

**NATIONS UNIES
HAUT COMMISSARIAT DES NATIONS UNIES
AUX DROITS DE L'HOMME**

**PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME**

**UNITED NATIONS
OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS**

**SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL**

Mandate of the Special Rapporteur on the independence of judges and lawyers.

REFERENCE: AL G/SO 214 (3-3-16)
KHM 7/2011

24 November 2011

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers pursuant to General Assembly resolution 60/251 and to Human Rights Council resolution 17/2. As you may be aware, my mandate addresses the independent and proper functioning of domestic courts as well as international and mixed or “hybrid” tribunals, such as the Extraordinary Chambers in the Courts of Cambodia (ECCC), as highlighted in a number of reports to the Human Rights Council and the General Assembly (A/HRC/4/25, para. 59, A/62/207, para. 66, A/HRC/11/41, para. 92; A/64/181, para. 101; A/63/271, para. 56).

The establishment of the ECCC in 2003 has been a very welcome and positive development, as highlighted by my predecessor (A/61/384, para. 63). My mandate has closely followed the developments in the work of the Extraordinary Chambers. In this respect, I acknowledge the progress made in judicial proceedings, with the verdict being handed down by the Trial Chamber convicting Kaing Guek Eav, alias ‘Duch’, in Case 001, currently under appeal, and the commencement of trial in case 002. This sends a strong signal that such crimes cannot go unpunished. This is also a very important issue to me, as I have devoted my second report to the General Assembly to the role of the judiciary in combating impunity and ensuring accountability (A/65/274). The possibility offered to victims to participate in the criminal proceedings, as enshrined in the ECCC Internal Rules, is also innovative and commendable.

I would, however, like to draw to your attention information I have received which raises serious concerns in two respects. The first issue concerns alleged interference by Cambodian authorities with the work of the ECCC. The second concern pertains to the alleged resulting deficiencies in the conduct of investigation, notably in cases 003 and 004, and the inappropriate impairment of the right of access to justice for victims of crimes within the jurisdiction of the ECCC in cases 003 and 004.

In terms of the first issue, concerns have arisen with respect to case 002 as well as cases 003 and 004. Following the issuance of legally binding summonses to six Governmental officials on the basis that their testimony would be conducive to ascertaining the truth, the Cambodian Minister for Information reportedly stated on 7

October 2009, that the Government's position was that they should not give testimony, and that if foreign officials were dissatisfied they could "pack their clothes and return home". In its decision dated 9 September 2010, the ECCC Pre-Trial Chamber noted that the Government "ha[d] made no public statement correcting or reversing the comment by [Minister of Information] Khieu Kanharith" (D314/1/12, para. 40(d)).

In this respect, I have noted that the Pre-Trial Chamber has not reached a majority decision on whether or not the Co-Investigating Judges failed to conclude that material placed before them gives rise to a reason to believe that interference with the administration of justice in terms of Internal Rule 35(1) may have occurred (D314/1/12, para. 41). However, in a separate opinion, the international judges of the Pre-Trial Chamber, whose function it is to ensure that international standards are applied, found the allegations of interference to be of a "grave nature" and were "of the view that no reasonable trier of fact could have failed to consider the above-mentioned facts and their sequence constitute a reason to believe that one or more members of the [Royal Government of Cambodia] may have knowingly and willingly interfered with witnesses who may give evidence" (D314/1/12, Opinion page 19 et seq., paras. 5-6). For my part, I fully share the concerns raised by the international judges of the Pre-Trial Chamber.

Allegations concerning inappropriate comments by officials of the Royal Government of Cambodia on cases 003 and 004 have also been drawn to my attention. On 10 May 2011, the Cambodian Minister of Information reportedly stated, referring to the international staff at the ECCC, "if they want to go into Cases 003 and 004, they should just pack their bags and leave". Similarly, at the beginning of October 2011, the Minister of Foreign Affairs affirmed that only Cambodia can decide how many additional suspects the Khmer Rouge tribunal will prosecute. He reportedly said: "On the issue of the arrest of more Khmer Rouge leaders, this is a Cambodian issue... This issue must be decided by Cambodia". This statement echoes similar previous remarks made by other senior Cambodian Government officials, including the Prime Minister, which have been drawn to my attention, and come at a critical time in cases 003 and 004 pending before the ECCC.

In addition, former international co-investigating judge at the ECCC, Siegfried Blunk, resigned from the tribunal on 9 October 2011, citing these specific statements and that he had initiated contempt of court proceedings in respect of the 10 May 2011 statement. He noted that "[a]lthough [he] will not let himself be influenced by such statements, his ability to withstand such pressure by Government officials and to perform his duties independently could always be called in doubt, and this would also call in doubt the integrity of the whole proceedings in Cases 003 and 004".

Turning to the second issue, I am concerned about information received regarding the Co-Investigating Judges' handling of Civil Party applicants and victims in case 003 and their treatment of the International Co-Prosecutor's request for additional investigative acts, in which the international judges have underlined serious flaws in the conduct of the Co-Investigating Judges.

Allegations received indicating that little information was made available to victims and the general public as to the scope of this case are worrisome. In particular,

applicants have reportedly not been granted access to relevant case files in order for their lawyers to assist them in effectively submitting a proper application and exercise all the rights recognized in the Internal Rules governing the ECCC. These include the right to file investigative requests during the investigation phase and the possibility to participate meaningfully in the proceedings. Furthermore, I have been informed that case 003 was closed without any notice to potential victims as to the scope of the investigation. I am also puzzled by the reasoning deployed to deny Civil Party status to victims in this case, some of whom had already been recognized in respect of identical conduct in earlier cases before the Court.

In light of the allegations, I am concerned that the conduct of case 003, and in particular its treatment of victims, fails to meet international standards and raises the implication that it may have been prematurely terminated.

I note in this respect, with satisfaction, the appointment of a new international co-investigating judge. I also note that with the judicial investigation in case 004 still open, steps may still be taken to ensure that this case is conducted in accordance with the ECCC law, the Internal Rules and international standards. The independence and integrity of the judiciary should be ensured in all stages of judicial proceedings.

In this regard, I fully support the appeal made by the United Nations Under-Secretary General for Legal Affairs on 20 October 2011, to your Excellency's Government to refrain from interfering in any way with the judicial process in the ECCC and in particular to refrain from statements perceived as an attempt to influence the outcome of cases 003 and 004 and impacting on their progress. I call on your Excellency's Government to fully cooperate with the ECCC in full compliance with the 2003 agreement establishing the Extraordinary Chambers, and with its international obligations, in particular the International Covenant on Civil and Political Rights. The requirement of independence of a tribunal is enshrined in article 14(1) of the Covenant, to which Cambodia is a party. Likewise, there shall be no inappropriate or unwarranted interference with the judicial process as stated in the United Nations Basic Principles on the Independence of the Judiciary (adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, see in particular principles 2 and 4), and as required by the application of the fundamental principle of separation of powers. Furthermore, Rule 35 of the Internal Rules governing the ECCC expressly prohibits any interference with the administration of justice.

I would also like to stress that the right to a remedy for victims of violations of international human rights law and humanitarian law is enshrined in numerous international instruments. I refer more specifically to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005). Principle 12 recognizes victims' rights to effective judicial remedies. Such a right includes equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to all relevant information concerning violations and reparation

mechanisms (principle 11). Referring to the ECCC law and agreement, Rule 21(c) of the Internal Rules also stipulates that victims shall be kept informed and that their rights shall be respected throughout the proceedings.

Furthermore, I would like to refer in this connection to the Basic Principles on the Role of Lawyers (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990), and in particular to Principle 21, which provides that lawyers should have access to appropriate information, files and documents in sufficient time in order to provide effective legal assistance to their clients.

In conclusion, let me stress once again that the ECCC should function independently without interference or undue pressure, so as to achieve its mandate to establish justice and try serious crimes committed during the Khmer Rouge regime (1975-1979), while enabling victims and/or their families to access justice and obtain an effective remedy. To ensure full clarity in this area, I would respectfully encourage your Excellency's Government to issue formal public instructions to all Government authorities to strictly observe the independence of the ECCC and refrain from any statement or act that could reasonably be perceived as suggesting interference with the prosecutorial and judicial process of the Court.

It is my responsibility under the mandate provided to me by the Human Rights Council to seek to clarify the cases brought to my attention. Since I am expected to report on this case to the Human Rights Council, I would be most grateful for your cooperation and your observations on the above matters. Finally, I would like to inform you that a similar letter has been sent to the President of the ECCC.

Please accept, Excellency, the assurances of my highest consideration.

Gabriela Knaul
Special Rapporteur on the independence of judges and lawyers