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NOTES

Introduction

7. For some leading historical accounts of the terror, see generally Kiernan, supra note 4; Craig Etcheson, The Rise and Demise of Democratic Kampuchea (1984); David P. Chandler, The Tragedy of Cambodian History: Politics, War, and Revolution since 1945 236–72 (1993); Michael Vickery, Cambodia, 1975–1982 (1984); Elizabeth Becker, When the War Was Over: Cambodia Under the Khmer Rouge Revolution (1986).
8. The most infamous such prison was located at a former high school in Phnom Penh and is now the Tuol Sleng museum. See generally David P. Chandler: Voices of S-21: Terror and History at Pol Pot’s Secret Prison (1999).

12. See, e.g., Chanrithy Him, When Broken Glass Floats (2001); Luong Ung, First They Killed My Father: A Daughter of Cambodia Remembers (2006); Children of Cambodia’s Killing Fields (Dith Pran ed., 1997).


17. M. Cherif Bassiouni, Introduction to International Criminal Law 578 (2003) (arguing that “probably the biggest weakness in these [ad hoc tribunals] is their failure to contribute to the enhancement of national judicial systems”).


22. Cassese, supra note 21, at 333–34; Ratner et al., supra note 15, at 248.


24. Cassese, supra note 21, at 334; Dickinson, supra note 18, at 307 (arguing that “side-by-side working arrangements allow for on-the-job training” that is more effective than classroom learning); Ethel Higonnet, Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice, Yale Law School Legal Student Scholarship Papers 67–24 (2005).

25. Dickinson, supra note 18, at 306; Cassese, supra note 21, at 334 n. 41; Higonnet, supra note 24, at 45–46.


28. The Special Tribunal for Lebanon was created by a Security Council resolution, but only after an agreement was signed between the Lebanese government and UN Secretary-General. S.C. Res. 1757, U.N. Doc. S/RES/1957 (May 30, 2007).


30. That was particularly so in East Timor, where despite local calls for an international tribunal, UN officials and potential donors were loath to bear the costs or responsibility for politically sensitive charges against Indonesians. Suzanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, 16 Harv. Hum. Rts. J. 245, 246–47.

31. See Dickinson, supra note 18, at 296 n. 4 (citing David Scheffer, who was instrumental in setting up the ECCC and SCSL, and Hansjörg Strohmeyer, who worked to establish the East Timor and Kosovo courts, rejecting them as models in comments made in 2002).


33. Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses, UNTAET, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000). “Serious crimes” were defined to include genocide, war crimes, crimes against humanity, murder, and sexual abuses.


36. See UNMIK Resolution 2000/64 of 15 December 2000 On Assignment of International Judges/Prosecutors and/or Change of Venue.


42. ICTY Rules of Procedure and Evidence (rev. 46), rev’d Oct. 11, 2011, r. 11 bis.


48. Peter Maguire, ECCC’s Tarnished Legacy and the UN, Cambodia Tribunal Monitor (Mar. 27, 2012), http://www.cambodiatribunal.org/sites/default/files/03-27-12-Maguire Commentary.pdf (calling the ECCC an “expensive, overcomplicated experiment that should never be tried again”).


51. Interview with Craig Etcheson, former investigator in the ECCC Office of the Co-Prosecutors, via telephone (Oct. 22, 2012).


53. Interview with William Smith, ECCC deputy international Co-Prosecutor, Phnom Penh (June 5, 2012).

Chapter 1

1. Tom Fawthrop, *UN Abets Khmer Rouge Impunity*, Asia Times Online (June 12, 2002).


15. *Id.* at 261–64; Kiernan, *supra* note 5, ch. 7.


20. See, e.g., Stephen R. Heder, *Dealing with Crimes Against Humanity: Progress or Illusion?,* in *Southeast Asian Affairs* 2001, at 129–30 (2001); Kheang Un & Judy Ledgerwood, *Is the Trial of Duch a Catalyst for Change in Cambodia’s Courts?* 95 *Asia Pacific Issues* 8 (E.-W. Ctr., June 2010). In fact, in at least one instance, the possibility of an investigation into the activities of current CPP leaders has appeared during the proceedings. See Forwarding Order, Case No. 003/07-09-2009-ECCC-OCIJ (May 4, 2012) (including a request by reserve international Co-Investigating Judge Laurent Kasper-Ansermet to investigate alleged Khmer Rouge crimes in Vietnamese territory in which senior CPP leaders may have been involved, citing Steve Heder, *Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Accountability in Comparative Perspective,* in *Bringing the Khmer Rouge to Justice* 377 (Jaya Ramji & Beth Van Schaack eds., 2005)).


22. Sok-Kheang Ly, *State and Individual Efforts to Bring about Reconciliation* (Documentation Center of Cambodia, Aug. 2009).


36. Khmer Rouge forces repeatedly violated the cease-fire, but UNTAC’s Japanese leader interpreted his peacekeeping mandate narrowly, emphasizing neutrality and consent and allowing force only when UNTAC units were attacked. See Steven R. Ratner, The New UN Peacekeeping 157–86 (1996).
44. Heder, supra note 42, at 9–12.
47. See, e.g., Wendy Lambourne, The Khmer Rouge Tribunal: Justice for Genocide in

48. See Ciorciari & Ramji-Nogales, supra note 34.


51. See David Scheffer, All the Missing Souls 345–59 (2012).


58. Thomas Hammarberg, How the Khmer Rouge Tribunal Was Agreed, Searching for the Truth (June 2001), at 38.


60. U.N.G.A. Res. 52/135 (Dec. 12, 1997). Kofi Annan later appointed Australian Ninian Stephen, Mauritian Rajsoomer Lallah, and American Steven Ratner to the group. The resolution used the term “group of experts” rather than “commission,” which had been used for the ICTY and would suggest adherence to that model. Hammarberg, supra note 58, at 38–39.


65. Scheffer, supra note 51, at 377–78.


67. Scheffer, supra note 51, at 369–70 (noting that Kenya, Portugal, and Britain supported the concept).


86. Presentation by His Excellency Sok An, to the Stockholm International Forum: Truth, Justice and Reconciliation, at 6 (Apr. 23–24, 2002).


88. Id. See also Thierry Cruvellier, Court of Remorse: Inside the International Criminal Tribunal for Rwanda 10 (2010) (noting that “the new Rwandan government was envisioning the establishment of a court in Kigali where Rwandans would be involved . . . [but] the UN Security Council chose to set up the tribunal outside the country and, in order to guarantee its impartiality, barred Rwandans from having any judicial responsibility.”).


91. See Greg Torode, Beijing May Veto Genocide Tribunal, S. China Morning Post, Feb. 6, 1999; Etcheson, supra note 24, at 154–55; Ratner et al., supra note 78, at 281.

92. Scheffer, supra note 64, at 226.

93. Letter from the Cambodian Prime Minister to the UN Secretary-General (Apr. 28, 1999).


96. Jarvis participated in the talks as an advisor to the Cambodian Government. Fawthrop & Jarvis, supra note 72, at 155.


100. Hammarberg, supra note 58, at 39–40. King Sihanouk argued that a UN-majority arrangement with Cambodian consent would not violate Cambodian sovereignty. Id.

101. Id.

102. Scheffer, supra note 51, at 387–89 (noting that the Cambodian Government found the label of a “mixed tribunal” offensive to its sovereignty).

103. Id.
104. Id. at 392–93; Scheffer, supra note 64, at 229–30.


107. Hammarberg, supra note 58, at 40.


110. Interview with Hans Corell, former UN Legal Counsel, via telephone (Nov. 15, 2012).


114. See, e.g., Heder, supra note 42, at 37 (citing Foreign Minister Hor Namhong’s March 12, 1999, remarks at a press conference, asserting that Hun Sen would focus on Nuon Chea, Khieu Samphan, and Mok).


116. Heder, supra note 42, at 37.

117. Corell interview, supra note 110.

118. Thomas Hammarberg, How the Khmer Rouge Tribunal Was Agreed, SEARCHING FOR THE TRUTH (Oct. 2001), at 42.

119. Corell interview, supra note 110.

120. Id.

121. Scheffer, supra note 51, at 396–99.

122. U.N., Cambodia Agree on Court to Try Khmer Rouge Leaders, DEUTSCHE PRESSE-AGENTUR, July 6, 2000.


125. Letter from Sok An, Senior Minister in Charge of the Council of Ministers, to Hans Corell, Under Secretary-General for Legal Affairs (Nov. 23, 2001). See also Statement from the Royal Government of Cambodia Task Force on the Khmer Rouge Trial (Mar. 15, 2002).

126. Daily Press Briefing by the Office of the Spokesperson for the Secretary-General (Feb. 8, 2002).


128. Corell interview, supra note 110.


131. The U.S. government pressed for a fully international tribunal, but British and Sierra Leonean officials favored a hybrid court in Freetown featuring strong national ownership. See Scheffer, supra note 51, at 322–31.


133. Corell interview, supra note 110.

134. The Sierra Leonean government did not insist on the full scope of national involvement foreseen in its agreement with the UN, partly due to a loathness to take full responsibility for the prosecutions of rebel leaders. Thierry Cruvellier, From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test, International Center for Transitional Justice and Sierra Leone Court Monitoring Program, at 31 (2009). See also Sarah Kendall & Michelle Staggs, From Mandate to Legacy: The Special Court for Sierra Leone as a Model for “Hybrid Justice,” UC Berkeley War Crimes Study Center, at 3, n. 4 (Apr. 2005) (noting that although the government nominated one judge on each trial chamber, nominees were not required to be Sierra Leonean, and Trial Chamber II had no national judge).

135. Mydans, supra note 129; Cambodia Says Keeping Door Open for UN on Khmer Rouge Trial, Reuters, Feb. 9, 2002.


137. Corell interview, supra note 110.

138. See EU Asks U.N. to Seek Khmer Rouge Trials, Wash. Times, Feb. 22, 2002; Tran-


141. Bill Myers, Cambodian Tribunal Pushed, CHICAGO TRIBUNE, Mar. 9, 2002.

142. See Etcheson, supra note 24, at 151–54.

143. Joint Communique of the 35th Annual ASEAN Ministerial Meeting, Bandar Seri Begawan ¶ 45 (July 29–30, 2002).

144. Fawthrop & Jarvis, supra note 72, at 195. Civil society organizations including the Open Society Institute reportedly played a key convening role. Interview with David Scheffer, UN Special Expert to advise on UN Assistance to the Khmer Rouge Trials and former U.S. Ambassador-at-Large for War Crimes Issues, Phnom Penh (June 16, 2012).


146. Id. pmbl. ¶¶ 7–8, ¶¶ 1, 4–6. See also Elizabeth Becker, U.N. Revives Plan to Try Remnants of Khmer Rouge in Cambodia, N.Y. TIMES, Nov. 21, 2002 (noting that 37 states had abstained from a key committee vote for similar reasons).


149. Report of the Secretary-General, supra note 95, ¶ 21.


151. On the debates regarding the tribunal’s personal jurisdiction, see generally Heder, supra note 42; Scheffer, supra note 109.

152. Report of the Secretary-General, supra note 95, ¶ 29.

153. Id. ¶¶ 28–29. Similar concerns have justified the international majority at the SCSL. See Erika Kinetz, Eyes of the World Turn to ECCC for Lessons, CAMBODIA DAILY, Nov. 12, 2007 (paraphrasing SCSL Chief Prosecutor Stephen Rapp as saying that although the SCSL’s national staff members are essential, international control of hybrid courts is needed, because national courts lack “a good record of prosecuting members of a seated regime or its allies”).

154. Presentation by Deputy Prime Minister Sok An to the National Assembly on
Ratification of the Agreement Between Cambodia and the United Nations, at 8 (Oct. 4–5, 2004) [hereinafter Sok An 2004 Presentation]. See also Erika Kinetz, ECCC Hopes to Be New Model for Tribunals, CAMBODIA DAILY, Oct. 19, 2009 (quoting ECCC official and current acting Director of Administration Kranh Tony as saying the Cambodian Government wanted to create “something new” to be faster, more affordable, and more immediate to the affected population).


156. Id.


159. Id.


161. Id.

162. Report of the U.N. Secretary-General, supra note 95, ¶ 30, 81.


167. See 2001 Law, supra note 123, art. 31; ECCC Law, supra note 166, art. 47 bis new.

168. Report of the U.N. Secretary-General, supra note 95, ¶ 25 (arguing that the Agreement constituted an “international agreement” that must be “implemented in accordance with the requirements of the law of treaties”). See also ECCC Law, supra note 166, art. 2 (2) (specifying that the Vienna Convention on the Law of Treaties applies to the agreement).

169. Framework Agreement, supra note 150, art. 4; ECCC Law, supra note 166, art. 14 new; Internal Rules of the ECCC, rev’d Aug. 3, 2011, r. 77(13) [hereinafter ECCC Internal Rules (rev. 8)].

170. See chapter 3 for discussion of the OA.
171. ECCC Law, supra note 166, art. 11 new; Framework Agreement, supra note 150, art. 3.

172. ECCC Law, supra note 166, art. 46 new. To save costs, the United Nations has indeed abolished international posts or made them national posts where “expertise is available locally and the functions can be met through national recruitment.” ECCC, ECCC Revised Budget Requirements 2010–2011, at 7 (Jan. 24, 2011).

173. Key examples include Co-Prosecutor Chea Leang, Co-Investigating Judge You Bunleng, Director of the Office of Administration Tony Kranh, and VSS head Rong Chhun.\footnote{See generally Roger Fisher & William Ury, Getting to Yes (rev. ed. 2011).}


176. See Wang Jianwei, Great Power Relations and Their Impact on Japan-Southeast Asian Relations: A Chinese Perspective, in Japan’s Relations with Southeast Asia 70–79 (Lam Peng Er ed., 2013); Kittis Prasirtsuk, Japan and ASEAN in East Asian Community-building: Activating the Fukuda Doctrine, in id. at 105–6.


179. For example, Sok An announced in September 1999 that his team would soon complete a draft domestic law for a Khmer Rouge tribunal—an apparent means of pressuring the UN negotiators. The next day, Japan announced a new $40 million soft loan. George Chigas, The Trial of the Khmer Rouge: The Role of the Tuol Sleng and Santebal Archives, 4 Harv. Asia Q. (Winter 2000).


182. Corell, supra note 147, at 4.


184. Interview with Craig Etcheson, former investigator in the ECCC Office of the Co-Prosecutors, via telephone (Oct. 22, 2012).
Chapter 2

1. See Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (June 6, 2003) [hereinafter Framework Agreement], art. 2(2) (providing that the agreement would be implemented through a domestic law).


4. Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias “Duch,” Case No. 001/18-7-2007-ECCC/OCIJ (PTC01), ¶ 19 (Dec. 3, 2007) [hereinafter Decision on Duch’s Detention Appeal].


6. See Statute of the Special Court of Sierra Leone, Jan. 16, 2002, art. 8(1),(2) [hereinafter SCSL Statute]; Statute of the Special Tribunal for Lebanon, § 1, art. 4(1), Annex, U.N. Doc. S/RES/1757 (May 30, 2007). The Kosovo and East Timor panels also had jurisdiction over offenses that would normally have fallen to ordinary domestic criminal courts.

7. Decision on Request for Release, supra note 5, ¶ 10–12 (also noting that “[a]s a court of special (‘extraordinary’) and independent character within the Cambodian legal system, the ECCC was designed to stand apart from existing Cambodian courts” and that ECCC officers have “no competence to appear before or sit in judgment over a decision by a domestic Cambodian court”). See also Decision on Duch’s Detention Appeal, supra note 4, ¶ 19.


11. Report of the Secretary-General on Khmer Rouge Trials, ¶ 15, U.N. Doc. A/57/769 (Mar. 31, 2003). See also id. ¶ 16(b),(c) (proposing to remedy these defects by a majority of international judges, a single prosecutor and single investigating judge, and a simpler two-tier structure with a trial chamber and appeals chamber).

12. Interview with Michael G. Karnavas, former Co-Lawyer for Ieng Sary, Phnom Penh (May 19, 2012).

13. The Special Panels in East Timor included an investigating judge, but the judge’s role was limited to ensuring the rights of accused under investigation. See UNTAET Regulation 2000/11, § 12 (entered into force Mar. 6, 2000) as amended by Regulation 2000/14, § 4 (entered into force May 10, 2000).


15. Id. r. 53(3). The submission must contain, inter alia, a summary of the facts, the alleged offenses, the identity of the persons to be investigated, if applicable, and the signature of both Co-Prosecutors.

16. Id. r. 55(2)-(3).

17. Id. r. 55(4).

18. Id. r. 67(1),(4).

19. Framework Agreement, supra note 1, arts. 5(4), 6(4).


21. Quoted in id. ¶ 133.

22. See Interview with William Smith, ECCC deputy international Co-Prosecutor, Phnom Penh (June 5, 2012) (arguing that “it is inefficient to have two heads, though there are benefits for the Cambodian judicial system by injecting Cambodians into a proper system”).


24. See Bates, supra note 20, ¶ 134.

25. Id. ¶ 131 (quoting Judge Lemonde). See also Quelles leçons tirer du procès des Khmers rouges? REVUE DE SCIENCE CRIMINELLE 597 (2011) (featuring an interview with Lem-
onde, translated from French by the authors, noting that the procedure governing disputes between the Co-Investigating Judges could not be used daily because if a question was transmitted to the Pre-Trial Chamber it would result in weeks or months of delay).


27. See Duch Closing Order, supra note 23, ¶ 7 (noting that the CIJs considered the investigation concluded in May 2008, three months prior to the Closing Order’s issuance).

28. See Closing Order, Case No. 002/19-9-2007-ECCC-OCIJ ¶ 13 (Sept. 15, 2010) [hereinafter Case 002 Closing Order] (noting that the CIJs had completed the investigation eight months before the closing order’s issuance).


30. ECCC Internal Rules (rev. 8), supra note 14, r. 55(5),(6).


32. Interview with Clint Williamson, former UN Special Expert to advise on the UN Assistance to the Khmer Rouge Trials and former U.S. Ambassador-at-Large for War Crimes Issues, via telephone (June 27, 2012). See also Interview with Anta Guissé, Co-Lawyer for Khieu Samphan, Phnom Penh (Nov. 15, 2012) (noting that because civil law trials are so short, the common law system may be more applicable to mass crimes proceedings); Interview with Panhavuth Long, Program Officer, Cambodian Justice Initiative, Phnom Penh (July 6, 2012) (noting that if the investigation was more public the trial could be shorter “instead of revisiting the same issues and prolonging everything”).

33. See, e.g., Charles C. Jackson, Process and Problems: Defense Counsel at the Extraordinary Chambers in the Courts of Cambodia, at 24 (updated Nov. 2010), available at http://www.cambodiatribunal.org/sites/default/files/resources/ctm_eccc_defense_charles_jackson.pdf. But see Quelles leçons, supra note 25 (arguing that for complex mass crimes trials, an investigative judge is more efficient than party-driven investigations because one party seeks to confuse the Tribunal and prevent it from working). Cf. Judge Marcel Lemonde, remarks at the conference “The Contribution of Criminal Proceedings before the ECCC to Cambodian Law,” Royal University of Law and Economics, Phnom Penh, Dec. 4, 2012 [hereinafter Judge Lemonde Remarks] (saying that investigative judges should be employed at future mass crimes courts because “one of the main objectives of defense is to not go to the point right away”).

34. See, e.g., Cassese, supra note 29, at 357 (noting that in domestic systems proceedings before investigating judges are often “excessively lengthy”).

35. See, e.g., Judge Lemonde Remarks, supra note 33 (noting that he expected the ECCC to follow the “new European model” being generated by decisions of the European Court of Human Rights, which brings together the best of both the adversarial and inquisitorial systems: a pretrial phase “more open but more efficient and richer” and a trial that is “shorter but respect[s] the rights of the parties”). The expectation of a short trial is implicit
in the Internal Rules, which provide extraordinarily limited opportunity for immediate appeal and—unique among mass crimes courts—including no provision for periodic review of defendants’ detention during trial. See ECCC Internal Rules (rev. 8), supra note 14, r. 82(1), r. 104(4).

36. Interview with Michiel Pestman, former Co-Lawyer for Nuon Chea, Phnom Penh (June 9, 2012). One of the authors also heard this from the international CJ on her arrival in Phnom Penh.

37. Internal Rule 60(2) provides in part: “Except where a confrontation is organized, the [CJ]s or their delegates shall interview witnesses in the absence of Charged Persons . . . or their lawyers[.]” Judge Lemonde was reportedly the principal drafter of the Internal Rules. The exclusion of defense from witness questioning derives from Cambodian procedures based on obsolete French law. See Cambodian Criminal Procedure Code (as adopted Aug. 10, 2007) [hereinafter CPC], art. 153 (providing in part: “The investigating judge questions witnesses separately, without any presence of the charged person and any civil party. The investigating judge may also arrange a confrontation between the charged person, civil parties and witnesses”).

38. Judge Lemonde Remarks, supra note 33. Cf. Michael Karnavas, Op-Ed., It’s Time to Salvage the Khmer Rouge Tribunal’s Legacy, CAMBODIA DAILY, Dec. 12, 2012 (responding to Judge Lemonde’s remark by noting that the Court’s mishmash of procedures derive from the Internal Rules, which the ECCC judges drafted and “to this day continue to be amended and unevenly interpreted and applied”).

39. Karnavas interview, supra note 12 (arguing that “the judges should have read the entire dossier. They should decide which documents they want, which witnesses should come in . . . . But here we have judges abdicating their role—I wonder why? Big hint: They haven’t read the file”).

40. See, e.g., Kathia Martin-Chenut, Proces International et Modeles de Justice Penale, in DROIT INTERNATIONAL PENAL 847, 854–56 (Hervé Ascensio et al., 2d ed. 2012) (discussing how reforms to the ICTY and ICTR rules, particularly in response to efficiency problems evident in the Milosevic trial, led to the “hybridization” of international criminal procedures, including allowing more written submissions and decisions in lieu of oral hearings).

41. Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, Case No. 002/19-9-2007-ECCC/TC, ¶ 26 (Trial Chamber, June 20, 2012).


43. See Bates, supra note 20, ¶ 132 (reporting that the one-year Duch investigation included interviews of more than 60 witnesses, two days of in camera confrontation hearings between Duch and 12 key witnesses, and a repetition of the same questions at trial). See
also Anette Marcher, *Investigating Judge Seen as Obstacle to Justice for KR*, Phnom Penh Post, Feb. 4–7, 2010 (noting that participants in a workshop on due process before the ECCC was established recommended abolishing investigative judges in the Cambodian national system because their role “makes no positive contribution to the administration of justice . . . [but] results in continuing dysfunction and unnecessary dual work.”).

44. Smith interview, supra note 22.

45. You Bunleng, Cambodian Co-Investigating Judge at the ECCC, response to questionnaire from the authors, June 25, 2012 (translated from Khmer by Kimsroy Sokvisal).

46. See, e.g., Interview with Rupert Skilbeck, former head of the ECCC Defence Support Section, via telephone (July 7, 2012).

47. See Bates, supra note 20, ¶ 132 (citing interviews with judicial staff); authors’ interviews with parties.

48. Id. ¶ 133.

49. ECCC Internal Rules (rev. 8), supra note 14, r. 73(a); Interview with Hans Corell, former UN Legal Counsel, via telephone (Nov. 15, 2012) (Saying that he and his delegation invented the PTC to solve only one problem: disagreements between the Co-Investigating Judges and the Co-Prosecutors: “Ironically, there would be a positive effect of the super-majority rule here. In order to stop a prosecution before the ECCC at least one international judge on the Pre-Trial Chamber would have to support such a decision. I saw no other way of protecting all the work put into this. I saw this as an element that could bring some dignity in the proceedings that, irrespective of the final outcome, at least there would be a public hearing of the case in question before the ECCC.”).


52. A supermajority of the Supreme Court found the appeal inadmissible under its narrow interlocutory jurisdiction. Decision on Ieng Sary’s Appeal Against the Trial Chamber’s Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne Bis in Idem* and Amnesty and Pardon), Case No. 002/19-9-2007-ECCC-TC/SC(11) (Mar. 20, 2012). Two international judges dissented, arguing the SCC had an obligation “to give the Appeal full consideration at the earliest possible juncture.” Id. Dissenting Opinion of Judges Klonowicka-Milart and Jayasinghe ¶ 4. See also Anne Heindel, *Interpreting the Right of Appeal in the Interest of Fair Proceedings*, Cambodia Tribunal Monitor (July 12, 2012), http://www.cambodiatribunal.org/sites/default/files/CTM Heindel 12-07-12.pdf. Due to Ieng Sary’s death, the issue will not be subject to further adjudication.

53. Karnavas interview, supra note 12.

54. Decision on Appeal against Provisional Detention Order of Ieng Sary, Case No. 002/19-9-2007-ECCC/OCIJ (PTC03), ¶ 23 (Oct. 17, 2008) [hereinafter Decision on Ieng Sary’s Detention Appeal].
55. Decision on Duch’s Detention Appeal, supra note 4, ¶ 63.


57. Decision on Ieng Sary’s Detention Appeal, supra note 54, ¶¶ 57–63.


59. Ieng Sary’s Appeal Against the Closing Order, Case No. 002/19-9-2007-ECCC/OCIJ (PTC 75), ¶ 22 (Oct. 25, 2010).

60. In the Closing Order, the CIJs had ducked the question, finding that it should be decided in a public adversarial hearing before the Trial Chamber. See Case 002 Closing Order, supra note 28, ¶ 1333.

61. Decision on Ieng Sary’s Appeal Against the Closing Order, supra note 58, ¶ 67.

62. See, e.g., Interview with Craig Etcheson, former investigator at the ECCC Office of the Co-Prosecutors, via telephone (Oct. 22, 2012) (emphasizing that “[t]he amount of staff and lawyer time required [to address these repeated challenges] is quite remarkable”).


64. Id. arts. 7–8. The ECCC may hears cases involving the destruction of cultural property under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, but that convention neither defines the elements of a crime nor establishes individual criminal responsibility. The ECCC Law also grants the Court jurisdiction to adjudicate crimes against internationally protected persons, citing the Vienna Convention of 1961 on Diplomatic Relations, but that convention also does not establish individual criminal responsibility.

65. Case 002 Closing Order, supra note 28, ¶ 1301.

66. Ieng Sary’s Appeal Against the Closing Order, supra note 59, ¶ 8 (citations omitted).


69. See, e.g., Prosecutor v. Hadzihasanovic et al., supra note 68, ¶ 62.

70. See, e.g., Prosecutor v. Milutinović et al., Decision on Dragoljub Ojdanić’s Motion

71. See Duch Appeal Judgment, supra note 67, ¶ 97.

72. Article 6 of the Penal Code of 1956 states in part, “[c]riminal law has no retroactive effect. No crime can be punished by the application of penalties which were not pronounced by the law before it was committed.”

73. See Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, Case No. 002/19-9-2007-ECCC/OCIJ (PTC 145 & 146), ¶ 88 (Feb. 15, 2011); Decision on Ieng Sary’s Appeal Against the Closing Order, supra note 58, ¶ 204.

74. See Decision on Appeals by Nuon Chea and Ieng Thirith, supra note 73, ¶ 89–90; Decision on Ieng Sary’s Appeal Against the Closing Order, supra note 58, ¶ 205.

75. Duch Appeal Judgment, supra note 67, ¶ 91, 96.

76. Prosecutor v. Hadzihasanovic et al., supra note 68, ¶ 34.

77. Decision on Appeals by Nuon Chea and Ieng Thirith, supra note 73, ¶ 97.

78. Decision on Ieng Sary’s Appeal Against the Closing Order, supra note 58, ¶ 212.

79. Decision on Appeals by Nuon Chea and Ieng Thirith, supra note 73, ¶ 98, 100. See also Decision on Ieng Sary’s Appeal Against the Closing Order, supra note 58, ¶ 213.

80. Decision on Appeals by Nuon Chea and Ieng Thirith, supra note 73, ¶ 99.

81. Duch Trial Chamber Judgment, supra note 67, ¶ 292. Duch did not challenge this on appeal.

82. Decisions on Appeals by Nuon Chea and Ieng Thirith, supra note 73, ¶¶ 134–48; Decision on Ieng Sary’s Appeal Against the Closing Order, supra note 58, ¶¶ 304–13.


84. Decision on Ieng Sary’s Appeal Against Trial Chamber’s Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, Case No. 002/19-9-2007/ECCC/TC/SC(10), ¶ 8 (Mar. 19, 2012) (finding the appeal inadmissible).

85. Duch Trial Chamber Judgment, supra note 67, ¶¶ 293–96.

86. Duch Appeal Judgment, supra note 67, ¶¶ 176, 179.

87. Id. ¶ 213.

88. See Decision on Appeals by Nuon Chea and Ieng Thirith, supra note 73, ¶ 154.


91. Decision on Ieng Sary’s Request to Make Submissions on the Application of the

92. Decision on Urgent Joint Defence Request to Intervene on the Issue of Joint Criminal Enterprise in the OCP Appeal Against the Duch Closing Order, Case No. 001/18/-07-2007-ECCC/OCIJ (PTC 2), ¶ 8 (Nov. 5, 2008).

93. Decision on Ieng Sary’s Request to Make Submissions in Response to the Co-Prosecutors’ Request for the Application of Joint Criminal Enterprise, Case No. 001/18-7-2007-ECCC/OCIJ (PTC 02), ¶ 4 (July 3, 2009).

94. Duch Trial Chamber Judgment, supra note 67, ¶¶ 511–12.

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

96. Id. ¶¶ 30–37.


98. Duch Trial Chamber Judgment, supra note 67, ¶ 549.

99. Decision on Appeals by Nuon Chea and Ieng Thirith, supra note 73, ¶ 230. See also Rehan Abeyratne, Superior Responsibility and the Principle of Legality at the ECCC, 44 Geo. Wash. Int’l L. Rev. 39 (2012) (arguing that although the PTC decided the matter correctly, the 1977 Additional Protocol I to the Geneva Conventions of 1949 would have provided a stronger basis for the ruling than post–World War II jurisprudence).

100. Decision on Ieng Sary’s Appeal Against the Closing Order, supra note 58, ¶ 459.


103. Notably, international crimes were entirely excluded from the STL’s jurisdiction, apparently because some Security Council members doubted the events at issue would satisfy the “widespread or systematic” threshold required for crimes against humanity. See STL Report of S-G, supra note 10, ¶¶ 23–25.


105. According to trial monitors, the decision not to file national charges was both a
legal and a tactical decision by the prosecutor, who described national law as “a legal mine field” that could complicate the court’s response to jurisdictional challenges.” Sarah Kendall & Michelle Staggs, From Mandate to Legacy: The Special Court for Sierra Leone as a Model for “Hybrid Justice,” UC Berkeley War Crimes Study Center (Apr. 2005) at 7. But see Jalloh, supra note 104, at 173 (finding it “regrettable” that national law was not invoked, “as its use in indictments would have at least played a symbolic role by signaling the restoration of the rule of law in the country thereby enhancing the legitimacy of its troubled system”).

106. See ECCC Law, supra note 63, art. 3 new.


110. Id. ¶¶ 52–54.

111. Case 002 Closing Order, supra note 28, ¶ 1574.


114. Framework Agreement, supra note 1, art. 12(1). See also ECCC Law, supra note 63, arts. 20 new, 23 new, and 33 new. Comparatively, the SCSL Statute provides that in amending that court’s rules the judges “may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.” SCSL Statute, supra note 6, art. 14(2). The SCSL Trial Chamber found that this reference “is only a means of guidance for the Judges … and certainly not legally binding upon them.” Prosecutor v. Allieu Kondewa, SCSL-2003-12-PD, Decision on the Urgent Defense Application for Release from Provisional Detention, ¶ 27 (Nov. 21, 2003).

115. See Framework Agreement, supra note 1, art. 12(1). See also ECCC Law, supra note 63, arts. 20 no new, 23 new, and 33 new.

116. See SCSL Statute, supra note 6, art. 14.

117. See, e.g., You Bunleng, supra note 45 (highlighting the challenge of applying Cambodian procedures in a court comprising staff and judges from diverse legal traditions); Judge Lemonde Remarks, supra note 33 (saying the ECCC’s civil law system was applied by actors who are not familiar with it and do not want to discover or understand it); Inter-
view with Elisabeth Simonneau Fort, ECCC Civil Party Lead Co-Lawyer, Phnom Penh (June 1, 2012) (noting that although the Court should apply civil law, common law lawyers tend to advance the system they know, and most mass crimes jurisprudence is rooted in common law); Etcheson interview, supra note 62 (noting that learning the rules, and innovation, is part of working in any suigeneris institution, and OCP staff often felt that they were “making [it] up as [they] went along”).

120. Karnavas interview, supra note 12. See also Ieng Sary’s Response to the “Co-Prosecutors’ Request to Put Before the Chamber Two Letters by Amnesty International Addressed to KHIEU Samphan and IENG Sary,” Case No. 002/29-09-2007-ECCC/TC, ¶¶ 6–21, 29 (Mar. 3, 2013) (including a description of inconsistencies in the Trial Chamber’s application of document admission rules and a request that the Chamber “[e]stablish clear and fair rules regarding the admission of new documents that would apply to all parties in a uniform manner”). Cf. Confidential interview, Phnom Penh (May 14, 2012) (noting that, as at other hybrid courts including the Kosovo panels, Bosnian War Crimes Chamber, and Special Panels in East Timor, at the ECCC “rules are violated based on momentary convenience”).

121. Interview with Diana Ellis, Co-Lawyer for Ieng Thirith, Phnom Penh (Nov. 11, 2012). See also Martin-Chenut, supra note 40, at 861 (raising the question of whether mixing the accusatorial and inquisitorial systems “destabilizes their coherence” or “represents a solution”).

122. Karnavas interview, supra note 12.

123. Simonneau Fort interview, supra note 119.

124. But see Smith interview, supra note 22 (“It’s better to have a process based on [domestic] civil law because Cambodia has a lot to gain from following the ECCC model, even with modifications”). Cf. Martin-Chenut, supra note 40, at 862 (arguing, citing Rupert Skilbeck, that international trials present special challenges making it impossible to simply transpose domestic models; hybridization is needed “despite the risk of creating monsters”).

125. See Letter from Sok An, Senior Minister in Charge of the Office of the Council of Ministers to Hans Corell, UN Undersecretary for Legal Affairs (Jan. 22, 2002) (noting the Government’s intent to establish “a hierarchy in which Cambodian law and procedure are relied upon before resorting to other international procedure where necessary to fill any gaps”).

126. Yoshi Kodama, Japanese Ministry of Foreign Affairs, For Judicial Justice and Reconciliation in Cambodia: Reflections upon the Establishment of the Khmer Rouge Trials and the Trials’ Procedural Rules 2007, 9 LAW & PRACTICE OF INT’L TRIBS. 37, 83 (2010). See also You Bunleng, supra note 45 (stating that the Internal Rules are a revision of Cambodia’s procedures based on the challenges of prosecuting mass crimes cases in accordance with international standards).

127. See, e.g., Preliminary Objection Concerning the Legality of the Internal Rules and

128. Preliminary Objection Concerning the Legality of the Internal Rules, supra note 127, ¶ 12.

129. Id. ¶ 20 (arguing that “any departure from ‘existing procedures in force’ must . . . be justified by reference to one of the[] specific statutory exceptions . . . [and] creation of new rules for the sake of convenience or mere efficiency . . . is in direct violation of the terms of Article 12(1) of the ECCC agreement.”).

130. See, e.g., Decision on Request for Release, supra note 5, ¶ 11.


132. Id.


134. Id.

135. Id.

136. Previously two competing codes were in force, the Transitional Law adopted by the UN Transitional Authority in Cambodia in 1992 and the State of Cambodia (SOC) Law on Criminal Procedure (1993). The SOC arguably lacked legal authority to adopt it at the time, but the SOC Law remained the primary source of reference for Cambodian courts until the 2007 adoption of the CPC. Sluiter, supra note 31, at 319.

137. See, e.g., Khuon Narim & Khy Sovuthy, Municipal Court Sentences 13 Boeng Kak Protesters to Jail, Cambodia Daily, May 25, 2012 (reporting that 13 women arrested for protesting the confiscation of their land by a private company were “charged and then immediately sentenced” to two-and-a-half years in prison after their lawyers walked out “in order to protest the court’s decision to deny their request for witnesses and to have the case delayed”).

138. See, e.g., Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of Accused, Experts and Witnesses Testifying on Character, Case No. 001/18-7-2007/ECCC/TC (Oct. 9, 2009) (Judge Lavergne dissenting).

139. See Preliminary Objection Concerning the Legality of the Internal Rules, supra note 127, ¶ 20.

140. See, e.g., Interview with Jeanne Sulzer, former Legal Officer in the ECCC Civil
Party Lead Co-Lawyer Section, Phnom Penh (June 1, 2012). Judge Lemonde Remarks, supra note 33 (saying the CPC is “a copy and paste” of the French Code before 2000 and is “not adapted to the 21st century” as the old French Code has gaps and fairness issues that have been sanctioned by the European Court of Human Rights).

141. Judge Lemonde Remarks, supra note 33.

142. See, e.g., Transcript of Trial Proceedings—Case 002, Case No. 002/19-9-2007-ECCC/TC, at 70 (Aug. 27, 2009) (in which a French defense lawyer argued against following the civil law approach on civil parties’ rights to question witnesses, highlighting debates on that issue in France).

143. Marcher, supra note 43.


146. See Cable 06PHNOMPENH2095, supra note 144, ¶ 2.

147. See id. ¶ 4.


149. Id. (quoting assistant prosecutor Alex Bates).

150. Thet & Kinetz, supra note 145.

151. MacKinnon, supra note 148, at 19 (quoting an unnamed senior Western diplomat in Phnom Penh as saying, “It’s not that Hun Sen will be indicted, but one or two top generals could be.”).


154. See, e.g., OSJI, Progress and Challenges and the Extraordinary Chambers in the Courts of Cambodia, at 11 (June 2007).


157. Bar Association, supra note 156.

158. Cable 07PHNOMPENH77, supra note 152, ¶ 4.


160. Cable 07PHNOMPENH103, U.S. Embassy Phnom Penh, RGC Worried ECCC

161. Former Ambassador-at-Large David Scheffer visited Phnom Penh and spoke with Sok An at the request of OSJI “at the behest of some ECCC staff members.” See id. ¶ 7.

162. See ECCC Internal Rules (rev. 8), supra note 14, r. 11.


167. See Erika Kinetz & Prak Chan Thul, Int’l Lawyers Join in Condemnation of High Bar Association Fees, CAMBODIA DAILY, Apr. 16, 2007; Cable 06PHNOMPENH2095, supra note 144, ¶ 6 (repeating speculation that the defense office’s USD $4.8 million dollar budget was the primary reason for the BAKC’s interest in the ECCC); Cable 07PHNOMPENH438, U.S. Embassy Phnom Penh, Cambodian Bar Association Says to ECCC: Show Me the Money ¶ 5 (Mar. 20, 2007), available at http://www.wikileaks.org/cable/2007/03/07PHNOMPENH438.html (reporting that most sources believed the BAKC was seeking money after losing international funds due to irregularities in the election for Bar president).


171. Simonneau Fort interview, supra note 119. But see interview with former ECCC official, via telephone (June 10, 2012) (saying that as a separately constituted court, the ECCC is neither a civil nor a common law court, and the relative influence of each varies across issues).


173. See Amnesty International, Sierra Leone: Recommendations on the Draft Statute of
the Special Court (Nov. 14, 2000), at 17 (arguing similarly in anticipation of the SCSL “that the mixture of two different sets of rules of evidence may cause confusion.”).

175. Id. ¶ 28.
176. Id.
177. Id. ¶ 46.
178. Id. ¶ 47.
179. Id. Partially Dissenting Opinion of Judge Noguchi ¶ 6. Similarly, the CIJs have said that merely because some CPC provisions were not incorporated into the Internal Rules “does not constitute a ‘lacuna[.]’” Rather “[t]hey were deliberately left out because they were manifestly ill-adapted to the unique circumstances of the ECCC.” The Strategy of the Co-Investigative Judges in Regard to the Judicial Investigations, Case No. 002/19-9-2007-ECCC-OCIJ, ¶ 11 (Dec. 11, 2009).
180. See, e.g., Civil Party Co-Lawyer Silke Studzinsky’s response to Judge Klonowiecka-Milart regarding the interplay of the Internal Rules and CPC regarding civil party admission, Transcript of Appeal Proceedings—Kaing Guek Eav “Duch,” Case File No. 001/18-7-2007-ECCC/SC at 67–68 (Mar. 30, 2011) (arguing that in view of a difference between CPC article 355 and Internal Rule 100, “the rules are clear in this regard . . . and therefore we see [the Internal Rules] as a specific and as a first-ranking source where we have to look, except where there is a gap.”)
181. Duch Appeal Judgment, supra note 67, ¶ 409. Cf. id. ¶ 466 (noting that in considering Duch’s appeal, “the Supreme Court Chamber begins with an examination of the relevant provisions of the 2007 Code of Criminal Procedure of Cambodia. The Chamber will then determine whether the Internal Rules deviate from this regime and, if so, to what extent.”). Cf. Decision on Immediate Appeal Against the Trial Chamber’s Order to Unconditionally Release the Accused Ieng Thirith, Case No. 002/19-9-2007 ECCC-C/SC, ¶ 33 (Dec. 14, 2012) (noting the “methodological uncertainty as to whether the Trial Chamber opted to innovate pursuant to Article 12 of the ECCC Agreement by incorporating [international procedural standards], or whether it remained grounded in Cambodian law and was interpreting existing provisions in light of international standards”).
182. See, e.g., Long interview, supra note 32 (arguing that enactment of the CPC during the life of the Court benefits the domestic system, because ECCC practice will influence how nationals apply the law in national courts).

Chapter 3

1. We set aside administrative functions related to outreach and victim support, which are discussed at length in subsequent chapters.
2. Interview with David Tolbert, former UN Special Expert to advise on the UN Assistance to the Khmer Rouge Trials, via telephone (June 19, 2012).

4. ECCC Law, supra note 3, art. 31 new.


6. Framework Agreement, supra note 3, art. 8(4).


8. Kodama, supra note 5, at 49.


13. Interview with Hans Corell, former UN Legal Counsel, via telephone (Nov. 15, 2012).


17. Confidential interview responses (on file with the authors).

18. Interview with Clint Williamson, former UN Special Expert to advise on the UN Assistance to the Khmer Rouge Trials and former U.S. Ambassador-at-Large for War Crimes Issues and UN Special Expert, via telephone (June 27, 2012) (noting that “there was lots of skepticism about the ability of the Court to operate effectively in light of how
things were playing out initially” and that more effective administration was “important before the U.S. got behind the Court publicly”.

20. Williamson interview, supra note 18.
21. Confidential interview responses (on file with the authors).
22. Confidential interview with a senior ECCC staff member, Phnom Penh (Nov. 2012).
23. ECCC Law, supra note 3, art. 44(1) new.
24. Id. art. 44(4) new.
25. ECCC Law, supra note 3, art. 44(2) new; Framework Agreement, supra note 3, art. 17(a).
26. Framework Agreement, supra note 3, art. 17(c).
27. Id. art. 17(b), (d).
28. To date, approximately 35 UN member states have contributed to the ECCC. The United Nations also applied $5 million left in the UN’s account from the UN Transitional Authority in Cambodia. Extraordinary Chambers in the Courts of Cambodia, How Is the Court Financed? http://www.eccc.gov.kh/en/faq/how-court-financed (last visited Apr. 24, 2012).
35. Corell interview, supra note 13. See also Hans Corell, Foreword, in INTERNATIONAL PROSECUTORS v, vii (Luc Reydamds et al. eds., 2012) (asking: “What credibility would national courts have if they were funded by different donors and not from taxes or other official revenues? It is obvious that the same reasoning should be applied at the international level.”).
36. Confidential senior staff interview, supra note 22.
37. SCSL Statute, supra note 10, art. 25.
39. Id. r. 19(1) (noting that the Co-Prosecutors also participate in a consultative capacity).
40. Heindel, supra note 12.
41. Confidential senior staff interview, supra note 22.
42. Interview with Larry Johnson, former UN Assistant Secretary-General for Legal Affairs, via telephone (June 21, 2012).
43. Id.
44. Tolbert interview, supra note 2.
45. Id.
47. A 2007 audit by UNDP, discussed in detail infra, found the oversight of the Cambodian side of the court to be sorely lacking. United Nations Development Program, Audit of Human Resources Management at the Extraordinary Chambers in the Courts of Cambodia (ECCC), Report No. RCM0172 (June 4, 2007), at 20–21.
49. Cable 08TOKYO217_a, U.S. Embassy Tokyo, DAS Marcial Engages Japan Interlocutors on SE Asia ¶ 10 (Jan. 28, 2008), available at http://www.wikileaks.org/plusd/cables/08TOKYO217_a.html (paraphrasing comments made by Ihara Junichi, Ministry of Foreign Affairs of Japan). See also Cable 08USUNNEWYORK872, U.S. Mission to the United Nations, Corruption Allegations Dominate Khmer Rouge Trials (UNKRT) Steering Committee Meeting in New York at UK Mission ¶ 15 (Sept. 29, 2008), available at http://www.wikileaks.org/cable/2008/09/08USUNNEWYORK872.html (paraphrasing a statement by Peter Taksoe-Jensen, Assistant-Secretary for Legal Affairs, that the UN Office of Legal Affairs “does not presently have the resources to devote the necessary time and attention to the Tribunal”).
50. Anne Heindel with John Ciorciari, Possible Roles for a Special Advisor or Oversight Committee for the ECCC, SEARCHING FOR THE TRUTH (Jan.–Mar. 2008); OSJI, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia 10 (Dec. 7, 2007).
52. Williamson interview, supra note 18.
53. Id.
54. Postlewaite, supra note 51.
55. Interview with Craig Etcheson, former investigator in the ECCC Office of the Co-Prosecutors, via telephone (Oct. 22, 2012).
56. Williamson interview, supra note 18.
57. Although the Special Expert post was not initially associated with the United States, subsequent U.S. funding and the appointment of former U.S. officials have created
a nexus since 2010. See Cable 09STATE15565, U.S. Secretary of State, Demarche Request: U.S. Candidate for UN Special Expert for the Khmer Rouge Tribunal ¶ 6 (Feb. 10, 2010), available at http://www.cablegatesearch.net/cable.php?id=10STATE15565 (noting that U.S. officials had offered to fund the position); Cambodia: Ban Designates New Adviser for Khmer Rouge Trials, UN NEWS CENTRE, Jan. 18, 2012.

58. See Letter from Nuon Chea Defense Team, Request for Information Related to Ex-Parte Meetings Between Judge Cartwright, Andrew Cayley, and/or Knut Rosandhaug (Nov. 4, 2011).


61. The Nuon Chea team demanded the dates and minutes of meetings to see if Judge Cartwright and Cayley had discussed issues pertaining to Case 002. Request for Information Regarding Ex-Parte Meetings Among Judge Silvia Cartwright, the International Co-Prosecutor, and the Deputy Director of Administration, Case no. 002/19-9-2007-ECCC-TC, ¶ 6 (Nov. 15, 2011). Defense lawyers sought to participate but were rebuffed on the grounds that the meetings are “informal” and “ad hoc” and defense teams could raise administrative or operational matters with the OA Deputy Director. Letter from Knut Rosandhaug to Mr. Udom and Mr. Karnavas (Nov. 7, 2011), available at http://www.eccc.gov.kh/en/document/court.

62. See Urgent Application for Disqualification of Judge Cartwright, Case No. 002/19-9-2007-ECCC-TC, ¶ 12 (Nov. 21, 2011) (arguing that that while the secret meetings may have been undertaken with good intentions, they violated the Cambodian Code of Judicial Ethics and raised concerns about Judge Cartwright’s impartiality).


67. SCSL Statute, supra note 10, art. 7.


69. Cable 05CANBERRA1215, supra note 66, ¶ 3.


73. Cable 06PHNOMPENH1118, supra note 71, ¶ 9.

74. Cable 07PHNOMPENH429, supra note 70, ¶ 1.

75. Id. ¶ 7. The U.S. Embassy supported that approach, but with exceptions in “rare circumstances” on “issues that could threaten the ECCC’s existence [or] credibility.” The Australians also did “not support joint diplomatic engagement.” Id. ¶ 5–6.

76. Id. ¶¶ 8–9.

77. Id. ¶ 6.

78. Kodama asserts that the Friends Group “never uses bilateral assistance to force issues on the Office of Administration.” Kodama, supra note 5, at 108.

79. Williamson interview, supra note 18.

80. Id. (describing some “natural” differences in view between the New York–based group, which tended to take a “more legal or administrative view,” and ambassadors in Phnom Penh, who tended to put things in the “broader political context” of their relations with Cambodia, leading to “a bit of a disconnect” at times).

81. John Hall, Donors Should Adopt a Balanced Approach to Funding ECCC, Cambodia Daily, July 21, 2008 (suggesting that the shift may have been partly an effort to avoid exposure to another UN audit amid an ongoing corruption scandal).


83. Ford, supra note 82, at 977.

84. See, e.g., In Cambodia, UN Legal Chief Warns on Interference in Work of Genocide Tribunal, UN News Centre (Oct. 20, 2011); UN Defends Judge in Khmer Rouge Trial Row, Agence France Presse, Jan. 25, 2012 (reporting on meetings between Sok An and senior UN officials regarding the Case 003 and 004 disputes).


86. Tolbert interview, supra note 2.


90. The UNDP’s Office of Audit and Performance Review and a Malaysia-based firm performed the audit in early 2007, and the ECCC later released it publicly. UNDP Audit, supra note 87, at 9.

91. The 2007 ECCC personnel handbook specifically asserts that only national section chiefs can perform those roles. Id. at 18–19.

92. Id. at 1–5, 15–16 (adding that the performance evaluation system was inadequate).

93. Id. at 9–11.

94. Id.

95. Id. at 5.

96. Kodama, supra note 5, at 57. Kodama was the Japanese Co-Chair of the Friends of the ECCC donor group in 2006–7 and supports the Cambodian Government’s position on sovereignty over domestic staff management and hiring, subject to reasonable outside critiques. Id. at 77.

97. UNDP Audit, supra note 87, at 6.

98. Hall, supra note 7, at 186.


100. Id.


102. Id.

103. These arguments were not unique to Cambodia. National staffers made very similar arguments at the Special Panels in East Timor. Suzannah Linton, Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor, 25 MELB. U. L. REV. 122, 150 (2001).

104. UNDP Audit, supra note 87, at 11, 20–21 (adding that the Project Board’s process did not “provide sufficient assurance that the implementation of the project will be properly directed and controlled”).

105. Id. at 6, 20–21.

106. Id.

107. Cable 07PHNOMPENH429, supra note 70, ¶ 4.

108. Extraordinary Chambers in the Courts of Cambodia, Personnel Handbook (Na-


111. Id. at 2.


114. Douglas Gillison, KR Victims Unit Officers Dismiss Questions on Appointments, CAMBODIA DAILY, Aug. 6, 2009; Julia Wallace, Khmer Rouge Tribunal Victims Unit Gets New Chief, CAMBODIA DAILY, Sept. 2, 2010 (noting that Helen Jarvis and her successor, Rong Chhorn, were both appointed head of the Victims Unit without such a competition).


117. Press Release, OSJI, Corruption Allegations at Khmer Rouge Court Must Be Investigated (Feb. 24, 2007).


121. Id. ¶ 10 (noting that Cambodian staffers feared making accusations openly given the lack of a “whistleblower culture” but were glad international staffers revealed information to OSJI, hoping media attention would end the practice).

122. Id. ¶ 6, 8 (noting that Scheffer also thought OSJI had erred by “going public too quickly”).

123. Id. ¶¶ 8–9.

124. United Nations Development Program, supra note 109. See also Kinetz, supra note 14.

125. Cable 07PHNOMPENH826, U.S. Embassy Phnom Penh, ECCC

126. See, e.g., Kinetz, supra note 85 (including a staffer’s confidential allegation that he had to “hand over 25 percent of his salary for his job”); Douglas Gillison, ECCC Reviews New Graft Allegations on Eve of Funds Drive, CAMBODIA DAILY, July 29, 2008 (noting that Sean Visoth circulated a memo within the ECCC concerning new allegations of corruption).


129. Tolbert interview, supra note 2; Hall, supra note 7, at 191.


133. Cable 08PHNOMPENH841, U.S. Embassy Phnom Penh, Core Donors Updated on Khmer Rouge Tribunal Are United in Addressing the Corruption Issue ¶ 1 (Oct. 10, 2008), available at http://dazzlepod.com/cable/08PHNOMPENH841/. Key donors approached the Cambodian Government bilaterally about the need to address the corruption issue but did not issue a joint demarche. Id. ¶ 6 (noting that the Japanese embassy saw a joint demarche as too confrontational and one-sided, and France and Australia agreed).

134. Tolbert interview, supra note 2 (noting that donors had helped arrange the meeting after Sok An initially resisted meeting with him, because the RGC objected to the creation of the Special Expert post).

135. Id. (paraphrasing Sok An and noting that Sok An had asked Tolbert to provide a copy of the OIOS report and to remove OA Deputy Director Knut Rosandhaug, both of which Tolbert refused to do). See also Cable 08PHNOMPENH883, U.S. Embassy Phnom Penh, Sok An on the Khmer Rouge Tribunal ¶¶ 6, 7, 9, 13 (Nov. 3, 2008), available at http://dazzlepod.com/cable/08PHNOMPENH883/.


139. Cable 09PHNOMPENH168, supra note 138, ¶ 6.

140. Id. ¶¶ 10–12.


144. The ambassadors present represented Japan, France, Australia, Germany, the United Kingdom, and the United States, as well as the European Union chargé. Cable 09PHNOMPENH264, supra note 142, ¶¶ 5–6, 11. She added, “The donors have rallied around a position that will encourage both sides to re-think their positions. We have been frank in stating that we believe it is time for the Cambodians to make some concessions, but also believe the UN must be seen as engaged.”

145. Id. ¶ 6.


148. Cable 09PHNOMPENH333, supra note 147, ¶ 6.


151. Id.

152. Sophal Ear, Cambodian ‘Justice,’ Wall St. J. Asia, Sept. 1, 2009 (noting that Uth’s

153. Cable 09PHNOMPENH564, supra note 149, ¶ 9 (noting that ECCC drivers had told embassy drivers that they had not been asked to pay kickbacks for some time—another indication of how widely known the kickback scheme was among diplomatic missions in Phnom Penh).

154. Cable 09STATE15565, supra note 57, ¶ 4.

155. OSJI, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia 16 (Dec. 2010) [hereinafter OSJI Dec. 2010 Report]. Some Court personnel interviewed for this book asserted confidentially that they believe some corrupt activity is still occurring but that the Government has been more successful in keeping staffers from going public.


157. Cable 09PHNOMPENH316, supra note 115, ¶ 1.

158. Sok An even noted the similar role that U.S. officials played in the impasses of the 1999–2003 period and 2009. Cable 09PHNOMPENH333, supra note 147, ¶ 5.

159. James O’Toole, UN Keeps Corruption Probe Confidential, Phnom Penh Post, Oct. 18, 2010.


162. Cable 06PHNOMPENH1983, supra note 11, ¶ 5 (noting that head of the Defense Support Unit Rupert Skilbeck warned the Friends group in 2006 that fees paid to Cambodian prosecutors and defense lawyers at the ECCC—which far exceed normal pay in Cambodia—would raise public relations questions).


164. Id.

165. David Cohen, Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future? 61 Asia Pacific Issues 5 (E.-W. Ctr., Aug. 2002). See also Steven R. Ratner et al., Accountability for Human Rights Atrocities in International Law 253 (3d ed. 2009) (emphasizing that the Panels and SCU “could not adequately protect at-risk witnesses; public defenders were underpaid and poorly trained; and investigators lacked basic tools”).

166. Cohen, supra note 165, at 3.


173. Confidential senior staff interview, supra note 22.


175. Kodama, supra note 5, at 56.


178. Cable 06PHNOMPENH1362, supra note 88, ¶ 6.


180. Respondent no. 2, confidential questionnaire to Cambodian ECCC staffers (June 2012) (on file with the authors) [hereinafter ECCC respondent no. 2].

187. Etcheson interview, supra note 55.
188. Confidential senior staff interview, supra note 22.
189. Tolbert interview, supra note 2 (calling the budget preparation and adjustment process "very inefficient").
190. Kodama, supra note 5, at 81–82.
191. Id. at 63–64.
192. The original budget for the tribunal was set at $30 million, but when Japan announced its $21 million contribution, both international and Cambodian participants in the talks reportedly feared Japanese dominance and raised the figure to $56 million. Youk Chhang, *The Thief of History—Cambodia and the Special Court*, 1 INT’L J. OF TRANS. JUST. 157, 165 (2007).
193. The United States was conspicuously absent, barred by law from providing financial support directly to the Cambodian Government.
194. Kodama, supra note 5, at 45–46.
195. As early as September 2006, ECCC officials reported to U.S. officials that “the ECCC’s budget office has concluded that the original USD 56.3 million three-year budget for the ECCC is now widely believed among Cambodian and UN staff to be inadequate.” Cable 06PHNOMPENH1691, U.S. Embassy Phnom Penh, *Ambassador Meets with ECCC Co-Prosecutor; Funding Shortfalls Highlighted* ¶ 6 (Sept. 6, 2006).
196. Interview with Rupert Skilbeck, former head of the ECCC Defence Support Section, via telephone (June 7, 2012) (noting as an example that initial budgets planned for a three-month investigation—an unrealistic time frame that any civil law investigating judge could have corrected).
199. Id. at 4.
201. *Tribunal Officials Take Funding Case to UN*, PHNOM PENH POST, Feb. 17, 2012; Khmer Rouge Tribunal Faces Staff Resignations, CAMBODIA HERALD, Jan. 22, 2013.
202. Kofi Annan did request that the SCSL be funded through assessed contributions, but when that request was denied, it had to rely on voluntary contributions instead. The SCSL also scaled back its initial request of $114.6 million for its first three years to $57 million. Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT’L L. 436, 453–54 (2002).
204. Marlise Simons, *Test for a Court as Prosecutors Face Liberia’s Ex-Ruler*, N.Y. TIMES,

205. You Bunleng, Cambodian Co-Investigating Judge at the ECCC, response to questionnaire from the authors, June 25, 2012 (translated from Khmer by Kimsroy Sokvisal).

206. Etcheson interview, supra note 55.

207. ECCC Respondent no. 2, supra note 182.

208. Respondent no. 3, confidential questionnaire to Cambodian ECCC staffers (June 2012) (on file with the authors).

209. Respondents nos. 5 and 6, confidential questionnaires to Cambodian ECCC staffers (June 2012) (on file with the authors).

210. Respondent no. 4, confidential questionnaire to Cambodian ECCC staffers (June 2012) (on file with the authors).


212. Id. at Annex A. Shortfalls in funding for victims’ participation and outreach are discussed further in chapters 7 and 8.


217. Lauren Crothers, National Staff Let Go at War Crimes Tribunal, Cambodia Daily, July 4, 2013.


220. Prak Chan Thul, Salaries as Elusive as Justice at Cambodia’s Khmer Rouge Trial, Reuters, Feb. 1, 2013.


222. Confidential discussion (on file with the authors).

223. See International Federation for Human Rights, States Should Not Hinder ICC’s
Notes to pages 102–5


225. Rapoza, supra note 177, at 539.


227. Confidential senior staff interview, supra note 22.

228. See, e.g., Cable 06PHNOMPENH1845, U.S. Embassy Phnom Penh, Cambodia’s ECCC Making Good Progress ¶ 9 (Oct. 10, 2006), available at http://www.wikileaks.org/cable/2006/10/06PHNOMPENH1845.html (paraphrasing the view of UN Office of Human Rights director Margo Picken that “there may be aspects of the ECCC that are flawed but . . . donor engagement remains the best option to see that the ECCC accomplishes its objectives and meets the expectations of the Cambodian people”).

229. See Erika Kinetz, Officials Stand by Structure of KR Tribunal, Cambodia Daily, Oct. 3, 2007 (quoting OSJI court monitor Heather Ryan as saying the Framework Agreement and ECCC Law actually allow for “great flexibility in establishing an effective administration system and making modifications to deal with problems that are identified”). But see Erika Kinetz, ECCC Hopes to Be New Model for Tribunals, Cambodia Daily, Oct. 19, 2009, quoting Chief of Court Management (and current acting OA Director) Tony Kranh as arguing that increased international oversight would be “just for control”.

Chapter 4


2. See Prosecutors v. Kaing Guek Eav alias Duch, Case No. 001/18-7-2007/ECCC/TC, Judgment ¶ 141–42 (July 26, 2010) [hereinafter Duch Trial Chamber Judgment]. See also id., ¶ 143 (noting that the number of S-21 victims “are likely to be considerably greater than indicated”).

3. Except where otherwise noted, the information in this introduction comes from the Duch Trial Chamber Judgment, supra note 2, ¶¶ 111–224; Anne Heindel, The Duch Verdict: Khmer Rouge Tribunal Case 001 (Documentation Center of Cambodia, 2010), available at http://www.d.dccam.org/Tribunal/Documents/pdf/Case_001_The_Duch_Verdict.pdf.


5. See, e.g., “3rd Division Units: Short Biographies of those Associated with the Ten-
dency,” Documentation Center of Cambodia File No. D21311 (a list of S-21 prisoners beside which Duch wrote “kill them all”); Nate Thayer, Death in Detail, Far East. Econ. Rev., May 13, 1999 (in which Duch recalls a 1978 episode in which Nuon Chea ordered him to kill 300 CPK prisoners without interrogation and “I [Duch] just did” and describes that to kill victims without wasting bullets, he and comrades usually slit their throats and “killed them like chickens”).

6. Duch Trial Chamber Judgment, supra note 2, at 69.

7. For a detailed history of S-21, see generally David P. Chandler, Voices from S-21 (2000).


9. The civil party scheme and outreach efforts are discussed in detail in chapters 7 and 8.

10. See generally Duch Trial Chamber Judgment, supra note 2. For the leading journalistic account of the Duch trial, see generally Thierry Cruvellier, Le Maître Des Aveux (2011).

11. The international Co-Prosecutor reported that 238 of 351 facts were not being contested by the defense during trial. Transcript of Trial Proceedings—Kaing Guek Eav “Duch,” Case No. 001/18-7-2007-ECCC/TC, at 95 (Mar. 31, 2009) [hereinafter 3/31/2009 Trial Transcript] (“Regarding the remaining 112 of the 351, they have either not been agreed to or alternatively they have been agreed, partly agreed or not disputed with some comments”).


13. Duch Trial Chamber Judgment, supra note 2, ¶ 38 (emphasis added; referencing rule 87(2) of the Court’s Internal Rules).


15. See, e.g., Transcript of Trial Proceedings—Kaing Guek Eav “Duch,” Case No. 001/18-7-2007-ECCC/TC, at 17–18 (Nov. 26, 2009) [hereinafter 11/26/2009 Trial Transcript] (“[I]t is true that before this Court we have a civil law system. The guilty plea does not exist as such, but I should like to know what could have prevented any attempts to promote such a plea because it is stated in our Internal Rules that what is not provided for in national law can be sourced from international law.”).

16. See 11/25/2009 Trial Transcript, supra note 1, at 22 (including an assertion by the prosecution that “he has mostly admitted crimes that are undoubtedly established by the documentary evidence and not more”).

17. See, e.g., Douglas Gillison, Duch Denies Teaching to Kill; Also Denies Personally Killing, Cambodia Daily, June 18, 2009.

18. ECCC, Compilation of Statements of Apology Made by Kaing Guek Eav alias Duch During the Proceedings, at 2 (Feb. 16, 2012) [hereinafter Compilation of Duch
Apologies]; 3/31/2009 Trial Transcript, supra note 11, at 68 (providing slightly different translated text). See generally Terith Chy, A Microsocial Analysis of a War Crimes Trial in Cambodia: Rituals of Apology, Justice and Condemnation (Sept. 2012) (unpublished Master of Arts dissertation, University of Hull (on file with authors)).

19. See, e.g., Prak Chan Thul & Isabelle Roughol, Duch Apology Is Heard, But Not All Accept, CAMBODIA DAILY, Apr. 2, 2009 (quoting a student saying, “If he was not honest, he would not have dared to confess”).

20. Id.

21. Transcript of Trial Proceedings— Kaing Guek Eav “Duch,” Case File No. 001/18-7-2007-ECCC/TC, at 72 (Aug. 27, 2009) [hereinafter 8/27/2009 Trial Transcript]. See also Michelle Staggs Kelsall et al., Lessons Learned from the ‘Duch’ Trial: A Comprehensive Review of the First Case Before the Extraordinary Chambers in the Courts of Cambodia, Asian International Justice Initiative, KRT Trial Monitoring Group, at 22 (Dec. 2009) (paraphrasing Roux in an interview explaining “that while Civil Parties are allowed to intervene in the proceedings to further their interest in obtaining reparations, this is only relevant when an accused denies responsibility, which was not the case with his client”).

22. See, e.g., Alex Bates, Transitional Justice in Cambodia: Analytical Report, Atlas Project, ¶ 109 (Oct. 2010) (noting “the often repetitious and irrelevant questioning from Civil Party lawyers” in the Duch case); Erika Kinetz, Civil Party Ruling Goes to the Heart of the ECCC’s Role, CAMBODIA DAILY, Mar. 19, 2008 (quoting Nuon Chea’s lawyers with regard to the participation of civil parties: “[T]he record will reflect that nearly two hours was spent simply repeating previously articulated arguments”).

23. See Staggs Kelsall et al., supra note 21, at 33.


25. Staggs Kelsall et al., supra note 21, at 28. See also Sarah Thomas & Terith Chy, Including the Survivors in the Tribunal Process, in On Trial: The Khmer Rouge Accountability Process 214, 261 (John D. Ciorciari & Anne Heindel eds., 2009) (highlighting the judges’ “hands-off approach” and disinclination “to attempt meaningful management of civil party participation” and arguing that many of the identified problems with the original civil party scheme could have been easily avoided “through timely and robust judicial intervention”).

26. Michael Saliba, Interview with Alain Werner, CAMBODIA TRIBUNAL MONITOR (Sept. 21, 2009), http://www.cambodiatribunal.org/sites/default/files/ctm_blog_9-21-2009_.pdf. See also Staggs Kelsall et al., supra note 21, at 34 (noting that “[t]he occurrence of repetitious questions significantly decreased after the Civil Party Lawyers finally followed the Chamber’s suggestion from Week 15 and appointed one or two Counsels to ask questions on behalf of all the Groups”).

27. Quoted in Bates, supra note 22, ¶ 212.

28. 8/27/2009 Trial Transcript, supra note 21, at 70.
29. See Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of the Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, Case No. 001/18-7-2007/ECCC/TC, ¶ 4 (Oct. 9, 2009) [hereinafter Decision on Civil Party Submissions].

30. See Groups 1 and 2—Civil Parties’ Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing, Case No. 001/18-7-2007/ECCC/TC, ¶¶ 9–11, 20, 32 (June 9, 2009) [hereinafter Civil Parties’ Joint Request] (citing Internal Rule r. 91(1), which provides: “The Chamber shall hear the Civil Parties, witness and experts in the order it considers useful”); Cambodian Code of Criminal Procedure (as adopted Aug. 10, 2007), art. 335, which allows civil parties and their lawyers to make brief closing statements, which in practice sometimes addresses sentencing).

31. See Civil Parties’ Joint Request, supra note 30, ¶ 6.


33. Id. ¶ 26.

34. Id. ¶¶ 28–35.

35. Id. ¶¶ 44–46.

36. 8/27/2009 Trial Transcript, supra note 21, at 68–69.

37. Staggs Kelsall et al., supra note 21, at 18.


39. Id.

40. Id. Indeed, Judge Lemonde allowed a documentary team following his investigative work to film the encounter. The tribunal’s national spokesperson and Duch’s national lawyer reported that while visiting Choeung Ek, Duch had cried—an allegation both the national Co-Investigating Judge and the international Co-Prosecutor denied. Prak Chan Thul, Duch Sheds Tears at Choeung Ek Killing Fields, Cambodia Daily, Feb. 27, 2008. The episode drew positive media reaction internationally; however many in Cambodia felt that the incident had been manufactured for public consumption. Documentation Center of Cambodia Director Youk Chhang commented, “For PR purposes, it has been effective[] reaching out across the world[,]” Erika Kinetz & Prak Chan Thul, Duch Returns to S-21, Discusses Role As Chief, Cambodia Daily, Feb. 28, 2008.

41. Quoted in Bates, supra note 22, ¶ 133.

42. Staggs Kelsall et al., supra note 21, at 18.

43. 8/27/2009 Trial Transcript, supra note 21, at 71–72.

44. Staggs Kelsall et al., supra note 21, at 18. Indeed, in a subsequent interview Roux said, “Ultimately we should strive to find some common rules for victim participation in international tribunals. We should begin with the civil law system and adapt it accordingly as we confront the unique challenges of trials in international criminal tribunals.” Michael
Saliba, *Interview with Defense Counsel François Roux, Cambodia Tribunal Monitor* (Sept. 21, 2009) (on file with the authors).

45. 3/31/2009 Trial Transcript, *supra* note 11, at 87.

46. See Transcript of Trial Proceedings—Kaing Guek Eav “Duch,” Case No. 001/18-7-2007-ECCC/TC, at 117–18 (Nov. 23, 2009) (closing statement by civil party team 4 arguing that Duch was not a pawn because he in fact had saved the lives of a few select people).


54. Id. ¶ 558.

55. Id. ¶ 609.


57. *See* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended and promulgated on Oct. 27, 2004, NS/RKM/1004/006, art. 29 [hereinafter ECCC Law] (stating that the fact that a suspect acted pursuant to superior orders does not relieve his or her criminal responsibility).


60. *Duch* Trial Chamber Judgment, *supra* note 2, ¶ 552.

61. Id. ¶ 607.


64. See, e.g., 3/31/2009 Trial Transcript, *supra* note 11, at 80–81. See id. at 81 (“Why Duch was imprisoned? Was it because he killed less people? This is the lesson”).

66. The ICTR noted that it has “finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted.” Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-A, Judgment, ¶ 94 (Appeals Chamber, June 1, 2001) (citing Prosecutor v. Delalic et al. (Celebici), Case No. IT-96-21-A, Judgment, ¶ 602 (Appeals Chamber, Feb. 20, 2001)). Nevertheless, prosecutors must not discriminate on impermissible bases, such as race, color, religion, opinion, national or ethnic origin. Celebici Appeals Judgment, supra, ¶¶ 605, 614.

67. See Transcript of Trial Proceedings—Kaing Guek Eav “Duch,” Case No. 001/18-7-2007-ECCC/TC, at 11–12 (Nov. 24, 2009) (arguing that S-21 “was at the apex” of the network of prisons and uniquely received prisoners from all parts of the country, including high-ranking officials from whom Duch forced confessions that contributed to mass purges). Duch disputed the idea that “S21 was unique in the network of security centres given its direct link to the Central Committee and its role in the detention and execution of CPK cadre.” Duch Trial Chamber Judgment, supra note 2, ¶¶ 119–20.


69. See, e.g., 11/25/2009 Trial Transcript, supra note 1, at 107.

70. See, e.g., 3/31/2009 Trial Transcript, supra note 11, at 80–81.

71. Id. at 75–76. See also id. at 82 (“Duch is not a senior leader or the most responsible for the crimes”); Douglas Gillison, Duch to Victims: ‘I Regret Every Murder,’ Cambodia Daily, Apr. 1, 2009 (quoting Kar Savuth as saying Duch was one of nearly 200 prison chiefs, some of whom were responsible for more deaths, and that Duch fell outside the court’s personal jurisdiction).

72. 3/31/2009 Trial Transcript, supra note 11, at 77–79.

73. Id. at 77. He compared this uncertainty to the fear cadre suffered during the DK that they might be arbitrarily arrested and killed. 11/25/2009 Trial Transcript, supra note 1, at 108.


75. See 11/25/2009 Trial Transcript, supra note 1, at 99.

76. See id. at 103, 110, 112.
77. Id. at 117.
79. See id. at 8.
80. See id. at 16 (referencing the Obrenovic plea agreement at the ICTY).
81. See 8/27/2009 Trial Transcript, supra note 21, at 40.
82. Id. at 52.
83. Id. at 59.
84. Id. at 62.
85. Letter from Richard Rogers, Chief, Defence Support Section, to Judge Nil Nonn, Trial Chamber President, re Request by Mr Kaing to Withdraw Co-Lawyer François Roux (July 5, 2010) (stating, “In his request, Mr. Kaing states that he has lost confidence in Maitre Roux and provides three underlying reasons[,]” which were not made public); Notification of Withdrawal of Designation of Co-Lawyer, Case No. 001/18-7-2007/ECCC/TC (July 9, 2010).
87. Tribunal UN spokesperson Lars Olsen reportedly explained, “Duch has chosen a second local attorney . . . to represent him because ‘we cannot find international lawyers that met his criteria[.]’”
89. See generally Appeal Brief by the Co-Lawyers for Kaing Guek Eav Alias “Duch” Against the Trial Chamber Judgment of 26 July 2010 (Nov. 18, 2010); Reply by the Co-Lawyers for Kaing Guek Eav Alias “Duch” to the Co-Prosecutors’ Response of 20 December 2010 (Jan. 14, 2011).
90. Erika Kinetz & Prak Chan Thul, Duch’s Lawyer Becomes First Foreign Bar Member in Cambodia, CAMBODIA DAILY, Aug. 9, 2007.
91. Quoted in Bates, supra note 22, ¶ 112.
92. Thierry Cruvellier, Duch Trial Ends with a Twist, 95 INT’L JUSTICE TRIBUNE (Dec. 9, 2009).
93. Interview with Michael G. Karnavas, former Co-Lawyer for Ieng Sary, Phnom Penh (May 19, 2012).
95. See, e.g., Reply by the Co-Lawyers, supra note 89, ¶¶ 14(b), 23.
96. Phorn & Gillison, supra note 88. Later before the Supreme Court Chamber, he argued, “Because this is a national court, it is not an international court. Therefore it has to use the domestic law. And . . . as I said, there are a number of existing laws . . . [.] There is no need to refer to the international law.” 3/28/2011 Trial Transcript, supra note 58, at 35.
97. Phorn & Gillison, supra note 88.
98. Id.

99. Karnavas interview, supra note 93; Interview with Richard Rogers, former Head of the ECCC Defence Support Section, Phnom Penh (May 29, 2012).

100. Interview with Michiel Pestman, former Co-Lawyer for Nuon Chea, Phnom Penh (June 9, 2012). Cf. Interview with Diana Ellis, Co-Lawyer for Ieng Thirith, Phnom Penh (Nov. 11, 2012) (“It can be difficult where co-lawyers come from different legal systems; the extent to which this causes problems will depend in part on the personalities involved [but] the difficulties need not be insuperable”); Julia Wallace, Duch Defense Victim of Teamwork’s Complications, Cambodia Daily, Nov. 30, 2009 (paraphrasing David Scheffer’s speculation that the divergence may have resulted “because they come from very different educational and cultural backgrounds”).

101. Karnavas interview, supra note 93.

102. Duch Trial Chamber Judgment, supra note 2, ¶ 486.


106. See Staggs Kelsall et al., supra note 21, at 10.


108. 3/28/2001 Trial Transcript, supra note 58, at 35.


110. Notably, François Roux first raised this during trial closing arguments. 8/27/2009 Trial Transcript, supra note 21, at 48.

111. Duch Trial Chamber Judgment, supra note 2, ¶ 574.

112. See Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence, Case No. 001/18-7-2007-ECCC/TC (July 26, 2010).

113. See id.

114. Id. ¶ 5. Comparatively, “It is well recognised within the jurisprudence of the ICTY’s Tribunal that although it must consider sentencing practices in the former Yugoslavia, the Tribunal is not bound by such practice,” and indeed the ICTY’s maximum sentence of life imprisonment shows that it is not bound by the national legal system. Prosecutor v. Obrenovic, Case No. IT-02-60/2-S, Sentencing Judgment, ¶ 56 (Trial Chamber, Dec. 10, 2003) (citations omitted).

115. Co-Prosecutors’ Appeal Against the Judgment of the Trial Chamber in the

116. ECCC Internal Rules (rev. 8), supra note 14, r. 98(5).


118. See id. at 71–72.

119. Id. at 70–71.


121. Id. ¶ 351.


123. Id. ¶¶ 24–26.

124. Id. ¶ 27.

125. See, e.g., Prosecutor v. Dragon Nikolic, Case No IT-94-2-S, Sentencing Judgment (Trial Chamber, Dec. 18, 2003) (considering as aggravating factors the gravity of the crimes, vulnerability of the victims, and the convicted person’s abuse of his position of authority, and as mitigating factors the convicted person’s guilty plea, remorse, contribution to reconciliation, the substantiality of his cooperation, and his character.)

126. Duch Trial Chamber Judgment, supra note 2, ¶ 606. Cf. Prosecutor v. Obrenovic, Case No. IT-02-60/2-S, Sentencing Judgment, ¶ 121 (Trial Chamber, Dec. 10, 2003) (finding remorse to be a substantial mitigating factor where the convicted person was “genuinely remorseful for his role in the crimes for which he has been convicted, and seeks to atone for his criminal conduct”).

127. Duch Trial Chamber Judgment, supra note 2, ¶¶ 629, 631.


129. Duch Appeal Judgment, supra note 120, ¶ 379.

130. Id. ¶ 363.

131. Id. ¶ 368.

132. Id. ¶ 369.

133. Id. ¶ 376.

134. See id. ¶ 372, n.794 (citing international jurisprudence). See, e.g., Prosecutor v. Se- manza, Case No. ICTR-96-13-A, Judgment, ¶ 396 (Appeals Chamber, Nov. 17, 2001) (“If a Trial Chamber finds that mitigating circumstances exist, it is not precluded from imposing a sentence of life imprisonment, where the gravity of the offence requires the imposition of the maximum sentence provided for.”).
135. As of 2007, at the ICTY only one accused (1.8% of persons convicted) had received a life sentence, while at the ICTR, 37% had received life sentences. See Harmon & Gaynor, supra note 128, at 684 (noting the discrepancy in the length of sentences between the ICTY and the ICTR). The SCSL has not sentenced any of its nine convicted persons to life imprisonment.


138. Decision on Request for Release, supra note 136, ¶ 16. See also Heindel, supra note 137, ¶ 2.

139. Decision on Request for Release, supra note 136, ¶¶ 35, 36.

140. Duch Trial Chamber Judgment, supra note 2, ¶ 627.

141. Quoted in Bates, supra note 22, ¶ 232.

142. Duch Appeal Judgment, supra note 120, ¶ 399.


145. Rogers interview, supra note 99 (calling Judge Noguchi’s support for the majority a “mistake” and noting that political pressure could also be brought to bear to try to “turn” a single international judge to achieve a supermajority).


147. See id., ¶ 54. Likewise, in the Kajelijeli case, the Appeals Chamber considered the link between the detaining state and the tribunal in determining the responsibility of the ICTR for violations of the accused’s rights while in state custody. See Juvénal Kajelijeli v. Prosecutor, Case No. ICTR-98-44A-A, Judgment, ¶ 232 (Appeals Chamber, May 23, 2005).

148. Defense Appeal Brief Challenging the Order of Provisional Detention of 31 July 2007, Case No. 002/14-8-2006, ¶ 3 (Sept. 5, 2007). See also id., ¶¶ 68–73; Detention Order, Military Court No. 16DK/2002 (Feb. 22, 2002) (holding Duch for crimes against humanity pursuant to the ECCC Law); Gillison, supra note 12 (noting that when renewing the charges against Duch in 2007, the Military Court “said it was merely holding him until the Khmer Rouge tribunal began operations”).

149. Duch Appeal Judgment, supra note 120, ¶¶ 392–99.

150. Partial Dissent from the Appeal Judgment, supra note 122, ¶ 7.
151. Id. ¶¶ 9–14.
152. Id. ¶ 15.
153. ECCC Law, supra note 57, art. 33 new.
156. ICCPR, supra note 155, arts. 14(2), (3)(a),(c).
157. Partial Dissent from the Appeal Judgment, supra note 122, ¶ 17.
158. Id. ¶¶ 20, 28.
159. Id. ¶ 30.
161. Quoted in Bates, supra note 22, ¶ 146.
162. See Internal Rules of the ECCC (Rev. 3), rev’d Mar. 6, 2009, r. 23(11).
163. Id. r. 23(12).
164. All teams requested “at a minimum,” the compilation and dissemination of Duch’s statements of apology with civil party comments, access to free medical care for their clients, the funding of educational programs about the Khmer Rouge and S-21 in particular, the erection of memorials and pagoda fences, and the inclusion of civil party names in the final judgment. See Civil Parties’ Co-Lawyers’ Joint Submission on Reparations, Case No. 001/18-7-2007-ECCC/TC, ¶¶ 12–30 (Sept. 14, 2009) [hereinafter Civil Parties’ Reparations Submission].
165. Duch Trial Chamber Judgment, supra note 2, ¶¶ 664–75. The Court announced on August 5, 2010, that it had begun producing 5,000 hard copies of the judgment and 17,000 of the judgment summary to be distributed around the country. Press Release, ECCC to Distribute the “Duch” Verdict Nationwide (Aug. 6, 2010). The compilation was not put on the website until February 2012. The Press Office claimed that it could not be done until the Supreme Court Chamber verdict was issued. The statements were also published in some local newspapers in serial form.
166. See Civil Parties’ Reparations Submission, supra note 164, ¶¶ 31–32.
167. Id. ¶¶ 33–39.
169. See Duch Trial Chamber Judgment, supra note 2, ¶¶ 663–65.
170. Id. ¶ 662.

171. See, e.g., Patrick Kroker, *Transitional Justice Policy in Practice: Victim Participation in the Khmer Rouge Tribunal*, 53 GER. YB INT’L L. 754, 783 (2010) (noting that “[i]n light of the strong dependence of the civil party mechanism on the reparations claim, which the Trial Chamber itself had pointed at on several occasions, it could have been more creative and courageous concerning the awarded measures”).

172. Karnavas interview, supra note 93.


174. Id. ¶ 644.

175. Id. ¶ 654.

176. Id.

177. Id. ¶ 653.

178. Id. ¶ 654.


183. Cf. Sophal Ear, Letter, *Khmer Rouge Tribunal vs. Karmic Justice*, N.Y. TIMES, Mar. 17, 2010 (relaying how his mother “always said that no matter what happened to the Khmer Rouge leadership in their current lifetime, Karmic justice would prevail in the next: They would be reborn as cockroaches”).

184. Documentation Center of Cambodia, supra note 181, at 21.


189. See Statement of the Co-Chairs of the Friends of the ECCC (Feb. 3, 2012) (“On this very special occasion, [the Embassies of France and Japan] reaffirm the expectations that judges and lawyers as well as the national and international staff of the ECCC will uphold the highest standards of law and due process.”)


192. Ly Hor, Banteay Meanchey Province, unpublished interview by staff of the Documentation Center of Cambodia (2011).

Chapter 5


4. Id. ¶ 157.

5. Id. ¶¶ 33–47. See also Stephen Heder with Brian D. Tittemore, Seven Candidates for Prosecution 46–55 (2d ed. 2004).


9. Unlike the Genocide Convention and ECCC Law, the 1979 tribunal decree defined
genocide as “planned massacres of groups of innocent people; expulsion of inhabitants of cities and villages in order to concentrate them and force them to do hard labor in conditions leading to their physical and mental destruction; wiping out religion; destroying political, cultural and social structures and family and social relations.” See Decree Law No. 1: Establishment of People’s Revolutionary Tribunal at Phnom Penh to Try the Pol Pot-Ieng Sary Clique for the Crime of Genocide (July 15, 1979).


18. Decision on Challenge to Jurisdiction, supra note 14, ¶ 82.

19. Decision on Ieng Sary, supra note 12, ¶ 47.

20. Id. ¶ 53.

counting how he was told in 2000 that Hun Sen claimed to have “personally drafted the pardon and amnesty for Ieng Sary in 1996 and purposely made it so that Ieng Sary would be subject to prosecution for the Pol Pot era crimes”).

22. See Decision on Ieng Sary, supra note 12, ¶ 55. Moreover, it ruled that because the 1979 tribunal was not independent and impartial, its judgment against Ieng “can not be characterized as a genuine judicial decision” and “is therefore incapable of producing valid legal effects” subject either to a pardon or to the principle of res judicata in the Cambodian Code of Criminal Procedure. Id. ¶¶ 30–31.


27. Interview with Anta Guissé, Co-Lawyer for Khieu Samphan, Phnom Penh (Nov. 15, 2012).

28. Interview with Jeanne Sulzer, former Legal Officer at the ECCC Civil Party Lead Co-Lawyers Section, Phnom Penh (June 1, 2012) (stating that France is phasing out investigative judges due to concerns that excessive power and pressure have led to errors and abuse).

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


32. ECCC Internal Rules (rev. 8), supra note 30, r. 55(10).


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

36. See, e.g., Decision on Reconsideration of Co-Prosecutors’ Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons’ Knowledge of the Crimes, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 67), ¶ 68 (Sept. 27, 2010) (in which the PTC reviews the request due to the CIJs’ “failure to meet their obligation to provide reasoned orders”); Decision on Ieng Sary’s Appeal Regarding the Appointment of a Psychiatric Expert, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 10), ¶ 24 (Oct. 21, 2008) (admitting an appeal due to the “failure of the Co-Investigating Judges to rule on the Request as soon as possible”).

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

38. Interview with Michael G. Karnavas, former Co-Lawyer for Ieng Sary, Phnom Penh (May 19, 2012).

39. See SMD Decision, supra note 34, ¶ 22 (affirming its prior finding that the CIJs “are independent in the way they conduct their investigation”).

40. See Guissé interview, supra note 27 (“Investigative judges are so powerful, if they are good it is perfect; if they are bad it is very bad.”).

41. Statement of Wayne Bastin (Oct. 8, 2009). See also Douglas Gillison, Claim of Bias Made Against ECCC Judge, CAMBODIA DAILY, Oct. 9, 2009.

42. Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Field on Behalf of Ieng Sary and Khieu Samphan, Case No. 002/19-09-2007-ECCC/OCIJ (PTC24), ¶ 8 (Nov. 5, 2009).

43. Ieng Sary’s Application to Disqualify Co-Investigating Judge Marcel Lemonde & Request for a Public Hearing, Case No. 002/19-09-2007-ECCC/OCIJ(PTC01), ¶ 29 (Oct. 9, 2009).

44. Decision on Ieng Sary’s Application to Disqualify Co-Investigative Judge Marcel Lemonde, Case No. 002/19-09-2007-ECCC/OCIJ(PTC01), ¶ 22–25 (Dec. 9, 2009) (emphasizing the event’s informality and the fact the discussion was not in Lemonde’s native language).

45. The Ieng Sary defense team has consistently argued prejudice arising from the fact that Stephen Heder “worked for the Co-Prosecutor in drafting the introductory submissions, and later for the Co-Investigating Judges in confirming the introductory submission by his involvement in the preparation of the Closing Order.” See, e.g., Decision on Objections to Documents Proposed to be Put Before the Chamber on the Co-Prosecutors’ Annexes A1-A5 and to Documents Cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, Case No. 002/09-07-2009-ECCC-TC, ¶ 10
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(Apr. 9, 2012). The prosecution says that Heder “left their office before the introductory submission was written in the second quarter of 2007.” Id. ¶ 13.


49. Guissé interview supra note 27. But see Interview with Craig Etcheson, former investigator in the ECCC Office of the Co-Prosecutors, via telephone (Oct. 22, 2012) (saying that the investigating judges “largely ignored the final submission” when writing the closing order, which is problematic because the prosecution is responsible for carrying the closing order into court and may not agree with the form of the charges).

50. SMD Order, supra note 31, ¶ 6.

51. SMD Decision, supra note 34, ¶¶ 36–37.

52. Interview with Richard Rogers, former head of the Defence Support Section, Phnom Penh (May 29, 2012) (arguing further that formal investigatory requests cannot compensate for the absence of client instructions regarding potential lines of inquiry).

53. Karnavas interview, supra note 38.

54. Id. See also Guissé interview, supra note 27 (“Investigators from different judicial backgrounds don’t have the same habits, don’t consider the consequences of what they are doing as they don’t know how the evidence will be used.”).

55. Guissé interview, supra note 27.

56. Interview with Michiel Pestman, former Co-Lawyer for Nuon Chea, Phnom Penh (June 9, 2012). See also Sulzer interview, supra note 28 (arguing that the judges could have taken a middle ground on confidentiality and disclosed the scope of the investigation earlier to facilitate civil party admissibility).

57. See, e.g., Letter from the Ieng Sary defense team to Deputy Director Rosandhaug and the Co-Investigative Judges (Dec. 18, 2008), quoted in Order on Breach of Confidentiality of the Judicial Investigation, Case No. 002/14-08-2006, ¶ 2 (Mar. 3, 2009) (stating that the defense team created a public website because the CJJs were suppressing defense filings that “may be embarrassing or which call into question the legitimacy and judiciousness of acts and decisions of the judges”).

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


60. Karnavas interview, supra note 38. The conduct of OCIJ interviews was a major


62. ECCC Internal Rules (rev. 8), *supra* note 30, r. 60(1) (emphasis added), r. 55(5) (a), (d).

63. *Id.* r. 87(4), r. 104bis.

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

65. ECCC Internal Rules (rev. 8), *supra* note 30, r. 41(1).

66. *Id.* r. 60(3). The Cambodian Criminal Procedure Code also states that appearance is mandatory once summoned. Cambodian Criminal Procedure Code (as adopted Aug. 10, 2007), art. 153. See also id. art. 179.


69. Prosecutor v. Sam Hinga Norman et al., Case No. SCSL-2004-14-T, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, ¶ 29 (Appeals Chamber, Sept. 11, 2006) [hereinafter Norman Appeal Decision on Kabbah Motion].

70. Prosecutor v. Issa Hassan Sesay et al., Case No. SCSL-04-15-T, Written Reasoned Decision on Motion for Issuance of a Subpoena to H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, ¶ 20 (Trial Chamber, June 30, 2008) [hereinafter Sesay Decision on Kabbah Motion] (footnotes omitted). See also Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-T, Decision on Request for a Subpoena for Major Jacques Biot, ¶ 2 (Trial Chamber, July 14, 2006) [hereinafter ICTR Decision on Biot]; Prosecutor v. Slobodan Milosevic, Case No. IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder, ¶ 41 (Trial Chamber, Dec. 9, 2005) [hereinafter ICTY Decision on Blair & Schröder].

71. Prosecutor v. Sam Hinga Norman et al., Case No. SCSL-04-14-T, Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena Ad Testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, ¶ 40, 45 (Trial Chamber, June 13, 2006) [hereinafter Norman Decision on Kabbah Motion].

72. *Id.* ¶ 41. The Trial Chamber decided with little analysis that this information was obtainable through other means, and on appeal the SCSL Appeals Chamber agreed. *Norman Appeal Decision on Kabbah Motion*, *supra* note 69, ¶ 32.
73. Sesay Decision on Kabbah Motion, supra note 70, ¶ 19 (finding that Kabbah could provide evidence on Sesay’s relations with UN peacekeepers).


76. Norman Decision on Kabbah Motion, supra note 71, Dissenting opinion of Hon. Justice Thompson ¶ 2–3.

77. Id., Dissenting opinion of Hon. Justice Thompson ¶ 27.

78. Id., Dissenting opinion of Hon. Justice Thompson ¶ 29.


80. See Decision on Summons Appeal, supra note 64, ¶¶ 25, 30–31.


83. Sihanouk Refuses to Testify at Cambodian Trials, ABC RADIO AUSTRALIA, Sept. 10, 2009.

84. Constitution of the Kingdom of Cambodia, art. 7 (adopted 1993, as amended through 2008) [hereinafter Cambodian Constitution].

85. Law on the Titles and Privileges of the Former King and Queen of Cambodia (Oct. 29, 2004).

86. Douglas Gillison & Yun Samean, Nuon Chea’s Lawyers Seek Hun Sen, Retired King Testimony, CAMBODIA DAILY, Mar. 2, 2009, at 28 (quoting Prince Sisowath Thomico); Yun Samean & Emily Lodish, Gov’t Rejects Call to Investigate King Father, CAMBODIA DAILY, Aug. 27, 2007; email from Ambassador Julio A. Jeldres, Official Biographer to King Father Sihanouk (Aug. 13, 2009).

87. Sok Khemara, Court Mulls Bringing ‘King Father’ to Court, VOA KHMER (May 4, 2009), http://www.voacambodia.com/content/a-40-2009-05-04-voa3-90174962/1354885.html (quoting Ke Kim Se, Sihanouk’s former cabinet chief).

88. Erika Kinetz & Yun Samean, Retired King Invites Staff to Palace, CAMBODIA DAILY, Aug. 31, 2007.

89. Asian Human Rights Commission, Cambodia: Immunity from Prosecution for Former King Sihanouk is Illegitimate, Unconstitutional and Indefensible, Sept. 3, 2007, available at http://www.ahrchk.net/statements/mainfile.php/2007statements/1174/. See also Sok, supra note 87 (citing legal monitors who assert that calling Sihanouk would not be “against the Constitution” but would be “a sensitive risk”).

90. See CAMBODIAN CONSTITUTION, supra note 84, art. 136 (providing that “The
Constitutional Council shall . . . interpret the Constitution and laws adopted by the National Assembly and reviewed completely by the Senate”.

91. Decision on Summons Appeal, supra note 64, ¶ 24. Cf. Decision on Ieng Sary, supra note 12, ¶ 29 (finding that it is “not in a position to determine the respective powers of the King and National Assembly” and thus the constitutional validity of Ieng Sary’s 1996 pardon and amnesty).

92. See Cambodian Constitution, supra note 84, arts. 80, 104, 126.

93. See Norman Decision on Kabbah Motion, supra note 71, Separate concurring opinion of Hon. Justice Benjamin Mutanga Itoe ¶ 130.

94. Id., Dissenting opinion of Hon. Justice Thompson ¶ 14 (quoting the decision with approval).

95. See ICTR Decision on Biot, supra note 70, ¶ 4; ICTY Decision on Blair & Schröder, supra note 70, ¶ 28; Prosecutor v. Radislav Krstic, Case No. IT-98-33-A, Decision on Application for Subpoenas, ¶ 27 (Appeals Chamber, July 1, 2003).

96. ICTY Decision on Blair & Schröder, supra note 70, ¶ 28.

97. See Summary of IENG Sary’s Appeal Against the OCIJ’s Order on Nuon Chea and IENG Sary’s Request to Summon Witnesses referred to in his Letter dated 16 December 2009 and in Paragraph 21(D) of his 11th Investigative Request, at 2 (Mar. 15, 2010), available at https://sites.google.com/site/iengsarydefence/ [hereinafter Summary of Ieng Sary Appeal on Request to Summon Witnesses]. As the PTC recognized, this objection is inconsistent with the SMD Decision discussed above, which rejected the “principle of sufficiency” of evidence. Decision on Summons Appeal, supra note 64, ¶ 24.


99. See Summary of Ieng Sary Appeal on Request to Summon Witnesses, supra note 97, at 3; Note of International Investigating Judge Marcel Lemonde, at 3 (Jan. 11, 2010).

100. Note of International Investigating Judge Marcel Lemonde, supra note 99, at 3.

101. ECCC Law, supra note 11, art. 33 new; ECCC Internal Rules (rev. 8), supra note 30, r. 14(5), r. 15.

102. Decision on Summons Appeal, supra note 64, ¶¶ 69–71.

103. Id. ¶ 68.


106. The scope of authority for one CIJ or Co-Prosecutor to act alone is discussed in chapter 6.

107. Order in Response to the Appeals Chamber’s Decision on Nuon Chea and Ieng Sary’s Requests to Summon Witnesses, Case No. 002/19-09-2007-ECCC-OCIJ, ¶ 5 (June 11, 2010).
111. Pestman interview, supra note 56 (noting that the list remained tentative, providing the defense no opportunity to object to their exclusion).
112. Id. (contending that Heng was the highest-level Khmer Rouge commander in Phnom Penh during the evacuation who is still alive and was Nuon Chea’s bodyguard before the DK period). See also Sixth and Final Request to Summons TCW-223, Case No. 002/19-09-2007-ECCC-TC (July 22, 2013). Karnavas does not view the witnesses as crucial to Ieng Sary’s case and believes the Government’s refusal to cooperate is not about political interference but instead about maintaining control. Karnavas interview, supra note 38.
113. Quelles leçons, supra note 26 (authors’ translation from the original French).
116. See, e.g., Lauren Crothers, Courts Failing to Grant Bail, Provide Free Lawyers, CAMBODIA DAILY, June 30–July 1, 2012 (reporting the view of Yeng Virak, executive director of the Community Legal Education Center, that “detention ahead of trial is used excessively, and the presumption of guilt is widespread in the court system,” as well as a report by local human rights group Licado stating that “noncustodial sentencing remains unheard of, bail is underutilized’ and pretrial detainees still make up over one-third of the prison population”).
117. ECCC Internals Rules (rev. 8), supra note 30, r. 63(b).
118. Id. r. 63(6)(a), (7).
120. See, e.g., Prosecutor v. Issa Hassan Sesay et al., Case No. SCSL-04-15-AR65, Sesay—Decision on Appeal Against Refusal of Bail, ¶ 36 (Appeals Chamber, Dec. 14, 2004); Prosecutor v. Radoslav Brdanin et al., Case No. IT-99-36, Decision on Application


122. See Decision on Appeal Against Provisional Detention Order of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTCo3), ¶¶ 101–6 (Oct. 17, 2008) [hereinafter Ieng Sary Detention Decision] (highlighting their past travels and contacts and the gravity of their alleged crimes).

123. Id. ¶¶ 111–17.

124. See id. ¶¶ 118–23.


126. See, e.g., Prosecutor v. Radolav Brdanin et al., Case No. IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Tadic, ¶ 35 (Trial Chamber, Sept. 20, 2002).

127. Ieng Sary Detention Decision, supra note 122, ¶ 123.

128. With regard to one accused, the Supreme Court Chamber found the Trial Chamber “could have investigated in a deeper fashion alternative measures other than detention which could have equally ensured the presence of the accused at trial,” but did not consider the issue itself because the accused’s submissions “did not provide any details as to the means of securing such presence.” Decision on Immediate Appeal by Khieu Samphan on Application for Release, Case No. 002/19-09-2007-ECCC-TC/SC(04), ¶ 58 (June 6, 2011).

129. See Former Khmer Rouge Minister Argues to Go Free, Agence France Presse, May 21, 2008 (reporting that when asked how many children she has, Ieng Thirith said, “Three or four. I forget . . . I have four children. I almost forgot.”); Khmer Rouge ‘First Lady’ in Cambodia Court Tirade, Agence France Presse, Feb. 24, 2009 (reporting an infamous 15-minute tirade during which she rejected the charges against her and said, “Don’t accuse me of being a murderer, otherwise you will [be] cursed to the seventh circle of hell”).

findings by a geriatrician that Alzheimer’s disease is the primary cause of her condition, but “personal stress, exposure to trauma and restricted environment and stimulation” have affected her).

131. Prosecutor v. Pavle Strugar, Case No. IT-01, Decision re the Defence Motion to Terminate Proceedings, ¶¶ 35, 38, 47 (Trial Chamber, May 26, 2004).


134. Id.


137. See, e.g., OSJI, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, at 18 (Feb. 2012).


140. Ieng Sary, Ieng Thirith, and Khieu Samphan’s third year would have expired in November 2010.

141. See Press Release, Pre-Trial Chamber Dismissed Appeals from Ieng Sary, Khieu Samphan and Ieng Thirith Against Extension of Provisional Detention (Apr. 30, 2010).

142. See ECCC Internal Rules (rev. 8), supra note 30, r. 81(2), r. 82(1).

143. Id. r. 68(1).

144. Id. r. 68(2).


146. Decision on Immediate Appeal by Khieu Samphan on Application for Release, supra note 128, ¶ 37.

147. See Prosecutor v. Vujadin Popovic et al., Case No. IT-05-88-AR65.1, Decision on Interlocutory Appeal of Trial Chamber Decision Denying Drago Nikolic’s Motion for Provisional Release, at 5 (Appeals Chamber, Jan. 24, 2006) (noting that the Trial Chamber has “considerable discretion” when determining how to weigh factors relevant to determining the necessity of pretrial detention).

148. Karnavas interview, supra note 38.

149. Interview with Panhavuth Long, Program Officer, Cambodian Justice Initiative,
Phnom Penh (July 6, 2012) (emphasizing that judges and prosecutors at in-country tribunals are sometimes concerned about “public outcry instead of considering [the] best interests of justice”).

150. Internal Rule 89ter allows the Trial Chamber to separate the proceedings at any stage and try them in the order it deems appropriate “when the interests of justice so requires.”

151. Ieng Sary’s Motion to Conduct the Trial Through Half-Day Sessions, Case no. 02/19-09-2007-ECCC/TC (Jan. 19, 2011).

152. See, e.g., Kong Sothanarith, Health Failing Nuon Chea and Ieng Sary: Lawyers, VOA Khmer (Jan. 11, 2013), http://www.voacambodia.com/content/health-failing-nuonchea-and-ieng-sary-say-lawyers/1581376.html; Assoc. Press, Second of 3 Aging Defendants at Cambodia’s Khmer Rouge Tribunal Sent to Hospital, Jan. 16, 2013 (reporting that both Nuon Chea and Khieu Samphan were sent to the hospital in the same week).


156. Ieng Sary’s Motion, supra note 151, ¶ 13.


159. “Considering that the Accused [Ieng Sary and Nuon Chea] both suffer several chronic physical ailments and regularly participate in proceedings from the holding cell” the Trial Chamber scheduled a hearing to review their fitness for trial in March 2013. Memorandum from Trial Chamber President Nil Nonn, Re-Appointment of Experts to Review the Health and Fitness of IENG Sary and NUON Chea during the week of 11 March 2013 (Dec. 18, 2012). Nuon Chea was found fit for trial. See Second Decision on Accused NUON Chea’s Fitness to Stand Trial, Case No. 002/19-09-2007/ECCC/TC (Apr. 2, 2013).

160. See, e.g., Prosecutor v. Milosevic, Order Terminating the Proceedings, Case No. IT-
02-54-T (Trial Chamber, Mar. 14, 2006); Prosecutor v. Norman et al., Decision on Registrar’s Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues, Case No. SCSL-04-14-T, ¶¶ 14–18 (Trial Chamber, May 21, 2007); Prosecutor v. Kony et al., Decision to Terminate the Proceedings Against Raska Lukwiya, Case No ICC-02/04-01/05, at 4 (July 11, 2007).

164. Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order (E124/2) and Related Motions and Annexes, Case No. 002/19-09-2007/ECCC/TC, ¶ 4 (Oct. 18, 2011) [hereinafter Severance Order Reconsideration] (finding also that this was unnecessary in a purely inquisitorial legal system where indictments are judicially controlled). Importantly, the Supreme Court Chamber has since ruled that the Trial Chamber committed an error of law by failing to consult with the parties on the terms of severance, noting in part:

[The Trial Chamber] fails to appreciate the sui generis mixed jurisdictional nature of the ECCC and ignores provisions explicitly referring to the adversarial nature of the ECCC proceedings and to the Co-Prosecutors’ crucial role and responsibility in creating ECCC indictments and proving the charges therein.

Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01, Case No. 002/19-09-2007-ECCC-TC/SC(18), ¶ 42 (Feb. 8, 2013) [hereinafter SCC Severance Decision].
165. Severance Order, supra note 163, ¶ 7.
166. Press Release, supra note 162.
168. Id. ¶ 36.
170. See, e.g., Decision on Immediate Appeal Against the Trial Chamber’s Order to Unconditionally Release the Accused Ieng Thirith, Case No. 002/19/09-2007 ECCC-TC/SC(16), ¶ 37 (Dec. 14, 2012) (“Traditionally, most civil law jurisdictions have adopted the principle of legalism . . . pursuant to which the prosecution has no discretion to discontinue or ask for the discontinuation of a criminal action once it has been initiated and the court, which has sole authority to terminate proceedings, can only do it for a reason specifically expressed in the law.” (citations omitted)).
171. Karnavas interview, supra note 38.

172. See, e.g., Interview with Diana Ellis, Co-Lawyer for Ieng Thirith, Phnom Penh (Nov. 11, 2012) (saying the prosecution’s initial submission should have focused only on good crime evidence).


174. Sulzer interview, supra note 28. The Supreme Court Chamber appears to agree, as it suggested that the Trial Chamber may wish to “state clearly” that due to the declining health of the accused “justice is better served by concluding with a judgment” on a smaller number of representative charges. SCC Severance Decision, supra note 164, ¶ 50.

175. Interview with Elisabeth Simonneau Fort, international Lead Co-Lawyer for Case 002 ECCC Civil Parties, Phnom Penh (June 1, 2012). See, e.g., Co-Prosecutors’ Request to Admit Witness Statements Relevant to Phase 2 of the Population Movement . . . , Case No. 002/19-09-2007-ECCC/TC, ¶ 15 (July 5, 2012) (noting witness statements “suggest[ing] the existence of a CPK policy to conduct a large scale relocation of Cham People in order to disperse them throughout Khmer villages with only a minority of Cham people allowed in each village”).

176. Karnavas interview, supra note 38.

177. Long interview, supra note 149.

178. See OSJI, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, at 19 (Feb. 2012).

179. SCC Severance Decision, supra note 164, ¶ 43.

180. See Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, Case No. Case No. 002/19-09-2007-ECCC/TC, ¶ 4 (Apr. 26, 2013) [hereinafter Second Decision on Severance] (affirming the appropriateness of the status quo, finding it most likely to promote legal certainty and “to represent a proportionate balance between the factors identified by the SCC Decision and necessary in order to safeguard [the Chamber’s] ability to reach any timely verdict in Case 002” due to the advanced age and fragile health of the accused and many victims). See also Decision on Immediate Appeals Against Trial Chamber’s Second Decision on Severance of Case 002, Summary of Reasons, Case No. 002/19-09-2007-ECCC/TC/SC(28), ¶ 11 (July 23, 2013) (determining that “to order an expansion of Case 002/01 . . . would inevitably result in unnecessary delays”).

181. Memorandum from Trial Chamber President Nil Nonn, Scheduling of Trial Management Meeting to Enable Planning of the Remaining Trial Phases in Case 002/01 and Implementation of Further Measures Designed to Promote Efficiency, ¶ 1 (Aug. 3, 2012).

182. ECCC Press Release, supra note 162.

183. A year and a half into proceedings, the Trial Chamber estimated that over the course of the Case 002/01 trial it had heard testimony “on an approximate average of 7.3 courtroom days per month.” Second Decision on Severance, supra note 180, ¶ 14 (attributing the slow pace to “the health of the Accused, witness availability, and the appeal pro-
cess”). During 21 months of hearings, the Trial Chamber heard only 52 fact witnesses, 3 experts, 5 character witnesses, and 32 civil parties—nearly half of whom provided victim impact statements during a special four-day hearing. Statistics for Case 002/01 are available at http://www.eccc.gov.kh/en/articles/statistics-case-0021.

184. Two months before the end of hearings, the Co-Prosecutors noted that due to the unsettled status of the severance decision, the Trial Chamber had been “managing and planning the trial on a week to week basis[,]” Co-Prosecutors’ Immediate Appeal of Second Decision on Severance of Case 002, Case No. 002/19-09-2007-ECCC/SC, ¶ 75 (May 10, 2013). But see id. ¶ 70 (nevertheless arguing that “the most significant impediment [to expeditious proceedings] had been the four-day trial schedule . . . and the frequent judicial recesses scheduled by the Trial Chamber”).

185. See generally Letter from Co-Lawyers for Ieng Sary to Susan Lamb, Trial Chamber Senior Legal Officer, Re: Scheduling of the Substantive Trial (Oct. 17, 2011) (listing myriad unresolved procedural topics and seeking clarification in advance of trial).

186. See Objections, Observations, and Notifications Regarding Various Documents to be Put Before the Trial Chamber, Case No. 002/19-09-2007-ECCC-TC, ¶¶ 22–23 (Nov. 14, 2011) (describing efforts by all parties for a pretrial conference and arguing that “the principal obstacle to an efficient trial in Case 002 is undoubtedly the Chamber’s consistent failure to engage the parties in anything resembling a meaningful discussion.”). Cf. Radosa Mulitunovic, Mladic: Just Another “False Start,” 152 Int’l Justice Trib. at 1 (May 23, 2012) (noting that “a shrinking staff, limited resources and smaller budget, combined with its congenital bureaucratic nature, have made the ICTY prone to succumb to pressure to ‘start the trial now and solve problems as we go’”).

187. Additional procedural debates are discussed at http://www.cambodiatribunal.org/category/commentary/expert-commentary/.

188. See ECCC Internal Rules (rev. 8), supra note 30, r. 90(2) (noting that in addition to the judges, the parties and their lawyers “shall also be allowed to ask questions with the permission of the President”).

189. See Memorandum from Trial Chamber President Nil Nonn to Co Prosecutors, Advance Notice of Assignment of Four Witnesses During First Trial Segment (5–16 December 2011) (Nov. 28, 2011).

190. Karnavas interview, supra note 38; Sulzer interview, supra note 28 (arguing that the judges’ material inability to lead most witnesses and civil party interviews at trial has led to confusion).


192. This bar to “proofing” witnesses, followed by the ICC, intends to prevent “a rehearsal of in-court testimony.” See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarize Witnesses for Giving Testimony at Trial, ¶ 51 (Trial Chamber, Nov. 30, 2007).
193. Pestman interview, supra note 56.
194. Karnavas interview, supra note 38 ("They are the captain of the ship but without access to the navigational gear, be it the compass or the ship’s wheel."); Sulzer interview, supra note 28 (arguing that “the court selects witnesses but doesn’t question them, so questioning is not focused”).
195. Ianuzzi interview, supra note 37.
196. Co-Prosecutors’ Request, supra note 167, ¶ 35.
197. Memorandum from President Nil Nonn to Co Prosecutors, Re: Advance Notice of Assignment of Four Witnesses During First Trial Segment (5–16 December 2011) (Nov. 28, 2011).
198. Ianuzzi interview, supra note 37.
199. See Memorandum from Trial Chamber President Nil Nonn to all Parties, Re: Order of Witnesses for Current Segment of Case 002/02 (May 11, 2012).
200. See Memorandum from Trial Chamber President Nil Nonn to all Parties, Re: Updated Information Regarding Scheduling of Proposed Experts (May 25, 2012).
201. Karnavas interview, supra note 38. Cf. Prosecutor v. Ratko Mladic, Case No. IT-09-92-PT, Decision on Consolidated Prosecution Motion to Sever the Indictment, to Conduct Separate Trials, and to Amend the Indictment, ¶ 34 (Oct. 13, 2011) (rejecting a prosecution request to sever an indictment into two trials due to potential inefficiencies, including the likelihood of parties presenting evidence in the first trial “on events to be taken up in the second trial”).
202. Second Decision on Severance, supra note 180, ¶ 117.
204. Severance Order, supra note 163, ¶ 8.
205. Co-Prosecutors’ Request, supra note 167, ¶ 26. Judicial notice “establishes a well-founded presumption for the accuracy of [a] fact’ and shifts the burden to the disputing party to disprove it. Prosecutor v. Krajisnik, Case No. IT-00-39-PT, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92bis, ¶ 16 (Trial Chamber, Feb. 28, 2003). See also Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 228 (Trial Chamber, Nov. 16, 1998) (holding that res judicata only applies inter partes to matters already fully determined in a case or to an individual if a prior criminal case had fully litigated the issue).
206. Decision on IENG Sary’s Motions Regarding Judicial Notice of Adjudicated Facts from Case 001 and Facts of Common Knowledge Being Applied in Case 002, Case No. 002/19-09-2007-ECCC/TC, at 3 (Apr. 4, 2011). By contrast, both the ICTY and ICTR may take judicial notice of adjudicated facts or documentary evidence. ICTY Rules of Procedure and Evidence (rev. 49), rev’d May 22, 2013, r. 94(B) (allowing only for the authenticity of documentary evidence to be recognized); ICTR Rules of Procedure and Evidence, as amended Oct. 1, 2009, r. 94(B).
207. Severance Order Reconsideration, supra note 164, ¶¶ 8, 10.

208. The Supreme Court Chamber has ordered the Office of Administration “to immediately explore” the creation of a second trial chamber if consecutive trials are intended, both to eliminate appearance of bias and to allow a second trial to begin while the Trial Chamber is drafting the Case 002/01 judgment. Order Regarding the Establishment of a Second Trial Panel, Case No. 002/19-09-2007-ECCC-TC/SC (28) (July 23, 2013); SCC Severance Decision, supra note 164, ¶ 51. Cf. Mladic decision, supra note 202, ¶ 35 (rejecting a prosecution request to sever an indictment into two trials in part due to concern that “if the writing of the judgment in the first case were taking place during the pre-trial period or start of the second case, this could negatively affect the pace of the second case”; moreover, “partiality and appearance of partiality of the Chamber could be raised if the Chamber were to hear both cases”).

209. Pestman interview, supra note 56.

210. Simonneau Fort interview, supra note 175.

211. Guissé interview, supra note 27 (noting that at the ICTR there was one system and people knew the rules, while at the ECCC rules are constantly changing and “it’s one document rule one day, another the next”).

212. Karnavas interview, supra note 38; Ianuzzi interview, supra note 37 (stating that the trial judges appear to be making up rules as they go).

213. Opening Statement of Son Arun, Case No. 002/19-09-2997-ECCC/TC, ¶ 12 (Nov. 23, 2011). See also Ieng Sary’s Motion to Add New Trial Topics to the Trial Schedule, Case No. 002/19-09-2007-ECCC/TC, ¶¶ 3–6 (May 23, 2011); Motion in Support of “Ieng Sary’s Motion to Add New Trial Topics to the Trial Schedule” and Request to Add Additional Topics, Case No. 001/19-09-2007-ECCC/TC, ¶ 9 (May 25, 2011).

214. Pestman interview, supra note 56.

215. Memorandum from Trial Chamber President Nil Nonn to all Parties, Directive in Advance of Initial Hearing Concerning Proposed Witnesses at 2 (June 3, 2011). The prosecution noted that relevant pre-1975 issues can be raised during scheduled witness and expert testimony. See Co-Prosecutors’ Joint Response, Case No. 002/10-09-2007-ECCC/TC, ¶ 6 (June 6, 2011). Defense teams attempted to do so whenever possible.

216. See, e.g., Julie Flint & Alex de Waal, Case Closed: A Prosecutor Without Borders, World Affairs J. (Spring 2009) (noting that human rights groups and women’s groups warned that the limited charges brought “risk offending the victims and strengthening the growing mistrust of the work of the [ICC] in the DRC”).

Chapter 6

1. See, e.g., Confidential interview with former national staff, Phnom Penh (June 18, 2012) (stating that joint operations work well unless politics are involved because national authority is not based inside the Court, but on the outside).
2. The Nuon Chea team has argued that, as a corollary to vocal government opposition and efforts to shut down Cases 003 and 004, vocal government support of Case 002 shows that the accused will be convicted no matter what the evidence shows. See Application for Immediate Action Pursuant to Rule 35, Case No. 002/19-9-2007-ECCC/TC, ¶ 3 (Apr. 25, 2012). See also Julia Wallace & Kuch Naren, *UN ‘Concerned’ About Judge’s Resignation*, *Cambodia Daily*, Mar. 21, 2012 (quoting Ou Virak, CCHR president, “If the government is willing to go to such lengths to block cases it doesn’t want to go ahead, how confident can we really be that it hasn’t already determined the outcome in the cases that have been allowed to go ahead—Cases 001 and 002?”).


5. OSJI, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, at 6 (Feb. 2009). See also Erika Kinetz, *ECCC to Name More Defendants: Prosecutor, Cambodia Daily*, June 13, 2008 (saying expanded prosecution “has become, for some, a test of the political independence of the ECCC.”).


8. See, e.g., Interview with Michael G. Karnavas, former Co-Lawyer for Ieng Sary, Phnom Penh (May 19, 2012) (asking, “Do you want to push 003 and 004 to the point that it damages 002 and then you have nothing?”).


10. Antonio Cassese, *International Criminal Law* 332 (2d ed. 2008) (noting that this was partly to reduce the costs associated with the ad hoc tribunals, with their longer lists of suspects).


13. Duch Appeal Judgment, supra note 11, ¶¶ 57, 61, 63, 79.


15. Id. at 236.

16. See, e.g., Internal Rules of the ECCC, rev’d Aug. 3, 2011, r. 13(6), r. 49(1) [hereinafter ECCC Internal Rules (rev. 8)] (giving the Co-Prosecutors exclusive authority to initiate prosecution at their discretion or on the basis of a complaint). See also Updated Statute of the ICTY, rev’d July 7, 2009, art. 18(1) [hereinafter ICTY Statute]; Statute of the ICTR, amended Dec. 16, 2009, art. 17(1).

17. See ECCC Internal Rules (rev. 8), supra note 16, r. 19. Cf. ICTY Statute, supra note 16, art. 16(2); Prosecutor v. Delalic et al. (Celebici), Case No. IT-96-21-A, Judgment, ¶¶ 602–3, 606 (Appeals Chamber, Feb. 20, 2001) (stating that prosecutorial discretion is broad, but prosecutors must not seek or receive instructions “from any government or other source”).

18. See ECCC Internal Rules (rev. 8), supra note 16, r. 55(2), r. 55(3).

19. See, e.g., Note of the International Reserve Co-Investigating Judge to the Parties on the Egregious Dysfunctions within the ECCC Impeding the Proper Conduct of Investigations in Cases 003 and 004, Case No. 003/07-9-2009-ECCC-OCIJ and 004/07-9-2009-ECCC-OCIJ, ¶ 8 (Mar. 21, 2012).

20. Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor’s Appeal Against the Decision on the Re-Filing of Three Investigative Requests, Case No. 003/07-9-ECCC/OCIJ (PTC06), Opinion of Judges Lahuis and Downing on the Co-Prosecutor’s Appeal ¶ 18 (Nov. 15, 2011) [hereinafter Lahuis and Downing Opinion on the Co-Prosecutor’s Appeal] (citations omitted).

21. See ECCC Internal Rules (rev. 8), supra note 16, r. 55(4).

22. See id. r. 55(4).

23. See id. r. 67(1).

24. Id. r. 67(3).

25. Decision on Appeal Against Closing Order Indicting Kaing Guek Eav Alias “Duch,” Case No. 001/18-7-2007-ECCC/OCIJ (PTC2), ¶ 37 (Dec. 5, 2008). Similarly, with regard to prosecutorial discretion, the international PTC judges found that, because the Internal Rules provide that the Co-Prosecutors “shall” open a judicial investigation if they “have reason to believe that crimes within the jurisdiction of the ECCC have been committed,” once they have made that determination they are obliged to do so by forwarding an introductory submission. See Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, Case No. 001/18-11-2008-ECCC/PTC, Opinion of Judges Lahuis and Downing ¶ 23 (Aug. 18, 2009) [hereinafter PTC Considerations on Co-Prosecutors’ Dispute].
26. See Dervieux, supra note 14, at 239.
27. See Decision on International Co-Prosecutor’s Re-Filing of Three Investigative Requests in Case 003, Case No. 003/07-9-2009-ECCC/OCIJ, ¶ 6(c) (July 27, 2011); Press Release by the Co-Investigating Judges Regarding Civil Parties in Case 004 (Aug. 8, 2011); PTC Considerations on Co-Prosecutors’ Dispute, supra note 25, ¶ 32 (noting Chea Leang’s argument).
29. See, e.g., Report of the Secretary-General, supra note 12, ¶ 30; ICTY Rules of Procedure and Evidence (rev. 49), rev’d May 22, 2013, r. 11 bis [hereinafter ICTY Rules] (stating that those most responsible and thus suitable for ICTY prosecution are determined by “the gravity of the crimes charged and the level of responsibility of the accused”).
31. See Duch Appeal Judgment, supra note 11, ¶ 76.
32. Prosecutor v. D. Milosevic, Case No. IT-98-29/1-PT, ¶ 22 (Referral Bench, July 8, 2005).
34. Report of the Secretary-General, supra note 12, ¶ 30.
35. Situation in the Democratic Republic of Congo, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I Entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58,” Situation No. ICC-01/04, ¶ 77 (Appeals Chamber, July 13, 2006).
38. Group of Experts Report, supra note 33, ¶ 219(2). For one legal scholar’s argument on how prosecutors at the ECCC, ICC, and elsewhere can balance between the aims of prosecution and reconciliation, see generally Neha Jain, Between the Scylla and Charybdis of Prosecution and Reconciliation: The Khmer Rouge Trials and the Promise of International Criminal Justice, 20 Duke J. Comp. & Int’l L. 247 (2009–10).
39. See Rome Statute, supra note 37, art. 53(3)(b).
40. Only the Security Council has the authority to prevent an ICC investigation or prosecution, and then only to delay it for a 12-month period. See Rome Statute, supra note 37, art. 16.


42. PTC Considerations on Co-Prosecutors’ Dispute, supra note 25, ¶ 32.

43. Id. ¶ 34.

44. See Vannarin & Gillison, supra note 41 (quoting former international Co-Prosecutor Robert Petit saying that “fears of civil war in Cambodia were ‘hogwash’”). Cf. Human Rights Watch, Selling Justice Short: Why Accountability Matters for Peace, at 3 (July 2009) (noting that in practice “the anticipated negative consequences of pressing for accountability often do not come to pass”).

45. As far back as 1999, the UN Group of Experts reached a similar conclusion. See Group of Experts Report, supra note 33, ¶ 109.


47. PTC Considerations on Co-Prosecutors’ Dispute, supra note 25, ¶ 34.


50. Interview with Panhavuth Long, Program Officer, Cambodian Justice Initiative, Phnom Penh (July 6, 2012).


54. Comparably, the ICC operates on the principle of complementarity, meaning that it does not investigate or prosecute when a national jurisdiction is able and willing to genuinely do so. See Rome Statute, supra note 37, art. 17. The ICTY and ICTR have the capacity to refer lower-level offenders to national jurisdictions. See ICTY Rules, supra note 29, r.11bis; ICTR Rules of Procedure and Evidence, amended Oct. 1, 2009, r. 11bis. In Sierra Leone there was a truth commission process acting parallel to the SCSL.

56. The first international Co-Prosecutor Robert Petit had the phrase “too many names” embossed in Khmer on baseball hats as his parting gift for international OCP staff, who used the expression when discussing the national side’s unwillingness to proceed. Confidential email from former OCP staff (June 13, 2012).


61. ECCC Law, supra note 11, art. 20 new. See also ECCC Internal Rules (rev. 8), supra note 16, r. 71(4)(c) (providing that where there is no supermajority “the action or decision done by one Co-Prosecutor shall stand or . . . the action or decision proposed to be done by one Co-Prosecutor shall be executed”).

62. See PTC Considerations on Co-Prosecutors’ Dispute, supra note 25.

63. Interview with Craig Etcheson, former investigator in the ECCC Office of the Co-Prosecutors, via telephone (Oct. 22, 2012) (calling the dispute between the Co-Prosecutors the “seed of paralysis in Cases 003 and 004”).

64. Press Release, Statement of the Acting International Co-Prosecutor: Submission of Two New Introductory Submissions (Sept. 8, 2009). Deputy international Co-Prosecutor Bill Smith filed the submissions as Robert Petit had recently resigned.


70. See PTC Considerations on Co-Prosecutors’ Dispute, supra note 25, Opinion of Judges Prak, Ney & Hout ¶ 8; Confidential email from former OCP staff (June 13, 2012).

71. Confidential email from former OCP staff (June 13, 2012). See also Cable 08PH-
NOMPENH947, U.S. Embassy Phnom Penh, Khmer Rouge Tribunal: Rocky Road for New Cases, Steady Path for Trial of Five KR Leaders ¶ 5 (Nov. 28, 2008), available at http://www.wikileaks.org/cable/2008/11/08PHNOMPENH947.html (stating the views of the OSJI monitor that Chea Leang was “explicitly told not to agree to the new cases so as to protect Cambodia’s peace and stability”).

72. See, e.g., David Scheffer, Opinion: How Many Are Too Many Defendants at the KRT? Phnom Penh Post, Jan. 8, 2009 (stating that the prosecutorial dispute “was anticipated in the negotiations and strikes [him] as demonstrating that the ECCC is working its will as it was designed to do”).

73. Etcheson interview, supra note 63 (noting that the OCP has “been able to isolate [the Co-Prosecutor’s dispute over Cases 003 and 004] and keep it from contaminating [their joint work on] Case 002 to a significant extent.”


75. Robert Petit’s successor Andrew Cayley has said, “[S]he has never stopped me from doing what is right. . . We are working together, and even where there are moments she can’t join, I make sure things are done.” Julia Wallace, KR Prosecutors Say Conscience Dictates Work, Cambodia Daily, Oct. 10, 2011.


77. See Letter to Marcel Lemonde, Lettre du co-juge d’instruction international en date du 02 juin 2010 re Dossiers 003 et 004 (June 8, 2010).


79. Decision on You Bunleng, supra note 76, ¶ 9.


82. Press Release, Statement by the International Co-Prosecutor Regarding Case File 003 (May 9, 2011).

83. See Decision on International Co-Prosecutor’s Re-Filing of the Request for an Extension of Time for the Filing of Civil Party Applications in Case 003, Case No. 003/07-9-ECCC/OCIJ, ¶¶ 7, 8 (Aug. 9, 2011); Press Release, Statement from the Co-Investigating Judges Related to Case 003 Request from the International Co-Prosecutor (June 7, 2011). Andrew Cayley said, “[T]his amounts to a deliberate gross violation of the Victim’s rights.” International Co-Prosecutor’s Appeal Against the “Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003,” Case No. 003/07-9-ECCC/OCIJ, ¶ 66 (July 7, 2011).

84. Rob Carmichael, Tribunal’s Credibility Under Threat as Controversial Cases Head for

85. Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill, Case No 003/07-9-ECCC/OCIJ (PTCo2), Opinion of Judges Lahuis and Downing ¶ 5 (Oct. 24, 2011) [hereinafter Lahuis and Downing Opinion on Hamill].

86. Press Release, Statement by the International Co-Prosecutor Regarding Case File 003 (May 9, 2011).

87. See Decision on You Bunleng, supra note 76, ¶ 12.

88. Press Release, Statement by the International Co-Prosecutor Regarding Case File 003 (May 9, 2011). See also Douglas Gillison, Justice Denied, FOREIGN POLICY (Nov. 23, 2011) (reporting that on Blunk’s arrival, “he told his office that his inquiries would be suspect-based; seeking first to determine the guilt or innocence of defendants before examining the facts and allegations, a backwards approach his staff said appeared designed either for a frame-up or a cover-up”).

89. See Press Release, Statement from the Co-Investigating Judges (Apr. 29, 2011); OSJI, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, at 11 (June 2011). See also Lahuis and Downing Opinion on the Co-Prosecutor’s Appeal, supra note 20, ¶ 12 (noting that the Case 002 documents and other evidence collected during the entire investigation were not placed into the case file until very late in the process).

90. See, e.g., Lahuis and Downing Opinion on Hamill, supra note 85, ¶¶ 9–15 (in which the CIJs replaced a defective civil party rejection order while challenges to the defects were on appeal).

91. Id. ¶ 9.


93. Decision on You Bunleng, supra note 76, ¶ 13.

94. See, e.g., Douglas Gillison, UN Legal Team Walks Out on Stymied KR Cases, CAMBODIA DAILY, June 13, 2011; Gillison, Justice Denied, supra note 88 (quoting from their letter to the Secretary-General: “It is our duty to notify you that we consider, as a matter of law and procedure, that the co-investigating judges did not conduct a genuine, impartial or effective investigation and as such did not discharge their legal obligation to ascertain the truth.” . . . “In our view, the decision to close the investigation at this stage breaches international standards of justice, fairness and due process of law.”).

95. See Gillison, UN Legal Team, supra note 94; Decision on You Bunleng, supra note 76, ¶ 14. See also Press Release, Public Statement by Co-Investigating Judges (June 12, 2011) (saying that they “welcome the departure of all staff members who ignore the sole responsibility of the CIJs” to decide whether or not to close the Case 003 investigation).

96. See Gillison, UN Legal Team, supra note 94.

98. See Press Release by the International Co-Investigative Judge (Oct. 10, 2011). It is not clear why Blunk resigned. The only consensus was that he was “a bizarre man.” Gillison, Justice Denied, supra note 88. Nevertheless, his departure was precipitated by an internal investigation he initiated after the Documentation Center of Cambodia published an interview with a witness he had previously questioned. Some claim the investigation revealed his role in “the falsification of evidence, including witness tampering, and the back-dating of orders.” Id. However, it was more likely a confluence of events. There have been suggestions that the internal investigation revealed to him that, despite his friendship and shared agenda with Judge You Bunleng, the national side had been acting behind his back to stage-manage his contact with the few witnesses he interviewed. Finally, there were unconfirmed rumors that state donors confronted him with his aberrant judicial orders and asked him to resign.

99. Foster & Phorn, supra note 68. But see Julia Wallace, No Pressure on Tribunal, Gov’t Insists, CAMBODIA DAILY, Oct. 13, 2011 (backtracking to say, the Government “understands very well that it is at the exclusive discretion of the ECCC to decide who to indict”).


101. See also Framework Agreement, supra note 11, art. 5(6) (“In case there is a vacancy or a need to fill the post of the international co-investigating judge, the person appointed to fill this post must be the reserve international co-investigating judge”).

102. Compare Statute of the Special Court of Sierra Leone, Jan. 16, 2002, art. 12(1) [hereinafter SCSL Statute] with Framework Agreement, supra note 11, art. 3(6) and ECCC Law, supra note 11, art. 11 new. See also Constitutional Council Decision No. 040/002/2001, Feb. 12, 2001, at 3 (unofficial translation) (finding that the United Nations “only provides a list of candidates, and has no decision-making rights” in appointments).


106. See ECCC Law, supra note 11, art. 11 new (providing that the President of each Chamber may designate reserve judges already appointed by the SCM “to replace a foreign judge if that judge is unable to continue sitting”). See also Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement Between the Co-Investigating Judges Pursuant to Internal Rule 72, Case No. 003/16-12-2011-ECCC/PTC, ¶ 37 [hereinafter Downing and Chung Opinion] (Feb. 10, 2012) (arguing: “If a reserve judge is not able to temporarily replace an absent judge pending his permanent replacement then one must logically inquire as to the purpose of having a Reserve Investigating Judge”). Notably, a
reserve international Trial Chamber judge has repeatedly replaced an absent judge without any challenge to her authority to do so. See, e.g., Transcript of Trial Proceedings—Case 002, Case No. 002/19-9-2007-ECCC/TC, at 104 (Jan. 18, 2012).


109. Statement Attributable to the Spokesperson for the Secretary-General on Cambodia, International Co-Investigating Judge of the Extraordinary Chambers in the Courts of Cambodia (Jan. 20, 2012). See also Downing and Chung Opinion, supra note 106, ¶ 33 (stating that the appointment of a new international CIJ was ongoing and is unrelated to the reserve international CIJs’ ability to temporarily replace the absent judge “in order to ensure that court proceedings go on timely and smoothly”).

110. See generally Decision on You Bunleng, supra note 76. But see Bridget Di Certo, Judge’s Exit Shakes KRT, PHNOM PENH POST, Mar. 21, 2012 (quoting Judge You Bunleng saying, “I didn’t obstruct him, I just did not recognize his work”).

111. See Press Statement of the National Co-Investigating Judge (Dec. 6, 2011); Press Statement by the National Co-Investigating Judge (Feb. 10, 2012).


113. See generally Decision on You Bunleng, supra note 76.

114. See Note of the International Reserve Co-Investigating Judge, supra note 19, ¶¶ 33–54; Decision on You Bunleng, supra note 76, ¶¶ 40–66. See also Press Statement by National Co-Investigating Judge (Mar. 26, 2012) (acknowledging that he had told national staff not to follow the directions of Judge Kasper-Ansermet).

115. See Press Release of the Reserve International Co-Investigating Judge (May 4, 2012) (“For reasons which are manifestly more political and financial than strictly legal, the Reserve International Judge . . . found himself in a highly hostile environment and was severely impeded in the day-to-day performance of his duties, as a result of which he tendered his resignation to the United Nations Secretary General.”); Julia Wallace, From Phnom Penh with Love, INT’L JUST. TRIB. (Mar. 28, 2012).

117. See Statement by the Co-Investigating Judges (Feb. 28, 2013); Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel, Case No. 004/07/-09-2009-ECCC-OCIJ (May 17, 2013); Press Release, Statement by the International Co-Investigating Judge Regarding Additional Crime Sites in Case 004 (Dec. 19, 2012); Lawyers Recognition Decision Concerning All Civil Party Applications on Case File No. 003, Case No. 003/07-09-2009-ECCC-OCIJ (Feb. 26, 2013); Lawyers Recognition Decision Concerning All Civil Party Applications on Case File No. 004, Case No. 004/07-09-2009-ECCC-OCIJ (Apr. 1, 2013).

118. See, e.g., ECCC COURT REPORT (Oct. 2013), at 5 (reporting that “the International side of the [OCIJ] continued the investigation of Case Files 003 and 004”). See also Abby Seiff, Wanted: Lawyers for Hot Cases, PHNOM PENH POST, May 15, 2013 (discussing Judge Harmon’s unsuccessful efforts to recruit Cambodian lawyers to assist the international side of the office); Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant [REDACTED], Case No. 003/07-09-2009-ECCC/OCIJ (PTC 05) (Feb. 13, 2013) (describing additional irregularities in the administration of Case 003, which the national judges remain unwilling to acknowledge and remedy).

119. See, e.g., Sok Khemara, Suspect Questions “Most Responsible” Tribunal Mandate, VOA KHMER (Aug. 16, 2011), http://www.voacambodia.com/content/suspect-questions-most-responsible-tribunal-mandate-127880513/1356676.html (quoting Case 003 suspect Meas Muth expressing no concerns about being prosecuted, saying, “Now the senior-most leaders and the most responsible persons are at the court already”); Kuch Naren & Julia Wallace, KRT Suspect Im Chaem Informed of Her Rights, CAMBODIA DAILY, Mar. 6, 2012 (quoting Case 004 suspect Im Chaem saying, “I don’t need a court to judge me, and Prime Minister Hun Sen has already told the public that the tribunal is just for hearing cases 001 and 002”).


121. Karnavas interview, supra note 8.

122. The Trial Chamber did not reach a supermajority once regarding the applicability of a national statute of limitations to domestic crimes in the ECCC Law, but no allegations of political interference were raised on that occasion.

123. See David Scheffer, The Value of Steve Heder’s Research on the ECCC’s Personal Jurisdiction, and an Afterword on the Purpose of the Dispute Settlement Mechanisms, CAMBODIA TRIBUNAL MONITOR (Aug. 8, 2011) (on file with the authors) (“It was precisely because negotiators foresaw a possible rift between the Co-Prosecutors, in particular, over additional individuals to bring to trial that the dispute mechanism was developed.”).

124. See, e.g., ECCC Law, supra note 11, arts. 16, 23 new. During negotiations, the United Nations sought to give the international Co-Prosecutor independent authority to indict suspects on his own authority; however, the Cambodian Government insisted that the two...
Co-Prosecutors must make decisions by consensus. See *Hun Sen Proposes Judges to Aid Prosecutors in K. Rouge Trial*, JAPAN ECON. NEWSWIRE, Apr. 6, 2000.

125. ECCC Internal Rules (rev. 8), *supra* note 16, r. 13(3), r. 14(4) (addressing the Co-Prosecutors and CIJs, respectively).

126. *Id.* r. 54, r. 56.

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

128. See *Statement from the Co-Investigating Judges* (June 9, 2010).

129. See *id.*

130. Co-Prosecutors may not act unilaterally if the dispute relates to an introductory submission, supplemental submission relating to new crimes, final submission, or a decision relating to an appeal. CIJs may not act unilaterally if the dispute features a decision that would be open to appeal by the charged person or a civil party, a notification of charges, or an arrest and detention order. ECCC Internal Rules (rev. 8), *supra* note 16, r. 71(3), r. 72(3). See also PTC Considerations on Co-Prosecutors’ Dispute, *supra* note 25, ¶ 16 (“[O]nly cases of major concern specifically identified in the Internal Rules would a disagreement prevent one [“co”] from proceeding with a given action pending a decision by the Pre-Trial Chamber.”).

131. ECCC Internal Rules (rev. 8), *supra* note 16, r. 71(1), r. 72(1).

132. PTC Considerations on Co-Prosecutors’ Dispute, *supra* note 25, ¶ 27.

133. Decision on IENG Sary’s Appeal Against the Closing Order, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 75), ¶ 274 (Apr. 11, 2011).

134. See Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, Case No. 003/07-9-2009-ECCC/OCIJ (June 6, 2011).


136. Considerations of the Pre-Trial Chamber Regarding the International Prosecutor’s Appeal Against the Decision on Time Extension Request and Investigative Requests Regarding Case 003, Case No. 003/07-9-2009-ECCC/OCIJ (PTC 04), ¶ 3 Separate opinion of Judges Downing & Lahuis (Nov. 2, 2011).

137. *Id.* ¶ 12 Separate opinion of Judges Prak, Ney & Huot.

138. See, e.g., Note of the International Reserve Co-Investigating Judge, *supra* note 19, ¶ 34.


141. Interview with Hans Corell, former UN Legal Counsel, via telephone (Nov. 15,
2012). Cf. Quelles leçons, supra note 49 (arguing that the “co” system is inefficient and that the dispute settlement procedure is unworkable on a day-to-day basis).

142. Cable 09PHNOMPENH648, supra note 57, ¶ 1.

143. Open Society Justice Initiative (OSJI), Political Interference at the Extraordinary Chambers in the Courts of Cambodia, at 11 (July 2010).

144. Corell interview, supra note 141.

145. Framework Agreement, supra note 11, art. 7; ECCC Law, supra note 11, arts. 20 new, 23 new.

146. Cable 09PHNOMPENH264, U.S. Embassy Phnom Penh, Khmer Rouge Tribunal: Donors Chart a More Unified Course ¶¶ 3–4 (Apr. 24, 2009), available at http://www.wikileaks.org/cable/2009/04/09PHNOMPENH264.html (reporting that the national judges convinced the international judges not to release the decision until “the time was right”).

147. See Lahuis and Downing Opinion on the Co-Prosecutor’s Appeal, supra note 20; Lahuis and Downing Opinion on Hamill, supra note 85. See also Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor’s Appeal Against the Co-Investigating Judges’ Order on International Co-Prosecutor’s Public Statement Regarding Case 003, Case No 003/07-9-ECCC/OCIJ (PTC03) (Oct. 24, 2011).

148. David Scheffer, The Extraordinary Chambers in the Court of Cambodia, in 3 International Criminal Law 219, 246 (M. Cherif Bassiouni ed., 2008). See also Scheffer, supra note 123; Douglas Gillison, Genocide Judges Duel It Out in Phnom Penh, The Investigative Fund (Dec. 7, 2011) (reporting that David Tolbert believes this shows the tribunal “did not have sufficient procedural or legal safeguards to respond effectively to a Blunk scenario and that this experience should not be repeated elsewhere”).

149. See discussion of this issue in chapter 5.


151. Interview with Richard Rogers, former head of the ECCC Defence Support Section, Phnom Penh (May 29, 2012).

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


154. Press Release, Clarification of the National Judges of the Pre-Trial Chamber on the Note of Mr. Laurent Kasper-Ansermet, D38, dated 21 March 2012 (March 26, 2012).

155. Id.


158. Framework Agreement, supra note 11, art. 4; ECCC Law supra note 11, art. 14 new(1); ECCC Internal Rules (rev. 8), supra note 16, r. 98(4).

159. Scheffer, supra note 148, at 246.

160. Karnavas interview, supra note 8. See also Michael Karnavas, Op-Ed, It’s Time to Salvage the Khmer Rouge Tribunal’s Legacy, CAMBODIA DAILY, Dec. 12, 2012 (saying “[t]he ECCC is failing as a model court because the international judges have not been robust in insisting on the uncompromising application of international standards and best practices”).


162. Long interview, supra note 50.

163. Interview with Michiel Pestman, former Co-Lawyer for Nuon Chea, Phnom Penh (June 9, 2012).

164. Cf. Quelles leçons, supra note 49 (authors’ translation from the French).

165. Rogers interview, supra note 151. Cf. Interview with Diana Ellis, Co-Lawyer for Ieng Thirith, Phnom Penh (Nov. 11, 2012) (emphasizing that the moment you have political interference, the process cannot be fair because “judicial independence lies at the heart of a fair judicial system and interference compromises the whole system. You don’t know if a decision is being taken based on a level of proof, or if a judge has been directed to take a specific decision.”).

166. See, e.g., Kuch & Wallace, supra note 119 (noting that the PTC international judges and Kasper-Ansermet “have expressed concern that the rights of the suspects have already been violated” by the years-long presumptive investigation being undertaken without their participation or official awareness).

167. Di Certo, supra note 110.

168. Corell interview, supra note 141.

169. See ECCC Law, supra note 11, art. 11 new.

170. See Constitution of the Kingdom of Cambodia, art. 132 (adopted 1993, as amended through 2008) (“The King is the guarantor of the independence of the Judiciary. The Supreme Council of the Magistracy shall assist the King in this matter”).

171. See, e.g., Surya P. Subedi, Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, ¶ 24, U.N. Doc. A/HRC/15/46 (Sept. 16, 2010). But see Julia Wallace, UN Concerned Over Dilatory Appointment of KRT Judge, CAMBODIA DAILY, Jan. 12, 2012 (quoting a government spokesperson saying that the SCM “is very independent. Our government has nothing to do with that one, even though a number of the government people sit on that one”).

173. See Samantha Melamed, Criteria for KR Judge Selection Still Unreleased, Cambodia Daily, Nov. 28, 2005 (quoting the executive director of the Cambodia Defenders Project: “Before the government appoints any judges, there must be time for the public to comment [. . .] . . . At the least we want [judges] with integrity, competence, [who are] clean and independent.”).

174. OSJI, Progress and Challenges at the Extraordinary Chambers in the Courts of Cambodia, 8 (June 2007).

175. See Douglas Gillison, Officials Mum on KR Tribunal Judicial Appointments Memo, Cambodia Daily, June 20–21, 2009 (reporting that government officials and Cambodian ECCC officials could not explain a discovered 2006 memorandum from Deputy Prime Minister Sok An to Hun Sen asking him to approve the exact list of 29 Cambodian judges and prosecutors who were appointed to the Court by the King six weeks later on the nomination of the SCM).


179. See International Center for Transitional Justice, supra note 178, at 19.

180. Id. (stating that for the STL the panel comprised an ICTY judge, an ICTR judge, and the UN Legal Counsel).

181. Thomas Miller, KRT Judge Talks Court Controversies, Phnom Penh Post, Aug. 18, 2011.


183. See, e.g., Group of Experts Report, supra note 33, ¶¶ 133, 136.

184. Bates, supra note 140, ¶ 145. See also Kelly McEvers & Phann Ana, Disorder in the Courts, Cambodia Daily, Mar. 4–5, 2000 (reporting that a “handful” of judges queried said that “no matter how far away from Phnom Penh they were, they felt the pressure of the Prime Minister”); Statement of Lao Mong Hay, Institutions for the Rule of Law and Human Rights in Cambodia, at 8 (Mar. 21, 2006), cited in Request for Investigation Pursuant to Rule 35, Case No. 002/19-9-2007-ECCC/TC, n.14 (Apr. 28, 2011):

Apart from some 40 judges and prosecutors appointed after the new constitution, the rest, some 120, did not have any legal training, let alone a law degree, when
they were appointed during the communist era. Their appointment was then based on their membership of—and loyalty to—the communist party. [. . .] All were instructed to serve the party. Those who were subsequently appointed were also compelled one way or another to join the current power, the Cambodian People’s Party (the ‘CPP’). [. . .] Even reformist judges and prosecutors feel pressure from people at the top [. . .].

185. ECCC Law, supra note 11, art. 10 new. See generally ECCC Code of Judicial Ethics (Sept. 5, 2008).
187. See Mackenzie & Sands, supra note 177, at 282 (noting that outside activities may give rise to an appearance of bias or “simply compete for the time of judges and thus interfere with the work of the court or tribunal”).
188. ECCC Internal Rules (rev. 8), supra note 16, r. 34(2) (emphasis added).
189. Rogers interview, supra note 151.
191. Id. ¶ ¶ 28–33.
192. See James Welsh & Prak Chan Thul, Filmmaker: KR Judge Says He Accepted Cash, Cambodia Daily, June 10–11, 2006; LICADHO, supra note 186, at 25. Judges who admit taking money often say it was only a “gift” or “fee” from a grateful litigant after the decision was rendered, and deny that it was a bribe. See, e.g., McEvers & Phann, supra note 184; Kheang Un & Judy Ledgerwood, Is the Trial of ‘Duch’ a Catalyst for Change in Cambodian Courts? 95 Asia Pacific Issues 6 (E.- W. Ctr., June 2010).
194. See id. ¶ ¶ 9, 11–14.
195. See id. ¶ ¶ 14–15.
196. See, e.g., Public Decision on the Co-Lawyers’ Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, Case No. 002/19-9-2007-ECCC/OCIJ (PTC 01), ¶ 30 (Feb. 4, 2008).
198. Id.
200. See Di Certo, supra note 110. See also Memorandum from Judge Kong Srim, President JAC to Judge Prak Kimsan, President PTC, Decision of the JAC Regarding the Request to Appoint Two International Judges to Hear the Application for Disqualification of the President of the Pre-Trial Chamber (Mar. 23, 2012) (including the forceful dissent of Judge Lavergne, stating that neither the PTC nor the JAC has the authority to review the validity of a judge’s decision to recuse him- or herself on any matter).

201. See also Olga Martin-Ortega & Johanna Herman, Hybrid Tribunals & the Rule of Law: Notes from Bosnia & Herzegovina & Cambodia, JAD-PbP Working Paper Series No. 7, 18 (May 2010) (noting that of the internationals, “only one judge and two reserve judges had experience at other international criminal tribunals”).


203. Corell interview, supra note 141; Corell, supra note 202, at ix–xi.

204. Cf. Framework Agreement, supra note 11, art. 3(3) (providing in part that judges shall “possess the qualifications required in their respective countries for appointment to judicial offices”).

205. See, e.g. ICTY Statute, supra note 16, art. 13; ICTR Statute, supra note 16, art. 12; SCSL Statute, supra note 102, art. 13 (requiring “qualifications required in their respective countries for appointment to the highest judicial offices” and taking into account experience in criminal and international law); Rome Statute, supra note 37, art. 36(3)(b) (requiring “qualifications required in their respective States for appointment to the highest judicial offices,” competence and relevant experience in criminal or international law).


207. Yash Ghai Report, supra note 3, ¶ 43 (noting the removal and appointment of judges on executive instructions, contrary to the law in force).

208. Id. ¶ 43.

209. Id. ¶ 54.


211. Quoted in Bates, supra note 140, ¶ 277.

212. See, e.g., Group of Experts Report, supra note 33, ¶ 98.
213. Steve Heder, The Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia As Regards Khmer Rouge “Senior Leaders” and Others “Most Responsible” for Khmer Rouge Crimes: A History and Recent Developments, at 40 (April 26, 2012). See also Cable 07PHNOMPENH103, U.S. Embassy Phnom Penh, RGC Worried ECCC Prosecutions Could Affect Peace and Security ¶ 9 (Jan. 22, 2007), available at http://www.wikileaks.org/cable/2007/01/07PHNOMPENH103.html (noting, “In a country whose judiciary does nothing with respect to any politically related case without instructions, it is little surprise that the RGC is reticent about a legal process that they might not be able to control”).

214. Reach Sambath, Khmer Rouge Leaders Will Not Escape the Law: Hun Sen, Agence France-Presse, Sept. 11, 2000. See also Un & Ledgerwood, supra note 192, at 4 (noting that the PRK government collapsed all stories of the DK period into a standard “national narrative” exemplified by the Tuol Sleng Genocide Museum). Cf. Thierry Cruvellier, Court of Remorse: Inside the International Criminal Tribunal for Rwanda 166 (2006) (noting that when meeting with Rwanda officials to discuss the events of 1994, “one question must first be answered: who stopped the genocide? There is only one right answer—the RPF”).

215. Situation in Uganda, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, Situation No. ICC-02/04 (July 5, 2004) (containing the Letter from Prosecutor Moreno Ocampo to President Kirsch [June 17, 2004]).

216. See, e.g., International Refugee Rights Initiative, Discussion Paper 1: A Poisoned Chalice?, at 9 (Oct. 2011) (”[I]t was assumed that the government of Uganda’s co-operation was contingent on the ICC not investigating it [i.e., government forces], and therefore it appeared that the ICC had made this decision for political reasons rather than on the basis of any proper analysis of the crimes committed”); William A. Schabas, First Prosecutions at the International Criminal Court, 27 Hum. Rts. L. J. 24, 31 (2006) (“The suspicion is inescapable that the Prosecutor has a tacit, if not an explicit, understanding with the Ugandan authorities that he will prosecute the rebel leaders only”).


218. See, e.g., Dina Temple, Carla del Ponte’s Days in Rwanda Look Numbered, N.Y. Sun, Aug. 7, 2003 (noting that the United States and United Kingdom supported Rwanda on this issue). See also Cruvellier, supra note 214, at 132 (highlighting that “Rwandan authorities have managed to use, shake up, manipulate, and intimidate the ICTR . . . [ , having] no qualms about subjecting the tribunal to their interests[.]”); Ellis interview, supra note 165 (noting that because no RPF officers were prosecuted, the ICTR provided victors’ justice, which was inevitable as the tribunal could not function without the cooperation of the ‘victors’ now running the Rwandan government).

219. But see Cruvellier, supra note 214, at 105–13 (recounting the story of how, when the Appeal Chamber dismissed all charges in the Barayagwiza Case, Rwanda formally withdrew cooperation and the prosecutor was forced to ask the Chamber to reconsider). Compare Barayagwiza v. Prosecutor, Case No. ICTR-97-19, Decision (Appeals Chamber,

220. International Co-Prosecutor Andrew Cayley has noted, “I think that in a number of international courts in which I have worked, states might deny trying to exercise influence, but they still do, to varying degrees, behind the scenes. Such political influence is not always motivated by bad faith. Sometimes intervention takes place for well-founded reasons.” Interview with Andrew Cayley, Global Brief (Sept. 9, 2011), available at http://globalbrief.ca/blog/2011/09/09/on-international-criminal-justice/.

221. Cable 07PHNOMPENH429, U.S. Embassy Phnom Penh, Friends of the ECCC or RGC? ¶ 8 (Mar. 16, 2007), available at http://dazzlepod.com/cable/07PHNOMPENH429 (stating former Director of Administration Sean Visoth’s view that the Chinese were placing pressure on the Government with regard to the tribunal).

222. See, e.g., Press Release, Australia Announces New Pledge of AUD 1.61 Million (Mar. 27, 2012) (reporting that the Australian Foreign Minister announced the donation in Phnom Penh, including 0.61 million for the national side). Three days earlier, in the midst of Kasper-Ansermet’s allegations of massive dysfunction, the Government called the ECCC a “model court” that “is running smoothly and normally.” Bridget Di Certo, KRT Is a Model Court Says State, Phnom Penh Post, Mar. 23, 2012.

223. Cable 07PHNOMPENH429, supra note 221, ¶ 8 (finding it of concern “that the two countries are focusing exclusively on the preservation of their bilateral relationships with the RGC in their discussions about the ECCC, and are not taking a more nuanced approach as co-chairs of the Friends”).

224. See, e.g., Letter from HRW, FIDH, Amnesty International and OSJI to Stephen Mathias, UN Assistant Secretary General for Legal Affairs, Extraordinary Chambers in the Courts of Cambodia (Mar. 29, 2011) (on file with author); OSJI, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, at 33 (June 2011); But see Press Release, United Nations Rejects “Media Speculation that Judges Received Instructions to Dismiss Case Before Extraordinary Chambers in the Courts of Cambodia, SG/SM/13642 (June 14, 2011).


226. Mike Eckel, Cambodia’s Kangaroo Court, Foreign Policy (July 20, 2011).

227. Id.


229. Corell, supra note 202, at vi. See, e.g., Richard Goldstone, For Humanity:
Reflections of a War Crimes Investigator 105 (2000) (recounting how as the first ICTY prosecutor he was told “at least one indictment had to be issued before the November [budget] meeting in order to demonstrate that the system was working and that the tribunal was worthy of financial support[,]” which led to the indictment of an available low-level offender).

230. Cable 09PHNOMPENH648, supra note 57, ¶ 4. But see New KRT Judge: “I Will Assume This Mission,” CAMBODIA DAILY, Feb. 15, 2012 (quoting Judge Kasper-Ansermet: “I don’t have to consider political or financial issues because we speak now as there are budget problems, and we have, of course, the political side of cases, but I have to not care about it”). Nevertheless, there have been rumors that donors have sought to target their funding to Case 002 and away from Case 003 and 004. If this is true, it appears that—to its credit—the UN has not agreed to this kind of direct donor influence over the Court’s docket.

231. See also Confidential Cable, U.S. Embassy Phnom Penh, Friends of the ECCC Discuss Budget and Judicial Calendar ¶ 1 (Jan. 14, 2010), available at http://www.wikileaks.org/cablegate.html. Cf. id. ¶ 7 (reporting that Deputy Director Knut Rosandhaug “suggested that the law could be changed to transfer [Case 003] entirely to the domestic court[,]”).

232. See, e.g., Jared Ferrie, Wikileaks: UN Discussed Dropping #003, CHRISTIAN SCIENCE MONITOR, Aug. 3, 2011 (noting that “[s]uch a move would . . . undoubtedly kill the problematic case”). See also Julia Wallace, Chaos Now Bites KR Defence, 153 INT’L JUST. TRIB. (June 6, 2012) (noting that Rosandhaug asked You Bunleng to clarify Judge Kasper-Ansermet’s order recognizing Richard Rogers as Case 004 accused Ta An’s international counsel, knowing You would “respond[,] as could have been expected, in the negative” and adding that “Rosandhaug, a UN career bureaucrat, is widely perceived to be uninterested in pursuing new cases.”) See also Interview with Richard Rogers, former head of the ECCC Defence Support Section, Phnom Penh, via telephone (June 12, 2012) (“I don’t have any evidence that OLA instructed Knut, but at least he must be pretty confident of some support to take steps like this”). This is particularly concerning as the Case 003 and 004 accused were not informed of their rights before Judge Kasper-Ansermet arrived and the Court had consistently maintained the legal fiction that they are not entitled to counsel because they are not charged and the investigation is secret, even though their names had been public for over a year and multiple media outlets had since interviewed them about their alleged crimes. In October 2012, Göran Sluiter was assigned international Co-Counsel for Ta An (Case 004) (joining national Co-Counsel Mom Luch); however, in June 2013, it was revealed that the international head of the Defence Support Section (DSS), a formally autonomous arm of OA, had been arbitrarily disregarding existing funding guidelines in an effort to save money in violation of Ta An’s defense rights. See Decision on Application Requesting Funding for Legal Consultant’s Flight to the Office of the Co-Lawyer, Case No. 001/21-05-2013-UNAJ (June 25, 2013), available at http://
www.eccc.gov.kh/en/dss/defence-support-section/claims-decisions (noting that the DSS head had placed Sluiter and Ta An “in a disadvantageous situation in comparison with the other Defence teams and their clients in Cases 001 and 002 . . . in breach of the principle of equality before the law”).


234. Id. ¶ 25, 37. In contrast, at the ECCC, as discussed in chapter 3, the salaries of national staff—including judges—were not paid by the Cambodian Government on more than one occasion despite its obligation to do so under the ECCC Agreement, due to a lapse in international donations. See, e.g., Cash Crunch Threatens Cambodia’s War Crimes Court, Agence France-Presse, Feb. 10, 2013.

235. SCSL Judicial Independence Decision, supra note 7, Separate Opinion of Justice Robertson ¶ 3.

236. See Miller, supra note 228 (stating that Basic Principle 7 on the Independence of the Judiciary (“It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions”) “reflects the understanding that the budget of the court cannot be used as a means to limit the scope of its operation”).


239. Prosecutor v. S. Milosevic, Case No. IT-02–54-AR73.4, ¶ 20 Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement (Appeals Chamber, Oct. 21, 2003). See also Radosa Mulitunovic, Mladic: Just Another “False Start,” Int’l Just. Trib. (May 23, 2012) (noting “for seasoned court observers, the ‘false start’ to the Mladic trial indicates pressure from the UN Security Council” to finish all trials before the Residual Mechanism takes effect in July 2013); Cf. Cohen, supra note 182 (noting that in a judgment drafted in East Timor Judge Blunk wrote: “Mitigation is . . . that before the Court [he] pled guilty on the second day of the trial, so that the Court whose lifespan ends on 20 May 2005, can turn its resources to the remaining trials, which according to [the Security Council resolution] should be concluded ‘as soon as possible’.” [emphasis in original]).

240. See, e.g., James O’Toole, Ban Hits Back at Tribunal Critics, Phnom Penh Post, June 16, 2011; UN Press Release, supra note 224 (calling the closure of Case 003 “an interim procedural step subject to an independent judicial process” and saying that the CIJs “are under no obligation to provide reasons for their actions at this stage of the investigation”).

241. Cambodian Center for Human Rights, supra note 225 (stating, “Unless the United
Nations takes immediate steps to ensure that investigations take place in Cases 003 and 004 in earnest, the international community will have to take its measure of the blame—along with the RGC—for [failing victims].

242. See Ellis interview, supra note 165 ("[The UN] has real [cultural] problems dealing with internal issues. If people are accused of wrongdoing the tendency is to move them sideways or upwards, but not out of the organization.").

243. Statement by the Spokesperson for the UN Secretary-General (Mar. 30, 2012); Wallace & Kuch, supra note 2.

244. Di Certo, supra note 110 (quoting country representative Rupert Abbot). See also James A. Goldston, Justice Delayed Is Justice Denied, N.Y. Times, Oct. 13, 2011; Cambodian Law Body Reportedly Blocking Swiss Judge, Radio Australia (Jan. 17, 2012) (quoting OSJI monitor Clair Duffy noting that as [attempts to shut down Case 003] continue to unfold and the UN hasn’t taken any strong action in relation to this, its credibility even more come (sic) under fire, particularly for future engagements by the UN in these kind (sic) of institutions).


249. Email from attendee of “Legal Issues Facing the United Nations—Reflections from Three Years as Legal Counsel,” American Bar Association, Oct. 28, 2011, on file with author (Nov. 26, 2011) (recounting O’Brien’s statement that while it would be incredibly easy to begin an investigation tomorrow, the UN knows what it will find, and is afraid that those findings will affect Case 002. As the results of Cases 003 and 004 are “inevitable,” it is just trying to keep things on track to get through Case 002.).

250. See UN Prosecutor, supra note 120. Cf. OSJI, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, at 4 (June 2011) (reporting that “[a] number of donors have underscored the importance of the court’s second case . . . seeming to imply that preserving the case may require ceding the ability to proceed with Cases 003 and 004”). Cf. Rogers telephone interview, supra note 232 (stating that donors generally share the UN’s view that Cases 003 and 004 should go away, and some donors were staying with them only to save Case 002); Long interview, supra note 50 (saying, “Donors don’t care if their funding is properly managed and justice is being properly done. They want to feel they are contributing something to Cambodia instead of considering if Cambodia is establishing real criminal accountability.”).

252. Scheffer, supra note 148, at 246.


255. See, e.g., Un & Ledgerwood, supra note 192, at 7.

256. See, e.g., Rogers telephone interview, supra note 232 (“The combination of two-faced donors and a weak UN have allowed this whole process to drift”). Cf. David Cohen, Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future, 61 Asia Pacific Issues 6 (E.-W. Ctr., Aug. 2002) (stating that the Timorese case did not “bode well for future hybrid tribunals if the United Nations uses [the tribunal’s] unique status as an excuse for not meeting the very standards it as an institution is supposed to embody”); Michael E. Hartmann, International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping, U.S. Institute for Peace, at 14 (Oct. 2003) (finding that the Kosovo example proves that future international missions “should condition their initial deployment in the judiciary upon a worst-case scenario” and “[l]ocal or national jurists should not be expected to be impartial and impervious to coercion and threats”).

257. Confidential interview with a senior ECCC staff member, Phnom Penh (June 2012). See also Men Kimseng, UN Not Fulfilling Tribunal Role As Partner: Monitor, VOA Khmer (Nov. 9, 2011), http://www.voacambodia.com/content/un-not-fulfilling-tribunal-role-as-partner-monitor-133527368/1359597.html (quoting Panhavuth Long: “Some UN officials see their role as just coming in to assist, which requires that they give only advice” but in performing their official duties, they should see themselves as a “partner” not an “adviser”).

258. Phillip Rapoza, Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?, 21 Am. U. Int’l L. Rev. 525, 530 (2006). Judge Rapoza is now a reserve ECCC Supreme Court Chamber judge. See also Cohen, supra note 182, at 3 (noting that “the root of all the problems of the Serious Crimes process was the failure by the UN to ensure proper leadership, a clear mandate, political will, and clear ‘ownership’ of the process from the beginning”).
Chapter 7

1. ECCC, Germany Pledges More Financial Support to Maximise Victims’ Participation in KR Trials (June 17, 2010).

2. See, e.g., Yael Danieli, Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in International Law, 27 Cardozo L. Rev. 1633, 1641–43 (2005–6). But cf. Interview with Diana Ellis, Co-Lawyer for Ieng Thirith, Phnom Penh (Nov. 11, 2012) (agreeing that victims have been forgotten, but emphasizing that they “should obtain redress through a different mechanism” because the point of a criminal trial is to determine if an accused is guilty of crimes and not the proper forum to discuss wrongs unrelated to the specific charges); Response to “Demande des co-avocats principaux pour les parties civiles afin de définir l’étendue de la déclaration sur la souffrance des parties civiles défendantes,” Case No. 002/19-9-2007-ECCC/TC (Nov. 12, 2012) (raising the “delicate” situation of some civil parties providing personal statements of suffering at the Case 002/01 trial referencing facts outside the scope of the now significantly reduced charges, potentially harming the rights of accused Khieu Samphan).


7. UN Declaration, supra note 5, §§ 4, 6(a)–(c) (through, inter alia, being kept informed about proceedings, having the opportunity to present views and concerns, and receiving assistance throughout the process); id. § 7 (including restitution, compensation, services, and assistance).


9. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia


14. Confidential interview, supra note 11.

15. Anyone who witnessed, was a victim of, or has knowledge of an alleged crime within the jurisdiction of the ECCC can lodge a complaint. See Internal Rules of the ECCC, rev’d Aug. 3, 2011, r. 49 [hereinafter ECCC Internal Rules (rev. 8)]. However, unlike under domestic law, a victim cannot initiate a criminal action at the ECCC. Compare Cambodian Criminal Procedure Code (as adopted Aug. 10, 2007), art. 5 [hereinafter CPC], with ECCC Internal Rules (rev. 8), supra.

16. Internal Rules of the ECCC, adopted June 12, 2007, r. 23(6)(a) [hereinafter ECCC Internal Rules (original)] (providing that, “When joined as a Civil Party, the Victim becomes a party to the criminal proceedings”). This provision has since been removed from the Rules.

17. Cable 08USUNNEWYORK872, U.S. Mission to the United Nations, Corruption Allegations Dominate Khmer Rouge (UNAKRT) Steering Committee Meeting In New York at UK Mission ¶ 5 (Sept. 29, 2008), available at http://www.wikileaks.org/cable/2008/09/08USUNNEWYORK872.html (also asserting that this was “an area . . . where the Tribunal is weakest” and that the VU lacked an adequate procedure for processing its nearly 2,000 victim complaints).

18. See, e.g., Interview with Jeanne Sulzer, former Legal Officer in the ECCC Civil Party Lead Co-Lawyers Section, Phnom Penh (June 1, 2012).

19. Interview with Rupert Skilbeck, former Head of the ECCC Defence Support Section, via telephone (June 7, 2012).

20. ECCC Internal Rules (original), supra note 16, r.12; Internal Rules of the ECCC (rev. 5), rev’d Feb. 9, 2010, r. 12bis [hereinafter ECCC Internal Rules (rev. 5)] (mandating these responsibilities to the newly established Victim Support Section).

22. See Alex Bates, Transitional Justice in Cambodia: Analytical Report, Atlas Project, ¶ 189 (Oct. 2010); Youk Chhang, Comment, Sad Situation for Civil Parties, Phnom Penh Post, Oct. 1, 2009; Open Society Justice Initiative (OSJI), Recent Developments at the Extraordinary Chambers in the Courts of Cambodia (Oct. 2008). Similar problems have faced the ICC in Kenya. See, e.g., Press Release, Redress, Concern over VPRS’s Potential Inability to Process in Time the Sheer Number of Victim’s Applications for Participation in the 2 Kenya Cases (June 29, 2011) (noting that the ICC victims unit had received 2,350 applications for participation but would only be in a position to process 400 by the deadline). See also You Bunleng, Response to questionnaire from the authors, June 25, 2012 (translated from Khmer by Kimsroy Sokvisal) (noting that the OCIJ’s assessment of the large number of civil party applications was extremely time consuming).

23. OSJI, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia (Feb. 2008) (noting that the draft 2008 budget lacked funds for outreach trips or legal representation for victims).

24. See, e.g., Erika Kinetz, ECCC Confronts Difficulty of Involving Victims, Cambodia Daily, Aug. 15, 2007 (noting the dismay of a local court monitor that “the administration of the ECCC considers the Victims Unit just an administrative unit”).


27. Eric Stover et al., Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia, 93 Int’l Rev. of the Red Cross 14 (June 2011); Phuong N. Pham et al., Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia, 3 J. Hum. Rts. Prac. 264, 273 (2011).


29. Id. at 16.

30. OSJI, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia 18 (Dec. 2010).

31. OSJI, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia 13 n.31 (Sept. 2010) [hereinafter OSJI Sept. 2010 Report].

32. In its revised 2012–13 budget, the UN side of the Court did allocate one slot for an Associate Information Systems Officer to support the national side of the VSS. ECCC, Revised Budget Requirements—2012–13 (Jan. 29, 2013), at 21.

33. Press Release, Khmer Rouge Victims in Cambodia (May 12, 2011), available at www.thearyseng.com (suggesting that Rosandhaug’s lack of support for the VU was responsible).

34. Cable 07PHNOMPENH77, U.S. Embassy Phnom Penh, Update on the ECCC; David Scheffer Coming to Cambodia ¶ 5 (Jan. 17, 2007), available at http://dazzlepod.com/cable/07PHNOMPENH77.html. Cf. Confidential interview with former VSS staff member, Phnom Penh (June 11, 2012) (stating that Keat had no power because she was
not connected within the Cambodian Government, but came from the UN/NGO community.


36. See, e.g., OSJI, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia 33 (Feb. 2012).


39. See, e.g., Robbie Corey-Boulet, Attacks on Jarvis Multiply, PHNOM PENH POST, June 8, 2009; Douglas Gillison & Phann Ana, KR Victims Say Troubled by Jarvis’ Marxist-Leninist Ties, CAMBODIA DAILY, June 18, 2009 (noting a letter from 40 victims asking how a Leninist could lead the victims of Leninist ideology); Sophal Ear, Letter, Khmer Rouge Tribunal vs. Karmic Justice, N.Y. TIMES, Mar. 17, 2010 (arguing that “appointment of a devout Marxist-Leninist as head of the Victims Unit . . . fully endorsed by the U.N. head of the tribunal, sealed the tribunal’s fate as an international and domestic farce”).

40. Robbie Corey-Boulet, Nationality and the Jarvis Debate, PHNOM PENH POST, June 12, 2009 (quoting Youk Chhang).

41. Confidential interview with former VSS staff member, supra note 34.

42. See Douglas Gillison, KRT Personnel Chief Temporarily Named to Victims Unit, CAMBODIA DAILY, June 28, 2010 (noting that he would “take care of both sections” temporarily).

43. OSJI Sept. 2010 Report, supra note 31, at 13. At the ECCC, Rong has reportedly served as Special Program Manager for the OA Director—essentially the number two position on the national side of the OA—and more recently as head of the Court’s incipient Legacy Office. In October 2012, reportedly due to quiet pressure from the U.S. Government in response to allegations of financial misappropriation, Rong stepped down from formal, if not de facto leadership of VSS.

44. Sulzer interview, supra note 18.

45. Internal Rules of the ECCC (rev. 6), rev’d Sept. 17, 2010, r. 12 [hereinafter ECCC Internal Rules (rev. 6)] (stating that the OA shall provide the Civil Party Lead Co-Lawyers Section “necessary administrative support”). Half of the Lead Co-Lawyers’ funding is also channeled through the VSS, creating, at least in perception, a mechanism for control by the national side of the Court.

46. See, e.g., Theary C. Seng et al., Complaint Alleging Obstruction of Justice . . . (Oct. 24, 2010), http://www.cambodiapolitics.info/samrainsyparty/archives/achieve_2010/
October/Cambodia%20REVISED%20ECCC%20COMPLAINT%20ECCC%20COPY.htm.

47. Cable 07PHNOMPENH77, supra note 34, ¶ 5.
49. Id.
50. Id.
51. Interview with Panhavuth Long, Program Officer, Cambodian Justice Initiative, Phnom Penh (July 6, 2012).
52. See, e.g., Sulzer interview, supra note 18.
54. Michelle Staggs Kelsall et al., Lessons Learned from the ‘Duch’ Trial: A Comprehensive Review of the First Case Before the Extraordinary Chambers in the Courts of Cambodia, Asian International Justice Initiative’s KRT Trial Monitoring Group (Dec. 2009), at 33 (reporting the view of civil party lawyers in Case 001 that the VU “did not appear to have sufficient funds to facilitate adequate lawyer-client interaction and case preparation”). Cf. ICC Rules of Procedure and Evidence, adopted Sept. 9, 2002, r. 90(5) [hereinafter ICC Rules] (ensuring financial assistance for victim participant representation by common legal representatives); Prosecutor v. Katanga et al., Case No. ICC-01/04-1/07, Order on the Organisation of Common Legal Representatives of Victims, ¶ 17 (Trial Chamber, July 22, 2009) [hereinafter Katanga Order] (tasking the ICC Registry to “propose a suitable support structure . . . to provide the common legal representative with the necessary legal and administrative support, both at the seat of the Court and in the field” to keep their clients informed, receive their instructions, maintain files, and obtain legal support).
55. See Kroker, supra note 25, at 767 (stating that civil society organizations helped organize civil party representation in Case 001 “due to passivity on the part of the Court”).
57. Interview with Karim A.A. Khan QC, ECCC Civil Party Co-Lawyer in Case 001, via telephone (June 5, 2012).
58. See ECCC Internal Rules (rev. 5), supra note 20, r. 12.
59. Id. r. 12ter(4).
60. Id. r. 12ter(5)(b).
61. Id. r. 12ter(3).
62. See ECCC Internal Rules (original), supra note 16, r. 23(7) (generally), r. 82 (regarding right to representation at trial), r. 105 (regarding appeals from the Trial Chamber judgment).
63. See ECCC Internal Rules (rev. 5), supra note 20, r. 23(3).
64. See, e.g., Silvia Cartwright, Opening Speech to the ECCC 7th Plenary Session (Feb. 2, 2010) (noting that with over 4,000 civil party applicants, “[i]t is clear . . . that this greatly exceeds the capacity of the Trial Chamber to involve them individually”).
65. Youk Chhang, *Conducting a Legal Experiment at Victims’ Expense, Cambodia Trial Monitor* (Sept. 29, 2009), http://www.cambodiatribunal.org/blog/2009/09/conducting-legal-experiment-victims-expense (noting that in Case 001 “no attempt was ever made by the Co-Investigating or Trial Judges in the Duch/S-21 case to limit the number of civil parties by applying the qualifying criteria or otherwise vetting the applications” in advance).

66. ECCC Internal Rules (original), *supra* note 16, r. 23(2).

67. Practice Direction, *supra* note 21, art. 3.1 (emphasis added).

68. Similarly, at the ICC, victims include “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.” ICC Rules, *supra* note 54, r. 85(a).

69. ECCC Internal Rules (rev. 5), *supra* note 20, r. 23bis(2) (emphasis added). Cf. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-1/06 OA9 OA10, Judgement on the Appeals of the Prosecutor and the Defence Against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ¶ 58 (July 11, 2008) (finding that “the participation of victims in the trial proceedings [. . .] is limited to those victims who are linked to the charges).


71. Id. ¶ 409–14.

72. Decisions on victim status will no longer be made in the judgment. The revised rules require the Co-Investigating Judge to make a decision—appealable to the Pre-Trial Chamber—on applications prior to the issuance of the Closing Order. See ECCC Internal Rules (rev. 5), *supra* note 20, r. 23bis.

73. See Prosecutors v. Kaing Guek Eav alias Duch, Case No. 001/18-7-2007/ECCC/TC, Judgment, ¶¶ 645–49 (July 26, 2010) [hereinafter Duch Trial Chamber Judgment]. See also You Bunleng, *supra* note 22 (noting that civil party applications did not always provide sufficient information, and the credibility of their stories could not always be verified).

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

75. See, e.g., Duch Appeal Judgment, *supra* note 70, ¶¶ 445–50, 558–63 (regarding special bonds of affection).


78. Id. ¶ 42 (emphasis in original).

79. Id. ¶ 75. See also id. ¶ 72.
80. Id. ¶ 77.
82. Id. ¶ 29.
83. Id. ¶¶ 83–89.
84. Id. ¶ 93. See also id. Separate and Partially Dissenting Opinion of Judge Marchi-Uhel ¶¶ 67–68.
85. Id. ¶ 97.

86. Interview with Elisabeth Simonneau Fort, International Lead Co-Lawyer for Case 002 ECCC Civil Parties, Phnom Penh (June 1, 2012) (arguing that “It is a judicial process, not reconciliation” and that PTC judges were loath to deal with the issue of selecting among prospective civil parties). Cf. Anushka Sehmi, New Victim Participation Regime in Kenya, VRWG Bulletin, Issue 22 (Spring 2013), available at http://www.redress.org/newsletters/vrwg-bulletin (noting with concern that the novel collective approach for registering victim participants in the ICC’s Kenya cases could reduce the integrity of the victim participation regime by undercutting the causal link between individual victims’ harms and the alleged crime). See generally Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11, Decision on Victims’ Representation and Participation (Oct. 3, 2012) [hereinafter Ruto & Sang Decision].

87. Sulzer interview, supra note 18.

89. Lead Co-Lawyers and Civil Party Lawyers Request for Reconsideration of the Terms of the Severance Order E124, Case No. 002/19-9-2007-ECCC/TC (Oct. 18, 2011); Urgent Request on the Scope of Trial One and the Need for a Reasoned Decision Following the Civil Parties Request for Reconsideration of the Severance Order, Case No. 002/19-9-2007-ECCC/TC, ¶ 8 (Nov. 17, 2011) [hereinafter Urgent Request on the Scope of Trial One]. See also id. ¶ 9 (requesting that the Trial Chamber “clarify the legal criteria and threshold that must be met in order for Civil Parties to participate in the first trial of Case 002”).

90. See Lead Co-Lawyers Urgent Request on the 19 October 2011 Hearing Following the Chambers’ Memorandum E125, ¶¶ 12–13 (Trial Chamber, Oct. 7, 2011).

91. Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, Case No. 002/19-09-2007/ECCC/TC, ¶ 157 (Apr. 26, 2013) [hereinafter 2013 Severance Decision] (“[T]he Trial Chamber has not sought to re-open admissibility decisions taken during the pre-trial phase and . . . membership of the consolidated group also remains unchanged following renewed severance of Case 002.”).

92. See, e.g., Sulzer interview, supra note 18 (noting with concern that because of the PTC decision admitting everyone in Case 002 and the severance decision, many victims will never have their claims discussed in court). Former Civil Party Lawyer Silke Studzinsky said, “The severance order has a huge impact on more than 70 percent of our clients . . .
Their participation rights are moot. They cannot address the crimes and the suffering for which they are admitted [as civil parties].” Julia Wallace, ‘Mini-Trials’ a Mixed Blessing for KR Victims, Cambodia Daily, July 11, 2012.

93. Simonneau Fort interview, supra note 86. Interview with Nushin Sarkarati, ECCC civil party lawyer, Phnom Penh (Nov. 15, 2012) (noting that her U.S.-based clients say their main reason for participating is the opportunity to contribute to a judgment, followed secondarily by their wish to be recognized as victims).


95. Id. ¶ 8.


97. Id. ¶ 9.

98. Id. ¶ 10.

99. See, e.g., UN Declaration, supra note 5, §A.2 (“The term ‘victim’ also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”). In supreme understatement, the international PTC judges noted on appeal that “the approach and procedures in the judicial investigation for Case 003 are significantly different from those taken in Case 001 and 002”). Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Rob Hamill, Case No 003/07-9-ECCC/OCIJ (PTC02), Opinion of Judges Lahuis and Downing ¶ 2 (Oct. 24, 2011).

100. See PTC Decision on Case 002 Civil Party Applications, supra note 77, ¶ 29.

101. Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant [REDACTED], Separate opinion of Downing & Chung ¶¶ 27–37 (Feb. 13, 2013) (finding that the decision violated ”legal certainty and equality before the law,” contravened the intention of the Internal Rules as well as national and international practice, lacked reasoning, and violated the fundamental rights of victims). When reserve international CIJ Kasper-Ansermet took office, he admitted both rejected civil parties on reconsideration, a decision adopted by his successor Judge Harmon. See Lawyers Recognition Decision Concerning All Civil Party Applications on Case File No. 003, Case No. 003/07-09-2009-ECCC-OCIJ, ¶ 8 (Feb. 26, 2013).

102. See, e.g., War Crimes Research Office, Efficient Representation of Victims at the International Criminal Court (Dec. 2011), at 16–18 (noting that the ICC Victims Participation and Reparations Section has been unable to process victim participation applications in time to ensure all applicants are able to participate in confirmation hearings). Due to the large number of victims seeking to participate, the ICC Assembly of State Parties is currently reevaluating the practicality of the ICC’s individualized approach to victim participation. See generally Report of the Court on the Review of the System for Victims


104. See, e.g., Interview with Craig Etcheson, former investigator in the ECCC Office of the Co-Prosecutors, via telephone (Oct. 22, 2012).

105. ECCC Internal Rules (rev. 8), supra note 15, r. 23(1).

106. See id. r. 55(1), 74(4), 80(2), 86, 88(1), 89(2), 90(2), 91(1), 92, 94(1)(a).


109. ECCC Law, supra note 9, art. 35 new(c).


112. Id., ¶ 30.

113. Id.


115. Rome Statute of the International Criminal Court, art. 68(3), July 17, 1998, 2187 U.N.T.S. 90 (entered into force on July 1, 2002). See also Statute of the Special Tribunal for Lebanon, art. 17, Annex, U.N. Doc S/RES/1957 (May 30, 2007) (“Where the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”).

116. Prosecutor v. Lubanga Dyilo, Case No. 01/04-1/06, Decision on Victims' Participation, ¶ 101(Trial Chamber, Jan. 18, 2008). But see generally Ruto & Sang Decision, supra note 86 (establishing a new simplified mode of “collective” participation for Kenyan victims participating only through a common legal representative).

117. See, e.g., ECCC Internal Rules (rev. 8), supra note 15, r. 55(10),(11) (authorizing civil parties to request the CJIs to make orders and undertake investigative actions and to consult the case file); r. 59(5) (authorizing civil parties to request the CJIs to “interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf”); r. 74(4) (authorizing civil parties to appeal against certain orders of Co-
Investigating Judges, including primarily those relating to investigative actions and civil party applications). See also CPC, supra note 15, art. 134.

118. Prosecutor v. Lubanga Dyilo, Case No. 01/04-1/06(OA 8), Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber of 2 February 2007, Separate Opinion of Judge Georgios M. Pikis ¶ 11 (Appeals Chamber, June 13, 2007). See also Situation in the Democratic Republic of the Congo, ICC-01/04–556, Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD . . ., ¶ 55 (Appeals Chamber, Dec. 19, 2008) (noting that “participation pursuant to article 68(3) . . . does not equate victims[. . .] to parties to the proceedings before a Chamber[.]”)


120. See ECCC Internal Rules (original) supra note 16, r. 94(a) (providing the opportunity for the “lawyers” of civil parties to make a closing statement).

121. Written Version of Oral Decision of 1 July 8 on the Civil Party’s Request to Address the Court in Person, Case No. 002/19-9-2007-ECCC/OCIJ (PTC03), ¶ 3 (July 3, 2008) [hereinafter PTC Decision on Request to Address the Court] (finding that Rule 77(10) clearly prescribes “that the Civil Party is not permitted to address the Court in person”). See Internal Rules of the ECCC (rev. 1), rev’d Feb. 1, 2008, r. 77(10) (providing in part with regard to the procedure for pretrial appeals: “the Co-Prosecutors and the lawyers for the parties may present brief observations”)

122. Decision on Application for Reconsideration of Civil Party’s Right to Address Pre-Trial Chamber in Person, Case No. 002/19-9-2007-ECCC/OCIJ (PTC03), ¶ 6 (Aug. 28, 2008). See also Mahdev Mohan, The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal, 9 INT’L CRIM. L. REV. 733, 752–54 (2010) (noting the perception that by promoting her individual interests in the proceedings, the civil party had precipitated restrictions on civil parties’ active involvement).

123. Decision on Request to Address the Court, supra note 121, Dissenting Opinion of Judge Downing ¶ 3. See also Decision on Application for Reconsideration of Civil Party’s Right to Address Pre-Trial Chamber in Person, Case No. 002/19-9-2007-ECCC/OCIJ (PTC03), ¶ 20 (Aug. 28, 2008) [hereinafter PTC Decision on Application for Reconsideration] (citing arguments by civil party lawyers that the obligation to have a lawyer “would be unjust in the absence of funds for legal representation being provided by the ECCC”).

124. PTC Decision on Application for Reconsideration, supra note 123, ¶ 22.

125. Directions on Unrepresented Civil Parties’ Right to Address the Pre-Trial Chamber in Person, Case No. 002/19-9-2007-ECCC/OCIJ (PTC03), ¶¶ 9–10 (Aug. 29, 2008). See also id. at 4 (requiring notice in writing explaining the content and relevance of the proposed submission at least 10 days prior to a hearing).

126. CPC, supra note 15, art. 326 (providing in part, “The presiding judge shall listen to
the statements of civil parties, civil defendants, victims, witnesses and experts in the order which he deems useful").

127. ECCC Internal Rules (rev. 6), supra note 45, r. 23ter(2). Cf. Special Tribunal for Lebanon Rules of Procedure and Evidence, as amended Feb. 20, 2013, r. 86(C)(ii) [hereinafter STL Rules] (providing, “A victim participating in the proceedings may only do so through a legal representative unless the Pre-Trial Judge authorises otherwise”). Although not explicit, it appears that at the ICC victims are also mandated to participate through their legal representative. See ICC Rules, supra note 54, r. 90.


130. Michael Saliba, Interview with Alain Werner, CAMBODIA TRIBUNAL MONITOR (Sept. 21, 2009), at http://www.cambodiatribunal.org/sites/default/files/ctm_blog_9-21-2009_pdf See generally Stover et al., supra note 27 (analyzing the experience of the 22 civil parties who testified).


132. ECCC Internal Rules (rev. 8), supra note 15, r. 89bis.

133. Decision on the Request of Group 2, supra note 131, ¶ 7.


135. Id., ¶ 22.


137. See, e.g., Interview with Andrew Ianuzzi, former Legal Consultant to Nuon Chea, Phnom Penh (May 29, 2012).

138. ICC Rules, supra note 54, r. 89(1) (“[T]he Chamber shall . . . specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements”).

139. Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of the Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, Case No. 001/18-7-2007/ECCC/TC, Dissenting Opinion of Judge Lavergne ¶ 8 (Trial Chamber, Oct. 9, 2009).

140. Id., Dissenting Opinion of Judge Lavergne ¶ 4.

141. Id., Dissenting Opinion of Judge Lavergne ¶ 13 (stating that “[a]ny other interpretation can only be contrary to the law”).
142. Id., Dissenting Opinion of Judge Lavergne ¶¶ 16, 35.


144. STL Rules, supra note 127, r. 87(C) (providing, “[a]t the sentencing stage, subject to the authorisation by the Trial Chamber, a victim participating in the proceedings may be heard by the Trial Chamber or file written submissions relating to the personal impact of the crimes on them”).

145. Julia Wallace, Losing Civil Parties in Cambodia, 143 Int’l Justice Trib. (Jan. 18, 2012). See also Sarkarati interview, supra note 93 (noting that with the 11 civil party legal teams in Case 002 often disagreeing among themselves, the lead co-lawyer system promotes coherence and efficiency).

146. Sulzer interview, supra note 18. See, e.g., Ruto & Sang Decision, supra note 86, ¶¶ 36, 43; Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings, ICC-ASP/11/22 (Nov. 5, 2012) (considering a range of options for dealing with victims’ applications, including a “fully collective application process leading to collective participation in proceedings”); ICC Assembly of States Parties, Victims and Reparations, ICC-ICC-ASP-11/Res.7 (Nov. 21, 2012) (“request[ing] the Bureau to prepare, in consultation with the Court, any amendments to the legal framework for the implementation of a predominantly collective approach in the system for victims to apply to participate in the proceedings”).

147. See ECCC Internal Rules (original), supra note 16, r. 23(8)(c),(d). Cf. ICC Rules, supra note 54, r. 90(4) (providing that the court shall take “all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, . . . are represented and that any conflict of interest is avoided”). At the ICC, before assigning common representation the court considers “tensions between them in terms of ethnicity, age, gender or the type of crimes they were allegedly the victim of.” Katanga Order, supra note 54, ¶ 12(b). Thus in the Katanga case, the Trial Court found it appropriate to assign common representation to two different groups: one general group of victims, and one group of victims who had been child soldiers. See id. ¶¶ 6, 12(c), 13.

148. ECCC Internal Rules (rev. 8), supra note 15, r. 12ter(3).

149. Instead, the Lead Co-Lawyers are tasked with developing their own internal procedures “in consultation” with the civil party lawyers. See id. Comparatively, an ICC Trial Chamber has said that if a conflict of interest arises, it may split the consolidated group. See Katanga Order, supra note 54, ¶ 16 (“In case the conflicting instructions are irreconcilable with representation by one common legal representative, and thus amount to a conflict of interest, the common legal representative shall inform the Chamber immediately, who will take appropriate measures and may, for example, appoint the Office of Public Counsel for the Victims to represent one group of victims with regard to the specific issue which gives rise to the conflict of interest.”).

150. ECCC Internal Rules (rev. 8), supra note 15, r. 12ter(6).
151. See Request for Admission of Belated Filing According to Article 10.2 and 9 of the Practice Direction, Case No. 002/19-9-2007-ECCC/TC, ¶¶ 7–9 (Mar. 21, 2011).

152. See id. ¶ 14.

153. ECCC Internal Rules (rev. 5), supra note 20, r. 12 ter.

154. Id., r. 12ter(5)(b).

155. Comparatively, an ICC Trial Chamber has emphasized, “The common legal representative shall be responsible for both representing the common interests of the victims during the proceedings and for acting on behalf of specific victims when their individual interests are at stake.” Katanga Order, supra note 54, ¶ 13.


157. Wallace, supra note 145 (paraphrasing her comments).

158. Id.

159. Indeed, some say the Lead Co-Lawyers are too deferential to the civil party teams and fail to exercise their authority to select a course of action when consensus cannot be reached, reducing the effectiveness of the group.


161. Id. ¶ 17.

162. Id. ¶ 14.

163. Id. ¶ 20.


166. Id. ¶ 11.

167. Id. ¶¶ 12–15.

168. See, e.g., Transcript of Trial Proceedings—Case 002, Case No. 002/19-9-2007-ECCC/TC, at 69–70 (June 29, 2011) (in which the Trial Chamber cautioned that “where a number of the lawyers, like in the civil parties groups, need to make their presentations, they have to make sure that there is no repetition,” asking them to “allocate amongst yourselves to stand and make the presentations,” and limiting presentations to two.


170. Indeed, it is conceivable that civil party questioning could unknowingly undermine the prosecution case. See, e.g., Van den Wyngaert, supra note 156, at 10 (noting that
“[t]here is even a risk that a ‘victim case’ may, unwittingly, undermine the case of the prosecution”; Khan interview, supra note 57 (stating that the Bashir case at the ICC is showing that “civil parties can sometimes be used as a Trojan Horse to undermine the prosecution”).


172. Wallace, supra note 145. See also Sarkarati interview, supra note 93 (noting that the judges “opened this amazing opportunity, and expectations skyrocketed” but “[n]ow they treat civil parties like an ineffective part of the process”); Urgent Request on the Scope of Trial One, supra note 89, ¶ 4 (discussing the fact that although the Trial Chamber had notice that civil parties were filing a request for reconsideration of the severance order, it did not wait to read their submission before issuing its decision and never ruled on the specific civil party concerns raised); Notice of Trial Chamber’s Disposition of Remaining Pre-Trial Motions . . . and Further Guidance to the Civil Party Lead Co-Lawyers, 1–2 (Nov. 29, 2011) (saying it wouldn’t respond to the civil party severance arguments because they were “repetitive”).


174. Cf. Ruto & Sang Decision, supra note 86, ¶¶ 56–58 (limiting the right of individual participation in the Kenya situation to a few victims who are selected to express their views and concerns directly to the ICC).

175. But see Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-1/06, Decision Establishing the Principles and Procedures to Be Applied to Reparations, ¶ 178 (Trial Chamber, Aug. 7, 2012) [hereinafter Lubanga Reparations Decision] (agreeing with the Pre-Trial Chamber that “[t]he [ICC] reparation scheme . . . is not only one of the Statute’s unique features. It is also a key feature. In the Chamber’s opinion, the success of the Court is, to some extent, linked to the success of its reparation system.”).

176. ECCC Internal Rules (rev. 8), supra note 15, r. 23 quinquies(1). The Rules define “collective and moral” as measures that: (a) acknowledge the harm suffered by civil parties as a result of the commission of the crimes for which an Accused is convicted and (b) provide benefits to the civil parties which address this harm. Id.

177. Duch Trial Chamber Judgment, supra note 73, ¶ 661 n. 1144.

178. ECCC Internal Rules (original), supra note 16, r. 23 (11).

179. See Duch Trial Chamber Judgment, supra note 73, ¶¶ 663–64; Press Release, ECCC to Distribute the “Duch” Verdict Nationwide (Aug. 6, 2010).

180. See Duch Trial Chamber Judgment, supra note 73, ¶¶ 667–75.

181. ECCC Internal Rules (rev. 6), supra note 45, r. 23quinquies(3)(b) (giving the judges
the power to “recognise that a specific project appropriately gives effect to the award sought by the [Civil Party] Lead Co-Lawyers and may be implemented. Such project shall have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding”).

182. Nevertheless, as of November 2012, the VSS is seeking 5 million dollars to establish a “Reconciliation Foundation of the Kingdom of Cambodia for the Victims of the Khmer Rouge Regime 1975–1979” “to implement, manage and maintain the requested reparation projects as well as nonjudicial measures and to secure their long-term funding.” Draft Concept Paper of the Victims Foundation of Cambodia (on file with authors). Although the VSS is seeking international participation for the foundation’s governing organs, in light of ongoing reports of rampant financial corruption in Cambodian institutions, including at the ECCC, the 2009 admonition of Youk Chhang should be taken seriously:

In the current political and cultural climate of Cambodia, it would be impossible to establish a fund of money involving the Government or local NGOs that would be transparently administered and reach its intended beneficiaries: the victims.

Letter from Youk Chhang, Director, Documentation Center of Cambodia, to Judge Cartwright, Trial Chamber Judge, ECCC (Aug. 20, 2009) (on file with authors).

183. Trial Chamber Memorandum, Trial Chamber’s Response to the Lead Co-Lawyers’ Initial Specifications of Civil Party Priority Projects as Reparations Pursuant to Rule 80 bis(4) (E218/7/1), ¶¶ 3, 6–7 (Aug. 1, 2013) [hereinafter TC 2013 Reparations Response]. See generally Lead Co-Lawyers’ Indication to the Trial Chamber of the Priority Projects for Implementation As Reparations (Internal Rule 80bis(4) with Confidential Annexes, Case No. 002/19-09-2007-ECCC/TC (Feb. 12, 2013).


185. Stuart White, Little Time for Reparations at KRT, PHNOM PENH POST, Aug. 7, 2013. As of July 2013, the German Federal Ministry for Economic Cooperation and Development (BMZ) had committed up to a total of EUR 400,000 for a variety of NGO reparations projects. Judicial Updates: Reparations and Non-Judicial Measures, ECCC COURT REPORT (Aug. 2013), at 8.

186. Sarkarati interview, supra note 93.

187. ECCC Internal Rules (rev. 8), supra note 15, r. 23 quinquies (1).

188. 2013 Severance Decision, supra note 91, ¶ 158.

189. See, e.g., Cartwright, supra note 64 (highlighting the importance of this “enhancement,” which will allow the newly named VSS “to develop and implement programmes and measures that will benefit all victims whether they are civil parties or not”).
190. ECCC Internal Rules (rev. 5), supra note 20, r. 12bis(3).
191. Cartwright, supra note 64.
192. OSJI, Recent Initiatives at the Extraordinary Chambers in the Courts of Cambodia 26 (Mar. 2010).
193. Julia Wallace, New Report Questions KRT Administration, CAMBODIA DAILY, Feb. 24, 2012. See also OSJI, Recent Initiatives at the Extraordinary Chambers in the Courts of Cambodia 33 (Feb. 2012) (highlighting that victims, civil parties, and NGOs have looked to the VSS for leadership on the court’s nonjudicial measures mandate but that “these initiatives are stagnating”). The VSS reports that it had developed “an action plan for a number of projects under the schemes of Reparation and Non-Judicial measures in close collaboration with all stakeholders involved.” Rong Chhorng, Letter, KRT Victims Support Section Doing What It’s Supposed To, CAMBODIA DAILY, Feb. 27, 2012. The VSS also reports that it has held meetings and conducted field visits to plan for memorials and other projects. See, e.g., updates from the Victims Support Section in ECCC Court Report (Mar. 2012), at 9; ECCC COURT REPORT (Dec. 2011), at 9; ECCC COURT REPORT (Aug. 2011), at 9. See also Press Release, Victims Support Section Convenes Roundtable Discussion on Broader Support to Victims (Sept. 8, 2010).
194. Wallace, supra note 193.
195. According to the partner Transcultural Psychosocial Organization Cambodia (TPO) website, it is a three-year project in partnership with VSS and the Cambodian Defenders Project (CDP) “to promote gender equality and improve access to justice” for female victims of gender-based violence under the Khmer Rouge. UN Trust Fund to End Violence Against Women has given the project $600,000 to encourage participation of female civil parties and the creation of gender-based violence self-help groups.
196. Rong, supra note 193.
197. Interviewees confirm that the Cambodian Defenders Project and the Transcultural Psychosocial Organization implement the majority of activities.
198. Memorandum from President of the Trial Chamber, Initial Specification of the Substance of Reparations Awards Sought by the Civil Party Lead Co-Lawyers Pursuant to Internal Rule 23quinquies(3), at 2 (Sept. 23, 2011) (noting that provision of expanded reparations “presupposes the development of awards . . . in parallel with the ongoing trial” and that a VSS program manager had been tasked with this responsibility).
199. See, e.g., Staggs Kelsall et al., supra note 54, at 45–46 (calling for VSS to “adopt a greater role in ensuring non-legal measures that facilitate greater access to information about the ECCC and a greater sense of engagement with the justice process underway”).
200. See, e.g., Stover et al., supra note 27, at 43 (noting that “[d]uring the Duch trial, civil party participation often appeared as if it were a work-in-progress rather than a process guided by well-honed rules and procedures”); Pham et al., supra note 27, at 274, 284 (noting that civil parties rejected from the proceedings at judgment reacted most commonly with “anger, helplessness, shame, and feelings of worthlessness”).
201. See John D. Ciorciari & Anne Heindel, *Trauma in the Courtroom, in Cambodia’s Invisible Scars* 121 (Daryn Reicherter & Beth Van Schaack eds., 2011).


203. But cf. Confidential interview with senior court staff, Phnom Penh (Nov. 1, 2012) (judging civil party participation “ill-advised” on the grounds that a formalized victim participation procedure embedded in a mass crimes trial process adds length but not depth to proceedings, and has a number of other adverse spin-offs, such as high costs, heavy administrative burdens, and a tendency to promote unrealistic expectations among victims as to the likely outcomes of participation).


205. Interview with Michael G. Karnavas, former Co-Lawyer for Ieng Sary, Phnom Penh (May 19, 2012) (arguing that although they are called a party and sometimes expect the “bells and whistles” of a party, civil parties’ role is limited to supporting the prosecution). See also Ianuzzi interview, *supra* note 137 (calling civil parties “second-class citizens”).

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**Chapter 8**

1. *But see generally* Oskar N.T. Thoms et al., *State-Level Effects of Transitional Justice: What Do We Know?, Int’l J. Trans. Just.* 1–26 (2010) (finding the empirical evidence insufficient to support claims that transitional justice mechanisms contribute to larger policy goals such as reconciliation, psychological healing, respect for human rights or the rule of law, or increased democratic governance).

2. Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks,* 50 B.C. L. Rev. 1, 1–2 (2009) (noting that the ad hoc tribunals have had limited “on-the-ground domestic impact”).


11. See *id.* at 18 (asserting that “a hybrid court may be seen as largely irrelevant unless there is a robust outreach program that informs the public about its activities”).


17. Chandra Lekha Sriram, *A Revolution in Accountability* 104 (2005) (arguing that the SCSL’s “outreach effort has been impressive... extensive, and in comparison to other tribunals, quite timely”).

18. David Crane, *Dancing with the Devil: Prosecuting West Africa’s Warlords—Current Lessons Learned and Challenges, in Atrocities and International Accountability* 133, 139 (Edel Hughes et al. eds., 2007).

19. *Id.* at 136.


22. Thierry Cruvellier, *From the Taylor Trial to a Lasting Legacy: Putting the Special*

23. See generally Rachel Kerr & Jessica Lincoln, The Special Court for Sierra Leone—Outreach, Legacy and Impact: Final Report, War Crimes Research Group Department of War Studies Kings College London (Feb. 2008); id. at 14 (finding that Sierra Leoneans’ “general knowledge [of the court] was high but depth of understanding was poor”).

24. Sriram, supra note 17, at 104–5. The European Union funded most of the SCSL’s outreach efforts. Ramírez, supra note 7, at 12.


27. Id.

28. Id.

29. Correspondence with Peter Foster, former UNAKRT Public Affairs Officer, June 13, 2012 (adding that during his interview for his position, he was asked how he would deal with “a colleague or supervisor who was actively working against [him]”).


31. Interview with Craig Etcheson, former investigator in the ECCC Office of the Co-Prosecutors, via telephone (Oct. 22, 2012).

32. Extraordinary Chambers in the Courts of Cambodia, Internal Rules, June 12, 2007 [hereinafter ECCC Internal Rules (original), r. 9(4)].

33. Id. r. 12 (h).

34. In February 2010, the ECCC judges updated the Internal Rules and expanded the mandate of the renamed Victim Support Section to include working with NGOs and government agencies to develop and implement “programs and measures other than those of a legal nature addressing the broader interests of victims.” Extraordinary Chambers in the Courts of Cambodia, Internal Rules [rev. 5], rev’d Feb. 5, 2010, r. 12 bis (2).


36. Id.


38. Foster correspondence, supra note 29.

39. Id.

40. ICTJ Report, supra note 35, at 5.


42. Cable 06PHNOMPENH1983, supra note 41, ¶ 8 (paraphrasing Tolbert).


44. See, e.g., ECCC, Revised Budget Estimates from 2005 to 2009 36–37 (July 2008).


48. Cable 06PHNOMPENH1983, supra note 41, ¶ 3 (quoting OA Director Sean Visoth).


50. Id. at 4–5. See also Pentelovitch, supra note 47, at 490–91 (arguing that overreliance on NGOs can result in “garbled, politicized, and confusing messages”).

51. Sperfeldt, supra note 49, at 5. See also OHCHR Report, supra note 10, at 20 (recommending that hybrid courts employ such an officer). Cf. Pentelovitch, supra note 47, at 469–70, 489–90 (asserting that as of early 2008 the ECCC kept civil society “at arm[’]s length with regard to planning and feedback of outreach activities” and contending that in this regard, the ECCC had an “institutional under-reliance on civil society”).

52. Email from Mychelle Balthazard, Ph.D. (focus on ECCC outreach) (Nov. 4, 2012) (on file with author, citing Everett M. Rodgers, Diffusion of Innovation 205 (5th ed. 2003)).

53. Interview with Panhavuth Long, Program Officer, Cambodian Justice Initiative, Phnom Penh (July 6, 2012).


57. Pentelovitch, supra note 47, at 466 (arguing that the printed materials “missed the mark” of educating ordinary survivors).

58. ECCC posters have featured drawings relevant to the Court and messages such as “Every decision must have the support of both Cambodian and International Judges” and “Everyone can be involved in the process.” See ECCC, Posters, http://www.eccc.gov.kh/en/public-affair/publication/poster (visited Aug. 13, 2013). Stickers say “I support the KR


60. See ECCC COURT REPORT (Jan. 2013), at 6; ECCC COURT REPORT (Sept. 2013), at 10.


62. Peter Manning, Governing Memory: Justice, Reconciliation and Outreach at the Extraordinary Chambers in the Courts of Cambodia, MEMORY STUDIES 1, 3 (2011).

63. Id. at 4–5.


65. Funding for ADHOC’s program expired in 2010. Thet Sambath, Adhoc Halts ECCC Outreach as Programme’s Funding Dwindles, PHNOM PENH POST, Apr. 5, 2010.


67. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended and promulgated on Oct. 27, 2004, NS/RKM/1004/006, art. 34 new. Under the Internal Rules, the Pre-Trial Chamber proceedings are in camera unless the Chamber decides otherwise at the request of one of the judges or parties. Internal Rules of the ECCC [rev. 8], rev’d Aug. 3, 2011, r. 77(6) [hereinafter ECCC Internal Rules (rev. 8)].

68. ECCC Internal Rules (rev. 8), supra note 67, r. 79(6)(a). Exceptions are made when the Chamber believes that a public hearing “would be prejudicial to public order” or would violate necessary protective measures. Id. r. 79(6)(b).


75. See id.

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

77. Confidential questionnaire to Cambodian ECCC Personnel, Respondent No. 2, June 2012 [hereinafter ECCC Respondent No. 2] (on file with the authors).

78. Huy interview, supra note 76.

79. See, e.g., Cable 09PHNOMPENH626, U.S. Embassy Phnom Penh, Khmer Rouge Tribunal: The Trial of S-21 Interrogation Center Head Kaing Guek Eav, Week 17 ¶ 3 (Aug. 25, 2009), available at http://www.wikileaks.org/cablegate.html (noting that some “farmers said they had left their villages at about 2 AM to take the ECCC busses to the court” and that others “complained that they had not been prepared for the trip to Phnom Penh and the length of the proceedings”); Cable 09PHNOMPENH645, U.S. Embassy Phnom Penh, Khmer Rouge Tribunal: The Trial of S-21 Interrogation Center Head Kaing Guek Eav, Week 18 ¶ 3 (Sept. 1, 2009), available at http://www.wikileaks.org/cablegate.html (noting that most of the villagers attending “had to leave before the trial ended”).

80. Huy interview, supra note 76. Cf. Cable 09PHNOMPENH58, U.S. Embassy Phnom Penh, Khmer Rouge Tribunal: Results of Public Perception Survey ¶ 8 (Jan. 23, 2009), available at http://www.wikileaks.org/cablegate.html (“What media cannot provide for Cambodians is a sense of participation or greater buy-in of the process through opportunities to ask questions and discuss personal accounts.”).

81. Phuong Pham et al., So We Will Never Forget: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia (Jan. 2009), at 36.

82. Phuong Pham et al., After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia (June 2011), at 21.

83. Id. at 23.

84. Id. at 22. For Case 002, Asian International Justice Initiative is again collaborating with Mekong Films, with sponsorship by the U.S. Department of State, to broadcast a half-hour TV show about weekly court developments called “Facing Justice.” They have a companion show on radio, where listeners can call in and ask questions about the proceedings from Cambodian experts. Interview with Kris Baleva, Asian International Justice Initiative, Phnom Penh (July 5, 2012).

85. Confidential interview with national staff. See also Kaing Menghun & Colin Meyn, Study Shows Newspapers’ Pencilant for Violence, CAMBODIA DAILY, Sept. 28, 2012 (noting scant ECCC coverage by Khmer-language newspapers due to “a lack of reader interest in the day-to-day happenings at the court,” which Pen Samithy, presi-
dent of the Cambodian Club of Journalists, attributes to the fact that “[t]he process is boring”).


87. Long interview, supra note 53.

88. Foster correspondence, supra note 29 (adding that due to the office’s hybrid structure under Cambodian leadership, he “could easily have ended up in a corner office completely shut out of any national outreach activities”).

89. Id.

90. Id.

91. Id. (calling this “the biggest difference” in national and international approaches to outreach and noting that Cambodian appointees in the public affairs office were committed to two-way exchange).

92. Confidential interview with national staff.

93. OSJI, Progress and Challenges at the Extraordinary Chambers in the Courts of Cambodia 14 (2007).

94. Foster correspondence, supra note 29.

95. ICTJ Report, supra note 35 (noting that the two-sided nature of the Court had “created some confusion” in relation to outreach).


97. Id.


100. Reach Sambath, Letter, KRT’s UN Side Wasn’t Warned of Media Alert, CAMBODIA DAILY, June 11, 2010. See also Gillison, Judge Backs Out of New Inquiries, supra note 99 (quoting the UN spokesperson saying that the Cambodian statement was “sent without the prior knowledge of the UN side and was not approved and endorsed by the UN side”).

101. Confidential questionnaire to Cambodian ECCC Personnel, Respondent No. 4, June 2012 [hereinafter ECCC Respondent No. 4] (on file with the authors).

102. ECCC Internal Rules (rev. 8), supra note 67, r. 56.

103. Long interview, supra note 53.

104. See Press Release, Statement from the Co-Investigating Judges (May 18, 2011); Order on International Co-Prosecutor’s Public Statement Regarding Case File 003, Case No. 003/07-9-2009-ECCC-OCIJ (May 18, 2011); Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor’s Appeal Against the Co-Investigating Judges’ Order on International Co-Prosecutor’s Public Statement Regarding Case 003, Case No. 003/07-9-2009-ECCC/OCIJ (PTC03) (Oct. 24, 2011). But cf. Decision on Appeals
Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, Case No. 002/19-9-2007-ECCC/OCIJ, ¶¶ 51–55 (June 24, 2011) (finding in Case 002 that the CIJs are obligated by Internal Rule 21(1)(c) to ensure that “victims are kept informed . . . throughout the proceedings” and not merely before the end of the investigation so that they are able to fully exercise their right to file civil party applications). Justice Harmon invoked this rule in unilaterally informing the public about additional crime sites under investigation in Case 004. Press Release, Statement by the International Co-Investigating Judge Regarding Additional Crime Sites in Case 004 (Dec. 19, 2012).

105. Id. r. 35(1)(a) (allowing sanctions for anyone who “discloses confidential information in violation of an order of the Co-Investigating Judges or the Chambers”).


108. Cf. Alejandro Chehtman & Ruth Mackenzie, Capacity Development in International Criminal Justice: A Mapping Exercise of Existing Practice, DOMAC/2 at 31–32 (Sept. 2009) (noting that decisions from the Kosovo panels will not be useful to the local courts because they are generally not published).


110. Warning for Unauthorized Disclosure of Confidential Information, Case No. 002/19-9-2007-ECCC/OCIJ (PTC), ¶ 1 (July 9, 2010); Directive on Classification of Pre-Trial Chamber Documents, Case No. 002/07-7-2010-ECCC/PTC10, ¶ 5 (Sept. 9, 2010).


112. See Douglas Gillison, File on Sou Met, Meas Muth Leaks from Court, Cambodia Daily, June 10, 2011.

113. See Human Rights Watch, supra note 12, at 117 (warning the ICC and other courts to resist the temptation to produce “propaganda” or “one-sided information”).

114. See ECCC Court Report (May 2011), at 1.

115. Kong Sothanarith, Few Take Part in Two Tribunal Cases: Monitors, VOA Khmer (Jan. 9, 2013), http://www.voacambodia.com/content/few-take-part-in-two-tribunal-cases-monitors/1579892.html (noting a steep reduction in complaints for Cases 003 and 004 relative to Case 002 and quoting Latt Ky of the human rights group ADHOC as saying, “The fewer number of people interested is due to a lack of outreach”). As of October
2013, 1,700 persons had applied to be civil parties in Cases 003 and 004 combined, primarily due to recent outreach efforts by Judge Harmon. See ECCC COURT REPORT (Oct. 2013), at 5. As discussed in chapter 7, in Case 002 there were nearly 4,000 applicants.

116. See, e.g., Interview with Youk Chhang, Director of the Documentation Center of Cambodia, Phnom Penh (July 10, 2012) (saying the Court created PAS to hide its mistakes, but public respect is undermined when PAS information is inconsistent with what they hear from sources outside of the Court).

117. Huy interview, supra note 76.

118. See, e.g., Foster correspondence, supra note 29; Huy interview, supra note 76; Confidential Questionnaire to Cambodian ECCC Personnel, Respondent No. 3, June 2012 (on file with the authors); Confidential Questionnaire to Cambodian ECCC Personnel, Respondent No. 5, June 2012 (on file with the authors); Confidential Questionnaire to Cambodian ECCC Personnel, Respondent No. 6, June 2012 (on file with the authors).

119. Sriram, supra note 17, at 105.


123. Sriram, supra note 17, at 105.

124. Id. at 106–8.


128. Baylis, supra note 2, at 18.

129. ECCC Internal Rules (rev. 8), supra note 67, r. 11(2)(k).

130. Tessa Bialek, Legacy at the Extraordinary Chambers in the Courts of Cambodia: Research Overview, Documentation Center of Cambodia, at ¶II(3) (2011).

131. Id. (citing deputy international Co-Prosecutor William Smith).

132. Id. at ¶III(1).

133. OSJI, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia (Aug. 2009), at 10–11.

135. Confidential interview with a senior ECCC staff member, Phnom Penh (Nov. 1, 2012).

136. Long interview, supra note 53.

137. See generally OHCHR Report, supra note 10.

138. A more complete list is available in Bialek, supra note 130.


140. By late 2012, the fruitful completion of the VT project appeared uncertain due to efforts by the head of legacy on the national side of the Court to assume control before the proprietary interactive features were incorporated. See id. at 66 (calling Hoover Institution of Stanford University and the War Crimes Studies Center of the University of California, Berkeley, “former partners”).

141. Id. at 11, 16.

142. Id. at 13, 17.

143. ECCC, ECCC Revised Budget Requirements—2012–2013, supra note 46, at 5–6, 18.

144. See, e.g., Long interview, supra note 53.

145. Interview with Rupert Skilbeck, former head of the ECCC Defence Support Section, via telephone (June 7, 2012).

146. Confidential interview with former national staff member, Phnom Penh (June 18, 2012) (“Cambodians can learn from international work habits: independence, timeliness, and preparation. Cambodians bring familiarity with local law, local culture, the general context and history, as well as an ability to help with fieldwork”).

147. Interview with Karim A.A. Khan QC, ECCC Civil Party Co-Lawyer in Case 001, via telephone (June 5, 2012).


149. Id.

150. Confidential interview with former staff member.

151. Etcheson interview, supra note 31.

152. Huy interview, supra note 76.


155. Ryan, supra note 70, at 73.

156. Bates, supra note 154, at 50.

157. Skilbeck interview, supra note 145.


159. See ECCC COURT REPORT, supra note 114, at 7.

161. Bialek, supra note 130, at §III(1); Email response from national OCIJ staff (June 3, 2012) (“Some ECCC officials serve in the governmental judicial system. Therefore, the experiences they gained from the ECCC will have an impact on the Cambodian legal system.”).

162. Duncan McCargo, Politics by Other Means? The Virtual Trials of the Khmer Rouge Tribunal, 87 Int’l Aff. 613, 615 (2011) (noting that “the ECCC was conceived partly as a showcase for international standards of justice,” one that would have a “contagion effect” upon the wider Cambodian justice system by exemplifying best practice).

163. See, e.g., Joint Press Statement, H.E. Deputy Prime Minister Sok An and UN Assistant Secretary-General Patricia O’Brien, Apr. 19, 2010, http://www.unakrt-online.org/articles/joint-statement-he-deputy-prime-minister-sok-and-ms-patricia-o’Brien-under-secretary-general (asserting that the ECCC “is living up to the hope for it to be a model court”); Statement by Ministry of Foreign Affairs of Japan, June 13, 2007 (“The Khmer Rouge Trials are instrumental in realizing the rule of law and justice in Cambodia and the Trials will provide a good model for strengthening Cambodia’s judicial system”); Decision on IENG Sary’s Application to Disqualify Judge Nil Nonn and Related Requests, E5/3, ¶ 14 (Jan. 28, 2011) (noting that as a model court, the ECCC may “serve to encourage and underscore the significance of institutional safeguards of judicial independence and integrity”); Special Representative of the Secretary-General for Human Rights in Cambodia, Situation of Human Rights in Cambodia, at 19, U.N. Doc. E/CN.4/2005/116 (Dec. 20, 2004) (“It is hoped that the establishment of a transparent process that complies with international standards will have an educational effect on existing formal institutions and create . . . further demand for a well functioning judicial system.”).


165. Compare Bates, supra note 154, at 51 (citing Co-Prosecutor Chea Leang as saying that constraints on human and financial resources will make it challenging to transfer skills to the local judiciary), with Long interview, supra note 53 (emphasizing that legacy doesn’t have to be expensive; instead, measures can be practical and realistic).

166. See, e.g., Email response from national VSS staff (June 5, 2012); Coughlan et al., supra note 160, at 23–24 (saying the strong role of defense counsel and the Internal Rules’ provision of a right to silence are welcome in a society in which too few accused have even minimal fair trials).

167. See, e.g., David Boyle, The Legacy of the ECCC Proceedings in Cambodian Law, Draft Thematic Report Published by the Center of Applied Research in Law (Sept. 2012) (on
file with author) (presenting “a thematic selection of case law of the [ECCC] relevant to the interpretation of Cambodian criminal law and procedure, especially as regards respect for international fair trial standards”).


169. ECCC Respondent No. 4, supra note 101.

170. Long interview, supra note 53.

171. Huy interview, supra note 76.

172. Response to questionnaire from Co-Investigating Judge You Bunleng, Cambodian Co-Investigating Judge at the ECCC (June 25, 2012). See also Long interview, supra note 53; David Boyle & Buth Reaksmey Kongkea, Court Extension, a First Step to Reform, PHNOM PENH POST (Oct. 11, 2012) (reporting the Court of Appeal’s incorporation of the ECCC case database management system).

173. Long interview, supra note 53.

174. You Bunleng, supra note 172.

175. See, e.g., Judge Marcel Lemonde, remarks at the conference “The Contribution of Criminal Proceedings before the ECCC to Cambodian Law,” Royal University of Law and Economics, Phnom Penh, Dec. 4, 2012 (“The rule of law cannot be built within a day. Cambodia cannot, from one day to another, become Sweden.”); Kelly McEvers & Phann Ana, Disorder in the Courts, CAMBODIA DAILY, Mar. 4–5, 2000 (quoting Janet King, in-country director of the University of San Francisco’s Community Legal Education Center: “They’re not going to change their mental mindsets by sitting in on a lot of seminars and workshops. This change will take decades.”).

176. ECCC Respondent No. 2, supra note 77. See also LICADHO, Human Rights in Cambodia: The Charade of Justice (Dec. 2007) at 1 (noting that “despite . . . millions of dollars invested by foreign donors in reform programs since 1992, there has been no progress whatsoever in the single most important issue affecting the courts: their lack of independence from political and financial influence. . . . [T]he donor community remains focused upon short-term, material indicators of progress. They consistently ignore what is actually happening in the Cambodian courts on a daily basis: where existing legislation is routinely ignored, and training courses are routinely forgotten, as soon as political or financial influences come into play”).

177. Confidential interview with former national staff member, supra note 146.


179. Confidential interview with former national staff member, supra note 146 ("Cambodia doesn’t need good laws, it already has most of the laws it needs; what is needed is judicial reform").


182. Interview with Michael G. Karnavas, former Ieng Sary Co-Lawyer, Phnom Penh (May 19, 2012).

183. Confidential interview with former national staff member, *supra* note 146.


185. Interview with Jeanne Sulzer, Legal Officer in the ECCC Civil Party Lead Co-Lawyers Section, Phnom Penh (June 1, 2012).


188. *Id.* at 30.

189. Pham et al., *supra* note 82, at 26.

190. *Id.*

191. *Id.* at 29.


193. *Id.* at 34–38.

194. Interview with Hans Corell, former UN Legal Counsel, via telephone (Nov. 15, 2012).


196. Interview with Youk Chhang, Director of the Documentation Center of Cambodia, Phnom Penh (July 10, 2012).

197. Interview with Clint Williamson, former UN Special Expert for advising on UN Assistance to the Khmer Rouge Trials and former U.S. Ambassador-at-Large for War Crimes Issues, via telephone (June 27, 2012).


201. See, e.g., Transcultural Psychosocial Organization, *Justice and Relief for Survivors*

202. Confidential senior staff interview, supra note 135.

203. Long interview, supra note 53. But see Interview with Diana Ellis, Co-Lawyer for Ieng Thirith, Phnom Penh (Nov. 11, 2012) (stating that a significant problem with all international courts is that they are mandated, inter alia, to create a historical record, whereas this should not be seen as the function of a court, which necessarily tells a partial story based on the available evidence).

Conclusion


5. Khmer Rouge Mixed Tribunal Is a ‘Sham,’ Deutsche Presse Agentur, Nov. 15, 2011.


8. David Scheffer, Why the Cambodia Tribunal Matters to the International Community, Cambodian Tribunal Monitor (Sept. 2007) (on file with the authors).


12. Interview with Hans Corell, former UN Legal Counsel, via telephone (Nov. 15, 2012).

13. Id.

14. Id.

15. Interview with William Smith, ECCC deputy international Co-Prosecutor,
Phnom Penh (June 5, 2012); interview with Panhavuth Long, Program Officer, Cambodian Justice Initiative, Phnom Penh (July 6, 2012).


17. Elena Baylis, Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks, 50 B.C. L. Rev. 1, 18 (2009) (noting that some mixed courts have found it difficult to recruit experienced judges).

18. Id. at 18–20.

19. Interview with Rupert Skilbeck, former head of the ECCC Defence Support Section, via telephone (June 7, 2012).


21. Id.


28. Phuong Pham et al., After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia 26–30 (June 2011) (noting, inter alia, that in late 2012, 75% of respondents believed the ECCC was “neutral,” 81% believed the ECCC would help promote reconciliation, and 76% believed the ECCC will have a positive impact on Khmer Rouge victims and their families).

29. Mashal, supra note 2 (in which Chak Sopheap of the Cambodian Center for Human Rights argues that “[t]his court has brought about public participation and debate” and has catalyzed “a public argument about the right of fair trial for the accused”).