

Recent Developments at the Extraordinary Chambers in the Courts of Cambodia

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Recent Developments at the Extraordinary Chambers in the Courts of Cambodia (ECCC) is a regular report issued by the Open Society Justice Initiative examining progress, priorities, and challenges at the ECCC. Other Justice Initiative reports and publications on the ECCC can be found at <http://www.justiceinitiative.org/activities/ij/krt>.

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

The Extraordinary Chambers in the Courts of Cambodia (ECCC) continues to face pressing challenges that require immediate and ongoing attention. In August 2009, the ECCC's donors, the United Nations, and the Cambodian government agreed on a package of anticorruption measures for the court. The package's framework remains skeletal, however, and significant additions are needed to ensure it works, including establishing an effective whistleblower protection program, increasing the transparency of the anticorruption process so its effectiveness can be monitored, and creating a credible way to address past allegations. Meanwhile, fears about government interference in judicial and prosecution decisions have grown rather than diminished. In addition, delays in the investigation of the four other accused individuals (the "002 case") remain unaddressed, creating the likelihood of a considerable wait before their trial can take place.

During the period covered by this report, international prosecutor Robert Petit notified the court that he would step down in August 2009. To date, no successor has been named. The court is in the middle of its first trial, the investigation of the case against the four other accused is at the critical final stage, and an active disagreement about whether to pursue additional prosecutions is unresolved. The ECCC cannot afford a delay in identifying a new international prosecutor.

Cambodians have been streaming to the trial of Kaing Guek Eav, alias "Duch," since it began on March 30, 2009, with nearly 500 observers packing the court each day. Duch is being prosecuted for his alleged role in atrocities committed at the infamous torture center, the S-21 prison, during the Khmer Rouge reign. The S-21 prison, now the location of the Tuol Sleng Genocide Museum in Phnom Penh, served as a death camp for over 12,000 prisoners who either died of starvation or torture at the prison, or were taken to the nearby killing fields of Choeung Ek and executed. In addition to those who attend the trial, many more Cambodians are watching live television coverage or following the trial through daily newspaper and radio coverage.

Duch's trial is providing Cambodians with vivid testimony about the conditions at S-21 prison and explanations from Duch and others concerning how and why some of the Khmer Rouge atrocities occurred. In this civil law trial, Duch has been given the opportunity to address the court repeatedly and to confront witnesses. He has frequently acknowledged moral and legal responsibility for the crimes that occurred at the prison, but never fails to remind the court that he had no choice in his actions and would have been killed if he failed to carry out orders from the "upper echelon."

While court management problems slowed the beginning weeks of the trial, the Trial Chamber has made vast improvements since then, and the process is now moving forward with acceptable efficiency. Problems remain with ineffective or repetitive questioning, balancing the rights of the accused with the interests of civil parties, and translation difficulties. But these problems do not overshadow the contribution that this

dramatic trial seems to be making to Cambodians' increased understanding of their past and what constitutes justice for that past.

Recommendations

To the ECCC, donors, the United Nations, and the government of Cambodia:

- *Urgently build on the framework of the new anticorruption mechanism to ensure its effectiveness, including:*
 - Establishing effective whistleblower and witness protection measures for those who report corruption;
 - Instituting measures to enhance transparency, including a public reporting requirement for the Independent Counsellor charged with receiving corruption complaints;
 - Providing a standing independent investigative capacity as a fall-back if the Independent Counsellor's interventions are insufficient;
 - Addressing existing corruption allegations; and
 - Publicizing anticorruption programs and measures to the court's staff and to the public.
- *Halt attempts at political interference:* Greater leadership from senior international staff, the UN, and the donor community is needed to ensure that the government of Cambodia ceases all attempts to improperly interfere with judicial and prosecutorial decisions.
- *Devote more funds and effort to a robust outreach effort.*
- *Contribute additional funding and expertise to ensuring the ECCC leaves a positive legacy and impact on the legal and judicial profession and rule of law in Cambodia.*

To the United Nations:

- In searching for a new chief international prosecutor, the UN should seek out persons with the strong leadership, diplomatic and prosecutorial skills necessary to perform the functions of this important office at a critical stage in the life of the ECCC, and ensure he or she is in place as soon as possible.

To the ECCC judges:

- In revising the ECCC's Internal Rules to address the victim participation problems the court is currently encountering, ECCC judges should consider the following procedural suggestions:
 - Imposing a system of joint representation for civil party participation, to fairly consolidate the interests of many of the civil parties;
 - Allowing separate representation and trial participation to advance the unique interests of a small group of civil parties;¹
 - Limiting the scope of civil party participation to the issues that do

¹ For example, unique representation may be needed for members of minority groups disproportionately affected by Khmer Rouge policies, or victims subject to sexual assault or forced marriages.

not substantially overlap with the interests or role of the prosecutors.

This report covers issues of ongoing concern at the court, including the need for an effective anticorruption mechanism, the threat of political interference, and the management of civil party participation, among other pressing issues. The report also examines recent legal developments and related progress, including the trial of Duch and the work of the Pre-Trial Chamber and Office of the Co-Investigating Judges.

ISSUES OF ONGOING CONCERN

Building an Effective Anticorruption Mechanism: More Work Needed

More than two years after allegations surfaced that Cambodian ECCC staff were required to pay a percentage of their salaries to high-level staff at the court, agreement on an ECCC anticorruption package was finally reached between the United Nations and the Cambodian government in August 2009. Brokered by the United States government, the mechanism is a step forward in addressing corruption problems that have plagued the court. Yet significant structural gaps remain that need to be addressed before the anticorruption package can be effective. The final program must be sufficiently substantive and credible that staff who suffer from or witness corruption will believe that: 1) they can safely report the problem; and 2) appropriate action will be taken. The existing program does not yet meet these criteria.

The key element of this new package is the establishment of an Independent Counsellor who will “be available to all staff to bring their concerns confidentially.” When such concerns are submitted, the first step is a “counseling” of staff alleged to be participating in the corruption. If counseling of the staff member fails to fix the problem, the Independent Counsellor can raise the complaint with the UN and the government of Cambodia to resolve the issue “promptly through consultations.” The new package builds upon the existing structures within the ECCC designed to address corruption.

This package, however, needs significant additions to ensure it is functional and credible, including:

- *A witness and whistleblower protection mechanism:* Although the UN and the government of Cambodia have agreed that the anticorruption measures will ensure “full protection of staff on both sides of the ECCC against any possible retaliation for good faith reporting of wrongdoing,”² there is no mechanism to provide that protection. Given the previous reports of retaliation against suspected whistleblowers, an effective protection system *which is trusted by staff* must be available as a crucial component of any effective mechanism.

² United Nations and Government of Cambodia, *Joint Statement on Establishment of Independent Counsellor at Extraordinary Chambers in the Courts of Cambodia*, Phnom Penh/New York, August 12, 2009, available at <http://www.un.org/News/Press/docs//2009/13146.doc.htm>.

- *A public reporting requirement:* The UN and Cambodian government note that they will “carefully monitor the implementation of the existing structure and the function of the Independent Counsellor,” and that the Independent Counsellor will “keep the Joint Sessions informed about his or her activities.” However, no public reporting requirement exists for this post. Given the serious and ongoing nature of the corruption allegations dogging the court (which have also crept into the litigation of ECCC cases on the basis of fair trial concerns), both staff and the general public need to have confidence in the process designed to prevent and address corruption allegations in future. Such trust cannot exist if there is no way to monitor its functions (while, of course, respecting confidentiality concerns).
- *Investigative capacity:* No investigative capacity exists to address any complaints not resolved through counseling or high-level consultations. Investigations may be necessary if, as previous allegations have suggested, the reports of corruption are systemic or widespread. At the very least, it is necessary for the UN Office of Internal Oversight Services (OIOS) to continue its initial investigative review function, especially if the processes set in motion by the Independent Counsellor do not work.
- *Ability to address previous complaints:* More than a year ago, several ECCC staff members brought concerns about corruption to the UN’s attention. They did so in good faith, assuming that the UN would both address their concerns and protect them from retaliation. To date, their complaints have gone unaddressed. Some individuals suspected of complaining about corruption have been harassed and threatened in response to news that complaints had been made. Little has been done to ensure their ongoing protection. It would be a disservice to the substance of the allegations and the courage of the individuals who came forward if the new anticorruption mechanism fails to ensure that their complaints are addressed.

This new package was negotiated against a backdrop of encouraging news about previous corruption allegations. The ECCC’s director of administration, alleged to be at the center of the corruption scheme, has been absent from the court for six months on “medical leave” and reports indicate that kickback payments have been substantially curtailed.³ Yet this is no guarantee that such alleged practices will not resurface in the future. And with trials now in motion at the ECCC, all parties have an interest in ensuring that an effective and workable anticorruption regime is in place to address problems should they arise.

Donors have an essential role to play in ensuring these additional measures are instituted to fill out the anticorruption package. The United States, in particular, has played a constructive role in pushing this mechanism forward and should continue to play a leadership role with both the Friends of the ECCC in New York and the ECCC Steering Committee in Phnom Penh.

³ “Rosandhaug Calls Tribunal ‘Swift and Efficient,’” *The Phnom Penh Post*, *Post.blogs*, May 20, 2009.

The new anticorruption package will be effective only to the extent donors hold firm to their commitment to its success. For the package to work, donors must be active, attentive, and engaged.

Independence from Political Interference and Corruption Allegations

Possible political interference in the prosecutorial and judicial work of the court represents the most serious challenge to both the credibility of the ECCC and its ability to meet international fair trial standards. Concerns about political manipulation are being fed by the the Pre-Trial Chamber's inexplicable delays in issuing its decision about whether to investigate additional accused. Recent public statements by Prime Minister Hun Sen to French President Nicolas Sarkozy that no more than five persons should be tried by the ECCC heighten these concerns.⁴ The secrecy of the investigation process deprives the public of adequate information about whether the international investigating judge is allowed to seek to interview key insider witnesses. But the fact that the "invitation" issued to former King Sihanouk to appear before the judges was signed only by the international investigating judge is a sign that a dispute still exists on this issue.

Political interference is precisely what the international framers of the *Agreement* were concerned about. The *Agreement* includes protections to help deal with such interference, but there are indications that these protections, which include the process for resolving "disagreements" between the prosecutors or the investigating judges and the super-majority voting requirement, are not fully effective for several reasons. First, to be effective the procedures require the international senior staff to respond and pro-actively invoke the protections. For the protections to work, the Pre-Trial Chamber judges, the international prosecutor, and the international investigating judge must be quick and forthright in addressing suspected interference.⁵ Second, the Cambodian officers can easily overwhelm the protective processes by delay and obfuscation of the issues.

Stronger leadership from senior international staff, the UN, and the donor community is required to ensure that the government of Cambodia ceases all attempts to improperly interfere with judicial and prosecutorial decisions.

Management of Civil Party Participation and the Victims Unit

The ECCC can make an important contribution to victims of the Khmer Rouge and to the development of international justice mechanisms generally by expanding the opportunity

⁴ See Michael Heath, "Cambodia Pushes to Curb Khmer Rouge Court, Group Says," Bloomberg.com, July 22, 2009 at <http://www.bloomberg.com/apps/news?pid=20601080&sid=a9471cEULOM8..>

⁵ The international prosecutor has been slow to express public concern about statements by government officials clearly intended to preclude Cambodian staff from cooperating with the investigation of additional accused. After first announcing that he intended to submit additional names for investigation, he waited six months before invoking the formal dispute resolution process necessary to move the investigations forward. The Pre-Trial Chamber's seven-month delay in issuing a decision on the disagreement about additional suspects is not easy to explain, given the substance of the issue. Likewise, the international investigating judge responded to questions about whether he is being prevented from interviewing high-level "insider" witnesses by refusing to respond substantively, instead stating that when he can no longer do his job, he will leave. While decisions about how to respond to situations of known or suspected interference are delicate and the timing must be left to the discretion of the court or judicial officers, at some point delay in responding cancels the effectiveness the protective measures in the *Agreement*.

for victims to participate in the proceedings, either as formal civil parties or through the programs of the ECCC's Victims Unit.⁶ The ECCC is unique in the extent to which it allows victims to formally participate the investigation and trial process by becoming civil parties.⁷ However, without immediate attention to the management of civil party participation, this opportunity may be wasted and victims of the Khmer Rouge left with frustrated expectations.

It is important to realize that the Victims Unit (and NGOs working with victims) can serve the needs of many victims without requiring the victim to seek formal civil party status. Many victims want only information, a chance to see and understand what is happening at the court, and a safe place to tell the story of what happened to them during the Khmer Rouge era. Plans in place at the Victims Unit to increase such services are an important step to making the court meaningful to a large number of victims; these plans must be implemented. Victims need to be told that they can access services without having to become a formal civil party. This step alone may serve to limit the number of victims who wish to participate as civil parties.

The right of victims to participate in the investigation and trial as a civil party is an attribute of the civil law system used in Cambodia. The court's procedures for processing applications and organizing and managing civil parties are still in their infancy—and certainly not effective yet. Large backlogs exist in the initial processing of applications by the Victims Unit, and in the legal decisions on admissibility that must be made by the investigating judges for the 002 Case (the case involving the four other accused in custody: Khieu Samphan, Ieng Sary, Ieng Thirith, and Nuon Chea, whose case is discussed in greater detail below). Many applicants receive no communication or acknowledgment from the court for more than a year after submitting their application.⁸

A review of participation by civil parties in the Kaing Guek Eav (alias "Duch") case, currently underway and discussed in greater detail below, can provide important lessons for the court as it moves forward. There are 93 civil parties participating in the Duch trial. Most received assistance with the application process by one of the NGOs working to support the court. The NGOs have also assisted in obtaining legal representation for the victims, as the court has provided none. The result of this process is that the civil parties have been divided into four groups based not on different legal interests but on association with the NGO that initially assisted them. Each of the four groups in the Duch trial is represented by two lawyers—one international and one Cambodian. As a result, each time a witness is questioned or a legal argument raised at trial, up to eight civil party lawyers have the opportunity to be heard. While the Trial Chamber has made progress recently in urging the parties to avoid repetition and imposing strict time limits,

⁶ The Victims Unit was formally established by the Office of Administration pursuant to the direction of Internal Rules, Rule 12 to facilitate the participation of victims as civil parties.

⁷ See Internal Rules, Rule 23 for a description of the application process to become a civil party, and the rights of participation.

⁸ The Victims Unit reports that as of June 2009 it has received 1666 civil party applications, 2039 victim complaints, and 64 unclassified submissions. See *ECCC Court Report, July 2009 at http://www.eccc.gov.kh/english/news.view.aspx?doc_id=303*.

considerable trial time is devoted to civil party legal participation that does not add to the substance of the trial and, perhaps more important, may not be serving the interests of victims.

This problem is exacerbated by the Trial Chamber's decision not to limit the scope of the civil party questioning at trial. The ECCC's internal rules provide that civil parties participate "in assistance of the prosecution,"⁹ and the Trial Chamber cited this provision in declining to rule that civil party lawyers must limit their questions to issues unique to their clients and avoid questions that duplicate those of the prosecution. As a result, at trial the civil parties' lawyers act to "clarify" and "follow up" the questions and legal arguments of the prosecutors rather than limiting their involvement to issues related to the unique interests of their client. Counsel for Duch has raised several objections about the "inequality of arms" that results from the situation.¹⁰

Additional concern about the effectiveness of civil party participation was raised when civil party lawyers in the Duch case put forth a list of civil parties who claimed to be survivors of S-21 prison seeking to give testimony about their experience at the prison. There were serious questions raised about whether any of the five witnesses had actually been at S-21 prison. The civil party lawyers were inadequately prepared: they could not inform the court of the substance of their clients' testimony, or protect their clients from the embarrassment of having their testimony questioned. The civil parties were clearly traumatized and had suffered greatly during the Khmer Rouge period, but it was not clear they had relevant testimony to present to the court. A string of poorly prepared civil parties appearing before the court with questionable substantive information undercuts the credibility of all the civil parties and reveals inadequacies in the processes the court, the Victims Unit, the civil party lawyers, and the NGO community are using when dealing with victims.

The testimony of four of the civil parties in the Duch trial revealed that the investigating judges and the trial judges might have improperly admitted persons as civil parties who did not qualify. Because Duch is acknowledging responsibility for the crimes charged against him, this flaw is not a major issue and the qualifications of admitted civil parties have not yet been challenged by Duch's counsel. However, depending on how the charges are crafted in the 002 Case, there may be complex issues about who qualifies as a civil party. Defense counsel intent on delay or testing every detail of the case against his or her client may be motivated to challenge the admission of many civil parties. Difficulties under the current scheme in establishing the identity, injury, and cause of

⁹ Internal Rules, Rule 23.

¹⁰ Problems arise when the civil parties act as an aid to the prosecution and ask questions or make arguments that should have been made by the prosecutors. On these occasions they act as another prosecutor and risk an imbalance in the equality of arms between the prosecution and the defense. On some occasions the civil parties do this job very well and accomplish goals in questioning a witness that the prosecutor or the judges were unable to accomplish. But making up for holes in the prosecution or judicial questioning should not be their role. In contrast, there have been occasions where the effective questioning by civil party lawyers serves a different role than that of the prosecutor, for example when a civil party lawyer elicited new information about the interrogation and murder of her client's husband.

injury of thousands of civil parties could become an unmanageable burden for the court if this occurs.

Thousands of civil parties participating at the investigative level of the court also pose challenges. Civil parties, through their lawyers, have access to the confidential case file, the right to request investigative actions, and the right to appeal many decisions issued by the investigating judges. When properly handled, civil parties can play an important role in shaping the investigation.¹¹ But large numbers of civil parties, if not well organized, pose serious problems for protecting the confidentiality of certain witnesses or information, and for efficiently proceeding with the investigation.

Finally, the presence of several thousand civil parties at trial in what is likely to be a multi-defendant 002 Case would be unmanageable. The Trial Chamber in the Duch case made strides in managing civil party participation as delays and other difficulties become obvious. As a result, the process seems to be marginally manageable in this single defendant trial where there are 93 civil parties, extremely cooperative counsel for all parties, and an accused who concedes nearly every material fact of the alleged crimes. But several thousand civil parties¹² are expected to seek to participate in the trial against the four senior leaders in the 002 Case. The lawyers for each of these accused have displayed a highly contentious strategy and style. None of the accused has acknowledged responsibility for any crimes at this stage. Under existing policies for civil parties, the trial in the 002 Case would be chaotic.

To avoid derailing the 002 Case, consideration must be given now to how a large number of civil parties will be grouped and how each group will participate in the trial. The court should consider the practical needs and interests of civil parties and other victims at the various stages of the proceedings.¹³ To date, the assumption has been that extensive legal participation including full access to the confidential case file, the right to appeal many issues, to question extensively all witnesses, and to fully participate in all legal arguments presented to the court is necessary to meet the needs of civil parties. This may be more than most civil parties require. Informal discussions with victims (not all of whom are civil parties) indicate they have limited interest in in-depth legal participation but are highly interested in: 1) receiving ongoing information about the process; 2) being provided opportunities to attend proceedings; and 3) having the opportunity to tell the story of their experience during the Khmer Rouge period.

¹¹ There are important opportunities for victims and civil parties to influence the investigation of a case and the ultimate indictment. For instance, it was civil parties who convinced the investigating judges to ask prosecutors to file an additional submission regarding claims of forced marriage in the Khmer Rouge period. See *ECCC Court Report, June 2009*, at <http://www.eccc.gov.kh/english/cabinet/fileUpload/140/Court-Report-2009-06-EN.pdf>.

¹² The Victims Unit estimates there will be 2,500 civil parties in the 002 Case. Other estimates range from 1,000 to 4,000 civil party participants, but the number could conceivably go much higher.

¹³ At a minimum, these should include the investigation stage, the general trial stage, portions of the trial related to the facts of a civil party's particular situation, and the portion of the trial where civil parties can address the court about their injuries and request for reparations. Consideration should be given to assisting victims and civil parties after the conclusion of trial as well.

It is possible to avoid most of the expected problems associated with having a huge number civil parties by better matching victims' participation to their needs. Limiting participation to activities short of courtroom participation will likely satisfy most victims.

Effort needs to be made immediately, however, to refine the methodology of this participation if the court is to be able to handle the 002 Case without disastrous courtroom management problems.

The court should impose a system of joint representation for civil parties, to streamline their participation. When unique interests of a small group of civil parties arise, the court should allow separate representation and trial participation for the limited purpose of advancing such interests.¹⁴ In addition the scope of civil party participation should be limited to issues that do not substantially overlap with those raised by the prosecutors.

Outreach

While public attention to the court has increased greatly as a result of the start of the Duch trial, research shows that many Cambodians have little or no knowledge of the court.¹⁵ Public understanding about the court must be sustained and bolstered when the Duch trial is completed. The ECCC outreach program has been limited to date and consists basically of distributing printed material and participating in outreach events organized by NGOs. This is insufficient.

Although members of the NGO community have engaged in outreach through their countrywide networks, this work has been hampered by limited (and shrinking) funding and is not a substitute for court directed outreach. The court is said to be in the process of developing a new outreach and communication plan for the second half of 2009 and 2010, including allocating additional funds for such work. But the court has not unveiled the plan or consulted widely with civil society.

Even if its trials are successful, the ECCC will be considered a failure if the people of Cambodia are not aware of the court's work. Ensuring greater public knowledge of and engagement with the trials needs to be a priority for the ECCC. The court must devote more funds and greater energy to its outreach effort.

Legacy

One of the primary justifications for locating the court within the Cambodian court system was the hope that it would leave a positive legacy on rule of law reform in Cambodia. This does not appear to be happening in any material way. Capacity building, developing model practices for domestic courts, and providing an example of justice that meets international standards and defies impunity are often cited as goals of the ECCC.

¹⁴ Unique representation may be needed for victims who are members of minority groups disproportionately affected by Khmer Rouge policies, or victims subject to sexual assault or forced marriages.

¹⁵See, Phuong Pham, Patrick Vinck, Mychelle Balthazard, Sokhom Hean, Eric Stover, *So We Will Never Forget*, Human Rights Center, University of California, Berkeley, January 2009, at <http://hrc.berkeley.edu/pdfs/So-We-Will-Never-Forget.pdf>.

Yet these goals are unlikely to be met without a sustained and concerted effort from senior court officials and political will from the government. Unfortunately both appear lacking.

The efforts to combat impunity and trigger reform to establish an independent and credible judiciary in Cambodia seem to be crumbling as Cambodia's domestic courts are used to quell speech that is critical of powerful interests¹⁶ and displace poor and powerless residents in the service of land redevelopment that favors a few powerful interests.¹⁷ By working concertedly with the legal profession, students, and the general public, the ECCC could make a greater contribution to promoting a positive legacy of respect for rule of law.

Little has been done by the court to build the understanding or capacity of legal professionals and personnel outside of the ECCC. This is a lost opportunity in a nation where many legal processes are rudimentary and badly in need of improvement. It is not enough for the court to help build the capacity of the few Cambodians fortunate enough to work at the ECCC; a more focused effort is needed to ensure that the example set by the ECCC positively influences domestic courts.

Additional funding, commitment, and expertise are needed if the ECCC is to leave a positive legacy on the legal and judicial professions and rule of law situation in Cambodia.

Office of the Co-Prosecutors

International Co-Prosecutor Robert Petit announced his resignation, to be effective the end of August 2009. A replacement needs to be found quickly in order to: 1) provide needed leadership in the Duch trial; 2) press for the timely completion of the investigation in the 002 Case; 3) promote a prompt resolution to the disagreement between the two prosecutors about whether additional suspects should be investigated; and 4) ensure that the resolution of the disagreement by the Pre-Trial Chamber is properly carried out.

Petit's announcement follows of the recent departure of three other international lawyers from that office. These posts have been refilled, but not by lawyers with significant leadership experience in either war crimes or complex trial work. This shifting personnel has resulted in at least four international lawyers and three Cambodian lawyers rotating through the Duch Trial. While each may be extremely competent, this practice results in a

¹⁶ Human Rights Watch Commentary, *Cambodia: End Assault on Opposition, Critics, Prime Minister Hun Sen Launches Harsh Crackdown in Years*, July 14, 2009 at <http://www.hrw.org/en/news/2009/07/14/cambodia-end-assault-opposition-critics>.

¹⁷ See Cambodian League for the Promotion and Defense of Human Rights (LICADHO), *Land Grabbing & Poverty in Cambodia: the Myth of Development*, May, 2009 at <http://www.licadho-cambodia.org/reports/files/134LICADHOREportMythofDevelopment2009Eng.pdf>; and *Development Partners Call for Halt to Evictions of Cambodia's Urban Poor*, July 16, 2009 at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/CAMBODIAE/XTN/0,,contentMDK:22247170~menuPK:293861~pagePK:2865066~piPK:2865079~theSitePK:293856.00.html>.

lack of consistency and dilutes the prosecutorial presence at the trial. There have been several embarrassing moments in which it was evident that the prosecutor assigned for the day was not as familiar with details of a piece of evidence as was necessary for an effective witness examination. It should be a priority for the office to hire lawyers with the expertise and experience appropriate to major war crimes cases and who can provide consistent trial presence.

In addition, it will be necessary for the next international prosecutor to have the skill and commitment to take a firm but diplomatic stand against possible attempts at political interference in prosecutorial decision making. This is not an easy task, but it is essential if the court is to live up to its promise of independence and compliance with international standards. The UN must move quickly to nominate a highly qualified replacement for the outbound international co-prosecutor and ensure s/he is in place as soon as possible.

LEGAL DEVELOPMENTS AND OTHER PROGRESS

The Duch Trial

Overview and Highlights

The Trial Chamber completed 16 weeks of trial by the end of July in the case against Kaing Guek Eav, alias “Duch,” on charges of crimes against humanity, war crimes, and the domestic Cambodian crimes of murder and torture related to his tenure as the head of S-21 prison. In recent weeks, the trial has focused on:

- 1) the relationship of S-21 prison to the overall policy of the Communist Party of Kampuchea (or CPK, the ruling party in the Khmer Rouge regime);
- 2) the existence of an armed conflict with Vietnam during some or all of the jurisdictional period covered by the ECCC (April 17, 1975 to January 7, 1979);
and
- 3) the operation of S-21 prison, the associated work camp at Prey Sar, and the killing fields at Choeung Ek where prisoners were taken to be executed and buried.

This report provides an overview of significant developments during the Duch trial, but does not detail the evidence or trial process. The Asia International Justice Initiative prepares weekly monitoring reports that delve more deeply into the trial’s evidence and proceedings.¹⁸

Beginning in late May 2009, Craig Etcheson, a political scientist with Khmer Rouge expertise and an analyst in the prosecutors’ office, gave testimony over eight trial days about Khmer Rouge policy and organization. Questioning was interrupted by lengthy legal debates about how expert witnesses should be questioned, and how documents from experts should be presented to the chamber.¹⁹ Etcheson’s testimony summarized his July

¹⁸ See UC Berkeley War Crimes Center web site at http://socrates.berkeley.edu/~warcrime/KRT_reports.html.

¹⁹ The chamber made no definitive public ruling on these issues even after repeated debates over several days of the trial. In the end, the parties apparently agreed to the admission of the documents referenced in Etcheson’s report. This leaves parties with insufficient guidance for the future regarding the scope and

18, 2007 report, *Overview of Hierarchy of Democratic Kampuchea*. The report was based on a review of Khmer Rouge-era documents and outlined the strict hierarchical reporting lines and structure of the CPK. In his most dramatic testimony, Etcheson described Duch as not just a cog in the bureaucracy of the CPK, but rather an enthusiastic and innovative creator of methods to better carry out CPK policy to identify and destroy “enemies.” According to Etcheson, Duch rose in the ranks of the CPK and in the esteem of his superiors because of the zeal with which he performed his job.

While acknowledging that that the bizarre system of CPK purges was initiated by the paranoia of the Standing Committee of the CPK, Etcheson testified that policy was significantly furthered by the method devised by Duch of torturing one “enemy” to obtain the names of additional “enemies”, and then torturing the additional persons to further extend the numbers purged. He emphasized that the eagerness with which Duch pursued his duties contributed to the magnitude of the atrocities at S-21.

Journalist and author Nayan Chanda was called to testify by the chamber as an expert on the existence of an international armed conflict during the period of the court’s jurisdiction.²⁰ He was queried based on the facts described in his 1986 book *Brother Enemy: The War after the War*, which explores the relationships between Cambodia, Vietnam, and China, and the influence of Soviet and American interests in the years following the 1976 fall of Saigon (now Ho Chi Minh City) in Vietnam. Chanda described low level border incursions by the Khmer Rouge, and to a lesser extent by the Vietnamese, in 1975 and 1976, but testified that there was no public and sustained armed conflict between the two countries until December 31, 1977, when Vietnam publicly broke off diplomatic relations with Cambodia. However, on further examination by Duch’s defense lawyer, Francois Roux, he stated that in his opinion there was a state of armed conflict between the two countries that dated back to 1975. Thus the issue, which is a legal question for the judges, of whether a state of international armed conflict existed during the entire jurisdictional period of the ECCC, remains ambiguous.²¹

Duch testified for nine days about the basic operation of S-21 prison, the S-24 re-education camp at Prey Sar, and the Choeung Ek killing fields. He repeated several times the theme of his defense that he unwillingly performed his job, believed he would be killed if he did not, had essentially no hands-on involvement in the torture or killing that occurred at the S-21 prison complex, and was completely beholden to the will of the

method of questioning “experts” and the basis and procedure for having documents admitted before the chamber.

²⁰ The existence of an international armed conflict is an element of the war crimes charges against Duch. It is a legal issue to be determined by the chamber based on factual evidence. Duch has acknowledged that a state of international armed conflict existed between Cambodia and Vietnam as of December 31, 1977. The prosecution argues that an international armed conflict existed during the entire jurisdictional period of the court: April 15, 1975 to January 7, 1979.

²¹ Following the civil law prohibition against “preparing” any witness, including an expert witness, Chanda was not given information in advance about the questions he would be asked. When he appeared, the chamber queried him about facts and sources in his 1984 book. He displayed an admirable memory for important details. However, had he been given advance guidance about the factual areas that were at issue and opinions he would be asked to give, he would likely have been able to provide more precise help to the chamber in resolving the issue of when a state of international armed conflict existed in Cambodia.

“upper echelon.” He stated that he spent most of his time in his office on the outskirts of the S-21 prison reviewing written confessions and passing on orders from the “upper echelon” about whom to torture and kill. He stated that he only interrogated one prisoner at S-21, tortured none, and only visited the killing fields on a single occasion. Duch reiterated that all those arrested and brought to S-21 were destined for execution, most after being tortured to give false confessions to name others in “traitorous networks.”

The chamber called four survivors of S-21 prison to describe their experiences there. Van Nath, Bou Meng, and Chum Mey survived S-21 because they had skills that Duch needed at the prison and thus, although they suffered horribly, were not executed. Norng Champhal was a nine or ten year old child in January 1979 who had recently arrived at the prison with his mother and survived by hiding with his younger brother during the confusing days before the arrival of the Vietnamese and the fall of the Khmer Rouge on January 7, 1979.²² Each testified persuasively and expressed gratitude to the chamber for the opportunity to tell his story.

Problems with Civil Party Testimony

Five civil parties, recommended by their lawyers, were called to give testimony about conditions at the prison complex and Duch’s involvement.²³ Each claimed to have survived imprisonment at S-21.²⁴ Duch disputed that any of these civil parties had actually been at S-21 prison. Based on photos and a biography produced in court, Duch acknowledged that one survivor had been at the Prey Sar re-education camp. Each civil party gave testimony that was either internally inconsistent, inconsistent with statements made in their civil party applications, or materially inconsistent with established facts about operations at S-21. Records from S-21 were not available or not produced to verify their presence at S-21. Duch addressed the court after each witness testified and made a case for why the person could not have been at S-21. Each had clearly suffered greatly, but their testimony was not convincing on the relevant issues about operations at S-21 or Duch’s personal involvement in operations.

This situation raised the understandable ire of the Trial Chamber, and the judges harshly questioned civil party lawyers about the failure to properly communicate with their clients before submitting their names to the court as helpful witnesses, and for not adequately preparing their clients before they appeared in court. Because of the inconsistencies in the civil parties’ testimony, little if any substantive information was

²² Duch initially insisted that Champhal’s testimony could not be true and was adamant that no children survived the last days at S-21. Duch testified that only the artists and craftsmen who received special treatment were spared in anticipation of the arrival of the Vietnamese. It was only when, in the days following Champhal’s testimony, the prosecutors located a “confession” made by Champhal’s mother that Duch acknowledged that Champhal must in fact have been at S-21 and that his Champhal’s was accurate.

²³ Civil parties will have an opportunity later in the trial to address the court concerning their losses and suffering, and their views on appropriate moral or symbolic reparations. During this portion of the trial, the civil parties were asked only to provide substantive testimony regarding the charges against Duch.

²⁴ Like the accused, civil parties called to testify do not take an oath and are not subject to penalties for perjury. See Internal Rules (Revision 3, March 6, 2009), Rule 23 6 (3). This civil law practice is consistent with the practice in Cambodian domestic courts. The Internal Rules can be found at http://www.eccc.gov.kh/english/internal_rules.aspx.

provided to the court and doubts were raised about whether four of the testifying witnesses even qualified to be civil parties.²⁵ Of perhaps greater significance, these civil parties were put through the distress of having their testimony questioned in public. The situation demonstrated the urgent need for better management of civil party participation by the court, the victims unit, the civil party lawyers, and the NGOs that assist civil parties.²⁶

Problems with Court Management

The testimony of a former S-21 guard/executioner, Him Huy, and a former interrogator, Mam Nay, resulted in considerable argument about whether the witnesses had been properly advised about the risk of self-incrimination and their right to remain silent. Defense attorney Roux made a long statement about how the witnesses should be advised that the prosecution's theory of liability meant that if "Duch was found responsible for crimes, the witnesses, as his subordinates, would also automatically be responsible." This improper, inaccurate speech was designed to intimidate the witness and prevent them from speaking. Unfortunately, neither the judges, the prosecutors, nor the civil parties interrupted Roux. Ultimately, the chamber addressed the issue by, in addition to verbally informing the witnesses about the right to refuse to answer questions that might incriminate them, providing these witnesses with the opportunity to meet with counsel paid for by the witness support unit and giving them the option to have the counsel sit in court while they testified. Mam Nay and Him Huy took advantage of the opportunity. Both witnesses were represented by counsel in the courtroom as they testified, and both, on occasion, refused to answer questions put to them about their personal involvement in unlawful actions.

The testimony of Mam Nay highlighted in dramatic fashion the tone of the trial and the active role Duch plays in it. Mam Nay is a 77-year-old, highly educated man who was one of the four top interrogators—and alleged torturers—working for Duch. Mam Nay denied any involvement in or knowledge of torture or executions at S-21. He claimed that he worked and lived in a house on the outskirts of the main S-21 complex and that prisoners were brought to him for questioning. He stated that it was not difficult to get a confession from the prisoners and that he did not need to torture people to do so. He also testified that he paid no attention to what was happening elsewhere in S-21 and did not know what happened to prisoners after he obtained a confession. Although his testimony was not credible, and therefore not helpful to the chamber, none of the four judges who questioned him were able to break through his stubborn denial. The prosecutors made a small crack by showing Mam Nay the 390-page book he had created at S-21 with notes from lectures given by Duch and others that included discussion of torture, but he still maintained he was never instructed to, nor did in fact, torture prisoners. Three civil party lawyers examined the witness without any impact. Finally the tenth lawyer or judge to

²⁵ In order to qualify as a civil party and participate in the proceedings, one must demonstrate that he/she suffered a personal injury that is physical, material, or psychological and the "direct consequences of the offense." Internal Rules, Rule 23(2). Although the civil parties who testified were no doubt victims of crimes committed by the Khmer Rouge, some may not have been victims of crimes committed at S-21.

²⁶ This situation raises concern about the possibility of a large number of extremely time-consuming challenges to civil parties' qualifications in the 002 Case.

question the witness, civil party lawyer Alain Werner, confronted Mam Nay with his statement to the investigating judges that he used electric shocks and whips to torture people. Mam Nay chose to remain silent when asked if that statement to the investigating judges was true. Why Mam Nay was allowed to testify for more than a day before being confronted with this direct and core contradiction by any of the judges or lawyers who questioned him is a mystery.

Finally, Duch was given a chance to comment on Mam Nay's testimony. Duch spoke directly to Mam Nay, slashing his hands through the air and pointing at his former subordinate, admonishing him for not speaking the truth to the court, the victims, and the Cambodian people: "You should not be afraid to die. You should be afraid of not telling the truth." The performance revealed Duch in the role of commander, telling his subordinate what to do, and left Mam Nay cowering. It was an impressive, moving and frightening display of the personal power Duch must have commanded at S-21. Mam Nay finally broke into tears, his denial defeated by Duch rather than any of the lawyers or judges in the courtroom. It was only following his confrontation with Duch that Mam Nay acknowledged he regretted the suffering at S-21.

Like other incidents in recent weeks, this episode illustrated Duch's powerful command in the courtroom. He clearly relishes playing the role of teacher and expert, demonstrating far more familiarity with the documents assembled by the prosecutors and investigating judges than any other player in the courtroom.

The chamber and the parties often look to Duch for an explanation of apparently conflicting facts. He displays a remarkable memory and knowledge of the case file. Often he can succinctly resolve apparent contradictions in the documents. Several times he has addressed the court following confusing testimony from a witness and offered a well-reasoned explanation based on documents he has reviewed. For instance, after hearing the testimony of a civil party who claimed to have used an alias during the Khmer Rouge era and escaped from Choeung Ek, Duch referenced documents that showed that the named prisoner was at S-21 much earlier than the witness stated and that he was killed. Duch concluded with complete confidence: "Therefore this witness could not be who he says and could not have escaped from S-21." Duch sat down following his pronouncement looking satisfied and confident that the matter was fully resolved. Duch seems eager to take on the role of accused, expert, defense lawyer, and judge. After several similar episodes, the Trial Chamber finally admonished Duch that it is the chamber's role to analyze the evidence—not his.

Improvements in Courtroom Management

Despite this incident with Duch—which highlighted some of the continuing problems in managing his trial—there have been notable improvements in court management. For example, following several weeks of excruciatingly slow progress at the beginning of the trial, the Trial Chamber has taken strong steps to speed the progress of the proceedings. The president of the chamber, Nil Non, has developed skill in ruling decisively on objections and submissions by lawyers and in interrupting and stopping parties from asking repetitive or irrelevant questions. The chamber has imposed and strictly adheres to

short time limits for parties to put questions to the witnesses after the judges do the primary, and often lengthy, initial questioning.²⁷ In addition, with the general approval of the parties, the court eliminated 15 names from the witness list. Given these changes, the process of taking testimony and evidence is now projected to conclude in October 2009.

The majority of the questioning of each witness is done by the Trial Chamber, with the president often questioning the witness extensively before asking the other judges if they have additional questions. Because the time limits for questioning by the parties, particularly by the prosecutors, is so limited, it is important that the chamber's questioning fully develop the contribution that the witness can make to the issues before the court. Unfortunately, this is not always accomplished. Questioning by the court is often rambling and imprecise. It is frequently not clear that there is a relevant purpose to a line of questions. Facts that are not in dispute are unnecessarily repeated by several witnesses.²⁸ The chamber often sticks to a planned line of questioning and ignores the need to listen to the witness' response and ask follow-up questions when an answer is non-responsive or reveals important new information. However, as the trial progresses the chamber has evidenced increasing skill in questioning witnesses, and it is fair to expect this progress to continue.

Trial Chamber Decision on Detention Pending Trial and Judgment

On July 31, 2007, the investigating judges ordered the provisional detention of Duch and the Pre-Trial Chamber, in a subsequent appeal, upheld the legality of that provisional detention order. When the case was transferred to the Trial Chamber, defense lawyers for Duch renewed their challenge to the detention of their client, attacking the legality of the eight years of years of pretrial detention he served in a Cambodian prison and seeking: (a) the immediate release of Duch, subject to any conditions the Trial Chamber may impose; and (b) a declaration that Duch, if convicted, is entitled to credit for the entirety of time served and an additional reduction of sentence as compensation for the violation of his rights. The Trial Chamber issued a ruling on June 15, 2009 making the significant finding that the detention of Duch by the Cambodian Military Court for more than eight years was, although not attributable to the ECCC, unlawful.²⁹

Duch was detained for more than eight years by the Cambodian Military Court before he was transferred to the custody of the ECCC on July 31, 2007. The chamber recognized that international jurisprudence holds that an international criminal tribunal has both the authority and the obligation to consider the legality of an accused's prior detention, and that an accused's previous history of detention is relevant for sentencing considerations. After reviewing the records of the detention, the chamber held that the eight year detention of Duch by the Cambodian Military Court violated the three-year ceiling for

²⁷ For instance, if a witness is scheduled to testify for a day, the prosecutors will have one hour to question the witness, the four civil party groups 20 minutes each, and the defense 80 minutes.

²⁸ For example, Duch acknowledges, and numerous witnesses have testified about, the paucity of food provided to prisoners. While it may be necessary to ask about this subject in trying to verify if a witness was actually at S-21 prison, it is not necessary to repeat such testimony for purpose of establishing the nature of the conditions at S-21. Yet this subject is explored in detail with nearly every witness.

²⁹ Trial Chamber Decision on Request for Release, June 15, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/353/E39_5_EN.pdf.

provisional detention imposed by Cambodian law, as well as Duch's internationally-recognized right to a trial within a reasonable period of time.

Although the chamber noted that the ECCC could not simply divorce itself from the unlawful prior detention, it held that absent allegations of torture or serious mistreatment by the national authorities, the ECCC was not barred from ordering provisional detention, even though Duch's previous detention was unlawful. Applying international jurisprudence, the chamber stated that if Duch is convicted by the ECCC, he is not only entitled to credit for the time he was detained, but also to seek a reduction in sentence as a result of the previous violation of his rights.

This decision of the Trial Chamber is welcomed as a robust protection of an accused's right to a trial within a reasonable period of time and detention in accordance with the law. It is a decision that should serve as a model and precedent for domestic courts where unlawful pretrial detention practices are endemic.³⁰

Prosecutors' Renewed Request to Apply Joint Criminal Enterprise as a Mode of Liability
On June 8, 2009, the prosecutors filed a motion before the Trial Chamber to impose "joint criminal enterprise" (JCE)³¹ as a mode of liability in the charges against Duch. This motion is a second attempt by the prosecutors to introduce JCE in the proceedings against Duch.

When the investigating judges issued a closing order indicting Duch that omitted JCE, the prosecutors appealed and sought the inclusion of JCE. The Pre-Trial Chamber dismissed the request on December 5, 2008 on the ground that the prosecutors did not adequately describe their intent to claim that S-21 was a separate JCE and thus deprived Duch of adequate notice of the nature of the JCE.

The prosecutors argued that the Trial Chamber has the authority to change the legal characterization of the crimes set out in the indictment so that the charges match the evidence collected during the judicial investigation and described in the indictment. The prosecutors contended that all the facts necessary to plead JCE have already been set out in the indictment and other court documents and accordingly, the chamber has the power to impose JCE liability based on those facts and that no prejudice to Duch will result. The prosecutors contend that JCE is important to reflect the totality of Duch's criminal conduct in which Duch, together with his subordinates, was an integral part of a JCE in the functioning of S-21.

The chamber indicted that it would rule on the applicability of JCE in the case against Duch in its final judgment. The delay in this ruling puts the parties in the difficult

³⁰ US State Department, Bureau of Democracy, Human Rights, and Labor, *2008 Human Rights Report: Cambodia*, February 25, 2009 at <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119036.htm>; Cambodian League for the Promotion and Defense of Human Rights (LICADHO), *Excessive Pretrial Detention must be Addressed*, January 25, 2004 at <http://www.licadho-cambodia.org/press/files/81pressextpredet.pdf>.

³¹ JCE is a mode of liability that imposes individual criminal responsibility on a person for actions perpetrated by more than one person in furtherance of a common criminal plan.

situation of not knowing during the trial whether they need to present evidence of, rebuttal to, or argument regarding the charge of JCE.

Civil Party Motion Regarding Corruption Allegations

Lawyers for one of the four civil party groups in the Duch case filed a motion asking the Trial Chamber to request that the UN Office of Internal Oversight Services report (“OIOS Report”) concerning corruption allegations at the ECCC be submitted to the parties.³² The motion notes that the OIOS Report details its review of “widely reported allegations of corruption at the ECCC” and is still confidential. It contends that the report is directly relevant to the Duch trial proceedings because its publication after the close of the trial could expose the trial judgment to claims of abuse of process or unfairness by the accused and others. The chamber has not yet ruled on this motion.

Cambodians’ Attention to the Duch Trial

With the promotion of Reach Sambath from the position of ECCC press spokesperson to head of the Public Affairs Unit in June 2009, significant steps have been taken to ensure that Cambodians have access to the trial proceedings. Beginning in July, the court has been offering transportation and logistical assistance to help Cambodians living in rural areas attend the trial proceedings. The trial chamber at the ECCC holds up to 500 people and is nearly full most trial days. The members of the audience are provided with written information about the trials and given an oral explanation about what they will see in the courtroom.

In addition, the Duch trial proceedings are broadcast in full on a domestic television station. Cambodian newspapers and radio stations provide daily coverage of the trial. Testimony at the trial is providing dramatic descriptions of the operation of S-21 prison and how it fit into the philosophy of the Khmer Rouge. Although based only on anecdotal evidence at this time, the trial seems to be encouraging important discussion in Cambodia about the Khmer Rouge era and about what justice means.³³ This serves one of the more important goals of the ECCC.

³² The Office of Internal Oversight Services (OIOS) was established in July 1994 as an operationally independent office that assists the Secretary-General with internal oversight of UN resources and staff through monitoring, internal audit, inspection, evaluation, and investigation. The OIOS has the authority to initiate, carry out, and report on any action it considers necessary to fulfill its oversight responsibilities. See <http://www.un.org/depts/oios/>. An OIOS review of ECCC staff allegations of corruption was submitted by the UN to the government of Cambodia in August or September of 2008 with a request that a fuller investigation be conducted, but the government of Cambodia refused on grounds that neither the UN nor OIOS had any authority to conduct the review. The review has not been made public.

³³ Khmer Mekong Films, the producer of the weekly television program “Duch on Trial: Time for Justice” estimates that between 2 and 2.5 million people in Cambodia watch the half-hour show aired on CTN television each week. Although there are estimates that as many as 80% of Cambodians have access to television or radio, no statistics are available regarding the number of Cambodians who watch any significant portion of the live feed of the Duch Trial. Outreach efforts by the court should monitor this and determine what additional efforts are necessary to ensure a high level of understanding about the court and to provide an opportunity for discussion about the meaning of the court.

Pre-Trial Chamber

The Pre-Trial Chamber has issued several significant decisions in recent weeks. It has dismissed the appeal by Ieng Sary's lawyers of the investigating judges' Confidentiality Order; issued a warning to Khieu Samphan's international lawyer, Jacques Vergès; and affirmed the decision of the investigating judges that Ieng Sary, Ieng Thirith, Khieu Samphan, and Nuon Chea should remain in provisional detention for a second year as the judicial investigation continues. Significantly, the chamber has not yet ruled on the appeal by defense counsel of the investigating judges' refusal to take action on allegations of corruption at the ECCC. Nor has the Pre-Trial Chamber ruled on the disagreement between the two prosecutors over whether additional suspects should be submitted for judicial investigation and charges.

*Failure to Rule on Prosecution Disagreement regarding Additional Suspects*³⁴

The disagreement between the two prosecutors about whether to proceed with the investigation of additional suspects has been pending before the Pre-Trial Chamber since early December 2008 without a decision. Ruling on such disagreements so that the court processes can proceed is the basic reason the Pre-Trial Chamber was established.³⁵ Delay in resolving the dispute serves to diminish the possibility that the additional cases, if that is the result of the decision, can be investigated and brought to trial with a reasonable time. The ECCC will clearly extend beyond its initially projected three-year life, but frustration with the length of time the process is taking is rising. If investigation of the additional cases does not begin soon, it may be impossible to complete them. Furthermore, as evidence mounts that the disagreement is politically driven,³⁶ it appears more likely that the delay in resolving the disagreement results from manipulation for political purposes. This situation diminishes the overall credibility of the court.

Dismissal of Confidentiality Order Appeal—Blow to Transparency and Judicial Accountability

The Justice Initiative's May 2009 report contained a lengthy discussion of the investigating judges' March 3, 2009 Order on Breach of Confidentiality (the "Confidentiality Order").³⁷ The Confidentiality Order was issued against the defense lawyers for Ieng Sary on the basis that they published on their website certain documents related to their client's case in violation of the "confidentiality of the investigative process" and thereby failed to act in accordance with the ethical standards of the legal profession. A copy of the notice of ethical violation was sent to the various bar associations of which the lawyers are members so these bodies "may decide on any appropriate action."³⁸

³⁴ See OSJI May 2009 Update, *supra*. note 1, page 7 for a more extensive discussion of this issue.

³⁵ See *Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, July 2003, ratified October 19, 2004, (the *Agreement*), at <http://www.eccc.gov.kh/english/agreement.list.aspx>, Article, 7.

³⁶ See Michael Heath, "Cambodia Pushes to Curb Khmer Rouge Court, Group Says," Bloomberg.com, July 22, 2009 at <http://www.bloomberg.com/apps/news?pid=20601080&sid=a9471cEULOM8>.

³⁷ Case of Ieng Sary, *Order on Breach of Confidentiality of the Judicial Investigation*, March 3, 2009, at http://www.eccc.gov.kh/english/cabinet/courtDoc/248/D138_EN.pdf ("Confidentiality Order").

³⁸ Confidentiality Order, page 7.

In a blow to transparency and accountability for judicial actions at the ECCC, the Pre-Trial Chamber ruled the appeal by the lawyers “inadmissible.”³⁹ The chamber’s decision leaves standing the order of the investigating judges, the conclusion that there was an ethical violation, and the steps taken by the investigating judges to punish the defense lawyers.

In ruling the appeal “inadmissible,” the chamber concluded that the investigating judges were “correct that the lawyers, by proceeding to publish in their website case file documents without first seeking the approval of the relevant judicial authority for each document, acted in defiance of the general rule of confidentiality of investigations and recognized standards and ethics of the legal profession.”⁴⁰ There was no discussion of the rationale for this conclusion that sweepingly rejected important arguments of the defense lawyers about the limitations of confidentiality and the balance that must be struck if they are to properly represent their client’s interests. The chamber followed this conclusion with the finding that the investigating judges’ prior admonition to the lawyers on the subject was not a “decision” that could be the basis for sanctions and therefore could not be appealed. It follows that any sanctions imposed by the judges would have been erroneous as well. The investigating judges did not impose “sanctions” listed in Internal Rule 35 and 38.⁴¹ However, they did impose a punishment of potentially equal or greater severity in that they ordered their finding that a serious ethical violation had occurred to be sent to the bar associations where the defense lawyers are registered, thus potentially triggering serious professional sanctions.⁴² The chamber did not send the issue back to the investigation judges to correct, but let the punishment imposed stand without a remedy.⁴³

³⁹ Case of Ieng Sary, Decision on Admissibility of “Appeal against the Co-Investigating Judges’ Order on Breach of Confidentiality of Judicial Investigation,” July 13, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/378/D138_1_8_EN.pdf. Internal Rules, Rule 56 (1): “All persons participating in the judicial investigation shall maintain confidentiality.”

⁴⁰ Ibid. at para. 43.

⁴¹ Rule 35 is the provision governing interference with the administration of justice. The sanctions for any such interference are not specifically enumerated in the rule itself, but Rule 35(4) states that “Cambodian Law shall apply in respect of sanctions imposed on a person found to have committed any act set out in sub-rule 1.” Rule 38 governs misconduct of a lawyer. It does not provide for any specific sanctions but does allow, under Rule 38(2) for the co-investigating judges or the chambers to “refer such misconduct to the appropriate professional body.” See ECCC Internal Rules (Rev 3) at <http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv3-EN.pdf>.

⁴² Such a referral is particularly problematic in Cambodia where serious concerns exist about manipulation of bar association disciplinary measures to quell defense of speech that offends powerful interests. See Human Rights Watch Commentary, *Cambodia: End Assault on Opposition, Critics, Prime Minister Hun Sen Launches Harsh Crackdown in Years*, July 14, 2009 at <http://www.hrw.org/en/news/2009/07/14/cambodia-end-assault-opposition-critics>.

⁴³ This result is made possible by an anomaly in the Internal Rules. Rule 35 separates the reference to “sanctions” available to the chamber from the option of punishing the counsel by sending a finding of ethical violations to his or her Bar Association “for appropriate action.” Certain protections are available when “sanctions” are imposed, but not when referral is made to a bar association. See Internal Rules, Rules 35, “Interference with the Administration of Justice,” and Rule 38 “Misconduct of a Lawyer.”

The appeal of the Confidentiality Order raised important issues about the investigating judges' position that blanket secrecy—subject only to their unfettered discretion—is legally correct and appropriate. The chamber's dismissal of the appeal leaves the issues unaddressed and leaves no practical way for concerned defense lawyers, the prosecution, or civil parties to address them. The chamber's decision leaves no appeal right. If Ieng Sary's lawyers wish to challenge the decision of the investigating judges they can now do so only by deliberately violating the express order of the judges and risking escalated punishment. Allowing the punishment imposed by the investigating judges to stand without a right to appeal risks the due process rights of defense counsel and diminishes the accountability of the investigating judges.

Warning to Jacques Vergès, Counsel for Khieu Samphan

On May 19, 2009, the Pre-Trial Chamber issued a warning to Jacques Vergès, international defense counsel for Khieu Samphan, that “was his conduct to remain offensive or otherwise abusive, or was he to obstruct proceedings or adopt a conduct that amounts to an abuse of process, the Chamber would impose sanctions pursuant to Internal Rule 38.”⁴⁴ The warning resulted from Vergès' behavior at a public Pre-Trial Chamber hearing on April 3, 2009 regarding two appeals related to the continued detention of Khieu Samphan. At Vergès' request a public hearing to argue the issues was scheduled for February 27, 2009. Vergès did not attend the hearing and Cambodian counsel for Khieu Samphan, Sa Sovan, provided only vague excuses. Sa Sovan requested the court adjourn the hearing because Vergès had planned to present the argument on one of the cases. The chamber complied and rescheduled the hearing for April 3, 2009. At the rescheduled hearing, Vergès declined to present any argument related to the substantive detention issues. He attempted to raise the issue of allegations of corruption at the court and was told by one of the judges that he was not allowed to raise new matters at the hearing. Vergès replied:

...[F]irst of all, I will not raise any new matters, I shall abide by your decision, but allow me to explain why—I shall not dwell on it, as you allowed the civil party to do this morning. I'll be brief. Firstly, I shall be silent because it is not for me to be more concerned about your honor than you yourselves are. If you consider that corruption should not be discussed, I am not going to force the discussion on you. I shall be silent because I understand your caution in this regard and I think that the presumption of innocence that you sometimes deny the accused may be of some benefit to you. And I shall be silent because the head of state which hosts you has stated publicly that he wishes you to leave, making of you, in a moral sense, squatters. I shall be silent also because a member of the government of the country that hosts you stated that you were obsessed only by money, thus confirming the charge—be it grounded or not—of corruption, which blights this tribunal. Lastly—you see, I'll be brief—because it is not seemly to fire on ambulances and victims and the wounded; nor is it seemly to fire on hearses and those who are about to die.⁴⁵

⁴⁴ Case of Khieu Samphan, Pre-Trial Chamber, Warning to International Co-Lawyer (Vergès Warning), May 19, 2009, at http://www.eccc.gov.kh/english/cabinet/courtDoc/324/C26_5_22_EN.pdf. at p.10.

⁴⁵ Vergès Warning, para. 13.

The chamber concluded: “the unsubstantiated allegations made by Mr. Vergès and the language he employed were abusive and insulting towards the Pre-Trial Chamber’s judges. The allegations made outside the context of the Appeals [at issue in the hearing] and the scope of a permissible reply, amount to an offensive and obstructive conduct within the meaning of Internal Rule 38. They cannot be tolerated by the Pre-Trial Chamber, which has a duty to ensure that decorum and dignity necessary for court proceedings are preserved. ...[Mr. Vergès’ actions have] the result of delaying proceedings and misusing the Court’s resources...[and] the behavior of Mr. Vergès more generally amounts to an obstructive conduct and an abuse of process within the meaning of Internal Rule 38.”⁴⁶ The warning was sent to the Paris Bar Association in France.

Decisions on Extended Provisional Detention for Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan

The Pre-Trial Chamber issued four separate decisions on appeals by Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan challenging the extension of provisional detention for each accused for a second year.⁴⁷ In each case, the chamber found that the investigation of the case was progressing with sufficient diligence to justify continued detention. Depending on the grounds put forth by the investigating judges in the various cases, the chamber found that detention was necessary to prevent the accused from exerting pressure on witnesses or victims, to preserve or prevent destruction of evidence, to ensure the presence of the accused during the proceedings, to protect the security of the accused, and to preserve public order. The decisions rejected all requests for bail or some form of house arrest.

The affirmed detention order for Ieng Thirith runs until November 12, 2009, for Nuon Chea until September 15, 2009, for Ieng Sary until November 10, 2009 and for Khieu Samphan until November 17, 2009. The internal rules of the court provide that provisional detention can be ordered for one year at a time and extended twice for a total possible period of pretrial detention of three years.⁴⁸ Thus in 2010 the maximum three year period for provisional detention will expire for all four accused. If the judicial investigation is not concluded by that date and the charges either dismissed or the accused transferred to the Trial Chamber pursuant to a final indictment, the accused will likely have to be released.

⁴⁶ Vergès Warning, paras. 30 and 31. Internal Rules, Rule 38 addresses “misconduct of a lawyer and allows judges to refuse audience to a lawyer whose conduct is offensive or abusive, obstructs the proceedings, amounts to an abuse of process.”

⁴⁷See Nuon Chea Case, Pre-Trial Chamber, Public Decision on Appeal on Extension of Provisional Detention, May 4, 2009, at [http://www.eccc.gov.kh/english/cabinet/courtDoc/325/C9_4_7_EN_\(redacted\)](http://www.eccc.gov.kh/english/cabinet/courtDoc/325/C9_4_7_EN_(redacted)); Ieng Sary Case, Pre-Trial Chamber, Decision on Appeal of Ieng Sary against OCIJ’s Order on Extension of Provisional Detention, June 26, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/366/C22_5_39_EN.pdf; Ieng Thirith Case, Pre-Trial Chamber, Decision on Ieng Thirith’s Appeal against Order on Extension of Provisional Detention, May 11, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/337/C20_5_18_EN.pdf; and Khieu Samphan Case, Pre-Trial Chamber Decision on Khieu Samphan's Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, July 3, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/371/C26_5_26_Redacted_EN.pdf.

⁴⁸ Internal Rules, Rule 63.

Office of the Co-Investigating Judges

Timing of the Closing of the 002 Case Investigation

The judicial investigation of charges against Ieng Sary, Ieng Thirith, Nuon Chea, and Khieu Samphan in the case referred to by the court at the “002 Case” passed the two-year mark on July 18, 2009. The investigation is confidential and it is difficult to evaluate its progress. The investigating judges stated during a press conference on May 27, 2009 that they have set a goal to “try to end” the 002 Case investigation by the end of 2009. There has been no update as to whether that goal still seems achievable.

Once the judges announce that they have completed their investigation, the parties have the opportunity to request additional investigation steps. In addition, all previous requests from the parties for investigation or legal rulings that have not been ruled on will be deemed “rejected.”⁴⁹ The prosecution, defense, and civil parties will have an opportunity to appeal to the Pre-Trial Chamber any denial of such investigation requests.⁵⁰ Given the number of accused involved, there are likely to be many such appeals. At its current rate of four to six months to finalize an appeal, it may take the Pre-Trial Chamber considerable time to resolve all investigation issues. Only when this process is completed can the investigating judges issue a closing order that serves as the formal indictment.⁵¹ The prosecutors then have the opportunity to appeal the final closing order to the Pre-Trial Chamber.⁵² Given the possibility of two rounds of substantive appeals as well as additional investigation following the initial appeal round, it is unlikely that trial in the 002 Case could begin before 2011.

Based on statements they have made to the public, the investigating judges have yet to decide whether they are pursuing JCE as a theory of liability against the accused. Nor have they decided whether to include charges of genocide. This does not bode well for completion of the investigation by the end of 2009. There continue to be indications that there are disagreements between the two investigating judges about interviewing witnesses who have close government connections.⁵³ Concern that the advanced age of the accused will prevent them from appearing for a trial grows as the investigation drags on. If the investigation process does not conclude with an indictment that allows the case to be transferred to the Trial Chamber by late fall of 2010, the accused will likely have to be released from provisional detention because the three year limit for such incarceration will have expired.⁵⁴ Such a result would reflect badly on the effectiveness and efficiency of the court.

⁴⁹ Internal Rules, Rule 66(2).

⁵⁰ Internal Rules, Rules 66(3) and 74(2) and (4).

⁵¹ Internal Rules, Rule 67.

⁵² Internal Rules, Rule 74(2).

⁵³ See Kok Khemara, Sihanouk ‘Will Not Go’ to Tribunal, *VOA Khmer*, July 20, 2009 at <http://www.voanews.com/khmer/2009-07-20-voa2.cfm>.

⁵⁴ Rule 63(7). Assuming the normal extension process, the maximum three year period for provisional detention will expire for Ieng Thirith on November 12, 2010; for Nuon Chea on September 15, 2010; for Ieng Sary on November 10, 2010; and for Khieu Samphan on November 17, 2010.

The court must take steps to ensure that the investigation is moving forward rapidly and not rendered inert by outside interference, inadequate recourses, lack of expertise, or poor management. The 002 Case covers the most senior leaders of the Khmer Rouge still alive. Avoiding delay in the case is critical given the advanced age of the accused.

Ruling on Challenge to Use Confessions Obtained through Torture

Counsel for Ieng Thirith filed a request with the investigating judges to exclude from consideration all evidence acquired through torture, including the confessions taken after torture at S-21 prison. This argument was based on the mandate of the United Nations Convention against Torture (CAT), to which Cambodia is a signatory.⁵⁵ The CAT provides that any “statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceeding, except against a person accused of torture as evidence that the statement was made.”⁵⁶ The purpose of this provision is to discourage the use of torture by prohibiting states from using evidence gathered through torture against criminal suspects, and to minimize the chance that an unreliable confession will be used against a criminal suspect.⁵⁷

The prosecutors objected to Ieng Thirith’s request and argued that the purpose of the CAT exclusionary rule is to prevent evidence obtained through torture from being used against the person tortured, not to prevent its use against a person who may bear responsibility for committing the torture.⁵⁸ They argued that the CAT does not prevent use of three categories of evidence contained in S-21 confessions: 1) statements made by tortured detainees related to the hierarchy and policies of the CPK (and S-21 expert opinions based on these statements); 2) annotations on confessions by S-21 personnel; and 3) biographical information obtained at S-21 registration. They argued that this evidence is both reliable and does not offend the purposes of the CAT.

The investigating judges issued a ruling on July 28, 2008 tracking the rationale put forth by the prosecutors.⁵⁹ They ruled that evidence from confessions where torture occurred could be used for “lead” evidence and to establish facts other than the truth of the contents of the confession, for instance as evidence that the CPK relied on the contents of confessions to carry out systematic crimes. The more difficult question is when a tortured confession can be used to support the truth of statements made in the confession. The judges found that “it is not possible at this stage to affirm that no element of truth [of the contents of a confession] can ever be found in the confessions [obtained by torture or under questionable circumstances]. The reliability of the statements cannot be assessed

⁵⁵ Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, G.A.Res.39/46, U.N.GAOR, 39th Sess., Supp. No.51 U.N. Doc. A/39/51 (1984).

⁵⁶ CAT, Article 15.

⁵⁷ See Report of the Special Rapporteur on Torture, United Nations General Assembly, Torture and other Cruel, Inhuman or Degrading Treatment, August 14 2006, U.N. Doc. No. A/61/ 259.

⁵⁸ Co-Prosecutors’ Response to Ieng Thirith’s Defence Request for Exclusion of Evidence obtained by Torture, Dated 11 February 2009, Office of the Co-Investigating Judges, Ieng Thirith Case, April 30, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/323/D130_5_PUBLIC_REDACTED_PA_ENG.pdf.

⁵⁹ Office of the Co-Investigating Judges, Order on Use of Statements which were or may have been Obtained by Torture, July 28, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/386/D130_8_EN.pdf.

until the end of the investigation, when the case file is deemed complete. At that point, as with all of the evidence in the case file, the reliability of the confessions will be assessed on a case-by-case basis, with the understanding that the Co-Investigating Judges will proceed with utmost caution given the nature of the evidence and the manner in which it was obtained.”⁶⁰ Thus, the investigating judges declined to impose a bright line rule as requested by defense counsel that the contents of tortured confessions are inherently unreliable, but rather will evaluate evidence obtained through torture for reliability. The judges did not articulate a method or test for such evaluation. This ruling is subject to appeal to the Pre-Trial Chamber.

⁶⁰ Ibid, paragraph 28.

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