

## BRIEFING PAPER

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

## December 2015

### EXECUTIVE SUMMARY

The Extraordinary Chambers in the Courts of Cambodia (ECCC) has made significant progress recently, including hearing testimony related to charges of genocide in Case 002.2, and the charging of an additional suspect in Case 004. Case 003 accused Meas Muth appeared personally for charging on a revised and shortened list of crimes, thus mooted the outstanding arrest warrant that the Judicial Police had ignored. However, the court's progress must be balanced against its failure to hold oral arguments in the appeal of the Case 002.1 judgment. This report summarizes these developments.

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## I. Case 002.2 Trial: Evidence on Charges of Genocide against Cham Muslims and Ethnic Vietnamese

The Case 002.2 trial, with charges against Nuon Chea and Khieu Samphan, was in recess during much of October and November due to Cambodian holidays, time given the defense to prepare for scheduled appellate arguments and review newly disclosed documents, and time needed by the court to consider pending motions. Nonetheless, the Trial Chamber has continued to make progress in the case, including hearing testimony on the treatment of Cham Muslims and ethnic Vietnamese by the Khmer Rouge. Five witnesses and three civil parties provided testimony about the persecution and killing of Cham Muslims, while one former cadre denied knowledge of persecution or mistreatment of the Cham. Although not always entirely clear or consistent, the testimony offered dramatic evidence regarding the persecution and killing of Cham Muslims by the Khmer Rouge.

The chamber has now turned its focus to evidence relevant to the charges of persecution and genocide of ethnic Vietnamese by the Khmer Rouge. It heard the testimony of a Cambodian who had been a mobile-unit worker during the Khmer Rouge period who spoke of witnessing torture and executions of Vietnamese at Wat Khsach pagoda in Siem Reap province. An ethnic Vietnamese civil party testified that his family was forced to leave their home and move to Kampong Chhnang province in 1975 and described a mass execution of ethnic Vietnamese. Another Cambodian farmer and platoon chief testified about the targeting of ethnic Vietnamese by the Khmer Rouge in Battambang province and orders given to battalions to report the identities of Vietnamese people to the upper echelon. He stated that he witnessed the arrest of four Vietnamese families and claimed to have seen rotten corpses and skeletons at Tuol Tatrong, which he believed to be an execution site. With respect to both the ethnic Vietnamese and the Cham population living in Cambodia during the Khmer Rouge reign, Nuon Chea and Khieu Samphan are charged as senior leaders responsible for genocide and crimes against humanity encompassing deportation, extermination, murder, and persecution.

The Trial Chamber continues to face challenges in dealing with witness statements and other evidence produced in the ongoing investigations in Case 003 and 004—which overlap with factual situations at issue in Case 002.2. The investigations in Cases 003 and 004 are intended to be confidential, but information relevant to the Case 002.2 trial is being regularly disclosed to the parties, who have sought to admit into evidence Written Records of Interviews (WRIs) from the investigations, and to question witnesses who have given evidence in the investigations. Ruling that the identity of witnesses and the content of their testimony cannot be disclosed publicly even if it is used as evidence in the 002.2 trial, the chamber stipulated that testimony in Case 002.2 of a witness or civil party interviewed in Case 003 or 004 shall be held in closed session, and that the same procedure shall apply to questioning of any witness about a statement from Case 003 or 004. This ruling resulted in the testimony of at least one witness being screened from the public.

The defense lawyers continue to raise objections to the use of untested WRIs from the investigation in Case 002 as well as from Cases 003 and 004. They argue that WRIs for witnesses who do not appear in court and are thus not subject to cross-examination are not reliable evidence. They maintain that this is demonstrated by instances of significant discrepancies between WRIs and subsequent testimony when witnesses who have made WRIs are called at trial. Similar objections have been made to the use of statements by civil parties who do not appear to give live testimony and whose statements are not made under oath. Defense counsel continue to insist that the need to review the large number of Case 003 and 004

documents produced by the prosecution, some of which are only in Khmer, is an unfair burden. This applies particularly to actions of the accused in Cases 003 and 004 who are the subject of testimony in the 002.2 trial: Case 004 accused Ao An has been referred to several times in recent trial testimony in Case 002.2. The new information regularly changes the landscape the defense must deal with and they have little opportunity to challenge it with additional investigation.

The Trial Chamber recognizes these as serious fair trial challenges and has attempted to mitigate the impact by offering more time to the defense in certain circumstances and by hearing ongoing arguments on the admissibility of specific evidence. The chamber walks a fine line each day in seeking an appropriate balance between admitting evidence that is reliable and advances truth-seeking goals, while still ensuring fairness to the defense.

Arthur Vercken, defense counsel for Khieu Samphan, has resigned as counsel for the Case 002.2 trial, but apparently is still participating in the appeal of the judgment in Case 002.1. No reason has been given for the resignation and it is not expected to cause a delay in the trial proceedings, as Khieu Samphan's other counsel, Anta Guissé, has been carrying the load of the defense for the last several months.

## II. Case 002.1 Appeal: Supreme Court Chamber's Efforts to Hold Oral Arguments on Appeal Foiled by Defense Counsel Absence

Defense counsel for Nuon Chea submitted eight requests to the Supreme Court Chamber (SCC) for additional investigation or the admission of additional evidence in the course of their appeal of the judgment in the first part of Case 002 (covering the evacuation of Phnom Penh and other cities and targeting of Lon Nol soldiers in 1975). The SCC heard the testimony of three requested witnesses advanced by Nuon Chea to support claims that his authority was always more limited than described by the Trial Chamber in the judgment and was further weakened by insurrection in the ranks and an attempted coup d'état. Nuon Chea's argument is that his limited authority diminishes his responsibility for crimes. The SCC requested a brief from Nuon Chea's counsel to clarify this argument. The Nuon Chea brief and response from the prosecutors has remained confidential.

The SCC granted some of the defense requests to admit additional evidence, including transcripts of an interview with former Trial Chamber Judge Sylvia Cartwright; excerpts from a book written by the investigating judge responsible for the Case 002 closing order, Marcel Lemonde; and other transcripts of interviews. Significantly for Nuon Chea, the SCC declined to hear additional live testimony including that of any of the sitting government officials he has argued are essential witnesses.

The SCC scheduled three days, beginning on November 17, to hear oral arguments on the appeal of the Trial Chamber's judgment in Case 002.1.

The appeal arguments of the defense to be considered by the SCC include:

1. The right to an independent tribunal was violated because the Trial Chamber was deeply biased. This was evidenced in part by the chamber's refusal to call certain witnesses.

2. The right to an effective defense was violated because the defense had insufficient time and opportunity to question witnesses and the court declined to summon Heng Samrin, Ouk Bunchhoeun, and Robert Lemkin.
3. Trial Chamber decisions were insufficiently reasoned and failed to address key arguments; and
4. The right of Nuon Chea and Khieu Samphan to be informed of the charges against them was infringed because the chamber's severance order was not clear as to which charges were encompassed, and the Trial Chamber relied on facts outside the scope of the severance order in arriving at its judgment.

The appeal hearing was adjourned, however, without substantive legal argument because counsel for Nuon Chea refused to participate. Defense counsel Victor Koppe was absent without explanation from the courtroom and Nuon Chea was given the floor by the chamber and delivered a 20-minute "explanation" for Koppe's absence.

Nuon Chea condemned the SCC, the Trial Chamber and its judgment. He stated that had hoped the trial "could allow Cambodia as an innocent justice-loving nation to come together and meaningfully discuss what happened during the Democratic Kampuchea period," and he accepted moral responsibility for the suffering in Cambodia during that time. Stating his belief that the court was not interested in the truth, he argued "its mission was simply to endorse the instructions of a handful of officials in power, and tell a tale approved by the government before the tribunal was established." He called the judgment against him "a shameful failure." Stating he had instructed his counsel not to participate in the appeal hearing, he clarified that he was not withdrawing his appeal, but that he would rest on the briefs already filed. Koppe has continued to participate in the trial proceedings in Case 002.2.

Son Arun, the Cambodian counsel for Nuon Chea, then claimed he would no longer participate in the hearing at the request of his client. In spite of the court's order that he continue to be present for the hearing, he did not return to the court room after the morning break. The chamber found that it was improper to move forward with the appeal hearing with no legal representation for Nuon Chea and ordered the Defense Support Section to appoint standby counsel to represent Nuon Chea's interests at the appeal hearings. In a subsequent ruling, the court clarified that standby counsel would be selected from the list of national counsel available to the Defense Support Section, and that they would not take instructions from Nuon Chea. At the time of writing, there is still no indication of when counsel will be appointed or when the appeal hearing can continue. Even after standby counsel is appointed, it will likely need time to prepare for the hearing.

### III. Fourth Suspect Charged in Case 004 Investigation; Meas Muth Charged at Personal Appearance

The Case 004 investigation took a significant step forward with the announcement on December 9 that a fourth suspect had been charged by the international co-investigating judge with crimes against humanity and genocide. Yim Tith (aka Ta Tith), former acting secretary of the Northwest Zone during the Khmer Rouge regime, appeared at the ECCC with his defense counsel for the reading of charges. His counsel will now have access to the investigation case file and increased opportunities to participate in the ongoing investigation. He was released to return to his home after the hearing. Yim Tith is the final of the four suspects in Cases 003 and 004 to be charged, despite the stated opposition of the Cambodian government to the cases proceeding.

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Reportedly, Yim Tith appeared at the court voluntarily and no arrest warrant was issued.

There was also a partial resolution regarding the violation of the agreement between the UK and the Cambodian government establishing the ECCC caused by the refusal of the Cambodian judicial police to execute arrest warrants issued by the international co-investigating judge for at least one accused who has not agreed to appear before the court voluntarily. (See the [October 2015 Justice Initiative Update Report](#) for additional details on this issue.)<sup>1</sup>

The former International Co-Investigating Judge Mark Harmon made public in June, 2015, information about the government's failure to execute the warrants in question. The UN engaged in private discussions with the government of Cambodia about the violation of the agreement and included a reference to it in a public report to the UN General Assembly on September 30, 2015.<sup>2</sup> Stephen Mathais, assistant secretary-general for legal affairs of the United Nations also met with Cambodia's deputy prime minister, Sok An, in late November and discussed the apparent violation of the Agreement. The parties issued a joint statement stating that they agreed "on the importance of a fully satisfactory solution being reached as soon as possible, consistent with the terms of the Agreement, and that relevant steps will be taken by the Royal Government to this end."

Subsequently, without explanation, Meas Muth—the accused subject of an outstanding arrest warrant—appeared voluntarily at the court for charging on December 14, 2015. While this action did not remedy the violation of the agreement, it did make the matter of executing the warrant moot for the time being. It remains to be seen if government cooperation in Cases 003 and 004 will be forthcoming in the future.

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<sup>1</sup> Justice Initiative, "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: March 2015," <http://www.opensocietyfoundations.org/sites/default/files/eccc-march-2015-20150323.pdf>, See also *ECCC Agreement*, Article 25.

<sup>2</sup> Request for a Subvention to the Extraordinary Chambers in the Courts of Cambodia, Report of the Secretary-General, A/70/403, September 30, 2015, <http://www.un.org/ga/acabq/documents/all?type%5B%5D=report&keys=A%2F70%2F403>.

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