

# Saving Justice when an Accused Dies: Case 002 at the ECCC

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The Extraordinary Chambers in the Courts of Cambodia (ECCC) is up against the clock. The four surviving senior leaders of Democratic Kampuchea currently awaiting joint trial in Case 002 for crimes against humanity, war crimes, genocide, and felonies under the Cambodian Penal Code are nearing the inevitable realities of old age. Former Deputy Secretary, Nuon Chea, and former foreign minister, Ieng Sary, are well into their eighties, while former head of state, Khieu Samphan, and former social affairs minister, Ieng Thirith, follow close behind. It is likely that one, if not all, of the accused may die before the ECCC renders a final judgment.

It is feared that if one or more of the accused die before the trial's conclusion, the ECCC will be seen as a complete failure. Fortunately, a final judgment, though key to the relevance of a court, is not the only valuable element that may derive from the ECCC. Case 002—the criminal prosecution of four accused destined to span the course of a number of years, involving 3,850 Civil Parties, 4,151 victims' complaints, and more than 350,000 pages of documents—will be bursting with material that could be useful in education and development. This article will first examine the legal effect the death of an accused has on a criminal trial. It will then present opportunities to salvage the evidence, findings, and testimony of Case 002 in the event the trial is terminated before judgment.

## I: The Case of the Death of an Accused: Legal Effect

### A. Timing

While there are no explicit rules in the core documents of international courts, international court precedent suggests that proceedings should be terminated in the event of death of an accused prior to judgment. The International Criminal Tribunal for the former Yugoslavia, an *ad hoc* court established to prosecute the horrific crimes committed in the former Yugoslavia, has terminated six cases due to the death of an accused. Perhaps the most notable is the trial of Slobodan Milosevic for genocide, war crimes, and crimes against humanity. Milosevic, the first head of state to ever stand trial before an international criminal tribunal for such crimes, died in a United Nations detention facility on March 11, 2006. ICTY trial proceedings were terminated days later, allowing him to escape judgment four years into trial.

In *Prosecutor v. Norman et al.*, the Special Court for Sierra Leone (SCSL) held that the death of an accused terminates proceedings against that person effective the moment of death. Therefore, even if the accused had fully undergone trial and presented his

defense, given the “individual and personalized” nature of criminal matters, the SCSL can no longer exercise jurisdiction to issue a judgment. The SCSL held that the principle of individual criminal responsibility, the right to a fair trial, and the right to appeal, if convicted, would be violated if proceedings continued after an accused died. The SCSL also highlighted the fact that a judgment in a criminal trial is “the exclusive legal privilege and prerogative” of the person alleged to have committed the crime and cannot be conferred to a surviving successor to pursue any additional proceedings.

The law establishing the ECCC guarantees to an accused the same rights outlined above by the SCSL Trial Chamber in *Prosecutor v. Norman et al.* These rights together appear to ensure that a judgment at the ECCC cannot be rendered if the accused is no longer alive, even if the trial has been completed. According to Article 35 of ECCC Law, an accused is presumed innocent until the court has reached a definitive judgment. Thus, once one of the four aging senior leaders in Case 002 die, the ECCC proceedings will be terminated for that accused and he or she will die legally innocent.

The ICTY Appeals Chamber in *Prosecutor v. Delic* held the death of an accused after the delivery of a trial judgment, but before the rendering of the appeals judgment, effectively terminates appellate proceedings. As a consequence, the ICTY Appeals Chamber had to consider the finality of the Trial Judgment rendered in the chamber below. Finding no applicable law on the matter, the Appeals Chamber determined that sustaining a trial judgment when an appellant dies follows the spirit of an international criminal tribunal. Therefore, “nothing can undermine the finality of the Trial Judgment.”

## B. Jointly Tried Accused

If one or more of the four accused die during trial or appellate proceedings, the proceedings would continue for the remaining, surviving accused. If the trial proceedings have concluded in a joint trial, but the chamber has not announced judgment, a verdict may only be rendered for the surviving accused. However, it may be possible for the court to consider all the evidence brought before the court in rendering the judgment—including that related to the deceased accused. In the joint trial of *Prosecutor v. Norman et al.* at the SCSL, the judgment for the surviving accused was based on the “the entire evidentiary record” before the court. The court found that it was “neither possible nor desirable to separate the evidence” from the case file admitted against the deceased accused. If one or more accused in Case 002 at the ECCC die before judgment, it is conceivable the ECCC could follow this same approach.

## II: The Salvation of Evidence, Findings, and Testimony

### 1. Educational Value: To Remember and Prevent

#### 1. Documentaries

If one or more of the accused die before judgment in Case 002 at the ECCC,

filmmakers may use the trial evidence, testimony, and exhibits from Case 002 in a documentary to educate the public. The documentary could provide background information on the crimes committed during Democratic Kampuchea and show detailed accounts of the trial's proceedings, including live witness testimony, admitted trial exhibits, and courtroom scenes. Video clips of the four accused present in the courtroom would verify to Cambodians that justice was being sought, even if there was no final judgment. Additionally, filmed testimony of victims and witnesses would confirm that Cambodians were given a voice during the trial. As live footage of victims is more personal, the message conveyed to viewers may be more compelling than mere words on paper.

After four years of trial, *Prosecutor v. Milosevic* at the ICTY generated a vast, detailed account of the atrocities committed against the Bosnian people. Of note, the infamous "Scorpion video," which captured brutal executions by the Serbian police, was only made available to the public after being shown in trial. When local television stations throughout Serbia aired the video, people were visually confronted with facts they had previously denied and forced to admit that Serbians had committed these atrocities. The country became outraged and the government was pressured to arrest the individuals in the video who committed the crimes. In Cambodia, many people have doubts that a government would commit such egregious acts against its own people. Testimony and trial evidence released during Case 002 may be equally significant and have as great of an effect on Cambodians.

## 2. Exhibitions

Maps, photos, drawings, statements, and transcripts introduced at trial could be used in exhibitions to publicize the details and findings of Case 002. ECCC Internal Rule 87 allows all evidence to be admitted which the Chamber "deems conducive to ascertaining the truth." Presumably a low standard, this rule will allow introduction of an enormous amount of documents into the case file of Case 002. Evidence admitted during proceedings by the prosecution or civil parties and examined and questioned by the accused, although not judicially verified, could be a key to learning about the Khmer Rouge.

It would be beneficial to have traveling exhibitions throughout the provinces that visit school sites or areas frequented by villagers. These traveling exhibitions would have a greater chance of educating youths who have little or no knowledge of the genocide committed and the rural individuals who are unable to travel to Phnom Penh. Since many of the Khmer Rouge survivors are illiterate and uneducated, in order to adequately communicate the relevant information from Case 002, the "legalese" of the documents and records would need to be simplified when used in the exhibits.

## 3. Textbooks

It is important for all generations of Cambodians to know about the history of the Khmer Rouge era to ensure that tragedies like that never happen again. Yet, it was not until 2009 that the Royal Government of Cambodia officially integrated a history

textbook specifically about Democratic Kampuchea into the curriculums of primary and secondary schools. Students are now required to learn about the formation of the Khmer Rouge regime, the organizational structure, and the party leaders, including Case 002's Khieu Samphan, Noun Chea, and Ieng Sary.

It would be beneficial to update the official school textbook and the accompanying book, *A History of Democratic Kampuchea (1975-1979)*, published by the Documentation Center of Cambodia, to include details from Case 002. Facts, evidence, and testimony presented in the case may form a more complete understanding of the Democratic Kampuchea period and supplement the material already available.

However, it would not be wise for the updated textbook to be overwhelmed with legal information about the trials at the ECCC. An alternative possibility would be to produce a specific textbook for Cambodian law and graduate students that outlines in detail Case 001/002's evidence, findings, testimony, and proceedings. Particularly with Cambodia's weak and tainted judicial system, training prospective lawyers about fair trial methods and how to use the resources available to defend clients and construct compelling arguments would benefit the whole country.

#### *4. Extraordinary Archives*

The evidence, testimony, and trial footage introduced in Case 002 will constitute a public record of the grave crimes committed by the Khmer Rouge and be accessible to historians, lawyers, academics, scholars, and other interested parties. While not containing a judicially verified verdict, the record will preserve the memories that have come to light during the trial proceedings and help individuals understand Cambodia's turbulent history, how it happened, and who was or may have been responsible.

Notably, scholars have argued that experts may construct narratives from the record that may be as "informational and persuasive" as an actual verdict. Even if Case 002 is terminated, Cambodians will have the opportunity to craft their own final judgment if given access to the information necessary to do so.

Following the conclusion of Case 002, there will be a wealth of case material accessible to the general public as a result of the internet. However, many Cambodians do not have easy access to the web, and even if the ECCC's archives are located in Phnom Penh, many people affected by the Khmer Rouge will not be able to travel to the city to review these materials. It would be beneficial to set up permanent or temporary information and documentation centers throughout the provinces, complete with copies of the public records from Case 002/001 and staffed with individuals who could read, interpret, and locate the sought documents.

#### *5. Caveat: Confidential Information and Protected Witnesses*

Not all evidence, findings, and testimony introduced during Case 001/002 will be available to the public. A trial conducted before the ECCC, even one which fails to render a verdict, will unavoidably produce an immense amount of public, confidential,

and strictly confidential evidence. Only the material classified as public is open and may be distributed to Cambodians and the rest of the world to view for educational purposes. Confidential and strictly confidential material consists of closed hearings, documents on the health of the accused, Co-Prosecutor submissions, and Co-Investigating Judges findings and decisions. Any person having access to confidential or strictly confidential materials are bound by the duty of confidentiality and prohibited from disclosing such information to others.

Additionally, under ECCC law, trial proceedings must be conducted with due regard to the protection of victims and witness. Therefore, any victim or witness who testified or assisted the Court in a way which “is liable to place their life or health or that of their family members or close relatives in serious danger” is entitled to appropriate security measures. In the event of death of an accused and the termination of proceedings, these measures remain effective unless cancelled or changed. This is significant because failure to protect these individuals uninterrupted may prompt retaliation and thus discourage continued participation of victims and witnesses in existing and future trials.

The overarching principle behind the ECCC’s classification system is to protect the confidentiality of closed judicial proceedings while ensuring transparency of information to the public. Pursuant only to an order by the Co-Investigating Judges or Chambers, a document marked confidential or strictly confidential may become accessible to the public. One way to accomplish this is by creating copy of the confidential or strictly confidential document and editing the content of any sensitive information. Another way confidential material becomes public is when events make protection of the document no longer necessary and it may be re-classified and placed in the public section of the case file.

#### B. Legacy of the ECCC

The absence of verdict will be a serious, but not fatal, blow to the relevance of the ECCC. First, two former Khmer Rouge leaders, current accused Ieng Sary and Brother Number One, Pol Pot, have already been judged by the people of Cambodia. In 1979, the country established the People’s Revolutionary Tribunal to try the individuals responsible for the grave human rights abuses committed during Democratic Kampuchea. Although the trial was plagued with procedural defects, it was the first effort by Cambodia to tell the world about the Khmer Rouge crimes and seek justice. Second, it has been over thirty years since Vietnam removed the Khmer Rouge forces from power. It has been far too long since the crimes of the Democratic Kampuchea era to care only about a judgment. The very fact that Case 002 went to trial will be itself a notable contribution to reconciliation in Cambodia. Through the introduction of evidence at trial, Case 002 will formally recognize the crimes by Democratic Kampuchea that caused the deaths of nearly two million Cambodians.

When Milosevic died on March 11, 2006, he brought a four-year trial to a startling

halt. Some saw the lack of final judgment as proof of the court's inability to manage country-wide, complex international crimes. For others, the mere trial of Milosevic reaffirmed the importance of international criminal justice. A former head of state had been indicted, extradited to the ICTY, and put on trial. While he may have technically evaded a final judgment, he did die in a jail cell. He did not escape justice. The day the ECCC issued indictments for genocide, war crimes, and crimes against humanity, the same became true for the four remaining leaders of Democratic Kampuchea: they will live to judgment or die on trial.