



Cambodia's kangaroo court

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PHNOM PENH, Cambodia — It was a damning indictment by any estimation: a 100-plus-page report published 10 years ago by a Khmer-speaking, British-based scholar of Cambodian history with the help of American University. The scholar, Stephen Heder, spent years compiling evidence of war crimes by seven top officials of the Khmer Rouge, the ultra-Marxist regime whose brutal efforts to create an agricultural utopia in Cambodia in the late 1970s wiped out up to a quarter of the population.

On June 27, Heder saw some of his efforts come to fruition: Three of the five officials still living went on trial in what has been called the most significant war crimes tribunal since the Nazi trials at Nuremberg.

What is more significant, however, is what Heder will likely never see: the prosecution of the two other remaining officials despite overwhelming evidence, years of official investigation, and hundreds of millions of dollars spent by the United Nations, the United States, and other donor countries.

The prosecution is mired in a dispute that has riven the U.N.-backed tribunal, with infighting between prosecutors and judges, dubious legal rulings, and inaction from its funders. The struggle is part of a larger tug of war pitting Cambodia's authoritarian prime minister against the international community. And from Heder's perspective, it's an outrage that in the end prompted his resignation from the tribunal, citing the "toxic atmosphere of mutual mistrust" at the "professionally dysfunctional office" of the investigating judges.

The dispute is threatening the legacy of the eight-year-old court, which was set up to help bring resolution to one of the grimmest chapters of the 20th century, when an estimated 1.7 million Cambodians were murdered, starved, worked to death, or died of disease in the "Killing Fields" of the Khmer Rouge's 1975-1979 rule.

The tribunal has a long and not-so-glorious history. In the late 1990s, the government, headed by Prime Minister Hun Sen, approached the United Nations to create a court to try Khmer Rouge officials. But they didn't want a fully international court, like what was set up for the former Yugoslavia. Despite vocal misgivings from U.N. negotiators, the final agreement in 2003 was for a hybrid, with Cambodian and international judges and

prosecutors working with Cambodian and international laws, under a French-style system.

Those misgivings proved well founded. "I did not want ... the U.N. emblem to be given to an entity that did not, shall we say, represent the highest international standards," Hans Corell, the chief U.N. negotiator at the time, told me in an interview. "But of course what we predicted seems to have developed into the problem that we were concerned would occur."

With the help of Heder's research, prosecutors compiled substantial evidence against potential suspects. The trial that opened on June 27 (known as Case 002 in court parlance) featured four senior officials, three of whom were the focus of Heder's report: Ieng Sary, Khieu Samphan, and Nuon Chea -- who was second only to the infamous Pol Pot, who died in 1998.

Prosecution investigators also targeted two top military commanders, according to confidential court documents, in what is known as Case 003. The documents allege that Sou Met and Meas (or Meah) Mut -- both of whom served as top officials in the Cambodian military until recently -- took part in purges that resulted in tens of thousands of deaths.

The Cambodian government, however, has openly stonewalled on new prosecutions beyond the current trial. Last October, Hun Sen bluntly told visiting U.N. Secretary-General Ban Ki-moon that new cases would "not be allowed." Hun Sen has warned of the potential for civil war, though his opposition likely stems from the fact that many Khmer Rouge officials, like himself, are now in government and fear that investigators could dredge up new evidence of war crimes.

Many critics now point the finger not only at the Cambodian government, but also the United Nations for not doing more to stand up to Hun Sen's demands.

"The Cambodian government has been forthright all along that there would be no new cases," said Anne Heindel, legal advisor to the Documentation Center of Cambodia, which researches the Khmer Rouge. "It's the failure of the United Nations to act that's been surprising."

Scrutiny of late has focused on the two investigating judges who, under the French-style rules, are primarily responsible for pretrial investigations. One of them is German investigating judge Siegfried Blunk, who many hoped would pursue the new cases despite the objections of his Cambodian counterpart.

That hasn't happened. Instead, on April 29 the judges closed the investigation into Case 003, despite having taken no basic steps, such as questioning the suspects, identifying crime sites, or notifying victims' lawyers, to advance the case. (They gave no explanation as to why none of these steps had been taken; the news release that accompanied the announcement of Case 003's closure was one sentence long and, moreover, was released

at 6 p.m. on a Friday after the close of business, just to further add to the suspicion.)

That set off a fight with British prosecutor Andrew Cayley, who appealed the closure and publicly identified specific crime sites, prompting a harsh rebuke from the investigating judges' office and an order to retract his statement. Cayley called the rebuke "abusive," "unreasonable," "capricious," and "unprecedented."

David Scheffer, a Northwestern University law professor who helped set up the court when he was U.S. war crimes ambassador, called on the judges to follow up on Cayley's appeal and "stop issuing foolish orders that only reveal their own insecurity over past performance."

"The integrity of the [tribunal] hangs in the balance," he wrote in a recent blog post. Other observers have been even more critical. The Open Society Justice Initiative, a watchdog organization funded by billionaire George Soros, said in a report released June 14: "[I]t is abundantly clear that if the court continues to give the appearance of having succumbed to political interference in Case 003, the legacy of the [court] will be severely undermined."

Tensions reached a boiling point in May when several tribunal employees sent an angry letter to Ban complaining about Blunk, according to two officials who have seen the letter but asked to remain anonymous in order to discuss the court's internal matters. Blunk also sent a letter to Ban, though its contents are unclear.

At least five employees resigned in protest over Blunk's actions. Heder has refused to speak publicly about his resignation, but in a letter to Blunk on May 5 (a copy of which was given to me), he wrote:

In view of the judges' decision to close the investigation into Case File 003 effectively without investigating it, which I, like others, believe was unreasonable; in view of the UN staff's evidently growing lack of confidence in your leadership, which I share; and in view of the toxic atmosphere of mutual mistrust generated by your management of what is now a professionally dysfunctional office, I have concluded that no good use can or will be made of my consultancy services.

Cambodian rights activist Ou Virak also complained that Blunk's conduct was "a matter of utmost concern" and suggested that the United Nations had acquiesced to the Cambodian government.

Blunk has repeatedly declined to answer questions from the media, but issued a statement through a court spokesman: "The co-investigating judges have worked independently from outside interference, and are resolved to defend their independence against all interference wherever it may come from."

The feud, as well as concerns about public perception, prompted officials from the court's

main donors, which include the United States, Australia, and others, to intervene directly with Blunk and Cayley multiple times -- by phone and in person.

One Phnom Penh-based diplomat described Blunk after meeting him as "a person who takes his job very seriously," but said there didn't appear to be indications of unethical or illegal behavior. The diplomat was blunter about the United Nations. "The U.N. has to make things work; it has to get its house in order," said the diplomat, who was not authorized to speak to the media. "Where is the institution of the court" in this feud?

The U.S. war crimes ambassador, Stephen Rapp, who also spoke to Blunk directly, told me that Washington had warned the Cambodian government not to interfere. But he also suggested that money was as much a factor as jurisdiction in deciding which cases to pursue.

"It's a question of the mandate, but it's also a question of resources as well," he said in an interview. "We expect people ... to be making decisions that you can't pursue every case. We want them to make them on a proper basis, with an understanding that resources are limited and they need to prioritize."

The United Nations, meanwhile, insists its actions have been proper. In a statement released the same day as the Justice Initiative report, Ban's chief spokesman, Martin Nesirky, denied speculation that the United Nations was pushing judges to close Case 003.

"The judges and prosecutors must be allowed to function free from external interference by the Royal Government of Cambodia, the United Nations, donor States, and civil society," he stated. "It follows that the United Nations categorically rejects media speculation that we have instructed the [judges] to dismiss Case 003.

Observers say the damage the court has suffered as a result of the feud, the lack of transparency, and the confusing legal orders could be mitigated by how the Case 002 trial plays out -- and whether Cambodian society embraces the court's decisions in the end.

But nobody's expectations are high. "I think people aren't just looking to the court for reconciliation and truth, or the end of impunity.... They're looking at it for the legacy it leaves behind for the Cambodia courts," Cayley's deputy, William Smith, said in an interview. "And if the court's legacy is to mean anything, it should hold up some basic rights."