

Voices

Troubled Khmer Rouge Investigation Raises New Transparency Concerns

By Heather Ryan, Open Society Justice Initiative

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Cambodia's Khmer Rouge tribunal, officially known as the Extraordinary Chambers in the Courts of Cambodia (ECCC), has been steadily continuing with the trial of two former senior Khmer Rouge leaders, Nuon Chea and Khieu Samphan, even as an investigation continues into two further possible cases, known as Cases 003 and 004.

The current trial remains beset by concerns about the health of the ageing defendants, and Nuon Chea in particular, following the death of co-defendant Ieng Sary and a ruling that his wife Ieng Thirith is not mentally fit to stand trial.

But a new issue is now facing the ECCC (which combines Cambodian and international judges, court officials and staff) linked once again to the persistent question of whether these cases would proceed at all, in the face of the Cambodian government's stated opposition to any further trials.

Now it has emerged that counsel appointed to represent a suspect in Case 004, currently under investigation at the ECCC, have not been granted access to the case file in spite of repeated requests.

Access by counsel for a person under investigation at the ECCC to the case file and the opportunity to participate in the investigation is triggered when a suspect is formally "charged" and notified by the co-investigating judges of the crimes he or she is being investigated for. The decision on when in the investigation process to "charge" a suspect is within the discretion of the co-investigating judges, (You Bunleng, Cambodian, and Mark Harmon from the United States).

The purpose of access to the case file and participation in the investigation is to allow counsel for a charged person to protect basic fair trial rights and to enhance the efficiency and effectiveness of the investigative and trial process. Defense counsel cannot adequately fulfill these functions if they are not allowed to access the file or to participate until an investigation is nearly over.

On the other hand, there is no reason for investigating judges to permit access to the file if it is clear the charges will not finally be laid against a suspect under investigation.

In Case 004 the co-investigating judges have provided extremely limited information about the status of the investigation in spite of the fact that it was initiated (after a lengthy preliminary investigation by the Co-Prosecutors) in late 2008 and is claimed by the court to be nearing completion.

Lawyers for civil parties (victims and survivors and their families, who have a legal representation before the tribunal) have been granted access to the case file and the opportunity to participate; victims of the crimes under investigation have been invited to apply to become civil parties; and the press has repeatedly reported the names of the suspects in the investigation, and even interviewed some of them.

Lengthy delays in proceeding with the investigation, evidence that the government of Cambodia does not want the investigations to go forward, and the refusal of the Cambodian Co-Investigation Judge to participate with his international counterpart on the case all raise public concerns about the legitimacy of the investigation and whether the case will be allowed to proceed to completion under the rules of the court.

This situation calls for greater transparency by the co-investigating judges about the nature and the status of the investigation so as to allay public suspicion that the process is being manipulated behind the scenes.

While there may be a perfectly legitimate reason for the co-investigating judges not to formally charge the persons under investigation, delaying a decision on charging and refusing access to the investigation by suspects for such an extended period of time raises suspicion that the delay is the result of ongoing political problems surrounding the investigation.

Such reasons, if they exist, would be improper and have a potentially negative impact on the fair-trial rights of the suspects and the legacy of the court.

Under these circumstances, additional transparency from the co-investigating judges—or at least the international co-investigating judge—is required to assure the public that the highly unusual refusal to allow suspects access to the case file and to participate in the investigation at this late stage in the process is not at the expense of the rights of the suspects.