

# Recent Developments at the Extraordinary Chambers in the Courts of Cambodia

August, 2019

## Case 002/2: Death of Nuon Chea

Nuon Chea, popularly known as “Brother No. 2” to indicate his position as second only to Pol Pot in command of the Khmer Rouge, died at the age of 93 on August 4, 2019 at the Khmer-Soviet Friendship Hospital. He had been convicted as a senior leader of the Khmer Rouge of war crimes, crimes against humanity, and genocide. The Supreme Court Chamber affirmed a 2014 Trial Chamber Judgment in 2016. A second Trial Chamber Judgment, issued with full reasoning in March 2019, was on appeal to the Supreme Court when Nuon Chea died. He was sentenced to life in prison under both judgments. Only the second judgment included charges of genocide.

The second trial against Nuon Chea, with Khieu Samphan as his co-accused, was the most far-reaching of the court, covering crimes committed at a number of cooperatives, worksites, security centers, and execution sites across the country. The trial lasted 24 months and included the testimony of 185 people and over 5,000 evidentiary documents. Unlike the first trial, the second included genocide charges. Nuon Chea and Khieu Samphan were judged guilty of genocide with respect to Vietnamese populations and Nuon Chea was additionally found guilty of genocide with respect to Cham Muslims. The Trial Chamber Judgment, the most extensive in the court’s history, covered over 2,300 pages in English.

Two days after Nuon Chea’s death, the Supreme Court received a request from his defense counsel asking that the court terminate the pending appeal proceedings and vacate the Trial Chamber Judgment against him, or alternatively, that it continue the appeal process under the guidance of Nuon Chea’s designated representatives.<sup>1</sup> The Supreme Court Chamber issued an order on August 13, 2019 terminating the appeal but expressly holding open consideration of the request “concerning the impact of his death on the trial judgment and underlying convictions.”<sup>2</sup>

Neither the Cambodian Law of Criminal Procedure, the founding documents of the court, nor its internal rules expressly address what happens to a Trial Chamber Judgment when the accused dies pending appeal. The appeals court for the International Tribunal for the Former Yugoslavia, acknowledging the lack of international precedent on the issue, has held unambiguously that the presumption of innocence does not apply after a trial court judgment has been issued. Further, it found that a trial chamber judgment stands following the



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<sup>1</sup> Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea’s Death Prior to the Appeal Judgment, August 6, 2019, at [www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/F46\\_2\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/F46_2_EN.PDF).

<sup>2</sup> Decision to Terminate Proceedings Against Nuon Chea, August 13, 2019, at [www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/Decision%20to%20terminate%20proceedings%20against%20Nuon%20Chea%20ENGLISH.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/Decision%20to%20terminate%20proceedings%20against%20Nuon%20Chea%20ENGLISH.pdf).

termination of an appeal on the death of an appellant.<sup>3</sup> This holding is not, however, binding on the ECCC and it has been the subject of some criticism, although primarily because the appeal, very near completion, was not allowed to proceed. The position in favor of vacating the trial chamber judgment following the death of the accused before an appeal judgment is final rests on the argument that the presumption of innocence applies equally to appeals and therefore mandates termination of a conviction that cannot be finally tested on appeal. Nuon Chea’s counsel emphasized that the ECCC Law states, “the accused shall be presumed innocent as long as the court has not given its definitive judgment,” and that this principal “applies *mutatis mutandis* [while making the necessary changes] to the appellate proceedings.”<sup>4</sup>

The status of the Trial Chamber Judgment against Nuon Chea remains uncertain pending a ruling from the Supreme Court Chamber.

### **Case 002/2: Appeal by Khieu Samphan**

The full Trial Chamber Judgment in the second Case 002 trial, released on March 27, 2019, is now lodged in the court’s Supreme Court Chamber on the appeal of Khieu Samphan. The decision includes convictions against Khieu Samphan for crimes against humanity, war crimes, and genocide. Khieu Samphan, sentenced to life in prison following an earlier trial of separate charges, was handed a second term of life in prison.

The Co-Prosecutors have stated that they intend to appeal a single legal ruling in the judgment. They assert that the Trial Chamber erred by finding that male victims of forced marriage who were coerced to have sexual intercourse without their consent were not victims of the crime against humanity of Other Inhumane Acts. Lawyers for Khieu Samphan have formally notified the court of an extensive list of legal and factual challenges to the Trial Chamber Judgment. It now falls to them to file a legal brief on the issues raised. The Supreme Court Chamber has the discretion to hold oral argument. The court’s June 30, 2019 completion plan estimates a decision to be issued in the second quarter of 2021—an extension of two quarters from the estimate in the March 31, 2019 plan. It is unclear if the termination of the appeal by Nuon Chea will shorten this estimate.

### **Case 004 with charges against Yim Tith**

In a significant, but not unexpected, development, the Co-Investigating Judges issued separate and conflicting closing orders in the final case on their docket. The International Co-Investigating Judge published a nearly 500-page (in

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<sup>3</sup> Prosecutor v. Delic, Decision on the Outcome of the Proceedings, ICTY, IT, 0483A29, June 2010,

<sup>4</sup> Articles 35 and 35 of the Law on the Establishment of the Extraordinary Chambers, as amended, November 27, 2004 at [www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended](http://www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended).

English) indictment against Yim Tith that includes charges of crimes against humanity, war crimes and genocide, concluding:

Yim Tith played a major role in all of the atrocities described [in the indictment] and wholeheartedly subscribed to the ideology at the core, and the implementation, of the CPK's [the Khmer Rouge's Communist Party of Kampuchea] inhuman societal model. His role and actions easily compare with those of Ao An or Meas Muth, for example, and certainly with those of Kaing Guek Eav alias "Duch"; they even exceed some of those significantly. There can thus be no doubt that Yim Tith is subject to the Court's jurisdiction. He should stand trial for his crimes.<sup>5</sup>

The Cambodian Co-Investigating Judge issued an order of over 500 pages (in Khmer) dismissing the charges against Yim Tith on the ground that he was not a "person most responsible" for Khmer Rouge crimes and thus not subject to the personal jurisdiction of the court. His conclusion was that:

Overall, the participation of YIM Tith, especially in 4 mentioned crime bases [described in the dismissal order], was just not much active, without initiative plan, and was similar to ones of normal sector or district cadre level to enforce policy that shall be followed. Otherwise, he would be subjected to killing. . . . [The above] mentioned participation does not fall in criterion for "most responsible person," which mainly focuses on active, actual and direct participation. [The National Co-Investigating Judge] did not find evidence that YIM Tith is senior leader or most responsible person. Therefore, the ECCC does not have jurisdiction upon him.<sup>6</sup>

### **Pre Trial Chamber Appeals of the Final Three Cases on the Court's Docket.**

The dueling closing orders following the investigation against Yim Tith puts the case in a similar procedural posture to the cases against Ao An and Meas Muth. These are the final cases on the court's docket. The judicial investigation process for each case is now complete. Yet, each case is in a state of limbo because, instead of a joint decision about whether the cases should proceed to trial, the Cambodian investigating judge issued a dismissal order, and the international judge issued an indictment.

What happens to these cases? The court's rules allow the prosecutors and the accused to appeal closing orders to the Pre Trial Chamber on the ground that

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<sup>5</sup> Press Release, June 28, 2019, Co-Investigating Judges Issue Two Separate Closing Orders in the Case against Yim Tith, at <https://www.eccc.gov.kh/en/document/public-affair/co-investigating-judges-issue-two-separate-closing-orders-case-against-yim>.

<sup>6</sup> *Ibid.*, p. 3.

the rulings of the investigating judges regarding jurisdiction is erroneous. Thus, in a complex set of appeals that will likely be mirrored in all three cases: the international prosecutor will appeal the dismissal order arguing that the accused is a “person most responsible” and subject to the jurisdiction of the court, and the Cambodian prosecutor and the accused will appeal the indictment arguing the accused does not meet the criteria.

In considering these appeals, the Pre Trial Chamber will likely have to address the precedent of the Supreme Court Chamber in the Duch Appeal holding that the determination of the Co-Investigating Judges as to whether an accused is “a person most responsible” is not a jurisdictional requirement of the ECCC. The Chamber held that:

The terms “senior leaders” and “most responsible” are not jurisdictional requirements of the ECCC, but operate exclusively as investigatorial and prosecutorial policy to guide the independent discretion of the Co-Investigating Judges and Co-Prosecutors as to how best to target their finite resources in order to achieve the purpose behind the establishment of the ECCC. Whether an accused is a “senior leader” or “most responsible” is therefore a nonjusticiable issue before the Trial Chamber.<sup>7</sup>

This analysis, if followed, would seem to limit the scope of review of the Pre Trial Chamber over the findings of the Co-Investigating Judges. While addressing the power of the Trial Chamber rather than the Pre Trial Chamber, the Supreme Court narrowly defined the scope of judicial review of decisions by the Co-Investigating Judges on personal jurisdiction:

In the context of the ECCC, the Trial Chamber has the power to review the discretion of the Co-Investigating Judges and the Co-Prosecutors on the ground that they allegedly exercised their discretion . . . *in bad faith or according to unsound professional judgment*. This power of review by the Trial Chamber is extremely narrow in scope, and would have to be exercised with full respect for the independence of the Co-Investigating Judges’ and Co-Prosecutors’ offices.<sup>8</sup> (emphasis added)

This holding does not provide significant guidance to the Pre Trial Chamber as to how to resolve appeals against opposing conclusions by the Co-Investigating Judges as to whether accused persons qualify as “most responsible.” Nor does it provide guidance as to how the chamber should proceed in the event it is unable to reach the necessary supermajority decision on any of the appeal issues.

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<sup>7</sup> Appeal Judgment in Case against Kaing Guek Eav, *alias* Duch, Supreme Court Chamber, August 9, 2012, para. 79, p. 41, at <https://www.eccc.gov.kh/sites/default/files/documents/court/Case%20001AppealJudgementEn.pdf>.

<sup>8</sup> *Ibid.*, para. 80.

The appeal process in the Ao An case is procedurally further along than the other cases. In June the Pre Trial Chamber held a hearing on the appeals filed against the conflicting closing orders. Neither the documents filed by the parties nor the hearing was public, but the chamber published a 12-page summary outlining the issues on appeal.<sup>9</sup> The summary disclosed that none of the disagreements between the Co-Investigating Judges, including the disagreement as to competing Closing Orders, had been brought before the Pre Trial Chamber for resolution in spite of the fact that a “number of confidential disagreements were registered” by the judges. Instead the Co-Investigating Judges issued competing closing orders and left it to the accused and the prosecutors to appeal the conflicting orders. There is every indication that the same situation applies in each of the three cases.

The court’s founding documents and rules establish a process for resolving such disagreements. In fact, the only reason for establishing the Pre Trial Chamber in the complex structure of the court was to provide a method for resolving disagreements between the co-prosecutors and the co-investigating judges. The court rules detail the process for disagreements to be filed by either or both judges, and then provides that either or both can bring the “disagreement” to the Pre Trial Chamber for resolution.

For reasons that the Co-Investigating Judges have not disclosed, neither sought to engage the Pre Trial Chamber to resolve their obvious and fundamental disagreements about how to handle the cases. The International Co-Investigating Judge stated in his closing orders that he believes conflicting closing orders, although not anticipated in the rules or the Agreement, are permissible and can be resolved by the Pre Trial Chamber. It is difficult to determine if the fact that the issue of jurisdiction of the court to prosecute Yim Tith is presented on appeal by the parties (under Rule 77(13)) rather than under the disagreement provisions (Rule 72) will make a difference in the outcome of the case.

Nonetheless, the procedural decision not to bring the disagreements to the Pre Trial Chamber and the associated issuance of competing closing orders contributes to greater uncertainty at this point as to how the impasse will be resolved. The defense in the Ao An Case has argued that the presence of conflicting closing orders is “incompatible with the legal framework” of the court and violates the accused’s fundamental rights and the principle of legal certainty. Thus, it argues, the charges must be dismissed.

There is one clearly, and perhaps overridingly, positive impact of the process followed by the Co-Investigating Judges. The substance and resolutions of disagreements raised to the Pre Trial Chamber are not presumptively public, but closing orders are. When translation is completed the public will benefit

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<sup>9</sup> Report of Case and Appeals, Pre Trial Chamber, Ao An Case, June 19, 2019 at [www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/D360\\_16\\_Redacted\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/D360_16_Redacted_EN.PDF).

greatly by the fact that closing orders with extensive factual and legal analysis of the two investigating judges—after nearly 10 years under investigation—will be available in Khmer, English, and French. Given the uncertainty of if or how the cases will go to trial given their history and bizarre procedural posture, this is a significant benefit to the public.

The closing orders published in each of the three outstanding cases, particularly the indictments of the International Co-Investigating Judge, extensively detail the factual investigations and conclusions of the claims against each of the accused. While not the same weight as findings after a public trial, the analysis of the investigating judges is an important resource describing the actions, involvement and responsibility of Khmer Rouge cadre at a level lower than the most senior leadership for extremely serious crimes at a large number of crime scenes. The documents provide an important view of the extent and horror of Khmer Rouge crimes that was not fully explored in the cases against Khieu Samphan, Nuon Chea and Duch. They demonstrate that crimes of the extent and magnitude that occurred in Cambodia during the Khmer Rouge period involved, and likely could not have occurred without, the knowing actions of numbers of persons outside the top political leadership.

## **The Ongoing Conflict in the Remaining Cases**

Having completed each of the investigations in the final cases of the court, the International Co-Investigating Judge has resigned his position. What happens next with the cases will now have to be determined by the Pre Trial Chamber . . . or if it cannot resolve the disputes about jurisdiction, the Trial Chamber or the Supreme Court Chamber.

The current impasse presented by the appeals of the competing closing orders is a version of the same standoff that occurred when the international prosecutor initially submitted the cases for investigation in 2008 and the Cambodian prosecutor filed an objection. The Cambodian Co-prosecutor, Cambodian Co-Investigating Judge and the Cambodian Judges of the Pre Trial Chamber have all sought to have the cases dismissed. Officials of the Cambodian Government have drawn criticism for political interference with the independence of the court for publically arguing that the cases should not go forward.

Ten years later the same battle is being fought between the international and the Cambodian side of the court. Significantly however, the International Co-Investigating Judge has now publically presented the results of years of significant factual investigation into the charges that Ao An, Yim Tith and Meas Muth are criminally liable for some of the most serious atrocities committed by the Khmer Rouge.

Unfortunately, the dilemma of how to resolve the standoff on these three cases might still be a long way off. It is likely that Pre Trial Chamber will split on

the appeals of the dueling closing orders with the Cambodian contingent voting to uphold the dismissal order of the Cambodian Co-Investigating Judge and the international judges voting to uphold the indictment of the international Co-Investigating judge. This is the pattern of the chamber in the public decisions on the cases. If an impasse on the Pre Trial Chamber results in the cases being transferred to the Trial Chamber for consideration it is likely that the parties will, yet again, raise the same issues.

While it is encouraging to see that the cases against Ao An, Yim Tith and Meas Muth are traveling through the legal channels of the court, it is discouraging that the international/Cambodian fault lines in the cases are so obvious that concerns about political interference into decision making on the cases remain.