

The Legality of the charges against Khmer Rouge leaders

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On March 27, 2019 the Trial Chambers of the Extraordinary Chambers in the Courts of Cambodia released its long-awaited full reasons for the conviction in Trial 002/02 (Trial 2) of Nuon Chea and Khieu Samphan on November 16, 2018, who were leaders in the Khmer Rouge regime from 1975 to 1979 for crimes against humanity, war crimes, grave breaches of the Geneva Conventions and genocide. The Trial Chamber convicted the accused and sentenced them to life imprisonment. This Journal published a overview of these reasons here based on a summary of the reasons released the day the conviction was pronounced in anticipation of these full reasons. An important point here is that this incredible and deadly revolution was not ended only though war and politics, but that the ringleaders have become subject to the rule of law. This article will deal with the fundamental principle of the legality of some of the charges against them through many of the arguments the accused argued before the Trial Chamber in the second trial.

As noted in our earlier article and expanded on release of the full reasons in eccc-international-criminal-law-latest-developments in this Journal, the Trial Chambers bifurcated the case against these two accused. The first Trial Chamber convicted the two for crimes against humanity committed during

two phases of forced population movements as well as the for executions of former Khmer Republic soldiers. They were sentenced to life imprisonment in Trial 002/01. They appealed their convictions. The Supreme Court Chamber upheld their convictions for crimes against humanity committed during the two phases of population movement and additionally entered a conviction for murder in relation to the second movement. But it reversed their convictions for the crimes against humanity of extermination and persecution on political grounds in relation to the movement of populations and allowed the appeal of the extermination, persecution and murder convictions for the crimes against Khmer Republic soldiers in Appeal 002/01(Appeal).

The bifurcation placed the defence team in a difficult position because many issues of law relevant to both trials were decided in the first trial and appeal. In many situations, they had to argue that the Trial Chambers in the second trial should refuse to follow the appeal judgment from the first trial. This article will focus on the issue of legality of the charges raised in Khieu's defence in his Trial Brief 002/02 (Brief) and as dealt with by the Trial Chamber.

This principle of legality, *nullum crimen sine lege* (no crime without law) and *nulla peona sine lege* (no punishment without law), is a fundamental principle of international criminal law and stands as one of the bastions of the rule of law. It provides that a person cannot be charged with or punished for conduct that did not constitute an offence in domestic or international law when he engaged in it, that the law shall clearly define the law so that potential offenders have access to the elements of the law and could foresee what conduct is punishable. The principle includes the rule that the law shall be strictly interpreted, any ambiguity resolved in favour of the accused and that the law should not be extrapolated to a novel situation by analogy. Khieu's defence team argued that the Supreme Court had allowed the gravity and magnitude of the charges against him to reduce the proper *mens rea* to be applied to his crimes and that the Trial Chamber should not follow it.

Khieu's defence based on the legality of the charges

Legality

Khieu's defence team was bold enough to commence this argument with a heading that described the thrust of their argument about the approach of the Supreme Court to legality: "Precedence of the fight against impunity over the fight against arbitrary punishment" (Brief, para. 351, also para. 380).

Accessibility and Forseeability

Khieu's defence team relied heavily on cases from the European Court of Human Rights (ECtHR) in their arguments about the proper normative and qualitative components of the principle. They relied on the recent case of *Vasiliauskas v. Lithuania*for the non-retroactivity principle (see the recent article in this Journal about this point (here)). For the qualitative requirements of the principle, accessibility and foreseeability, they referred to paragraphs 74-5 in *Korbely v. Hungary*, in which the Grand Chamber held that an order from the General Staff to teach members of the military about the contents of a published brochure containing the text of the Geneva Conventions constituted sufficient

accessibility to the law to convict a military officer for killing civilians. Interestingly, they also referred to paragraphs 235-9 and 244 in *Kononov v. Latvia* (the defence team mistakenly named Lithuania in their footnote) where the Grand Chamber held that a platoon commander charged with killing civilians had sufficient, accessible and foreseeable knowledge of the war crimes he was charged with because they were *lex specialis* governing criminal conduct during war primarily addressed to armed forces and especially commanders, even though the laws of war were not published. The Khieu defence relied on *Vasiliauskas*again for the proposition that the qualitative requirement of foreseeability requires that the accused can know from the wording of the relevant provision and if necessary, with legal advice on the court's interpretation of it, what acts or omissions would make him liable for a particular punishment (Brief, para. 319). The defence's point was that foreseeability meant not just foreseeability of criminal charges in general, but their specifics and the possibility of understanding their extent and impact (Brief, para. 323). They next argued that ECtHR cases hold that the criminal law must be construed strictly, citing among other ECtHR authorities, paragraph 154 in *Vasiliauskas* where the Grand Chamber held that "…the criminal law must not be extensively construed to an accused's detriment, for instance by analogy…" The defence also cited *ad hoc* tribunal cases, including paragraph 120 in *Naletilic*, where the Appeal Chamber (ICTY) held that ambiguity in the law, in that case, the factual requirements (of an armed conflict or its character) of the *mens rea* required to prove the crime of grave breaches of the Geneva Convention, had to be resolved in favour of the accused.

Khieu's defence team challenged the holding of the Supreme Court's statement of legality, repeated in connection with a number of crimes:

The Supreme Court Chamber further recalls that, as to the accessibility requirement, in addition to treaties, "laws based on custom […] can be relied on as sufficiently available to the accused" and that, as to foreseeability, the accused "must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision". In this regard, the Supreme Court Chamber accepts the argument of the Co-Prosecutors that, given that the crimes for which Khieu Samphan was convicted "are some of the gravest known; he seriously cannot contend that he did not understand that his conduct was criminal in the sense generally understood" (Appeal Judgement 002/01, paras. 762, 5).

They continued to press their argument that the purpose of applying this simplified statement of foreseeability and accessibility to those charged with making a significant contribution to the implementation of a Joint Common Enterprise (JCE) and to those charged with the crime against humanity of murder, was to avoid a proper discussion of the lessened standard of *mens rea* it alleged the Supreme Court allowed for both charges. They argued that their statement of legality was a "ploy" (Trial Brief, para. 356) to support a finding the requirements of accessibility and foreseeability were met because the accused knew the enormity of their conduct was generally criminal (Brief, paras. 351-61).

Basically, the defence argued that general knowledge of the wrongful nature of the conduct and the gravity of the crimes cannot take the place of a precise definition of the offence and penalty (Brief,

para. 373).

Mens Rea for Murder

In the case of the *mens rea* for the crime against humanity of murder in customary international law in 1975, Khieu's defence argued that it was the specific intent to kill, not *dolus eventualis* as they argued was accepted by the Supreme Court. They argued that the Trial Chamber should depart from the Supreme Court's ruling accordingly (Brief, para. 395). They reviewed the *Doctor's Trial* as the only authority cited by the Supreme Court from the American Military Tribunal (prior to 1975) and found that it did not support the lesser *mens rea*. But even if it did, they argued there was no subsequent authority establishing customary international law afterwards (Brief, paras. 404-6). Khieu defence also argued that the Supreme Court's definition was developed from the case law of *ad hoc* tribunals decided after 1975 and further, that the Supreme Court had violated the principle of legality by relying on post-1975 laws from various countries and that the pre-1975 laws cited did not collectively demonstrate the state practice nor the *opinio juris* required to establish customary international law in 1975.

In respect of the JCE, Khieu's defence then argued that the Supreme Court had fabricated a "hybrid" theory of Joint Criminal Enterprise (JCE) and so retroactively applied a law unforeseeable in 1975 when it delivered its judgment November 23, 2016 (Brief, paras. 430-1). They noted that the Pre-Trial Chamber (here) had held that JCE III was not foreseeable or accessible in 1975 and should not be applied. Then they argued that the Supreme Court's hybrid JCE theory of liability that included within the common purpose the crimes necessary to achieve it (JCE I), but also crimes that were merely foreseeable, even if that risk was accepted (JCE III) (Brief, paras. 430-516). They argued this hybrid theory of liability could not have been foreseen nor was accessible to the accused in 1975 and applying it violated the principle of legality. Khieu's defence asked the Trial Chamber not to apply it.

Trial Chamber

Legality

The Trial Chamber accepted the principle of legality and committed itself to look at the issue wherever the Supreme Court had not (Trial 2, para. 22). It did note that the principle did not prevent a chamber from interpreting or clarifying the law or from relying on other decisions, even post-dating the relevant period, provided that it did not create new law or interpret the law beyond the reasonable limits of acceptable clarification (Trial 2, para. 21). Further, crimes and bases of liability must be foreseeable and accessible in general, that is, objectively. The Trial Chamber cited paragraphs 77-9 of *Streletz, Kessler and Krenz v. Germany* where the Grand Chamber of the ECtHR had held that the accused should have been able to foresee the charges of incitement to homicide and intentional homicide of Berlin Wall "border violators" against them because, as very senior officers in the State apparatus, they could not have been ignorant of Germany's constitution, international obligations and international criticism of its border policy when they had implemented or maintained that regime by superimposing on the law secret orders and instructions on the improvement of border-protection and

the order to fire given to border guards. The Chamber held that it could also rely on domestic law in assessing whether the conduct and punishment in question was foreseeable the way it was charged, but this was not necessary if it was foreseeable under customary international law (Trial 2, para. 23).

However, the Trial Chamber held that Khieu had conflated the non-retroactivity requirement with the qualitative requirements of accessibility and foreseeability (Trial 2, para. 26). It held that the Supreme Court had clarified the crimes and bases of liability at the relevant time relying in the first Appeal and did not obscure the clear definition of the crimes at the relevant time by relying on their gravity.

The Trial Chamber accused Khieu's defence of a selective reading of the ECtHR cases, noting that while *Vasiliauskas*specified the accused must have a clear statement of the law at the time of the conduct, the requirement that the elements of the crime were accessible and foreseeable did not preclude judicial interpretation, especially in customary international law where interpretation might be "reasonable and often necessary" (Trial, paras. 28-9). The Trial Chamber concurred with the Supreme Court where it held that the gravity of the crimes was part of the foreseeability analysis, but not the sole consideration (Trial 2, para. 30). It finally rejected the idea that the Supreme Court relied on the gravity of the crimes to avoid considering accessibility because it expressly found that the offences and bases for liability must have existed under national and international law in 1975 in treaties and customary law that were sufficiently accessible to the accused. Their positions of authority would have also made this law accessible (Trial 2, para. 31).

***Mens rea* for murder**

The Trial Chamber rejected Khieu's submissions that the only *mens rea* for murder that was foreseeable in 1975 for murder was the direct intent to kill. The Supreme Court had adopted a definition of *dolus eventualis* that provided that if an actor engaged in life-endangering conduct, his killing becomes intentional if he "reconciles himself" or "makes peace" with the likelihood of death. If the killing is committed "with manifest indifference to the value of human life", conduct of even minimal risk can result in a finding of intentional homicide. Large scale killings that would be classified as reckless murder in the United States would come within *dolus eventualis*, which does not include negligence or gross negligence (see Trial 2, paras. 631-2, first Appeal, paras. 390-1, 410, adopted from the *Stakic* Trial Chamber, ICTY, para. 587)). The Trial Chamber observed that the jurisprudence of *ad hoc* tribunals accepts the concept of *dolus eventualis* (Trial 2, para. 635). However, the Trial Chamber and Supreme Court conducted their own assessment of the state of customary international law in 1975. The Trial Chamber interpreted the *Medical Case* decided by the IMT as encompassing an intent of endangering the lives of their victims with the knowledge that they would likely cause their deaths (Trial 2, para. 636). It noted that the Supreme Court also found domestic practice that supported its conclusion about *dolus eventualis*. For a further analysis of the Trial Chamber's findings see eccc-international-criminal-law-latest-developments in this Journal.

Next, the Trial Chamber legitimately conducted a review of principles common to major legal systems in the world to assess the existence of a "general principle of law" (the third sources of international law after treaties and customary law under Article 38 of the Statute of the International Court of

Justice) (Trial 2, para. 638). The Trial Chamber found that many civil and common law legal systems required less than direct intent to kill for the crime of murder. Interestingly, the exception was pre-1975 Cambodian and French law. However, in both cases, the law allowed the intent to kill to be inferred from circumstantial evidence, especially when the conduct showed a high likelihood that it would cause death, although still not at the level of *dolus eventualis* (Trial 2, paras. 648-649). Accepting the Cambodian and French exceptions, the Trial Chamber found most domestic systems accepted a standard of *mens rea* lower than direct intent (Trial 2, para. 650). It was satisfied that pre-1975 international and national jurisprudence and its review of domestic legislation demonstrated a general principle of law that when a person knowingly and willingly engaged in conduct likely to lead to death, that conduct would amount to murder or a similarly serious crime in each domestic legal system. This was consistent with the Supreme Court's conclusion that the *mens rea* of murder as a crime against humanity in 1975 must be defined in a broad sense as encompassing *dolus eventualis* (Trial 2, para. 650).

Joint Common Enterprise

The Trial Chamber held that liability for a crime committed through JCE I (direct intent) and II (intent to engage in a systemic pattern of criminal conduct) was foreseeable and accessible in 1975, weighing the customary status and positions of the accused objectively. However, it noted that the Cambodian courts agreed that JCE III (foreseeable risk of crime and acceptance of risk) was not customary international law in Cambodia in 1975 (Trial 002/02, para. 3707). The Closing Order charged only JCE I.

After reviewing the basic elements of the JCE basis of liability (described here), the Trial Chamber summarized Khieu's defence that the Supreme Court had wrongly invented a new hybrid form of JCE combining the *actus reus* of JCE I with the *mens rea* of *dolus eventualis* drawn from JCE III, instead of direct intent to carry out a common purpose and the underlying crimes, a hybrid that was not foreseeable to the accused in 1975, violating the principle of legality (Trial 02, para. 3713). The Trial Chamber seems to have interpreted Khieu's defence as saying that the common purpose and resulting crimes were not criminal, but merely foreseeable and therefore not within JCE I (Trial 2, para. 3731).

The Trial Chamber agreed with the argument of Khieu's defence team that the direct intent required for JCE I must cover both the common purpose and the crimes it encompassed, while JCE III pertained to crimes committed outside the common purpose as a foreseeable consequence of achieving the common purpose requiring only a *mens rea* of *dolus eventualis* which was not sufficient to support a conviction under JCE 1 (Trial 2, paras. 3712-5). The Trial Chamber also dismissed the Co-Prosecutors' argument for a lower *mens rea* discussed in eccc-international-criminal-law-latest-developments.

In its review of the facts, the Trial Chamber found that the Party leaders shared a common purpose of rapidly implementing socialist revolution by a great leap forward in Cambodia designed to build the country, defeat its enemies and create an autonomous, homogenous Khmer society of worker

peasants. It observed that this “common purpose” was not primarily the commission of crimes, but nevertheless, its successful implementation into a transformation of Cambodia into a revolutionary society was contingent on the execution of criminal policies and the elimination of the enemies of the revolution (Trial 2, para. 3743). The Chamber found that the common purpose was implemented across Cambodia by Party cadres and military through five policies that were intrinsically linked to the common purpose and involved the commission of crimes. The Chamber held that this made the purpose criminal itself (Trial 2, para. 4068). By designing, implementing, controlling and contributing to the policies and because they held overall positions of authority, the accused were responsible for the crimes under JCE I.

Conclusion

The rule of law is a bulwark between a gruesome end to a gruesome revolution and the institution or re-institution of normative order. The legality of charges against those who have committed international crimes is an important safeguard against arbitrariness. In this case, the Trial Chamber was asked to ensure that the elements of crimes charged against the accused were foreseeable and accessible to them at the time they were committed. The Trial Chamber here did what a court must: listen to divergent arguments and decide the issue and here reached solid conclusion. The Chamber concluded that a common purpose that was not primarily directed at the commission of crimes was made criminal by its implementation through criminal policies based on international crimes. This was encompassed by JCE I.

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