



Assurances Regarding Non-Prosecution

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The ECCC is a special court with the mandate to try very few Khmer Rouge officials. It is also the only court likely to address crimes committed during the Democratic Kampuchea period. For this reason, although the Internal Rules explicitly and thoroughly protect the right against self-incrimination, there was little initial effort to ensure that witnesses not only knew about their right to silence, but also understood it and felt confident to exercise it. That has changed over time, with the Trial Chamber progressively taking a stronger approach toward protecting the rights of witnesses.

In the Court's first trial against Kaing Guek Eav *alias* Duch, the head of the S-21 security center, the process of informing witnesses about their right against self-incrimination was treated *pro forma* until 43 days into trial when Defense Counsel Francois Roux told an insider witness that he was in potential danger of prosecution and should speak to counsel about his possible liability before national courts. The Prosecution expressed concern that the issue hadn't been raised in advance, but instead in front of the witness just before he was to testify, potentially generating alarm and impacting his willingness to speak truthfully. During this witness' subsequent testimony, and the testimony of other S-21 staff, the Trial Chamber provided a lawyer to advise them when the potential for self-incrimination arose.

The appropriate procedures for upholding the right against self-incrimination have recently been debated in Case 002 against the surviving senior Khmer Rouge leaders, due to concern that once again the issue is being raised at the last minute in front of witnesses, possibly as a form of intimidation. As a consequence, the Trial Chamber issued Directions Pursuant to Internal Rule 28 (right against self-incrimination) on May 10,

2012, stating the Court's process for ensuring the right going forward. They include informing all witnesses of the right, identifying persons who may need legal advice, and making counsel available to those who ask for help or are thought to require it.

Due to the Co-Prosecutors' concern that the implementation of these safeguards might deter an insider witness from testifying, they requested that the Court "complement" this procedure by providing two assurances of non-prosecution: The Co-Prosecutors will not initiate ECCC proceedings against a witness, and a "witness cannot be prosecuted under current Cambodian law in any other Cambodian court." In support of their request, the Prosecutors argued that although the new Cambodian Criminal Code of 2009 provides for the prosecution of international crimes, it does so only prospectively, and national crimes under the former 1956 Code would be subject to an expired 10-year statute of limitations. [Co-Prosecutor's Request for Leave to Provide Assurances with Respect to Non-Prosecution for Witnesses (May 30, 2012)]. In essence, they argue that only the ECCC is vested with legal authority to try crimes from the 1975-1979 period, and thus no one else will ever be held accountable for that era's mass atrocities — a disturbing legal proposition, no matter how remote the possibility that national courts will ever supplement the work of the ECCC by prosecuting DK crimes.

As pointed out by the Ieng Sary defense team, even if there is no current law giving Cambodian courts jurisdiction over DK crimes, the Cambodian National Assembly could always decide to change the law at some future date. As they note ruefully, "In 1996, when Mr. IENG Sary was granted his Royal Pardon and Amnesty, there was no pending legislation to create the ECCC." Moreover, a ruling to the contrary would "send the message that victims cannot expect justice in any judicial setting in Cambodia." [Ieng Sary's Response to the Co-Prosecutor's Request for Leave to Provide Assurances (June 20, 2012)].

In its Response to Co-Prosecutor's Request for Leave to Provide Assurances with Respect to Non Prosecution for Witnesses (June 19, 2012), the Trial Chamber supported the Prosecution request, but only with regard to assurances of non-prosecution by the ECCC, which it found to be supported by international practice. However, it said that providing assurances of non-prosecution before Cambodian Courts would be "inappropriate given the ECCC's role and legal framework."

The practice of the Trial Chamber in protecting the right against self-incrimination has advanced considerably since it first became an issue of concern in the *Duch* trial. The weaknesses of Cambodian courts in applying the law are well known, with accused sometimes facing conviction without compelling evidence and with no opportunity to present a defense. Assurance of non-prosecution under such circumstances means little or nothing. Conversely, the Trial Chamber's actions to uphold the right against self-incrimination, and to provide local counsel the opportunity to make it meaningful, is one way in which ECCC practice is setting a positive model for the domestic judicial system.