Chapter 5

CASE 002—THE CENTERPIECE CASE AGAINST SENIOR LEADERS

“Cutting the Head to Fit the Hat”

Case 002 is likely to feature the Court’s last trial and is viewed by many as its centerpiece. It is considered the most important Khmer Rouge case because it involves the four most senior leaders who were alive when the Court was created: Nuon Chea, Ieng Sary (now deceased), Khieu Samphan, and Ieng Thirith. Many questions about Democratic Kampuchea’s (DK) three-year, eight-month, and twenty-day rule have not been answered. Unlike Duch, the defendant in the Court’s first case, these leaders have never admitted any responsibility for the crimes of that period but instead have blamed the lower cadre and rogue elements. Their trial offered the first and likely only opportunity to show how decisions made by those at the center of power during the DK caused the deaths of an estimated two million Cambodians.

With four accused and thousands of documents in the case file, the proceedings were often called the most complex since Nuremberg. The evidence connecting individual defendants to atrocities is less overwhelming than in Case 001, and while Duch essentially pled guilty, in Case 002 the defense teams mounted vigorous defenses. The case is also more politically sensitive than Case 001, because unlike Duch, the Case 002 defendants had extensive dealings with foreign powers and with the Cambodian Government after the fall of the DK regime. All of these factors made Case 002 a much tougher functional test for the ECCC judges and prosecutors, who are charged with delivering a fair trial and credible justice expeditiously and at an acceptable cost.
One of the Court’s first hurdles was determining if it had the power to try Ieng Sary, who was convicted in absentia in 1979 and granted amnesty and pardon in 1996. His challenges to the Court’s jurisdiction tested the hybrid Court’s ability to navigate tensions between international accountability norms and Cambodian law. All judicial chambers addressed the issue at least once, but without final resolution due to the ECCC’s convoluted structure and extraordinarily narrow provision for immediate appeal. The Court’s unique civil law approach to investigations has contributed to other problems, leading to legitimate defense concerns. In particular, the Court’s heavy reliance on Co-Investigating Judges (CIJs), who are endowed with immense responsibility and discretion, rendered that office—and the entire investigation—vulnerable to charges of incompetence and bias. Decisions by national judges that suggest a lack of independence from the Cambodian Government prompted accusations of political interference, particularly in connection with the Court’s efforts to summon government witnesses.

The ECCC’s inefficiency in getting the case to trial also generated problems. It resulted in the suspects’ lengthy preindictment detention and prompted the Trial Chamber to seek to expedite judgment by severing the indictment into a series of “mini trials.” Although “Case 002/01” involved senior leaders at the pinnacle of the Democratic Kampuchea hierarchy, the crimes it addressed are not representative of the harms suffered by most victims during the Pol Pot era. Further challenges arose as trial judges who lack experience managing mass crimes trials inconsistently developed and applied hybrid rules, leading to procedural confusion and delay. One of the octogenarian accused was severed from the case before trial hearings began due to dementia, and another died a few months before the end of trial. With additional Case 002 trials unlikely due to the advanced age of the two remaining accused and donors’ eagerness to conclude the tribunal’s work as soon as possible, the ECCC’s centerpiece case is greatly reduced in scope and, regrettably, in its likely significance to many survivors.

BACKGROUND

The Co-Prosecutors elected to try the four surviving senior leaders together, both in the hopes of increasing efficiency and to facilitate trying them under
the theory of Joint Criminal Enterprise—a among other modes of liability. The accused were charged with responsibility for genocide, war crimes, and crimes against humanity committed pursuant to a joint criminal plan to implement “rapid socialist revolution in Cambodia through a ‘great leap forward’ and defend the Party against internal and external enemies, by whatever means necessary.” The Closing Order found that they did so, *inter alia*, by forcing population movement; establishing and operating work cooperatives; reeducating “bad elements” and killing “enemies” inside and outside of the party; targeting “specific groups, in particular the Cham, Vietnamese, Buddhists, and former officials of the Khmer Republic, including both civil servants and former military personnel and their families”; and regulating marriage. Their positions as cabinet-level DK officials and participants in the key decision-making committees of the Communist Party of Kampuchea (CPK) gave them the apparent capacity to develop and influence those high-level policies.

Nuon Chea is often referred to as “Brother Number Two,” though he has denied that he was called this and that he was second in command after Pol Pot. He was born in 1926 in Battambang Province, and went to high school and took law classes in Bangkok, where he became politically active and joined the Communist Party of Thailand. When he returned to Cambodia in 1950, he joined the local communist party and became a senior member by 1960. During the DK period, he was Deputy Secretary of the CPK and a member of the CPK Central and Standing Committees—the key decision-making bodies in Democratic Kampuchea. He was allegedly responsible for military and security affairs, including control over S-21, with Duch reporting directly to him during the last years of the regime. After Pol Pot’s death in 1998, Nuon Chea defected from the Khmers Rouges. According to his lawyers, “Nuon Chea disputes the charges against him and, notwithstanding his position in the government of Democratic Kampuchea, he argues that he had no direct contact with the bases and was not aware of what was happening there.”

Ieng Sary was born in 1925 in Vietnam. He became politically active at Collège Sisowath in Phnom Penh and then studied in France, where he became a member of the French Communist Party. He returned to Cambodia and became a history professor in 1957, allegedly joining the Khmers Rouges in 1963. During the DK period, he was Deputy Prime Minister and Minister for Foreign Affairs and a member of the CPK Central and Standing Committees. He is alleged to have either encouraged or failed to prevent the transfer of large numbers of For-
eign Ministry personnel to the S-21 detention center. As discussed in chapter 1, he and Pol Pot were convicted of “genocide” in absentia by the 1979 People’s Revolutionary Tribunal, a special court established by the Vietnamese-backed government, and sentenced to death and confiscation of all their property. In 1996, to entice Ieng to defect from the Khmer Rouge movement with thousands of his followers, at Hun Sen’s behest King Sihanouk issued a royal decree pardoning him from the 1979 tribunal’s sentence and providing him amnesty from potential prosecution under the 1994 law banning Khmer Rouge membership. Ieng moved to Phnom Penh with his wife, Ieng Thirith, and argued that the pardon and amnesty prevented the ECCC from exercising jurisdiction over him. Ieng Sary died on March 14, 2013, shortly before the end of the Case 002/01 trial hearings.

Khieu Samphan was born in Svay Rieng province in 1931. He went to France to study in 1955, where he was active in the French Communist Party before returning to Cambodia to become a professor. In 1962, he was appointed Secretary of State for Commerce in then Prince Sihanouk’s government. Threatened with arrest, he went into hiding in 1967 and by the early 1970s had joined the Khmers Rouges. From 1976, Khieu Samphan served as head of state (President of the State Presidium), taking over this title from Sihanouk. He alleges that, like the former King, in this role he was merely a figurehead. He was a member of the Central Committee and participated in many Standing Committee meetings, and had duties in the Ministry of Commerce. He disputes allegations that he was Chairman of the Party’s Political Office. In 1987, he replaced a retiring Pol Pot as the official head of the Khmers Rouges and representative at the 1989 Paris Peace Conference. After Pol Pot’s death in 1998, Khieu Samphan left the Khmer Rouge movement and defected to the Government.

Ieng Thirith was born in Phnom Penh in 1932. She studied at the Lycée Sisowath in Phnom Penh and then obtained a degree in English Literature in France. She married Ieng Sary in 1951; her sister later married Pol Pot. Ieng Thirith returned to Cambodia in 1957 to work as an English professor. During the DK period, she was Minister of Social Affairs and Action and a candidate member of the CPK Central Committee. She was sent to investigate and report on health issues in the Northwest Zone and therefore may have known that many Cambodians were starving under the DK regime. She is also alleged to have either encouraged or failed to prevent the arrest and execution of ministry staff. She denied this during a pretrial hearing and placed all blame on Nuon
Chea. Along with her husband, she defected from the Khmer Rouge movement in 1996. The charges against Ieng Thirith were severed from the rest of Case 002 immediately before the start of trial hearings after she was found to suffer from dementia.

TRYING IENG SARY: TENSION BETWEEN INTERNATIONAL LAW AND PAST DOMESTIC PRACTICE

Long before Case 002 began, analysts foresaw that the prosecution of Ieng Sary would pose special challenges for the ECCC. As discussed in chapter 1, Ieng Sary and Pol Pot were convicted of genocide in absentia in 1979 by the People’s Revolutionary Tribunal—a special court established by the Vietnam-backed government that ousted the Khmers Rouges. The 1979 tribunal sentenced them to death and confiscation of all of their property. Years later, as part of a 1996 deal with the Cambodian Government to facilitate Ieng Sary’s defection from the Khmers Rouges with his followers, King Sihanouk issued a Royal Decree pardoning Ieng from his 1979 sentence and providing him an amnesty from prosecution under the 1994 Law to Outlaw the Democratic Kampuchea Group. He is the only Khmer Rouge leader to have received an amnesty, raising obvious tensions with international norms against granting amnesty for crimes such as genocide.

As the ECCC is an “internationalized” court, its obligation to recognize the validity of the Ieng Sary amnesty has been debated since negotiations began. The ECCC framers failed to address the effect of the Royal Decree on the Court’s jurisdiction, but instead gave the ECCC Chambers explicit authority to determine the scope of any preexisting amnesty or pardon.

After Ieng was taken into custody, he argued that as a consequence of the Royal Decree, the ECCC did not have jurisdiction to try him. In brief, he argued that his amnesty from the effects of the 1994 Law was intended to prevent his prosecution for all criminal acts committed by the Khmers Rouges from 1975 to 1979—the temporal jurisdiction of the ECCC. Similarly, he argued that he could not serve any sentence for the underlying acts for which he was found culpable by the 1979 tribunal. Moreover, he argued that international law does not prohibit domestic amnesties for jus cogens crimes—that crimes with a
higher legal status implicating, among other state obligations, the duty to prosecute or extradite offenders. To the contrary, the Co-Prosecutors argued that the pardon only prohibited execution of the 1979 sentence of death and property confiscation, and the amnesty applied only to future violations of the 1994 Law, which merely criminalized membership in the Khmer Rouge organization. In the alternative, they argued that amnesty for *jus cogens* crimes is not recognized under international law.\(^\text{13}\)

There is wide, though not universal, agreement that domestic amnesties for serious international crimes are invalid under international law. Acceptance of their invalidity is broadest with regard to crimes for which a state has a treaty obligation to prosecute or extradite. For example, the Special Court for Sierra Leone (SCSL) Appeals Chamber has said:

\[
\text{[G]iven the existence of a treaty obligation to prosecute or extradite an offender, the grant of an amnesty in respect of [the international crimes set forth in the SCSL Statute] is not only incompatible with, but is in breach of an obligation of a State towards the international community as a whole.}\(^\text{14}\)
\]

Cambodia has treaty obligations to prosecute or extradite persons who commit grave breaches under the 1949 Geneva Conventions and genocide under the 1948 Genocide Convention,\(^\text{15}\) both of which were charged in Case 002. As a consequence of these obligations, the ECCC Trial Chamber found that the 1996 Decree could not “relieve it of the duty to prosecute these crimes or constitute an obstacle thereto.”\(^\text{16}\)

There is also growing support for the view that domestic amnesties for other serious crimes, such as crimes against humanity, are invalid under customary international law. For example, discussing the effect on the jurisdiction of the SCSL of the amnesty clause in the Lomé Peace Agreement between the warring factions, the UN Secretary-General said:

\[
\text{While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.}\(^\text{17}\)
\]
The SCSL Appeals Chamber then found that there is a “crystallizing international norm that a government cannot grant amnesty for serious violations under international law.”\textsuperscript{18}

The ECCC Trial Chamber examined the views of international, regional, and state courts, as well as human rights bodies, and agreed that there is an emerging consensus that blanket amnesties violate states’ duty to investigate serious international crimes and punish the perpetrators. Notably, it found the creation of the ECCC and other hybrid courts to evince the determination of states that serious crimes should not go unpunished.\textsuperscript{19} It therefore concluded, “[S]tate practice demonstrates at a minimum a retroactive right for third States, internationalized and domestic courts to evaluate amnesties and set them aside or limit their scope should they be deemed incompatible with international norms.”\textsuperscript{20} Having previously found that the Royal Decree may have been intended to grant Ieng Sary general immunity for any criminal acts committed before 1996,\textsuperscript{21} the Trial Chamber ruled that, because this is at odds with Cambodia’s treaty obligations and the trend in customary international law, it had the discretion to find that the scope of the amnesty excludes the serious international crimes with which Ieng is charged.\textsuperscript{22}

The Trial Chamber did not make this finding on the basis of the ECCC’s hybrid character, but ruled solely on the basis of Cambodia’s state obligations. The decision thus strongly affirms fully domestic Cambodian courts’ obligation to prosecute and punish all persons responsible for serious international crimes, and concomitantly the accountability of all those who perpetrate them. As Documentation Center of Cambodia (DC-Cam) Director Youk Chhang emphasized after Ieng Sary was taken into detention in 2007, “The arrests of the most politically untouchable of the Khmer Rouge leaders is a powerful message to the people of Cambodia[.]”\textsuperscript{23} The Ieng Sary defense appealed the Chamber’s decision in part on the basis that the Chamber acted \textit{ultra vires} by evaluating not only the scope but also the validity of the Decree.\textsuperscript{24} However, there will be no final determination of this question, because a Supreme Court Chamber supermajority found that the issue falls outside the narrow scope of its interlocutory review authority.\textsuperscript{25}

The ECCC avoided a politicized showdown over the Ieng Sary pardon and amnesty—which some observers feared while the Court was taking shape. Though it is troubling that the Supreme Court found it had to wait till judgment to determine whether the Court had the competence to try him in the
first place, the lower Chambers’ decisions on this topic were based on reasonable jurisprudence and were consistent with the trend in international practice. On other issues, however, the Court has run into significant obstacles in managing Case 002.

**CHALLENGES TO THE INVESTIGATION**

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

However, when asked to identify the ECCC’s principal structural flaw, many Court officials interviewed for this book immediately named the OCIJ. As discussed in chapter 2, having two investigations followed by a full-length trial is inefficient. Former CIJ Lemonde believes this duplication resulted “because the lawyers who were recruited [to implement the system] were mostly from countries of common law, in any case it was practitioners who were familiar with the operation of other international courts and saw no reason to change their practice.” To an extent this may be true; however, there are also more fundamental concerns. Khieu Samphan Co-Lawyer Anta Guissé says that in France, where there are questions about a witness’s story, the parties can ask for confrontation during the investigative stage. Although this appears to be true in all modern domestic civil law systems, Cambodian procedures, which (as discussed in chapter 2) are based on obsolete French law, do not provide for it. At the ECCC, the failure to include the parties in witness interviews has necessitated the reexamination of core evidence at trial. To many Court officials and analysts, this duplication is the main reason the judicial investigation was a wasted effort.
Investigating judges have enormous discretionary power, which has led France and other national judicial systems to limit or eliminate their role.28 The Case 002 defense teams have attacked the investigatory process, alleging bias, methodological failures, procedural irregularities, and a lack of transparency. Their criticisms are directed largely toward the attitudes and professionalism of specific judges but have also helped reveal intrinsic weaknesses in the ECCC’s institutional capacity to meet the needs of a mass crimes process.29

Concerns about Impartiality

According to the ECCC Internal Rules, the CIJs “may take any investigative action conducive to ascertaining the truth. In all cases they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory.”30 The power to investigate is exclusive to the CIJs. Concomitantly, the parties are prohibited from undertaking their own investigations, though they “are entirely free to review any document from any public source in their search for evidence” and to request that the CIJs place it in the case file.31 They may also request the CIJs to undertake an investigative action they consider “useful for the conduct of the investigation.”32 The CIJs have said:

Before this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties. . . . The capacity of the parties is thus limited to such preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action.33

Because the CIJs act independently, they have broad discretion to decide whether or not an investigative act is useful.34 In making this evaluation, they have no explicit duty to consult with a party requesting an investigative action before rejecting it, nor have they done so. The Pre-Trial Chamber (PTC) found in one case that it would have been “sensible” for the CIJs to consult the requesting party, but it did not reach the question of whether this amounted to an obligation.35 Some investigative requests were rejected without adequate reasoning, and others were never addressed, obligating the PTC to itself review the merits.36 Fewer than 20% of the Nuon Chea team’s investigative requests were carried out.37 “You tie our hands, and then you don’t go out and do what you are supposed to do,” laments Ieng Sary’s former Co-Lawyer Michael Karnavas.38

At other internationalized tribunals, investigators are not expected to be neutral, so there is no presumption that their witness statements will be dis-
interested, it is difficult to challenge their integrity, and a successful challenge is unlikely to infect the entire case. In contrast, at the ECCC the CIJs have near-total investigative discretion, and thus the fairness of the entire process is dependent on their independence and impartiality. The CIJs and some investigators provided easy targets for multiple personal bias challenges. A former CIJ investigator alleged that during a weekend meeting at his home Judge Lemonde said, “I would prefer that we find more inculpatory evidence than exculpatory evidence.” Lemonde responded that if he indeed said that, it would have been in jest. The defense sought his disqualification, arguing that this statement expressed actual bias, but the PTC found that Lemonde’s remark did not amount to an instruction to the investigators.

Co-Investigating Judge You Bunleng was also challenged for appearance of bias due to his refusal to summon requested government witnesses, discussed below. Moreover, two key CIJ staff members provided fodder for repeated bias claims because they had written books that indicated prejudgment, and one had also worked in the Office of the Co-Prosecutors for several months during the drafting of the initial submission. However, the PTC rejected this concern, emphasizing that because the CIJs have sole authority to conduct the investigation, their independence and impartiality safeguard the entire process. Finally, the defense argued that national CIJ staff members’ presumed participation in the kickback scheme discussed in chapter 3 could impact judicial integrity. The PTC likewise rejected this allegation, finding that “the allegations that staff members possibly have paid money to a superior cannot lead to the conclusion that these staff members can influence the Judges to manipulate the outcome of proceedings[.]” Although none of these challenges succeeded, they raised questions about the OCIJ’s impartiality and contributed to doubts about the integrity of the ECCC as a whole.

Investigative Capacity and Fairness Concerns

Although the ECCC’s in-country hybrid form has clear investigative advantages—such as proximity to crime sites, and witnesses and investigators fluent in the local language—the Court struggled to conduct a full investigation in Case 002. This is due both to its reliance on CIJs to perform that function and to the sheer enormity of potential evidence, which includes forensic remains, witness testimony, and nearly one million pages of documents collected by DC-Cam since 1995.

For example, after filing their introductory submission for Case 002, the
Hybrid Justice

Co-Prosecutors placed an additional 18,000 documents they had not cited on a shared materials drive, because they could not exclude the possibility that the documents might include exculpatory evidence. When defense teams asked the CIJs to search the drive for exculpatory information, the CIJs emphasized that, while they could not arbitrarily exclude evidence they knew to exist, they were not “required to conduct an exhaustive search for all evidence; an impossible task.”

A structure that relies on investigating judges arguably carries an inherent bias toward the prosecution’s case—at least when it involves complex mass crimes—because the prosecutors furnish vast amounts of information in the initial submission. Guissé says, “In the domestic [French] system, as soon as an investigative judge is assigned, the prosecution is no longer in charge of the investigators. Here the prosecutors had a long time to shape the case; everyone is already biased.” The CIJs essentially acknowledged this when they said: “The logic underpinning a criminal investigation is that the principle of sufficiency of evidence outweighs that of exhaustiveness: an investigating judge may close a judicial investigation once he has determined that there is sufficient evidence to indict a Charged Person.” The Pre-Trial Chamber disagreed, finding that the judges have a duty to examine all documents in which there is a prima facie reason to believe exculpatory evidence may exist before assessing the sufficiency of the evidence for trial.

Yet investigating judges have limited capacity to digest a vast introductory submission and pursue extensive further investigation. Former Defence Support Section (DSS) head Richard Rogers says that due to the complexity of Case 002, the CIJs were unable to examine carefully all the documents referenced in the Prosecutors’ introductory submission, let alone develop exculpatory evidence. Rogers contends that, as a practical matter, a mass crimes court dependent on investigative judges requires defendants to provide guidance on where to seek exculpatory evidence and is therefore incompatible with the right to remain silent. Michael Karnavas says, “[The CIJs] never did an investigation; they only did a validation. The investigation was done for them by the prosecution.” When the CIJs began, they had nothing but the prosecution’s submission, and “natural instinct says, let me rely on what has already been done.”

Employing investigators from diverse legal traditions may exacerbate this tendency. Arguably, “It’s not in the DNA of investigators from the Anglo-Saxon system to look for exculpatory evidence in the sense of the French system.”
Anta Guissé notes that, unlike the practice in France, the CIJs delegated their power to investigators without a standardized methodology or code of conduct. “The [CIJs] need to take more control over investigators.” She suggests that the ideal system may be to let the parties investigate first and then have an investigating judge sift through the evidence they have collected.55

Internal Rule 56(1) provides: “In order to preserve the rights and interests of the parties, judicial investigations shall not be conducted in public. All persons participating in the judicial investigation shall maintain confidentiality.” The confidentiality of the investigation makes it difficult for the public—and even the parties—to assess its quality. Former co-counsel for Nuon Chea Michiel Pestman argues that confidentiality did not require secrecy from the parties.56 Repeated refusals by the CIJs to share information raised suspicions that they invoked the “fig leaf” of confidentiality to hide their incompetence as domestic law judges unaccustomed to managing an enormously complex investigation.57

The Ieng Sary defense unsuccessfully sought to learn if an overall strategy existed and if investigative work was being carried out according to a consistent methodology.58 Among its complaints was that the “[c]ollection of witness interviews are arbitrarily placed on the Case File, often months after the interviews were conducted, with little or no explanation of how these interviews fit into the judicial investigation.”59 Moreover, interviews were riddled with leading questions, were not consistently recorded, and some interviewees were questioned on multiple occasions, suggesting no line of questioning had been developed in advance.60

Karnavas says that because the defense is not allowed to do its own investigation, the case file must be a primary source for determining which lines of investigation to request. “But over here, with a case of this magnitude, it’s virtually impossible. Especially when you don’t know what is their process, how they are going about doing it.”61 This impeded the parties’ ability to participate fully in the investigation. As discussed in the next chapter, concerns that the veil of secrecy around the OCIJ was shrouding incompetence and bias grew substantially with the arrival of a new international investigating judge.

Allegations of Government Interference

During the investigative phase of Case 002, another important functional constraint on the ECCC became apparent—its inability or unwillingness to call certain senior Cambodian officials to testify at the Court. The defense repeated-
ly sought to have the CIJs interview King-Father Norodom Sihanouk and high-level Cambodian officials, including Prime Minister Hun Sen. The Cambodian Government resisted, and national judges supported the RGC. The controversy again spotlighted the preponderance of domestic judges at the ECCC and their susceptibility to political pressure.

The ECCC Internal Rules give the CIJs the explicit authority to issue orders “necessary to conduct the investigation, including summonses,” and “take statements from any person whom they consider conducive to ascertaining the truth[,]” subject only to the right against self-incrimination of witnesses. The Trial and Supreme Court Chambers have similar authority, which they may exercise at their discretion. International CIJ Marcel Lemonde, acting alone, found it would be “conducive to ascertaining the truth” to request an interview with King-Father Sihanouk. He also summoned several high-level officials to appear in closed session on a date when they were available: Senate and CPP President Chea Sim, National Assembly President Heng Samrin, Minister of Economy and Finance Keat Chhon, Senator Ouk Bunchhoeun, Senator Sim Ka, and Minister of Foreign Affairs Hor Namhong. None responded.

Caution at International Courts

The ECCC Internal Rules define “summons” as “an order to any person to appear before the ECCC." Once summoned, witnesses must appear. “In the case of refusal to appear, the Co-Investigating Judges may issue an order requesting the Judicial Police to compel the witness to appear.” The Internal Rules provide blanket authority to summon witnesses with no exception. The International Criminal Tribunal for the former Yugoslavia (ICTY) Rules provide similar authority; nevertheless, the ICTY has said with regard to subpoenas that they “should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction.” Therefore,

While a Trial Chamber should not hesitate to resort to this instrument where it is necessary to elicit information of importance to the case and to ensure that the defendant has sufficient means to collect information necessary for the presentation of an effective defence, it should guard against the subpoena becoming a mechanism used routinely as part of trial tactics.

The SCSL agreed that subpoenas should be used “sparingly” and therefore evaluated whether officials’ testimony was both helpful and necessary. Referencing
ICTY jurisprudence, the SCSL said that “convenience is not a sufficient justification for the issuance of a subpoena, and that when the evidence sought to be proffered can be obtained through other means, it would be inappropriate to grant such an order.”

In the Norman case at the SCSL, defendants from the Civil Defense Force (CDF) sought to call President Ahmad Tejan Kabbah, alleging that Kabbah was “commanding, materially supporting, and communicating with various members of the alleged CDF leadership” during the war. The SCSL Trial Chamber found that the accused had failed to identify “with sufficient specificity” how his testimony would relate to a charge in the indictment or materially assist their case. By contrast, in the later Sesay et al. decision, the Trial Chamber found that testimony from Kabbah, who by then was former President, could materially assist the accused in specified ways. The concurring opinion of Judge Itoe suggested that the result differed because the testimony sought in the Sesay case was more directly relevant to the determination of guilt or innocence, and the court viewed the Norman request as one made solely to embarrass Kabbah and expose his involvement in the conflict.

In his dissent to the Norman decision, Judge Thompson argued that the SCSL should adopt a more flexible standard for compelling testimony to uphold fairness norms and “ensure that no relevant evidence vital to the discovery of the truth is foreclosed by reasons of legal technicalities.” His preferred approach appears close to the civil law standard in the ECCC Internal Rules requiring the CIJs to consider only whether it would be “conducive to ascertaining the truth” to issue a summons. In Judge Thompson’s view, it is inappropriate to consider in advance whether the evidence a witness may provide is favorable or adverse to the applicant as it amounts to “a predetermination of the probative value of such evidence.” Instead, he believed only prima facie evidence should be required to show that the information sought is necessary for the investigation or trial. Similarly, the Ieng Sary team has argued that a “best evidence” rule is inapplicable in a civil law investigation.

Calling Senior Cambodian Officials

As in Sierra Leone, at the ECCC, calling senior officials is a politically charged process given the links that many have to the Khmer Rouge period—including Prime Minister Hun Sen, who was a lower-level CPK official early in the DK period, and King-Father Sihanouk, who served for a year as the regime’s head of state and was effectively under house arrest in Phnom Penh for most of the DK
period. In rejecting the request to summon Prime Minister Hun Sen, the CIJs determined that he was not likely to have useful information on the topics highlighted, and moreover many other witnesses who have personal knowledge of the events have been interviewed. Thus his testimony would not be useful.\textsuperscript{80} It therefore appears that the international CIJ took factors similar to those highlighted by the SCSL into consideration and determined that the persons he did summon could provide information conducive to seeking the truth.

In addition to statutory standards, privileges and immunities may limit a Court’s ability to issue summons. As Philippe Sands noted in the context of an arrest warrant issued against a head of state, lawfulness of process “depends on the Court’s powers and attributes and the legal basis upon which it was established.”\textsuperscript{81} The ECCC’s hybrid character makes this analysis more complex than it would be for a clearly national or international court.

The request to interview the late King-Father Sihanouk, who passed away on October 15, 2012, was particularly controversial. After Cambodia first requested UN assistance to try the Khmers Rouges, Sihanouk said on multiple occasions that he would testify to share his experiences.\textsuperscript{82} In recent years, however, he expressed a negative view of the Court and unwillingness to participate, especially after Court officials declined his 2007 invitation to the Royal Palace, which he described as “the only chance for the court to get his input.”\textsuperscript{83}

The Cambodian Constitution provides, “The King of Cambodia shall reign but shall not govern. The King shall be the Head of State for Life. The King shall be inviolable.”\textsuperscript{84} Sihanouk retired in 2004 and his son, Sihamoni, assumed the throne. That October, the Cambodian National Assembly passed a law granting various privileges to Sihanouk and bestowing on him the title “Great Valorous King” or “Hero King.”\textsuperscript{85} Persons close to the royal family argued that the 2004 law entitled Sihanouk to “the same immunity he had as a reigning King”\textsuperscript{86} and that calling him to the ECCC would violate the constitution and the 2004 law.\textsuperscript{87} National Assembly Deputy President Nguon Nhel similarly asserted that Sihanouk “cannot rightfully be summoned to testify at the tribunal.”\textsuperscript{88} In contrast, the Asian Human Rights Commission argued that the Cambodian Constitution confers immunity on “the reigning monarch and not upon anybody else. No act of parliament can confer the same inviolability upon former King Sihanouk.”\textsuperscript{89}

To remove any doubt within domestic law, Cambodia’s Constitutional Council would need to issue a pronouncement on the legal effect of Article 7 of
the Constitution and the 2004 law. If the ECCC were an ordinary domestic Cambodian court, a Constitutional Council decision would bind it. However, because the ECCC is “a special internationalized tribunal,” it might also have been necessary to consider whether international law entitled him to immunity from testifying at the ECCC. Realities on the ground made this a moot question; absent immense diplomatic pressure, the ECCC lacked the power to compel Sihanouk to testify before it. This may explain why the PTC declared without analysis that Cambodian law on this question was settled—“[T]he King Father cannot be subpoenaed, nor can coercive measures be used against him[,]” and assumed without question that national law bound the ECCC.

Unlike the King, high-level Cambodian officials are not “inviolable,” but enjoy waivable procedural immunity from arrest and detention. It appears that neither the Constitution nor any other Cambodian law offers officials immunity from testifying at a domestic or international court. Nevertheless, it remains possible that Cambodian courts would decide that Prime Minister Hun Sen, and possibly other high-level officials, are exempt from process due to the offices they hold. Judge Itoe of the SCSL has cited a French case in which the Cour de Cassation found that President Chirac was not under any obligation to appear as a witness at the pretrial stage of a trial because “the obligation is accompanied by a measure of a constraint . . . and is punished by a criminal penalty.” Similarly, the Supreme Court of Sierra Leone has found that “A serving Head of State is entitled to absolute immunity from process brought before national courts[.]” By contrast, international tribunals have rejected such immunities. The ICTY and International Criminal Tribunal for Rwanda (ICTR) Trial Chambers have found that government officials have no immunity from being subpoenaed to testify before them and may be compelled to attend pretestimony interviews. However, they have never found it necessary to subpoena incumbent officials after evaluating the statutory requirements discussed above.

There is no indication in the public record that, at least initially, the CIJs considered domestic immunities an impediment to summoning the named officials. According to information released by the Ieng Sary team, national CIJ You Bunleng instead objected to the request due to the need to close the investigation in a reasonable time—a common refrain of the judges when dismissing defense motions. International CIJ Lemonde, acting alone, issued summons to the government officials, suggesting that he believed he had authority to do so. Court spokesperson Lars Olsen reportedly said:
I don’t want to get into any speculation about any immunity because we would expect that any law-abiding citizens would comply with a summons issued by a court of law [. . .] I would assume that this would particularly apply to people representing the very law-making organs that have created this court.98

Nevertheless, Lemonde did not request enforcement after the recipients did not respond, apparently raising the issue of their immunity only after the fact.99 Lemonde, following the lead of Judge You, justified his failure to seek enforcement on the basis that “coercive measures is [sic] fraught with significant practical difficulties, and, in the best-case scenario, would unduly delay the conclusion of the judicial investigation, contrary to the need for expeditiousness,” leaving it to the Trial Chamber to decide if coercive measures were warranted.100 He may have decided that coercive action was politically impossible without the agreement of the Cambodian Government, as the Cambodian judicial police are tasked with enforcement under the ECCC Law and Internal Rules.101 However, upon review, the Pre-Trial Chamber said that the biggest hurdle was the summoned officials’ likely invocation of parliamentary immunity, which would at the very least “significantly delay” the proceedings. They therefore agreed that the question should be deferred to the Trial Chamber, preserving the right of the accused to seek exculpatory evidence at a later date.102

Nevertheless, due to a number of government statements reported in the press, the PTC directed the CIJ to assess “whether or not a nexus exists between RGC discouragement and the actual failure of the summoned witnesses to provide statements.”103 For example, Hun Sen reportedly claimed to have personally vetoed the testimony of “some people,”104 and government spokesperson Khieu Kanharith was reported to say:

[T]hough the individuals could appear in the court voluntarily, the government’s position was that they should not give testimony. He said that foreign officials involved in the court could “pack their bags and return home” if they were not satisfied with the decision.105

In response, the CIJs merely noted that Hor Namhong, Cambodia’s Foreign Minister, claimed to have disregarded his summons because Judge Lemonde acted alone in issuing it, which Hor believed did not meet the necessary formal
requirements. Without mentioning any of the other witnesses or providing any additional reasoning, the CIJs said they did not believe an investigation into government interference was warranted.

On appeal, the PTC was unable to reach a supermajority decision. The national judges found, in part, that the statements of a government spokesperson could not prevent higher-level officials from testifying. The international PTC judges determined that after considering all of the allegations and their sequence, no reasonable trier of fact could fail to find that “one or more members of the RGC may have knowingly and willfully interfered with witnesses who may give evidence before the CIJs.” However, due to the lack of supermajority agreement, by default the CIJ decision not to investigate remained in effect.

The defense teams have since highlighted government opposition to the testimony of these officials multiple times before the Trial and Supreme Court Chambers, with the Nuon Chea team in particular seeking to link these events to the Government’s well-documented disapproval of obstructed Cases 003 and 004, discussed in the next chapter. Michiel Pestman’s prediction that the requested government witnesses would not be called has proven true. The Nuon Chea team continues to contend that the summoned officials are important to his client’s case. After leaving office, Judge Lemonde said these witnesses “clearly had something to say, because they were aware of events and facts for which their testimony was important.”

With little hope that the requested officials would be summoned, the Nuon Chea defense team sought to prove government interference by persistently interjecting the officials’ names into the proceedings, and being castigated for doing so—including having their microphone regularly shut off. For example, the team sought to question a witness about a 2004 statement he provided an NGO claiming to have seen Hun Sen meet Nuon Chea and other high-level DK officials in the 1970s. The Trial Chamber, not for the first time, warned two international members of the Nuon Chea team against further “misconduct,” including their continual “irrelevant” references to government officials. This strategy severely tested the bounds of advocacy in a country unaccustomed to witnessing the exercise of vigorous defense rights and challenges to senior officials. Although the team’s escalating antics achieved diminishing returns for its client, the effort exposed the vulnerability of the majority-domestic hybrid tribunal to charges that it lacked the independence to deliver credible justice.
MORE EFFICIENCY AND FAIRNESS PROBLEMS: 
LENGTHY PRETRIAL DETENTION AND EFFORTS TO EXPEDITE TRIAL

Efficiency has also been a serious challenge to the Case 002 proceedings. Despite the ECCC’s in-country location and heavy reliance on domestic personnel, it has been hard-pressed to deliver justice swiftly and at a low cost—two of the anticipated benefits of the hybrid model. As discussed in previous chapters, the ECCC faced long delays establishing itself as an institution, developing rules, conducting investigations, and preparing for trial. Those delays raised problems for the Court related to lengthy pretrial detention. More recently, cost concerns, frustration with embarrassing political disputes, and the fragile health of the Case 002 defendants led to increasing donor pressure on the Court to complete Case 002 quickly. In an effort to speed the trial, the Trial Chamber split the indictment, likely reducing the impact of the verdict, and held trial in the physical absence of the accused, raising fairness concerns.

Pretrial Detention

Some of the early legal challenges before the ECCC related to the charged persons’ lengthy pretrial detention. As a hybrid court, the ECCC has an opportunity to directly influence the Cambodian judiciary’s habitual failure to respect detention limits. Its jurisprudence generally has followed precedents from international courts but leaves mixed lessons for Cambodian domestic courts.

Under the Internal Rules, the ECCC may only provisionally detain a Charged Person if there exist both a “well founded reason to believe” that he or she has committed the charged crimes and evidence that detention is “necessary” to prevent him or her from pressuring witnesses or victims, colluding with accomplices, destroying evidence, or fleeing; or to protect the Charged Person’s security or preserve public order.

The various grounds for finding detention necessary are disjunctive, meaning that the existence of any one alone provides a sufficient basis for retaining a charged person in custody. Provisional detention is allowed for one year and may be extended only twice. The Court found that provisional detention was appropriate for all five charged persons in 2007, and extended their detention by one year in 2008 and again in 2009. Despite the advanced age of the accused
in Case 002 and the length of time that had passed since their alleged crimes, the Court refused to release them on bail or allow for home detention. As the three-year limit approached, the CIJs made it clear that they would issue the Closing Order in time to ensure their detention for trial. Although the Court’s jurisprudence has been facially consistent with international standards, it is questionable whether it has adhered in spirit, as to all appearances no Chamber ever genuinely contemplated the possibility of release. This is troubling due to the widespread abuse of pretrial detention in the domestic courts and the potential for a negative precedent.

Human rights bodies such as the European Court of Human Rights, Inter-American Commission and Court of Human Rights, and UN Human Rights Committee have determined that pretrial detention should be allowed only on an exceptional basis. The ICTY, ICTR, and SCSL have justified more restrictive pretrial detention policies by highlighting the gravity of the crimes charged and their inability to ensure the return of an accused released to his or her home jurisdiction. However, once the ICTY began having a more cooperative relationship with the states of the former Yugoslavia, it increasingly released accused on bail pending trial. The International Criminal Court (ICC) has also granted accused provisional release.

Although the ECCC is located in Phnom Penh, and the Cambodian Government appears well equipped to ensure the return of the charged persons, the ECCC has taken a restrictive approach to release. For example, the Pre-Trial Chamber held that Ieng Sary and Ieng Thirith must be detained to ensure their presence, despite their age, ill health, and failure to flee during the many years the tribunal was being established. The PTC acknowledged that human rights law requires “specific evidence” of a threat to public order but cited only an analyst’s view that the proceedings could “lead to the resurfacing of anxieties” in Cambodia in determining that Ieng Sary’s release “would actually disturb the public order”—a concern the Government has similarly invoked to resist charging additional suspects (see chapter 6).

The ECCC also denied Ieng Sary’s repeated requests for hospital or house arrest due to his ill health, concluding that it would not satisfy the objectives of provisional detention and could jeopardize his safety. Neither the Internal Rules nor the rules of other international criminal tribunals explicitly allow provisional release on the basis of health concerns, but in practice other tribu-
Hybrid Justice

Talas have allowed temporary release to a confined medical area in three circumstances: when treatment is unavailable at the detention unit or in the host country, on humanitarian grounds when an accused's condition is so grave that it is incompatible with any form of detention, and when an accused is found unfit to stand trial.\textsuperscript{125} Accused have been released home only in a few cases involving inoperable and incurable cancer with a prognosis of at most a few months to live.\textsuperscript{126}

With regard to Ieng Sary, the Pre-Trial Chamber held, “There is no evidence of an immediate need for long-term hospitalisation and the ECCC Detention Facility is properly equipped to provide medical assistance as required.”\textsuperscript{127} As Ieng Sary’s heart condition was neither untreatable nor imminently terminal, there was no obligation under international precedent to grant him house arrest. Nevertheless, no international tribunal has tried accused of such advanced age, and absent a greater risk of flight or public disorder, it might have behooved the Court to create new precedent in this area\textsuperscript{128}—if for no other reason than to ensure the accused persons’ continuing fitness to stand trial.

The gradual decline of Ieng Thirith, first noted in 2008,\textsuperscript{129} may have been exacerbated by her four years of pretrial detention.\textsuperscript{130} The ECCC, like international courts, applies the ICTY’s \textit{Strugar} fitness test, which requires the defense to show that the accused’s mental incapacity prevents her from exercising her rights effectively at trial.\textsuperscript{131} Once it became inescapable that Ieng Thirith was unable to participate in her own defense,\textsuperscript{132} the Trial Chamber appropriately decided that it must release her.\textsuperscript{133} The Chamber could not reach a supermajority, and absent guidance from the Internal Rules on how to proceed, it looked to “general provisions of international criminal and human rights law” and found that it must follow the interpretation of the law most favorable to the accused.\textsuperscript{134}

On appeal, the Supreme Court Chamber determined that not all possible medical steps had been taken to improve her condition and ruled that she should remain in detention in an appropriate medical facility for an initial six months of treatment.\textsuperscript{135} When the Trial Chamber decision was announced, there were public expressions of distress,\textsuperscript{136} and the Supreme Court decision was seen by many as an effort to appease Cambodian opinion despite the fact that her chances of improvement were slight to none.\textsuperscript{137} She was not sent to a suitable mental health facility, as there are none in Cambodia—a legacy of destruction of the medical system under the Khmer Rouge regime. As a result, she remained in the general ECCC detention facility until September 2012, when
the SCC finally released her after three medical experts reassessed her condition and found that despite additional treatment her mental health had worsened.\(^\text{138}\)

A final example of the Court’s propensity to maintain the Charged Persons in detention was the CIJs’ last-minute push to ensure the Closing Order would be issued before the expiration of the three-year maximum provisional detention period. A 2009 U.S. Embassy cable reported Deputy Director of Administration Knut Rosandhaug’s concern about “massive political consequences” if the suspects had to be released.\(^\text{139}\) The Closing Order was issued on September 15, 2010, four days before Nuon Chea’s release would have been mandatory.\(^\text{140}\) The Court made clear its awareness of the impending deadline in a press release explaining the consequences of the issuance of a Closing Order on continued detention.\(^\text{141}\) If the Charged Persons had been released, under the Internal Rules there would have been no basis for their redetention during trial unless they failed to appear.\(^\text{142}\)

Upon issuing the Closing Order, the CIJs had the authority to extend their detention four more months until the accused were brought before the Trial Chamber.\(^\text{143}\) Saved by the bell, the Court soon faced another impending deadline. Unclear wording in the Internal Rules regarding the impact of an appeal of the Closing Order on the four-month limit\(^\text{144}\) convinced the Pre-Trial Chamber that it must issue its decision within the same four months. Practically unable to make the deadline, it issued its disposition without providing reasons. The Trial Chamber found this to be a violation of the rights of the accused, but not severe enough to warrant release.\(^\text{145}\) The Supreme Court Chamber overturned that finding, ruling that the filing of the appeal started a new four-month detention period, and thus the PTC had issued its fully reasoned decision within the required period.\(^\text{146}\) The accused remained safely in detention awaiting trial, with no violation of their rights.

The factors considered in determining the need for provisional detention are highly speculative and subjective in their application, and the ECCC has not clearly violated international standards in finding the accuseds’ continuing detention “necessary.”\(^\text{147}\) Yet the reasons the Court has provided likely obscure its underlying rationale: a reluctance to release the accused due to the horrific nature of their alleged crimes, the many years that they have lived in impunity, and the adverse public reaction that would accompany their release. Michael Karnavas believes the international judges were “intellectually dishonest” in their detention rulings:
My client should have been provisionally released. End of story. By any stretch of the imagination. But he wasn’t. . . . [The international judges] have gone along to get along, with what might have appeared as smaller battles early on, as opposed to taking principled positions. . . . They are always finding creative ways to get around [the rules].

The ECCC’s legacy for the Cambodian judiciary, which routinely disregards excessive pretrial detention, is therefore mixed. The Court has strictly complied with mandatory detention limits, but it has consistently interpreted the Court’s rules to avoid releasing unpopular accused, perhaps demonstrating how judges can both facially observe the letter of the law and achieve an ends-driven result. The predilection of judges to find prolonged pretrial detention necessary is likely greater in the context of an in situ hybrid court than a court physically removed from the crimes and their societal impact. It is an open secret that if, as has now come to pass, one or more of the accused die of old age before reaching judgment, their preverdict detention may be the only “justice” victims receive after 30 long years.

Efforts to Expedite Trial

The slow pace of the proceedings did more than raise pretrial detention issues; it put the completion of Case 002 in jeopardy. Using its authority under Internal Rules, the Trial Chamber decided in September 2011 to separate the proceedings and hold sequential trials related to different parts of the indictment. The ECCC is the first mass crimes court to contemplate consecutive trials based on one indictment.

The Trial Chamber made this decision to reach a timely verdict given the advanced age of the accused and many of the victims. Paradoxically, it has also greatly limited the relevance of the first trial for Cambodians, as it no longer includes many types of harm suffered during the DK regime. Although the decision to divide the proceedings may allow a judgment to be reached before the death of more accused, the first mini-trial did not proceed swiftly, partly due to many novel procedural questions raised. The age and maladies of the accused, which led to problematic efforts to try Case 002/01 without their physical attendance, make a second trial extremely unlikely. If the Court reaches judgment in Case 002 only with regard to limited charges, the potential meaningfulness of this “centerpiece” case will be substantially diminished.
Presence and Fitness

Given the age and fragile health of the octogenarian accused, it has long been feared that they would not live to see judgment. That concern was realized in late 2011, when Ieng Thirith was separated from Case 002 due to a lack of mental fitness, and again in March 2013 with the death of Ieng Sary. Both Ieng Sary and Nuon Chea had physical ailments and difficulty concentrating for long periods, which prevented them from sitting through a full day of trial, leading Ieng Sary to request early in the process for trials to be conducted in half-day increments.\(^{151}\) After trial began, all three accused spent time in the hospital, leading to delays in the proceedings.\(^{152}\) Accused Khieu Samphan required hospitalization most recently in late 2012, but otherwise has been the most robust of the defendants, and the only one to consistently attend full days of trial. Accused Nuon Chea was hospitalized twice in 2013 and participated in the last several months of hearings from outside the courtroom.

The ECCC, like all internationalized courts, guarantees the right of an accused to “be tried in his or her presence,”\(^{153}\) though that right may be waived or forfeited where there are “substantial trial disruptions.”\(^{154}\) In order to mitigate the day-to-day effects of the accused’s ill health, the ECCC set up a special room where the accused may watch the trial and instruct their counsel through a two-way audio-video link.\(^{155}\) Internal Rule 81(5) provides that the Accused may be ordered to participate by video when “the Accused’s absence reaches a level that causes substantial delay and[] where the interests of justice so require.” Defense counsel have argued that “video-link technology must not be equated with physical presence at trial”\(^{156}\) and that if an accused “falls asleep in the holding cell, that is not active participation. . . . That would be nothing but a charade to suggest that he is following the proceedings.”\(^{157}\) Nevertheless, in an effort to mitigate the effects of Ieng Sary’s declining health, in late 2012 the Trial Chamber ordered him to participate by video-link from the holding cell despite his refusal to waive his right to be physically present.\(^{158}\) The age and ill health of the Khmer Rouge defendants thus posed a serious and ongoing handicap not only to an efficient trial but also to fair proceedings. Ieng Sary’s lawyers challenged the ruling and sought a reevaluation of his fitness for trial;\(^{159}\) however, these motions unfortunately became moot when the proceedings against him were terminated.

When an accused dies prior to verdict, international courts have uniformly
terminated the proceedings, depriving victims of a judgment of guilt or innocence, as well as an explanation of the factual basis for the judgment. According to an ECCC judge, in theory the Closing Order would have been very beneficial as “mini judgment” operating on probability instead of certainty. But because the CJJs did not include particulars related to charges it is impossible to tell on what facts the charges are based.

The Split Indictment: Conviction or Truth Telling?

In severing the Case 002 indictment, the Trial Chamber noted that in cases of similar complexity at international courts, trial chambers have required as long as ten years to reach judgment. Its aim was therefore “to limit the number of witnesses, experts and civil parties called,” enabling it “to issue a verdict following a shortened trial, safeguarding the fundamental interest of victims in achieving meaningful and timely justice, and the right of all Accused in Case 002 to an expeditious trial.” Other mass crimes courts have likewise reduced the scope of large indictments; however, in accordance with their adversarial approach the prosecution has played the primary role in determining which charges are cut. At the ECCC, none of the parties’ lawyers was asked for his or her views in advance, despite their many years of mass crimes case experience, as the Trial Chamber believed a consultative procedure would itself result in unacceptable delays.

The first trial, Case 002/01, addresses only the evacuation of Phnom Penh and other major cities after April 17, 1975, killings of soldiers and civil servants of the defeated Khmer Republic government at the Tuol Po Chrey execution site in Pursat Province contemporaneous with the evacuation, the forced migration of Cambodians to the DK North and North West Zones from 1975 to 1977, and related crimes against humanity.

No cooperative, worksites, security centers, [other] execution sites or facts relevant to the third phase of population movements will be examined during the first trial. Further, all allegations of, inter alia, genocide, persecution on religious grounds as a crime against humanity and Grave Breaches of the Geneva Conventions of 1949 have also been deferred to later phases of the proceedings in Case 002.

In a press release announcing its decision to sever, the Trial Chamber justified the narrow topic selected for the first trial in part by noting, “The forced movement of population also affected a very broad cross-section of the Cam-
bodian population at the time, including a large percentage of civil parties in Case 002.” Although supporting the purpose behind the severance order, the Co-Prosecutors objected to the form:

[T]he charges selected for the first and likely only trial of the Accused would not be representative of their alleged criminal conduct, in contrast to international practice; it would not promote an accurate historical record; and would diminish the legacy of ECCC proceedings in advancing national reconciliation.

Rather than sever the indictment into policy segments, the Co-Prosecutors argued the first trial should include representative crimes: the evacuation of Phnom Penh as well as crimes at a few security centers, work sites, and cooperatives.

The Ieng Sary team argued that in effect the prosecution was asking the Trial Chamber to amend the Closing Order, which is outside the scope of its authority. This is because, unlike in an adversarial system where the prosecution has the authority to make deals with the defense and drop charges from an indictment, the civil law focus is on finding the “material truth.” Therefore, once a formal determination has been made that a crime has been committed, discretion cannot be exercised to dismiss it: crimes can only be severed in a way that preserves the totality of the Closing Order.

In the view of some persons interviewed, the Co-Prosecutors should have filed a shorter, tighter introductory submission in the first place. This criticism has been leveled at most mass crimes courts, where the prosecution, due to the massive quantity of information available, “throws a net hoping something will stick.” Considering the extremely limited mandate of the ECCC, it was arguably important to establish a comprehensive record of major crimes in Case 002, even if some charges are never adjudicated. Moreover, according to one civil law-trained lawyer, there is no legal reason why the judges could not have severed the facts of the indictment in a more creative and representative manner as requested by the prosecution. It is also unclear whether the Court had the authority to sever the charges and exclude genocide and religious persecution from the first case. If the facts of the forced transfer prove religious persecution, the ECCC should be able to issue convictions on that basis. Deciding otherwise limits the effect of the indictment and amounts to prejudgment.

Michael Karnavas says:
Now it’s a race to finish, to convict them before somebody dies. That’s the madness of this [severance order]. Is the Court more interested in getting a conviction, or in getting a cohesive narrative that deals with the issues in a contextual manner that allows the Cambodian people to see what exactly happened—why, when, and how?176

The severance order reminds Panhavuth Long of a saying by senior Khmer Rouge figure Ta Mok during the DK period: “Cut the head to fit the hat.”177 Victims have expressed concern that the Court will never address some key topics, such as the crime of genocide.178 Fourteen months into trial the Supreme Court Chamber overturned the Trial Chamber severance order and upbraided the Trial Chamber for, among other things, failing to consider the representativeness of the charges.179 Although the Trial Chamber reconsidered its terms of severance from scratch, due to acute awareness of the substantial time already spent hearing evidence tailored to the original severance decision and the need to reach an expeditious end to proceedings, the narrow scope of charges to be addressed in Case 002 remained the same, a fait accompli.180

MIXED RULES AND TRIAL MANAGEMENT PROBLEMS

The trial in Case 002/1 lasted two years.181 In its press release announcing the severance of Case 002, the Trial Chamber speculated: “The advantage of separation of proceedings into segments is that each trial will take an abbreviated time for the Chamber to complete.”182 The Co-Prosecutors disagreed that the severance order would promote efficiency, and they appear to have been proven correct.183 The novelty of the severance procedure, as well as the unconsidered application of mixed national and international rules rooted in both civil and common law traditions, caused significant confusion and delay.184

Due to Case 002’s procedural complexity—including the large number of documents and witnesses involved—the parties sought to have management meetings before the start of trial.185 These requests were rebuffed in an effort to start trial as quickly as possible.186 Although none of the Trial Chamber judges has mass crimes trial management experience, they have a propensity to make immediate oral decisions without consulting each other, the parties, or their
legal officers. Moreover they demonstrated what some called a face-saving reluctance to revisit their rulings even when they proved unworkable. As a consequence, procedural debates riddled the trial, and there was widespread criticism that the adoption and application of rules was arbitrary and inconsistent. This resulted in confusion among the parties and prevented the trial from offering an engaging narrative for Cambodians. Just one of the procedural debates that consumed trial proceedings is discussed below.\textsuperscript{187}

Questioning of Witnesses

In civil law practice, the judges first question the witnesses and then ask the parties if they have additional questions.\textsuperscript{188} Unlike in Case 001, during which the judges each took responsibility for developing expertise on a topic and led the questioning of related witnesses, in Case 002 the Trial Chamber decided to delegate its responsibility to one of the parties.\textsuperscript{189} Both defense and civil party lawyers believe the judges’ abdication of their responsibility to direct questioning resulted in procedural confusion.\textsuperscript{190}

The responsibility to question fell primarily on the prosecution. In the common law and at the ICTY and ICTR, the prosecution presents its evidence by selecting the witnesses it wishes to call, determining the order of their appearance, and preparing witnesses by, for example, comparing prior witness statements and highlighting potential inconsistencies.\textsuperscript{191} By contrast, in civil law the judges control these matters and parties are not allowed to vet witnesses beforehand.\textsuperscript{192} As a result of the mixture of these practices, the ECCC Co-Prosecutors had to determine solely on the basis of prior statements and evidence in the case file what questions to ask of a witness selected by the Trial Chamber. They had no ability to proof witnesses in advance to determine the extent of their knowledge on the topic at hand or the consistency of their current memories with statements made years prior.

For example, two witnesses were on the civil parties’ list to discuss internal purges, a subject not included in Case 002/01. Unexpectedly, the Trial Chamber called them to provide historical background, and tasked the prosecution with primary responsibility for extracting relevant information from them. Michiel Pestman believes that after the indictment was split, the Trial Chamber used footnotes in relevant paragraphs of the Closing Order to determine whom to call rather than asking the parties. Thus, the prosecution was confronted with questioning witnesses they did not want to hear. Pestman and others argue that
the trial should have started with experts who could establish the overall context of the proceedings.193

While putting parties in charge of questioning, the Court forbade them from using leading questions to more efficiently draw out information, even when a witness was uncooperative. Leading questions are generally disallowed in civil law trials because all witnesses are court witnesses—they are not considered adverse to any party—and the court does most of the questioning, unlike the process in Case 002. However, once the Chamber delegated this role to the parties, no justification remained for a blanket prohibition.

The Trial Chamber’s hybrid practice maintained its control over who testified when and on what topic, yet relied on adversarial questioning (without the opportunity for proofing or leading questions) to elicit information. The prosecution had the burden of proof, but no control over where the case was going.194 The consequence was a lack of coherence: Neither the parties nor the Cambodian public understood precisely why some witnesses were called, nor what they were expected to contribute to the process. Andrew Ianuzzi, former lawyer for Nuon Chea, says, “It’s as if Case 002 was designed to be the most boring trial possible.”195

A further problem—resulting more from delays and the severance decision than the Trial Chamber’s hybrid rules—has been establishing appropriate limits on what evidence witnesses may present. The Co-Prosecutors argued that witnesses scheduled for Case 002/01 who have information relevant to other parts of the indictment should be allowed to present it, partly because many are elderly and may not be available later.196 The Trial Chamber held that questions to witnesses should be “limited to facts relevant to the first trial” but allowed the prosecution to make oral requests for further testimony,197 and in practice some witnesses were allowed to testify to a broader scope of issues.198 In May 2012, the Trial Chamber agreed to a prosecution request to hear elderly witnesses on the full scope of Case 002.199 Some expert witnesses were also heard on all subjects.200 As a consequence, the Chamber heard some of the same evidence as if the trial had never been split, while the defense only challenged issues related to population movement and the Tuol Po Chrey execution site, and the judgment should be limited to those facts. Michael Karnavas contended during trial that due to procedural controversies and understandable efforts by the prosecution to take advantage of unclear rules to place as much evidence as possible on the
record in the first case, “Had they not severed, [the hearings] would probably be further ahead.”

Of greater fair trial concern, shortly before the end of hearings, in response to prosecution arguments that severance had jeopardized its ability to meet its burden of proof, the Trial Chamber suddenly declared, “From the outset, the Chamber has ruled that all parties may lead evidence in relation to the roles and responsibilities of all Accused in relation to all policies of the DK era”—citing only a decision on expert witness testimony. The Khieu Samphan lawyers called this development “shocking,” arguing that they were “never given the opportunity to refute allegations relating to the elaboration and implementation” of policies other than forced evacuation, and that the result would be prejudgment of legal issues which are theoretically the subject of forthcoming “mini-trials.” The repercussions are as of yet unclear, but this development highlights the disorder resulting from novel and equivocal procedures.

Barriers to Further Case 002 Trials

Procedural complexities are also likely to prevent the expeditious start to a possible second trial. The Trial Chamber asserted that it selected the subject matter “to ensure that the issues examined in the first trial provide a basis to consider the role and responsibility of all accused, and to provide a foundation for the remaining charges in later trials.” As the Co-Prosecutors have noted, the only way for the Trial Chamber to adopt facts established in the first trial into a subsequent trial would be through judicial notice of adjudicated facts or res judicata. However, it is unclear whether the Trial Chamber has the ability to take judicial notice of adjudicated facts, as it has previously found “no legal basis in the Law on the Establishment of the ECCC or in the Internal Rules for the Chamber to take judicial notice of adjudicated facts . . . before the ECCC.”

Moreover, neither mechanism would likely be available in Case 002/02 until the Supreme Court Chamber issued its final judgment on Case 002/01, as some rulings of the Trial Chamber may be overturned. In the Duch case, eighteen months elapsed between the issuance of the trial and appeals judgments. The Trial Chamber has held that there is no impediment to using a trial verdict as a legal and factual foundation for a second trial without waiting for the Supreme Court judgment. Even if this were possible, it is questionable how the Trial Chamber could draft a complex foundational judgment while overseeing a new
In the Duch case, the Trial Chamber took over eight months to draft the judgment. With limited charges being addressed, and the very real potential that another accused could die before judgment is handed down, there is little likelihood that much of the Khmer Rouge era will ever be addressed by the ECCC.

CONCLUSION

In its most important case, the ECCC faced dilemmas common to international and hybrid tribunals as they carry out their judicial functions: how to deliver justice efficiently while observing fair trial norms and attempting to develop a factual narrative that addresses the needs and demands of survivors. These challenges were accentuated by its hybrid form, which has rendered the Court susceptible to accusations of bias and political interference and contributed to procedural delays and confusion. Both the common law and the civil law systems have mechanisms refined over the years to promote both fairness and efficiency. When civil and common law features are haphazardly combined, however, a schizophrenic process results and jeopardizes both objectives. The fact that the ECCC’s investigatory and trial judges lack prior experience managing complex criminal trials has only exacerbated the problem.

Pestman argued that the blending of legal systems and inconsistent rule application has produced troubling unpredictability. Elisabeth Simonneau Fort added that personalities play an important role as the Court swerves between “some civil law, some common law, and then some civil law again.” Guissé said the reason the rules were constantly changing had less to do with the civil law/common law mix and more to do with the judges, who lack experience working in other international jurisdictions. Karnavas called the trial process “chaotic” and contended, “They are trying to have it every which way: It’s the French system, it’s not the French system, it’s the national system, it’s the ICTY. Whenever it suits them they are constantly changing the rules as the game is being played.” Although these concerns have not irreparably tainted the Case 002 proceedings, they do pose serious risks to the case. The ECCC’s experience shows the folly of creating special rules for a hybrid court with such a narrow mandate and limited lifespan. For trials to proceed smoothly and expeditiously, specific, clear, established rules tailored to a mass crimes process must be in place at the start of any future hybrid court process.
In addition to concerns about fairness, the ECCC’s functional challenges led to questions about its capacity to deliver meaningful justice for the myriad Cambodians who have suffered from the atrocities of the Pol Pot era. Neither international nor hybrid courts can function as truth commissions and address all historical harm. Of necessity, they must focus on particularly serious crimes and the responsibility of a limited number of persons. As discussed in chapter 1, the ECCC’s jurisdiction was intended to be narrow, focusing on senior Khmer Rouge leaders and others “most responsible” and on crimes committed in Cambodia between April 17, 1975, and January 6, 1979.

The Case 002 defense teams sought to broaden the historical discussion. Son Arun, Cambodian Co-Lawyer for Nuon Chea, argued that “[o]ne needs a full picture of these facts in order to properly assess the acts and intentions of the DK leaders when they came to power.” Pestman argued that Nuon Chea had essentially admitted ordering the evacuation of Phnom Penh, and the trial should focus on evaluating his legal justifications. The Court resisted efforts to focus on topics such as the U.S. bombardment of the civil war era, Vietnamese intervention, and abuses by various Cambodian factions outside of the DK era. Trial Chamber President Nil Nonn issued a directive informing all parties that:

Background contextual issues and events outside the temporal jurisdiction of the ECCC will be considered by the Chamber only when demonstrably relevant to matters within the ECCC’s jurisdiction and the scope of the trial as determined by the Chamber.

The reluctance to discuss those topics owes partly to politics, but it also obviously represents the pressure of time. It has taken over 30 years to bring the accused to trial, and the pressure has been intense to reach a verdict quickly. The severance order further limited the scope of the historical discussion, leaving doubt about whether it offered Cambodians a meaningful slice of “truth.”

All mass crimes courts struggle with the need to balance the obligation to prevent undue delay in the proceedings with the need to provide a comprehensive, coherent narrative of events. There is little purpose in holding a small number of exemplary trials if a judgment is never reached, or if a judgment is so narrow that it fails to resonate with the affected population. Slobodan Milosevic’s death before verdict on a massive indictment created an impetus toward narrower indictments and shorter trials. However, this approach, as exemplified
by the ICC’s *Lubanga* single-charge indictment, risks being nonrepresentative of the victims’ primary concerns.\(^{216}\) The ECCC’s Case 001 addressed one detention center at which primarily Khmer Rouge cadres and their families were killed. The Case 002 indictment has been split in an effort to reach judgment quickly primarily on one narrow topic—mass population movements. As of October 2013, with Case 002/01 closing arguments underway, it appears doubtful that most of the story of the senior leaders of Democratic Kampuchea will ever be told in a judicial forum, and an enormous gap will remain in the official legal record. This is of particular concern because, as discussed in the next chapter, it is unlikely any other persons will be tried by the ECCC.
Workers unearthing remains at a mass grave at Tram Kak district, Takeo province, circa 1979. (Courtesy of the Documentation Center of Cambodia.)

One of many village meetings organized throughout Cambodia in 1982–83 by the People’s Republic of Kampuchea to shed light on the crimes of the Pol Pot regime. (Courtesy of the Documentation Center of Cambodia.)
The People’s Revolutionary Tribunal, which issued history’s first genocide convictions against Pol Pot and Ieng Sary *in absentia*, held in the Chaktomuk Theatre, Phnom Penh, July–August 1979. (Courtesy of the Documentation Center of Cambodia.)

UN Legal Counsel Hans Corell and Cambodian Deputy Prime Minister Sok An return to the Chaktomuk Theatre for the signing ceremony of the ECCC’s Framework Agreement, June 6, 2003. (Photo by Heng Sinith, courtesy of the Documentation Center of Cambodia.)
Head of the UN Transitional Authority in Cambodia Yasushi Akashi (left) and King Norodom Sihanouk (right) during the UN’s interregnum in Cambodia in 1992–93. (Photo by Benny Widyono, courtesy of the Documentation Center of Cambodia.)

Khmer Rouge soldiers in the mountainous northwestern province of Anlong Veng turning over their weapons to defect to the government with Ieng Sary in 1996. (Photo by Khun Ly, courtesy of the Documentation Center of Cambodia.)
Prime Minister Hun Sen (front left) and Prince Norodom Ranariddh (front right) at the National Assembly in October 2004, when the ECCC Law was passed. Deputy Prime Minister Sok An (far right, head bowed) and current Acting Director of the ECCC Office of Administration Tony Kranh (top center) are among those in the background. (Photo by Heng Sinith, courtesy of the Documentation Center of Cambodia.)

UN Secretary-General Ban Ki-moon (left) addresses the ECCC judges and staff in the courtroom gallery during an October 2010 visit to the tribunal. (Courtesy of the Extraordinary Chambers in the Courts of Cambodia.)
The ECCC complex, including the courtroom *(top)* and administration building *(bottom)* on the site of a former military base on the western outskirts of Phnom Penh. (Photos by Socheat Nhean, courtesy of the Documentation Center of Cambodia.)
Duch on the day of the appeal judgment. (Courtesy of the Extraordinary Chambers in the Courts of Cambodia.)

Villagers watching Duch’s trial on screen at an outreach event in a pagoda at the former Khmer Rouge stronghold of Pailin in northwestern Cambodia. (Photo by Keo Dacil, courtesy of the Documentation Center of Cambodia.)
Civil party Chum Mey, one of few survivors of the infamous Tuol Sleng prison, explaining how he was tortured to the Court (top) and later holding a copy of the Duch verdict with fellow Tuol Sleng survivor Vann Nath outside the ECCC (bottom). (Courtesy of the Extraordinary Chambers in the Courts of Cambodia.)
Co-Prosecutors Andrew Cayley and Chea Leang on the first day of opening statements in Case 002, November 2011. (Courtesy of the Extraordinary Chambers in the Courts of Cambodia.)

Nuon Chea (back, with cap) and his Co-Lawyers Michiel Pestman (left) and Son Arun (right) at the initial Case 002 hearing, June 27, 2011. (Courtesy of the Extraordinary Chambers in the Courts of Cambodia.)
Nuon Chea, former Deputy Chairman of the Communist Party of Kampuchea, addressing Chinese visitors to Democratic Kampuchea (top) and addressing the ECCC Trial Chamber on December 14, 2011 (bottom). (Courtesy of the Documentation Center of Cambodia and the Extraordinary Chambers in the Courts of Cambodia.)
Khieu Samphan (left) and Ieng Sary (right) with Lao Prince Souphanouvong (center) during his visit to Democratic Kampuchea. (Courtesy of the Documentation Center of Cambodia.)

Khieu Samphan during the proceedings against him at the ECCC. (Courtesy of the Extraordinary Chambers in the Courts of Cambodia.)
Ieng Sary toasting the Chinese ambassador as foreign minister of Democratic Kampuchea (top) and greeting his international defense lawyer Michael Karnavas in the ECCC courtroom on November 23, 2011. (Courtesy of the Documentation Center of Cambodia and the Extraordinary Chambers in the Courts of Cambodia.)
Former DK Minister of Social Affairs Ieng Thirith, wife of Ieng Sary, in 1999 in Pailin (top, photo by Youk Chhang) and at a hearing in Case 002 on August 30, 2011 (bottom) before she was severed from the case due to dementia and lack of fitness to stand trial. (Courtesy of the Documentation Center of Cambodia and the Extraordinary Chambers in the Courts of Cambodia.)
Public visitors to the ECCC on the third day of Case 002 opening statements, November 23, 2011. (Courtesy of the Documentation Center of Cambodia.)

Visitors being briefed in the public courtroom gallery before a Case 002 trial hearing as prosecutors and civil parties (left) and defense teams (right) take their seats. (Courtesy of the Extraordinary Chambers in the Courts of Cambodia.)
Case 004 suspect Im Chaem (*far left*) in 1979 and at her home in Anlong Veng in 2011 (*bottom*, photo by Dara Vanthan). (Courtesy of the Documentation Center of Cambodia.)
Case 004 suspect Ta An in Battambang, Cambodia, on August 1, 2011. (Photo by Dara P. Vanthan, courtesy of the Documentation Center of Cambodia.)

Deputy Director of the Office of Administration Knut Rosandhaug and acting OA Director Tony Kranh (left) in 2011 with Cambodian Co-Investigating Judge You Bunleng and his then international counterpart, Siegfried Blunk (right). (Courtesy of the Extraordinary Chambers in the Courts of Cambodia.)
An outreach event on Khmer Rouge history and the ECCC in a Cham Muslim community, led by the Documentation Center of Cambodia. (Photo by So Farina, courtesy of the Documentation Center of Cambodia.)