

Dead End at Cambodia's Khmer Rouge Tribunal: Next Steps for the UN

April 29, 2020

Three cases remain before the Extraordinary Chambers in the Courts of Cambodia (ECCC) following trials in Case 001 against Duch, and Case 002 against Nuon Chea (now deceased,) and Khieu Samphan. The judgment in the second of two 002 Case trials is currently on appeal to the Supreme Court Chamber. Cases 003/004, which include Case 004/2 with charges against Ao An, Case 003 with charges against Meas Muth, and Case 004 with charges against Yim Tith, are in a state of deadlock as a result of opposing rulings by international and national judges. The deadlock results from the refusal of the national judges to implement the terms of the ECCC's establishing Agreement and the rules of the court designed to prevent political interference in determining who is prosecuted. The position of the national judges conforms to the insistence of the Government of Cambodia that the cases not proceed to trial. The time has come for the United Nations, a partner in the court's creation, to honestly acknowledge that Cases 003/004 cannot be brought to a legitimate legal conclusion and should be ended.

A consistent pattern of facts, culminating in judicial deadlock and rejection of judicial procedure established by the Agreement, make clear that the court is incapable of bringing Cases 003/004 to a legitimate legal conclusion:

- Cases 003/004 were initiated by an introductory submission filed by the international prosecutor in 2009. The national co-prosecutor fought the submission on grounds that the cases would threaten national peace and reconciliation. The national co-prosecutor has never produced credible factual support for this contention.
- Prime Minister Hun Sen has repeatedly stated his objection to the ECCC's prosecuting any individuals beyond those already indicted in Cases 001 and 002. In October 2010, he told UN Secretary-General Ban Ki-moon that "Case 003 will not be allowed....The court will try the four senior leaders successfully and then finish with Case 002." Other Cambodian government officials, as well as senior Cambodian court officials have widely echoed Hun Sen's words. The express message from the government has been that it will not allow Cases 003 and 004 to be adjudicated. (See Endnote)
- At each instance in the life of Cases 003/004, when a prosecutorial or judicial decision has been required, the national officials have acted in lockstep to defeat the court's jurisdiction, investigation, or prosecution:
 - i) The national prosecutor objected to and refused to participate in the investigation of the cases. She has pleaded for dismissal throughout the life of the cases.
 - ii) The national investigating judge did not actively participate in the investigation of the cases. He issued a closing order dismissing the

charges in each case on the grounds that the accused did not fall within the court's jurisdiction.

iii) Each time the Pre Trial Chamber (PTC) considered a legal issue related to the cases, the national judges found that the cases were not properly before the court.

iv) At each level, the national officials echoed the political lines of argument consistently maintained by the government of Cambodia, including that the court's mandate was fulfilled by the prosecution of the first two cases.

- It was only because of the existence of extraordinary protections against political interference built in to the ECCC's Agreement, Law and Internal Rules that the cases have survived the 11 years since the international prosecutor submitted them for investigation. The supermajority voting requirement and the default-decision provision that investigations proceed unless there is a supermajority vote dismissing them have pushed the cases forward in spite of consistent opposition by the national judges and prosecutor. These protections shielded the cases long enough that full judicial investigations have been completed by international investigating judges and detailed indictments have been published. At the same time, however, the national investigating judge issued conflicting orders that the cases be dismissed because the accused did not fall within the court's jurisdiction.
- A December 19, 2019 PTC ruling addressed cross appeals from the conflicting orders in the 004/2 case against Ao An. The international and national judges came to opposite conclusions as to the appropriate result. The national judges state that none of the pending cases can proceed because they are each contrary to the government's wishes and intentions under the Agreement. In taking this position, the national judges ignore and violate the ECCC Agreement and rules that provide that cases must proceed to their legal conclusion unless there is a supermajority vote of judges on a chamber or an agreement of the co-Investigating judges to dismiss them. This default rule is a key part of the framework of the Agreement between the United Nations (UN) and the Government of Cambodia establishing the ECCC. It is the bulwark against political interference that allowed the UN to proceed with the Agreement over concerns that the Government of Cambodia would seek to control who came before the court for prosecution, investigation, or trial.
- As evidenced by various memos from the PTC judges and clerks following the December ruling, the chamber is deadlocked, with the international judges insisting that the indictment proceed to trial and the national judges insisting the case be archived. As a result, no action has been taken to resolve the inconsistent orders.

- On April 3, 2020 the national judges of the Trial Chamber declared in an extra-judicial statement that Case 004/2 with charges against Ao An was closed before the PTC, and that the Trial Chamber is not seized of the case. They added that “there will be no trial of Ao An now or in the future.” The statement reveals that the national judges of the Trial Chamber intend to follow the lockstep actions of their national PTC colleagues and bar the case from legitimate legal consideration by the Trial Chamber. It also demonstrates that the chamber is deadlocked and cannot arrive at a judicial resolution of the case.
- On April 22 the UN Secretary General issued a statement that he had “reinstated” the international investigating judge, Michael Bohlander. Bohlander had resigned his position and, along with his national colleague, closed down the office of the co-investigating judges immediately after they issued the last pair of competing closing orders in the OO3/004 Cases. The court does not disclose the reason or procedural basis for the reinstatement. Unfortunately, the work of the PTC investigating judges—except for final closing orders has always been conducted in secrecy. While justified during a factual investigation, there is no rationale for secrecy during the wrangling that is going on to address the deadlock on the cases.
- In their March 12, 2020 memo outlining the deadlock and emphasizing they can do no more to resolve it, the international judges of the Pre Trial Chamber suggest that an option may be to reinstitute the office of the co-investigating judges so that the international co-investigating judges can transfer the case and indictment to the Trial Chamber and avoid the administrative deadlock. If this step is taken, then the case merely sees more delay as we already have been advised by the national judges of the Trial Chamber that they will not allow the case to proceed “now or ever.”
- There are no procedures set forth in the rules or the Agreement that would allow the investigating judges to take other actions to resolve the deadlock, but “the interests of justice” may allow them some leeway to dismiss the case or move it along procedurally. This would be acceptable only if it resolved the three cases quickly and finally. The worst case scenario would be for the investigating judges to take actions that result in further delay, procedures and appeals that lead again and again to the same deadlock from rejection by the national Trial Chamber Judges. That would increase damage to the credibility of the court.

It is now obvious that the national judges are acting to freeze all of the 003/004 Cases and ignore the Agreement’s protections against political interference. While the December 16, PTC decision only applies formally to Case 004/2, its reasoning extends to all three 003/004 Cases. There is no reason to believe that the position of the PTC and Trial Chamber national judges to reject the case will be different in the other two 003/004 Cases. The recent developments in Cases

003/004 demonstrate that the judges of the court are unable and unwilling to bring cases 003/004 to a legitimate legal conclusion consistent with international fair trial standards and the terms of the Agreement. The national judges' refusal to follow the default decision-making mandates of the Agreement provides a fatal blow to the cases.

It is time the UN concede that the efforts to stem political interference in decisions about who is tried before the court have been ineffective. Continuing the 003/004 Cases is a waste of time and resources. More importantly, it severely damages the credibility the court earned by successfully completing three trials against Duch, Nuon Chea, and Khieu Samphan. The current deadlock violates international principles of legal certainty and basic justice. It undercuts the rule of law principles that the ECCC was designed to promote. No legitimate interest is served by continuing procedures in cases that are so clearly infected by politically induced deadlock and failure to comply with the provisions of the Agreement and principles of judicial independence.

It is clear that the national court officials as well as the government of Cambodia seek to end Cases 003/004. The judicial officials of the Trial Chamber and the Pre Trial Chamber have indicated that they have no way to proceed. The UN should concede that the 003/004 Cases have been defeated not by legal means, but through failure of the court's national officials to follow the Agreement and rules designed to prevent political influence in judicial decision-making. The UN should proceed to disengage from the cases in a planned manner that:

- Includes a public explanation for the extraordinary step of disengaging from the 003/004 Cases.
- Provides for the ECCC to continue the appeal process before the Supreme Court Chamber in Case 002/02.
- Makes robust provisions for notification and outreach to civil parties in the 003, 004, and 004/2 Cases in a manner that addresses their justifiable need for information about the substance of the cases, why they are being ended, and any feelings of betrayal and disappointment that may arise. Provisions must also be made for more general outreach in Cambodia about the decision to end the cases. Cambodian NGOs with some independence from the court and civil party lawyers should play a major role in the outreach work.
- Immediately provides for protection and maximum public access to the court's original archives and provide that full copies of the archives are maintained by the UN. The UN should immediately secure an expert in internationalized court archives to conduct a thorough survey of actions that need to be taken to secure, preserve, and make appropriately accessible all materials in the ECCC archives. In particular, the UN must exert leadership to carry out all necessary efforts to urgently secure the

archives, or a copy thereof. Provisions must be made, with the input of key court stakeholders, to ensure that as large a portion of the archives as possible, consistent with established international standards on confidentiality, are publicly available—including for copying by appropriate institutions and NGOs. It should also urge and organize the donors of the ECCC to provide adequate funding 1) for the necessary outreach to civil parties and the general population of Cambodia; and 2) to fully develop and carry out a plan to secure, preserve and make appropriately accessible materials for the ECCC archives.

- Recognizes the significant failure ending these cases short of a legitimate judicial resolution represents, and commission an independent review of lessons for current and future UN-backed tribunals to protect against political interference by obstructionist national authorities.

Endnote

For further detail of the statements of Hun Sen and other high level government officials demanding that the cases not proceed, see generally Open Society Justice Initiative's monitoring reports "[Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: November 2011](#)," pp. 11-13, and "[Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, March 2010](#)".

The prime minister has repeatedly stated his objection to the ECCC's prosecuting any individuals beyond those five already indicted in Cases 001 and 002.ⁱ In late October 2010, he told UN Secretary-General Ban Ki-moon that "Case 003 will not be allowed....The court will try the four senior leaders successfully and then finish with Case 002."ⁱⁱ

Hun Sen's words have been widely echoed by other Cambodian government officials, as well as senior Cambodian court officials. For example, earlier this year Cambodian Minister for Information Khieu Kanharith, said in March of 2010 that those interested in pursuing Cases 003 and 004 "should just pack their bags and go home."ⁱⁱⁱ In March of 2011—with both Cases 003 and 004 still pending judicial determination—the national deputy co-prosecutor declared at a public forum for civil party representatives: "There will be no Case 003 and 004."^{iv} In June of 2011, at the 60th anniversary of the Cambodian People's Party, Senate President Chea Sim said that his party supported the ECCC's process along the lines of Prime Minister Hun Sen's statement to UN Secretary-General Ban Ki-moon that Case 003 not be allowed.^v

Demonstrating the widespread understanding that the Cambodian officials' words were meant to influence the ECCC, one of the suspects in Case 004, Im Chaem, reportedly said: "The government already said the tribunal should stop with Case

002.”^{vi} She added: “I have no intention of going to court....I'm happy because I feel protected by the government, especially Prime Minister Hun Sen.”^{vii}

ⁱ See, for example, Chean Sokha and Robbie Corey-Boulet, —ECCC Ruling Risks Unrest: PM, Phnom Penh Post, September 8, 2009; Sopheng Cheang, —Cambodia PM Accuses Other Countries of Stirring Unrest, Associated Press, September 10, 2009; and Vong Sokheng, —Inquiries could sink ECCC: PM, Phnom Penh Post, September 10, 2009. See also, Hun Sen speech recorded and broadcast by Voice of America, March 18, 2009; Neth Pheaktra and Georgia Wilkins, —Judges Should Focus on Current KR Suspects: Gov't, Phnom Penh Post, March 12, 2008; Chean Sokha and Robbie Corey-Boulet, —ECCC Ruling Risks Unrest: PM, Phnom Penh Post, September 8, 2009; Maggie Tait, —Interference 'Deplored' by Judge, NZPA, April 5, 2009, at <http://www.stuff.co.nz/world/asia/2315921/Interference-deplored-by-judge>.

ⁱⁱ Hun Sen to Ban Ki-moon: Case 002 Last Trial at ECCC, Phnom Penh Post, Oct. 27, 2010.

ⁱⁱⁱ James O'Toole, “Prosecutor speaks out, Phnom Penh Post, May 10, 2011, pp. 1-2.

^{iv} Alice Foster and Chhorn Chansy, ‘Prosecutor Says Tribunal Lacks Money, Time.’ Cambodia Daily, March 18, 2011, p. 23.

^v Thomas Miller, “More Questions for KRT Case 003, Phnom Penh Post, June 29, 2011, p. 2

^{vi} Julia Wallace and Kuch Naren, —Dam Victims Appeal to Tribunal to Investigate Case 004: Im Chaem Denies Involvement in Khmer Rouge Crimes, July 1, 2011, Cambodia Daily, p. 1.

^{vii} Julia Wallace, —Scenes from a Khmer Rouge Trial Gone Wrong, The Atlantic, September 21, 2011, available at: http://www.theatlantic.com/international/archive/2011/09/scenes-from-a-khmer-rouge-trial-gone-wrong/245405/?single_page=true.