

Progress of the Extraordinary Chambers in the Courts of Cambodia

An estimated 1.7 million people died during the Democratic Kampuchea regime of the Khmer Rouge from 1975-79. After the overthrow of the regime, Cambodia continued to suffer through nearly two decades of conflict. The Cambodian government and the United Nations formally established the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2006 to try senior leaders of the Khmer Rouge and those “most responsible” for the crimes that took place. This “hybrid” tribunal—a tribunal that forms part of the Cambodian domestic legal system, but also incorporates international components—is the first internationally-backed criminal court to include a majority of national judges, to feature judicially-directed investigations that follow an inquisitorial procedural model, and to permit victims to participate as civil parties. The court has five suspects in custody and has almost completed its first trial.

OVERVIEW OF DUCH’S TRIAL

Kaing Guek Eav, also known as Duch, is the first Khmer Rouge leader being tried by the ECCC. Duch was arrested in 1999 and kept in military detention until his transfer to the ECCC in 2007. Duch has admitted his role in running the notorious interrogation center known as S21 (now the site of the Tuol Sleng genocide museum) and he has accepted responsibility for much of what took place there. He is charged with crimes against humanity, grave breaches of the Geneva Conventions—including forced labor, unlawful detention, and inhuman living conditions—and torture. All charges are related to crimes committed at S21 and the Choeung Ek “killing field,” a mass execution and burial site located near Phnom Penh.

Duch’s trial began in March 2009 and the presentation of evidence lasted for seven months. The closing arguments are scheduled to take place in late November 2009. The court heard extensive testimony

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from Duch, as well as 9 expert witnesses, 17 fact witnesses, 7 character witnesses and 22 civil parties. Ninety-two civil parties were admitted in the case, represented by four groups of lawyers. The trial has attracted considerable public interest in Cambodia, with proceedings broadcast on national television and many thousands of people attending the court hearings in person. The judgment in the Duch trial is expected in early 2010.

THE ACCUSED IN CASE 002

Nuon Chea, born in 1926, is charged with crimes against humanity and grave breaches of the Geneva Conventions. He was second in command to the Khmer Rouge’s “Brother No. 1” Pol Pot.

Ieng Sary, born in 1925, was deputy prime minister and foreign affairs minister. He is charged with crimes against humanity and grave breaches of the Geneva Conventions. Although Ieng received a royal pardon after defecting in 1996, the pre-trial chamber ruled that he is still subject to prosecution.

Ieng Thirith is the wife of Ieng Sary. Born in 1932, she was Pol Pot’s sister-in-law and the social affairs and action minister. She is charged with crimes against humanity.

Khieu Samphan was born in 1931 and was the Khmer Rouge’s head of state. He is charged with crimes against humanity and grave breaches of the Geneva Conventions.

PROGRESS OF OTHER PROCEEDINGS

The judicial investigation in the ECCC’s second case, which is against Khmer Rouge leaders Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan is expected to conclude in late 2009, with a trial unlikely to commence before early 2011. The completion of the trial could be complicated because all four suspects are 70-years-old or older and their pre-trial detention cannot be extended past September 2010.

Two further preliminary investigations against several other suspects are also underway. The Cambodian co-prosecutor opposed the decision to commence these investigations and, in accordance with ECCC procedure, the dispute was referred to the pre-trial chamber. However, the judges were unable to reach a supermajority, or a majority plus one, so the investigations are proceeding.

ONGOING CHALLENGES

Victim Participation The ECCC is the first in the line of international and hybrid tribunals to allow victims to participate directly in proceedings as civil parties. For the case against Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan, more than 2000 victims applied to participate, and by October 2009, 190 civil parties had been officially admitted. The large number of civil party applicants and the challenges of managing their participation in the courtroom have caused the ECCC judges to move to limit victim participation for future cases. Victim participation should not be permitted to compromise the rights of the accused to a fair and expeditious trial, but it should be seen as an opportunity for the ECCC to attract broader public support and to contribute directly to a lasting impact on Cambodian society.

Reparations Under the ECCC rules, civil parties may apply for moral and collective reparations, which could be interpreted to include a broad range of symbolic measures—memorials or statements of apology for example. Some victims have made claims for other forms of reparations, such as the provision of medical and educational services. No awards have yet been made and depend on a conviction.

Corruption The ECCC has faced persistent concerns over allegations of corruption and a lack of transparency. In 2007 most international donors to the Cambodian side of the ECCC suspended funding until the claims were resolved. Pursuant to a new agreement between the United Nations and the Cambodian government, an independent counselor was appointed to help strengthen the entire ECCC administration by investigating good faith complaints and ensuring that complainants

are not targeted for retaliation. The new measure does not apply to past complaints and is yet to be tested.

Political Interference Despite measures to address corruption, concerns remain about attempted political interference by Cambodian government officials over national court officers, particularly regarding the future investigations. Some high-ranking government officials have suggested that pursuing additional investigations will destabilize Cambodia's peace. Such statements risk undermining respect for the work of the court as an independent judicial institution.

Outreach The slow progress in the judicial investigation in the ECCC's second case and the expected long gap between the trials risk creating a negative effect on public interest and on international support for the ECCC. The suspects' advanced age raises fears that delays could impact the trials' completion. Nonetheless, the gap between trials offers a chance for the court to strengthen its important outreach work with Cambodian communities and to encourage further discussion on expectations for other forms of accountability regarding Cambodia's past, namely reparations, truth-seeking, and memorialization.

Legacy Serious contributions to judicial reform cannot realistically be expected from the ECCC in the context of Cambodia's struggling justice sector. However, the ECCC's greatest positive legacy may be through the provision of fair trials, its treatment of victims, and the creation of space for broader public debate about justice for past impunity in Cambodia.

November 2009

ICTJ IN CAMBODIA

ICTJ has been actively engaged with transitional justice issues in Cambodia since 2003.

- In 2006 ICTJ provided comments for the ECCC on drafting its internal rules and gave technical assistance to the development of a communication policy.
- ICTJ conducted a survey in November 2007 of the visitors to Choeung Ek, the public memorial of one of Cambodia's notorious "killing fields."
- ICTJ conducted workshops for ECCC judges and local civil society representatives on reparations and monitoring issues in 2007 and 2008.
- ICTJ and the ECCC victims' unit facilitated a workshop on legacy for victims' representatives in 2009.