

Ieng Sary Pre-Trial Hearing: The Appeal Against the Provisional Detention Order and the Participation of Khmer Rouge Survivors Under the Living Document Project

By Savina Sirik

The time for justice is approaching to account for the loss of Cambodian lives during the Democratic Kampuchea, commonly known to ordinary people as Pol Pot regime. The establishment of a UN backed tribunal designed to seek the truth while bringing the senior leaders and other most responsible individuals to justice has decreased the public's skepticism regarding the current government's dedication to providing justice to victims. Hopefully the tribunal will also provide answers to some of the many questions on the part of the survivors of DK that have remained unanswered for over three decades. After many years of preparation, this tribunal, called the Extraordinary Chambers in the Court of Cambodia (ECCC) finally formed its structure in 2006 and began its investigation into crimes committed during DK. The exact structure of the Court was finalized only after a long consideration of legal and financial issues.

So far, five senior leaders of DK have been arrested and held in the ECCC provisional detention facility. Each of them has filed an appeal against the order of provisional detention issued by the Co-Investigating Judges. In less than a year, the pre-trial appeals of Kaing Guech Iev (alias Duch), Nuon Chea, and Ieng Thirith have been heard and rejected, though the hearing of Khiev Samphan was adjourned. Although the legal arguments representing the main interests and concerns of the victims will be discussed later, during the trials, survivors are also concerned with the safety and whereabouts of the charged persons. The former DK foreign minister, Ieng Sary, who was arrested and placed in provisional detention by order of the Co-Investigating Judges of the ECCC in November 2007, appealed the legality of his detention. On the 30 June 2008, the Court convened for its fifth pre-trial hearing to consider oral submissions regarding Ieng Sary's appeal. DC-Cam's Living Document Project was able to use this hearing as an opportunity to invite 50 representatives from four provinces: 20 from Kampong Speu, 20 from Kampot, 4 from Prey Veng, and 6 from Sihanouk Ville to participate in this important event. The case drew a great deal of public attention, especially from NGOs, media groups, and academics. The media used this historical event to update the public on the ongoing process of the hybrid tribunal. The Film Team of DC-Cam also paid great attention to this hearing. The team observed the hearing, photographing the participants and recording the entire pre-trial proceeding, which will be uploaded to the Cambodia Tribunal Monitor website (www.cambodiatribunal.org).



Commune chiefs and villagers listen to Mr. Ly's presentation

The first day of the trip began on the morning of Sunday, the 29th of June, following the arrival of the commune chiefs and villagers the previous day. The participants gathered at the Center's Public Information Room (PIR), and were welcomed by Sokkheang Ly, the Living Document Project Leader. Mr. Ly began by introducing himself, the Center and its projects, particularly the Living Document project, to the

audience. In the past years, a few of the present audience members had been invited by the Center to participate in tours which brought them to the notorious Tuol Sleng Genocide Museum, the Killing Fields of Cheung Ek, and the ECCC's Court building to meet with the Court's representatives. Mr. Ly then explained the Living Document project's previous tours, its goals to disseminate and update information on the ECCC and the history of the Khmer Rouge, and its other activities. After a few minutes of explaining the project and its goals, Mr. Ly moved on and talked about the detailed schedule of the trip before reading out a summary of Ieng Sary's biography to the visitors. Foreign minister during the DK, Ieng Sary, who was born in 1930, received a university education in France during the 1950s. He was appointed the foreign minister in March 1976. Ieng Sary's revolutionary alias and true identity drew the audience's attention, prompting murmurs throughout the room. Some audience members took out notebooks and began taking notes. Some others were content listening carefully to the presenter. Once in a while, the visitors stopped the presenter and asked questions regarding the exact meaning of the terms used in the document so they could understand its meaning correctly. Other times, they asked Mr. Ly to slow down the reading pace in order to be sure to understand. Mr. Ly's presentation ended with a question and answer session. One of the audience members asked a question regularly asked by survivors. This question was, "who ordered the executions and left people to starvation?" Ly did not directly answer the question, but instead explained some reasons why there were a mass executions and widespread starvation throughout Cambodia during the DK. He said that there was a lack of trust within the society under the DK that led to the killing of over one million people. One member of the audience raised the issue and began to speak emotionally about the hardship she went through during the Khmer Rouge era. After the question and answer session, the crowd took a 15 minute break before the next session.

Peou Dara Vanthan, the deputy director of the Center, led the next the session with an hour-long presentation on the structure of the ECCC, scope and time frame of the tribunal, rights of defendants, and what the commune chiefs and villagers should expect to view the following day. One villager wondered why there was an appeal

against the provisional detention. Vanthan explained the legal procedure and further explained the accused's right to a good defense. The session continued for about an hour before breaking for lunch at a nearby restaurant.

After lunch, the villagers were brought to the hotel to rest before returning to the Center to attend the afternoon session. At 2 pm, the commune chiefs and villagers were bused back to the Center.

Three documentary films, *Behind the Walls of S-21*, *Preparing for Justice*, and *The Khmer Rouge Rice Fields: The Story of a Rape Survivor Tang Kim*, produced by the Center were screened, with a short introduction prior to each screening by a Film Team member.



Participants watch documentary films

During the screenings, the audience remained quiet and occasionally talked to each other when a particular scene peaked their attention. The screenings were an important method of adding to the audience's understanding of the history of the Khmer Rouge. Following the films, the participants broke for dinner and the introductory day ended.

On June 30th, 2008, the participants travelled to the ECCC Court building to observe the submissions of the parties regarding Ieng Sary's appeal against provisional detention. The group was seated in the main court room after slowly passing through the Court's security checkpoint due to the large number of spectators attending the hearings. The hearing was the first to take place in the main courtroom of the ECCC, behind bulletproof glass, where the entire audience could watch the events with their own eyes. This change gained the audience's attention more than any other previous hearing. The courtroom's viewing area filled up as a large number of spectators watched the proceedings.

Shortly before the Judges entered, Ieng Sary was brought into the main courtroom and seated in a designated place for accused persons. The former Khmer Rouge foreign minister walked with a cane and the assistance of the security guards to the podium in front of the panel of judges. He looked pale and old, but still retained an aura of power. As soon as the five judges came in, silence was restored to the room and the press was instructed to leave. The President of the Pre-Trial Chamber, Prak Kim San instructed people in the courtroom to sit down so the hearing could begin. Prak Kim San opened the hearing by reading a short statement, including a brief biography of Ieng Sary and a summary of the crimes with which he is accused. As in previous hearings, when instructed by the Judge to answer questions, Ieng stood up slowly and required the guards' assistance. The Judge then informed Ieng of his right to speak on his own behalf and participate in the hearing. As soon as the Judge

ended his statement, Ieng was asked to decide whether he wished to make a statement by himself or have his co-lawyers speak on his behalf. He preferred to have his lawyers speak for him. Report Judge Ney Thol then read a summary of the relevant legal issues.

The full morning was devoted to a discussion of Ieng Sary's legal right to assist in his own defense. The Defense raised two issues in this regard: Ieng's medical capability to assist his defense team and the translation of supporting documents. When invited to read his statement, the Cambodian defense lawyer, Ang Udam took the opportunity to suggest to the Judge to permit his client to sit next to them to easily communicate. The international defense counsel, Michael Karnavas, submitted to the Court that Ieng's poor health condition would not allow him to remain in the detention facility and suggested placing Ieng under house arrest. The Defense also pointed out that the Co-Investigating Judges failed to respond to its request for a physical and psychological examination of Ieng Sary and that Ieng could not be deemed capable to stand the trial until such examinations take place. Karnavas stated that "obviously, the co-investigating judges did not fully appreciate the role of the defense and ... the fact that an accused has the right to participate, even at this investigatory stage of the process." He believes that the Co-Investigating Judges did not satisfy Ieng's right to participate in the pre-trial proceedings due to its denial of medical examinations. The Defense also insisted that a prompt medical examination is necessary to ensure Ieng is capable of assisting in his own defense and participating in the proceedings. Karnavas continued his submission by emphasizing two legal defenses Mr. Ieng is claiming: Double Jeopardy and the Royal Pardon and Amnesty granted by the former King Norodom Sihanouk in 1996. These issues would end up being discussed in more depth the following days. Lastly, the Defense requested that document translation should be done promptly in order to providing Ieng with his full right to participate in his own defense.

After a fifteen minute break, the hearing continued with a Prosecution statement responding to the medical fitness and translation issues raised by the Defense. The deputy co-prosecutors, Vet Chariya and William Smith accused the Defense of



Ieng Sary sits in the podium at the pre-trial hearing

arguing issues not raised in its written submissions and argued that the issues did not affect the ongoing proceedings as it was just a pre-trial stage. The international deputy prosecutor argued that the Defense's complaint of the lack of response from the Co-Investigating Judges regarding its request for an evaluation of Mr. Ieng, had not been communicated to the co-prosecutor's office and that there was no evidence proving that the charged person was not capable to proceed. After the deputy co-prosecutors ended their arguments, the civil party lawyers took the stage and put forth arguments similar to the Prosecution's submissions. Next, the Civil Party lawyer Silke Studzinsky requested the judge to allow

a civil party, Theary Seng, to address the Court without her lawyer. However, this request was rejected and Theary Seng was stopped from talking. Following a suggestion from the civil party lawyer, the judges went into chambers to deliberate on the issue raised by the Civil Party and adjourned the hearing until the afternoon. The participants were talking quietly to each other when discussing this point. Some agreed with the civil party's argument that the parties should be provided equal duration for speaking in the hearing. Some others, however, wanted to hear more from the defense and the charged person and thus thought it was suitable that the court provided longer time for the defense. Apart from their opinions on these issues, the Living Documents team observed that the villagers could follow the proceedings much better than those who attended earlier hearings.

Following an hour lunch break, the commune chiefs and villagers returned to the courtroom to continue observing the pre-trial proceedings. The afternoon session continued for about an hour and a half before the Judges decided to delay the hearing to the next day due to the medical condition of the charged person. During the first portion of the afternoon session, the judges read their decision on the rights of civil parties to speak for themselves, rather than through their respective lawyers. Thereafter, the Defense requested a postponement of the hearing until the following day to allow the accused to take a rest, arguing that Ieng felt dizzy and tired. The lawyers said that Ieng had been trying to hold himself back from coughing all day. The deputy co-prosecutors however, argued that evidence should be shown to prove Ieng's inability already has high blood pressure and heart problems. All parties then asked the doctor questions. Following the questions and answers, the Judges filed out of the courtroom to deliberate on the request. Ten minutes later, the Judges announced the decision to delay the hearing until the following day. After the Court announced its decision the crowd broke, and the day's session ended. The DC-Cam group was bused to City Cat restaurant for dinner where Living Document Project members conducted interviews.

Attendees expressed varied points of views on the delay of the hearing due to the medical condition of the accused. Some were disappointed with the reasons given for the adjournment. Ry Matt, 67, a Cham Muslim from Prey Nup district, Sihanouk Ville, was not satisfied with reasons the Defense Lawyers provided in requesting a postponement. "I hope that the Court will bring justice to all the KR victims, but the interruption makes me feel negatively about the remaining proceedings," he added. Ieng's fragile health condition also decreased confidence in the procedures of the pre-trial hearing. Sum Seth, 45, of Chbar Morn district, Kampong Speu, believed that Ieng's poor health situation would interrupt the proceedings and would frustrate her expectations of fully understanding the pre-trial hearing. She continued that if Ieng kept claiming physical disability, she would not be able to bring back a Court's decision to her community.

On the next day, July 1st, 2008, the court continued its session. Some participants who attended the proceeding on the first day returned to the courtroom to continue observing the hearing. We noticed that the number of attendees in the viewing room

had decreased significantly, to approximately half of the previous day's audience. The DC-Cam group continued to represent a large portion of total participants.

The hearing's contents for the second day concentrated on a preliminary jurisdictional issue: "double jeopardy," which is literally the right not to be judged twice for the same crime. Just as the first day, each party was allowed to submit their position on the issue to the Court. The Defense was the first to speak. The Defense read its submission before the panel of judges, arguing that the ECCC's accusations against Ieng violate the principle of double jeopardy because he has already been condemned to death *in absentia* for the crime of genocide by the People's Revolutionary Tribunal (PRT) of the Vietnamese installed government in 1979. The PRT was created with no effort to present a defense, but did issue a judgment against Ieng on the charge of genocide. International defense lawyer Michael Karnavas argued that Ieng's case was still fully adjudicated by a domestic Cambodian tribunal, therefore existing Cambodian law should be applied, which would effectively strip the ECCC of jurisdiction over Ieng. In their counter argument, the deputy co-prosecutors responded that Ieng Sary was not being charged twice for the crimes he was prosecuted for by the PRT, but rather, that genocide is different from the war crimes and crimes against humanity he now faces. The international deputy prosecutor added that double jeopardy did not apply anyways, as the PRT did not comply with international fair trial standards. Additionally, double jeopardy is used to prevent the condemned from suffering the punishment twice, but Ieng did not suffer any kind of hardship or punishment as a result of the KRT's conviction against him. The submissions made by the Defense and Prosecution filled up the whole morning and continued into the afternoon session.

As soon as they finished their packed lunch, the commune chiefs and villagers invited by DC-Cam to observe the hearing were sent home despite the fact that the proceedings had not finished. Although they could not observe the entire hearing, villagers expressed their sincere appreciation to DC-Cam for bringing them to



Audiences are queuing to get in the Court's viewing area on the morning of June 30th, 2008

witness part of the court's hearing and helping them to understand the process of the tribunal. In some exit interviews, people spoke positively about the tribunal's effort to bring justice to victims. Lim Hal, East Trapeang Sala sub-district council's member, of Banteay Meas district, Kampot, said, "I understand that the co-prosecutors are working hard and thoroughly to provide justice

for victims, even though the Defense lawyers seem to strongly defend their client, Ieng Sary." Ho Pon, 45, of Banteay Meas district, Kampot, believed that this tribunal will certainly create a sense of justice for the people of Cambodia, as shown through the Court's allowance of defense and arguments in the court.

When asked if they had known this former Khmer Rouge leader, some quickly responded "yes" to the question. Lim Hal of Kampot and Sum Set from Kampong Speu concurred that they had seen his photo hanging on the wall of a meeting room during the Pol Pot regime. "Even though I was then a small kid and his face was much younger, I could still tell it was him." emphasized Set. The weak appearance of Ieng as well as the other accused worried the interviewees most. Many shared a similar view that the trial proceedings should be speedy, as the accused are aged and very sick. Their suggestion to the Court would be to urge it to proceed faster, so that justice could be delivered before the accused begin dying off.

The remaining portions of the hearing continued for another two days, continuing with submissions related to the effect of the royal amnesty and finally, the main issue of the hearing, Ieng's appeal against his provisional detention. On Wednesday 2nd July, 2008 the jurisdictional issue on which the court focused was the Royal Decree signed by the King Norodom Sihanouk granting amnesty to Ieng Sary. The Civil Parties' Lawyers delivered their oral submissions following two observations made by the Defense and the Prosecution. The Civil Parties argued that the amnesty was just a general one, stating that amnesty was given to any person who was convicted on political grounds at the time.

On the last day of the hearing, Thursday 3rd of July, the court discussed the final issue of the appeal: Ieng's appeal against the provisional detention order. In their submission, the Defense argued that the Co-Investigating Judges' conclusions on provisional detention did not meet the requirements of the ECCC's internal rules. The Cambodian lawyer stated that the four conclusions made by the co-investigating judges supporting their decision to place Ieng in detention, including preserving public order, ensuring Ieng's safety, preventing Ieng from threatening witnesses or victims, and to prevent him from fleeing were legitimate. The defense then argued that those factors were not supported by evidence and the detention actually puts the accused in danger due to his critical health condition. The Defense requested house arrest and greater access to medical facilities in lieu of detention in order to ensure the appearance of Ieng Sary at trial. In their counter argument, the co-prosecutors submitted that the ECCC's medical facilities are sufficient to provide medical care to Ieng and that it is not necessary to keep him under hospital detention.

The Living Documents Project team noticed that, while the issues discussed in the hearing on the last two days seemed to be more interesting and significant as it centered on the royal amnesty and provisional detention, the audience had decreased considerably. The audience filled only one third of the courtroom seats and consisted mostly of journalists and NGO employees.

It is worthy of note that the hearing was not the first public appearance of Ieng. His name appears quite frequently in the press and he is generally recognized by common people. In September 1996, Ieng was granted amnesty by the King Norodom Sihanouk (see *The New York Times*, "A Khmer Rouge Rebel Gets Cambodian Amnesty," Online September 15, 1996) following an official meeting between the King and the former Khmer Rouge foreign minister. The amnesty was meant specifically to excuse him from death penalty in 1979 by the PRT court and the 1994 law outlawing the Khmer Rouge movement (*The New York Times*, "An Amnesty in Cambodia," Online September 18, 1996). Yet, in a public letter to Amnesty International, the King still voiced his support for any future trial of Ieng Sary and other former Khmer Rouge senior leaders (*Raksmey Kampuchea*, "Ieng Sary's amnesty and KR draft law," October 7th, 2000). Earlier in the same year, Ieng had led a mass defection of the Khmer Rouge group to the government, which was critical in bringing down the remaining elements of the Khmer Rouge. He insisted on an amnesty from the King as a price for this defection despite protests from many researchers based on the evidence of Ieng's responsibility for the atrocities that took place in Cambodia from 1975-79.