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Process remains fraught in decades-long wait for justice in Cambodia

By Tom Fawthrop

The Khmer Rouge nightmare that terrorized Cambodia during the 1970s ended nearly 30 years ago.

In Rwanda and Sierra Leone, the wheels of justice turned quickly, with tribunals investigating events that kicked off within a few years of the mass killing.

For Cambodians, it has been an agonizingly long wait for justice. Since the Khmer Rouge tribunal was finally established in Phnom Penh last year, they have been kept waiting again, with legal squabbles over rules of evidence delaying the indictment stage, when some senior leaders of the Khmer Rouge would be formally charged under international law with crimes against humanity and genocide.

This hybrid tribunal, with international and Cambodian judges sitting together as co-prosecutors, was also adopted by the Sierra Leone tribunal. A special UN mission is in charge of legal assistance to the tribunal.

The final hurdle - the legal fees to be paid by foreign lawyers defending the accused (senior Khmer Rouge leaders) to the Cambodian bar council, has just been sorted out.

The original demand, that foreign defense lawyers should pay around US$4,900 (Bt170,177) a year for the privilege of addressing a "Cambodian court", has been knocked down to a reasonable $500 fee.

The international judges threatened a boycott against "extortionate" fees that might have undermined the right of the accused to choose foreign counsel (the prosecution is led by a Canadian lawyer with a Cambodian co-prosecutor).

French lawyer Jacques Verges, who has made his mark with his energetic defense of notorious clients including Klaus Barbie and Carlos the Jackal (Ilich Ramírez Sánchez), has promised to appear at the tribunal on behalf of Khieu Samphan, president of the Khmer Rouge regime and, as it happens, a former student classmate of Verges in Paris.

Why such monumental procrastination over Cambodia? In the aftermath of the Pol Pot bloodbath, international lawyers were largely silent, when, in 1979 and the early 1980s, Cambodian survivors publicly called for an international tribunal.

The US and some western governments preferred to support the bloody credentials of the Khmer Rouge - keeping them in the Cambodia seat at the UN - rather than the cause of international justice. Many observers in the 1980s and even the 1990s predicted that a Cambodia tribunal would never happen.

It was only in 1997 that the UN belatedly recognized that these terrible crimes should be addressed. Even then, UN-Cambodia negotiations dragged on for six years until a final agreement in 2003.

Certainly no other tribunal has endured so many obstacles and so many governments vehemently opposed to the cause of justice.

Finally, a tribunal was announced (officially known as ECCC - the Extraordinary Chambers in the Courts of Cambodia) and set up last year. But even this glimmer of justice is under threat from many quarters.

The purveyors of doom and gloom have cast a pall of pessimism over proceedings. Rumors abound of international judges about to walk out, the tribunal on the verge of collapse, or speculation that Prime Minister Hun Sen's government is hell-bent on sabotaging the whole thing.

But the Phnom Penh reality is far more complicated and nuanced. The decades of cynical neglect during which time several Khmer Rouge leaders have died, including Pol Pot, and the tortured history of negotiations has made this a uniquely complicated tribunal from the outset.

No one is more deeply committed to a tribunal than Khmer Rouge victim Chhang Youk, who today heads the internationally respected Documentation Centre of Cambodia (DC-Cam) the genocide research centre set up in 1994 after US Congress passed the Cambodian Genocide Justice Act.

Chhang said: "I am very satisfied with the prosecution, with both Cambodian and international lawyers. They are working just fine together, there is no conflict here. They are a model of cooperation for the rest of the tribunal." DC-Cam has released more than 58,000 documents to the prosecution, including vital telegrams and communications sent by top leaders.

Unfortunately, arguments over legal fees and rules of evidence have obscured the impressive progress made by the joint prosecution team led by Canadian Robert Petit.

Petit, an international prosecutor who served in war crimes tribunals in Rwanda, Kosovo, East Timor and Sierra Leone, is among the most positive. "We've made a lot of progress, more than other tribunals [at this stage]. We have a pretty good record, especially considering the limited resources we have."

The prosecution team is ready to proceed with indictments. The tribunal has not run aground, but it continues to sail through turbulent waters. As one insider who is trying hard to make the tribunal work describes it: "Some international judges seemed to have a hard time understanding anything about Cambodia, [and] more than a few Cambodian judges do not understand much beyond the borders of Cambodia." This is a recipe for acute misunderstanding.

It has been suggested that keeping this tribunal on the rails and on time to deliver justice requires a special UN envoy. The existing UN body is headed by Michelle Lee, a UN coordinator who runs the administration of the international component.

In most UN missions, New York appoints a credible diplomat to head the mission and mediate any conflict with the host government.

The history of UN-Cambodia negotiations over the tribunal has often been acrimonious. In 2002, the UN legal affairs team staged a unilateral walkout over the negotiations, which delayed the formation of the tribunal by at least a year.

The tribunal has also faced hostility from China, who, it seems, never wanted it to happen in the first place. Flip-flops from Prime Minister Sen and his tribunal task force are partly explained by intense pressure from Beijing to save face from damning facts that will come out in the trial concerning their complicity and support for the Pol Pot regime.

The struggle to ensure this tribunal abides by international standards and solves conflicts quickly is crying out for dynamic mediator. The UN needs to appoint an outstanding diplomat or former statesman to help both sides avoid further deadlock.

This tribunal will continue to be plagued with bottlenecks and problems until the UN finds a respected mediator, acceptable to both sides, to expedite the process.

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