

## **KRT judge talks court controversies**

**Thomas Miller**

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The Khmer Rouge tribunal has come under fire from allegations that it is planning to dismiss its third and fourth cases, both of which are opposed by the government. At the centre of the controversy are the court's co-investigating judges, who decide whether to send a case to trial or dismiss it. Siegfried Blunk, co-investigating judge from Germany, responded this week in writing to questions from Post reporter Thomas Miller. His replies are printed in full.

### **You served from 2003-05 as an international judge at the East Timor hybrid court. What lessons did you take from your time there?**

In East Timor, where I served as an International Judge for two years before the Court closed down as planned, the hybrid court ("Special Panels for Serious Crimes") was part of the local court system like the "Extraordinary Chambers in the Courts of Cambodia". This, just like here, necessitated working together with local judges and staff, which was a useful learning process – and an exercise in patience.

I have never subscribed to Kipling's statement that "East is East and West is West, and never the twain shall meet": they certainly can meet and work together successfully, as I demonstrated here on a small scale by instituting joint working groups composed of national and international staff, thereby doing away with the previous lack of trust and the duplication of efforts.

### **What was your motivation for coming to the ECCC?**

On recommendation by UN and approval by the Supreme Council of Magistrates, I was appointed Reserve Investigating Judge in 2008 by the King of Cambodia, and having taken part in several Plenary Sessions, was appointed full-time judge in December 2011. I welcomed this opportunity to contribute to the Tribunal by sharing my experience gained in the hybrid court of East Timor.

### **Case 002 has been called the most complex case since Nuremberg. What is so complicated about it, and what must the court do in order to ensure the proceedings are carried out properly?**

In Case 002, investigations were necessary not just into the responsibility of the 4 accused persons, but also into the whole structure of the Khmer Rouge regime, the chain of command of the armed forces, the hierarchy of the Communist Party, and the system of extermination camps throughout the country.

For this purpose, the Investigating Judges compiled a wealth of evidence, including more than 10,000 documents and 700 witness interviews. This abundance of evidence together

with the Indictment were placed at the disposal of the Trial Chamber in January 2011, and the Investigating Judges are eagerly awaiting the scheduling of substantial trial hearings.

**The question of personal jurisdiction is a contentious one in Cases 003 and 004. What is the determining factor for whether a suspect is a “senior leader” of the Khmer Rouge, or one of those “most responsible” for the crimes carried out by the regime?**

Whether the four accused in Case 002 were “senior leaders” of the Khmer Rouge Regime is now for the Trial Chamber to decide, wherefore any comment by the Investigating Judges would be inappropriate.

For Cases 003 and 004 we have conducted an in-depth analysis of the origin and meaning of the term “most responsible” and developed a set of criteria based on the ECCC Law, and the jurisprudence of international tribunals, especially the one for Sierra Leone because its jurisdiction was limited similarly to persons who bear “the greatest responsibility”.

**You told Voice of America recently that you were “vigorously investigating” Case 004. What investigating have you done so far? Is your colleague, Judge You Bunleng, also investigating the case?**

I told Voice of America that “the Office” of the Co-Investigating Judges is vigorously investigating Case 004; this Office includes both judges. The nature of our investigations is twofold: on the one hand we compile and analyze documentary evidence, on the other hand we conduct field investigations and interview witnesses. So far, in Case 004 we have compiled more than 1,200 documents (comprising more than 41,000 pages) which are being analyzed. As the national Investigating Judge simultaneously has to fulfill his duties as President of the Cambodian Court of Appeal, it is obviously my duty to do the field investigations. For this purpose, I have travelled all over the country, even to provinces more than 350 km away, to examine crime sites and interview witnesses.

**You and Judge You Bunleng said recently that there are “serious doubts” whether the suspects in Case 004 are “most responsible” and therefore within the court’s jurisdiction. What are those doubts, and what is your basis for them?**

As I said, we have developed a set of criteria for defining the term “most responsible”, which however should not be made public before the Closing Order has been issued. [Editor’s note: The Closing Order is a judicial decision made by the co-investigating judges after they have investigated a case. The Order will either indict the suspects and send the case to trial, or dismiss the case due to lack of evidence or jurisdiction.]

**What are the most challenging aspects of Cases 003 and 004? How do they differ from the court’s first two cases?**

In Case 001, the accused had meticulously documented the crimes alleged wherefore he could hardly deny them. In Cases 003 and 004, on the contrary we cannot rely on comparable evidence, and the alleged crimes have to be investigated 30 years after they took place, which is more than one generation later.

**Your office stated in February that the Case 003 investigation was focused on documents from Cases 001 and 002, and that no “field investigations” in the case were being carried out. You said just two months later that the investigation had been completed. What evidence did you investigate that was unique to Case 003?**

My 30 years experience as a judge and prosecutor taught me that documents are the most reliable evidence, wherefore the resources of the Office were focused for a while on analyzing the 10,000 evidentiary documents and 700 witness interviews compiled in Case 002 for their relevance to Cases 003 and 004.

After this was accomplished, field investigations resumed and key witnesses were questioned, including Duch.

**International co-prosecutor Andrew Cayley has requested that you conduct further investigation in Case 003, including interviews with suspects and examinations of alleged crime sites. In your judgment, why were those actions unnecessary in the initial investigation?**

Unfortunately, the requests by Mr. Cayley had to be rejected as invalid, even his re-filed requests. According to our rules of procedure, it is now for the Pre-Trial Chamber to decide on his appeal, wherefore I should refrain from comment.

**Khmer Rouge historian Stephen Heder, who was a consultant in your office until he resigned in May, has claimed that you and Judge You Bunleng closed the Case 003 investigation “effectively without investigating it”, and criticized your management of the OCIJ office. Is his assessment accurate?**

After the contract of this consultant was not renewed by our Office for certain reasons, he obviously had an axe to grind, and in a toxic letter tried to portray the termination of his contract as his “resignation” levelling all sorts of allegations at our Office. He would be well advised to bear in mind his post-contractual obligations.

**A number of observers have pointed to the coincidence of the government’s public opposition to Cases 003 and 004, and what Cayley and others have said was an insufficient investigation into Case 003, as evidence that the court has decided to dismiss cases based on political, rather than legal considerations. Have political considerations or the uncertain funding situation at the court influenced your investigation in Case 003? How can you assure the public that your office is operating independently?**

The Co-Investigating Judges, who had to take an oath of office “not to accept instructions from any government or any other source” are committed to honour this oath, and have publicly stated and made it abundantly clear on several occasions that they are resolved to defend their independence in all directions (tous azimuths), which includes the Cambodian government and the United Nations. As regards funding: since we need not focus resources on Case 002 any more, we have voluntarily proposed substantial savings for the future budget of our Office, so that any reduction of funding is unlikely to affect us.

**Your office decided that civil party applicant Rob Hamill “did not demonstrate that he suffered the alleged psychological injury as a direct consequence of the death of his brother”, who was captured at sea and executed at S-21. Yet, one of the alleged crimes in Case 003 is the “capture of foreign nationals off the coast of Cambodia and their unlawful imprisonment, transfer to S-21 or murder”. Why did you reject Hamill’s civil party application, which had been accepted in Cases 001 and 002?**

As the admissibility of this application is pending before the Pre-Trial Chamber, any comment by me would be inappropriate.

**What do you say to observers who claim that a failure to bring suspects in Cases 003 and 004 to trial would be viewed as a political decision that would undermine the purpose of the ECCC and possibly unravel the court’s first two cases?**

I am aware of this oft-repeated mantra, so far however, none of the self-styled observers have succeeded in explaining how a dismissal of Case 003 or 004 could “unravel” the Court’s first two cases.