

Limited liability for Khmer Rouge tribunal

Sebastian Strangio

May 13, 2011

PHNOM PENH - Sometime later this year, Cambodia's war crimes court will convene its second trial at which four ailing Khmer Rouge leaders will face a raft of charges including crimes against humanity, war crimes and genocide. The four accused - Khmer Rouge "Brother No 2" Nuon Chea, former foreign minister Ieng Sary, head of state Khieu Samphan and minister of social affairs Ieng Thirith - are the most senior surviving leaders of the regime, whose ultra-Maoist revolution led to the death of an estimated 1.7 million Cambodians between 1975-79.

The tribunal's first case, against Khmer Rouge jailer Kaing Guek Eav, came to an historic conclusion in July when judges convicted him for his role in the deaths of as many as 15,000 people at Phnom Penh's notorious S-21 prison. The 30-year jail sentence handed down against the wiry former schoolteacher, better known by his revolutionary nom de guerre Duch, is currently under appeal.

As the United Nations-backed tribunal gears up for its much more complicated second case, controversy surrounds the potential indictments of five further mid-ranking Khmer Rouge figures. The names of the suspects in Case 003 and Case 004, as the court refers to them, have not yet been officially disclosed but human-rights activists have named the pair under investigation as Meas Muth, former commander of the Khmer Rouge navy, and ex-air force head Sou Met.

The latter case also allegedly involves Im Chem, a former district chief in Banteay Meanchey province, and a pair of deputy zone secretaries, Yim Tith (alias Ta Tith) and Aom An (alias Ta An).

The government has long opposed any prosecutions beyond the second case, arguing that further arrests could threaten social stability or plunge the nation back into civil war. In October, Prime Minister Hun Sen told visiting UN secretary general Ban Ki-moon that Case 002 would be the tribunal's last and that the pursuit of new cases was "not allowed".

This week, government spokesman Khieu Kanharith warned the tribunal's foreign staff about pushing too hard on the two cases. "If they want to go into Case 003 or 004, they should just pack their bags and return home," the Phnom Penh Post quoted him as saying.

Court monitors and rights activists have recently expressed concerns over apparent signs that the international side of the court is yielding to government pressure. The issue came

to a head late last month when the court's co-investigating judges - You Bunleng of Cambodia and Siegfried Blunk of Germany - officially announced that their investigation into Case 003 had been completed. Critics charged that the judges had carried out few if any field investigations in the sensitive case and that the probe had been fast-tracked as a prelude to its likely dismissal by the court.

"The investigating judges have acted precipitously to shut down the investigation, and I say that because we know from talking to people working in the court that they have not gone to crime scenes and done the kind of investigation that one would expect in any criminal case, much less a case of this seriousness," Brad Adams, Asia director for Human Rights Watch, told the Associated Press after the investigation was closed. "It was a political decision, it appears, to shut down this case."

Theary Seng, a human-rights activist and victims advocate, said the manner of the announcement - delivered in a curt, one-sentence statement after close of business on a Friday - indicated that Blunk and You Bunleng were shying away from public scrutiny. "It was transparently deceitful," she said. "The judges have a duty - it's not an option - to investigate. They have failed in their duty to investigate and they have failed to inform the public ... It has scarred the legacy of the Khmer Rouge tribunal already."

Bringing the five additional suspects to justice was also important in justifying the overall cost of the tribunal, she said. "There's no magic number as to how many should be prosecuted and should be indicted. But five indictees after \$200 million spent with only one verdict is not acceptable. The current five are not sufficient for the crimes that took the lives of 1.7 million Cambodians."

Dereliction of duty

Under the court's internal rules, which follow the French civil law system, investigating judges conduct the investigation and then submit their evidence to the court's prosecutors, who decide whether to go to trial. In a statement on May 9, international co-prosecutor Andrew Cayley said the alleged crimes in Case 003 - which include murder, torture, unlawful imprisonment and enslavement - had "not been fully investigated", and urged the co-investigating judges to "summon and question the suspects" in the case.

He also made public a detailed list of locations across the country thought to be connected with the alleged crimes and gave information to victims wishing to apply as civil parties in the case.

Though court observers welcomed Cayley's disclosure, it lacked the signature of his Cambodian counterpart Chea Leang, a long-time opponent of further prosecutions. The next day, she released her own statement countering the call for further probes, claiming that the suspects in Case 003 fell outside the court's jurisdiction, which restricts its mandate to "senior leaders" of the Khmer Rouge regime and those deemed "most responsible" for its crimes.

Despite their clear disagreement on whether to move forward on the controversial case,

Cayley said he would continue to work closely with Chea Leang and fulfill the legal obligations of his position. "She and I both agree that matters within the court need to be handled according to the law," he said. "As the international prosecutor, I have a legal obligation and a duty to act and follow the rules and we have never been in disagreement on that."

Clair Duffy, a court monitor with the Open Society Justice Initiative, said that whatever the extent of Cayley's legally-invested powers, he and other international judges are likely to face significant practical difficulties as the pursuit of the case runs up against entrenched government opposition. "In terms of securing national cooperation in the investigation and arrest of suspects, the Cambodian government needs to lift its opposition to these cases and make this happen," she said. She added that the UN needed to "step up" and pressure Phnom Penh to cease its meddling in the case.

The longstanding conflict between the Cambodian and international sides of the tribunal reflects the awkward political compromise that gave birth to the hybrid court. The brewing disagreement over additional prosecutions is likely to bring such issues to a head and court observers say the fate of the two cases will be a test of the tribunal's credibility. "The point is that the issue affects more than just Case 003 and Case 004 - it affects the whole of the court," Duffy said. "Judicial independence is a fundamental tenet of any justice system. The implications of a lack of judicial independence or of political decision making by judges are huge."

Court spokesman Lars Olsen said that it was "premature" to make any kind of judgment about political interference at the tribunal. "It's too early to predict what will be the legacy of the court," he said, adding that "regardless of what will be the outcome of the investigation, the decisions of the judges will be made public" and open to scrutiny.

Theary Seng, whose parents perished under the Khmer Rouge regime, said she was hopeful that pressure was now building on the court to push forward with the third case, and that the UN would be forced to put up a "good fight" against government manipulation. "The UN failing to address these concerns will damage and further embed cynicism in the Cambodian population," she said. "The UN will be greatly implicated if they don't act."