

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

September 24, 2007 Update

Recent Developments at the Extraordinary Chambers in the Courts of Cambodia (ECCC) is a monthly report by the Open Society Justice Initiative examining progress, priorities, and challenges at the ECCC. Other Justice Initiative reports and publications on the ECCC can be found at www.JusticeInitiative.org.

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Update on Recent Developments

1. Arrest and Charging of Nuon Chea

Nuon Chea was arrested at his home in Pailin by judicial police appointed by the Ministry of Interior working with local police authorities on the morning of September 19, 2007. He was flown by helicopter to Phnom Penh and transferred to the Extraordinary Chambers in the Courts of Cambodia (ECCC) for an initial appearance before the co-investigating judges, in which he was formally charged. Nuon Chea is the second person to be arrested by the court pursuant to an initial submission from the co-prosecutors to the investigating judges filed on July 18, 2007. The initial submission named five suspects. Nuon Chea and Kaing Guek Eav, also known as Duch, who was transferred to the ECCC on July 31, 2007, are the only suspects whose names have been released or who have been formally charged by the court.

During the Khmer Rouge period, Nuon Chea was known as Brother Number Two because of the level of power he held within the Khmer Rouge leadership. Nuon Chea was the deputy secretary of the Central Committee of the Communist Party of Kampuchea, the deputy prime minister of the Government of Democratic Kampuchea, deputy chairman of the Revolutionary Army of Kampuchea, head of the National Assembly and second only to Pol Pot in terms of formal power during the Khmer Rouge rule of 1975-79. With the death of Pol Pot in 1999, Nuon Chea became the most senior living member of the regime. He is now 82-years old.

During an initial hearing on September 19, 2007, the co-investigating judges informed Nuon Chea of the charges against him and ordered that he be held in provisional detention.

A written provisional detention order was published on September 21, 2007.¹ The judges found that the evidence implicates Nuon Chea in crimes against humanity, specifically referring to murder, torture, imprisonment, persecution, extermination, deportation, forcible transfer, enslavement and other inhumane acts, and war crimes on the basis of grave breaches of the 1949 *Geneva Conventions*, specifically referring to willful killing, torture, inhumane acts, willfully causing great suffering or serious injury to body or health, willful deprivation of rights to a fair trial, unlawful confinement and unlawful deportation or transfer. Significantly, Nuon Chea was not charged with genocide, a charge that the co-prosecutors had recommended for at least some of the suspects named in the initial submission.² The order specifically states that it is without prejudice to the outcome of the ongoing judicial investigations, which may identify other offenses.

In their order, the judges state that they find provisional detention appropriate because the “crimes are of a gravity such that, 30 years after their commission, they still profoundly disrupt public order to such a degree that it is not excessive to conclude that the release of the charged person risks provoking, in the fragile context of today’s Cambodian society, protests of indignation which could lead to violence and perhaps imperil the very safety of the charged person” Further, they found that given Nuon Chea’s specific position as “Number Two” in the regime, he might attempt and would be in a position to pressure witnesses and victims. Finally, they found that because he faces a maximum sentence of life imprisonment if convicted, Nuon Chea might “be tempted to flee legal process.”

The detention order includes a summary of statements that Nuon Chea made during the hearing:

Nuon Chea disputed the crimes with which he is charged, indicating that he would be ashamed to have committed such crimes and specifying that: *“We did not have any direct contact with the bases and we were not aware of what was happening there.”* He stated that during the Democratic Kampuchea period, all real power was in the hands of the Military Committee, of which he was not a member. He added that he was a member of the legislative power and that he never adopted any law allowing citizens to be killed. He pointed out that he personally lost around 40 family members during the events of the time. He criticised the fact that people speak incessantly about the 1.7 million victims of Democratic Kampuchea, without ever mentioning the deaths caused by others before 1975 or after 1979. He argued that the conditions for provisional detention are not satisfied because, since he rallied the Royal Government of Cambodia, he has been living freely without any resulting disorder; he specified that he has no intention of destroying any evidence or placing pressure on anyone at all, adding that he is not of a cruel nature, having been a Buddhist monk; he emphasised that he has never been threatened by anyone and,

¹ ECCC web site, http://www.eccc.gov.kh/english/cabinet/indictment/2/Provisional_Detention_Order_Nuon_Chea_19092007_ENG.pdf

² See “Statement of Co-Prosecutors,” July 18, 2007, at ECCC web site, http://www.eccc.gov.kh/english/cabinet/press/33/Statement_of_Co-Prosecutors_18-July-2007_.pdf.

on the contrary, has received many signs of affection; finally, he made the point that he has lived very close to the Thai border for years and that it would have been easy for him to escape if he had wanted to. He declared that he wishes to enlighten the Kampuchean people and the whole world concerning the real enemies of Cambodia, specifying that he is a patriot and not a coward and that he does not intend to tarnish the honour of his country by fleeing.

Although Nuon Chea has chosen Son Arun, a lawyer from Battambang, to represent him, no lawyer representing Nuon Chea was present at the hearing.

2. Co-Investigating Judge You Bun Leng Appointed as President of Cambodian Court of Appeal

The King of Cambodia signed a royal decree on August 9, 2007 appointing You Bun Leng, the Cambodian co-investigating judge on the ECCC, to replace Ly Vouch Leng as the president of the Cambodian Court of Appeal.³ The announcement occurred only three weeks after the co-investigating judges were seized of the case against the first five suspects in an initial submission by the co-prosecutors, and two weeks after the arrest of the first suspect, Kaing Guek Eav, also known as Duch, on July 31, 2007. The content and timing of the announcement raised questions about whether Judge You Bun Leng would leave the ECCC, possibly delaying and disrupting the proceedings, and concern about the existence or appearance of executive interference with the independence of the ECCC judges.

In a letter delivered to the permanent representative of Cambodia at the United Nations, the UN publicly expressed its concern and asked Cambodian authorities to consider keeping Judge You Bun Leng in his current position.⁴ Cambodian NGO leaders expressed concern about the judge's potential removal, which they saw as a threat to judicial independence and which they feared would cause further delays in the trial process.⁵ The UN special representative for human rights in Cambodia and the UN special rapporteur on the independence of judges and lawyers issued a joint statement expressing concern over judicial independence in Cambodia in light of the appointment. This statement asserted that Judge You Bun Leng's promotion was not made in accordance with Cambodian law, which grants the Supreme Council of Magistracy the authority to make all judicial appointments. The statement pointed out that the appointment of Judge You Bun Leng as president of the Court of Appeal was made at the request of the prime minister in his capacity as chair of the Supreme Council for State Reform and therefore violated Cambodian law and principles of judicial independence.⁶

³ Royal Decree NS/RKT/0807/339.

⁴ Press Release of United Nations Assistance to the Khmer Rouge Trials, "UNAKRT Expresses Concern over Cambodian Judicial Appointment" August 16, 2007.

⁵ Press release of Cambodian Human Rights Action Committee, "CHRAC deeply concerned over lack of Judicial Independence in Appointment of ECCC Judge You Bunleng to Appeals Court," August 20, 2007.

⁶ Joint Public Statement, "The United Nations Special Representative of the Secretary General for human rights in Cambodia and the Special Rapporteur on the Independence of Judges and Lawyers express concern over judicial independence in Cambodia in the light of judicial appointments," 23 August 2007. <http://cambodia.ohchr.org/whatnew.aspx>.

On August 24, 2007, Prime Minister Hun Sen stated that Judge You Bun Leng would remain at the ECCC despite his promotion to the presidency of the Court of Appeal.⁷

While this outcome does not address concerns raised by the UN human rights experts about the failure to follow the legal process for transfer and appointment of judges, it helps ensure that the ECCC judicial investigation process will proceed without the additional delay that would have resulted from appointing a reserve judge to replace Judge You Bun Leng. It is still uncertain how You Bun Lang will handle the dual responsibilities of serving as both an investigating judge of the ECCC and president of the Court of Appeal, or how long he will remain with the ECCC. He has stated that for the time being the ECCC will be his priority.

The episode raises concerns about the independence of Cambodian judicial officers. International standards for judicial independence enshrined in the *UN Basic Principles on the Independence of the Judiciary*⁸ require the state to guarantee the independence of the judiciary and require that the “term of office of judges, their independence, security, adequate remuneration, conditions of service...shall be adequately secured by law.”⁹ Specifically, judges “shall have guaranteed tenure until mandatory retirement age or the expiry of their term of office, where such exists.”¹⁰ Further, Article 7 of the ECCC *Agreement* mandates that all judges shall be appointed for the duration of the proceedings. While there are legitimate reasons why an appointed judge may not be able or willing to serve for the duration of the ECCC, judges cannot be removed from their position by executive request or decree without violating these principles of independence

Likewise, the terms of judges’ appointment, including salary and other conditions of service, must be guaranteed by law for the duration of their tenure.¹¹ This is necessary because judges working under short-term contracts for service may feel pressure to please the entity, or entities, that have power to renew their contracts. Short contracts, subject to the need for repeated renewal do not meet the requirements of the *UN Basic Principles on the Independence of the Judiciary* cited above which require that judges be provided secure tenure of office.¹²

The Cambodian judges of the ECCC were appointed by a royal decree that did not specify a term for their tenure.¹³ At least some of the Cambodian judges currently

⁷ See “No transfer for Khmer Rouge judge: Cambodian PM,” Agence France-Presse, August 24, 2007.

⁸ United Nations Basic Principles on the Independence of the Judiciary (Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985), see <http://www.ohchr.org/english/law/indjudiciary.htm>.

⁹ Id, Article 11.

¹⁰ Id. Article 12.

¹¹ Id. Article 11.

¹² Id, Article 11.

¹³ Royal Decree NS/RKT/0506/214, See ECCC Web Site, <http://www.eccc.gov.kh/english/legislation.list.aspx>.

working at the ECCC are reported to be working under contracts of less than one year, with some contracts as short as one month. This situation may have arisen to accommodate budgetary concerns, but these concerns can and must be addressed in a manner that does not violate principles of judicial independence. The situation should be remedied and judges provided with contracts for the duration of the ECCC.

3. *Case against Kaing Guek Eav (also known as Duch)*

Kaing Guek Eav, also known as Duch, was arrested and charged with crimes against humanity by the ECCC on July 31, 2007. Immediately prior to this arrest, he had been held in pretrial detention since May 10, 1999, under orders of the Cambodian Military Court in anticipation of ECCC proceedings. The charges by the co-investigating judges of the ECCC stem from Duch's position as head of the infamous S-21 prison, now the Toul Sleng Genocide Museum, during the Khmer Rouge period.¹⁴ More than 14,000 people are believed to have been interrogated and tortured at the prison. Most prisoners, some of whom were young children, were ultimately killed.

Duch's foreign lawyer, Francois Roux, was approved for registration with the Bar Association of the Kingdom of Cambodia and, along with his Cambodian co-counsel, Kar Savuth, is now able to fully represent Duch. Duch was interviewed by the co-investigating judges on August 23, 2007, in the presence of his lawyers. The interview was held *in camera*.

Duch's lawyers filed a notice of appeal of the provisional detention order issued by the co-investigating judges. In that order, the co-investigating judges held that they did not have jurisdiction to rule on the legality of Duch's prior detention and stated that "the acts alleged...are of a gravity such that, 30 years after their commission, they profoundly disrupt the public order to such a degree that it is not excessive to conclude that the release of [Duch] risks provoking, in the fragile context of today's Cambodian society, protests of indignation which could lead to violence and perhaps imperil the very safety of the person concerned. Furthermore, because Duch may be sentenced to life imprisonment, it is feared that he may seek ... to flee any legal action."¹⁵ The judges ordered that Duch be placed in provisional detention at the ECCC detention facility, where he remains today.

Duch's notice of appeal will trigger a hearing before the judges of the Pre-Trial Chamber. The internal rules of the court provide that hearings of the Pre-Trial Chamber shall be held *in camera* unless, at the request of any judge or party, the judges decide that all or part of a hearing will be held in public. Given that an initial provisional detention order is unlikely to compromise any protective orders for witnesses or reveal confidential details of an investigation, holding a public hearing on this issue will increase the public's understanding of and confidence in the court. On September 5, 2007, the Pre-Trial Chamber agreed to hold the hearing in public—an encouraging indication of the Chamber's commitment to transparency.

¹⁴ ECCC Order of Provisional Detention, Investigation No. 001/18-07-2007
<http://www.eccc.gov.kh/english/indictments.list.aspx>.

¹⁵ *Id.*

Rule 21(4) of the court's internal rules provides that proceedings "shall be brought to a conclusion within a reasonable time." There is no other reference to the time in which the Pre-Trial Chamber must hold a hearing for an appeal such as that filed on behalf of Duch against the provisional detention order. A hearing date has not yet been scheduled, and the court has not yet released a copy of the notice of appeal or brief filed on behalf of Duch.

4. Independence of the ECCC

The response of the Cambodian government to a statement issued by a domestic NGO raises concerns about the independence of the ECCC. On August 20, 2007, the Cambodian Action Committee for Justice and Equality publicly called upon the Cambodian National Assembly to remove any immunity that former King Norodom Sihanouk may have from prosecution before the ECCC. Prime Minister Hun Sen responded with a passionate statement about how the former king had suffered during the Khmer Rouge period and rejected the request. On September 2, 2007, government spokesperson Khieu Kanharith stated that the government could "terminate" the ECCC if its international judges charged Sihanouk for any Khmer Rouge crimes.¹⁶

The statement of the government spokesperson is troubling to the extent that it reveals the government's understanding of the ECCC's independence. An independent court cannot be subject to government instructions on who can and cannot be charged. Charging decisions belong to the co-prosecutors and the co-investigating judges, subject to the judicial rulings of the trial and appeals chambers. Likewise, judicial and prosecutorial independence requires that prosecutors, investigating judges, and trial and appellate judges control when and under what circumstances witnesses are called to appear before the court.

5. Pre-Trial Chamber

The judges of the Pre-Trial Chamber met in August 2007 to plan their work. Now that the Chamber is seized of two cases, it must develop standard operating procedures and practice directives. The basic parameters of procedure before the Pre-Trial Chamber are outlined in the internal rules adopted by the court in June 2007.¹⁷ However, many important details were left to be addressed in practice directives and standard operating procedures. These details include procedures and timelines for the parties to file petitions and briefs, provisions for public access to petitions and other filings of the parties, and provisions protecting confidential information from disclosure.

An international senior legal officer has been hired to assist the judges of Pre-Trial Chambers. This should bring to their work significant expertise in international criminal matters. Three clerks have been hired for the Cambodian judges of the Pre-Trial Chamber and one additional clerk is being sought to assist the international judges.

¹⁶ "Minister: Government Can 'Terminate' ECCC," *The Cambodia Daily*, September 3, 2007.

¹⁷ Internal Rules of the ECCC, June 2, 2007, http://www.eccc.gov.kh/english/internal_rules.aspx.

The courtroom for the Pre-Trial Chambers is not adequate for public hearings and the trial courtroom is not ready to be used for public hearings of the Pre-Trial Chamber. This situation needs to be addressed immediately. The Pre-Trial Chamber will hold public hearings in the near future and the court must have adequate facilities, with appropriate audio visual recording, translation and transcriptions services, as soon as a hearing is announced.

Immediate Challenges Facing the Court

1. Victims Unit Must Begin Operation

The court's internal rules require the establishment of a Victims Unit to coordinate the participation of victims as civil parties in the ECCC process.¹⁸ Victims of crimes within the jurisdiction of the ECCC are entitled to petition at any time during a judicial investigation to become civil parties in the proceeding. To qualify as a civil party, a victim must demonstrate a physical, material or psychological injury that is a direct consequence of an offence under investigation by the court.¹⁹ Once admitted, civil parties are entitled to actively participate in the proceedings with access to the dossier of the case, the right to request certain investigative actions be taken, and the right to file appeals and participate in appeals filed by others from orders of the co-investigating judges. Now that judicial investigations are proceeding and a hearing on the appeal of the preliminary detention order for Duch is imminent, the court must assure that the participation rights of victims can be exercised.

On July 6, 2007, the court advertised employment vacancies for (1) a Cambodian national to head the Victims Unit and (2) an experienced international to act as deputy head of the unit. The application process for these positions closed on July 29, 2007, but no applications for the head of the Victims Unit were received and the court has re-advertised the position. Applicants for the international deputy position have been short-listed and a hiring decision should be made soon.

The delay in setting up the Victims Unit comes in part because the unit was not foreseen in the original 2004 staffing or budget plans for the court. The unit was created by the internal rules adopted in June 2007. Now that cases are proceeding at the investigative stage, victims should have the opportunity to realize their legal rights to petition to participate in the proceedings. The court has an immediate obligation to ensure that this right is understood and easily exercised by victims. It cannot wait until the end of 2007 (as was suggested by a court official quoted in recent newspaper article), after the court has attempted to raise additional funds for a Victims Unit.²⁰ Nor can the ECCC merely invite people to come to the court and file complaints on its web site, as it has done. Given that few people outside Phnom Penh have access to electricity, let alone computers, a statement on a web site is insufficient to ensure that victims are included in the work of the court in a meaningful way. The court must develop and effectively

¹⁸ Id. Rule 12.

¹⁹ Id. Rule 23 (2).

²⁰ Erika Kinetz, "Victims Slow to Heed KR Trial Prosecutors' Call," *Cambodia Daily*, August 30, 2007.

disseminate information to the public about the rights of victims to participate in the proceedings and the process for victims to exercise those rights.

2. Anticipated Budget Shortfalls

Although the court has not publicly released figures about its spending to date, court officials have acknowledged that additional funds must be raised for the Cambodian and the international sides of the budget before mid-2008.²¹

The Office of Administration, headed by Director of Administration Sean Visoth and Deputy Director Michelle Lee and charged with providing administrative support to all arms of the court, has indicated that it plans to begin additional fundraising with donors in Phnom Penh in October 2007. It is in the process of preparing budget proposals for the court through 2010. With many of the court's operations underway, these new budget proposals are likely to be much more realistic than the original budget of \$56.3 million over three years.

Significant additional funding will be necessary if the court is to fulfill its mandate. Donors contributing additional funding may be able to place conditions on their donations which, while respecting the independence of the ECCC, could help remedy some of the problems that have hindered the court since its inception. Reasonable preconditions for further donations would include:

- appointing a high-level monitor to advise the UN Secretary General on the parties' compliance with the Agreement and the court's ability to meet international fair trial standards;
- requiring the court to provide experienced international support and protection officers for the Witness-Expert Support Unit;
- requiring the court to demonstrate that it has remedied problems with human resource practices identified by UNDP auditors, including lack of transparency, nepotism, and the hiring of staff without required qualifications for their position; and
- adopting procedures to prevent corrupt practices, specifically the alleged practices of requiring staff or officers of the court to kick back a portion of their salary to those higher in rank. Insistence on strong policy statements against such practices and on installation of an ombudsperson to whom court employees and officials can report corrupt practices would be appropriate.

3. Witness Protection and Support

The Justice Initiative and other civil society organizations have raised serious concerns about the adequacy of the funding, expert staffing, and planning for witness support and

²¹ The original funding for the ECCC was divided into two budgets, one for the "Cambodian side of the budget" and one for the "international side of the budget." The Cambodian budget was charged with paying the salaries of Cambodian staff and covering other specified items, including, for instance, costs of renovating the courtroom and the office building of the ECCC. The international budget was charged with paying salaries of international staff and other specified items, including, for instance, costs of defense counsel for indigent defendants. Of the original \$56 million budget, approximately \$13 million was allocated to the Cambodian side and \$43 million to the international side.

protection services.²² Thus it is encouraging that the acting chief of the Victims and Witnesses Unit at the International Criminal Tribunal for the Former Yugoslavia (ICTY) has been working as acting coordinator of the ECCC's Witness-Expert Support Unit since late July 2007 and stayed until September 20, 2007. (The UN staff person originally hired for this position left in June 2007 and no permanent replacement has been located.) The presence of the ICTY expert provided the ECCC with an opportunity to re-evaluate many of the initial assumptions about the organization, staffing, and planning for the unit.

Initial assumptions by the UN that witness protection services can be fully delegated to the Cambodian Judicial Police are problematic.²³ Potentially useful models exist in several international and hybrid courts that have operated longer than the ECCC and have developed expertise on how to meet the needs of witnesses. The Special Court for Sierra Leone (SCSL), for example, hired a clinical psychologist, counselors, nurses, and support assistants for witness support efforts. It identified and trained some of the best Sierra Leonean police officers and security guards, and hired ex-army intelligence officers and protection officers for its protection activities. To date, they have provided support and/or protection for 350 witnesses, and expect that number to increase to 500-600 witnesses by the end of the SCSL's mandate. The UN will not meet its responsibility to the ECCC and to the witnesses who appear before the court if it does not ensure that experienced witness support and protection officers are hired.

4. Translation and Transcription Services

The court's efforts to recruit qualified translators and interpreters have yet to produce adequate results and this has a significant impact on court proceedings. Major backlogs and delays in the translation of documents are reportedly hindering the progress of work in the Office of the Co-Prosecutor and the Office of the Co-Investigating Judges. The multinational staff of these offices cannot prepare cases for trial without an enormous increase in translation services. Experience at other tribunals has shown that delay and serious errors can occur when translation services are inadequate. The court must redouble its efforts to deal adequately with the translation backlog through more active recruiting, management, and training.

The court has announced that three Cambodian positions are open in the Transcription Unit, but the text of the announcement raises concerns about whether adequate preparations are under way. The announcement indicates that the staff will "produce an exact transcript of the audio record of witness interviews, trial proceedings or deliberations in Khmer language."²⁴ It is unclear what the court intends to do to create transcripts in English and French, which are official languages of the ECCC, as no staff

²² See Justice Initiative reports: *Recent Developments at the ECCC*, August 2007, http://www.justiceinitiative.org/db/resource?res_id=103814 and *Progress and Challenges at the ECCC*, June 2007, http://www.justiceinitiative.org/db/resource?res_id=103799.

²³ A Supplementary Agreement on Security and Safety, February 2006, (<http://www.eccc.gov.kh/english/agreement.list.aspx>) provides that witness protection is the responsibility of the judicial police. UNAKRT points to this provision as a basis for refusing to provide international assistance for this function despite ample information about the limited capacity of and public trust in the judicial police.

²⁴ ECCC web site, http://www.eccc.gov.kh/english/job_opportunity.aspx.

for this work is currently being recruited. Another concern is that the court now plans to create transcripts from audio tapes rather than using transcribers in the courtroom to create them in real time.

This proposed process necessarily means that transcripts will not be available for immediate review by the judges or parties, an important service when judges, lawyers and witnesses do not all speak the same language. It is also a less accurate way of creating transcripts than having transcribers present in court when the proceedings are taking place and then checking transcripts against the audio for accuracy when necessary. Likewise, accurate real-time transcripts of formal statements and hearings during the judicial investigation and pretrial hearing proceedings will be needed to create an accurate record for lawyers and judges, and for the archives of Cambodia. Given the court's history of delay in meeting translation needs, the court's current plans raise concerns that backlogs in obtaining needed transcripts will cause additional delay in the proceedings. The need for accurate and timely transcripts would be better served by hiring trained transcribers to make real-time transcripts from live proceedings.

Corresponding rules of procedure of the International Criminal Court, the ICTY, the International Criminal Tribunal for Rwanda, and the SCSL require "full and accurate" transcripts to be made. Each of these courts is staffed with transcribers present in the courtroom at all hearings. This best practice should be followed by the ECCC.

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JUSTICE INITIATIVE

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