

The ECCC and International Criminal Law: Latest Developments

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On November 16, 2018, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC), (see for an overview of its history, structure and operations here) issued its judgment in the case NUON Chea and KHIEU Samphan. At that time it issued only a summary of its reasons (discussed here) but the entire judgment of 2387 pages was released on March 28, 2019 (here).

Overview of the cases at the ECCC

This might very well be last of the cases against ten individuals initiated by the ECCC, although it has already been appealed (see for instance here). The trajectory of these cases has been rather convoluted.

The first five persons were charged on July 18, 2007; they were NUON Chea, IENG Sary, KHIEU Samphan, IENG, Thirith and KAING Guek Eav alias Duch. The last one, Duch (as case 001) went on trial February 17, 2009 (after his case was severed from the other accused on September 19, 2007) and he was convicted on July 26, 2010 to 35 years imprisonment for war crimes and crimes against humanity committed at the infamous Security Prison 21 (or S-21 prison) in Phnom Penh (see here); his appeal was dismissed, and his sentence increased to life imprisonment on February 3, 2012. (here)

The four other persons, tried collectively in case 002, were indicted on September 15, 2010 by the co-prosecutors, a decision which was confirmed by the co-investigative judges on January 13, 2011. On September 22, 2011, the Trial Chamber issued a severance order limiting the scope of the first trial in case 002 to factual allegations with respect to two phases of the internal population movement and crimes against humanity committed during these forcible transfers, while also including the executions of former Khmer Republic officials at Tuol Po Chrey. Following an appeal by the co-prosecutors and the annulment of the severance order by the Supreme Court Chamber on December 13, 2011, the Trial Chamber again severed the proceedings in case 002 on March 29, 2013, limiting the scope of case 002/01 to the same crimes as was done earlier, which was appealed, resulting in a decision by the Supreme Court Chamber on November 25, 2013. Case 002/02 would address genocide and mass rape, which occurred through a state policy of forced marriages.

In the meantime, on 17 November 2011, the Trial Chamber found IENG Thirith unfit to stand trial due to the impact of a progressive, dementing illness and ordered the severance of the charges against her from case 002, a stay of the proceedings against her and her release. IENG Thirith died on 24 August 2015 while under judicial supervision. IENG Sary, IENG Thirith's husband, died on 14 March 2013.

As a result of the two deaths in the original 002 case, the two separate trials continued only against the two remaining accused, NUON Chea and KHIEU Samphan, whose first trial (case 002/01) had started on November 21, 2011 (while the appeal of the severance order was still on-going) and finished on July 23, 2013. On August 7, 2014, the Trial Chamber found them guilty of crimes against humanity relating to the forced movement of the population from Phnom Penh, the subsequent movements of the population to other areas and the executions of former Khmer Republic soldiers at Tuol Po Chrey and sentenced them to life imprisonment. On November 23, 2016, the Supreme Court Chamber for the most part upheld the Trial Chamber decision but reversed the convictions entered by the Trial Chamber for the crime against humanity of extermination in relation to the evacuation of Phnom Penh on April 17, 1975; with regard to the second phase of population transfers between 1975 and 1977, it reversed the convictions for extermination and persecution on political grounds; the Supreme Court Chamber also reversed their convictions for the crimes against humanity of extermination, murder and persecution on political grounds at Tuol Po Chrey; but it upheld the sentence of life imprisonment. The second case (case 002/02), which is the subject of this article, had started on October 17, 2014 and was completed on June 23, 2017. (For the overview of the above, see paras. 2-13 of the 2018 judgment while the first judgment of the Trial Chamber in case 002/01 can be found here and that of the Supreme Court Chamber in the same case can be found here.)

In 2009, the International Co-Prosecutor filed two submissions to request the Co-Investigating Judges to conduct judicial investigations into allegations of crimes relating to five other suspects who had operated at the regional, rather or at the national level, but lower in the hierarchy than the first five accused. These are now referred to as case 003 and case 004 (of which the allegations and procedural issues will be discussed in a subsequent article).

MEAS Muth and SOU Met were initially named as suspects in case 003. The judicial investigation against SOU Met was terminated on June 2, 2015 following his death. MEAS Muth, who had been a Central Committee Member, a Deputy Secretary of the General Staff, Secretary of Division 164, which included the navy and Secretary of the Kampomg Som Autonomous Sector was charged *in absentia* in March 2015 with war crimes, crimes against humanity and genocide. He appeared voluntarily before the International Co-Investigating Judge in December 2015, where he was notified of additional charges. On 10 January 2017, the International Co-Investigating Judge concluded the judicial investigation in Case 003 against MEAS Muth (see here). On November 28, 2018, the two Co-Investigating judges issued two separate closing orders in the case against him, due to a disagreement about whether he was subject to the ECCC's personal jurisdiction as a senior leader or one of the persons most responsible for crimes committed during the period of Democratic Kampuchea (here); it is likely that this will be appealed.

Case 004 pertains to three people, namely YIM Tith, IM Chaem and AO An.

On December 9, 2015, the International Co-Investigating Judge charged YIM Tith who had been the secretary or highest functionary in a number of different regions called zones, with genocide, war crimes and crimes against humanity. Case 004 remains the case against YIM Tith after the severance of the case and the creation of case files 004/01 and 004/02. On May 31 and June 4, 2018, the National Co-Prosecutor and the International Co-Prosecutor separately filed final submissions, disagreeing on whether he falls within the personal jurisdiction of the ECCC for the same reasons as set out above with respect to MEAS Muth. The same disagreement occurred with the Co-Investigative Judges on August 16, 2018 and an appeal was filed with the Pre-Trial Chamber by these judges on December 14 and 20, 2018 (see here, para. 1), which has not been decided yet.

On February 22, 2017, the Co-Investigative Judges dismissed the charges of crimes against humanity, which had been laid against IM Chaem (case 004/01), who had been a secretary in two different zones, due to yet again a lack of personal jurisdiction. On June 29, 2018, the Pre-Trial Chamber issued its considerations with respect to the International Co-Prosecutor's appeal against this dismissal. Three judges found that the ECCC had no individual jurisdiction over her while two other judges found that there was sufficient evidence to charge her as one of the most responsible individuals; as a result, the case was closed. (here)

The International Co-Investigating Judge charged AO An, the secretary in one zone and deputy secretary in another, in case 004 on March 27, 2015 with crimes against humanity and on March 14, 2016 he expanded the charges by also including genocide. On December 16, 2016, the Co-Investigating Judges concluded the judicial investigation against AO An and the case was severed, creating case file 004/02. On 16 August 2018, the Co-Investigating Judges issued two separate closing orders in this case, again due to a disagreement about whether AO An was subject to the ECCC's personal jurisdiction. (here). This was appealed on January 10, 2019. (here)

Legal issues in case 002/02

While the factual analysis of the crimes carried out by the accused dominates the decision, some legal issues were also addressed in some detail, both with respect to crimes and with respect to the forms of extended liability. The following underlying crimes are discussed (as well as the overarching elements of war crimes and crimes against humanity): murder, extermination, enslavement, deportation, imprisonment, torture, persecution and inhumane acts as crimes against humanity and willful killing, torture, willfully causing great suffering or serious injury to body or health, inhumane treatment, willfully depriving a prisoner of war or a civilian of the rights of a fair and regular trial, unlawful confinement of a civilian and the unlawful deportation of a civilian as a war crime. The judgment also addressed the various elements of genocide. The following modes of liability were examined: joint criminal enterprise (or JCE), planning, instigation, ordering, aiding and abetting, including accessory after the fact and superior responsibility.

The legal analysis was for the most part based on the ICTY/ICTR precedents as well as on the judgment of the Supreme Court Chamber in case 002/01, which itself had relied heavily on ICTY/ICTR jurisprudence, and as such do not offer a great deal of new development. The exceptions to this general statement, which will be addressed in this article are: the reasoning with respect to the underlying crime of murder; a discussion about forced labour as a legal concept; the notion of civilian population as a prerequisite for crimes against humanity; and the *mens rea* for another form of extended liability, namely JCE. The analysis of the concept of forced marriage as discussed in this case also warrants attention but this issue will be the subject of a separate article.

Civilian population

The notion of civilian population is part of the elements of crimes against humanity. The other ones are: (i) there is an attack; (ii) that is widespread or systematic; (iii) on national, political, ethnical, racial or religious grounds; (iv) there is a nexus between the acts of the direct perpetrator and accused and the attack; and (v) the accused has the requisite knowledge (para. 301).

The issue with respect to civilian population is whether an attack by a state or organization against its own armed forces could amount to an attack against a civilian population. This radical departure of the long standing rule that this was not possible had been upended both by the ICC and the International Co-Investigative Judge of the ECCC (for an explanation of these two decisions see PKIGJJ: Analysis: The Notion of Civilians in International Criminal Law).

This decision by the International Co-Investigative Judge was overruled by the Trial Chamber in case 002/02 by saying that “while an interpretation of the protections afforded by crimes against humanity to include domestic armed forces may be considered desirable, it is not clear that a legal framework affording such protection was either foreseeable or accessible by 1975.” (para. 309). This is not entirely surprising as all the judgments issued since the ICC Appeals Chamber in the June 2017 Ntaganda case by the ICTY have consistently adhered to the established approach with respect to civilian population, as can be seen in the cases of *Mladi?* (Trial Chamber, November 22, 2017), *Prli?* (Appeals Chamber, November 29, 2017), *Seselj* (Appeals Chamber, April 11, 2018) and *Karadži?* (Appeals Chamber, March 20, 2019).

Murder

As with all cases before the ECCC, the issue with respect to all aspects of the international crimes, both the international aspects, as well as the underlying crimes as defined in international criminal law, is what those elements were during the time over which the ECCC had jurisdiction, namely between 1975 and 1979. While there was no dispute that the crime of murder was known in international criminal law at that time as both an underlying crime for war crimes and a crime against humanity and while there was also no dispute that the *actus reus* of murder is an act or omission of the accused which caused the death of the victim directly or indirectly and that this act or omission substantially contributed to the death of victim (para. 627 with further details in para. 628), the question of the level of *mens rea* needed to be clarified by the Trial Chamber in 002/02.

The question with respect to *mens rea* was whether, in addition to an intent to kill (or *dolus directus* in civil law), a lower *mens rea*, namely an intent to cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to death (*dolus eventualis* in civil law), would also satisfy this aspect of murder in the seventies, the relevant time required for legality in case 002/02. *Dolus eventualis* is a higher level of *mens rea* than recklessness in common law, although ICTY jurisprudence have at times equated these concepts as in *Staniši?* and *Simatovi?*, Trial Chamber, May 30, 2013. (For an examination of the various levels of *mens rea* in international criminal law, see ICC PTC decision, Lubanga, paras. 349-360 and ICC PTC decision, Bemba, paras. 352-369). It was argued by the defence that, although this level of *mens rea* had been accepted by the international tribunals, this jurisprudence was decided in the nineties and as such had no precedent value for the ECCC. (paras. 632 and 635)

The Trial Chamber, while relying heavily on the decision of the Supreme Court Chamber in case 002/01, also conducted its own analysis by examining both customary international law in place in the seventies, primarily by reference to the *Medical Case* decided after WWII by the American Military Tribunal in Nuremberg (paras. 636-637) as well as, in detail, the legislation of a large number of civil and common law systems (paras. 640-649). Based on this survey it came to the following conclusion:

Having examined how the aforementioned national systems, representative of the world's major legal systems, define the crime of murder (understood as the unlawful and intentional killing of a human being), and disregarding the post-1975 legislation and case law referred to by the Supreme Court Chamber, the Trial Chamber finds that while the precise definition of this crime may vary, and while French and Cambodian law may differ from other approaches, the vast majority of these domestic systems recognise that a standard of *mens rea* lower than direct intent may apply in relation to murder, the lowest being *dolus eventualis*. This encompasses the case of an individual who willingly engages in conduct with the knowledge that his or her act or omission would likely lead to the death of the victim(s) and who, at a minimum, accepts or reconciles him or herself with the possibility of this fatal consequence. Therefore, the Chamber is satisfied that the review of pre-1975 international and national jurisprudence and legislation demonstrates a general principle of law that when an individual knowingly and willingly engaged in conduct which was likely to lead to death, that conduct would

amount to murder or a crime of similar seriousness in each domestic legal system. This is consistent with the Supreme Court Chamber's conclusion that "the *mens rea* of murder as a crime against humanity as it stood in 1975 must be defined *largo sensu* so as to encompass *dolus eventualis*." (para. 650)

Forced labour

Forced labour was discussed in this case as part of the crime against humanity of enslavement. As a general notion, this approach is not unique as the ICTY and SLSC have discussed forced labour on a number of occasions.

With respect to the notion of forced labour, it should be noted that in the ICTY caselaw the notion of forced labour is most often discussed as a violation of the laws of war, which have regulated the employment of prisoners of war and civilians in some detail. The general principle under the laws of war is that forced labour in itself is not necessarily illegal, but that only certain types of labour are prohibited, such as work with a military character or unhealthy or dangerous work. It has also been pointed out in the caselaw that the situation of civilians outside detention facilities, doing similar work under similar circumstances as detainees, should be taken into account in a determination of whether the forced labour of these civilian prisoners can be characterized as a war crime. Forced labour is not mentioned in international instruments as a crime against humanity. As a result, specific manifestations of forced labour have to fit within the parameters of other enumerated crimes against humanity, such as inhumane acts or enslavement (see the ICTY cases of *Naletili? & Martinovi?*, Trial Chamber, March 31, 2003; *Krnojelac*, Trial Chamber, March 15, 2002; *Simi?*, Trial Chamber, October 17, 2003; and *Mladi?*, Trial Chamber, November 22, 2017 as well as the SLSC cases of *Sesay, Kallon and Gbao* ('RUF'), Trial Chamber, February 25, 2009; and *Taylor*, Trial Chamber, May 18, 2012)

It has been held that inhumane acts are committed if prisoners were injured while involved in forced labour, specifically digging of trenches, either as a result of mistreatment or being exposed to hazardous situations.

The most important determination that forced labour is enslavement depends on whether a detainee has no real choice as to whether to work. Relevant factors in such an assessment are:

- the substantially uncompensated aspect of the labour performed;
- the vulnerable position in which the detainees find themselves (being under guarded supervision, for instance, or performing dangerous work);
- the fact that detainees who are unable or unwilling to work are either forced to or are put in solitary confinement;
- longer term consequences of the labour (such as health problems);

- whether there are inhumane conditions during the carrying out of the work.

A refinement was added in the 002/02 case as a result of the contention by the defence in the context that forced labour should be illegal and of a certain gravity, and, that in assessing the gravity of the conduct, it should be put in the perspective of the dire living and working conditions of farmers and other workers in Cambodia at the time. (para. 668). The Trial Chamber was of the view that “while there are limited situations in which people can be forced to work, if the conditions are such that this goes beyond lawfully required labour and encompasses the exercise over a person of any or all powers attaching to ownership, such conduct amounts to enslavement and is therefore not justifiable under any circumstance.” (para. 669)

JCE

The Trial Chamber followed in general the established jurisprudence re JCE (for an explanation see PKIGJJ: Karadži? receives life imprisonment, see also paras. 3708-3712 in this decision) with the exception that the ECCC caselaw has consistently indicated that JCE III was not part of ICL in the seventies and as such not within the jurisdiction of the ECCC. (para. 3703)

Further to the determination by the Trial Chamber with respect to the *mens rea* of underlying crimes being at the level of *dolus eventualis*, the Co-Prosecutors argued indirectly that the same should also apply to JCE but this was rejected by the Chamber as *dolus eventualis* applies to JCE III and cannot be transposed to JCE, which requires *dolus directus*. (paras. 3714-3716)

Conclusion

The Trial Chamber in the ECCC 002/02 case has made some valuable contributions to existing ICL jurisprudence on two levels. First of all, it clarified some lingering issues with respect to underlying crimes of murder and forced labour, as well the mode of liability of JCE. Secondly, it has also made it clear that the vast majority of caselaw developed by the international tribunals recently can also be extrapolated to an earlier time period, namely the seventies or even before.

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