

BRIEFING PAPER

Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: March 2015

The Extraordinary Chambers in the Courts of Cambodia (ECCC) has been remarkably active in the first quarter of 2015, but its progress is being undermined by mounting evidence of political interference in two cases currently under investigation. This report reviews significant recent developments in Case 002/02, including witness testimony, shortcomings in outreach, additions to the case file, and the need to plan for reparations. It then examines Cases 003 and 004, including ongoing political interference, the failure of the judicial police to execute arrest warrants, and the refusal of the UN and international officials to oppose this interference. It concludes with recommendations for action by the court, the United Nations (UN), the government of Cambodia, and the court's donors.

Case 002/02 trial advances

The second trial of senior Khmer Rouge leaders Nuon Chea and Khieu Sampan—on charges of crimes against humanity, war crimes, and genocide—has been moving steadily forward after an earlier delay caused by a defense counsel boycott. The Trial Chamber ruled that the accused remain fit to stand trial and has generally held evidentiary hearings four days each week. Several fact witnesses, including four civil parties and several former Khmer Rouge officials, have testified about the Tram Kok Cooperative and the Kriang Ta Chan security center in Takeo Province, the first crime sites to be addressed by the chamber in this trial. Journalist Elizabeth Becker testified as an expert about regional politics during the period including and surrounding the Khmer Rouge rule, as well as about her experiences in Cambodia during the same time frame. The trial is expected to last at least through mid-2016.

The challenges presented by this trial's testimony speak to the extraordinary difficulties that attend these complex historical cases. The recent testimony included repetitions, lapses in memory and comprehension, contradictions, evasions, vague responses, translation difficulties, and significant reliance on hearsay. While these factors reduce the clarity of the testimony, they may be largely unavoidable given the complicated nature of the issues, the gap of over 35 years since the events occurred, and the reluctance of many former Khmer Rouge cadres to testify. Despite these challenges, the court record that has been created is itself an important achievement.

The Trial Chamber has generally been effective in managing witness presentations that cover relevant factual subjects likely to be of interest to the public. However, there have been occasional lapses in the chamber's effective management. For instance, in response to an objection by Cambodian counsel for Nuon Chea who argued that a judge's questioning of a witness put the judge in the role of the prosecutor, the president of the Trial Chamber cut the objection off and repeatedly admonished the lawyer that he was not allowed to criticize the court. While the objection may not have been valid, it was courteously and professionally delivered and the reaction of the president undermined the legitimate role of defense counsel in challenging trial procedures.

While the court continues to bring student and community groups to observe the proceedings on most trial days, there is limited press, radio, or television coverage of the trial reaching average Cambodians. A popular weekly television program that summarized and provided analysis of the week's proceedings has recently been discontinued due to lack of funding.¹ The court's outreach program for the

¹ *Facing Justice* was produced by Khmer Mekong Films in partnership with the East-West Center, UC Berkeley's War Crimes Studies Center, and the WSD Handa Center for Human Rights and International Justice at Stanford University.

trial is extremely weak, due to inadequate funding. The limited media coverage and shrinking outreach efforts on Case 002/02 risk wasting an important opportunity to engage and inform Cambodians about the court and the Khmer Rouge crimes it is trying. The court, the government of Cambodia, and the court's donors should devote more resources to bringing the details of this trial to a greater number of Cambodians.

In an action that raises fair trial concerns and has the potential to delay 002/02 trial proceedings, the International Co-Prosecutor recently added nearly 3,000 pages of statements from 155 witnesses and civil parties to the Case 002/02 court file. These documents were produced in the course of the investigation by the International Co-Investigating Judge in Cases 003 and 004 (described in more detail below). It is an essential responsibility of the prosecutors to update the Trial Chamber and the parties in Case 002/02 with information that could be exculpatory or relevant to the accused. Nonetheless, the parties are entitled to have sufficient time to review and analyze this new information. The new material—provided after the trial is already underway—imposes a considerable burden and raises fair trial concerns related to adequate notice and the opportunity to prepare a defense. The prosecutor has indicated that additional material derived from investigations in Cases 003 and 004 will be added to the Case 002/02 case file in the coming months. Defense counsel have requested time to review the new material in order to determine its impact on Case 002 proceedings. To date, the Trial Chamber has dealt with the issue by adjusting the order of witnesses, but is expected to rule soon on whether a delay in the proceedings is necessary to allow the parties time to further digest the new material.

Finally, the Case 002/02 civil parties—victims of the Khmer Rouge crimes being adjudicated who have chosen to participate in the case—are in the process of developing proposed reparation projects to be submitted to the Trial Chamber for endorsement. Reparation projects can only be approved by the Trial Chamber in the event of a judgment against the accused, and only if they are fully funded by outside donors. The projects being developed for approval serve the broad needs of Khmer Rouge victims and are important outreach tools to enhance to positive impact of the court. They deserve sufficient attention and funding from donors.

Political interference at new level in Cases 003 and 004; UN and international officials remain silent

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 International Co-Investigating Judge Mark Harmon. He 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 investigating judges who claimed that political interference (or the appearance thereof) prevented them from doing their jobs, Harmon began work in October 2012. Although the judicial investigation process is confidential, it is clear from limited court reports that

Harmon has 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. Consequently, investigations have been undertaken without the assistance and cooperation of the Cambodian Co-Investigating Judge or the Cambodian Co-Prosecutor.

The complex rules of the court contemplate that a Cambodian and an International Co-Prosecutor will work together on initial investigations and submit appropriate cases to the Co-Investigating Judges for more extensive judicial investigation—likewise to be conducted by the Cambodian and International Co-Investigating Judges in cooperation. If the prosecutors or the investigating judges disagree about if and how to proceed with an investigation, the rules allow one prosecutor or judge to proceed on his or her own so long as the other does not seek a ruling from the Pre-Trial Chamber to stop the investigation. The Pre-Trial Chamber can only reach a decision to end an investigation if four out of its five judges agree to do so. If such a “super-majority” decision is not reached, a presumption that the investigation goes forward prevails and one Co-Prosecutor or one Co-Investigating Judge can proceed without the cooperation of the other. In Cases 003 and 004, the Cambodian Co-Prosecutor did not agree with her international counterpart that the cases should go forward and raised the issue before the Pre-Trial Chamber. The Pre-Trial Chamber judges split, with the three Cambodian judges voting not to pursue the cases and the two international judges voting that the evidence supported the International Co-Prosecutor’s position that the cases should precede to judicial investigation. Since there was no “super-majority” decision to stop the investigations, both cases proceeded to the Co-Investigating Judges for judicial investigation.

If the Co-Investigating Judges disagree on whether or how to proceed with an investigation, the court’s rules allow one judge to continue investigating the case on his own unless the other judge requests the Pre-Trial Chamber to rule on the disagreement. Again, the Pre-Trial Chamber can stop the investigation only with a “super-majority” vote of four out of five judges. In Cases 003 and 004, the Cambodian Co-Investigating Judge has declined to pursue the investigations, but has not to date brought his disagreement with the International Co-Investigating Judge to the Pre-Trial Chamber for resolution. The current International Co-Investigating Judge is allowed to and has proceeded with the investigation of both cases, independent of his Cambodian counterpart. The Cambodian Co-Investigating Judge likely understands that the Pre-Trial Chamber, having failed to stop the investigations when the question was raised at the level of the Co-Prosecutors, is unlikely to reach a “super-majority” decision to stop them at this point.

The Cambodian government's intransigence and interference in these cases is well documented.² That opposition is likely based on the government's concern that the cases implicate persons connected to those currently in high office, or raise facts that would be embarrassing to individuals currently in high office. The government's suggestion that the suspects pose any genuine risk of inciting violence appears unfounded. Regrettably, the government's opposition to Cases 003 and 004—regardless of its source—makes it uncertain that these cases can be brought to a credible legal conclusion.

On February 26, 2015 Prime Minister Hun Sen reprised his objections and stated in a speech at an international summit on the UN's anti-genocide "Responsibility to Protect" initiative that the court's investigations had "almost gone beyond the limit" and could cause former Khmer Rouge soldiers to start another civil war.³ Less than a week later, Judge Harmon publicly stated that he has charged Im Chaem (Case 004) *in absentia* with a series of crimes against humanity committed at Phnom Trayoung security center and Spean Sreng worksite. The crimes alleged include murder, extermination, enslavement, imprisonment, persecution on political grounds, and other inhumane acts.

Harmon also advised that he has charged former Khmer Rouge Navy Commander Meas Muth (Case 003), *in absentia* with crimes against humanity including murder, extermination, enslavement, imprisonment, persecution on political and ethnic grounds, and other inhumane acts allegedly committed at Wat Enta Nhien security center, Kampong Som, Kratie, S-21 security center, and against Vietnamese, Thai, and other foreigners. Harmon announced that Meas Muth has also been charged with war crimes including the unlawful confinement of civilians, willful deprivation of a prisoner of war or civilian's rights to fair and regular trials, willful killing, unlawful deportation or transfer, willful causing of great suffering or serious injury to body or health, and torture, all allegedly committed in the same locations against the same groups.

Pursuant to the court's internal rules, the charging of suspects is a preliminary step in a judicial investigation. Once charged, the suspects become "accused persons" and their defense counsel are provided access to the case file and are permitted to request that specific investigative acts be undertaken. Only after this process is completed will the investigating judge make a decision on whether to dismiss an accused or to proceed with a request for a formal indictment by sending the case to the Trial Chamber for trial. Before issuing a closing order that either indicts the charged persons or dismisses them, the Co-Investigating Judges must submit the case file to the Co-Prosecutors for a final submission and recommendation on whether to indict and, if so, on what charges. The Co-Investigating Judges are not bound to follow the recommendation of the Co-Prosecutors—or of either of them acting alone.

² See for instance, Open Society Justice Initiative, "The Future of Cases 003 and 004 at the Extraordinary Chambers in the Courts of Cambodia, available at <http://www.opensocietyfoundations.org/publications/future-cases-003-and-004-extraordinary-chambers-courts-cambodia>.

³ Kuch Naren, "Hun Sen Warns of Civil War if ECCC Goes Beyond 'Limit', *Cambodia Daily*, February 27, 2015.

Counsel for the two accused have argued that their clients' rights were adversely affected by Harmon's refusal to allow them earlier access to the case file and the opportunity to request investigative actions. Yet Im Chaem and Meas Muth declined to appear voluntarily before the court for an initial hearing where the charges could be presented to them. The normal next step under these circumstances, which was followed in Cases 001 and 002, would be to issue an arrest warrant for the suspects, and to ask the judicial police to execute the warrant. Next, a hearing would be held at which the charges would be read and a decision made on whether bail should be granted or whether the accused should be held in pretrial detention.

Apparently at least one arrest warrant was issued in Cases 003 and 004 by Judge Harmon, but it was not honored or executed by the judicial police. As a result, an unusual *in absentia* process was used to charge Im Chaem and Meas Muth and they were not brought to the court. A court spokesperson explained this departure from procedure by stating only that "it has not been possible, within a reasonable time, to get any arrest warrants executed."⁴ The court's inadequate transparency regarding the lack of cooperation in executing court orders makes it impossible to know whether the judicial police outright refused to execute the warrants, made excuses for such failure, dragged their feet, or forestalled the issuance of such warrants by indicating in advance their unwillingness to execute them. However, the details do not change the basic nature or impact of the non-cooperation. There is no excuse and no precedent for the judicial police's refusal to carry out a court order.

In absentia charging of suspects is not provided for in the ECCC rules and has not previously been used at the court. It is sometimes practiced in domestic Cambodian courts, often in highly political cases. *In absentia* procedures should be a last resort and used primarily when it is impossible to arrest an accused because he or she has deliberately left the jurisdiction of the court in order to avoid arrest on a charge of which he has prior formal notice, or because the court has no arrest powers. Here, the accused are readily available for arrest (they have been giving interviews to the press), and the judicial police are apparently defying a court order to arrest them. The situation makes a mockery of the ECCC.

The Agreement between the government of Cambodia and the UN establishing the ECCC provides at Article 25 that the "Government of Cambodia shall comply without undue delay with any request for assistance by the Co-Investigating Judges.... or an order issued by any of them, including, but not limited to.... service of documents; arrest or detention of persons."⁵ The refusal by judicial police, who are under the direct control of the Cambodian government, to carry out a legitimate order to bring suspects to the court for charging is a direct violation of the Agreement by the government of Cambodia.

⁴ May Titthara, "Khmer Rouge Duo Charged," *The Phnom Penh Post*, March 3, 2015.

⁵ Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, June 6, 2003.

It is still uncertain whether Judge Harmon will seek an indictment against Im Chaem, Meas Muth, or either of the other two suspects in Case 003 or 004. But by orchestrating the judicial police's non-cooperation in carrying out arrest warrants, the Cambodian government may be seeking to improperly end the cases, regardless of Harmon's decision.

While this refusal to honor legitimate orders of the ECCC is troubling, the failure of the UN and the court's international officials to address or even fully acknowledge such political interference is even more appalling. By moving forward as if nothing is wrong, they raise concerns about whether they have the will or the ability to enforce the Agreement, and even whether they might conduct trials *in absentia* in order to avoid addressing the real problem of political interference.

The court, its international and Cambodian officers, and the UN have an obligation to transparently and effectively address political interference or risk complicity with it. And now that two names of the accused and the basic charges against them have been publicly disclosed by the investigating judge, full disclosure of the facts surrounding the failure to arrest the accused must be made.

In addition to providing a majority of the funding for the court, major reasons for UN and international involvement include ensuring that international fair trial standards are met and protecting the court from political interference. The UN and international officials at the court are failing in this obligation by silently accommodating the Cambodian government's refusal to cooperate in the legal resolution of Cases 003 and 004.

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 turning a blind eye, they: 1) diminish the integrity and reputation of the entire court; 2) provide a vivid demonstration to Cambodian domestic courts of caving in to political interference; 3) show that the UN is not committed and able to uphold principles of judicial independence; and 4) deepen Cambodians' cynicism about the prospect of judicial or rule of law reform in their country.

The continued political interference in Cases 003 and 004 affects two additional issues that should be addressed immediately by the court and the UN. First, there are vacancies for two international judge posts on the Pre-Trial Chamber—the chamber that will hear appeals from parties in Cases 003 and 004 and resolve any disagreements between the International and the Cambodian Co-Investigating Judges about if and how to proceed with the cases. The UN and the government of Cambodia must ensure there is no delay in finalizing these appointments. Second, the investigative material in Cases 003 and 004 is reportedly of a very high quality. Steps must be taken to ensure that the court's archives, including material from Cases 003 and 004, are professionally preserved, protected, and made accessible to researchers and the public at the conclusion of the cases. The objections of the government of Cambodia to Cases 003 and 004 and the information that may be uncovered in their investigation make securing the archives a matter of urgency.

Recommendations Based on Recent Developments

1. The **government of Cambodia** must comply with its obligations under the Agreement and ensure the judicial police comply with all legitimate court orders in a timely manner. It must cease all interference with the progress of Cases 003 and 004.
2. The **UN and ECCC officials** must transparently address efforts to interfere with judicial independence and failures of the judicial police and the government of Cambodia to comply with court orders and respect the terms of the Agreement.
3. **Donors** should fund media and outreach projects of the court and of experienced NGOs about the Case 002/02 trial. This is essential to ensuring Cambodians have a broad understanding about the court and about the evidence being presented in the trial.
4. The **UN and the government of Cambodia** must take steps to ensure that international judicial vacancies on the Pre-Trial Chamber are filled immediately with competent judges.
5. The **UN and the court** must develop a plan for professionally preserving, protecting, and making accessible all archives of the court, while still respecting legitimate witness protection and related interests.
6. **Donors** should adequately fund reparation projects approved by the court.

For more information, please contact:

Jonathan.Birchall@opensocietyfoundations.org

Open Society Justice Initiative
224 West 57th Street
New York, NY
10019
United States of American
www.opensocietyfoundations.org
Tel: +1-212-548-0600
Fax: +1-212-548-4662

The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. Our staff is based in Abuja, Amsterdam, Bishkek, Brussels, Budapest, The Hague, Cape Town, London, Mexico City, New York, Paris, Santo Domingo, and Washington, D.C.
