

# **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.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/sub\\_listing](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/sub_listing).

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## **Executive Summary and Recommendations**

The Extraordinary Chambers in the Courts of Cambodia (ECCC) marked an important milestone on July 26, 2010, when the Trial Chamber issued its judgment against Kaing Guek Eav, alias Duch, finding him guilty of crimes against humanity and war crimes and sentencing him to 35 years in detention. This sentence was reduced by five years as compensation for a period of illegal pretrial detention by the Cambodian Military Court, and Duch will be credited with time already served in pretrial detention—eleven years to date. Thus, 19 years remain to be served on his sentence. Both Duch’s defense attorneys and the court’s prosecutors have indicated they will appeal the judgment and the sentence.

The Trial Chamber read a summary of the lengthy judgment in a public hearing that was widely broadcast over radio and television in Cambodia. While many Cambodians have expressed frustration that the sentence was less than expected and that meaningful reparations were not awarded, the Trial Chamber’s care in explaining its reasons for the judgment seems to be winning increasing acceptance for the sentence. The dialogue that the Duch judgment has generated in Cambodia about justice and the Khmer Rouge period demonstrates that the court’s work is successfully engaging many Cambodians in these essential issues.

The release of the Duch judgment represents a high point in the public profile of the ECCC and highlights the contribution the court can make in bringing justice to Cambodians and, more generally, in redressing atrocious crimes. The Duch judgment presents an important opportunity to increase the effectiveness and success of the court by addressing its shortcomings. The July 2010 appointment of Clint Williamson as UN Special Expert to the Secretary-General for the ECCC provides the UN, the ECCC’s donors, and the court with the high-level leadership long needed to tackle the difficult ongoing problems of political interference and funding.

This report examines recent progress made by the court, including the Duch judgment and the appointment of the Special Expert. It also looks at the challenges currently facing the court, including fundraising, proceeding with Cases 002 and 003/004, and managing civil party participation and reparations.

### **The key recommendations from this report are:**

#### **To the UN Special Expert to the Secretary-General for the ECCC, the government of Cambodia, and all court officials and staff:**

- A) Focus immediate attention on ensuring the court is free of political interference in judicial and prosecutorial decision-making. The court can publicly demonstrate its independence by moving forward on Cases 002 and 003/004 with full cooperation from both Cambodian and international officials of the court. Specific attention should be paid to the need for international and Cambodian cooperation in securing testimony from witnesses who hold high government posts (in Case 002), and in proceeding with the

judicial investigation of five suspects put forward for prosecution by the court's international prosecutor (in Cases 003/004).

- B) Support the Special Expert in developing a completion strategy that ensures the court's pending cases are completed in a manner consistent with the goals of the court and international standards.

**To the court's donors:**

Commit sufficient funds for the court to fulfill its mandate of providing justice to the Cambodian people in accordance with international standards .

**To the court's judges, the court administration, and the Victim Support Section:**

- A) Amend the court's rules to provide the Trial Chamber with greater flexibility to award collective reparations to civil parties.
- B) Ensure the Victim Support Section has adequate leadership and resources to meet its mandate of serving civil parties and other victims.
- C) Immediately develop a strategic plan to carry out the recently expanded mandate of the Victim Support Section.

## Trial Chamber Judgment in the Duch Case

Kaing Guek Eav, alias Duch, was the warden of the Khmer Rouge S-21 prison where over 12,000 prisoners were held captive, tortured, and executed. He was the first person tried by the ECCC. On July 26, 2010, the Trial Chamber issued its judgment, finding Duch guilty of crimes against humanity and war crimes, and sentencing him to 35 years in prison. The crimes against humanity included enslavement, imprisonment, torture (including one instance of rape), and persecution on political grounds. The war crimes included willful killing, torture and inhumane treatment, willfully causing great suffering or serious injury to body or health, willfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian. The sentence will be reduced by five years in compensation for the violation of Duch's human rights resulting from illegal pretrial detention by the Cambodia Military Court. After receiving credit for the eleven years he has already served in pretrial detention, Duch has 19 years of the sentence remaining. As a comparison, the vast majority of sentences handed down by the International Criminal Tribunal for the former Yugoslavia (ICTY) for similar crimes have been for under 20 years imprisonment.<sup>1</sup>

The Duch judgment was announced in a public court hearing that was broadcast over radio and television throughout Cambodia. Many victims, particularly those who participated in the case as civil parties, understandably expressed disappointment and even outrage with the sentence initially.<sup>2</sup> The horrific nature of the atrocities committed under Duch's supervision can never be compensated for by a prison sentence, particularly one that is less than life in prison—the maximum allowed under Cambodian and ECCC law. However, the chamber's written judgment carefully lays out reasons for its verdict and sentence, and as the details of the judgment become better known, more victims seem to be accepting that the judgment is a meaningful step forward for their, and the nation's, healing.<sup>3</sup>

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<sup>1</sup> See sentences given to those convicted by the ICTY at <http://www.icty.org/sections/TheCases/JudgementList>. Examples include: Dragan Nikolic, commander of a detention center, was convicted of crimes against humanity for persecution, rape, torture, and murder, and received 20 years; Dusko Sikirica, commander of security at a detention camp, was convicted of persecution as a crime against humanity, and received 15 years; Miroslav Kvočka, deputy commander of a detention camp, was convicted of crimes against humanity and war crimes of persecution, murder, and torture, and received 7 years; Radislav Krstić, senior military leader overseeing the Srebrenica massacre, was convicted of aiding and abetting genocide, war crimes, and crimes against humanity, and received 35 years; Miroslav Bralo, member of the notorious Jokers paramilitary unit, was convicted of crimes against humanity and war crimes for murder, torture, rape and persecution, and received 20 years; Dragoljub Kunarac, leader of an army reconnaissance group, was convicted of war crimes and crimes against humanity of torture, rape, and enslavement, and received 28 years. More recently, in August 2010, the International Criminal Tribunal for Rwanda, which largely focuses on genocide crimes, convicted Dominique Ntawukulilyayo, a local political leader, of genocide and sentenced him to 25 years of imprisonment. See <http://www.unict.org/tabid/155/Default.aspx?id=1159>.

<sup>2</sup> See for example, Robert Carmichael, "Former Khmer Rouge's Prison Chief Found Guilty of War Crimes," *Duchelle*, July 27, 2010 at <http://www.dwworld.de/dw/article/05839122,00.html>; and John Ciorciari, "The Duch Verdict," *Cambodia Tribunal Monitor (CTM)*, July 27, 2010 at <http://blog.cambodiatribunal.org/2010/07/duch-verdict.html>.

<sup>3</sup> See quotations from two of the most publicly outspoken civil parties in the Duch trial, "Khmer Rouge Jail Survivors Grow to Accept Duch Sentence," *Agence France-Presse*, August 12, 2010, at [http://www.google.com/hostednews/afp/article/ALeqM5gU8scyO1qtb1hbmXO\\_QVU9gPVcxw](http://www.google.com/hostednews/afp/article/ALeqM5gU8scyO1qtb1hbmXO_QVU9gPVcxw), and Veng Rachana and James O'Toole, "Dust Settles on KRT Verdict," *The Phnom Penh Post*, August 13, 2010.

This report will not provide a full analysis of the Trial Chamber's judgment. However, it is important to highlight some of its key factual and legal findings, including:

- **Duch's role in the atrocities.** The Trial Chamber found that Duch was criminally responsible “for crimes of a particularly shocking and heinous character.” At S-21, he “managed and refined a system over the course of more than three years that resulted in the execution of no fewer than 12,272 victims.” The Chamber found that most of these victims were systematically tortured, and that those who were not executed “died as a result of the conditions of detention, which led to widespread disease, malnourishment and physical and psychological pain, as well as extreme fear.” Most of the S-21 victims were imprisoned because they were perceived to be enemies of the Khmer Rouge. The Chamber noted that Duch “worked tirelessly, to ensure that S-21 ran as efficiently as possible and did so out of unquestioning loyalty to his superiors and CPK ideology, without regard to the humanity of the detainees he oversaw. Under his tutelage, S-21 became a highly efficient instrument of persecution in furtherance of a politically-motivated policy of discrimination.”<sup>4</sup>
- **Civil parties.** Of the 90 civil party applications open at the completion of the trial, the chamber admitted 66. Twenty-four were rejected because they failed to satisfy the chamber that they were immediate victims of S-21 (or the related facility known as S-24), or because they were not able to prove close kinship or bonds of affection or dependency with immediate victims.
- **Waterboarding as torture.** The interrogation techniques of waterboarding and plunging detainees' heads into a water jar were expressly found to constitute torture.<sup>5</sup>
- **Crimes under domestic law and the statute of limitations.** The chamber did not reach a supermajority decision (which requires four out of five votes) on whether the charges against Duch for the crimes of murder and torture under Cambodian law were barred by the expiration of the statute of limitations. The Cambodian judges voted that the domestic charges were valid and reasoned that the statute of limitations had not expired because the limitations period did not start to run until after 1993 when the current constitution was adopted. They reasoned that the lack of a fully functioning judiciary and other political circumstances between 1979 and 1993 tolled the statute. In contrast, the two international judges on the bench found that there was inadequate evidence as to the ineffectiveness of the judicial system between 1979 and 1993 to find that the limitations period was tolled. They found the attempt made in the ECCC Law to “extend” the statute of limitations for domestic crimes by an additional 20 years was ineffective because the step was taken after the right to prosecute the crimes had already been extinguished. The international judges thus found that the statute of limitations barred the domestic charges. The chamber issued no ruling on the domestic charges because of the failure to reach a supermajority decision.<sup>6</sup> Hence, Duch was not convicted on those charges.

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<sup>4</sup> Judgment in case against Accused Kaing Guek Eav *alias* Duch, July 26, 2010, (referred to as “Duch Judgment”), para. 597, at [www.eccc.gov.kh/english/cabinet/courtDoc/635/20100726\\_Judgement\\_Case\\_001\\_ENG\\_PUBLIC.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/635/20100726_Judgement_Case_001_ENG_PUBLIC.pdf).

<sup>5</sup> *Ibid.*, para. 360.

<sup>6</sup> Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, July 26, 2010 at [http://www.eccc.gov.kh/english/cabinet/courtDoc/637/20100726\\_Preliminary\\_Objection\\_Case\\_001\\_ENG\\_PUBLIC.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/637/20100726_Preliminary_Objection_Case_001_ENG_PUBLIC.pdf).

- **Dissent on sentence.** The 35-year sentence, reduced by five years because of illegal pretrial detention, was agreed to by a supermajority vote of the chamber. Judge Jean-Marc Lavergne, however, dissented on the sentence. His dissenting opinion states his view that when the court reduced a potential life sentence to a term of years because of mitigating circumstances, it was required by Cambodian and international jurisprudence to reduce it to 30 years rather than the 35 years used by the majority. He pointed out that the newly adopted Cambodian Penal Code, as well as the Statute of the International Criminal Court, takes this approach.<sup>7</sup>
- **Joint Criminal Enterprise.** The chamber ruled that the mode of liability known as “joint criminal enterprise,”<sup>8</sup> (JCE) as applied under international customary law, applies to crimes charged by the ECCC. It held that the basic and systemic forms of JCE—known as JCE I and II—were part of international customary law as of 1975. The chamber did not find it necessary for purposes of its judgment to rule on the customary status of the extended form of JCE, known as JCE III, during the court’s jurisdictional period of 1975-1979.<sup>9</sup>
- **Continuous state of armed conflict.** The chamber ruled that an international armed conflict existed between Cambodia and Vietnam during the entire period of the jurisdiction of the court—April 1975 to January 1979—for purpose of the charges of war crimes against Duch.<sup>10</sup>
- **Sexual violence.** The Trial Chamber found credible evidence of at least one rape perpetrated by staff of S-21 with the knowledge of Duch. It held that, “while rape comprises a separate and recognized offence both within the ECCC Law and international criminal law, it is undisputed that rape may also constitute torture where all other elements of torture are established.” The chamber found that the evidence of rape satisfied the legal requirements for both rape and torture, but classified Duch’s offense as the crime against humanity of torture because it was an egregious component of prolonged and brutal torture of the victim.<sup>11</sup>

On August 16, 2010, the prosecutors filed a notice of appeal stating that they would seek a ruling from the ECCC Supreme Court to increase the sentence against Duch and correct certain errors

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<sup>7</sup> Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence, July 26, 2010 at [http://www.eccc.gov.kh/english/cabinet/courtDoc/636/20100726\\_Dissenting\\_Opinion\\_of\\_Lavergne\\_J\\_Case\\_001\\_ENG\\_PUBLIC.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/636/20100726_Dissenting_Opinion_of_Lavergne_J_Case_001_ENG_PUBLIC.pdf).

<sup>8</sup> Joint criminal enterprise (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. JCE I (or “basic” JCE) applies when all members act pursuant to a common purpose and possess the same criminal intent. JCE II (or “systemic” JCE) is characterized by the existence of an organized system of ill treatment, such as an extermination or concentration camp, where the accused intends to further the common system of ill treatment. JCE III (or “extended” JCE) requires a common plan for which the accused held a shared intent but extends liability to crimes outside of the common plan if they are a natural and foreseeable consequence of the plan.

<sup>9</sup> Duch Judgment, paras. 511-513.

<sup>10</sup> Duch Judgment, para 423.

<sup>11</sup> Duch Judgment, paras. 361-366. Under the ECCC statute it is plausible to characterize rape as a war crime, an independent crime against humanity, or as constituting other crimes against humanity or war crimes, such as torture or other inhumane acts. The chamber applied jurisprudence from the ICTY with respect to cumulative convictions and endorsed the standard that multiple convictions under different statutory provision, but based on the same conduct, are permissible only if each statutory provision involved has a materially distinct element not contained in the other. Further, where the charged facts fit within more than one crime, the conviction should be entered under the most specific and detailed provision.

of law with regard to the charges of crimes against humanity. The prosecutors assert that the Trial Chamber abused its discretion in sentencing Duch by: 1) giving insufficient weight to the gravity of the “crimes of a particularly shocking and heinous character” committed by Duch, his willing participation in those crimes, and other aggravating circumstances; and 2) giving undue weight to the mitigating circumstances. The other legal errors asserted by the prosecutors are that the chamber: 1) applied an erroneous legal definition of the crime against humanity of enslavement; 2) improperly subsumed torture, rape, extermination (subsuming murder) and other inhumane acts into the crime against humanity of persecution on political grounds; and 3) improperly characterized rape as torture rather than as an independent crime against humanity.<sup>12</sup> The prosecutors have 60 days from filing the notice of appeal to present legal arguments in support of their position.

Counsel for Duch filed a notice of appeal challenging the judgment on the ground that the prosecution of Duch was improper because he was not a “person most responsible” for crimes within the court’s jurisdiction. Duch’s appeal requests that the Supreme Court Chamber enter a judgment of acquittal on his behalf.<sup>13</sup> Twenty-two of the civil party applicants have notified the court they will appeal the rejection of their applications. As a result of these appeals, a final judgment in the Duch case will likely not be rendered before the first quarter of 2011. Duch will remain in ECCC detention until that occurs.

The legal challenges to the judgment and the public controversy around the length of the sentence should not overshadow the decision’s enormous significance. The case was the first public trial of a defendant deeply involved in the crimes of the Khmer Rouge. Close to 30,000 Cambodians attended a portion of the proceedings in person, and millions more watched on television. The trial’s most important contribution will not be the length of Duch’s prison term or the legal details of the judgment, but the catalyzing effect of this event in generating discussions about justice, impunity, the rule of law, judicial independence, and the history of the Khmer Rouge era. For Cambodians, the Trial Chamber’s carefully executed trial and reasoned judgment will stand as milestones against impunity.

## **Special Expert**

On July 1, 2010, UN Secretary-General Ban Ki-moon appointed Clint Williamson as a Special Expert to the Secretary-General for the ECCC. Williamson, who served as the U.S. Ambassador-at-Large for War Crimes Issues from June 2006 until September 2009, made his first trip to Phnom Penh in his new capacity the week of July 20, 2010. There, he met with court officials, representatives of the donor community, Cambodian Deputy Prime Minister Sok An, and representatives from the NGO community. Williamson’s appointment represents a belated yet essential step toward more concerted international engagement with the ECCC. The court suffers from a fractured leadership scheme, and effective and sustained high-level UN leadership is essential to deal with the political, funding, and management problems facing the court.

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<sup>12</sup> Co-Prosecutors Notice of Appeal Against the Judgment of the Trial Chamber in the Case of Kaing Guek Eav, alias Duch, August 16, 2010 at [http://www.eccc.gov.kh/english/cabinet/courtDoc/645/E188\\_2\\_EN.PDF](http://www.eccc.gov.kh/english/cabinet/courtDoc/645/E188_2_EN.PDF).

<sup>13</sup> Notice of Appeal by the Co-lawyers for Kaing Guek Eav alias Duch against the Trial Chamber Judgment of 26 July 2010, August 24, 2010 at [http://www.eccc.gov.kh/english/cabinet/courtDoc/649/E188\\_8\\_EN.PDF](http://www.eccc.gov.kh/english/cabinet/courtDoc/649/E188_8_EN.PDF).

Issues of immediate priority for the Special Expert should include fundraising, addressing political interference in judicial and prosecutorial decision-making, and developing a completion plan for the court which takes into account the need to fulfill the ECCC's mandate and leave a positive impact on domestic rule of law development. Williamson has the experience and stature to address each of these issues at the appropriate levels in the Cambodian government, diplomatic circles of donor states, and UN and ECCC management. Unfortunately, these problems have languished during much of the court's tenure, and Williamson must act with urgency to protect the integrity and effectiveness of the institution.

### **1) Budget**

The ECCC has had only limited success in raising funds for its donor-approved 2010-2011 budget of \$87.1 million.<sup>14</sup> A donor pledge conference held in May 2010 in New York raised \$17 million. Since then, additional pledges of \$2.5 million from the EU and €400,000 from Germany have been received. Most of the pledges represent contributions for 2010. While currency fluctuations and actual spending affect the figures, the portion of the budget that remains unfunded for 2010 is approximately \$6.3 million on the international side and \$3.7 million on the Cambodian side. The unfunded portion for 2011 is \$29.8 million for the international side and \$9.3 million for the Cambodian side.

An adequate and stable budget allows the court to hire and retain top quality staff and ensure that it can operate effectively and in accordance with international standards. During 2011 the court should be operating at its full capacity, with a joint trial of four high-level accused, an appeal of the court's judgment in the Duch case, and the judicial investigation of five additional (as yet undisclosed) accused persons underway. Yet concerns about the court's independence remain a stumbling block for support, and donors should make clear that their commitment to supporting the ECCC's essential work is conditioned on the Cambodian government refraining from attempts to unduly influence the court.

### **2) Political Interference**

Apparent political interference with the decision making of ECCC judicial and prosecutorial officers is the subject of a fuller discussion in the Justice Initiative's July 2010 publication, *Political Interference at the Extraordinary Chambers in the Courts of Cambodia* ("the *Interference Report*").<sup>15</sup> Of immediate concern to the Special Expert should be the apparent interference of Cambodian officials in the court's efforts to seek testimony from witnesses who hold high government posts (in Case 002), and its ability to move forward with the judicial investigation of five suspects identified for prosecution by the court's international prosecutor (Cases 003/004). No public efforts have been made to address either of these issues since the Justice Initiative's previous report was issued.

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<sup>14</sup> The total 2010-2011 budget of \$87.1 million reflects \$42.9 million for 2010 and \$44.2 million for 2011. The international portion of the budget is \$65.4 million combined, with \$32.2 million attributable for 2010 and \$33.2 million for 2011. The Cambodian portion of the budget totals \$21.7 million with \$10.7 million for 2010, and \$11 million for 2011. See ECCC Press Release "Approved ECCC Budget 2010-2011," April 12, 2010 at [http://www.eccc.gov.kh/english/news.view.aspx?doc\\_id=343](http://www.eccc.gov.kh/english/news.view.aspx?doc_id=343).

<sup>15</sup> Full text at [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/political-interference-report-20100706](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/political-interference-report-20100706).



Ending political interference in judicial proceedings in Cases 003/004 (discussed below) requires a concerted effort by the UN and donor states to insist that the political powers in Cambodia allow the ECCC to operate independently in judicial and prosecutorial decisions, including decisions about whom to call as a witness and whom to prosecute. The Justice Initiative welcomes the statements of Prime Minister Hun Sen following the announcement of the Duch judgment that “I respect the verdict handed down by the court. The government has no right to interfere or put any pressure on the court.”<sup>16</sup> This attitude should now be publicly demonstrated with regard to the other cases pending before the court: the 002 Case against alleged senior leaders Nuon Chea, Ieng Sary, Khieu Samphan, and Ieng Thirith; and the 003/004 Cases against five additional suspects submitted for judicial investigation. The Cambodian government’s commitment to judicial independence will be evidenced if and when high-level government witnesses cooperate with summonses to assist the court with testimony in case 002, and cases 003/004 against the five additional suspects are being actively investigated with full cooperation from Cambodian officials and staff.

### **3) Completion Strategy**

The ECCC was designed as an exceptional court of limited duration, intended to try only “senior leaders and those most responsible” for Khmer Rouge atrocities. While the specific number of suspects to be investigated or prosecuted was left to the discretion of the prosecutors and the judges, the term of the court was initially budgeted for only three years. This was a highly unrealistic estimate, but it nonetheless reflects the expectation of the donors, the UN, and the government of Cambodia that the court would have a limited life.

Currently, the court has cases at three stages of proceeding: 1) Case 001, where the Trial Chamber judgment against Duch is under appeal to the Supreme Court Chamber; 2) Case 002, where a lengthy trial of four senior leaders is expected to begin in early to mid-2011; and 3) Cases 003/004, which are currently in the initial stage of judicial investigation. The international and Cambodian prosecutors have indicated that they do not intend to present the names of additional suspects for prosecution, and it is highly unlikely that the investigating judges will initiate investigations of additional suspects on their own. For the court’s planning purposes, it is reasonable to assume that the conclusion of Cases 001 through 004 will represent the logical time to end the work of the ECCC.

It is appropriate, then, that the court begins developing a reasonable and transparent strategy to prepare for the conclusion of its work. The completion plan should take into account the court’s obligation to: 1) investigate, prosecute, and adjudicate outstanding cases in accordance with international standards; 2) support rule of law development in Cambodia and provide a model of independent justice to Cambodians; and 3) address residual and legacy issues related to the court, such as the post-ECCC disposition of the court’s investigatory material, archives, and physical assets, and legal issues that may arise following a final judgment in the cases.

While transferring cases against some accused to domestic courts for prosecution has been a key part of the completion strategy for the International Criminal Tribunal for the former Yugoslavia (ICTY), such a strategy is unlikely to be effective for the ECCC because Cambodian courts still face significant challenges, including unchecked political interference, widespread corruption,

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<sup>16</sup> Reported by Cheang Sokha, “Government Respects Duch Verdict”, *Phnom Penh Post*, August 5, 2010.

and a lack of institutional capacity<sup>17</sup> which likely render them unsuitable, in their current state, for these cases. Indeed, the Trial Chambers of the International Criminal Tribunal for Rwanda (ICTR) has prevented the transfer of several indicted ICTR defendants to Rwandan domestic courts for similar reasons.<sup>18</sup>

Flexibility will be necessary in devising any completion plan because it is particularly difficult to anticipate the time required to complete the complex cases that the ECCC has before it. Nonetheless, laying out the framework for a winding down and eventual cessation of operations—and funding needs to do so properly—will be important to guide the work of the court and reassure donors.

## **Case 002: Charges against Nuon Chea, Ieng Sary, Nuon Chea, and Ieng Thirith**

Case 002 is in the final stages of the judicial investigation against charged persons Ieng Sary, Nuon Chea, Khieu Samphan, and Ieng Thirith on claims that each, as a member of the Khmer Rouge senior leadership, is guilty of war crimes, crimes against humanity, and genocide. The investigating judges have disclosed that they are considering charges of genocide based on attacks against ethnic Vietnamese and Cham Muslims. The judicial investigation will be completed with a closing order that either dismisses the charges or contains an indictment on some or all of the charges. The investigating judges have indicated that they intend to issue the closing order before September 19, 2010. This date represents the expiration of three years of provisional pretrial detention for Nuon Chea, the first of the four Case 002 accused to be arrested. ECCC rules make clear that if a judicial closing order is not issued before the expiration of three years of provisional detention, the accused must be released.<sup>19</sup>

On August 16, 2010 the prosecutors issued their final submission to the investigating judges on the 002 Case, recommending that indictments be issued against all four accused for genocide, crimes against humanity, war crimes, and violations of the 1956 Cambodian Penal Code.<sup>20</sup> They state that the four charged persons committed these crimes through a “joint criminal enterprise, the purpose of which was to enforce a political revolution in Cambodia and systematically destroy any opposition to the CPK’s rule. Through this joint criminal enterprise, the Charged Persons enslaved the Cambodian population, deprived them of their fundamental human rights

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<sup>17</sup> See generally, *Interference Report*.

<sup>18</sup> See e.g., *Prosecutor v. Munyakazi*, ICTR-97-36-R11bis, Decision on the Prosecutor’s Request for Referral of Case to the Republic of Rwanda, May 28, 2008; *Prosecutor v. Kanyarukiga*, ICTR-2002-78-R11bis, Decision on Prosecutors Request for Referral to the Republic of Rwanda, June 6, 2008; *Prosecutor v. Hategekimana*, ICTR-00-55B-R11bis, Decision on Prosecutor’s Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda, June 19, 2008; *Prosecutor v. Kayishema*, ICTR-01-67-R11bis, Decision on the Prosecutor’s Request for Referral of Case to the Republic of Rwanda, Dec. 16, 2008.

<sup>19</sup> Internal Rules, Rev. 5, February 9, 2010, Rule 63 (7), at <http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv5-EN.pdf>. (All references to the internal rules are to this version unless otherwise stated and will be referred to as “Rule \_\_\_”).

<sup>20</sup> Duch is still formally a “charged person” in Case 002. The prosecutors have requested that charges not be pursued against him in the case in light of the fact that he was charged with related crimes in Case 001.

and freedoms and orchestrated mass killings of individuals that the Charged Persons and other CPK leaders perceived to be real or potential enemies of the CPK.”<sup>21</sup>

The prosecutors will have an opportunity to appeal the closing order issued by the investigating judges, and the charged persons can appeal jurisdictional issues implicated in the order.<sup>22</sup> Once the Pre-Trial Chamber considers all appeals, any final indictments issued will be transferred to the Trial Chamber to be set for trial.

### **Cases 003/004: Judicial Investigation of Five Unnamed Suspects**

Cases 003/004 result from the Pre-Trial Chamber’s authorization—in the absence of an opposing supermajority—of the international prosecutor’s September 2009 submission of the names of five accused persons and an undisclosed number of crime sites for formal judicial investigation and charging as crimes within the jurisdiction of the court. Potential political interference in the decision making of judicial and prosecutorial court officials regarding Cases 003/004 is the subject of more extensive discussion in the Justice Initiative’s *Independence Report*.

Since the *Independence Report* was issued there has been no public indication of progress towards either resolving the issue of political interference or investigating the cases (other than minimal crime scene investigation conducted only by the international side of the court). Once the judicial investigation in Case 002 is finalized with the issuance of a closing order, Cambodian and international staff of the investigating judges’ office will have no responsibilities other than investigation of Cases 003/004. Public indications that these cases are being actively investigated by both international and Cambodian court officials will be necessary to demonstrate the effectiveness of the court’s operation as well as its independence from political interference.

### **Civil Party Participation and Victim Support Section (VSS)**

The court’s groundbreaking steps to include victims of Khmer Rouge atrocities in its proceedings will be undermined without a stronger commitment to effective execution of the court’s newly expanded mandate to assist civil parties and victims. This must be addressed by ensuring that the court’s Victim Support Section, with support from the court’s administration, has the leadership, planning capacity, and resources to serve and inform civil parties and other victims about the court.

There are 3,993 civil party applicants in Case 002. The investigating judges issued a series of decisions in late August 2010 ruling on the admissibility of some applications and are expected to rule on the remainder by the time the closing order is issued in mid-September 2010. If the trends in these rulings hold true, a significant portion, perhaps the majority, of the applications will be rejected because the applicant was not able to establish *prima facie* personal harm that was a direct consequence of the facts under judicial investigation.<sup>23</sup>

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<sup>21</sup> See press release: “Co-Prosecutors request indictment of Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith,” August 16, 2010 at [http://www.eccc.gov.kh/english/news.view.aspx?doc\\_id=364](http://www.eccc.gov.kh/english/news.view.aspx?doc_id=364).

<sup>22</sup> Rule 74.

<sup>23</sup> See for example, Order on the Admissibility of Civil Party Applicants from Current Residents of

In anticipation of the large number of civil parties seeking to participate in Case 002, the court's judges have made dramatic changes in the procedures for the civil parties' involvement in the trial stage of the proceedings. The new rules, adopted in February 2010, provide that civil parties will be represented at trial *as a group* by a single team of "lead co-lawyers."<sup>24</sup> The court reports progress in efforts to have both the Cambodian and international lawyers for this post on board and in Phnom Penh by October 2010 so they can begin to understand the specific interests of the civil party group they will represent.

While limiting the rights of individual civil parties to directly participate in trial proceedings, the recent changes in the rules provide balance by expanding the mandate of the Victim Support Section (VSS).<sup>25</sup> Specifically, the VSS has a mandate to provide general information to victims (especially civil parties), assist and support civil parties in attending proceedings, undertake outreach activities related to victims (especially civil parties), and to provide non-judicial remedies for victims. An example of a non-judicial remedy under consideration is a registry of victim names and information. The German government recently announced an additional donation of €400,000 to support victim participation at the ECCC.<sup>26</sup>

The new rules adopted in February 2010 also require each civil party to be individually represented by a lawyer who will serve as the interface between the civil parties and the lead co-lawyers.<sup>27</sup> Lawyers representing civil party applicants, mostly pro-bono, generally have a large number of clients spread throughout Cambodia, and even in other parts of the world. Civil party applicants, with the help of their lawyers, will have only ten days following a ruling by the investigating judges on the admissibility of their applications to file an appeal if their application is denied.<sup>28</sup> One civil party legal team represents over 1,200 applicants because so few other options exist for civil party representation. The court committed to provide basic legal representation to applicants with no other access to a lawyer, and hired three Cambodian lawyers to represent 569 such applicants in early August 2010.<sup>29</sup> The legal representation provided to civil parties is stretched thin and cannot be meaningful without assistance from the VSS for travel, meetings, and communication between civil parties and their representatives.

The presence of civil party lawyers does not affect the obligation of the VSS to provide outreach services and information to civil parties and victims generally. It is a large task given the number

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Oddar Meanchey Province, August 26, 2010 at [http://www.eccc.gov.kh/english/cabinet/courtDoc/652/D392\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/652/D392_EN.pdf).

<sup>24</sup> Rule 23(5)

<sup>25</sup> Rule 12 *bis*.

<sup>26</sup> See ECCC Press Statement, "Germany Pledges More Financial Support to Maximise Victims' Participation in KR Trial," June 16, 2010 at [http://www.eccc.gov.kh/english/news.view.aspx?doc\\_id=352](http://www.eccc.gov.kh/english/news.view.aspx?doc_id=352).

<sup>27</sup> Rule 23 *ter*.

<sup>28</sup> Rule 77 *bis*.

<sup>29</sup> Unfortunately this was after the June 30, 2010 deadline for civil parties to submit needed information to support their applications. The appointed lawyers immediately filed a request for an extension of the deadline for their clients to file supplemental information to establish that their injuries came within the scope of the Case 002 investigation, arguing that the late appointment of legal representation did not allow them adequate opportunity to complete their applications with the assistance of counsel. The request was denied. See Phann Ana and Lucy Jordan, "KRT Denies Civil Parties an Extended Deadline," *Cambodia Daily*, August 16, 2010.

of victims that the Khmer Rouge produced and the ground-breaking nature of civil party participation at the ECCC.

The efforts of much of the VSS staff have been commendable, particularly with respect to notifying applicants of the need to amend their submissions to include information about their relationship to specific sites under investigation and to designate legal counsel.<sup>30</sup> However, the section as a whole has suffered from inadequate strategic planning and leadership and has not been fully effective in carrying out the expanded mandate given to it with the revised internal rules in February 2010.

The court, citing lack of necessary funds, has cancelled some planned outreach activities and has not implemented a plan for regular communication with civil parties and other victims. The director of the VSS, Helen Jarvis, left her position in June 2010. The court's chief of personnel has been appointed as her replacement, and fulfilling the responsibilities of these two demanding posts at the same time will be very challenging. We understand that the court has hired an experienced outreach coordinator to assist. This will be an important development if he is provided with a robust mandate and adequate resources to fulfill the mission of the VSS.

There is no information that the court has begun developing or carrying out the “non-legal measures” to assist victims. If the ECCC judges adopt rules allowing for expanded opportunities for reparations awards (see section immediately below), the responsibilities of the VSS may be further expanded. While effectively meeting the legitimate needs of civil parties and carrying out its expanded mandate is made more difficult by the court's overall budget shortages, the pledge of earmarked funds from Germany should help to alleviate that problem if the court and VSS leadership devise a plan to make effective use of the funds.<sup>31</sup>

The effective incorporation of a system of civil party participation for victims into a hybrid tribunal has been, justifiably, a point of pride for the ECCC, but there is a gap between rhetoric and practice in the treatment of victims. Although many Cambodians speak powerfully of the value of victim participation, civil parties who participated in the Duch Trial have been some of the strongest critics of the court—both before and after the judgment and sentencing.<sup>32</sup> This contradiction points to a need for the court's administration to take immediate steps to ensure effective leadership and strategic planning within the VSS. The victims seeking to participate in the 002 Case deserve more attention than the court is currently providing, and the effectiveness of any trial in Case 002 may well be impacted if the newly adopted scheme of civil party

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<sup>30</sup> This was a large task as the great majority of the applications were submitted before the court released information about the scope of the judicial investigation and the need for applicants to demonstrate that they had a claim related to one of the specific crime sites under investigation. The requirement that civil parties be represented by counsel was added in February 2010, after the deadline for civil party applications passed. The VSS undertook to contact as many applicants as possible to urge them to provide necessary additional information and designate legal counsel.

<sup>31</sup> The Office of Administration has been reluctant to authorize planned expenditures by the VSS because of the court's overall budget concerns. The need for improved VSS leadership is dramatically illustrated by the fact that the court was required to return over \$340,000 in December 2009 to the German Technical Cooperation (GTZ), because it had not been programmed or spent in accordance with the grant under which it was given.

<sup>32</sup> See for example, Julia Wallace and Phann Ana, “With Late Lawyers, 800 Face Exclusion at Tribunal,” *Cambodia Daily*, August 12, 2010.

participation is not executed with effective leadership. Donors, the UN, and the Special Expert should also be concerned about this issue, as adequately informing victims and civil parties may be one of the surest ways to help the court provide a sense of real justice to Cambodians.

## **Reparations: Proposed Revision of Rules to Add Flexibility**

The reparations award issued by the Trial Chamber as a part of the Duch judgment was extremely limited: listing the names of all accepted civil parties as well as the name of any family member who may have been harmed at S-21 in the judgment, and an order for a compilation of all statements of apology and acknowledgments of responsibility made by Duch during the trial. The chamber was hindered in its ability to order more expansive reparations because the court's rules provided that, upon conviction of an accused, civil parties are entitled to "collective and moral reparations" that must be borne exclusively by the accused.<sup>33</sup>

At the scheduled September 2010 plenary, the judges will consider changes to the rules to allow the Trial Chamber more flexibility in developing reparations awards to benefit civil parties. Judges of the court have actively sought the views of civil parties, their lawyers, and the domestic NGO community in developing proposals for consideration to better meet the interests of civil party claimants. The judges' ability to expand potential reparations awards by modifying the internal rules is limited because of: 1) the large number of victims of the Khmer Rouge in Cambodia generally and the large number of civil parties expected to participate in Case 002 more specifically; 2) the limited resources of the accused persons in Case 002; 3) the limited resources of the court itself to fund reparation awards; and 4) the inability of the court to bind others, such as the government of Cambodia, to reparation orders.

In spite of these limitations, an expansion of the Trial Chamber's ability to make recommendations and endorse feasible forms of reparations would represent progress in meeting the victims' needs for recognition and respect. We urge the court to proceed in this direction in the September 2010 plenary so that such changes can be in effect for Case 002 before trial.

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<sup>33</sup> Rule 23 *quinquies*.

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