

BRIEFING PAPER

Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: A Critical Supreme Court Affirms Life Sentences

EXECUTIVE SUMMARY

On November 23, 2016, the Supreme Court Chamber of the Extraordinary Chambers of the Courts in Cambodia (ECCC) affirmed the life sentence convictions given to Nuon Chea and Khieu Samphan by the lower Trial Chamber in August, 2014. However, the Supreme Court was severely critical of some aspects of the handling of the case by the lower court. This paper summarizes and analyzes the judgment. The two men remain on trial on a second set of charges arising from their role in genocide and crimes against humanity committed by the Khmer Rouge regime that ruled Cambodia from April 1975 until the Vietnamese invasion of December 1978.

Summary of Supreme Court Chamber decision

In a notable 520-page decision, the Supreme Court Chamber of the Extraordinary Chambers of the Courts in Cambodia (ECCC) affirmed the life sentence convictions given to Nuon Chea and Khieu Sampan. The Supreme Court Chamber's decision, announced on November 23, 2016, confirmed an earlier ruling by the Trial Chamber against the two senior leaders of the Khmer Rouge.

While this decision is not the end of proceedings against Nuon Chea and Khieu Sampan, it does remove any possibility they would be spared from serving the rest of their lives in prison for crimes against humanity committed during the Khmer Rouge rule of 1975-79.

After nearly two years of trial proceedings, in August 2014 the Trial Chamber issued a judgment against Nuon Chea and Khieu Sampan in connection with three alleged criminal policies of the Khmer Rouge: The evacuation of the population of Phnom Penh in April 1975 (Population Movement Phase One), subsequent forced population movements (Population Movement Phase Two), and the targeting of former Khmer Republic officials for execution. The Trial Chamber's convictions against the accused for crimes involving each of these policies was based on a finding that they participated in a joint criminal enterprise (JCE) that encompassed the policies.

The Supreme Court Chamber was severely critical of many aspects of the Trial Chamber's judgment, finding that it relied on inadequate evidence or erroneous interpretations of the law in arriving and some of its key conclusion. But the Supreme Court Chamber confirmed the conviction of the accused, based on a theory of JCE, for the crimes against humanity of inhumane acts and persecution in relation to the evacuation of Phnom Penh in April 1975 and for murder and other inhumane acts in relation to subsequent mass movements of populations. However, the Supreme Court Chamber reversed the conviction for crimes against humanity committed at Toul Po Chrey, where hundreds of form Khmer Republic soldiers were executed, because a policy to target such persons was not reasonably established so as to justify a finding of JCE liability for those crimes. It also found that there was insufficient evidence of a large number of deaths during the evacuation of Phnom Penh to justify a finding of the crime of extermination and reversed that conviction against both accused.

Errors of factual finding and analysis

The Supreme Court Chamber's decision demonstrates a thorough factual and legal analysis of the large number of errors claimed by the accused. It includes a detailed review of the evidence relied upon by and the reasoning of the Trial Chamber. In numerous instances it determined that the Trial Chamber's analysis of evidence in support of its findings came up short.

The Supreme Court Chamber found that the Trial Chamber did not adequately analyze the probative value of some evidence, inappropriately relied on hearsay and unsworn or untested statements to make factual findings, and did not always explain its analysis as to how the evidence reached the appropriate threshold to justify certain factual finding. This is illustrated by a few examples:

[T]he Supreme Court Chamber considers that the Trial Chamber’s finding that “at least several thousand people died” during the evacuation due to “killings, starvation and exhaustion (which was the basis for the conclusion [that deaths occurred on a mass scale]) was unreasonable.... there was only little reliable evidence as to the occurrence of killings of civilians and of deaths due to the conditions imposed. Although it is plausible that more deaths occurred than those established through the evidence, the number of deaths actually proven is insufficient to establish killings on a large scale....[I]n light of the very limited evidence establishing actual deaths during the evacuation and the weakness of the evidence relied upon to establish the overall death toll, the Supreme Court Chamber considers that no reasonable trier of fact could have entered this finding. Accordingly, the scale element of the crime of extermination cannot be said to have been established in respect of Population Movement Phase One. (Para. 536 and 537)¹

And:

The Trial Chamber, nevertheless, found that the “majority [of evacuees during the evacuation of Phnom Penh] witnessed beatings, shootings and killings and saw countless dead bodies lying along the road as they exited Phnom Penh.” While [referenced] concrete factual findings recount the experiences of several evacuees, the Trial Chamber did not explain how it was able to infer that at least one million people shared the same experience of witnessing beatings, shootings and killings and reach such a finding beyond reasonable doubt, nor is such an explanation evident. In the absence of any such explanation, the Supreme Court Chamber considers that the Trial Chamber’s finding amounted to an unreasonable extrapolation. (Para. 600)

And:

[T]he Supreme Court Chamber considers that the findings relating to the conditions on boats, trains and trucks [during the Phase Two evacuations] are indeed formulated misleadingly, in that they create the impression of general conditions, even though they are based on single pieces of evidence, relating to specific incidents. (Para. 623)

In some instances, including the finding immediately above related to conditions during the Phase Two evacuations, the Supreme Court Chamber found that unsupportable factual findings made by the Trial Chamber did not impact the judgment because other evidence was available in the record to support the Trial Chamber’s conclusion. In other instances, the findings of factual errors resulted in the reversal of a conviction entered by the Trial Chamber. For instance, the above analysis from the Supreme Court Chamber that there was insufficient probative evidence of death on a mass scale during the evacuation of Phnom Penh made unreasonable the finding, to the required standard of beyond a reasonable doubt, of the crime against humanity of extermination. The Trial Chamber conviction of both accused for this crime was thus reversed.

¹ All paragraph references are to the Supreme Court Chamber Judgment on Appeal in Case 002-01, November 23, 2016, available at https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2016-11-23%2011:55/Case%20002_01%20Appeal%20Judgement.pdf.

Most significantly for the judgment against the accused, the Supreme Court Chamber found that the Trial Chamber's conviction for murder and extermination based on a policy to target for execution former Khmer Republic soldiers at Tuol Po Chrey after the Khmer Rouge took control of Phnom Penh on 17 April 1975 was based on evidence that was "weak, ambivalent, of low probative value and called into question by other evidence," (Para. 970) and that the conclusions were marked by "inadequacies in the evaluation of the evidence." (Para. 970) Thus the Supreme Court Chamber found that it was not reasonable for the Trial Chamber to find that it had been established beyond reasonable doubt that a policy emanating from the party center contemplating the execution of Khmer Republic soldiers existed at the time of the events at Tuol Po Chrey. Because the common criminal purpose regarding these events was not established, the accused could not be held criminally liable based on JCE for the crimes against humanity that the court acknowledged occurred at Tuol Po Chrey.

The decision emphasizes that much of the evidence presented at the trial—and to some extent relied upon by the Trial Chamber—was vague, imprecise, and insufficient to conclude that crimes were committed to the standard of beyond a reasonable doubt. This evidentiary problem arises partly because the facts at issue are over 30 years old, memories fade, witnesses die, and facts witnessed become blurred with facts heard about. Magnifying this problem is the convoluted combination of the civil and common law aspects of the investigation and trial of the case that created ample opportunity for multiple statements from witnesses resulting in inconsistent testimony. In addition, the severance of the charges against the accused into several trials created evidentiary issues about the relevance of certain evidence in each trial and complicated the effort to obtain a clear and complete picture of the facts. However, as the Supreme Court Chamber made clear, none of these problems can be a rationale for basing convictions for crimes against humanity on only hearsay, vague testimony, or unsupported extrapolation. Convictions must be based on rigorous testing of evidence regardless of the challenges faced by the prosecution in developing evidence.

Errors in legal conclusions

The Supreme Court Chamber also addressed significant challenges raised by the conclusions of the Trial Chamber. These included the intent requirement for the crime against humanity of persecution, whether in 1975 crimes against humanity required the prosecution to prove a nexus to an armed conflict or a state plan or policy, and the correct framework for JCE as it existed in customary international law in 1975.

The Supreme Court Chamber's decision includes an extensive review of jurisprudence related to the requirements for establishing JCE as a form of liability under the status of international criminal law in 1975. JCE is the legal theory that holds persons liable for crimes carried out by others acting as part of group who share a common purpose that includes the commission of criminal acts. The Supreme Court Chamber found that the Trial Chamber used a legally incorrect formulation of the requirements for JCE liability.

The Trial Chamber found that the common purpose of the Khmer Rouge—agreed to by the accused—was to "implement rapid socialist revolution through a 'great leap forward' and defend the Party against internal and external enemies, by whatever means necessary." The Trial Chamber stated that "[t]his common purpose was not in itself necessarily or entirely criminal," but was implemented "through the Population Movement Policy [...] and Targeting Policy [...] which *resulted in and/or involved* crimes." (Para 811, emphasis added) The Supreme Court Chamber held that a policy that merely

“resulted” in crimes was not adequate to establish JCE liability as that implied holding leaders liable for crimes that were not part of the agreed purpose, but which were merely foreseeable.

The Supreme Court Chamber held that the crimes must be more than merely foreseeable, finding instead that “the member of the JCE must accept the commission of the crime either as a goal, or as an inevitable consequence of the primary purpose or as an eventuality treated with indifference.” (Para. 809) Nonetheless, the Supreme Court Chamber found that the factual findings of the trial court supported a finding of liability under the correct articulation of JCE. Therefore, the Supreme Court Chamber affirmed convictions based on JCE for crimes committed during the Phase One and Phase Two population movements on the ground that they were an inevitable part of the evacuation plans that were part of the common purpose agreed to by the accused.

In its discussion, the Supreme Court Chamber made clear that it rejected application of what is known to JCE III (which extends liability to crimes not part of the common purpose but which are foreseeable to the members of the JCE) to cases brought before the ECCC. An argument for the application of JCE III by the ECCC was the subject of the Co-Prosecutors’ appeal. The Supreme Court Chamber rejected this appeal as inadmissible because it would not impact the judgment in the case at hand. Yet, it is clear from the decision that the chamber rejects the notion of JCE III as an applicable mode of liability under international law as it existed in 1975

The Trial Chamber judgment only covered a portion of the charges against Nuon Chea and Khieu Samphan. The trial of a slew of additional charges is ongoing with hopes that the evidentiary phase will be completed in the next several months. The Supreme Court Chamber’s decision establishes that the accused will spend their lives in prison regardless of the outcome of the ongoing trial. However, the decision will guide the Trial Chamber in a more rigorous analysis of the evidence presented and a more nuanced application of principles of international law to the facts.

Fair trial challenge: refusal to call Heng Samrin as witness

The accused raised several fair trial challenges to the judgment on appeal, most of which were rejected by the Supreme Court Chamber as baseless. The chamber did, however, address the challenge of Nuon Chea that the refusal of the Trial Chamber to call Heng Samrin as a witness had a major impact on his fair trial right to present a defense and that it evidenced a lack of independence by the Trial Chamber.

The testimony of Heng Samrin, a current member of Cambodia’s National Assembly, was requested repeatedly by Nuon Chea who claimed it to be a lynchpin of his defense because it related to the inner workings of the Khmer Rouge. The controversy over calling Heng Samrin began with the co-investigating judges in 2009 and eventually involved each level of the ECCC. In nearly every instance, the international faction of the court found that Heng Samrin was a *prima facie* relevant witness and should be called. The Cambodian judges invariably refused to call him. The Cambodian government inappropriately interfered in the issue with public statements that Heng Samrin should not appear before the court.

The Supreme Court Chamber addressed the issue and found that it was an error for the Trial Chamber *not* to call Heng Samrin as a witness—while acknowledging that he may refuse to appear even if properly summonsed. It noted that the international judges of

the Trial Chamber believed Heng Samrin should be called as a witness, but declined to opine whether the failure affected Nuon Chea's fair trial rights.

While finding error by the Trial Chamber in failing to summon Heng Samrin, the Supreme Court Chamber nonetheless reasoned:

[T]he Supreme Court Chamber considered whether the interests of justice would best be served by seeking to rectify the alleged error by calling the proposed witnesses in exercise of its discretionary powers under Internal Rule 104(1). This would have been contrary to the principle that evidence should be heard by the Trial Chamber rather than the Supreme Court Chamber and would have likely prolonged the appeals proceedings. Alternatively, the Supreme Court Chamber considered addressing Nuon Chea's related grounds of appeal, drawing whatever inferences in favour of the Defence as may be considered necessary and appropriate. The Supreme Court Chamber concluded that the latter approach was most appropriate in the circumstances and that proceeding in this way would not prejudice Nuon Chea in any way, while contributing to the efficiency of the proceedings. (Para. 38)

It remains to be seen if the Trial Chamber will interpret the findings of the Supreme Court Chamber as a direction to call Heng Samrin in the current case—where his testimony, according to Nuon Chea, is even more relevant than in the first trial. As was the case with each of the other chambers and judges who have addressed this issue, no effort was made by the Supreme Court Chamber to acknowledge or address the implication of political interference in the question of calling Heng Samrin as a witness. Rather, the Supreme Court concluded with the negative finding that, “it is not obvious that [lack of appropriate judicial independence] would be the only possible conclusion.” (Para.123)

Sentencing: no modification of life sentences due to errors

A compelling issue facing the Supreme Court Chamber, given the significant changes it made to the Trial Chamber's judgment, was whether it was proper to refuse a remedy to the accused in the form of a modification of the life sentences. The Supreme Court Chamber's analysis of this issue is convincing.

The Supreme Court Chamber noted that a sentence should reflect the inherent gravity of the criminal conduct, including the number and vulnerability of victims, the impact of the crimes upon them and their relatives, the discriminatory intent of the convicted person when this is not already an element of the crime, the scale and brutality of the offenses, and the role played by the convicted persons. The most significant change to the Trial Chamber judgment was the finding that the accused cannot be held liable of crimes at Tuol Pro Chrey. The Supreme Court Chamber found that these crimes had only a limited effect on the overall number of victims for which the accused were responsible and did not materially affect the gravity of their crimes as reflected in the convictions that were affirmed.

Conclusion

The Supreme Court Chamber engaged in detailed and extensive analysis of the questions put before it in the appeal of the Trial Chamber's judgment. Its decision stands strongly in favor of a high level of precision in both the factual and legal analyses necessary for credible convictions by a court committed to the highest standards of justice. The decision will likely have a positive effect on both the remaining proceedings at the ECCC and the development of international criminal law more generally.

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