

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

August 2007 Update

Recent Developments at the Extraordinary Chambers in the Courts of Cambodia *is the first in a series of monthly reports 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 www.JusticeInitiative.org.*

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Progress at the ECCC

Co-Investigating Judges Seized of Case—Five Suspects Included

On July 18, Chea Leang and Robert Petit, co-prosecutors of the Extraordinary Chambers in the Courts of Cambodia (ECCC), made their first Introductory Submission requesting that the co-investigating judges open an investigation into specific crimes and that charges be issued. Although the names of the suspects were not made public, the arrest of Kaing Guek Eav, alias Duch, described below, revealed the identity of one. Under the rules of the ECCC, an Introductory Submission outlines facts, identifies persons suspected of being responsible for crimes within the jurisdiction of the ECCC, and requests investigating judges to investigate those crimes and suspects. The way was paved for this initial submission by the adoption of internal rules of procedure at a plenary session of all the judges in June.¹ These rules will guide the investigation and trial process and help ensure that the court meets international standards for fair trials.

Co-Investigating Judges You Bun Leng and Marcel Lemonde are now properly seized of a case and can begin formal judicial investigations that may lead to the issuance of indictments and the referral to the trial chamber of a case, or several cases, against specific accused persons.

In their press release, the prosecutors disclosed that the submission refers to 25 distinct factual situations of murder, torture, forcible transfer, unlawful detention, forced labor, and religious, political, and ethnic persecution as evidence of crimes committed in the execution of a common criminal plan. The submission refers to allegations that constitute crimes against humanity, genocide, grave breaches of the Geneva Conventions, homicide, torture, and religious persecution. Further, the press release disclosed that the prosecutors transmitted more than 1,000 documents constituting over 14,000 pages, including statements or records of over 350 witnesses, a list of 40 other potential witnesses, thousands of pages of Democratic Kampuchea-era documentation, and the locations of over 40 undisturbed mass graves.

The prosecutors did not publicly name the five persons referred to in the submission. Their names will likely be released if a decision is made by the investigating judges to order their arrest for either questioning or pretrial detention—which is how Duch’s name was made public. The judicial investigation is generally confidential, however the investigating judges have the authority under the internal rules to “jointly through the Public Affairs Section, issue such information regarding a case under judicial

¹ ECCC Internal Rules, June 12, 2007, <http://www.unakrt-online.org/Docs/Court%20Documents/2007-06-18%20IRs%20English.pdf>.

investigation as they deem essential to keep the public informed of the proceedings, or to rectify any false or misleading information.”²

The press release describes the crimes committed as part of a common criminal plan constituting a systematic and unlawful denial of basic rights of the Cambodian population and the targeted persecution of specific groups. The purported motive of this common plan—also known as a joint criminal enterprise—was to effect a radical change in Cambodian society along ideological lines. This description indicates that the initial submission may contemplate a single trial under joint charges for some or all of the five named persons. The length of time needed for the judicial investigation stage will depend on the complexity of the facts, the number of suspects and the charges pursued.

Arrest and Detention of Kaing Guek Eav, Alias Duch

Duch, age 62, was brought to the ECCC on July 31, 2007 for a formal interview with the co-investigating judges. He was informed that his name was included in the Introductory Submission and was formally charged with crimes against humanity. The judges ordered that he be held in provisional detention at the ECCC.

As he has previously acknowledged in public statements, Duch was the head of the infamous S-21 prison, now the Toul Sleng Genocide Museum, during the Khmer Rouge period. Over 14,000 people are believed to have been interrogated and tortured at the prison. Most prisoners were ultimately killed.

Duch was taken to the ECCC from a Cambodian military prison where he has been detained since May of 1999 on a set of charges issued by the Military Court of Cambodia related to his actions during the Khmer Rouge period and in express anticipation of the establishment of the ECCC. Duch is represented by Cambodian counsel Kar Savuth. In addition, Francois Roux, a French lawyer with 30 years of legal experience including trial experience at the International Criminal Tribunal for Rwanda, is assisting Kar Savuth. Mr. Roux has submitted his application to register with the Bar Association of the Kingdom of Cambodia so that he can appear as co-counsel for Duch.

The co-investigating judges rejected Duch’s claims that provisional detention was inappropriate because he had been held in prison for more than eight years in violation of international standards of justice, and that the conditions required to justify pretrial detention had not been met. The co-investigating judges stated that they did not have jurisdiction to determine the legality of Duch’s prior detention. They found that the length and conditions of Duch’s stay in the Cambodia military prison were not sufficiently grave to require release or voiding of the charges but acknowledged that Duch may have an eventual remedy at the ECCC for prejudice caused by the prior detention.

The co-investigating judges ordered Duch placed in pretrial detention because “the acts alleged...are of a gravity such that, 30 years after their commission, they profoundly disrupt the public order to such a degree that it is not excessive to conclude that the

² Rule 56 (2) of the Internal Rules of the ECCC.

release of [Duch] risks provoking, in the fragile context of today's Cambodian society, protests of indignation which could lead to violence and perhaps imperil the very safety of the person concerned. Furthermore, because Duch may be sentenced to life imprisonment, it is feared that he may seek ... to flee any legal action.”³

Duch will have the opportunity to appeal the detention order to the Pre-Trial Chamber.

Next Steps in the Judicial Process

The investigating judges will now review the submissions and begin judicial investigation to determine which, if any, charges, and against which individuals, should be taken to trial. They have the option to summon the suspects for questioning. The suspects will have the right to a lawyer and the right to remain silent during questioning by the investigating judges. The investigating judges have the authority to expand or reduce the list of persons they investigate for the crimes listed by the prosecutors.

The investigating judges must determine whether to seek to detain, in addition to Duch, other suspects pending the completion of the investigation. The decision to detain a suspect named in the Introductory Submission must be based on a determination that there is well founded reason to believe that the person may have committed the crimes specified, and whether detention is necessary to:

- i) prevent the charged person from exerting pressure on witnesses or victims, or prevent collusion between the charged person and accomplices of crimes falling within the jurisdiction of the ECCC;
- ii) preserve evidence or prevent the destruction of any evidence;
- iii) ensure the presence of the charged person during the proceedings;
- iv) protect the security of the charged person; or
- v) preserve public order.⁴

Most orders or decisions of the investigating judges can be appealed by the charged person or the by the prosecutors to the Pre-Trial Chamber.

The prosecutors will participate in the investigation being led by judges You Bun Leng and Lemonde. In addition, according to their recent press release, they will continue their investigative mandate, and may submit additional names and criminal acts to the investigating judges. If there are disputes between the co-prosecutors about further submissions, they will be submitted to the Pre-Trial Chamber for resolution.

Victims Unit Must Begin Operation

The court's internal rules require the establishment of a Victims Unit to coordinate the participation of victims in the process. Victims of crimes committed during the Khmer Rouge period of April 17, 1975 to January 6, 1979 are permitted to file complaints requesting either the Office of the Co-Prosecutors or the Office of the Co-Investigating Judges investigate their complaints. The court has an obligation to respond to all complaints received, but does not have an obligation to investigate further. Victims of

³ ECCC Order of Provisional Detention, Investigation No. 001/18-07-2007
<http://www.eccc.gov.kh/english/indictments.list.aspx>

⁴ Rule 63 of the Internal Rules of the ECCC.

crimes investigated or tried by the court may seek to participate in either the investigation phase or the trial as *parties civiles*.

The court is seeking to hire a Cambodian national to head the Victims Unit; it is also seeking to hire an international deputy. The application process for those positions closed on July 29, 2007.

The internal rules provide that the court has the power to award “non-financial or moral reparations to victims” of crimes found by the court. This is vague terminology and there is little precedent in either Cambodian or international law for determining how to interpret this language and award such reparations. The Victims Unit will have the difficult job of effectively advising the people of Cambodia about the nature and limitations of both victim participation and reparations from the ECCC. If this task is not accomplished in a timely and effectively manner, victims’ unrealistic expectations could fatally undermine the ECCC’s chances of success. The Victims Unit was not provided for in the original court budget. The ECCC must reallocate other funds for the unit and include the needs of the unit in an additional funding request to donors.

Defense Support Section

The Defense Support Section is seeking both national and foreign lawyers interested in representing suspects, charged and accused persons (jointly referred to as “defendants”), or victims before the court. Several lists have been established to provide adequate choice of competent counsel:

- A general list of Cambodian lawyers willing to represent defendants or victims. The only requirement for this list is that the lawyer be a member of the Bar Association of the Kingdom of Cambodia (the BAKC). Defendants or victims who have funds to pay for a lawyer can choose lawyers from this list.
- A general list of foreign lawyers willing to represent defendants or victims. Foreign lawyers must meet specific qualifications of the BAKC and go through the process of registering with the BAKC. Defendants or victims who have funds to pay for a lawyer can choose lawyers from this list.
- A list of Cambodian lawyers who are members of the BAKC and also meet specific experience requirements established by the Defense Support Section. Lawyers on this list are eligible to be paid by the Defense Support Section if chosen by defendants who are unable to pay for their own lawyer.
- A list of foreign lawyers registered (or willing to register) with the BAKC who also meet specific experience requirements set up by the Defense Support Section. Lawyers on this list are eligible to be paid by the Defense Support Section if chosen by defendants who are unable to pay for their own lawyer.
- The Defense Support Section will also initially collect the names of Cambodian and foreign lawyers who are registered with the BAKC and willing to represent victims before the court. These names will be passed on to the Victims Unit.⁵

⁵ For specific requirements see: http://www.eccc.gov.kh/english/defence_office.aspx.

Increased Staffing for Legal Proceedings

The court has recently posted openings for a variety of new jobs in anticipation of active judicial proceedings. On the Cambodian side (at www.eccc.gov.kh), recently advertised positions included head of the Victims Unit, witness assistants, court officers, investigators/researchers/analysts, analyst/data coders and investigators. On the international side (at www.unakrt-online.org), positions included deputy for the Victims Unit, analyst, witness support assistant, witness support coordinator, and administrative assistant.

In addition, the court has contracted on a short-term basis with two highly experienced specialists to assist in developing plans and capacity for court management and witness protection and support.

Detention Unit Turned over to the Cambodian Ministry of Interior

On July 18, the ECCC announced the handover of the ECCC detention unit from the court to Cambodia's Ministry of Interior. The Ministry of Interior will be responsible for administering the facility during the tenure of the ECCC. The facility was designed to hold up to eight people. It will be managed by a governor assigned by the Ministry of Interior.

On July 25, a representative of the International Committee of the Red Cross (ICRC) from Bangkok inspected the facility. While the ICRC does not certify whether the facility meets international standards, they will note any significant problems with the facility and recommend necessary modifications.

Immediate Challenges Facing the Court

Anticipated Budget Shortfalls

Although the court has not publicly released figures about its spending to date, court officials have acknowledged that additional funds must be raised for the Cambodian and the international sides of the budget before mid 2008. The original budget for the court was set at \$56.3 million over three years. Commitments for \$43 million have been received. Given the delays in beginning legal proceedings and their complexity, it is unlikely the court will finish its work within three years. Additional funds will thus be needed to cover the extended time frame.

Equally important, many elements necessary for the court to function properly were not included in the original budget. Items such as periodic judicial plenary sessions, meetings of the judicial committees, audio visual equipment and transcription services to record the proceedings, support for judicial leadership, and the entire Victims Unit were not included in the original budget. Other costs, such as translation, investigation, outreach, and witness protection and support were underestimated in the original budget.

Considerable planning and explanation will be needed to raise sufficient additional funds to meet the court's needs. However, this process will provide the court with an opportunity to assess its needs and articulate those needs persuasively. For instance, the

court can show its commitment to outreach by developing a comprehensive plan and seek funding that ensures there is meaningful outreach to Cambodians throughout the country. Likewise, this is an opportunity for the court to realistically assess likely threats to witnesses and defense lawyers and plan to meet those threats in a way that gives reasonable assurances to people who cooperate with the court.

The Office of Administration has indicated it plans to begin additional fundraising with donors in Phnom Penh in early fall of 2007.

Transparency

The press release issued by the co-prosecutors announcing the Introductory Submission was laudable in that it provided detailed information, giving the public an understanding of the scope of the initial submissions without disclosing information that would prejudice further investigations or the rights of suspects. Similar information should be released on a regular basis by the prosecutors and the investigating judges.

The court has been less forthcoming on important issues related to financial and administrative operations. No meaningful information has been released to the public about the results of the recent United Nations Development Programme (UNDP) audit into human resource management issues or the June 2007 Expert Assessment of UNAKRT readiness for legal proceedings. A joint press release from UNDP, the ECCC, and the EU indicated that the court was cooperating fully with all recommendations made in the UNDP audit report.⁶ This statement appears at odds with reports that UNDP has requested significant decreases in the salaries of Cambodian staff, and that this issue has not been resolved.⁷ The public and the donor community have insufficient information about which, if any, of the UNDP recommendations are being implemented. Release of at least summary information about both the UNDP audit report and the potential salary reduction would help stem unhelpful speculation.

In addition, no comprehensive information has been released about the court's spending over the last 18 months or its budget needs as it moves forward. No information has been made public about what, if anything, the court intends to do to investigate reports of required salary kickbacks by Cambodian court staff. The failure to effectively investigate these reports and disclose the findings continues to undermine the long term credibility of the ECCC.

Courtroom Facilities

The investigative process has now reached a stage where an adequately furnished courtroom may be needed at any time for either *in camera* or public hearings. Yet the courtroom is still simply an auditorium and not a facility designed to hold trials or public hearings. The small room designated as a Pre-Trial Chamber cannot be used for public hearings because it has no public gallery. The court does not yet have audio visual equipment, or transcription services to record either public or *in camera* proceedings.

⁶ "KR Trial Officials Agree to UNDP Recommendations," *The Cambodia Daily*, June 27, 2007

⁷ "Tribunal Staff Facing Salary Cut," VOA Khmer, June 22, 2007, www.voanews.com/khmer/2007-06-22-voa6.cfm.

The need for public courtrooms with recording and transcription equipment and services for both the Trial and the Pre-Trial Chamber has long been evident and publicly noted. Efforts must be redoubled to ensure that these facilities' lack of readiness does not delay legal proceedings.

Witness Protection

The investigating judges will now begin actively interviewing witnesses. Defense counsel will soon be involved and may be talking to potential witnesses. Yet experienced professional witness protection resources are not available at the court. A highly experienced expert from the International Criminal Tribunal for the former Yugoslavia arrived at the ECCC in late July to work for two months assisting the Witness/Expert Support Unit at the court. This is a positive step, but the court must immediately conduct a comprehensive analysis of witness protection needs and take the necessary steps to address them.

According to the ECCC, protection of threatened witnesses outside of the court premises is formally a responsibility of the Cambodian government and delegated to the judicial police. However, the UN side of the court still bears responsibility to ensure that witness protection measures are adequate to meet anticipated threats. The UN has more experience with witness protection measures than the Cambodian judicial police and must provide sufficient expertise and personnel to deal with threats that are not adequately addressed by the current arrangement.

Outreach

The Introductory Submissions have thrust the court onto the front pages of newspapers and radio reports throughout Cambodia. There will be increasing interest in the work of the court as legal proceedings go forward. The Center for Social Development held a day-long public forum on the ECCC and reconciliation on July 27, 2007 in Kampong Thom. Several of Pol Pot's relatives attended the forum. Key officials from the court were available to answer questions. Attendees at the forum were keenly interested in knowing what will happen next. The time is right for the court to intensify its efforts to provide accessible information—as well as opportunities for questions and discussion about the court—to a broad range of people in Cambodia.

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