

## KRT Judges Maintain Pretense of Interest in Next Mini-Trial

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By Michael G. Karnavas

During the Extraordinary Chambers in the Courts of Cambodia's (ECCC) Trial Management Meeting on Case 002, held December 11 and 12, the Trial Chamber entertained us with a marvelously farcical tragedy: Nothing ado about much, or, Why there will not be a Case 002/02, although we will pretend there will be one to keep hope alive.

It was captivating to see (and hear) how the judges came armed with all the answers as to why they could not possibly begin to hear evidence in Case 002/02 (as if they had even figured out what segments of Case 002 would even be heard) before completing the judgment in Case 002/01.

Where have they been, and what have they been doing? When did this occur to them? Why was this issue not addressed during the protracted (albeit belated) hearings on the legitimacy of the severance of Case 002? Why the pretense of this public trial management meeting? And, why delay discussing the proverbial elephant in the (court)room: When and to what extent will the next segment of Case 002 be tried?

Regrettably, this farcical comedy was about a real tragedy: The current judges of the ECCC's Trial Chamber are not genuinely serious in trying the remaining segments of Case 002.

The Trial Chamber held this two-day public trial management meeting (other, more important ones they held in closed sessions) to effectively convince (dupe, more like it) the public that it is impossible for them to begin hearing evidence in Case 002/02 until 6 or 8 or 10 months or longer down the road, after they finally get around to completing the judgment in Case 002/01. If one did not know better, the over-the-top performance, featuring suggestive questioning and quick-witted repartee with the representatives of the ECCC administrators, was rather convincing. But, when you strip the fluff and ignore the rationalizations, the judges doth protest too much.

These judges are not obtuse. After they get around to finding the two remaining accused guilty and handing down life sentences—and to think they will do otherwise is delusional when considering how the trial proceedings were carried out—the likelihood that the international donors will pony up more money so that two ailing octogenarians can be further tried for the sake of accountability and an additional life sentence is precisely nil. Can you not just hear them? “Gee, if only we had the funding to carry on! Time to bid my leave. Cheerio, au revoir, auf wiedersehen, chum reap Leah.”

What is the alternative? Start the remaining Case 002, and then, irrespective of the verdict and sentence, complete the trial. Not a pleasant proposition if you have personal and/or professional plans beckoning you. But then, why sign on to be a judge at the ECCC (or prosecutor, for that matter; remember the abrupt retreats of the previous international co-prosecutors, Robert Petit and Andrew Cayley, both largely AWOL from the proceedings during their tenure to jet set to conferences and search for greener pastures) if you have no intention of sticking it out to the end, bitter or otherwise?

Do these judges seriously expect international donors to continue financing this case when they see all this foot-dragging being justified by patent obfuscation? Even the most casual observer would have noticed that Case 002 has been marred with unnecessary delays.

Granted, the size and complexity of the 002/01 mini-trial is novel to all of the judges of this Trial Chamber. Fair enough. But the Duch trial was a dress rehearsal, with plenty of errors in trial management and trial proceedings to learn from. Then, there was this gap of time as to when the judges had access to the case file and when the case actually began—some 13 months between the issuance of an indictment (closing order) and the opening statements.

We were told that the case was severed for manageability purposes. But then why have the judges not been able to get their act together? The ECCC Supreme Court Chamber, in a rather sharp decision, instructed these judges to come up with a plan for trying the rest of Case 002. That was nearly a year ago. Lots of efforts have been made to pry out of these judges their game plan. And now, after 2 years of being coy, the grimy little truth has emerged. The game plan was to entice and delude all those concerned, especially the civil parties, that they had a plan at the ready, when a plan was never even seriously contemplated. More charitably, they simply had no idea what they were doing and didn't think far ahead. Be that as it may, what a mess they have managed to make.

Many may not realize that the judges do not draft the judgments in tribunals such as the ECCC. In fact, it is their staff that does the vast majority of the work. As early as the appearance of the very first witness, the legal officers (including interns in some cases) dedicated to the Trial Chamber judges began summarizing the evidence for the purpose of drafting the judgment. When considering all of the breaks in this case; the 2-, 3- and 4-day-per-week trial sessions; the extended period between the conclusion of evidence-hearing and the closing arguments; and the weeks that have passed since, it is supremely ironic to hear from the judges just how taxing it is for them to draft the judgment. Was it not being drafted all along? What have they been doing with all this free time while on the U.N. payroll?

It would be funny, if it were not so tragic, how badly the civil party lawyers also missed the mark, hoodwinked into supporting the Trial Chamber's delay tactics. Why are they so apathetic about having the rest of the case tried as soon as possible? The unintended consequence of their position is a de facto decertification of all the civil parties, whose claims rest in the balance of the remaining segments of Case 002. It speaks volumes that the principal international lawyer for the civil parties was absent during this highly important public trial management meeting. Better start lowering the expectations of the civil parties by coming clean: This was it for Case 002.

And what of the two accused in the dock who have been incarcerated for nearly 7 years: What of their rights? Well, if the Trial Chamber has no intent to carry on with Case 002 anytime soon, it is only fair and just that Nuon Chea and Khieu Samphan be provisionally released to at least home detention, if they so desire. If they are not going to be afforded a fair and expeditious trial as guaranteed by the Cambodian Constitution, at least they should be afforded some vestige of human dignity—even for a brief period—as they await the judgment. At their age, time is a precious commodity, little of which either one has to squander away—waiting in their prison cell while the Trial Chamber tries to figure out what next.

The newly minted prosecutor, Nicholas Koumjian, made a sound proposal, providing a clear timetable, a list of witnesses and a way to proceed starting as early

as February. Too bad he was not around earlier. Experience, pragmatism and commitment were lacking in his predecessors, but now is not the time to assign blame. No more so is it worth arguing over the merits of the severance. It is time to find solutions. There is no credible excuse for not proceeding with the rest of Case 002 with all deliberate speed. There never was going to be a separate panel. The simple truth is that these judges need to find a way to get on with it. A road map, which they should have come up with months, if not years ago, was handed to them by the prosecution. Rather than feigning anticipatory anxiety as to why it is impossible to draft and deliberate at the same time, they should just start hearing the evidence.

There is ample time to send out summonses to witnesses so that, come February, the trial of Case 002/02 can begin in earnest—and efficiently. It's about time for the Trial Chamber to stop stalling.

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