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Khmer Rouge Tribunal: Last chance to salvage justice?

Over two years ago, Cambodia's Prime Minister Hun Sen reportedly told UN Secretary-General Ban Ki-moon that the Khmer Rouge Tribunal's second trial (Case 002) would be its last. Since then, investigations in Cases 003 and 004 – which involve five individuals suspected of genocide, crimes against humanity and war crimes – have barely progressed.

Mark Harmon, a seasoned prosecutor of war crimes at the International Criminal Tribunal for the former Yugoslavia, has recently been appointed as the new International Co-Investigating Judge at the Extraordinary Chambers in the Courts of Cambodia (ECCC), as the UN-backed Tribunal is officially known. His arrival provides a window of opportunity for prompt, thorough, independent and impartial investigations in Cases 003 and 004.

But should Judge Harmon be obstructed, as his predecessors were, it may not just be Cases 003 and 004 that are undermined. Rather, the entire Tribunal, and its role in strengthening the rule of law in Cambodia will be put at risk.

The saga of Cases 003 and 004

The Cambodian government opposes investigations in Cases 003 and 004 on the grounds that this could fuel “national instability”. Some suspect that the reason for this opposition is concern about what could be revealed during further investigations and potential trials, particularly about the role of current Cambodian government officials during the Khmer Rouge period.

Such political interference – and any resulting impunity – is the antithesis of justice and a breach of the agreement between Cambodia and the UN to establish the Tribunal.

A full history of Cases 003 and 004 is beyond the scope of this commentary. In summary, ongoing obstruction by the Tribunal's Cambodian staff and officials, with political interference at its root, has caused a litany of disputes and resignations that have served to delay justice and deny rights to suspects and victims alike.

The situation came to a head earlier this year with the resignation of Judge Laurent Kasper-Ansermet. As Reserve International Co-Investigating Judge, he was supposed to replace Judge Siegfried Blunk, who had resigned as International Co-Investigating Judge in October 2011,¹ citing perceived political interference.

In January 2012, it emerged that Cambodia's Supreme Council of Magistracy (on which the ECCC's Cambodian Co-Investigating Judge You Bunleng and Co-Prosecutor Chea Leang sit as voting members) was refusing to formally appoint Judge Kasper-Ansermet, despite his nomination by the UN.²

Judge Kasper-Ansermet attempted to work on Cases 003 and 004 but apparently faced obstruction from Judge You Bunleng and the Tribunal's Cambodian staff, who were seemingly following orders from elsewhere.

¹ See AI Press Release: *Cambodia: UN must act to safeguard future of Khmer Rouge Tribunal*, 10 October 2011, <http://www.amnesty.org/en/for-media/press-releases/cambodia-un-must-act-safeguard-future-khmer-rouge-tribunal-2011-10-10>.

² See AI Public Statement: *Cambodia: Immediately appoint International Co-Investigating Judge at Khmer Rouge Tribunal*, 10 January 2012, <http://www.amnesty.org/en/library/asset/ASA23/001/2012/en/e72104d3-f9b3-4507-a930-258530fb40ab/asa230012012en.pdf>.

In one of his final moves before resigning in May of this year, Judge Kasper-Ansermet issued a note on 'Egregious Dysfunctions within the ECCC impeding the proper conduct of investigations in Cases 003 and 004'. He set out in startling detail the obstruction he had faced, including *inter alia*: the rejection of his signed orders for inclusion in the official case-files; the Pre-Trial Chamber's Cambodian judges' refusal to recognize his authority to act; his international staff being refused access to the Tribunal's Records and Archives Unit; and the Court Management Section refusing to provide drivers, transcribers and translators for his investigations.

"Do not let the perfect be the enemy of the good"

Amnesty International has consistently called for prompt, thorough, independent and impartial investigations in Cases 003 and 004, to be undertaken without external interference.³ The organization condemned the interference and obstruction that led to Judge Kasper-Ansermet's resignation.⁴

Ambassador David Scheffer – the UN Secretary-General's Special Expert on the Tribunal – has reassured Amnesty International of the UN's vigilance and firm stance over the troubling patterns of interference at the ECCC.

But while there have been strong words – with the UN voicing its concerns publicly about political interference – unfortunately it seems that there has been limited action. Specifically, the UN and the Tribunal's donor countries have failed to publicly set out conditions for their continued involvement in the ECCC or make clear the consequences should these problems continue. Further, the UN has failed to initiate any investigation into the alleged political interference.

The reasons for this lackluster response seem apparent.

According to the *Cambodia Daily* newspaper, in October 2011 UN Under-Secretary General for Legal Affairs Patricia O'Brien informed Cambodian human rights groups that there would be no investigation into political interference in Cases 003 and 004, because it "could really undermine Case 002 ... the defence might have a field day with that."

Similarly, a number of diplomats representing the Tribunal's donor countries have told Amnesty International – to paraphrase Voltaire – "do not let the perfect be the enemy of the good!"

Their argument goes like this: by focusing too much on the "challenges" in Cases 003 and 004, human rights groups risk undermining confidence in the integrity of Cases 001 and 002. These cases brought S21 prison chief Kaing Guek Eav (alias Duch), and alleged Khmer Rouge leaders Nuon Chea, Khieu Samphan and Ieng Sary to trial, and represent significant "good" for the victims of the Khmer Rouge.

Indeed, the Tribunal has achieved some significant successes. The proceedings have seen the unprecedented involvement of victims of international crimes as Civil Parties. The final verdict in Case 001, despite its flaws, represents an important step towards achieving accountability for the mass crimes of the Khmer Rouge. And the trial in Case 002 has compelled alleged Khmer Rouge leaders to confront the past and hear testimony from victims and witnesses; while the Trial Chamber, acting robustly and fairly, released one of the accused, Ieng Thirith, on fitness grounds.⁵

The importance of Cases 003 and 004

But this argument – of not letting the perfect be the enemy of the good – must be approached with caution.

³ See AI Public Statement: *UN-Cambodia Court: Excessive secrecy, exclusion and fears of inappropriate interference*, 8 June 2011, <http://www.amnesty.org/en/library/asset/ASA23/004/2011/en/bcfec000-9ae9-4b5c-aa25-db4de503243f/asa230042011en.pdf>.

⁴ See AI Press Release: *Cambodia: Khmer Rouge Tribunal at risk as second judge resigns*, 19 March 2012, <http://www.amnesty.org/en/for-media/press-releases/cambodia-khmer-rouge-tribunal-risk-second-judge-resigns-2012-03-19>.

⁵ See AI Press Release: *Cambodia: Amnesty International welcomes Ieng Thirith decision*, 13 September 2012, <http://www.amnesty.org/en/for-media/press-releases/cambodia-amnesty-international-welcomes-ieng-thirith-decision-2012-09-13>.

By speaking out about the interference in Cases 003 and 004, Amnesty International has not sought to undermine the ECCC and its other cases; nor do we think that this will be the consequence. Rather, we have spoken out because such interference, left unchecked, has the potential to taint the achievements made so far and the very purpose of the ECCC – to bring justice to the victims of the Khmer Rouge. It also jeopardizes the Tribunal's other core rationales, summarized on the ECCC's website, which include to “educate Cambodia's youth” and “strengthen rule of law” in Cambodia.

Justice for the victims of the Khmer Rouge

Clearly, the failure to investigate Cases 003 and 004 properly means denying, probably forever, justice to the victims of the alleged crimes in these cases. And let us not forget that the crimes alleged in these two cases led to the deaths of many more people than those who perished in Duch's S21 prison.

What is more, a botched investigation in Cases 003 and 004 risks tainting Cases 001 and 002 to such a degree that the victims feel that real justice has not been achieved in those cases also. Revelations about political interference, the obstruction of investigations and judicial misconduct in Cases 003 and 004, including those detailed by UN-nominated Judge Kasper-Ansermet, inevitably raise questions about the investigations and trials in Cases 001 and 002. At the very least, they suggest the unfortunate possibility that interference may have also occurred in those cases.

If the national side of the Tribunal is willing to bow to external pressure in Cases 003 and 004, might they have done so in Cases 001 and 002? For example, did translators provide accurate translations of ‘unfavorable’ interviewee testimonies during investigations? Was enough effort made to find exculpatory evidence, or did Cambodian investigators choose not to reveal certain leads to their international colleagues?

(This is saying nothing of troubling developments in Cases 001 and 002, including *inter alia*: corruption allegations on the Cambodian side, and the UN's refusal to make public the results of its enquires into the same; the Supreme Court Chamber's decision in Case 001 to overturn the Trial Chamber's remedy for Duch's unlawful detention, or to provide an alternative remedy;⁶ concerns about how investigators interviewed witnesses, compounded by a hybrid trial procedure that seems to prevent the proper cross-examination of those witnesses; and the refusal of apparently relevant witnesses in Case 002 – including senior Cambodian government officials – to appear before the Tribunal.)

Arguably, the taint caused by the interference in Cases 003 and 004 is already apparent to many, including the donor community. The ECCC is facing a significant funding shortfall, which has reportedly led Ambassador Scheffer to warn the Tribunal's UN staff about the viability of their employment.

It was perhaps no surprise that the ECCC received hardly any mention during the high profile visits of US President Barack Obama and other world leaders for the recent ASEAN and East Asia Summits in Phnom Penh. People seem fed up with the Tribunal, while much of Cambodian civil society no longer appears to see it as a priority.

Truth-finding

While the Tribunal has helped to create the space for discussing the Khmer Rouge, experts are divided on just how reluctant Cambodians were to talk about this period beforehand.

But there is no doubting the significant efforts that the Tribunal has made in conducting outreach to communities throughout the country and transporting citizens to the capital to see the trials unfold. There are concerns, however, that politically sensitive issues – particularly those relating to Cases 003 and 004 – have barely been mentioned during this outreach, denying victims the information that would enable them to participate in those cases.

The Tribunal's ability to educate Cambodians about the country's brutal past is already (perhaps, artificially) narrowed by its temporal jurisdiction, which covers only the precise dates of the Khmer Rouge regime, from 17 April 1975 to 6 January 1979. For example, this prevents the Tribunal from looking at the US bombing of

⁶ See AI Press Release: *Cambodia: Khmer Rouge judgment welcome, but raises human rights concerns*, 3 February 2012, <http://www.amnesty.org/en/for-media/press-releases/cambodia-khmer-rouge-judgment-welcome-raises-human-rights-concerns-2012-02->.

Cambodia in the context of the Vietnam War, and gross human rights violations committed in Cambodia during the 1980s.

Further, the Tribunal's restricted personal jurisdiction – whereby only “Senior Leaders of Democratic Kampuchea” and those “most responsible for the crimes” committed during the Khmer Rouge period may be prosecuted – means that the role of lower level perpetrators will not be properly considered. Throughout the country, these perpetrators live alongside their victims' families.

Meanwhile, due to the complexity of the trial and concerns over just how long the accused will live or remain fit for trial, Case 002 has been severed into “mini-trials”. This means that the crimes currently being tried are limited.

All of these realities underscore the importance of Cases 003 and 004, which reportedly look down the chain of command and involve mid-level Khmer Rouge cadres. Proper investigations – and potential trials – in these cases would help to provide a more accurate historical narrative of the Khmer Rouge period, by considering the alleged perpetration of crimes at a lower level.

Strengthening the rule of law in Cambodia

Both the Cambodian government and the UN have recognized the unique opportunity for the ECCC to bestow a positive legacy for the justice system and rule of law in Cambodia. Commitments in this regard were reaffirmed at the Tribunal's legacy conference in September 2012.

And the question of legacy is now in the spotlight, as onlookers question if the Tribunal will have any positive impact in tackling the shortcomings in Cambodia's politicized justice system.

At the same time as the recent legacy conference, the Phnom Penh Municipal Court tried 71-year old government critic and human rights defender Mam Sonando on politically motivated charges of instigating insurrection, later sentencing him to 20-years in prison. Amnesty International considers him to be a prisoner of conscience.⁷ (In a welcome move, some international staff at the ECCC have started a petition for his release).⁸

The interference in Cases 003 and 004 at the ECCC has the potential to leave a lasting negative legacy for rule of law in Cambodia. Cambodians will see that even at the UN-backed court, the Cambodian government – as it does in the domestic justice system, and as Mam Sonando knows only too well – is able to dictate proceedings as it sees fit. Ignoring political interference and impunity at the Tribunal may serve merely to reinforce and legitimize these same problems in the Cambodian courts.

The last chance

Amnesty International is calling on the Cambodian government and the UN to seize the opportunity that Judge Harmon's arrival offers. This is 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.

Surely the Cambodian government does not want to see Case 002 end without any convictions, or to be blamed internationally and domestically for the collapse of the Tribunal. Rather, we can assume that it wants to secure its reputation as the government that defeated the Khmer Rouge regime and held it accountable for its crimes.

Further, the UN does not want to see its reputation as a driver of international justice being undermined.

In accordance with the agreement to establish the Tribunal, the UN should affirm to the Cambodian government that its involvement in the ECCC is conditional on an end to political interference. And the UN should make clear that it will hold the Cambodian government to public account should political interference force it to withdraw.

⁷ See AI Press Release: *Cambodia: Baseless conviction of government critic reflects shrinking space for free speech*, 1 October 2012, <http://www.amnesty.org/en/for-media/press-releases/cambodia-baseless-conviction-government-critic-reflects-shrinking-space-fre>.

⁸ See <http://www.ipetitions.com/petition/justice-for-mam-sonando/>.

Together with the UN, the Cambodian government should make a public commitment in support of prompt, thorough, independent and impartial investigations in Cases 003 and 004, and for allowing justice to take its course according to the law.

Donor countries should reward this commitment by providing full resources to the Cambodian and international sides of the Tribunal, including the Office of the Co-Investigating Judges. They should earmark monies for investigations in Cases 003 and 004 and, if so required, the subsequent trials; and make all funding conditional on an end to political interference, with safeguards against corruption in place.

The Co-Investigating Judges should be left unimpeded to undertake investigations without interference. They should direct the Tribunal's Victims Support Section and Public Affairs Section to undertake outreach on Cases 003 and 004 as a matter of urgency, providing an opportunity for victims to participate properly in those cases.

Amnesty International is calling on the Cambodian government, the UN and the Tribunal's donors to strive for "the perfect" at the ECCC. It is what the Cambodian people deserve. It is the only way to safeguard the Tribunal's reputation and legacy, to secure the "good" that has already been achieved and to salvage justice in Cases 003 and 004.

This is an opinion piece posted on iLawyer, a Blog on International Justice, in December 2012, <http://ilawyerblog.com/khmer-rouge-tribunal-last-chance-to-salvage-justice/> (no longer active).

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