

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

October 2008 Update

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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Introduction

Since the Open Society Justice Initiative's ("Justice Initiative") last public report of May 2008,¹ the legal and administrative operations of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") have continued to improve, but persistent and credible questions about the integrity and independence of the court put that progress at risk. The Justice Initiative supports international funding of the court in a manner calculated to enhance the quality and impact of its operations. Specifically, **donors should condition any future funding, as well as the release of existing pledges, on a meaningful resolution of longstanding concerns about perceived corruption at the ECCC, and the court's response to corruption complaints.** While the UN and the Cambodian sides of the court adopted new procedures this summer intended to address corruption concerns, the first application of those procedures has exposed their inadequacy.

Before any additional international funds are released to the ECCC, donors must insist that, at a minimum, all court staff who filed complaints under the UN anti-corruption program established in July 2008 or who otherwise brought information about kickbacks or other corrupt practices at the court to the UN's attention, have available immediate protection and redress for any retaliatory measures taken against them. Failure to protect complainants is unfair to those who reasonably relied on the UN and its member governments, and puts the credibility of both the court and the UN in jeopardy.

This report provides the latest information on the general progress of the court, focusing particularly on the most pressing challenges the court is currently facing. It also details developments in legal proceedings in individual cases before the ECCC.

1. Addressing Corruption Allegations and Protecting Complainants

While the ECCC's struggle to address concerns about corruption poses a serious and potentially fatal problem for the court, the past five months have seen encouraging signs of progress in other aspects of the court's operations. The Pre-Trial Chamber issued several substantive decisions, the judges' plenary adopted amendments to the rules of procedure, and there continues to be steady advancement toward the first public trial: the case of Kaing Guek Eav (a.k.a. "Duch"), is now expected to commence in the first quarter of 2009. The Secretary-General's expert on UN assistance to the ECCC, whose term ended on September 30, secured several significant achievements, particularly regarding administrative and budgetary issues. The court bolstered its Witness Unit, the

¹ The last Justice Initiative update of May 2008, found at http://www.justiceinitiative.org/db/resource2?res_id=103899 (May 2008 Report).

Victims Unit, and the court management section with the arrival of top-tier staff from other internationalized war crimes courts. The UN established a donor management board based in New York. And the donors approved a budget through the end of 2010, with a number of countries making new pledges to the court.

Both the Cambodian and the international sections of the court² made strides over the summer, albeit separately, toward the establishment of a court-wide program to deal with corruption allegations, which first became public over nineteen months ago. The Cambodian side of the court designated two “ethics monitors” (the president of the Supreme Chamber, Kong Srim, and the head of the Public Affairs Office, Helen Jarvis)³ to receive complaints of corruption and instituted a program through which alleged improprieties could be reported to the head of the Khmer Rouge Task Force, Deputy Prime Minister Sok An.⁴ The Cambodian side also made public statements that it would not tolerate corrupt practices.⁵

In July 2008, the UN outlined to the press and to senior court staff its new anti-corruption program, which applies to the international side of the court and consists of three parts: 1) a reporting system in which complaints from either UN or Cambodian staff would be initially reviewed by a UN investigative office; 2) the appointment of a high level staff person within the Office of Administration as an “ethics officer” with responsibility to receive confidential complaints, counsel staff and officials, and provide training on ethics issues and standards; and 3) proposed revisions to the code of conduct for staff and the code of ethics for judges, to expressly forbid corrupt practices including giving or requesting kickbacks.⁶ At their September plenary, the international and national judges amended the code of ethics to include a prohibition against accepting or providing payments that could be perceived as intended to influence their performance.⁷ Unfortunately, there are no enforcement mechanisms in the code of ethics. Moreover, the

² Although the 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>, envisioned a unified court, in practice the court has often operated as two separate units, one Cambodian, the other international.

³ See Douglas Gillison, “KRT Chief, Khmer Judges in Anti-Graft Pledge,” *The Cambodia Daily*, August 16-17, 2008; Neth Pheaktra, “KRT Forms New Anti-Corruption Committee,” *The Mekong Times Daily*, August 18, 2008 at

http://www.krtrial.info/showarticle.php?language=english&action=shownews&art_id=2844&needback=1.

⁴ Georgia Wilkins and Vong Sokheng, “Govt to Review Future KRT Graft Complaints in Secret,” *The Phnom Penh Post*, September 16, 2008.

⁵ See John Hall, “Opinion: New Corruption Allegations Pose Test for Future of KR Tribunal,” *The Cambodia Daily*, August 15, 2008; Douglas Gillison, “KRT Chief, Khmer Judges in Anti-Graft Pledge,” *The Cambodia Daily*, August 16-17, 2008.

⁶ See John Hall, “Opinion: New Corruption Allegations Pose Test for Future of KR Tribunal,” *The Cambodia Daily*, August 15, 2008.

⁷ Code of Judicial Ethics, Article 3, (2) was added to provide: “Judges shall not directly or indirectly accept, offer, or provide any gift, advantage, privilege or reward that can reasonably be perceived as being intended to influence the performance of their judicial functions or the independence of their office.” ECCC website at http://www.eccc.gov.kh/english/cabinet/fileUpload/83/Code_of_judicial_ethics_-_5_09_08.pdf.

details of the UN anti-corruption program have never been disclosed in writing to the public or, to our knowledge, to the full staff of the court. This failure limits the impact of the program as a deterrent to wrongdoing and as a motivation for victims of improper action to come forward.

After the UN announced the establishment of its program, a number of Cambodian ECCC employees filed complaints with the UN, reportedly alleging that they were forced to pay kickbacks in order to secure or retain their jobs with the court.⁸ The UN's Office of Internal Oversight Services (OIOS)⁹ reviewed those claims and reportedly found them credible. By mid-September, the OIOS had transmitted a confidential report to the Cambodian government, apparently recommending that it conduct an investigation.¹⁰

The OIOS did not pursue its own investigation beyond the initial review because—although UN and international donor funds are potentially at issue—the OIOS may purportedly only conduct a full investigation of international staff, not Cambodian staff of the court. The OIOS has said, however, that if its preliminary investigation makes out a *prima facie* case of corruption, it would issue a report, as it did in this instance, to the Cambodian government for resolution. While the Cambodian government has acknowledged receipt of the OIOS report, it has taken no public action and has expressed hostility toward the UN's efforts to address the kickbacks issue.

The Cambodian government's overt hostility is worrisome, as is new information suggesting that persons suspected of filing complaints under the UN procedure may suffer intimidation. There is a long history of violent retaliation in Cambodia against those who threaten powerful political or economic interests.¹¹ For this reason, complainants justifiably fear the prospect of their identities becoming known to Cambodian court administrators and the government.

When corruption complaints were filed this summer, the United Nations Development Programme (UNDP) properly froze the funding it administers for the Cambodia side of

⁸ The number of complainants and any potentially identifying information about them is being withheld by the UN to protect their privacy.

⁹ The Office of Internal Oversight Services (OIOS) was established in July 1994 as an operationally independent office that assists the Secretary-General with internal oversight of UN resources and staff through monitoring, internal audit, inspection, evaluation, and investigation. The OIOS has the authority to initiate, carry out, and report on any action it considers necessary to fulfill its oversight responsibilities. See <http://www.un.org/depts/oios/>.

¹⁰ Georgia Wilkins, "KR Court Graft Review Unfairly Names and Shames Gov't Says," *The Phnom Penh Post*, September 22, 2008.

¹¹ 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.

the court pending resolution of the corruption complaints.¹² It is urgent that the UN now redouble its efforts to strengthen the anti-corruption mechanism. Donors must work with the UN to put in place measures ensuring that all persons with information about corruption may report it freely, confidentially, and without fear of retaliation. UNDP should require the imposition of disciplinary measures against those who have directed corrupt activities or who have engaged in retaliatory or intimidating acts against suspected complainants. The UNDP, like the OIOS, has a responsibility to donors and member governments to ensure that UN and donor funds are used for their intended purposes.

The ECCC may be a mix of international and Cambodian components, but unremedied corruption in any part of the court taints the entire institution. If the Cambodian side of the court cannot prevent intimidation and retaliation against complainants, it is incumbent upon the UN and international funders to ensure their protection, regardless of nationality. It is not acceptable to claim that the UN has no authority over Cambodian staff at the court. The UN is obliged to protect complainants, whose livelihoods and safety may be at stake.

To date, not enough information has been made available about the UN and Cambodian anti-corruption procedures to reassure those concerned about whether a robust program is in place and will be enforced. Because allegations of corruption damage the credibility of the court, all stakeholders—the court itself, the UN, and the government of Cambodia—must act quickly to effectively address them.

The Justice Initiative urges donors to fund the court, but to condition disbursement of their funds on the adoption and demonstrated implementation of anti-corruption mechanisms. In so doing, we endorse the September 1, 2008 statement of ECCC Trial Court Judge Sylvia Cartwright, made at the public opening of the judges' plenary session: "One of the major issues that has been troubling for all the judges is that of corruption within the ECCC. We welcome efforts to ensure that the allegations are dealt with fully and fairly and that independent measures are put in place to make sure, if there are further claims, that they are resolved in a transparent manner."¹³

2. ECCC Budget

Since the major revision of its budget in June, the court has released only summary budget figures. These indicate that the revised total budget for the court, from the beginning of operations through the end of 2010, is \$135.4 million. This represents a \$79.1 million increase over the original budget of \$56.3 million (for three years of operation) and leaves \$74.6 million still to be raised. The court is currently trying to raise

¹² See Douglas Gillison, "ECCC Funding Delayed Over Graft Claims," *The Cambodia Daily*, August 6, 2008. The UNDP funds were being used to pay salaries to 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.

¹³ Douglas Gillison, "ECCC Judges Meet to Discuss Trial Procedures," *The Cambodia Daily*, September 2, 2008.

funds needed to see the court through December 2009. The amount needed to cover this period is \$46 million, of which \$35.9 million is allocated for the international side and \$10.1 million for the Cambodian side.¹⁴

The United States government announced on September 16, 2008 that it would make an initial contribution of \$1.8 million to the international side of the court. The German government has announced a pledge of \$4.3 million toward the new, expanded budget, to support the international side of the court. The Japanese government has contributed an additional \$2.9 million to the Cambodian portion of the budget, and the Cambodian government has pledged an additional \$1 million. These contributions and pledges leave a budget shortfall for next year of \$36 million. Given the glacial pace of fundraising, it is likely that the court will continue to operate with less than a full year of its budget in hand and will be raising funds continuously on an urgent basis.

3. Translation

Establishing a coherent and fair translation policy that secures the rights of the accused to a fair trial while not compromising competing demands for court resources has proved difficult for the ECCC—as it has for other internationalized courts. Khmer, French, and English are the official working languages of the court according to the *Agreement* establishing the ECCC.¹⁵

While all of the accused speak fluent Khmer, and have a Khmer speaking co-counsel representing them, three of the five defense teams have international lawyers who speak English, but not Khmer or French (lawyers for Nuon Chea, Ieng Thirith, and Ieng Sary) and two have lawyers who speak French but not fluent English or Khmer (lawyers for Duch and Khieu Samphan). Simply put, the court does not have the capacity to translate into three languages all of the documents that are generated by the parties or referred to in submissions to the court. The backlog of documents awaiting translation is large and growing steadily. Over the last eight months, the court has hired additional translators and interpreters. In addition, the revised budget increases the funds allocated for translation staff, as well as for outsourcing some translation tasks. The court has also made a commitment to the ongoing training of translation staff.

On June 20, 2008, the investigating judges issued an order addressing the rights of charged persons and their lawyers to insist on the translation of documents.¹⁶ The Translation Order recognized that the availability of translation may affect the rights of a charged person to a fair trial, and sought to balance those rights against the court's resources and capacity. The order imposes limits on the extent of translation defendants can demand: the charged person has a right to translation of only those documents most critical to the pending charges. This order has been appealed to the Pre-Trial Chamber by

¹⁴Summary budget figures provided by the Office of Public Affairs of the ECCC as of July 25, 2008.

¹⁵ See *Agreement*, Article 26.

¹⁶ Order on Translation Rights and Obligations of Parties, June 20, 2008, http://www.eccc.gov.kh/english/cabinet/courtDoc/84/Order_on_translation_rights_and_obligations_A190_EN.pdf (Translation Order).

Ieng Sary and Khieu Samphan and is discussed further in the section on Khieu Samphan, below.

4. *Victims Unit*

The Victims Unit continues to accept complaints from witnesses to and victims of crimes committed during the Democratic Kampuchea period, and applications from victims who wish to participate in the proceedings as civil parties. The unit reports that over 1,800 complaints and civil party applications have been received, including one by a transgendered woman who is also requesting that the court investigate other crimes of sexual violence committed by the regime.¹⁷ It is not known how many of these applications have been accepted, how many have been rejected, or how many remain pending.

In the case against Duch on charges related to crimes committed at the S-21 prison, 28 civil parties have been accepted.¹⁸ In the case against the remaining four charged persons as well as Duch for other crimes alleged in the introductory submission, there are 13 civil parties. In July, the investigating judges reported that “many” more applications had been received and were under review.¹⁹ The investigating judges have not reported whether any civil party applications have been rejected and, if so, for what reason. Nor have they indicated what standards are used to evaluate applications.

Lack of resources has prevented the Victims Unit from processing civil party applications and complaints in a systematic and timely way. The German government announced a \$2.4 million grant to the ECCC to be used for the Victims Unit. The grant is designed to “allow the victims to play a more prominent role in the proceedings.”²⁰ It is critically important that these funds, along with the funds from the ECCC core budget allocated to the Victims Unit, be put to use immediately to eliminate the backlog of unprocessed civil party applications and complaints, and to ensure that civil parties have sufficient knowledge and access to legal representation to exercise their rights.

5. *Communication and Transparency*

In a positive development, in May, the court initiated publication of *The Court Report*, a monthly newsletter in Khmer and English. The August issue includes an update from the Office of the Co-Prosecutors, the Office of the Co-Investigating Judges, the Pre-Trial

¹⁷ Prak Chan Thul, “Khmer Rouge Survivor Speaks Out against Sexual Violence,” *The Cambodia Daily*, September 04, 2008.

¹⁸ Closing order indicting Kaing Guek Eav Alias Duch, August 8, 2005, at http://www.eccc.gov.kh/english/cabinet/courtDoc/115/Closing_order_indicting_Kaing_Guek_Eav_ENG.pdf, (Duch Indictment) at para. 6, page 3.

¹⁹ *The Court Report*, July 2008, Issue 3, page 6, at http://www.eccc.gov.kh/english/cabinet/fileUpload/62/2008_July-_Court_Report.pdf.

²⁰ “Japan pledges US\$2.4 Million for Cash-strapped Cambodian Genocide Tribunal,” *International Herald Tribune*, July 11, 2008, at <http://www.iht.com/articles/ap/2008/07/11/asia/AS-Cambodia-Khmer-Rouge.php>.

Chamber, and the Victims Unit.²¹ The court plans to include regular information about hearings, pending appeals before the Pre-Trial Chamber, outreach events, and other activities each month. The Office of Public Affairs is exploring methods for distributing the newsletter throughout Cambodia and has made it available to NGOs working to inform Cambodians about the court.

Nonetheless, there has been little progress in addressing other transparency issues discussed in the Justice Initiative's May 2008 report.²² As noted above, although the donors have approved the court's budget, only a summary of the budget—not specific details—has been made public. The court has provided little information and no detail about the UN anti-corruption program. Only scant information was provided about the work of the Secretary-General's special expert during his six month assignment, including what will happen now that his term expired, at the end of September. The failure of the court to be open about these issues generates unnecessary suspicion and concern and undermines the effectiveness of the positive actions taken by the court.

Since our last report, court officials have held no press conferences to update the public on investigative or prosecution matters. There has been no substantive information from the Office of the Co-Investigating Judges about progress on most of the cases other than brief references in the monthly newsletter. The introductory submission naming the five charged persons now in detention was issued over a year ago, on July 18, 2007, and aside from the case of Duch, little information has been released on the scope and nature of the case(s) being developed against them. Similarly, there has been no information from the Office of the Co-Prosecutors about the status or timing of planned submissions naming additional suspects. In this respect, the court is missing an opportunity—as well as failing to meet its obligation—to assist the people of Cambodia in understanding its work and the crimes of the Khmer Rouge period. A great deal of information can and should be provided to the public without interfering with the integrity and confidentiality of the investigative and preparatory process.

The Pre-Trial Chamber has made strides by publishing on the court website most pleadings filed by parties before it. Yet several documents have not been made available, leaving the public in the difficult position of not knowing what the chamber is withholding from publication and why. Neither the public nor the parties have recourse if documents are withheld by the chamber.

6. Appointment of New Reserve Judges

A Royal Decree dated July 14, 2008 appointing French former Judge Catherine Marchi Uhel as reserve judge for the Supreme Chamber (replacing resigning Judge Martin Karopkin) and German Judge Siegfried Blunk as reserve international investigating judge, was posted August 22 on the court's web site. Both judges attended the September plenary session.

²¹ See ECCC website at <http://www.eccc.gov.kh/english/publications.courtReport.aspx>.

²² May 2008 Report, at: http://www.justiceinitiative.org/db/resource2?res_id=103899.

7. Developments in Specific Cases

Kaing Guek Eav (a.k.a. Duch)

On August 8, 2008, the investigating judges issued a Closing Order indicting Duch, the former head of the infamous Khmer Rouge torture center Tuol Sleng (also known as S-21 prison), with crimes against humanity and war crimes.²³ The judges ordered that Duch remain in provisional detention until he is brought before the Trial Chamber.²⁴ The prosecutors filed an appeal of the indictment, claiming the investigating judges should have included charges of murder and torture under domestic law, and set forth joint criminal enterprise (JCE) as a theory of liability.

The 45-page closing order and indictment outlines the historical and political context that led to the establishment of the S-21 prison following the April 17, 1975 seizure of power by the Communist Party of Kampuchea. It describes a regime that “pursued a policy of ‘completely disintegrat[ing]’ the economic and political structures of the Khmer Republic and creating a ‘new, revolutionary State power.’”²⁵ It details the policy of torture and “smashing”²⁶ carried out against enemies of the regime at the S-21 prison, the Choeng Ek execution site and the nearby Prey Sar (S-24) re-education camp. Details of Duch’s alleged participation in and control over these acts form the core of the closing order.

Based on Duch’s alleged role in the gruesome facts detailed in the order, the investigating judges concluded that there are substantial grounds to believe that Duch should be tried for individual and/or superior responsibility for the following crimes against humanity: murder, extermination, enslavement, imprisonment, torture, rape, persecution on political grounds, and other inhumane acts.²⁷ In addition, Duch is charged with grave breaches of the Geneva Conventions of 1949 for: 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 of the rights of fair and regular trial, and unlawful confinement of a civilian.²⁸

The prosecutor’s appeal against the indictment argues that the failure to include domestic crimes and to hold Duch accountable for crimes at S-21 as a member of a joint criminal enterprise constitutes legal error.²⁹ The appeal seeks a broader indictment than that issued

²³ Closing Order Indicting Kaing Guek Eav Alias Duch, August 8, 2005, at http://www.eccc.gov.kh/english/cabinet/courtDoc/115/Closing_order_indicting_Kaing_Guek_Eav_ENG.pdf. (Duch Indictment).

²⁴ Ibid. at page 45.

²⁵ Ibid, at para. 10, page 4.

²⁶ Ibid. at para. 31, page 9. The term “smash” was widely understood to mean “kill” during the DK period.

²⁷ Offenses defined as punishable under Articles 5, 29 (New) and 39 (New) of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (2004), (the *Law*).

²⁸ Offenses defined as punishable under Articles 6, 29 (New) and 39 (New) of the *Law*.

²⁹ Co-Prosecutors Appeal against the Closing Order against Duch, September 5, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/129/CP_appeal_on_closing_order_Duch_D99_3_3_OCP_Appeal_EN.pdf. (Appeal of Duch Closing Order.)

by the investigating judges to reflect the “totality of Duch’s alleged criminality” and avoid the possibility of an acquittal on procedural grounds.³⁰

The Pre-Trial Chamber has invited three legal experts to file *amicus curiae* briefs on the development and applicability of joint criminal enterprise as a theory of liability for the ECCC, taking into account that the crimes alleged were committed between 1975 and 1979.³¹ The chamber has announced that it plans to issue its decision on the appeal on December 5, 2008. With this timetable, it is unlikely that the Duch trial will start before the end of 2008, as previously anticipated by the court.

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. He has been hospitalized at least five times since being detained by the ECCC in November 2007.³²

Claim that amnesty, pardon and double jeopardy bar further claims against Ieng Sary:

In July, the Pre-Trial Chamber held a four-day hearing on Ieng Sary’s appeal of the investigating judges’ November 14, 2007 order mandating his provisional pretrial detention.³³ His defense attorneys argued that a 1996 pardon and amnesty, along with the principle of *ne bis in idem* (“not twice for the same thing” or the principle against double jeopardy), prevent the ECCC from bringing charges against him for Khmer Rouge era crimes. (In 1979, the Vietnamese-backed People’s Revolutionary Tribunal (PRT) tried and convicted Ieng Sary *in absentia* for genocide, and sentenced him to death. A Royal Decree of September 14, 1996 pardoned Ieng Sary from the sentence handed down by the PRT and granted him amnesty with respect to a July 1994 law outlawing the “Democratic Kampuchea” group.) The chamber has not announced a date for delivering a decision on these issues.

Pre-Trial Chamber ruling restricting rights of civil parties to participate:

During the Ieng Sary jurisdictional hearing, the chamber made a significant ruling restricting the extent of civil party participation. The chamber held that a civil party not represented by a lawyer cannot address the chamber.³⁴ The chamber relied on Internal Rule 77(10), which generally addresses the conduct of proceedings before the chamber, and restricts to “lawyers for parties” the right to address the judges.³⁵ Judge Rowan

³⁰ Ibid. at para. 3.

³¹ Invitations to file *amicus curiae* briefs were reportedly sent to Judge Antonio Cassese, McGill University’s Centre for Human Rights and Legal Pluralism, and Professor Kai Ambos.

³² See, e.g. “Briefing, KRT: Ieng Sary Back at Calmette for Treatment,” *The Cambodia Daily*, August 2-3, 2008; “Ieng Sary Returns to KR Tribunal Detention Center,” *The Cambodia Daily*, August 9-10, 2008.

³³ Ieng Sary’s Appeal against Provisional Detention Order, January 15, 2008, at http://www.eccc.gov.kh/english/cabinet/courtDoc/31/Ieng_sary_appeal_C22_I_5_EN.pdf.

³⁴ Oral judgment given on July 1, 2008, confirmed by written judgment on July 3, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/89/Civil_Party_request_to_address_the_court_C22_I_54_EN.pdf.

³⁵ Ibid. at page 2, para. 3.

Downing dissented, pointing out that the jurisdictional issues that were the subject of the hearing could potentially bar all claims against Ieng Sary, and that it was therefore inconsistent with the principle of civil party participation to prohibit the civil party from addressing the chamber on the issues.³⁶

Six counsel representing nine civil parties were present at the hearing at which this ruling was made. Defense counsel expressed concern that the court allowed civil parties to make inappropriate emotional arguments for Ieng Sary's detention, and stated that the principal of equality of arms was being strained by the burden on the defense of responding to so many lawyers and parties. The chamber denied a request to reconsider the decision. However, it issued a separate directive stating that in general unrepresented civil parties cannot address the chamber, but they may apply to address them if they have a position on an issue that is different from the position set forth by the prosecutors. It will then be within the discretion of the chamber to determine if it is appropriate to hear directly from an unrepresented civil party.³⁷

The ECCC's Internal Rule 21(1)(a) provides that "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties." Imposing appropriate limitations on the number and duration of arguments by civil parties and insisting that submissions are relevant and non-repetitive are important tools to protect the rights of the accused and the principle of equality of arms. The Pre-Trial Chamber has previously acknowledged its right and obligation to control the participation of civil parties to protect the rights of the accused.³⁸ In the Cambodian context, limiting the right of unrepresented civil parties to address the court is an appropriate further limitation at the pretrial stages in the proceedings only if civil parties have reasonable access to legal representation.

Challenge to applicability of Joint Criminal Enterprise:

In July, lawyers for Ieng Sary filed a motion with the investigating judges arguing that the theory of Joint Criminal Enterprise (JCE)³⁹ is inapplicable before the ECCC as a form of liability. Counsel contended that a press release in which prosecutors stated that the crimes were "committed as part of a common criminal plan" amounted to "stealthily seeking the application of Joint Criminal Enterprise."⁴⁰ Ieng Sary's lawyers assert first that JCE it is not specified as a form of liability in the ECCC Law and is not part of Cambodian domestic law. Second, they argue that JCE is not recognized in customary international law and even if it is recognized today, it was not customary international

³⁶ Ibid. at page 3.

³⁷ See Decision on Civil Party Participation in Provisional Detention Appeals, March 21, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/53/PTC_decision_civil_party_nuon_chea_C11_53_EN.pdf.

³⁸ Ibid.

³⁹ Joint Criminal Enterprise 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 Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-A, ICTY Appeals Chamber, October 2, 1995.

⁴⁰ Ieng Sary's Motion Against the Application at the ECCC of the form of Liability Known as *Joint Criminal Enterprise*, July 28, 2008 (document filed as "Public" but not yet posted on ECCC website).

law in 1975-1979, the relevant period for the ECCC. They further allege that the prosecutor's office, "by seeking to apply JCE before the ECCC, is inexorably casting a wide shadow of liability on a variety of distinguished members of Cambodian society and others," including the king and prime minister.⁴¹

Use of the JCE theory of liability has become common practice at other international criminal tribunals, even though it is not explicitly included in their statutes. These courts recognize JCE as part of customary international law founded upon post-World War II jurisprudence.⁴²

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.

Khieu Samphan's Cambodian counsel, Say Bory, announced on July 1, 2008 that he was stepping down from the case for "health reasons." Three weeks later, he was replaced by Sar Sovann, who will serve as co-counsel with international lawyer Jacques Vergès.⁴³

The appeal of Khieu Samphan's original provisional detention order remains in limbo as the court has not yet resolved the issues that Vergès raised at the April 23, 2008 hearing, when he stated he could not adequately represent his client because an insufficient number of documents had been translated into French.⁴⁴ On August 15, 2008, the Pre-Trial Chamber issued a direction noting that in the four months since the hearing it has received no notice from Khieu Samphan regarding his readiness to proceed.⁴⁵ Khieu Samphan responded that no progress has been made in translating the files and asked the chamber to either order that his requested translation of the full file be accelerated or declare his detention illegal because his foreign lawyer has not yet been informed in French of the charges underpinning Khieu Samphan's provisional detention.⁴⁶ In the

⁴¹ Ibid. at page 1.

⁴² See e.g., at the International Criminal Tribunal for the former Yugoslavia: *Prosecutor v. Tadic*, [Appeals Chamber] Judgment, IT-94-1-A, July 15, 1999, paras. 227-229; *Prosecutor v. Kvočka et al.*, [Trial Chamber] Judgment, IT-98-30/1-T, November 2, 2001, paras. 265-312; *Prosecutor v. Sainovic et al.*, *Ojdanic* Joint Criminal Enterprise Appeal Decision, IT-99-37, May 21, 2003; *Prosecutor v. Krajisnik*, [Trial Chamber] Judgment, IT-00-39-T, September 27, 2006; at the International Criminal Tribunal for Rwanda: *Prosecutor v. Rwamakuba* Interlocutory Appeal Decision on JCE and Genocide, ICTR-98-44C, October 22, 2004; *Ntakirutimana* [Appeals Chamber] Judgment, ICTR-96-10/17, December 13, 2004, paras. 461-468; at the Special Court for Sierra Leone: *Prosecutor v. Brima et al.*, [Appeals Chamber] Judgment, SCSL-2004-16-A, February 22, 2008.

⁴³ Press Release, [Appointment of New Cambodian Co-Lawyer for Khieu Samphan](http://www.eccc.gov.kh/english/cabinet/press/71/KS-DSS-Press_Release_Sa-RS.pdf), July 23, 2008, at http://www.eccc.gov.kh/english/cabinet/press/71/KS-DSS-Press_Release_Sa-RS.pdf.

⁴⁴ See Decision on Application to Adjourn Hearing on Provisional Detention Appeal, April 23, 2008, at http://www.eccc.gov.kh/english/cabinet/courtDoc/62/PTC-Decision_on_app_to_adjourn_Khieu_Samphan_hearing_C26_I_25_EN.pdf.

⁴⁵ Public Direction to the Decision Concerning the Appeal against Provisional Detention Order, August 15, 2008, para. 7 at http://www.eccc.gov.kh/english/cabinet/courtDoc/119/C26_I_27_EN.pdf.

⁴⁶ Notification to the Pre-Trial Chamber of the Defence's Position Concerning Khieu Samphan's Appeal Against Provisional Detention Order, August 21, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/124/C26_I_28_EN.pdf.

meantime, Khieu Samphan's lawyers also appealed the investigating judges' order detailing the translation rights of the parties, and sought their client's immediate and unconditional release on the ground that his fundamental fair trial rights have been violated by the court's failure to translate all the documents in the case file.⁴⁷

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.

Extended provisional detention:

On September 16, 2007, the investigating judges extended the provisional detention of Nuon Chea for up to one additional year. They noted that the investigation had developed additional evidence that Nuon Chea had committed the crimes charged, citing particularly statements by Duch that Nuon Chea played a role in the operation of S-21 prison. The judges relied on the findings from the original September 19, 2007 detention order, as affirmed by the Pre-Trial Chamber on March 20, 2008, as evidence that sufficient grounds exist to justify an additional year of detention.⁴⁸

Conditions of provisional detention:

In a ruling that affects the right of all charged persons to speak with each other in detention, in September the Pre-Trial Chamber set aside an order of the investigating judges that had denied detainees the right to communicate with each other.⁴⁹ The Pre-Trial Chamber relied on jurisprudence from the International Criminal Court and the European Court of Human Rights in concluding that "limitation of contacts between prisoners can only be ordered to prevent pressure on witness or victims when there is evidence reasonably capable of showing that there is a *concrete risk* that the charged person might collude with other charged persons to exert such pressure while in detention."⁵⁰ Because there were no facts alleged to support a concrete risk that Nuon Chea might collude to pressure witnesses, the restriction could not be supported. Further finding that there was "no reason related to investigative purposes justifying that contacts between the five Charged Persons currently detained at the ECCC Detention Facility be restricted," the chamber set aside the restrictive order regarding all five persons held in detention.⁵¹

⁴⁷ Defence Appeal Against the Decision to Deny the Request for Translation of Khieu Samphan's case file, August 14, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/118/Defence_appeal_against_decision_to_deny_request_translation_A190_I_1_EN.pdf, (Khieu Samphan Translation Appeal), page 2.

⁴⁸ Order of Extension of Provisional Detention, September 16, 2008 at http://www.eccc.gov.kh/english/cabinet/courtDoc/137/C9-3_Order_on_Extension_of_Provisional_Detention_NC_ENG.pdf.

⁴⁹ Decision on Nuon Chea's Appeal Concerning Provisional Detention Orders, September 26, 2008 (Provisional Detention Decision). See also previous Order Concerning Provisional Detention Conditions, May 20, 2008, para 6, at http://www.eccc.gov.kh/english/cabinet/courtDoc/76/Provisional_detention_condition_Nuon_chea_C33_EN.pdf.

⁵⁰ Provisional Detention Decision at para. 21 (emphasis added).

⁵¹ Ibid., para. 24.

Ieng Thirith

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

The Pre-Trial Chamber held a hearing on May 21, 2008 to rule on her provisional detention appeal. On July 9, 2008, the Pre-Trial Chamber affirmed the November 9, 2007 provisional detention order of the investigating judges.⁵² In a decision similar to others it has issued on the same question, the chamber evaluated whether the conditions for ordering provisional detention set out in Internal Rule 63(3) were satisfied. This involved an analysis of whether there were well-founded reasons to believe that the charged person may have committed the crimes with which she has been charged, and whether provisional detention is a necessary measure pursuant to at least one of the five criteria set out in Rule 63(3)(b). The Pre-Trial Chamber found that all of the reasons justifying provisional detention existed and denied her appeal.

8. Other Legal Developments: Limiting Appeals

Rule 104 of the Internal Rules provides that the Supreme Court Chamber shall decide appeals “on any issues of fact and law against the decisions of the Trial Chamber.”⁵³ In the September 2008 plenary, the judges amended that rule to limit appeals to instances where “an error on a question of law would invalidate the decision, or where an error of fact would occasion a miscarriage of justice.”⁵⁴ The Cambodian domestic practice—based on the civil law system—is that appeals from a trial judgment are allowed on any issue of fact or law and often result in a retrial of the case.⁵⁵ In contrast, the change in the scope of appeal brings the practice of the ECCC into accord with the practice of other international criminal tribunals.⁵⁶ The practical difficulties of allowing complete retrials on appeal provide the obvious rationale for this change.

The Defence Support Section objected to this change, however, stating that the judges do not have the legal authority to depart from Cambodian procedural law to the extent required to adopt the amendment.⁵⁷ Because the Cambodian practice of allowing complete retrials on appeal is not inconsistent with international practice, the Defence Support Section argued that there is no legal basis for deviating from the established Cambodian procedure and that by doing so the judges are impermissibly legislating

⁵² Decision on Appeal against Provisional Detention Order of Ieng Thirith, July 9, 2008, at http://www.eccc.gov.kh/english/cabinet/courtDoc/95/Decision_on_Ieng_thirith_appeal_C20_I_27_EN.pdf.

⁵³ Rule 104 (1), Internal Rules (Rev. 1), February 1, 2008 at http://www.eccc.gov.kh/english/cabinet/fileUpload/27/Internal_Rules_Revision1_01-02-08_eng.pdf.

⁵⁴ Joint Press Statement by Judicial Officers, September 5, 2008 at http://www.eccc.gov.kh/english/cabinet/press/78/Joint_statement_by_Judicial_officers_on_the_4th_plenary_EN.pdf.

⁵⁵ Cambodia Code of Criminal Procedure, August 2007, Article L521-1.

⁵⁶ See for instance Statute of the International Criminal Tribunal of the Former Yugoslavia, updated February 8, 2008, Article 25 (1) at <http://www.un.org/icty/legaldoc-e/index.htm>.

⁵⁷ Defence Support Section: Press Statement, September 5, 2008 at http://www.eccc.gov.kh/english/cabinet/press/75/DSS_Press_Statement_05-09-2008.pdf.

where they have no authority. This issue reflects the ongoing tension within the ECCC about the correct balance between international and domestic procedure, and between civil and common law practices that the Trial and Appeals Chambers will have to resolve.

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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 criminal justice. Its offices are in Abuja, Budapest, London, New York, and Washington D.C.

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