

# **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.justiceinitiative.org/activities/ij/krt>.

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## ***Executive Summary***

The Extraordinary Chambers in the Courts of Cambodia (ECCC) has achieved considerable progress, including recently completing the evidence phase of its first trial. This accomplishment is marred, however, by the little progress the court and its stakeholders have made in addressing fundamental concerns about corruption allegations and political interference at the ECCC. During the period covered by this report (September-November 2009), no substantial action was taken to develop or implement the anticorruption mechanism that was outlined in an August 2009 agreement between the United Nations (UN) and the government of Cambodia. Concerns about political interference in the court's work have been heightened by several recent events, including: the refusal of the Cambodian investigating judge to participate in summoning for questioning witnesses who hold a high rank in the Cambodian government, statements by key government officials that it was not necessary for the officials to comply with the summonses, and indications that the government will not allow the court to pursue the investigation of five additional suspects. Further, although the UN submitted names of nominees for a new international prosecutor—to be appointed before the departing international prosecutor left that post on September 1, 2009—the government of Cambodia has failed to make the appointment. As a result, the Office of the Prosecutors is currently without balanced and strong leadership as it enters the final and critical stages of the investigation of Case 002 against four defendants accused of leading the Khmer Rouge.

If not addressed, these problems would fundamentally undermine the ability of the ECCC to fulfill its mandate, satisfy international fair trial standards, and deliver justice to the people of Cambodia. Further delay should not be tolerated by parties committed to the success of the court. The government of Cambodia, the UN, donor states, and the court's staff and officials have critical roles to play in ensuring that any political interference ceases and that the court operates fairly, independently, and impartially.

The conclusion of the evidence stage of the trial against Kaing Guek Eav, alias “Duch,” for war crimes, crimes against humanity, and torture and murder under Cambodian domestic law constitutes a major achievement. Final statements by all parties will be presented the week of November 23, 2009 and a decision of the Trial Chamber is anticipated in early 2010. The trial, while imperfect, did convincingly demonstrate that the court has successfully built the necessary physical, technical, and staff structure to conduct a fair and sophisticated trial. Thousands of Cambodians have attended the trial, and the proceedings were broadcast throughout the country. Extensive preparation by the judges and the parties resulted in a trial that by all accounts met basic international fair trial standards.

However, the Duch trial cannot be the sole measure of the ECCC's success or the only means of accountability for the crimes of the Khmer Rouge. Duch, who entered a guilty plea, was not a high level political player in the Khmer Rouge. Although he is portrayed by the prosecution as a willing and enthusiastic accomplice to the horrific goals and policies of the Khmer Rouge leadership, he did not set those goals and policies. Some of those who allegedly did set them are charged in the next case, known at the ECCC as

“Case 002.” The four individuals charged—Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith—are expected to go to trial in mid 2011. This joint trial against high level accused who are pleading not guilty will pose challenges that the court did not face in the Duch trial.

In addition to the recommendations below, this report addresses the specter of political interference at the court, provides an overview of the Duch trial—including key lessons learned—and examines recent allegations of bias against an investigating judge and the international judges of the Pre-Trial Chamber. This report also addresses the lack of progress on an anticorruption mechanism, efforts of parties to seek information about corruption allegations, the disagreement between the international and Cambodian prosecutors over charging additional suspects, and civil party participation. Finally, the report addresses the need for additional funding for outreach and legacy work, and the need for a re-evaluation of the court’s rules regarding transparency.

## **Recommendations**

### **To the ECCC, donors, the United Nations, and the government of Cambodia:**

- ***Insist and ensure that the court is independent of political interference.***  
Greater involvement from senior international staff and political resolve from the UN and the donor community are needed to ensure that the government of Cambodia does not continue to improperly interfere with judicial and prosecutorial decisions. Senior prosecutorial and judicial investigative officers should be requested to verify on an ongoing basis the full, active, and independent cooperation of both international and Cambodian staff and officers.
- ***Insist that a replacement international prosecutor be appointed immediately.***  
The appointment should come no later than the end of November and be from the list of nominees submitted by the UN.
- ***Insist on immediate implementation of an effective anticorruption program.***  
The program should include:
  - Establishing effective whistleblower and witness protection measures for those who report corruption;
  - Instituting measures to enhance transparency, including requiring periodic public reporting by the independent counsellor charged with receiving corruption complaints;
  - Providing a standing independent investigative capacity for the independent counsellor;
  - Addressing existing corruption allegations; and
  - Publicizing anticorruption programs and measures to the court’s staff and to the public.
- ***Ensure the allocation of sufficient funds and staff resources for robust outreach, victim participation, and legacy efforts.***

### **To the United Nations and the government of Cambodia:**

- ***Take immediate steps at the highest level of the UN and the government of Cambodia—including publicly reaffirming the importance of prosecutorial and judicial independence—to ensure that likely violations of the Agreement in the***

*form of political interference in judicial and prosecutorial decisions at the ECCC are remedied and not repeated.*

- *Appoint a high-level UN representative* to ensure that the *Agreement* is complied with and fundamental fair trial principles are protected.

**To the ECCC judges:**

- *Further develop trial management policies that:*
  - Improve effective questioning of witnesses;
  - Allow some “proofing” of witnesses;
  - Provide guidance on certain evidentiary issues, including admissibility of documents, relevancy, and undisputed facts;
  - Make effective use of expert witnesses; and
  - Improve handling of civil party witnesses and questioning by civil party lawyers.
- *Adopt rule changes to ensure the court balances proposed limitations on individual civil party participation with expanded opportunities for general victim participation.*
- *Conduct a comprehensive review of court policies and procedures for disclosing information.* Such a review is necessary to help the court strike a better balance between the legitimate need to keep certain information confidential and the right of people to have access to information about their public institutions.

**The ECCC Cases**

At present there are four cases at various stages of development within the ECCC:

**Case 001:** Kaing Guek Eav, alias “Duch,” transferred to ECCC custody on July 31, 2007, and charged with crimes against humanity, war crimes, and with torture and murder under Cambodian law. The evidentiary portion of the trial commenced on March 30, 2009 and closing statements will take place November 23-26, 2009. A judgment is expected in the first quarter of 2010.

**Case 002:** Four accused persons are in custody: Nuon Chea, arrested September 19, 2007; Ieng Sary, arrested November 14, 2007; Ieng Thirith, arrested November 14, 2007; and Khieu Sampan, arrested November 19, 2007. The case remains under formal investigation by investigating judges. Each accused is charged with crimes against humanity. With the exception of Ieng Thirith, each is also charged with war crimes. The court has advised that the judicial investigation will conclude at the end of 2009 and any indictments will likely be issued in the fourth quarter of 2010. Any trial will likely commence in mid 2011.

**Cases 003 and 004:** The international prosecutor submitted the names of five suspects in two separate cases to the investigating judges on September 7, 2009 requesting formal judicial investigation. The names of the suspects and the subject matter of the investigations remain confidential. None of the additional suspects have yet been formally charged or arrested.

## ***Independence from Political Interference***

Political interference at the ECCC poses a serious challenge to both the credibility of the court and its ability to meet international fair trial standards. There are currently three situations of paramount urgency. First, six witnesses holding government positions in Cambodia have refused to honor summons to give testimony before the investigating judges in Case 002 and high government officials have publicly encouraged this refusal. Second, confidential sources inside the court indicated that Cambodian officers and staff of the ECCC will likely not be allowed by their government to cooperate with the prosecution and investigation of the case against additional suspects recently submitted for judicial investigation (“Cases 003/4”). Third, the government of Cambodia has failed to act on the UN nomination of an international prosecutor to replace Robert Petit, who left office on September 1, 2009.

### *Interference with Witness Testimony in Case 002*

The Justice Initiative has reported previously on concerns that Cambodian officials in the Office of the Investigating Judges were not willing to cooperate with requests to interview certain witnesses who had close ties with the government.<sup>1</sup> On October 7, 2009 international Investigating Judge Marcel Lemonde provided verification of this when he posted on the ECCC website the cover letters for six summonses sent to high-ranking government officials and issued under his single signature in Case 002.<sup>2</sup> As far as can be ascertained, none of the cited individuals have appeared or agreed to appear as requested. Compliance with court summonses is mandatory.<sup>3</sup> If a person fails to comply, the investigating judge is authorized to “issue an order requesting the judicial police to compel the witness to appear.”<sup>4</sup> The government of Cambodia has a direct obligation under the *Agreement* to assist the investigating judges in actions, including the “service of documents” such as these.<sup>5</sup>

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<sup>1</sup> Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, May 2009. Throughout this report, prior OSJI reports on the ECCC will be referred to as “OSJI [date] Report.” All reports can be accessed at:

[http://www.soros.org/initiatives/justice/articles\\_publications/listing?type=Publication](http://www.soros.org/initiatives/justice/articles_publications/listing?type=Publication).

<sup>2</sup> See official ECCC press release: “Number of Case Documents in Case 002 Published,” October 7, 2009, [http://www.eccc.gov.kh/english/cabinet/press/134/ECCC\\_Press\\_Release\\_7\\_Oct\\_2009\\_ENG-FRE.pdf](http://www.eccc.gov.kh/english/cabinet/press/134/ECCC_Press_Release_7_Oct_2009_ENG-FRE.pdf). The persons summoned include Chea Sim, president of the Senate; Heng Samrin, president of the National Assembly; Hor Namhong, minister of foreign affairs; Keat Chhon, minister of finance and two senators. The international investigating judge is authorized to take steps such as issuing a summons on his sole signature once he has submitted a notice describing the action and noting that his counterpart refuses to agree or cooperate with the greffier of the Office of the Co-Investigating Judges, Rule 71(3).

<sup>3</sup> Internal Rules, Rev. 4, Sept. 11, 2009 at [http://www.eccc.gov.kh/english/internal\\_rules.aspx](http://www.eccc.gov.kh/english/internal_rules.aspx), Rule 60(3), (All reference to internal rules are to this version and referred to as “Rule \_\_\_”).

<sup>4</sup> *Ibid.* If such an order is requested and the judicial police of Cambodia mandated to carry it out do not comply, further evidence of interference will exist. The rules do not obligate the investigating judge to take this step, but his failure to attempt it, even knowing it is not likely to succeed, would call into question his compliance with the obligation not to tolerate political interference in the work of the court. .

<sup>5</sup> 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, July 2003, ratified October 19, 2004, (the *Agreement*), at <http://www.eccc.gov.kh/english/agreement.list.aspx>. Article 25 states: “The Royal Government of Cambodia shall comply without undue delay with any request for assistance by the co-investigating judges,

The response of government officials to the summonses was swift and explicit. The government spokesperson stated, “except for individuals who volunteer to go, the government’s position is ‘no’ to this, even if they are called as witnesses,” and foreign officials involved in the tribunal “can pack up their clothes and return home” if they are not satisfied.<sup>6</sup> This direct interference in the investigation of Case 002 is a clear violation of Cambodian government commitments under the *Agreement*. The *Agreement* mandates at Article 5(3) that judicial officers “shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.” Article 12(2) requires that the court shall operate “in accordance with international standards,” and Article 13 that the accused shall be afforded the right to trial by an independent and impartial tribunal in accordance with Article 14 of the International Covenant on Civil and Political Rights.<sup>7</sup> These provisions are violated when the government instructs or encourages officials to disregard court orders and refuse to undertake investigations. Article 28 allows the UN to withdraw its cooperation with the court if the government of Cambodia takes action that causes the court “to function in a manner that does not conform with the terms of the present Agreement.” The UN, the states that support the court, and the international officials of the court have an obligation to demand assurance that the Cambodian government will cease interfering in the work of the ECCC and will allow the officers of the court to cooperate fully to carry out the goals of the court.

#### *Cooperation in Investigation of Additional Suspects*

In August 2009, nine months after the international prosecutor filed his notice of disagreement concerning the submission of the names of five additional suspects for judicial investigation in Case 003/4, the Pre-Trial Chamber issued a divided ruling that allowed the submission to go forward. There are now five additional suspects, whose names remain confidential, under investigation by the investigating judges. A more extensive discussion of this ruling is set forth below. The ruling of the Pre-Trial Chamber includes an opinion signed by the two international judges holding that the investigation against the five suspects should go forward as requested by the international prosecutor, and an opinion by the three Cambodian judges agreeing with the Cambodian prosecutor that the investigation should not go forward. The *Agreement* provides that because no super-majority vote (four out of five judges) was achieved, the investigation will go forward.<sup>8</sup>

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the co-prosecutors and the Extraordinary Chambers or an order issued by any of them, including, but not limited to ... b. service of document.”

<sup>6</sup> See “Cambodia PM Questions Khmer Rouge Court Summonses,” AFP, October 8, 2009; and “Khmer Rouge Court Calls Government Witnesses,” AFP, October 7, 2009.

<sup>7</sup> *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21<sup>st</sup> Sess. Supp. No. 16, U.N. Doc.A/6316 (1966). (Cambodia signed on October 17, 1980 and acceded on May 26, 1992.)

<sup>8</sup> *Agreement*, Article 6(4). This presumption was included in the *Agreement* specifically to preclude political interference in the decision about whom to investigate and prosecute as well as to resolve legitimate professional disputes. See David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, M. Cherif Bassiouni, International Criminal Law, Third Edition, Volume III, International Enforcement, Martinus Nijhoff Publishers, The Netherlands, 2008.

Following public announcement of this decision, the prime minister bluntly stated his objection to charges against any additional accused, implying that it will result in social unrest that may kill 200,000 to 300,00 people.<sup>9</sup> The prime minister had made similar statements before the chamber issued its divided ruling.<sup>10</sup> The active cooperation of Cambodian officials and staff in these new investigations is necessary to the proper functioning of the court, and will be a key test of whether the government accepts, in spite of its prior objection, the court's determination that these investigations should proceed.

It appears likely—and concerns have been raised confidentially by sources inside the court—that Cambodian members of the staff will refuse to participate in the investigation and prosecution of the additional suspects in Case 003/4.<sup>11</sup> Because the investigations are confidential, it is extremely difficult to monitor whether Cambodian staff is cooperating. Nonetheless, the publicly stated opposition to any additional investigation by the most senior Cambodian government official, and indications that such instructions tend to be followed by Cambodian staff, make it necessary that the UN request verifiable assurances from key international and Cambodian staff that full and diligent cooperation on all aspects of the investigation and prosecution of the additional suspects is occurring and will continue.

#### *Failure to Appoint an International Co-Prosecutor to Replace Robert Petit*

In a June 23, 2009 press statement, international Prosecutor Robert Petit announced that he would resign his post effective September 1, 2009. In early August 2009, the UN submitted to the government of Cambodia the names of two persons as nominees to replace Petit.<sup>12</sup> The *Agreement* provides that the Supreme Counsel of the Magistracy shall select a replacement prosecutor from such nominations.<sup>13</sup> To date the government of Cambodia has failed to announce its selection and a former deputy prosecutor, William Smith, is serving in the role of acting international prosecutor.

While no reason for this delay has been stated publicly, it is becoming increasingly apparent that it will, and perhaps is intended to, weaken the Office of the Prosecutor by

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<sup>9</sup> See for instance, Chean Sokha and Robbie Corey-Boulet, "ECCC Ruling Risks Unrest: PM," *The 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," *The Phnom Penh Post*, September 10, 2009.

<sup>10</sup> See, 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," *The Phnom Penh Post*, March 12, 2008; Chean Sokha and Robbie Corey-Boulet, "ECCC Ruling Risks Unrest: PM," *The Phnom Penh Post*, September 8, 2009; Maggie Tait, "Interference 'Deplored' by Judge," NZPA, April 5, 2009, at <http://www.stuff.co.nz/world/asia/2315921/Interference-deplored-by-judge>.

<sup>11</sup> At a September 26, 2009 victims outreach meeting, Chea Leang, when expressly questioned about the possibility of additional arrests and the desire of victims to see more than five accused before the court, refused to acknowledge the possibility of proceedings against suspects other than the original five charged persons. A Cambodian representative of the investigating judges' office made similar misleading remarks at the same meeting.

<sup>12</sup> Douglas Gillison, "2 Nominated To Replace KR Prosecutor Petit," *The Cambodia Daily*, August 20, 2009.

<sup>13</sup> *Agreement*, Article (5).

depriving it of long-term leadership. There are important issues facing the prosecutors over the next several months. Most significantly, the close of the investigation and the development of a final submission in Case 002 involve imminent and important decisions that will fundamentally affect the case.

### *Addressing Political Interference*

The UN and donor states must press the government for the immediate appointment of an international prosecutor pursuant to the terms of the *Agreement*.

In addition, given the persistence of myriad complicated and far-reaching problems at the ECCC, including of a political nature, the UN should appoint a high level official, based at the United Nations in New York, who can engage on a political level with the Cambodian government and senior court officials. This official should be responsible for assuring that the *Agreement* is complied with and fundamental fair trial guarantees are met.

Finally, international officers of the court, particularly the judges and the prosecutor, are responsible for ensuring that political interference is not tolerated and, if it exists, is eliminated or exposed. The need for reassurance that judicial officials take this responsibility seriously is amplified by the blanket secrecy covering many of the court's pretrial proceedings. While limited confidentiality of certain information is common during the investigative stages of criminal proceedings, excessive secrecy is inappropriate and damaging to the credibility of the court.<sup>14</sup> Cambodian and international judicial officers at the court should provide sufficient information concerning the cooperation of all staff in all investigations to allow the public to determine if the court is operating independently.

The ECCC was designed to serve as an example in Cambodia of how a court can help to deliver justice and end impunity. Cambodians working in the ECCC have a difficult job and it requires great courage to take action contrary to the wishes of government officials. In this effort, they deserve far more support from the UN and the donor states than they have gotten to date. Strong statements of political resolve from the UN and donor states that denounce any attempts at political interference would be an important step toward remedying the problems outlined in this section.

## ***The Duch Trial***

### *Summary and Accomplishments*

After 72 trial days stretched over nearly six months, the evidence phase of the Duch trial concluded on September 17, 2009. The trial represents a success in several respects, most fundamentally in the very fact that it occurred. Duch is the first accused to be tried before the ECCC. The court's operations were built from an empty physical shell when administrative operations began in early 2006 to a fully functioning prosecutorial, investigative and judicial institution. Despite imperfections common in developing

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<sup>14</sup> See discussion in OSJI, May 2009 Report, October 2008 Report, May 2008 Report, March 2008 Report, December 2007 Report, and August 2007 Report.



judicial institutions, the Duch trial demonstrated all of the qualities of a trial process that meets international fair trial standards.

#### *Respect for Fair Trial Rights*

While some of the legal decisions made in the course of the trial were debatable, the Trial Chamber manifestly respected the fair trial rights of the parties. These rights include those specifically mandated in the *Agreement* through the incorporation of Articles 14 and 15 of the ICCPR.<sup>15</sup> Duch's right to adequate legal representation, to a public trial, and to confront witnesses and have adequate time and resources to present his defense were honored. There was no apparent interference with the independence of the judges.

#### *Overcoming Technical Challenges*

The trial presented difficult technical challenges, including the need to translate proceedings and documents into the three official languages of the court (Khmer, English, and French), the management of a large number of documents indexed and presented in electronic form in the courtroom, and the location of the court 12 miles away from the center of Phnom Penh. Notwithstanding these difficulties, the court made considerable improvements as the trial progressed. The need for interpretation of testimony and translation of documents inherently slows down a trial process and there were times when it was clear to observers, and noted by the parties, that the lack of accurate translation and interpretation was causing confusion about the views of a party, a judge, or a witness. The judges made consistent efforts to ensure that all persons in the courtroom spoke at a pace that make it possible for the interpreters to keep up, and the parties requested clarification if there was a suspected error. While problems continued to the end of the trial, their frequency diminished dramatically. The parties gradually displayed more skill with the technical tasks of locating and displaying documents and video testimony. By the end of the trial, all of the basic technical aspects of running a trial seemed to be operating effectively.

#### *Expediting the Proceedings*

As is standard in civil law trials, the judges of the Trial Chamber held the major role in calling and questioning witnesses. The president of the chamber, Nil Nonn, generally took the lead in questioning witnesses, with other members of the chamber often asking follow up questions or occasionally taking the lead with a witness. Counsel for the prosecution, civil parties, and the defense were then allowed to question witnesses. Duch was permitted to comment on the testimony of each witness. The pace of the proceedings was unacceptably slow over the first several weeks, but the chamber then took appropriate steps to ensure the trial could be completed within a reasonable period and still respect the rights of the parties and the interest of the public in understanding the facts relevant to the charges against Duch. The judges enforced time limits on the questioning of witnesses by the parties, struck a number of persons from the proposed witness list, and admonished the lawyers to avoid repetitious or irrelevant questioning.

#### *Facilitating Public Access*

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<sup>15</sup> *Agreement*, Article 12(2).

The extensive factual testimony was matched by important opportunities for Cambodians to access the trial proceedings. After the first month of the trial, the court provided transportation to between 350 and 500 people a day from around Cambodia to observe the trial proceedings. While observing a single day of the proceedings will not provide a deep understanding of the facts of the case or how the trial works, it does give people an introduction to the process and likely engenders an interest to follow the proceedings more closely on television or through other media. The trial was broadcast in full across the country on television. In addition, radio, newspapers, and other television broadcasts included regular reports and updates on significant events during the trial process.

### *Fostering Public Understanding*

Because one goal of the ECCC is to contribute to reconciliation and an enhanced understanding of justice in Cambodia,<sup>16</sup> the court needed to conduct the Duch trial so that detailed factual testimony was presented and accessible to a large number of Cambodians. The lack, until recently, of significant efforts to educate the public and particularly the younger generation about the Khmer Rouge, has created a void in the understanding in Cambodia about the Khmer Rouge history. A full evidentiary trial, easily accessible through mass media to most Cambodians was necessary to meet the court's goals of informing the public about the realities of the Khmer Rouge Era. The court's efforts on these fronts were commendable. The chamber struck a good balance between the need to conduct an efficient trial and the need to publicly present a complete picture of the atrocities committed at S-21 Prison, Duch's alleged role in committing them, and the place of the prison in the Khmer Rouge regime. Thus, in spite of the fact that Duch admitted basic liability for the crimes charged, the court properly permitted the parties to present evidence on all factual aspects of the case.<sup>17</sup> The testimony of 22 civil parties who spoke about their personal experiences at S-21 or the loss of a family member added depth to public understanding of the suffering caused by the operations at the prison.

The court was fortunate that its first trial involved an accused as cooperative and articulate as Duch. Duch's aptitude for telling his version of the S-21 story was a defining element of the trial. From the beginning, Duch acknowledged responsibility and apologized, repeating numerous times a version of the statement "[t]he loss of life of the people is calculated as equal to one million people, and as a member of the CPK (Communist Party of Kampuchea) I recognize that I am responsible mentally for the crimes committed by the CPK in those periods of time. I would like to express my regretfulness and my heartfelt sorrow and loss for all the crimes committed by the CPK from 1975 to 1979. . . . I would like to emphasize that I am responsible for the crimes committed at S-21, especially the torture and execution of the people there."<sup>18</sup>

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<sup>16</sup> "Introduction to the Khmer Rouge Trials," Third Edition, 2008, ECCC Publication, at [http://www.eccc.gov.kh/english/cabinet/publications/an\\_introduction\\_to\\_Khmer\\_Rouge\\_Trials\\_3th.pdf](http://www.eccc.gov.kh/english/cabinet/publications/an_introduction_to_Khmer_Rouge_Trials_3th.pdf).

<sup>17</sup> Because Duch's acknowledgement of responsibility eliminates dispute about his guilt for the crimes charged, sentencing will be the primary practical impact of the chamber's judgment.

<sup>18</sup> Duch Trial Transcript, March 31, 2009, page 67, line 12.

Nonetheless, a cornerstone of Duch's defense was that the Khmer Rouge regime was built on the "twin pillars of terror and secrecy," that he acted under orders from his superiors, and that disobeying would have resulted in his own death.<sup>19</sup>

In contrast, the theme of the prosecution was that Duch was an enthusiastic, active, and innovative leader of the S-21 torture and extermination center; that he deliberately "devised the inhumane conditions of detention in S-21; that he ordered and participated in the torture of detainees and ordered the execution of victims."<sup>20</sup>

Few facts about the operation of S-21 that had not been previously described in the extensive writing about the prison were revealed at the trial. Nonetheless, the trial offered an opportunity to understand Duch's personality and thought processes. It is rare that an accused has both the willingness and the opportunity to speak so frequently and extensively in a criminal proceeding. Although not under oath,<sup>21</sup> Duch was questioned and given great latitude in addressing the chamber at the beginning of the trial, at the beginning of each of the eight issue areas around which the chamber organized the trial,<sup>22</sup> and following the testimony of each witness and civil party who spoke. Duch occupied center stage at the trial and his eagerness to ensure that it was his narrative of the S-21 story that prevailed was apparent. While this situation creates an obvious opportunity for manipulation by an intelligent and self interested accused, it also has given Cambodians a unique glimpse into the mind of a man who has admitted responsibility for the torture and death of over 12,000 individuals, many of whom he acknowledged were innocent of any wrongdoing.

Consistent with his background as a teacher, Duch sought to educate the court about how S-21 worked, offering detailed displays of memory and familiarity with the thousands of documents related to the prison. In contrast, the other parties and the judges often deferred to Duch on questions about the meaning and relevance of S-21 documents.

At times Duch expressed humility and deference with apparently sincere apologies stated softly and sometimes with obvious emotion. At other times his presentations were characterized by displays of pride and arrogance. For instance, on several occasions he refused to answer questions that he believed were unimportant, or admonished civil party lawyers for not having a better understanding of the facts of the case.<sup>23</sup> Duch consistently attempted to distance himself from the specifics of the horror he orchestrated, insisting that he spent most of his time in his office reading and annotating confessions and rarely observed interrogations, torture, or executions.

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<sup>19</sup> See, for example, Statements of defense counsel Francois Roux, Duch Trial Transcript, March 31, 2009, page 87, line 1 and following.

<sup>20</sup> See, for example, Statements of International Prosecutor Robert Petit, Duch Trial Transcript, March 31, 2009, page 51, line 5.

<sup>21</sup> See Internal Rules, Rev. 4, Sept. 11, 2009, Rule 24, under which only certain witnesses are required to take an oath. The accused as well as civil parties present testimony without taking an oath to tell the truth.

<sup>22</sup> See OSJI August 2009 Report, page 5 for an outline of the eight issue areas defined by the court.

<sup>23</sup> See for example, Duch Trial Transcript, April 29, 2009, pages 63, 67, and 81.

Duch's personal history revealed a pattern. His devotion to teaching as a young man was followed by his commitment to the revolutionary movement in the late 1960s and early 1970s and, subsequently, to the Khmer Rouge and to his immediate superiors. In 1998, Duch devoted himself again to a superior cause when he converted to Christianity and an evangelical church. Duch's desire to please and seek recognition from his superiors was confirmed by the findings of French psychologist Francoise Silboni-Guilbaud and Cambodian psychiatrist Kar Sunbunna, who examined him at the request of the investigating judges.<sup>24</sup> While he is clearly intelligent and educated, Duch's need to please and to be seen as loyal and competent by his superiors overrode his willingness to objectively question their goals and means. Duch's behavior at trial again displayed a desire to be seen as exceedingly cooperative with the court, as if he were attempting to exchange his old role with that of the perfect defendant. His behavior included bows and displays of humility—bordering on obsequiousness—toward the court, and helpful explanations when others were confused about a document or a fact.<sup>25</sup>

Duch described S-21 as a torture and death camp where “once prisoners entered, they were already dead.” The very few who survived were the rare exceptions who had a unique skill to offer the regime. Duch described two general stages and kinds of prisoner brought to S-21. Prisoners brought to S-21 before April 1976 were generally soldiers or loyalists of the former Lon Nol regime that the Khmer Rouge sought to eliminate. After a Standing Committee order dated March 30, 1976 to eliminate internal enemies, most of the prisoners were Khmer Rouge cadre of increasingly high rank charged as traitors of the regime in its repeated attempts to purge its ranks.

Although it was a forgone conclusion that prisoners of S-21 would be killed, most were nonetheless tortured until they provided a confession. Rudimentary medical care was given to prisoners in order to keep them alive and sufficiently conscious to sign a complete confession. Prisoners were tortured to continue revealing the “string of traitors” the leadership believed existed. Those named in the tortured confessions would be arrested next and subjected to the same senseless system. After signing such a confession, the prisoner would be brutally executed. No one in the Khmer Rouge system had any security that he or she would not be the next victim of the program. In this way, the Duch's description of the regime as one based on fear and terror seems correct. One of the difficult challenges for the Trial Chamber will be to determine if and how this context influences Duch's sentencing for his significant role in perpetuating the terror.

The testimony of 22 civil parties was a moving and disturbing portion of the trial. Some of the civil parties testified as direct victims about their own imprisonment and torture, other testified about the loss of loved ones who they said had suffered horribly at S-21. Generally, each of the parties testified with great personal dignity and brought a new level of understanding to the suffering of the Khmer Rouge period—suffering that continues to this day in destroyed lives and emotional and physical wounds. Few of the

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<sup>24</sup> Duch Trial Transcript, August 31, 2009, pages 2, 22, 24, and 30.

<sup>25</sup> A telling moment occurred when Duch thanked expert David Chandler for praising his professionalism in running S-21, seemingly still believing that professionalism in the running of a torture and execution camp was a high compliment. See: Duch Trial Transcript, August 6, 2009, page 124.

civil parties expressed a willingness to forgive Duch for his role in their loss.

### *Jurisprudence of the Trial Chamber*

The chamber issued several important written decisions during the course of the trial.

#### *Pretrial Detention*

The first involved the legality of more than nine years of pretrial detention served by Duch prior to the beginning of his trial at the ECCC. Although seven years of this detention was served under the jurisdiction of the Cambodian Military Court, the chamber ruled that such extended pretrial detention violated his fundamental human rights and entitled him to a remedy of both credit for any time served if he is found guilty by the ECCC, and additional compensatory credit or compensation for the violation of his rights.<sup>26</sup> This decision could provide an important precedent for domestic courts in Cambodia, where the problem of lengthy pretrial detention is severe.<sup>27</sup>

#### *Civil Party Participation*

A divided decision on the right of civil parties to participate in proceedings related to sentencing of the accused created controversy among the civil parties.<sup>28</sup> The majority decision held that civil parties, whose legal interest is in reparations if the accused is found guilty, could not participate in questioning Duch or other witnesses on issues related to sentencing or to his character. The majority reasoned that sentencing of the accused serves the public interest and the prosecutors, as representatives of the public interest, have the role of assisting the court in finding a sentence that weighs the interests of the community and the gravity of the crimes. The majority opinion further held that because evidence about the character of the accused related, in this case, solely to the issue of an appropriate sentence, the civil parties had no interest or right to question witnesses who testified about the character of the accused.

Judge Jean-Marc Lavergne dissented from part of the majority decision, arguing that it was impossible to separate the issue of character of the accused from issues related to guilt. Summarizing, he stated, “[W]hy did he or she do that?” This is a legitimate concern for all parties, including Civil Parties whose participation cannot be reduced to a simple discussion pertaining to the objective culpability of the accused. It is necessary to be able to understand what motivated criminal conduct, in particular for the purpose of avoiding its repetition. Also, this need to understand is even more crucial where the crimes involved were too long left without answer, if not concealed.”<sup>29</sup>

#### *Other Issues*

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<sup>26</sup>See OSJI August 2009 Report for a more extensive discussion of this decision.

<sup>27</sup> Ibid.

<sup>28</sup> Trial Chamber Decision: Civil Party Lawyers’ Joint Request for Ruling on Standing of Civil Party Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, October 9, 2009. [http://www.eccc.gov.kh/english/cabinet/courtDoc/452/E72\\_3\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/452/E72_3_EN.pdf), (Trial Chamber Decision on Civil Party Participation).

<sup>29</sup> Ibid, para. 28.

The Trial Chamber has left for its final decision several important issues raised by the parties. These include whether the concept of joint criminal enterprise<sup>30</sup> is applicable to the case, and whether the statute of limitations has expired on the charges of murder and torture under domestic laws. The chamber will also rule on the challenges to the right of certain persons to participate as civil parties, because the defense objected that a number of persons who participated at trial had not established their status as a victim who suffered an injury as a direct consequence of the crimes alleged to have been committed by Duch. There has been no guidance yet from any arm of the court as to the standard of proof necessary to establish the appropriate link, and the chamber's ruling on these issues could be extremely useful to victims seeking to participate in subsequent cases.

### *Lessons of the Duch Trial for Future Trials*

The cooperation of Duch and his counsel made it much easier for the prosecution, which has the burden of proving the elements of all crimes charged,<sup>31</sup> and the Trial Chamber, responsible for trial management and the primary questioning of all witnesses, to clearly demonstrate the role of Duch in relation to S-21 Prison. All indications are that those advantages will not be present when the court begins the trial of Case 002 against the alleged surviving senior leaders of the Khmer Rouge: Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith. It is expected that these accused will refuse to talk openly with the investigating judges and will deny responsibility for all charged crimes. This trial will present the prosecution and the court with extremely difficult challenges in presenting evidence of the charges and in telling a comprehensible story of the senior leadership of the Khmer Rouge. Modifications in the trial process that might assist in the effective presentation of evidence in Case 002 include:

- **Effective questioning of witnesses.** While the chamber did an adequate job of questioning witnesses in the Duch trial, it was not faced with the need, and did not display the necessary skill, to elicit revealing and truthful testimony from witnesses who are reluctant, obviously biased, extremely nervous, or who give inconsistent testimony. The questioning by the chamber generally consisted of an apparently planned series of questions with only rare follow up when a witness either failed to respond to the question asked or, in responding, provided unexpected but important new information. A surprising number of witnesses gave courtroom testimony that was inconsistent with prior statements made to the investigating judges or others. The chamber failed to explore or discover the cause of this persistent problem. There were limited instances where the judges asked very precise questions about a matter of relevance to the case. This type of questioning was often more effective in eliciting relevant testimony and maximizing the witness's contribution to the trial.

The civil law practice under which judges control the questioning of witnesses may require modification in the context of a complex, multiple-defendant war crimes trial. In Case 002, involving four uncooperative accused, tens of thousands of documents, and facts likely spanning the entire geography of Cambodia, this approach is not

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<sup>30</sup> Joint criminal enterprise (JCE) is a mode of liability that imposes individual criminal responsibility on a person for actions perpetrated by more than one person in furtherance of a common criminal plan.

<sup>31</sup> Rule 87.

likely to be efficient or effective. It is unrealistic to expect judges who only receive the case file a few months before will master facts of such scale and breadth in sufficient detail to ask probing questions of witnesses who are not fully cooperative. Examination of witnesses requires detailed familiarity with all aspects of a case, including knowledge of what other witnesses have said about each element of the subject matter at issue, what other statements the witness has made, how the witness's testimony fits into the larger case, and what biases the witness may have. The chamber judges do not have the time or the support staff to have this kind of familiarity with such details in a case as massive as Case 002.

The prosecution, which will have worked with the evidence for over four years when the trial starts, is in a much better position to effectively question witnesses in such a complex case. The interests of justice might be better served in Case 002 by allowing the prosecution, with its greater familiarity with the details of the case and the witnesses, to take a much larger role in questioning witness. The chamber judges should continue their role of presenting the background and general testimony of the witnesses, but the practice of a long, and often vague, examination by the judges followed by an extremely limited examination by the prosecution and other parties should be modified. The prosecution's role in eliciting facts in support of its case was unduly limited in the Duch trial,<sup>32</sup> and should be expanded in Case 002 to allow the prosecution to shoulder a greater share of the burden of questioning witnesses. For its part, the prosecution must ensure that there is continuity, experience, and detailed knowledge of the case on the part of the lawyers who appear at the trial.<sup>33</sup>

- **Allow Some Proofing of Witnesses.** The practice in domestic Cambodian courts, and that applied by the chamber, was that neither lay nor expert witnesses could be “proofed” prior to the trial. This meant that a party who suggested that a witness be called was not allowed to meet with the witness before trial and verify what testimony of relevance the witness could contribute, provide the witness with copies of any prior statements, or advise the witness about the nature of the questioning before the trial chamber. Witnesses are understandably uncomfortable in the grand and intimidating ECCC courtroom where they are asked to recall details of events that occurred over thirty years ago. Many witnesses appeared extremely nervous or intimidated. As a result, the testimony of witnesses, including expert witnesses, was often unnecessarily repetitive, vague, and confusing. While full “proofing” of witnesses—encouraged in some common law jurisdictions—would not fit well in the civil law procedures before the ECCC, some modification of the process should be strongly considered in the interest of both efficiency and precision of testimony, but also fairness to the

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<sup>32</sup> Time limits for the prosecution's questioning of witnesses were based on how much time the Chamber spent questioning the witness. The prosecution was allowed one half hour of questioning for a witness that the trial judges scheduled for one day. This time was split between the national and the international prosecutor, which left approximately 15 minutes for each to ask questions to the witness. The time for a half-day witness was 15 minutes in total, split between the two prosecutors.

<sup>33</sup> This was not always the case in the Duch trial, where, for reasons including resignations of key personnel, there was a disturbing rotation of attorneys appearing for the prosecution and an apparent lack of consistent familiarity with the case.

witness.<sup>34</sup> At a minimum, the court should establish a process where a witness is provided with copies of prior statements given to the investigating judges or otherwise in the case file, as well as a summary of the subject matter about which they will be questioned.

- **Provide Guidance on Evidentiary Issues, including Admissibility of Documents, Relevancy, and Undisputed Facts.** Throughout the trial there was confusion and argument about what constituted relevant testimony or documentary evidence, the form of questions that were allowed, how documents were to be put before the court, and what evidence was needed or allowed as to undisputed facts. The chamber provided little definitive guidance on these issues to the parties in the course of the trial. Evidentiary challenges will likely be more frequent and contentious in the Case 002 trial. More explicit chamber guidance on such issues, either in advance of the trial, or in the form of definitive rulings when the issues first arise, would greatly assist the trial process.

**Effective Use of Expert Witnesses.** The chamber called several expert witnesses, including David Chandler, Nyanda Chanda, Craig Etcheson, Francoise Silboni-Guilbaud, and Kar Sunbunna. Experts including Justice Richard Goldstone, Stephane Hessel, and Raul Jenner testified at the request of the defense about the value of an admission of guilt, of forgiveness and reconciliation, and of the kind of duress that Duch was under from his superiors. While each of these witnesses had deep knowledge about issues related to the trial, their testimony was diluted by the fact that neither the investigating judges nor any of the parties had interviewed them about their testimony prior to the trial. They came to the proceedings with only a general understanding of what they would be examined about and inadequate opportunity for preparation. For instance, David Chandler and Nyanda Chanda were questioned about parts of the books they wrote decades ago. While, with their books in front of them, they were able confirm general conclusions from their work, their ability to bring a deeper level of expertise by having considered specific issues and questions in light of their expertise and vast research would have likely made stronger contributions to the trial process.

Case 002 will present even more complex issues and it will be necessary to evaluate the significance of large numbers of facts and documents to arrive at meaningful and accurate conclusions. Experts can be given the authority to access documents and talk to witnesses and the accused.<sup>35</sup> Experts can also serve an important role in explaining the results of complex analysis to the public at trial. They can only do this, however, if they are adequately prepared by being given precise information about the scope of their requested testimony, and adequate opportunity to review relevant documents and information. The chamber should modify its procedures for the testimony of expert witnesses by either allowing the party that proposes the witness to advise the

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<sup>34</sup> See discussion of this issue in the context of international courts at: Tracey Gurd, “When Witnesses Change their Stories...” *The Lubanga Trial at the International Criminal Court*, February 10, 2009 at <http://www.lubangatrial.org/2009/02/10/when-witnesses-change-their-stories.../>

<sup>35</sup> Rule 31.



witness about the scope of questioning and provide them with relevant documents, or taking on this task themselves.

- **Handling of Civil Party Witnesses and Questioning by Civil Party Lawyers.**

A unique and important aspect of the Duch trial was the opportunity for civil parties to address the court, tell the story of their loss and request specific questions to be put to the accused. This portion of the Duch trial was extremely moving and appeared to satisfy a deep need of victims to describe their suffering and honor the memory of family members killed at the hands of the Khmer Rouge. Such witnesses were appropriately given latitude by the chamber to bear witness. The opportunity for individual civil parties to speak about their suffering and ask the accused about facts surrounding their own fate or that of their loved ones at the hands of the Khmer Rouge is an important contribution of the ECCC and should not be sacrificed even though it is time consuming and may not always reveal facts relevant to the guilt of the accused. However, the experience of the Duch trial argues for additional guidance and controls by the chamber on such testimony to ensure that it does not drift into uncontrolled narrative or become threatening or abusive to the accused.

On several occasions during the Duch trial questions arose about whether questioning by civil party lawyers on issues related to the general guilt of the accused, but not related to an issue about which the civil party had particular knowledge or interest, should be allowed. The court generally allowed civil party lawyers to question witnesses on all issues not related to sentencing. This practice drew reasonable objections from defense counsel on the ground that it subjected the accused to a panel of multiple prosecutors and was unnecessarily broad. For instance, it is questionable whether it is appropriate for civil parties, with no relevant personal knowledge, to question witnesses already thoroughly examined by the court and the prosecution on the issue of the existence of an international armed conflict. Objections to such questioning and requests for guidance from the chamber on the scope of civil party questions did not elicit helpful rulings. The efficiency of the trial, and the rights of the defense, would be better served by greater clarity on the parameters of the civil parties' right to question witnesses and present evidence.

### ***Allegations of Bias against Investigating Judge and International Judges of the Pre-Trial Chamber***

Counsel for Ieng Sary filed a motion with the Pre-Trial Chamber on October 9, 2009 to disqualify Investigating Judge Marcel Lemonde from serving on Case 002 on the ground that he has demonstrated bias against the rights of the defense.<sup>36</sup> The motion describes an exchange between Lemonde and senior international staff of his office in which Lemonde is claimed to have stated that he “would prefer that we find more inculpatory evidence than exculpatory evidence.” It claims that this statement demonstrates that Lemonde is not properly respecting his duty to objectively investigate for both evidence of guilt and

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<sup>36</sup>Ieng Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde & Request for a Public Hearing, October 9, 2009. (Ieng Sary Motion to Disqualify Lemonde). This motion has not yet appeared on the ECCC website; see also Douglas Gillison, “Claim of Bias made Against ECCC Judge,” *The Cambodia Daily*, October 9, 2009.

innocence, undermining Ieng Sary's right to be tried before an independent and impartial tribunal in accordance with the internal rules which provide "in all cases, they [investigating judges] shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory."<sup>37</sup>

The defense buttresses its argument by pointing out that the investigating judges have emphasized that they have the *exclusive* right to investigate the facts under their jurisdiction and that the parties are not authorized to take independent investigative steps.<sup>38</sup> Defense counsel can request that the investigating judges take certain investigative action, but cannot investigate themselves and are largely dependent on the judges to seek exculpatory evidence. Thus, the defense argues, any indication of bias against the defense or a "preference" for a type of evidence must be treated with the greatest seriousness.

The description of the statement that Lemonde is alleged to have made is based on an affidavit of his chief analyst, who left the ECCC in August 2009. The Pre-Trial Chamber will decide the motion and Lemonde has the opportunity to file a response.<sup>39</sup> Under the internal rules of the court, Lemonde is entitled to remain in his position pending the resolution of the motion and if the motion were to be granted no previous action of his would be automatically nullified.<sup>40</sup> The motion will be deemed rejected unless a supermajority of four of the five judges on the chamber votes for removal.<sup>41</sup>

Subsequently, counsel for Nuon Chea and Khieu Samphan filed motions to remove Lemonde on similar grounds of bias.<sup>42</sup> These motions have not been made public and it is not clear if, like the Ieng Sary motion, they limit their complaint to the alleged statement by Lemonde or claim a broader pattern of bias. In the context of a two-year investigation, a single statement by an ex-staff member may be insufficient to raise doubts about the impartiality of the investigating judge. Nonetheless, the motion raises questions about the practicality of a system that places the entire burden of investigating both inculpatory and exculpatory evidence in a mass crimes case on the office of investigating judges.

Although there is no time limit set forth in the rules for such decisions, it is important to the interests of all parties that the motions be resolved quickly. If the chamber decides that the motions have no merit, then the office of the investigating judges should act to ensure that the investigation of Case 002 can be finalized without a cloud over Lemonde's status. If the chamber decides action is necessary, it should be taken as soon as possible so that the issue does not unnecessarily delay the proceedings or create questions about the value of prior investigative actions.

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<sup>37</sup> Article 14(1) of the ICCPR; and Rule 55 (5).

<sup>38</sup> Ieng Sary Motion to Disqualify Lemonde, para. 18.

<sup>39</sup> Rule 34(7).

<sup>40</sup> Rule 34 (5) and (9).

<sup>41</sup> Rule 34 (11).

<sup>42</sup> Sebastian Strangio, "Second Bias Motion Planned," *The Phnom Penh Post*, October 12, 2009.

Counsel for Ieng Sary complicated the resolution of the request to disqualify Lemonde by filing a motion dated October 20, 2009 requesting “appropriate measures to be taken concerning certain statements by Prime Minister Hun Sen which challenge the independence” of the international judges of the Pre-Trial Chamber.<sup>43</sup> The motion quotes the prime minister stating: “I know that some foreign judges...have received orders from their governments to create problems here... There is no doubt that they received advice from their government to do so.”<sup>44</sup> The statement was made in response to the announcement that the Pre-Trial Chamber ruling would permit the investigation of five additional suspects to go forward. The request claims that such a statement by the highest-ranking government official in Cambodia raises sufficient questions about the independence of the court as to justify the Pre-Trial Chamber in “taking all necessary and reasonable measure to clarify and/or verify the alleged conduct” of the international judges of the chamber, and to do so before the chamber rules on any other pending decisions.

The concern raised in the motion about Ieng Sary’s right to be tried before a tribunal that is fair and impartial is justifiable and must be taken seriously given ongoing concerns about political interference in the ECCC.<sup>45</sup> Nonetheless, the motion presents a disturbing irony. Ieng Sary’s lawyers do not claim to believe that the prime minister’s statement is credible, but rather that it creates the appearance of partiality. The quoted statements must be put in the context of their relationship to the Pre-Trial Chamber ruling, which government leaders opposed, and viewed alongside the numerous statements from the highest level of the Cambodian government that raise concern that instructions are being given to the Cambodian officials at the court on this issue.<sup>46</sup> The statement of the prime minister contributed to the broader concern about the independence of the court, but the ambiguous request for relief in the motion is unlikely to ensure that the chamber addresses general indications of political interference that repeatedly arise.

### ***Lack of Progress on Anticorruption Mechanism***

The UN, the court, and the government of Cambodia have made no visible progress toward implementing a credible anticorruption program at the court since the Justice Initiative’s August 2009 report. After nearly a year of negotiations, on August 11, 2009, the government of Cambodia and the UN signed an “Agreement to Establish an

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<sup>43</sup> Ieng Sary’s Request for Appropriate Measures to be Taken Concerning Certain Statements by Prime Minister Hun Sen which Challenge the Independence of Pre-Trial Chamber Judges Kantinka Lahuis and Rowan Downing, October 20, 2009, (Request re Prime Minister Statements), not yet posted on ECCC website.

<sup>44</sup> Ibid., para 8. The Request cites Sopheng Cheang, “Cambodia PM Accuses Other Countries of Stirring Unrest,” Associated Press, September 10, 2009 and an unofficial translation of a speech delivered on September 9, 2009 as sources for the quote of the prime minister.

<sup>45</sup> See discussion above on independence from political interference.

<sup>46</sup> See Michael Heath, “Cambodia Pushes to Curb Khmer Rouge Court, Group Says,” Bloomberg.com, July 22, 2009 at <http://www.bloomberg.com/apps/news?pid=20601080&sid=a9471cEULOM8>; the request cites Sopheng Cheang, “Cambodia PM Accuses Other Countries of Stirring Unrest,” Associated Press, September 10, 2009. See, also notes 9 and 10, supra.

Independent Counselor at the Extraordinary Chambers for the Courts in Cambodia.”<sup>47</sup> This agreement provided the skeletal outline of an anticorruption program that might, if properly developed, be a step toward both ensuring that ECCC staff have a safe and effective remedy if they are aware of or subjected to corrupt practices. As a result, it might also remedy the stain on the credibility of the court left by almost three years of inadequately addressed corruption allegations. However, steps to make the program operational have not been taken, and significant concerns have been expressed about the independence of the “independent counsellor” charged with running the program because of his role as the head of the Cambodia National Audit Authority.<sup>48</sup>

Since the August 11, 2009 announcement of the plan, the independent counsellor has visited the court and held a single press conference at which he promised he would be available to all staff. He stated that he intended to collect information on all corruption and other complaints from court staffers, and would be involved in resolving those deemed to be “well-founded.”<sup>49</sup> However, these limited promises appear to be empty as the counsellor has yet to reveal publicly, or to the staff of the ECCC, how his office will deal with complaints to ensure that those who come forward are safe and free from retaliation, how to contact him, the nature and limit of his power to investigate charges, the kind of reporting he will do about the actions of his office, and other critical elements that are a prerequisite to an effective program.

The Justice Initiative’s attempts to contact the independent counselor to learn of his plans have been rebuffed. Several staff members at the court have made efforts to contact him, but were also unsuccessful. At this point, it appears as if the latest agreement between the UN and the government of Cambodia is still an empty vessel.

There appears no excuse for the delay in activating an anticorruption program at the ECCC other than a lack of resolve on the part of key stakeholders. The pattern of progress toward a credible anticorruption mechanism is that the UN, the donors, and the Cambodian government move toward a resolution only when critical funding is needed for the court. Once the immediate pressure for funding is off, discussions and progress toward a resolution cease. After two and a half years of this pattern, the court and the UN

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<sup>47</sup> See *Joint Statement on Establishment of Independent Counsellor at Extraordinary Chambers in the Courts of Cambodia*, Phnom Penh/New York, August 12, 2009, at <http://www.un.org/News/Press/docs/2009/13146.doc.htm>.

<sup>48</sup> See also Robbie Corey-Boulet, “Corruption Counsel’s Role at ECCC Unclear,” *The Phnom Penh Post*, September 23, 2009, quoting expressions of concerns about the independence of the appointed independent counselor: “Sophal Ear, a professor at the US Naval Postgraduate School in California whose father died during the Khmer Rouge regime, wrote in a *Wall Street Journal* op-ed that the selection of Uth Chhorn in particular was troubling [because of his position as head of the National Audit Authority (NAA)]. . . . he said the NAA’s lack of transparency had robbed it of all credibility, adding: ‘Since the auditor general and the independent counsellor will be one and the same, this does not bode well for the credibility of the ECCC.’ The NAA, which began its work in 2002 and is tasked with auditing all government bodies, is officially independent under the Law on Audit. But a 2008 review by the nonprofit Global Integrity stated: ‘The NAA is believed to not be politically independent, even by law.’”; and Sophal Ear, “Opinion: Cambodian ‘Justice’ Without Major Personnel Changes, the Khmer Rouge Trial Risks Descending into Farce,” *Wall Street Journal*, September 1, 2009.

<sup>49</sup> Robbie Corey-Boulet, “ECCC Official to Collect Evidence,” *The Phnom Penh Post*, September 24, 2009.

will have difficulty convincing court staff and Cambodians that any plan to solve the corruption problems faced by the court is anything but window dressing. A serious and robust approach to resolving the corruption complaints needs to be implemented immediately and monitored closely.

### ***Court and Stakeholder Decisions Related to Allegations of Corruption***

Over the last several months, a series of decisions have been issued from the ECCC and related entities with the combined effect of limiting any review of the impact of past corruption allegations on the fairness of the proceedings or the rights of the accused. Based on complaints of corruption at the ECCC filed with the UN by Cambodian staff from the court, the Office of Investigation and Oversight Services (OIOS), an investigatory arm of the UN, conducted a review of the allegations and issued a report.<sup>50</sup> The report has not been released to the public, but the findings were delivered to the government of Cambodia in September 2008 recommending further investigative action—an indication that the OIOS found a prima facie case that there was a problem with corruption in the court.<sup>51</sup> Lawyers for various accused and civil parties have sought either investigation of the allegations to determine if corruption issues impact the fair trial rights of the parties, and/or public release of the OIOS report. Each of these attempts has been frustrated:

- February 6, 2009. The Phnom Penh Municipal Court dismissed a request to open a domestic investigation into the allegations of corruption.<sup>52</sup> This dismissal has been appealed by counsel for Nuon Chea but there has been no known action taken by the prosecutor general of the Court of Appeals.
- April 3, 2009. The investigating judges dismissed a request by counsel for the accused in Case 002 to evaluate allegations of corruption or seek access to the OIOS report to determine if the rights of the accused to a fair and impartial trial were affected. The investigating judges stated they lacked jurisdiction to take investigative action in relation to the allegations, and that the claims were too speculative to warrant relief on the ground that the basic fairness of the process was affected. They pointed the accused to other arms of the court and any UN/Cambodian government agreement for a remedy.<sup>53</sup>
- August 11, 2009. The UN and the government of Cambodia entered into an agreement with a skeleton outline of an anticorruption program to be headed by an independent counsellor who is the head of the Cambodian National Audit Authority and an advisor to the government. The independent counsellor is empowered to receive future complaints, but not to perform investigations. He

<sup>50</sup> See discussion of these facts in OSJI October 2008 Report, at page 3.

<sup>51</sup> Cat Barton, “Tribunal Graft Charges Spread: German Delegation Results of Secret UN Probe; Staff Concur,” *Phnom Penh Post*, February 27, 2009; John Hall, “Court Administration at the ECCC,” in *On Trial: The Khmer Rouge Accountability Process*, edited by John D. Ciorciari and Anne Heindel, Documentation Series No. 14, Documentation Center of Cambodia, 2009; and Georgia Wilkins, “KR Court Graft Review Unfairly Names and Shames Gov’t Says,” *The Phnom Penh Post*, September 22, 2008.

<sup>52</sup> Georgia Wilkins, “Defence Lawyers Condemn Halt of KR Tribunal Probe,” *The Phnom Penh Post*, February 9, 2009.

<sup>53</sup> OCIJ Ieng Sary Case, Order on (Eleventh) Request for Investigative Action, April 3, 2009 at [http://www.eccc.gov.kh/english/cabinet/courtDoc/286/D158\\_5\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/286/D158_5_EN.pdf). (OCIJ Corruption Order)

has not yet established an operational office to receive complaints and it is not clear that he will consider complaints that arise before the establishment of his office.

- August 18, 2009. The Pre-Trial Chamber dismissed the appeal filed by the accused persons against the April 3, 2009 refusal of the investigating judges to take action on this issue.<sup>54</sup> Echoing the investigating judges, it pointed the parties to other options for relief and observed that the matter of corruption allegations was before the appropriate authorities of the Kingdom of Cambodia and the UN, who at that time were reportedly looking for a resolution. This process has been ineffective. The chamber determined that the charged persons' fair trial rights were sufficiently safeguarded by available alternatives to raise the issue such as filing a motion to annul investigation measures or to cross examine witnesses. Finally, the chamber found "that the allegation that staff members possibly have paid money to a superior cannot lead to the conclusion that these staff members can influence the Judges to manipulate the outcome of the procedure, and therefore affect the independence and impartiality of the court or the judges. The nature of the allegation is too remote to draw such a conclusion without additional facts."<sup>55</sup>
- September 23, 2009. The Trial Chamber dismissed a request filed on behalf of civil parties for an order for the release of the OIOS report.<sup>56</sup> Before ruling, the chamber sought advice from the UN Office of Legal Affairs (OLA) about whether the confidential OIOS report contained allegations about the involvement of judges in the corruption scheme. The OLA response informed the chamber that there was "no information to suggest that there has been or is corruption among any of the judges of the ECCC, nor information that would suggest that the ECCC judicial process is in any way prejudiced by corruption."<sup>57</sup> The chamber then concluded, "[i]t appears that the allegations of corruption that are the focus of the UN-OIOS Report (and of the Request) concern whether certain national administrative staff of the ECCC paid money to obtain or retain their positions. The Trial Chamber does not consider that there is any link between these allegations and the fair trial rights of any of the parties in the present case that justifies it in requesting disclosure of the UN-OIOS Report...nor would disclosure of the UN-OIOS Report impact the 'transparency of proceedings' given that there is no suggesting that the Report concerns the present case." The ruling concludes that "[t]he remedies sought by the Request accordingly lie outside the purview of the Trial Chamber and need instead to be pursued through the appropriate administrative, disciplinary and/or legal

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<sup>54</sup> Decision on Appeal Against Order of the Co-Investigating Judges' Order on the Charged Persons' Eleventh Request for Investigative Action, August 18, 2009 at [http://www.eccc.gov.kh/english/cabinet/courtDoc/410/D158\\_5\\_1\\_15\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/410/D158_5_1_15_EN.pdf) (PTC Corruption Decision).

<sup>55</sup> Ibid.

<sup>56</sup> Trial Chamber Decision on Group 1- Civil Party Co-Lawyers' Request that the Trial Chamber Facilitate Disclosure of an UN-OIOS Report to the Parties, September 23, 2009 at [http://www.eccc.gov.kh/english/cabinet/courtDoc/437/E65\\_9\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/437/E65_9_EN.pdf) (TC Corruption Decision).

<sup>57</sup> September 30, 2009 Letter from Patricia O'Brien, Under-Secretary-General for Legal Affairs, UN Office of Legal Affairs to Michiel Pestman, Victor Koppe, and Andrew Ianuzzi, legal counsel for Nuon Chea.

mechanisms,” such as appropriate national authorities, and the independent counsellor.

- September 30, 2009. In response to letters dated February 23 and March 4, 2009, Patricia O’Brien, Under-Secretary-General for Legal Affairs, OLA, stated her refusal to release the OIOS report to counsel for Nuon Chea, noting in support of her decision that the Trial Chamber had refused to order release of the report. The letter stated that the UN’s refusal to release the report was based on its own certification of the irrelevance of the report to fair trial issues: “The OIOS report does not contain any information suggesting that there is any corruption which would prejudice the judicial process.”

The ECCC judicial rulings each narrowly interpret the authority of the judges to look into issues such as corruption that are outside of the factual jurisdiction of the court.<sup>58</sup> Each also recognizes the inherent authority of judges to guard the integrity of the court and the fair trial rights of the parties.<sup>59</sup> Nonetheless, each finds factual allegations of corrupt practices within the administration of the court insufficient to invoke this inherent protective jurisdiction.<sup>60</sup> The common reasons for such refusal are: 1) the suggestion that other avenues of investigation or remedy are more appropriate; and 2) the conclusion that the allegations do not go to the core integrity of the court or fair trial rights because they do not involve allegations specifically against judges. The difficulty with the first rationale is that the list of refusals outlined above indicates that reasonable avenues of redress are closed to the parties. It also misses the point of the parties’ requests: more information is needed to determine whether fair trial rights are adversely affected. The parties were seeking the assistance of the judicial organs of the court to ensure that such information is available and not hidden. The difficulty with the second rationale is that it is an overly simplistic view of how courts work and the role of staff at all levels in the court in providing a process that meets fundamental standards of fairness.

The combined decisions of the courts and OLA create a circle of shifting responsibility and roadblocks that essentially eliminates any effective remedy. Through these combined rulings and decisions, the judges of the ECCC, the UN, and the government of Cambodia have effectively drawn a protective ring around the corruption allegations by refusing to deal with them and stating or alluding that they should be dealt with by another entity that makes similar denials of responsibility. This leaves the parties without an effective channel to investigate whether findings of corruption impact their rights. It eliminates all transparency and accountability at the ECCC for past allegations of corruption. This situation strengthens the mandate to the UN and the Government of Cambodia to make operational an effective anti-corruption mechanism in the court.

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<sup>58</sup> OCIJ Corruption Order, para. 11; PTC Corruption Decision, para. 24, 28, and 29; TC Corruption Decision.

<sup>59</sup> OCIJ Corruption Order, para. 12; PTC Corruption Decision, para. 33, and 50; TC Corruption Decision, para. 13, 16, and 17.

<sup>60</sup> OCIJ Corruption Order, para. 13; PTC Corruption Decision, para. 34, 37, 38, and 44; Trial Chamber Corruption Decision, para. 18.



## ***Pre-Trial Chamber Decision on Disagreement over Additional Suspects***

In a ruling dated August 18, 2009, but made public on September 2, 2009, the Pre-Trial Chamber ended the deadlock between the international and Cambodian prosecutors as to whether the names of five additional suspects will move forward for formal judicial investigation.<sup>61</sup> The *Agreement* and the rules of the court mandate that prosecution requests to investigate suspects submitted by a single prosecutor shall go forward over the objection of the other prosecutor unless the Pre-Trial Chamber rules otherwise by a supermajority vote of four out of five judges.<sup>62</sup>

The judges, voting along international/Cambodian lines, did not have a supermajority to stop the submission. On September 8, 2009 acting international Prosecutor William Smith announced in a press statement that that he had submitted five additional names for investigation to the investigating judges and, in addition, that he has no plans to conduct any further preliminary investigations into additional suspects at the ECCC.<sup>63</sup>

The chamber issued a complicated ruling which contained a unanimous description of the case and decisions on preliminary issues, and separate opinions by the international and Cambodian judges on the substantive issues. Noting the presumption that prosecutions go forward unless the court rules with a supermajority to prevent that result, the chamber placed the burden of persuasion on the national prosecutor to establish a valid reason to prevent the submissions from moving forward. The Cambodian prosecutor originally claimed that additional investigations were inconsistent with the *Agreement*, would undercut reconciliation in Cambodia, and were inconsistent with court's budget constraints as her basis for objecting to the additional submissions. She did not dispute the sufficiency of the evidence to support proceeding against the named persons.<sup>64</sup>

The Cambodian judges offered two reasons why the five additional names should not go forward. First, they accepted an argument of the Cambodian prosecutor that she did not know about or participate in the preliminary investigation of any of the additional suspects. They found that a "unilateral" preliminary investigation is a violation of *Agreement* and the internal rules and therefore is invalid.<sup>65</sup>

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<sup>61</sup> Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 72, 18 August 2009, [http://www.eccc.gov.kh/english/cabinet/courtDoc/425/Public\\_redacted\\_version\\_and\\_Considerations\\_of\\_the\\_PTC\\_regarding\\_the\\_Disagreement\\_between\\_the\\_Co-Prosecutors\\_pursuant\\_to\\_Internal\\_Rule\\_71\\_\(English\).pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/425/Public_redacted_version_and_Considerations_of_the_PTC_regarding_the_Disagreement_between_the_Co-Prosecutors_pursuant_to_Internal_Rule_71_(English).pdf), and Corrigendum. August 31, 2009, [http://www.eccc.gov.kh/english/cabinet/courtDoc/426/Corrigendum\\_to\\_the\\_Considerations\\_of\\_the\\_PTC\\_Regarding\\_the\\_Disagreement\\_Between\\_the\\_Co-Prosecutors\\_Pursuant\\_to\\_Internal\\_Rule\\_71.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/426/Corrigendum_to_the_Considerations_of_the_PTC_Regarding_the_Disagreement_Between_the_Co-Prosecutors_Pursuant_to_Internal_Rule_71.pdf). (jointly "Disagreement Ruling").

<sup>62</sup> *Agreement*, Article 6(4), Rule, 71, (4).

<sup>63</sup> Statement of the Acting International Co-Prosecutor, "Submission of Two New Introductory Submissions," December 8, 2009 at [http://www.eccc.gov.kh/english/news.view.aspx?doc\\_id=310](http://www.eccc.gov.kh/english/news.view.aspx?doc_id=310).

<sup>64</sup> Statement of the Co-Prosecutors, January 5, 2009 at [http://www.eccc.gov.kh/english/cabinet/pres/84/Statement\\_OCP\\_05-01-09\\_EM.pdf](http://www.eccc.gov.kh/english/cabinet/pres/84/Statement_OCP_05-01-09_EM.pdf).

<sup>65</sup> There was considerable discussion in the press at least six months preceding the date Chea Leang claims she was aware of the investigation about the possibility of naming additional accused demonstrating



The international judges dismiss this argument on the ground that it was first submitted on May 22, 2009 and therefore could not be considered as part of the disagreement which was outlined by the parties beginning in November of 2009.<sup>66</sup>

As their second basis for rejecting the additional submissions, the Cambodian judges found that the submissions related to facts already before the investigating judges in Case 002. They stated that the prosecutors' initial submission in Case 002, which named as suspects Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith and covered facts that "occurred in Cambodia territory during the period of Democratic Kampuchea from 17 April 1975 to 6 January 1979, which resulted in the death of between 1.7 and 2.2 million people," is so inclusive that it essentially covers all crimes within the jurisdiction of the court and thus prevents the prosecutors from making any additional submissions of crimes or suspects.<sup>67</sup>

Rejecting this argument, the international judges pointed out that both prosecutors limited their original submission in Case 002 to specific crime sites and made formal supplementary submissions when they wanted the investigating judges to investigate additional crime sites or crimes.<sup>68</sup> The judges concluded that a submission interpreted as expansively as described by the Cambodian judges would be too broad to meet the specificity requirement of the internal rules. Further, they pointed out that if the prosecutors had tried to merely add the names of additional subjects to the existing investigation in Case 002, the rights of both the current accused in that case, as well as any new accused, would likely be prejudiced as the Case 002 investigation has been proceeding for over two years and further delay to accommodate additional accused would likely be prejudicial.

Neither the international nor the Cambodian judges address any of the original three reasons raised by the Cambodian prosecutor in the joint press statement of the prosecutors to justify her refusal to participate in that additional submission.<sup>69</sup> After concluding that Chea Leang's claim that she did not know about the preliminary investigation and that the submissions were already subsumed in the Case 002 investigation were appropriate grounds for refusing the additional submissions, the Cambodian judges found that no purpose would have been served by considering the original grounds as it would not allow the court to obtain a dispositive super majority

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that Petit was open with the press about his intentions. See, for instance, Erika Kinetz, "ECCC To Name More Defendants: Prosecutor," *The Cambodian Daily*, June 13, 2008; Mean Veasna, "Tribunal to Investigate More Former Leaders," *VOA Khmer*, June 13, 2008; and Douglas Gillison, "KRT Budget Shortened, Lowered to \$142.6M," *The Cambodia Daily*, June 22, 2008 (indicating discussion of additional suspects in the context of budget planning).

<sup>66</sup>Disagreement Ruling, International Judges Opinion para 28.

<sup>67</sup>Disagreement Ruling, Cambodian Judges Opinion, para 26.

<sup>68</sup> The international prosecutor asserts that this argument, like the above argument, was raised by the Cambodian prosecutor well after the issues of the disagreement were outlined by the parties. Disagreement Ruling, Joint Opinion, para. 39.

<sup>69</sup> Statement of the Co-Prosecutors, January 5, 2009 at [http://www.eccc.gov.kh/english/cabinet/pres/84/Statement\\_OCP\\_05-01-09\\_EM.pdf](http://www.eccc.gov.kh/english/cabinet/pres/84/Statement_OCP_05-01-09_EM.pdf).

vote that the new submissions should not go forward. The international judges stated it would not serve any purpose for them to address issues not addressed by the Cambodian judges.

Concerns raised by observers that the Cambodian prosecutor's unwillingness to agree to the additional submissions was influenced by improper political considerations or instructions were bolstered by repeated statements by high government officials that additional accused would not be permitted or would create problems for the country.<sup>70</sup> The international prosecutor apparently did not raise concerns about political interference in the pleadings he filed regarding the disagreement, which were not made public. The Pre-Trial Chamber therefore did not address them. As a result, the chamber's 42-page ruling allows the additional submissions to go forward by virtue of the default provisions of the *Agreement* regarding the absence of a super majority, but does not air any issues of real public concern underlying the disagreement.

Finally, the portion of the ruling that addresses the confidentiality of Pre-Trial Chamber decisions on disagreements between the prosecutors or the investigating judges provides reason for concern. In contrast to internal rule 71 (4) (a) that provides that decisions of the Pre-Trial Chamber should be handed down *in camera*, the *Agreement* provides that such a decision of the chamber shall be communicated to the Director of Administration who “shall publish it and communicate it to the Co-Prosecutors.”<sup>71</sup> The chamber does not expressly acknowledge that the terms of the *Agreement*, a foundational document of the court, takes precedent over the internal rules. Instead it notes that the *Agreement* “does not specify to whom and when a decision shall be published” as grounds for its conclusion that judicial decisions on disagreements between prosecutors or investigating judges need be made public only at the discretion of the Director of Administration.<sup>72</sup> This remarkable refusal to recognize that “publish” means “to make public” defies the common meaning of the word<sup>73</sup> as well as its context within the *Agreement* which provides at Article 12 (2): “*In the interest of securing a fair and public hearing and credibility of the procedure*, it is understood that representatives of Member States of the

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<sup>70</sup> Speech recorded and broadcast by Voice of America, March 18, 2009. A recent survey conducted by the Documentation Center of Cambodia indicated that a significant majority of Cambodians support trying additional suspects because of the vast nature of the crimes committed by the Khmer Rouge. See Therith Chey, “A Thousand Voices – Questions on Additional Prosecutions as Proposed by the Co-Prosecutors of the ECCC,” Documentation Center of Cambodia, March 5, 2009; Neth Pheaktra and Georgia Wilkins, “Judges should Focus on Current KR Suspects: Gov’t,” *The Phnom Penh Post*, March 12, 2008.

<sup>71</sup> *Agreement*, Article 7(1) (emphasis added).

<sup>72</sup> Disagreement Decision, Joint Opinion, para. 53.

<sup>73</sup> See general definitions of “publish”: Merriam-Webster Online Dictionary: “1 a : to make generally known; b : to make public announcement of; 2 a : to disseminate to the public; b : to produce or release for distribution; *specifically* : print; 2c c : to issue the work of (an author)” at <http://www.merriam-webster.com/dictionary/publish>. Compact Oxford English Dictionary: “verb: 1. prepare and issue (a book, newspaper, piece of music, etc.) for public sale; 2. print in a book, newspaper, or journal so as to make generally known; 3. announce formally; 4. Law communicate (a libel) to a third party... — origin Latin, *publicare* ‘make public,’” at [http://www.askoxford.com/results/?view=dev\\_dict&field-12668446=publish&branch=13842570&textsearchtype=exact&sortorder=score%2Cname](http://www.askoxford.com/results/?view=dev_dict&field-12668446=publish&branch=13842570&textsearchtype=exact&sortorder=score%2Cname); Dictionnaire de la Langue Francaise, “Publier, Verbe transitive, Sens 1, Rendre public,” at <http://www.linternaute.com/dictionnaire/fr/definition/publier/>.

United Nations, of the Secretary-General, of the media and of national and international non-governmental organizations will at all times have access to the proceedings before the Extraordinary Chambers. Any exclusion from such proceedings in accordance with the provisions of Article 14 of the Covenant shall only be to the extent strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice” (emphasis added).

In leaving the determination as to whether to publish its decisions to the Director of the Administration, with the suggestion that he publish a redacted version of its opinion, the chamber emphasizes that the publication is discretionary but provides no standards for the exercise of that discretion. This bizarre interpretation of the mandate in the *Agreement* that Pre-Trial Chamber rulings be published further entrenches the custom of unnecessary secrecy that undermines confidence in the court.

### ***Civil Party Participation***

Following the September 2009 plenary of the ECCC judges, the court announced certain rule changes related to civil party participation<sup>74</sup> These changes address concerns raised by the judges themselves as well as outside observers that civil party participation practices in the Duch trial needed improvement to better meet the legitimate needs of the victims, respect the rights of the accused, and contribute to a more efficient trial process. While adopting some rule changes in the September plenary, other proposed changes were announced preliminarily as the judges continue to finalize the details of rule changes needed to implement them. The announced changes include:

- A single claim for collective and moral reparation will be formulated for all civil parties, who will constitute a single, consolidated group. Lead co-lawyers, “supported by” civil party lawyers will represent the consolidated group. Special procedures to address any conflicts of interest will be formulated.
- Unspecified supplementary forms of victim participation, which will occur outside of formalized court proceedings, will be implemented.
- Civil party applications can no longer be submitted to the Trial Chamber. The deadline for the filing of civil party applications is now 15 days after notification of the conclusion of the judicial investigation. For Case 002, the close of the investigation is expected to occur by the end of 2009. The investigating judges will rule on the admissibility. Parties and victims may appeal orders by the investigating judges in relation to the admissibility of civil party applications under an expedited appeal process. No challenge to the admissibility of civil parties will occur at the trial stage.

The judges are seeking input from current civil party lawyers and civil society for the final rules to implement these changes. They plan to adopt the implementing rules at a plenary planned for late January 2010.

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<sup>74</sup> ECCC Press Release, “Sixth Plenary Session Concludes,” September 11, 2009 at [http://www.eccc.gov.kh/english/news.view.aspx?doc\\_id=311](http://www.eccc.gov.kh/english/news.view.aspx?doc_id=311).

A major challenge implicated by the adoption of these proposals is the limitation of legal representation at trial of all civil parties to a single co-lawyer team, consisting of one international and one Cambodian lawyer. This plan raises two main issues: 1) who pays for, hires and has ultimate authority over the lead lawyers; and 2) what is the nature of the lawyer-client relationship between civil parties, their chosen lawyer, and the lead lawyer team if all civil parties are “forced” to be represented by the designated team. The judges will need to answer these questions in revised rules and practice directives.

A significant practical problem in the changes adopted in the September 2009 plenary arises from the imminent cut off date for civil party applications in Case 002.<sup>75</sup> The new cut off date for victims to apply for civil party status is scheduled to occur by mid January 2010 for Case 002. The investigation process is secret, and it was not until November 5, 2009 that the investigating judges released information about the scope of the investigation and the factual basis likely to be covered by an indictment, so that victims could determine if they are likely to qualify as civil parties with a direct relationship to facts included in the final indictment.<sup>76</sup> This leaves the Victims Unit of the court, and civil society groups that work with victims, an unreasonably short time to adequately inform victims in Cambodia and elsewhere of their potential civil party rights.

Severely shortening the deadline for civil party applications eases the burden on the Trial Chamber of dealing with civil party applications. However, it will also result in a considerably reduced number of applications. By eliminating the period after a final indictment is published, when interest is likely highest and victims have adequate information to determine if they meet the qualifications to become a civil party, a large number of eligible victims will have no practical ability to participate in the case.

The proposed and recent changes to the rules governing civil party participation signifies a move from classic *individual* civil party representation toward a system with many more attributes of *group* representation of victims. In many ways, such changes are appropriate to the circumstances of the ECCC where a majority of Cambodians can claim to be victims. The domestic model of active civil party participation by each individual damaged is not feasible. The Duch trial well illustrated how even a relatively limited number of individual civil party participants is difficult to manage.<sup>77</sup>

The court’s move toward a system of group representation of civil parties is balanced, at least on paper, by a commitment to “supplementary forms of victim participation, which will occur outside of formalized court proceedings.”<sup>78</sup> This is a reasonable balance in a mass atrocity trial. While it is necessary to modify individual civil party participation, it is necessary to honor the need and desire of a great number of people in Cambodia it

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<sup>75</sup> Rule 23.

<sup>76</sup> See official ECCC press release, “The Co-Investigating Judges Release Information about Scope of Investigation in Case 002,” November 5, 2009, at [http://www.eccc.gov.kh/english/news.view.aspx?doc\\_id=322](http://www.eccc.gov.kh/english/news.view.aspx?doc_id=322).

<sup>77</sup> See OSJI, August 2009 Report, page 6.

<sup>78</sup> See ECCC Press Release, “Sixth Plenary Session Concludes,” September 11, 2009 at [http://www.eccc.gov.kh/english/news.view.aspx?doc\\_id=311](http://www.eccc.gov.kh/english/news.view.aspx?doc_id=311).

participate in the proceedings in ways that include: 1) receiving ongoing information about the process; 2) being provided opportunities to attend proceedings; and 3) having the opportunity to tell and preserve the story of their experience during the Khmer Rouge period. The court must not neglect its commitment to victims in this regard as it finalizes rule changes, budgets, and work plans.

### ***Legacy and Outreach***

Under the timetable currently established for Case 002, the investigating judges are expected to issue a closing order and/or indictment in September 2010. This is subject to appeal by the prosecutors. Assuming the case against the senior leaders results in an indictment, it appears unlikely that any trial in Case 002 would begin before March 2011 at the earliest. The court will have an 18-month period with no trial. This creates both a need and an opportunity for additional outreach to Cambodians about the court.

After the intense media coverage of the Duch trial, Cambodians may be discouraged and lose interest in the court if there is not ongoing, accessible information about what is happening at the court. Fortunately, the court's Public Affairs Office is developing a proactive outreach program designed to reach a large number of Cambodians with a wide range of information about court related issues. It appears that the details of this program have not been finalized but that it will likely involve programs to bring Cambodians from rural areas to the court and Toul Sleng Museum for informational tours, a weekly television show with information and experts on the court, programs with university and high school students about the goals and work of the court, and expanded and updated publications. The development of extensive activities of this kind is an important step forward in ensuring that the court is meaningful to Cambodians, but it cannot be accomplished without committed funding. The Justice Initiative urges donors, the UN, and the government of Cambodia to fully support this work with adequate funding and institutional support.

Any long gap between trials would also present an opportunity for senior staff of the court to participate in meaningful projects to ensure that the ECCC contributes to improving legal processes and practices in the domestic setting. Providing a positive example for domestic rule of law reform and practices is one of the chief advantages and justifications for a hybrid court such as the ECCC.<sup>79</sup> However, experience from other courts that address mass atrocities demonstrates that these goals cannot be achieved without a commitment of financial and high level staff resources. There are reports that the ECCC's Office of Administration is developing plans for outreach work to take advantage of the additional time some senior court staff may have between the trials to formalize work on legacy issues with appropriate partners in the domestic legal setting. As with outreach, this work takes sustained commitment of funds and will from donors, the UN, and the government of Cambodia to ensure that the opportunity is not lost. Funds and senior staff time must be committed to legacy work if the opportunity is not to be wasted and one of the major goals of the court is not to be sacrificed.

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<sup>79</sup> See "Introduction to the Khmer Rouge Trials," Third Edition, 2008, ECCC Publication at [http://www.eccc.gov.kh/english/cabinet/publications/an\\_introduction\\_to\\_Khmer\\_Rouge\\_Trials\\_3th.pdf](http://www.eccc.gov.kh/english/cabinet/publications/an_introduction_to_Khmer_Rouge_Trials_3th.pdf).

## Transparency

As several sections of this report make obvious, the lack of commitment to comprehensive transparency practices and principles at many levels in the court remains a problem. Examples where greater transparency would enhance the credibility of the court as a public institution designed to deliver justice and provide a model for courts in Cambodia include:

- **Press Briefings.** The court held regular weekly press briefings during a portion of the Duch trial, but then stopped this practice. The briefings initially appeared to be an important step forward in terms of public transparency, however, the information provided was generally superficial and self laudatory. Participants refused to answer legitimate questions on several occasions and questioners were often cut short when asking questions that the court officials did not want to answer.<sup>80</sup>
- **Regular Information about the Progress of Judicial Investigations.** As can be seen from the discussion above regarding the deadline for civil party applications, the lack of meaningful and timely information about the nature and progress of the judicial investigation severely limits the ability of victims to exercise their rights as civil parties. More broadly, the court should take greater heed of the fact that the confidentiality of the pre-trial stage is limited to the purpose of preserving “the rights and interests of the parties.”<sup>81</sup> Information “deemed essential to keep the public informed of the proceedings and to rectify false or misleading information” should be made public.<sup>82</sup> The court does not regularly follow these mandates.<sup>83</sup> Limited information is made available about the ongoing work of the court and there are no obvious criteria or procedure to ensure that information that is not appropriately confidential is released.
- **Required publication of Pre-Trial Chamber decisions, redacted if necessary to protect the rights of accused.** The Pre-Trial Chamber decision, discussed above, resolving the disagreement between the prosecutors over whether to pursue additional suspects, holds that the decision about whether to publish the ruling of the court is a discretionary one that lies with the Office of Administration. Not only is this contrary to the language of the *Agreement*, which mandates publication of such decisions,<sup>84</sup> but it is inappropriate that an administrative official is given discretion, with no guidance to prevent it from being arbitrary, about whether to publish a court decision or ruling—especially one that relates to the core work and credibility of the court.

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<sup>80</sup>See, for instance, J.B., “TKR, Campagne de Non-communication,” *Cambodge Soir*, September 17, 2009, at [http://www.cambodgesoir.info/index.php?option=com\\_content&view=article&id=36154:tkr-campagne-de-non-communication&catid=39:khmer-rouge&Itemid=44](http://www.cambodgesoir.info/index.php?option=com_content&view=article&id=36154:tkr-campagne-de-non-communication&catid=39:khmer-rouge&Itemid=44).

<sup>81</sup> Rule 56 (1).

<sup>82</sup> Ibid.

<sup>83</sup> The recent release of limited documents by investigating judges surrounding the summonses of governmental officials and the motions to disqualify Lemonde is a welcome exception, but is incomplete and apparently designed to serve legitimate purposes of the investigating judges other than general transparency.

<sup>84</sup> *Agreement*, Article 12 (2).



Rule changes to mandate publication of court decisions in accordance with the *Agreement* should be adopted.

Statements by high-ranking government officials and fairness challenges by parties have raised concerns about whether the court is operating free of improper outside interference and bias. If these allegations are untrue, the only way that the court will convince Cambodians and others of that fact is by dramatically increasing the transparency of its work. When the court hides behind secrecy on the pretence that it is necessary to protect the rights of witnesses, suspects, and accused, the suspicions raised by the statements of some government officials and the concerns raised by defense counsel are given increased credence.

The ECCC would be well served by a comprehensive review of its policies and procedures for disclosing information. Such a review might help the court to strike a better balance between the legitimate needs of a court to keep certain information confidential at certain times,<sup>85</sup> and the right of people to have access to information about their public institutions. A better balance would also help the court preserve credibility by demonstrating that it is not hiding behind a cloak of secrecy. Recognizing that secrecy was one of the trademarks of the Khmer Rouge regime, the ECCC, in its efforts to expose the horrors of the regime, should operate more openly. The people of Cambodia—and the integrity of the ECCC—would be better served by more transparency.

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<sup>85</sup> Secrecy and confidentiality in portions of court proceedings, including those at the ECCC, are necessary to protect 1) the rights of accused persons; 2) witnesses and others providing information; and 3) the integrity of ongoing investigations. These goals are of considerable importance and a court must have the ability to close proceedings and protect information in order to respect them. However, policies about secrecy must be balanced against the high value in transparency of public institutions generally and the unique goals and circumstances of the ECCC.

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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: anticorruption, equality and citizenship, freedom of information and expression, international justice, national security and counter-terrorism, and national criminal justice. Its offices are in Abuja, Brussels, Budapest, Freetown, London, New York, and Washington DC.

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E-mail: [info@justiceinitiative.org](mailto:info@justiceinitiative.org)

**Abuja**

Plot 1266/No.32  
Amazon Street  
Maitama, Abuja, Nigeria  
Phone: +234 9 413-3771  
Fax: +234 9 413-3772

**Budapest**

Oktober 6. u. 12  
H-1051 Budapest, Hungary  
Phone: +36 1 327-3100  
Fax: +36 1 327-3103

**Brussels**

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

**London**

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

**New York**

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

**Washington DC**

1120 19th Street, N.W, 8th Floor.  
Washington, DC 20036 USA  
Phone: +1 202 721 5600  
Fax: +1 202 530 0128

[www.justiceinitiative.org](http://www.justiceinitiative.org)



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