



## **A Tumultuous 12 Months at the Khmer Rouge Tribunal**

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**December 25, 2012**

On February 3, the Supreme Court Chamber at the Khmer Rouge tribunal issued its final judgment against S-21 prison chief Kaing Guek Eav, better known as Duch.

The sentence was life in prison, handed down for the defendant's oversight of the notoriously brutal detention centre that orchestrated the murder, and often torture, of some 14,000 prisoners.

The decision – the court's first – was a watershed moment, immediately heralded as a landmark in Cambodian justice, and held up as proof that the Extraordinary Chambers in the Courts of Cambodia would serve as a model for Cambodia's oft-criticised domestic courts.

Deputy Prime Minister Sok An called the handing down of the verdict “a historic day for our country and for all humanity”.

But while the government and foreign donors were eager to fête the decision, many others found plenty to fault in a decision that may well prove to be the court's last.

Rights groups criticised the Supreme Court Chamber for leaving the matter of Duch's parole in the hands of the domestic legal system, seen by many as a tool of the ruling regime.

They also questioned the judges' decision to ignore the lower chamber's leniency, offered in light of the eight years of illegal imprisonment to which Duch was subjected by the Cambodian military, saying it raised serious concerns about the court's respect for fair trial rights.

Amnesty International's Rupert Abbott said at the time that the ruling “may be perceived as a case of public opinion trumping human rights”. While the Cambodian Center for Human Rights called it “a dangerous precedent for the Cambodian judiciary, who may be encouraged to ignore human rights abuses by other branches or institutions of government”.

The fallout from the Duch verdict could easily be read as a microcosm of the public's feelings towards the court over the course of 2012.

The past year saw champions of the court point to it time and time again as an exemplar of an "international standard of justice", and a lodestar for domestic courts, even as volleys of criticism were being lobbed at the UN-backed tribunal – including allegations of corruption, government interference and botched and blocked investigations.

Nowhere did the court's seams show more plainly than in the case of controversial reserve international Co-Investigating Judge Laurent Kasper-Ansermet.

Tapped in November 2011 to replace former international Co-Investigating Judge Siegfried Blunk – who himself resigned over perceived government interference, after being accused of having omitted key parts of the investigation – Kasper-Ansermet soon found himself effectively blocked from looking into the government-opposed Cases 003 and 004 when Cambodia's Supreme Council of Magistracy refused to acknowledge his appointment on the grounds that he had previously tweeted about the cases in question.

In a filing dated March 21, Kasper-Ansermet detailed the repeated refusals of his national-side counterpart, Co-Investigating Judge You Bunleng, to acknowledge his authority to investigate cases 003 and 004, calling Bunleng's obstructionism "a violation of the national and international laws that define the conduct of proceedings at the ECCC".

By May, Kasper-Ansermet resigned, citing the "dysfunctional situation" created by Bunleng, whom he accused of having thwarted his every step to investigate the cases.

However, the controversy surrounding the stalled cases didn't end when American judge Mark Harmon was sworn in at the court in November to take Kasper-Ansermet's place.

Breaking with established court protocol, Kasper-Ansermet had invoked an internal court rule interpreted as granting broad powers in the interest of protecting the rights of victims and the accused. Under the rule, he issued a number of decisions – conspicuously lacking the approval of Bunleng – including informing defendants in cases 003 and 004 of the charges against them, and granting parties access to the case files.

In his first public act as co-investigator, Harmon appeared to do the same, releasing 14 new Case 004 crime sites in five provinces that did not bear the seal of his national counterpart.

And though cases 003 and 004 remain in flux (Prime Minister Hun Sen told UN Secretary-General Ban Ki-moon in 2010 that Case 002 would be the tribunal's last, and that the other cases threatened the country's stability), Case 002 has seen its fair share of trouble as well.

The health of the accused has been a perennial subject of debate. Dementia-stricken ex-Social Affairs Minister Ieng Thirith was ruled unfit to stand trial and given a conditional release after months of rehabilitation in an attempt to mitigate the effects of her condition.

Arguing against the conditions in a hearing, Thirith co-counsel Diana Ellis said it would be “repugnant” to impose conditions on an accused who was mentally incapable of understanding them, and that to do so would bring the court “into disrepute”.

Thirith’s husband, ex-foreign minister and co-accused Ieng Sary, has been plagued by health concerns of his own – including a chronic heart condition, high blood pressure, vertigo and chronic fatigue – conditions that render him immobile, and according to his attorneys incapable of following proceedings.

In November, however, geriatrician Dr John Campbell testified that after a two-month hospital stay, Sary was capable of participating in his own defence, despite his myriad health problems.

In the wake of the trial chamber’s subsequent decision ruling Sary fit to stand trial, his defence lawyer Michael Karnavas lambasted the ruling and Campbell’s testimony, portions of which he called “ridiculous”.

“You can’t have it both ways,” Karnavas said at the time. “You can’t say he’s fit to stand trial and that the trial can move forward, and then have him downstairs where he has double vision, or he’s unconscious, or in pain.”

The court, however, blocked Karnavas’s attempt to allow the ailing Sary to follow proceedings in the courtroom – where he would be in full view of the public – saying in its decision that it had the authority to order his participation from his holding cell, a ruling roundly supported by the prosecution.

The move was criticised by observers for having political undertones, with some noting that the court couldn’t afford the public blow of losing a second defendant following the release of Thirith.

Clair Duffy, at the time a tribunal monitor with the Open Society Justice Initiative, suggested that the trial chamber’s decision may have been motivated in part by its experiences with Thirith.

“No doubt, since the Trial Chamber has already lost one individual from Case 002, it will be under pressure to do everything it can not to lose a second,” she said.

The criticisms of the trial also extended to its handling of the investigations into Case 002, which lawyers for all three defendants said were riddled with problems.

In a document dated December 7, the Ieng Sary team, at times seconded by the counsels for co-accused Nuon Chea and Khieu Samphan, said that it had uncovered 15 instances of irregularities in the judicial investigation into Case 002, including unrecorded and staged witness interviews.

According to the court's own internal rules, a "written record shall be made of every interview". Despite indicators that investigators failed to adhere to this rule, the Trial Chamber this month flatly rejected the defence requests to hear additional evidence from involved parties regarding the irregularities.

However, at the same time, the chamber acknowledged that some of the irregularities were indeed "puzzling", but maintained that the defence should have raised the concerns before the trial began.

The defence experienced further difficulties in calling other witnesses, namely Hor Namhong and Keat Chhon, the current ministers of foreign affairs and finance, respectively. In a filing made in September, the Ieng Sary defence, later supported by the Nuon Chea defence, requested to hear the testimony of the two senior ministers, both of whom had ignored summonses to give evidence in Case 001.

The pair's names have repeatedly come up at the court, with Namhong at one point taking to the press to deny in-court testimony from witness Phy Phuon, accusing him of being "in charge" of the Boeung Trabek detention centre.

In a statement, Namhong said that the Democratic Kampuchea regime "not only destroyed a generation of Cambodian people but also, in many ways, a civilisation".

"My greatest hope is that one day justice is done and the legacy of the Khmer Rouge is given its place in the dustbin of history, without defence or controversy," he added.

The Nuon Chea defence seized on Namhong's remarks as evidence of government interference in the trial – the perceived existence of which has been a cornerstone of their strategy – saying it amounted to overt political pressure.

Indeed, days later, in the local media, the witness who had made the remarks recanted, saying he had misspoken because he "was sick and ... confused with the questions".

The Trial Chamber for its part ultimately refused to condemn Namhong's remarks as it had past remarks by Hun Sen, saying the circumstances of Phuon's retraction weren't necessarily related to Namhong's statement, and that the statement itself did not demonstrate intent to influence trial proceedings.

Alleged political interference aside, the court's work was also threatened by an ongoing funding crunch that has loomed over the proceedings, particularly on the national side, leaving the tribunal to rely on piecemeal donations to keep its doors open, and forcing it to revise down its budgetary projections for next year.

The court's fundraisers continue to struggle to solicit money from increasingly fatigued donors – their fatigue borne not only by financial crises at home, but also, some observers say, from the lingering perception of the court's mismanagement issues.

The crunch has seen both a dip in morale and mounting fears over the progress of Case 002 compounded by the Trial Chamber's October announcement they would sit trial fewer days each week due to a staff shortage.

Meanwhile, the issue of the legacy that the Khmer Rouge tribunal will leave to Cambodia's domestic courts, a key element of the court's mission, has moved closer to the forefront, with some still touting the ECCC as a "model court", while others note that any celebration of the court's enduring contribution is premature at best.

Rupert Abbott – Amnesty International's researcher on Cambodia, Laos and Vietnam, who formerly worked at the ECCC's Defence Support Section – said in a recent op-ed, written with Stephanie A Barbour on the international law blog iLawyer, that committing to cases 003 and 004 represented "perhaps the last chance to ensure that the ECCC delivers justice that the Cambodian people perceive as genuine, and to help achieve the Tribunal's other purposes including truth-finding and strengthening the rule of law in Cambodia".

In an email Sunday, he reiterated his views, first highlighting the fact that "generally, the proceedings in [cases 001 and 002] have set some positive examples about respect for fair trial rights... [and] has provided opportunities for Cambodians working in the domestic justice system to improve their legal knowledge and skills".

However, he noted, left unchanged, the court's legacy could do more harm than good.

"Firstly, and most importantly, political interference in cases 003 and 004 and any resulting impunity has tainted the Tribunal and its other cases, and has the potential to leave a disastrous, negative legacy," he said.

"It demonstrates that even at the UN-backed court, the Cambodian government—as it does in the domestic justice system—is able to dictate proceedings as it sees fit. This political interference and impunity at the Tribunal may serve merely to reinforce and legitimize these same problems in the Cambodian courts."