Northwestern Journal of International Human Rights

Volume 8 | Issue 2 Article 2

Spring 2010

A Review of the Jurisprudence of the Khmer Rouge Tribunal

Anees Ahmed

Robert Petit

Follow this and additional works at: http://scholarlycommons.law.northwestern.edu/njihr

Recommended Citation

Anees Ahmed and Robert Petit, A Review of the Jurisprudence of the Khmer Rouge Tribunal, 8 Nw. J. Int'l Hum. Rts. 165 (2010). http://scholarlycommons.law.northwestern.edu/njihr/vol8/iss2/2

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Human Rights by an authorized administrator of Northwestern University School of Law Scholarly Commons.

 $\P 1$

¶2

A Review of the Jurisprudence of the Khmer Rouge Tribunal

Robert Petit and Anees Ahmed*

I. Introduction

The Khmer Rouge Tribunal ("Tribunal"), formally known as the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), began its judicial activities with the adoption of its Internal Rules ("Rules") on June 12, 2007.¹ Since then, the Tribunal has initiated proceedings against five defendants and, in the process, has created a sizeable body of jurisprudence on procedural and substantive issues. This paper outlines some of the key features of this truly "extraordinary" court and then analyzes the salient aspects of its emerging jurisprudence. The issues addressed in this jurisprudence are diverse, but this paper shall deal only with those that may be of relevance to other criminal tribunals responding to national and international crimes of comparable gravity and complexity.

Within the first two and a half years of the Tribunal's judicial activity, a substantial precedent has emerged with respect to the practical operation of the Rules, at least before the Co-Investigating Judges and the Pre-Trial and Trial Chambers. After the adoption of the Rules on June 12, 2007, the Co-Prosecutors filed their first "introductory submission" on July 18, 2007 to request judicial investigation against five suspects—Nuon Chea,² Ieng Sary,³ Khieu Samphan,⁴ Ieng Thirith,⁵ and Kaing Guek Eav (a.k.a. "Duch")⁶—for crimes enumerated under Cambodian and international law. Acting on this introductory submission, the Co-Investigating Judges commenced judicial investigation against all five suspects (during the judicial investigation stage defendants are referred to as "charged persons"), and the suspects were all subsequently arrested.

002/14-08-2006 Closing Order Indicting Kaing Guek Eav alias Duch, pt. IV (Aug. 8, 2008) [hereinafter Duch Indictment].

^{*} Robert Petit is Counsel in the Crimes Against Humanities and War Crimes Section of Justice Canada. He was formerly the International Co-Prosecutor of the Extraordinary Chambers in the Courts of Cambodia ("ECCC"). Anees Ahmed is the International Senior Assistant Prosecutor of the ECCC. The views expressed in this article are solely those of the authors. The authors thank Merryn Quayle and Elena Rose, former ECCC legal interns, for their assistance in the preparation of this article.

¹ Extraordinary Chambers Court of Cambodia Internal Rules, 2010, *available at* http://www.eccc.gov.kh/english/internal rules.aspx. [hereinafter Rules].

² Nuon Chea is the former Deputy Secretary of the Communist Part of Kampuchea ("CPK"), member of its Standing and Central Committees, and the Chairman of the Democratic Kampuchea's Peoples' Assembly. *See*, Case of Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ, Provisional Detention Order, ¶ 1 (Sept. 19, 2007).

³ Ieng Sary is the former Minister of Foreign Affairs of Democratic Kampuchea and a full-rights member of the Standing and Central Committees of the CPK. See, Case of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ, Provisional Detention Order, ¶ 2 (Nov. 14, 2007).

⁴ Khieu Samphan is the former Head of State of Democratic Kampuchea and a full-rights member of the Central Committee of the CPK. See, Case of Khieu Samphan, Case No. 002/19-09-2007-ECCC-OCIJ, Provisional Detention Order, ¶ 2 (Nov. 19, 2007).

⁵ Ieng Thirith, wife of Ieng Sary, is the former Minister of Social Action of Democratic Kampuchea. *See* Case of Ieng Thirith, Case No. 002/19-09-2007-ECCC-OCIJ, Provisional Detention Order, ¶ 2 (Nov. 14, 2007). ⁶ Duch is the former head of the Khmer Rouge's S-21 Security Centre in Phnom Penh. See Case of Duch, Case No.

On September 19, 2007, the Co-Investigating Judges launched a separate judicial investigation pertaining to the Khmer Rouge's S-21 Security Centre in Phnom Penh and started separate proceedings against Duch as its head.⁷ This dossier was designated as Case File No. 1.8 The dossier pertaining to the remaining twenty-four fact situations, in which all five charged persons are being investigated, was designated as Case File No. 2.9 The trial proceedings in Case File No. 1 have since concluded, and a judgment is pending. For Case File No. 2, the judicial investigation is expected to conclude in September 2010 with the issuance of an indictment.

II. BACKGROUND OF THE TRIBUNAL AND ITS SPECIAL FEATURES

The full name of the Tribunal—Extraordinary Chambers in the Courts of Cambodia—is itself indicative of the Tribunal's background and special nature. The Tribunal is a product of long, and at times contentious, negotiations between the United Nations and the Government of Cambodia ("Government").¹¹¹ These negotiations principally revolved around the United Nation's concern that the Tribunal should apply international standards of justice and due process, and the Government's concern that the Tribunal should maintain its Cambodian characteristics. As a result of the long duration of the negotiations, the Tribunal is one of the most recently established criminal tribunals, but the crimes for which it seeks accountability are among the oldest being prosecuted by any existing international tribunal or court.¹¹¹

The negotiations resulted in the adoption of the two founding documents of the Tribunal: (1) an agreement between the United Nations and the Government signed on June 6, 2003 ("Agreement")¹² and (2) a legislation of the Cambodian Parliament, initially adopted on August 10, 2001 and later modified on October 27, 2004 in accordance with the Agreement ("ECCC Law"). Consistent with the spirit of the negotiations, these founding documents gave the Tribunal certain characteristics that make it unique among the international tribunals. ¹⁴

A. Nature of the Tribunal

The founding documents envisage the Tribunal as a hybrid institution that is based on the application of national and international laws and employs national and international officials. The documents, therefore, place the Tribunal somewhere between a purely international tribunal

¶3

¶4

⁷ Id. at pt. II.

⁸ Id. at pt. 1. This dossier is formally and more completely described as Case No. 001/18-7-2007-ECCC-OCIJ.

⁹ This dossier is formally and more completely described as Case No. 002/19-9-2007-ECCC-OCIJ. *See e.g.*, Case of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ, Order on Request for Extension of Page Limit, 1 (Dec. 2, 2008). ¹⁰ The process of the United Nations' involvement can be traced back, if not earlier, to the request for "assistance" dated June 21, 1997, to the United Nations Secretary General by the two Cambodian Co-Prime Ministers. *See* TOM FAWTHORPE & HELEN JARVIS, GETTING AWAY WITH GENOCIDE? ELUSIVE JUSTICE AND THE KHMER ROUGE TRIBUNAL 117-118 (2004).

¹¹ The Tribunal has the temporal jurisdiction to prosecute certain crimes committed between April 17, 1975, and January 6, 1979, under the Khmer Rouge's Democratic Kampuchea regime.

¹² Agreement Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, U.N.-Cambodia, June 6, 2003, available at http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf [hereinafter Agreement].

¹³ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006, Oct. 27, 2004, available at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf [hereinafter ECCC Law].

¹⁴ The Agreement and the ECCC Law shall be collectively referred to as the "founding documents."

¶7

¶8

and a purely municipal court. In their first ever decision, the Co-Investigating Judges described the Tribunal as a "special internationalized tribunal." On appeal, the Pre-Trial Chamber referred to the *Taylor* decision of the Special Court for Sierra Leone ("SCSL"), which considered the indicia governing an international court, including that (1) it is an expression of the will of the international community, (2) it is considered part of the machinery of international justice, and (3) its jurisdiction involves trying the most serious international crimes. The Pre-Trial Chamber elaborated that the Tribunal is "entirely self contained from the commencement of investigation through to the determination of appeals." It operates "as an independent entity" that does not review decisions of any other court and likewise is not subject to any other court's review. In so holding, the Pre-Trial Chamber refused to consider the legality of a defendant's detention by a Cambodian military court prior to his arrest by the Tribunal.

The Trial Chamber has also commented on the hybrid nature of this Tribunal, affirming that it is "a court of special and independent character within the Cambodian legal system ... designed to stand apart from existing Cambodian courts and rule exclusively on a narrowly-defined group of defendants for specific crimes committed within a limited period."²¹ The Trial Chamber specified that the Tribunal was a "separately constituted, independent and internationalized court."²² Asked to review the same detention matter as the Pre-Trial Chamber, the Trial Chamber held that it could, and indeed did, rule on the legality of orders of a Cambodian military court in relation to the prior detention of an accused.²³ The Trial Chamber noted that in the case of an alleged violation of an accused's rights, even if such violation cannot be attributed to the Tribunal, international jurisprudence indicates that an international criminal tribunal has both the authority and the obligation to consider the legality of the action in question.²⁴

Similarly, while determining the validity of the Tribunal's Internal Rules, the Pre-Trial Chamber noted that the focus of the Tribunal "differs substantially enough from the normal operations of the Cambodian criminal courts" for it to warrant a "self contained regime of procedural law [suited to its] unique circumstances." ²⁵

B. Mix of Applicable National and International Laws

The ECCC Law permits application of both national and international substantive and procedural law at the Tribunal. In terms of substantive criminal law, the ECCC Law allows the

¹⁵ Case of Kaing Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC-OCIJ, Order of Provisional Detention, ¶ 20 (July 31, 2007).

¹⁶ Case of Kaing Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC-OCIJ (PTC 01), Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias Duch, ¶ 20 (Dec. 3, 2007) [hereinafter Duch Detention Appeal Decision] (citing Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-1, Appeals Chamber Decision on Immunity from Jurisdiction, ¶¶ 38-39 (May 31, 2004)).

¹⁷ *Id.* ¶ 18.

¹⁸ *Id*. ¶ 19.

¹⁹ *Id*. ¶ 18.

 $^{^{20}}$ *Id.* ¶ 21.

²¹ Case of Kaing Guek Eav alias Duch, Decision on Request for Release, Case No. 001/18-7-2007-ECCC-TC, ¶ 10 (June 15, 2009) [hereinafter Duch Request for Release Decision].

²² *Id*. ¶ 10.

²³ *Id*.

²⁴ *Id*. ¶ 16.

²⁵ Case of Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 06), Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, ¶ 14 (Aug. 26, 2008) [hereinafter Nuon Chea Annulment Appeal Decision].

Tribunal to prosecute persons for (1) crimes under the Cambodian Penal Code of 1956,²⁶ (2) crimes under the Genocide Convention of 1948,²⁷ (3) enumerated crimes against humanity,²⁸ (4) grave breaches of the Geneva Conventions of 1949,²⁹ (5) crimes under the Hague Convention for the Protection of the Cultural Property in the Event of Armed Conflict of 1954,³⁰ and (6) "crimes" under the Vienna Convention on Diplomatic Relations of 1961.³¹ In their first Introductory Submission, the Co-Prosecutors sought the prosecution of five defendants for genocide, crimes against humanity, grave breaches of the Genocide Convention, and (national) crimes under the Cambodian Penal Code.³² Their request for the prosecution of national crimes was, however, denied in the first indictment issued by the Co-Investigating Judges against defendant Duch,³³ a decision that was reversed on appeal.³⁴

The Agreement requires that the Tribunal's procedure shall be in accordance with Cambodian procedural law.³⁵ However, until the adoption of the Cambodian Code of Criminal Procedure ("CPC") in August 2007—much later than the drafting of the Tribunal's basic documents—there was a lack of clarity regarding the sources of the Cambodian procedural law. Therefore, where (1) Cambodian law does not deal with a particular matter, (2) there is uncertainty in Cambodian law, and (3) Cambodian law is inconsistent with international standards, the Agreement provides that "guidance may be sought [from] procedural rules established at the international level."³⁶ The applicable procedural law at the ECCC must, therefore, be consistent with "international standards of justice, fairness and due process of law."³⁷ The basic documents also bound the Tribunal to the fair trial rights embodied in Articles 14 and 15 of the International Covenant of Civil and Political Rights ("ICCPR").³⁸

Using their implicit rule-making power, the "Plenary"³⁹ of the Tribunal's judges adopted the "Internal Rules" of the court for three purposes: (1) to consolidate applicable Cambodian procedural law for proceedings before the Tribunal, (2) to adopt additional rules where "existing [Cambodian] procedure" does not deal with any matter, and (3) to resolve an uncertainty regarding the interpretation or application of "existing [Cambodian] procedure" or a question

¶10

²⁶ ECCC Law, *supra* note 13, at art. 3.

²⁷ *Id.* at art. 4.

²⁸ *Id.* at art. 5.

²⁹ *Id*. at art. 6.

³⁰ *Id*. at art. 7.

³¹ Id. at art. 8.

³² Co-Prosecutors of the ECCC, Statement on the First Introductory Submission (July 18, 2007), *available at* http://www.eccc.gov.kh/english/cabinet/press/33/Statement_of_Co-Prosecutors_18-July-2007_.pdf [hereinafter Co-Prosecutors' Statement of 18 July 2007].

³³ Duch Indictment, *supra* note 6, ¶ 152. In denying this request, the Co-Investigating Judges referred to a hierarchy of crimes and only charged the "highest available legal classification" under international law: crimes against humanity and grave breaches of the Genocide Conventions.

³⁴ Case of Kaing Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC-OCIJ (PTC 02), Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias Duch, ¶ 57 (Dec. 5, 2008) [hereinafter Duch Indictment Appeal Decision].

³⁵ Agreement, *supra* note 12, at art. 12.

³⁶ *Id.* at art. 12(1).

³⁷ *Id.* at art. 12(2).

³⁸ *Id.*; ECCC Law, *supra* note 13, at art. 33.

³⁹ The word "Plenary" is not mentioned either in the Agreement or the ECCC Law. However, Internal Rule 18 refers to "Plenary Sessions" comprising of all the permanent and reserve judges, permanent and reserve Co-Prosecutors, Heads of the Victims Unit and the Defense Support Section, and the Director and Deputy Director of Administration. Each of these participants has well-delineated voting rights.

regarding its consistency with international standards.⁴⁰ Challenges to the constitutionality of the Internal Rules or their superiority to the CPC have been dismissed.⁴¹ The CPC, according to the Pre-Trial Chamber, shall apply only where "a question arises which is not addressed by the Internal Rules."⁴²

Various judicial organs of the Tribunal have routinely referred to and relied upon jurisprudence of international tribunals,⁴³ regional judicial bodies like the European Court of Human Rights,⁴⁴ and comparable national jurisdictions to interpret the Internal Rules.⁴⁵

C. Inquisitorial Judicial System

As foreseen by the Agreement and the ECCC Law, the Cambodian model of criminal procedure is reflected in the Tribunal's procedure. Cambodia, owing to its colonial connection with France, follows the Continental European inquisitorial model of criminal procedure. In general, this is reflected in the procedure before the Tribunal as consolidated in the Internal Rules. Special features that characterize this system include (1) the provision for judicial investigation by "impartial" Co-Investigating Judges, 46 (2) participation of the defendants throughout the judicial investigation, 47 (3) substantive rights of victims to participate throughout the proceedings as "civil parties", 48 (4) wider appellate powers, including the right to hear fresh evidence at appeal, 49 (5) discovery of evidence being court-driven rather than party-driven, 50 (6) liberal rules of evidence, and (7) creation of a *dossier* (a Case File).51

⁴⁰ Rules, *supra* note 1, at Preamble. Unlike other international criminal tribunals that grant an explicit power to their judges to draft rules of evidence and procedure, the ECCC's founding documents gave no such power to the Plenary of judges.

⁴¹ Nuon Chea Annulment Appeal Decision, *supra* note 25, ¶ 14; Case of Khieu Samphan, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 11), Written Version of the Oral Decision on Application by the Co-Lawyers for the Civil Parties Concerning Oral Submissions, ¶ 2 (Dec. 4, 2008); Case of Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 06), Decision on Civil Party Co-Lawyers' Joint Request for Reconsideration (Feb. 25, 2009).

⁴² Nuon Chea Annulment Appeal Decision, *supra* note 25, ¶ 15.

⁴³ Including the International Criminal Court ("ICC"), the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR"), the Special Court for Sierra Leone ("SCSL") and the Special Panels for Serious Crimes of East Timor. See *e.g.*, Case of Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 07), Decision on Nuon Chea's Appeal Regarding Appointment of an Expert, ¶ 21 (Oct. 22, 2008); Duch Detention Appeal Decision, *supra* note 16, ¶ 20; Case of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 05), Decision on Appeal Concerning Contact Between the Charged Person and his Wife, ¶ 16 (Apr. 30, 2008).

⁴⁴ Including the European Court of Human Rights ("ECHR"). See *e.g.*, Case of Ieng Sary, Case File No. 002/19-09-2007-ECCC-OCIJ (PTC 12), Decision on Ieng Sary's Appeal Against the OCIJ Order on Translation Rights and Obligations of the Parties (Feb. 20, 2009) [hereinafter Ieng Sary Translation Appeal Decision].

⁴⁵ Including cases from France and the UK's Privy Council. See *e.g.*, *id.* ¶ 23, 31.

⁴⁶ Rules, *supra* note 1, at R. 55(5).

⁴⁷ Case of Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 07), Decision on Nuon Chea's Appeal Regarding Appointment of an Expert, ¶¶ 25-7 (Oct. 22, 2008).

⁴⁸ Rules, supra note 1, at R. 23.

⁴⁹ Case of Ieng Sary, Case File No. 002/19-09-2007-ECCC-OCIJ (PTC 03), Decision on Appeal Against Provisional Detention Order of Ieng Sary, ¶ 68-9 (Oct. 17, 2008) (holding that, at appeal, the Pre-Trial Chamber "will undertake its own analysis" and consider the "evidence submitted and the whole case file of the Co-Investigating Judges") [hereinafter Ieng Sary Detention Appeal Decision]; Rules, *supra* note 1, at R. 104. Rule 104(1), however, has been recently amended to restrict appeals before the Supreme Court [Appeals] Chamber to only grounds of (1) an error on a question of law invalidating the impugned decision and (2) an error of fact that has occasioned a miscarriage of justice. This has brought this Tribunal's appellate procedure in line with that of other major international tribunals like the ICTY, the ICTR and the SCSL.

⁵⁰ E.g., Rules, supra note 1, at Rs. 84, 87, 90, 91, etc.

⁵¹ *Id.* at R. 87(1) (stating that "[u]nless otherwise provided [...] all evidence is admissible"). The Case File, or the *dossier*, forms the basis of proceedings before the Tribunal. The Glossary of the Internal Rules describes the Case

According to the procedure of the Tribunal, the Co-Prosecutors conduct a "preliminary investigation" to determine "whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify suspects and potential witnesses."⁵² If the Co-Prosecutors have "reasons to believe" that such crimes have been committed, they may send an introductory submission to the Co-Investigating Judges requesting a judicial investigation.⁵³ Upon receipt of an introductory submission from the Co-Prosecutors, the Co-Investigating Judges may initiate a judicial investigation with the participation of the Co-Prosecutors, the defendants, and the victims as civil parties.⁵⁴ Throughout this judicial investigation, parties may seek investigative action or other orders from the Co-Investigating Judges,⁵⁵ some of which are subject to appeal before the Pre-Trial Chamber.⁵⁶ There is no appeal from decisions of the Pre-Trial Chamber.⁵⁷

At the conclusion of the judicial investigation and after the Final Submission of the Co Prosecutors, if the Co-Investigating Judges find "sufficient evidence (*charges suffisantes*)"⁵⁸ to indict a defendant, they issue either an indictment or a dismissal order.⁵⁹ The indictment forms the basis of the substantive trial conducted by the Trial Chamber;⁶⁰ however, the Trial Chamber may also conduct its own "additional investigation."⁶¹

The evidence collected by the Co-Investigating Judges and that brought before the Trial Chamber forms part of the Case File, but for the evidence to be used by the Trial Chamber in its judgment, it must be "put before the Chamber and subjected to examination." The defendant may raise jurisdictional challenges, but only before the initial hearing, after which they are barred. Although they initiate proceedings and are one of the parties during the investigation, the Co-Prosecutors bear the burden in the Trial Chamber of proving the guilt of the accused "beyond reasonable doubt."

The Trial Chamber hears testimony on the basis of a common witness list that the court creates after receiving suggestions from the parties.⁶⁵ The statutory provisions and recent practice indicate that the judges question the witnesses – including experts – first, followed by the Co-Prosecutors, the Civil Parties, and the Defense.⁶⁶ There is a limited right of interlocutory appeal

File as "all the written record of investigative action undertaken in the course of preliminary investigation or a judicial investigation, together with all applications by parties, written decisions and any attachments thereto at all stages of the proceedings, including the record of proceedings before the Chambers."

```
<sup>52</sup> Rules, supra note 1, at R. 50(1).
```

¶14

¶15

⁵³ *Id.* at R. 53(1).

⁵⁴ Id. at R. 55.

⁵⁵ Id. at R. 55(10).

 $^{^{56}}$ Id. at R. 74. This Rule indicates the categories of decisions against which different parties may appeal. The Pre-Trial Chamber has held these lists to be exhaustive, thereby holding appeals not falling under them as inadmissible. See Ieng Sary Translation Appeal Decision, supra note 44, ¶ 28, Disposition.

⁵⁷ The Trial Chamber is not an appellate body, and the Supreme [Appeals] Court Chamber has jurisdiction to decide appeals against a judgment or decision of the Trial Chamber only. Rules, *supra* note 1, at R. 104.

⁵⁸ Duch Indictment, *supra* note 6, ¶ 130.

⁵⁹ Rules, *supra* note 1, at R. 67(1).

⁶⁰ *Id.* at R. 79(1).

⁶¹ Id. at R. 93(1).

⁶² *Id.* at R. 87(2).

⁶³ *Id.* at R. 89(1).

⁶⁴ *Id.* at R. 87(1).

⁶⁵ Id. at R. 80(1)-(2), 80 bis.

⁶⁶ *Id.* at R. 91(1)-(2). Since the commencement of the substantive proceedings in the trial against Duch on March 30, 2009 the Trial Chamber followed this sequence in respect of the evidence of the accused, witnesses and the experts.

¶18

¶20

to the Supreme Court Chamber from decisions of the Trial Chamber, and the remainder of the decisions can be reviewed only at judgment.⁶⁷

The judgment of the Trial Chamber is limited to the facts set out in the indictment, though the Chamber may "change the legal characterization of the crimes set out in the indictment as long as no new constitutive elements are introduced."⁶⁸ The judgment also disposes of claims by the victim civil parties.⁶⁹ The civil parties, however, may be granted only "collective and moral reparations" which shall be "awarded against and … borne by" convicted persons.⁷⁰

In a departure from typical Continental civil law procedure, the Supreme Court Chamber can hear only appeals against judgments or interlocutory decisions on the grounds of: (1) an error on a question of law invalidating the impugned decision, or (2) an error of fact that has occasioned a miscarriage of justice. The Supreme Court Chamber may also examine the evidence or discover new evidence to determine issues before it.⁷¹

D. Co-Equal Prosecuting and Investigative Officials

In light of the hybrid nature of the Tribunal, its founding documents envision that national and international officials will work side-by-side at all levels, including as prosecutors and investigating judges. The judicial chambers comprise a mix of national (Cambodian) and international judges. Similarly, there are two co-equal Co-Prosecutors, one national and one international, and two co-equal Co-Investigating Judges, one national and one international.⁷² The judicial chambers operate on the principle of supermajority, but the Co-Prosecutors and Co-Investigating judges are expected to work jointly by achieving consensus in their decision-making. If, however, there is a disagreement between the Co-Prosecutors or the Co-Investigating Judges such that they cannot achieve consensus, those differences are submitted to the Pre-Trial Chamber for a judicial determination.⁷³

Recently, the Pre-Trial Chamber ruled on the Tribunal's first and as yet only disagreement proceedings, initiated by the Co-Prosecutors. The adjudicatory process in relation to such disagreement is, by law, confidential; however, to ensure that the public is duly informed of ongoing proceedings of the Tribunal, the Co-Prosecutors (together⁷⁴ and individually on the part of the International Co-Prosecutor⁷⁵) issued statements informing the public of the dispute. The disagreement principally concerned the appropriateness of opening new judicial investigations

⁶⁷ *Id.* at R. 104(4). These appeals are referred to as "immediate appeals" and may be filed against the following decisions: (1) decisions that have the effect of terminating the proceedings, (2) decisions on detention and bail, (3) decisions on protective measures, (4) decisions on interference with the administration of justice, and (5) decisions declaring a civil party application inadmissible.

⁶⁸ *Id.* at R. 98(1).

⁶⁹ Id. at R. 100(1).

⁷⁰ *Id.* at R. 23(11).

⁷¹ *Id.* at R. 104(1).

⁷² Agreement, *supra* note 12, at arts. 5-6. This dichotomy is also reflected among the administrative officials. Although the ECCC has a Cambodian Director of Administration (performing functions similar to those of a Registrar), the United Nations appoints an international Deputy Director of Administration.

⁷³ *Id*. at art. 7

⁷⁴ Co-Prosecutors of the ECCC, Statement (Jan. 5, 2009), *available at* http://www.eccc.gov.kh/english/cabinet/press/84/Statement_OCP_05-01-09_EN.pdf [hereinafter Co-Prosecutors' Statement].

⁷⁵ International Co-Prosecutor, Press Statement (Apr., 24, 2009), *available at* http://www.eccc.gov.kh/english/cabinet/press/107/Statement_co_prosecutors_En.pdf [hereinafter International Co-Prosecutor's Statement].

against certain additional suspects for crimes committed under the Khmer Rouge. The International Co-Prosecutor had proposed the initiation of new prosecutions because, according to him, there were reasons to believe that (1) the crimes described in his filings were committed, (2) those crimes were within the jurisdiction of the Tribunal, and (3) they should be investigated by the Co-Investigating Judges. He believed that the new prosecutions would lead to a more comprehensive accounting of the crimes that were committed under the Khmer Rouge regime between 1975 and 1979.⁷⁶

The National Co-Prosecutor, however, argued that the new prosecutions should not proceed on account of "(1) Cambodia's past instability and the continued need for national reconciliation, (2) the spirit of the Agreement and the ECCC Law, and (3) the limited duration and budget of the Tribunal." She contended that the Tribunal should instead prioritize the trials of the five defendants already detained, especially when, according to her, the Agreement and the ECCC Law envisioned only a small number of trials. She maintained that the Tribunal's mandate can be adequately fulfilled through the prosecution of the five suspects already detained.⁷⁷

The Pre-Trial Chamber declared that it was unable to assemble an affirmative vote of at least four judges to resolve the disagreement. In accordance with the Agreement, the absence of a majority decision meant that the prosecutions could proceed. Thus, the International Co-Prosecutor forwarded the files for the new prosecutions to the Co-Investigating Judges so they could open new investigations. Introductory submissions seeking fresh prosecutions are, by law, confidential documents. However, recognizing the need to keep the public informed, the International Co-Prosecutor issued a statement regarding the new submissions. The new submissions cover crimes that were allegedly committed as part of a joint criminal enterprise to systematically and unlawfully restrict the rights of the Cambodian population. Five suspects are identified, and judicial investigation is requested into forty distinct factual situations of murder, torture, unlawful detention, forced labor, and persecution. If proved, the factual allegations in the new submissions would constitute crimes against humanity, grave breaches of the Geneva Conventions, violations of the 1956 Cambodian Penal Code, and genocide.

No other disagreement proceedings have been brought before the Pre-Trial Chamber, either by the Co-Investigating Judges or by the Co-Prosecutors.

E. Supermajority Requirement for Judicial Decision-Making

Another unique feature of the Tribunal that reflects its hybrid nature is the *supermajority* required for decision-making in its three judicial chambers—the Pre-Trial Chamber, the Trial Chamber, and the Supreme Court Chamber. The supermajority requirement ensures that for any decision of the Pre-Trial and Trial Chambers, comprising three Cambodian and two international

¶21

¶22

⁷⁶ Co-Prosecutors' Statement, *supra* note 74.

⁷⁷ Id

⁷⁸ Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, Disagreement No. 001/18-11-2008-ECCC/PTC (Aug. 18, 2009). As discussed in more detail below, a decision of the Pre-Trial Chamber requires an affirmative vote–or *supermajority*–of at least four judges.

⁷⁹ Agreement, *supra* note 12, at art. 7(4), 20.

⁸⁰ Acting International Co-Prosecutor, Statement on Filing of Two New Introductory Submissions (Sept. 2009), available at

http://www.eccc.gov.kh/english/cabinet/press/130/ECCC_Act_Int_Co_Prosecutor_8_Sep_2009_(Eng).pdf. ⁸¹ *Id.*

judges, an affirmative vote of at least one international judge is required.⁸² Similarly, for any decision of the Supreme Court Chamber, comprised of four Cambodian and three international judges, an affirmative vote of at least one international judge is required.⁸³ This supermajority formula was the key to the acceptance of the present hybrid nature of the ECCC by the United Nations and the Government of Cambodia.

F. Substantive Victim Participation in the Proceedings as Civil Parties

Participation of victims as full parties—"civil parties"—is a unique distinguishing feature of the Tribunal. Although the Agreement and the ECCC Law are silent on this issue, the Rules, reflecting Cambodian criminal procedure, granted full rights as parties to the victims of the crimes being prosecuted by the Tribunal.⁸⁴ The Rules also created the Victims Unit, which has a wide-ranging mandate.⁸⁵

The issue of victim participation and the extent of civil parties' rights came up for judicial determination in the first-ever appeal before the Pre-Trial Chamber in Case File No. 2.86 The charged person, Nuon Chea, argued that, according to Cambodian procedure, civil parties were permitted to participate only in the trial on the merits and not in the pre-trial proceedings. He submitted that victim participation must not be prejudicial to, or inconsistent with, the right of a defendant to a fair trial.⁸⁷ The Pre-Trial Chamber found that the text of Rule 23(1)(a) is clear in that it provides for participation of civil parties "in all criminal proceedings, which include [pretrial proceedings]".88 From an analysis of the scheme of the Rules, the Chamber concluded that "civil parties have active rights to participate starting from the investigative phase".89 Contrasting the Tribunal's procedure with that of the International Criminal Court ("ICC"), the Chamber noted that at the Tribunal, a civil party, once admitted, may participate in all stages of the proceedings without having to "show any special interest [at each] stage," as is the case at the ICC. 90 The inclusion of civil parties in the proceedings was in recognition of the Tribunal's stated purpose of national reconciliation⁹¹ and the international standards it is required to follow.⁹² The Rules provide the means for the judicial chambers to cure any "apparent imbalance or unfairness" that may result from civil party participation. 93 Although it reached a decision on the substance of Nuon's challenge, the Pre-Trial Chamber declined to lay down a "prescriptive" procedure"94 of regulation of civil party participation, despite its acknowledgment that the number civil parties would increase.95

⁸² Agreement, *supra* note 12, at arts. 4(1)(a), 7(4).

⁸³ *Id.* at art. 4(1)(b). Whereas the Pre-Trial Chamber is the final appellate body during the pre-trial proceedings, the Supreme Court Chamber is the final appellate body during the trial.

⁸⁴ Rules, *supra* note 1, at R. 23.

⁸⁵ Id at R 12

⁸⁶ Case of Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 01), Decision on Civil Party Participation in Provisional Detention Appeals (Mar. 20, 2008).

⁸⁷ *Id*. ¶ 5.

⁸⁸ *Id.* ¶ 36 (emphasisadded).

⁸⁹ *Id*.

⁹⁰ *Id*. ¶ 49.

⁹¹ *Id.* ¶ 37 (citing Rules, *supra* note 1, at Preamble).

⁹² *Id*. ¶ 40.

⁹³ *Id*. ¶ 43.

⁹⁴ Id.

⁹⁵ *Id*. ¶ 48.

Once the number of civil parties did increase, different chambers adopted the following mechanisms to regulate their participation in accordance with the imperatives of procedural fairness: (1) in Case File No. 1, during trial proceedings all the civil parties were divided into four groups, which were each permitted to address the Chamber; 96 (2) the Rules were amended to provide a right to the Co-Prosecutors, but not to the civil parties, to make an opening statement; 97 (3) legally represented civil parties were permitted to speak only through counsel; 98 (4) civil parties—like all other parties—were ordered to give advance written notice should they wish to address the chamber orally;99 and (5) each of the four groups of civil parties was granted time for oral arguments as has been granted to the defense and the prosecution. 100

It became clear during the course of the first trial that victim participation as full-rights parties would conflict with judicial economy as perceived by the Chamber. Consequently, in a split ruling delivered near the conclusion of the first trial, the Trial Chamber limited the rights of Civil Parties to question the Accused and experts on matters relating to sentencing. 101 The Trial Chamber held that it was for the Co-Prosecutors to prove the guilt of the accused, while the civil parties, who have an interest in securing a decision on the criminality of the actions of the accused to establish a claim for reparation, have the right during the trial to assist the prosecution in establishing guilt. 102 According to the Chamber, however, these respective roles change with respect to sentencing. 103 The Co-Prosecutors' responsibility is to ensure an appropriate sentence, and the civil parties' responsibility is to seek reparations. The Co-Prosecutors have no role in seeking reparations, and the civil parties have no role in relation to sentencing. 104

In the light of the experience gained in the first trial, which concluded in November 2009, two successive Plenary sessions of the ECCC Judges considered measures to modify the participation of civil parties to meet the requirements of the trials of mass crimes with a view to "promoting greater efficiency in trial management and the ability of the ECCC to reach a verdict in any future trials."105 The Plenary agreed that the key features of the new scheme would include: (1) a single claim for collective and moral reparation to be formulated by a single consolidated group of all civil parties, (2) lead Co-Lawyers, supported by the civil party lawyers, to support the consolidated group, and (3) special procedures to address any conflict of interest that arises. 106

¶27

¶28

⁹⁶ Case of Kaing Guek Eav alias Duch, Case File No. 001/18-7-2007-ECCC-TC, Agenda for Initial Hearing, 2 (Feb. 13, 2009).

⁹⁷ Rules, *supra* note 1, at R. 89 *bis* (2).

⁹⁸ Case of Ieng Sary, Case File No. 002/19-09-2007-ECCC-OCIJ (PTC 03), Written Version of Oral Decision of 1 July 2008 on the Civil Party's Request to Address the Court in Person, ¶ 3 (July 3, 2008).

⁹⁹ Case of Khieu Samphan, Case File No. 002/19-09-2007-ECCC-OCIJ (PTC 11), Written Version of Oral Decision on Application by the Co-Lawyers for the Civil Parties Concerning Oral Submissions, ¶ 5 (Dec. 4, 2008). ¹⁰⁰ Case of Ieng Sary, Case File No. 002/19-09-2007-ECCC-OCIJ (PTC 17), Conduct of Criminal Proceedings, 3 (Apr. 2, 2009).

¹⁰¹ Case of Kaing Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC-TC, Decision on Civil Party Co-Lawyers' Joint Request for Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character (Oct. 9, 2009). 102 *Id.* ¶ 41.

¹⁰³ *Id*. ¶ 42.

¹⁰⁴ Id.

¹⁰⁵ Press Release, Extraordinary Chambers in the Courts of Cambodia, Sixth Plenary Session Concludes (Sept. 11, 2009).

¹⁰⁶ Id.

¶33

¶34

III. SALIENT FEATURES OF THE JURISPRUDENCE

A. Detention Issues

1. Provisional Detention and Bail

Since the beginning of its judicial proceedings and the subsequent arrest of the five charged persons, the Co-Investigating Judges, the Pre-Trial Chamber, and the Trial Chamber have heard applications for release from detention on a number of occasions.

Rule 63(3) describes the conditions under which a charged person, under judicial investigation, may be provisionally detained by the Co-Investigating Judges. It requires that:

- (a) there must be well founded reasons to believe that the charged person may have committed the crimes specified in the Co-Prosecutors' introductory submission; and
- (b) the following disjunctive conditions must be met to conclude that detention is a necessary measure:
 - (i) to prevent the charged person from exerting pressure on victims or witnesses, or to prevent collusion between the charged person and his accomplices in the charged crimes,
 - (ii) to preserve evidence or to prevent its destruction,
 - (iii) to ensure the presence of the charged person in the proceedings,
 - (iv) to protect the security of the charged person, or
 - (v) to preserve public order.

Rule 63(7) provides for an annual review of detention and a subsequent extension by the Co-Investigating Judges by a reasoned order only after hearing objections by the charged person.

The Co-Investigating Judges issued five decisions ordering the initial (provisional) detention of these charged persons. The initial provisional detention orders were for a period of one year, which can be extended, by order of the Co-Investigating Judges, for additional one-year periods. Appeals against those detention decisions have been decided by the Pre-Trial Chamber.

In Case File No. 1, Duch made an oral application for his release at the beginning of his trial on the grounds that, *inter alia*, he had admitted his guilt, he had cooperated with the Tribunal, he had expressed remorse, and his previous detention by a Cambodian military court should be taken into account.¹⁰⁷ In its decision on this issue, the Trial Chamber ruled that Duch's prior detention by the military court constituted a violation of the Cambodian domestic law applicable at the time and that his prior detention also contravened his internationally recognized

¹⁰⁷ Case of Kaing Guek Eav alias Duch, Case File No. 001/18-7-2007-ECCC-TC, Transcript (Apr. 1, 2009). *See* Douglas Gilison, *Duch Seeks Release and Sentence Reduction*, CAMBODIA DAILY, Apr. 2, 2009, p. 1.

right to a trial within a reasonable time. 108 The Chamber found that, if convicted, Duch is entitled to credit for the time spent unlawfully in detention under the authority of the military court. 109 If acquitted, Duch would be entitled to pursue remedies available within Cambodian national law. 110

In Case File No. 2, the appeals of charged persons Nuon Chea, Ieng Sary, and Ieng Thirith against their original detention were dismissed by the Pre-Trial Chamber, and charged person Khieu Samphan withdrew his appeal.¹¹¹ After they had served one year of detention, their detention was renewed by the Co-Investigating Judges, pursuant to a statutory review. All four charged persons unsuccessfully appealed against the renewal of their detention.

In deciding appeals of detention orders, the Pre-Trial Chamber has laid down a broad standard of review. It deals with detention appeals by examining (1) the procedure of the Co-Investigating Judges prior to the impugned order, (2) the sufficiency of facts for ordering detention under Rule 63(3), (3) whether the circumstances on which the impugned order is based still exist on the date of the issuance of the appellate decision, and (4) the exercise of discretion by the Co-Investigating Judges in applying Rule 63(3).¹¹²

To date the Tribunal has found that well-founded reasons exist in the case of all the current charged persons to believe that they may have committed the crimes specified in the introductory submissions of the Co-Prosecutors. In conducting this examination, the Pre-Trial Chamber has analyzed whether facts or information exists that would satisfy an objective observer that the charged person may have committed the offences. It considered the word "committed" in Rule 63(3)(a) to mean "to incur individual responsibility for" and, therefore, to include all the modes of liability permitted to be charged under the ECCC Law.

In analyzing the threat to victims or witnesses that the charged persons would pose if released, the Pre-Trial Chamber has considered that a "degree of influence is necessarily attached to senior positions [of power] and involvement in political movements [...] which does not stop when one no longer occupies such positions."¹¹⁵ The Pre-Trial Chamber has also considered the gravity of charges and the consequential lengthy sentence as factors in determining whether a charged person is likely to appear for trial.¹¹⁶

The Tribunal is unique among international criminal tribunals in that it provides for disturbance of public order as grounds for provisional detention.¹¹⁷ In reviewing claims based on those grounds, the Pre-Trial Chamber has noted that although specific evidence is required to demonstrate an actual risk that public order may be disturbed if a defendant is released, this

¶35

¶36

¶37

¶38

¹⁰⁸ Duch Request for Release Decision, *supra* note 21, ¶ 21.

¹⁰⁹ *Id.* ¶¶ 29, 36.

¹¹⁰ *Id.* ¶ 37.

¹¹¹ Case of Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), Decision on Appeal Against Order on Extension of Provisional Detention of Nuon Chea (May 4, 2009); Case of Ieng Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTC16), Decision on Ieng Thirith's Appeal Against Order on Extension of Provisional Detention (May 11, 2009).

¹¹² Case of Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 01), Decision on Appeal Against Provisional Detention Order of Nuon Chea, ¶ 9 (Mar. 20, 2008) [hereinafter Nuon Chea Detention Appeal Decision]. ¹¹³ *Id.* ¶ 46.

¹¹⁴ ECCC Law, *supra* note 13, at art. 29 (allowing for the modes of liability of planning, instigating, ordering, aiding and abetting, committing and superior criminal responsibility); Ieng Sary Detention Appeal Decision, *supra* note 49, ¶ 71

¹¹⁵ Ieng Sary Detention Appeal Decision, *supra* note 49, ¶ 99.

¹¹⁶ Nuon Chea Detention Appeal Decision, *supra* note 112, at ¶ 75.

¹¹⁷ Ieng Sary Detention Appeal Decision, *supra* note 49, ¶ 101; Nuon Chea Detention Appeal Decision, *supra* note 112, at \P 66.

assessment necessarily involves "a measure of prediction," particularly in the context of mass atrocity crimes. 118

The Pre-Trial Chamber has also dismissed repeated requests for alternative modes of detention, including "house arrest" and "hospital detention." It has noted that the Rules do not specifically provide for alternative modes of detention; they only foresee provisional detention at the Tribunal's Detention Unit. However, since Rule 65(1) provides for a release on bail, the Pre-Trial Chamber has treated these requests as applications for bail with conditions. Notwithstanding this interpretation, if any of the conditions necessitating provisional detention are met, no order for release on bail can be made.

2. Segregation in Detention

¶41 The Pre-Trial Chamber struck down an order of the Co-Investigating Judges which, in effect, directed that the charged persons in the Tribunal's Detention Unit must be segregated from one another. 123 Although the Pre-Trial Chamber found that the Co-Investigating Judges had the authority under Rule 55(5) "to limit contacts between the charged persons and any other persons in the interest of investigation," such measures are limited by Rule 21(2) as "strictly to the needs of the proceedings, proportionate to the gravity of the offence charged and fully [respecting] human dignity."124 Relying on the jurisprudence of the ICC, the Pre-Trial Chamber noted a distinction between segregation to preserve order in the prison and restriction of communication between the detainees to avoid prejudice to the proceedings. 125 The Pre-Trial Chamber found that judicial authorities had jurisdiction over the latter case but not over the former.¹²⁶ Any limitation of contact must be by a reasoned decision that clarifies that the purpose of the segregation is to avoid prejudice. 127 In reversing the decision of the Co-Investigating Judges, the Pre-Trial Chamber restored contacts within the Detention Unit between co-detainees Ieng Sary and Ieng Thirith, who have been spouses for more than fifty-seven years. 128 The Pre-Trial Chamber noted that the alleged crimes were committed thirty years ago, and the codetainees "had all that time to discuss any matters related to such allegations." 129 The Chamber also noted that a long duration of limited contact, without proper justification, affects the detainees' "right to be treated with humanity." 130

Within a few days of the reversal of their first order of segregation, the Co-Investigating Judges issued a second order of segregation. However, the second order specifically excluded

¹¹⁸ Ieng Sary Detention Appeal Decision, *supra* note 49, ¶ 112.

¹¹⁹ *Id.* ¶ 120.

 $^{^{120}}$ Id. ¶ 119.

¹²¹ *Id.* ¶ 120.

 $^{^{122}}$ Id. ¶ 121.

¹²³ Case of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 05), Decision on Appeal Concerning the Charged Person and his Wife, ¶ 9 (Apr. 30, 2008).

¹²⁴ *Id.* ¶¶ 14-15.

¹²⁵ *Id.* ¶ 16 (relying on Prosecutor v. Katanga and Chui, Case No. ICC-01/04-01/07, Decision Revoking the Prohibition of Contact and Communication Between Germain Katanga and Mathieu Ngudjolo Chui, Single Judge of the ICC, 8 (Mar. 3, 2008)).

¹²⁶ *Id.* ¶ 16 (relying on Rule 64 of the Rules of Detention of the ICTY and the ICTR and Rule 101 of the Regulations of the Court of the ICC).

¹²⁷ *Id*. ¶ 17.

¹²⁸ *Id*. ¶ 19.

¹²⁹ *Id*.

¹³⁰ *Id*. ¶ 21.

Ieng Sary and Ieng Thirith on the grounds that they are "spouses." ¹³¹ On appeal by Nuon Chea, the Pre-Trial Chamber reversed the order. ¹³² In light of the jurisprudence of the ICC and the European Court of Human Rights, the Pre-Trial Chamber considered that a limitation of contact could be ordered only to prevent pressure on victims and witnesses "when there is evidence reasonably capable of showing that there is a concrete risk" that one detainee might collude with other detainees to exert such pressure. ¹³³ With the passage of time, as the investigation progresses and the risk necessarily decreases, the threshold becomes higher. ¹³⁴ The Pre-Trial Chamber held that the mere fact that provisional detention was considered necessary as a measure to prevent a detainee from exerting pressure on victims and witnesses does not lead to the conclusion that the detainee might collude with another detainee, while in detention, to exert such pressure. ¹³⁵ It found no reason related to the investigation that justified restriction of communications among the current detainees of the Tribunal. ¹³⁶

B. Fair Trial Issues

1. Fitness to Stand Trial

Given the advanced age and the associated ailments of most of the defendants before the Tribunal, the issue of fitness to stand trial has been raised repeatedly. In particular, two charged persons, Nuon Chea and Ieng Sary, citing their medical history, requested the Co-Investigating Judges to appoint psychiatric experts to assess their fitness to stand trial. The Co-Investigating Judges denied their requests separately, on the grounds that the issue of fitness to stand trial did not arise at that stage of the proceedings because the charged persons "had not yet been set for trial." The two charged persons lodged separate appeals before the Pre-Trial Chamber, but the Pre-Trial Chamber dismissed them on the grounds that the facts did not warrant the appointment of fitness experts. 138

Although it dismissed the appeals, the Pre-Trial Chamber laid down detailed guidelines that may guide the Tribunal in dealing with future requests for evaluation of fitness to stand trial. The Pre-Trial Chamber noted that Rule 32 provides for appointment of experts to determine whether a defendant is "physically and mentally fit to stand trial." However, it also noted that the Tribunal's constitutive documents do not define the precise meaning of the expression "fit to

 $^{^{131}}$ Case of Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ, Order Concerning Provisional Detention Conditions, \P 6 (May 20, 2008).

¹³² Case of Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 09), Decision on Nuon Chea's Appeal Concerning Provisional Detention Conditions (Sept. 26, 2008).

 $^{^{133}}$ *Id.* ¶ 21.

¹³⁴ *Id*.

¹³⁵ *Id.* ¶ 22.

¹³⁶ *Id.* ¶ 24.

¹³⁷ Case of Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ, Letter from the Investigating Judges to the Defense Counsel for Nuon Chea, ¶ 1 (Mar. 14, 2008); Case of Ieng Sary, Case File No. 002/19-09-2007-ECCC-OCIJ, Written Record of Interview on Conditions of Detention, 3 (May 2, 2008).

 $^{^{138}}$ Id. ¶ 11; Case of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 10), Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert, 11 (Oct. 21, 2008).

¹³⁹ Cited in Open Society Justice Initiative, Recent Developments at the Extraordinary Chambers for the Courts of Cambodia 16-17 (May 2008), available at

http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/eccc_20080514 /eccc_20080514.pdf (stating that the originals have been sealed as confidential in ECCC chambers) [hereinafter Nuon Chea Fitness Appeal Decision].

¶46

¶48

stand trial."¹⁴⁰ As there was no guidance in the Internal Rules or under Cambodian law, the Pre-Trial Chamber sought "guidance in procedural rules established at the international level."¹⁴¹ Relying on decisions of ICTY and the Special Panels for Serious Crimes in East Timor, the Pre-Trial Chamber ruled that, in the name of fairness, defendants before the ECCC enjoyed procedural rights throughout the process, including the right to be informed of the charges against them, the right to prepare their defense, and the right to defend themselves.¹⁴² It also found that a number of provisions of the Rules confirm that the charged persons are given the opportunity to play an active role during the investigative phase.¹⁴³ The Pre-Trial Chamber, therefore, found that the charged persons are entitled to have their capacity to exercise these procedural rights during the pre-trial phase evaluated by an expert, if their request is properly justified.¹⁴⁴

Moreover, the Pre-Trial Chamber noted that the Rules and the Cambodian law are silent on the prerequisites for a successful application for an order on appointment of an expert. The Chamber, therefore, sought guidance from procedure established at the international level and concluded that it shall review appeals on this issue by determining whether "there was adequate reason to question the charged person's capacity to participate, with the assistance of his [counsel], in the proceedings and sufficiently exercise his right during investigation."¹⁴⁵ The Pre-Trial Chamber also took into account its own observations of the charged person's behavior during the proceedings.¹⁴⁶

On the basis of analysis conducted in November 2009, all the charged persons in Case File No. 2 have been found fit to stand trial at this stage of the proceedings.

2. Translation Rights and Obligations of the Parties

In any tribunal that deals with national and international officials working in a multi-lingual environment, issues involving the translation of documents are a regular phenomenon. Thus, the international criminal tribunals have developed procedures and jurisprudence to address those issues. Faced with requests for translations of all the documents in the Case File, either in the language of the charged persons or in the language of their international defense counsel, the Co-Investigating Judges issued an order on the translation rights and the obligations of the parties ("Translation Order"). 147

The Translation Order noted that the ECCC Law provides for three official working languages of the Tribunal: Khmer, English, and French.¹⁴⁸ However, it found that there was no

¹⁴⁰ *Id*. ¶ 20.

¹⁴¹ *Id.* (relying on Agreement, *supra* note 12, at art. 12).

¹⁴² *Id.* ¶ 25 (citing Prosecutor v. Strugar, Case No. IT-01-42-T, Decision re the Defense Motion to Terminate Proceedings, ICTY Trial Chamber (May 26, 2004), 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 (Dilli District Court) (Mar. 1, 2005).

¹⁴³ *Id.* (citing ECCC Law, *supra* note 13, at art. 35 and Rules, *supra* note 1, Rs. 55(10), 66, 31(10), 34, 55(6), 55(11), 58, 73, 74, 76, 58(6)). The order of citation of Rules is according to the order in Nuon Chea Fitness Appeal Decision, *supra* note 139.

¹⁴⁴ *Id*. \P 27.

¹⁴⁵ *Id*. ¶ 35.

¹⁴⁶ *Id*. ¶ 41.

¹⁴⁷ Case of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ, Order on Translation Rights and Obligations of the Parties (June 19, 2008) (*parties notified on* June 23, 2008) [hereinafter Translation Order].

¹⁴⁸ ECCC Law, *supra* note 13, at art. 45.

statutory provision detailing the extent of translation rights and obligations. ¹⁴⁹ Upon analysis of international jurisprudence, it ordered that a charged person must be provided, in a language he understands, (1) the indictment with the elements of proof that it relies upon and (2) the introductory and final submissions with the indices of factual elements that they rely upon. ¹⁵⁰ Noting the finite translation capacity of the Court Management Section of the Tribunal, the Translation Order also required the defense teams to reduce their translation requirements by utilizing linguistic capacity within their teams and in the Defense Support Section. ¹⁵¹ It directed that each defense team be provided a translator, free of charge. ¹⁵²

Charged persons Khieu Samphan and Ieng Sary challenged the Translation Order before the Pre-Trial Chamber. Khieu Samphan claimed that the Translation Order (1) violates his right to effective legal representation by not requiring documents to be provided in French, the language of his international counsel, and (2) erroneously reverses the burden of translation of documents from the Tribunal to the defense. Claiming an abuse of process, he sought an unconditional release from detention. ¹⁵³ Ieng Sary contended that the Translation Decision (1) violates his right to participate in his defense by not requiring all the documents in the case file to be provided in Khmer, the language he understands, (2) violates his right to effective legal representation by not requiring documents to be provided in English, the language of his international counsel, and (3) violates the equality of arms principle by reversing the burden of translation from the Court to the defense. ¹⁵⁴

In separate decisions, issued on the same date, the Pre-Trial Chamber dismissed the two appeals as inadmissible.¹⁵⁵ It found that the matters raised in the appeals did not fall within the ambit of the exhaustive list of appealable matters set out in Rule 74(3)(b).¹⁵⁶ However, it examined whether Rule 21 requires the Pre-Trial Chamber to adopt a broader interpretation of the right to appeal to ensure that the proceedings during the investigation are fair and adversarial and that a balance is preserved between the rights of the parties.¹⁵⁷

The Pre-Trial Chamber noted that although a charged person has a right to be informed of the charges against him, he has no explicit right to receive all the documents contained in the case file in his own language or that of his lawyer. The fact that a language is one of the three official languages of the Tribunal does not create a right for a charged person to have all the documents on his case file translated into that language. The Pre-Trial Chamber, after reviewing international jurisprudence, noted that the right of lawyers at the Tribunal to have access to the case file does not mean that all material collected should automatically be translated

180

¶49

¶50

¹⁴⁹ Translation Order, *supra* note 147, ¶ A1.

 $^{^{150}}$ Id. \P B4

¹⁵¹ *Id*. ¶ A4

¹⁵² *Id.* ¶¶ B2-B3.

¹⁵³ Case of Khieu Samphan, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 11), Appeal Against the Decision to Deny the Request for Translation of Khieu Samphan's Case File, ¶ 7 (July 22, 2008).

¹⁵⁴ Case of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ (PTC), Appeal Against the OCIJ's Order on Translation Rights and Obligations of the Parties, ¶¶ 7-8 (July 22, 2008).

¹⁵⁵ Case of Khieu Samphan, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 11), Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties (Feb. 20, 2009) [hereinafter Khieu Samphan Translation Appeal Decision]; Ieng Sary Translation Appeal Decision, *supra* note 44.

¹⁵⁶ Khieu Samphan Translation Appeal Decision, *supra* note 155, ¶¶ 31, 33.

¹⁵⁷ *Id.* ¶ 36.

¹⁵⁸ *Id.* ¶ 40.

¹⁵⁹ *Id*.

¶53

¶54

into their language. ¹⁶⁰ The Chamber found, however, that depending on the specific circumstances of a case, translation of documents might be necessary to ensure that a charged person is able to exercise his or her rights during the investigation. ¹⁶¹ It noted the presence of trained linguistic capacity within the defense teams, where lawyers and other personnel trained in at least two languages of the Tribunal were available, ¹⁶² and the provision, free-of-charge, of a full time translator where further assistance is required. ¹⁶³ It found that international jurisprudence has recognized that providing the defense with an interpreter is an adequate substitute for the provision of the translation of certain documents. ¹⁶⁴ Regarding exculpatory material, the Chamber recognized that the defense has a right for such material to be translated as long as it identifies the document and requests that it be translated. ¹⁶⁵

The Pre-Trial Chamber found that the Co-Investigating Judges' Translation Order did not violate any fair trial right of the charged persons and, as such, did not require interference. 166

3. Disqualification of a Judge or a Court Official

Just before the commencement of the public oral hearing for his provisional detention appeal before the Pre-Trial Chamber, charged person Nuon Chea filed an application for the disqualification of the Pre-Trial Chamber Judge Ney Thol on account of (1) his position as a serving Cambodian Army official, (2) his "participation in political cases," and (3) his proximity to the ruling party in Cambodia. ¹⁶⁷

The Pre-Trial Chamber dismissed the challenge by reference to statutory provisions and international jurisprudence. It noted that the test for bias is provided in Rule 34(2), which refers to actual and perceived bias. ¹⁶⁸ The Chamber noted that the starting point for any determination of a claim of bias is the presumption of impartiality attached to a judge. This presumption derives from their oath and the qualification of their appointment and places a high burden on the party seeking a disqualification. ¹⁶⁹ The Chamber found that this presumption applied to the judges of the Tribunal. ¹⁷⁰ There is a high threshold to reach in order to rebut the presumption of innocence. ¹⁷¹ The moving party must adduce sufficient evidence that the judge in question can be perceived objectively to be biased. Applying the appeals judgment of the ICTY in *Furundzjia*, the Chamber noted the test to be of a "reasonable observer, properly informed, to reasonably apprehend bias." ¹⁷² The Chamber noted that (1) Judge Ney Thol occupied his position as a Tribunal Judge in his personal capacity and not as a Cambodian Army officer, ¹⁷³ and (2)

```
<sup>160</sup> Id. ¶ 42.
```

¹⁶¹ *Id.* ¶ 43.

¹⁶² *Id.* ¶ 46.

 $^{^{163}}$ Id. \P 47.

¹⁶⁴ *Id*.

¹⁶⁵ *Id.* ¶ 49.

 $^{^{166}}$ Id. \P 50.

¹⁶⁷ Case of Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 01), Public Decision on the Co-Lawyer's Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, ¶ 23, 27 (Feb. 4, 2008).

¹⁶⁸ *Id*. ¶ 12.

¹⁶⁹ *Id.* ¶ 15.

¹⁷⁰ *Id.* ¶ 16.

¹⁷¹ *Id*. ¶ 19.

¹⁷² *Id.* ¶¶ 20-1.

¹⁷³ *Id*. ¶ 24.

membership in a [ruling] political party does not give rise to a presumption that his decisions are politically motivated.¹⁷⁴

In another defense challenge, the Pre-Trial Chamber dismissed as inadmissible an appeal against the decision of the Co-Investigating Judges refusing a request for information regarding the perceived bias of a legal officer working under them.¹⁷⁵ The charged person Ieng Sary had argued that public statements a legal officer had made about the proceedings before joining the Tribunal gave rise to a perception of bias.¹⁷⁶ Without going into the merits of the appeal, the Pre-Trial Chamber found that the decision in question did not fall within the exhaustive category of decisions against which the Pre-Trial Chamber may grant an appeal.¹⁷⁷

The Co-Investigating Judges also rejected, for "lack of any legal basis," ¹⁷⁸ the request by the Ieng Sary defense for certain information concerning a conflict of interest of an investigator with the Office of the Co-Investigating Judges. ¹⁷⁹ In rejecting this request, the Co-Investigating Judges reiterated that the Internal Rules provide for a party to request the disqualification of a judge but not the disqualification of an investigator, subject to the formula specified in the Rules. ¹⁸⁰

In December 2009, the Pre-Trial Chamber also rejected defense applications for the disqualification of the international Co-Investigating Judge on the grounds that he had instructed his senior staff to look only for incriminatory material, despite his duty to look for all evidence, including exculpatory evidence.¹⁸¹ The Chamber found that the statement of one of the senior staff members present in the meeting where those instructions were allegedly issued was not trustworthy and, regardless, that at an advanced stage of judicial investigation, any preference indicated by the Judge to his staff should not be construed as indicative of prejudice.¹⁸² The Chamber also relied on the statement of the Judge in question that the statement, if made, was made "in jest"¹⁸³ and that the Judge was speaking in English which was "neither his first nor his native language."¹⁸⁴

The Pre-Trial Chamber also dismissed a "request for appropriate measures to clarify and/or verify the alleged conduct of" its two international judges on the basis of a public statement by the Cambodian Prime Minister that "some foreign judges of the ECCC had received orders from their governments." The Chamber noted that although the request was filed under the Rule 34, which provides for the disqualification of judges, it sought only unspecified "appropriate"

¶55

¶56

¶57

¹⁷⁴ *Id*. ¶ 27.

¹⁷⁵ Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 08), Decision on Ieng Sary's Appeal Against the Letter Concerning Request for Information Concerning Legal Officer David. Boyle, 5 (Aug. 28, 2008). ¹⁷⁶ *Id.* ¶ 1.

¹⁷⁷ *Id.* ¶ 17.

¹⁷⁸ Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ/A252, OCIJ's Response to Ieng Sary's Lawyer Request for Information Concerning the Potential Existence of Conflict of Interest of OCIJ Investigator Stephen Heder, ¶ 2 (May 29, 2009) [hereinafter Investigator Decision].

¹⁷⁹ Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Request for Information Concerning the Potential Existence of Conflict of Interest of OCIJ Investigator Stephen Heder (Jan. 30, 2009).

¹⁸⁰ Investigator Decision, *supra* note 178.

¹⁸¹ Case of Ieng Sary, Case File No. 002/09-10-2009-ECCC/PTC(01), Decision on Ieng Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde, (Dec. 9, 2009).

¹⁸² *Id*. ¶ 24.

 $^{^{183}}$ *Id.* ¶ 29.

¹⁸⁴ *Id*

¹⁸⁵ Case of Ieng Sary, Case No. 002/20-10-2009-ECCC(PTC 03), Decision on Ieng Sary's Request for Appropriate Measures Concerning Certain Statements by Prime Minister Hun Sen Challenging the Independence of the Pre-Trial Chamber Judges Katinka Lahuis and Rowan Downing, ¶ 1 (Nov. 30, 2009).

measures."¹86 The Chamber held that it had no such power.¹87 In addition, the Chamber noted that the mere fact that a judge has been subjected to press criticism does not require the judge's disqualification.¹88 Although public confidence may be as much shaken by publicized inferences of bias, whether true or false, disqualification applications have typically ignored "rumours, innuendoes and erroneous information published as fact in the newspapers and threats or other attempts to intimidate a judge." ¹89 The Chamber further held that where allegations of bias are made on the basis of a judge's decisions, it is insufficient to allege error on a point of law.¹90 What must be shown is that the rulings were or would be reasonably perceived or be attributable to a bias against the applicant and not genuinely related to the application of law or relevant facts. ¹91

4. Applicability of Previous Pardons and Amnesties

When ordering the provisional detention of charged person Ieng Sary in November 2007,¹⁹² the Co-Investigating Judges, *proprio motu*, noted that an amnesty and pardon granted to Ieng Sary by the King of Cambodia in 1996 in relation to a prior conviction for genocide, raised a "special difficulty"¹⁹³ concerning the Tribunal's jurisdiction to investigate and prosecute him.

The amnesty and pardon related to Ieng Sary's trial and conviction by the People's Revolutionary Tribunal ("PRT") in August 1979. The PRT was established after the overthrow of the Khmer Rouge regime to "try the acts of genocide committed by the Pol Pot-Ieng Sary clique." The PRT indicted, prosecuted, and convicted Ieng Sary—in his absence—of "genocide," sentenced him to death, and ordered the confiscation of his property. He never served his sentence. Fifteen years later, the Government enacted a law ("Outlawing Law") that made it a crime to be a member of the Khmer Rouge. He Rouge in 1996, the King of Cambodia granted him a pardon for his PRT conviction and an amnesty from any future prosecution under the Outlawing Law.

The ECCC Law provides that the scope of any amnesty or pardon granted to an accused person prior to the creation of the Tribunal is a matter to be decided by the Tribunal.¹⁹⁸ Accordingly, the Co-Investigating Judges ruled on the impact of Ieng Sary's PRT conviction and the royal pardon and amnesty on the Tribunal's ability to prosecute him, holding that (1) the principle of *ne bis in idem* (double jeopardy) did not apply because the Tribunal had not yet charged Ieng Sary with genocide, the only crime for which the PRT convicted him, and (2) the

```
<sup>186</sup> Id.
```

¶61

¶59

¹⁸⁷ *Id.* ¶ 10.

¹⁸⁸ *Id.* ¶ 8.

¹⁸⁹ *Id*.

¹⁹⁰ *Id.* ¶ 9.

¹⁹¹ *Id*

¹⁹² Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order (Nov. 14, 2007).

¹⁹³ *Id.* ¶ 5.

¹⁹⁴ People's Revolutionary Tribunal, Decree Law No. 1 (Jul. 15, 1979).

¹⁹⁵ Revoluntionary People's Tribunal, Judgment (Aug. 1979).

¹⁹⁶ Law on the Outlawing of the "Democratic Kampuchea" Group, Reach Kram No. 1, NS 94 (1994) [hereinafter Outlawing Law]. Specifically, the Outlawing Law outlawed being a member of the "political organisation or the military forces of the Democratic Kampuchea Group." The Outlawing Law also empowered the King of Cambodia to grant an amnesty or pardon to those who violated it.

¹⁹⁷ Cambodian Royal Decree No. NS/RKT/0996/72 (Sept. 14, 1996).

¹⁹⁸ ECCC Law, *supra* note 13, at art. 40.

royal pardon and amnesty did not bar Ieng Sary's prosecution for any crime within the Tribunal's jurisdiction.¹⁹⁹

On appeal before the Pre-Trial Chamber, Ieng Sary argued that the ECCC has no jurisdiction to investigate or prosecute him by virtue of the royal amnesty and pardon.²⁰⁰ Relying on the principle of double jeopardy, Ieng Sary argued that his PRT conviction for genocide subsumes all the charges that the Tribunal is investigating and bars his prosecution before the Tribunal.²⁰¹ In response, the Co-Prosecutors contended that the principle of double jeopardy is not applicable in this case, because the PRT trial did not conform to international fair trial standards. Further, the double jeopardy principle would not bar prosecution for the crime of genocide as recognized under international law, or for other crimes under the ECCC Law, as cumulative charging for different offenses arising out of the same conduct is not prohibited under international law where unfairness can be taken into account at sentencing.²⁰²

Second, as an alternative argument, Ieng Sary submitted that even if double jeopardy does not apply, the royal amnesty and pardon prohibit the ECCC from exercising its jurisdiction over him. In particular, he argued that (1) the Outlawing Law covers the offences alleged in the Introductory Submission, (2) the pardon covers the 1979 conviction, and (3) the amnesty and pardon are binding on the Tribunal.²⁰³ In response, the Co-Prosecutors submitted that the amnesty and pardon did not immunize Ieng Sary from prosecution by the Tribunal because, among other reasons, assuming that the royal pardon was issued in relation to the same crimes for which Ieng Sary is currently being charged before the ECCC, such a pardon is not valid for those crimes as they have a *jus cogens* status in international law. Even if the pardon is deemed valid, the Tribunal, being a special internationalized body, is not bound by national pardons or amnesties.²⁰⁴

The Pre-Trial Chamber—without striking down the amnesty or pardon or laying down a general rule on their legality—ruled that the application of the amnesty on Ieng Sary's current prosecution is "uncertain" and it is not "manifest or evident" that the amnesty/pardon will prevent his conviction on genocide. Following this decision, the case against Ieng Sary was permitted to continue. However, the issue is likely to be raised again before the Trial Chamber during Ieng Sary's substantive trial, which has yet to begin.

C. Individual Criminal Responsibility

Joint Criminal Enterprise has come under close scrutiny at the ECCC. In their first introductory submission of July 18, 2007, the Co-Prosecutors sought the initiation of a judicial investigation against five named suspects for various national and international crimes and under various permissible modes of criminal liability. They submitted that, in terms of settled

184

-

¶62

¶63

¹⁹⁹ Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order (Nov. 14, 2007).

²⁰⁰ Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 03), Ieng Sary's Submission Pursuant to the Decision on Expedited Request of Co-Lawyers for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues (Apr. 7, 2008) [hereinafter Ieng Sary's Jurisdiction Submission].

²⁰² Case of Ieng Sary, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 03), C22/I/32, Prosecution's Response to Ieng Sary's Submission on Jurisdiction, ¶ 6 (May 16, 2008) [hereinafter Prosecutions' Jurisdiction Submission]. ²⁰³ Ieng Sary's Jurisdiction Submission, *supra* note 200, ¶ 9.

²⁰⁴ Prosecutions' Jurisdiction Submission, *supra* note 202, ¶¶ 22-23.

²⁰⁵ Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 03), Public Decision on Appeal Against Provisional Detention Order of Ieng Sary, ¶¶ 57-9 (Oct. 17, 2008).

¶67

¶68

¶69

¶70

international jurisprudence, the term "committed" should be read to include the commission of the crime as a co-perpetrator through participation in a joint criminal enterprise ("JCE"). 206

The first introductory submission was bifurcated on September 19, 2008 into two case files: Case File No. 1 and Case File No. 2. In their Indictment of Duch, pursuant to the conclusion of the judicial investigation in Case File No. 1, the Co-Investigating Judges, without explaining their reasoning, declined to apply JCE as a mode of liability. On appeal, the Pre-Trial Chamber sought three *amici* briefs on the question of applicability of JCE before the Tribunal. However, the Pre-Trial Chamber did not decide on the applicability of JCE before the Tribunal. Instead, the Chamber ruled that the accused could not be liable under JCE because he did not have sufficient notice that he was being investigated under the JCE mode of liability.

At trial, the Co-Prosecutors requested the Trial Chamber to (1) apply JCE in their judgment of Duch and (2) declare that JCE is applicable at the Tribunal.²⁰⁹ As there is no appeal from decisions of the Pre-Trial Chamber,²¹⁰ the Co-Prosecutors based their request on the Trial Chamber's authority under Rule 98 to "change the legal characterization" of the crimes set out in the Indictment.²¹¹ The Co-Prosecutors argued that despite the Pre-Trial Chamber's preliminary ruling on JCE's applicability, the Trial Chamber is free, pursuant to its specific "civil law" power under Rule 98, to change the legal characterization of the crimes, based on the facts contained in the Indictment as well as those presented during the trial.²¹² The Trial Chamber has since stated that it shall rule on the applicability of JCE when rendering its final judgment.²¹³

The question of the applicability of JCE in Case File No. 2 was decided by the Co-Investigating Judges when they dismissed the charged person Ieng Sary's challenge on that issue.²¹⁴ In dismissing the challenge, the Co-Investigating Judges held that JCE liability applied to international crimes being prosecuted before the ECCC, even though it did not apply to domestic crimes. The Co-Investigating Judges found that the application of customary international law (embodying JCE) at the ECCC is a corollary to the finding that the ECCC holds indicia of an international court applying international law.²¹⁵ This order has been appealed and is pending determination before the Pre-Trial Chamber. To date, four charged persons hev been charged with participating in a JCE.

The matter of applicability of JCE before the Tribunal, therefore, now rests with the Pre-Trial Chamber (in Case File No. 2) and the Trial Chamber (in Case File No. 1).

D. Admissibility Issues

One of the principal sources of evidence against the Khmer Rouge leaders being prosecuted at the ECCC are "confessions" obtained through torture by the Khmer Rouge cadres

²⁰⁶ See ECCC Office of the Co-Prosecutors, Statement of the Co-Prosecutors, 3 (July 18, 2007).

²⁰⁷ Duch Indictment, *supra* note 6.

²⁰⁸ Duch Indictment Appeal Decision, *supra* note 34, ¶ 142.

²⁰⁹ Case of Kaing Guek Eav, Case No. 001/18-07-2007-ECCC-OCIJ, Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, ¶ 41 (June 8, 2009) [hereinafter JCE Trial Chamber Submission].

²¹⁰ See id. at art. II(C).

²¹¹ Rules, *supra* note 1, at R. 98(2).

²¹² JCE Trial Chamber Submission, *supra* note 209, ¶¶ 6-7.

²¹³ Case of Kaing Guek Eav alias Duch, Transcript of Trial Proceedings, Case No. 001/18-07-2007-ECCC-TC, 8-9 (June 29, 2009).

²¹⁴ Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise (Dec. 8, 2009).
²¹⁵ *Id.* ¶ 21.

from the victims detained at their central detention facility in Phnom Penh. The defendants at the Tribunal have challenged the use of this evidence, relying on Article 15 of the Convention Against Torture ("CAT"), which prohibits the use in evidence of any statement made "as a result of torture" except as evidence that the "statement was made."

In Case File No. 1, without ruling on the principle of law, the Trial Chamber admitted many confessions into evidence on the condition that, "[T]he relevance of these documents is limited to the fact that they were made and, where appropriate, constitute evidence that they were made under torture. They are not admitted for the truth of their content." ²¹⁶

In Case File No. 2, however, the Co-Investigating Judges allowed a controlled and limited use of this evidence, subject to a close scrutiny of its reliability.²¹⁷ The Judges held that the issue of the reliability of the "confessions" did not arise if the statements were used not for their contents but rather to prove that the Khmer Rouge relied on those statements to "carry out systematic crimes within the jurisdiction of the ECCC."²¹⁸ The Judges ruled that the reliability of the statements will be assessed on a case-by-case basis and it is, at this stage, not possible to affirm "that no element of truth can ever be found in the confessions." ²¹⁹

On appeal, the Pre-Trial Chamber found the Co-Investigating Judges' order to be outside the category of orders that it could consider on appeal; hence it dismissed the appeals as inadmissible. However, the Chamber noted that Article 15 of CAT should be "strictly applied"; "there is no room for a determination of the truth or for the use otherwise of any statement obtained under torture." The Chamber noted that despite the inadmissibility of the appeals, Rule 87 provided the possibility to the defendants to object to the admissibility of evidence at trial. 222

E. Administration of Justice Issues

1. Administrative Corruption in the Court

Charged person Nuon Chea—supported by charged persons Ieng Sary, Ieng Thirith, and Khieu Samphan—filed a request for investigative action in which he alleged that certain national administrative officials paid to obtain or retain their positions at the Tribunal. Nuon sought, among other things, disclosure of material from the Government and the United Nations — including the report of an inquiry conducted by the United Nations Office of Internal Oversight Services ("OIOS") — and an order for an administrative inquiry into the allegations. ²²³ Without going into the merits of the allegations, the Co-Investigating Judges dismissed this request

¶71

¶72

²¹⁶ Case of Kaing Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC/TC, Decision on Parties' Request to Put Certain Documents Before the Chamber Pursuant to Internal Rule 87(2), ¶ 8 (Oct. 28, 2009).

²¹⁷ Case of Ieng Thirith et al., Case File No. 002/19-09-2007-ECCC/OCIJ, Order on Use of Statements Which Were or May Have Been Obtained Under Torture, 28 (July 28, 2009).

 $^{^{218}}$ Id. ¶ 27.

²¹⁹ *Id.* ¶ 28.

²²⁰ Case of Ieng Thirith, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 26), Decision on the Admissibility of Appeal Against the Co-Investigating Judges' Order on Use of Statements Which Were or May Have Been Obtained Under Torture, ¶ 31 (Dec. 18, 2009).

 $^{^{221}}$ *Id.* ¶ 30.

²²² *Id.* ¶ 26.

²²³ Case of Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ, Eleventh Request for Investigative Action, ¶ 22 (Mar. 27, 2009).

¶76

¶77

because they "lack jurisdiction" to conduct such investigative action, as it does not form part of the "facts set out in the introductory submission [submitted by the Co-Prosecutors]."²²⁴

Dissatisfied by this dismissal, the four charged persons filed notices of appeal before the Pre- Trial Chamber. Essentially, the appeals argued that the Co-Investigating Judges' rejection of the request was "incorrect as a matter of law, public-policy, and common sense,"²²⁵ contending that the Co-Investigating Judges' jurisdiction is "not nearly as limited as [their order rejecting the request] suggests"²²⁶ and that the requested action falls within both the statutory and the inherent powers of the Tribunal.²²⁷ The appeals contended that it would be "futile" to await resolution of the issue by the Government and/or the United Nations.²²⁸

The Co-Prosecutors' position, as stated in their joint response to the four appeals, was that the requested investigative action falls outside the scope of the powers of the Co-Investigating Judges. According to the Co-Prosecutors, those powers are limited to the confines of the Tribunal's substantive jurisdiction to bring to trial senior leaders and those who were most responsible for the crimes committed under Democratic Kampuchea between 1975 and 1979. Those powers are further limited to the facts set out in the Co-Prosecutors' Introductory Submission or a Supplementary Submission.²²⁹ The Co-Prosecutors' response pointed to the absence of a nexus between the allegations in question and the judicial decision-making of the Tribunal and the fact that the appeals did not allege any infringement on the fair trial rights of the charged persons. If the appeals had alleged an infringement on fair trial rights, the Co-Investigating Judges would have had the power under the Tribunal's Rules to (1) sanction any interference in the administration of justice,²³⁰ (2) seek annulment of tainted proceedings for "procedural defects,"²³¹ or (3) act to disqualify one or both of themselves for bias.²³²

The Pre-Trial Chamber held that each of the appeals filed by the charged persons was inadmissible.²³³ The Chamber concluded that the applicable Rules did not provide for "a request for investigative action on a factual situation that may suggest interference with the administration of justice or corruption in [the Tribunal]."²³⁴ The Chamber observed that the

²²⁴ Case of Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ, Order on Request for Investigative Action, \P 9-10 (Apr. 3, 2009).

²²⁵ Case of Nuon Chea, Case File No. 002/19-09-2007-ECCC-OCIJ (PTC 21), Appeal Against Order on Eleventh Request for Investigative Action, ¶ 35 (May 4, 2009) [hereinafter Nuon Chea Corruption Appeal].

²²⁶ Id. ¶¶ 22-25.

²²⁷ Case of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 20), Ieng Sary's Appeal Against the Co-Investigating Judges' Order on Request for Investigative Action Regarding Ongoing Allegations of Corruption & Request for an Expedited Oral Hearing, ¶¶ 18-34 (May 4, 2009).

²²⁸ Nuon Chea Corruption Appeal, *supra* note 225, ¶ 31-33.

²²⁹ Case of Nuon Chea et al., Case File No. 002/19-09-2007-ECCC-OCIJ (PTC 19, 20, 21 & 22), Co-Prosecutors' Joint Response to Defense Appeals Against the Co-Investigating Judges' Order Denying Request for Investigative Action Regarding Allegations of Administrative Corruption, ¶ 9 (May 29, 2009).

²³⁰ *Id.* ¶ 10 (citing Rules, *supra* note 1, at R. 35).

²³¹ *Id.* (citing Rules, *supra* note 1, at R. 76).

²³² *Id.* (citing Rules, *supra* note 1, at R. 34).

²³³ Case of Nuon Chea, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 21), Decision on Appeal Against the Co-Investigating Judges' Order on the Charged Person's Eleventh Request for Investigative Action (Aug. 18, 2009); Case of leng Thirith, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 19), Decision on the Appeal of the Charged Person Against the Co-Investigating Judges' Order on Nuon Chea's Eleventh Request for Investigative Action (Aug. 25, 2009); Case of leng Sary, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 20), Decision on the Appeal of the Charged Person Against the Co-Investigating Judges' Order on Nuon Chea's Eleventh Request for Investigative Action (Aug. 25, 2009); Case of Khieu Samphan, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 22), Decision on the Appeal of the Charged Person Against the Co-Investigating Judges' Order on Nuon Chea's Eleventh Request for Investigative Action (Aug. 27, 2009).

²³⁴ *Id.* ¶ 28 (Nuon Chea), ¶ 26 (Ieng Sary), ¶ 31 (Ieng Thirith), ¶ 25 (Khieu Samphan).

matter was before the appropriate authorities of the Government of Cambodia and the United Nations, and that Nuon Chea's foreign counsel had also asked the Royal Prosecutor in Phnom Penh to investigate the issue.²³⁵ In the Chamber's view, the remedies available to the charged persons under the Internal Rules and Cambodian law sufficiently safeguarded their interests and rights, including the right to an independent and impartial tribunal.²³⁶

The Trial Chamber also confronted this issue. Shortly after the charged persons' appeals were filed before the Pre-Trial Chamber in Case File No. 2, certain civil parties in Case File No. 1 filed a motion before the Trial Chamber in which they requested that the Chamber facilitate disclosure of the OIOS report.²³⁷ The Trial Chamber denied the request, noting that the remedies sought lay outside its purview and should instead be pursued through the appropriate administrative, disciplinary, or legal mechanisms.²³⁸

2. Confidentiality of Judicial Investigation

A dispute concerning the confidentiality of judicial proceedings arose in the Pre-Trial Chamber. On December 3, 2008, in response to a newspaper article that discussed confidential information, the Co-Investigating Judges sent a letter to all defense teams reminding them of their confidentiality obligations.²³⁹ They sent a second letter on January 15, 2009, reiterating that the confidentiality of the case file, as provided for by the Internal Rules, "concerns all filings thereon, including the filings drafted by the parties ... it is for the Judges, and not for the parties, to decide when and how to disclose confidential case file material."²⁴⁰ The defense for Ieng Sary responded to this letter by stating their position that they were free to publicize their own filings.²⁴¹ Ieng Sary's defense then posted nine case file documents on their website,²⁴² prompting the Co-Investigating Judges to issue an order regarding breach of confidentiality of the judicial investigation ("Confidentiality Order").²⁴³

The Confidentiality Order stated that the principle of confidentiality of the judicial investigation did not infringe on the rights of a charged person to a fair trial, since it concerns only the preparatory stage of proceedings and does not apply during the trial stage.²⁴⁴ It censured Ieng Sary's Defense Counsel, stating that they had breached both the Rules²⁴⁵ (by revealing confidential information) and the Agreement²⁴⁶ (by failing to act in accordance with the

¶78

¶79

²³⁵ *Id.* ¶¶ 29, 38 (Nuon Chea).

²³⁶ *Id.* ¶¶ 44 - 45.

²³⁷ Case of Kaing Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC/TC, Group 1-Civil Parties' Co-Lawyers' Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties (May 11, 2009).

²³⁸ Case of Kaing Guek Eav alias Duch, Case No. 001/07-2007-ECCC/TC, Decision on Group 1 – Civil Parties' Co-Lawyers' Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties, ¶ 18 (Sept. 23, 2009).

²³⁹ Letter from the Co-Investigating Judges to Defense Teams Regarding Confidentiality, A238 (Dec. 3, 2009) (*cited in* Case of Ieng Sary et al., Case File No. 002/19-09-2007-ECCC/OCIJ), Order on Breach of Confidentiality of the Judicial Investigation, ¶ 1 (Mar. 3, 2009) [hereinafter Confidentiality Order]).

Letter from the Co-Investigating Judges to Defense Teams Regarding Confidentiality, A238/1/Corr.1 (Jan. 15, 2009), *cited in* Confidentiality Order, *supra* note 239, \P 3.

²⁴¹ A238/2 (Jan. 20, 2009), cited in Confidentiality Order, supra note 239, ¶ 4.

²⁴² Confidentiality Order, *supra* note 239, ¶ 5.

²⁴³ *Id*.

²⁴⁴ *Id*. ¶ 11.

²⁴⁵ Rules, *supra* note 1, at R. 56(1): "All persons participating in the judicial investigation shall maintain confidentiality."

²⁴⁶ Agreement, *supra* note 12, at art. 21(3): "Any counsel...shall, in the defense of his or her client, act in accordance with the present Agreement, the Cambodian Law on the Statutes of the Bar and recognized standards and ethics of

standards and ethics of the legal profession).²⁴⁷ The Judges ordered the Defense Counsel to cease posting information related to the judicial investigation and remove "the offending content" from their website. They also forwarded a copy of the order to the Counsel's bar associations "so that these bodies may decide on any appropriate action."²⁴⁸

The Co-Investigating Judges' Order was appealed to the Pre-Trial Chamber.²⁴⁹ The Pre-Trial found that the appeal was inadmissible, noting that the Co-Investigating Judges' orders to cease posting information related to the judicial investigation and that an order to remove "the offending content" from the website is not subject to appeal before the Pre-Trial Chamber under the Internal Rules.²⁵⁰

IV. CONCLUSION

Within over the first three years of its existence, the Khmer Rouge Tribunal has created a considerable body of jurisprudence, both procedural and substantive. This process is expected to take an important turn when the Trial Chamber renders its decision in the first trial of Duch and perhaps the subsequent appeal. Given the novel structure of the Tribunal, and its specificities, it remains to be seen to what degree its jurisprudence will influence developments in international criminal law. However, and perhaps in part for these very reasons, the jurisprudence of the Tribunal deserves close analysis.

the legal profession."

²⁴⁷ Confidentiality Order, *supra* note 239, ¶ 21.

²⁴⁸ Id

²⁴⁹ Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC), Ieng Sary's Appeal Against the OCIJ Order on Breach of Confidentiality of the Judicial Investigation & Request for Expedited Filing Schedule and Public Oral Hearing (Mar. 10, 2009).

²⁵⁰ Case of Ieng Sary, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 18), Decision on Admissibility on Appeal Against the Co-Investigating Judges' Order on Breach of Confidentiality of the Judicial Investigation, ¶ 10 (July 13, 2009).