

Jurisdiction key in 003 fight

James O'Toole

June 23, 2011

Cambodia's war crimes tribunal will convene the initial hearing on Monday in a trial that has been more than a decade in the making.

Legal wrangling between the United Nations and the Cambodian government dating back to the 1990s dragged on for years before the two sides settled on an arrangement that satisfied both UN concerns about judicial independence and local sovereignty desires.

Long judicial probes followed legal and logistical negotiations, and pre-trial appeals against the indictment in the case took several months to resolve following the conclusion of investigations last year.

But for all the preparation that has led up to the second trial, it has been overshadowed of late by controversy over the court's Case 003, with tribunal judges standing accused of deliberately botching their investigation under pressure from the Cambodian government, which opposes prosecutions beyond Case 002.

Rights groups and international co-prosecutor Andrew Cayley have urged that the investigation be reopened, a request that so far has not been heeded.

With staff from the investigating judges' office having begun resigning in protest, the conflict over Case 003 appears to have reached full bloom in recent weeks. Some observers say, however, that the seeds for the present disagreement were planted long ago.

"The real crux of the issue appears to be a disagreement over the scope of the tribunal's jurisdiction — a disagreement that was never adequately resolved in the political negotiations to create the court," John Ciorciari, an assistant professor of public policy at the University of Michigan, said in an email.

The 2003 agreement between the government and the UN that established the Extraordinary Chambers in the Courts of Cambodia, as the tribunal is formally known, sets out its mandate to prosecute "senior leaders" and those "most responsible" for crimes under the Khmer Rouge.

Although defence teams are likely to contest the point, there is little controversy over whether the four defendants in Case 002 fall into the category of "senior leaders".

With their cabinet-level positions in the regime, former KR Brother No 2 Nuon Chea, head of state Khieu Samphan, foreign minister Ieng Sary and social action minister Ieng Thirith had long been envisaged as possible suspects for the court ahead of their arrests in 2007.

In the case of Kaing Guek Eav, the former S-21 prison chief who last July became the first person convicted at the tribunal, Ciorciari said both the UN and the Cambodian government “clearly” considered the infamous jailer to fall into the category of most responsible “due to the particularly heinous nature of his offences and the abundance of evidence against him”.

Alex Hinton, director of the Centre for the Study of Genocide, Conflict Resolution and Human Rights at Rutgers University, called the jurisdiction negotiations a “tricky” issue.

“On the one hand, the negotiators wanted clarity,” he said in an email. “On the other hand, negotiators can’t make the final decisions about who will be tried. This had to be left to the jurists at the court.”

The suspects in Case 003 remain officially confidential but are widely known to be former Khmer Rouge navy commander Meas Mut and air force commander Sou Met.

The pair are alleged to have been responsible for thousands of deaths, though Cambodian court officials have nonetheless argued that the men fall outside the tribunal’s jurisdiction.

“The suspects mentioned [in] the Case File 003 were not either senior leaders or those who were most responsible,” Cambodian co-prosecutor Chea Leang said in a statement last month. The agreement establishing the tribunal, she added, “envisaged the prosecution of a limited number of people”.

But David Scheffer, who was involved in the talks to establish the court in his former role as United States ambassador-at-large for war crimes issues, wrote in an essay last month that negotiators “typically spoke of up to 15 or so individuals ultimately being prosecuted”.

“I am struck by how a distorted view of the personal jurisdiction of the ECCC still appears to deeply influence the work of those whose responsibility lies with an accurate reading of the ECCC Law and the UN-[Cambodian government] Agreement,” Scheffer wrote.

A report released last week by the Open Society Justice Initiative, which monitors the court, supports Scheffer’s point, noting that Meas Mut and Sou Met held positions of significant authority in the KR hierarchy in addition to their alleged direct links to mass atrocities.

“Taken at face value, it is difficult to comprehend how senior officials such as Meas Muth and Sou Met could legitimately be found not to fall under . . . the ECCC’s jurisdiction,” the report said.

The tribunal’s international prosecutors have said they will pursue no further cases beyond Case 003 and Case 004, which involves a trio of mid-level KR officials.

Press reports from 2001 cite Prime Minister Hun Sen discussing the possibility of around 10 suspects being tried at the court, but more recently, the premier has been resolute in opposing Cases 003 and 004, telling UN secretary general Ban Ki-moon last year that they “will not be allowed”.

Hun Sen has previously cited the potential for “civil war” in response to additional prosecutions, though few commentators see this as realistic. Equally, there is no danger of any high-level officials in the Cambodian People’s Party leadership being targeted for prosecution, though Hun Sen may fear that trials beyond Case 002 could nonetheless strike fear into the ranks of former Khmer Rouge defectors now integrated with the government.

“Those in power will never let it get to a level at which it could spread out in any unpredictable way,” historian David Chandler said.

Hans Corell, who served as the UN’s undersecretary general for legal affairs during the talks to establish the tribunal, said in an email that negotiators “certainly foresaw conflict, mainly manifested in a situation where an international co-investigating judge or an international co-prosecutor wanted to pursue a case and the Cambodian counterpart was of a different opinion”.

In Case 003, however, German co-investigating judge Siegfried Blunk has apparently joined his Cambodian counterpart in quashing the investigation, leaving limited recourse for international prosecutors.

Corell said the language setting out the court’s jurisdiction “is clear enough”, noting that a similar provision at the Special Court for Sierra Leone had been implemented successfully. Instead, he said there were fundamental flaws in the make-up of Cambodia’s tribunal.

“The problem is really that the idea of establishing a truly international tribunal for Cambodia was not accepted by the government,” he said.

Council of Ministers spokesman Phay Siphon declined to discuss the government’s view of the court’s mandate, calling this a task for “the lawyers and the judges”.

“My suggestion is to go back to see what is the mandate through the law – what is the mandate through the government and the UN,” he said.