Hybrid Justice
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CONCLUSION

The ECCC has evoked a wide range of reactions from Cambodian survivors. At times, they have been strongly positive. On the day the Supreme Court Chamber handed down a life sentence to Duch, civil party Bou Meng said, “I am fully relieved and fully satisfied with the court’s ruling. 100 percent . . . This court is a good model for the world.”¹ Sopheap Chak, program director for Cambodian Center for Human Rights, said, “today is quite historic for Cambodia . . . It is a long-awaited resolution for the victims of Khmer Rouge.”² Surveys continue to show that large majorities of Cambodians support the ECCC’s work even though the Court has not addressed—and almost certainly will not adjudicate—the crimes that most survivors suffered individually.

Yet the ECCC has had a precarious existence, often teetering on the precipice of collapse. Inefficiency and recurrent political impasses have eroded the patience of many Cambodians, especially those most informed about the process. Amid corruption and mismanagement allegations, scholar Sophal Ear, a survivor of the Pol Pot era, expressed frustration with the “theater of the absurd” taking place at the Court and lamented that “the tribunal was essentially hijacked to advance domestic and international agendas.”³ As political interference engulfed Cases 003 and 004 and as scope for victim participation narrowed in Case 002, prominent former civil party Theary Seng withdrew from the process and called the ECCC“a political farce, and irredeemable sham”⁴—citing government obstruction and UN failure at “fulfilling its duties, and more than that [helping] enable the impunity.”⁵

International observers have also rendered increasingly bleak assessments of the tribunal. In an early 2012 report, Mark Ellis of the International Bar Association, an “early supporter” of the ECCC who still supports its “overall mission,” lamented that “a growing number of problems” undermine “the very legitimacy of the court.”⁶ Scholar Peter Maguire argues that the Court is perilously close to failing:
Even if there is no third case, a credible trial of Khieu Samphan, Ieng Sary, Noun Chea and Ieng Thirith, would make it possible to overlook the court’s many failings. If Cambodia’s E.C.C.C. cannot try the surviving Khmer Rouge leaders before they die, the “mixed tribunal” should be considered an expensive farce never to be tried again.  

Now only two defendants remain in Case 002, and if the Court is not seen to have delivered a sound trial and reasonable verdicts, few analysts will consider the ECCC anything more than a costly failure.

From the perspective of those seeking to address impunity in Cambodia, the ECCC’s highly flawed structure was arguably the best of an unappealing menu of institutional options. David Scheffer, one of the prime architects of the ECCC, argues that “there is no question that the ECCC was an experiment, but one for which there really was no viable alternative after years of negotiations.”

He adds:

It’s a humbling exercise for the international community. You’re dealing with a sovereign government. You don’t necessarily get to dictate the process. You have to negotiate the process . . . In the aftermath, it’s extremely easy for critics to point out all the mistakes. But let’s talk pragmatically about how you achieve justice.

Given the Cambodian Government’s strong bargaining position, a UN-led court was unlikely to win Cambodian consent. The likely alternatives to the ECCC—crude domestic trials by a discredited court system or the absence of charges altogether—would likely have been worse, and advocates for the Court had good reasons to take risks in pursuing accountability for some of history’s most heinous crimes. Whether or not the ECCC completes Case 002 effectively and pulls at least modest success from the jaws of possible failure—and whether it thus justifies consuming funds and political capital that could have been expended on other initiatives—the Court must be judged in relation to realistic counterfactuals.

Of course, addressing impunity in Cambodia is not the only impetus behind international involvement in the Khmer Rouge tribunal process. It is also part of a broader effort, led by international criminal lawyers, to entrench and
enforce accountability norms. From that perspective, the ECCC has been more problematic, because its functional shortcomings damage the UN’s reputation and could undermine the credibility of mass crimes processes in general. To some UN officials and human rights advocates, the Court also sets a “dangerous precedent” for international criminal justice, perhaps encouraging other states to demand majority-domestic courts.

Hans Corell, who as the lead UN negotiator objected to the ECCC’s structure, asserts, “I did not want . . . the U.N. emblem to be given to an entity that did not . . . represent the highest international standards,” and adds, “everything I warned against has been happening.” Corell argues that many of the Court’s problems “could have been avoided with a majority of international judges and a single prosecutor and investigating judge,” which would have made the court “a different creature.” Looking forward, Corell would “immediately discourage anything like [the ECCC].”

The Court’s structural handicaps have indeed contributed to inefficiency and credibility problems, and the Cambodian case thus offers some clear lessons: the Court’s divided, cumbersome structure should not be mimicked, and the United Nations should resist arrangements in which it plays junior partner to a national judicial system with dubious capacity and independence. It is important to go beyond these headline lessons, however. Many of the ECCC’s problems—such inefficiency, jurisdictional debates, and barriers to effective outreach and capacity-building—reflect common challenges in mass crimes trials that are likely be present even in better-designed courts. Many are also problems of agency more than reflections of the Court’s peculiar structure, and in this respect the Court’s experience also bears some important (if unfortunate) parallels with proceedings at other mass crimes courts. The Khmer Rouge proceedings offer insights into a number of ways in which these challenges can be addressed.

**INTERNATIONAL STANDARDS OF JUSTICE?**

Officials and analysts have justified UN involvement in the Khmer Rouge trials, like UN participation in other hybrid courts, partly to ensure compliance with international standards of justice. The ECCC has issued many decisions in line
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Due to their more extensive formal legal training and experience, international judges at the Court have tended to take the lead in drafting opinions and formulating the legal rationales for decisions. On judicial matters that do not affect clear domestic political sensitivities, the ECCC has functioned much like a fully international court—open to legitimate legal challenges but demonstrating a good faith effort to follow established norms of accountability and due process.

Applying the Court’s procedural rules has been a challenge, however, and the Court has breached international standards over highly politicized issues, especially the jurisdictional dispute. These flow foreseeably (though not inevitably) from the ECCC’s structure and have been the Court’s greatest weakness to date, undermining its judicial credibility despite its many sound decisions on less contentious issues.

The Need for Predictable and Targeted Rules

The novelty of a civil law–based approach to mass crimes cases and the awkward fusion of Cambodian and international procedures via the ECCC’s Internal Rules have led to inconsistency in the application of the rules. The absence of predictable rules arguably violates the basic due process rights of defendants and exposes the ECCC to charges of cherry-picking to achieve desired outcomes.

Basing a hybrid court’s rules partly on national procedures may facilitate local capacity-building by helping to illustrate sound application of local procedures, but it has proven highly problematic in Cambodia. The use of national procedures as a point of departure at the ECCC was part of an overall government effort to assert ownership and control over the process—a kind of home-field advantage. Sovereignty arguments are weak in this regard, however, especially when local rules are half-formed and unfamiliar to local lawyers.

Domestic rules are also not tailored to mass crimes cases, and in states emerging from conflict, they will seldom if ever be suited to handle such cases without major modification. That is certainly the case in states like Cambodia, where domestic rules were ill-equipped to manage the complex Khmer Rouge trials. In practice, hybrid courts will inevitably look to international precedent, so the lesson for designing future mixed courts is to use existing international procedures as a base. These can be customized to fit country conditions, but the International Criminal Court (ICC) and other existing courts (including the ECCC) should be able to provide a strong template, obviating the need to
reinvent the wheel with each new hybrid court—a process that created delay in addition to fairness concerns at the ECCC.

An Independent Majority on the Bench

More serious deviations from international standards of justice have occurred when the Court’s judges and other key personnel have locked horns over politically sensitive topics. Corruption has been an important concern, but even more damaging has been the evident political interference in Cases 003 and 004. The Cambodian Government has offered no strong justification for its public opposition, and the United Nations has evaded its responsibility to ensure an independent process through legal fig leaves—arguing that it cannot interfere in an independent judicial process even amid widespread and credible allegations by ECCC staff that the process is not independent.

The supermajority rule adopted at the ECCC—an effort to mitigate the risks of a majority-domestic bench—has been ineffective as a stopgap measure. Indeed, the supermajority rule has arguably contributed to the problem by suggesting that political interference is an inherent part of the process, embedding that expectation in how the Court functions, and reducing incentives for international actors to confront it. These problems exemplify what many critics of the ECCC’s hybrid structure asserted during its creation: the imperative of having a strong independent majority on the bench.

Independent judges need not be foreign, but in practice governments that lack the capacity to hold credible domestic proceedings are often the same governments that lack judicial independence. Mass crimes cases invariably have great local political importance, making domestic judges all the more vulnerable to political pressure. The ECCC shows how controlling that pressure can be and how badly it can damage the perceived integrity of the judicial process. Beyond the issue of sovereign control, the ECCC provides almost no evidence that having a majority of domestic judges on the bench improves the Court’s function or its public legitimacy or legacy. A court does not need a national majority to communicate the active involvement and ownership of the host government. Architects of future mixed courts should therefore adopt a strong presumption in favor of international majorities on the bench. Doing so will not render a tribunal immune from political influence—international judges can also be subjected to pressure—but offers a much better model than the majority-domestic system at the ECCC.
Retaining Judges with Relevant Training and Expertise

The ECCC example also shows the importance of selecting a greater number of judges with expertise in international criminal law and, even more important, experience managing complex criminal cases. “It’s absolutely necessary that they have courtroom experience,” asserts Corell. In postconflict states, there is unlikely to be a large number of judges with relevant training. Hybrid courts should select international judges with mass crimes experience. In some instances, as in Cambodia, many international judges also lack such experience, contributing to uncertainty in rule application and inefficiency—an issue that has plagued the ECCC and other hybrid courts and undermines much of the purpose for international involvement. Although judges with international criminal experience have been difficult for hybrid courts to recruit, the proliferation of tribunals should ease that constraint somewhat. Tribunals should also invest in capacity-building on the front end, immersing judges in training in The Hague or elsewhere for several months before commencing cases. The up-front costs of such preparation would likely be more than offset in efficiency savings and more effective, credible jurisprudence.

The Question of Jurisdiction

The Cambodian Government insisted on a majority of Cambodian judges and other elements of control partly to guard against an overly zealous prosecution. National concerns about controlling the scope of prosecution are not necessarily illegitimate, and international actors often share those concerns, but they must be addressed more clearly in negotiations over the statute for a hybrid court. The question of jurisdictional bounds is one of the most difficult to resolve in creating any mass crimes tribunal. Judicial independence requires allowing the prosecutor some discretion to “follow the evidence,” but in mass crimes courts there normally will (and must) be limits imposed by political decision-makers. The ECCC is a painful example of what happens when two passengers embark on a journey together without a sufficiently clear agreement on their destination.

The result of the failure to reach a political agreement has been overt political interference during the judicial proceedings, which has undermined the ECCC’s legitimacy and caused costly, inefficient delays. The most obvious inter-
ference has occurred on the Cambodian side, but weary donors and the United Nations have exercised the power of the purse strings in a manner that could also be construed as political interference.

Some of the problem could be resolved by designing a court’s structure to give the domestic government less control, but even majority-international courts have faced jurisdictional disputes, as in the cases of East Timor and Sierra Leone. The governing documents for a hybrid court cannot spell out a precise list of suspects to minimize this challenge, which would be an intolerable constraint on prosecutorial discretion. They must, however, be premised on mutual understanding about what would constitute “red lines.” The United Nations should not agree to a mixed tribunal in the future—and donors should not force it to do so—without a candid assessment of the political boundaries that its partner is apt to impose.

ADVANTAGES IN EFFICIENCY?

The ECCC’s experience shows that hybrid courts with substantial UN participation do not automatically deliver major cost savings. From a financial perspective, the Court has been much more “international” than “domestic.” It has been vastly more expensive than a domestic proceeding would be and much less cost-efficient than the Bosnian War Crimes Chamber or even the more comparable Special Court for Sierra Leone (SCSL). On a per-defendant basis, it is even more costly than the International Criminal Tribunals for Rwanda (ICTR) or the former Yugoslavia (ICTY). Generous pay packages and benefits for personnel have contributed, and the Cambodian experience suggests that managing the merger of staff at a mixed court will more likely lead to cost inflation on the national side than savings on the UN side.

The financial situation at the ECCC is certainly an improvement on East Timor, which was crippled from birth by a lack of funds. Hybrid courts are sure to fail if they are created simply to avoid the costs of credible justice, and the ECCC’s ability to marshal nearly $200 million for the accountability process is largely positive. Resource allocation and management is a bigger problem than the total price tag. The ECCC has dedicated too few resources to the vital functions of outreach and victim participation, which its location and form
empower it to conduct effectively. Resources for those tasks would be much more abundant if the Court were not saddled with structural inefficiencies and plagued by delays and political impasses.

Avoiding Unnecessary Duplication

To a considerable degree, the ECCC’s inefficiency stems from its messy and duplicative structure, a result of successive political compromises and a lack of foresight about the functional effects of dividing the Cambodian and international sides and fusing civil law and common law features. The ECCC’s separation of national and international staff in key legal and administrative offices is one of its most glaring deficiencies, reducing efficiency and overall organizational cohesion. Hybrid teams can be advantageous in some respects, coupling staff with complementary skills, but the ECCC shows convincingly that two-headed arrangements should be avoided. A hybrid court with a single integrated investigation office and registry would be able to function much more efficiently and decisively.

The fusion of civil law and common law has also produced redundancy. In theory, the idea of investigating judges has appeal as a way to improve efficiency. Former international Co-Investigating Judge Marcel Lemonde contends that they may still “represent the future” of international criminal trials and attributes many of the ECCC’s troubles with the OCIJ to common law lawyers who weren’t familiar with the civil law system and in some cases “had no desire to become familiar with it.”20 Even if future mass crimes tribunals were to focus on hiring judges and prosecutors with civil law experience, the ECCC proceedings suggest that mass crimes cases will often be too large for one judicial office to investigate completely, creating an institutional logjam. In addition, mass crimes trials will almost inevitably entail an expansive courtroom process—and thus a second full vetting of the evidence—given survivors’ compelling interest in observing a public proceeding. At the ECCC, the absence of a defense right to challenge the evidence in a pretrial proceeding made a lengthy trial phase imperative from a due process standpoint as well. Although this latter problem could be corrected by allowing a pretrial defense challenge, the architects of future mass crimes proceedings would be wiser to avoid investigating judges altogether. Their role has created problems due to inefficiency, fairness, and credibility—to too much of the process at the ECCC has hinged on the perception of their competence and impartiality.
Lemonde describes the structure of the “cos” and the complex dispute resolution scheme as “a bit monstrous” and “a model of inefficiency,” and many other Court officials agree. Even if future courts include co-prosecutors and/or investigating judges, there is little apparent utility in having a separate pre-trial chamber whose decisions are neither final nor appealable. The ECCC’s Pre-Trial Chamber also has had too much overlapping responsibility with other chambers, requiring multiple appeals and wasting both funds and time. If a pretrial mechanism does exist, its authority must be circumscribed to a relatively narrow range of functions, such as reviewing indictments and dealing with pretrial detention issues. The Special Tribunal for Lebanon, in which one international judge serves as a pretrial judge performing these functions, provides a more efficient model. So do the ICC’s pretrial chambers, which have limited authority to review the pretrial phases of the investigation, ensure the pretrial rights of the accused, and confirm charges. The ECCC’s problem of multiple appeals bodies also suggests that parties should have a direct right to appeal pretrial rulings to the appeals chamber, the decisions of which will be final and binding on the trial chamber. Such a mechanism, which exists at the ICC, would offer ample due process with much more efficiency.

Part of the reason why such a cumbersome system was adopted is that relatively few of the people most crucial to the negotiations for the Court were practiced courtroom lawyers with mass crimes experience. Former international Co-Prosecutor Robert Petit argues,

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

Corell agrees. “People involved in this kind of process should listen closely to persons with courtroom experience . . . listen to those with courtroom experience,” he asserts, repeating the point for emphasis.

Unifying Court Leadership

One of the most common complaints from ECCC personnel is the lack of decisive leadership under the ECCC’s two-headed structure. Future hybrid courts should have a court president and registrar with the authority needed to drive
through key decisions and impose administrative and budgetary discipline. The individuals chosen to occupy those and other key positions also matter. The ECCC has benefited from having a few personnel with expertise in Khmer Rouge history, as well as a number of officials and defense counsel with ample experience at other hybrid and international courts. Funds would also have been better spent, however, if officials experienced in judicial administration had occupied key administrative positions from the start. The president and registrar must be viewed, inside and outside of the building, as credible and competent in the working of a mass crimes court. They do not necessarily need to be international appointees, but given the limited number of likely candidates in states emerging from conflict, they usually should be.

Strengthening Oversight Mechanisms

Many of the ECCC’s problems are related to the weak oversight structures in place for the Court. The United Nations is deeply involved in the Khmer Rouge trials but has been reluctant to exert firm ownership of the process. This is closely related to the lack of clear lines of authority. Among multiple UN entities and personnel involved—the Office of Legal Affairs, Controller’s Office, Department of Economic and Social Affairs, UN Development Program, the Special Expert, and the UN-appointed Deputy Director of Administration—it has often been unclear who is in charge, confusing and weakening administration.

As the saga over Cases 003 and 004 drags on, Rupert Abbott and Stephanie Barbour of Amnesty International argue that although the United Nations has used “strong words” regarding Cambodian political interference, it has been guilty of a “lackluster response.”26 Brad Adams of Human Rights Watch has accused the United Nations of “burying its head in the sand.”27 When the UN Secretariat does not “buy into” a hybrid court fully, it is likely to have weak, indecisive management, which contributes to financial inefficiency and administrative irregularities. The United Nations and donor states need to decide in advance whether to own a process or to distance themselves from it. The ECCC shows the reputational and financial problems of going halfway.

If international actors decide to invest heavily in a hybrid court, there needs to be a formal process of donor oversight. Donor states are not stewarding their taxpayers’ money well when they agree to fund a court that they cannot or do not meaningfully supervise. Supervision does not mean overreach into judicial functions—it means ensuring that money is productively and transparently
spent. The ECCC example also shows that donors should fund a hybrid court as a single entity rather than setting up financial structures that reinforce divisions and add to uncertainties and delays. In general, the best model for any mass crimes court is to be funded through UN-assessed contributions but subjected to rigorous and regular questioning on costs from a dedicated UN office with expertise in the management of mass crimes cases—an office that still does not exist after two decades of UN involvement in international criminal tribunals.

A STRONGER NEXUS TO SURVIVORS?

Without major cost advantages and with the risks that the hybrid model poses to judicial standards, the justification for mixed courts must rest to a large extent on their potential connection with the survivor population and societal contribution in the state where atrocities occurred. The ECCC’s performance suggests that hybrid courts can confer those functional advantages but that mixed personnel and an in-country presence by no means guarantee effective victim participation or capacity-building functions.

Outreach to the General Public

The ECCC’s ability to connect with victims and the general Cambodian population has been one of the clearest functional advantages flowing from the Court’s in-country setting. Although the ECCC has not met its full outreach potential or achieved the SCSL’s level of success—which has been the best among mass crimes trials to date—it has exceeded the fully international courts and the Special Panels in East Timor.

The Court’s divided structure and unclear lines of responsibility posed modest obstacles to outreach from the start, but the main barrier to its effectiveness has been the decision by donors and Court management not to fund outreach adequately. The Court’s problems in other areas, such as the corruption scandal and evident political interference, have also affected outreach adversely by forcing Court officials to play defense and distracting attention away from positive elements of the ECCC’s judicial example.

When the ECCC has had sufficient funds, it has been able to conduct effective outreach in partnership with Cambodia’s well-developed NGO community. Its efforts to ensure strong public participation in the courtroom have been
unparalleled, and its use of diverse media and civil society networks has allowed information to reach many of Cambodia’s poorly connected communities. Crucially, the ECCC proceedings have served as a vehicle for raising awareness about issues ranging from human rights to mental health, and they have signaled that it is now acceptable to speak publicly about the Khmer Rouge period and to educate youth about it. The ECCC has not led most such efforts, but its participation has magnified their impact by offering an official imprimatur.

Even when the Court has struggled through successive crises, it has set a positive example of transparency by comparison to national courts and may increase popular expectations of transparency in domestic proceedings. While there are mixed views of the ECCC, especially among better-informed observers and members of the opposition parties, general public support for the process has been strong. Yet inefficiency, corruption, and political interference have turned many international and Cambodian observers against the Court, and further problems could lead it to fail the public’s expectations for a credible judicial process.

In sum, public outreach at the ECCC has been far from perfect, but it has been a relative success compared to most mass crimes courts. It shows some important advantages of in-country hybrid proceedings but also the need to fund such efforts appropriately if future hybrid courts are to provide social benefits that justify their administrative and jurisprudential risks. Moreover, the Cambodian case shows the importance of supportive NGO networks in outreach activities—a lesson vital for national courts, hybrid tribunals, and above all for the ICC, which conducts its trials far from the locus of atrocities.

Engaging Victims

The ECCC’s victim participation scheme, featuring a novel system enabling some victims to join the proceedings as civil parties, has been an important experiment for mass crimes courts. The attention that the ECCC’s ambitious scheme drew to victim’s needs is a positive aspect of its performance and legacy and contributes to a general trend of international criminal courts to incorporate victims in accountability processes. The participation of civil parties in the Duch trial, while inefficient, succeeded overall in giving victims a central place in the related processes of justice-seeking, truth-telling, and empowerment. However, moving beyond that small universe of victims, the larger numbers
of potential civil parties in Case 002 has taxed the Court’s resources and led to inconsistent and sometimes unfair rulings. The ECCC’s difficulties suggest that a system of direct civil party participation will often be untenable at a mass crimes court. Limited participatory rights—such as those existing at the STL and ICC—offer a more realistic path forward, coupled with a process that ensures victims are able to share their stories as witnesses and complainants.

Any victim participation scheme is apt to fall flat if it is not strongly supported by donors. The Court’s meager capacity to issue “collective and moral reparations” undercuts public expectations regarding its ability to provide victims with relief. The efforts of the underfunded Victim Support Section to correspond with many thousands of general Khmer Rouge victims also highlights that even in a state with a large and active NGO community, a hybrid court can only engage victims meaningfully if it has the resources to do so. There will necessarily be significant constraints on what volume of funds are available, putting stress again on the need for more efficient structures for judicial administration.

Delays and inefficiency have also led to a further problem at the ECCC with regard to victim involvement: the Trial Chamber’s decision to split the Case 002 indictment and proceed with a trial that is not representative of the harms endured by most Cambodian survivors. For a mass crimes court with limited personal jurisdiction and finite resources to connect meaningfully to large numbers of survivors, its trials need to present a compelling narrative relevant to their experiences.

Capacity-Building and the Rule of Law

Hybrid courts like the ECCC naturally result in some transfer of skills between national and international personnel. Current and former personnel at the Court assert that mixed legal teams worked well and provided opportunities to play to their comparative advantages and to develop skills. The fact that some Cambodians are being trained at the ECCC and remain engaged—or will later engage—with the local judicial system makes this a nonnegligible positive outcome of the Khmer Rouge trials. Of course, this function need not be limited to hybrid courts. The ICC should look for opportunities to expand the involvement of personnel from states emerging from mass crimes and to provide technical assistance to proceedings conducted by national governments with an evident commitment to fair proceedings. A capacity-building focus flows di-
rectly from the ICC’s complementarity principle, which stresses its mandate to complement the exercise of sovereign judicial authority.

The ECCC’s broader effect on the Cambodian judiciary or rule of law is much less apparent. Major change in the domestic legal system in the near term is unlikely, and as of yet there are few signs that the ECCC’s role as a “model court” is translating into better function in Cambodia’s ordinary courts. Other hybrid courts have not fared particularly well on this score, suggesting that the capacity-building potential of mixed tribunals is modest at best without dedicated resources and programs. Perhaps the ECCC’s most promising example for the rule of law in Cambodia has been the demonstration—for the most part—of fair trial rights through a vigorous defense and procedural safeguards. The ECCC also provides a valuable resource to Cambodian educators, students, and practitioners, many of whom are already using its voluminous documentary record and outreach materials to study various points of law. For the ICC and other mass crimes courts, a key lesson is to provide the public with clear and relevant information, even though doing so will often lead to critiques. A tribunal’s functions do not all need to be successful to be useful as a catalyst for dialogue and reflection on what it means to have a rule of law.

NEGOTIATING THE TERMS OF FUTURE MASS CRIMES COURTS

The design and operation of mass crimes courts are invariably the products of complex negotiations and ongoing political and financial compromises, and the motivations of the actors vary. The capacity and will of the host government matter greatly, and the Cambodian case shows plainly how difficult it is to build and run an effective tribunal when the host government is more focused on political control than a credible and independent judicial process. When a host government rejects the types of institutional features and personnel choices that would optimize a court’s function, as the Cambodian Government did, mounting effective trials is difficult indeed.

For this reason, some human rights advocates have argued that the United Nations should have avoided the Khmer Rouge trials altogether. Doing so would have protected the United Nations from involvement in troubled pro-
ceedings and might have averted a further blemish on the reputation of international criminal justice, but it would also have forfeited an importance chance to promote accountability for some of history's most egregious offenses. The UN should not easily walk away from opportunities to forge workable hybrid arrangements, even in difficult cases like Cambodia; the alternative of dubious domestic proceedings—or no trials at all—would sometimes be much worse. The Cambodian case does not justify an end to hybrid courts; rather, the most constructive lessons to draw from the ECCC are ways that some of the problems of structure and agency adversely affecting the Court could be fixed, even when working with a difficult sovereign partner. Although the ECCC will be the only mass crimes proceeding in Cambodia in the foreseeable future, the United Nations and international justice advocates will surely deal with challenging conditions again.

One lesson to draw from Cambodia is that the United Nations and key donors need to be more concerned with, and more informed about, the prospective function of a mass crimes court during the design phase. Representatives of the United Nations, major donor states, and civil society come to the table with diverse agendas and typically engage in horse-trading that leads to overly complex structures and mandates that the realized court will lack the funding and capacity to meet effectively. Thoughtful reflection on the implications of design features can reduce (if not eliminate) this problem. Including negotiators with mass crimes court experience is imperative.

The inclusion of investigating judges and three official languages have created foreseeable challenges that should have been weighed more heavily during negotiations. In some cases, design flaws have resulted partly from a failure to spell out specific provisions during the negotiations. For example, the ECCC’s civil party scheme began with too many legal teams offering largely redundant contributions in court. The judicial structure enabling certain legal issues to be raised four times, including Pre-Trial Chamber review of orders by the Co-Investigating Judges, has been unnecessarily cumbersome as well. Both of these problems arose from the Internal Rules, which were drafted by judges seeking to fill lacunae in the tribunal’s constitutive documents with little explicit authority and official oversight.

These technical aspects of the Court are not easily detachable from the political rivalries that ran throughout the negotiations, which largely explains
why such inefficient features were adopted. At least some such problems can be avoided, however, if negotiators concentrate on their interests in an effective proceeding, not just their narrower interests in exerting influence over a particular aspect of the proceedings. Increasing efficiency would have gone a long way toward improving the ECCC’s performance and public legitimacy, and those who design other courts should take heed.

Enhanced efficiency would not eliminate problems such as corruption and political interference, however, and the Cambodian case demonstrates that international negotiators should insist on stronger institutional safeguards—citing the ECCC’s problems as support for such demands. The ICC was not an option for Cambodia given its temporal jurisdiction, but in the future the threat of ICC action will often be available in negotiations, which could help overcome unreasonable assertions of host government prerogative. Donor states also need to be committed to ensuring necessary safeguards, because without their backing, the UN Secretariat usually has little independent leverage. Donors have ample incentive to reflect carefully on the functional implications of the design features they endorse, as they will bear the ultimate bill for the proceedings that result.

Even if international officials and civil society leaders engage thoughtfully, there will be cases in which an acceptable hybrid arrangement is simply unavailable. Where a host government has custody of suspects and enjoys the political clout to resist a credible judicial process, the UN should be circumspect about offering its explicit imprimatur to the court, which risks diluting the already compromised standards of international criminal justice. When all measures to ensure an adequately designed hybrid court have been exhausted, the United Nations would be wiser to provide only limited technical support. That would allow UN officials to threaten to exit credibly and to disengage, if necessary, without bringing the process to an end. Donors should not force the UN Secretariat to enter into a majority-domestic hybrid arrangement, and if they disagree fundamentally with UN experts, they should participate through other channels.

When a deal is concluded for a hybrid court, however, the United Nations needs to engage actively and assertively to uphold standards of administrative integrity, judicial independence, and due process. The Cambodian case shows the danger of ambivalent and halting UN engagement, which can lead to pas-
sivity and become a form of collusion in a substandard process. Worse still, where the United Nations fails to defend core principles such as transparency and judicial independence, it risks contributing to a negative legacy, both for the country involved and for the UN system itself. If the United Nations and enough of its key members do commit themselves to defending international standards, hybrid courts can have a valuable role to play alongside the ICC and domestic proceedings in advancing the cause of justice.