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Analysis Extraordinary Chambers in the Courts of Cambodia

By Julia Wallace, Phnom Penh

Losing civil parties in Cambodia

Soum Rithy spent two years of his youth being beaten and tortured in a Khmer Rouge jail between 1977 and 1979, after Pol Pot's cadres mistook him for a soldier in the previous government. He saw his father die of disease exacerbated by the lack of modern medicine under the ultra-Maoist regime, while two brothers starved to death. His third brother, the youngest, had his throat cut by Khmer Rouge soldiers after he was caught stealing a papaya.

Rithy was excited when, in mid-2010, he was formally accepted as a civil party in Case 002, the Khmer Rouge tribunal's biggest and most important case, in which four senior regime leaders are accused of genocide, war crimes and crimes against humanity. Like many victims, the formal recognition of his suffering and the idea that he could play a role in convicting the leaders whose policies led to his torment, meant a great deal to him.

The Extraordinary Chambers in the Court of Cambodia (ECCC) is the first internationalised court to allow victims of mass crimes to participate fully in proceedings as civil parties - a concept borrowed from French-influenced Cambodian criminal procedure. Civil parties are able to file claims for damages against the court's defendants and support the prosecution during proceedings, exercising nearly full procedural rights. They may also receive "collective and moral" reparations from the accused.

But since the hybrid court's inception in 2006, these victims' rights have been gradually chipped away at, in an effort to streamline and simplify court proceedings - to the point where many observers no longer consider them to be true civil parties anymore. Although he has little formal education, Rithy has attended every single day of the trial in Case 002 and watched the proceedings closely. He is frustrated by what he sees as a steady erosion of his lawyers' ability to represent him. "Civil parties have limited rights to speak on the floor of the court, and our civil party lawyers don't get much chance to argue on the floor," he said.

"Victims do not participate as civil parties at the ECCC; they act as victim participants, same as at the International Criminal Court (ICC). In fact, in some instances victims at the ICC have more robust participation rights," said Anne Heindel, an expert in international law who monitors the trial for DC-Cam, the archive centre of the Khmer Rouge regime. She said the court should be more honest about the fact that its experiment in civil party participation has been scaled down, and suggests the court should perhaps even stop calling its victim participants "civil parties."

First blows in Duch trial

The first blows were relatively minor. During a pre-trial hearing in 2008, civil parties were denied the right to directly address the bench. Victims and their lawyers boycotted part of the 2009 trial of Khmer Rouge prison commandant Kaing Guek Eav, known as Duch, after they were refused the right to question character witnesses or make statements on sentencing - particularly important in that case given that Duch based his defence on a tearful bid for leniency.

In a passionate dissent to the trial judges' decision on that issue, Judge Jean-Marc Lavergne of France asked, "How far can one go without breaching the spirit of the law, or fundamentally distorting the meaning of the involvement of civil parties before the ECCC and the purpose of the trial as a whole, characterised by the coexistence of two interrelated actions, namely criminal and civil actions?" At the end of the Duch trial, victims were stunned when the verdict was read out to find that they had been awarded no reparations at all, save for the right to have their names listed in the judgement. More recently,

One Tweeting Judge and two cases to be dropped

The non-nomination of the "tweeting judge" may signal the end of Cases 003 and 004. Swiss Judge Laurent Kasper-Ansermet was informally told by Cambodian officials last weekend that authorities had rejected him as the Khmer Rouge tribunal's new investigating judge, according to the Phnom Penh Post. Speaking through Twitter on Sunday, Kasper-Ansermet described facing hostility to his plans to further investigate Cases 003 and 004, a move unpopular with Phnom Penh. Referring to a series of negative statements made by Cambodian Co-Investigating Judge You Bunleng he said: "The position adopted by my national colleague leads to the situation where the [Office of the Co-Investigating Judges] would not be anymore constituted according to the law and therefore not properly functioning," Kasper-Ansermet said. "It has been like walking in shackles."

No official announcement rejecting the Swiss judge has been made and so the UN says it is unable to react. The office of UN Secretary General Ban Ki Moon told media last week that, "The United Nations has made every effort to secure the appointment of the judge." Cambodia had "an obligation" to appoint the reserve candidate in the case of the vacancy created by the departure of Judge Siegfried Blunk of Germany in mid-October. [Read IJT_142 - A tweeting judge in a twisted case]

Canada: endless extradition threat for Mugesera

Will the 15 year-long judicial battle for the extradition of Rwandan scholar Léon Mugesera, 58, soon come to an end? Mugesera is accused of inciting Hutus to exterminate Tutsis during a notorious speech in November 1992. He fled with his family to Canada in 1993. Although used by the International Criminal Tribunal for Rwanda (ICTR) in several trials, Mugesera's speech did not provide grounds for universal jurisdiction in Canada, where a far less notorious suspect, Désire Munyaneza, was jailed for life in 2009. "There is nothing in the evidence to suggest that Mr. Mugesera deliberately […] incited murder, hatred or genocide," said the Ottawa Federal Court of Appeal in September 2003, reversing two previous deportation orders. The Supreme Court upheld them in 2005. But Canadian Justice Minister Irwin Colter said his country would not hand Mugesera over "unless we do receive assurances that a capital punishment will not be executed".

In late 2011, after the ruling by the European Court of Human Rights in favour of Sylvère Ahorugeze's extradition from Sweden and the ICTR's first authorised transfer to Kigali of Jean Uwinkindi, Canada's immigration ministry ordered Mugesera's "deportation" to Rwanda for January 12. After a "last" appeal, rejected last Wednesday, he collapsed and was transferred to hospital. Grace came from the UN Committee Against Torture, which requested a delay in investigating due to the risk that Mugesera could face torture in Rwanda. Canadian judges ordered a stay of the deportation until January 20.

France & Rwanda on the reconciliation plane

"While I am happy with the findings and everybody in this country seems to be very excited, I am not excited," Rwandan President Paul Kagame said to the New Times after the 10 January release of a French ballistics report on the 6 April 1994 coup in Kigali, that seemed to exonerate the RPF. "The reason is simple – have we been waiting to be cleared by a French judge? Were we, all along, waiting to be absolved by a foreign judge?"

[Read also - Rwanda's RPF off the genocide hook]

civil parties were completely denied the right to give opening statements when substantive hearings in Case 002 began in November. The decision was handed down by trial judges in a peremptory memo over the vocal protests of civil party lawyers, who begged for just 30 minutes to present their clients' perspective.

But the most frustrating step for many victims came when civil party participation was "consolidated" in early 2010. Thereafter, all victim participation in court would be channelled through two "lead co-lawyers," while the victims' personal lawyers would not be able to speak. The civil parties would have to file one joint claim for reparations.

This change was a direct response to the civil party system's chaotic first outing during the Duch trial, which saw the case's 90 civil parties divided into four groups, each of which was led by multiple foreign and Cambodian lawyers. Lawyers for all four groups were granted the right to speak in open court, raising concerns over equality of arms and making it difficult for judges to effectively manage the trial. Since the ranks of civil parties in Case 002 have swollen to nearly 4,000 victims, it was obvious that something would have to change.

Lead Co-Lawyers - "uncontrolled power"

Despite the fact that the new system has been in place for nearly two years, victims and their personal lawyers are still struggling to adjust to what they say are frustrating constrictions on their rights, and a fundamental shift in the attorney-client relationship.

There is no mechanism to deal with disputes between Lead Co-Lawyers and the 30-odd personal lawyers, which has also created friction. Silke Studzinsky, a German lawyer representing hundreds of civil parties, including many victims of sexual violence, said she was frustrated by the lead co-lawyers' seemingly arbitrary rejection of submissions she wanted to file on behalf of her clients.

Under the old system, Studzinsky filed a request for investigative action that led to the inclusion of forced marriage in the Case 002 indictment, something that she said would be difficult now. "We have NO body to complain to about whatever decision they take. We are fully in their hands. They do not have only a coordinating role, they decide which content is submitted and which is excluded. They have uncontrolled power."

Another blow to victims was struck late last year, when trial judges decided to "sever" Case 002 into multiple mini-trials over serious concerns that another one of the elderly accused might die or become incapacitated before a verdict (Khmer Rouge Social Action Minister Ieng Thirith was recently declared unfit for trial due to age-related dementia.)

But the effect of this severance on civil parties has not yet been completely considered. In the first mini-trial, only forced evacuations and population movements will be considered. The three-quarters of civil parties whose grievance is not connected to these evacuations may never get their day in court, and they will be excluded from any reparations awarded in the judgement.

Theary Seng, a Cambodian-American lawyer who was imprisoned under the Khmer Rouge as a child and lost her parents to the regime, has been one of the most prominent civil parties since 2007, when she became the first victim to submit an application to participate in Case 002. In November, she theatrically withdrew her civil party status by handing the court a sheet of paper that said, simply, "ENOUGH." She said she was frustrated with government interference at the court, but also lashed out at the lead co-lawyer system, calling Ms. Simonneau Fort an "incompetent neophyte" and saying she had found it impossible to work with her. "The court has created a disempowering process for victims," she said.

This is precisely the role the lead lawyers were intended to take on - gatekeepers to thousands of occasionally fractious victims and their lawyers, who tend to have widely disparate legal strategies and goals. "It can permit a kind of coherent and strategical defence, avoiding opposite positions or repetitive pleadings. Referring to the number of civil parties, it was necessary to create that organisation," Simonneau Fort responded.

Still, she too has felt that the court is unnecessarily constricting the rights of victims. "Sometimes it is clear that the [Trial] Chamber considers that civil parties have not such an important role as a party," she said. "Some oral or written decisions have limited our rights: right to speak, right to answer on specific items, time to do it."

Rithy understands well that he may never see concrete reparations, but he is still hoping for the court to take a broader view of civil party rights. "We want the rights of civil parties to be respected and treated equally on the floor of the tribunal because only victims can describe how that physical and emotional suffering was when we lost our close relatives," said Rithy.

By Radosa Milutinovic, The Hague

Cuska - a "brave and patriotic" trial

It was a sign of changing times in Serbia at the end of December 2011, when Deputy War Crimes Prosecutor Bruno Vekaric told journalists that an insider witness testimony describing atrocities against Kosovo Albanian civilians committed by Serb paramilitaries in 1999 constitutes a "brave and patriotic act."

"It is patriotic to testify about the killings of women and children and other horrors which he saw with his own eyes. It is as patriotic as defend[ing] your fatherland," Vekaric said. He was referring to the account given by Zoran Raskovic during the high-profile trial of members of the Jackals paramilitary unit that opened on December 20, 2010 before the Special War Crimes Chamber of Belgrade's High court - which started its work in 2003.

Twelve accused - two of them still at large - are charged with crimes against ethnic Albanians in the village of Cuska in western Kosovo, including the killing of at least 44 civilians, rape, looting and the burning of property. The crimes were allegedly committed on May 14, 1999, during NATO's bombing of Serbia. After refusing the court's protective measures, Raskovic - who was 20 years old and a member of the Jackals at the time, testified in gruesome detail how his former comrades killed women, children and men in Cuska.

"Ranko Momic was the worst... He raped a pregnant Albanian woman before my own eyes. He then shot her. Afterwards, Momic lit a cigarette and ordered me to set a house on fire," Raskovic told the court on December 26, amid loud protests from both the accused and their supporters.

"We saw no terrorists"

The importance of Raskovic's widely-reported testimony is hard to overstate in a Serbia where predominant public opinion still has it that Serbian forces in Kosovo fought a just war against Albanian KLA "terrorists," helped by NATO "aggressors." "Nobody shot at us and we saw no terrorists," Raskovic testified. The Jackals case is not the first in Belgrade to be brought against Serbs for crimes in Kosovo. In four previous cases, nine Serb perpetrators, including policemen and members of the notorious Scorpions paramilitary - were sentenced to a total of 165 years in prison for the massacres of Albanian civilians in 1999.

But the Cuska trial could turn out to be the most significant because of the alleged aim of the Jackals' operation. According to the indictment, their goal was to "spread fear among the Albanian population and to force it to leave Kosovo for Albania." This charge implicitly places the Jackals as direct perpetrators, within a joint criminal enterprise aimed at persecuting hundreds of thousands of Albanian civilians outside Kosovo. That mirrors the main prosecution strategy in cases against high-ranking Serbian officials such as Sainovic and Djordjevic at the ICTY.

To date, six of them have received long prison sentences (15 to 27 years) for conceiving and implementing such a criminal enterprise under the leadership of Slobodan Milosevic, who died in 2006 near the end of his trial at The Hague. Cuska and Belgrade's other trials also illustrate the need for regional cooperation in prosecuting war crimes. Deputy prosecutor Vekaric says Serbian prosecutors have so far exchanged information and evidence in only 19 war crimes cases over eight years, with Kosovo's "provisional authorities."

Many non-Serb victims and witnesses, especially from Kosovo, have testified in Belgrade, thanks largely to the Humanitarian Law Center (HLC), an NGO which has gathered dossiers on crimes in Kosovo, Croatia and Bosnia. So far, Special Chamber sentenced 48 Serb perpetrators to a total of 545 years in prison for war crimes committed in Croatia, Bosnia and Kosovo, and one Albanian to 13 years.

"Selective" indictments

The HLC - headed by renowned human rights activist Natasa Kandic - is also the harshest critic of Belgrade's war crimes prosecutors. The Centre claims that indictments are "selective" - limited to direct perpetrators and not aimed high enough at the military and police chain of command. Responding angrily last November to that charge, prosecutor Vladimir Vukcevic claimed Kandic was "biased" and "self-interested to prove, without any valid evidence, that our state is responsible for all the crimes committed in Croatia, Bosnia and Kosovo, not the perpetrators who are being prosecuted." This dispute between one-time allies illustrates the enormity of the challenges that war crimes prosecutors and judges in Belgrade still face - eight years after they started work.

Nine KLA convictions quashed

The Court of Appeals in Belgrade has quashed the convictions of nine former members of the Kosovo Liberation Army (KLA) jailed for the murder of civilians in 1999. In a statement the court said that the first instance verdict's "findings are unclear and contradictory, and are in violation of criminal proceedings." The men will face a retrial, according to the court's website. The KLA's Gnjilane Group members had been sentenced to between eight and fifteen years in prison. Four of them will remain in custody where they have been remanded for three years since their arrest. The war crimes trial was one of the most high-profile to be heard in a Belgrade court. But the reasons for overturning the verdict are unclear and the full judgement is not yet published.

Bangladesh "mastermind" arrested

Bangladesh arrested an Islamist leader last Wednesday on charges of war crimes during the country's 1971 liberation struggle against Pakistan, lawyers said. Ghulam Azam, 89, a former head of the opposition Jamaat-e-Islami party, has been accused of creating and leading pro-Pakistan militias which carried out murders and rapes during the nine-month war.
"He has been arrested after the International Crimes Tribunal rejected his (anticipatory) bail petition," said state prosecutor Syed Haider Ali. "He was the mastermind of all crimes against humanity during 1971."
Azam is the sixth and the most high profile Islamist to have been arrested since the nation's secular government set up the tribunal in 2010. He faces 62 counts of crimes against humanity. Two senior members from the main opposition Bangladesh Nationalist Party are also facing war crimes charges.

By Thierry Cruvellier

ICTR legacy: fragile and confusing

When former Rwandan MRND leaders Edouard Karemera and Mathieu Ngirumpatse received life sentences in December 2011, the conclusion of 17 years of work at the International Criminal Tribunal for Rwanda (ICTR) was remarkable: there was no plan at the state or party level to exterminate Tutsis prior to the shooting down of former President Habyarimana's plane on 6 April 1994.

"The Prosecution has not proved beyond a reasonable doubt that Karemera and Ngirumpatse, or other leaders, planned the massacre of Tutsis in advance of the assassination of President Habyarimana," judges wrote in the summary of their yet unpublished decision.

The last major judgement

It is the last major judgement that an ICTR trial chamber is likely to hand down. And it underlines the fragile and confusing legacy of the court regarding the narrative of the 1994 genocide. To date, 11 former cabinet ministers have been tried (four of whom were acquitted), two are still on trial and two more are at large or dead. In effect, almost the entire government that presided over the genocide has been brought to book.

On May 25, when the genocide was almost complete, Karemera became Minister of the Interior, while Ngirumpatse acted as a special envoy for the interim government. They were "inextricably linked with the policies of the Interim Government," judges wrote, meaning they agreed with its decision to mobilise militiamen and civilians to destroy Rwanda's Tutsis.

Given how cursory the oral judgement was, it is not yet possible to assess how it may hold up on appeal. But it is enough to wonder if the ICTR's genocide narrative has given as much material to its victims as it has to its deniers.

According to prosecutors, Karemera (MRND's vice president) and Ngirumpatse (MRND president) formed, trained, armed, and financed the Interahamwe militia, the youth branch of the party created in 1992 and the leading civilian perpetrators of the Rwandan genocide. The prosecutor also claimed that both men participated in meetings and rallies that fostered the Hutu Power movement and anti-Tutsi extremism. But judges dismissed all those charges.

Short of proof

"The Prosecution has not proved beyond a reasonable doubt that the military training of the Interahamwe or the distribution and stockpiling of arms were intended to facilitate the killing of Tutsis," judges wrote. "The Chamber considers it reasonable to infer that Karemera and Ngirumpatse... were merely seeking to protect themselves and their supporters from attacks from other opposition political parties, or the RPF [the Rwandan Patriotic Front, the rebel army that overthrew the government in July 1994]."

Similarly, prosecutors failed to prove that Interahamwe rallies were called for killing Tutsis. "It is reasonable to infer that [the accused] merely held the political rallies to galvanise support for their party and speak out against opposition parties and the RPF," the Chamber said.

From one judgement to the next, ICTR judges have tried to establish when Rwandan authorities may have agreed to set the genocidal machine in motion. This particular Chamber decided it was after April 12, contradicting other ICTR judgements. Judges are likely to trigger further outrage among survivors by giving some weight to the accused's theory of a "spontaneous" genocide.

"The Chamber acknowledges that the genocide may have started as a spontaneous reaction to the assassination of President Habyarimana, which was fuelled by the belief that the Tutsi-led RPF was responsible, and prior anti-Tutsi propaganda," judges wrote.

Guilty by inference

In recent judgements against top military and political leaders, the key word has been "inference." According to judges, no documents explicitly "manifest an agreement to mobilise extremist militiamen and armed civilians to attack, kill, and destroy Rwanda's Tutsi population." However, there were instructions to arm regional authorities, including with "cutting and thrusting weapons." After the plane was shot down and the massacres began,"the only reasonable inference is that Karemera knew that the civil defence forces were killing innocent Tutsis" with those weapons.

Conviction on what the documents "don't say"

"Karemera and Ngirumpatse failed to take necessary and reasonable measures to prevent their subordinates from further killing Tutsis, and to punish them." This is the main line that has increasingly been used as the basis for convicting some of the court's most prominent suspects.

A key element in Karemera's conviction is the role the civil defence plays in mobilising civilians to murder Tutsis rather than to fight rebels. But judges admit that the available documents do not show any such plan. The conviction, then, rests on what the documents "don't say," judges found.

"The Chamber considers that any individual or organisation which opposed the killings and wished to restore peace to the country, would have stated in obvious and emphatic terms that the mass slaughter of innocent civilians of mostly Tutsi ethnicity must end immediately."

The documents issued by the government did not. Therefore, they were an implicit approval of the massacre.

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