

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

As the Extraordinary Chambers in the Courts of Cambodia (ECCC) prepares for the commencement of its first trial, the court stands at a crossroads. On the one hand, thirty years after the end of Khmer Rouge rule, the ECCC is poised to start delivering the justice Cambodians have long sought: it has arrested five suspects, begun preparing for their trials, and taken some steps to explain its operations to the Cambodian public. In January, the ECCC's Trial Chamber announced that the first procedural hearing in the trial of Kaing Guek Eav, a.k.a. Duch, the commander of Toul Sleng S-21 Prison, will take place on February 17, 2009. The start date for the substantive portion of the trial will be announced at that time and is expected to be in mid or late March. The beginning of this long awaited trial will provide the public with an opportunity hear direct evidence about the planning and execution of some of the most disturbing crimes of the Khmer Rouge era. The Duch trial will also enable the court to show the Cambodian public what a transparent and fair judicial process looks like.

On the other hand, the court is plagued by pressing institutional challenges that threaten to prevent it from fulfilling its mandate. How the court, the Cambodian government, the United Nations, and international donors respond to these challenges will be crucial to the ECCC's immediate future and long-term legacy.

The principal challenges now confronting the court are:

- **Relying on law and facts, not politics, in deciding how many suspects will be investigated. Currently mired in an internal dispute over the number of suspects to be tried, the court must demonstrate that it can quickly make a reasoned determination, free of political interference and in a transparent manner, on whether to investigate and charge additional suspects beyond the five now in custody.**

In December, International Co-Prosecutor Robert Petit announced his intention to widen prosecutions. Petit proposed submitting to the court's investigating judges the names of additional suspects and recommendations for charging them with crimes within the jurisdiction of the ECCC.¹ His Cambodian counterpart, Chea Leang, has refused to support the submissions. In response, Petit submitted the question of whether to move forward with the charges to the Pre-Trial Chamber, pursuant to a special dispute resolution procedure set forth in the *Agreement* between the United Nations (UN) and the government of Cambodia.² The drafters designed this unique procedure as a guard against improper political interference with decisions about whom to investigate and prosecute. The court now faces a crucial test of whether this protection is effective in guarding the independence of the court.

- **Addressing corruption complaints. Dogged for months by unresolved allegations of official corruption, the court must take aggressive action to dispel the suspicion that its staff have paid kickbacks to political overseers.**

Concerns about the court's integrity continue to fester because of long-unaddressed complaints about corruption within the ECCC. A confidential UN report, delivered to

¹ According to local media reports, Petit proposed six additional suspects. See Douglas Gillison, "International Prosecutor Seeks Ruling on KR Suspects," *Cambodia Daily*, December 9, 2008.

² 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>.

the Cambodian government in August 2008, detailed complaints of corruption at the court. But to date the United Nations and the Cambodian government have yet to put in place a plan to address these complaints. During a high-level UN visit to Cambodia in December 2008, the Cambodian government and the UN agreed to establish a joint committee to strengthen anti-corruption measures, including protecting whistleblowers, and report the results to the court's donors by January 31, 2009.³ The subsequent reports by the parties reveal that they have not made progress in agreeing on an independent process to deal with allegations of wrongdoing, and fail to even mention whistleblower protection.⁴ The UN representative from the Office of Legal Affairs, Peter Taksoe-Jensen, indicated in a press statement that he will return soon to Cambodia to address the issues again with the government of Cambodia. This lack of progress and incomplete information does not assuage public concerns.

- **Raising additional funds.** Without an infusion of new financial support, the court risks running out of funds before it can complete a single trial.

Funding remains a major problem for the ECCC—in large part because of the failure to address concerns about corruption and independence. Although the Japanese government recently pledged an additional \$21 million for the international side of the court, the Cambodian portion of the budget will to be depleted in late February or March 2009 without additional contributions.⁵ Donor funds held by the United Nations Development Programme (UNDP) for the Cambodian side of the court have been frozen at the request of donors, pending resolution of corruption complaints.⁶ This prudent action is an important part of the donors' role in ensuring the ECCC meets basic standards of integrity.

- **Strengthening the Victims Unit.** The court needs to add resources and leadership to this section in order to deal with the influx of civil party applications it has received and ensure that victims who seek to participate in the proceedings are properly acknowledged.
- **Bolstering outreach efforts.** The court must prioritize this function, in light of a recent survey that found many Cambodians are still unaware of the court, and given that the commencement of trials will increase the public's hunger for knowledge of the ECCC.

To help the court address these challenges, donors should pledge future funding adequate to ensure the completion of current investigations, including investigations that may go forward

³ See Douglas Gillison and Phann Ana, "UN, Gov't Agree to Joint Review of ECCC," *The Cambodia Daily*, December 11, 2008.

⁴ See Cambodia Report on Joint Sessions, January 31, 2009 at http://www.eccc.gov.kh/english/cabinet/fileUpload/102/Joint_sessions_report_EN.pdf, and Douglas Gillison and Prak Chan Thul, "Phnom Penh Court Halts ECCC Investigation," *The Cambodia Daily*, February 7-8, 2009.

⁵ In addition to the original budget of \$56.3 million, new budget estimates add \$44.1 million to see the court through the end of 2009. This is allocated as \$38.3million to the United Nations to be raised from voluntary contributions from member states and \$5.8 million the Cambodian side of the court to be raised by the Cambodian government either from its own resources or from donations. See Revised Budget Estimates 2005-2009, July 2008 at <http://www.unakrt-online.org/Docs/Other/2005-2009%20ECCC%20Approved%20Budget.pdf>.

⁶ See Douglas Gillison, "ECCC Funding Delayed Over Graft Claims," *The Cambodia Daily*, August 6, 2008. The UNDP funds were being used to pay salaries of Cambodian staff and judges. Funds provided separately by the Japanese government are now being used to pay these salaries until the corruption complaints are resolved.

as requested by the international prosecutor, and any resulting trials and appeals, but condition the release of funds upon the following:

- Prompt and transparent resolution of the dispute between the Cambodian and international co-prosecutors over whether to investigate and charge additional suspects.
- Implementation of genuine efforts to address existing and any future corruption allegations, including protection of those who report improper practices, and publication of the details of this procedure. In addition, donors should maintain their freeze on funds held by UNDP for the Cambodian side of the court until corruption allegations are addressed.
- Direction of a more substantial share of budgetary resources and institutional attention to the Victims Unit and to outreach efforts, to ensure that Cambodians are aware of, and where appropriate able to participate in, the work of the ECCC.

These institutional challenges confronting the court are discussed in greater detail below, followed by an examination of recent legal developments in the five pending cases.

INSTITUTIONAL CHALLENGES

Deciding How Many Suspects Will Be Investigated

Independence is the hallmark of any properly functioning judicial institution. The ECCC's founding document, the *Agreement*, expressly demands that both judges and prosecutors be "independent in the performance of their functions and . . . not accept or seek instructions from any government or any other source."⁷ Such independence is firmly established as a core international standard for fair trials by Article 16 of the 1966 International Convention on Civil and Political Rights (ICCPR), which is expressly binding on the ECCC.⁸

The nature of Cambodian Co-Prosecutor Chea Leang's opposition to investigation of additional suspects beyond the five already charged has raised concern that she may not be free to act independently in determining appropriate targets for prosecution.⁹ Her objections seemingly acknowledge the sufficiency of the evidence and legal basis for proceeding with the investigations, yet she refused to agree for reasons which are not factually supported and appear as pretext. International Co-Prosecutor Robert Petit announced on December 8, 2008 his decision to submit the names of additional suspects for prosecution before the ECCC. Chea Leang refused to agree to submit these names for investigation, explaining that "investigations should not proceed on account of (1) Cambodia's past instability and the continued need for national reconciliation; (2) the spirit of the agreement between the United Nations and the Government of Cambodia ("Agreement") and the spirit of the law that established this court ("ECCC Law"); and (3) the limited duration and budget of this court."¹⁰ Rejecting these as invalid reasons to refuse to investigate suspects for whom his office has found significant evidence of liability for crimes within the jurisdiction of the ECCC, Petit filed a "Statement of Disagreement" with the Pre-Trial Chamber requesting the judges intervene to resolve the dispute and allow the investigation of additional suspects to proceed.

⁷ *Agreement*, Article 7.

⁸ *Agreement*, Article 12.

⁹ Currently, five individuals are in ECCC custody, set to be prosecuted for responsibility for crimes committed under Khmer Rouge rule between April 17, 1975 and January 6, 1979: former head of state Khieu Samphan; Khmer Rouge ideologue Nuon Chea; former head of Tuol Sleng Prison, Kaing Guek Eav (alias "Duch"); and husband and wife pair, Ieng Sary and Ieng Thirith, both former ministers under the Khmer Rouge.

¹⁰ Statement of the Co-Prosecutors, January 5, 2009 at

http://www.eccc.gov.kh/english/cabinet/press/84/Statement_OCP_05-01-09_EN.pdf.

Procedures for resolving disputes between the two co-prosecutors or the two co-investigating judges are set out in the *Agreement*, and further detailed in the internal rules of the court.¹¹ If the two prosecutors are not able to agree on whether to submit the names of suspects for further investigation, either of them may submit the disagreement to the Pre-Trial Chamber for resolution. This method for resolving disagreements was designed as a protection against improper political interference with objective decision making about which suspects to prosecute.¹² In addition, in a key compromise intended to prevent improper interference with prosecutions going forward, the *Agreement* establishes a presumption that proposed investigations and prosecutions will advance when the two prosecutors disagree, unless there is a “super majority” vote of four out of five of the Pre-Trial Chamber judges to stop the action.¹³

David Scheffer, former US Ambassador for War Crimes and a key negotiator of the *Agreement*, recently pointed out that the dispute resolution provisions in the *Agreement* and the presumption that prosecutions would go forward in the event of a disagreement were meant to address concerns that the prosecutors might disagree “either 1) based on the merits of any particular individual being charged; or 2) because one of the co-prosecutors appears politically influenced and the other seeks the ruling of the Pre-Trial Chamber to ensure the integrity of the ECCC. Obviously, during the negotiations, concerns about political influence were dealt with delicately, but everyone knew we were building a dispute settlement mechanism to overcome either merits or political disagreement.”¹⁴ The reasons put forth by the Cambodian prosecutor justifying her decision not to proceed are not related to the merits of the evidence and so suggest that the political motivations that worried the drafters of the *Agreement* are the basis for her decision.

Of further concern is the possibility that this dispute may be settled in secrecy. Unfortunately, in July of 2007, the judges of the ECCC adopted an internal rule that any Pre-Trial Chamber decision resolving a disagreement would be handed down *in camera*, creating the possibility that written decisions on such issues will never be disclosed to the public.¹⁵ This internal rule providing for decisions *in camera* directly contradicts Article 20 of the *Agreement*, which states, “the decision [resolving such disagreements] shall be communicated to the Director of the Office of Administration, who *shall publish it* and communicate it to the Co-Prosecutors” (emphasis added). The possibility that the dispute over charging additional suspects—which speaks to the very independence of the court—would be resolved entirely in secret feeds suspicion that the court is susceptible to political manipulation, and will likely increase public cynicism about the ECCC.¹⁶

¹¹ See *Agreement*, Article 7; Internal Rules, (Rev. 2), Rule 71. The Internal Rules of the ECCC are at http://www.eccc.gov.kh/english/cabinet/fileUpload/88/IR_Revision2_05-01-08_En.pdf.

¹² See Scott Worden, “An Anatomy of the Extraordinary Chambers,” and Brad Adams, “Cambodia’s Judiciary: Up to the Task?,” in *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence before the Cambodian Courts*, edited by Jaya Ramji and Beth Van Schaak, The Edwin Mellen Press, 2005; and Craig Etcheson, “The Political Origins of the Tribunal,” in *Justice Initiatives: The Extraordinary Chambers*, The Open Society Justice Initiative, Spring 2006.

¹³ *Agreement*, Articles 6(4), and 7(4); *Law*, Article 20; See also, IR, Rule 71(4) that provides “A decision of the Chambers requires the affirmative vote of at least four judges. This decision is not subject to appeal. If the required majority is not achieved before the Chamber, in accordance with Article 20 new of the ECCC Law, the default decision shall be that the action of decision done by one Co-Prosecutor shall stand, or that the action or decision proposed to be done by one Co-Prosecutor shall be executed.”

¹⁴ David Scheffer, “How Many are too Many Defendants at the KRT?,” *The Phnom Penh Post*, January 8, 2009.

¹⁵ IR, Rule 71(4). This contrasts with the general rule that Pre-Trial Chamber’s decisions are public at IR, Rule 78.

¹⁶ Pre-Trial Chamber decisions taken in secret would also be a violation of Article 12 of the *Agreement*, which provides: “it is understood that the representatives of Member States of the 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... shall

In addition to testing the ability of the court to operate free of political interference, the investigation of additional suspects is important to fulfilling the court's goal of trying senior leaders and those most responsible for atrocities committed during the Khmer Rouge regime. As concluded by the leaders of the Cambodia Human Rights Action Committee, a coalition of leading human rights groups in Cambodia:

We do not believe that the ECCC should arbitrarily limit itself to five prosecutions [as proposed by the Cambodian co-prosecutor]. . . Without further prosecutions the ECCC will fail to deliver justice to the people of Cambodia and damage efforts to create genuine reconciliation. We fear that the efforts and achievement of the Cambodian government and people, and the international community in creating the ECCC will be squandered if the court is seen to only partially fulfill its mission . . . We urge all stakeholders in the ECCC process, including the Royal Cambodian Government and the international community, to ensure that the court is able to act independently and free of political interference or consideration, and give it full support as it acts to fulfill its mission.”¹⁷

The ECCC will not deliver justice for serious crimes if political considerations limit who can be charged by the court.

Addressing Corruption Complaints

There has been no visible progress toward addressing the complaints of corruption brought forward by court staff to the United Nations in June 2008. In August 2008, the Cambodian government indicated it did not intend to respond to the findings of a UN investigation that found further inquiry was needed. Accordingly, late last year, representatives of the UN Secretary General's office and the Office of Legal Affairs traveled to Cambodia to meet with high-level government officials, including Deputy Prime Minister Sok An, to discuss the need for cooperation on corruption. These meetings took place on December 8-10, 2008, but the participants provided little public information about the results other than a general statement that they intend to work more closely together and will report back on these efforts by January 31, 2009.¹⁸ As of February 10, there has been no further information provided, other than brief reports by the parties revealing that they have not made progress in developing an independent process to deal with allegations of wrongdoing. The UN representative from the Office of Legal Affairs, Peter Taksoe-Jensen, indicated in a press statement that he will return to Cambodia in the near future to address the issues again with the Cambodian government. This lack of progress and incomplete information does not assuage public concerns.

The apparent refusal of the Cambodian government to cooperate with the United Nations to directly address claims about corrupt practices demonstrates an unwillingness to support basic structural goals of the court. The *Agreement* sets up a partnership between the government and the UN to operate an institution that complies with international standards. Such a court must operate with sufficient integrity to provide a model for Cambodian domestic justice and other hybrid tribunals addressing mass atrocities. Cooperation between the parties on basic issues critical to the integrity of the institution is needed to justify continued investment and UN engagement with the court. The UN and donors must insist on a cooperative, transparent approach to complaints of corruption as a condition for continued support. Specifically, they

only be to the extent strictly necessary in the opinion of the chamber concerned and where publicity would prejudice the interests of justice.”

¹⁷ Statement of Cambodia Human Rights Action Committee (CHRAC), “Civil Society Calls for Investigation of Further Suspects by the ECCC,” January 14, 2009.

¹⁸ See Douglas Gillison and Phann Ana, “UN, Gov't Agree to Joint Review of ECCC,” *The Cambodia Daily*, December 11, 2008.

must insist on:

- independent and credible investigative and/or administrative action to deal with existing corruption allegations;
- establishment of joint whistleblower and witness protection measures for those who report corruption;
- establishment of a mechanism for ongoing, independent investigations of corruption allegations or other wrongdoing; and
- publication of anti-corruption programs and measures.

The UN and the court have a special obligation not to abandon those who have come forward to report wrongdoing, and to protect them from intimidation and retaliation. Given Cambodia's history of violent retaliation against those who threaten powerful political or economic interests,¹⁹ complainants justifiably fear the prospect of their identities becoming known to Cambodian court administrators and the government.

The persistence of unresolved allegations of corruption will almost certainly affect the upcoming trials, and divert attention from the crimes of the Khmer Rouge. International counsel for Nuon Chea recently filed a complaint in Phnom Penh Municipal Court requesting a criminal investigation against at least two individuals, regarding allegations of corrupt practices at the ECCC.²⁰ The complaint was dismissed by the municipal court without explanation and with no known investigation at the ECCC.²¹ The ongoing failure to deal with these allegations will continue to damage perceptions of fairness. The complaint suggests that corruption allegations will be used by defense counsel to assert that the court is not meeting international fair trial standards.

In early January, the Cambodian judges of the ECCC issued a surprising public statement concerning the filing of the criminal complaint in which they denied any implication that judges are involved in any improper actions and stated, "if the above accusation [of corruption] stems from bad faith in putting the blame on the judges, we reserve the right to legal recourse against any individuals who have provoked such a problem."²² The international defense counsel who filed the complaint objected to these statements as a form of intimidation.²³ The head of the court's Defense Support Section, Richard Rogers, pointed out that such statements could have an intimidating effect not just on persons with information about possible corrupt practices, but also on persons with evidence related to the cases before the ECCC: "If [potential witnesses at the ECCC] now see that the ECCC judges, who are meant to be the neutral guardians of fairness, are threatening to take legal action against defense lawyers, they may think twice before coming forward for fear that legal action

¹⁹ Numerous reports detail retaliation against people who speak against official corruption or other forms of wrongdoing in Cambodia. See, for instance, *Attacks & Threats Against Human Rights Defenders In Cambodia--2007*, issued August 2008, Cambodian League for Promotion of Human Rights (LICADHO) at <http://www.licadho.org/reports.php#r-127>; *Risky Business—Defending the Right to Housing*, Amnesty International, issued September 26, 2008 at <http://www.amnesty.org/en/library/info/ASA23/014/2008/en>; and *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Yash Gai*, A/HRC/7/42, February 29, 2008 at http://cambodia.ohchr.org/webdocuments/reports/SRSG_HR_rpt/SRSG_HR13022008E.pdf.

²⁰ Phorn Bopha and Katie Nelson, "Nuon Chea Defense Submits Graft Complaint," *The Cambodia Daily*, January 9, 2009.

²¹ See Douglas Gillison and Prak Chan Thul, "Phnom Penh Court Halts ECCC Investigation," *The Cambodia Daily*, February 7-8, 2009.

²² Press Release of National Judges, January 9, 2009 at http://www.eccc.gov.kh/english/cabinet/press/85/National_Judges_Press_Release_En.p.

²³ Dutch Cambodia Trial Lawyers Claim Intimidation, *Radio Netherlands Worldwide*, January 9, 2009 at <http://www.radionetherlands.nl/news/international/6128565/Dutch-Cambodia-trial-lawyers-claim-intimidation>.

will be initiated against them.”²⁴ The perception of impartiality of judges is diminished when they are seen as discouraging an ongoing judicial proceeding or investigation.

The continued failure to address corruption will likely sap public support for the ECCC. A recent survey of Cambodian attitudes toward the ECCC conducted by researchers for the Human Rights Center, University of California, Berkeley, (funded in part by the Open Society Institute and with assistance from the Open Society Justice Initiative) revealed that two thirds of respondents who are aware of the court have confidence in its fairness.²⁵ A similar percentage of respondents stated that going before a domestic court meant having to pay a bribe to the judge or the police, suggesting that respondents’ confidence in the fairness of the ECCC results from the presence of international participants.²⁶ International complacency in the face of corruption complaints and attendant challenges threatens this public confidence. The reputation and ultimate success of the ECCC rest on timely and public resolution of this core integrity issue.

Raising Additional Funds

Throughout its history, the ECCC has had a funding problem. The court’s as-yet inadequate responses to the twin challenges of corruption and political interference have not helped. The Japanese government, to date the single largest donor to the ECCC, announced an additional donation of \$21 million to the international side of the court on January 12, 2009.²⁷ This pledge still leaves the international side of the court approximately \$10 million short of funds needed to operate through the end of 2009. Funds raised for the Cambodian side of the budget are expected to run dry in late February or March of 2009, absent additional contributions.

And yet, to date, donors have not used what influence their funds provide to encourage a more effective court. A Japanese embassy representative noted that his discussions with Prime Minister Hun Sen about Japan’s recent pledge did not address the issue of corruption complaints at the court.²⁸ Japan, like other donors making recent pledges (including the US, France, and Australia), has been all too willing to contribute funds without seeking public assurances that current corruption complaints are being adequately dealt with and proper protections are in place to prevent recurrence. Donor complacency is counter-productive. Ultimately, it sends the wrong message to the government and people of Cambodia about the importance of integrity to legal institutions.

The UNDP has been administering international donor funds for the Cambodian portion of the budget of the ECCC. These funds have been frozen at the request of donors, pending a satisfactory outcome to the corruption concerns raised by a UN Office of Internal Oversight

²⁴ See Douglas Gillison and Prak Chan Thul, “KR Defense Chief: Judges Put Fairness at Risk,” *The Cambodia Daily*, January 17-18, 2009.

²⁵ Phuong Pham, Patrick Vinck, Mychelle Balthazard, Sokhom Hean, Eric Stover, *So We Will Never Forget*, Human Rights Center, University of California, Berkeley, January 2009, page 39 at <http://hrc.berkeley.edu/pdfs/So-We-Will-Never-Forget.pdf>.

²⁶ *Ibid.*, page 33.

²⁷ See Cheang Sokha and Kay Kimsong, “Japanese Gov’t Gives 21 Million to KR Court,” *The Cambodia Daily*, January 12, 2009. The court’s budget is separated into an “international side” and a “Cambodian side” with separate expenses allocated to each, according to the terms of agreements between the UN and the government of Cambodia. Of the \$46 million needed to see the court through the end of 2009, \$35.9 million was allocated for the international side and \$10.1 million for the Cambodian side.

²⁸ “Japan Pledges more Money for Khmer Rouge Tribunal,” *International Herald Tribune*, January 11, 2009, <http://www.iht.com/articles/ap/2009/01/11/asia/AS-Cambodia-Japan-Khmer-Rouge.php>.

Services (OIOS) report about kickback practices at the court.²⁹ Since these funds were frozen, in July, 2008, Japan has been the only donor government to contribute funds to the Cambodian side of the budget.³⁰ It is unclear if Japan or other donors will assist the Cambodian side of the court by authorizing release of funds held by UNDP. Donors should maintain the position that their funds not be released until adequate independent and public protections against corrupt practices are put into place, and that the additional recommendations set forth above regarding independence, assisting the Victims Unit, and bolstering outreach are followed.

Strengthening the Victims Unit

The Victims Unit continues to accept complaints from witnesses to and victims of crimes committed during the Khmer Rouge era, as well as applications from victims who wish to participate in the proceedings as civil parties. Twenty-eight civil parties were accepted in the Duch case during the course of the judicial investigation. Sixty-six additional applications were submitted to the Trial Chamber in advance of the February 2, 2009 deadline. The Trial Chamber is expected to rule on the admissibility of pending applications at the initial hearing for the Duch trial, scheduled for February 17, 2009.

There are currently 25 accepted civil parties in the case against the other four accused persons (referred to by the court as the “002” case).³¹ The Victims Unit reports that over 2,800 additional complaints and civil party applications have been received. The backlog in processing these submissions remains a problem. NGOs helping victims to file applications report they have slowed efforts in this regard because of concern that the court’s delay in contacting applicants will increase frustration on the part of victims. The Victims Unit is in the process of hiring additional staff to bolster outreach to victims and the administrative capacity to process applications. This should be a priority task for the court, as dealing with victims who seek to participate in the process is critical to the success of this court’s commitment to civil party participation.

Bolstering Outreach Efforts

The recent public opinion survey, conducted by researchers for the Human Rights Center, University of California, Berkeley, found that two-thirds of Cambodians who were generally aware of the ECCC believed it would have a positive effect on the victims of the Khmer Rouge and their families.³² Troubling however, is the finding that that 39 percent of the respondents had no knowledge of the ECCC, and nearly half (46 percent) had only limited knowledge. Fifty-three percent of those with some knowledge about the court accurately described it as a hybrid court comprising national and international judges and staff. However, 82 percent of this group were unable to name all five accused currently awaiting trial.³³

²⁹ See Douglas Gillison, “ECCC Funding Delayed Over Graft Claims,” *The Cambodia Daily*, August 6, 2008. The UNDP funds were being used to pay salaries of Cambodian staff and judges. Funds provided separately by the Japanese government are now being used to pay these salaries until the corruption complaints are resolved.

³⁰ Japan allowed the Cambodian Government to transfer \$2.8 million of development funds already paid to the ECCC. See Douglas Gillison, “KR Tribunal Donors Extend Funding Delay,” *The Cambodia Daily*, August 12, 2008.

³¹ *The Court Report*, Issue 9, January 2009, Publication of the ECCC at <http://www.eccc.gov.kh/english/publications.courtReport.aspx>.

³² *Human Rights Center Survey*, page 47.

³³ These results are not strikingly different from a February 2008 survey conducted by the International Republican Institute that found 71% of Cambodians were “aware” of the court and 69% supported it. See “Survey of Cambodian Public Opinion,” International Republican Institute, January 27- February 26, 2008 at <http://www.iri.org/asia/cambodia/2008%20May%2027%20Survey%20of%20Cambodian%20Public%20Opinion.%20January%2027-February%2026.%202008.pdf>.

The findings are encouraging because they demonstrate that Cambodians have a much higher level of confidence in the ECCC than in domestic courts and have an expectation that the court will deliver needed justice. However, the results reveal a need for the court and civil society to dramatically increase the quality and quantity of public outreach efforts. A key recommendation of the survey is:

Greatly expand and improve the outreach efforts of the ECCC. Knowledge of the ECCC nationwide should be much higher at this point in time, given that it became operational in 2006. Less than 1 percent of those who lived under the Khmer Rouge (four individuals) had participated in an ECCC-related outreach activity during the 12 months prior to the survey. Public service announcements about the court should be broadcast on radio and television. Interviews with court judges and staff should be commonplace during the trials to help explain complicated legal and judicial concepts to the public. Finally a weekly summary of trial proceedings—preferably in a talk show format that encourages debate—should be aired on both radio and television.³⁴

The beginning of the Duch trial will increase the level of media and public interest in the court and make outreach easier. Nonetheless, the results of this survey should prompt the court to dramatically increase its outreach efforts, and should encourage donors to support additional efforts by both the court and the NGO community.

LEGAL DEVELOPMENTS

Kaing Guek Eav, a.k.a. Duch

Duch is charged by the ECCC with crimes against humanity, war crimes, and murder and torture under domestic law for his actions as the head of the infamous Khmer Rouge torture center Toul Sleng (also known as S-21 Prison). The Trial Chamber will hold the initial public hearing in the case on February 17, 2009 to address preliminary issues and set a date for the beginning of the substantive trial. The substantive trial is expected to begin in March 2009.

On December 5, 2008, the Pre-Trial Chamber delivered its decision on the prosecutors' appeal of the indictment against Duch. In a 43-page decision that criticized both the investigating judges and the prosecutors, the chamber amended the indictment to add charges for pre-meditated murder and torture under Cambodian domestic law, but refused the prosecutors' request to add joint criminal enterprise (JCE) as a theory of liability in the Duch case.³⁵

The chamber added murder and torture charges under domestic law because the record disclosed evidence to support them and the investigating judges had failed to give any reasoned basis for excluding them from the indictment. The decision on whether to amend the indictment to include JCE rested on findings from other international criminal tribunals that prosecutors must plead the specific nature of the JCE they allege in order to provide the

³⁴ *Human Rights Center Survey*, page 48.

³⁵ Pre Trial Chamber Decision on Appeal against Closing Order Indicting Duch, December 05, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/198/D99_3_42_EN.pdf. (*Duch Appeal Decision*). 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. See, *Prosecutor v. Dusko Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-A, ICTY Appeals Chamber, October 2, 1995.

defendant with adequate notice of the charges.³⁶ The chamber found that the prosecution did not adequately describe their intent to claim that Tuol Sleng S-21 Prison was a separate JCE prior to the close of the investigation and thus deprived Duch of adequate notice of the nature of the JCE. Ironically, Duch's defense lawyers had not raised lack of adequate notice as a bar to the applicability of JCE. Rather, they argued that the issue of whether JCE is applicable to the case could be determined even later in the proceedings—by the Trial Court once the case is transferred.³⁷

Ieng Sary

Ieng Sary served as deputy prime minister and foreign minister during the Democratic Kampuchea period and is charged with crimes against humanity and war crimes.

Ruling on Appeal of Provisional Detention: Pardon, Amnesty, and Double Jeopardy

In August 1979 the People's Revolutionary Tribunal, established by the Vietnamese controlled forces that ousted the Khmer Rouge from Cambodia in January 1979, held a trial and found Ieng Sary guilty *in absentia* of "genocide." The court sentenced him to death. The trial was generally condemned as a sham preceding that failed to respect the most basic fair trial standards. On September 14, 1996, a royal decree was issued to induce Ieng Sary to cease hostilities and declare allegiance to the ruling government. The decree purported to pardon Ieng Sary for the genocide conviction and grant him amnesty with respect to violations of a 1994 *Law on Outlawing the "Democratic Kampuchea" Group*.³⁸ The 1979 conviction, and the subsequent amnesty and pardon, raise questions about whether the ECCC is barred from prosecuting Ieng Sary. The *Agreement* establishing the ECCC expressly provided that the ECCC should decide the scope of the amnesty/pardon.³⁹

The co-investigating judges, in their initial provisional detention order issued on November 14, 2007, determined that the 1979 conviction and subsequent amnesty and pardon were not a bar to their investigation for war crimes or crimes against humanity. Defense counsel appealed the order and the Pre-Trial Chamber handed down its written decision on October 17, 2008.⁴⁰

The chamber noted that the impact of the pardon, amnesty, and prior conviction can be raised again before the Trial Chamber and thus did not need to be fully resolved at the investigative stage. However, reasoning that any ECCC detention order would "not be lawful if any circumstances could be foreseen which would evidently or manifestly prevent a conviction by the Trial Chamber,"⁴¹ the chamber considered the issues on a preliminary basis. The chamber concluded that the prior conviction, pardon, and amnesty all failed that test—i.e., none of these measures were found to have evidently or manifestly prevented a conviction before the ECCC.

In determining that the 1979 conviction for genocide was not a bar to the current proceedings because of the principal of *ne bis in idem* or double jeopardy,⁴² the chamber found that it was

³⁶ See *Prosecutor v. Blaskic*, IT-95-14-A, "Judgment," Appeals Chamber, July 29, 2004, para. 209; and *Prosecutor v. Kvočka*, ICTY IT-98-30/1-A, "Judgment," Appeals Chamber, February 28, 2005, para. 28.

³⁷ *Duch Appeal Decision*, para. 27.

³⁸ Royal Decree No. NS/RKT/1996/72, September 14, 1996. Law on the Outlawing of the "Democratic Kampuchea" Group, Reach Kram No. 1, NS 94, 15 July 1994. The amnesty and pardon can be found at http://www.eccc.gov.kh/english/cabinet/legislation/2/pardon_for_ieng_sary.pdf.

³⁹ *Agreement*, Article 11.

⁴⁰ Public Decision on Appeal against Provisional Detention Order of Ieng Sary, October 17, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/155/C22_I_74_EN.pdf. (the *Ieng Sary Detention Decision*)

⁴¹ *Ibid.* para. 16.

⁴² *Ne bis in idem*, roughly translated as *not twice for the same thing*, is the common law version of the principle against double jeopardy. Article 14 (7) of the ICCPR provides that "No one shall be liable to be tried or

not clear that the current ECCC charges against Ieng Sary (crimes against humanity and war crimes) were for the “same offenses” as those addressed in the 1979 proceeding. Therefore, it held “at this stage of the proceedings it was not manifest or evident that the 1979 trial and conviction would prevent a conviction by the ECCC.”⁴³ Given this finding, the chamber held it did not need to consider the issue of whether the 1979 trial had to reach minimum fair trial standards in order for the principle of *ne bis in idem* to be applicable to the conviction.

The chamber found that the 1996 pardon from the 1979 sentence for genocide was inconsistent with the provision on amnesty in Article 27 of the Constitution of Cambodia of 1993 and therefore it was not “manifest or evident” that it would prevent a conviction for genocide before the ECCC.⁴⁴ Finally, the chamber ruled that the amnesty from prosecution under the *Law to Outlaw the “Democratic Kampuchea” Group* of 1994 applies to offenses other than those within the jurisdiction of the ECCC and therefore “cannot be seen as having the possible effect of preventing a conviction by the ECCC.”⁴⁵ Consequently, the chamber concluded that the investigating judges properly exercised their discretion to order provisional detention.

Ruling on Appeal of Provisional Detention: Justification for Detention

In the same October 17, 2008 decision, turning to the need to detain Ieng Sary during the investigative phase, the Pre-Trial Chamber applied the standard adopted in the decision on Nuon Chea’s provisional detention appeal.⁴⁶ It ruled that the information in the case file constituted sufficient basis to satisfy an objective observer that Ieng Sary may have committed the charged offenses. The chamber cited evidence from which it could be inferred that Ieng Sary exercised great authority as the minister of foreign affairs and was a member of the Central and Standing Committees of the Communist Party of Kampuchea. It observed that prisoner lists from S-21 show that more than 100 persons arrested were from the ministry of foreign affairs and that other evidence demonstrates Ieng Sary’s alleged involvement in sending cadres for purging by execution at S-21.

The chamber rejected the finding of the investigating judges that Ieng Sary must be detained to avoid the risk that he would exert pressure on witnesses, destroy evidence, or collude with other charged persons. Although the judges considered that Ieng Sary had the necessary influence to organize others to place pressure on witnesses and victims, the chamber found no evidence of any past actions or behavior that would display “a concrete risk that he might use that influence to interfere with witnesses and victims.”⁴⁷ However, the chamber ruled that detention was necessary to ensure the presence of Ieng Sary during the proceedings, to protect his security from harm that might occur if the court were to release him, and to protect public order that may be disturbed if he were released.

Ieng Sary had not requested that the court release him, but requested that he be placed in an alternative form of detention such as house arrest or hospitalization because of his current health problems. The chamber rejected this request, finding that the risks that justify provisional detention are insufficiently addressed by Ieng Sary’s proposal for provisional release. The chamber found no evidence of an immediate need for long-term hospitalization of Ieng Sary.

punished again for an offence for which he as already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

⁴³ *Ieng Sary Detention Decision*, para. 53.

⁴⁴ *Ibid.*, para. 58.

⁴⁵ *Ibid.*, para. 61.

⁴⁶ Decision on Nuon Chea’s Provisional Detention Appeal, March 20, 2008 at

http://www.eccc.gov.kh/english/cabinet/courtDoc/54/PTC_decision_on_nuon_chea_appeal_C11_54_EN.pdf.

⁴⁷ *Ieng Sary Detention Decision*, para. 99.

Extension of Provisional Detention for Additional Year

A month after the October 17, 2008 ruling, the original one-year provisional detention order for Ieng Sary expired. On November 10, 2008, the investigating judges issued an order extending the provisional detention for an additional year.⁴⁸ In this order, the judges largely restated the original grounds for provisional detention as supported by the Pre-Trial Chamber on appeal. In addition, the judges addressed whether the time that had lapsed since the original detention warranted reconsidering the extension. The judges reasoned that the passage of time did not reduce the need for continued provisional detention because of the scope and complexity of the investigation and the additional evidence gathered against Ieng Sary.

Pre-Trial Chamber Decision on Request for Psychiatric Exam

In March 2008, Ieng Sary filed a motion with the investigating judges requesting that a psychiatric specialist be appointed to determine his fitness to stand trial. On October 21, 2008, this request was rejected by the judges because “the question of sending him for trial does not ... arise at this stage.”⁴⁹ It appears that the investigating judges determined any evaluation of fitness to stand trial should be deferred until the completion of the investigation phase.

The Pre-Trial Chamber rejected this conclusion and ruled that the concept of fitness to stand trial is triggered the moment an individual is charged with a crime before the ECCC. The chamber based its ruling on international jurisprudence that an individual’s fitness to stand trial encompasses his/her capacity “to plead, to understand the nature of the charges, to understand the course of the proceedings, to understand the details of the evidence, to instruct counsel, to understand the consequences of the proceedings, and to testify,” all of which arise during the investigative stage.⁵⁰ Thus, the chamber held that an accused has the right to request the appointment of an expert to evaluate his capacity to participate in the judicial investigation stage.

However, the Pre-Trial Chamber found that, in order to justify appointment of an expert, the accused must demonstrate an “adequate reason to question [his] capacity to participate, with the assistance of his Co-Lawyers, in the proceeding and sufficiently exercise his rights during the investigation.”⁵¹ The chamber found that Ieng Sary had not made such a showing and cited numerous medical and expert reports that indicated his medical problems did not have an effect on his mental capacity. The chamber held that the mere assertion by defense counsel that Ieng Sary may not have sufficient ability to consult with the defense team was insufficient to trigger the right to the appointment of an expert.

⁴⁸ Order on Extension of Provisional Detention for Ieng Sary, November 11, 2008, At: http://www.eccc.gov.kh/english/cabinet/courtDoc/182/C22-4-Detention-Ieng-Sary-EN_redacted.pdf. See IR, Rule 63 that provides provisional detention can only be ordered by the investigating judges for a period of one year for charges of genocide, war crimes, or crimes against humanity. However, the period can be extended for up to two further one year periods by a reasoned order.

⁴⁹ Public Decision on Ieng Sary’s Appeal Regarding the Appointment of a Psychiatric Expert, October 21, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/157/A189_I_8_EN.pdf. (*Ieng Sary Decision re Appointment of Expert.*)

⁵⁰ Specifically, *Prosecutor v. Struger*, Case no. IT-01-47, “Decision Re the Defence Motion to Terminate Proceeding,” Trial Chamber II, May 26, 2004 (the “*Struger Decision*”), and *Prosecutor V. Stanisic*, Case No. IT-03-69, “Decision on Stanisic Defense Motion on the fitness of the accused to stand trial with confidential annexes,” Trial Chamber II, April 27, 2006, page 203 and *Deputy General Prosecutor for Serious Crimes v. Nahak*, case no. 01A/2004, “Findings and Order on Defendant Nahak’s Competence to Stand Trial,” Special Panels for Serious Crimes in East Timor (Dili District Court), March 1, 2005, paras. 32 to 48. The quoted language is from the *Strugar Decision* at para. 36.

⁵¹ *Ieng Sary Decision re Appointment of Expert*, para. 41.

The Pre-Trial Chamber's decision recognizes the importance of an accused person's right to participate effectively in proceedings before the ECCC from the earliest stages and to challenge the application of that right with adequate facts. It leaves the door open for Ieng Sary or other accused to make another motion for expert evaluation if stronger supporting facts are present.

Khieu Samphan

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

Provisional Detention Orders

The investigating judges issued the initial one-year provisional detention order for Khieu Samphan on November 19, 2007. At least twice during the initial year, Khieu Samphan filed requests to be released. The investigating judges denied these requests and then extended the provisional detention order for Khieu Samphan an additional year on November 11, 2008.⁵² The judges maintained there had been no significant change in the grounds that justified the original detention and that the period of detention was not excessive given the complexity of the case.⁵³

Appeal of Order Concerning Translation Rights and Obligations

On June 19, 2008, the investigating judges issued an Order Concerning Translation Rights and Obligations that applies to all parties and details the documents parties are entitled to have translated into Khmer and the language of international counsel.⁵⁴ Attorneys for both Ieng Sary and Khieu Samphan filed appeals to this order arguing that basic fair trial rights of their clients were violated by limiting the documents that must be translated.⁵⁵ Unlike Ieng Sary, Khieu Samphan requested a public hearing on the appeal issues. This hearing was held on December 4, 2008.

During the hearing, the prosecutors argued that neither a charged person nor defense counsel is entitled to demand that every document produced in the case be translated into the languages of the charged person and that of international defense counsel. According to consistent jurisprudence from other international tribunals, cited by the prosecutors, a court must translate certain documents central to the charges and evidence at trial. However, there is no right to translation of *all* documents related to the case. The prosecutors noted that numerous documents in the case file had already been translated into Khmer for Khieu Samphan and/or French, the first language of defense counsel Jacques Vergès. They emphasized the obligation of defense counsel to cooperate with the translation unit of the court and maximize the linguistic skills on the legal team representing Khieu Samphan.

⁵² Order of Provisional Detention, Khieu Samphan, November 11, 2008 at http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=ocij_docs.

⁵³ Khieu Samphan appealed the original provisional detention order. After the Pre-Trial Chambers determined on October 2, 2008 that it would decide the appeal filed based on the written submissions, defense counsel moved to withdraw the appeal. An earlier April 2008 hearing on the appeal was cut short when defense counsel Jacques Vergès refused to participate, claiming an insufficient number of documents relevant to the defense had been translated into French. See OSJI October 2008 Updated Report in the index at http://www.justiceinitiative.org/db/resource2?res_id=103899; and Direction on Continuation of Proceedings Related to Appeal against Provisional Detention, October 2, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/151/C26_I_29_EN.pdf.

⁵⁴ Order Concerning Translation Rights and Obligations of the Parties, June 19, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/84/Order_on_translation_rights_and_obligations_A190_EN.pdf. For a more detailed description of this order see the Justice Initiative Updated of October 2008 in the index at http://www.justiceinitiative.org/db/resource2?res_id=103899.

⁵⁵ See Defense Appeal against the Decision to Deny the Request for Translation of Case File, July 22, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/118/Defence_appeal_against_decision_to_deny_request_translation_A190_I_1_EN.pdf.

Jacques Vergès and Sar Chanrath, appearing on behalf of Khieu Samphan, argued that they could not represent their client on these serious charges without translation of each and every document in the case file. While not providing detail as to which additional documents merited translation, defense counsel expressed concern with the lack of translation of documents into French for the benefit of Vergès. Counsel argued that the lack of translation defeated their client's basic right to know the charges and evidence against him and was grounds for dismissing the charges. The Pre-Trial Chamber will issue a decision at a later date.

Nuon Chea

Nuon Chea was second in command to Khmer Rouge leader Pol Pot and has been charged with crimes against humanity and war crimes.

Investigating Judges Extend Provisional Detention for Additional Year

On September 16, 2008, the investigating judges extended the provisional detention of Nuon Chea for a second year.⁵⁶ In a short ruling, the judges noted that the March 20, 2008 Pre-Trial Chamber decision on the appeal of the initial detention order had found reasonable grounds to believe that Nuon Chea had committed the crimes charged. The judges considered that there existed even more evidence as of September 16, 2008 to support such a belief. Specifically, the judges cited 23 statements of Duch concerning the context and operation of S-21 Prison as well as the role played by Nuon Chea. To justify Nuon Chea's further detention, the investigating judges reasoned that the conditions set out in the Pre-Trial Chamber's appeal decision on provisional detention order remained valid.⁵⁷ Nuon Chea has appealed the September 16 order, arguing that the decision is poorly reasoned.

Pre-Trial Chamber Decision on Right to Examination for Fitness to Stand Trial

On October 22, 2008, the Pre-Trial Chamber rejected Nuon Chea's appeal of the investigating judges' refusal to issue an order for the appointment of an expert to assess his fitness to stand trial and "capacity to participate effectively in his defense."⁵⁸ In a decision that closely mirrors its decision in the Ieng Sary case, the Pre-Trial Chamber rejected the investigating judges' suggestion that Nuon Chea's request was premature given the stage of the proceedings. The Pre-Trial Chamber confirmed that accused before the ECCC are "in principle entitled to have their capacity to exercise their procedural rights effectively during the investigation and pre-trial phase evaluated by an expert if their request is properly justified."⁵⁹

Nonetheless, the chamber denied the request on the ground that it was "not properly justified" because Nuon Chea had presented insufficient facts to support the need to appoint an expert to evaluate his cognitive functions. The chamber relied on the reports of medical experts who had examined Nuon Chea and found that his capacities are not significantly affected by his cardiovascular ailments and that his cognitive functions are normal for a person of his age. In addition, the chamber put weight on the fact that Nuon Chea had made relevant, well-

⁵⁶ IR, Rule 63 provides that provisional detention can only be ordered by the investigating judges for a period of one year for charges of genocide, war crimes or crimes against humanity. However, the period can be extended for up to two further one year periods by a reasoned order.

⁵⁷ Order on Extension of Provisional Detention of Nuon Chea, September 16, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/137/C9-3_Order_on_Extension_of_Provisional_Detention_NC_ENG.pdf.

⁵⁸ Decision on Nuon Chea's Appeal Regarding Appointment of an Expert, October 22, 2008, page 2 at http://www.eccc.gov.kh/english/cabinet/courtDoc/158/D54_V_6_EN.pdf.

⁵⁹ Ibid., para. 27.

structured, and comprehensive statements during hearings before the investigating judges and the Pre-trial Chamber.

Request for Information about Corruption Complaints –

On September 19, 2008, Nuon Chea’s lawyers filed requests with both the director and the deputy director of administration of the ECCC seeking information about any complaints of corruption at the ECCC that had been submitted by court staff. On October 31, 2008 they submitted a similar request to the government of Cambodia. The defense team requested information about the nature of the complaints, the court officials involved, and the response of the United Nations and the government of Cambodia to the complaints. As of the date of this publication, the government has not responded to the request and the ECCC officials have refused to provide substantive information.

The request asserts that information about the corruption allegations and the UN and government response is necessary in “assessing the essential preconditions of a fair trial.” The implication of the request—that certain kinds of corruption and the failure of the court or the government to properly address it undermine the actual or perceived impartiality and fairness of the judicial process—is legitimate and underscores the need for the court to act scrupulously and transparently in dealing with any evidence of corruption.

Ieng Thirith

Ieng Thirith was minister of social affairs in the Democratic Kampuchea regime and is charged with crimes against humanity.

Extension of Provisional Detention

In a November 10, 2008 order, the investigating judges extended the provisional detention of Ieng Thirith for a second year.⁶⁰ Ieng Thirith filed an objection to the proposed extension and a request for release under protective conditions. She argued that additional detention was unwarranted because the investigating judges had not conducted the investigation diligently over the last year and had not gathered sufficient additional evidence to warrant a well-founded belief that she committed the crimes with which she has been charged.⁶¹ The judges disagreed. The public version of the November 10, 2008 order stated, without specifying further, that the judges “have collected additional evidentiary materials ... at the request of the parties or on their own motion, some of which provide specific information regarding the Charged Person’s potential role within the regime.”⁶² Ieng Thirith has appealed this ruling.

⁶⁰ Order on Extension of Provisional Detention of Ieng Thirith, November 10, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/181/C20-4-Detention-Ieng-Thirith-ENG_Redacted.pdf.

⁶¹ *Ibid.*, para. 11 c.

⁶² *Ibid.*, para. 17.

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