

The end of the judicial mandate of the Extraordinary Chambers in the Courts of Cambodia is near

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By: James Hendry

The judicial mandate of the Extraordinary Chambers in the Courts of Cambodia (ECCC) nears its end. On January 12, 2022, the Chambers issued a Press Release (here) headlined that it had entered the residual phase of its mandate, though its text notes that the residual functions would actually commence at the end of judicial proceedings in any Chamber of the ECCC. This announcement followed two decisions by the Supreme Court Chambers. On December 17, 2021, it terminated the case of MEAS Muth (here). On December 28, it terminated the case against YIM Tith (here). These cases followed a pattern starting with its decision terminating the AO An case on 10 August, 2020 (here). This article will discuss this line of cases. The only judicial matter left is an appeal from the conviction of KHIEU Samphan heard by the Supreme Court Chamber of the Extraordinary Chambers on August 16 to 19, 2021 (Press Release here).

The United Nations-Royal Government of Cambodia Agreement (UN-RGC Agreement (here)) led to the Cambodian Law establishing the Chambers (ECCC Law, here) that provides in Article 1 that "The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979." The Addendum (here) establishing the residual powers comes into force at the end of judicial proceedings. The Cambodian government's eagerness to see an end to the judicial proceedings behind the Chambers' official Press Release is consistent with the policy-driven approach taken by national prosecutors and judges to press for an end to the three final cases.

As explained in an earlier article in this Journal dealing with the AO An case (here), the Chambers is an unusual hybrid international criminal tribunal. There are national and international Co-Prosecutors, national and international Co-Investigating Judges. At the end of their investigation, these Judges issue a Closing Order which sends the accused to trial or dismisses the case. The five-member Pre-Trial Chamber, composed of three national and two international judges, hears appeals from the Closing Orders made by the Co-Investigating Judges and some other decisions. The Rules (here) are premised on unanimity throughout the process and there are mechanisms for resolving disagreements at the investigative stage, but they provide that a decision of the Pre-Trial Chambers requires four affirmative votes and in default, the action being appealed takes effect (Rule 77(13)). The Rules also provide that a conviction in the Trial Chamber also requires four votes and in default, the accused is acquitted (Rule 98(4)). An appeal from the Trial Chamber is made to the Supreme Court Chamber consisting of seven judges, four national and three international, requiring five affirmative votes, and on default, the trial decision stands (Rules 108 bis (immediate appeals) and 111(6) generally).

A useful way of seeing the judicial trend in ending the remaining caseload of the ECCC is to start with the termination of the case of AO An.

AO An

The beginning of the end started with an appeal to the Pre-Trial Chamber of two contradictory Closing Orders in the case of AO An, a person of high rank and authority in the Khmer Rouge hierarchy alleged to have engaged in genocide, the crimes against humanity of murder, enslavement, extermination, persecution on political and religious grounds, torture, imprisonment and other inhumane acts as well as breaches of provisions of the Cambodian Penal Code of 1956.

The Pre-Trial Chamber unanimously held the contradictory Closing Orders to be illegal because they violated the framework of the ECCC, but went on to attach the joint opinions on the merits of its three national judges upholding the dismissal order and its two international judges upholding the order for indictment, noting that there was no supermajority on the merits to reach a decision (here, p. 61 and para. 169). But it also stated “In the specific case of appeals against Closing Orders, Internal Rule 79(1) suggests that the Pre-Trial Chamber has the power to issue a new or revised closing order that will serve as a basis for the trial (para. 30).”

The different approaches in the opinions on the merits created a recipe for a stalemate that would bring the remaining cases to an end. The national judges interpreted “senior leader” and “most responsible” according to the Cambodian interpretation of the UN-RGC Agreement which was to bring a certain number of persons - the three persons already convicted (and a couple of others who had died during the lengthy proceedings) - to trial. The international judges interpreted the two terms as a mixed question of fact and law according to international law as reflected in the Appeal Judgment in the appeal decision of “Duch” (here), the commandant of Security Centre 21 where many thousands were tortured and died. In Duch, the Supreme Court Chamber held that “suspects” must be Khmer Rouge officials, but that the two undefined terms were not jurisdictional nor justiciable by the Trial Chamber and that “the determination of whether an accused is ‘most responsible’ requires a large amount of discretion” and that “neither a suspect nor the ECCC can verify whether a suspect is ’most responsible’ pursuant to sharp-contoured, abstract and autonomous criteria” (Duch, paras. 62-68). The Supreme Court Chambers in Duch also noted that “The debates in the Cambodian National Assembly over the UN-RGC Agreement and amendments to the 2001 ECCC Law confirm that the definition of “senior leaders” is not fixed and that the characteristic should operate as investigatorial and prosecutorial policy.” (Duch, para. 77, see also the article on “most responsible” in this Journal here).

While the Pre-Trial Chamber in AO An unanimously reasoned that it could exercise investigative functions and issue Closing Orders as the investigating judges “has or should have done for the instruction to be complete and legal”, it did not do so (Pre-Trial Chamber, paras. 30, 44, 47). There was no dismissal or indictment.

The case was then lost in the limbo of ECCC bureaucracy. The Trial Chamber returned the filings of the International Co-Prosecutor required by the Rules to commence a trial and issued a Press Release saying that it had no authority to make any decision on the case. The International Co-Prosecutor then filed an “Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2” requesting the Supreme Court Chamber to hold that the evidence demonstrated that the Trial

Chamber was seized of the AO An case and to order it to proceed to trial. This resulted in that Chamber's decision on 10 August, 2020 terminating the case (here, para. 71).

The Supreme Court Chamber rejected the admissibility argument advanced by the International Co-Prosecutor that the Trial Chamber had been seized of the case and refused to act and so had made an appealable "decision". It noted that Rules 104 and 105 allow only appeals from the Trial Chambers and held that that body had not been seized of the case because the Case File had not been properly transferred to it by the Pre-Trial Chamber and that the statement in the Press Release was not a "decision". Further, it noted that the Pre-Trial Chamber had unanimously held the Closing Orders to be nullities and so the default principle was not engaged by the divergence in the opinions of the national and international judges and further, no indictment was issued to give the Trial Chambers seisin of the case. The "inaction" of the Trial Chamber thus was not an appealable "decision" (paras. 48-50, 53, 55).

The Supreme Court Chamber did hold the appeal or application was admissible on the grounds that the case required clarity and finality because legal stalemates indicate the failure of the judicial system to provide remedies according to the maxim that where there is a right, there should be a remedy (para. 64). It did observe that the Pre-Trial Chamber had decided it could issue a Closing Order on its own and the Supreme Court Chamber held that it should have done so (paras. 59, 61).

On the merits, the Supreme Court Chamber rejected the International Co-Prosecutor's argument that the default provision operated where there was no supermajority in favour of dismissal because of the unanimous finding that the Closing Orders were nullities and of no legal effect (para. 67). Thus, after 13 years of investigation and "the great numbers of victims in the central zone" where AO An held power, there was no agreement that AO An was within the jurisdiction of the ECCC (para. 69). The Supreme Court Chamber held that the case was terminated (para. 71).

The Co-Investigating judges sealed the case (here).

MEAS Muth

In a similar approach to the case of AO An, the Supreme Court Chamber terminated the case of MEAS Muth. He was a Party leader and high military commander alleged to have engaged in genocide; the crimes against humanity of murder, extermination, imprisonment, enslavement, torture, persecution, and other inhumane acts including inhumane treatment, enforced disappearance, attacks against human dignity, forced labour, forced marriage, and rape; grave breaches of the Geneva Conventions including unlawful confinement of civilians, wilful killing, wilfully causing great suffering or serious injury to body and health and torture; and premediatated homicide contrary to the 1956 Penal Code, at sites across Cambodia, including security centres and killing sites (see here for the Case Profile).

As in the AO An case, the Co-Investigating Judges had issued contradictory Closing Orders. On appeal, the Pre-Trial Chamber unanimously held that the contradictory Closing Orders were illegal,

that it lacked the required majority to decide the appeal on the merits and that its decision was not subject to appeal under Rule 77(13) (here, p. 40). Curiously, on the merits, the National Judges held that the Closing Orders were "of the same value and stand valid" but that the case should be held at the ECCC archives (Pre-Trial Chambers, paras. 115-117) while the International Judges held the dismissal order null and void saying that the indictment de facto unanimous (Pre-Trial Chambers, paras. 341-343. However, the Pre-Trial Chamber did not send the required documents to the Trial Chamber, forcing its Greffier to advise the parties that it would not proceed.

The International Prosecutor launched an appeal in the Supreme Court Chamber, as in the AO An case, against the Pre-Trial Chamber's failure to send the case to trial (here).

Once again, the Supreme Court Chamber noted that the Rules confined it to hearing appeals from the Trial Chamber. But it decided that it would treat the matter as an "application" and on that basis it was admissible as in the AO An case as one requiring legal certainty and clarity, invoking its jurisdiction as an appellate and first instance court under Article 9 of the ECCC Law.

The Supreme Court Chamber followed its reasoning in the AO An case, adding that the Pre-Trial Chamber's unanimous declaration that their decision was unappealable put an end to the case (para. 35). It refused to accept the argument that the fact that the International Judges had held the indictment valid and the dismissal order null and void on the merits making the indictment de facto unanimous (paras. 37, 38, 41). The Supreme Court Chambers criticized this argument made in the face of a unanimous decision Pre-Trial Chamber decision that the Co-Investigating Judges contradictory Closing Orders were illegal (para. 41). The absence of a definitive and enforceable indictment brought the case to an end (para. 42).

The Co-Investigating Judges formally sealed and archived the case file (here).

MEAS Muth dissent

Judge Clark was the sole dissent in a seven judge Supreme Court Chambers composed of four Cambodian judges and three "foreign" judges, as they are described in Article 9 new of the ECCC Law.

Judge Clark chose to dig deeply into the procedural history of the case to discover the origins of the "fundamental disagreements" between the national and international officials that led to the impasse in these cases (dissent, paras. 3,6,7). She found that the International Co-Prosecutor aimed at a comprehensive accounting for the Khmer Rouge crimes while the national prosecutor aimed at national peace and reconciliation by prioritizing the trials of the suspects already detained as envisioned by the UN-RGC Agreement (para. 11). Judge Clark's microscopic review of the procedures in the case also showed it was dogged by disagreement all along at least since 2008 when the Co-Prosecutors had disagreed over the investigation (paras. 7, 45).

She recalled the unanimous decision of the Pre-Trial Chamber that the contradictory Closing Orders were illegal, but she thought that the Supreme Court Chambers should focus on the "incoherent" judges' reasons on the merits where the National Judges found that both Closing Orders were valid while the International judges upheld the Indictment and rejected the Dismissal saying that the indictment was unanimous (para. 67). In her view, the only proper remedy for this "incoherence" was to quash the Pre-Trial Chamber's decision and direct a reconsideration (para. 71). Though recognizing such a reconsideration would result in the same outcome, she proceeded to the merits of the Application after finding that the Supreme Court Chamber had the "legal, inherent and moral authority to receive this Application" and that it was admissible (para. 72,73).

On the merits, she was of the view that the Pre-Trial Chamber should have ignored the conflicting Closing Orders and determined the matter itself – the same conclusion of the majority - and which would allow the default rule to apply (para. 77). Because no reasonable decision-making body could come to the illogical determinations made by the Pre-Trial Chambers in her view, it had no validity in law (para. 84). She thought that the argument that the default mechanism should apply in the absence of a supermajority in favour of dismissal failed because it was premised on the existence of a valid enforceable decision by the Pre-Trial Chamber when the reality was that the finding that the Closing Orders were illegal closed off a consideration of the merits (para. 86). There was simply no basis for forwarding the case to Trial (para. 87). In conclusion, she noted that the case had been propelled forward by the default principle to the Pre-Trial Chamber where the fixation on the conflicting Closing Orders frustrated obtaining justice on the merits (para. 88). She noted that cultural differences played an important role with the national officials taking a view of personal jurisdiction based on policy which explained how "most responsible" could be interpreted to exclude major Party bosses and military leaders (para. 88). She wrote "Considering the time spent investigating a person who has benefitted from a national policy not to prosecute suspects at his level of seniority, it would be unconscionable to act further" (para. 92). She voted to quash the Pre-Trial decision and terminate the case (para. 92). She appended an Addendum with a minute analysis of the record that showed the national policy of limiting the prosecutions to five suspects was baseless (para. 109).

YIM Tith

YIM Tith was also a Party leader and alleged to have engaged in genocide, the crimes against humanity of murder, extermination, enslavement, imprisonment, torture, deportation, other inhumane acts (forcible transfer, confinement and working in inhumane conditions, forced marriage), and persecution, grave breaches of the Geneva Conventions of wilful killing and unlawful transfer or deportation of civilians and premeditated homicide under the 1956 Penal Code committed in the southwest and northwest zones of Cambodia (Case Profile here).

As in the two preceding cases, the Co-Investigating Judges issued contradictory Closing Orders. Again, the Pre-Trial Chamber on appeal held (here, p. 49) unanimously that the Orders were illegal, and that there was no appeal from its decision based on Rule 77(13) and that there was no supermajority on the merits (para. 116).

As in the previous two cases, the Supreme Court Chamber held that the appeal was an Application because it was not an appeal from the Trial Chamber and that it was admissible for the purposes of safeguarding justice (para. 24).

The Supreme Court Chambers again held that the contradictory Closing Orders were nullities, that the consideration of their merits was redundant and therefore there was no basis for invoking the default provisions. It reaffirmed its view that the Pre-Trial Chamber should have issued its own Closing Order. It also reaffirmed its position that the Pre-Trial Chambers declaration that its decision was not subject to appeal terminated the matter. The lack of a valid indictment put an end to the International Co-Prosecutor's bid to move the case to trial (paras. 25-31).

The Co-Investigating Judges ordered the case be sealed and archived (here).

YIM Tith dissent

Judge Clark also dissented in this last of the three cases. She commenced by noting the similarity of process in these three cases which led to the same "bizarre" decision by the Pre-Trial Chamber which "failed to provide a clear pathway to trial or termination" (dissent, paras. 1, 30). The differences between the policy and the legal approach to the case, especially the question of whether YIM Tith was one of the "most responsible" for the Khmer Rouge human disaster, should have been decided by the Pre-Trial Chamber where the default provisions would apply (para. 31). She argued that the Supreme Court Chamber should go beyond the failure of the Pre-Trial Chamber to provide a valid indictment and consider why the ECCC resources were wasted for years if no further trials were to be allowed (paras. 44, 45). She recognized that no further action could remedy the irreconcilable difference between the national and international officials in the pre-trial process and that the case must be terminated because of the "futility" of any other action (para. 51).

Conclusion

The Supreme Court Chamber approached their task in a judicial manner setting out the relevant procedural facts, noting that the Pre-Trial Chamber had decided in each case unanimously that two contradictory Closing Orders were of no legal effect, but that it had the power to issue a new Closing Order in each case but did not do so. The Supreme Court Chambers did not consider why the Pre-Trial Chamber refused to resolve the question itself. But it held that the "appeal" that was filed should be referred to as an "application" that it would decide in the interests of justice. The decision was simple. There was no indictment or dismissal in any of the three cases and so they were terminated. The Supreme Court Chamber did not have to probe the merits of the Closing Orders because the Pre-Trial decision could not be appealed, so the dispute about the significant issues such as whether the accused was a senior leader or most responsible, remained below the plane on which the Supreme Court Chamber could properly reach to decide the cases on the merits.

The dissenting judge was obviously exasperated by the way the differences in policy and legal approaches of the national and international officials moved the procedures by virtue of the default

principle through to the appeal to the Pre-Trial Chamber where they were stopped by its problematic reasoning: unanimously deciding the conflicting Closing Orders were illegal, then moving on to the merits of each without using its power to issue its own Closing Order to move the case forward where the default provisions could again move the case onward. Once again, it appears that politics intervened to clog the process. Peter Maguire recognized the role of politics affected the ECCC as in every similar process before it (here). Unfortunately, it appears to have been decisive in these three cases, bringing the whole ECCC scheme crashing down costing hundreds of millions of dollars and leaving a huge number of victims without the appearance of justice. The ECCC is now dead as a judicial body but for one outstanding appeal and will, after its decision in that case, enter its residual mandate. Of all of the criminal tribunals that have been established (see the history of the international criminal tribunals in this Journal here, only the International Criminal Court and the Kosovo Specialist Chambers are still operating.

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