

## The Khmer Rouge Tribunal Paves the Way for Additional Investigations

By [Neha Jain](#)

### Introduction



Prosecutors of international criminal tribunals face an unusual dilemma that purely national jurisdictions do not normally experience: what happens when the prosecution of individuals suspected of committing grave crimes is challenged on the ground that it undermines national reconciliation? Perhaps nowhere is this conflict more apparent than in the Extraordinary Chambers in the Courts of

Cambodia, colloquially known as the Khmer Rouge Tribunal or the ECCC. On September 2, 2009, the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) made public its decision in the dispute between the Co-Prosecutors of the ECCC over whether to proceed with the investigation of additional suspects.<sup>[1]</sup> The dispute is unique in the history of international criminal tribunals. It marks the first ever instance of international prosecutors simultaneously exercising their discretion to reach divergent decisions on whom to prosecute. It places the Pre-Trial Chamber in the novel position of an international judicial organ having to decide between these competing claims. The ECCC is also unusual in having equal national and international counterparts at all levels of decision making (except the judicial organ, where the national judges are in a majority). The dispute therefore implicates issues that challenge the seeming coherence of international criminal justice and its diverse constituencies.

### Background

The ECCC is tasked with prosecuting senior leaders and those most responsible for the crimes committed during the Khmer Rouge regime which governed Cambodia from 1975 to 1979.<sup>[2]</sup> In accordance with the Internal Rules of the ECCC, all prosecutions are the responsibility of co-equal national and international prosecutors.<sup>[3]</sup> Once the Co-Prosecutors have reason to believe that crimes within the ECCC's jurisdiction have been committed, they are tasked with opening a judicial investigation by forwarding an "Introductory Submission" to the Office of the Co-Investigating Judges (OCIJ). This statement contains the relevant facts, offences and legal provisions, and the names of the accused, if applicable. It is

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accompanied by evidentiary material in support of its claims.<sup>[4]</sup> The Co-Investigating Judges conduct a judicial investigation on the basis of this Introductory Submission and other Supplementary Submissions. The investigation is concluded with the issuance of a Closing Order that either indicts the charged person and forwards the case to trial or dismisses it.<sup>[5]</sup>

The ECCC has so far indicted five suspects, four of whom were high ranking members in the regime, and the fifth, Kaing Guek Eav alias Duch, who headed the infamous Tuol Sleng prison in Phnom Penh.<sup>[6]</sup> The current dispute between the Co-Prosecutors arose out of the decision of the international Prosecutor to forward new Introductory Submissions to the OCIJ. These allegedly contained new facts and crimes, thus opening up the possibility of investigating additional suspects. According to the national Prosecutor, who has resisted this decision on practical and policy grounds, additional investigations would undermine national reconciliation efforts, especially in light of Cambodia's history of instability. She has also argued that the spirit of the ECCC law does not contemplate further prosecutions, and that the Court's limited duration and resources support a narrower range of potential suspects for trial.<sup>[7]</sup>

In accordance with the constitutive documents and Internal Rules of the ECCC, the dispute was referred to the Pre-Trial Chamber (PTC), an organ specifically mandated to resolve disputes between the Co-Prosecutors. The PTC is composed of three national and two international judges and follows the "super-majority rule" to adopt a decision, which requires four out of the five judges to vote in its favor.<sup>[8]</sup> In the event this super-majority cannot be obtained, the law favors prosecution and moving forward with the investigation.<sup>[9]</sup>

### **Legal Arguments Raised by the Parties**

The national Prosecutor objected to the opening of additional investigations on three main grounds.<sup>[10]</sup> First, she argued that the facts and crimes included in the new Introductory Submissions were already covered in the First Introductory Submission that dealt with the totality of crimes committed during the Khmer Rouge regime. According to the national Prosecutor, since a new Introductory Submission could be issued only pursuant to the emergence of new facts that were not already under investigation, the Submissions in this case were not necessary. Second, she stated that the preliminary investigation leading to the issuance of the new Submissions was illegal because it was conducted unilaterally and without her knowledge or assistance. Finally, she reiterated her argument that the additional investigations would not be in the interest of national reconciliation and that, given the ECCC's limited time and resources, they would endanger the existing trials. She cautioned that the indictments could lead those loyal to the Khmer Rouge to commit acts of violence, and may also prevent ex-Khmer Rouge members from acting as witnesses for fear of being indicted.

The international Prosecutor challenged these arguments on factual and legal grounds.<sup>[11]</sup> He asserted that the First Introductory Submission had only contained a set of twenty-five specific criminal facts and that the new Submissions contained new facts and crimes. He challenged the national

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Prosecutor's illegality argument and claimed that she was aware of the preliminary investigations, particularly since they were based on in-house documents collected prior to the First Introductory Submission with her consent. He also stated that the national reconciliation arguments are inconsistent with the ECCC's mandate to ensure accountability. In particular, Rule 53 of the Internal Rules made it clear that the main criterion for deciding whether to proceed with investigations was whether there was "reason to believe" that crimes had been committed.

### **The Decision of the Pre-Trial Chamber**

The decision of the Pre-Trial Chamber saw a split between the national and international judges, the former ruling in favor of the national Prosecutor and the latter in favor of the international Prosecutor. The national judges agreed with the national Prosecutor that the preliminary investigation was a significant starting point that validated the Introductory Submission. Since the preliminary investigations had been carried out unilaterally by the international Prosecutor, without the knowledge of, or in co-operation with the national Prosecutor, they were in violation of ECCC law and the Internal Rules.<sup>[12]</sup> They also disagreed that the new Introductory Submissions contained additional facts or crimes. Hence, they dismissed the necessity argument for filing the new Submissions, especially since the First Submission judicial investigation by the OCIJ had not been completed.<sup>[13]</sup> The national judges considered these conclusions sufficient to vitiate the filing of new Introductory Submissions and therefore did not review the Co-Prosecutors' additional grounds.

The international judges disagreed with their national counterparts on both these conclusions. They considered that the national Prosecutor's unawareness of the preliminary investigations comprised background information rather than an issue germane to the dispute. They surmised that, based on the national Prosecutor's own assertions, she should have known of the investigations.<sup>[14]</sup> They further noted that the First Introductory Submission could not possibly have included the totality of crimes committed during the Khmer Rouge regime, since this would have lacked the element of specificity required of an Introductory Submission under Internal Rule 53(1). Had this truly been the case, the Co-Prosecutors would not have filed Supplementary Submissions after the First Introductory Submission requesting the OCIJ to investigate new facts. They also compared the new Submissions with the First Introductory Submission and found that the former did in fact contain new crimes along with facts that overlapped those contained in the First Introductory Submission. According to the international judges, the international Co-Prosecutor could file a new Submission in relation to these new crimes in order to cover the criminal responsibility of additional suspects.<sup>[15]</sup> Since the national judges rejected to rule on the third issue of national reconciliation raised by the national Prosecutor, the international judges also refused to comment on it. They did nevertheless point to Internal Rule 53(1) as providing no room for prosecutorial discretion. Thus, according to the international judges, once the Co-Prosecutors had reason to believe that crimes within the jurisdiction of the ECCC had been committed, they were obliged to open a judicial investigation by forwarding an Introductory Submission to the OCIJ.<sup>[16]</sup>

## Discretion to Prosecute

The issue of prosecutorial discretion however deserves a far more nuanced analysis than suggested by the bald statement of the international judges.<sup>[17]</sup> At first glance, Rule 53(1) certainly appears closer to the civil law model of *Legalitätsprinzip* that obliges the prosecutor to prosecute every serious crime falling within his or her mandate. A corresponding obligation seems to extend to the OCIJ, where the Internal Rules declare a judicial investigation to be compulsory for crimes within the ECCC's jurisdiction.<sup>[18]</sup> The only factors compelling dismissal of a case by the OCIJ are lack of jurisdiction, insufficiency of evidence, or non-identification of the perpetrators.<sup>[19]</sup> A closer inspection however reveals that the Co-Prosecutors enjoy considerable latitude in fulfilling their duty to prosecute. After determining whether there is "reason to believe" that crimes within the ECCC's jurisdiction have been committed, they are tasked with launching an investigation.<sup>[20]</sup> Furthermore, they are free to decide which factors to take into account in concluding who should be considered a "senior leader" or "most responsible" for the crimes alleged.

There is no provision in the ECCC law explicitly authorizing a refusal to investigate or prosecute on national reconciliation grounds. However, the Preamble of the Agreement signed between the Cambodian Government and the United Nations,<sup>[21]</sup> which is one of the constitutive instruments of the ECCC, states that one of ECCC's aims is to promote justice, stability, peace and security, as well as national reconciliation. The fact that the imperatives of domestic peace and stability were meant to be taken into account during prosecutions is also clear in the documents and reports preceding the ECCC's establishment.<sup>[22]</sup>

Further, in the event of a lacuna or ambiguity in its procedural law, the ECCC may consider relevant rules of procedure established at the international level.<sup>[23]</sup> While the practice of other international tribunals suggests that international prosecutors have exercised their discretion on whether and whom to prosecute based on a host of factors,<sup>[24]</sup> including policy considerations, there is no consensus on when and to what extent it is appropriate to do so. The Rome Statute of the International Criminal Court (ICC) is the only constitutive instrument of an international tribunal that expressly allows the Prosecutor to choose whether to investigate or prosecute "in the interests of justice."<sup>[25]</sup> Though the need for national reconciliation and the provision of alternative justice mechanisms is certainly acknowledged as a possible interpretation of this mandate,<sup>[26]</sup> the ICC Prosecutor has publicly declared his refusal to bow to purely political constraints.<sup>[27]</sup> There is moreover no clear guidance in the Statute on how the Prosecutor is expected to balance the need for prosecution versus the interests of justice.

## Conclusion

Since the judges failed to reach a super-majority in favor of the national Prosecutor, the investigations will go forward. The issues raised here may however have to be revisited if the national and international Co-Investigating Judges, to whom the new Introductory Submissions are forwarded, also

disagree on whether to issue indictments based on the new Submissions. The dispute will then have to be referred to the Pre-Trial Chamber. While the Chamber managed to decide the dispute between the Co-Prosecutors on relatively uncontroversial grounds, it may not be able to sidestep the primary legal issue that it was able to avoid this time – the legitimacy of not proceeding with investigations or prosecutions against suspects on the ground that it will adversely impact national reconciliation.<sup>[28]</sup> If the international judges' interpretation of Internal Rule 53(1) is valid, then this is not a legitimate ground for refusing to proceed with prosecutions.

Through its cautious judgment in the present case, the Chamber has avoided entering into this controversial terrain that international criminal tribunals such as the ICC will be forced to confront. In so doing, it has perhaps only postponed the inevitable. Furthermore, while the divergent decisions of the judges are based on objectively differing factual conclusions, they may back the ECCC's critics, who contend that the decisions of the national and international organs of the court may be influenced by the respective political considerations of their constituencies.

### **About the Author**

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### **Endnotes**

[1] Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, Case No. 001/18-11-2008-ECCC/PTC (Aug. 18, 2009), *available at* [http://www.eccc.gov.kh/english/news.view.aspx?doc\\_id=308](http://www.eccc.gov.kh/english/news.view.aspx?doc_id=308) [hereinafter PTC decision].

[2] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea art. 1 (2004), *available at* [http://www.eccc.gov.kh/english/cabinet/law/4/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf) [hereinafter ECCC law].

[3] Extraordinary Chambers in the Courts of Cambodia Internal Rules, Rule 49(1), *available at* [http://www.eccc.gov.kh/english/cabinet/files/irs/ECCC\\_IRs\\_English\\_2007\\_06\\_12.pdf](http://www.eccc.gov.kh/english/cabinet/files/irs/ECCC_IRs_English_2007_06_12.pdf) [hereinafter ECCC Internal Rules].

[4] *Id.* Rule 53.

[5] *Id.* Rules 53, 55, 67.

[6] The five accused, who have been charged war crimes and/or crimes against humanity, are Kaing Guek Eav (alias Duch), the head of the S-21 prison in Democratic Kampuchea; Khieu Samphan, the DK regime's former head of state; Ieng Sary, the former Deputy Prime Minister and Minister for Foreign Affairs; his wife Ieng Thirith, who was Minister for Social Affairs; and Nuon Chea, the Khmer Rouge's chief ideologue: see Case Information

Sheets for Case 001, available at <http://www.eccc.gov.kh/english/caselfo001.aspx>, and Case 002, available at <http://www.eccc.gov.kh/english/case002.aspx>.

[7] Press Release, Office of the Co-Prosecutors in the Extraordinary Chambers in the Courts of Cambodia, Statement of the Co-Prosecutors (Jan. 5, 2009), available at [http://www.eccc.gov.kh/english/cabinet/press/84/Statement\\_OCP\\_05-01-09\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/press/84/Statement_OCP_05-01-09_EN.pdf).

[8] ECCC law, *supra* note 2, art. 20 (new) and art. 23 (new); ECCC Internal Rules, *supra* note 3, Rules 71, 72.

[9] ECCC Internal Rules, *supra* note 3, Rule 71(4).

[10] Considerations of the Pre-Trial Chamber, *supra* note 1, ¶¶ 28-38.

[11] *Id.* ¶¶ 39-43.

[12] *Id.*

[13] *Id.* ¶¶ 20-30 (opinion of Judges Prak, Ney and Huot).

[14] *Id.* ¶¶ 2-4 (opinion of Judges Lahuis and Downing).

[15] *Id.* ¶¶ 5-20 (opinion of Judges Lahuis and Downing).

[16] *Id.* ¶ 23 (opinion of Judges Lahuis and Downing).

[17] For a more detailed presentation of these arguments, see Neha Jain, *Between the Scylla and Charybdis of Prosecution and Reconciliation: The Khmer Rouge Trials and the Promise of International Criminal Justice*, DUKE J. INT'L & COMP. L. (forthcoming).

[18] ECCC Internal Rules, *supra* note 3, Rule 55(1).

[19] *Id.* Rule 67(3).

[20] *Id.* Rule 53(1).

[21] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Khmer Rouge, Preamble (June 6, 2003), available at <http://www.eccc.gov.kh/english/agreement.list.aspx> [hereinafter Framework Agreement].

[22] *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution*, G.A. Res. 52/135, ¶¶ 102-111, U.N. Doc. A/53/850, U.N. Doc. S/1999/231 (Mar. 16, 1999).

[23] Framework Agreement, *supra* note 21, art. 12.

[24] See, e.g., Hassan B. Jallow, *Prosecutorial Discretion and International Criminal Justice*, 5 J. INT'L CRIM. J. 145, 154 (2005); Morten Bergsmo, Catherine Cissé & Christopher Staker, *The Prosecutors of the International*

*Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and the ICTR, and the ICC Compared, in THE PROSECUTOR OF AN INTERNATIONAL CRIMINAL COURT* 121, 135 (Loiuse Arbour et al. eds., 2000).

[25] Rome Statute of the International Criminal Court arts. 53(1)(c), (2)(c), July 17, 1998, 2187 U.N.T.S. 90.

[26] See, e.g., Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice*, 3 J. INT'L CRIM. J. 695 (2005); Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481 (2003).

[27] See ICC, *Address by Mr. Luis Moreno-Ocampo, Nuremberg, 24/25 June 2007, Building a Future on Peace and Justice*, available at [http://www.icc-cpi.int/library/organs/otp/speeches/LMO\\_nuremberg\\_20070625\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/speeches/LMO_nuremberg_20070625_English.pdf).

[28] Even though the Internal Rules do not mention national reconciliation as a ground for dismissal of the case by the Co-Investigating Judges, they may well take the view that the grounds contained therein are non-exhaustive, and that this is a reasonable interpretation of the ECCC's mandate.