



Legal ruling spotlights serious Khmer Rouge court problems

Robert Carmichael

October 25, 2011

A ruling published on Tuesday has revealed evidence of possible judicial misconduct as well as serious procedural irregularities on the part of investigating judges at the Khmer Rouge tribunal, say court watchers.

The ruling was handed down by the tribunal's Pre-Trial Chamber (PTC), which rules on disputes for cases that have not yet gone to trial. The two international judges on the PTC concluded that the Office of the Co-Investigating Judges (OCIJ) had denied victims the "fundamental right to legal representation.

Judicial misconduct

Observers say their dissenting opinion provides the most damning evidence to date that the OCIJ, whose role it is to probe evidence against suspects and to rule on the admissibility of civil parties, had failed in its duties when dealing with the tribunal's controversial third case, which the government has openly said it would not permit to reach trial.

Clair Duffy, a tribunal monitor with the Open Society Justice Initiative, said the implications of Tuesday's ruling were "huge". "Their observations on how the Case 003 investigation has been run – in every sense – confirms what we have all been hearing, but they go a step further," she said. "There is no question in my mind that this opinion is prima facie evidence of judicial misconduct."

New Zealand victim

Tuesday's ruling followed the OCIJ's rejection in April of civil party applicant Robert Hamill, a New Zealander whose brother Kerry was tortured and murdered by the Khmer Rouge in 1978. Hamill, who is already recognised as a civil party in the tribunal's first two cases, was rejected by the OCIJ in April for Case 003 - on the grounds that he "did not demonstrate that he suffered the alleged psychological injury as a direct consequence of the death of his brother".

That same day the OCIJ closed Case 003 amid accusations they had buckled under political pressure. It soon became clear that the investigating judges had deliberately botched their Case 003 investigation. They failed to interview the two suspects or notify them that they were under investigation; they also declined to interview most witnesses or visit crime scenes; and they reportedly stuffed the case file with irrelevant documents.

Appeal and ruling

In May Hamill appealed the OCIJ's rejection of his civil party application. Tuesday's

PTC ruling, which dealt with that rejection, was split along national lines, with the three Cambodian judges upholding the OCIJ's stance. That ruling means Hamill's appeal has failed, since the PTC needed to garner four votes to overturn the OCIJ's order. The Cambodian judges concluded that since the OCIJ had not charged either of the two suspects, there could be no victims, and that nullified Hamill's appeal.

However their opinion was not shared by the two international judges. In their 12-page dissenting judgement, Rowan Downing and Katinka Lahuis listed a litany of problems with the actions of the two investigating judges, Siegfried Blunk and You Bunleng, during their Case 003 investigation. (Blunk resigned on October 9 claiming political interference had made his position untenable, but Tuesday's ruling will raise questions that other forces were at work.)

In the dark

Downing and Lahuis wrote that Blunk and You had repeatedly refused to recognise civil party lawyers in breach of Cambodian and international practices, and refused to give reasons for that stance; kept victims in the dark about the case thereby preventing them from filing applications to become civil parties; and denied victims' lawyers access to the case file despite repeated requests.

"In the absence of any reason or explanation provided by the Co-Investigating Judges for not giving (Hamill's) lawyers access to the case file at this stage and given the importance for the lawyers of having access to the case file in order to lodge their appeal, we are in favour of granting their request to access the case file," Downing and Lahuis wrote, adding that would not happen in practice since they had failed to persuade two of their Cambodian colleagues to agree to that. Downing and Lahuis also revealed that the OCIJ judges had altered details in their rejection of Hamill's appeal, backdated it and put it on the file, but failed to notify either Hamill or the PTC. They said the changes to the appeal rejection were "so fundamental that they affect its very substance."

So many mistakes

In short, they said, there were so many mistakes in the OCIJ's procedures that the investigating judges should reconsider their rejection of Hamill's appeal. Duffy said donors and the United Nations – which has for months been resisting calls to investigate the conduct of the OCIJ – must now act. "I can't stress enough the seriousness of the international judges' exposure of the modification and backdating of documents on the case file, while the matter was pending appeal," Duffy said.

"The fudging of public records by any public official would ordinarily be a cause for concern, but judges attempting to cover up their mistakes while their decision is being appealed is shocking," she said, adding that failure to investigate now would look "farcical". Judge You Bunleng did not respond to emailed questions on Tuesday.

Investigate the Investigators?

The ruling will further increase pressure on the United Nations to conduct an investigation into what has gone on at the tribunal. Last week Patricia O'Brien, the UN's senior legal officer, visited Phnom Penh and told the government to stop interfering with the judicial process in Case 003 and in the court's fourth and final case, which the

government has also said it would not permit to get to trial.

Anne Heindel, a legal adviser with the Documentation Center of Cambodia (DC-Cam), a genocide research organisation in Phnom Penh, said the opinion of the international judges was “a breath of fresh air”. “(It provides) the first judicial acknowledgment of the severe procedural irregularities that have tainted Case 003,” Heindel said by email. “The politics of this case are poised to split the court in half just as its most important trial begins.”

The fallout from Case 003 comes just days after the tribunal announced that its most important trial – that of the four surviving leaders in Case 002 – would start on November 21. The elderly defendants deny charges of genocide, crimes against humanity and war crimes, and stand accused of responsibility in the deaths of up to 2.2 million people during the Khmer Rouge’s 1975-79 rule. DC-Cam’s Heindel said the fact that the three Cambodian judges had voted as a bloc when ruling on Hamill’s appeal did not bode well for another pending appeal: That of the international prosecutor Andrew Cayley, who asked for more work to be done by the OCIJ on Case 003.

“If the national judges will not allow a direct victim of the crimes to be admitted as a civil party – in contravention of the court’s rules and previous case law – they are unlikely to allow the investigation itself to continue,” Heindel said.