

## **BRINGING DOMESTIC CASES INTO COMPLIANCE WITH INTERNATIONAL STANDARDS**

### ***Applicability of ECCC Jurisprudence and Procedural Mechanisms at the Domestic Level***

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*Although the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) deviates from national practice in terms of its adopted procedures and its jurisdiction to prosecute international crimes occurring between 1975 and 1979, it is nevertheless a domestic court grounded in the Cambodian Constitution (“Constitution”) and judicial structure. As such, the jurisprudence and procedural mechanisms emerging from the ECCC lend themselves to application by domestic courts. Cambodia has ratified a number of the major international human rights conventions pertaining to fair trial rights, expressly incorporating them into its domestic system through the Constitution. With the ECCC being uniquely woven into the fabric of the Cambodian court structure, it can assist the judiciary to realize those obligations by setting an example as to how domestic courts should be applying international principles in their day-to-day consideration of domestic law. Bringing domestic cases into compliance with international standards by applying ECCC jurisprudence, in conjunction with additional measures, can enhance Cambodia’s judicial system and promote respect for the rule of law.*

The ECCC is an extraordinary chamber within the existing Cambodian court structure. It was established with the cooperation of the United Nations (“UN”) to try senior leaders of Democratic Kampuchea and those who were alleged to be most responsible for both international and national crimes committed in Cambodia during the period 17 April 1975 to

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6 January 1979. A number of features governing the ECCC’s establishment and its function within the Cambodian domestic system support the conclusion that its jurisprudence is part and parcel of Cambodian law and, therefore, applicable in domestic courts. These features include: **a.** the status of the ECCC as a domestic court; **b.** the role of the Constitution,<sup>1</sup> which specifically requires courts to consider international legal principles when applying domestic law; **c.** the impact of other instruments that govern the operation and procedure of the ECCC,<sup>2</sup> which are grounded in domestic procedure and supplemented by international principles; **d.** the interplay between domestic and international law in Cambodia; and **e.** the aspiration of the ECCC to serve as a “model” court for Cambodia in enhancing judicial capacity and fostering the rule of law.

With these unique features, the ECCC provides an exquisite opportunity for Cambodians to witness the functioning of a Cambodian court that aims to achieve both substantive and procedural justice through the application of international standards and principles. Though fairly endeavoring to respect the rights and dignity of all parties, the ECCC has not lived up to its promise, let alone potential, to consistently apply these standards and procedures. Many of its decisions – both substantive and procedural – are open to unwelcome challenge and criticism.<sup>3</sup> Of greater concern, however, are the allegations of corruption,<sup>4</sup> political interference,<sup>5</sup> revelations of significant deficiencies in its investigative processes in Case 002<sup>6</sup> and implications of misconduct, incompetence and lack of independence in the judicial investigations of Cases 003 and 004.<sup>7</sup> The Trial Chamber’s claim that the ECCC is “a model

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<sup>1</sup> Constitution of the Kingdom of Cambodia, 1993, amended 15 February 2008.

<sup>2</sup> 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 (“Agreement”); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (“Establishment Law”); ECCC Internal Rules, Rev. 8 (as revised on 3 August 2011) (“Internal Rules”).

<sup>3</sup> See, e.g., *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Order to IENG Sary Defence on Filing of Preliminary Objections, 25 February 2011 (requiring the Ieng Sary Defence to consolidate all of its preliminary objections on jurisdiction into a single 35-page summary); *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 26 October 2011.

<sup>4</sup> See, e.g., Michael Saliba, *Allegations of Corruption at ECCC: Overview*, (28 September 2009), available at <http://www.cambodiatribunal.org/blog/2009/09/allegations-corruption-eccc-overview> (last visited 25 September 2012); Alex Bates, *Transitional Justice in Cambodia: Analytical Report*, ATLAS Project/British Institute of International and Comparative Law (October 2010) (“Bates Report”), p. 58-60.

<sup>5</sup> See, e.g., Bates Report, p. 52-58.

<sup>6</sup> See, e.g., Anne Heindel, “Critical” Irregularities in Interview Procedures Highlighted During Witness Testimony, (30 August 2012), available at <http://www.cambodiatribunal.org/.../CTM%20Heindel%2012-08-30.pdf> (last visited 25 September 2012).

<sup>7</sup> Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers of the Courts of Cambodia*, February 2012 (“OSJI 2012 Report”), available at

court”<sup>8</sup> is more aspirational than actual. Certain decisions made by the Office of Co-Prosecutors (“OCP”), the Office of the Co-Investigating Judges (“OCIJ”) and the Chambers (Pre-Trial, Trial and Supreme Court) are seemingly politically driven, fostering (or *perpetuating*, as it were, in the currently existing prosecutorial and judicial context) a culture of circumvention and/or concealment.

Considering, however, that courts throughout Cambodia are at best haphazardly applying the international human rights principles incorporated in the Constitution,<sup>9</sup> the ECCC, imperfect as it may be, is best poised to guide the Cambodian judicial system. It is no exaggeration to say that for the first time in modern Cambodian history (or at any time for that matter), through the ECCC Cambodians are seeing how a court of law ought to function: parties are afforded the right to be heard; defence lawyers are openly and aggressively challenging the prosecution while also demanding to be heard by the judges; and rulings and decisions are for the most part transparently reasoned and subject to actual review.

Any action by the Cambodian judiciary to ensure greater application of Constitutional fair trial rights will depend almost exclusively on the Cambodian Government (“Government”),

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<http://www.soros.org/sites/default/files/cambodia-eccc-20120233.pdf> (last visited 1 October 2012), p. 5, 20-30. Judges of the Pre-Trial Chamber have also referred to certain irregularities that occurred during the investigative process in Case 003 and 004 regarding the admissibility of civil parties. In relation to Case 004, Judges Lahuis and Downing observed that “[w]here the lack of transparency in the proceedings has seriously impaired the right of the Appellant to present the best case possible ... we are additionally compelled to address the specific issue of the notification of the Order in Case 004 to the Appellant and his Co-Lawyers.” *Case 004/07-09-2009-ECCC/OCIJ (PTC 02) Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Application Robert Hamill (Dissenting Opinion of Judges Lahuis and Downing)*, 14 February 2012, para. 7. *See also Case 003/07-09-2009-ECCC/OCIJ (PTC 02), Appeal Against Order on the Admissibility of Civil Party Application Robert Hamill (Dissenting Opinion of Judges Lahuis and Downing)*, 24 October 2011, para. 2.

<sup>8</sup> The Trial Chamber has stated that, while the ECCC lacks the mandate to directly address alleged deficiencies in national mechanisms designed to uphold the independence of the judiciary, “[i]t may, as a model court, nonetheless serve to encourage and underscore the significance of institutional safeguards of judicial independence and integrity.” *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Decision on IENG Sary’s Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011 (“Decision on IENG Sary’s Application to Disqualify Judge Nil Nonn”), para. 14 (emphasis added).

<sup>9</sup> *See, e.g.*, Cambodian Center for Human Rights (“CCHR”), *Fourth Bi-Annual Report: Fair Trial Rights 2009-2011* (2012) available at [http://www.cchrcambodia.org/index\\_old.php?url=media/media.php&p=report\\_detail.php&reid=81&id=5](http://www.cchrcambodia.org/index_old.php?url=media/media.php&p=report_detail.php&reid=81&id=5) (last visited 22 October 2012), identifying a number of fair trial rights which are not consistently upheld by domestic courts, including the presumption of innocence, the right to legal representation and the rights not to be compelled to confess or be subjected to lengthy pre-trial detention. *See also* Center for Social Development, *Court Watch Bulletin*, Vol. 3, No. 15, October 2006 (“Court Watch Bulletin 2006”) (copy on file with author), finding that between June and September 2006 a number of violations of fair trial rights were observed in Cambodian courts, including violations of the presumption of innocence, the right to trial within a reasonable time, and the right to assistance of counsel.

which, effectively, controls the judiciary.<sup>10</sup> This article offers some thoughts on how Cambodia can seize this extraordinary opportunity to harvest the positive fruits of the ECCC's jurisprudence and procedural mechanisms to strengthen domestic judicial capacity.

### *The role of the ECCC as a domestic court*

The ECCC was established as a Cambodian domestic court.<sup>11</sup> The Government explicitly rejected creating the ECCC as an international tribunal, as was suggested by the international community during negotiations between the Government and the UN concerning the ECCC's establishment.<sup>12</sup> The clear intention of the Government was to establish a domestic court with international elements. Though often characterized as "internationalized" (a label of dubious substance), the ECCC is a court embedded in the domestic court system. This intention is reflected in the documents which establish and define the jurisdiction of the ECCC: the Agreement and the Establishment Law, each of which refer to the creation of "Extraordinary Chambers" within the existing court structure.

During the protracted negotiations leading up to the Agreement, the UN had expressed "concern with continued problems related to the rule of law and the functioning of the judiciary [in Cambodia] resulting from, *inter alia*, corruption and interference by the executive with the independence of the judiciary."<sup>13</sup> The UN proposed changes to the draft Agreement, including provisions for the majority of the judges on the Trial and Supreme Court Chambers to be international, for decisions of the Chambers to be resolved by simple majority vote rather than a "supermajority," and for only one prosecutor and one investigating judge, each of whom would be international (rather than two co-prosecutors and two co-investigating judges, national and international, as had been envisioned in the original draft).<sup>14</sup> The proposals to bolster the international elements of the court were intended to

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<sup>10</sup> See, e.g., Special Rapporteur, *Report of the Special Rapporteur on the situation of human rights in Cambodia*, delivered to the General Assembly, 15<sup>th</sup> Session, U.N. Doc. A/HRC/15/46 (16 September 2010) ("Special Rapporteur 2010 Report"), para. 41; Special Rapporteur, *Report of the Special Rapporteur on the situation of human rights in Cambodia*, U.N. Doc. A/HRC/18/46 (2 August 2011) ("Special Rapporteur 2011 Report"), para. 23. See also Press Release, CCHR, Blurred separation of powers serves the political objectives of the executive (16 March 2011) (copy on file with author).

<sup>11</sup> See, e.g., *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/PTC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "Duch," 3 December 2007 ("*Duch* Appeal Against Provisional Detention Judgment"), para. 19.

<sup>12</sup> The Secretary-General, *Report of the Secretary-General on Khmer Rouge Trials*, delivered to the General Assembly, 57<sup>th</sup> Session, U.N. Doc. A/57/769 (31 March 2003) ("Secretary-General 2003 Report"), para. 6.

<sup>13</sup> *Id.*, para. 13.

<sup>14</sup> *Id.*, para. 16.

remedy perceived weaknesses in the Cambodian system, with the UN Secretary-General stating that these adjustments were necessary to “ensure that the impartiality and independence of the Extraordinary Chambers and the integrity and accessibility of the proceedings were fully protected.”<sup>15</sup> The Government rejected these proposed amendments, making it clear that it wanted a domestic, as opposed to an international or internationally controlled, court.<sup>16</sup> Despite the involvement of the UN, and the ECCC’s jurisdiction to try international crimes,<sup>17</sup> it is clear that the ECCC was established as a *sui generis* court within the domestic court system bound by the Constitution and other Cambodian law.<sup>18</sup> Put differently, there is a strong institutional link between the ECCC and the courts of Cambodia justifying an expectation that the jurisprudence of the ECCC will be heeded by the domestic courts, despite the fact that the decisions of the ECCC do not explicitly create law for the domestic courts.

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<sup>15</sup> *Id.*

<sup>16</sup> The UN Secretary-General stated that “it became apparent to me, during my team’s visit to Phnom Penh, that the Government of Cambodia was not prepared to contemplate proposals that would require it to make any changes to those provisions of its national law that specified how the Extraordinary Chambers were to be structured and organized.” *Id.*, para. 20. See generally on the negotiations leading to the establishment of the ECCC, Suzannah Linton, *Putting Cambodia’s Extraordinary Chambers in Context*, 11 SING. Y.B. INT’L L. 195, 223-225 (2007) (“Linton 2007”).

<sup>17</sup> As Professor Schabas has observed: “The fact that a national judicial institution only deals with international crimes is not enough to make it an international court.... The test should be whether the tribunal can be dissolved by the law of a single country. If that is the case, as it is in Cambodia, then the tribunal is national. Cambodia has an agreement with the United Nations by which it pledges cooperation. The agreement has been endorsed by a General Assembly resolution. Nevertheless, the legal framework of the Extraordinary Chambers is profoundly national. What the Cambodian legislator can do it can also undo.” WILLIAM A. SCHABAS, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS 19 (OUP 2012).

<sup>18</sup> Although a number of decisions from both the Pre-Trial and Trial Chambers have described the ECCC as an “internationalized” court, the author maintains that this characterization is a fiction, not grounded in any particular jurisprudence. Whatever the term “internationalized” may denote, the ECCC is not an international court. The features relied upon by the Chambers in characterizing the ECCC as an “internationalized” court include, *inter alia*, the fact that its judiciary includes Cambodian and international judges who take separate and distinct judicial oaths from judges of domestic courts, its decisions are not reviewable by courts outside its structure and it has no jurisdiction to judge the activities of other bodies. See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011 (“Decision on IENG Sary’s Appeal Against the Closing Order”), paras. 215-16; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, para. 32. These features do not displace the ECCC’s status as a court embedded within the domestic judicial system. As the Pre-Trial Chamber has acknowledged, the ECCC is “part of the Cambodian court system,” *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 01), 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, 4 February 2008, para. 30. The Trial Chamber has also noted that the ECCC was established “within the existing Cambodian court structure,” *Case of Kaing Guek Eav alias “Duch”*, 001/18-07-2007-ECCC/TC, Decision on Request for Release, 15 June 2009, para. 10.

## ***The Constitution***

The Constitution, as the “supreme law” of Cambodia,<sup>19</sup> governs the operation of both the ECCC and domestic courts. The Constitution explicitly incorporates international human rights standards into the domestic framework, providing that “the Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.”<sup>20</sup>

Cambodia has ratified the major international human rights conventions,<sup>21</sup> including the International Covenant on Civil and Political Rights (“ICCPR”).<sup>22</sup> The ICCPR is the primary international instrument recognizing the obligation of States under the UN Charter to promote “universal respect for, and observance of, human rights and freedoms.”<sup>23</sup> The ICCPR sets out the “equal and inalienable rights”<sup>24</sup> and minimum guarantees which apply to all individuals concerning their civil and political participation, including fair trial rights. Since Cambodia has ratified these instruments, and chosen to unambiguously incorporate them into its Constitution,<sup>25</sup> it is beyond cavil that meaningful adherence to the rule of law in Cambodia requires that all domestic courts apply and uphold these overarching human rights provisions.<sup>26</sup> Because the ECCC is a domestic court, it follows that the laws and instruments

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<sup>19</sup> Constitutional Council Decision 092/003/2007, 10 July 2007 (“Constitutional Council 2007 Decision”), available at [http://www.ccc.gov.kh/english/cont\\_dec\\_2007.php](http://www.ccc.gov.kh/english/cont_dec_2007.php) (last visited 27 September 2012).

<sup>20</sup> Constitution, Art. 31.

<sup>21</sup> See, e.g., International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 171 (signed on 17 October 1980, accession 26 May 1992); Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85 (accession 14 October 1992); Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3 (accession 15 October 1992); Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 U.N.T.S. 13 (signed on 17 October 1980, accession 15 October 1992). According to the UN Treaty Collection Database, Cambodia has signed, ratified or acceded to 65 treaties, covenants and protocols. See UN Treaty Collection Database website, available at <http://treaties.un.org/pages/CNs.aspx> (last accessed 24 October 2012).

<sup>22</sup> 16 December 1966, 999 U.N.T.S. 171 (signed on 17 October 1980, accession 26 May 1992).

<sup>23</sup> *Id.*, preamble.

<sup>24</sup> *Id.*

<sup>25</sup> Articles 31(2) to 50 of the Constitution expressly mirror a number of rights contained in these international human rights treaties, including fair trial rights under Article 38 such as: the requirement that the prosecution, arrest or detention of any person shall not be done except in accordance with the law; the right to defence and legal recourse; the right to be considered innocent until the court has finally judged on the case; and that any case of doubt shall be resolved in favor of the accused.

<sup>26</sup> See, e.g., Elinor Fry, *Between Show Trials and Sham Prosecutions: The Rome Statute’s Potential Effect on Domestic Due Process Protections*, 23 CRIM. L. FORUM 35 (2012), arguing that ratifying States (such as Cambodia) are compelled to strengthen fair trial rights as part of their obligations under the Rome Statute, by reason of the express reference in the Articles relating to the principle of complementarity and *ne bis in idem* to the conduct of domestic trials in accordance with international due process standards. See Rome Statute of the International Criminal Court, *opened for signature* 17 July 1998, 2187 U.N.T.S. 90 (“Rome Statute”), Arts. 17,

adopted to establish and govern the ECCC are subject to the Constitution and the human rights protections enumerated in it.<sup>27</sup>

### ***Instruments governing the practice and operation of the ECCC***

The instruments governing the practice and operation of the ECCC provide that the ECCC must apply Cambodian fair trial principles and rules of procedure but may look to procedural rules established at the international level where there is a *lacuna* in the Cambodian rules. This interplay between Cambodian and international law mirrors the requirement that domestic laws must be consistent with the principles enshrined in the Constitution, which include the provisions of the ICCPR and international human rights instruments.

#### **\* *The Agreement***

The Agreement signed on 6 June 2003 between the Government and the UN was intended to formalize the cooperation between them for the establishment of the ECCC and to provide, *inter alia*, the legal basis, principles and modalities for that cooperation. According to Article 12 of the Agreement, the procedure applicable at the ECCC shall be “in accordance with Cambodian law.” However, the Agreement provides that “guidance may also be sought in procedural rules established at the international level” where there is a deficiency or uncertainty or where Cambodian law is inconsistent with international standards.<sup>28</sup>

Article 12(2) explicitly provides that the ECCC shall exercise its jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the ICCPR. Article 14 of the ICCPR sets out the fundamental fair trial rights which attach to all persons charged with criminal offenses including: the right to a fair and public hearing by a competent, independent and impartial tribunal; the right to be presumed innocent until proven guilty; the right to be informed of the nature of the charges; the right to

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20(3). Cambodia signed the Rome Statute on 23 October 2000 and ratified it on 11 April 2002. See Coalition for the International Criminal Court, *available at* <http://www.iccnw.org/?mod=country&iduct=29> (last accessed on 24 October 2012).

<sup>27</sup> For example, the Constitutional Council, which is comprised of nine members appointed by the King, the National Assembly and the Supreme Council of the Magistracy and is entrusted with the duty “to safeguard respect of the Constitution, interpret the Constitution and laws adopted by the National Assembly and reviewed completely by the Senate” (see Articles 136-138 of the Constitution), has been required to consider whether the Establishment Law is consistent with the Constitution. It found that the original Establishment Law approved by the Senate in 2001 was not in accordance with the Constitution to the extent that it allowed for the death penalty. See Constitutional Council Decision No 040/002/2001 KBTh Ch, 12 February 2001, *available at* <http://www.eccc.gov.kh/en/document/legal/cambodia> (last visited 27 September 2012). The 2001 Establishment Law was subsequently amended to create the 2004 Establishment Law.

<sup>28</sup> Agreement, Art. 12(1).

adequate time and resources for preparation of a defence and to communicate with legal counsel; the right to be tried without undue delay; and the right to be tried in one's presence. Article 15 embodies the principle of legality, requiring that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

\* *The Establishment Law*

The Establishment Law was created "to bring to trial senior leaders of the Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law,<sup>29</sup> international humanitarian law and custom, and international conventions recognized by Cambodia."<sup>30</sup> The original version of the Establishment Law was passed in 2001 (prior to the signing of the Agreement in 2003), and later amended in 2004. While the purpose of the Agreement was to establish cooperation between the UN and the Government, the role of the Establishment Law was to put into practice exactly how this would be done, while also specifying the ECCC's subject matter, temporal and personal jurisdiction. Simply, the Agreement must be implemented "through" the Establishment Law.<sup>31</sup> Mirroring Article 12(2) of the Agreement, Article 33 new of the Establishment Law also provides that the ECCC shall exercise its jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the ICCPR.

Although the Establishment Law was adopted to apply specifically to the ECCC and its provisions cannot be directly applied by other courts, it is nevertheless grounded within Cambodian law supplemented by international fair trial standards, including the ICCPR. Given that Cambodian courts are obliged to consider the same international standards as imported by the Constitution in their application of domestic law, the jurisprudence of the ECCC applying the Establishment Law can be instructive to domestic courts interpreting similar provisions. For example, the recently enacted Cambodian Criminal Code, which criminalizes the same international offenses of genocide, crimes against humanity and grave

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<sup>29</sup> Though it is expected that the Accused appearing before the ECCC will enjoy the presumption of innocence throughout the proceedings (*see* Cambodia Constitution, Art. 38; Establishment Law, Art. 35 new), it is galling that the ECCC's founding document contains language implying a presumption of guilt.

<sup>30</sup> Establishment Law, Art. 1.

<sup>31</sup> Article 12(2) of the Agreement provides that "[t]he present Agreement shall be implemented in Cambodia through the Law on the Establishment of the Extraordinary Chambers as adopted and amended."

breaches of the Geneva Conventions<sup>32</sup> punishable by the ECCC under the Establishment Law,<sup>33</sup> already illustrates both a jurisprudential and legislative impact by the ECCC, providing an opportunity for domestic courts to apply ECCC jurisprudence.

\* ***The Internal Rules***

The Internal Rules of the ECCC were adopted in June 2007<sup>34</sup> by the Plenary Session of national and international judges. As observed by the Pre-Trial Chamber, the Internal Rules “form a self-contained regime of procedural law related to the unique circumstances of the ECCC.”<sup>35</sup> Although the Internal Rules do not stand in opposition to the Cambodian Criminal Procedure Code (“Criminal Procedure Code”), the Pre-Trial Chamber has held that reference should be made to the Internal Rules as the “primary instrument”<sup>36</sup> where there is a difference between the Internal Rules and the Criminal Procedure Code. The provisions of the Criminal Procedure Code should only be applied where a question arises which is not addressed by the Internal Rules.<sup>37</sup>

The legal authority to adopt the Internal Rules is given to the ECCC through the National Assembly by means of Article 33 new of the Establishment Law, but only to the extent that the existing procedures in force “do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards.”<sup>38</sup> This practice of creating procedural rules specific to the ECCC is consistent with the procedure employed at the International Criminal Court (“ICC”) and some of the *ad hoc* tribunals, whose governing statutes allow for the

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<sup>32</sup> Kingdom of Cambodia, Criminal Code (“Cambodian Criminal Code”), 30 November 2009, English-Khmer Translation by Bunleng CHEUNG, Arts. 183, 188, 193.

<sup>33</sup> Establishment Law, Arts. 4, 5, 6.

<sup>34</sup> The Internal Rules have been amended twice every year since February 2008, with the most recent version (Revision 8) adopted in August 2011.

<sup>35</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC06), Decision on Appeal Against the Order Refusing Request for Annulment, 26 August 2008 (“Decision on Appeal Against Order Refusing Request for Annulment”) para. 14.

<sup>36</sup> *Id.* The Trial Chamber also supports this view. See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Decision on Nuon Chea’s Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, 8 August 2011, para. 7. The Supreme Court Chamber advocates a more nuanced, if not dissimilar, approach, holding that “Cambodian law remains the controlling procedural law for proceedings before the ECCC, save where that law is inadequate according to the criteria specified in these provisions.” *Case of Kaing Guek Eav alias “Duch”*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012 (“*Duch* Appeal Judgement”), para. 409.

<sup>37</sup> Decision on Appeal Against Order Refusing Request for Annulment, para. 15.

<sup>38</sup> Establishment Law, Art. 33.

adoption of specific rules of procedure, although without the limitation which exists at the ECCC that such rules can be established only when there is a *lacuna* in the domestic law.<sup>39</sup>

Notwithstanding Article 33 new of the Establishment Law, an argument can be made that the legal framework of the ECCC does not provide the Judges any power to legislate on procedural issues, particularly where judge-adopted rules could conflict with or deviate from procedural legislation adopted by the National Assembly. Perhaps the better practice would have been for the Plenary to have adopted an interpretative declaration of Article 12(1) of the Agreement, as one legal scholar noted, by identifying which elements of Cambodian criminal procedure were certain and consistent with international standards and which were uncertain or inconsistent with international standards.<sup>40</sup> This practice would have clearly articulated how the ECCC would determine which rules of international criminal procedure should act as “gap-filling” or serve the “corrective function” envisaged by Article 12(1) of the Agreement.<sup>41</sup> However, despite the availability of this prudent – and much more transparent – approach in reconciling any *lacunae* or ambiguities, the Trial Chamber has held that the Judges of the Plenary acted within their discretionary parameters in drafting and adopting the Internal Rules<sup>42</sup> – which to this day continue to evolve.<sup>43</sup> Of course, allowing the judges of the ECCC or the other international tribunals the unfettered ability to create procedural rules, then declare the creation of those rules to be within their own broad discretion, presents the danger that procedural rules founded in expediency and economy will impinge upon substantive rights.

While the Internal Rules specifically apply to the ECCC, for the most part they are based on and grounded within Cambodian procedure. The Internal Rules complement principles of

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<sup>39</sup> See Rome Statute, Art. 51, which provides for “Rules of Procedure and Evidence” to be adopted upon a two-thirds majority of the members of the Assembly of States Parties. The Rules and any amendments must be consistent with the Rome Statute. See also Statute of the International Criminal Tribunal for the former Yugoslavia, U.N. Doc. S/RES/827 (25 May 1993), Art. 15, which provides for judges to adopt “rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.” This provision is mirrored in the Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/Res/955 (8 November 1994), Art. 14, which also provides for rules relating to “other appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.” Each of these bodies has enacted rules of procedure pursuant to these provisions.

<sup>40</sup> Goran Sluiter, *Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers*, 1 J. INT’L CRIM. JUST. 7 (2006).

<sup>41</sup> *Id.*

<sup>42</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Decision on NUON Chea’s Preliminary Objections Alleging the Unconstitutional Character of the ECCC Internal Rules, 8 August 2011, para. 9.

<sup>43</sup> The fact that the Internal Rules have been revised every year since their operation has, according to some, “undoubtedly caused uncertainty.” Bates Report, p. 47.

domestic procedure, incorporating the international fair trial rights, standards and principles set out in the Constitution, which, indubitably, all Cambodian courts should in any event be applying. Thus, ECCC decisions made pursuant to the Internal Rules should be considered and – when appropriate– applied by domestic courts. The Internal Rules cannot, and in fact should not, supplant applicable Cambodian procedures insofar as those procedures are consistent with international standards. Such an approach would not only be inconsistent with the ECCC’s power to adopt the Internal Rules, but would also undermine its ability to leave a jurisprudential fair trial legacy that is relevant and applicable to domestic courts.

### ***Interplay of domestic and international law in Cambodia***

The interplay between international law incorporated into the Constitution and domestic law in Cambodia supports the conclusion that the ECCC’s jurisprudence is applicable in domestic courts because international law incorporated through the constitution is also domestic law. Cambodia appears to adhere to a dualist – as opposed to a monist – system in its approach to implementing international law in its domestic legal order.<sup>44</sup> As distinct from a monist system, where international law exists alongside the domestic law as equally applicable by courts, a dualist system considers international law to be separate from domestic law and only applies international law if it is directly incorporated into domestic law through a State’s constitution or through implementing legislation.<sup>45</sup> In Cambodia, international human rights

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<sup>44</sup> The Pre-Trial Chamber declined to comment on the characterization of Cambodia as a dualist legal system as asserted by IENG Sary and NUON Chea in their appeals against decisions of the OCIJ, except to say that it had no bearing on the issues raised on appeal. *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC 145 and 146), Decision on Appeal by NUON Chea and IENG Thirith against the Closing Order, 15 February 2011, para. 98; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC 35, 37, 38 and 39), Decision on Appeals Against the Co-Investigative Judges’ Order on Joint Criminal Enterprise (JCE), 20 May 2010, para. 48. The Constitution does not directly state whether Cambodia follows a monist or dualist approach to international law. However, as Professor Linton observes, “[Cambodian] courts refuse to entertain claims that are, in the absence of enabling legislation, directly based on international laws, or even for that matter, on the Constitution.” Linton 2007, p. 203. The Government has certainly indicated its preference for dualism as evidenced by its report to the Committee on the Elimination of Racial Discrimination, referring to the fact that eight conventions ratified by Cambodia were not to be directly invoked before Cambodian courts or administrative authorities, although they “provide a basis for the development of national legislation, such as that pertaining to the observance and protection of human rights...” Committee on the Elimination of Racial Discrimination, *Seventh Periodic Reports of States Parties Due in 1996: Cambodia*. 05/05/97, U.N. Doc. CERD/C/292/Add.2, (5 May 1997), para. 19.

<sup>45</sup> See, e.g., Gabriele Olivi, *The Role of International Courts in Prosecuting International Crimes: New Perspectives*, 18 SRI LANKA J. INT’L L. 83, 86-87 (2006).

principles have been explicitly incorporated into the domestic framework by the Constitution and are thus, at least in theory, applicable in domestic courts.<sup>46</sup>

The Constitutional Council has recognized that although a law may not violate the Constitution, a court must consider whether its application in a particular case would be incompatible with either provisions in the Constitution, other Cambodian law or international conventions recognized by Cambodia. In finding that a proposed amendment to the Law on the Aggravating Circumstances of Felonies<sup>47</sup> was consistent with the Constitution, the Constitutional Council noted that the trial judge should rely not only on the proposed amended Article for a conviction, but also on “the laws.”<sup>48</sup> The term “laws” refers to “the national laws, including the Constitution which is the supreme law, all the laws that remain in force, and the international laws already recognized by the Kingdom of Cambodia...”<sup>49</sup> Thus, despite the fact that international law does not appear to be directly enforceable in domestic courts, local judges, like ECCC judges, are nevertheless constitutionally obliged to consider international human rights conventions and fair trial rights in applying and interpreting domestic law.<sup>50</sup>

\* ***Jurisprudence of International and Internationalized Tribunals***

There is nothing in the Establishment Law, the Agreement or the Internal Rules that *requires* ECCC judges to follow the jurisprudence or rules of procedure of international or

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<sup>46</sup> While crimes under international and customary law are not *directly* punishable in domestic courts in Cambodia, they can be implemented by legislation into the domestic framework, as has occurred in relation to international crimes penalized in the Cambodian Criminal Code. *See* Cambodian Criminal Code, Arts. 138, 188, 193. For further discussion on the applicability of international criminal law in domestic systems generally, *see* WARD N. FERDINANDUSSE, *DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS* (T.M.C. Asser Press 2006).

<sup>47</sup> The amended Article 8 provides that a judge must not consider any attenuating circumstances for punishment, or suspend or reduce a sentence below the mandatory minimum for felonies punishable with forced labor.

<sup>48</sup> Constitutional Council 2007 Decision, p. 1.

<sup>49</sup> *Id.*

<sup>50</sup> Similarly, the Justices of the United States Supreme Court have considered international law in their judgments; for example, in determining whether the imposition of a sentence of life without parole for a juvenile in a non-homicide case violated the United States Constitution’s Eighth Amendment prohibition against cruel and unusual punishment. *See Graham v. Florida*, 130 S. Ct. 2011, 2033-34 (2010): “The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But “[t]he climate of international opinion concerning the acceptability of a particular punishment” is also “not irrelevant.”... The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.” (Internal citations omitted).

internationalized tribunals.<sup>51</sup> This jurisprudence is not binding on the ECCC, nor is it binding in other Cambodian domestic courts. However, given that the Constitution, the Establishment Law and the Internal Rules explicitly incorporate the protections of international human rights instruments, including the ICCPR, the jurisprudence and rules of procedure of international and internationalized tribunals can be used for guidance in interpreting relevant provisions of international law and procedure, both at the ECCC and in domestic courts.

The ECCC has cited jurisprudence from the ICC, the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), the Special Court for Sierra Leone (“SCSL”) and the Special Panels for Serious Crimes (“Special Panels”) in Timor Leste as well as international human rights bodies including the European Court of Human Rights (“ECtHR”), Human Rights Committee (“HRC”) and Inter-American Court of Human Rights (“IACtHR”), particularly in situations where there is no pertinent Cambodian law or practice. In relation to fair trial rights, the ECCC cited jurisprudence from these bodies when considering, for example, the principle of legality under Article 15 of the ICCPR and customary international law,<sup>52</sup> the interpretation of Article 14(7) of the ICCPR and the *ne bis in idem* principle<sup>53</sup> and the impact of public statements condemning an accused on the right to be presumed innocent under Article 14(2) of the ICCPR.<sup>54</sup>

Predictably, there will be reluctance if not outright resistance to apply any ECCC jurisprudence or procedural practices that make reference to jurisprudence or practices from the *ad hoc* international tribunals, the ICC or human rights courts. The refrain from the

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<sup>51</sup> Cf. preamble to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed on 16 January 2002, which explicitly provides that its jurisprudence may be “linked” to that of the international tribunals.

<sup>52</sup> See, e.g., Decision on Ieng Sary’s Appeal Against the Closing Order, para. 214, in which the Pre-Trial Chamber applied jurisprudence from the ECtHR and the ICTY in holding that the international standard of legality applies to proceedings before the ECCC.

<sup>53</sup> *Id.*, paras. 127-60, where the Pre-Trial Chamber referred to the practice and jurisprudence of the ICTY, ICC, ICTR, SCSL, the ECtHR, and the IACtHR in holding that the principle of *ne bis in idem* had not been violated.

<sup>54</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC(15), Decision on Nuon Chea’s Appeal Against the Trial Chamber’s Decision on Rule 35 Applications for Summary Action, 14 September 2012 (“Decision on Nuon Chea Rule 35 Appeal”). When considering the presumption of innocence in light of statements made by the Prime Minister that publicly referred to NUON Chea as a “killer” and a “perpetrator of genocide,” the Supreme Court Chamber noted that “[g]iven the lack of pertinent Cambodian jurisprudence, guidance was sought on the international level.” *Id.*, para. 52. The Supreme Court Chamber referred to jurisprudence from the ICC, HRC, ECtHR, IACtHR, and various domestic courts including the United Kingdom’s Privy Council and the United States Supreme Court. While dismissing the appeal on the merits, it emphasized that “State interference with a pending criminal case through the public speech of a government official in the course of their official duties is a violation of the presumption of innocence in the jurisprudence of both human rights bodies and national systems.” *Id.*

judges and prosecutors (and perhaps even defence lawyers) no doubt will be that Cambodian law cannot be based on non-domestic jurisprudence and, therefore, ECCC jurisprudence should be disregarded. In other words, they will seek to maintain the *status quo* in the domestic courts; business as usual. It is worth re-emphasizing, however, that since domestic courts are mandated to consider and apply the same international legal instruments incorporated by the Constitution, an ECCC decision or procedural practice predicated on the ICCPR fair trial rights incorporated in the Constitution is, at a minimum, persuasive authority in domestic courts. Any claim to the contrary, especially if based on the excuse that a decision cites jurisprudence from one of these international bodies, is meritless.<sup>55</sup>

### ***The ECCC as a “model” court***

With the realization that the Cambodian judicial system as it currently exists has certain weaknesses, the ECCC was intended to serve as a model for the domestic courts and to have a long-term impact on enhancing and building the domestic judiciary’s capacity. Arguably, the ECCC would establish and demonstrate best practices to be subsequently emulated by domestic courts, and would allow for the transfer of knowledge and expertise of the international community. As the UN Secretary-General stated during the establishment of the ECCC:

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 better awareness amongst the general population of the facts about Cambodia’s tragic past and further demand for a well functioning judicial system.<sup>56</sup>

The UN Special Rapporteur on the situation of human rights in Cambodia has repeatedly acknowledged the importance of the ECCC as a model court in remedying deficiencies in the domestic court system, observing that “[t]he Court’s activities in this regard continue to set an important example for the national sector of the administration of justice in accordance

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<sup>55</sup> International law can also be a useful tool for interpreting State constitutions through a common language and dialogue and offers a range of jurisprudential models and precedents through which State courts can learn and participate in a global exchange of ideas. See Martha Davis, *Human Rights, Social Justice and State Law: A Manual for Creative Lawyering*, (Spring, 2008) Chap. 1, p. 2, available at [http://nlginternational.org/hrdocs/NESRI%20legal\\_training%20\\_manual.pdf](http://nlginternational.org/hrdocs/NESRI%20legal_training%20_manual.pdf) (last visited 3 October 2012).

<sup>56</sup> Special Representative of the Secretary-General for Human Rights in Cambodia, *Situation of Human Rights in Cambodia*, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2005/116, (20 December 2004), para. 19.

with international fair trial standards.”<sup>57</sup> In December 2010, the Special Rapporteur wrote to the Cambodian Prime Minister about the importance of the ECCC for “setting an example to the international community of the country’s commitment to ensuring accountability for past atrocities, to protecting human rights, and to upholding the independence of the judiciary and the rule of law.”<sup>58</sup> The Trial Chamber has also acknowledged the significance of the ECCC in this regard, observing that “[i]t may, as a model court, ... serve to encourage and underscore the significance of institutional safeguards of judicial independence and integrity.”<sup>59</sup> A consequential benefit of the ECCC is its ability, at least in theory, to improve the domestic judiciary’s understanding of international standards and the conduct of trials according to these principles.

Despite the Constitutional requirement to consider international legal instruments and human rights protections, these international legal principles have rarely, if ever, been applied in practice by the domestic courts in Cambodia. A recent report from the UN Special Rapporteur on the situation of human rights in Cambodia raised concerns about the independence and competence of the judiciary, observing that “in spite of the Constitutional guarantees and the existence of various institutions to enhance and safeguard its independence, the Special Rapporteur is of the view that the judiciary has not been working as effectively, independently and impartially as possible.”<sup>60</sup> Areas of major concern in domestic criminal proceedings include limited legal argument in the courtroom,<sup>61</sup> the absence of any rigorous analysis of law or publication of reasoned decisions,<sup>62</sup> corruption and political interference within the judiciary;<sup>63</sup> excessive reliance on confessions extracted in

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<sup>57</sup> Special Rapporteur 2011 Report, para. 34. *See also* Special Rapporteur 2010 Report, para. 59, in which the Special Rapporteur observed:

There is much expectation that the ECCC will function as a model court in Cambodia, so that good practices can be shared with the wider judiciary and gradually help to uplift its practice. The place of the ECCC within the Cambodian court system potentially enables judges, prosecutors and other court officials of the ECCC to transfer knowledge to their colleagues in the judiciary.

<sup>58</sup> Special Rapporteur 2011 Report, para. 35.

<sup>59</sup> Decision on IENG Sary’s Application to Disqualify Judge Nil Nonn, para. 14.

<sup>60</sup> Special Rapporteur 2010 Report, para. 30. Bates also refers to the “self-avowedly poor state” of the Cambodian judiciary, *citing* Consultant’s interviews with Judge Nil Nonn. Bates Report, p. 5, 50-51.

<sup>61</sup> Special Rapporteur 2010 Report, para. 42.

<sup>62</sup> *Id.* Judge Nil Nonn has expressly lamented that Cambodian judges fail to explain their arguments specifically and has stated that, in the future, he would explain his judgments more carefully, appreciating the “reasoning culture” of the international judges on the bench. Bates Report, p. 50, *citing* Consultant’s interviews with Judge Nil Nonn.

<sup>63</sup> Special Rapporteur 2010 Report, paras. 44, 51-52; Bates Report, p. 52-60.

police custody, often under duress;<sup>64</sup> lengthy detention without charge,<sup>65</sup> and a lack of trust by the public that the courts will deliver impartial justice.<sup>66</sup>

Many of these deficiencies have been exposed in the recent controversy surrounding the 20-year jail term handed down by the Phnom Penh Municipal Court to independent radio station owner Mam Sonando for allegedly inciting insurrection activities in Kratie's Broma village.<sup>67</sup> The sentence was imposed after a three and a half day trial, which was held two months after Mam Sonando's arrest on 15 July 2012, and during which the prosecution presented little evidence of his involvement in the alleged insurrection activities in Broma village.<sup>68</sup> The case has been described as "one of the most blatantly politically motivated trials in recent years,"<sup>69</sup> with human rights groups claiming that the Government fabricated the alleged plot to silence the owner of one of the few independent radio stations in Cambodia and to cover up its eviction of 600 Broma villagers who were involved in a land dispute with a rubber plantation.<sup>70</sup> United States State Department spokeswoman Victoria Nuland has called on the Government to "release Mam Sonando immediately to ensure that its court system is free from political influence, and to reaffirm its commitment to guaranteeing its citizens' basic rights."<sup>71</sup>

### ***Recognizing the ECCC's deficiencies***

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<sup>64</sup> Special Rapporteur 2010 Report, para. 51.

<sup>65</sup> This problem has also been expressly highlighted by Judge Nil Nonn. See Bates Report, p. 51, citing Consultant's interviews with Judge Nil Nonn.

<sup>66</sup> Special Rapporteur 2010 Report, para. 42.

<sup>67</sup> Criminal Case no. 206 dated 18 May 2012 of the Prosecution Department attached to the Kratie Court, later transferred to Criminal Case no. 2207 dated 16 July 2012 of the Prosecution Department attached to the Phnom Penh Municipal Court.

<sup>68</sup> On 28 June 2012, two days after the Cambodian Prime Minister publicly named Mam Sonando, the Investigating Judge of Kratie First Instance Court decided to expand the investigation of Criminal Case no. 206 to include Mam Sonando (Order number 1373 PPS 12, dated 28 June 2012 of the Investigating Judge of Kratie First Instance Court). On 29 June 2012, Mam Sonando was summoned for an interview but was not in Cambodia at that time. An arrest warrant was issued that same date. Mam Sonando was arrested in Phnom Penh on 15 July 2012. The Kratie First Instance Court transferred the case to the Prosecution Department attached to the Phnom Penh First Instance Court, where the latter was seized with the criminal case no. 2207. The judicial investigation concluded on 7 August 2012. Mam Sonando was charged with: Plotting against a public civil servant (Articles 29 and 504); Insurrection (Article 29, 456 and 457); Interference in the fulfillment of public duties (Articles 609 and 29); and Inciting people to use weapons against public authorities (Articles 464 and 29). The trial was held from 11-14 September 2012. On 1 October 2012, the Court announced its verdict.

<sup>69</sup> Peter Zsombor, *Sonando Verdict a Tough Test for KRT Legacy*, CAMBODIA DAILY, 4 October 2012, at 1.

<sup>70</sup> Peter Zsombor, *Donors Criticize Sonando Sentence*, CAMBODIA DAILY, 3 October 2012, at 20.

<sup>71</sup> *Id.* CCHR also recently raised concerns about the "undisguised political interference" that led a Cambodian provincial court to drop its investigation into the murder of a high-profile environmental activist, Chut Wutty, as he accompanied journalists investigating alleged illegal logging. Press Release, CCHR, CCHR Says Dropping of Chut Wutty Case is Indicative of Political Interference (7 October 2012) (on file with the author).

Despite the seemingly good intentions of judges, prosecutors and administrative staff at the ECCC, *all is not well*. Decisions and practices, even those that have passed judicial scrutiny by the Supreme Court Chamber, are not necessarily beyond criticism or challenge, nor should they be applied with reckless abandon by domestic courts. Circumspection is required to ensure that contrived legal decisions or unfair procedural practices from the ECCC are identified and rejected. Consider, for example, the Supreme Court Chamber's majority decision on appeal in Case 001, finding that the ECCC had no authority to order a reduction in Duch's sentence for his 8 years of unlawful detention by the Military Tribunal.<sup>72</sup> Given that the problem of lengthy detention without trial in Cambodia has been expressly acknowledged by the President of the Trial Chamber,<sup>73</sup> the Supreme Court Chamber's holding on this point sets a worrying precedent, sending "a message to the Cambodian justice system, and the Cambodian citizens who are subject to inappropriate and excessive pre-trial detention by the national court system, that due process and human rights standards can be ignored."<sup>74</sup>

Domestic courts should also be circumspect in adopting many of the procedures employed by the OCIJ, the body charged with undertaking "investigative action conducive to ascertaining the truth"<sup>75</sup> and examining both inculpatory and exculpatory evidence. A practice appears to have emerged whereby OCIJ investigators would, in violation of the Internal Rules,<sup>76</sup> conduct unrecorded interviews with witnesses, sometimes showing the witnesses documents, and would afterwards conduct recorded interviews which would be summarized by the OCIJ and signed or thumb printed by the witnesses. The summaries of the recorded interviews make no reference to the prior unrecorded interviews, deceptively suggesting that the

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<sup>72</sup> *Duch* Appeal Judgement, para. 395. The Supreme Court Chamber held that the international jurisprudence relied upon by the Trial Chamber was not applicable to the ECCC and that the ECCC had no authority to grant such a remedy in the absence of either attribution of the violations to the ECCC or the existence of an abuse of process (paras. 389-99). The Supreme Court Chamber increased the sentence of 35 years imposed by the Trial Chamber to a sentence of life imprisonment. Two of the international judges disagreed, observing that the prejudice to Duch's liberty was "extreme" and that the ECCC was "uniquely positioned to grant a remedy" (Partially Dissenting Joint Opinion of Judges Agnieszka Klonowiecka-Milart and Chandra Nihal Jayasinghe, paras. 14-15).

<sup>73</sup> Bates Report, p. 51, *citing* Consultant's interviews with Judge Nil Nonn.

<sup>74</sup> OSJI 2012 Report, p. 12.

<sup>75</sup> Internal Rule 55(5).

<sup>76</sup> *See* Internal Rules 21(1), 25, 51(8), 55(7) and 62(3). These Rules define the procedures that OCIJ investigators must follow when interviewing witnesses, including making a written record of *every* interview, which must provide information on the duration of the interview, and explicitly stating the reasons why an interview was not audio recorded.

summaries faithfully reflect the interviews and the manner in which they were conducted.<sup>77</sup> On at least one occasion, the investigators facilitated what appeared to be a “staged” interview where the OCIJ prepared questions and answers based on a previous unrecorded interview, which were then read by the witness into a recording device.<sup>78</sup> The written summaries are frequently used to “refresh” a witness’s memory in court,<sup>79</sup> with the Trial Chamber seemingly accepting the contents of the summaries as “faithful and accurate” reflections of the *actual* interviews.<sup>80</sup> More worryingly, the Prosecution has sought to rely exclusively on a number of these summary statements in lieu of witness testimony,<sup>81</sup> despite the lack of transparency in how the summaries were prepared,<sup>82</sup> and the uncertainty of

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<sup>77</sup> During the questioning of witness Meas Voeun by the IENG Sary Defence team, the witness testified that investigators came to his home to interview him prior to the recorded interview and that he was “read out some documents to brief me on this.” The witness also testified that “[m]y wife was close to me and she would just be there to listen to the questions and at times would remind me of my recollection of the events.” The written summary made no mention of this prior interview. *Case of NUON Chea et al.*, 002/19-09-2007-ECCC, Transcript, 9 October 2012, p. 35-36. *See also Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, IENG Sary’s Request that the Trial Chamber Seek Clarification from the OCIJ as to the Existence of Any Record Relating to the Questioning of Witness Oeun Tan on 8 October 2008, 29 August 2012; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, IENG Sary’s Request to Hear Evidence From the Interpreter Concerning Witness Phy Phuon’s Second OCIJ Interview Whereby Irregularities Occurred Amounting to Subterfuge, 23 August 2012 (“Phy Phuon Request”); *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, IENG Sary’s Request that the Trial Chamber Seek Clarification from the OCIJ as to the Questioning of Witness Nornng Sophang on 17 February 2009 and Summon the OCIJ Investigators to Give Evidence Regarding This Interview, 27 September 2012. Similarly, there are material discrepancies between some OCIJ summaries of witness statements and the audio recordings of those statements. *See, e.g., Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Request for Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, 17 November 2011.

<sup>78</sup> *See* Phy Phuon Request, intro, para. 8.

<sup>79</sup> For example, during the testimony of telecommunications witness Nornng Sophang, the witness testified that he did not know clearly who came to the Centre to collect telegrams. He was then referred by the Prosecution to a copy of his OCIJ summary statement and was asked to “see if that statement might refresh your memory.” To this, the witness responded: “I stand by that statement...sometimes it was communicated through a person who would come to the Centre.” *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Transcript, 3 September 2002, p 16-18.

<sup>80</sup> *See, e.g., Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Transcript, 15 December 2011, p. 21-24 during questioning by Judge Lavergne.

<sup>81</sup> *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Co-Prosecutors’ Request to Admit Witness Statements Relevant to Phase 1 of the Population Movement, 15 June 2012; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Co-Prosecutors’ Request to Admit Witness Statements Relevant to Phase 2 of the Population Movement and Other Evidentiary Issues with confidential Annexes I, II, III and Public Annex IV, 5 July 2012; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Co-Prosecutors’ Further Request to Put Before the Chamber Written Statements and Transcripts with Confidential Annexes 1 to 16, 27 July 2012.

<sup>82</sup> This has also been noted by Judges of the Pre-Trial Chamber in relation to Case 003, who noted that “the Co-Investigating Judges’ approach in conducting this judicial investigation is on the whole unclear” and “very little information has been provided to permit an understanding in respect of the focus of this investigation.” *Case 003/07-09-2009-ECCC/OCIJ (PTC 02)*, Appeal Against Order on the Admissibility of Civil Party Application Robert Hamill (Dissenting Opinion of Judges Lahuis and Downing), 24 October 2011, para. 2.

discerning whether the summaries reflect the witnesses' actual memories as opposed to memories aided or created by the OCIJ investigators during the unrecorded interviews.<sup>83</sup>

Another example of conduct that should not be emulated by domestic courts is the occasional disparate treatment of the parties by the Trial Chamber, giving rise to the perception that it has a less than full commitment to upholding fair trial rights, in particular the rights of the accused.<sup>84</sup> Examples include the Trial Chamber frequently switching off defence counsels' microphones, preventing them from responding to objections or exercising their right to make the necessary record,<sup>85</sup> allowing witnesses to determine for themselves whether to respond to questions put to them by the Defence;<sup>86</sup> and ostensibly ruling on the same grounds of an objection differently depending on whether the objection was raised by the Prosecution or the

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<sup>83</sup> The Trial Chamber has indicated a reluctance to remedy these deficiencies, characterizing Defence questions put to the witnesses on these issues as an improper attempt to question the integrity of the investigative process, rather than a legitimate exercise of the fundamental right to test and challenge evidence. For example, in response to Defence questioning of a witness on these matters, the Trial Chamber orally noted that "there is a presumption of the integrity of the judicial investigation" and that "the investigation is treated as the starting point and can be rebutted only in exceptional circumstances." The Trial Chamber ruled that the Defence should simply ask the questions that they have of the witness. *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Transcript, 6 September 2012, p. 43-44 (Judge Cartwright). However, the Trial Chamber previously ruled that witnesses may be confronted with discrepancies in the investigative process "where necessary to assess the probative value of their testimony or to safeguard the fairness of trial proceedings." *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Decision on NUON Chea's Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, 13 March 2012.

<sup>84</sup> Disparate treatment of the parties does not accord with international fair trial standards. As explained by the ICCPR Human Rights Committee, the right to a fair trial requires that "[t]he right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant." ICCPR Human Rights Committee, CCPR/C/GC/32, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, para. 13. Further, "[t]he requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial" (*id.*, para. 21).

<sup>85</sup> See, e.g., Stuart White, *Cambodia's Leaders Called out at Khmer Rouge Court*, PHNOM PENH POST, 1 August 2012, available at <http://www.phnompenhpost.com/index.php/KRTalk/cambodias-leaders-called-out-at-khmer-rouge-court.html> (last visited 28 September 2012), reporting that the International Co-Lawyer for the Accused Nuon Chea had his microphone turned off by the Trial Chamber three times during the examination of a witness. There are numerous other instances where this practice has been employed by the Trial Chamber. See, e.g., *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Transcript, 23 July 2012, p. 75-76, preventing Defence counsel from responding to objections; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Transcript, 30 May 2012, p. 30-31, preventing Defence counsel from explaining lines of questioning; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Transcript, 15 February 2012, p. 87, preventing Defence counsel from making submissions on international case law; and *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Transcript, 20 March 2003, p. 84-86, preventing Defence counsel from responding to allegations of interference with their clients' medical assessments.

<sup>86</sup> See, e.g., President Nil Nonn's directions to the witness Suong Sikoeun during questioning by counsel for Mr. IENG Sary. *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Transcript, 15 August 2012, p. 53:

If you believe that the question is repetitive you can reserve your right not to respond, or you can ask question to the Chamber to see whether you should respond to the question... if you know that the question is leading; then you can reserve your right not to respond to the question.

Defence.<sup>87</sup> These practices undermine the impartiality and integrity of the ECCC, casting doubt on its proclaimed commitment to upholding fair trial rights for all parties.

### ***Harnessing the positive from the ECCC***

The ECCC has yet to positively impact domestic courts. Indeed, its potential to do so has recently been called into question in response to the controversy surrounding the highly politicized Mam Sonando trial. International human rights organizations have voiced concern that the verdict sets a worrying precedent for the legacy value of the ECCC in improving domestic fair trial protections, with Amnesty International observing that “far from setting a good example, the Khmer Rouge tribunal may have done just the opposite.”<sup>88</sup> Similarly, Clair Duffy from the Open Society Justice Initiative stated, “[w]hile the Tribunal has already helped improve the skills of some local judges and lawyers, the court system remains unchanged.”<sup>89</sup> However, notwithstanding its many deficiencies and criticisms, the ECCC remains the best promise for meaningful judicial and court administration reform in Cambodia.

A number of significant ECCC decisions and practices can be applied to enhance the integrity of the domestic criminal justice system and strengthen fair trial rights. The right to a fair trial is a “cardinal requirement” of the rule of law,<sup>90</sup> encompassing the principle that all people are equal before the law and that all are equally subject to, and must abide by, the

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<sup>87</sup> For example, a number of objections raised by the Prosecution during the testimony of Mr. Suong Sikoeun on 16 August 2012 were sustained by the Trial Chamber on the grounds that the questions put by the Defence invited the witness to speculate (*Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Transcript, 16 August 2012, p. 36, 58). The witness was directed not to respond to any questions put by the Defence starting with “if” (p. 51). When the Defence has raised objections on the same grounds, they have been almost invariably overruled, although in many instances accompanied by a direction from the Trial Chamber again advising the witness not to speculate. This has occurred, for example, in relation to an objection raised by counsel for Nuon Chea during the Prosecution’s examination of witness Em Oeun (*Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Transcript, 27 August 2012, p. 36-37) and in relation to an objection raised by counsel for Mr. Ieng Sary during the examination of Norng Sophang, where the Trial Chamber ruled that the objection was “ungrounded” although it noted that some of the witness’s previous responses had been “presumptuous” and reminded the witness of his obligation not to speculate (*Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Transcript, 4 September 2012, p. 39-40). The Trial Chamber has also sustained an objection raised by the Prosecution, finding that it was inappropriate for the Defence to try to “destabilize” a Civil Party witness during questioning (*Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Transcript, 28 August 2012, p. 72-73).

<sup>88</sup> Peter Zsombor, *Sonando Verdict a Tough Test for KRT Legacy*, CAMBODIA DAILY, 4 October 2012, at 1-2, quoting Rupert Abbott, Amnesty International’s Asia Researcher for Cambodia, referring to the example of Prime Minister Hun Sen telling visiting UN Secretary-General Ban Ki-moon that he would not allow Cases 003 and 004 to go forward.

<sup>89</sup> Peter Zsombor, *Sonando Verdict a Tough Test for KRT Legacy*, CAMBODIA DAILY, 4 October 2012, at 2.

<sup>90</sup> As described by eminent jurist Lord Bingham in his enlightening text, *THE RULE OF LAW 90* (Penguin Books 2011).

law.<sup>91</sup> The ECCC's demonstrated capacity to interpret and apply international fair trial standards, particularly as related to the ICCPR, is perhaps the most important aspect of its legacy value.<sup>92</sup>

At the pre-trial stage, decisions of the ECCC on the issue of bail and the criteria necessary to justify provisional detention in light of the right to liberty under Article 9 of the ICCPR are instructive to domestic courts. For example, in Case 001, the Pre-Trial Chamber confirmed on appeal that provisional detention of the Accused Duch was "necessary" having regard to Article 9 of the ICCPR and the Internal Rules, after considering in detail the justifications put forward as the basis for detention.<sup>93</sup> Despite the fact that a presumption of release on bail exists in domestic law,<sup>94</sup> the Cambodian criminal justice system continues to rely on incarceration as the default position for accused who are awaiting trial and applications for release on bail are rarely made or granted.<sup>95</sup> Bail hearings at the ECCC provide useful

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<sup>91</sup> Lord Bingham defines the principle of the "rule of law" as requiring "that all persons and authorities within the state, whether public or private should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered by the courts." *Id.*, at 8.

<sup>92</sup> The UN Office of the High Commissioner for Human Rights has described legacy as an important aspect of a hybrid court's capacity to strengthen "the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening judicial capacity." See United Nations Office of the High Commissioner for Human Rights (OHCHR), *Rule of Law Tools in Post Conflict States: Maximizing the Legacy of Hybrid Courts*, United Nations, 2008, p. 4-5, available at [www.ohchr.org/Documents/Publications/HybridCourts.pdf](http://www.ohchr.org/Documents/Publications/HybridCourts.pdf) (last visited 28 September 2012).

<sup>93</sup> *Duch Appeal Against Provisional Detention Judgement*, para. 57. The Pre-Trial Chamber found that the provisional detention by the OCIJ was a necessary measure to prevent the accused from exerting pressure on witnesses or victims; to prevent the destruction of evidence; to ensure his presence during the proceedings; to protect his security; and to preserve public order. Addressing the grounds for provisional detention under Internal Rule 63(3), the Pre-Trial Chamber found the grounds were met because: if released, the accused could intimidate witnesses (para. 34); it was essential that the witnesses not be afraid or pressured against testifying (para. 36); there was a risk that the accused would disappear (para. 39); if he were to be released, there would be a risk to the accused's safety from victims, their relatives and former S-21 staff (para. 43); and the impact of the Democratic Kampuchean regime, the interest of Cambodians and the press in the ECCC proceedings, and public knowledge of the accused's identity meant that his release would impact the public order (paras. 50, 52, 55).

<sup>94</sup> Art. 203 of the Criminal Procedure Code provides that "[i]n principle, the charged person shall remain at liberty" but "[e]xceptionally" they may be provisionally detained under the conditions of the Criminal Procedure Code. Article 204 provides that provisional detention may be ordered only for a felony or for misdemeanors involving a punishment of imprisonment of one year or more. Article 205 provides that provisional detention may be ordered where it is "necessary" to prevent the offense from happening again, to protect witnesses or preserve evidence or exhibits, to guarantee the presence of the accused at trial, or to protect the charged person's security or public order.

<sup>95</sup> *Joint Cambodian NGO Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the Kingdom of Cambodia*, delivered to the UN Committee Against Torture, 45<sup>th</sup> session, U.N. Doc. CAT/C/45/1 (1 November 2010) p. 4-5, available at [http://tpocambodia.org/uploads/media/Joint\\_Cambodian\\_NGO\\_CAT\\_Report\\_06-10-10\\_English.pdf](http://tpocambodia.org/uploads/media/Joint_Cambodian_NGO_CAT_Report_06-10-10_English.pdf) (last visited 10 October 2012); Cambodian Center for Human Rights, *Fourth Bi-Annual Report: Fair Trial Rights 2009-2011* (2012), p. 17-20, available at [http://www.cchrcambodia.org/index\\_old.php?url=media/media.php&p=report\\_detail.php&reid=81&id=5](http://www.cchrcambodia.org/index_old.php?url=media/media.php&p=report_detail.php&reid=81&id=5) (last visited 22 October 2012). The Center for Social Development's Court Watch Project ("CWP") has reported that in the cases observed by the CWP the courts

examples for national courts of a dynamic process: where the prosecution must establish concrete justifications for detention, the defence has the ability (and the obligation) to present arguments and rigorously challenge the basis for detention and judges must comprehensively examine those arguments and issue reasoned decisions, taking the presumption of liberty as a starting point.

The ECCC has also produced some valuable jurisprudence on the conditions under which an accused may be detained, including the restrictions that a court may impose regarding contact between an accused person and his wife,<sup>96</sup> and the right of a detained accused to access material on the case file in accordance with his right to participate in his defence and to ensure equality of arms with the prosecution.<sup>97</sup> The latter decision is of particular importance given that the Criminal Procedure Code forbids lawyers to provide copies or parts of the case file to their clients,<sup>98</sup> raising serious concerns about the right of accused – particularly those who are unrepresented – to a fair trial and to participate in their defence.<sup>99</sup>

The requirement at the ECCC for judges to produce reasoned decisions, which has been emphasized by the Supreme Court Chamber as “a corollary of the accused’s fundamental fair trial rights,”<sup>100</sup> is also an important precedent for domestic courts, where judicial reasoning is

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rarely released defendants following the initial appearance, even in cases involving relatively minor offenses. Court Watch Bulletin 2006, p. 8.

<sup>96</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/PCOJ (PTC05), Decision on Appeal Concerning Contact Between the Charged Person and his Wife, 30 April 2008, in which the Pre-Trial Chamber found that the decisions of the Co-Investigating Judges preventing contact between the accused IENG Sary and his wife, co-accused IENG Thirith, were not adequately reasoned and, in particular, did not explain how the limitation of contact was a necessary and proportional measure to protect the interests of the investigation (para. 18). The Pre-Trial Chamber found that the charged persons should be allowed to meet in accordance with the rules applicable at the Provisional Detention Facility. *Id.*, para. 21.

<sup>97</sup> *Case of Kaing Guek Eav alias “Duch”*, 001/18-07-2007-ECCC-OCIJ, Co-Investigating Judges Order on access to the case file by detainees, 23 January 2009. The OCIJ, applying jurisprudence from the ECtHR, recognized that “there has been an increasing tendency for the Court to recognize that the right of the accused to participate in his or her own defence and equality of arms with the prosecution requires a certain level of ‘direct, satisfactory’ access to the evidence by the accused in person.” *Id.*, para. 11. It granted the Defence’s request, setting out a general principle allowing the accused to access documents on the case file, while taking into account practical constraints at the detention facility. *Id.*, para. 15.

<sup>98</sup> Art. 149 of the Criminal Procedure Code provides that the lawyer may read out part of the case file to his client, but may not give copies of part of the case file to his client.

<sup>99</sup> In Cambodia, not every indigent accused has the right to a lawyer appointed by the court. Article 203 of the Criminal Procedure Code provides that the assistance of a lawyer is compulsory only if the case involves a felony, or the accused is a minor. In the majority of cases observed by the CWP in 2006, defendants were not represented by defence counsel at any time during the investigative stage and only 46% were represented at trial. Even in cases where a defence lawyer was assigned during the investigation, they were often assigned “on the spot” and were not able to adequately prepare for the investigative proceeding. Court Watch Bulletin 2006, p. 4.

<sup>100</sup> *See, e.g.*, Decision on Nuon Chea Rule 35 Appeal, para. 25. In response to an appeal filed by the NUON Chea Defence team against the Trial Chamber’s Decision refusing a Rule 35 request for sanctions to be imposed

often deficient or, indeed, nonexistent. Many of the ECCC’s decisions demonstrate its ability to conduct independent, rigorous and comprehensive analysis of complex international legal principles, rather than simply accepting at face value the way that these provisions have been interpreted in the past by international criminal tribunals. For example, in consideration of the controversial extended form of Joint Criminal Enterprise (“JCE III”) as a mode of liability, the Pre-Trial Chamber conducted an extensive critical analysis of the authorities that had previously been relied upon to support JCE III’s existence in customary international law, rather than simply adopting the position of the ICTY Appeals Chamber on this issue.<sup>101</sup> It reversed the holding of the OCIJ that this mode of liability could be applied at the ECCC, concluding that JCE III was not reflective of customary international law during the period 1975-1979.<sup>102</sup> The Trial Chamber affirmed the Pre-Trial Chamber’s decision.<sup>103</sup>

Decisions of the ECCC that comprehensively interpret fair trial rights under the ICCPR by reference to international jurisprudence can also be instructive to domestic courts. For example, in considering the right to adequate time and facilities for the preparation of a defence and the right to communicate with counsel of one’s choosing pursuant to Article 14 of the ICCPR, the Pre-Trial Chamber held that an order of the OCIJ refusing a Defence request for audio-visual recording of meetings between an accused and his lawyer at the detention facility violated the accused’s fair trial rights.<sup>104</sup> Referring to jurisprudence from the ECtHR, the Pre-Trial Chamber adopted a broad interpretation of Article 14, finding that the way in which this right was narrowly applied by the OCIJ was “not compatible with the object or purpose of fair trial guarantees.”<sup>105</sup> Similarly, the ECCC has delivered significant

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for statements made by the Prime Minister against the accused, the Supreme Court Chamber found that the oral decision of the Trial Chamber rejecting the Defence’s request was a “non-authoritative declaration, devoid of reasoning” (para. 26) and that the Trial Chamber erred in holding the request inadmissible, “as it unduly bars the Defence’s access to the appellate process” (para. 29).

<sup>101</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC35), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010. Having reviewed the authorities relied upon by the ICTY Appeals Chamber in *Prosecutor v. Tadić* in relation to JCE III, the Pre-Trial Chamber was of the view that they do not provide sufficient evidence of consistent State practice or *opinio juris* at the time relevant to Case 002. *Id.*, para. 77.

<sup>102</sup> *Id.*, para. 88.

<sup>103</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011.

<sup>104</sup> *Case of NUON Chea et al.*, 002/19-09-2007/ECCC/OCIJ (PTC64), Decision on IENG Sary’s Appeal Against Co-Investigating Judges’ Order Denying Request to Allow Audio/Video Recording of Meeting with IENG Sary at the Detention Facility, 4 June 2010.

<sup>105</sup> *Id.*, para. 31.

decisions on the fitness of an accused to stand trial<sup>106</sup> and the legality of continued detention without trial,<sup>107</sup> which could be applied by domestic courts to strengthen the fair trial rights of the accused.

Many of the procedural mechanisms employed during trial at the ECCC can also be adopted for use by domestic courts, to remedy significant deficiencies in the way domestic trials are currently conducted. These practices include the ability of parties to object to questions;<sup>108</sup> the application of rules of evidence;<sup>109</sup> and the adoption of mechanisms that allow for the testing and exclusion of evidence.<sup>110</sup> Given that the domestic Criminal Procedure Code provides merely that the court will consider the evidence submitted for its examination based on the judge's "intimate conviction,"<sup>111</sup> these practices provide an important example for domestic courts in restricting the use of evidence to safeguard fair trial rights.

### ***Where to from here?***

The time has come to think about *how* domestic courts can harness the positive jurisprudence and procedural mechanisms emerging from the ECCC, and develop the means through which to incorporate these practices. This will require Government engagement as well as

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<sup>106</sup> *Case of NUON Chea et al.*, 002/19-09-2007/ECCC/TC, Reassessment of Accused's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011, 13 September 2012, paras. 18-21. Relying on jurisprudence from the ICTY and the Special Panels, the Trial Chamber re-affirmed its findings that the Accused IENG Thirith is unfit to stand trial.

<sup>107</sup> *Id.*, paras. 19-23, in which the Trial Chamber considered jurisprudence from the ICC, ECtHR and the United States Supreme Court in considering the legality of IENG Thirith's continued detention in light of the internationally proscribed protections against indefinite detention and the right to be tried without undue delay. The Trial Chamber ordered IENG Thirith's immediate release on the grounds that there was no basis for her continued detention. *Id.*, para. 30. This decision has been appealed to the Supreme Court Chamber by the Office of the Co-Prosecutors, but at the time of writing no decision by the Supreme Court Chamber has been issued.

<sup>108</sup> While the Internal Rules do not include a right to raise objections, it has become standard practice at the ECCC since its operation commenced.

<sup>109</sup> Rule 87(2) of the Internal Rules provides that "[a]ny decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination." Under Rule 87(3), the Trial Chamber also has the discretion to reject a request for evidence when specific criteria are met, including where the evidence is irrelevant or repetitious, unsuitable to prove the facts it purports to prove or not allowed under the law. The opportunity for parties to object to any document pursuant to these criteria is also a precondition for the admission of all new documents before the Trial Chamber. *Case of NUON Chea et al.*, 002/19-09-2007/ECCC/TC, Decision Concerning New Documents and Other Related Issues, 30 April 2012. Once material that satisfies these minimum standards for admissibility has been put before the Trial Chamber, the Trial Chamber will then consider the probative value of the evidence and the weight to be accorded to it. *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Decision on Admissibility of Material on the Case File as Evidence, 27 May 2009, para. 7.

<sup>110</sup> For example, the Pre-Trial Chamber has found that documents obtained through torture cannot be relied upon for the truth of their contents. *Case of NUON Chea et al.*, 002/19-09-2007/OCIJ(PTC31), Decision on Admissibility of IENG Sary's Appeal Against the OCIJ's Constructive Denial of IENG Sary's Requests Concerning Identification of and Reliance on Evidence Obtained Through Torture, 10 May 2010, para. 38.

<sup>111</sup> Art. 321.

commitment to meaningful and sustainable reform of the entire judicial system, with the overriding objective of advancing the rule of law in Cambodia.

As an appropriate follow-up to the ECCC Legacy Conference, consideration should be given to holding a symposium with input and cooperation from all levels of the judicial system, including representatives of the Council for Legal and Judicial Reform, Ministry of Justice, national judges, prosecutors and lawyers, representatives of non-governmental organizations and international experts, including those from all organs and sections of the ECCC (judges, defence lawyers and prosecutors). The purpose of the symposium would be to identify the problems within the current judicial system;<sup>112</sup> to devise modalities and solutions to address those problems; to identify general, positive aspects of the ECCC for domestic application;<sup>113</sup> and to formulate an action plan for how the positive and transferable jurisprudence and procedural mechanisms from the ECCC could be applied uniformly and consistently throughout domestic courts.

From the symposium, working groups should be formed, comprised of a smaller constituent of national and international lawyers, judges and prosecutors. These working groups should carefully sift through the positive and negative aspects emerging from the ECCC and identify those aspects that advance fair trial rights and are appropriate and able to be applied by domestic courts, to remedy known and widely documented weaknesses in the current judicial system. A working session or plenary of the working groups should be convened to identify the legislative and procedural changes that are required to enable domestic courts to consistently apply international standards, with the assistance of ECCC jurisprudence and practice. This task should be approached by reviewing all laws relating to the criminal justice sector as a whole, rather than one piece of legislation at a time, to ensure that any proposed changes fit within the overall legal context and are consistent with, and complementary to, changes made in each law individually.<sup>114</sup> This group should then

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<sup>112</sup> It is important to note that these weaknesses in the Cambodian context are well-known and obvious (as detailed earlier in this article) and have been publicized by numerous monitoring agencies and non-governmental organizations working in the area of criminal justice. Further resources do not need to be devoted to re-identifying these problems. Rather, the focus should be on building upon this knowledge to identify areas in which ECCC jurisprudence could assist in remedying these deficiencies.

<sup>113</sup> Some positive aspects of the ECCC that can be domestically adopted were identified at the ECCC Legacy Conference, which hosted a number of working groups on a variety of topics, such as, the jurisprudential legacy of the ECCC, lessons learned from trial monitoring, and archiving and documenting the work of the ECCC.

<sup>114</sup> The benefits of a holistic approach to legislative reform have been identified during the democratic reform processes of other post-conflict countries, for example through the work of the Brčko Law Revision Commission (“BLRC”) in Bosnia and Herzegovina. Determining that the entire judicial and criminal justice

forward its recommendations to the Government and relevant stakeholders for review and comment, with concrete deadlines set for providing responses and strategies for future action.

The Council for Legal and Judicial Reform, the Ministry of Justice and national stakeholders must assist and be engaged in all stages of the symposium and working groups to instill a sense of ownership in the proposed measures for a self-sustaining reform process. The final stage will require the Government, through the Ministry of Justice, to facilitate implementation of the recommended measures. The ultimate goal of this process is to ensure that the positive aspects of ECCC jurisprudence and procedural mechanisms can be applied uniformly, consistently and predictably throughout domestic courts to strengthen fair trial rights and judicial capacity. These legal principles must also be implemented throughout law schools and judicial and legal training institutions, to train domestic lawyers, judges and prosecutors on the use of ECCC jurisprudence and procedure.

### ***Clarion call to defence lawyers***

There is no reason for defence lawyers practicing in the domestic courts to wait for the Government to take action. They must act as the vanguard for fair trial rights and lead the way in this reform process by consistently invoking international legal principles and provisions of the ICCPR before domestic courts. Whenever possible, arguments concerning these rights should be anchored by ECCC jurisprudence and procedure. If the ECCC has interpreted a particular right emanating from the Constitution, then reference should be made to it while highlighting that the ECCC is a domestic court, bound by and adhering to the Constitution. If a practice is applied at the ECCC, such as the requirement to provide legal reasoning for a decision, why should defence lawyers shy away from demanding that domestic judges be obliged to do the same? If the prosecutor is privately engaging in conversations with the trial judge about the case, whether it is on the merits or for administrative matters, the defence lawyer should point out that the ECCC Supreme Court Chamber noted that *ex parte* communications between a sitting judge and the prosecutor

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system needed to be overhauled, the BLRC adopted a strategy of reviewing all laws related to a particular sector as a whole, rather than each law individually, to ensure the proposed changes were consistent and fit within the legal framework as a whole. See Michael G. Karnavas, *Creating the Legal Framework of the Brčko District of Bosnia and Herzegovina: A Model for the Region and Other Postconflict Countries*, 97 AM. J. INT'L L. 111, 116 (2003).

should be avoided because they “may create the appearance of asymmetrical access enjoyed by the prosecutor to the trial judge.”<sup>115</sup>

Defence lawyers should begin to sift through the decisions and practices of the ECCC to identify those that can be applied in furtherance of their clients’ fair trial rights. Considering that not all ECCC jurisprudence or procedural mechanisms are readily accessible, the Bar Association of the Kingdom of Cambodia (“BAKC”) can and should commit to assist in this process. The BAKC should select a panel of lawyers to work with the various court monitoring groups and identify the most essential decisions and procedural practices to be advocated by defence lawyers in their cases.

By fearlessly and zealously advocating for domestic courts to conduct trials in accordance with Constitutionally enshrined fair trial principles as applied and interpreted by the ECCC in selected jurisprudence and procedural practices, defence lawyers can play a leading role in “internationalizing” domestic cases throughout the courts of Cambodia, not merely in their Extraordinary Chambers.

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<sup>115</sup> *Case of NUON Chea et al.*, 002/19-09-2007/ECCC-TC/SC(12), Decision on IENG Sary’s Appeal Against the Trial Chamber’s Decision on Motions for Disqualification of Judge Silvia Cartwright, 17 April 2012, para. 24.