

# Planning and Leadership Now Needed at ECCC

NOVEMBER 2013

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This paper looks at the challenges facing the Extraordinary Chambers in the Courts of Cambodia (ECCC), as the first trial of two former senior Khmer Rouge leaders, Nuon Chea and Khieu Samphan, moves towards its conclusion. The Open Society Justice Initiative is calling on all involved with the court to display honest leadership and to respond appropriately to the evident constraints on time, funding and political support that it now faces.

As counsel for Nuon Chea and Khieu Sampan present closing arguments in the first phase trial of Case 002 at the Extraordinary Chambers for the Courts in Cambodia, attention turns to when and if a second trial of remaining charges against these accused will go forward. Only with honest leadership and immediate planning can the court and the United Nations redeem what minimally must be provided to Cambodians from the original goals of the ECCC: a judicial proceeding that meets basic international standards and provides a model for domestic legal reform. The court cannot afford another chapter of failure in ensuring that the court operates properly.

A. The Severance of Case 002 Charges against Senior Leaders of the Khmer Rouge and the Prospect of Multiple Trials

The mammoth closing order (equivalent to an indictment) in the case alleges offenses committed across Cambodia throughout the Khmer Rouge reign from April 1975 to January 1979. It includes charges of forced evacuations, forced marriage, torture, executions, enslavement, and genocide against ethnic Vietnamese and Cham Muslim populations. Before any evidence was presented the Trial Chamber issued a "severance order" providing for a sequence of mini-trials, with the first phase to address only charges relating to the evacuation of Phnom Penh and other cities, and (added subsequently) the execution of Lon Nol leaders and loyalists at Toul Po Chrey immediately after the Khmer Rouge took power in April 1975. The goal of the order was to help ensure that there would be a final judgment on at least some counts before the accused became too frail to stand trial or died. The plan has not fully succeed as Ieng Sary, accused as a senior leader in Khmer Rouge atrocities, died mid-way through the trial, and his wife, Ieng Thirith, facing similar charges, was found to be unfit to stand trial because of age-related dementia.

Nuon Chea and Khieu Sampan have participated in the first phase trial through the close of evidence and closing arguments. But the Trial Chamber will likely deliberate over the judgment until the summer of 2014, and an appeal may follow before any judgment is final. Both accused are in their late 80's with a variety of medical problems. While Khieu Sampan has attended a majority of the trial proceedings, Nuon Chea has appeared in the courtroom only sporadically, choosing instead (as recommended by his physician) to observe the proceedings from a hospital bed in a holding cell.

B. Immediate Planning is Required if a Second Case 002 Trial is to Go Forward

Pursuant to the severance order, and as directed by the Supreme Court Chamber in rulings on the validity of that order, the Trial Chamber must plan the details of the second phase trial. At this late stage, it appears that very little planning has

taken place, partially because it remains unclear if the court will proceed with the second trial. The ambiguous funding commitments from some of the court's donors, including the Government of Cambodia, and the advanced age and frail health of the accused are the cited reasons. The court has announced that a "trial management" hearing to begin planning for the second phase trial will take place in November or December of 2013, but it is clear the court is a long way from being ready to start a second phase trial in the case.

There are many complex questions that must be resolved before a second trial can start, including 1) Are the current Trial Chamber Judges available to stay on the court for the second phase? 2) Can the same panel of judges sit on the second trial from a legal standpoint? (The Supreme Court Chamber has indicated there may be a conflict that prevents them from doing so, but it will be for the parties to raise this in the first instance.) 3) Is it consistent with fair trial standards to begin a second trial before a judgment or before an appeal in the trial of the first phase? 3) how can evidence, findings and rulings from the first phase be used in the second phase consistent with fair trial standards? 4) Which charges in the closing order will be included in the second phase trial, and which will be left out? and 5) What are the reasonable budgetary and staff needs for the process, so as not to delay the conclusion of the first phase case? Some of these are pure legal questions for the judges, others require the judges and the court administration to work together, and will involve a commitment on budgetary issues from the UN, international donors and the Government of Cambodia. Court officials could have begun resolving these questions in a transparent manner long ago so as to be prepared to begin the second phase trial, if it is to go forward, as soon as possible.

Of primary importance is the determination as to what judges will sit on the panel for a second trial, as they are the judges that will be in the best position to plan for the legal details of the trial. If the same judges sitting on the first phase trial will sit on the second trial, then they need significant additional resources so as not to delay the writing of the judgment in the first phase. If, as seems more likely, at least several new judges will need to be brought in either from the existing reserve judges or from other chambers of the court, this process should also have already begun to permit the new judges to begin preparing to start the second trial as soon as legally and practically feasible.

### C. ECCC Donors Must Immediately Commit Adequate Resources for a Second Trial or be Honest about Declining to Fund Further Trials

The lack of transparent planning raises questions about whether the court and its stakeholders intend to proceed with a second phase trial. Although the court must make every effort to complete its mandate through a judicial resolution, legitimate concerns about whether that is feasible or practical have been raised. First, the

remaining accused are frail and elderly and it is doubtful that either of them, and particularly Nuon Chea, will remain alive and fit through a second phase trial that may not start for months and may last as long as the first phase—nearly two years. Does it make sense to start a trial when it is unlikely it can be completed?

Second, are the donors willing to adequately support the court through the conclusion of a second phase trial? The court has struggled over the last years to obtain adequate funding from both the international donor states and the Government of Cambodia. Cambodian and international staff are bearing the brunt of this problem in terms of unfairly short and stingy UN contracts and a complete lack of pay for much of the Cambodian staff for months at a time. The donor states and the Government of Cambodia have not made a reliable commitment to adequately fund the court through a second Case 002 trial. If they are not willing to do so, they should say so honestly now and avoid the travesty of a trial that stops mid way before its natural conclusion because of a lack of funding. If they are willing to fund the court through its legal conclusion, they must stop dribbling out funding to deal with crisis situations and publicly commit to adequate support.

Some Cambodians express the view that it would be a grave injustice to Cambodians not to move forward with the second trial as soon as possible so as to present the extremely serious charges remaining in the closing order. These are charges that go to the core of Khmer Rouge practices that directly affected millions of Cambodians. Others express the view that the first trial is enough given the age of the accused, the slowness with which the court moves and that, if there is a guilty verdict in the first case, the accused will likely be in prison the rest of their lives even without a second trial. Arguments can be made for both views; the court and its key stakeholders, the United Nations, the donors and the Government of Cambodia, have an obligation to consider these questions and to make a transparent decision about whether to proceed. Should they decide to proceed, this would require them to forthwith implement steps to ensure that their decision brings the maximum benefits to Cambodians from the already considerable investment in the court.

D. The Court Must Increase Outreach and Stakeholders must Explore Options for Information if Additional Trials are Completed

Regardless of what decision is made, the court must increase its investment in outreach to ensure Cambodians have adequate and comprehensible information about the process. If the court decides it is not feasible to proceed with a second Case 002 trial, it must develop a concrete exit strategy designed to preserve as many of the benefits of the its work as possible. Equally important, an exit strategy must include provisions for the information in indictments that is not

aired in a public trial to be accessible to the public. This is a delicate matter because it must be handled so as to respects the rights of the accused and of witnesses whose identity may need to be protected. The interests of civil parties with legitimate expectations must also be respected and provided for in any such plan. Finally, an exit strategy short of a full legal conclusion of the court's mandate is a political decision; the donors, the UN and the Government of Cambodia must take responsibility and be honest with the public about the reasons for such decision.

Other courts have looked at issues related to investigations or indictments that cannot proceed to a public conclusion. For instance, the International Criminal Tribunal for the former Yugoslavia (ICTY) provides in its internal rules for a summary hearing of the facts of an indictment when it is deemed unlikely that an arrest will occur. While the legal situation in Case 002 is very different because the accused are in custody, the point is to illustrate that the ICTY judges sought a creative solution to a difficult problem via their own rules. Some form of a truncated process that focuses more on the facts of the closing order than the liability of any particular person may be possibility. There are other alternatives too, and a solution will require the balancing of many interests. The judges, the court administration, the UN and the Government of Cambodia should immediately explore options so that valuable work already done by the court is not lost should its operations be cut short, either because of the death of accused persons or because the donors decline to fund the court further.

#### E. The Same Requirements for Planning, Honesty and Outreach Apply to Cases 003 and 004

Similar considerations for timely planning, honesty and outreach apply to Cases 003 and 004. The investigation of those cases is proceeding without the assistance of the national side of the office of the co-investigating judges. There is little reason to believe that, even assuming the international co-investigating judge recommends indictments, that the cases will ever go to trial, given vocal and persistent objections of the Government of Cambodia. As with the second trial in Case 002, the court, the UN, the donors and the Government of Cambodia should be honest with the public about the status of the cases and the role of political interference and whether they will proceed to a conclusion with judicial integrity. They must exercise leadership and planning to ensure that the benefits of the investigations are not lost to the Cambodian people if the cases do not go to trial because of a lack of political will or a lack of committed funding.

#### Court Officials and Stakeholders Must Display Leadership and Act Immediately to End Harmful Stalemate

For too long the court and its stakeholders have passively refused to address the practical and political constraints on the court. The impasse could be broken if the

judges and the administration of the court were to immediately begin detailed planning and decision making in order to start a second phase trial as soon as legally and practically possible. High level assistance must be provided to the Trial Chamber, including additional judicial personnel if necessary, to accomplish this so as not to delay the judgment in the first phase trial. A realistic timetable and budget must be prepared and donors must affirmatively commit to adequately fund the second trial if it is to go forward.

These processes must be as transparent as possible. If a decision is made by the donors, the UN and the Government of Cambodia that the trial should not go forward for political, practical or financial reasons, the parties must honestly say so immediately> They must explain the decision to Cambodians and plan for dealing with the untried portions of the case in a manner that serves the interests of Cambodians and still respects fair trial principles. The same principles apply to Cases 003 and 004.

To date there has been a marked lack of proactive and creative leadership at all levels in planning the court's work. This has been accompanied by a lack of transparency and candor about the realities of the current situation. It is critical that the UN and the senior court officials exercise leadership on these issues.

If they do not step up, two grim alternatives present themselves: either the court will limp along until there is an embarrassing blow-up that results in it winding up its operations in disgrace. Alternatively, it could enter an equally embarrassing state of limbo, with staff and judges leaving because the donors stop funding without actually making a decision about how to preserve the benefits of the court for Cambodians. Both of these consequences can and should be avoided by ending the current stalemate with proactive planning and honesty.

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