

**Recent Developments  
at the Extraordinary Chambers  
in the Courts of Cambodia:**

February, 2008 Update

*Recent Developments at the Extraordinary Chambers in the Courts of Cambodia (ECCC)* is a monthly report 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>.

# Recent Developments at the Extraordinary Chambers in the Courts of Cambodia

## February, 2008<sup>1</sup>

### Overview

There have been several significant developments at the Extraordinary Chambers in the Courts of Cambodia (ECCC) since the Open Society Justice Initiative's last *Recent Developments* report (dated December 7, 2007). These include:

Judicial developments in the Nuon Chea case:

- The Pre-Trial Chamber issued a written opinion rejecting an application filed on behalf of Nuon Chea to disqualify Judge Ney Thol. Nuon Chea claimed Ney Thol's status as a military general and chief judge of the Military Court, his previous role in three highly political cases, and his involvement with the ruling political party created an appearance of bias, making it inappropriate for him to sit in proceedings against Nuon Chea.
- The investigating judges issued an order refusing to annul the record of Nuon Chea's initial appearance and provisional detention hearings. Nuon Chea had asserted that his waiver of the right to counsel at those hearings was inadequate.
- The Pre-Trial Chamber held a public hearing on Nuon Chea's appeal of the provisional detention order of the investigating judges. His counsel argued that there was no proper waiver by Nuon Chea of his right to counsel at the hearing, and that there were insufficient facts to support the finding that pretrial detention was necessary to prevent flight, tampering with evidence or witnesses, or to preserve the public order. Defense counsel also objected to the right of the four civil parties to present arguments at the hearing and asked the chamber to decide the permissible scope of participation by civil party representatives in Pre-Trial Chamber proceedings.

Other activities:

- The judges of the ECCC met in a plenary session from January 28 to February 1, 2008, followed by a week of seminars and workshops on legal and judicial matters relevant to the court. The judges adopted a judicial code of conduct, appointed Judge Kong Srim as a "resident judge" and approved some revisions to the internal rules of procedure.
- The investigating judges, with the assistance of the Public Affairs Unit, held a series of community outreach meetings in Pailin, Cambodia, a former Khmer Rouge stronghold and the residence of several potential witnesses for the court.<sup>2</sup>

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<sup>1</sup> This report addresses progress and events that have occurred since the last Justice Initiative update of December 7, 2007, which can be found in the index at [http://www.justiceinitiative.org/db/resource2?res\\_id=103899](http://www.justiceinitiative.org/db/resource2?res_id=103899) ("December, 2007 Report").

<sup>2</sup> Victims of crimes under the jurisdiction of the ECCC can participate in proceedings in three ways: 1) as a witness in the investigation or the trial called by a party or the court; 2) as a complainant that submits

- Staff for the Victims Unit have been hired and have begun to develop procedures to assist victims interested in becoming civil parties<sup>3</sup> and in filing complaints with the office of the prosecutors.<sup>4</sup> Lawyers representing four civil parties presented argument before the Pre-Trial Chamber regarding the appropriateness of provisional detention of Nuon Chea.

Immediate challenges facing the court include:

- The United Nations proposal to appoint a special advisor to provide additional leadership and expertise to the administration of the ECCC has met with opposition from the government of Cambodia. It is possible that a special advisor will be appointed to represent solely the interests of the United Nations Assistance to the Khmer Rouge Trials (UNAKRT), which administers the international aspects of the Extraordinary Chambers, at least until the government of Cambodia is persuaded of the benefits of a special advisor and agrees to cooperate with him or her. The establishment of such a post is essential if the administrative, budgetary, and leadership problems facing the ECCC are to be adequately addressed.
- The court's lack of transparency and its failure to provide access to documents continues to be a problem, interfering with the ability of the public and the international community to understand and evaluate the work of the court.
- A revised budget for the court was released to donors in New York on January 31, 2008 and seeks approximately \$113.7 million through the first quarter of 2011 in addition to the original budget of \$56.3 million, for a total budget of approximately \$170 million. The court has reported that funds for the Cambodian side of the budget, including salaries for Cambodian staff, will be exhausted in March or April 2008. The court has not announced a contingency plan to deal with the likelihood of budget shortfalls before the fundraising effort is complete.

## **Update on Specific Cases since December 7, 2007**

### ***1. Ieng Sary—Appeal of Provisional Detention Order, Hospitalization***

Ieng Sary, deputy prime minister and foreign minister during the Democratic Kampuchea regime, remains in detention charged with crimes against humanity and war crimes. Cambodian lawyer Ang Udom, along with United States lawyer Michael Karnavas are representing Ieng Sary.<sup>5</sup> Mr. Karnavas was sworn in as a member of the Bar Association of Cambodia on February 1, 2008.

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information about crimes to the co-prosecutors; or 3) as a civil party with the right to participate through an attorney along side the prosecutors in the investigation and the trial.

<sup>3</sup> Rule 23, Internal Rules, describes the criteria for a victim of crimes within the jurisdiction of the ECCC to become a civil party and the rights to participate in the proceedings that accompany that status. The Internal Rules are available at [http://gov.kh/english/internal\\_rules.aspx](http://gov.kh/english/internal_rules.aspx)

<sup>4</sup> Rule 49, Internal Rules, describes the procedure for victims and others to submit information about crimes within the jurisdiction of the ECCC to the co-prosecutors for their consideration.

<sup>5</sup> See ECCC Press Release of December 17, 2007 at [http://www.eccc.gov.kh/english/cabinet/press/55/IS-14-DSS-Press\\_Release\\_Karnavas\\_Assignment\\_ENG.pdf](http://www.eccc.gov.kh/english/cabinet/press/55/IS-14-DSS-Press_Release_Karnavas_Assignment_ENG.pdf).

On January 15, 2008, Ieng Sary appealed his provisional detention order to the Pre-Trial Chamber. The appeal brief challenged the investigating judges' findings that Ieng Sary would be a flight risk, interfere with witnesses, victims and third parties, and/or that public order would be disrupted if he were released.<sup>6</sup> It also highlighted the dangers to Ieng Sary's health if he remained in custody. Ieng Sary's lawyers did not address the issues of pardon or amnesty<sup>7</sup> in their brief, but expressly reserved that issue for a later time. No hearing date has been set for the appeal.

On February 4, 2008, the press reported that Ieng Sary had been hospitalized with an infection.<sup>8</sup> He was released and returned to the ECCC detention center on February 11, 2008, but readmitted to the hospital on February 13, 2008. There have been no public updates since.

## ***2. Khieu Samphan – Appeal of Provisional Detention Order***

Khieu Samphan, who served as president of Democratic Kampuchea during the Khmer Rouge period, is charged with crimes against humanity and war crimes. On November 19, 2007 his lawyers filed an appeal against the investigating judges' order for his provisional detention. No briefs or additional information concerning the appeal have been released. He is represented by Cambodian lawyer Dr. Say Bory and French lawyer Jacques Verges.

## ***3. Nuon Chea – Order of Investigating Judges Refusing to Annul Record; Application to Disqualify Pre-Trial Chamber Judge; Delay in Swearing-in of International Defense Counsel; and Appeal of Provisional Detention Order***

The primary legal developments during January and February 2008 were in the Nuon Chea case. Nuon Chea, often referred to as “Brother Number Two,” was second in command to Khmer Rouge leader Pol Pot. He is charged with crimes against humanity and war crimes. Nuon Chea is represented by Cambodian lawyer Son Arun and Dutch lawyers Michael Pestman and Victor Koppe. During the past two months, key judicial proceedings in the case against him included:

*a. Co-Investigating Judges Decide Lack of Legal Counsel Is No Basis for Annuling Record:* On January 25, 2008, the investigating judges issued an order refusing to annul the record of Nuon Chea's statements in two hearings (his initial appearance on September 19, 2007 and his provisional detention hearing on the same day) although he did not have the assistance of legal counsel at the time. Nuon Chea's lawyers argued that their client's “apparent waiver of his right to counsel was involuntary, uninformed,

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<sup>6</sup> See Ieng Sary Appeal against Provisional Detention, January 15, 2008 at

[http://www.eccc.gov.kh/english/cabinet/courtDoc/31/Ieng\\_sary\\_appeal\\_C22\\_I\\_5\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/31/Ieng_sary_appeal_C22_I_5_EN.pdf)

<sup>7</sup> Ieng Sary was previously tried *in absentia* for genocide by the Vietnamese-backed People's Revolutionary Tribunal in 1979, which convicted Ieng Sary and sentenced him to death. A Royal Decree dated September 14, 1996 purports to pardon Ieng Sary from the sentences of execution and confiscation of property handed down in the 1979 judgment and to grant amnesty with respect to a July 1994 law outlawing the “Democratic Kampuchea” group.

<sup>8</sup> Douglas Gillison, “Ieng Sary Revisits Hospital in Dubious Health,” *The Cambodia Daily*, February 5, 2008.

ambiguous, and therefore ineffective.”<sup>9</sup> The investigating judges found that Nuon Chea’s waiver of the right to counsel was, in fact, knowing and informed, and there was no basis to annul the record.

*b. Decision on Application to Disqualify Pre-Trial Chamber Judge Ney Thol for Bias:* On February 4, 2008, the Pre-Trial Chamber rejected an application by Nuon Chea’s lawyers to disqualify Judge Ney Thol, one of three Cambodian judges on the ECCC’s Pre-Trial Chamber.

The defense challenge was filed pursuant to Rule 34(2) of the ECCC’s Internal Rules, which allows any party to “file an application for disqualification of a judge in any case in which the Judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias.”<sup>10</sup> The defense application, filed on January 29, 2008, argued that “Judge Ney Thol’s position as a serving military officer and his participation in highly questionable judicial decisions ‘would lead a reasonable observer, properly informed, to reasonably apprehend bias’ against Mr. Nuon and the Khmer Rouge and in favor of the [Cambodian Peoples’ Party],”<sup>11</sup> which is the ruling political party in Cambodia. The application for disqualification did not set forth facts or assert that Judge Ney Thol had actual bias against Nuon Chea. Rather, it asserted the established principle that a judge cannot continue to serve on a case if there is a reasonable appearance of bias that arises from an interest the judge has in the case, or if there are “circumstances [that] would lead a reasonable observer, properly informed, to reasonably apprehend bias.”<sup>12</sup> This standard acknowledges the principle that not just justice but also the appearance of justice is critical to the integrity and credibility of courts, and that circumstances that provide a sufficient appearance of bias, even if actual bias cannot be proven, are sufficient to warrant disqualification of a judge.

The chamber requested an expedited response to the application from the prosecutors and a reply to that response from defense counsel. It set a deadline of 9:00 a.m. on February 1, 2008 for the prosecutors’ response, and a 4:00 p.m. deadline on the same day for the defense reply. It is not known if civil parties were given an opportunity to respond. Notably, the application for disqualification, the response, and the reply have not been made public. According to the chamber’s decision (the “Public Decision”), the prosecutors maintained that the application was not urgent and requested that due regard be paid to the opportunity for all parties involved to fully respond to the legal and factual

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<sup>9</sup> Order Refusing a Request for Annulment, January 25, 2008, available on the ECCC website at [http://www.eccc.gov.kh/english/cabinet/courtDoc/30/OCIJ\\_refusing\\_decision\\_D55-I\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/30/OCIJ_refusing_decision_D55-I_EN.pdf).

<sup>10</sup> The Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev.1), February 1, 2008, at [http://www.eccc.gov.kh/english/cabinet/fileUpload/27/Internal\\_Rules\\_Revision1\\_01-02-08\\_eng.pdf](http://www.eccc.gov.kh/english/cabinet/fileUpload/27/Internal_Rules_Revision1_01-02-08_eng.pdf). (the “Internal Rules”).

<sup>11</sup> Public Decision on the Co-Lawyers’ Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, para. 14, February 4, 2008, at [http://www.eccc.gov.kh/english/cabinet/courtDoc/32/PTC\\_disqualification\\_ney\\_thol\\_C11\\_29\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/32/PTC_disqualification_ney_thol_C11_29_EN.pdf). (the “Public Decision”).

<sup>12</sup> *Ibid.*, para. 20, citing *Prosecutor v. Furundzija*, IT-95-17/1A, “Judgment,” Appeals Chamber, July 21, 2000, para.189, from the decisions of the International Criminal Tribunal for the Former Yugoslavia.

basis of the request. Counsel for Nuon Chea submitted a reply in which they agreed that it was not necessary to immediately rule on the application and requested the chamber to invite the submission of *amicus curiae* briefs and hold a public hearing. Further, they amended the requested relief to seek Judge Ney Thol's removal from the Nuon Chea case only and not from the ECCC as a whole. On February 1, Judge Ney Thol also filed a response to the motion, as he is entitled to do under the ECCC's Internal Rules.<sup>13</sup>

On February 4, 2008 the chamber issued a Public Decision finding that it had sufficient information to decide the application and that it was in the interests of justice to proceed expeditiously to consider the matter without holding a public hearing or calling for further response from the parties or written *amicus curiae* briefs.<sup>14</sup>

The chamber deemed the application inadmissible to the extent that it sought the removal of Judge Ney Thol from proceedings other than the pending appeal of the provisional detention order of Nuon Chea. It limited its consideration to whether the facts set forth in the application met the legal standard for disqualification of a judge under the test of whether there is an objective appearance of bias, noting that the application did not assert or set forth facts to support a claim that Judge Ney Thol had actual bias against Nuon Chea. The chamber enunciated the established principle that a judge cannot continue to serve on a case if there is a reasonable appearance of bias that arises from an interest a judge has in the case, or "circumstances that would lead a reasonable observer, properly informed to reasonably apprehend bias."<sup>15</sup>

In its ruling, the chamber relied on jurisprudence from international courts providing that judges are entitled to a "presumption of impartiality which . . . derives from their oath to office and the qualifications for their appointment [ . . . ], and places a high burden on the party moving for disqualification to displace that presumption."<sup>16</sup> It found that the application did not present sufficient facts to overcome this presumption.

The Pre-Trial Chamber further concluded that Ney Thol did "not occupy his position as a Pre-Trial Chamber Judge of the ECCC in the capacity of an RCAF [Royal Armed Forces of Cambodia] officer, but in his personal capacity."<sup>17</sup> On this basis it distinguished Ney Thol's situation from that underlying the 2005 judgment of the European Court of Human Rights (ECHR) in the case of *Öcalan v. Turkey*. In the *Öcalan* case, the ECHR found that the applicant's concern about the independence and impartiality of the Turkish National Security Court was justified since the bench hearing his case had included a military judge and recalled that it had consistently held that "certain aspects of the status of military judges sitting as members of the national security courts made their independence from the executive questionable."<sup>18</sup> While finding *Öcalan* to be "not

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<sup>13</sup> Rule 35, Internal Rules. The response of Judge Ney Thol is appended to the Public Decision.

<sup>14</sup> See Public Decision, para. 8.

<sup>15</sup> *Ibid.*, para. 20, citing *Prosecutor v. Furundzija*, IT-95-17/1A, "Judgment" Appeals Chamber, 21 July 2000, para.189, from the decisions of the International Criminal Tribunal for the Former Yugoslavia.

<sup>16</sup> *Ibid.*, para. 15.

<sup>17</sup> *Ibid.*, para 24.

<sup>18</sup> *Öcalan v. Turkey* (2005) 41 E.H.RR.985, Grand Chamber Judgment, 12 May 2005, para. 112, available at

relevant” to the facts at hand, the chamber did not explain how potential concerns raised by Ney Thol’s continuing service as a military general and as head of the military court were overcome by the fact that he was formally “serving in his personal capacity.”

Second, the chamber rejected Nuon Chea’s claim that Judge Ney Thol’s involvement in three politically-charged cases established grounds for his disqualification. Defense counsel had argued that Judge Ney Thol should be disqualified because he participated in certain cases, the outcomes of which indicated a willingness to utilize his judicial power improperly in the service of the political agenda of Cambodia’s ruling party.<sup>19</sup> The chamber found that the defense did not demonstrate that the “opinions expressed in one case can give rise to any appearance of bias in another case.”<sup>20</sup> It also noted that Nuon Chea was not alleged to have been involved or mentioned by Judge Ney Thol in any of the specified cases.<sup>21</sup>

The chamber characterized the evidence produced by defense counsel as generalized commentary from third parties about the competence and motivation of the Cambodian judiciary as a whole, and not specifically about Judge Ney Thol. It found that such generalized commentary could not be seen as evidence of an “apprehension of bias by Judge Ney Thol” in the case of Nuon Chea<sup>22</sup> and noted that defense counsel did not provide evidence of any instruction from a political actor that affected the decisions of Judge Ney Thol.<sup>23</sup> It concluded:

Considering the high threshold to be reached by the Defence, the quality of the evidence submitted does not reach the standard to allow the conclusion that Judge Ney Thol acted upon the instruction of any political organisation or that he was politically motivated. There could be no such apprehension of bias by an objective observer informed of all the relevant circumstances of the matters put before the Pre-Trial Chamber.<sup>24</sup>

*Justice Initiative Analysis:* The defense effort to disqualify Judge Ney Thol was not unexpected and there was considerable anticipation about how it would be resolved. The impartiality of national judges has been an issue of great interest and concern in Cambodia, and apprehensions in this regard have been raised in relation to Judge Ney Thol in particular.<sup>25</sup> Critics of the ECCC and many Cambodians cite these considerations

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<http://cmiskp.echr.coe.int/tkp197/view.asp?item=49&portal=hbkm&action=html&highlight=ocalan&sessionid=5803293&skin=hudoc-en>.

<sup>19</sup> Ibid., para. 27. The defense brief is not public and the cases at issue were not discussed in detail in the Public Decision, so insufficient information is available to critically evaluate this argument.

<sup>20</sup> Ibid., para. 31.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid., para. 32.

<sup>23</sup> Ibid., para. 33.

<sup>24</sup> Ibid., para.34.

<sup>25</sup> Ker Munthit, Associated Press, “Cambodia Judges’ Credibility Questioned,” May 22, 2006.



as a basis for grave concern about the independence of a court with a majority of judges who are Cambodian.<sup>26</sup>

Against this background, the ECCC *Agreement* included various safeguards designed to assure that the court meets internationally recognized fair trial standards. Article 33 of the *Agreement* incorporates Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), to which Cambodia is a party, which mandates that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” Article 3(3) of the ECCC *Agreement* further provides that “the judges...shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.”

The ECCC *Agreement* includes further protections to assure judicial independence, including: the involvement of international judges and senior staff in all significant decisions, the obligation to take swift action in the face of evidence of interference, a requirement that significant decisions be adopted by supermajority vote, and the requirement that proceedings be transparent.

To honor the spirit of these protections with regard to the impartiality of judges, the judges of the ECCC have a special responsibility to scrutinize carefully disqualification petitions to ensure that defendants’ right to be judged impartially is respected. They must assure the public they take this responsibility seriously.

Based on the Pre-Trial Chamber’s Public Decision on the application to disqualify Ney Thol—and in view of its failure to release publicly key pleadings—the Justice Initiative has concerns about the degree to which these expectations were met. The Public Decision relies heavily on the presumption, well established in the jurisprudence of contemporary international courts, that judges appointed to those courts are in fact impartial.<sup>27</sup> This jurisprudence has emphasized that the presumption is warranted in light of the fact that

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<sup>26</sup> See, for example, articles in *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, Lewiston, New York), 2006; *UN Special Report of the Secretary General on Khmer Rouge Trials*, U.N. GAOR 59th Sess., Agenda Item 1056 (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); *Report of Special Representative to Secretary General for Human Rights in Cambodia, Continuing Patterns of Impunity in Cambodia*, October, 2005, at [http://cambodia.ohchr.org/webdocuments/reports/Thematic\\_rpt/242\\_Thematic\\_05-Oct-05\\_eng.pdf](http://cambodia.ohchr.org/webdocuments/reports/Thematic_rpt/242_Thematic_05-Oct-05_eng.pdf).

<sup>27</sup> See *Prosecutor v. Furundzija*, IT-95-171-A, Judgment, 21 July 2000, available at <http://www.un.org/icty/furundzija/appeal/judgement/index.htm>; *Prosecutor v. Karemera, Rwamajuba, Ngirumpatse, Nzirorera*, ICTR-98-44-T; Decision on Motion by Karemera for Disqualification of Trial Judges, 17 May 2004, available at <http://69.94.11.53/ENGLISH/cases/Karemera/decisions/040517g.htm>; *Prosecutor v. Norman* SCSL-2004-14-PT, Decision on the Motion to Recuse Judge Winter from Deliberations in the Preliminary Motion on the Recruitment of Child Soldiers, Appeals Chamber, 28 May 2004, available at <http://www.sc-sl.org/Documents/CDF/SCSL-04-14-PT-112.pdf>.

judges on international courts must be appointed based their capacity and integrity and on the fact that they take an oath to act impartially.<sup>28</sup>

The assumption underlying this presumption—that judges are appointed and operate in a context that assures judicial independence—is unfortunately open to perennial doubt in Cambodia, where as already noted there is a well established and widely acknowledged history of a lack of independence within the judiciary. It appears that defense did not argue that this presumption was not valid in the context of Cambodia and did not allege facts evidencing bias or the appearance of bias specific to Nuon Chea. In this regard, the Public Decision is consistent with cases in which courts have held that evidence of bias specific to an individual defendant is required where the bias alleged related to a general fact situation.<sup>29</sup> These cases do not, however, involve allegations that a judge is subject to political influence. The *Öcalan* case stands for the proposition that an unacceptable perception of bias can arise from the background and position of a judge that evidences a general bias that might affect, or be perceived to affect, an individual defendant.

The ECCC Pre-Trial Chamber’s unqualified reliance on a presumption of independence—that, unfortunately, has doubtful validity in Cambodia—to avoid a more searching analysis is unlikely to dispel existing concerns about whether all judges on the court will be held to international standards of impartiality. A more searching analysis of concerns about judicial independence by the chamber could have helped to allay these concerns and enhanced the credibility of the ECCC.

The court’s failure to handle the application more transparently contributes to this suspicion. Article 12 of the *Agreement* emphasizes that:

In the interest of securing a fair and public hearing and credibility of the procedure, it is understood that representatives of the United Nations, of the Secretary-General, of the media and of the 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 [ICCPR] shall only be to the extent strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice.

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<sup>28</sup> Judge Ney Thol was appointed in accordance with the ECCC’s *Law* and the *Agreement*, the two documents providing the ECCC’s legal framework. He was officially appointed by Royal Decree on May 7, 2006 and subsequently sworn in during an official ceremony. The *Agreement* at Article 10 (as amended), requires that judges of the ECCC “shall be appointed from among the currently practicing judges or from judges who are additionally appointed in accordance with the existing procedures for appointment of judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law, including international humanitarian law and human rights law.”

<sup>29</sup> See *Furundzija*, and *Prosecutor v. Issa Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Decision on Sesay, Kallon and Gbao Appeal Against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankoli Thompson from the RUF Case, January 24, 2008, para 14, available at <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-909.pdf>.

Unless the court honors each of the protective procedures—and does so publicly—its credibility will be subject to suspicion. The court should have done more to satisfy the obligation for maximum transparency, including: (1) publicly releasing the application and other pleadings, (2) allowing adequate time for all parties to respond to the application, and (3) holding a public hearing on the issue.

*c. Delay in Swearing-in of International Defense Counsel:* The Pre-Trial Chamber held a public hearing on February 4, 2008 to address Nuon Chea's appeal of the order of the investigating judges that he be held in provisional detention. One of the international defense counsel for Nuon Chea, Victor Koppe, came to Cambodia to argue the appeal along with Cambodian co-counsel, Son Arun. Victor Koppe had been advised by the Bar Association that his application for registration had been approved and that he would be formally sworn in on February 1, 2008. At the hearing, the court announced that the swearing in would be stayed because of a request of the Bar Association to further consider the application of Koppe.

Koppe's swearing-in was delayed because several days earlier he had signed an application to disqualify Judge Nay Thol of the Pre-Trial Chamber on the ground of the appearance of judicial bias. The Bar Association objected to Koppe's signing the application before he was formally sworn in. Koppe expressed his concern that the action was retaliation for moving to disqualify a judge.<sup>30</sup> Because Koppe was not sworn in as a member of the Bar Association, there was no international counsel present<sup>31</sup> and able to argue the appeal of the provisional detention order along with Cambodian co-counsel at the hearing scheduled for February 4, 2008, and thus the hearing was postponed. After discussions with the Bar Association, Koppe was sworn in on February 6, 2008 and argued the appeal along with Son Arun before the Pre-Trial Chamber on February 7 and 8, 2008.

*d. Legality of Continuing Provisional Detention Argued before Pre-Trial Chamber:*

On February 7, 2008, the Pre-Trial Chamber began a two-day hearing on Nuon Chea's appeal by of the pretrial detention order issued by the investigating judges on September 19, 2007. Nuon Chea argued that the detention order was invalid because he had been denied his right to counsel at the detention hearing and because his right to remain silent was not adequately protected there. At the detention hearing, Nuon Chea stated that he wanted to proceed without counsel, after having previously stated that he wanted counsel to represent him. The appeal was based on the premise that this waiver of the rights to counsel and to remain silent at the hearing was not voluntary, informed, or effective because Nuon Chea, under the circumstances and given the fragile state of his health, did not understand his rights and did not have the capacity to adequately waive them. In addition, counsel argued that, regardless of the validity of the waiver of right to counsel, there were insufficient facts to support the conclusion that provisional detention was

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<sup>30</sup> Douglas Gillison, "Bar Delays Dutch ECCC Lawyer's Admission," *The Cambodia Daily*, February 3, 2008.

<sup>31</sup> Mr. Pestman, the other international counsel representing Nuon Chea, was not in Cambodia on the date scheduled for the hearing.

necessary to prevent public disorder, danger to Nuon Chea, interference with witnesses or evidence, or to ensure Nuon Chea's presence at trial.

Significant details of the hearing include:

- At the opening of the hearing, defense counsel raised an objection to the presence of counsel for civil parties on the ground that they did not have an interest in the specific legal issue at stake. Defense counsel urged the chamber to interpret the internal rules of the court narrowly to exclude civil parties from presenting arguments unless there was a showing of a specific interest in the issue. The chamber permitted the civil parties to present arguments in order to allow the hearing to go forward, but requested briefs from the parties on the issue. In the future, the chamber will consider the argument of the counsel for the civil parties only if a decision is made that their participation was appropriate.
- Counsel for four persons who have been admitted as civil parties in the case against Nuon Chea argued in favor of upholding the order for provisional detention, endorsing the arguments of the prosecutors. In addition, one civil party directly addressed the court. The legal arguments of the civil parties were similar to the arguments of the prosecutors. In addition, the civil parties described atrocities that they, their families, or others had experienced during the Khmer Rouge period.
- The defense and the prosecution had opposing views on the standard of review that should be applied by the chamber to appeals of orders from the investigating judges. The defense argued that the chamber should only review such decisions for abuse of discretion, while the prosecutors argued that the review was *de novo*.
- The hearing was well conducted with due respect shown for all parties. Given that this hearing was the first time that civil parties have appeared in such a proceeding, leeway for victims to present their views and positions was appropriate. However, given the limited nature of the issues on appeal and the large number of counsel arguing (seven separate counsel and one civil party), there was much repetition and some irrelevant argument. The hearing demonstrated the need for the court to balance the interests of the parties in publicly explaining their position on the one hand, and the rights of the accused to the presumption of innocence and to confront evidence against them on the other.

#### ***4. Kaing Guek Eav, aka Duch***

Kaing Guek Eav, the former head of the infamous Khmer Rouge torture center Tuol Sleng, is charged with crimes against humanity. The investigating judges announced that on February 26 and 27, 2008 they will conduct an on-sight investigation at Tuol Sleng and at Choeng Ek, the "killing fields" near Phnom Penh where Tuol Sleng prisoners were taken to be executed. The site visits will be filmed and Duch will be present, as will several witnesses who were imprisoned at Tuol Sleng. The investigating judges indicate that the trial of the case against Duch will begin in mid-to-late 2008.<sup>32</sup>

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<sup>32</sup> Statement of Judge Marcel Lemonde at press conference in Pailin Cambodia on January 16, 2008.

## ***5. Ieng Thirith -- Appeal of Provisional Detention Order***

Ieng Thirith, minister of social action during the Democratic Kampuchea regime, is charged with crimes against humanity. Her counsel filed a brief in support of the appeal of the order to hold Ieng Thirith in provisional detention. The brief, which has been posted on the court's Web site,<sup>33</sup> argues that there were insufficient factual findings made by the investigating judges specific to Ieng Thirith to justify detention under any of the conditions provided for in the internal rules, and that the fragile state of her physical and mental health justify conditional release.

No hearing date has been set for the appeal and no announcement has been made as to whether the hearing will be public. The Pre-Trial Chamber has issued an order allowing *amicus* briefs on the appeal.

## ***Other Developments***

### ***1. Victims Unit***

The court made progress recently in developing and staffing its Victims Unit, which is responsible for assisting victims in filing complaints with the prosecutors or applications to become civil parties and participate in the investigative or trial phases of the proceedings.<sup>34</sup> An international deputy director was hired in late 2007 and the Cambodian director began working at the ECCC in mid-February 2008. The deputy director has met several times with local non-governmental organizations (NGOs) to strengthen their ability to provide victims with information about their right to participate as civil parties in the ECCC process and to develop strategies to assist civil parties in obtaining legal representation and presenting their positions to the court as a group rather than individually.

The draft ECCC budget presented to donors in late January 2008 includes funds for five support staff for the Victims Unit and a joint outreach office housed with the court's general outreach program in Phnom Penh. It does not include funding for active outreach into urban and rural areas or any funds for legal representation of victims. Nor are funds for such outreach included in the Public Affairs budget of the ECCC. Adequate outreach, coordination, and legal representation of victims will be necessary if the role of victims who participate in ECCC proceedings is to be constructive and meaningful. Close coordination between the Victims Unit and the NGO community and creative funding strategies will be necessary to accomplish these goals, but additional funding from the court is also required if its victim participation mandate is to be met.

As of February 1, 2008, four persons had been formally admitted as civil parties, but it is believed that there have been many more applications and an even greater number of complaints filed by victims. A priority for the Victims Unit must be to process these complaints and applications and develop a system to communicate with those who submitted them about the status of their submissions.

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<sup>33</sup> See ECCC website at:

[www.eccc.gov.kh/english/cabinet/courtDoc/28/Appeal\\_Ieng\\_thirith\\_C20\\_I\\_3\\_EN\\_revised.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/28/Appeal_Ieng_thirith_C20_I_3_EN_revised.pdf).

<sup>34</sup> See notes 2, 3 and 4, *supra*, for references to the role of civil parties and the right to file complaints.

The role of victims at the ECCC presents a groundbreaking opportunity for victims of mass atrocities to participate in and benefit from (although not financially) judicial proceedings.<sup>35</sup> However, the participation rights of victims present many logistical and legal challenges that the chambers and the administration must address immediately if they are to prevent delay in the proceedings or improperly affect the rights of accused to a fair trial. Among other challenges, the ECCC must address funding issues, develop methods for communicating with victims, provide protection and support for victims who participate, and develop parameters for victim participation in each phase of the judicial proceeding. These challenges must be managed in a manner that strikes the proper balance between the rights of victims on one hand and of the accused on the other.

## ***2. Plenary Session of Judges***

ECCC judges held a plenary session on January 28 - February 1, 2008. The judges remained in Phnom Penh for a week following the plenary for a series of workshops and seminars organized by the Berkeley War Crimes Project and the East-West Center; funding was provided by the British Embassy.

Other than brief opening statements and a photo opportunity, the judges' plenary session was closed to the public. The judges adopted a code of judicial ethics, appointed Kong Scrim as resident judge, and refined the court's rules of procedure.<sup>36</sup> The code of judicial ethics is based on the code adopted by the International Criminal Court and contains no provisions for enforcement.<sup>37</sup> Given the concerns raised about judicial independence since the inception of the ECCC, significant enforcement provisions would have added to the court's credibility and it is unfortunate that they were omitted. The revised internal rules are posted on the ECCC Web site.<sup>38</sup>

## ***3. Outreach in Pailin by Investigating Judges and the Public Affairs Unit***

In January 2008, the investigating judges of the ECCC conducted a series of outreach meetings in Pailin, Cambodia, a Khmer Rouge stronghold until the late 1990s. Meetings were held with district and commune level officials, judicial police, and the general public. The meetings were scheduled in response to concerns that potential witnesses had been uncooperative with the court's investigators because they were misinformed about their potential roles.<sup>39</sup> The need to conduct these forums in the course of critical investigations highlights the need for the court to engage in much more robust public outreach in order not only to keep the public advised of its work, but also to ensure that the court receives cooperation from essential witnesses.

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<sup>35</sup> The Statute of the International Criminal Court also provides for victim participation, although victims are not entitled to the status of parties as they are in the ECCC. See article 68(3) of the *Rome Statute* at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf).

<sup>36</sup> See Press Release of February 1, 2008 on UNAKRT website at: <http://www.unakrt-online.org/Docs/Court%20Statements/2008-02-01%203rd%20Plenary%20Closing%20Statement.pdf>.

<sup>37</sup> See Code of Judicial Ethics, at [http://www.eccc.gov.kh/english/cabinet/fileUpload/31/Code\\_of\\_Judicial\\_Ethics\\_31-01-08\\_ENG.pdf](http://www.eccc.gov.kh/english/cabinet/fileUpload/31/Code_of_Judicial_Ethics_31-01-08_ENG.pdf).

<sup>38</sup> See Internal Rules, [Rev. 1], at [http://gov.kh/english/internal\\_rules.aspx](http://gov.kh/english/internal_rules.aspx).

<sup>39</sup> Douglas Gillison and Pin Sisovan, "ECCC Judges to Hold Public Forum in Pailin," *The Cambodia Daily*, January 15, 2008.

## ***Update on Challenges Facing the Court***

### ***1. Transparency Issues***

Concerns about lack of transparency at the court raised in the Justice Initiative's December 7, 2007 report have not been adequately addressed.<sup>40</sup> The Cambodian public is receiving little information about adversarial hearings before the investigating judges and has not been permitted to observe any of the investigative hearings.

The Pre-Trial Chamber exercised its discretion to hold its hearing on the provisional detention appeal of Nuon Chea in public. However, some of the pleadings relating to the appeal were not made public, most notably the brief of the prosecution. The decision of the Pre-Trial Chamber on the application to disqualify Judge Nay Thol described above was issued publicly, as is required by the court's Internal Rules,<sup>41</sup> but the application itself, the response of the prosecution, the reply of the defense and any submissions of civil parties were not made public. In other cases on appeal before the Pre-Trial Chamber, only a portion of the pleading and briefs related to the case have been publicly released. There are no discernable standards for why some pleadings are made public and others are not.

With access to only a portion of the pleadings, it is difficult to discern an accurate picture of the proceedings before the ECCC. It is understandable that portions of pleadings that disclose confidential information which may affect the safety of witnesses or the integrity of an ongoing investigation cannot be released. But portions of pleadings that do not contain such information should be released.

It is unlikely that there was confidential witness or investigative information in the motion filed by Nuon Chea's lawyers for removal of Judge Nay Thol, yet their submission was not made public. A key point of the defense counsel's argument was that the information justifying disqualification was well known and public. It is understood that defense counsel designated the application as a public document, but that this designation was overridden by the court. The court's decision to conceal pleadings related to judicial impartiality is especially problematic, as the lack of transparency can reinforce doubts about said impartiality. In addition, it is difficult to understand or evaluate the decisions of the Pre-Trial Chamber if the pleadings it considered and which are referred to in the decision are not released. Routinely releasing such pleadings would add greatly to the public's understanding of the process and to the credibility of the court.

The Justice Initiative continues to believe that the interests of justice and the ability of the Cambodian public to understand the ECCC's proceedings would be far better served if the court's internal rules reflect the spirit of the *Agreement*, and thus are amended to provide that adversarial hearings before the investigating judges and appeals by parties to the Pre-Trial Chamber are presumptively public, absent exceptional circumstances such as the need to protect the identity of witnesses or the integrity of an investigation. If this is not done, the court should, at a minimum, release documents, with appropriate

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<sup>40</sup> *Supra*, Note 1.

<sup>41</sup> Rule 34, Internal Rules.



redactions, related to public decisions of the Pre-Trial Chamber and orders of the investigating judges.

## ***2. Revised Budget and Administrative Leadership***

A revised budget for the court requesting an additional \$113.7 million through the first quarter of 2011 was released by the ECCC to donors on January 31, 2008. This revised budget would increase the court's total budget from its original \$56.3 million to \$170 million. The revised budget has not yet been released publicly. The original budget omitted funding for many core functions of the court, underestimated the cost of other functions, and underestimated the length of time it will take the court to complete its mandate, thus a significantly increased budget request was expected

On November 16, 2007 the Justice Initiative issued a memorandum to the Group of Interested States entitled *Critical Issues Surrounding the Fundraising Drive of the Extraordinary Chambers in the Courts of Cambodia* recommending that donors should provide additional funding for the ECCC but only on condition that certain changes are made or adequately addressed. These conditions include:

- The court should eliminate administrative divisions between the “Cambodian side” and the “international side,” minimize translation backlogs, institute best practices in human resource management, and prepare the courtroom and other physical structures for trial.
- The court should demonstrate that salary kickbacks are not presently occurring and institute measures to ensure that they will not happen in the future.
- The court should increase transparency through the more complete and frequent release of documents and information about its operations and relating to judicial proceedings.
- Donors should develop an active management oversight group to ensure that all donor funds are administered effectively and efficiently.
- UNAKRT and donors should work with a UN-appointed special advisor to assist with administrative and management reforms, monitor their effectiveness, and monitor ECCC compliance with the *Agreement*.
- Adequate planning and funding should be allocated for outreach, witness protection services, and the Victims Unit.<sup>42</sup>

The court has not yet demonstrated that it is addressing the significant leadership and administrative problems that were raised by the UN Assessment, an evaluation undertaken by two experts on behalf of the international side of the court to assess the court's readiness to begin trials,<sup>43</sup> and the United Nations Development Programme's

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<sup>42</sup> See *Critical Issues Surrounding the Fundraising Drive of the Extraordinary Chambers in the Courts of Cambodia* at: [www.justiceinitiative.org/db/resource2?res\\_id=103943](http://www.justiceinitiative.org/db/resource2?res_id=103943).

<sup>43</sup> See United Nations Development Programme, *Audit of Human Resources Management at the Extraordinary Chambers in the Courts of Cambodia (ECCC)*, available on the UNAKRT website at <http://www.unakrt-online.org/Docs/Other/2007-0604%20UNDP%20Special%20Audit%20of%20ECCC%20HR.pdf>, and discussion in the Justice Initiative



Audit of Human Resource Issues, undertaken to assess procedures and problems in human resource management on the Cambodian side of the court.<sup>44</sup> There has been no comprehensive public reporting of actions taken to address the serious issues raised in both reports concerning administrative leadership, human resource management, and general ability of the court to perform core functions such as court management, translation and interpretation, and witness protection. A special advisor should be appointed immediately to assist either the court generally, or at least the international side of the court, in dealing with administrative and leadership difficulties.

A December 27, 2007 message by the director of administration condemning corrupt practices at the ECCC<sup>45</sup> is an important initial step in addressing persistent allegations of corruption (principally in the form of required kickbacks by Cambodian court personnel). But it must be followed with the adoption of effective anti-corruption measures, including the presence of a person who can securely accept and act on complaints concerning inappropriate practices. Although these allegations were first publicized a year ago, to date adequate procedures have not been put in place to ensure such practices do not take place as the court moves forward.

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report *Critical Issues Surrounding the Fundraising Drive of the Extraordinary Chambers in the Courts of Cambodia* on issues relating to fundraising drive at [www.justiceinitiative.org/db/resource2?res\\_id=103943](http://www.justiceinitiative.org/db/resource2?res_id=103943).

<sup>44</sup> UNAKRT Summary of Recommendations of the Assessment Team (Vincent/St.Louis), available at <http://www.unakrt-online.org/Docs/Other/2007-06-13%20UNAKRT-Summary%20of%20Expert%20Recommendation.pdf>, and *Critical Issues Surrounding the Fundraising Drive of the Extraordinary Chambers in the Courts of Cambodia*.

<sup>45</sup> See International New Year Message from Director of Administration, December 27, 2007 at: [http://www.eccc.gov.kh/english/cabinet/speeches/6/Inter-Office\\_Memo.pdf](http://www.eccc.gov.kh/english/cabinet/speeches/6/Inter-Office_Memo.pdf).

OPEN SOCIETY  
**JUSTICE INITIATIVE**

The Open Society Justice Initiative, an operational program of the Open Society Institute (OSI), pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies worldwide. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in the following priority areas: national criminal justice, international justice, freedom of information and expression, and equality and citizenship. Its offices are in Abuja, Budapest, and New York.

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