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Inside the ECCC Emilie Boulenger & James O'Toole December 5, 2010

Marcel Lemonde stepped down last week from his position as Co-Investigating Judge at the Khmer Rouge tribunal. Along with his Cambodian counterpart You Bunleng, Lemonde was responsible for directing investigation in the tribunal's first and second cases. After more than four years in the position, Lemonde has been succeeded by German judge Siegfried Blunk and has returned home to France. In written responses to questions submitted by *The Post*, he discussed his experience at the court and his thoughts on leaving.

What was a typical day for you during the investigation phase?

There would be many meetings. A lot of reading as well. In fact, the day could be very different depending on the tasks of one member of staff or the other. The Office of the Co-Investigating Judges is composed of about 60 people, whose roles are very various and complementary.

While the lawyers were busy, with the help of analysts, examining the evidence, conducting essential legal research to answer the demands of the parties or preparing the text of the Closing Order, investigators were in the field interviewing witnesses or identifying crime sites.

Amongst all this activity, the responsibility of the judges was the ability to distinguish the main issue from the minor and especially to ensure that nobody panicked (as sometimes the risk would arise, given the difficulty of the enterprise).

What do you feel are the greatest successes you had and the greatest challenges you faced?

The simple fact of being able to complete the investigation despite all the obstacles was in itself a huge success. I think one does not always appreciate the tremendous difficulties that we faced.

[Case 002] itself was enormous, extraordinarily complicated and compounded by the structure of the Tribunal, which has a permanent disadvantage since every decision must be discussed, negotiated and formalised jointly; moreover, the context is not always favorable, it is an understatement. If we add to this the need to work in three languages and the fact that the international lawyers from the various

sections of the court have different legal backgrounds, we have an idea of the full significance of the result that we achieved.

What was the most personally surprising thing you discovered over the course of the investigation?

I do not know if we can speak of “discovery”, but the reconstruction at Tuol Sleng was particularly memorable. Having [former Tuol Sleng prison chief Kaing Guek Eav] and former detainees, face to face, on the scene where the events had taken place, was very moving. Indeed, I am sorry that this investigative action was not used more widely during the trial.

What is the status of the investigation in cases 003 and 004, and when do you expect these investigations to be finished?

It is now a question for my successor.

You directed these investigations on your own following a loss of support from You Bunleng, who had initially authorised the investigations. Do you have any idea why You Bunleng withdrew his support? Have you spoken to him about this in any detail beyond what was released publicly in your letters to one another?

Judge You Bunleng publicly explained his position. It is not for me to add anything to his statements, but he may, if he so wishes. As for our exchanges, fortunately, we did not only communicate by official letters! For four and a half years, we discussed matters daily and our few disagreements never had the slightest impact on our personal relationship.

Some observers have floated the possibility of remanding Cases 003 and 004 to national courts as a compromise with the government, which has expressed opposition to these cases. Do you have an opinion on the efficacy of such a move?

In my view, a judicial decision can only be taken by a judge. It will be up to the judges to decide what action to take in the cases before them. This leaves little room for the notion of “compromise”.

Do you feel that the Case 002 defence teams are working to undermine the tribunal?

Obviously I will not comment on the strategy of the defence. However, I can talk about the responsibility that places on commentators. “I have a dream”: I dream that one day we will read positive comments on the extremely difficult work that has been done at this tribunal and we will be reminded that the judgment of the Khmer Rouge leaders constitutes a historic moment, that no one would have imagined 10 years ago.

I have a dream that it will be possible to stop talking about this court in an exclusively negative way, as if the only thing to remember is that there is corruption in Cambodia or that some politician or other makes inflammatory and legally incorrect speeches.

Were you surprised by the allegations from your former staffer Wayne Bastin [who said in an affidavit last year that Lemonde had instructed investigators to find more inculpatory than exculpatory evidence]?

Yes.

Is there anything about this particular staff member that would cause him to attack your work or the work of your office?

I do not intend to comment [on] this lamentable episode, except to say that in a few years, all this will seem pretty insignificant.

Do you think we will ultimately see trials in Cases 003 and 004?

I do not know if we will see trials, but I know that that decision is only up to the judges. The co-investigating judges and, possibly, the judges of the Pre-Trial Chamber, will have to answer a number of issues: Is the procedure regular? Are the suspects part of “those most responsible”? Is there sufficient evidence against them? And so on.

Other considerations must not contaminate these purely judicial questions. The tribunal must obviously be independent and impartial: of course independent of the Government of Cambodia, as we are reminded regularly, but also independent of the media and NGOs, something we hear less often but is equally important and in no way less difficult.

One selling point for the court has been that it will serve as an example to local jurists and local courts. Have you observed this phenomenon yourself, and do you think it will ultimately hold true?

For more than three years, young Cambodian lawyers have worked daily within the court. It seems obvious to me that they learned something. Also the judges, prosecutors, lawyers have used a new way of working for them. This will leave a legacy, no doubt. But, of course, the rule of law is not built in a day and it will take time to perceive the effects of this influence.

What are the difficulties, or possible advantages, in having trials 30 years after the fact?

The disadvantages are obvious: Some actors or key witnesses are dead, others are elderly, do not remember or do not want to remember (because they are afraid of being victims of reprisals or being prosecuted themselves); whole libraries have been written, all are “pre-judgments,” judges must be

able to make independent decisions without being beholden to what has been written previously, while at the same time not being ignorant of it.

That being said, experience shows that the passage of time may also have its advantages: It is now possible to tackle some issues which, some years earlier, would have been taboo. In any case, it is clear for the various actors of the court that a particular responsibility weighs on them: They must renounce the sophisticated pleasures of unnecessary debate and do everything to ensure that justice must finally be done as soon as possible.

Are you satisfied with the court's caseload of, at most, 10 suspects?

I am not aware of such a decision.... More seriously, a judge does not need to be satisfied or dissatisfied with the number of accused. He must simply apply the law, calmly, meaning independently and impartially.

In this case, the law provides that the Tribunal judges the senior leaders and those most responsible, which is therefore necessarily a small number of people, unlike the tribunal for the former Yugoslavia, for example, where they also judge those lower down or less responsible.

What do you think will be the legacy of the tribunal?

There are several levels. First, as to the Khmer Rouge regime, the investigative Case File has brought new knowledge and better understanding of what happened. More generally, the judicial process has initiated debate within Cambodian society.

In terms of influence on the functioning of the Cambodian justice system and strengthening the rule of law, it is too early to draw lessons; we are now trying to sow something, which may be reaped in several years.

Finally, with regard to international justice, this court has been a unique experience, which unfortunately could not come to its appointed end because the actors are unfamiliar with the procedural system they are supposed to apply. In addition, some do not have a strong desire to familiarise themselves with this system.

What do you mean when you say it "could not come to its appointed end"?

When I say that "the experience (not "the court") unfortunately could not come to its appointed end", I'm thinking of the internal logic of the procedural system. For example, in the Duch trial, the case file was probably not used as efficiently as it could have been.

Where the trial phase is as lengthy as the investigative phase, it means that the system has not been fully applied. The main justification for a written investigation, which is necessarily rather long, is that it allows for the trial to focus on the core issues and therefore results in a more expeditious trial phase.

Much has been made about the dangers of political interference at the tribunal. Is this something you ever observed in the course of your work, and is it a concern for you as the process moves forward?

I can only speak for myself. I defy anyone to show a single decision that I made, which would not have been my own decision, taken freely, in good conscience. More generally speaking, is there any matter for concern? I often had reason to say that it would obviously have been much simpler to organise a purely international trial abroad, but I always added that it would have made no sense for the Cambodian people, who are clearly those most interested.

The condition for this trial to be useful is that it takes place in Cambodia, with the participation of Cambodians. By accepting to come and work in that Court, the international judges have chosen to do whatever they can to demonstrate that it is possible to organise a fair trial, respecting international standards, here in Cambodia. It is more difficult than to easily admit defeat and declare that this would be impossible, but it's also much more interesting.

What role do you think the court has played in the lives of Cambodians?

30,000 people attended the hearings. This never happened in any other international tribunal, and it is not nothing. The first consequence is that public debate was initiated in Cambodian society, a debate that had never taken place before and which is essential for the future of this country.

Interview by Emilie Boulenger and James O'Toole