

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

May, 2008 Update

*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>.

# Recent Developments at the Extraordinary Chambers in the Courts of Cambodia (ECCC) May, 2008<sup>1</sup>

## Overview

There have been several encouraging developments at the Extraordinary Chambers in the Courts of Cambodia (ECCC) since the last report by the Open Society Justice Initiative, issued March 3, 2008. These recent developments include the United Nations' appointment of a high-level advisor to address budgetary and administrative issues and a judicial decision giving victims broad participation rights. However, the court remains a work in progress and challenges persist, including tensions between the court and the media, which raise concerns about the quality and quantity of information the court is making available to the public, and the court's ongoing translation difficulties, which threaten to delay judicial proceedings. This report provides the latest information from the ECCC in the following areas:

### *Updates on Specific Cases:*

The Pre-Trial Chamber postponed the provisional detention appeal hearing for former Democratic Kampuchea President **Khieu Samphan** after his counsel, French lawyer Jacques Vergès, refused to participate because of the court's failure to translate documents necessary for his client's defense into French. The chamber issued a warning to Vergès for abusing the processes of the Pre-Trial Chamber.

On March 20, 2008, the Pre-Trial Chamber determined that civil parties had broad participation rights in the early stages of judicial proceedings, which enabled civil parties to submit briefs and present oral arguments in the provisional detention hearing for **Nuon Chea**.

### *General Developments:*

- **Supplementary Submission of Crimes by Prosecutors to Investigating Judges.** Spurred by information provided by victims, the prosecutors delivered a supplementary submission to the investigating judges requesting that additional criminal acts be included in the ongoing investigation against the five charged persons currently before the court: Nuon Chea, Khieu Samphan, Ieng Sary, Ieng Thirith, and Kaing Guek Eav (a.k.a. "Duch"). The submission focuses on crimes committed at an unnamed security center where "many Cambodians were unlawfully detained, subjected to inhumane conditions, forced labor, tortured, and executed between 1975 and 1979."<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 March 3, 2008, 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). ("February 2008 Report").

<sup>2</sup> Statement of the Co-Prosecutors, March 28, 2008 at [http://www.eccc.gov.kh/english/cabinet/press/63/Supplementary\\_Submission\\_Press\\_Release\\_28\\_March\\_08\\_ENG.pdf](http://www.eccc.gov.kh/english/cabinet/press/63/Supplementary_Submission_Press_Release_28_March_08_ENG.pdf). ("Statement of Co-Prosecutors").

- **Appointment of United Nations Expert Adviser.** Secretary-General of the United Nations Ban Ki-moon appointed David Tolbert, the former deputy prosecutor for the International Criminal Tribunal for the former Yugoslavia, to act as his expert adviser on ECCC issues. Tolbert's mandate includes revising the ECCC's budget in advance of the court's fundraising drive (now expected in late May 2008), streamlining the administrative operations of the UN side of the court, and instituting anti-corruption measures.
- **Independent Assessment of Human Resource Practices.** The ECCC Project Board<sup>3</sup> commissioned a "special review" of the ECCC's human resource practices related to Cambodian staff.<sup>4</sup> The report, issued publicly on April 25, 2008, highlights significant progress in dealing with shortcomings that had been identified in earlier audit reports.<sup>5</sup> The review did not purport to investigate or draw any conclusions about the existence of alleged salary kickbacks between some Cambodian ECCC staff and government officials.
- **Additional Expertise in Witness Protection and Court Management.** Two experienced international staff have joined the ECCC from other international/ized war crimes courts to become the ECCC's coordinator of the Witness and Expert Support Unit and its court management officer.
- **Opening of Information Center in Downtown Phnom Penh.** The ECCC is located 20 miles from the center of Phnom Penh and is difficult for many Cambodians to reach. The court now has an office located in downtown Phnom Penh to facilitate access for victims, witnesses, and the public.

*Immediate Challenges Addressed in this Report:*

- **Additional Submission of Suspects.** The prosecutors have not yet filed submissions to the investigating judges naming additional suspects beyond the five already in detention. Additional submissions are a necessary step to trigger judicial investigations and prosecutions and will be an important indicator of the ECCC's credibility.
- **Transparency Concerns Continue.** The ECCC must address problems with its public access and information policies to ensure greater transparency.

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<sup>3</sup> The ECCC Project Board is a committee consisting of the European Commission (EC), the ECCC, the UN Department of Economic and Social Affairs (DESA), and the United Nations Development Program (UNDP) set up to oversee the use of funds administered by UNDP and directed to covering costs of the Cambodian side of the ECCC budget.

<sup>4</sup> The UNDP maintains a trust fund of donor money earmarked for the national side of the ECCC's budget. In response to transparency concerns regarding the courts' hiring processes, UNDP commissioned an audit into the ECCC's use of UNDP trust funds in early 2007. The report found numerous irregularities and contained a series of recommendations to remedy them. The latest "special review" was commissioned to determine if the ECCC had remedied the problems found in the audit. The report of the initial UNDP Audit of Human Resources Management at the ECCC is available on the UNAKRT website at <http://www.unakrt-online.org/Docs/Other/2007-06-04%20UNDP%20Special%20Audit%20of%20ECCC%20HR.pdf> ("UNDP Audit").

<sup>5</sup> Report on the Special HRM Review, HRM Review Team, Deloitte, Touché Tohmatsu India Pvt. Limited, April 15, 2008, [http://www.eccc.gov.kh/english/cabinet/fileUpload/36/Report\\_of\\_HRM\\_Review\\_Team-15\\_April.pdf](http://www.eccc.gov.kh/english/cabinet/fileUpload/36/Report_of_HRM_Review_Team-15_April.pdf). ("Special Review Report").

## Update on Specific Cases

### *1. Ieng Sary*

Ieng Sary, deputy prime minister and foreign minister during the Democratic Kampuchea period, is detained by the ECCC and charged with crimes against humanity and war crimes.

#### *Appeal of Provisional Detention Order*

On January 15, 2008, Ieng Sary appealed the investigating judges' provisional detention order to the Pre-Trial Chamber.<sup>6</sup> His counsel also requested that the issues of pardon and amnesty, along with the principle of *ne bis in idem* ("not twice for the same thing" or the principle against double jeopardy), be addressed separately at a later date. (Ieng Sary was 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). The chamber refused the request to consider these issues at a later date and extended the deadline for filing a supplementary brief on these issues to April 7, 2008. Counsel filed a brief, which the ECCC has not made public, which argues that the ECCC's charges against Ieng Sary are barred because of the double jeopardy effect of the 1979 judgment for genocide, and by the pardon and amnesty he received in 1996. On April 30, 2008, the Pre-Trial Chamber also dismissed an application by Ieng Sary's lawyers to have separate hearings for the jurisdictional issues and the provisional detention issues.<sup>7</sup> The chamber has scheduled a public hearing for June 30, 2008.

#### *Decision on House Arrest and Hospitalization of Ieng Sary*

On March 13, 2008, Ieng Sary's lawyers requested that their client be placed under house arrest instead of ECCC custody. During April 2008, Ieng Sary's reportedly deteriorating health prompted his lawyers to ask the Pre-Trial Chamber to suspend consideration of his provisional detention appeal and to order the investigating judges to place Ieng Sary in the hospital. On April 30, 2008, the Pre-Trial Chamber decided not to suspend consideration of Ieng Sary's provisional detention appeal, and determined that it would consider the issues of house arrest and hospital placement during the provisional detention appeal hearing.<sup>8</sup>

#### *Appeal of Investigating Judges' Denial of His Request to See His Wife*

On December 20, 2007, Ieng Sary submitted to the ECCC's investigating judges a request for permission to visit his wife, Ieng Thirith, who is also detained by the ECCC. The investigating judges denied the request in a letter dated January 22, 2008 and Ieng Sary sought leave to appeal. Before the appeal came before the Pre-Trial Chamber, the

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<sup>6</sup> Ieng Sary's Appeal against Provisional Detention Order, 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> Decision on Ieng Sary's Request for Separation of Oral Hearings on Jurisdiction and Provisional Detention, April 30, 2008, at [http://www.eccc.gov.kh/english/cabinet/courtDoc/C22\\_I\\_28\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/C22_I_28_EN.pdf).

<sup>8</sup> Decision on Ieng Sary's Requests for Leave to Suspend the Consideration of his Appeal on Provisional Detention and for an Order Directing the OCIJ to Place Ieng Sary in a Hospital Facility, April 30, 2008, available at [http://www.eccc.gov.kh/english/cabinet/courtDoc/C22\\_I\\_29\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/C22_I_29_EN.pdf).

investigating judges ruled that Ieng Sary and Ieng Thirith could see each other in brief, weekly visits.

On April 30, 2008, the Pre-Trial Chamber determined that Ieng Sary was entitled to visit his wife.<sup>9</sup> The chamber considered ECCC's Internal Rule 55(5), which allows the investigating judges to "take any investigative action conducive to ascertaining the truth," including issuing "such orders as may be necessary to conduct the investigation." This rule, the chamber found, was sufficiently broad to allow the investigating judges to limit contact between a charged person and any other person of interest in the investigation. The chamber went on to consider the implications of Internal Rule 21(2), which limits the application of Rule 55(5):

Any coercive measures ... shall be taken by or under the effective control of the competent ECCC judicial authorities. Such measures shall be strictly limited to the needs of the proceedings, proportionate to the gravity of the offence charged and fully respect human dignity.

After a review of the practice at other international tribunals, the chamber determined that limitations on the personal contacts of a charged person must be made by a "reasoned decision" which clearly identifies the interest being protected by the limitation.<sup>10</sup> The chamber found that the investigating judges' decisions (by letter dated January 22, 2008, and in a memorandum dated March 17, 2008, neither of which is part of the public record) were not adequately reasoned. According to the chamber, the investigating judges' decision did not explain how the limitation on contact between Ieng Sary and his wife was a necessary and proportionate measure to protect the investigation's interests.

The chamber found that the limited contact between spouses for a significant length of time—between Ieng Sary and Ieng Thirith's arrest on November 19, 2007 to the date of the appeal, April 30, 2008—was without proper justification and affected Ieng Sary's right to be treated with humanity. It ordered that Ieng Sary and Ieng Thirith be allowed to meet in accordance with draft rules applicable for the ECCC detention center. (Problematically, the chief of the ECCC detention facility is still in the process of adopting rules governing persons held at the detention facility<sup>11</sup> and the draft rules are not publicly available). The chamber determined that the intervening ruling of the investigative judges (issued after the investigating judges' initial order that precluded visits between husband and wife, and before the Pre-Trial Chamber issued its own decision) that allowed only brief weekly visits was not in accordance with the draft rules. Dim Chuon, the ECCC detention facility governor, told the Cambodian press, however, that while prison rules allowed families to meet, no rule addressed meetings between prisoners. He stated that the couple would not be allowed to spend nights together and

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<sup>9</sup> Public Decision on Appeal Concerning Contact between the Charged Person and his Wife, April 30, 2008 at [http://www.eccc.gov.kh/english/cabinet/courtDoc/A104\\_II\\_7\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/A104_II_7_EN.pdf).

<sup>10</sup> *Ibid.*, para. 27.

<sup>11</sup> *Ibid.*, para. 10.

“[t]hey can just meet and ask a few words, whether each other is sick or not.”<sup>12</sup> It is not clear whether such limited contact meets the spirit or the letter of the Pre-Trial Chamber’s ruling.

## **2. Khieu Samphan**

Khieu Samphan, who served as president of Democratic Kampuchea during the Khmer Rouge period, is charged with crimes against humanity and war crimes.

### *Adjournment of Appeal of Provisional Detention Order and Warning to Counsel*

The Pre-Trial Chamber adjourned the April 23, 2008 hearing on Khieu Samphan’s provisional detention appeal after his international defense counsel, Jacques Vergès, refused to participate.<sup>13</sup> The chamber warned Vergès that he had abused the process of the court. Such a warning is a prerequisite to the chamber’s exercise of its authority to impose sanctions against counsel or to refuse to allow counsel to appear before the court in the future.<sup>14</sup>

The chamber started the hearing in open session, introducing the parties present, including Khieu Samphan, and his lawyers, Jacques Vergès (French) and Say Bory (Cambodian). It read out a summary of the appeal issues and positions of each party prepared by the reporting judges.<sup>15</sup> According to the summary, Khieu Samphan’s counsel argued that there was insufficient evidence against Khieu Samphan to prove that he had committed the crimes with which he is charged and he should therefore not be detained before trial. With counsel’s argument expected to reveal confidential information from the court files, the chamber then closed the proceeding to the public.

During the closed session, Vergès announced that he intended to remain silent because the documents he needed to defend his client were not available in French. According to the Adjournment Decision the chamber issued on the same day, summarizing what transpired during the closed session, Vergès “submitted that as a French speaking lawyer, he was entitled to all documents concerning the case in French, being an official language of the ECCC, in order to conduct the defense of his client.”<sup>16</sup> Khieu Samphan then asked for

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<sup>12</sup>See Douglas Gillison and Prak Chan Thul, “ECCC: Ieng Sary and Thirith Allowed to Visit,” *The Cambodia Daily*, May 2, 2008.

<sup>13</sup> Decision on Application to Adjourn Hearing on Provisional Detention Appeal, April 24, 2008 at [http://www.eccc.gov.kh/english/cabinet/courtDoc/62/PTC-Decision\\_on\\_app\\_to\\_adjourn\\_Khieu\\_Samphan\\_hearing\\_C26\\_I\\_25\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/62/PTC-Decision_on_app_to_adjourn_Khieu_Samphan_hearing_C26_I_25_EN.pdf). (“Adjournment Decision”).

<sup>14</sup> Rule 38(1) of the ECCC’s Internal Rules allows any chamber to “after a warning, impose sanctions against or refuse audience to a lawyer if, in their opinion, his or her conduct is considered offensive or abusive, obstructs the proceedings, amounts to abuse of process, or is otherwise contrary to . . . the Agreement.”

<sup>15</sup>Khieu Samphan-Report of Examination, Aprils 22, 2008 at [http://www.eccc.gov.kh/english/cabinet/courtDoc/61/PTC-Khieu\\_Samphan-Report\\_of\\_examination\\_C26\\_I\\_24\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/61/PTC-Khieu_Samphan-Report_of_examination_C26_I_24_EN.pdf). Internal Rule 77(10) provides that “The President of the Pre-Trial Chamber shall appoint one international and one national judge to be co-rapporteurs. The co-rapporteurs shall prepare a written report which shall set out the facts at issue and the details of the decision being appealed, which shall be placed on the case file. After the co-rapporteurs have read their report, the Co-Prosecutors and the lawyers for the parties may present brief observations.”

<sup>16</sup> Adjournment Decision, above n.13, para. 4.

proceedings to be adjourned because he did not feel confident that the hearing should go forward with only his Cambodian lawyer to represent him.

The chamber noted that Vergès had signed the appeal application and brief on December 21, 2007 and an application requesting a public hearing on February 13, 2008. He did not indicate to the court in those documents that there would be any difficulty in holding the scheduled appeal hearing. The chamber found that the refusal of Vergès to continue to participate in the appeal hearing was a “constructive withdrawal from the appeal and has a direct and adverse effect upon the fundamental right of the Charged Person to be represented before the Pre-Trial Chamber.”<sup>17</sup> The ECCC’s Internal Rule 38(1) allows any chamber of the court, “after a warning, [to] impose sanctions against or refuse audience to a lawyer if, in [its] opinion, his or her conduct is considered offensive or abusive, obstructs the proceedings, amounts to abuse of process, or is otherwise contrary to... the Agreement” between the UN and Cambodia establishing the ECCC and governing its operations. The chamber stated that “[a]s a consequence of the behavior of the International Co-Lawyer advising with effectively no notice that he will not continue to act in this appeal within the circumstances mentioned above, a warning is given ... as he has abused the process of the Pre-Trial-Chamber and the rights of the Charged Person.”<sup>18</sup> The chamber granted the motion for adjournment to an unspecified date.

After the adjournment, Vergès complained to the press, which had not been allowed to witness the hearing, that the court had advised his client to seek different international counsel and that the proceeding was a “unique scandal.” He stated: “I can understand that the tribunal should ask Mr. Khieu Samphan to change lawyers since the proceeding directed against him has been null from the start. His detention is illegal since it was ordered based on documents to which his lawyers did not have access.”<sup>19</sup>

*Justice Initiative Analysis:*

Irrespective of the manner in which Vergès raised the translation issue, his actions highlighted a significant problem for the court. Following the hearing, the court translation unit chief, Kong Sophy, told the press that the prosecutors’ introductory submission (a document of approximately 100 pages that outlines the basis for charges against the five persons the ECCC has detained) has been translated into the three official languages of the ECCC: Khmer, English, and French. He acknowledged, however, that the court has not yet translated into French most of the estimated 16,000 pages of documents attached in support of the introductory submission.<sup>20</sup>

The exact nature of the court’s legal obligation regarding document translation is not addressed in the ECCC *Agreement*, *Law*, or *Internal Rules*. The Office of Administration and experts who have reviewed the court’s preparedness for trials have, however, identified

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<sup>17</sup> Ibid., para. 9.

<sup>18</sup> Ibid., para. 15.

<sup>19</sup> Douglas Gillison, “Translation Row Stalls Khieu Samphan Hearing,” *The Cambodia Daily*, April 24, 2008 (“Translation Row”).

<sup>20</sup> Statement of Kong Sophy at press conference at ECCC, Phnom Penh, on April 24, 2005. See also Douglas Gillison, “Translation Row,” above n. 19.



inadequate translation and interpretation capacity as a critical management and operational issue.<sup>21</sup> The court is attempting to increase substantially the number and qualification of translators and interpreters.<sup>22</sup> To avoid further delays in court proceedings, this effort needs to remain a priority.

In its Adjournment Decision, the chamber emphasized that the internal rules recognize the need for collaboration between national and foreign co-lawyers and that “linguistic and legal issues may be fully addressed by a team of lawyers representing a charged person. . . . The alternative, if such collaboration is not possible, is for the charged person to make a request for a new lawyer to represent him.”<sup>23</sup> While collaboration between counsel and flexibility in prioritizing their translation needs is essential, they cannot substitute for translation of critical documents into one of the official languages of the court at the request of defense counsel properly acting in his or her client’s interest. At the same time, it is incumbent on counsel to raise serious concerns about translation and other fairness issues in a timely and appropriate way.

### ***3. Nuon Chea***

Nuon Chea was second in command to Khmer Rouge leader Pol Pot. The ECCC has charged him with crimes against humanity and war crimes. The Pre-Trial Chamber issued two decisions in the case on March 20, 2008.

#### *Decision on Civil Party Participation*

First, the Pre-Trial Chamber ruled that civil parties have a broad right to participate from the early stages of a case.<sup>24</sup> This right extends to provisional detention appeals and includes a right to make written submissions and oral argument at hearings. In reaching this decision, the ECCC chamber recognized its duty to balance civil party participation rights against the fair trial rights of the accused.<sup>25</sup>

Shortly before the scheduled hearing of Nuon Chea’s appeal to the Pre-Trial Chamber of the provisional detention order, the investigating judges admitted four victims as civil

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<sup>21</sup> See ECCC Yearly Financial and Activity Progress Report, dated as of December 31, 2007, p. 19, Section 7.1, entitled “Court Management Issues-Translation and Interpretation Services,” at [http://www.eccc.gov.kh/english/cabinet/fileUpload/34/ECCC\\_Yearly\\_Financial\\_and\\_Activity\\_Progress\\_Reports\\_2007.pdf](http://www.eccc.gov.kh/english/cabinet/fileUpload/34/ECCC_Yearly_Financial_and_Activity_Progress_Reports_2007.pdf); and Robin Vincent and Kevin St. Louis, “Summary of United Nations Expert Report on ECCC,” July 13, 2007, at <http://www.unakrt-online.org/Docs/Other/2007-06-13%20UNAKRT-Summary%20of%20Expert%20Recommendation.pdf>.

<sup>22</sup> See ECCC Yearly Financial and Activity Progress Report, above n. 21, p. 19.

<sup>23</sup> Adjournment Decision, above n.13, para. 12.

<sup>24</sup> See Public Decision on Civil Party Participation in Civil Party Appeals, March 20, 2008, at [http://www.eccc.gov.kh/english/cabinet/courtDoc/53/PTC\\_decision\\_civil\\_party\\_nuon\\_chea\\_C11\\_53\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/53/PTC_decision_civil_party_nuon_chea_C11_53_EN.pdf). (“Decision on Civil Party Participation”).

<sup>25</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 who submits information about crimes to the co-prosecutors; or 3) as a civil party with the right to participate through an attorney alongside the prosecutors in the investigation and the trial. Rule 23 of the Internal Rules of the ECCC 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. See Internal Rules 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). (“Internal Rules”).

parties. The civil parties asked to be present during the hearing and to be allowed to submit arguments. At the initial hearing on March 17, 2008, Nuon Chea's defense counsel objected to presentations by the civil parties or their counsel. The defense argued that the ECCC's internal rules provide no basis for civil party participation in detention order appeals and that the defense had not received any written submissions from the civil parties outlining their position. The chamber postponed the hearing for three days, required the civil parties to file written submissions advising the defense of their positions, and asked all parties to submit briefs on pretrial civil party participation. The chamber also stated that it would consider oral and written submissions by civil parties *only* if it ruled in favor of their participation at the pretrial stage. The parties agreed to this procedure. The prosecutors and five *amici curiae* filed briefs on the issue. Nuon Chea's defense counsel filed a joint brief with counsel for Ieng Sary, Ieng Thirith, and Khieu Samphan. The four civil parties also filed a joint brief.<sup>26</sup>

The chamber framed its analysis around Internal Rule 23(1), which states that the purpose of a civil party action is for victims to "participate in criminal proceedings...by supporting the prosecution," and that civil parties can participate in "all proceedings."<sup>27</sup> After extensively reciting the positions of all parties and *amici curiae*, the chamber found that the Criminal Procedure Code of Cambodia<sup>28</sup> and Cambodian practice allow for participation of civil parties in appeals of provisional detention orders. Acknowledging the chamber's obligation to follow Cambodian procedure when possible, the court analyzed whether this domestic procedure was consistent with international fair trial standards.<sup>29</sup> The chamber reviewed the scope of civil party and victim participation in other international and hybrid tribunals, including the International Criminal Court, the Special Panels for Serious Crimes in East Timor, and the internationalized panels of the Courts in Kosovo. It found that the Cambodian practice of allowing civil parties to participate in appeals at the pre-trial stage was "generally regarded as complying with fair trial principles,"<sup>30</sup> and emphasized the need to appropriately balance this right with the protection of defense rights.

The ECCC's Internal Rule 21(1)(a) provides that "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties." The chamber noted that civil party participation during pretrial proceedings could adversely affect the rights of the charged person if not properly administered. For instance, since the ECCC's *Internal Rules* do not allow for civil parties to participate in the initial detention hearing or to independently file an appeal from that ruling, their appearance for the first time during the

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<sup>26</sup> All briefs are available on the ECCC website from the index at [http://www.eccc.gov.kh/english/court\\_doc.list.aspx?courtDocCat=case\\_docs](http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs).

<sup>27</sup> Decision on Civil Party Participation, above n.24, para. 35.

<sup>28</sup> The Criminal Procedure Code of Cambodia, effective August 10, 2007.

<sup>29</sup> Article 12(1) of the 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, June 2003, (the "*Agreement*"), provides that the ECCC's "procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level." See *Agreement* at [http://www.eccc.gov.kh/english/agreement\\_image.aspx](http://www.eccc.gov.kh/english/agreement_image.aspx).

<sup>30</sup> Decision on Civil Party Participation, above n.24, para. 40.

appeal process may introduce new issues regarding which the defense has not received proper notice or an opportunity to respond. The chamber found that such problems “could cause an imbalance in the procedures and the right to a fair trial” and determined that the *Internal Rules* provide the chamber with the means to ensure that “any apparent imbalance or unfairness can be addressed.”<sup>31</sup> Such available protections include a requirement that civil parties:

- file written briefs which lay out their position before any hearing;
- limit their submissions to issues relevant to the appeal; and
- file joint submissions with other civil parties where they share the same views. (In the Nuon Chea appeal, the civil parties did file a joint submission that confined argument to the relevant issues.<sup>32</sup>)

*Justice Initiative Analysis:*

This decision adopts an expansive approach to victim participation that is consistent with the domestic practice in Cambodia, while promoting awareness of defense rights from the early stages of ECCC proceedings.

The chamber rejected the practice in the International Criminal Court (ICC) of imposing a requirement that civil parties demonstrate a particular interest in a specific proceeding before they can participate. Unlike the ECCC *Internal Rules*, the ICC Statute provides in Article 68(3) that: “[w]here the personal interests of Victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court.”<sup>33</sup> The ICC Appeals Chamber has interpreted this provision to mandate a “specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration.”<sup>34</sup> The ICC now requires that victims apply for leave to participate in pretrial appeals by providing “a statement in relation to how their personal interests are affected by the particular appeal, as well as why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented.”<sup>35</sup>

The language of the *Internal Rules* for the ECCC simply provides that “[w]hen joined as a Civil Party, the Victim becomes a party to the criminal proceedings.”<sup>36</sup> Both courts, however, have nearly identical definitions of “victim”: “a natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the

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<sup>31</sup> Decision on Civil Party Participation, above n.24, paras. 42-43.

<sup>32</sup> See Joint Response by Lawyers of Civil Party Parties, March 6, 2008, at [http://www.eccc.gov.kh/english/cabinet/courtDoc/44/Response\\_by\\_Lawyers\\_of\\_the\\_Civil\\_Parties\\_C11\\_48\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/44/Response_by_Lawyers_of_the_Civil_Parties_C11_48_EN.pdf).

<sup>33</sup> Rome Statute of the International Criminal Court 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>34</sup> Prosecutor v. Thomas Lubanga Dyilo, Case No. 01/04-01/06(OA 7), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Decision *sur la demande de mis en liberte provisoire de Thomas Lubanga Dyilo*, 40, Appeals Chamber, February 13, 2007, paras. 35-55, at [http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-824\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-824_English.pdf).

<sup>35</sup> *Ibid.*, para. 38.

<sup>36</sup> Rule 23(6), *Internal Rules*, above n.25.

ECCC [or the ICC].”<sup>37</sup> For the ECCC, the definition could conceivably be interpreted to allow all victims of Khmer Rouge atrocities to participate regardless of any relationship to a specific fact situation under investigation. Both the ECCC and the ICC are faced with the challenge of determining how closely a person’s injuries must be related to a specific fact situation under investigation in order to be accorded victim participation rights. The ICC has dealt with this issue by providing different rights of participation to those victims who can claim a relationship to an overall conflict (or “situation”) compared with those who have a direct relationship to a specific fact situation under investigation.<sup>38</sup> The ECCC’s investigating judges have not yet provided guidance to victims on this question.

In view of the broad approach to victim participation adopted in the Nuon Chea case, the Pre-Trial Chamber will need to develop appropriate protections to limit delays and unfair burdens on the accused. At the same time, the court will need to develop strategies and procedures to ensure that the participation of victims is meaningful. In this regard, the court needs to quickly:

- (1) respond effectively to victim participation applications and complaints. The Victims Unit reports that nearly 1,700 applications and complaints are still awaiting review and response;
- (2) establish effective and regular communication with victims who have applied for civil party status or filed complaints so they can be kept informed of their status and the progress of the case; and
- (3) manage expectations of what victim participation can realistically achieve through regular outreach events and dialogue with individual victims and victims’ groups.

That the court outlined protections to ensure respect for the rights of the charged person in the Nuon Chea case not only was a procedural necessity, but also served to highlight the importance of defense rights more generally in criminal proceedings. Jurisprudential analyses in a hybrid tribunal setting such as the ECCC can help to raise national and international consciousness about fair trial rights which are applicable—but often criticized as missing—in Cambodian national judicial procedures.<sup>39</sup>

#### *Decision on Appeal of Provisional Detention Order*

In its second ruling of March 20, 2008, the Pre-Trial Chamber affirmed the order of the investigating judges for provisional detention of Nuon Chea.<sup>40</sup> In doing so, it first considered the defense claim that Nuon Chea had not effectively waived his right to

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<sup>37</sup> Glossary, Internal Rules, above n.25; Rule 15(a) ICC Rules of Procedure and Evidence at [http://www.icc-cpi.int/library/about/officialjournal/Rules\\_of\\_Proc\\_and\\_Evid\\_070704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf).

<sup>38</sup> See Washington College of Law, War Crimes Research Office, “Victim Participation before the International Criminal Court,” November 2007, p. 44.

<sup>39</sup> See Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Yash Ghai, UN General Assembly, A/HRC/7/42, February 29, 2008 at [http://cambodia.ohchr.org/webdocuments/reports/SRSG\\_HR\\_rpt/SRSG\\_HR13022008E.pdf](http://cambodia.ohchr.org/webdocuments/reports/SRSG_HR_rpt/SRSG_HR13022008E.pdf) (“Human Rights in Cambodia”).

<sup>40</sup> Pre Trial Chamber Public Decision on Appeal against Provisional Detention Order of Nuon Chea, March 20, 2008 at [http://www.eccc.gov.kh/english/cabinet/courtDoc/54/PTC\\_decision\\_on\\_nuon\\_chea\\_appeal\\_C11\\_54\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/54/PTC_decision_on_nuon_chea_appeal_C11_54_EN.pdf). (“Decision on Nuon Chea Detention Appeal”).

counsel at his initial detention hearing and hence the provisional detention order was not valid. At his initial appearance (held the same day as his arrest on September 19, 2007), in which the investigating judges read the charges against him, Nuon Chea stated that his lawyer, Son Arun, was unable to be present in court until the next day. The investigating judges and Nuon Chea discussed whether to proceed with the adversarial hearing on detention without Son Arun, and Nuon Chea stated that he wanted to proceed without his counsel. The adversarial hearing was held the same day and the detention order was issued. In appealing the detention order, defense counsel argued that Nuon Chea's agreement to proceed with the hearing did not qualify as a knowing waiver of the right to counsel. Nuon Chea's defense argued that the failure of the investigating judges to explain adequately the consequences of a waiver and the fragile state of Nuon Chea's health disqualified any waiver.<sup>41</sup>

Responding to this argument, the chamber referred to international jurisprudence holding that a valid waiver of the fundamental right of counsel during judicial proceedings must be "express" as well as voluntary, knowing, unequivocal, informed, and intelligent.<sup>42</sup> In determining whether Nuon Chea's waiver met this standard, the chamber reviewed *in camera* the video-recording of the portions of the September 19, 2007, initial appearance of Nuon Chea during which the charges against him were read and of the adversarial hearing on provisional detention held the same day. Based on this review, the chamber found that Nuon Chea had sufficient information to give him a rational and fully informed appreciation of the consequences of proceeding without a lawyer. Further, the chamber found that there was no evidence in the video-recording of the hearings or in anything presented by the defense lawyers indicating that Nuon Chea's age or medical condition hampered his ability to make decisions. The chamber concluded that Nuon Chea's repeated statements that he wanted to proceed without his lawyer constituted a valid waiver.

The chamber next considered whether the conditions for provisional detention required by the ECCC's Internal Rules were satisfied. Internal Rule 63(3) allows for provisional detention during the investigative phase of proceedings only if the investigating judges find

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<sup>41</sup> See Appeal by Nuon Chea against Order of Provisional Detention, November 12, 2007, at [http://www.eccc.gov.kh/english/cabinet/courtDoc/15/appeal\\_against\\_provisional\\_detention\\_nuon\\_chea.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/15/appeal_against_provisional_detention_nuon_chea.pdf), stating at para. 2: "The Rule 63(1) adversarial hearing (the "Detention Hearing") was held in breach of Mr. Nuon's right to counsel as provided by the Rules and international legal standards. Despite having nominated a lawyer to represent him, Mr. Nuon appeared to waive his right to legal assistance at the Detention Hearing. However, given the [investigating judges'] failure to explain the consequences of such waiver and Mr. Nuon's fragile state of health at the time, the waiver was legally invalid."

<sup>42</sup> See *Prosecutor v. Krajisnik*, IT-00-39-T, Reasons for oral decision denying Mr. Krajisnik's request to proceed unrepresented by counsel, Trial Chamber, August 18, 2005, at [http://www.eccc.gov.kh/english/cabinet/courtDoc/44/Response\\_by\\_Lawyers\\_of\\_the\\_Civil\\_Parties\\_C11\\_48\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/44/Response_by_Lawyers_of_the_Civil_Parties_C11_48_EN.pdf), stating at page 2, "Before a request [of a defendant to represent himself at trial] may be addressed on its own terms, both the law and common sense indicate a preliminary inquiry to determine whether the request is unequivocal, informed and intelligent."; and *Prosecutor v. Bagosora*, ICTR-98-41-T, Decision on the Prosecutor's motion for the admission of certain materials under Rule 89 (c), Trial Chamber, October 14, 2004, stating at para. 18 that "[o]nce the detainee has been fully apprised of his right to the assistance of counsel; he or she is in a position to voluntarily waive the right. The waiver must be shown 'convincingly and beyond reasonable doubt.' It must be express and unequivocal, and must clearly relate to the interview in which the statement in question is taken." (internal citations omitted).

both a “well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplemental Submission” *and* that detention is a necessary measure for at least one of five reasons. These are to:

- 1) “prevent the Charged Person from exerting pressure on any witnesses or victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;
- 2) preserve evidence or prevent the destruction of any evidence;
- 3) ensure the presence of the Charged Person during the proceedings;
- 4) protect the security of the Charged Person; or
- 5) preserve public order.”

In addressing the first element, the chamber considered the meaning of a “well founded reason” to believe that the specified crimes were committed. In doing so, it sought guidance from ICC jurisprudence, which in turn had looked to the European Convention on Human Rights and the American Convention on Human Rights when interpreting the same phrase in the context of pretrial detention.<sup>43</sup> The chamber held that it was required to decide whether there are facts or information that would satisfy an objective observer that the charged person may have committed an offense specified in the introductory submission. Applying this standard to the facts before it, the chamber quoted extensively from interviews of other charged persons (Duch, Ieng Sary, and Khieu Samphan) as well as from Nuon Chea’s own prior statements. The chamber found that these statements affirmed Nuon Chea’s membership in the Khmer Rouge Standing Committee, the key decision-making body of the Democratic Kampuchea regime. Among other things, it was responsible for decisions governing the operation of the notorious S-21 detention facility, where as many as 17,000 people are estimated to have been unlawfully imprisoned, tortured and executed. The chamber found evidence that Nuon Chea “was in a position to give orders and used this position to give orders to the staff of S-21, in which prison crimes were allegedly committed.”<sup>44</sup> It concluded that these facts would satisfy an objective observer that Nuon Chea may be responsible for crimes specified in the introductory submission against him.

In addressing the second element specified in Internal Rule 63(3), the chamber held that Nuon Chea’s provisional detention satisfied all five of the reasons listed. The chamber found detention necessary to:

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<sup>43</sup> The chamber looked to *Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun” and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”))*, ICC-02/05-01/07, Decision on the Prosecution Application under Article 58 (7) of the Statute, Pre Trial Chamber, April 27, 2007, at [http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-1\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-1_English.pdf), in which the ICC Pre Trial Chamber stated at para. 28 that “the expression ‘reasonable grounds to believe’ must be interpreted and applied in accordance with internationally recognized human rights. Thus, in interpreting and applying the expression ‘reasonable grounds to believe’, the Chamber will be guided by the ‘reasonable suspicion’ standard under article 5(1)(c) of the European Convention on Human Rights and the jurisprudence of the Inter-American Court of Human Rights on the fundamental right to personal liberty under article 7 of the American Convention on Human Rights.”

<sup>44</sup> Decision on Nuon Chea Detention Appeal, above n.40, para. 64.



- Preserve evidence or prevent the destruction of evidence. The chamber based this finding on evidence set forth in the initial submission that Nuon Chea had admonished Kaing Guek Eav (a.k.a. “Duch”), a charged person and the head of the S-21 detention facility during the Democratic Kampuchea regime, for not destroying “evidence” (meaning documents) at S-21. This admonition allegedly occurred in a conversation between Nuon Chea and Duch in 1983.
- Prevent Nuon Chea from exerting pressure on witnesses. Based on the same conversation with Duch in 1983, the chamber concluded that Nuon Chea’s senior position in the Khmer Rouge movement attaches influence “which can still be applied today.”<sup>45</sup> Noting fears expressed by potential witnesses about testifying before the ECCC, the chamber found that the conversation between Nuon Chea and Duch, “if known by the victims, could adversely affect the willingness of the witnesses to testify if the Charged Person were released.”<sup>46</sup>
- Ensure Nuon Chea’s presence during the proceedings. This finding was based on the proximity of Nuon Chea’s residence to the Thai border and the fact that his stated willingness to participate in the proceedings is not persuasive since he has, until now, exercised his right to remain silent.
- Protect Nuon Chea’s security. The chamber based this finding on threats that members of the public allegedly made against another suspect, Duch, in the course of the appeal of his detention order and the fact that Nuon Chea had lived in a guarded house prior to his arrest.
- Preserve the public order. In making this finding, the chamber referred to research finding that Cambodians suffer from post-traumatic stress disorder that could resurface as a result of the ECCC proceedings. The gravity of the threat to public order was demonstrated, in the chamber’s view, by the existence of past disturbances and violent crimes in Cambodia, including anti-Thai riots in 2003.

Finally, the chamber found that none of the conditions proposed for bail would adequately address or outweigh the necessity for provisional detention indicated by the aforementioned criteria.

*Justice Initiative Analysis:*

In addressing pretrial detention appeals, the ECCC is dealing with fundamental human rights principles: the right to liberty and the presumption of innocence, both of which are enshrined in the International Covenant on Civil and Political Rights (ICCPR).<sup>47</sup> Article 9(3) of the ICCPR provides that “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.” According to the United Nations Human Rights Committee, which monitors compliance of States parties to the ICCPR, detention before trial should be used only where

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<sup>45</sup> Ibid, para. 62.

<sup>46</sup> Ibid, para. 63.

<sup>47</sup> *International Covenant on Civil and Political Rights*, adopted for signature and ratification by the General Assembly, Resolution 2200A (XXI), 16 December 1966, acceded to by the Royal Government of Cambodia in 1992, available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) (“ICCPR”).

it is lawful, reasonable, and necessary.<sup>48</sup> Principles adopted by the UN General Assembly specify that detention may be necessary “to prevent flight, interference with evidence or the recurrence of crime” or “where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner.”<sup>49</sup>

The test set forth in the ECCC’s Internal Rule 63, then, comports with international standards for provisional detention. It is often the gap between *de jure* and *de facto* compliance with international standards, however, that gives rise to criticism that courts disregard pretrial detention protections in practice. Excessive and unlawful pretrial detention by the courts in Cambodia has been well documented and criticized.<sup>50</sup> The chamber provides a helpful example for other courts in Cambodia by detailing the facts, standards, and reasoning used in reviewing detention orders.

The decision in Nuon Chea’s case is notable because it discloses considerable factual evidence against Nuon Chea from the co-prosecutors’ initial submission, interviews with other accused persons, and excerpts of two closed hearings: the first in which Nuon Chea waived his right to counsel and the second in which the investigating judges ordered his provisional detention. The initial submission and subsequent interviews of accused persons are not publicly available and there is no public record of the two relevant hearings. The chamber’s disclosure of information from these sources is, then, the only way for now that the public can evaluate whether the chamber is properly protecting Nuon Chea’s fundamental fair trial rights, including whether there is adequate evidence to support the chamber’s conclusions. While not a substitute for a revised rule that allows public adversarial proceedings—something that the Justice Initiative has repeatedly called for—the detailed account of specific evidence from confidential hearings and the initial submission provide an opportunity for independent analysis and validation of the chamber’s opinion. The inclusion of this information in the public decision is an important step by the chamber in assuring the public that it is adhering to international fair trial standards. At its next judicial plenary session, the court should take the next step of revising its rules to allow for public adversarial proceedings as an exception to the general rule of confidentiality of investigative proceedings.

#### *Appeal of Refusal of Investigating Judges to Order Psychiatric Evaluation*

On April 17, 2008, Nuon Chea’s defense counsel filed an appeal with the Pre-Trial Chamber seeking review of the investigating judges’ earlier refusal to appoint an independent psychiatrist to assess Nuon’s fitness to stand trial. Neither the original defense request—which indicates that defense counsel are preparing to claim Nuon Chea is unfit to stand trial<sup>51</sup>—nor its appeal has been released publicly (the original request to

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<sup>48</sup> *Human Rights and Pre-Trial Detention. A Handbook of International Standards relating to Pre-Trial Detention*, Professional Training Series No. 3 (New York: United Nations, 1994), 14–15.

<sup>49</sup> United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), adopted by General Assembly Resolution 45/110, 14 December 1990, Rule 6.

<sup>50</sup> See Report of Cambodian League for the Promotion and Defense of Human Rights (LICADHO), “Human Rights in Cambodia—The Charade of Justice,” Chapter 7, December 2007 at <http://www.licadho.org/reports/files/113LICADHOREportCharadeJustice07.pdf>.

<sup>51</sup> According to ECCC Internal Rule 32, “[t]he Co-Investigating Judges or the Chambers may, for the purpose of determining whether a Charged Person or Accused is physically and mentally fit to stand trial,



the investigating judges is part of the confidential case file). On April 18, 2008, however, Cambodian press reported that the investigating judges had ruled against a motion by Nuon Chea for an independent medical review, stating that the issue of Nuon's fitness to stand trial "does not arise at this stage" because an indictment is not imminent.<sup>52</sup>

According to Cambodian press accounts, Nuon Chea claims that "his thinking is unclear" and "his brain [is] not normal."<sup>53</sup> Nuon Chea now seeks an order from the Pre-Trial Chamber for the appointment of a psychiatric expert.

*Justice Initiative Analysis:*

The defense motion appealing the investigative judges' denial of Nuon Chea's request for medical review is not yet public so the exact nature of Nuon Chea's claim is not known. Similarly, the position taken by the investigative judges and the Pre-Trial Chamber regarding the request to appoint an expert to examine Nuon Chea is not clear either. The Justice Initiative will analyze this issue in greater detail once more information in the Nuon Chea case emerges. In the meantime, several general observations can be made concerning relevant international standards for resolving this issue.

Article 14(3) of the ICCPR provides minimum guarantees to individuals charged with crimes. These include the right of an accused person to be "tried in his presence, and to defend himself in person or through legal assistance of his own choosing" and to "examine, or have examined, the witnesses against him." These provisions reflect the principle that each person must be accorded the right to participate meaningfully in criminal proceedings against him or her. The question whether a defendant can participate meaningfully is central to a determination of a person's fitness to stand trial.

Other international tribunals have addressed the question of what test should be used to determine a suspect's fitness to stand trial. This determination has revolved around the mental capacity of the accused to participate adequately in the proceedings against him or her. In the *Struger* case,<sup>54</sup> an ICTY Trial Chamber held that the test for determining fitness to stand trial involves an assessment of whether a defendant is capable of entering a plea and, understanding the nature of the charges against him, the course and consequences of the proceedings, and details of the evidence. An accused must have the capacity to instruct counsel and to testify.<sup>55</sup> The threshold for fitness is met "when an accused has these capacities...at such a level that it is possible for the accused to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights i.e. to make his or her defense."<sup>56</sup> The defendant has the burden of proof to demonstrate that he lacks the capacity to stand trial and the standard must be the

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or for any other reasons, or at the request of a party, order that they undergo a medical, psychiatric or psychological examination by an expert."

<sup>52</sup> Douglas Gillison, "Nuon Chea's Defense Again Calls for Exam," *The Cambodia Daily*, April 18, 2008.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Prosecutor v. Pavle Struger*, "Decision on Defense Motion to Terminate Proceedings," Case No. IT-01-42-T, May 26, 2004 at <http://www.un.org/icty/strugar/trialc1/decision-e/040526.pdf>.

<sup>55</sup> *Ibid.*, para. 36.

<sup>56</sup> *Ibid.*, para. 37.

“balance of probabilities.”<sup>57</sup> In *Struger*, the ICTY Trial Chamber did not have to address whether the elements that are necessary for a fitness determination apply in pretrial proceedings. Each of the capacities listed, however, concerns actions that take place during the judicial investigation phase as well as at the actual trial.

#### **4. Kaing Guek Eav (a.k.a. Duch)**

Kaing Guek Eav, the former head of the infamous Khmer Rouge torture center Tuol Sleng (also known as S-21), is charged with crimes against humanity.

##### *On-Site Reconstruction and Confrontation Hearing*

In late February 2008, the investigating judges conducted on-site investigations at Tuol Sleng Genocide Museum, the site of the notorious detention facility at which Duch was warden, and at Choeung Ek, the “killing fields” near Phnom Penh where Tuol Sleng prisoners were executed. Duch, his counsel, civil parties, their lawyers, several survivors and Khmer Rouge era staff of Tuol Sleng attended the visit, which the court allowed a documentary crew to film. The proceedings were confidential but the local press covered them widely from the perimeter of both sites.<sup>58</sup>

Following the “reconstructions,” the investigating judges held a confrontation hearing at the court at which the prosecutors, civil parties, and other witnesses were present. This hearing is contemplated by ECCC Internal Rule 58(4), which provides for a procedure in which charged persons are interviewed by the co-investigating judges, who may “decide to confront the Charged Person directly with any other party or witness.” Internal Rule 58(5) provides that in the case of a confrontation interview, “the Co-Prosecutors and the lawyers for the other parties may ask questions, with the permission of the Co-Investigating Judges.” The investigating judges held the confrontation *in camera*. No public information is available regarding the content or conduct of this confrontation.

In an update released on April 24, 2008, the investigating judges indicated their intention to complete the Duch investigation by early May 2008.<sup>59</sup> Once this step is taken, the case moves toward the preparation of a formal closing order and, if sufficient evidence is found to support it, an indictment.<sup>60</sup> Following an indictment, a trial can be scheduled by the Trial Chamber.<sup>61</sup> This chain of events leading to an indictment could occur by July 2008, but delays due to appeals might extend this timeline. The investigating judges stated that they “hope that any trial of Duch on charges raised in the Co-Prosecutors’ Initial Submission could commence at the beginning of the last quarter of 2008.”

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<sup>57</sup> *Ibid.*, para. 38.

<sup>58</sup> See for instance, Ker Munthit, “Head of Notorious Khmer Rouge Torture Center Weeps at Mass Grave Site,” Associated Press, February 26, 2008.

<sup>59</sup> Office of the Co-Investigating Judges (OCIJ), Update on OCIJ activities for March 2008, issued April 24, 2008, at [http://www.eccc.gov.kh/english/cabinet/press/66/OCIJ\\_update\\_Mar\\_2008.pdf](http://www.eccc.gov.kh/english/cabinet/press/66/OCIJ_update_Mar_2008.pdf). (March 2008 Update of OCIJ).

<sup>60</sup> See Rule 66, Internal Rules, above n.25.

<sup>61</sup> See Rule 69, Internal Rules, above n.25.

## ***5. Ieng Thirith***

### *Appeal of Provisional Detention Order*

Ieng Thirith, minister of social action in the Democratic Kampuchea regime, is charged with crimes against humanity. The Pre-Trial Chamber has scheduled a hearing to rule on her provisional detention appeal for May 21, 2008.

## **General Developments:**

### ***1. Supplementary Submission of Additional Crime Site—Relevant to All Pending Cases***

On March 28, 2008, the ECCC prosecutors issued a press release announcing that they had delivered a supplementary submission to the investigating judges citing allegations of crimes committed at an unnamed security center where “many Cambodians were unlawfully detained, subjected to inhumane conditions, forced labor, tortured, and executed between 1975 and 1979.”<sup>62</sup> The submission does not name new accused persons but broadens the crime base against all five accused already charged.

In the statement released on March 28, 2008, Cambodian Co-Prosecutor Chea Leang noted that the submission was prompted by information provided by victims of Khmer Rouge crimes.<sup>63</sup> “Significantly, this request was filed as a direct result of victims providing their information to the court through the assistance of ADHOC, a Cambodian human rights organization,” she said. Chea Leang went on to note that, “[a]s a result of the detailed nature and concise form in which the information was provided, we were able to assess and act on this information quickly.” She encouraged victims to continue to come forward, noting that “[w]ithout participation of victims and witnesses, the court’s ability to ascertain the truth regarding the extent of the crimes and those who are responsible for them will be significantly reduced.” As a result of widening of the scope of the initial submission, the investigating judges have granted the application of three additional civil parties to the cases against Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith.<sup>64</sup>

The prosecutors’ statements highlight the need for the court and civil society to establish robust programs to advise Cambodians about opportunities to participate in the work of the ECCC by providing information to the prosecutors or, where appropriate, acting as civil parties. Active participation by witnesses and victims can help produce more accurate and thorough prosecutions of crimes committed during the Khmer Rouge regime.

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<sup>62</sup> *Statement of the Co-Prosecutors*, March 28, 2008 at [http://www.eccc.gov.kh/english/cabinet/press/63/Supplementary\\_Submission\\_Press\\_Release\\_28\\_March\\_08\\_ENG.pdf](http://www.eccc.gov.kh/english/cabinet/press/63/Supplementary_Submission_Press_Release_28_March_08_ENG.pdf). (“Statement of Co-Prosecutors”). Although Toul Sleng is the most notorious of the detention centers operated during the Khmer Rouge period, there were reportedly close to 200 additional detention sites at which the Khmer Rouge treated Cambodians inhumanely. The Documentation Center of Cambodia has conducted an extensive mapping of these sites. See [http://www.dccam.org/Projects/Maps/List\\_of\\_DK\\_Prisons\\_Most\\_Updated.pdf](http://www.dccam.org/Projects/Maps/List_of_DK_Prisons_Most_Updated.pdf).

<sup>63</sup> Rule 49(2) of the ECCC’s Internal Rules provides that the co-prosecutors “shall receive and consider all written complaints or information alleging commission of crimes within the jurisdiction of the ECCC” which may be lodged by “any person, organization or other source who witnessed or was a victim of such alleged crimes, or who has knowledge of such alleged crimes.”

<sup>64</sup> March 2008 Update of OCIJ, above n.58.

## **2. Appointment of UN Expert Adviser**

Secretary-General of the United Nations Ban Ki-moon appointed David Tolbert to act as a short-term expert adviser on issues related to the ECCC. Tolbert took up the post in New York on March 16, 2008. His mandate includes revising the ECCC's current budgetary needs and streamlining the administrative operations of the UN side of the court, UN Assistance to the Khmer Rouge Tribunal (UNAKRT).<sup>65</sup> Tolbert's expertise derives from over a decade of experience at the ICTY. He has held senior positions in all three organs of that court, including chef de cabinet to former ICTY President Gabrielle Kirk McDonald, deputy registrar and, until December 2007, deputy prosecutor. This appointment provides the UNAKRT with expertise urgently needed to deal with the leadership, administrative, and budgetary challenges the international side of the ECCC faces and will benefit the court as a whole. Tolbert arrived in Phnom Penh on April 27, 2008 for a ten-day visit with court officials and donors.

## **3. Talks Continue on ECCC Budget**

Representatives of the ECCC and the UN, including Director of Administration Sean Visoth and newly appointed special expert David Tolbert, met with donor states in New York on March 27, 2008 to discuss the ECCC's budget needs as well as the court's progress and operational challenges. The ECCC submitted a revised budget on January 31, 2008 seeking \$113.7 million in additional funds to see the court through to 2011.<sup>66</sup> (This amount was in addition to the original budget of \$56.3 million.) Donors were reportedly upset with the new \$170 million budget and demanded that the court justify why it needed so much money.<sup>67</sup> The *Wall Street Journal Asia* summarized donors' questions: "Why did the tribunal triple its original budget projection to \$170 million from \$56 million? Why did staff costs constitute around 70% of that increase – and what exactly will those staff be doing? And why is the court, now in its second year, taking so long to try the top Khmer Rouge officials, many of whom are now in their 80s?"<sup>68</sup> The court, with the assistance of UN expert David Tolbert, will revise the budget and is expected to release the new version in late May 2008.

Meanwhile, an influx of cash in early April 2008 prevented the ECCC from running out of money to pay Cambodian staff salaries. The court had indicated that it would run short of funds to pay national salaries by April 2008.<sup>69</sup> On April 4, 2008, the Australian

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<sup>65</sup> In Cambodia, the deputy director of administration represents UNAKRT. Three UN offices in New York are involved in administering and overseeing the ECCC for the United Nations: Department of Economics and Social Affairs (DESA) and the Controller's office oversee administrative and financial issues, and the Office of Legal Affairs oversees legal issues.

<sup>66</sup> See "Cambodia's UN-Assisted Genocide Tribunal Seeking to Triple Budget," Associated Press, February 7, 2009 at <http://malaysia.news.yahoo.com/ap/20080207/tap-as-gen-cambodia-khmer-rouge-4th-ld-w-d3b07b8.html>.

<sup>67</sup> See Erika Kinetz, "ECCC Budget Estimated at \$170 Million," *The Cambodia Daily*, February 7, 2008; Ek Madra, "Khmer Rouge Trial Taps Donors for Another \$114 Mln", *Reuters*, February 7, 2008; Erika Kinetz, "Australia Pledges \$456 to KR Tribunal," *The Cambodia Daily*, April 4, 2008; and "Editorial: Donors Turning Up Heat on KR Tribunal," *The Wall Street Journal Asia*, April 3, 2008.

<sup>68</sup> "Tribunal Trouble," *The Wall Street Journal Asia*, April 3, 2008, at [http://online.wsj.com/article/SB120717283373384537.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB120717283373384537.html?mod=googlenews_wsj).

<sup>69</sup> See Press Statement, *Director of Administration holds meeting with all Cambodian Staff*, March 11, 2008, at [http://www.eccc.gov.kh/english/news.view.aspx?doc\\_id=104](http://www.eccc.gov.kh/english/news.view.aspx?doc_id=104).

government announced a contribution of A\$500,000 (approximately US \$456,000) to the Cambodian side of the court to cover this immediate funding need. Three weeks later, on April 25, 2008, the French government announced that it would make an additional \$1,000,000 contribution, one quarter of which will be allocated to the Cambodian side of the court. These contributions will allow the court's work to proceed without interruption while the broader fundraising effort proceeds.

#### ***4. Assessment of Human Resource Practices***

The United Nations Development Programme (UNDP) and the Project Board (a body that oversees the funds administered by UNDP that are dedicated to the Cambodian side of the ECCC) commissioned a review of human resource management after earlier audits had identified serious problems, including the appointment of unqualified staff, excessive and unexplained pay rises for some staff, and insufficient paperwork regarding appointments and performance reviews.<sup>70</sup> The review they commissioned, the Special Human Resource Management Review Report (“Special Review Report”), was prepared by the Indian branch of auditing firm Deloitte Touche Tohmatsu and was released publicly on April 25, 2008.<sup>71</sup>

The report indicates that the ECCC has made significant progress since the original UNDP audit of June 2007, which had identified serious human resource problems. It concluded that the court has developed “robust” systems designed to “address previous shortcomings, provide effective support to the judicial process and minimize the risk of questionable HR [human resource] practices occurring in the future.”<sup>72</sup> The Special Review addressed the following topics:

- **Personnel handbook.** The handbook, which the ECCC adopted in August 2007, provides guidelines that are comprehensive and clear, and it has become the standard reference document for all key human resource processes, according to the Special Report.
- **Review of salary scale.** Salary rates for Cambodian staff are not inappropriately high despite the concerns raised by the earlier UNDP audit, released publicly in October 2007. After reviewing Cambodian staff salaries in light of these audit concerns, the Special Review determined that the current ECCC professional staff rates are at the top of the market without being above the market.
- **Validations of the job match findings and review procedures.** The ECCC followed a “logical and systematic” approach in determining whether current staff held the qualifications needed for their jobs. The criteria to determine whether a candidate matched the position requirements (developed by a human resources consultant in response to concerns raised in the 2007 UNDP audit, and approved by the ECCC Project Board on November 13, 2007) were found to be lenient, however. The court plans to re-advertise all positions where a match was not found between the stated job qualifications and the skills and experience of staff person.
- **Code of Conduct.** The ECCC adopted a Code of Conduct in August 2007 and all staff members have acknowledged receipt of a copy. A committee has been set up

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<sup>70</sup> See UNDP Audit, above n.4, and Special Review Report, above n. 5.

<sup>71</sup> Special Review Report, above n.5.

<sup>72</sup> Ibid, p. 23.

to deal with complaints and alleged Code of Conduct violations, but needs to be strengthened.

While finding that the court has made progress in addressing concerns raised by the earlier UNDP audit, the authors identified additional steps that the court must take if it is to “meet expected international standards.” Specifically, the report noted that the “ECCC should consider having a more integrated and holistic approach towards issues around code of conduct and should strive to adopt international best practices in the areas of dealing with corruption and work ethics.”<sup>73</sup> The authors recommended that the code of conduct be strengthened by incorporating new provisions, including ones that characterize failures to report violations as a form of misconduct, and by treating “offering and accepting gifts and money” as a violation. The report also identifies a need for enhancing the capacity of personnel staff in areas including position description and classification, conducting interviews, and undertaking performance assessments.

Like the UNDP audit that preceded it, the Special Review was not designed to investigate allegations that Cambodian ECCC staff or officers kicked back a portion of their salary to superiors in the administrative or political hierarchy in exchange for their jobs. The terms of reference clearly indicate such an investigation was not within the scope of the Special Review.

In order to ensure the integrity of the court, the ECCC, its founders (the UN and the Government of Cambodia), and its donors must take the steps necessary to identify and address the scope of the problems facing it, however widespread or limited they turn out to be. In accordance with international best practice, a professional investigation, conducted with adequate security and confidentiality controls, should be undertaken to look into allegations concerning salary kickbacks and to identify and implement the most appropriate measures to detect and prevent such practices.

In February 2007, the Justice Initiative identified three additional steps that continue to be central to ensuring the ECCC’s integrity:<sup>74</sup>

- Adoption of measures that would ensure “greater transparency in hiring procedures for Cambodian staff and improved human resource management.”
- “Placement of an independent full-time financial monitor within the ECCC itself”<sup>75</sup> (or, as suggested in October 2007, installation of “an experienced ombudsperson to whom employees and officials can confidentially report inappropriate requests for payment or any other violations of employment practices or ethical conduct”).<sup>76</sup>

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<sup>73</sup> Ibid., p. 22.

<sup>74</sup> Open Society Justice Initiative, *Corruption Allegations at Khmer Rouge Court Must Be Investigated Thoroughly*, February 14, 2007, available at [http://www.justiceinitiative.org/db/resource2?res\\_id=103627](http://www.justiceinitiative.org/db/resource2?res_id=103627) (“Corruption press release”).

<sup>75</sup> Ibid.

<sup>76</sup> Open Society Justice Initiative, *Justice Initiative Calls on Khmer Rouge Court to Fix Human Resource Problems*, October 5, 2007, available at [http://www.justiceinitiative.org/db/resource2?res\\_id=103908](http://www.justiceinitiative.org/db/resource2?res_id=103908).

- Creation of a whistleblower mechanism that would alert donors if kickback concerns resurface and protect those who come forward with information.<sup>77</sup>

The court has made good progress in respect of one of these proposed steps: It has taken some steps toward assuring greater transparency in human resource management. As noted by the recent Special Review Report, significant improvements have resulted in the ECCC's human resources practices, including the development and implementation of systems which "minimize the risk of questionable HR practices occurring in the future."<sup>78</sup> However, the ECCC has not yet adopted mechanisms, such as the appointment of an ombudsman and a whistleblower mechanism, that adequately address concerns about improprieties such as salary kickbacks.

Finally, the ECCC and its donors must recognize the enormous pressure on the ECCC's international judges and staff in the absence of a thorough investigation. Concern about the lack of independence of the judiciary in Cambodia and the potential for political interference in the ECCC's work was a major motivation for including international judges and staff in key positions. Yet if the court, the government of Cambodia, and the United Nations are unwilling to investigate allegations relating to salary kickbacks, this places additional pressure on international officers and staff to report information about possible political interference or other improper practices. It also allows a corrosive atmosphere of suspicion to hang about the Cambodian personnel, with no system to dispel or address such concerns.

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

### ***1. Prosecuting More People than the Five Charged Persons in Detention***

In his report of February 29, 2008, Special Representative of the United Nations Secretary-General on Human Rights in Cambodia Yash Ghai noted that "although the jurisdiction of the ECCC was restricted to 'senior leaders of the Democratic Kampuchea and those who were most responsible for the crimes committed,' if only the persons currently in the custody of the ECCC are accused, the people may not feel that this is adequate."<sup>79</sup>

While recognizing that decisions concerning whom and when to indict are committed to the sole discretion of the prosecutor and that the ECCC has the capacity to try only a finite number of suspects, the ECCC would best serve the interests of justice by ensuring that it exercises its statutory jurisdiction to try not only senior leaders of the Khmer Rouge but also those most responsible for the crimes committed during the Democratic Kampuchea regime. (At this point, only one person—Duch—falls into the second category). Given the sheer scale of the atrocities that occurred during the Khmer Rouge period, limiting prosecutions to five individuals would surely seem inadequate to those

<sup>77</sup> Corruption press release, above n.73.

<sup>78</sup> Special Review Report, above n.5, at p.23.

<sup>79</sup> Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Yash Ghai, UN General Assembly, A/HRC/7/42, February 29, 2008 at [http://cambodia.ohchr.org/webdocuments/reports/SRSG\\_HR\\_rpt/SRSG\\_HR13022008E.pdf](http://cambodia.ohchr.org/webdocuments/reports/SRSG_HR_rpt/SRSG_HR13022008E.pdf).



who survived Khmer Rouge era atrocities and would risk creating the perception that five individuals were in effect scapegoats for the crimes of others, even if the evidence fully supports the prosecution of those five. A credible indication from the prosecutor's office that it is reviewing information about other parties with a view toward submitting additional names for investigation is necessary if the ECCC is to avoid creating the perception that inappropriate political calculations prevented a more extensive inquiry.

## **2. *Transparency Issues***

The "reconstruction" proceedings in the Duch case, conducted by the investigating judges at Tuol Sleng and Choeung Ek in late February, 2008, served as a flash point for increasing tension between the press and the court.<sup>80</sup> While refusing access to the press, the ECCC allowed a documentary crew to film the process. Friction had been building for months as the ECCC determined how best to protect confidential information, while public and press concerns regarding the ECCC's failure to disclose information about its work mounted.<sup>81</sup> Public and press concerns range from lack of access to general information in the form of press conferences and statements about the work of the court to the ECCC's refusal to release significant documents such as proposed budgets and relevant pleadings of the parties. In response to these concerns, a group of media professionals and civil society leaders submitted to the ECCC twelve recommendations aimed at securing greater transparency and improving the relationship between the court, the press and civil society. The recommendations recognize that the court has legitimate interests in the confidentiality of certain information during the pretrial phase of proceedings but argue that confidentiality needs do not outweigh the powerful societal interest in developing a more open culture of transparency.<sup>82</sup>

Among the recommendations were that the court: hold regular press conferences and briefings; provide clarifications that defense counsel can speak to the press about non-confidential matters; release pleadings filed by the parties that do not disclose legitimately confidential information; and release administrative documents such as proposed budgets and actual budgets.

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<sup>80</sup> See Erika Kinetz, "News Anchor Refuses to Cover KR Tribunal," *The Cambodia Daily*, March 11, 2008; Erika Kinetz, "Tensions Mount Between ECCC Officials, Media," *The Cambodia Daily*, March 3, 2008; Erika Kinetz, "ECCC, Journalists Clash Over Tribunal Access," *The Cambodia Daily*, February 28, 2008.

<sup>81</sup> One Cambodian reporter threatened to stop covering the ECCC because he was uncertain if publishing certain information would result in sanctions from the court or the government. See Erika Kinetz, "News Anchor Refuses to Cover KR Tribunal," *The Cambodia Daily*, March 11, 2008. He decided to continue after discussing his concerns with a representative of the Public Affairs Unit of the court. See "News Anchor Resumes KR Tribunal Coverage, Briefing," *The Cambodia Daily*, March 12, 2008.

<sup>82</sup> Rule 56(1) of the ECCC's Internal Rules provides: "In order to preserve the rights and interests of the parties, judicial investigations shall not be conducted in public" but identifies opportunities for the judges to provide information to the public with appropriate protections. Rule 77(6) provides that proceedings of the Pre-Trial Chamber are generally to be conducted *in camera*, but provides that the "Pre-Trial Chamber may, at the request of any judge or party, decide that all or part of a hearing be held in public, in particular where the case may be brought to an end by its decision, including appeals or applications concerning jurisdiction or bars to jurisdiction, if the Pre-Trial Chamber considers that it is in the interests of justice and it does not affect public order or any protective measures authorized by the court."



The recent update on the activities of the co-investigating judges' office, filed on April 24, 2008 and issued publicly by the ECCC, provided some information about the status of ongoing cases.<sup>83</sup> This is a helpful step towards transparency. The court has indicated that it plans to issue monthly updates from each section of the court. In addition, the court is planning in the coming months to hold a day-long conference with the press and non-governmental organizations to discuss media policy and transparency issues. These are welcome developments and evidence a commitment to develop a more open information policy.

While positive, these steps do not address key ongoing concerns about public access to tribunal proceedings. Under current practice, adversarial hearings held before the investigating judges are considered part of the judicial investigation that "shall not be conducted in public" according to the ECCC's Internal Rule 56. Similarly, under Internal Rule 77(5), hearings of the Pre-Trial Chamber "shall be conducted *in camera*" unless, as provided in Rule 77(6), the Pre-Trial Chamber considers it "in the interests of justice and it does not affect public order or any protective measures authorized by the court."

The presumptively closed nature of these proceedings does not serve the interests of justice and the ability of the Cambodian public to understand the ECCC's proceedings. Legitimate public interests in following the ECCC's proceedings would be better served if the court's internal rules were amended to provide that adversarial hearings before the investigating judges and appeals 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. In the meantime, the ECCC should, at minimum, release pleadings and other documents (with appropriate redactions) that are related to public decisions of the Pre-Trial Chamber and orders of the investigating judges.

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<sup>83</sup> March 2008 Update of OCIJ, above n.58.

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, London, New York, and Washington D.C.

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