

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

The Extraordinary Chambers of the Courts in Cambodia (ECCC) has demonstrated progress with the beginning of its first public trial, but doubts about corruption and political interference remain. The trial against Kaing Guek Eav, alias “Duch,”—the commander of the notorious S-21 prison in Phnom Penh where 14,000 people were detained, interrogated, tortured, and executed—began on March 30, 2009. It has provided vivid testimony, with striking details concerning the background of Duch and S-21, and has included Duch’s public acknowledgment of responsibility for his crimes. The trial has been broadcast on television throughout Cambodia (some broadcasts are live, others tape-recorded). The trial is providing Cambodians with a unique opportunity to better understand one of the most devastating episodes of their history. Taken by itself, the trial to date has also provided Cambodians with a reasonable model of a legitimate trial process.

Nonetheless, the legitimacy of the Duch trial is threatened by the failure of the court to dispel the taint of corruption and political interference. The government of Cambodia and the United Nations have failed as yet to agree on a credible process for addressing complaints of corruption. This leaves staff who may be victims of corrupt practices bereft of a viable remedy or complaint mechanism that they can pursue without fear of putting their jobs or safety at risk. In the absence of such an agreed system, the problem of corruption will continue to be raised in court proceedings, and will tarnish any other accomplishments of the court.

Concerns about political interference in the decision about whom to investigate and charge with crimes, within the limited jurisdictional mandate of the court as set out in the *Agreement* between the government of Cambodia and the United Nations,¹ have grown as a result of a series of statements by Cambodian government officials. These statements have insisted that, despite a recommendation by the international co-prosecutor to pursue a handful of additional prosecutions, no more than the five persons currently charged by the court should be tried. At a minimum, these statements create an appearance of improper interference, which is unacceptable. They feed concerns which have persisted since the initial negotiations about the structure of the court, and which grew when the Cambodian co-prosecutor refused to agree to any additional investigations. The suspicion of interference must be addressed by public statements on the part of the court and the government, reaffirming their commitment to the independence of judicial and prosecutorial decision-making. In addition, the process pending before the Pre-Trial Chamber to resolve the disagreement between the two co-prosecutors about whether to proceed against the additional names should be handled as expeditiously and transparently as possible.

¹ *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>.

The combination of unaddressed corruption and the appearance of political interference is a toxic mix for the court. It is within the power of the government, the UN, donors, and the court itself to address these concerns with visible actions and explicit commitments to international fair trial standards. Recent statements from the government and the donor community fall short of what is required.

This update report addresses the above issues as well as some of the recent legal developments at the ECCC.

Duch Public Trial

Opening of the Duch Trial

On March 30, 2009, the ECCC's first trial opened with a reading of the indictment against Kaing Guek Eav, also known as "Duch," on charges of crimes against humanity, war crimes, and domestic law crimes of torture and murder. The allegations arise from Duch's tenure as warden of the infamous S-21, or Tuol Sleng Prison, in Phnom Penh where 14,000 men, women, and children were held by the Khmer Rouge for torture, interrogation, and eventual slaughter between April 1975 and January 1979.

The trial began with the reading of the 45 page "closing order" of the investigating judges that serves as the indictment. The opening statement of the prosecutors emphasized the horrific natures of the crimes committed at S-21, the associated work camp known as S-24, and the nearby killing fields of Choeung Ek where prisoners were taken to be killed after being tortured. Cambodian Co-Prosecutor Chea Leang stated that the Khmer Rouge was not a movement that started with the best of intentions and unexpectedly turned into something horrible. Rather, she argued, it began with a criminal philosophy toward ordinary Cambodians that held, "to keep you alive is no gain, to kill you is no loss." The horror of the regime arose from that philosophy, according to Chea Leang. Robert Petit, the international co-prosecutor, emphasized that Duch's apologies and acknowledgment of responsibility for atrocities at S-21 did not go far enough to constitute a full admission of guilt because he claimed to have acted only on orders from above and with no involvement in the details of operations at the prison complex. Petit submitted that the evidence will show that Duch had independent authority at S-21, used that authority actively and knowingly, and was committed to the criminal cause of the Khmer Rouge.

Duch, after being advised of his right to remain silent in the face of charges against him² and with the advice of his international and Cambodian defense counsel, addressed the court directly and admitted responsibility for crimes and apologized for them. In a carefully crafted and confidently delivered statement, he testified:

Pol Pot was very enthusiastic and implemented a policy that affected human lives....He controlled everything. The important thing is that

² *Agreement*, Article 13, and Internal Rules of the ECCC, as Revised March 6, 2009, Rule 21 (1) (d), available at <http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv3-EN.pdf>.

there were tens of thousands of party members who were in his grip. The crimes committed at the time were immense... [M]ore than one million lives were lost, and because I was a member of the Communist Party of Cambodia, I acknowledge that I truly have the mental responsibility for the crimes that the Communist Party of Cambodia committed at that time. I would like to express my remorse of deep suffering and profound regret for every crime of the Communist Party of Cambodia between April 17, 1975, and January 6, 1979.

Secondly, I would like to attest to other separate crimes at S-21, for which I would like to acknowledge my responsibility in front of the law. I attest by law to all crimes at S-21, in particular the torture and the carnage in S-21...I would like to ask for forgiveness from the victims who are still alive, and I would like to ask for forgiveness from every family member of the victims who have been brutally killed at S-21. At this moment, I would like ask those to please understand and hear that I would like to ask for forgiveness. Please consider this intention. Yet, I really do not ask you to forgive me at this moment. I already know that my killing human beings, particularly women and children, was a very grave crime that could not be forgiven. My request at this moment is that I would like to ask you to please keep the door to forgiveness open. ...

I believe that people in general at this moment regard me as a coward and an inhuman person. I would like to accept it with honesty and respect. While at S-21, I regarded my life and the lives of my family members as more important than the lives of those people detained in the S-21 detention center. Opposing orders from a superior, even knowing that that was an order to murder—I never dared to think about that at that time.

Cambodian counsel Kar Savuth argued that it was unfair for the court to try Duch for actions as the head of a single prison when there were 193 prisons in Cambodia during the Khmer Rouge period, including several where more people were killed than at S-21. François Roux, Duch's international defense counsel, emphasized that it was not easy for Duch to face the victims and the public and say "I am ashamed;" that it has been a long road for him to travel, a road which has taken many years. Roux rhetorically asked what allows a man who confesses to such crimes to remain alive, and answered that Duch believes he still has a role to play in humanity: to say, "this is what we can fall into, this is what we should not repeat."

Following opening statements, defense counsel requested the court release Duch from detention for the duration of the trial. The defense argued that almost a decade of pretrial detention (from 1999-2007 by the Military Court of Cambodia and from September 2007 by the ECCC), was a violation of both domestic and international human rights law

limiting pretrial detention and requiring a trial within a reasonable period of time.³ The Pre-Trial Chamber previously rejected this argument on December 3, 2007 on the ground that the Military Court of Cambodia was separate from the ECCC; the Military Court's detention of Duch, even if illegal, did not affect the right of the ECCC to detain him.⁴ The Trial Chamber committed to issuing a ruling on the request by June 15, 2009.

The Trial Chamber issued scheduling details for the first three months of the proceedings without indicating how long the trial may last.⁵ The questioning of witnesses and presentation of other evidence will be sequenced according to discrete issues. Duch and other witnesses will be questioned about one topic before the court moves on to question them about the next issue. The issues outlined by the Trial Chamber are:

- Operations at M-13 prison (the prison that Duch ran prior to 1975 and the establishment of the S-21).
- Establishment of S-21.
- Implementation of Communist Party of Kampuchea (CPK) policy at S-21.
- Existence and nature of armed conflict. (An armed conflict is an element of the charges of war crimes and, possibly, crimes against humanity.)
- Functions of S-21 and Choeung Ek (the "killing fields" associated with S-21).
- Establishment and functioning of S-24 prison (a work prison run by Duch and associated with S-21).
- Issues relating to the character of Duch.

Testimony regarding the Establishment and Operation of M-13 Prison, April 6-21, 2009
Six days of trial testimony focused on the establishment and operation of M-13 prison by Duch from 1971-1975, a prison administered by the Khmer Rouge guerrilla forces before they assumed power throughout Cambodia. Although falling outside of the temporal jurisdiction of the court, the Trial Chamber ruled that this evidence would be relevant to show Duch's role in establishing methods of treatment of prisoners similar to those that took place at S-21 beginning in 1975. M-13 was a camp devoted to the torture, interrogation, and execution of enemies of the Khmer Rouge guerilla forces. Duch's hands-on involvement in the camp during this period undercuts his claim that he was an unwilling and somewhat removed participant in the atrocities at S-21.

³ See *Cambodia Code of Criminal Procedure*, Article 210, Duration of Temporary Detention in Cases of Crimes Against Humanity (limiting pre-trial detention to three years), August 2007, the *Cambodia Law on Temporary Detention Periods*, Article 21, at [http://www.cambodia.gov.kh/krt/pdfs/Temporary%20Detention%20Period%20Law%20\(CS-RKM-0899-09\).pdf](http://www.cambodia.gov.kh/krt/pdfs/Temporary%20Detention%20Period%20Law%20(CS-RKM-0899-09).pdf), (limiting detention for crimes against humanity, genocide and war crimes to three years), August 1999, and Article 9(3) of the *International Convent on Civil and Political Rights*, General Assembly resolution 2200A (XXI), December 16, 1966, *entry into force* 23 March 1976 at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm, which protects the fundamental right of an accused to a trial within a reasonable time period or release from detention.

⁴ Kaing Guek Eav, Pre-Trial Chamber, *Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav, Alias "Duch,"* December 3, 2007, at http://www.cambodiatribunal.org/CTM/PTC_decision_appeal_duch_C5-45_EN.pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e&phpMyAdmin=ou7lpwtyV9avP1XmRZP6FzDQzg3.

⁵ See Kaing Guek Eav, Trial Chamber, *Direction on the Scheduling of the Trial*, March 20, 2009, at http://www.eccc.gov.kh/english/cabinet/courtDoc/260/E26_EN.pdf.

Duch, François Bizot, two guards and a former prisoner testified about M-13. Duch acknowledged with a calm, matter-of-fact manner that, although he had asked to do work other than run a prison, he developed the prison interrogation and torture techniques used at M-13 when this request was denied. As at S-21, prisoners at M-13 rarely left alive. They were systematically tortured to provide “confessions”—which Duch acknowledged were largely false—and then executed. François Bizot, a French scholar of Buddhism who later wrote *The Gate*, an account of his imprisonment at M-13 and relationship with Duch, testified that he was treated, relative to other prisoners, with deference by Duch. He did not undergo the harsh interrogation techniques or extreme physical conditions inflicted on other prisoners. Duch arranged for his release from the camp after three months of detention. Bizot testified to his view of Duch as a man so committed to the cause of communism that he was willing to commit atrocious and evil acts.

Former prisoner Ouch Sorn testified in graphic detail about the treatment of prisoners at M-13, often contradicting the testimony of Duch that tended to downplay the extent of mistreatment. When asked if he was still afraid of Duch, he said “no,” as Duch was now “a tiger with no teeth.” He concluded his testimony by thanking the chamber and stating, “[n]othing else is more valuable than this process.” Two former guards, Chan Vouen and Chan Khorn, testified with some inconsistencies about the involvement of Duch in cruelty and torture at M-13. Nonetheless, the evidence painted a picture of Duch as a knowing and willing participant in the Khmer Rouge scheme to brutally eliminate all perceived enemies. Duch responded to this testimony by acknowledging that M-13 “was not just harsh but cruel and heinous. It was the place where humanity was smashed.”

Trial Chamber Judge Jean Marc Lavergne handled most of the court’s questioning of the witnesses for this phase of the evidence. He displayed a detailed knowledge of the facts and guided the witnesses through relevant testimony. In a technique unique to civil law, the court asked Duch several times to directly respond to testimony of a witness while the witness remained on the stand. These “confrontations” emphasized stark differences between Duch and the witnesses about the nature of the events at M-13, with Duch’s version more benign.

Concerns about the accuracy of the translation of testimony were raised by defense counsel François Roux and echoed by each of the other parties. Roux claimed that as much as 50 percent of the testimony of those witnesses speaking Khmer is lost when translated to French. He requested that the court order the Office of Administration to remedy the situation. Significant problems with the accuracy of the translation into English and French were noticeable when listening to courtroom testimony. In addition, it was obvious from confused witness responses that not all questions were accurately translated. Such confusion and inaccuracies will certainly affect the efficiency of the trial process and may, if not remedied, affect the integrity of a judgment based on an inaccurate record of the proceedings.

On April 22, the Trial Chamber moved on to evidence about the establishment and operation of S-21. Although too early to judge definitively, the Trial Chamber has so far

moved the proceedings at a reasonable pace so as to elicit detailed testimony about Duch's role as a prison official. However, it has allowed some irrelevant and repetitive questioning and argument by the parties which, if not better controlled, will considerably delay the trial process. The first weeks of the trial produced dramatic direct testimony broadcast throughout Cambodia about the atrocities of the Khmer Rouge period. It was a successful demonstration of the accomplishments of the court and the potential it holds to provide an accounting of Khmer Rouge crimes.

Developments and Issues of Concern

Independence

Interference with Decision to Prosecute Additional Accused and to Interview Insider Witnesses

Overshadowing the achievements of the Duch trial are growing concerns about political interference with essential prosecution decisions about whom to charge with crimes. Recent statements by Cambodian Prime Minister H.E. Hun Sen, indicating that he does not want additional persons to be investigated and charged by the court, are evidence of efforts to politically direct prosecutorial decision-making. These statements constitute a fundamental violation of the commitment by the government of Cambodia that the ECCC will comply with international fair trial standards.⁶ Political direction about whom to prosecute and whom not to prosecute directly flouts the court's promise of independence. If this problem is not remedied immediately by credible commitments from the government of Cambodia to an independent judicial process, the ECCC's reputation as a tool of the current government will be reinforced.

The Justice Initiative's February 2009 report outlined the dispute resolution process established by the *Agreement* as a partial remedy to potential political interference in charging decisions at the ECCC.⁷ The process was invoked on December 29, 2008 by international Co-Prosecutor Robert Petit in an effort to secure the cooperation of his Cambodian colleague, Chea Leang, to submit the names of additional suspects for charging and judicial investigation. Chea Leang has refused to cooperate in this referral, citing budget constraints and claiming that additional investigations are inconsistent with the *Agreement* and would undercut the continuing need for reconciliation in Cambodia. She has not disputed the sufficiency of the evidence to support proceeding against the named persons.⁸

The *Agreement* provides a strong presumption in favor of additional prosecutions proposed by one of the co-prosecutors. In the event there is not a "supermajority vote" of four of the five judges of the chamber *to prevent* recommended prosecutions, they will go

⁶ *Agreement*, Article 12(2).

⁷ See, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, February 2009 Update, Open Society Justice Initiative, February 2009 in index at http://www.justiceinitiative.org/db/resource2?res_id=103899.

⁸ Statement of the Co-Prosecutors, January 5, 2009 at http://www.eccc.gov.kh/english/cabinet/pres/84/Statement_OCP_05-01-09_EM.pdf.

forward. Thus, at least one of the international judges on the chamber must agree that there are legitimate reasons to stop the prosecutions in order to prevent them from going forward.

The original jurisdiction of the Pre-Trial Chamber was limited to resolving disputes, such as the one now before it, between the co-prosecutors or the co-investigating judges.⁹ Its role is to protect the independence and the integrity of the court.¹⁰ While the judges, at a plenary meeting, expanded the role of the Pre-Trial Chamber to include resolving pretrial appeals on other issues,¹¹ resolution of disagreements between prosecutors and investigating judges remains the basic purpose of its existence. It has had the critical question concerning the investigation of additional suspects before it for more than four months and has made no announcement about when the decision will be issued. In an order that will further delay the resolution of the question, the chamber, on April 24, 2009, submitted to the two prosecutors requests for additional information concerning their disagreement.¹²

In the meantime, recent statements by Cambodian government officials make it appear that the government of Cambodia is attempting to prevent the court from pursuing charges against any additional suspects. On March 18, 2009, Prime Minister Hun Sen, in a speech at the Ministry of Education, Youth and Sports, expressed concern that charging additional suspects would undermine peace in Cambodia.¹³ He expressed disappointment that the Japanese government had in March pledged \$200,000 to the Cambodian side of the court because he hoped the ECCC would run out of money so that Cambodia could finish the trial by itself.¹⁴ Government spokesman and Minister of Information Khieu Kanharith stated that foreign judges were “dragging their feet” over issues like charging more suspects and that “they should just go ahead with the first few [trials] to show that [the court] is working...Because [foreign judges] have a lot of money, they can afford to drag their feet...The longer they drag their feet the more money they get.”¹⁵

Directives from the government of Cambodia against further prosecutions are

⁹ *Agreement*, Article 7, above n.1.

¹⁰ See David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, M. Cherif Bassiouni, International Criminal Law, Third Edition, Volume III, International Enforcement, Martinus Nijhoff Publishers, The Netherlands, 2008, at 246.

¹¹ Internal Rules (Rev.3), Rule 73. The Internal Rules can be found at http://www.eccc.gov.kh/english/internal_rules.aspx.

¹² See *Press Statement of International Co-Prosecutor*, April 24, 2009 at http://www.eccc.gov.kh/english/cabinet/press/107/Statement_co_prosecutors_En.pdf.

¹³ Speech recorded and broadcast by Voice of America, March 18, 2009. The realistic risk of social unrest in Cambodia from the arrest or prosecution of a handful of additional suspects seems nearly non-existent. As the prime minister reiterated in his speech, he has dismantled the political and military organization of the Khmer Rouge. A recent survey conducted by the Documentation Center of Cambodia indicated that a significant majority of Cambodians support trying additional suspects because of the vast nature of the crimes committed by the Khmer Rouge. See Therith Chey, “A Thousand Voices – Questions on Additional Prosecutions as Proposed by the Co-Prosecutors of the ECCC,” Documentation Center of Cambodia, March 5, 2009.

¹⁴ *Ibid.*

¹⁵ See for instance, Neth Pheaktra and Georgia Wilkins, “Judges should Focus on Current KR Suspects: Gov’t,” *The Phnom Penh Post*, March 12, 2008.

inconsistent with its commitment, under the *Agreement* to allow the court to operate independently and in accordance with international standards for fair trials. The recent statements lend credence to the concern that has stalked the ECCC since the early days of negotiating its existence: that it will be a political tool rather than an example of accountability that serves the legitimate needs of the Cambodian people for justice. Surprisingly, few of the international officers and staff of the ECCC have publicly expressed concern about these developments, and the UN has remained silent. The lone exception was Trial Chamber Judge Silvia Cartwright, who stated that “[c]ountries where the rule of law is respected and where their citizens can be sure of a fair trial are those in which the independence of the courts and judges is guaranteed. Comments, politically motivated or otherwise, which appear to be an attempt to interfere with that independence are therefore to be deplored.”¹⁶

Further compounding the problem of political interference in judicial matters are concerns expressed by court sources that the government of Cambodia is attempting to block the investigating judges from interviewing certain “insider” or high-level witnesses who may hold current positions of power and be embarrassed to testify about their involvement with the Khmer Rouge.¹⁷ The linkage testimony of insider witnesses is often essential to proving complex atrocity cases against senior leaders, and will undoubtedly be critical in the case against senior leaders Ieng Sary, Nuon Chea, Khieu Samphan, and Ieng Thirith. Any attempt by government officials to limit the court’s access to such witnesses directly undermines both the credibility and the effectiveness of judicial investigations.

The recent statements of government officials and concerns about interference threaten to put the UN, the donors, and the staff of the ECCC in the near-impossible position of either abandoning the ECCC or assisting a court that is destined to fail in fulfilling its mandate. If the court is to proceed with fair and independent trials, the government of Cambodia and the court must publicly reaffirm their commitment to the independence of judicial and prosecutorial decision-making. In addition, the court itself must exhibit a commitment to independence, specifically:

1. The Pre-Trial Chamber must ensure that it acts as quickly as possible to address the disagreement between the co-prosecutors, as this forms the core of its mandate and directly affects the integrity of the court;
2. The Pre-Trial Chamber must make its decision about the disagreement as transparent as possible and in a manner consistent with the rights of named suspects or witnesses. Widespread suspicion in Cambodia about political interference in the ECCC will be heightened rather than dispelled by a closed process and decision. In this regard the chamber should follow the mandate of the

¹⁶ Maggie Tait, “Interference ‘Deplored’ by Judge,” NZPA, April 5, 2009, at <http://www.stuff.co.nz/world/asia/2315921/Interference-deplored-by-judge>.

¹⁷ See for instance, Sok Khemara, “Court Mulls Bringing ‘King Father’ to Court,” *VOA Khmer*, May 4, 2009 at <http://www.voanews.com/khmer/2009-05-04-voa3.cfm>.

- Agreement* that its decisions be public unless redactions are necessary to serve legitimate interests of witnesses or accused;¹⁸
3. In the event investigations proceed against suspects as a result of the decision of the Pre-Trial Chamber, careful monitoring will be required by both those inside the court and outside to ensure that there is full cooperation by all parties in the ongoing investigation and prosecution process;
 4. If Cambodian staff are not willing, or not allowed, to cooperate with investigations, the obligation rests with their international counterparts to raise this problem without delay through transparent judicial channels.

The 2002 advice of Thomas Hammarberg, former Special Representative of the High Commissioner for Human Rights in Cambodia who was involved in the early negotiations between the UN and the government of Cambodia for the court, remains relevant:

[F]or the UN to agree to participate in a “mixed” tribunal, there had to be guarantees for the integrity of the process. This is fundamentally what the discussions had been all about. *Such guarantees for international standards require watertight protection against the risk of direct or indirect political pressure.* Of course, the Cambodian participants are more vulnerable than the international appointees. It is also a question of demonstrating to the Cambodian public that genuine justice is being carried out. In view of the cynicism in Cambodia about the justice system, some really clear signs of change are necessary. . .

If international standards indeed are to be met, neither the Prime Minister nor any other politician in Cambodia should influence the trial—or be seen to do so. The tribunal should not be an instrument for political purposes. The main problem with the final compromise [of the *Agreement*] is that it does not offer full guarantees on this crucial aspect; there is a widespread concern in Cambodia that Prime Minister Hun Sen will be able to influence the proceedings heavily.¹⁹

These warnings have not been heeded or given adequate vigilance by the international stakeholders in the court. The problems they foretold regarding the ability of the court to operate with integrity are now squarely on the doorstep of the ECCC.

Corruption Allegations and Protections

The cloud produced by unresolved allegations of corruption—in the form of salary kickbacks required of Cambodian court staff—continues to hover over the court more than two years after the allegations first became public. In December 2008, the UN and

¹⁸ Internal Rules, Rule 71(4), above n. 10 contains ambiguous language indicating that the decision on a disagreement shall be handed down *in camera*. In contrast, the *Agreement* provides at Article 7 that such a decision shall be published.

¹⁹ Ambassador Thomas Hammarberg, “How the Khmer Rouge tribunal was agreed: discussions between the Cambodian government and the UN,” 2001 at http://www.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm. (“Hammarberg Notes”)(emphasis added).

the government of Cambodia announced that they would produce a final agreement before the beginning of the Duch trial, with procedures that included protection for staff who report wrongdoing. Although the Duch trial has started, no agreement has been reached. A major point of discord in the negotiations is whether Cambodian staff who do not trust the legitimacy of the Cambodian process or fear retaliation for reporting corruption can report confidentially to the UN side of the court. This option, along with reasonable protection for whistleblowers, forms a minimum threshold for a credible system.²⁰

Further negotiations and a series of meetings between the government and Assistant Secretary-General (ASG) Peter Taksoe-Jensen of the UN Office of Legal Affairs at the beginning of April yielded no visible progress in reaching an agreement and no plans were set for further high-level meetings.²¹ In a move which may have undermined the position of the ASG, during the course of these negotiations, the government of Australia delivered a letter to the government of Cambodia agreeing to release Australian funds being held by the United Nations Development Programme (UNDP). These funds had previously been frozen pending resolution of the corruption issue—but were released despite the lack of an agreement between the UN and the Cambodian government.

Shortly thereafter, the government of Japan pledged \$4.1 million to the Cambodian side of the ECCC budget.²² This pledge will ensure that funds are available to pay Cambodian staff for the remainder of 2009. The government of Japan, however, did not insist on evidence of a credible procedure to deal with corruption allegations, or any other oversight provisions. Incentives for the government of Cambodia to institute acceptable measures to address allegations of wrongdoing are now gone. The donor community issued a joint statement in support of the Japanese contribution that included only ambiguous language calling for an agreement to address corruption.²³ International donors in Cambodia have long been criticized for failing to follow through with demands on accountability and progress when pledging additional funds in critical areas such as the development and passage of an anti-corruption law.²⁴ There is evidence that the same pattern is being followed in funding the ECCC.

Most recently, the government of Cambodia, through Phay Siphon, secretary of state and spokesman at the Council of Ministers, stated that it is monitoring UN personnel at the court and maintaining files—including a list of “enemies of the ECCC”—containing

²⁰ Experience at the ECCC has shown that: 1) court staff are unwilling to report to the court’s Cambodian “ethics monitors” because they fear retaliation; and 2) the Cambodian government has displayed an unwillingness to follow up on allegations that corrupt practices exist. See additional details in February 2009 Report at http://www.justiceinitiative.org/db/resource2?res_id=103899.

²¹ Statement of Peter Taksoe-Jensen, Assistant Secretary General, Office of Legal Affairs, United Nations Secretariat, Phnom Penh, Cambodia, April 8, 2009.

²² Embassy of Japan in the Kingdom of Cambodia, Press Release “Japanese Assistance for the Project to Enhance Judicial Process of the Extraordinary Chambers in the Courts of Cambodia,” April 30, 2009 at <http://www.cambodiatribunal.org/images/CTM/presstatement20090430.pdf>.

²³ Statement of the Co-Chairs of the Friends of the Court, on Behalf of the Donors of the ECCC, April 30, 2009 at <http://www.cambodiatribunal.org/images/CTM/jointstatement20090430.pdf>.

²⁴ See for instance, Tom Hunter, “Donor ‘Talk Fest’ Slammed,” *Phnom Penh Post*, April 30, 2009.

allegations of corruption against UN staff members.²⁵ Such statements would appear to diminish any remaining hope that the government is disposed to resolve in good faith the negotiations on how to address allegations of corruption at the ECCC.

This lack of resolution leaves the court with no effective procedure to deal with allegations of corruption, and without a remedy for the black mark on its reputation. The situation will discourage persons who wish to report alleged corrupt practices from coming forward. The court, the UN, and the donors will be seen to have abandoned those Cambodian staff who filed complaints in August of 2008 at the invitation of the UN. In addition, the court remains open to repeated assaults from defense counsel during court proceedings because of its failure to address the issue with credibility. At Pre-Trial Chamber hearings on April 1 and 2, 2009, addressing appeals of the extension of provisional detention, counsel for Ieng Sary and Khieu Samphan both raised the issue of unaddressed corruption allegations as grounds for releasing their clients from detention, and these challenges were a focus of press stories about the two hearings.²⁶

Counsel for four of the five defendants joined in filing a request with the investigating judges, insisting on information about allegations of corruption. The request argues that such allegations may undermine the rights of their clients to a fair trial.²⁷ This step was taken after a similar request to the Phnom Penh Municipal Court was dismissed, and a request to the UN and the government of Cambodia for a report on corruption complaints was denied.²⁸ In addition, much of the press coverage of the historic beginning of the Duch trial contained caveats about the credibility of the court based on outstanding corruption allegations, with court staff being increasingly willing to talk publicly, albeit anonymously, about the practice.²⁹ Left unaddressed, corruption allegations threaten to overshadow the trial and undermine its legitimacy, and will no doubt continue to haunt all other proceedings.

The Justice Initiative has advocated for over two years for the allegations of corruption at the ECCC to be addressed. Corruption may be endemic to other institutions in Cambodia, but that is no reason to tolerate it in a UN-backed court that purports to provide justice to Cambodians, be a model for judicial reform, and comply with international standards. To

²⁵ See Douglas Gillison, "Gov't Claims To Have Files on UN Staff," *The Cambodia Daily*, May 12, 2009; and Georgia Wilkins and Robbie Corey-Boulet, "Foreigners at ECCC Scrutinised," *The Phnom Penh Post*, May 13, 2009.

²⁶ See Douglas Gillison, "Khieu Samphan Defense Returns to Graft Argument at ECCC," *The Cambodian Daily*, Saturday-Sunday, April 4-5, 2009, and "Khmer Rouge Foreign Minister Seeks Release," *AFP*, April 2, 2009.

²⁷ Case of Nuon Chea, *Order on Request for Investigative Action*, April 3, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/286/D158_5_EN.pdf. See also, page 18, *infra* for discussion of Order of Investigating Judges dismissing this request.

²⁸ Case of Nuon Chea, *Eleventh Request for Investigative Action*, March 26, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/282/D158_EN.pdf.

²⁹ See for example, Editorial, "Not just Cambodia on Trial," *The Boston Globe*, April 17, 2009; "Disorder in the Court-Alleged corruption at Cambodia's war-crimes tribunal," *The Wall Street Journal*, April 1, 2009 at <http://online.wsj.com/article/SB123861252189879235.html>. "The Court on Trial," *The Economist*, April 2, 2009, and Joel Brinkley, "Cambodia's Curse-Struggling to Shed the Khmer Rouge's Legacy," *Foreign Affairs*, March /April 2009.

the contrary, the reason that international participation is needed in the ECCC is mainly to prevent the ECCC from being tainted by the political interference and corruption that infect Cambodia's domestic courts.³⁰

The responsibility for guarding the integrity of the ECCC rests, in different ways, with the parties to the court: the government of Cambodia, international donors, the UN, judges, and local and international staff. Each party must do its part if the ECCC is to claim a reputation as an institution of integrity.

Government of Cambodia. The government of Cambodia has a primary responsibility to deal with outstanding allegations of corruption through the establishment of credible and safe procedures to address allegations of wrongdoing. Its refusal to allow staff to confidentially report wrongdoing to the United Nations belies its public commitment that corruption will not be tolerated at the ECCC.

Donors. Because the ECCC is funded by voluntary contributions from member states, the donors of the ECCC significantly influence how the UN fulfills its mandate with regard to the court. Donors are in a position to insist that adequate protections against improper practices are put in place to protect the integrity of their contributions. They have done this in the past by instructing the UNDP to freeze certain donor funds that UNDP administers for the Cambodian side of the court.³¹ To the extent that donors now abandon their demand that corruption be adequately dealt with before funds are released, they effectively sanction the perpetuation at the ECCC of the same patterns of corruption that plague domestic courts in Cambodia.

United Nations. As a partner in the ECCC, the UN has an obligation to ensure that the institution operates with basic integrity, and that significant problems—such as the current corruption allegations—are dealt with fully and transparently. While it cannot be held fully responsible for the actions of its Cambodian partner, the UN has a distinct role to play in effectuating the principle of accountability for mass crimes. Recent population

³⁰ Stated reasons for international participation in the court include the need for funding and capacity building. However, the history of the negotiations between the UN and the government of Cambodia shows that the greatest obstacle in establishing the tribunal was debate about the amount of international control over judicial and other operations that the UN would insist upon because of concerns about lack of independence and corruption in the domestic system. See David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, M. Cherif Bassiouni, International Criminal Law, Third Edition, Volume III, International Enforcement, Martinus Nijhoff Publishers, The Netherlands, 2008, p. 246, and “Hammarberg Notes,” above n. 16.

³¹ See Douglas Gillison, “ECCC Funding Delayed Over Graft Claims,” *The Cambodia Daily*, August 6, 2008. The UNDP was administering donor funds used to pay salaries to Cambodian staff and judges until those funds were frozen in August 2008 pending resolution of outstanding corruption allegations. Funds provided separately by the Japanese government were used to pay these salaries until the corruption complaints are resolved. On April 8, 2009 Australia announced that funds it had contributed to UNDP for the Cambodian side of the court could be released despite the failure of the government of Cambodia and the UN to agree on procedures to resolve corruption allegations.

surveys make clear that many Cambodians are relying on the UN and other international actors to ensure that the ECCC operates more credibly than other Cambodian courts.³²

Domestic Judges and Staff. Cambodians are the primary stakeholders in the ECCC. Many Cambodian staff members have shown enormous courage, and provided hope for the future of their country, in rejecting demands to pay kickbacks to officials and in reporting corrupt practices, despite there being no strong mechanism in place to protect them. Like their international counterparts, Cambodian judges have a duty to hold fair trials seen to be independent and impartial.

International Judges and Staff. International judges and staff participate at all levels of the ECCC. They provide experience and expertise in international criminal justice, help nourish the capacity of Cambodian counterparts, and endeavor to ensure that the standards of independence and ethics that guide international tribunals are upheld at the ECCC. UN documents describing the negotiations for the ECCC make clear that a major reason for insisting on UN staff at all levels of the court—including as co-prosecutors, co-investigating judges, and judges with significant power on each of the judicial chambers of the court—was to protect against political interference or other practices that would prevent the court from meeting basic international standards. To fulfill this role, international staff must insist publicly and through channels at the UN that the court not allow allegations of unlawful practices to go unaddressed. They must be seen as upholding the standard to which the court is committed.

Enormous effort has been expended in establishing the ECCC. It has a current budget of more than \$100 million. These trials are the only opportunity for a judicial process to credibly provide accountability for atrocities committed by the Khmer Rouge. The ECCC has demonstrated with the beginning of the Duch trial that it can competently conduct trial proceedings. These accomplishments should not be put at risk by the failure of the court's major stakeholders to provide a viable process for dealing with allegations of wrongdoing.

Legal Developments

Transparency

Co-Investigating Judge's Order on Breach of Confidentiality

The investigating judges issued an order on March 3, 2009 sanctioning the lawyers representing Ieng Sary for posting on a website certain documents related to Ieng Sary's case that had not been formally released by the investigating judges or the Pre-Trial Chamber.³³ The investigating judges concluded that by posting the offending documents, defense counsel had violated the “confidentiality of the investigative process,” and

³² 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>.

³³ 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”).

thereby failed to act in accordance with standards of ethics for the legal profession. The judges forwarded the order to the respective bar associations of the counsel for “appropriate action.” The offending documents included requests filed on behalf of Ieng Sary to the investigating judges and the Pre-Trial Chamber, as well as orders regarding his case.

In an appeal of the Confidentiality Order to the Pre-Trial Chamber, counsel for Ieng Sary challenged that: 1) contrary to the order of the judges, not all documents filed before the investigating judges are protected by confidentiality; 2) the posted documents are confidential to protect the interests of the accused, Ieng Sary, and he can waive that right; 3) the order was issued without an appropriate warning and opportunity for a hearing; and 4) the order constitutes discriminatory treatment against defendants because the court itself has released similar documents without suffering similar consequences.

The Confidentiality Order and appeal raise important issues concerning transparency and fairness during the lengthy judicial investigation phase of the proceedings and the appropriateness of the near blanket ban on release of information during the investigation stage. The Confidentiality Order emphasizes that the rule is: all documents and information in the investigative phase are secret unless the investigating judges make a specific determination that they can be released. This is consistent with the general practice in the Cambodian legal system that all documents and information in the investigative phase are confidential.³⁴ However there are many reasons why this rule should not apply to the ECCC.

First, in the *Agreement* guiding the proceedings, the UN and the government of Cambodia acknowledged the need for a high level of transparency and openness at the ECCC. Article 12(2) stipulates:

The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party. ***In the interest of securing a fair and public hearing and credibility of the procedure***, it is understood that representatives of Member States of the United Nations, of the Secretary-General, of the media and of national and international non-governmental organizations will at all times have access to the proceedings before the Extraordinary Chambers. Any exclusion from such proceedings in accordance with the provisions of Article 14 of the Covenant shall only be to the extent strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice (*emphasis added*).

³⁴ *Cambodia Code of Criminal Procedure*, Article 121, August 2007.

Second, the ECCC has a unique hybrid structure, in part because of a general lack of trust in the independence of the domestic court system.³⁵ Suspicion about the credibility of the ECCC grows in proportion to the secrecy of its proceedings. The population of Cambodia and other observers of the court will assume that proceedings going on behind closed doors are “business as usual” under the Cambodian court system.

Third, an important goal of the ECCC is to model good practices in judicial administration and conducting fair trials for other courts in Cambodia, and to demonstrate for the people of Cambodia the principles of a fair trial. A substantial amount of the work of the court must take place in public if the ECCC is to provide a model of fair trial standards for domestic courts for both legal professionals and the general public.

Fourth, the ECCC’s commitment to comply with the international standards for fair trials set out in Articles 14 and 15 of the ICCPR must be demonstrated and monitored at all relevant stages of the proceedings including the investigation and pre-trial stages.³⁶ Many of the core international standards requirements, such as the right to counsel, the right against self-incrimination, and the presumption of innocence come into play during the investigative and pretrial phase of the ECCC proceedings. To the extent there is no public information about these processes, it becomes impossible to know whether the court is meeting international standards.

The Confidentiality Order demonstrated that a charged person or his lawyer is at risk of sanctions for disclosing documents or information alleging a violation of fair trial rights.³⁷ There is a potential black hole created by the confidentiality rules that allow for the possibility of violations of basic fair trial rights behind closed doors.

Fifth, the crimes that are the subject of the court’s jurisdiction took place between 28 and 33 years ago. The court will only be charging persons alleged to be senior leaders or those most responsible for alleged crimes that are now part of the common history and identity of the people of Cambodia. The fact that the court has no ability to charge crimes that are of an ongoing nature, or a large number of defendants, minimizes the need for secrecy to preserve the strategy or the integrity of the ongoing investigation. The persons charged with crimes and the basic nature of their alleged involvement are likely to be well known to the public at the time the identity of a charged person is released.

Finally, because the great majority of Cambodians were either directly affected or are the children of those directly affected by the Khmer Rouge regime, there is a heightened

³⁵ See generally *Justice Initiatives: The Extraordinary Chambers* (Open Society Justice Initiative, New York) 2006; *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence before the Cambodian Courts*, edited by Ramja, Jaya & Van Schaack, Beth, The Edwin Mellen Press, 2006; *UN Special Report of the Secretary General on Khmer Rouge Trials*, U.N. GAOR, 59th Sess., Agenda Item 105 (b), Para 37 UN Doc. A/59/432 (Oct. 12, 2004); Report of Group of Experts for Cambodia, established pursuant to G.A. Res. 52/135, U.N. GAOR, 53d Sess., Annex, Para 110, U.N.Doc.A/53/850, S/1999/231 (March 16, 1999).

³⁶ *Agreement*, Article 12, above n.1.

³⁷ See Internal Rules (Rev.3), Rule 56 (1): “All persons participating in the judicial investigation shall maintain confidentiality,” Rule 35 on Interference with the Administration of Justice, and Rule 38 on Misconduct of a Lawyer, above n.10.

personal interest in the proceedings that does not attach to ordinary domestic crimes. The proceedings before the ECCC relate to circumstances that are of deep personal and historic interest to the people of Cambodia and the world. The court allows for victims of crimes investigated and charged by the ECCC to participate as civil parties with rights to access the dossier, participate in and request certain investigative proceedings, and participate in appeals before the Pre-Trial Chamber.³⁸ Through their lawyers, civil parties are entitled to access to the court dossier that contains the documents most relevant to an investigation. Millions of Cambodians are victims or closely related to victims of crimes that are likely to be charged by the court. These victims, even if they do not choose to become formal parties, have interests in and moral rights to information equal to those of civil parties. Increased transparency is necessary to ensure that this large pool of victims receives sufficient information to fully understand the process and is not discriminated against because they chose not to, or are unable to, become civil parties.

In order to fulfill its goals, the court should reconsider, either in the course of its evaluation of its own rules and procedures or in the context of the appeal of the Confidentiality Order, modifying the presumption that pretrial and investigative documents and information are presumptively confidential. Provisions more appropriate to the circumstances of the ECCC would provide that confidentiality is protected only when it protects certain narrow interests, including: 1) the identity of witnesses; 2) legitimate needs to protect the strategy of the investigation; and 3) the rights of the accused (which can be waived).

In a March 3, 2009 press statement that coincided with the issuing of the Confidentiality Order, the investigating judges stated they would “communicate more systematically about their activities in future, and will publish an increased number of documents with regard to the judicial investigation.” This is a step in the right direction, but does not solve the core problem that greater openness of the proceedings must be incorporated into the general practice of the court to help maintain confidence in the proceedings. This is especially important given that the investigative process in the Ieng Sary, Nuon Chea, Khieu Samphan and Ieng Thirith case has been proceeding for more than 18 months with little public information about its progress.

Translation Rights

Decisions of the Pre-Trial Chamber regarding the Appeals by Ieng Sary and Khieu Samphan on the Order Concerning Translation

On June 19, 2008, the investigating judges issued an *Order Concerning Translation Rights and Obligations* that applies to all parties and details the documents parties are entitled to have translated into Khmer and the language of international counsel.³⁹ Attorneys for both Ieng Sary and Khieu Samphan filed appeals to this order arguing that

³⁸ Internal Rules (Rev.3), Rule 23, above n.10.

³⁹ *Order Concerning Translation Rights and Obligations of the Parties*, June 19, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/84/Order_on_translation_rights_and_obligation_A190_EN.pdf. For a more detailed description of this order see the Justice Initiative report, October 2008 in the index at http://www.justiceinitiative.org/db/resource2?res_id=103899.

basic fair trial rights of their clients were violated by limiting the documents that must be translated.⁴⁰

The Pre-Trial Chamber issued separate, but nearly identical, rulings on the two appeals on February 20, 2009.⁴¹ The chamber rejected the submission of both accused that the translation order constituted an “investigative action” against which the parties have a right to appeal under the internal rules. Investigative actions, it ruled, are actions performed “with the purpose of collecting information conducive to ascertaining the truth.” However, it then considered whether the order violated the accused’s rights to fundamental fairness enshrined in Rule 21 of the court’s internal rules. The translation order, which set forth several categories of documents which must be translated, held that the accused are not entitled to have each and every document referred to or in the case file translated.

In the Ieng Sary decision, the chamber considered whether the limitations in the translation order violated Ieng Sary’s fundamental right to be informed of the charges brought against him. Khieu Samphan had argued that the limitations violated his fundamental right to the effective assistance of counsel because his French international counsel could not properly assist him without the translation of all documents into French. In rejecting both arguments, the chamber relied on extensive international jurisprudence holding that “a defendant’s right to translation of documents into a language he or she understands does not extend to all documents in his /her case file.” The chamber found that the rights of Ieng Sary and Khieu Samphan were sufficiently protected by extensive rights granted by the translation order, and that the order was in accordance with international standards in respect of translation rights.

Defense Request for Investigation into Corruption Allegations

On March 26, 2009, counsel for Nuon Chea filed a request for investigative action with the investigating judges, setting forth the history of corruption allegations concerning the court and stating their concern that, if true, these allegations may affect their client’s right to receive a fair trial. They requested that the investigating judges obtain information about institutional corruption at the ECCC, and secure the results of and correspondence about the inquiry by the UN Office of Internal Oversight Services (OIOS), which conducted a review of complaints of corruption filed by Cambodian staff in August of 2008.⁴² Defense lawyers for other accused before the court, with the exception of Duch, filed notices of support for the request.

⁴⁰ *Defense Appeal against the Decision to Deny the Request for Translation of Case File*, July 22, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/118/Defence_appeal_against_decision_to_deny_request_translation_A190_I_1_EN.pdf.

⁴¹ Case of Khieu Samphan, *Pre-Trial Chamber Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties*, February 20, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/240/A190_I_20_EN.pdf, and Case of Ieng Sary, *Pre-Trial Chamber Decision on Ieng Sary's Appeal against Order on Translation Rights and Obligations of the Parties*, February 20, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/241/A190_II_9_EN.pdf.

⁴² Case of Nuon Chea, *Eleventh Request for Investigative Action*, March 26, 2009 at http://www.eccc.gov.kh/english/cabinet/courtDoc/282/D158_EN.pdf. The OIOS review was submitted by the UN to the government of Cambodia with a request that a fuller investigation be conducted, but the

The investigating judges quickly dismissed the request on April 3, 2009, finding that “accepting the request would amount to an abuse of power, since the facts at issue do not come within in the jurisdiction of the Co-Investigating Judges under the ECCC Law.”⁴³ They further commented that while they had an obligation to “guarantee that the ongoing judicial proceedings are irreproachable in every way” the request only raises “speculation as to hypothetical negative effects on any form of corruption on the proceedings.” Finally, the judges found that because the Cambodian and UN authorities are already seized of issues related to corruption, further inquiry would be “superfluous.”

Defense counsel has appealed the order to the Pre-Trial Chamber. The judges’ refusal to address the consistent allegations of corruption is consistent with a pattern among the participants and organs of the ECCC to claim that the problem is someone else’s responsibility. The efforts of the UN and the government of Cambodia to negotiate a resolution that allows the court to address corruption problems—referred to by the investigating judges—have stalled.⁴⁴ There is now no apparent remedy for a party claiming that corruption interferes with basic fair trial rights or international standards. This leaves no effective accountability mechanism at the ECCC for internal wrongdoing and, ultimately, diminishes with the court’s ability to fulfill its mandate.

government of Cambodia refused on grounds that neither the UN nor OIOS had any authority to conduct the review.

⁴³ Case of Nuon Chea, *Order on Request for Investigative Action*, April 3, 2009 http://www.eccc.gov.kh/english/cabinet/courtDoc/286/D158_5_EN.pdf.

⁴⁴ “The Court on Trial,” *The Economist*, April 2, 2009.

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