

BRIEFING PAPER

Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: Threat to Permanently Stay Cases 003, 004 and 004/2A

June 2017

Executive Summary

On May 5, 2017, the two co-investigating judges at the Extraordinary Chambers in the Courts of Cambodia (ECCC) threatened to put a permanent stay on their investigations in the court's three outstanding cases, citing supposed shortages in funding from its international donors and the Governments of Cambodia. The proposal is a drastic, insufficiently supported, and unwarranted option that would profoundly damage the credibility and legacy of the ECCC, without a more complete and transparent exploration of the circumstances and alternatives.

The Extraordinary Chambers in the Courts of Cambodia (ECCC) is facing what may be the most serious challenge yet to the completion of cases against three additional former senior Khmer Rouge leaders, following a call from the two co-investigating judges to put a permanent stay on its three outstanding cases against the three. The request, delivered to the court in a sealed document that was subsequently leaked to the media, cites supposed shortages in funding to the court from its international donors and the Government of Cambodia.

Staying the cases would effectively lead to the termination of the ECCC after it completes the current second case against Nuon Chea and Khieu Sampan, currently expected to conclude in the summer of 2018. To do so citing funding shortages would be to improperly ignore the persistent obstructionism of the Cambodian government with respect to the court pursuing further cases, which has stymied these proceedings from the start nine years ago. The proposal is a drastic, insufficiently supported and unwarranted option that would profoundly damage the credibility and legacy of the ECCC, without a more complete and transparent exploration of the circumstances and alternatives.

Background

The Extraordinary Chambers in the Courts of Cambodia (the ECCC) is charged with bringing to justice senior leaders and those most responsible for atrocities committed by the Khmer Rouge during its hold on power between 1975 and 1979 in Cambodia. The ECCC began operations in 2006 and has completed the trial and appeal of three accused persons: Duch, the former warden of the S21 prison, torture and execution center, is currently serving a life sentence after the final appeal of his conviction on charges of crimes against humanity; Nuon Chea and Khieu Sampan were judged to be senior leaders guilty of war crimes and crimes against humanity in the court's second trial, Case 002. The Supreme Court Chamber affirmed the life sentences handed down on those charges. Case 002/2 with additional charges against the same two accused is in its final stages, with a Trial Chamber Judgment expected in the summer of 2018.

There are charges under investigation by the court's co-investigating judges against three additional accused:

- Case 003 covers charges of genocide, war crimes and crimes against humanity against former alleged Naval Commander Meas Muth.
- Case 004 relates to charges against Yim Tith, former alleged acting Secretary of the Northwest Zone for genocide, crimes against humanity and war crime.
- Case 004/2, against former alleged Central Zone Secretary Ao An, includes charges of genocide as well as crimes against humanity.

The rules of the ECCC provide that once the judicial investigation in each case is complete, the co-investigating judges (one international and one Cambodian judge) will issue a Closing Order which either dismisses the charges or indicts the accused for crimes within the jurisdiction of the ECCC and forwards the case to the Trial Chamber.

Plan to "Permanently Stay" Remaining cases Under Investigation

On May 5, 2017 the co-investigating judges filed a highly unconventional "Confidential Request For Submission On Budgetary Situation of the ECCC and its Impact on Cases 003, 004 and 004/2." This document (referred to here as "the filing"), filed under seal, was leaked to the press and the judges have publicly acknowledged its existence and basic substance. In the filing the judges request responses from the parties, the UN and the court's donors to their ultimatum that they are preparing to issue a "permanent stay" of the three cases they are currently responsible for investigating.

The judges state that they are prepared to take this action by the end of June, 2017, for the sole reason that they believe inadequate funding threatens "the future of the cases" including their ability to complete the investigations, trials and appeals that may follow any indictments. Discussion in the media by persons that have seen the filing indicates that the gist of the judges concern is that, without increased assurances of adequate current and of future funding, the fair trial rights of the accused are violated and so the cases must be immediately disposed of for good. It is not clear what kind of response or assurances from the parties, the UN, the donors or the Government of Cambodia will impact the threatened outcome.

This is a troubling development for several reasons.

First, there is no legitimate basis for the judges' filing to be made under the veil of confidentiality that protects legitimate investigative actions and strategy. The judges are explicit that funding concerns are the "sole basis" for their contemplated actions and they do not relate or rely on any facts or case-specific considerations. This is an administrative and political matter that civil society and the Cambodian people have a right to understand, comment on, and perhaps contribute to solutions for. Stating publicly that their ultimatum and filing raises a "delicate matter and not properly discussed in the public domain at this stage" is insulting to civil society, which has worked hard to support the goals of the court, and of Cambodians generally. It is an improper use of the confidentiality rules governing the court.

Second, the argument of the co-investigating judges is based on a limited and unreasonable view of funding realities and of the history of the cases under investigation. There are widely acknowledged problems with the system of funding the ECCC by voluntary commitments made by donor states on an annual basis. This has been the situation since the establishment of the court and is built into its institutional framework. It has led to difficulty in recruiting and retaining staff, and had resulted in Cambodian staff at times working without pay. While difficult to measure, it is likely that the funding system is also responsible for delays and flaws in the proceedings. Although raising the court's budget each year has been a challenge and donors express increasing frustration with the slow pace of the proceedings, it is not clear from information provided by the UN, the court, or in relation to the co-investigating judges filing that the funding situation is significantly and certainly changed for the current year so as to justify the radical proposal of the co-investigating judges. The UN has indicated it has raised a significant portion of the 2017 budget and is endeavoring, as it has each year of the court's life, to complete that process before the end of the year.

With respect to the demand for guarantees of funding to complete the current investigation process of the co-investigating judges, we note that co-investigating judges have announced that they have completed the investigation of Cases 003 (Meas Muth),

and 004/2 (Ao An), and on June 13, announced the initial closing of the investigation in Case 004 (Yim Tith). Granting that there is work to be done drafting detailed Closing Orders and there is a possibility of minor additional investigative requests by the accused Yim Tith, it is nonetheless difficult to understand why the judges would threaten to pull the plug on these cases when they are so close to Closing Orders, and when funding for the current budget is moving toward fulfillment.¹

The reasoning of the judges with respect to the demand for current guarantees of full funding for possible trials and appeals should indictments be issued is even more troubling. The demand ignores the extremely difficult nine-year history of these investigations.

This deeply troubled history, fraught with evidence of political interference by the Government of Cambodia, has been detailed by the Justice Initiative since these cases were first contemplated by the co-prosecutors before 2009. Briefly, high level Cambodian Government officials, including Prime Minister Hun Sen, have publicly stated that the accused should not be subject to investigation or prosecution; there is evidence that the Cambodian prosecutor and judges have received and are carrying out the message to undermine the cases; and at every decision-making point, the Cambodian judges and prosecutor have made decisions designed to eliminate the cases.

All current indications are that, even with adequate funding, none of these cases will be tried at the ECCC. The Introductory Submissions—the filings by the international prosecutor which eventually became Cases 003 and 004 and 004/2—created a firestorm of controversy, with claims from the Government of Cambodia that pursuing the cases would result in a resurgence of civil war, and with evidence of political interference in the progression of the cases.² The Cambodian co-investigating judge has declined to participate in active investigation of the cases. He asserts that the ECCC does not have jurisdiction to do so because the accused are not senior leaders or "persons most responsible" for Khmer Rouge crimes as required for the ECCC to proceed against them. Active investigation of the cases has been conducted only by the international co-investigating judge and his staff.

Judge Bohlander is the fifth international co-investigating judge responsible for these investigations since they were initiated in September 2009. (One his predecessors, Judge Kasper-Ansermet, published an unprecedented public account of gross interference in the investigation process of Cases 003 and 004 when he left the court.²)

Yet, none of the cases has moved completely beyond the investigation stage (even the notice of dismissal of Im Chaem in Case 004, filed on February 22, 2017, was done without complete reasoning, with a complete decision to follow "in due course.") Neither Judge Bohlander, nor any of his predecessors in the office, may carry blame for the failure

¹ Although the Introductory Submission which initiated these cases is not public, numerous reports indicate that it is extremely wide ranging and covers a large number of crime sites--making for a complicated and unwieldy investigation. The Internal Rules provide a mechanism for the co-investigating judges to narrow the scope of charges at the time of issuing the closing order in order to "ensure a fair, meaningful and expeditious judicial process". (Rule. 66 bis). It is not clear how extensively the co-investigating judges are taking advantage of this rule to streamline and expedite the cases given the length of time they have been under investigation.

² Additional recent evidence of government interference is found in the statement by the Cambodian defense lawyer of Case 004 accused Yim Tith about his client: "The Cambodian Government already provided clear and confident [assurances] that the case would not be brought [by the ECCC]." Reported in the Phnom Penh Post article concerning the filing, Phnom Penh Post, May 8, 2017, *Andrew Nachemson, Erin Handly, Staying Khmer Rouge Cases Muddled*.

to wind these cases up within a reasonable time. However, this history is important in any honest evaluation of if and how these cases are to be brought to a completion in a legally and ethically defensible manner. It is disingenuous to imply that it is *only* the supposed failure of the UN and the donors to provide sufficient funding that has resulted in the uncomfortable situation the court finds itself with respect to these cases.

All relevant judicial decisions from Cambodian judges of the ECCC have taken the position that the cases should not and will not go forward to trial regardless of whether the international co-investigating judge issues any final Closing Orders containing indictments. These decisions are entirely consistent with the statements of the Cambodian Government that the cases cannot proceed to trial. The international judges have generally reasoned that the cases should move forward.

Under the Internal Rules of the court, which generally favor cases moving forward through an investigation in the event of a split opinion between the international and Cambodian judges, there are several future decision points where any indictment issued by the international co-investigating judge could be defeated by the Cambodian judges, thus ending the cases. Depending on competing interpretations of the Internal Rules, this could happen when the Cambodian co-investigating judge fail to agree to a Closing Order which does not dismiss the accused; if there is a disagreement at the Pre-Trial Chamber on an appeal against a Closing Order that contains an indictment; if the Cambodian police refuse to honor an arrest warrant to bind an indicted person over for trial; or if the Cambodian Trial Chamber Judges refuse to accept jurisdiction over the cases. Given the near inevitability of an outcome that stops the normal progress of any cases in which the international judge issues an indictment, it is no wonder that confusion reigns about how to proceed with funding. To ignore this and merely accuse the donors and the UN of shrugging their responsibility is an unfair distortion of the facts.

Third, the demands of the judges for additional guarantees about funding many years into the future for possible trials and appeals ignores the institutional reality and structure of the ECCC. While history has shown it is not ideal, the ECCC has operated, since its inception, and consistent with its founding instruments, as an institution which must develop a budget and seek funding from the UN, donor states and the Government of Cambodia (and to a lesser extent on private donors or foundations) on an annual basis. This has not been an easy task for the court, but it has succeeded every year to date and the court has functioned through the course of three trials, two of which have gone to final appeal.

There is no reasonable or realistic basis for arguing that an accused is entitled to have a case essentially dismissed if it is prosecuted by a court that operates on a system of annual budgetary appropriations. Under the reasoning of the co-investigating judges, all the defendants before the court up to this point could have insisted on a "permanent stay" during the investigation of their cases because the court is annually funded and did not have guaranteed funding through any time period necessary for appeal after trial. Such a result is nonsensical and out of touch with the structure of the court and with reality in general.

Conclusions

Regardless of whether one believes there is an outside possibility that any of these cases, if an indictment is issued, would proceed to trial, there is a disappointing lack of honest discussion about the extreme difficulties that these cases pose for the court. These

include the lack of political will to proceed on the part of the Cambodian government and the evidence of political interference, the advanced age and poor health of the accused, the time passed since the crimes were committed, and funding challenges.

Cases 003, 004 and 004/2 should be completed consistent with the application of the law and relevant rules to the facts of the cases. If this is impossible, it is vital that the court develop a plan with input from donors, the UN, the government of Cambodia, and civil society about how to end the cases with the least damage possible to the achievements of the court in Cases 001 and 002, to the value of information gathered during the nine years they were under investigation, to the civil parties, the accused and the people of Cambodia generally, and to the rule of law in Cambodia.

Such a completion plan must include adequate and honest public outreach explaining the history of the cases and the reasons they are ending, and provisions for public access to information gathered from the investigations. Adequate protections of the confidentiality interests of the accused and witnesses must be implemented. It would constitute a significant waste of public resources if all of the investigative material were secretly filed away as the co-investigating judges seem to be suggesting.

It has long been the position of the Justice Initiative that Cases 003 and 004 and 004/2 should proceed through full investigation and, if indictments are issued, to trial without political interference. The Justice Initiative has urged and advocated for adequate funding for this process from the UN, the Government of Cambodia and the donor states that have supported the court. It has recognized and lamented the problems of a "voluntary funding mechanism" for a hybrid tribunal such as the ECCC. The Justice Initiative acknowledges that under some circumstances inadequate funding of a court can result in violations of the internationally protected fair trial rights of accused persons. However, the reported plan of the co-investigating judges to eliminate the three cases under investigation is made on their own motion, at a time when the investigations are nearly complete, and as active and significant fundraising for the court is underway, particularly by David Scheffer, the UN Special Envoy to the Court. The proposal is a drastic, insufficiently supported and unwarranted option without a more complete and transparent exploration of the circumstances and alternatives.

Further, it is likely that the filing of the filing by the co-investigating judges will have negative, if unintended, consequences. Even if the judges do not carry out their threat, it is likely to provoke a series of requests from counsel for the accused for dismissal of cases for hypothetical fair trial violations that will likely never occur, further discourage donors about the wisdom of supporting the court, encourage staff to prematurely seek alternative employment, and add to the discouragement of victims of Khmer Rouge crimes. The position of the co-investigating judges is a blow to the cause of international accountability and the fight against impunity.

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