

**TRIBUNAL REVISITS HISTORY: A REPORT ON INITIAL HEARING OF CASE 002
27 - 30 JUNE 2011**

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"Nuon Chea acted like a thug. He caused the killings of people [then] and now he does not respect the court," said civil party Seng Chonn from Prey Veng during Case 002's initial hearing from 27 to 30 June 2011. "Nuon Chea was one of the big brothers then... Now he is wearing that [ski] cap and acting as if he is still a superpower," complained civil party Say Sen from Takeo of Nuon Chea's request to wear sunglasses and a ski cap in the court in order to protect his eyes from lights and head from the air-conditioner. These two civil parties were frustrated when seeing the accused, 4 senior leaders of the Khmer Rouge regime, protesting and leaving the courtroom each day for various reasons. "Except for Khieu Samphan, all left the courtroom. At the end of the day, you see only the victims in the courtroom," said civil party Chann Ke from Prey Veng, referring to the first few days of the hearing and expressing his upset from the courtroom scene where the accused had been mostly absent.

27 June marks the beginning of a historic and most important trial of senior leaders of the Khmer Rouge at the Extraordinary Chambers in the Courts of Cambodia (ECCC). The proceedings from 27 to 30 June were procedural in nature and, therefore, no facts were presented, although from time to time, parties to the proceedings discussed the general historical background of the country, particularly in the aftermath of the Khmer Rouge regime. It was interesting, nonetheless, for civil parties, complainants and the general public to see faces of the accused, who were holding positions within the highest tier of the Khmer Rouge hierarchy. For the occasion, the Victim Participation Project and the Living Document Project at the Documentation Center of Cambodia (DC-Cam) invited 15 civil parties from Case 002 and 25 community activists to attend this most important proceeding before the ECCC. The civil parties arrived on 26 June and met their lawyers in advance of the start of the proceedings on the following days. They all met with their lawyers again after the hearing and returned home on 30 June. Complainants were briefed by DC-Cam staff about the importance of the upcoming trials and the topics they would hear being argued by all parties before the Trial Chamber.

The trial was hailed by many as historic moment for Cambodia. Countries such as United States and France, which are donors and friends of the ECCC, applauded the initiation of, to use the words of the US Ambassador-at-large for War Crimes Stephen Rapp, "the most important [trial] in the world."¹ Many of the important questions discussed at the hearing included, amongst other things, the validity of the 1979 People's Revolutionary Tribunal, Amnesty and Pardon granted to Ieng Sary, and the proposed witness list.

Refusal to Attend Initial Hearing by the Accused

"I am not happy with this hearing," said Nuon Chea at the start of the initial hearings on 27 June. Nuon Chea's statement was a protest to the Trial Chamber decision's not to put his proposed preliminary objections on the agenda of the initial hearing. Nuon Chea and his lawyers had earlier requested that issues prior to the coming to power of the Khmer Rouge

¹ "US Envoy Hails End to Khmer Rouge Impunity," Douglas Gillison, The Cambodia Daily, 29 June 2011, p. 23.

such as the American bombings of Cambodia and occupation of Cambodia by Vietnam after the collapse of the Khmer Rouge be placed on the agenda. The team also requested that the list of witnesses his team intended to call be discussed in public. Apparently, the intention of the Nuon Chea team was to bring sensitive political issues outside of the court's temporal jurisdiction into the debate at the initial hearing. In addition, the Nuon Chea's defense also wanted to discuss political figures within the current Cambodia government, witnesses the defense believes possess relevant information about Khmer Rouge policies and administration. As a matter of fact, the Office of the Co-Investigating Judges had once summoned six political figures within the current Cambodian government to provide evidence at the ECCC, an effort met with no co-operation. It appears that one of the strategies of the Nuon Chea defense was to prove that the ECCC is under political interference and, therefore, Nuon Chea cannot receive a fair trial.

The request by Nuon Chea and his defense was rejected by the Trial Chamber which stated that the agenda had already been set and the debate would have to be relevant solely to the topics on the agenda. In protest, Nuon Chea requested return to his cell every morning of the hearing day, claiming the agenda set by the Trial Chamber was rather about Ieng Sary than about him. He informed the ECCC that he would return to the courtroom when his issues were placed on the agenda of the initial hearing. Nuon Chea was not alone in requesting to leave the courtroom. Ieng Sary, Ieng Thirith and Khieu Samphan all requested to leave the courtroom and return to their cells. Aside from Nuon Chea who had apparently protested, the remaining accused simply gave up their rights to participate in the hearing. The absence of the accused from the courtroom prompted Trial Chamber to reject requests to leave the courtroom by some of the accused. This led to a challenge from the defense which claimed it was a matter of rights and the accused's decision to give up participation rights should be accommodated. Trial Chamber then decided that the accused had to appear each hearing day and would have to provide reasonable reasons should they wish to be absent from the courtroom. Nonetheless, from day to day, Nuon Chea's tone when requesting to leave the courtroom appeared to become more polite. Judge Nil Nonn, president of the Trial Chamber, also appeared to be softer when dealing the accused's request to leave the courtroom.

Also regarding Nuon Chea specifically, the ECCC has been trying to obtain a recent documentary produced by freelance journalist Thet Sambath. The documentary, "Enemy of the People" actually contains a confession by Nuon Chea as to his knowledge about killings and mistreatment of enemies under his regime. The ECCC's attempt has been unsuccessful so far, as Thet Sambath has refused to hand over the video, saying he had promised not to betray the trust Nuon Chea had placed in him. "If I hand in the document[ary film] to the Court, it means that I betrayed them," Thet Sambath told Hello VOA on 28 June referring to Nuon Chea and other Khmer Rouge cadres who were the subject of his documentary film.²

1979 People's Revolutionary Tribunal

In a hasty trial of August 1979, Ieng Sary and Pol Pot were convicted in absentia of genocide and were sentenced to death and to have their wealth confiscated. No element of the verdict was ever carried out. In fact, they were at the Thai border, waging bloody civil war against the successor regime, the People's Republic of Kampuchea, when the verdict was announced and exploited Cambodia's thick jungle and valuable gems, until well into the late 1990s.

² Hello VOA, "For Film Maker, Truth will be hard for the court," 28 June 2011, <http://www.voanews.com/khmer-english/news/For-Filmmaker-Truth-Will-Be-Hard-for-the-Court-124721879.html> (Visited July 18, 2011).

Instead of having his life and assets taken, Ieng Sary was enriching himself along the Thai border.

The People's Revolutionary Tribunal in 1979 convened the first genocide trial ever established in the world that lasted for a total of five days. According to ECCC Co-Prosecutor Andrew Cayley, the trial did not meet even the most basic standard of fairness. The tribunal was established by a law decree issued by the executive body. Three members of the tribunal, including the president, were members of the government. The tribunal reached a guilty verdict over a total period of 20 days including the investigation. Worse, the defense lawyer provided a statement for the prosecution instead of protecting the interests of the defendants. Finally, the judgment was pre-determined. International Co-Prosecutor Andrew Cayley argued that it is legally correct to prosecute Ieng Sary before the ECCC, given the unreliability of the People's Revolutionary Tribunal. The defense for Ieng Sary argued, however, that Ieng Sary had already been prosecuted and cannot be legally tried again for the same types of crimes. The national defense counsel for Ieng Thirith added that it was the best the government then could afford to do at the time, given the total destruction of the country's infrastructure and resources.

1996 Amnesty and Pardon

At the request of the Co-Prime Ministers at the time, King Norodom Sihanouk signed a royal decree, granting Ieng Sary amnesty and pardon, the topic of which was heatedly debated on the second day of the initial hearing. This 1996 royal decree, according to the defense, pardoned Ieng Sary for the genocide conviction in 1979 and amnestied him from any additional prosecution. According to the defense, Ieng Sary cannot be prosecuted for being a member of the Khmer Rouge organization, nor for any charges before the ECCC. The defense was argued that, when Ieng Sary defected to the government in 1996, a deal was reached. The deal was that Ieng Sary would not be prosecuted for his violation of the 1994 law outlawing the Khmer Rouge organization and for any future prosecution. They argued that the defection of Ieng Sary led to the final collapse of the Khmer Rouge and brought peace to Cambodia and that, had Ieng Sary not defected, Cambodia might still be engulfed in civil war. Finally, they argued the 1996 royal decree stands and the ECCC has no personal jurisdiction over him. In other words, Ieng Sary must walk free.

The Co-Prosecutors argued that the pardon was for Ieng Sary's 1979 conviction and the amnesty was intended to protect him from prosecution only for his violation of the 1994 law. The 1994 law provided a grace period of 6 months, during which Khmer Rouge members who defected would not be prosecuted for belonging to the outlawed Khmer Rouge organization. According to the Co-Prosecutors, the amnesty was meant only to excuse Ieng Sary for his violation of the 1994 law and not for his actions during Democratic Kampuchea period. They added that, even if the Trial Chamber does find that the amnesty protects Ieng Sary from this prosecution, the Trial Chamber still has the discretion to find otherwise. According to them, the ECCC is "an internationalized tribunal" and no amnesty is possible for genocide under customary international law. The arguments by the Co-Prosecutors were supported by civil party lawyers who claimed that victims would be deprived of their rights to truth and an effective remedy as demanded by international law and that such rights would be violated should Ieng Sary be let free.

The issue dates back to 1996 when Ieng Sary still controlled Pailin. He and the Khmer Rouge under his control were still fighting the current government. Civil party lawyers argued that

Ieng Sary "obtained" the amnesty in 1996 in exchange for his defection. In other words, the government then was forced into giving him amnesty in exchange for peace, which most believed was necessary at the time. "I think it was necessary in order to bring an end to the war... The circumstance dictated it," said Chann Ke. If one looks back to the negotiation period when the deal was inked, no one, including possibly Ieng Sary himself at the time, could ever imagine in 1996 that a tribunal like the ECCC could ever be possibly established in the future.

The royal decree dated 14 September 1996 literally "relieved Ieng Sary ... of the punishment of death and seizure of assets in accordance with the judgment... of 19 August 1979 and the punishment provided in the Law on Outlawing the Group of Democratic Kampuchea ... of 15 July 1994." A reading of this decree means Ieng Sary cannot be punished for belonging to an outlawed group who took up arms against the government. The 1994 law deals entirely with the Khmer Rouge's subversive acts against the government by continuing their armed resistance up until Ieng Sary's defection. The law says nothing about being prosecuted for crimes committed during the Khmer Rouge regime. In this regard, it should be noted that Trial Chamber has to take into consideration the fact that Ieng Sary's prosecution in 1979 did not meet basic standards of fairness and due process of law and, therefore, the royal decree, which deals entirely with punishment provided in the 1994 law, does not shield him from being tried before the ECCC, which was never envisioned to have been established in the first place.

In support of the position of the prosecution, civil party lawyers requested the bench find that the royal decree of 1996 does not shield Ieng Sary from prosecution before the ECCC. The lawyers argued that victims would be deprived of justice, rights to seek appropriate remedy and truth, should Ieng Sary not be tried before the ECCC.

In fact, this issue of amnesty and pardon for Ieng Sary had already been raised during the negotiation between the government of Cambodia and the United Nations. No resolution was reached regarding how to deal with the pardon of Ieng Sary and the matter was left for the ECCC to decide after a long negotiation.³ The Pre-Trial Chamber already found that the pardon did not save Ieng Sary and now the issue is being raised again before the Trial Chamber.⁴ The same issue is likely to be raised one more time before the Supreme Court Chamber. It is believed that this was one of the shortcomings of the civil law system when dealing with crimes of this magnitude. The procedure has allowed the same issue to be addressed at every stage of proceedings and even before the ECCC was established. This process takes up large amounts of time, which the ECCC in particular does not have the luxury of wasting.

Victim Participation

On 23 June 2011, Pre-Trial Chamber (PTC) admitted 1728 civil party applicants, making the number of civil parties in Case 002 a total of 3850.⁵ It is a victory for victims and those who work for them. While some have hailed it as a success for victims, others have been worried.

³ Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Article 11.

⁴ PTC Decision on Ieng Sary Appeals Against Closing Order, 11 April 2011, p.

⁵ Pre-Trial Chamber overturns previous rejection of 98% of appealing civil party applicants in Case 002, 23 June 2011, at <http://www.eccc.gov.kh/en/articles/pre-trial-chamber-overturns-previous-rejection-98-appealing-civil-party-applicants-case-002>

Some commentators believed the PTC took too broad interpretation of the definition of "victim." The concerns relate to the support for this huge number of civil parties and their quality of participation. While funding for NGOs working on victim participation becomes scarcer, Victims Support Section is also struggling with its own budget and funding limitations. Time and resources do not allow for civil party lawyer to have one-on-one consultations with their clients and, therefore, group meeting with the clients occur in most cases. This is likely to remain a worry throughout the trial phase of Case 002.

Civil Party Co-Lead Lawyers offered some insight into the initial requests for reparation for victims. The requests include, amongst other things: a memorial day, memorials, free mental and physical health service for victims, genocide education, a museum to keep and preserve Khmer Rouge documents, compilation of the names of victims, a victim trust fund and dissemination of Case 002 judgment. This was the initial specification of reparation requests by victims. The Civil Party Co-Lead Lawyers informed the Trial Chamber that they would need some additional time to consult with the newly admitted civil parties before any final requests would be put to the Trial Chamber at a later stage of the proceedings.

The initial hearing was a test for the new mechanism designed to ease the complex process of victim participation at the ECCC during Case 002 trial. Civil Party Co-Lead Lawyers were appointed to represent the interest of civil parties before the ECCC. Their job is to represent the interests of a consolidated group of civil parties. The new mechanism was designed to expedite the proceedings and avoid repetition amongst various teams of civil party lawyers as seen in Case 001. It appears, however, that more than a few civil party lawyers spoke about any one issue at the initial hearing, which brings to question whether or not the new mechanism works to address the problems witnessed in Case 001. Both Civil Party Co-Lead Lawyers and civil party lawyers reportedly are working on a set of rules to guide their relationship and coordination. It remains to be seen if this will work and if such rules are even established. It also raises another important question in relation to victim participation as a concept and whether the model of victim participation used by the ECCC will be adopted by any future tribunal?

Other Issues

A number of other technical issues were also raised at the initial hearing, including the statute of limitation for the national crimes, the statute of limitation for grave breaches of the Geneva Convention, and proposed witness list. None of these issues were decided at the initial hearing. The Trial Chamber shall decide these matters at a later stage of the proceedings, although it is highly likely that these matters will be raised again before the Supreme Court Chamber if the Trial Chamber arrives at any conviction.

Statute of Limitation for National Crimes: The defense argued that the ECCC could not apply the national crimes of homicide, torture and religious persecution, stipulated in the 1956 Penal Code against the defendants before the ECCC because the statute of limitation for these national crimes had already expired. The defense noted that the 1956 Penal Code allows for a period of 10 year statute of limitation after the crimes had been committed. In other words, anyone suspected of committing these national crimes could only be brought to trial within 10 years of their commission. In the case before the ECCC, the defense claims that these domestic crimes cannot be applied after 1989. The prosecution and the civil parties counter-argued that the statute of limitations had been suspended after the collapse of the Khmer Rouge regime due to the fact that the Khmer Rouge regime had destroyed the judiciary and

human resources needed for a functional court system and that the court system was rebuilt only after the Paris Peace Accord was signed in the early 1990s. In fact, the Khmer Rouge had fought a civil war until well into the late 1990s.

Statute of Limitation for Grave Breaches of the 1949 Geneva Convention: The defense also argued that Article 6 of the Law on the Establishment of the ECCC could not be applied against the accused because Cambodia was not even a party to this convention at the time the alleged crimes occurred. The prosecution counter-argued that, although Cambodia was not a party to the convention during the prescribed period, Grave Breaches of the Geneva Convention had already risen to the level of customary international law and, therefore, is applicable before the ECCC.

Witness List: At the initial hearing, no decision was reached as to the number of witnesses and civil parties to be called during substantive portion of Case 002. The judges informed the parties that the list of witnesses would be decided during the first phase of trial proceedings. To protect identities of witnesses, the Trial Chamber advised parties to use pseudonyms when referring to particular witnesses. Parties were allowed to agree to or oppose certain witnesses. Lawyers for Nuon Chea were stopped during the hearing for referring to the detailed background of a witness, although a pseudonym for that particular proposed witness was used. Trial Chamber was correct when it stopped international lawyer for Nuon Chea from providing the details of witness X, as he was referred to. In fact, details given by the defense were adequate for the public to conclude that the defense was referring to Penn Sovann, former Prime Minister of People's Republic of Kampuchea. For security of the witnesses, their identity must remain confidential at least until they testify.

Conclusion

Health of the accused is an enduring challenge that the ECCC will have to deal with throughout the trial, given the accused's apparent fragile health. The public is highly concerned about the health problems and the frail appearance of the accused during the initial hearing makes it a real concern. Civil parties like Seng Chonn and Chann Ke acknowledge that the accused are old and frail, but are of the opinion that, as long as they are alive, they have to be prosecuted. "[T]o leave it as a lesson for young people in the future," said Seng Chonn. Civil party Chann Ke believes the accused have a lot of answers to provide to the people of Cambodia regarding why, how and what happened during the Khmer Rouge regime.

Trial Chamber will deal with all the issues raised above and will deliver its decisions at a later stage. Many, if not all, of these issues have been decided once by the Pre-Trial Chamber will likely be raised again before the Supreme Court Chamber if the accused live until the delivery of judgment. This is one of the serious shortcomings of the ECCC as it allows any issue to be raised and decided at every stage and level of the proceedings and this has taken a lot of time, of which the ECCC does not have the luxury of wasting.

Civil party participation remains a challenge for the ECCC as an institution to address if the ECCC is to provide a meaningful experience for victims. With the number of civil parties at 3850 and limited resources for people working on victim participation, any thought of meaningful participation by victims appears unrealistic issues.

END.