

SPECIAL REPORT

Khmer Rouge Trials

by *Thierry Cruvellier, Phnom Penh*

## Five more suspects in Phnom Penh

No more than ten former members of the Khmer Rouge will be prosecuted before the Extraordinary Chambers in the Courts of Cambodia (ECCC). On September 7<sup>th</sup>, the interim international co-prosecutor William Smith submitted to the office of the co-investigating judges what he said were his final requests for investigation. They relate to five individuals, charged in two separate submissions, thus adding to the five people already prosecuted in 2007.

The identities of the accused have not been released, but it is widely expected that former high-ranking military leaders Sou Met and Meas Mut make up one of the new cases, while it's thought the other case involves three Khmer Rouge cadres who acted at the district level.

The Cambodian government has publicly and unequivocally opposed all prosecutions other than the five that have been under way for the last two years.

The Cambodian co-prosecutor Chea Leang appeared to support her government, when she opposed the additional investigations requested by her international colleague. But after nine months of deliberation, in a decision made public September 2<sup>nd</sup>, the five judges of the pre-trial chamber indicated that they had not been able to resolve the disagreement between the co-prosecutors—the three Cambodian judges opposed the new submissions, while their two international colleagues gave their approval. In the absence of a super majority of four votes, the international prosecutor is thus free to act.

### ***“The final results are zero”***

The current division, which sheds light on the political context in which the ECCC operate, means the fate of these additional investigations is uncertain. It could easily be stalled at the investigative stage. The operation of the office of the prosecutor itself is also unclear, in as much as the international co-prosecutor seems to be acting without the collaboration of his national partner.

The government, meanwhile, is keeping up the pressure on the court. In a speech on September 7<sup>th</sup>, Prime Minister Hun Sen once again raised the spectre of a civil war that could cause up to “200,000 to 300,000 deaths” if new proceedings are launched.

While no one takes the threat of instability seriously, Hun Sen warned two days later that the court would not obtain a new indictment. “Please go ahead with the procedures. I will not have a say, but the thing is that you need to find a supporting force...you need four votes,” he stated, suggesting that the Cambodian judges should also do their part to block the process. “Thus, the final results are zero”.

At least one former Khmer Rouge leader seems to find support in Hun Sen's words. In an interview with Voice of America on September 10<sup>th</sup>, 65 year-old Im Chaem, who several sources identify as one of the proposed new suspects, said: “I absolutely will not go, because the charge is unacceptable, and even if I'm called to court, I will not go.”

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### ***Re-launching the IJT***

As we re-launch the International Justice Tribune after an absence of more than a year, we want to take this opportunity to remind our readers of how we see our role here at the IJT, and why we thought it important to bring back the bi-weekly international criminal justice newspaper.

The need for global coverage of transitional justice becomes more pressing every year.

Understanding the use of global instruments of justice requires that we also consider the political realities and strategies of major powers.

At the IJT we aim to provide a unique, global perspective on how war crimes justice develops around the world, and on the interplay of international justice and regional or world politics.

With its thirty correspondents throughout the world, the IJT is the only publication that provides this service.

We hope that the new IJT will continue its strong record of journalistic excellence and commitment to covering stories relating to all aspects of international justice, from court proceedings to the impact these trials and tribunals have on the daily lives of the victims on whose behalf the courts are established.

# Civil parties under attack at Khmer Rouge court

Chief prosecutor at the International Criminal Court (ICC), Luis Moreno Ocampo, is gathering information about possible war crimes committed by NATO soldiers, Al Qaeda and insurgents in Afghanistan.

Afghanistan is a party to the Rome Statute and “any war crime or crime against humanity committed on its territory by Afghan nationals or foreigners is of interest to the court”, Ocampo told reporters September 9th.

He added that he had received “allegations from different sources...including massive attacks, collateral damage exceeding what is considered proper, and torture” and was looking into the situation in Afghanistan. If his preliminary examination shows grounds, a full investigation could be launched.

The ICC is also conducting preliminary inquiries into allegations of serious crimes committed in Georgia, Colombia, Kenya, Ivory Coast, and by Israeli forces in Gaza.

## UN Gaza report released

The UN fact finding mission on the 2008/9 Gaza conflict claims to have found evidence that both Israelis and Palestinians committed serious war crimes and breaches of humanitarian law.

The report recommended that the Security Council should require Israel to investigate the alleged crimes.

The Security Council should also appoint a committee of experts to monitor the investigation, the report added. If it did not take place, or did not conform with international standards, the situation should be referred to the International Criminal Court.

The report also called on the Security Council to require the committee of experts to perform a similar role regarding the relevant Palestinian authorities.

Justice Richard Goldstone, who lead the mission, will present the report to the UN Human Rights Council on September 29th.

**Victims attending the trial of Kaing Guek Eav – a.k.a. Duch – were outraged when, on August 27th, the court’s trial chamber challenged their participation in the final phase of the trial.**

Preliminary internal discussions on the role of civil parties had been held within the Extraordinary Chambers in the Courts of Cambodia (ECCC) for several months. On August 21st, the result of these efforts was presented at the last minute to civil society organizations and human rights NGOs.

However, on August 27th, a majority of first instance judges suddenly revealed their determination to enact broad reforms regarding the participation of victims before the court.

In the middle of the morning, the trial chamber announced that, by a vote of four to one, it would not allow civil parties to be involved in debate over sentencing.

But that was just the first blow. The day before, the trial chamber had also asked all parties to the trial to give their opinion regarding the right of lawyers for civil parties to participate in the final phase of the process—that of the presentation of character witnesses such as psychological experts and defense witnesses.

The prosecutor defended the right of civil parties to examine these witnesses. “There are two choices: either one is party [to the trial] with everything that means, or one is not,” warned trial attorney Vincent de Wilde, dismissing the idea that there could be such a thing as a “half party”. “It is not justified that the civil parties suddenly be reduced to silence .... That would be a mistake,” he concluded, while suggesting some changes, such as a reduction in the time allotted to speak.

**“You sowed the wind,  
you reap the whirlwind”**

After the lunch break, the defense took the opportunity to sow a

bit more trouble for the other side. “You thought yourselves as prosecutors,” François Roux told lawyers for the civil parties, “You have sowed the wind, you reap the whirlwind.”

After a recess, the chamber handed down its decision. It was a slap in the face: the civil parties found themselves excluded, de facto, from the final phase in the process. Judge Jean-Marc Lavergne, who had disagreed twice with his peers, looked somber and the announcement plunged the courtroom into silence.

When arguments reopened on August 31st, 28 civil parties gathered in front of the court building saying they were boycotting the trial. In the court, the few victims’ lawyers still present made their protest heard, just barely avoiding contempt of court.

It seemed the trial would draw to a close in an atmosphere of mourning and anger, with the image of empty rows, where for five months the victims and their families had sat.

## **New method of representation**

But by the time the session ended on September 11th, the worst seemed to have been avoided and the abolition of civil parties was ruled out.

A working committee was established to define a new method of representation for the civil parties by January. The suggested process would be the nomination, either independent or through the court, of “principal co-lawyers” for the civil parties who, on a case by case basis, could appeal to lawyers for other specific victim groups.

After having threatened to radically end victim participation, the ECCC seems to have decided to move forward with the civil party experiment, provided changes are made along the way.

The International Criminal Tribunal for the former Yugoslavia (ICTY) convicted Florence Hartmann of contempt of court for quoting confidential court documents in her publications.

The September 14th ruling ordered Hartmann – a former spokesperson for ICTY Chief Prosecutor Carla del Ponte – to pay a fine of 7,000 euros.

Hartman accused ICTY judges of keeping important evidence against Serbia from the International Court of Justice (ICJ) when it was deliberating a genocide complaint against Belgrade. She claimed the documents could have influenced the ICJ's decision to clear Serbia of genocide in Bosnia.

Moloto said that Hartmann's actions could deter states from cooperating with the tribunal where the provision of evidentiary material is concerned.

#### Plavsic to be released

The Yugoslavia tribunal has granted a request for the early release of former Bosnian Serb President Biljana Plavsic who is serving an 11-year sentence for war crimes.

Plavsic was convicted in 2003 of persecuting Bosnian Muslims in the 1992-95 Bosnian war and is serving her sentence in Sweden. By October 24th, she will have served two-thirds of her sentence, making her eligible for parole under Swedish law.

Judge Patrick Robinson said that Plavsic should be granted early release, "notwithstanding the gravity of her crimes."

Plavsic pleaded guilty to persecutions on political, racial and religious grounds by "inviting paramilitaries from Serbia to assist Bosnian Serb forces in effecting ethnic separation by force". As part of the plea bargain, charges of genocide, extermination and murder were dropped from her indictment.

# Stephen Rapp, US Ambassador for War Crimes

*"It's important that we get back into a position of leadership"*

**Since 2005, Stephen Rapp has been prosecuting war criminals – first as Chief of Prosecutions for the International Criminal Tribunal for Rwanda, then as Chief Prosecutor for the Special Court for Sierra Leone (SCSL), where he led the case against former President of Liberia, Charles Taylor.**

He's now back in Washington D.C., as head of the US State Department's Office for War Crimes Issues.

The new Ambassador-at-large for War Crimes spoke to the IJT on September 7th - his last day as prosecutor for the SCSL.

**What was the greatest challenge in making the prosecution case against Taylor?**

There is no dispute about the horrendous atrocities committed in Sierra Leone – the amputations, the rape, the sexual slavery, the murders, the use of child soldiers, the ways in which people were enslaved to dig diamonds - but you have to show the responsibility of someone that never set foot in the country.

Here you have to rely upon oral testimony and you also have to rely on individuals who themselves have been involved in some of the atrocities.

And when you have to go beyond Sierra Leone - which is the country in which we have the power to ask for cooperation of the police and other authorities - and go to Liberia where we don't have that, and find credible witnesses and assure them of protection and bring them to the Hague and present their testimony...That is an enormous challenge.

**As a model of a hybrid court, do you think the SCSL was successful?**

I think so. Doing it the way

we did it, which was to build it as a partnership between the country and the international community, I think it's been justice that's been a whole lot closer to the people and a whole lot more meaningful.

**Was it a blow to US policy of "renationalising" international justice that the Taylor case couldn't be tried in Sierra Leone but had to be brought to The Hague?**

Obviously, moving it here, symbolically, was not useful. It was possible then for some to say it was a case of Europe judging Africa and we have to say, wait just a second here, this is the Special Court for Sierra Leone, 60 per cent of its people are Sierra Leonean, so is a substantial number of its judges in a court with a statute that was built on agreement with the country.

It's not a bunch of strangers and it's the internationals working in collaboration with them.

**But is the hybrid model still central to US policy?**

Very much so. Keep in mind that the US is prepared to engage with the ICC when the ICC has jurisdiction over cases and when there really isn't a national option available because there's no ability or willingness to investigate or prosecute.

But as a general rule, it makes so much more sense to do it where the crime has occurred, and the process helps build the justice system so that it's able to deal with other challenges in the future, so it's able to deal with the mid-level or lower level offenders that an international institution can't deal with.

And then to the extent you have the problems that lead to internationalisation, that you've got perhaps the perception of victor's justice, that the national system isn't sufficiently independent, that it doesn't have the capacity to do sophisticated investigations with forensic science

## ► Bemba's provisional release still in question

Former Democratic Republic of Congo Vice President and war crimes suspect Jean-Pierre Bemba is still being held at the International Criminal Court (ICC), despite a decision of provisional release taken by the court last month.

ICC Chief Prosecutor Luis Moreno Ocampo appealed the ruling and on September 3rd, the Appeals Chamber suspended Bemba's release until it reaches a final decision.

Ocampo said it would be risky to release Bemba – the most high-profile suspect to appear before the ICC:

“The pending charges may result in conviction with an overall lengthy sentence,” he argued, and that “increases the incentive to flee and to obstruct the prosecution. It also increases the capacity to harm witnesses, since the Accused knows the identity of the witnesses and will continue to discover essential prosecution evidence.”

Other international tribunals have been hesitant to provisionally release suspects.

Only the International Criminal Tribunal for the former Yugoslavia provisionally released over a dozen suspects, mostly for family or health reasons.

and all of that, then you can inject into that process international participation to improve it and to increase the independence of it.

### **How do you understand the new US administration's policy towards the ICC?**

It's already to some extent an American policy to engage with the ICC, to work with the ICC, and I think we can very much look forward to that continuing and being strengthened.

At the same time, if you look at quotations from President Obama and Secretary Clinton, they both have indicated that it's premature for the US to join the ICC, that there are still issues about the fact that the United States is involved in worldwide security and humanitarian assistance and efforts against terrorism, and it could find its forces subject to politicised prosecutions.

The position that I've said that the US should take, at least before stepping forward to deal with whether we ratify the ICC, is to basically take a firm position that if we have any of these crimes committed by Americans, we've got tough laws on genocide and war crimes and we will investigate and prosecute our own. Because the ICC basically says it's up to the country to do it themselves and it's only when it can't or won't that the ICC steps in. And our position should be that we'll never give cause for any legitimately motivated prosecutor to take a case against an American.

### **Two major issues that President Obama has had to tackle since taking office are the status of the US military prison at Guantanamo Bay, and ongoing revelations about the CIA torturing terrorism suspects. What sort of judicial solution would you propose to these very political cases?**

First of all, I want to note that as Ambassador for War Crimes, I'm not a prosecutor. I'll be dealing with the diplomacy of encouraging appropriate methods – including prosecution – to bringing accountability to situations of mass atrocities.

My office doesn't have any direct role on the Guantanamo situation. Obviously the President has spoken on that, we'll be closing Guantanamo within a year, that there's a review process going on in terms

of the individuals who remain there in terms of where they can be tried.

And certainly to the extent I'm involved in policy, I'll be urging that we adhere to our international obligations. We'll never again take the position that Geneva doesn't apply to the United States, a sad position taken not that long ago by the previous administration.

And in regard to the torture allegations, I think what's happening there is entirely appropriate and consistent with any country, even if they were in the ICC, which is that you deal with that yourself.

Just because there are allegations doesn't mean necessarily that these are cases that can be prosecuted. So we can't say for sure that there will be prosecutions but what we can say is there's a good faith investigation on-going and if there are sustainable cases, they'll be brought.

### **As you say, your role is now diplomatic. Is that a challenging position to take on at the moment given the many current allegations of US complicity in torture and prisoner abuse?**

Exactly. We've had the difficult perception created that America is opposed to the enforcement of international humanitarian law.

It occurred at the same time that the US was supporting institutions like the Yugoslavia tribunal, and the Rwanda tribunal and the Sierra Leone Special Court, and other special approaches. It's important that we get back into a position of leadership and that we are consistent in thought, word and deed.

And given what President Obama said in terms of our values and what we believe in as a country and the reason people have traditionally admired the United States, because of its adherence to democratic values and human rights, that will be clear again, and we'll have to deal with those situations that occurred when we weren't so observant to those values.

But whatever might have happened last year, two years ago, ten years ago, fifty years ago, shouldn't prevent us from exercising leadership now.

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