

BRIEFING PAPER

Recent Developments at the Extraordinary Chambers in the Courts of Cambodia

October 2015

EXECUTIVE SUMMARY

The Extraordinary Chambers in the Courts of Cambodia (ECCC) has made steady progress in the Case 002.2 trial against Khieu Samphan and Nuon Chea, with the court now addressing genocide charges related to the treatment of Cham Muslims and ethnic Vietnamese by the Khmer Rouge. Meanwhile, appeal proceedings in the first trial judgment against the same accused continue, with requests for and the hearing of additional testimony before the Supreme Court Chamber. A fifth international co-investigating judge has been appointed to complete the investigations in Cases 003 and 004, but there has been no public information about the UN-announced “review” of political interference in the issuance of arrest warrants in the cases. This report summarizes these developments.

I. Case 002.2: Trial Moves Steadily Forward, Addressing Genocide Charges and Fair Trial Concerns

The second phase trial in Case 002 (“002.2”) is moving forward with remarkable efficiency, particularly given concerns about the health of the aged accused. Both Nuon Chea and Khieu Samphan have been examined recently by court appointed doctors and found fit to stand trial, and there have been no significant adjournments due to their health. Nuon Chea often watches the proceedings from a holding cell with a bed because of back pain, but he is in the courthouse, and when he comes to the courtroom he appears remarkably alert. Khieu Samphan sits in the courtroom most days and appears to follow the proceedings with interest.

The Trial Chamber has heard testimony about several sites where crimes against humanity allegedly took place, including security centers, work sites, and group cooperatives overseen by the Khmer Rouge. On September 7, the court began hearing evidence related to charges of genocide and crimes against humanity for the alleged targeted persecution and killing of Cham Muslims. This will be followed by evidence of the same charges related to the deportation, persecution, and killing of ethnic Vietnamese who had lived in Cambodia for many generations. The chamber is currently scheduled to conclude these trial segments in December. Claims against the two accused related to forced marriages, rape, internal purges, and the Tuol Sleng prison complex are scheduled to be heard beginning in 2016.

The court’s completion plan predicts closing arguments by the end of 2016 and a judgment a year later in 2017. Absent delays, the chamber is on track to finish within that time frame. The chamber announced that it will not hold trial proceedings the week of September 28, 2015 in order to accommodate defense motions for additional time to consider requests by the prosecution to submit “newly discovered” evidence and general fair trial concerns raised by the placement of thousands of pages of documents from Cases 003 and 004 into the Case 002 file. If further delays to accommodate these requests are needed, the completion of the trial will likely be delayed.

A. Genocide Claims Relating to Cham Muslims and Ethnic Vietnamese

Although the Khmer Rouge regime is often referred to as “genocidal,” the killing of ethnic Cambodians by the Khmer Rouge has not been charged as genocide at the ECCC because the victims were not targeted on the basis of national, ethnic, racial, or religious grounds, which is required to establish genocide under international law. Rather, genocide charges against Nuon Chea and Khieu Samphan are related to allegations that the Khmer Rouge, under their leadership, targeted Cham Muslims and ethnic Vietnamese for deportation and elimination on ethnic or religious grounds—thus meeting the criteria for genocide.

The evidentiary segments relating to the treatment of Cham Muslim and ethnic Vietnamese by the Khmer Rouge—including genocide claims—are likely to draw increased public and press interest because of the place that the term “genocide” holds in the public perception of Khmer Rouge crimes. The court has done no real outreach to prepare Cambodians for the concept that genocide charges only relate to the killing of minority populations. Cambodians often express surprise and disappointment when this limitation is explained, as it goes against the prevailing popular understanding.

This situation is additionally complicated by an underlying and growing resentment and racism toward Vietnamese by many Cambodians that is fueled by current political discourse.

B. Fair Trial Issues: Defense Walkout and Objection to New Evidence

Beginning August 26, 2015, the Trial Chamber held a session in which the parties were permitted to present “key documents” they believe the chamber should focus on in arriving at its judgment. The parties were permitted to read from documents that had already been admitted into evidence, explain their significance, and highlight them for the court and the public. As a part of their presentation, prosecutors read incriminating portions of a number of Written Records of Interviews (WRIs) from the investigations in Cases 002, 003, and 004. These are the transcripts of statements given to the investigating judges. Many of the witnesses who made those statements were not subject to cross-examination by the defense and will not be called as live witnesses at trial. Consistent with precedent from other international tribunals, the chamber admitted these statements with the caveat that they can be used to prove facts other than the acts and conduct of the accused (i.e. they can be used to establish crime base evidence but not guilt), and as corroboration of other evidence. The chamber is to determine the weight to be given to the statements, in light of their being hearsay that the accused have not had the opportunity to test by cross-examination. Presumably the statements will be given *less* weight in the findings of the Trial Chamber than live witness testimony.

The use of WRIs in the key-document hearing prompted Nuon Chea defense counsel Victor Koppe to walk out of the proceedings for a day and to state that he had nothing but professional contempt for the international judges of the tribunal.

Counsel for both Nuon Chea and Khieu Sampan objected to the chamber's decision to admit into evidence WRIs of witnesses who will not be called to testify at trial and cannot be challenged by the defense. Many of these statements are visceral and potentially damaging. The defense feels they have no way to counter such evidence when it is read aloud in a public and dramatic manner, and no way to ensure is the WRIs are used for the limited purpose allowed under the chamber's admissibility ruling. The defense is concerned that the chamber will give these documents more weight they are due, in part because of the emotionally-powerful way they have been read in court. In addition, many statements contained in WRI's have been contradicted or retracted by witnesses who later appeared in court. Under circumstances where the witness does not appear at trial, the chamber will have to exercise care in how it weighs the statements, to ensure that the defense's right to confront evidence against them is not unduly infringed.

A second fair trial concern expressed by the defense relates to the large number of documents produced in Cases 003 or 004 that are being submitted for Case 002 during the trial. It is estimated that the prosecution has submitted over 9,000 pages, including 1,355 witness statements, to the defense pursuant to its obligation to disclose relevant evidence that comes to its attention. The prosecution has sought and received permission to include at least 143 witness statements from this cache of information as evidence against the defendants in the Case 002.2 trial. This was done pursuant to rulings on the admission of “newly-discovered evidence.” Likewise, the defense has sought to use material it considers exculpatory in the Case 002.2 trial and in the Case 002.1 appeal.

Because the investigation of Cases 003 and 004 is ongoing, new evidence continues to be produced. Part of the problem for the defense is the time required to review this material, and part is the lack of any real means to follow up or test its accuracy or significance. The chamber seems to understand the time burden and has granted some defense requests for additional time, but has been understandably reluctant to adjourn the proceedings to allow the full amount of time the defense has requested. The prosecution states they are being careful to request only the admission of new evidence that is not redundant and is otherwise important.

This situation results from the parallel investigations of Cases 003 and 004 while the Case 002.2 trial is still in progress, rather than the actions of the chamber or any of the parties. But the influx of new material does have fair trial implications in that it significantly affects the right of the accused to adequately prepare a defense and confront evidence against them. While a walkout by defense counsel and insults aimed at the chamber were not an appropriate response to these problems, the issue nonetheless, deserves close attention from the chamber. To address the problem of massive amounts of “new” evidence, the chamber must seek to minimize and remedy the burden on the defense by granting adequate time to evaluate the new information and by exercising restraint in admitting such information as evidence. The admission into evidence of untested WRIs from the 002 case file as well as from cases 003 and 004 requires care by the chamber to ensure they are used only for the limited purposes for which they are admitted, and that a critical evaluation is made to the weight given to such statements. The chamber could explain to the public and the parties how it evaluates untested WRIs so that the limitations governing such evidence are clear.

II. Case 002.1: Appeal before the Supreme Court Chamber

According to the court’s completion plan, the Supreme Court Chamber’s (SCC) appeal decision on the first Case 002 trial judgment, in which both Nuon Chea and Khieu Sampan were handed life sentences for crimes against humanity related to the evacuation of Phnom Penh and other cities, and for the targeted killing of former regime officials, will be issued in early 2016.

The defendants have raised a large number of issues on appeal, from overall fair trial complaints to very specific evidentiary and factual issues. The prosecution has appealed the Trial Chamber’s ruling that an extended form of joint criminal enterprise liability (JCE-III) was *not* part of international customary law by 1975-1979 and therefore cannot be used as a basis of liability against the accused. If the SCC considers this issue it will be for the sake of clarifying the law prospectively, since the SCC’s ruling cannot be used to extend the liability of the accused persons.

A major factual argument in the Nuon Chea appeal of the Trial Chamber’s judgment is that, contrary to the Trial Chamber’s conclusions, the Khmer Rouge was not controlled in a hierarchical manner with a central command structure in which the accused held senior positions. Rather, the defense argues that zone leaders had significant independent authority to make decisions, did not always follow the orders of the central authorities, and were at times disloyal to the central command, thus diminishing the responsibility of the accused for some of the crimes charged—particularly crimes related to the murder of former Lon Nol soldiers following the takeover of Cambodia by the Khmer Rouge. Nuon Chea’s defense team argued that it was critical for the SCC to hear several named

witnesses to support this theory and demonstrate the error in the Trial Chamber's conclusions.

The SCC agreed to hear three of the requested witnesses and held a three-day hearing at which they were questioned. While compelling and detailed testimony was given, the defense failed to elicit clear, credible evidence that contradicted the Trial Chamber's findings regarding the hierarchical nature of the Khmer Rouge decision-making with respect to the factual allegations at issue in the judgment.

The SCC has yet to rule on additional outstanding requests by Nuon Chea to seek the testimony of filmmakers Thet Sambath and Rob Lemkin, about information obtained in the course of making their documentary about Nuon Chea, *Enemies of the People*. Likewise, the chamber has deferred ruling on Nuon Chea's request to call Heng Samrin, a high-ranking government official whom the Trial Chamber declined to call as witnesses in spite of repeated requests by the defense.

Most recently, counsel for Nuon Chea filed an extensive brief ("Nuon Chea's Sixth Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against The Trial Judgment") requesting that the SCC consider 22 additional documents and summons two additional witnesses to testify in support of its detailed argument about the fragmented and uneven nature of Khmer Rouge decision making. They argue that such evidence undermines the Trial Chamber's findings concerning joint criminal enterprise, superior responsibility, and ordering as modes of holding the accused liable for crimes committed by lower level Khmer Rouge actors.

Rulings on these motions—and the hearing of additional evidence if the SCC so orders—can be expected shortly if the chamber adheres to its current plan to issue its decision early next year.

III. Cases 003 and 004: New International Co-Investigating Judge and Lack of UN Investigation into Political Interference

Cases 003 and 004, involving claims against four persons alleged to be among those "most responsible" for Khmer Rouge atrocities, are currently under investigation by the international co-investigating judge, who is acting without the cooperation of the Cambodian co-investigating judge. The cases have formally been under investigation since August 2009. After a series of problems—including the resignation of two prior international co-investigating judges who claimed that political interference (or the appearance thereof) prevented them from doing their jobs—Judge Mark Harmon (USA) began work in October 2012. Although the judicial investigation process is confidential, it is clear from limited court reports that Judge Harmon made major strides in the investigation, interviewing hundreds of witnesses and investigating a significant number of crime sites.

Statements from high-level Cambodian government officials, including Prime Minister Hun Sen, have condemned the pursuit of Cases 003 and 004 as inappropriate and dangerous to peace in Cambodia. Perhaps relatedly, investigations have been undertaken without the assistance and cooperation of the Cambodian co-investigating judge or the Cambodian co-prosecutor.

A. Appointment of Fifth International Co-Investigating Judge

Judge Harmon announced in July that he would soon resign for personal reasons, and he left the court in August. Michael Bohlander, from Germany, was nominated by the UN to replace Judge Harmon. The Cambodian Supreme Council of the Magistracy promptly provided its approval. While it is encouraging that the government did not drag its feet in approving Judge Bohlander's appointment, there are no other indications that the Cambodian government has changed its view that Cases 003 and 004 should not proceed to trial. The move to yet another international co-investigating judge raises concerns that the progress toward some kind of a conclusion to Cases 003 and 004 will likely slow. Before Harmon's departure, the court was indicating that the investigations would likely be completed by the end of 2016. There have been no public updates as to the progress of the cases since Judge Bohlander arrived this month.

B. No Public Information on UN Investigation into Political Interference

One of Judge Harmon's last acts as investigating judge was to issue charges *in absentia* against two suspects and to disclose that he took this action because the judicial police refused to carry out arrest warrants he had issued to bring the suspects to the court. The Open Society Justice Initiative and others regard the refusal of the judicial police to act as an apparent violation of the Agreement between the UN and the Government of Cambodia, and have called on the UN to take appropriate action.¹ The Agreement obligates the Cambodian government to cause its judicial police to carry out such orders. After news of the Cambodian judicial police's failure to carry out the arrest warrants became public, the UN announced on June 23, 2015 that it was reviewing documents related to the issue.²

Counsel for Meas Muth sought to stay the execution of a warrant—issued by the Pre Trial Chamber on June 4, 2015—to arrest Meas Muth and bring him to the ECCC for possible pretrial detention. Counsel for Meas Muth argued that it is impermissible for the international co-investigating judge to continue the investigation of their client while the chamber considers the validity of having charged him *in absentia* (because the judicial police refused to honor warrants to bring him in person to the court for charging). The chamber could not reach the supermajority of 4 needed to stay execution of the arrest warrant for Meas Muth. The two international judges voted that the request was not admissible under the court's rules. The three Cambodian judges stated that a stay of the arrest warrant should be issued because appearance in court for a pretrial detention hearing, “in Cambodian society, is regarded as humiliating and affecting Meas Muth's honour, dignity and rights substantially and irremediably.” Under the applicable rules of the court, the arrest warrant has not been stayed but rather remains in force. Nonetheless, it remains unexecuted by the Cambodian judicial police.

To date there has been no public information as to the conclusion of the UN's announced review of the judicial police's failure to execute the warrant. Nor has there been any indication that the UN is taking action to remedy what appears to be a blatant violation

¹ See detailed Justice Initiative discussion of this issue in Open Society Justice Initiative, “Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: March 2015 Update,” available at <https://www.opensocietyfoundations.org/briefing-papers/recent-developments-extraordinary-chambers-courts-cambodia-march-2015>.

² See Robertson, Holly, “UN to Review Documents Relating to Meas Muth,” *Cambodia Daily*, June 23, 2015.

of the Agreement by the government of Cambodia. The UN's silence and apparent failure to act raises questions about the effectiveness of its role as a partner in the Agreement and as a key stakeholder responsible for ensuring that the ECCC meets international standards of fairness—including that it operate free of political interference.

As the Justice Initiative has argued consistently, by ignoring government interference in the progress of Case 003 and 004, the UN and the court's international officials are damaging the ECCC as an institution. In apparently turning a blind eye to a breach of the Agreement, the UN: 1) risks diminishing the integrity and reputation of the entire court; 2) appears to ratify the Cambodian government's political obstruction of the judicial process; 3) suggests that it is not willing and able to uphold principles of judicial independence; 4) deepens Cambodians' cynicism about the prospect of judicial or rule of law reform in their country; and 5) jeopardizes its own ability to act as a credible partner in other hybrid tribunals.

Even as the ECCC continues to make progress in Cases 002.1 and 002.2, the question of how it handles Cases 003 and 004 will go a long way toward determining the court's legacy.

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