



INTERVIEW WITH ACTING INTERNATIONAL CO-PROSECUTOR WILLIAM SMITH

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William Smith is the Acting International Co-Prosecutor for the Extraordinary Chambers in the Courts of Cambodia (ECCC). He has been the International Deputy Co-Prosecutor for the last three years. Prior to joining the ECCC, he spent over ten years at the International Criminal Tribunal for the Former Yugoslavia as a trial attorney, legal officer, and analyst. He has also practiced law in South Australia as a defense barrister and solicitor as well as a prosecutor for the South Australian Police Department. He received a degree in law and the arts from the University of Adelaide and a Masters degree in international law from Leiden University in the Netherlands. On October 07, 2009, William Smith spoke to the Cambodia Tribunal Monitor about developments at the ECCC.

CTM: There are reports about on-going disagreements between national and international staff at the ECCC regarding your submissions for additional investigations. How will this affect the direction of the court vis-à-vis the additional investigations?

SMITH: As you know, the dispute over additional investigations was submitted to the Pre-Trial chamber last December. However, the disagreement has not affected our day to day work. To the contrary, there has been an increasing level of cooperation within the office and it is now as strong as ever. There is a mutual respect that has developed over three years of working together. Furthermore, the disagreement should not be characterized as one between the international staff and the Cambodian staff. We operate as a single office and this particular disagreement is only between two people - the international co-prosecutor and the national co-prosecutor.

The additional Introductory Submissions were filed with both the national and international co-investigating judges. While the two judges may eventually come to different conclusions with regard to arrests and indictments, at this time they are both

under an obligation to investigate the crimes alleged. Other than several actions that require the joint signature of the co-investigating judges such as indictments, other disagreements cannot suspend or impede the investigation of the co-investigating judges. The procedure to resolve an eventual dead-lock between the co-investigating judges with regard to indictments is similar to the procedure used to resolve the original disagreement between the co-prosecutors.

CTM: Do you have any comment on allegations that the national co-prosecutor received instructions from the government of Cambodia not to pursue additional suspects and that some international staff knew about and covered up such information?

SMITH: The Prime Minister's public expression of concern regarding additional prosecutions aligned with the national co-prosecutor's decision not to support additional investigations. People are free to draw conclusions as they see fit, but such conclusions are purely speculative. To my knowledge, there is no evidence of direct interference with the court and there has been nothing, up to this point, that has impeded the prosecutor's office from properly discharging its duties.

CTM: Given the poor health and old age of the charged persons in Case 002, there are concerns that some or all will die before their trials end. Is the prosecution taking any specific actions to deal with this particular concern?

SMITH: Let me begin by saying that the charged persons are not in poor health relative to their age. Furthermore, they receive the very good medical care while in confinement and there are indications that their health has improved rather than deteriorated. Of course there is always a possibility at that age to contract an ailment and die suddenly. In fact there is a high likelihood that one or more of the charged persons will be unfit to plead or will die before the conclusion of their trial. However, if these were over-riding concerns that would impede the legitimate judicial process, then the tribunal would never have been established. These concerns have existed ever since the establishment of the ECCC when it was evident that any potential suspects would be very old when brought to trial.

Now, just to be clear - we do not want any of the charged persons to die before their trial is concluded, but what is most important is to have a legitimate legal process that addresses the mass crimes that were committed during the period of Democratic Kampuchea. This process must be expeditious and fair and meet international standards of due process.

CTM: If a charged person dies before Case 002 concludes, will the trial for that person end as it did with *Milosevic* at the ICTY? If so, what will that mean for the Cambodian people given that one purpose of the tribunal is to establish the historical truth?

SMITH: We cannot continue a trial after an accused person dies and we cannot hold a trial if an accused person is unfit to plead. However, in Case 002, no single case is dependent on the other, so the trials for the remaining accused persons will continue. In

such a case, the Cambodian people would certainly be disappointed. They would be left with a feeling that justice has not been fully achieved. However, I think the majority of the Cambodian people would say that such a result is better than if no criminal tribunal had been established in the first place.

CTM: Can you comment on the unique aspects of the Duch trial given that he has in essence pled guilty while the prosecution has, at the same time, tried to prove his guilt?

SMITH: It is true that Duch has acknowledged his guilt with respect to many aspects of the crimes of which he is charged. For example, he has accepted roughly 85 percent of uncontested facts that we submitted to the defense. However, the facts that he accepted all related to the mechanics of his acts during the Khmer Rouge regime and were not related to his state of mind. This highlights a critical disagreement between the prosecution and the defense about whether Duch “willingly” committed the crimes. The prosecution asserts that Duch was a willing participant in these crimes and firmly challenges the position of the defense that Duch acted only out of fear and pursuant to superior orders. One must distinguish between those who were driving forces and those who acted only subject to such driving forces. Such a distinction is extremely important in international criminal law. If one were to accept Duch’s argument then nobody in the regime would be held responsible because everyone could claim that they were only acting out of fear and pursuant to superior orders.

CTM: Having challenged what will be one of the main mitigating factors put forth by the defense, will the prosecution seek the maximum sentence of life imprisonment?

SMITH: At the moment we are weighing all the evidence and evaluating the international case law. This is a difficult issue because no matter the ultimate sentence, it will sit well with some people and not with others. However, I reiterate the prosecution’s assertion that Duch acted willingly in the commission of his crimes and his state of mind during that time should be properly reflected in the ultimate determination of the sentence.