

# **The Duch Trial**

**at the**

**Extraordinary Chambers  
in the Courts of Cambodia**

March 2009

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**JUSTICE INITIATIVE**

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# Who Is Duch and Why Is He on Trial?

On March 30, 2009, Duch—the commander of Tuol Sleng, the notorious Khmer Rouge torture center—will be the first person to face justice at the Extraordinary Chambers in the Courts of Cambodia (ECCC). Duch, formally known as Kaing Guek Eav, is the first of five people currently slated for prosecution for Khmer Rouge crimes committed between April 17, 1975 and January 6, 1979 which resulted in the deaths of 1.7 million people due to starvation, torture, extrajudicial killings, disease, and overwork.

Tuol Sleng was a main torture center where real and perceived enemies of the Democratic Kampuchea leadership were taken for interrogation, forced confessions of their alleged wrongdoing, and—for all but a handful of an estimated 14,000 prisoners—“smashing” (the Khmer Rouge term for execution). Duch, who is now sixty-six years old, was at various points during the Khmer Rouge reign, in control of Tuol Sleng or second-in-command there. The ECCC indictment details horrific torture and execution techniques practiced at the prison against suspected enemies and their families, including children.

Based on his role at Tuol Sleng, Duch is charged with two sets of international crimes:

- **Crimes against Humanity**, including mass imprisonment, enslavement, torture, rape, murder, extermination, persecution, and other inhumane acts.
- **Grave Breaches of the Geneva Conventions of 1949** (“War Crimes”), including willful killing, torture or inhumane treatment, willfully causing great suffering or serious injury to body or health, willfully depriving a prisoner of war or civilian the rights of fair and regular trial, and unlawful confinement of civilians.

He is also charged with two national crimes under Cambodian law—murder and torture—both of which were added by the Pre-Trial Chamber based on factual findings of the investigating judges. Although a press statement issued by the co-prosecutors following their initial submission indicated that Duch and the other four defendants would be charged with genocide, the charge was not included when his case was separated from that of the other four. Duch does not face genocide charges.

Duch, a former mathematics teacher, joined the Khmer Rouge communist movement in the 1960s, and headed another security office called M13 between 1971 and 1975 before taking up his Tuol Sleng post. He remained in the Khmer Rouge movement for more than ten years after the Khmer Rouge was ousted from power in January 1979, including during a teaching stint in China between 1986 and 1988. After he returned to Cambodia, he began to lose touch with the Khmer Rouge commanders in the 1990s, became a school teacher, bred pigs, and traded rice. After his wife was killed in a burglary in November 1995, Duch converted to Christianity in 1996, fled to Thailand during renewed Khmer Rouge hostilities, and joined an international non-government organization. He was identified by journalists in May 1999 and was arrested that same month by the Cambodian military.

# Who Were the Khmer Rouge?

The Communist Party of Kampuchea (CPK), otherwise known as the Khmer Rouge, took control of Cambodia on April 17, 1975. The CPK created the state of Democratic Kampuchea in 1976 and ruled the country until January 1979. A few days after they took power in 1975, the Khmer Rouge forced up to two million people in Phnom Penh and other cities into the countryside to undertake agricultural work.

The Khmer Rouge attempted to implement a radical Maoist and Marxist-Leninist transformation program. The purported goal was to transform Cambodia into a rural, classless society in which there were no rich people, no poor people, and no exploitation. Instead, nearly everyone was deprived of basic human rights.

While in power, the Khmer Rouge set policies that disregarded human life and dignity, and produced murder, repression, and profound suffering on a massive scale. They arrested and killed thousands of soldiers, military officers, and civil servants from the former Khmer Republic regime led by Marshal Lon Nol. Over the three years and nine months of their reign, the Khmer Rouge executed hundreds of thousands of intellectuals; city residents; members of minority groups such as the Cham, Vietnamese, and Chinese; and many of their own soldiers and party members, who were accused of being traitors. Many were held in prisons, where they were detained, interrogated, tortured, and executed. The most important prison in Cambodia, known as Tuol Sleng or S-21, held approximately 14,000 prisoners during the nearly four years it was in operation. Only 12 prisoners are believed to have survived imprisonment there.

Additional details on historical and political background of the Khmer Rouge and an extensive summary of the factual allegations against Duch are included in the Closing Order and Indictment of Duch issued by the investigating judges

([www.eccc.gov.kh/english/cabinet/courtDoc/115/Closing\\_order\\_indicting\\_Kaing\\_Guek\\_Eav\\_ENG.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/115/Closing_order_indicting_Kaing_Guek_Eav_ENG.pdf)), as amended by the Pre-Trial Chamber decision adding charges of murder and torture under Cambodian law

([www.eccc.gov.kh/english/cabinet/courtDoc/198/D99\\_3\\_42\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/198/D99_3_42_EN.pdf)).

# Why Was the Extraordinary Chambers in the Courts of Cambodia (ECCC) Created?

The Extraordinary Chambers in the Courts of Cambodia (ECCC), set in Phnom Penh, is tasked with prosecuting senior leaders and those most responsible for crimes committed by the Khmer Rouge regime between April 17, 1975 and January 6, 1979. The court represents the first serious effort—thirty years after the crimes—to bring some measure of justice for the massive suffering and deaths of approximately 1.7 million people under Khmer Rouge rule. Its unique structure as a court formally embedded in the Cambodian domestic system but with international participation at all levels and a commitment to comply with international standards of justice is an experiment in the development of mechanisms to secure legal accountability for mass atrocities.

The court is the result of long negotiations between the United Nations and the Cambodian government, which were complicated by differing views about whether the ECCC would be primarily an international tribunal or a domestic court. Negotiations finally concluded with the passage of the *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, in 2001 and amended in October 2004,<sup>1</sup> and an *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*, signed in June 2003 and amended in October 2004.<sup>2</sup> The government of Cambodia insisted that a majority of the judges in each chamber of the court be Cambodian. The UN negotiators were concerned that widespread reports of corruption and a lack of independence and capacity in the domestic Cambodia court system would prevent the court from delivering justice and meeting international standards. The compromise evidenced in the *Law* and the *Agreement* is a court with a majority of Cambodian judges, a largely dual administration system, and international and Cambodian co-prosecutors and co-investigating judges. A requirement that the chambers of the court make decisions by “super majority” vote—4 out of 5 votes on the Pre-Trial and Trial Chambers and 5 out of 7 votes on the Supreme Court Chamber—is built in as a check and to guard the independence and integrity of the court by ensuring no significant decision is made without the concurrence of at least one international judge.

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<sup>1</sup> Referred to as the *Law* and found at:

[www.eccc.gov.kh/english/cabinet/law/4/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf) .

<sup>2</sup> Referred to as the *Agreement* and found at:

[www.eccc.gov.kh/english/cabinet/agreement/5/Agreement\\_between\\_UN\\_and\\_RGC.pdf](http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf).

# Why Is Duch's Trial So Important?

The ECCC exists to provide fair and impartial justice to the victims of Khmer Rouge crimes and to each and every accused in a domestic court system not known for its fairness and independence. Duch's trial—the court's first—is perhaps the most carefully watched demonstration of whether that goal is likely to be realized in Cambodia.

The ECCC offers a new form for delivering international justice. As a war crimes court based in the country in which the crimes were committed, and set up as part of Cambodia's national justice system, it has the potential to serve as a model for future "hybrid" courts that combine national and international elements.

Indeed, in recent months, advocates have proposed establishing a hybrid court in Sudan as an alternative to the prosecution of its president, Omar al-Bashir, by the International Criminal Court. A hybrid tribunal has also been proposed for Kenya as a way to address the post-election violence of 2007. The ECCC's structure, procedure, and operations are being looked to by many, but already there are concerns about the precedent the ECCC is setting. According to one Kenyan civil society activist: "A substantive treaty-based hybrid tribunal for Kenya should be pursued, however, with adequate inbuilt guarantees. It cannot be controlled by the Kenyan government, or it would lose legitimacy, as is happening in the Cambodia Extraordinary Chambers."<sup>3</sup> Meanwhile, former Special Rapporteur for Human Rights in Cambodia Yash Ghai also saw lessons for Kenya in the ECCC experience: "If the national regime is not interested in the punishment of perpetrators of crimes against humanity, and particularly if important members of the government may have been implicated in the violence, it is exceedingly hard for the international community, particularly through a hybrid tribunal, to ensure that justice is done."<sup>4</sup>

Widespread suspicions of political interference and corruption affecting the ECCC judicial process have yet to be convincingly dispelled. Both the international community and the people of Cambodia will be watching the Duch trial for evidence that the court is operating with judicial independence and professionalism from all parties.

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<sup>3</sup> Quote from Wainaina Ndungu, chief executive of the International Center for Justice and Conflict (a grouping of Kenyan civil society organizations) in "Kenya: Civil Society Proposes Hybrid Tribunal for Kenya," *Afrique en Ligne*, February 13, 2009, available at <http://www.afriquejet.com/news/africa-news/kenya:-civil-society-proposes-hybrid-tribunal-for-kenya-2009021321916.html>.

<sup>4</sup> Yash Ghai, "The Khmer Rouge Tribunal: Lessons for Kenya?" *Pambazuka News*, February 26, 2009, available at <http://www.pambazuka.org/en/category/comment/54416>.

# Why Is Transparency So Critical for this Trial?

The ECCC has been plagued by concerns about political interference, secrecy about its operations, delays, and corruption, which undermine the court's credibility. To build a reputation as a credible court that serves the justice needs of the people of Cambodia, the ECCC must address each of these concerns openly and transparently. Many in Cambodia and elsewhere will be looking to the Duch trial for evidence that the court fulfills its goals by holding a public and impartial trial that meets international standards, helps the people of Cambodia better understand the history of the Khmer Rouge period, and demonstrates a model of independent justice and impunity for domestic courts.

As in many legal systems, much of the pre-trial investigative phase of the cases before the ECCC is confidential. The ECCC has also conducted little public outreach. As a result, the public has received relatively limited information about the court's operations since its launch in July 2006. A January 2009 survey found that 85 percent of Cambodians had either limited or no knowledge of the ECCC.<sup>5</sup> The trial of Duch will be the first opportunity for the public to see the evidence developed by the court over the last two and a half years.

Unlike the four other defendants who have been charged by the ECCC, Duch has cooperated with the investigation and has admitted responsibility for many of his crimes. He will be the single defendant in this first trial. The trial should bring to light considerable physical and documentary evidence concerning the operation of Tuol Sleng Prison.

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<sup>5</sup> See Human Rights Center, University of California, Berkeley, *So We Will Never Forget: A Population-Based Survey on Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia*, p.36: "Nationally, 39 percent of respondents had no knowledge of the ECCC while 46 percent had only limited knowledge."

# How Does the ECCC Work?

## ***Basic Structure of the ECCC***

The ECCC consists of prosecution, chambers, defense, and administrative sections, with international and Cambodian staff in each,

Prosecutors initiate proceedings by requesting investigating judges to perform a complete judicial investigation of the crimes prosecutors describe. Following this investigation, the investigating judges, if appropriate, issue an indictment and send the case to the Trial Chamber. At this stage, the prosecutors are responsible for prosecuting the case before the Trial Chamber.

The court has a Pre-Trial Chamber, a Trial Chamber, and a Supreme Court Chamber. The Pre-Trial Chamber handles appeals from the parties during the investigative stage of the proceedings as well as disagreements between the co-prosecutors and the co-investigating judges. The Trial Chamber presides over the public trial of cases, and the Supreme Court Chamber handles appeals of Trial Chamber decisions.

The Pre-Trial and the Trial Chamber each consist of five judges: three Cambodian judges (one of whom serves as president) and two international judges. The Supreme Court Chamber consists of seven judges: four Cambodian judges (with one as president) and three international judges.

Decisions of each chamber, including a verdict of guilty by the Trial Chamber, must be achieved by either unanimity or a “super majority” (i.e. majority plus one) vote. If a super majority vote to convict cannot be reached by the Trial Chamber at the close of a trial, the accused will be acquitted. Each chamber is required to publish written opinions and dissents for all judgments.

At the Pre-Trial stage, the super majority voting requirement is accompanied by a requirement that prosecutions and investigations move forward in the event of a disagreement between Cambodian and the international prosecutors or investigating judges unless a super majority of 4 out of 5 judges vote to stop the process.

The administrative arm of the court handles not only administrative and financial issues, including staffing of the court, but also victim participation and victim and witness protection.

All defendants are represented by both domestic and international defense lawyers.

The official languages of the court are Khmer, English, and French.

## ***Procedure of the Trial***

The judges of the ECCC adopted a set of internal rules to guide their work. In many respects these rules embody the civil law legal tradition of Cambodian domestic criminal procedures. But they differ where necessary to accommodate the unique characteristics of the ECCC and to satisfy established international standards for fair trials. The internal rules can be found at [www.eccc.gov.kh/english/internal\\_rules.aspx](http://www.eccc.gov.kh/english/internal_rules.aspx).



The rules anticipate a lengthy pre-trial stage, followed by a relatively short trial. They imply that the accused will be the first person to testify at trial after opening statements. The judges will initially question the witnesses, including the accused. The prosecution and defense lawyers can then question the witnesses with the permission of the judges. Civil parties—victims of the Khmer Rouge who register as official participants in the trial—will not be allowed to question the accused or witnesses directly, but may submit questions for the judges to ask.

The internal rules state that except for certain evidence expressly excluded, such as communications between attorney and client, “all evidence is admissible.” However, the judges may limit evidence that is repetitive or not helpful in proving the claims before the court.

At the close of the evidence, the parties will make closing statements, and the judges will deliberate privately before issuing a written judgment.

### ***Witness Protection***

The likely need to protect witnesses who testify at trial was foreseen by the *Agreement* and the internal rules. It is expected that the ECCC will draw on the practice of protective measures developed at other international criminal tribunals. The court is likely to order confidentiality of the identity of certain witnesses, closed trial sessions, image and/or voice distortion, or video-conferencing as ways to deal with risks to the safety of certain witnesses.

The Witness and Expert Support Unit is the section of the court responsible for the well being of witnesses. The unit’s function is to advise the ECCC on appropriate measures for the protection and support of witnesses, including psychological issues.

### ***Sentencing Options***

The maximum sentence that can be imposed by the ECCC is life in prison; the minimum sentence is five years. In addition, the court may order confiscation of property or money that has been acquired through criminal conduct by the defendant. The *Agreement* provides that confiscated property will be turned over to the Cambodian state. Finally, the court may order moral or symbolic reparations to civil parties.

# Who Is Involved in the Trial?

## ***Trial Judges of the ECCC***

- **Nil Nonn**, Cambodia, is the president of the ECCC Trial Chamber as well as the president of Siem Reap Court. He received a Bachelor in Law in Vietnam.
- **Yar Sokhan**, Cambodia, previously a judge at the Phnom Penh Court, was appointed to the Bantey Meanchey Court in 2006. He received a Bachelor in Law in the USSR.
- **Thou Mony**, Cambodia, is a judge at the Cambodian Court of Appeal. He received a Bachelor in Law in Germany.
- **Silvia Cartwright**, New Zealand, was governor general of New Zealand from 2001-2006. Previously she served as a justice of the New Zealand High Court. She has been a member of the UN Committee monitoring compliance with the UN Convention to Eliminate All Forms of Discrimination against Women. She graduated with a LLB from the University of Otago in New Zealand.
- **Jean-Marc Lavergne**, France, comes to the ECCC from his position a vice president of the High Civil Court of Mans, France. He holds a Master in Private Law and Public Notary Certification.
- **Claudia Fenz**, Austria, is a reserve judge on the Trial Chamber. She has served as a judge in Austria and as a United Nations appointed judge in Kosovo.
- **You Ottara**, Cambodia, is a reserve judge on the Trial Chamber and a judge at the Cambodia Supreme Court. He received a Master of Law degree in Kazakhstan.

## ***Prosecutors and Defense Counsel***

The Cambodian lawyer Kar Savuth and the French lawyer François Roux represent Duch.

- **Kar Savuth** has practiced criminal law since 1982 and was one of the first lawyers to be admitted to the Bar Association of the Kingdom of Cambodia. He has represented persons accused of serious crimes, including former Khmer Rouge members, and has been the legal advisor to the General Secretariat of the National Assembly.
- **François Roux** has practiced law for over 35 years. He has defended four cases of genocide at the International Criminal Tribunal for Rwanda (ICTR), where he obtained a not guilty verdict in the case of *Bagilishmea*. He was a member of the defense team for Zacarias Moussaoui, convicted of conspiring to bring about the September 11, 2001 attacks in New York.

The two co-prosecutors are Chea Leang and Robert Petit.

- **Chea Leang**, Cambodia, holds a Master of Arts in Law from Germany. Prior to her current appointment she worked as a prosecutor at the Cambodia Court of Appeals.
- **Robert Petit**, Canada, has served as a legal officer in the Office of the Prosecutor of the ICTR, as regional legal advisor of the UN Mission in Kosovo in Mitrovica, as prosecutor of the Serious Crimes Unit in the UN Mission of Assistance to East Timor, and as senior trial attorney in the Office of the Prosecutor at the Special Court for Sierra Leone.

## ***Witnesses***

During the course of the trial, the Trial Chamber will rule on which of the sixty-six persons proposed by the parties as witnesses will testify. Most of the proposed witnesses have been listed by pseudonym to protect their identities, pending a risk assessment by the court to determine if it is appropriate to shield their identities from the public. Witnesses whose names have been disclosed include authors David Chandler, Nic Dunlop, and Nayan Chanda. Duch has cooperated in the investigation of the case and will likely be the first witness to testify.

## ***Victims***

As in many other jurisdictions using the civil law system, the ECCC allows victims of the crimes being tried before the court to apply to participate as civil parties. Among international and hybrid courts, only the ECCC and the International Criminal Court afford civil parties the right to take an active role in the proceedings. The goal of civil party participation is to allow victims to present their views and, within certain limits, contribute to the establishment of the facts, with the aim of making the court more meaningful to the population and promoting healing and rehabilitation.

Persons who believe they are victims of the crimes alleged in the case against Duch are entitled to apply to the court to participate in support of the case presented by the prosecutors. Twenty-eight civil parties were accepted in the Duch case by the investigating judges prior to the time the case was transferred to the Trial Chamber in December 2008. Sixty-six additional applications have been submitted to the Trial Chamber since that time. Forty-five have been provisionally accepted as parties and eleven are under consideration by the Trial Chamber. There are four teams of lawyers representing civil parties. Each team consists of both international and Cambodian lawyers. Most civil parties have chosen to be represented by one of the teams.

Unlike domestic Cambodian law where civil parties are entitled to apply for monetary compensation or reparations, the ECCC internal rules provide that civil parties are entitled to “moral or symbolic reparations” only.

The presence of civil parties in the trials of the ECCC will present the Trial Chamber with challenging questions about how to manage their participation in a manner that is genuine without impinging on the fair trial rights of the accused or causing unnecessary delay.

## Who Else Has Been Charged by the Court?

The international and Cambodian judges and prosecutors of the court were appointed by the United Nations and the Cambodian Government, respectively, in July 2006. In August 2007 the two co-prosecutors sent the names of four men and one woman to the two co-investigating judges for formal judicial investigation of crimes within the jurisdiction of the ECCC. The investigating judges ordered each of the five arrested, detained, and charged with crimes. The four persons currently charged by the court, apart from Duch, are:

**Nuon Chea**, second in command to Khmer Rouge leader Pol Pot, is currently under investigation charged with crimes against humanity including murder, torture, imprisonment, persecution, extermination, deportation, forcible transfer, enslavement, and other inhumane acts, and war crimes on the basis of grave breaches of the 1949 Geneva Conventions including willful killing, torture, inhumane acts, willfully causing great suffering or serious injury to body or health, willful deprivation of rights to a fair trial, unlawful confinement, and unlawful deportation or transfer.

**Ieng Sary**, deputy prime minister and foreign minister during the Democratic Kampuchea period, is under investigation charged with crimes against humanity including murder, extermination, imprisonment, persecution, and other inhumane acts, and war crimes on the basis of grave breaches of the 1949 Geneva Conventions including willful killing, causing great suffering or serious injury to body or health, willful deprivation of rights to a fair trial of prisoners of war or civilians, unlawful deportation or transfer or unlawful confinement of a civilian.

**Ieng Thirith**, minister of social affairs in the Democratic Kampuchea regime, is under investigation charged with crimes against humanity including murder, extermination, imprisonment, persecution, and other inhumane acts.

**Khieu Samphan**, president of Democratic Kampuchea during the Khmer Rouge period, is under investigation charged with crimes against humanity including murder, extermination, imprisonment, persecution, and other inhumane acts, and war crimes on the basis of grave breaches of the 1949 Geneva Conventions including willful killing, causing great suffering or serious injury to body or health, willful deprivation of rights to a fair trial of prisoners of war or civilians, unlawful deportation or transfer or unlawful confinement of a civilian.

As noted above, the separate case against Duch, the so-called “001 case,” has advanced more quickly than the others and the substantive trial is scheduled to begin March 30, 2009. The case against the other four charged persons, referred to by the court as the “002 case,” also includes charges against Duch but addresses a broader series of alleged crimes than those committed at Tuol Sleng Prison. The investigating judges, You Bunleng and Marcel Lemonde, are still conducting the confidential judicial investigation in the 002 case and no date has been announced for completion.

In December 2008, the international prosecutor proposed an additional six names for investigation. The Cambodian prosecutor has disagreed. The Pre-Trial Chamber has the responsibility to resolve this dispute and determine whether the investigations should go forward. Many see additional indictments as a litmus test for the ECCC’s credibility and independence.

# Related Resources

**ECCC official website:** [www.eccc.gov.kh](http://www.eccc.gov.kh)

**United Nations Assistance to the Khmer Rouge Tribunal:** [www.unakrt-online.org](http://www.unakrt-online.org)

**Open Society Justice Initiative:** <http://www.justiceinitiative.org/activities/ij/krt>  
This site contains regular monitoring reports on the trials and on the ECCC as an institution.

**Documentation Center of Cambodia:** [www.dccam.org](http://www.dccam.org)

**Cambodia Tribunal Watch:** [www.cambodiatribunal.org](http://www.cambodiatribunal.org)  
This site contains news, commentary, and video streaming of the trials.

**Berkeley War Crimes Center ECCC Monitoring Project:**  
[http://socrates.berkeley.edu/~warcrime/Cambodia\\_trial\\_monitoring\\_program.html](http://socrates.berkeley.edu/~warcrime/Cambodia_trial_monitoring_program.html)  
This site will contain weekly monitoring reports of the trials.

The Open Society Justice Initiative staff is available to comment or for interview on the Duch trial. Please contact:

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Heather Ryan, ECCC monitor and liaison: [hryan@osieurope.org](mailto:hryan@osieurope.org) (Phnom Penh)

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## JUSTICE INITIATIVE

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