

Preventing Impunity for the Costs of a Failed Utopia

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Two old men, senior officials in the Khmer Rouge Regime, were convicted of serious international crimes by a Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia on November 16, 2018.[1] Nuon Chea was a founding member of the Cambodian Communist Party (CPK), later joined by Khieu Samphan. Both were among the leaders of the party collectively known as “Angkar”.

Their crimes were committed in Cambodia between April 17, 1975 and January 6, 1979 as part of a plan to rapidly implement a socialist revolution by a “great leap forward”. On April 17, 1975, CPK forces entered Phnom Penh and directed the population to leave immediately. The pursuit of an agrarian Cambodian communist utopia began in earnest. It ended after consuming millions of lives.

This was the second of a bifurcated trial of these two men (two others accused died before the end of the trial). The first trial focused on crimes against humanity involving movements of populations within Cambodia and executions of former Khmer Republic officials.[2] The second trial concerned a broader range of crimes committed in Democratic Kampuchea (DK) and the Chamber has so far published only a summary of its reasons for judgment, with full reasons to follow. But even in this summary, the evil mechanism of this revolution is exposed.[3]

The result

The Chamber found Nuon Chea and Khieu Samphan guilty of

- the crimes against humanity of murder, extermination, deportation, enslavement, imprisonment, torture, persecution on political, religious and racial grounds and other inhumane acts through attacks on human dignity and for conduct characterized as enforced disappearances, forced transfer, forced marriage and rape within such marriages
- grave breaches of the Geneva Conventions, or war crimes, in killing, torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving prisoners of war or civilians of the right to fair trial and unlawfully confining civilians, because an armed conflict with Vietnam was going on at the relevant time
- genocide: in the case of Nuon Chea, genocide in the killing of members of the Vietnamese and Cham groups, and in the case of Khieu Samphan, genocide of members of the Vietnamese group.

They were both sentenced to life imprisonment. The verdicts were based on breaches of articles 4, 5, 6, 29,nd 39 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (ECCC Law).[4]

The Chamber's analysis of the liability of the accused was based on the theory that the alleged crimes were committed by the accused and others as part of a joint criminal enterprise aimed at implementing a rapid socialist revolution to be implemented by five policies that resulted in the crimes the accused (and the other members of the enterprise) intended to be committed and for which they were charged. These crimes were alleged to have been committed at many cooperatives, worksites, security centres and execution sites; by targeting specific groups: the Cham, Vietnamese, Buddhists and former Khmer Republic officials; and, by the forced regulation of marriage and rape within the confines of such marriages.

Crimes against humanity and grave breaches of the Geneva Conventions

In addressing the general or chapeau requirements of crimes against humanity under the ECCC law,[5] the Chamber found that the crimes against humanity were committed in a widespread and systemic attack against the civilian population of Cambodia from April 17, 1975 to January 6, 1979, victimizing millions of Cambodian citizens and forcing many to leave the country as refugees. The attack was widespread and systemic as shown by its geographic scope and number of victims. Further, the scope and magnitude of the crimes demonstrated that the attack could not have been random, and because they were carried out to further the policies of the CPK. Further, the Court found attacks were carried out on political, ethnic, racial and religious grounds creating a nexus between the attack and the criminal acts that were committed as part of it. The Chamber also held that Nuon Chea and Khieu Samphan knew of the attack and that their own acts formed part of it.

The crimes that were grave breaches of the Geneva Conventions took place during the on-going international armed conflict between Vietnam and DK from May 1975 to January 6, 1979. The Court found that crimes that were committed at S-21 Security Centre against Vietnamese civilians and other protected persons (prisoners of war) were closely related to the armed international conflict and that

the accused were both aware of the existence of the armed conflict and the protected status of the victims.

The S-21 Security Centre has been referred to as the epicentre of the Khmer Rouge nightmare.[6] It had been a high school in Phnom Penh and its commandant, a former math teacher known as Duch. As the death toll rose, a new execution site at Choeung Ek was established.

The criminal policies implemented by international crimes

As already noted, the Chamber analysed the facts as they related to policies used to implement the revolution.

The Chamber held that during the DK period there was a policy aimed at operating cooperatives and worksites as the primary instrument to wage class struggle and to create a labour force of “strictly controlled people”. The Court identified these as “crime sites”. There, the people, both “New People” from the cities and “Old People” from rural areas, were deliberately forced to work subject to threats, without adequate food or medical treatment, suffering overwork in many cases leading to death, unsafe working conditions and slavery. Some were killed or made to disappear creating an atmosphere of fear and uncertainty. Others experienced loss of religious and cultural traditions. The Cham and New People especially experienced discrimination. The Chamber held that the policy resulted in the crimes against humanity of murder, enslavement, persecution on political grounds, and other inhumane acts against dignity and by forced disappearance (para. 19).

The Chamber next held that there was a policy of operating security centres and execution sites to “smash” enemies, including Party members, Khmer Republic officials, Vietnamese soldiers, women and children. S-21 was at the centre of this, a place where individuals were detained without procedural safeguards, forced to work, to live in deplorable conditions and were subject to terrible interrogation and execution. The same occurred at other security sites. Nuon Chea gave direct instructions for many killings at S-21. The Chamber held that the crimes against humanity of murder, extermination, enslavement, imprisonment, torture, persecution on political grounds as well as other inhumane attacks against dignity and forced disappearance were committed at these crime sites in accordance with this policy (para. 25).

The Chamber also held that there was a policy to target specific groups: the Cham, Vietnamese, Buddhist and former Khmer Republic officials and their families in the name of creating an atheistic and homogeneous society without class divisions by abolishing ethnic, national, religious, racial, class and cultural differences (para. 26). The Cham were targeted because of their rebelling against restrictions on their religious and cultural traditions and were displaced in order to facilitate their assimilation, demonstrating that they were targeted as a group. They were subjected to religious and cultural indignities and then executed on a “massive scale”. The Chamber found that orders often came from the “upper echelon” and was also satisfied that perpetrators at some of the crime sites exhibited a genocidal mental state. Accordingly, the Chamber found the crime of genocide and the

crimes against humanity of murder, extermination, imprisonment, torture, persecution on political and religious grounds and other inhumane acts of forced transfer were committed against the Cham (para. 30).

The Chamber also found the Vietnamese living in Cambodia were expelled according to a policy of expulsion originally in agreement with Vietnamese authorities. The CPK policy later changed to execution. There were instances of killings of Vietnamese civilians on a “massive scale”, systematically organized and directed against them as an ethnic group. Hundreds of Vietnamese prisoners of war and civilians held at S-21 were killed. Accordingly, the Chamber found not only the crime of genocide and the crimes against humanity of murder, extermination, deportation and persecution on racial grounds, but in view of the ongoing international armed conflict, it found grave breaches against the Geneva Convention at S-21, including wilful killing, torture, inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilful deprivation of fair trial rights and unlawful confinement (para. 34).

The Chamber also found the crime against humanity of persecution perpetrated against Buddhists on religious grounds in some cooperatives, through the banning of the religion and the perpetration of indignities against the monks (paras. 35-6).

The Chamber also found that the crime against humanity of murder and persecution on political grounds was perpetrated against former Khmer Republic officials (para. 38). Many former officials were disappeared, killed, and former military families “smashed” because of their connection to the earlier regime.

The Chamber also found that the crime against humanity of other inhumane acts was committed through forced marriage and rape within forced marriages (para. 41). The CPK carried out a nation-wide policy forcing couples to marry and to produce children under threat of punishment, replacing the traditional Cambodian role of parents in spousal choice based on mutual trust, all in order to increase the population within 10-15 years.

Thus, the Chamber concluded that many CPK policies resulted in the commission of international crimes.

Liability for the crimes

The Chamber then turned to the issue of responsibility for the crimes it had found to have been committed. Under the heading of “Joint Criminal Enterprise”, it found that by April 17, 1975 until at least January 6, 1979, senior CPK leaders shared a common purpose to rapidly implement a socialist revolution through the “great leap forward” which was to build the country, protect it from enemies and radically transform the population into “an aesthetic and homogenous Khmer society of worker-peasants”.[7] This “utopia” was to be achieved through the work of all CPK functionaries implementing five policies designed to implement the common purpose: (a) displacing the urban population to rural areas and the rural population to other rural areas (b) operating cooperatives and worksites (c)

operating security and execution centres to re-educate “bad elements” and “smash” enemies (d) targeting specific groups such as the Cham and Vietnamese, and (e) regulating marriage. The Chamber held that these policies were intrinsically linked to the common purpose and involved the commission of crimes. Therefore, it held that the common purpose was criminal itself (para. 42).

The Chamber then found that the senior leaders, which included Nuon Chea and Khieu Samphan, personally oversaw the implementation of the policies and used direct perpetrators to commit the crimes in the furtherance of their common purpose. The Chamber found these crimes to be properly imputed to members of the joint criminal enterprise (para. 43).

The Chamber then assessed the basis of the individual liability of the accused through participation in the common purpose of the joint criminal enterprise (para. 49).

Nuon Chea was basically the number two man in the CPK and exercised ultimate decision-making power together with Pol Pot. He played a key role in creating and supporting the common purpose of the joint criminal purpose of senior leaders in the CPK, formulating and controlling its content and implementing and disseminating it through his principal role in leadership, propaganda and training. The Chamber found that he knowingly executed the common purpose through personal oversight of security centre S-21 as Duch’s supervisor and the arrest, detention, torture and killing of CPK members. The Chamber found he was among those who decided who would be arrested and sent to S-21 and ordered mass killings and so executed the common purpose through intermediaries and direct perpetrators, making a significant contribution to the commission of the crimes (para. 49). The Chamber found he shared the criminal intent of the other members of the joint criminal enterprise. However, the Chamber found he knew of the genocide of the Cham but did not share the necessary intent. The Chamber convicted him of crimes committed though the joint criminal enterprise. It also held that he aided and abetted in the crime against humanity of murder in the deaths at cooperatives, worksites and security centres committed outside the common purpose based on *dolus eventualis* based on his encouragement, and urging CPK functionaries to implement the criminal policies which he knew had a substantial effect on the commission of these crimes[8] Further, Nuon Chea had authority to discipline CPK cadres and the military, allowing the Chamber to find him responsible as a superior for the genocide against the Cham (paras. 50, 53).

The Chamber was satisfied that Khieu Samphan’s continuing involvement and public support for the CPK policies proved he participated and promoted the common purpose and its implementation through the criminal policies, sharing the requisite criminal intent (except toward the Cham), as well as making a significant contribution to the commission of the crimes. The Chamber held he committed the same crimes as Nuon Chea on the same bases of liability, including aiding and abetting the crime against humanity of murder at various sites not within the criminal purpose based on *dolus eventualis* (paras. 60-61). However, Khieu Samphan was not a “superior” as Nuon Chea was because he did not have the ability to prevent or punish crimes, and so was not liable for genocide of the Cham.

Reparations

The Chamber was not allowed by the Rules to award monetary payments. But it had the power to endorse projects by way of reparations for damages suffered from the crimes as moral and collective reparations. There were 3865 civil parties admitted in the case, and civil party lead co-lawyers proposed judicial recognition of projects designed to redress the harms suffered. These included projects on the history of the Khmer Rouge to prevent repetition, projects documenting the experiences of groups for the same purpose, projects to commemorate the suffering of the civil parties and projects providing mental and physical care for them.

Conclusion

Many revolutions have attempted to establish utopias. Many have left in their wake incredible bloodshed and the extinguishment of basic human dignity. Over the centuries, many revolutionaries have escaped liability for what they did in the name of “progress”. A case like this, though a long time in coming, shows that the tools for ending impunity exist.

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References

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2. Trial 002/01 see online, https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-….
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4. See, https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_a….

5. See the “Decision on the Co-Prosecutors’ Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement From the Definition of Crimes against Humanity”, https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E95_8_EN.PDF where the Chamber held that no such nexus was needed.
6. P.T. Chamberlin, *The Cold War’s Killing Fields* (Harper Collins, 2018) at 343-345.
7. See the “Decision on the Applicability of Joint Criminal Enterprise”, Trial Chamber, September 12, 2011, https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E100_6_EN.PDF. The Appeal Chamber on trial 002/01, November 23, 2016 held that the focus of the Trial Chamber in that case on categories of joint criminal enterprise developed by other international hybrid tribunals clouded the issue of responsibility, which should focus on the state of the law when the crimes were committed as it applied to an accused who did not carry out the *actus reus*of the international crime, but who had acted in concert with others based on a common purpose and made a contribution to its implementation (para. 775) online at https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-….
8. See id. where the Appeal Chamber held that criminal liability based on making a contribution to the implementation of a criminal purpose was at the relevant time limited to crimes encompassed by the common purpose (para. 807).