williamson adds that donors and UN officials soon came to see Tolbert’s role as a “positive factor” and concluded that “the Court was suffering by not having that role,” leading the UN to restart the post shortly after Tolbert’s temporary post expired. The post has been filled since 2010 by a pair of former U.S. war crimes ambassadors—Williamson and David Scheffer.

Inside the Court, an informal mechanism temporarily evolved on the UN side. In November 2011, it became public that for six months prior, Trial Chamber Judge Silvia Cartwright, then international Co-Prosecutor Andrew Cayley, and OA Deputy Director Knut Rosandhaug held “regular meetings” without the presence of the defense. According to Rosandhaug, the meetings concerned only administrative and organizational matters, and the idea for such meetings came from UN Under Secretary for Legal Affairs Patricia O’Brien. He added:

The aim was to add focus to communication between the UN component of the ECCC and UN Headquarters. Such meetings would replicate, in an informal way, the coordination committees that are standard in the other UN and UN-assisted tribunals.

Andrew Cayley reportedly said, “Administrative management meetings such as these take place in the ICC, ICTY, and the ICTR. They are normal. If they did not take place, these institutions, including the ECCC, would be paralyzed.” The Internal Rules do not provide for such meetings, however, instead creating the hybrid Judicial Administration Committee.

Defense lawyers objected, contending that meetings between Cartwright
and Cayley raised concerns of judicial bias.61 In seeking Cartwright’s disqualification for the appearance of bias, the Nuon Chea team noted that coordination councils at other courts are made up of the president, head prosecutor, and registrar and “meet pursuant to clearly defined and publicly available terms of reference” and are not “ad hoc” bodies.62 The Ieng Sary team likewise contended that comparisons with the practice of international courts were inappropriate, as the ECCC is a national court with a unique structure, including national and international personnel, no president, no registrar, and a prosecutor who, unlike at the ad hoc courts, is directly involved in ongoing proceedings.63

The Trial Chamber rejected the defense arguments and found that the meetings resembled other mass crimes tribunals’ coordination councils, which “are integral to address the unique administrative challenges faced by international tribunals.” It held that “[t]he ECCC confronts certain administrative matters which pertain exclusively to the United Nations component of the court,” and while the ECCC lacks a presidency, Judge Cartwright fills a similar position as Vice-President of the plenary. Moreover, the OA Deputy Director has functions “akin” to those of a registrar. Although such meetings are not explicitly provided for by the Internal Rules, “nor does the ECCC legal framework debar coordination by the United Nations component of the ECCC, where required.”64 On appeal, the SCC found that to address the “appearance of asymmetrical access enjoyed by the prosecutor to the trial judge,” defense representatives should be included, but it did not ban the meetings.65 Nevertheless, by all accounts, at that point the meetings ceased. Thus, if only for a short time, in the absence of formal internal management structures, a less transparent and authoritative institutional mechanism emerged to fulfill this function.

Monitoring by Donors

Since the ECCC depends on voluntary contributions, donors have had regular opportunities to exert influence on the proceedings. If used wisely, that engagement can strengthen a court’s operations, but at the ECCC donors have generally acquiesced in a weak structure for donor coordination and oversight. The Framework Agreement did not provide a structure for donor monitoring and oversight, and most key donors accepted a relatively hands-off role. In 2005, the U.S. government proposed establishing a donor management committee akin to the one established in the statute creating the SCSL,66 which sets forth that:
... interested States will establish a management committee to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested States.\textsuperscript{67}

The SCSL Management Committee includes representatives from the UN Secretary-General’s office, state donors, and Sierra Leone. Its mandate gives the committee an opportunity to play a significant oversight role in the SCSL’s management. The STL has a similar Management Committee.\textsuperscript{68}

Other key ECCC donors were not enthusiastic about the U.S. proposal. The Australian government responded that the Framework Agreement did not create such a mechanism and that donors had “missed their chance” to do so:

The current structure of the KRT [Khmer Rouge Tribunal] simply did not allow for a Management Committee. . . . The Australians would prefer to monitor the KRT through their embassies in relevant countries abroad and through the UN. . . . Cambodian political will was key to the KRT’s success . . . and donors might send the wrong signal if [they] pushed to take over too much control of the process. . . . For Australia, as for the UN, the Agreement—and in particular the provision allowing the UN to withdraw—alone provides sufficient international oversight by making international assistance “contingent on the KRT continuing to meet international standards.”\textsuperscript{69}

Instead of a management committee, a group of key donors responded to a May 2006 request from Deputy Prime Minister Sok An to create an informal group of donors to provide advice and support to the ECCC.\textsuperscript{70}

The following month, with Cambodian officials in attendance, the French and Japanese Ambassadors chaired the inaugural meeting of the “Friends of the ECCC” group and laid out several proposals for the Friends group. These included holding meetings every other month, limiting the group to a nonjudicial advisory role, avoiding a formal institutional structure, keeping discussions confidential, limiting participation to governments, and respecting the independence of the ECCC and prerogative of the OA.\textsuperscript{71} According to a Japanese participant, the Friends group was “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” and based on the idea that “friendly advice could be more effective than excessive pressure and inquisitorial consultations.”

A U.S. Embassy cable reveals that the Cambodian Government sought to exploit differences among donors to prevent an oversight mechanism that would favor the UN side of the court:

The Japanese were to have taken on the role as sole chair of the Friends of the ECCC; the idea of co-chairing the Friends was Sok An’s. According to the Japanese, Sok An is unhappy with Japanese unwillingness to side with the RGC against Michelle Lee and the UN side of OA, and is hoping that the French will be more supportive.

In a March 2007 cable, U.S. Ambassador Joseph Mussomeli expanded on the notion that divergent donor priorities weakened the Friends group’s potential as a serious monitoring body. Mussomeli argued that the French and Japanese Embassies “have shown no willingness to discuss contentious issues” related to the ECCC’s administration. He added:

The French and Japanese positions are fairly consistent: the Friends should not play an activist role; individual missions—if they are so inclined—can intervene with the ECCC or the government, but the Friends should not act in any collective diplomatic way.

Mussomeli also asserted that national political interests were at the heart of the hands-off approach to court monitoring. He expressed concern that France and Japan were “focusing exclusively on the preservation of their bilateral relationship with the RGC in their discussions about the ECCC” and that Japan was especially loath to press the government:

The Japanese position is particularly sensitive due to the balancing act the [Government of Japan] plays with China in Cambodia. The Chinese, Sean [Visoth] believes, are placing pressure on the government with respect to moving forward with the Tribunal. The Japanese want the Tribunal to succeed at virtually any cost, and therefore will be loathe to put any pressure on the government that might make the RGC accord more sympathy to Chinese views.
Thus, the donors approached the Friends group as an information-sharing device, rarely raising sensitive topics with the ECCC officials present and avoiding collective action despite the fact that “ECCC judges and staff have noted that the donors and interested states would be most effective if they could speak with a single voice.” Donors instead worked through bilateral channels with relatively rare exercise of coercive pressure. Williamson argues that although the Friends group has provided a “very useful” information-sharing function, it was invested with too little formal structure and authority and thus does not offer a good institutional model for hybrid courts.

An additional thin layer of donor oversight has operated in New York, where a relatively informal “steering group” of representatives of interested states, including Cambodia, have met periodically to share information about the ECCC, as well as a smaller “principal donors group.” The lines of responsibility between the New York–based group, typically including the legal officers of countries’ UN missions, and the Phnom Penh–based Friends group have not been clear, and at times wires have crossed. More important, neither has had authority approaching that of the SCSL Management Committee.

Donors also removed a layer of oversight by shifting toward a model of direct financing of the Cambodian side of the Court. Until late 2009, UNDP’s representative office in Cambodia administered most international grants to the Cambodian side of the Court. By then, however, donors had increasingly moved to provide funds to the Cambodian Government directly.

The extent to which donors have contributed to the ECCC has clearly affected the nature of donor oversight. During its formative years between 2006 and 2009, Japan provided nearly 50% of all contributions to the Court, followed by Australia at 8% and France at 6%. The United States and United Kingdom combined for just 6%. Although the U.S. share rose slightly to 8% by mid-2013, Japan remained the dominant donor at 41%. Perhaps more importantly, Japan has accounted for more than 60% of all bilateral donations to the Cambodian side of the Court, whereas European states have contributed much less, and the United States has not contributed any funds to the national side. This is in stark contrast to the SCSL, which between 2002 and 2009 depended heavily on funds from the United States (29%), United Kingdom (16%), Netherlands (12%), and Canada (9%). Japan’s relatively hands-off diplomatic approach at the ECCC contrasted with the more assertive Anglo-American engagement with the SCSL.
Cambodian Government Oversight

The Cambodian Government also has an oversight mechanism in place for its side of the court, headed by Sok An, who has chaired the Royal Government Task Force on the Khmer Rouge Trials since negotiations for the ECCC began in the late 1990s. In addition to his formal position as chair, Sok An has had a close working relationship with key ECCC administrative personnel, such as his longtime advisor Helen Jarvis, who headed the Public Affairs Section and Victims Unit, former OA Director Sean Visoth, and the omnipresent Rong Chhorn, who has filled a number of administrative roles at the Court. Sok An has also served as the key interlocutor for senior UN and donor officials on sensitive issues facing the Court. He and other senior Cambodian officials, including Prime Minister Hun Sen, have been much more closely focused on the ECCC than anyone at the highest levels at UN headquarters. On the Cambodian side, oversight problems have not occurred due to a lack of engagement—they have come from too much political interference.

Structural Handicaps

All new tribunals face challenges when building a new bureaucracy, but the process of administering the ECCC has been particularly contentious and problematic. In a private June 2007 report, two UN-appointed experts—former SCSL Registrar Robin Vincent and former ICTY Chief of Administration Kevin St. Louis—argued that the ECCC’s hybrid 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.” They cited divided administrative authority as a serious hindrance to core functions such as witness protection, public communications, and document translation.

Tolbert notes that the administration was “totally bifurcated” with “little communication” between national and international staffers sitting on opposite sides of the hall—an arrangement inimical to the goals of a hybrid court. That bifurcation has caused inefficiency and contributed to frequent misunderstandings. Within the first year of its operations, the Court came under fire for human resources mismanagement and corruption. Each problem arose partly from the decisions of individual agents, but the Court’s structural design played a key enabling role.
FUNCTIONAL CHALLENGES: HUMAN RESOURCES

One of the ECCC’s first major administrative problems pertained to human resources. Any hybrid court has the difficult task of fusing national and international personnel with very different skill sets, experience, work styles, and expectations. International personnel often have stronger formal technical training and more experience pertaining to transitional justice, whereas national officials generally have superior knowledge of local language, culture, and administrative practices. How those skills are prioritized in terms of hiring, pay, and seniority is a sensitive matter. It affects the court’s efficiency, the relative standing of national and international staffers, and staff morale. Control over personnel decisions is thus one of the most powerful levers for influence on the court.

The fact that each side of the ECCC hired its staff separately meant that hiring standards and procedures were bound to differ. The UN side used its normal formal recruitment process, while OA Director Sean Visoth approved a draft summary recruitment manual in June 2006 for the Cambodian side. Both got off to a quick start, leading court monitors from the Open Society Justice Initiative (OSJI) to conclude that the ECCC was “coming together faster than any other past international tribunal.” Yet OSJI soon expressed concerns to donors about the opacity of Cambodian hiring practices. UNDP responded by requesting an audit focusing on the Cambodian side of the OA.

Problems on the Cambodian Side

Completed in June 2007, the audit was scathing. It argued that the ECCC’s divided structure inhibited effective management, as international section heads were deliberately kept away from recruiting, evaluating, and even keeping track of Cambodian staffers’ time in the office. It found that out of 29 Cambodian personnel files reviewed, 18 staff “did not meet the minimum requirements specified in the vacancy announcements in terms of either academic qualifications or working experience” and that “recruitment was not performed in a transparent, competitive and objective manner.”

The auditors criticized Cambodian staff salaries as well. In 2004, UN and Cambodian negotiators had agreed that professional Cambodian staffers would be paid at 50% of the UN salary scale used by UNDP, but in 2006 Deputy Prime Minister Sok An approved a tax exemption for all Cambodian ECCC
staffers, which effectively raised their salaries above anticipated levels. The audit recommended that the UN lower Cambodian salaries accordingly and consider withdrawing from the tribunal if the Cambodian Government resisted measures the UNDP deemed necessary to maintain the integrity of the Court. Most dramatically, it suggested nullifying all past recruitments and launching a new hiring process under “close supervision of UNDP.”

Cambodian officials issued a response acknowledging “weaknesses” as the ECCC began its work but objecting to the “unbalanced” critiques of ECCC hiring practices, the auditors’ decision to cancel key exit interviews, and the audit’s recommendation for closer UNDP oversight. They viewed control over the hiring and management of national staff as part of the RGC’s sovereign authority over its side of the OA—authority recognized in the Framework Agreement. The Cambodian reply said the UNDP recommendations were:

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.

The Cambodian Government did not perceive authority for hiring as a narrow technical matter. It was a fundamental part of the political deal surrounding the Court.

UN officials acknowledged that fact and avoided pursuing structural reforms that could arrest the entire process. UNAKRT spokesman Peter Foster noted that agreement on the tribunal had taken many years and that “we certainly don’t want to reopen that.” He said that the UN could take a stronger “leadership role” but “[that] doesn’t necessarily mean that we have to renegotiate part of the contract or part of the agreement or change the basic fundamentals of how we’re structured.” Instead, he advocated changes “within the existing structure” providing “greater assistance and greater advice to our Cambodian colleagues.”

Criticism of local staff pay and qualifications were also sensitive. As in many postconflict environments, there were relatively few national applicants with relevant judicial experience. Nevertheless, some Cambodians resented the implication that they were less qualified to work at the ECCC or deserved
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lesser pay. In April 2007, Secretary-General of the Cambodian Bar Association Ly Tayseng demanded that Cambodian lawyers at the ECCC should receive the same pay as international lawyers. “Cambodian lawyers are more qualified than foreign lawyers who don’t speak Khmer and don’t understand the working culture of Cambodia,” Ly said. “It’s unfair. It’s discrimination.”

Trial Chamber judge Thou Mony added that the wage differential demeaned Cambodian staffers. The ratio did not change, but it revealed a challenge that all hybrid tribunals face—adopting pay scales that balance the needs of attracting talent, managing costs, and showing respect for local competencies.

Oversight Failures

The UNDP audit argued that flawed hiring practices were related to the ECCC’s split administration and weak oversight, especially on the Cambodian side. It noted that the ECCC’s 2007 budget included 80 more staff positions than the ECCC and donor representatives planned in June 2006. Although ECCC officials “could not provide any justifications for the significant increase in the staffing,” UNDP officials were “not aware of the additional posts,” and the additional positions had “not given rise to comments or questions by the members of the project board.”

The audit noted the potential “conflict of interest” of having the OA Director chair a Project Board intended to oversee and monitor its activities, and recommended that someone else chair the board. The Cambodian Government objected by arguing that no chair could be “considered neutral”—a concession that the OA Director was not—and noting that “the Project Board operates on a consensus basis,” preventing the Chair from acting unilaterally. While correct, that consensus requirement also meant the OA Director could block actions by other members of the board.

Oversight by the Friends of the ECCC donor group was also weak, partly due to similar structural flaws. In late 2006 and early 2007, the group did not even discuss the concerns about the possible mismanagement of human resources “due to the presence of ECCC staff throughout the meetings.” The structure of the Friends group—comprised only of bilateral donors and the ECCC staff, but lacking engagement from other UN agencies or civil society—militated against consideration of that serious issue.

Reforms in Human Resource Procedures

While the UNDP audit was ongoing, the ECCC and Project Board took remedial steps. In March 2007, the ECCC’s Personnel Section produced a Personnel
Handbook for the Cambodian side of the Court including guidelines on recruitment, pay, promotion, and performance evaluation. The Personnel Section revised it in August after the release of the UNDP audit. The Project Board did not point fingers but noted in September that it was “taking measures to boost the ECCC’s capacity.” In early 2008, the Project Board commissioned a review from the international auditing firm of Deloitte and Touche to assess the ECCC’s reforms. Deloitte’s report, issued in April, found major improvements. It noted that some “handholding” and “capacity building” would be needed to help the ECCC meet international standards, particularly on the national side, but praised the “willingness and commitment amongst ECCC staff to meet the expectations of the international community” and found that “robust” human resources systems had been implemented that would “address previous shortcomings” and “minimize the risk of questionable [human resources] practices occurring in the future.” It also found that the pay scale for Cambodian staff was “at the top of the market” but not unreasonable.

UNDP and the Project Board issued a press release indicating that they were “quite satisfied” and commended the ECCC on its reforms. European Commission chargé d’affaires Rafael Dochao Moreno, a key member of the Project Board, said, “we [now] have a system that can work.” Since that time, at least two key Cambodian appointees have gotten their jobs without competitive recruitment in violation of the new rules established. However, international staff has helped select many Cambodian staff members, and the Cambodian side of the ECCC has dealt with human resource management more transparently and effectively.

Thus, the split administrative structure delayed but did not prevent the development of reasonably sound human resource practices. Although oversight was weak at the outset and civil society had to take the lead in calling attention to problems, UNDP, the Project Board, and the ECCC all responded relatively quickly. This qualified success story contrasts with the Court’s handling of the more contentious dispute surrounding reports of corruption.

**CORRUPTION AND KICKBACK ALLEGATIONS**

Concerns about corruption had been present since the introduction of the concept of a hybrid court in Cambodia. They came to the fore in early 2007, when the most salient corruption allegations to face any internationalized court arose
at the ECCC. Media reports and an Open Society Justice Initiative press release included allegations that Cambodian staffers had to kick back a sizable share of their salaries in exchange for their jobs.\textsuperscript{116} Again, OSJI called for an investigation.\textsuperscript{117} Cambodian officials denied the allegations and accused OSJI of “bad faith and bias.”\textsuperscript{118} Sok An accused OSJI of trying to smear the Cambodian Government’s reputation,\textsuperscript{119} and the Cambodian Government considered closing OSJI’s local office.\textsuperscript{120}

Considerable evidence supported the allegations. In addition to a video of a Cambodian ECCC official describing the kickback scheme, a U.S. Embassy cable noted in March 2007 that “some ECCC international staff members are well aware that the practice exists because their Cambodian colleagues have told them so.”\textsuperscript{121} Donors were displeased with the public revelation of the allegations. In a meeting with former U.S. Ambassador for War Crimes Issues David Scheffer in mid-March, key donors “expressed disappointment over how OSJI has conducted itself and precipitated its current problems with the RGC.”\textsuperscript{122} French and Japanese officials did not comment or offer “signs of support for joint action” in the form of a demarche regarding OSJI’s possible expulsion, and Scheffer sought assurance from OSJI that future disclosures of information potentially harmful to the ECCC would be given to the Court before the press. While donors focused on managing OSJI’s fate and the drafting of the Internal Rules, “the allegations over corruption and kickbacks [were] nearly forgotten.”\textsuperscript{123}

The UNDP audit also skirted the corruption issue in the face of Cambodian Government resistance to an investigation. UNDP later issued a statement indicating 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.”\textsuperscript{124} Thus, UNDP did not consider itself entirely barred from addressing the corruption issue but chose not to pursue the matter. International judges at the ECCC were also aware of the allegations but believed it was not within their purview to intervene\textsuperscript{125}—again drawing attention to the hybrid structure that set Cambodian administrative matters apart. More reports of the kickback scheme surfaced in the media in late 2007 and early 2008.\textsuperscript{126}

In July 2008, the UN set up a new anticorruption scheme for the international side of the Court featuring appointment of an international ethics officer and a process for receiving and reviewing complaints.\textsuperscript{127} Although designed for the international side of the Court, a number of disgruntled Cambodian staffers
confidentially complained to UN officials about ongoing kickback demands on
employees. UNDP froze the funds it administered to the Cambodian side of
the tribunal. In August, at Special Expert David Tolbert’s request, the UN’s
Office of Internal Oversight Services began a confidential “review.” Although
a formal investigation of the Cambodian side would likely have exceeded the
UN’s legal purview, the “review” was a means to pressure the Cambodian Gov-
ernment to respond to corruption allegations. Tolbert found the allegations
credible and sent a confidential report to the Cambodian Government in Sep-
tember, recommending an RGC investigation.

Cambodian Government spokesman Phay Siphan denied any corruption
on the national side and argued that allegations were merely efforts to discredit
the Government or the tribunal. The RGC insisted that it alone had the juris-
dictional authority to investigate allegations against its officials. It did, however,
issue public assurances, create a new anticorruption committee, and name
two Cambodian “Ethics Monitors” to receive complaints of corruption and re-
port directly to Sok An.

Office of Administration Director Sean Visoth was at the center of the
controversy. Multiple reports named him as the recipient of kickbacks within
the office. Tolbert privately recommended Sean Visoth’s removal, and the UN
Office of Legal Affairs in New York supported him in this. Tolbert communi-
cated that recommendation to Sok An in a private meeting. Sok An did not
agree initially but said after some discussion that Sean Visoth would depart
from the tribunal “on my timetable, not yours.” In November, Sean Visoth
went on extended medical leave and did not return to the tribunal—a signifi-
cant diplomatic victory for the United Nations.

The Cambodian Government did not acquiesce to an independent UN
investigation or UN-led reporting process. In February 2009, UN Assistant
Secretary-General Peter Taksoe-Jensen visited Phnom Penh to meet with Sok
An, and the two issued a Joint Statement revealing the “essential elements of a
structure” to prevent corruption, including “parallel national and international
mechanisms to receive complaints.” Their interpretation of that language dif-
fered, however. Taksoe-Jensen argued that Cambodian staffers should be able
to complain either to national Ethics Monitors or a new UN-appointed inter-
national Ethics Monitor. Sok An insisted otherwise, emphasizing Cambodian
sovereignty and the plain text of the statement.

Donors pushed for a swift resolution to the dispute, eager to avoid delays in
the first trial as funds dwindled on the Cambodian side of the Court. Some key donors favored the Cambodian Government’s position on the anticorruption system. The French ambassador said privately that “Cambodia has real arguments,” and his Australian counterpart said, “Cambodia is in the right.” Japan’s Deputy Chief of Mission argued that donors should provide funds to keep the Cambodian side from depletion and that withholding funds had gotten Cambodia’s attention but increasingly looked like “international blackmail.” The French and Australian governments agreed, and the U.S. ambassador added “moral support.” Japan thus injected $200,000 to pay the salaries of 251 Cambodian staff members, and Australia requested that UNDP release $456,000 of its frozen funds.

Sok An continued to insist on separate anticorruption reporting structures, despite a call from the U.S. ambassador urging him to “take the deal.” U.S. Embassy officials concluded that the Cambodian proposal was inadequate and that “it may fall to the donors to push the Cambodians to take that next step.” Instead, donors eased off on the pressure. In April, Japan authorized a release of a further $4.17 million to the Cambodian side of the tribunal. Late that month, key donor states met and converged on taking an “even-handed approach to the negotiations” between the UN and Cambodian Government and pressing for a prompt resolution involving mutual compromise. U.S. Ambassador Carol Rodley encouraged donors to “send a message to the UN and Cambodia that, as a group, the donors want the two sides to engage seriously and get past the one last sticking point in the negotiations”—namely, the mechanism whereby Cambodian staffers could issue confidential complaints of misconduct.

The Friends group issued a public statement in May praising the ECCC’s progress on anticorruption measures. Shortly afterward, U.S. Ambassador-at-Large for War Crimes Issues Clint Williamson traveled to Phnom Penh to broker a deal. After consulting with Japanese officials, he proposed a model to Sok An featuring a single counselor who would receive all complaints. Sok An initially objected, assuming that the proposed position would be international, but warmed to the idea when Williamson raised the possibility of a Cambodian appointee. The core donors embraced the proposal the following day.

During the ensuing weeks, donors and the Cambodian Government discussed who the appointee would be and the importance of independence. In August, the Cambodian Government and United Nations issued a press release announcing that Uth Chhorn, the Auditor General of Cambodia, would fill the
role.\textsuperscript{150} Uth’s appointment reflected a relatively weak, face-saving UN response to Cambodian obstruction and donor ambivalence. One expressed aim of an official reporting mechanism was to provide “full protection of staff on both sides of the ECCC against any possible retaliation for good faith reporting or wrongdoing.”\textsuperscript{151} Uth’s status as a senior Cambodian official undermined the likelihood that Cambodian staffers would feel safe reporting malfeasance. Moreover, Uth had shown little transparency as auditor-general of a domestic system riddled with corruption.\textsuperscript{152}

Since the appointment of the Independent Counsellor in August 2009, no new public allegations of administrative corruption have surfaced at the ECCC. At the time of Uth’s appointment, a confidential U.S. diplomatic cable asserted, “[T]he ECCC is now likely Cambodia’s first corruption-free court.”\textsuperscript{153} In 2010, Secretary of State Hillary Clinton noted in a confidential cable that:

[the ECCC had] made considerable progress on strengthening management systems and eliminating corruption. Notably, there have been no allegations of corruption within the court administration since the removal of Cambodian Chief of Administration Sean Visoth in December 2008.\textsuperscript{154}

Thus, international pressure curbed public allegations of kickbacks at the ECCC—though anecdotal reports of other types of financial corruption continue.\textsuperscript{155} In the best light, the Court’s hybrid composition gave Cambodian staffers a channel through which to complain. Such complaints would have been much less likely in a purely domestic court. To some extent, UN and domestic responses to the corruption allegations helped infuse international standards into a Cambodian judicial entity—an explicit aim of the hybrid model.

Nevertheless, the corruption issue showed more problems than strengths of the ECCC’s hybrid structure. Corruption at the ECCC was not predetermined by the Court’s hybrid form—misconduct required human agency, as did official responses to the allegations—but the tribunal’s structure facilitated corruption by segregating the two sides of the Court and providing for weak independent oversight. The Court’s structure also hampered UN efforts to deal with corruption allegations swiftly and effectively.

Despite substantial evidence of the kickback scheme, no serious investigation was mounted. Faced with the possibility that the Khmer Rouge trials would grind to a halt, key donors—above all Japan and Australia—relieved pressure
on the Cambodian Government in spring 2009 by releasing funds to the Cambodian side and voicing support for the tribunal’s anticorruption efforts. Those decisions helped keep the ECCC functioning, but it also sapped the UN side of negotiating leverage and made a serious investigation much less likely. Donors clearly contemplated that fact. A confidential U.S. cable reported from a Friends group meeting in May 2009:

[A]s the French co-chair underscored, 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 in order to maintain the international standards expected of it.

The situation was in some respects reminiscent of the negotiations to establish the tribunal. With the UN and Cambodian Government deadlocked, donors prioritized the continuation of the accountability process. Donor interest in proceeding toward justice was legitimate, both from an efficiency standpoint and to pursue long-overdue justice, but the RGC was able to use that interest to avoid bargaining concessions to the United Nations. Although new anticorruption measures were put in place, past acts were largely swept under the rug. Moreover, the anticorruption mechanism established has been secretive. In March 2010, Uth announced that he would publish a report of his work, but he reversed course in October 2010, when he indicated that UN officials had instructed him to keep his report confidential. Not until October 2012 did Uth Chhorn establish office hours at the ECCC during which staffers can raise concerns. It is unclear whether corruption complaints have ceased or whether new allegations simply have not come to light.

FUNCTIONAL CHALLENGES: FUNDING AND FINANCIAL MANAGEMENT

From a financial standpoint, a tribunal’s success depends both on its efficient use of funds and its ability to access sufficient funding to meet its legitimate needs. One possible advantage of a hybrid court is that proximity to crime sites and survivors and reliance on lower-paid national personnel could trim the cost of proceedings. Indeed, donor fatigue from the costly ICTY and ICTR con-
tributed to the emergence of hybrid courts. Yet pursuing lower-cost justice also carries risks, as underfunded tribunals cannot meet their stated functions effectively. Indeed, the tribunals that are not endowed with predictable funding streams are likely to be the very ones donors are least committed to financing voluntarily.

The ECCC’s unique hybrid structure has contributed to both challenges. As discussed in chapter 2, its complex structure has made the Court much less efficient than it might have been. On the other hand, the ECCC’s heavy reliance on voluntary donor contributions, split funding model, and structural vulnerability to problems such as corruption and political interference have undermined its stability and contributed to frequent budgetary crises.

Cost (In)efficiency

Hybrid tribunals have been created with the expectation that they will be less expensive than fully international courts for the reasons noted above. Like most international and hybrid courts, the ECCC has been much more expensive than originally foreseen. The annual cost of its operations has risen over time, amounting to $173.3 million expended by the end of 2012 (see Figure 1). In a country where the annual budget for the entire national judicial system was a mere $3.3 million in 2007, the cost of the trials has brought criticism. This was foreseen early in the process. Court officials expect costs to trend downward after 2013, but projecting cost savings in future years is a routine—and often unfulfilled—part of bureaucratic budget planning.

In 2012, Brad Adams of Human Rights Watch stressed that “[a]fter five years and more than $150 million, the court has tried just one defendant.” Helen Jarvis, a key advisor to the Cambodian Government, countered that the funds spent were “not a great amount of money.” She added, “It’s about the cost of a bridge. Is one bridge worth more than justice for so many? I don’t think so.”

The ECCC has been considerably less expensive than fully international courts in terms of total cost but much less of a bargain when one considers the number of persons indicted or the number of cases completed by each court against charged individuals (see Table 1). Crude cost comparisons between tribunals inevitably gloss over variables that provide legitimate bases for variation. Some tribunals perform more complex functions than others, require more extensive investigations, or operate in more expensive areas due to costs of living
or security costs. Start-up costs for a new judicial institution also can be considerable. Still, it is clear that unless its number of completed cases rises unexpectedly, the ECCC will not be considered a cost-saving institution.

The ECCC is an expensive hybrid court, even relative to Sierra Leone—the most costly mixed tribunal to come before it. This is a lesser problem than pursuing justice too cheaply, as shown by the experience of the Special Panels for Serious Crimes in East Timor. As David Cohen argues, their trials were “[h]andicapped from the beginning by a debilitating lack of resources.” Their 2001 budget was a mere $6.3 million, of which $6 million went to the prosecution, and only $300,000 was provided to the rest of the court. The average

<table>
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<th>Years of Operation</th>
<th>Avg. Cost/Year</th>
<th>Persons Convicted or Acquitted</th>
<th>Cost/Person Convicted or Acquitted</th>
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<td>$23 m</td>
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Source: Data from the ICTY, ICTR, ICC, ECCC, SCSL, and UN websites.
Note: Costs in U.S. dollars (unadjusted for inflation).
annual budget for the Special Panels between 2003 and 2005 was just $4.8 million. The Special Panels even lacked an appeals court for nearly two years due to a lack of funds. Their Serious Crimes Unit was also grossly underfunded. Some of its investigators had caseloads including more than 300 murders. For months, the Unit had no forensic pathologist despite collecting 30 sets of human remains for examination. A shortage of skilled translators hampered efforts at all judicial levels. In May 2005, the Security Council abruptly cut all funds for the Special Panels, which shut their doors soon afterward. The East Timor model was cheap, but it was hardly a model for effective financing.

A more promising example of cost-efficient justice comes from Bosnia-Herzegovina. The War Crimes Chamber (WCC) in Bosnia and Herzegovina is a tribunal rooted more decisively in the local court system, but with support from a minority of international judges, prosecutors, and staff. The WCC has had a budget of roughly $20 million per year, similar to the SCSL and ECCC, but has eight trial chambers and more than 50 judges processing several hundred cases per year. The WCC’s example shows that efficiency gains are indeed possible when the host government has the will and capacity to handle cases reasonably effectively. In Cambodia, UN officials wisely rejected the possibility of playing an even more junior part, and higher costs were a predictable result of heavier international engagement.

A greater concern than the ECCC’s total price tag is the inefficient use of funds that the Court has received, which could usefully have been redeployed to other ends—particularly outreach and victim participation. Some of the Court’s inefficiency is built into its structure—such as the duplicative investigations and appeals discussed in chapter 2 and its cumbersome administrative structure. 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. In other instances, the lack of clear responsibility for tasks has driven up costs.

For example, the Court’s construction of a physical facility was delayed by ambiguities in its split authority structure. Under the Framework Agreement, the Cambodian Government is to “provide at its expense the premises . . . [and provide] utilities, facilities, and other services necessary for their operation.” The United Nations bears the costs for “utilities and services,” however, making it unclear precisely how to divide responsibilities. Moreover, UN-appointed officials believed that their role as guarantors of international standards entitled them to intervene in the planning and construction of certain aspects of the
facilities—such as the detention center and sites for defense and witness support services. As a consequence, after a full year of operations, the ECCC had not finished its courtrooms, installed audio/video equipment, or established an effective translation system.

A Tower of Babel

Translation has also presented a serious challenge for the ECCC. In most mass crimes courts, staffers, participants to the proceedings, and observers converge from diverse national or ethnic backgrounds. English and French have been the dominant currencies of communication. They are the official languages of the ICTY and ICTR and the working languages of the ICC. With the exception of the SCSL, which adopted English as its official language, hybrid courts have had to deal with multiple languages to accommodate strong national participation. The East Timor Special Panels Court had the greatest burden of four official languages: English, Portuguese, Bahasa Indonesia, and Tetum. The STL uses English, French, and Arabic. The ECCC also has three official languages: English, French, and Khmer.

Language issues have bedeviled the Court from its inception. In addition to the communication divide that tends to result between many national and international officials, the Court’s international side is also somewhat split between Francophone and Anglophone personnel, not all of whom are mutually conversant. At initial training sessions in 2006, French judicial officials complained that sessions were conducted in English and Khmer. Years after its inception, the ECCC still lacks the capacity to undertake the prodigious task of translating all of the documents generated by the parties or referred to in their submissions into three languages. In May 2009, ECCC administrators reported that the Court was still short-staffed by one-third, particularly lacking French interpreters. Most Cambodian students now elect to study English as a foreign language, making French-speaking translators a scarce commodity. The ECCC thus had to resort to a cumbersome “relay system”—Khmer to English to French or vice versa—to facilitate discussion with French lawyers on the defense teams.

One Cambodian staffer laments that translation “has generally been consuming more than double” the time that would be required to proceed in a single language. Craig Etcheson, who served on the staff of the Office of the
Co-Prosecutors, agrees that translation has been “one of the greatest challenges in the entire exercise” and has been “immensely time-consuming.” Translation issues have arisen on numerous occasions in the courtroom and prompted repeated challenges from the defense, especially the Khieu Samphan team, which has demanded complete translations of documents into French and has faulted inaccuracies in official translations. The Court rejected Khieu Samphan’s request for a complete translation of materials, reasoning that doing so would take too much time, but his request that the Court review transcript translations is compelling, since French is both an official language of the Court and the language of his international Co-Lawyers. Khieu Samphan’s Co-Lawyer Anta Guissé asserts that some translations have included important mistakes, and argues that defense teams should not have to read documents in all three languages to be sure of their meaning. As with many other aspects of the Court’s operations, efficiency concerns and scarce resources are in tension with the demands of a fair trial.

The inclusion of three official languages may have complicated the Court’s work unnecessarily. 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.” One official adds that some ECCC personnel refer to French as “the third superfluous language.” The decision to include French may have been politically expedient for the ECCC, but given the paucity of French-language documents and English proficiency of most French lawyers involved, in retrospect its inclusion appears to be one of the more avoidable sources of inefficiency at the ECCC.

Difficulties in Financial Management

The ECCC’s funding structure has introduced challenges in financial planning and management as well. Budgets have to be prepared by the Cambodian and international sides separately and shuttled from one side to another for comments and modification as they are reconciled. In addition, finances have come from a number of different channels. The international side has received funds from more than 20 UN member states and a handful of private donors. The national side has been funded through contributions from the Cambodian Government, direct bilateral aid from more than 10 different donor states, foreign aid channeled through UNDP and the Cambodian Government, and dis-
bursement of multilateral funds managed by the United Nations. Donors have differing requirements for their grants to the ECCC, including auditing and reporting requirements and grant periods.

The ECCC’s financial management challenges are compounded by the lack of a centralized international oversight mechanism. At the SCSL, the Management Committee monitors all court finances and reports to the UN Secretary-General. At fully international courts, reports go to the United Nations. The diversity of the ECCC’s funding sources places a heavy burden on the OA’s Budget and Finance Unit. Financial management is considerably easier at domestic courts—which receive funds exclusively from the government—or fully international tribunals that have their funds channeled through the United Nations. The OA must report separately to the Cambodian Government, UN entities, and individual foreign donors—consuming resources that could be better spent on legal or outreach functions.

Unpredictable Funding Streams

The ECCC has also faced the challenge of unpredictable and sometimes inadequate funds arising from its reliance on voluntary donor contributions. Its initial budget was determined only after the passage of the ECCC Law. UN and Cambodian officials agreed that the two sides would split a budget of $56.3 million spread over the tribunal’s three-year expected lifetime. International donors would pay roughly $43 million, and the Cambodian Government would fund the remaining $13.3 million. That agreement quickly came under strain, however. After an intergovernmental pledging conference in New York in March 2005, roughly 90% of the required donations on the international side were in place. Japan was the largest initial donor, contributing $21 million. Other major bilateral donors included Australia, France, Germany, and the United Kingdom. The Cambodian Government announced that it could contribute only $1.5 million, however. Cambodian officials argued that their most important contributions would be in-kind donations, such as providing a physical site for the tribunal. Foreign donors provided the rest, and this precedent set the stage for a series of episodes in which funds for the Cambodian side would nearly expire before an international rescue—a game reminiscent of the negotiations to create the tribunal.

Just months after the tribunal began operating, it became clear that the ECCC would far exceed the rosy initial cost estimates. That was not a sur-
prise, both because such institutions are habitually sold to donors with overly optimistic projections and because initial budget plans were based on unrealistic estimates by planners with little or no experience managing civil law or mass crimes trials.\textsuperscript{196} Since then, the ECCC has lurched from funding crisis to funding crisis. In January 2008, ECCC officials sent a revised budget to donors requesting $114 million more to fund the tribunal’s work through March 2011. As discussed above, most international donors were unenthusiastic amid allegations of mismanagement and corruption. Many demanded justification for the increased costs, and some withheld funds to press for reforms to the ECCC’s administration, but Australian and French infusions helped keep the court functioning.\textsuperscript{197}

The ECCC later shaved its budget request, requesting an additional $46 million through 2009—$36 million for the international side and $10 million for the Cambodian side.\textsuperscript{198} Pledges from Germany ($4.3 million) and the United States ($1.8 million) on the international side and from Japan ($2.9 million) and Cambodia ($1 million) on the domestic side and other key donors met some of that request, but the tribunal continued to require urgent fundraising to avoid depleting its resources.\textsuperscript{199}

Another funding impasse occurred in early 2009 amid the debate over an anticorruption mechanism. A Japanese grant of $21 million helped fill the shortfall on the international side, and as described above, funds on the Cambodian side dwindled before Australia and Japan infused more resources. Further crunches occurred in late 2010, when Cambodian staffers had to go without salaries pending donor replenishments,\textsuperscript{200} and similar crises occurred again in late 2011, 2012, and 2013.\textsuperscript{201}

In facing funding uncertainties and impasses, the ECCC is certainly not alone. The SCSL also was not created under Chapter VII authority and thus lacked access to assessed contributions from UN member states.\textsuperscript{202} Yet the existence of a donor-led Management Committee and a stronger UN role in the Sierra Leone tribunal helped the SCSL access international funds. The UN General Assembly’s budget committee took $16 million from its “subvention fund” of unused assessed contributions to help the SCSL through a budget crisis in 2004\textsuperscript{203} and again used subvention funds to help the SCSL overcome serious funding shortfalls in 2011 and 2012 amid its final trial against Charles Taylor.\textsuperscript{204} No such subvention funds have been forthcoming for the ECCC.

ECCC officials and staff present varying views on how funding uncertain-
ties have affected the Court’s functional efficacy. Cambodian Co-Investigating Judge You Bunleng asserts that the funding crises “affect, to some degree, the motivation and budget plans of staff and their families,” but staff in the Office of Co-Investigating Judges still exhibit “high commitment in fulfilling their duty” and “do not stop working . . . regardless of getting their salary on time.” Etcheson asserts that in the Office of the Co-Prosecutors, “with one exception, our national colleagues bit the bullet and did the work when they weren’t being paid” but that “it never did them any good in morale,” especially as months passed. One Cambodian staffer believes that “the international community would not let the Court’s work collapse,” so funding rescues are expected. By contrast, other staff say that funding impasses “really affect the Court’s work,” because staff lose motivation, depart, and need to be replaced—which causes delays—and because “without clear funding,” the Court’s offices have “unclear work plan[s].”

Both inefficiency and funding crunches have contributed to the underfunding of some important ECCC functions. By the end of 2012, the ECCC employed 176 international personnel and 292 Cambodians and had spent $173.3 million since its inception—$131.2 million funded through the UN side, and $42.1 million through the Cambodian side. By that point, the ECCC had spent approximately $135 million for total staff salaries, other staff costs, and nonstaff compensation; roughly $25 million for supplies, furniture and equipment, facilities alteration, general operating costs, and various contract services; but much smaller amounts for training, legacy, outreach trips, defense and victims support, and experts and witnesses.

Funding shortfalls have also affected the Court’s core judicial operations. The UN has cut many positions to reduce costs but has lost key staff members as a result. In October 2012, the Trial Chamber announced that staff cuts required it to hear courtroom proceedings only three days each week—a measure it acknowledged would further delay Case 002, its most important trial. UN Special Expert David Scheffer warned of further impending layoffs, and Secretary-General Ban Ki-moon said that if donors did not fill a funding shortfall of several million dollars in the Court’s 2012–13 budget, the crisis “could jeopardize the judicial proceedings.” Indeed, it has. In December 2012, international Co-Prosecutor Andrew Cayley had to tour Europe to help the Court raise funds to avoid bankruptcy. This is hardly the function one would wish for a prosecutor to undertake in the midst of the Court’s headline trial. In March 2013, approximately 20 Cambodian translators and interpreters went briefly on strike.
after going three months without pay, delaying the proceedings in Case 002 by more than a month. In July, the Court let 10% of Cambodian staff go to save money, but new threats of strikes came the following month after still another suspension of pay due to gaps in funding for the Cambodian side of the Court. In September, 134 Cambodian staff went on strike for three weeks until a UN loan to Cambodia covered their summer back pay. In October, the Cambodian Government pledged to fill the $1.8 million shortfall on the national side until the end of the year, but further funding gaps are almost certain in 2014.

Throughout the process, the Cambodian Government has funded less than 20% of the budget for the national side, relying on foreign donors to pay Cambodian personnel at the Court. The hybrid nature of the Court enables the Cambodian Government to force donors’ hands, because as Council of Ministers spokesman Ek Tha stressed during one recent pay freeze, “the international side will not be able to work without assistance from the Cambodian side.” Some believe the Cambodian Government wants the Court to close. In early 2013, after national judges and staff had gone nearly three months without pay, one Cambodian staffer said: “The government won’t pay these salaries. They just want the court to shut down . . . By creating this situation, they just want to embarrass the U.N.” At a minimum, Cambodian officials have been willing to take the risk that the Court will close—or that the proceedings will drag out until all of the defendants die—while donors continue to blink first, providing just enough funds to keep the national side afloat.

Funding problems relate closely to broader political disputes at the Court. In 2011, the ECCC’s administration faced pressure to wind down the work of the Office of the Co-Investigating Judges (OCIJ) in order to pour all available funds into Case 002. The Defence Support Section was initially refused funds for suspects in Cases 003 and 004, and more than one donor has reportedly sought to earmark funds for Case 002. In October 2012, Scheffer noted that a donor had withdrawn its pledge to fill the Court’s 2012 shortfall. According to rumors in Court circles, Japan was that donor and withdrew its pledge when the UN rejected Tokyo’s request to earmark funds for Case 002 only. Earmarking for an international court can easily verge into political interference, especially when it limits or withholds resources for particular cases. Some human rights advocates warned donors against imposing such limits in the lead-up to the 2012 Session of the Assembly of States Parties to the ICC. A court relying on voluntary contributions is particularly vulnerable.

Should the ECCC decide to proceed with Cases 003 and 004, the cost of
the process will rise again. Indeed, the Court revised its 2012–13 budget to add or reinstate 18 positions in the OCIJ after the new international CIJ Mark Harmon arrived in October 2012 and indicated his intention to press forward with further investigation of Cases 003 and 004—investigations often stymied during the politicized deadlock over those cases since 2009. Donor demands for earmarks will likely escalate over time, further eroding what little remains of the Court’s independent prosecutorial discretion.

CONCLUSION

The structure of the ECCC has posed serious challenges to effective administration and financial management. The United Nations agreed unenthusiastically to a partnership with a government fixated on maintaining a strong measure of political control. The ECCC’s split administrative and managerial structures have made it difficult for UN officials to deal decisively with problems arising on the Cambodian side of the court. Administrative inefficiencies and impasses have also lengthened the process, made it more expensive, and sapped donor interest.

The United Nations has sometimes been passive in dealing with administrative and financial problems at the ECCC, ambivalent about the Court as a whole, and unwilling to take strong ownership of a process it does not control. This is reminiscent of the situation in East Timor. Former Chief Justice of the Special Panels Phillip Rapoza suggests that:

[T]he question of ownership overlapped with the issue of control and neither the U.N. nor East Timor wished to take responsibility for what they did not consider wholly their own. In that sense, the hybrid process was too much a bastard child for either to claim paternity.

Deputy Director Knut Rosandhaug, the most senior UN administrative official, has reiterated the UN’s position that gives considerable deference to the Cambodian side of the Court, differentiating the ECCC as “a national court with UN backing, whereas other war crimes courts are run by the UN[.]” The division of authority between DESA, OLA, and UN officials in Phnom Penh has also been ambiguous, contributing to the lack of clear international owner-
ship of difficult administrative decisions.\textsuperscript{227} Despite the creation of a Special Expert position, donors generally have taken a hands-off managerial approach as well, seldom using the Friends group to exert strong managerial guidance, even when such guidance is sorely needed. Without tougher, more concerted donor engagement, the United Nations is in a difficult structural position indeed.\textsuperscript{228}

While it is true that changes to the structure of the Court would require renegotiation, the UN does have considerable capacity to fulfill its partnership obligations as outlined in the Agreement.\textsuperscript{229} The international responses to human resources mismanagement and the kickback scandal at the ECCC show that pressure from the United Nations and donors can drive reforms even within a difficult structural environment and in the face of domestic stonewalling. In administration and finance, as in other aspects of the Court’s operations, the United Nations and key donors have been eager to trumpet successes but too ready to distance themselves from the ECCC when adverse developments occur. The structure of the tribunal certainly provides incentives and opportunities to do so, but it does not predetermine that outcome.