

National and International Judicial Interpretations of ‘Most Responsible” at the Extraordinary Chambers in the Courts of Cambodia

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By: James Hendry

Last December, the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) released Considerations in three appeals from an unprecedented issuance of two conflicting Closing Orders issues by the Investigating Judges after examining the case of AO An over a period of a decade. The National Investigating Judge dismissed the case. The International Investigating Judge indicted AO An for the crimes of genocide, the crimes against humanity of murder, enslavement and other inhumane acts, extermination, persecution on political and religious grounds, torture, imprisonment and for breaches of provisions of the Cambodian Penal Code of 1956 committed during the Khmer Rouge regime in his Closing Order.

On appeal, the Chamber agreed on a number of key points including the admissibility of a number of grounds of appeal but could not resolve them on the merits by the required four judge supermajority. The Chamber's three National Judges upheld the dismissal while the two International Judges upheld the Indictment here. An article in this Journal written by Dr Joseph Rikhof - who-are-most-responsible-in-international-criminal-law - sets out the basic facts in the AO An case and notes that the central issue determining the personal jurisdiction of the ECCC is to try those 'most responsible' for the atrocities committed during the Khmer Rouge regime. He notes that the senior courts of the ECCC all have a majority of national judges. The effect of this unique structure among international tribunals becomes evident in this case where the National Judges compose the majority in what is becoming a tradition of dismissing new cases. Interestingly in this case, the National and International Prosecutors have issued Press Releases coming to different conclusions about whether the trial will proceed here.

This decision is interesting because the reasoning of the two sets of judges seems to explain the difference between the National and International Judges as one of law. The National Judges interpret the legal framework of the ECCC as aiming at the trial of a specific few senior leaders and those most responsible for the atrocities of the Khmer Rouge regime, while the International Judges apply the concept of senior leader and those most responsible as selective criteria for all of those who might fit them.

Personal jurisdiction of the ECCC

As noted by Dr Rikhof in his earlier article, personal jurisdiction of the ECCC is defined by article 2(1) of the United Nations-Royal Government of Cambodia (UN-RGC) Agreement and articles 1 and 2 of the Law on the Establishment of the Extraordinary Chambers (ECCC Law) as "senior leaders of Democratic Kampuchea and those who were most responsible."

In the *KAING Guek Eav alias* Duch case appeal of the conviction of the individual in command of Security Centre 21 where many thousands were tortured and died, the Supreme Court Chamber held that the only justiciable criteria giving the ECCC personal jurisdiction was whether an individual was a Khmer official (para. 61). The term 'most responsible' was too subjective, discretionary and inconsistent with article 29 of the ECCC law that negates lesser criminal responsibility based on rank to be a jurisdictional requirement. The same was true of the concept of 'senior leaders'. Rather, both concepts served as investigatorial or prosecutorial policy not justiciable before the Trial Chamber

(paras. 62-3, 74, 79).

Pre-Trial Chamber authority over the Investigative Stage in the AO An case

Because the two Closing Orders presented an unprecedented problem for the Chamber, it had to determine its authority on appeal. First, it noted that, despite the fact that the terms 'senior leader' and 'most responsible' are not justiciable, the limits of the discretion of the Co-Investigating Judges interpreting whether an individual met these policy objectives created the limits of the personal jurisdiction of the ECCC and were subject of review (para. 28). Second, the Chamber determined that article 79(1) of the Internal Rules allowed it to issue a new closing order. The Chamber then determined that it could perform the functions within the ECCC legal system of the Investigation Chamber which comprised appellate jurisdiction over the acts and decisions of the investigating judges and a second-instance investigative power (para. 44). This investigative jurisdiction enabled it to 'holistically address' all of the acts the prosecution and the investigating judges did or should have done over the entire case allowing it to complete the investigation and to assess the regularity of the procedure as required in order to make the instruction complete and legal (paras. 47-8).

The Chamber's main point was that in issuing two contradictory closing orders, the investigating judges violated the ECCC legal framework, breached their highest duties and created an unprecedented legal predicament undermining their judicial office (para. 89). It held that the Investigating Judges must issue one Concluding Order (Rule 67) finding support in articles 5 and 7 of the UN-RGC Agreement and Rule 72 providing a process for resolving disagreements between the Investigating Judges which could be finally resolved by a super-majority of the Pre-Trial Chamber, but failing that, the investigation would proceed or one Investigating Judge's approach would be acted on (para. 93-4). The Chamber observed that the Co-Investigating Judges may have deliberately refused to use the dispute resolution scheme to create a stalemate that could only be settled on appeal before the Chamber (para. 99). This violated the foundations of the ECCC legal system (para. 102). The Chamber held that there was room for give and take between the Co-Investigating Judges on issues where they disagreed but held that where the disagreement was so serious as to create a stalemate, the Judges have a duty to use it to have the matter resolved by supermajority at the Pre-Trial Chamber (para. 119). The Chamber concluded by accusing the Co-Investigating Judges of malpractice jeopardizing the whole legal system set up by the UN-RGC Agreement (para. 123).

Admissibility of the appeals

The Chamber then focused on the 18 grounds of appeal advanced by AO An's counsel: challenging the issuance of two closing orders; the determination that the ECCC had personal jurisdiction over AO An as most responsible based on certain factual findings, and erroneous definitions of the crime of genocide and inhumane acts and the JCE mode of liability in the Indictment Order; issues of subject matter jurisdiction alleging that the existence of certain crimes and modes of liability AO An was charged with were not legal because they did not exist at the relevant time; and finally, fair trial issues (paras. 131-3).

The Chamber determined that specific issues could be admissible appeals under Rule 74: subject matter jurisdiction was appealable on the issue of illegality, but not on the contours of the crime or mode of liability or defects in the form of indictment which were trial matters (paras. 138-9); personal liability was appealable only on the narrow scope of evidence relating to the gravity of the crimes and/or the level of responsibility of the accused and not on such matters as the contours of crimes or modes of liability (paras. 144-5) and fair trial matters only where the Trial Chamber could not rectify the matter and where denying the appeal would irreparably harm the fair trial rights of the accused guaranteed by Rule 21 (para. 147).

In the result, the Chamber held that AO An's appeal concerning the issuance of two Closing Orders was admissible under Rules 74 and 21 because it was not provided for in the Rules and could harm the fair trial of the accused (para. 149). The challenges to the scope of the Indicting Judge's discretion to determine personal jurisdiction and his interpretation of 'most responsible', the standard of proof, the hierarchy of evidence, AO An's role in the CPK and the sufficiency of the gravity of the crimes (including the issues of mens rea for genocide and that the Cham were specifically targeted) were admissible appeals (paras. 150-1, 155). The issues respecting legality and statute of limitations for murder were admissible (paras. 153-4). Appeals concerning defects in the form of Indictment, the contours of crimes and modes of liability and fair trial issues were not admissible (paras. 157-161).

The Unanimous Orders

The Chamber unanimously: ordered joiner of the appeals and decided the admissibility issue; decided the delay in investigation was unwarranted; declared that the Co-Investigating Judges' issuance of the Two Closing Conflicting Orders was illegal; declared that the Chamber might exercise authority over the review of investigative matters; that national courts have jurisdiction over any case not seized by the ECCC (see para. 57 and so would not result in impunity for other criminals); that the Co-Investigating Judges erred in assessing the reliability and probative value of the evidence; and that it could not assemble the required majority of four judges for a decision based on the merits (Part VII). Ironically, it allowed the National and International Judges to append their own opinions on the merits - splitting on the outcome the way they excoriated the Co-Investigating Judges for doing - pursuant to Rule 77(14).

The National Judges

The National Judges took the position that proceeding with cases 003 and 004 was contrary to the basic understandings and history of the ECCC process (paras. 170-173). In cases 001 and 002, all Prosecutors agreed to decide which suspects who are senior leaders and most responsible and investigate. However, cases 003 and 004 were commenced in secret by the International Prosecutor without informing the National Prosecutor, whose Introductory Submission triggered the full investigations concluded by the conflicting Closing Orders (paras.181-2, Rule 55(2)).

In the negotiations between the UN and Cambodia over the establishment of the ECCC, the UN proposed to prosecute 20 to 30 persons while Cambodia proposed 4 to 5 (paras. 200-1). The uncertainty about numbers was resolved by adopting the criteria of 'senior leaders' and 'most responsible'. The disagreement about numbers to prosecute continued in cases 003 and 004, which the National Judges thought should be settled in the dispute process for Prosecutors and Investigating Judges in the Rules (para. 203). After a review of the structure of government during the Khmer Rouge period, the National Judges said that the Communist Party of Kampuchea (CPK) 'Standing Committee' were the 'senior leaders' of the Democratic Kampuchea (DK) regime of which only NUON Chea survived while 'Duch' was the 'most responsible' (para. 223). AO An was neither (para. 225) so the National Judges held that the International Prosecutor's Submission was groundless (para. 227).

The National Judges then noted that the UN-RGC Agreement was subject to the Vienna Convention on the Law of Treaties focusing particularly on articles 26 and 27 and had to be implemented through the ECCC Law (para. 232). They wrote:

"250. The evidence as described in the history of bringing the Khmer Rouge to trial until the National Assembly session of the draft law and the authority structure of Democratic Kampuchea, cited in D3, the Introductory Submission, dated 18 June 2007, in Case 002 makes it clear that the purpose of using the terms of senior leaders and those most responsible in the Agreement as well as the ECCC Law is to refer to only 4 or 5 people in Cases 001 and 002."

"251. Bringing others to trial and creating Cases 003 and 004 are a violation of the Agreement and the ECCC Law, and the Cases cannot be concluded legally. Therefore, the preliminary investigation conducted unilaterally by the International Co-Prosecutor contradicts the principle of consensus. The Closing Order (Indictment) indicting and sending AO An to trial was prepared on the basis of the outcome of the illegal preliminary investigation is considered invalid."

The National Judges found the principle of consensus in article 16 of the ECCC Law that provides that "All indictments in the Extraordinary Chambers shall be the responsibility of two prosecutors, one Cambodian and another foreign, hereinafter referred to as Co-Prosecutors, who shall work together to prepare indictments against the Suspects in the Extraordinary Chambers" (para. 254). They appeared to approve the policy underlying establishing the ECCC as one focusing on national reconciliation and the search for justice concentrating on a very few senior leaders properly expressed by the National Co-Investigating Judge (para. 269) and an earlier statement by Co-Investigating Judges in the IM Cheam case respecting the policy, adding that it did not create a presumption of guilt or 'senior responsibility' of those brought before the ECCC (para. 270).

The National Judges reviewed the process leading to the National Co-Investigating Judge decision to decline to charge AO An. They noted that he focused on personal jurisdiction and that the "specificity of the ECCC Agreement and the ECCC Law highlights selective jurisdiction" (para. 273). They noted that he did not think the ECCC had personal jurisdiction (paras. 274-5). The National Judges wrote: "AO An's participation in the commission of crimes was non-autonomous, inactive, non-creative, and

indirect, which is far different from Duch's active, direct and creative participation. Moreover, AO An did not participate in making CPK policies" (para. 280). The National Judges considered the National Co-Investigating Judge's investigation was comprehensive and upheld his dismissal of the case (para. 282). They rejected the reasoning of the International Co-Investigating Judge that the UN-RGC Agreement was a political accord that did not limit his discretion, holding that the process leading to the Agreement legal experts had formulated legal instruments and standards determining the scope of the jurisdiction of the ECCC that bind him on the issue of personal jurisdiction (paras. 286-293). His Closing Order was an error of law and should be rejected (para. 294). In spite of the reasoning of the unanimous Chamber declaring the issuance of two Closing Orders illegal, the National Judges additionally found a lacunae in the law because it did not resolve the issue of two Closing Orders, so they invoked the principle of in dubio pro reo in favour of AO An (paras. 295-301). They held that the inability of the Chamber to achieve a supermajority meant that the dismissal order which was consistent with the selective ECCC law should prevail and the indictment annulled.

The International Judges

The two International Judges first recalled the Chamber unanimously decided that the simultaneous issuance of conflicting Closing Orders was an error of law and went on to consider the validity of each order, concluding that only the Indicting Order was valid (paras. 315-8). They recalled that one Co-Investigating Judge could issue a valid indictment acting alone and that where the two Judges disagree, the investigation must proceed unless one or both refers the disagreement to the Pre-Trial Chamber, which did not happen (para. 319). They called this the 'principle of continuation' that applied even to the issuance of the closing order to the point of closure and that this principle governed the issue before the Chamber (paras. 320-1). A dismissal does not allow the matter to proceed which was the effect of the inability to achieve a supermajority on appeal of a disagreement to the Pre-Trial Chamber and further, the disagreement process default was meant to allow the trial of senior leaders and those most responsible to proceed (para. 323). The Indictment order complied with this objective, while the dismissal, without mandatory referral of the disagreement to the Pre-Trial Chamber, was a 'brazen attempt' to avoid this step and ultra vires, allowing the Indictment to stand (paras. 325-6).

The difference between the National and International Judges then appears to turn on different views of the law. The National Judges interpret the legal instruments creating the ECCC process in their political context as one intended to try a select few senior leaders and those most responsible for the Khmer Rouge atrocities who fit the conditions of 'senior leader' or 'most responsible', while the International Judges interpret them as intending to send senior leaders and those most responsible to trial applying the *Duch* case principles. This seems to demonstrate that the difference between the blocs of National and International Judges does not appear simply to be a matter of tradition, but one of fundamental difference in legal interpretation.

The International Judges first rejected the AO An's argument that the International Co-Investigating Judge erred by failing to accept the narrow or selective interpretation of 'most responsible' (paras. 349-351). They upheld the international jurisprudence noting that other ECCC Chambers have held

that the determination of who is most responsible requires a qualitative and quantitative assessment of gravity of the crimes and the level of responsibility of the accused (para. 352). They affirmed that the level of responsibility included the accused's level of participation, rank or position, the permanence of their position and their *de facto* roles and responsibilities (para. 353). They also rejected the application of the principle of in *dubio* pro reo to support the narrow interpretation that focused on those highly placed officials who set and implemented CPK policy, noting that it was an evidentiary principle and not important where the term is clear (para. 354). The International Co-Investigating Judge found AO An most responsible, not based only on membership in a JCE 1 as argued by AO An, but because of a combination of his rank and scope of authority in the DK hierarchy, the character and magnitude of his crimes and that he was "clearly a major player in the DK structure and as a willing and driven participant in the criminal implementation of its inhuman policies" (para. 356). The International Co-Investigating Judge had also assessed genocide against the Cham (over 17000 victims), other crime sites under AO An's control: security centres and execution sites (13000 victims) and worksites where thousands were forced to work in dreadful conditions under threat of death as part of the consideration of gravity (paras. 356-7). Also, he did not err by comparing AO An to other Khmer officials such as Duch who provided objective analysis of the existence of crimes, especially when comparisons were one of many factors he took into account (paras. 358-9).

The International Judges rejected most of the errors alleged in the International Co-Investigating Judge's handling of evidence. The International Judges agreed with AO An's lawyers that he was not a member of the Part's highest Standing Committee and so did not determine or interpret CPK policies, but they rejected the argument that this disposed of the most responsible issue (para. 441). They recalled that there was no 'filtering standard in terms of positions in the hierarchy' and that the evidence 'firmly supports' AO An's role in conducting and delivering orders at meetings on political, security and military matters as well as economic matters such as forced worksites as well as specific meetings at the highest levels denouncing cadres as 'traitorous' (para. 445). Involvement in decision-making at Security Centre 21 was not a necessary element for finding he was among the most responsible (para. 444). The International Judges held that personal jurisdiction over AO An was established mainly through his responsibilities as Sector 41 Secretary (the highest administrative level below the zone with the duty, among others, of pursuing 'enemies,' ordering arrests and executions and supervising sector security centres (see Closing Order paras. 164, 172, 193-4) and Deputy Secretary of the Central Zone, but his short tenure was not determinative in the holistic assessment of most responsible (para. 471). The finding that AO An was the *de jure* Sector 41 Secretary does not prove that he exercised all of the duties associated with that position, but was a reasonable basis for some findings and may corroborate other evidence that was reasonably taken into account by the International Co-Investigating Judge, especially taking into account the principle of freedom of evidence providing that all evidence is admissible and should be considered only on the basis of whether it persuades the Co-Investigating Judge that there is sufficient evidence for the charge (paras. 479, 484, see 76, 80). The International Judges rejected the argument that the small size of Sector 41 and small number of direct subordinates and limited powers to implement policy affected the determination of whether AO An was most responsible because the assessing the gravity of the

crimes and level of responsibility of the accused was a holistic one on all of the evidence assessed by the Co-Investigating Judge and reviewed by the International Judges (paras. 527, 551). The International Judges rejected challenges to evidence that AO An ordered the Cham be killed and monitored the killings (para. 531) and that he had no role in forced marriages (para. 539). The International Judges held that the 'mosaic of evidence' sufficiently demonstrated AO An was liable for grave crimes including genocide against the Cham throughout the Central Zone including Sectors 41, 42 and 43 as part of a common purpose with others in the JCE, reinforced by his 'significant contribution' supporting the finding that the gravity of the crimes brought him within the personal jurisdiction of the ECCC (para. 558).

Then International Judges rejected the argument that the International Co-Investigating Judge applied the wrong law by relying too much on the rulings of the ad hoc tribunals and placing insufficient reliance on customary international law, because the Chamber had previously held that arguments without the potential to reverse the decision - here because they were not properly detailed and supported - could be dismissed immediately (para. 567). They held the ECCC had personal jurisdiction and committed AO An for trial (para. 631).

The National Co-Prosecutor had argued that the International Co-Investigating Judge erred by not recognizing that the law as established by the ECCC law that all senior leaders and most responsible had been brought before the Trial Chamber in trials 001 and 002 (paras. 641-2). The International Judges dismissed this argument out of hand finding that Cambodia did not have the unilateral power in negotiating the UN-RGC 'to redefine the meaning of personal jurisdiction and/or assert its 'influence' on the independent judicial functioning of the Court' (para. 652). They also dismissed the argument that the UN-RGC goal of 'national reconciliation and stability, peace and security' was promoted by the 'impunity gap' created by the limited committal of specific senior leaders and those most responsible to trial (para. 654). They held that disregarding the facts that AO An was charged with genocide, that the National Co-Investigating Judge had found thousands of deaths in case 004/2, that hundreds of civil party applicants had applied to take part in the proceedings, all showed that disregarding the plight of victims in case 004/2 would not achieve 'national reconciliation' by eliminating the possibility of a trial (para. 655).

The International Judges declared the International Co-Investigating Judge's appeal moot because the National Co-Investigating Judge's Closing order was void. They held the result was that the Trial Chamber was seized of the Indictment (para. 682). Then, they summarily dismissed the National Co-Investigating Judge's appeal (para. 683).

The International Judges held that the Indictment should be forwarded to the Trial Chamber because the National Co-Investigating Judge's order was a nullity. The supermajority required under Rule 77(13)(b) was not obtained and so the default decision must be that the Indictment move to trial (para. 685).

To avoid putting pressure on witnesses, to bring AO An to justice for serious crimes, and to assert the effectiveness of the Indicting Closing Order, the International Judges thought a measure of provisional detention was necessary (paras. 691-2).

Conclusion

The tradition of the Cambodian judges on the ECCC dismissing charges after trial 001 and 002 while the International Judges held there was enough evidence to support personal jurisdiction over those 'most responsible' referred to by Dr Rikhof seems to resolve itself in this case as a difference in law. In the unique situation of an international hybrid tribunal being composed of a majority of National Judges, resolvable by supermajority that would include an International Judge, it took the unprecedented split Closing Orders in this case to reveal that the judges proceeded on different legal bases. The Cambodian counsel and judges proceeded on the legal basis that the ECCC Law requires only the trial of a few senior leaders and those most responsible for the atrocities of the Khmer Rouge regime. This had already been accomplished. The International counsel and judges proceeded on the basis of the *Duch* reasoning with the concept of 'most responsible' being determined by gravity and responsibility as a policy standard for choosing the cases that should move forward to trial.

The Press Releases of each of the National and International Prosecutors suggest that there is a dispute about whether to proceed to prosecution. We shall see if this brings an end to the work of the ECCC.

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Image: PHNOM PENH, CAMBODIA - CIRCA NOVEMBER 2018 : STUPA at the KILLING FIELD of Choeung Ek. Skulls of victims of the Khmer Rouge inside this stupa.