

Recent Developments at the Extraordinary Chambers in the Courts of Cambodia

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Recent Developments at the Extraordinary Chambers in the Courts of Cambodia (ECCC) is a regular report issued by the Open Society Justice Initiative examining progress, priorities, and challenges at the ECCC. Other Justice Initiative reports and publications on the ECCC can be found at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/sub_listing.

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Executive Summary and Recommendations

In recent months, the credibility of the Extraordinary Chambers of the Courts in Cambodia (ECCC) has been frontally challenged in an unprecedented manner by a Cambodian government determined to politically terminate Cases 003/004—against five unnamed suspects referred for investigation by the international prosecution in September of 2009. To date, the United Nations and international donors have failed to respond.

Concerns about the case crystallized in October, when Prime Minister Hun Sen told UN Secretary-General Ban Ki-moon that, in the words of Cambodia’s foreign minister, “Hun Sen has said clearly that there will be no case 003 allowed.”¹ Such political interference in judicial decision-making shows why any “completion plan” that involves transferring cases from the ECCC to a fully domestic trial chamber is unworkable: it is unlikely any Cambodian court would be permitted to make independent decisions on the facts and the law.²

Beyond the fate of Cases 003/004, additional problems affect the court. First, the Pre-Trial Chamber issued a split decision on a request to investigate evidence of political interference regarding the testimony of witnesses who are government officials, thereby raising doubt about the court’s effectiveness in addressing challenges to its credibility. Second, the UN itself raised concerns about the court’s transparency by declining to publish a report by the Independent Counsellor charged with implementing the court’s anti-corruption mechanism. Finally, the court faces a fundraising crisis with respect to the 2011 budget.

At the same time, the ECCC has made significant progress in other areas since the Justice Initiative’s previous *Recent Developments* report, issued in September 2010.³ Most importantly, a closing order indicting the four living senior leaders of the Khmer Rouge for crimes against humanity, war crimes, genocide, and crimes under the Cambodian Penal Code was issued on September 15, 2010. An appeal of the closing order, based on jurisdictional issues, was filed by the accused and is currently being considered by the Pre-Trial Chamber. The appeal is expected to be decided in January 2011, and the substantive trial to begin by mid-2011.

¹ “Cambodia Rebuffs UN Chief on Khmer Rouge Trials,” *The New York Times*, October 27, 2010. Although Foreign Minister Hor Namhong referred to the case against the five unnamed defendants as “case 003,” this report uses the court’s own nomenclature to refer to it as “Cases 003/004.”

² For more about completion planning, please see the discussion in the final section of this paper and the Justice Initiative report, *Salvaging Judicial Independence: The Need for a Principled Completion Plan for the Extraordinary Chambers in the Courts of Cambodia*, available at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/khmer-rouge-tribunal-20101110.

³ Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: September 2010*, available at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia-report-20109002.

In their September plenary, the ECCC judges amended the court's rules to expand the options available to the Trial Chamber in fashioning reparations for civil parties. These changes will apply to Case 002—against the four senior leaders—and any subsequent cases. They provide the chamber with the authority to order or endorse programs that benefit civil parties and can be implemented by the Victim Support Section (VSS) in cooperation, where appropriate, with governmental or non-governmental organizations. The new provisions will give the chamber the power to make reparations awards including plaques, memorial sites, and the establishment of educational programs. Similar reparations were requested by civil parties in the Duch trial, but were denied because the original rules did not permit them.

This report examines in greater detail the issues summarized above: political interference, the closing order in the 002 Case, the Pre-Trial Chamber's ruling on witness testimony in the 002 Case, the Independent Counsellor's report, new reparation rules, and fundraising. It also provides updates on the status of the Duch Case and 003/004 Cases, as well as personnel changes and plans for the court's completion.

Key Recommendations from this Report:

To the UN Special Expert to the Secretary-General for the ECCC, the United Nations, and all senior ECCC officials:

- A) Swiftly respond to the Cambodian government's political interference by publicly underscoring that it is for the court, not any external actor, to determine the course of judicial proceedings in all cases. The court can publicly demonstrate its independence by moving forward on Cases 002 and 003/004 only with full cooperation from both Cambodian and international officials and staff of the court. Specific attention should be paid to the need for international and Cambodian cooperation in securing testimony from witnesses who hold high government posts (in Case 002), and in proceeding with the judicial investigation of five suspects put forward for prosecution by the court's international prosecutor (in Cases 003/004).
- B) Together with the government of Cambodia, develop a principled completion plan for the court that ensures all pending cases are completed efficiently and in a manner consistent with the mandate of the court and international standards, including standards regarding judicial independence.
- C) Together with the government of Cambodia, build additional transparency and public reporting into the court's anti-corruption mechanism.

To the court's donors:

- A) Support United Nations and ECCC officials in responding to the Cambodian government's political interference in the court's proceedings.
- B) Commit sufficient funds for the court to fulfill its mandate of providing justice to

the Cambodian people in accordance with international standards. This includes providing sufficient funds to ensure that issues of political interference do not undermine the credibility of the entire court.

- B) Ensure the Victim Support Section (VSS) has adequate resources to meet its expanded mandate of serving civil parties and other victims, particularly with respect to developing reparation programs that benefit civil parties and can be feasibly carried out even after the ECCC ceases operations. Fund NGOs that are providing assistance to civil parties and victims.

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

- A) Work quickly to hire an international deputy of the Victim Support Section and to start the work of the new international lead co-lawyer who will represent the interests of civil parties at the Case 002 trial.
- B) Support the VSS in carrying out its recently expanded mandate, particularly with respect to outreach and developing non-judicial measures and proposed reparation programs.
- C) Immediately seek an experienced lawyer to head the Defense Support Section.

Political Interference with Judicial Work of the ECCC

According to the public statements of Cambodia's foreign minister, as well as media reports, Cambodian Prime Minister Hun Sen advised UN Secretary-General Ban Ki-moon during a meeting in Phnom Penh on October 27, 2010 that the ECCC should shut its doors following the conclusion of Case 002 and not move forward on Cases 003/004.⁴ This represents an unacceptable attempt to strangle the independence of the court and to control who is investigated and charged. Previous statements by the prime minister and other high level government officials that the investigations into five additional suspects currently before the court in Cases 003/004 should not proceed⁵—and evidence that Cambodian officials of the court are unwilling to participate in those investigations—have gone largely unaddressed by the United Nations. This feeds the growing public perception that the Cambodian portion of the court cannot act independently of the prime minister's wishes. Attempts to minimize the blatant political interference (such as Cambodian spokesperson Khieu Kanharith's saying "[w]e don't say [pursuing the additional cases is] forbidden, because you cannot dictate, you cannot impose your will on the court")⁶ are ineffective at best and disingenuous at worst. The failure of Cambodian staff to investigate these cases speaks for itself.

Thus far, the UN's public response to the prime minister's recent statements has correctly reaffirmed that it is up to the court to decide how to proceed with cases before it: "We have to give [Cambodian and international court officials] the space that they need to make the proper decision. There should be no political interference with their work."⁷ But by itself, this response is inadequate. It misses the point that, as a practical matter, Cambodian court officials are not free to proceed independently with prosecutions that the prime minister has openly and categorically opposed. Cambodian court officials are understandably fearful of acting in apparent defiance of a public command by the head of state. The UN must demand that the government of Cambodia—its partner in the ECCC—live up to its commitment to allow the court to operate without political interference. Every day that the prime minister's widely reported threats are allowed to go unanswered, they reinforce growing public doubts about the ECCC's credibility.

⁴ See numerous press reports and quotes from the official Cambodian government spokesperson and the minister of foreign affairs, including Zsombor Perter and Phorn Bopha, "No more Khmer Rouge Trials, Premier Tells Ban," *Cambodia Daily*, October 28, 2010; Cheang Sokha and James O'Toole, "Hun Sen Shoots from the Lip: Cases after 002 Face Embargo," *Phnom Penh Post*, October 28, 2010.

⁵ Chean Sokha and Robbie Corey-Boulet, "ECCC Ruling Risks Unrest: PM," *Phnom Penh Post*, September 8, 2009; Sopheng Cheang, "Cambodia PM Accuses Other Countries of Stirring Unrest," Associated Press, September 10, 2009; and Vong Sokheng, "Inquiries could sink ECCC: PM," *Phnom Penh Post*, September 10, 2009; Hun Sen speech recorded and broadcast by Voice of America, March 18, 2009; Neth Pheaktra and Georgia Wilkins, "Judges should Focus on Current KR Suspects: Gov't," *Phnom Penh Post*, March 12, 2008; Maggie Tait, "Interference 'Deplored' by Judge," NZPA, April 5, 2009, at <http://www.stuff.co.nz/world/asia/2315921/Interference-deplored-by-judge>.

⁶ See Robert Carmichael, "This trip to Cambodia was probably not the success Ban Ki-moon had hoped for: UN Secretary-General flies out of Cambodian Storm," *ABC Radio Australia*, October 29, 2010.

⁷ Robert Carmichael, "Cambodia's Hun Sen has a Blunt Message for Ban Ki-moon," *DW-World*, October 27, 2010, at <http://www.dw-world.de/dw/article/0,,6159573,00.html>. "Those are decisions for the court officials to make, and the secretary-general is not in a position whatsoever to make those decisions. That is not for him to make."

Concerns about political interference recently moved the UN Committee Against Torture to urge the ECCC to go forward with “its efforts to bring further perpetrators of the Khmer Rouge-related atrocities to justice (Cases Nos. 003 and 004).”⁸

The government of Cambodia must affirm in unambiguous terms its commitment to supporting the work of the court, including the investigation, and if judicially determined, the prosecution and trial of additional accused persons. However, evidence that the Cambodian staff of the court are proceeding with their duties is also required in order to demonstrate the court’s independence. The specter of political interference will not dissipate until the ECCC can show publicly that Cambodian officials are in fact cooperating fully and in good faith in pursuing investigations.

Closing Order in Case 002

The investigating judges filed a closing order for Case 002 on September 15, 2010, issuing indictments against the four most senior living members of the Khmer Rouge regime:

- Ieng Sary, age 84, Khmer Rouge deputy prime minister for foreign affairs;
- Nuon Chea, 84, second in command under Khmer Rouge leader Pol Pot;
- Khieu Samphan, 79, Khmer Rouge head of state; and
- Ieng Thirith, 78, Khmer Rouge minister of social affairs.

The indictment summarizes charges against the four as follows:

[A]s a result of the judicial investigation, there is sufficient evidence (*charges suffisantes*) that Nuon Chea, Ieng Sary, Khieu Samphan, and Ieng Thirith, in Phnom Penh, within the territory of Cambodia, and during incursions into Vietnam, between 17 April 1975 and 6 January 1979, through their acts or omissions, committed (via a joint criminal enterprise), planned, instigated, ordered, or aided and abetted, or are responsible by virtue of superior responsibility, for the following crimes:

CRIMES AGAINST HUMANITY, specifically:

- (a) murder
- (b) extermination
- (c) enslavement
- (d) deportation
- (e) imprisonment
- (f) torture
- (g) rape
- (h) persecution on political, racial, and religious grounds
- (i) other inhumane acts....

GENOCIDE, by killing members of the groups of Vietnamese and Cham....

⁸ United Nations Committee Against Torture, Considerations of Reports Submitted by States Parties Under Article 19 of the Convention, Advance Unedited Version: Concluding Observations of the Committee Against Torture, Cambodia, Forty-fifth Session, 1-19 November 2010, para. 8.

GRAVE BREACHES OF THE GENEVA CONVENTIONS OF 12 AUGUST 1949, specifically:

- (a) wilful killing
- (b) torture or inhumane treatment
- (c) wilfully causing great suffering or serious injury to body or health
- (d) wilfully depriving a prisoner of war or civilian the rights of fair and regular trial
- (e) unlawful deportation or unlawful confinement of a civilian....

VIOLATIONS OF THE 1956 PENAL CODE [of CAMBODIA], specifically:

- (a) homicide
- (b) torture
- (c) religious persecution.⁹

The closing order is 400 pages of text with an additional 370 pages containing 5,419 footnotes—mostly references to interviews and documents in the extensive case file created in the course of the investigation. The order contains detailed descriptions of the history of the Khmer Rouge, its political and military structure, the roles and involvement of each of the accused, and specific findings related to the joint criminal enterprise that is alleged as a key form of liability for the charges. The closing order concludes that:

The common purpose of the CPK [Communist Party of Cambodia] leaders was to implement rapid socialist revolution in Cambodia through a “great leap forward” and defend the Party against internal and external enemies, by whatever means necessary....To achieve this common purpose, the CPK leaders *inter alia* designed and implemented the five following policies:

- The repeated movement of the population from towns and cities to rural areas, as well as from one rural area to another;
- The establishment and operation of cooperatives and worksites;
- The reeducation of “bad-elements” and killing of “enemies”, both inside and outside the Party ranks;
- The targeting of specific groups, in particular the Cham, Vietnamese, Buddhists and former officials of the Khmer Republic, including both civil servants and former military personnel and their families; and
- The regulation of marriage.¹⁰

The investigating judges received and reviewed 4,128 applications from persons claiming to be victims of crimes committed by the accused. They admitted 2,123 of the applicants as civil parties—victims recognized by the court as parties to the proceedings, who are allowed to claim collective and moral reparations. They rejected the remaining applications for a variety of reasons, most commonly because the applicant did not establish that his or her injury was related to a specific crime or crime-site included within the scope of the investigation. Most of the rejected civil party applicants have filed appeals claiming that the investigating judges followed erroneous standards in reviewing

⁹Closing Order, Case File 002, September 15, 2010, para. 1613 at <http://www.eccc.gov.kh/english/cabinet/courtDoc/740/D427Eng.pdf>.

¹⁰ Ibid, paras. 156 and 157.

their application or failed to adequately consider facts submitted. The Pre-Trial Chamber is charged with ruling on these appeals.

The prosecutors did not file an appeal to the closing order.

The rules of the court allow accused persons to appeal the closing order only regarding rulings that “confirm the jurisdiction of the court.”¹¹ The Pre-Trial Chamber rules on such appeals and then forwards the case to the Trial Chamber to schedule trial on all charges that survive the appeal process. The Pre-Trial Chamber is required to issue its decision on such appeals within four months of when they are lodged. If the chamber does not do so, the accused must be released from provisional detention until and unless the Trial Chamber makes a contrary ruling on detention once the trial process begins.¹² This four-month period will expire for the various accused within the final two weeks January 2011.

Each of the accused has filed an appeal against the closing order, claiming that the investigating judges erred by charging them with genocide, crimes against humanity, grave breaches of the Geneva Conventions, and with joint criminal enterprises as a mode of liability. They argue that these crimes and joint criminal enterprise were not part of the law applicable in Cambodia during 1975-1979—the relevant period of the court’s jurisdiction. Thus, they assert, the charges violate the principle of legality, which holds that a person can only be charged with crimes that were clearly established as such at the time of the alleged commission.¹³ The argument is premised on the claim that the ECCC is a domestic court that must apply Cambodian law, and that domestic criminal law between 1974 and 1979 did not provide for the criminalization of genocide, crimes against humanity, or war crimes. Further, they argue that joint criminal enterprise was not a mode of liability recognized in Cambodia during the relevant time. Counsel for Ieng Sary also claims that a pardon, given to him in 1996 by the King of Cambodia when he renounced his allegiance to Pol Pot and the Khmer Rouge, bars the claims against him, and that neither command responsibility nor aiding and abetting are appropriate modes of liability before the ECCC because they were not part of established Cambodian law by 1979.¹⁴

If the process for appeals of the closing order is completed within the four month window provided by the rules and the indictments are transferred to the Trial Chamber by late January 2011, it is feasible that the Trial Chamber could hold its initial hearing within the first quarter of 2011 and set a date for opening the trial within the first half of 2011, as

¹¹ Internal Rules Rev. 6, September 17, 2010, Rules 67(5) and 74(3)(a) at <http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv6-EN.pdf>. (All references to the internal rules are to this version unless otherwise stated and will be referred to as “Rule ___”).

¹² Rule 68(2) and (3).

¹³ See for instance, Ieng Thirith Defense Appeal from Closing Order, October 18, 2010, at http://www.eccc.gov.kh/english/cabinet/courtDoc/751/D427_2_1_EN.pdf; and Nuon Chea Appeal Against Closing Order, October 18, 2010 at http://www.eccc.gov.kh/english/cabinet/courtDoc/752/D427_3_1_EN.pdf.

¹⁴ Ieng Sary's Appeal Against the Closing Order, October 25, 2010, at http://www.eccc.gov.kh/english/cabinet/courtDoc/766/D427_1_6_EN.PDF.

expected.

The Duch Case

The Trial Chamber judgment finding Kaing Guek Eav, alias Duch, guilty on charges of crimes against humanity and grave breaches of the 1949 Geneva Conventions in connection with his role as the commander of the infamous S-21 prison was issued on July 26, 2010. Duch's sentence of 35 years in prison was reduced by five years as compensation for prior illegal detention by the Cambodian Military Court. In addition, Duch will receive credit for the 11 years he served in detention since his arrest in 1999, thus leaving 19 years remaining on the sentence. Appeals against the judgment by the prosecution, the defense, and civil parties are proceeding.

Appeal by Prosecutors

The prosecutors filed an appeal against the judgment, asking the Supreme Court Chamber to increase the sentence to 45 years and impose convictions on additional charges. Specifically, the prosecutors argue in their appeal that:

- 1) The Trial Chamber erred in sentencing Duch to only 35 years in prison by placing undue weight on mitigating circumstances such as his cooperation with the court, and by placing too little weight on the aggravating circumstances such as the gravity and extent of the crimes. They seek a revised sentence of life imprisonment, with a reduction to 45 years in recognition of the violation of his rights (the unlawful detention by the Cambodian Military Court) and what they consider to have been minimal cooperation with the court. During closing arguments following the trial, the prosecutors called for a sentence of "at least 40 years." Many Cambodians, used to harsh sentencing practices in domestic courts, expressed dismay that Duch received a sentence that, at least theoretically, left open the possibility he could be released before he dies. (Duch is currently 67 years old and appears in good health.) Further, the prosecutors requested that the Supreme Court Chamber clearly state that Duch must serve his sentence without the possibility of parole. Victims have raised the concern that Duch might be entitled to parole for good behavior under Cambodian law and serve only two-thirds of his sentence. The prosecutors seek to eliminate this possibility.
- 2) The Trial Chamber erred by subsuming the crimes of enslavement, imprisonment, torture, rape, extermination, murder, and other inhumane acts into the crime against humanity of persecution, rather than rendering separate and cumulative convictions for each. The prosecutors argue that by lumping the different crimes together, the chamber's judgment gives an inaccurate picture of the extensive nature of Duch's crimes.
- 3) The Trial Chamber should have convicted Duch of the crime against humanity of enslavement with regard to all the detainees of S-21, and erred in its finding that forced labor was an essential element of the crime of enslavement.

In concluding their appeal, the prosecutors focused on the need to increase the prison

sentence: “There comes a point where the crimes committed are sufficiently grave and the offender sufficiently notorious, or in such a position of authority, that the highest sentence must be imposed. That point was reached and passed here. In this case, a senior and responsible cadre of the Communist Party of Kampuchea presided over the factory of death of S-21. Principles of deterrence and retribution can only be adequately satisfied by the imposition of the highest sentence.”¹⁵

Appeal by Duch

Duch’s two Cambodian lawyers filed a notice of appeal against the judgment, asking that Duch be acquitted of all crimes and released from custody. They argue that Duch was too low in the Khmer Rouge hierarchy to be considered a person “most responsible” for crimes within the jurisdiction of the court. They assert that only those accused within the senior hierarchy of the Khmer Rouge can be considered “most responsible” within the meaning of the ECCC statute and that Duch cannot be held responsible for crimes at S-21 because he was only following orders. His counsel did not argue that, if the conviction was affirmed, the sentence imposed was too long.

Duch is currently represented by two Cambodian lawyers because his international counsel, Francois Roux, was dismissed by Duch immediately before the Trial Chamber’s judgment was issued.

Appeals by Rejected Civil Party Applicants

The Trial Chamber rejected the applications of 24 of the 90 persons who applied to be civil parties in the Duch trial. The court found that the rejected applicants had not adequately demonstrated a link to S-21 prison, either as a direct survivor or as one holding a close bond of kinship, affection, or dependency to a prisoner at S-21. Most of the rejected applicants filed appeals claiming that the Trial Chamber’s endorsement of a two-step process of conditionally admitting applicants for the trial and then rejecting their application in the final judgment was not provided for in the internal rules and is therefore erroneous. Further, they state that the chamber applied the wrong standard of proof in evaluating their applications and overlooked important evidence. Some of the applicants also appealed the chamber’s order on reparations, arguing that the judgment incorporates an unduly narrow interpretation of the chamber’s authority and obligation to award reparations.

The Supreme Court Chamber has not announced whether it will hold a public hearing to allow the parties to present arguments in support of their appeals. Likewise, the chamber has not announced when its decision will be issued.

Status of Cases 003/004

Cases 003/004 include allegations against five suspects whose identities remain confidential. After a lengthy process to resolve a disagreement between the international and Cambodian co-prosecutors about whether to submit Cases 003/004 for judicial

¹⁵ Co-prosecutors' appeal against the Judgement of the Trial Chamber in the case of Kaing Guek Eav alias Duch, September 13, 2010, paragraph 210 at http://www.eccc.gov.kh/english/cabinet/courtDoc/745/F10_EN.PDF.

investigation, they were submitted to the investigating judges in September 2009. However, to date it appears that there has been little substantive investigation of the cases. As noted above, high-level Cambodian government officials have made statements indicating that they do not believe Cases 003/004 should go forward. Most recently, Prime Minister Hun Sen reportedly announced to UN Secretary-General Ban Ki-Mon that the cases *would not* move forward. Evidence indicates that the court's Cambodian officials and staff are adhering to this politically directed position by refusing to conduct any activity in relation to these cases.¹⁶ This is patently contrary to basic minimum fair trial standards¹⁷ as well as the Law of the Extraordinary Chambers, which insists: "Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source."¹⁸

In the most recent issue of the ECCC newsletter *Court Report*, the court stated with regard to Cases 003/004 that "two field missions were undertaken by *international investigators*, with six witness interviews for crimes based within different crime sites" (emphasis added).¹⁹ This announcement is consistent with earlier indications that any investigation into Cases 003/004 is being done without the cooperation of Cambodian staff or officials.²⁰

Cooperation between the international and Cambodian investigating judges and their staffs is required if the investigation process is to operate effectively. The signature of both investigating judges is needed to issue an arrest warrant or file charges against a suspect. If the two judges cannot agree on whether to issue an arrest warrant or take other action to move the case forward, one can act alone after he has filed a formal notice of disagreement with the court. If either judge presses this disagreement for a judicial resolution in order to avoid a stalemate, the court will have to go through the same lengthy process followed when the international prosecutor pressed the cases forward in December 2009 over the objection of his Cambodian counterpart.

An international-only investigation of Cases 003/004 is not acceptable for a hybrid court that purports to be a joint effort and respect international standards for fair and

¹⁶ For information on public comments made by senior government officials and evident lack of Cambodian cooperation in the investigation of the cases, refer to the Justice Initiative report, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: March 2010*, regarding apparent political interference in Cases 003/004 at: http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia-20100324 ("Justice Initiative Political Interference Report").

¹⁷ International Covenant on Civil and Political Rights, 999 UNTS 171 of Dec. 16, 1966, *entered into force* Mar. 23, 1976, Article 14(1) "All persons . . . are entitled to a fair and public hearing by a competent, independent and impartial tribunal". Similar provisions are in the regional human rights treaties. *See also* European Convention, Article 6(1); American Convention, Articles 8(1) and 27(2); and African Charter, Articles 7(1) and 26.

¹⁸ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea, October 27, 2004, Article 10, at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf (the Law)

¹⁹ "The Court Report," ECCC Publication, November 2010 at <http://www.eccc.gov.kh/english/publications.courtReport.aspx>.

²⁰ Justice Initiative Political Interference Report at page 21.

independent trials. The UN and the government of Cambodia must take immediate action to ensure that Cambodian officials and staff fully cooperate in an independent investigation of Cases 003/004. Such cooperation is needed to ensure not only the practical functioning of the court, but as reassurance to the public that political pressures are not determining who is brought before the court for testimony, investigation, or prosecution.

On November 30, 2010, the Defense Support Section, which is charged with assisting suspects in obtaining qualified legal counsel, issued a press statement announcing that it had appointed experienced Cambodia lawyer Kong Sam Onn to represent the interests of the five unnamed suspects in Case 003/004, thereby ensuring that their rights were protected during the judicial investigation being conducted by the international investigating judge.²¹ Later the same day, the Public Affairs Section of the court, apparently at the direction of the investigating judges, issued a “clarification” regarding the assignment of legal counsel in Cases 003/004, stating:

The concept of assigning legal counsel to represent unnamed suspects in Cases 003 and 004 has explicitly been rejected by the Co-Investigating Judges in September 2010, upon a request from the Defence Support Section. This means that unless the judges decide otherwise, the court will not recognize any lawyer assigned by the Defence Support Section for this purpose.²²

No explanation was provided by the investigating judges as to why, after cases 003/004 have been pending in their office for over a year, it is unnecessary for the suspects to have the assistance of a single counsel to represent their interests. Equally troubling is that a decision to not recognize a lawyer was made in a press statement from the administration of the court rather than in a judicial ruling, which would have provided an opportunity for the parties to be heard and to file an appeal if appropriate.

Pre-Trial Chamber Decision on Investigation into Alleged Political Interference

The Pre-Trial Chamber issued a split decision—with the international judges ruling one way and the Cambodian judges the opposite—on a request by the Nuon Chea and Ieng Sary defense teams for an investigation into allegations of political interference with the appearance of witnesses summoned to give testimony before the investigating judges. Because a supermajority (four out of five judges concurring) was not reached, no “decision” was possible and the request for an investigation failed in spite of the strong opinion of the international judges that further investigation was necessary.

²¹Press Release—ECCC Defence Support Section, Upholding International Standards: Defence Support Section Appoints Counsel to Represent the Interests of the Suspects in Cases 003 and 004, November 30, 2010, at [http://www.eccc.gov.kh/english/cabinet/press/174/ECCC_DSS_30_Nov_2010_\(Eng\).pdf](http://www.eccc.gov.kh/english/cabinet/press/174/ECCC_DSS_30_Nov_2010_(Eng).pdf).

²²Press Release of Public Affairs Section of the ECCC, Statement Regarding Legal Counsel in Cases 003 and 004, November 30, 2010 at [http://www.eccc.gov.kh/english/cabinet/press/175/ECCC_30_Nov_2010_\(Eng\).pdf.pdf](http://www.eccc.gov.kh/english/cabinet/press/175/ECCC_30_Nov_2010_(Eng).pdf.pdf).

At issue was a request by Nuon Chea and Ieng Sary's defense counsel that the investigating judges interview six witnesses who hold high positions in the Cambodian government.²³ The international investigating judge concurred that these interviews were "conductive to ascertaining the truth" and issued summonses to the witnesses. The Cambodian investigating judge refused to sign the summons, stating that he did not believe the interviews were necessary. After news of the summonses became public, the spokesman for the government of Cambodia, Khieu Kanharith, was quoted in local newspapers stating that although the summonsed individuals could appear in court voluntarily, the government's position was that they should not give testimony. Further, said that foreign officials involved in the court could "pack their clothes and return home" if they were not satisfied with the decision.²⁴

None of the government officials appeared or responded to the summonses. The Nuon Chea and Ieng Sary defense teams requested the investigating judges take action to enforce the summonses and to investigate apparent political interference with the appearance of witness. The investigating judges refused: The international investigating judge stated he declined to take further action to secure the testimony of the witnesses because he did not want to delay the proceedings. The Cambodian judge reiterated that he did not believe it was necessary to call the witnesses to properly investigate the case. Appeals of this decision were filed with the Pre-Trial Chamber on behalf of Nuon Chea and Ieng Sary, with a request that an investigation be conducted into the evidence of political interference in the decision by the Cambodian judge and that further steps be taken to secure the testimony of the six government witnesses.

The Pre-Trial Chamber's split decision is a notable departure from its usual practice of issuing unanimous decisions. The other major decision of the chamber that similarly split along international/Cambodian lines also concerned an issue surrounded by allegations of political interference: whether the submission of additional suspects for judicial investigation (in Cases 003/004) should proceed over the objection of the Cambodian prosecutor.²⁵

The Pre-Trial Chamber judges issued a unanimous description of the facts of the appeal and the standard for determining when further investigation into allegations of political interference was appropriate. The court's internal rules provide that where there is a reason to believe that a person "threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with a witness, or potential witness, who is giving, has given, or may give evidence in proceedings before the Co-Investigating Judges or a Chamber,"

²³ Public Redacted Second Decision on Nuon Chea and Ieng Sary's appeal against OCIJ Order on Requests to Summons Witnesses, September 9, 2010, Section I (Procedural Background), at http://www.eccc.gov.kh/english/cabinet/courtDoc/689/D314_1_12_Redacted_EN.PDF.

²⁴ Ibid, para. 40.

²⁵ In that instance the international Pre-Trial Chamber judges wrote an opinion that the investigations should proceed and the Cambodian judges disagreed. As a result of a special presumption contained in the agreement establishing the ECCC, investigations proceed when there is such a disagreement unless there is a supermajority vote (four out of five judges) to stop them. The investigations in question thus proceeded over the objection of the Cambodian Pre-Trial Chamber judges and prosecutor and are now pending before the investigating judges as Case 003/004. See Justice Initiative Political Interference Report, *supra*.

the court is authorized to take action including conducting further investigations to ascertain whether there are sufficient grounds for instigating proceedings or referring the matter to the appropriate Cambodian or UN authorities.²⁶

The unanimous portion of the decision quoted with approval a definition of “intimidation” from the Council of Europe Committee of Experts on Intimidation of Witnesses and the Rights of the Defense as “any direct, indirect or potential threat to a witness, which may lead to interference with his/her duty to give testimony free from influence of any kind whatsoever.”²⁷ The opinion also noted that interference with the administration of justice can exist regardless of whether the efforts to interfere were effective.²⁸ The international and Cambodian judges disagreed, however, in applying these standards to the evidence that government officials interfered with the court’s efforts to secure testimony from persons who happen to be high government officials.

The opinion of the international judges stated that “[a]s a result of the repeated failure of the [Co-Investigating Judges] to act, we are of the view that given the grave nature of the allegations of interference the Pre-Trial Chamber must intervene.”²⁹ The opinion further stated “[w]e have reviewed the material placed before the Chamber in support of the allegations of possible interference with the administration of justice. In surveying this material we are of the view that *no reasonable trier of fact could have failed to consider that the above-mentioned facts and their sequence constitute a reason to believe that one or more members of the RGC may have knowingly and wilfully interfered with witnesses who may give evidence before the [Co-Investigating Judges]*” (emphasis added).³⁰

In contrast, the Cambodian judges declared in their joint opinion that the statements of the government spokesperson were insufficient to meet the threshold for requiring further investigation into possible political interference, stating:

[W]e find that the statements of the spokesperson, Mr. Khieu Kanharith, cannot obstruct, prevent, or threaten directly or even indirectly the appearance of the six high-ranking officials before this Court. The spokesperson acknowledges that “these [high-ranking] witnesses could appear in court voluntarily.” The spokesperson continued, that if they appeared, “the government’s position was that they should not give testimony”. These statements are, by their nature, not threatening, intimidating, or coercive directly or indirectly, in the case of these six high-ranking individuals. Mr. Khieu Kanharith used the term “should not” rather than “shall not.” The latter has the character of an absolute order, while the former does not. In addition, he did not assert that he expressed his opinion in the name of the Government.³¹

Further, the Cambodian judges stated that “[e]ven if [government spokesperson Khieu

²⁶ Rule 35.

²⁷ Ibid, para 34.

²⁸ Ibid, para 34.

²⁹ Ibid, para. 5 of separated opinion of Judges Catherine Marchi-Uhel and Rowan Downing.

³⁰ Ibid, para 6 of separate opinion of Judges Prak Kimsan, Ney Thol and Hout Vuthy.

³¹ Ibid, para 7 of separate opinion of Judges Prak Kimsan, Ney Thol and Hout Vuthy.

Kanharith] did make the statements in question, there are no written documents indicating that these six high-ranking witnesses will not come and give their testimony because they are intimidated by the statements of the spokesperson.”³²

This “non-decision” of the Pre-Trial Chamber illustrates that the role the international judges are expected to play—protecting the integrity of the process and combating political interference—is severely limited by the majority position Cambodian judges hold. In circumstances where the accused raises an issue of interference, the Cambodian judges can always block a remedy if they so choose, even over the objection of both international judges.

As noted by the head of the court’s Defense Support Section, “the greatest challenge for the defence remains the threat of political interference that may undermine the independence of the Court. Whilst there are judicial voting mechanisms in place to guard against this possibility, they may yet prove to be inadequate. If the proceedings are to meet international standards, the Court must ensure that defence teams are provided with an effective remedy for addressing all fair trial concerns, including those relating to political interference.”³³ The presence of international judges and the requirement of supermajority voting are designed as a bulwark against political interference. But such protections are effective only when there is a disagreement between the two prosecutors or the two investigating judges about whether a case should move forward for investigation or prosecution—not, as here, in relation to subsidiary, though nonetheless critical, matters.³⁴

Key Personnel Changes

Judge Marcel Lemonde, who has been the international co-investigating judge since the beginning of judicial operations in June 2006, left the court at the end of November 2010. His work and leadership have been essential in conducting the investigation and producing the closing orders for Cases 001 and 002. Siegfried Blunk, who has held the post of reserve international co-investigating judge since 2006, will replace Judge Lemonde. Judge Blunk is from Germany and previously served as a judge on the Special Panel for Serious Crimes in East Timor. Judge Blunk was sworn in on December 1, 2010.

Richard Rogers, who served as the head of the Defense Support Section for two years, left the post in November 2010. Rogers was an active spokesperson for the fair trial rights of persons accused before the ECCC. There is currently no deputy or replacement head of the DSS and it will be critical for the court to immediately recruit experienced persons for both posts.

³² Ibid, para. 9 of separate opinion of Judges Prak Kimsan, Ney Thol and Hout Vuthy.

³³ Richard Rogers, Press Statement—Defence Support Section, Chief of DSS, Leaving Statement. November 10, 2010.

³⁴ See also the Justice Initiative report, “Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: March 2010,” regarding apparent political interference in Cases 003/004 at: http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia-20100324 (“Justice Initiative Political Interference Report”) for further discussion of the limitations of the supermajority voting system in protecting against political interference.

Anti-Corruption Mechanism Report

Independent Counsellor Uth Chhorn—head of the National Audit Authority—is in charge of implementing the ECCC’s anti-corruption mechanism and reporting on his work to both the UN and the government of Cambodia. The anti-corruption mechanism was agreed to by the government of Cambodia and the UN in the wake of allegations that kickbacks were required of Cambodian staff as a condition of their employment. While the widespread kickback practice seems to have stopped—due in part to external pressure and in part to the extended leave-of-absence of Director of Administration Sean Visoth—the complaint and oversight mechanism was put in place to provide a deterrent to and a remedy against further corruption. The plan was intended to empower the Independent Counsellor to deal with complaints of corruption or other wrongdoing while protecting the confidentiality of any victim. In March 2010, Uth Chhorn’s office announced that he would publish a report of his work. On October 18, 2010, he reversed his position and announced he would not publish a report summarizing the activities of his office, under instructions from the UN.³⁵

The UN’s decision to prevent publication of an appropriate report about the work of the Independent Counsellor serves to weaken the entire anti-corruption mechanism by shrouding its operations in secrecy. The anti-corruption mechanism is already a weak tool for combating corruption.³⁶ Its success depends to a great extent on the confidence that court staff place in the process and the persons and institutions that control it. Any confidence the process has built to date is called into doubt by the decision of the UN to withhold reporting about the Independent Counsellor’s activities. While it is critical to keep the identity of people who report problems confidential if they so request, the UN and the government of Cambodia must provide more information about the work of the Independent Counsellor if the mechanism they designed is to have credibility and serve its purpose.

Modification of the Rules Regarding Reparations and the Victim Support Section

Although it is based on a domestic system that allows for civil party participation in order to enable victims of crimes to seek compensation for damages, the ECCC precludes victims from seeking monetary compensation and limits reparation awards to “collective and moral reparations.”³⁷ Under the initial internal rules, reparations were limited to an order to publish the judgment at the convicted person’s expense, an order to fund a non-profit activity or service that is intended for the benefit of victims, or “other comparable forms of reparation.” Civil parties, NGOs, and victims groups have long expressed dissatisfaction with the limited possibilities for reparations.

³⁵ James O’Toole, “UN Keeps Corruption Probe Confidential,” *Phnom Penh Post*, October 18, 2010.

³⁶ For a description of the anti-corruption mechanism and its shortcomings see the Justice Initiative’s *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: August 2009*, page 4 at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/eccc_20090817/eccc_20090817.pdf.

³⁷ Rule 23 *quinquies*.

In September 2010 the judges adopted changes to the internal rules with regard to reparations.³⁸ The new rules will apply to Case 002 and to any additional cases brought before the court. The new rules continue to provide that, if an accused is convicted, the Trial Chamber may award only “collective and moral reparations,” but now define such measures to include those that “acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted...and provide benefits to the Civil Parties which address this harm.”³⁹ In addition, the Trial Chamber now has the authority to order or endorse programs to benefit civil parties, to be implemented by the Victim Support Section (VSS) in cooperation, where appropriate, with governmental or non-governmental organizations. The new provision will give the chamber the power to order that plaques, memorial sites, or educational programs be established. Projects to be implemented in cooperation with the VSS can be funded by a variety of means including ECCC or NGO fundraising activities, donor contributions to the VSS, or community contributions. The VSS is directed to develop guidelines that, among other things, clarify the procedure to be followed after the ECCC concludes its mandate, to ensure follow through with reparations orders.

This expansion of reparation opportunities, along with the expansion of the VSS mandate to provide similar “non-judicial” programs for a range of victims even beyond civil parties,⁴⁰ provides a framework for addressing the needs of victims more meaningfully than the Trial Chamber was able to do in the Duch Case. Reparation awards and other VSS supported programs to benefit victims will likely remain symbolic given the enormous number of victims, but the recent changes open the door to more creative and inclusive measures. The combination of court ordered reparations and broader VSS programs will benefit victims who choose not to participate as civil parties or whose civil party applications are rejected.

The successful implementation of the new reparations and related options will depend largely on the leadership and creativity of the VSS, the lead co-lawyers, and the civil parties themselves. Funding for any projects will have to come from outside the court’s core budget. Close collaboration between civil party lawyers, co-lead lawyers, the VSS, and the NGOs that may actually fund and carry out the programs will be required. Such collaboration is not likely to happen easily and will depend on the interested parties’ ability to collaborate. Because NGOs will play a crucial role in assisting civil parties and victims in developing and carrying out reparations programs, they will need additional donor support.

Three factors may prevent the ECCC from fulfilling its mandate to meet the needs of victims: inadequate funding and leadership within the VSS (the international deputy recently left and no replacement or interim deputy has been appointed), the fact that the court does not yet have an international lead co-lawyer to represent civil parties on board

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Rule 12 *bis* (3.)

in Phnom Penh,⁴¹ and the large number civil parties wishing to participate in Case 002. Some recent developments in the VSS signify progress in readying the section to serve civil parties and victims. The section recently hired an experienced outreach coordinator and secured some earmarked funding for its activities, and will soon have a project manager and international consultant to assist in the development of reparation and related programs for civil parties and other victims.⁴²

Additional work is needed, however. The section needs an experienced international deputy to assist with the groundbreaking work assigned to it, and to implement procedures to ensure that the complex relationships between civil parties, civil party lawyers, co-lead lawyers, and the VSS are properly established. The VSS announced recently that it had completed a strategic plan for its work. However, this plan was developed without the input of civil parties, their lawyers, or the NGOs that work with them. The plan has not been made public and civil parties, their lawyers, and the NGOs working with them report that they have not seen the plan. Under such circumstances it is difficult to evaluate the strategic plan, and it is certainly discouraging that planning for the VSS is being handled with little transparency.

Fundraising

The court, funded by voluntary contributions from UN member states and the government of Cambodia, remains in a dire financial situation. Fundraising shortfalls for 2010 have resulted in cutbacks in some court operations, such as VSS activities, and in delays in replacing staff who resign. Because the court is not conducting a trial this year, it has been able to absorb some cuts. Beginning in early 2011, the court should be operating at full capacity with active proceedings before all chambers and offices of the court. The latest reports indicate that the unmet 2011 budget needs of the Cambodian side of the court are \$7.7 million, while the UN side of the court needs \$29.8 million.

Cambodian court staff have, on several occasions, gone without salary for several months because of cash shortfalls on the Cambodian side of the court. Most recently, Cambodian staff reported being informed they will likely not be paid in December 2010 due to lack of funds.⁴³

This dire fundraising situation damages the court's ability meet its mandate and to recruit highly qualified staff and officials. It also severely undermines efforts to pursue Cases 003/004 and plays into the government's strategy of ensuring these final cases do not proceed to full investigation and trial.

Completion Planning

The Justice Initiative published a report in November 2010 outlining standards for winding up the work of the ECCC: *Salvaging Judicial Independence: The Need for a*

⁴¹ On December 2, 2010 the court issued a press release stating that Elisabeth Simonneau Fort has been hired for the position, but the court did not indicate when she will take up her post in Phnom Penh.

⁴² See ECCC Press Release, "Victims Support Section Prepares for the ECCC's Second Trial," October 25, 2010, at http://www.eccc.gov.kh/english/news.view.aspx?doc_id=372.

⁴³ "Ban, O'Brien Arriving to Discuss KR Tribunal," *Cambodia Daily*, October 25, 2010.

*Principled Completion Plan for the Extraordinary Chambers in the Courts of Cambodia.*⁴⁴ The ECCC was designed as an exceptional court of limited duration, intended to try only “senior leaders and those most responsible” for Khmer Rouge atrocities. While the specific number of suspects to be investigated or prosecuted was left to the discretion of the prosecutors and the judges, the term of the court was initially budgeted for only three years. This was a highly unrealistic estimate, but it nonetheless reflects the expectation of the donors, the UN, and the government of Cambodia that the court would have a limited life. Currently, the court has cases at three stages of proceeding: 1) Case 001, where the Trial Chamber judgment against Duch is under appeal to the Supreme Court Chamber; 2) Case 002, where a lengthy trial of four senior leaders is expected to begin in early to mid-2011; and 3) Cases 003/004, which are currently in the initial stage of judicial investigation. The international and Cambodian prosecutors have indicated that they do not intend to present the names of additional suspects for prosecution, and it is highly unlikely that the investigating judges will initiate investigations of additional suspects on their own.

For the court’s planning purposes, it is reasonable to assume that the conclusion of Cases 001 through 004 will represent the logical time to end the work of the ECCC. It is appropriate, then, that the court begins developing a reasonable and transparent strategy to prepare for the conclusion of its work. The completion plan should take into account the court’s obligation to: 1) investigate, prosecute, and adjudicate outstanding cases in accordance with international standards; 2) support rule of law development in Cambodia and provide a model of independent justice to Cambodians; and 3) address residual and legacy issues related to the court, such as the post-ECCC disposition of the court’s investigatory material, archives, and physical assets, and legal issues that may arise following a final judgment in the cases.

As set out more fully in the *Completion Report*, transferring existing cases from the ECCC to domestic courts or chambers is not a viable completion option for the ECCC. While transferring cases against some accused to domestic courts for prosecution has been a key part of the completion strategy for the International Criminal Tribunal for the former Yugoslavia (ICTY), such a strategy is unlikely to be effective for the ECCC because Cambodian courts still face significant challenges, including unchecked political interference, widespread corruption, and a lack of institutional capacity which likely render them unsuitable, in their current state, to try these cases. The recent statements of the prime minister that Cases 003/004 would not be “allowed” to proceed demonstrates why a Cambodian domestic court would be unable to meet international fair trial standards by operating free of political interference.

Nonetheless, laying out the framework for concluding the court’s operations will be important to guide the work of the court and reassure donors.

⁴⁴ Available at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/khmer-rouge-tribunal-20101110 (*Completion Report*).

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E-mail: info@justiceinitiative.org

Belgium - Brussels
Rue d'Idalie 9-13
B-1050 Brussels, Belgium
Phone: +32-2-505-4646
Fax: +32-2-502-4646

Hungary - Budapest
Oktober 6. u. 12
H-1051 Budapest, Hungary
Phone: +36 1 882 3102
Fax: +36 1 882 3103

Bishkek – Kyrgyzstan
55A, Logyinenko St.
Bishkek 720040 Kyrgyzstan
Phone: +996 312 663475
Fax: +996 312 663448

Nigeria - Abuja
Plot 1266/No.32
Amazon Street
Maitama, Abuja, Nigeria
Phone: + 234 98-74-83-45/6
Fax: + 234 94-13-66-49

Sierra Leone- Freetown
38 Murray Town Road
Murray Town
Freetown, Sierra Leone
Phone: +232-22-234552
Fax: +232-22-235497

United Kingdom - London
Cambridge House
100 Cambridge Grove
Hammersmith London
W6 0LE United Kingdom
Phone: +44 207 031 0200
Fax: +44 207 031 0201

USA - New York
400 West 59th Street
New York, NY 10019 USA
Phone: +1 212-548-0157
Fax: +1 212-548-4662

USA - Washington DC
1730 Pennsylvania Avenue
N.W., 7th Floor
Washington, D.C. 20006
Phone: +1 202-721-5600
Fax: +1 202-530-0128

www.justiceinitiative.org

