



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
 Extraordinary Chambers in the Courts of Cambodia
 Chambres extraordinaires au sein des tribunaux cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
 Nation Religion King
 Royaume du Cambodge
 Nation Religion Roi

10 July 2017

PRESS RELEASE

CO-INVESTIGATING JUDGES ISSUE REASONS FOR DISMISSAL OF CASE 004/1

Today, the Co-Investigating Judges (CIJs) issued the reasons for the closing order of 22 February 2017 in which they dismissed the case against IM Chaem for lack of personal jurisdiction. In this press release, the CIJs summarise the main reasons for the dismissal. A public redacted version of these reasons with more details is available at:

<https://eccc.gov.kh/en/document/court/closing-order-reasons-case-0041>

<https://eccc.gov.kh/en/document/court/closing-order-disposition-case-00401>

Due to the dismissal for lack of jurisdiction, IM Chaem continues to benefit from the presumption of innocence and the right to privacy, which restrict the contents that may be made public, even more than in the case of an indictment, when these rights also apply but may have to give way to a greater extent to the need to keep the public adequately informed of procedural developments. However, a dismissal for lack of personal jurisdiction does not equate to a statement that no crimes were committed by a charged person. It would therefore be incorrect in such a scenario to state without further qualification that a charged person was “cleared” of the charges, as had been done in this case in some media.

In a Closing Order, the factual findings are based on a probability standard required for a decision on an indictment, and not on the “beyond reasonable doubt” standard required for a conviction following a trial. However, the overall finding by the CIJs that IM Chaem is not under the ECCC’s personal jurisdiction was made taking the available evidence at its highest.

Personal Jurisdiction at the ECCC and the Position of the ECCC within the Cambodian Legal System

The purpose of the Agreement between the UN and Cambodia of 6 June 2003 “is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial *senior leaders of Democratic Kampuchea and those who were most responsible* for the crimes [...] committed during the period from 17 April 1975 to 6 January 1979.” The Supreme Court Chamber (SCC) of the ECCC interpreted the terms “*senior leaders of Democratic Kampuchea and those who were most responsible*” as referring to two categories, namely, senior leaders of the Khmer Rouge who are among the most responsible, as well as non-senior leaders of the Khmer Rouge who are also among the most responsible. Both categories of persons must have been Khmer Rouge officials *and* among the most responsible; the criteria are cumulative, not disjunctive.

There is no residual jurisdiction for the ordinary Cambodian courts over crimes committed by those who do not fall under the categories of “senior leader” or “person most responsible”. A close study of the negotiation history preceding the establishment of the ECCC and the development since shows that currently no other Cambodian court has jurisdiction over any person or course of events which are within

the personal, temporal and subject-matter jurisdiction of the ECCC. An argument might therefore be made that the CIJs should counter the obvious effect of this view and exercise their discretion as broadly as possible in favour of a finding of personal jurisdiction in order to avoid an unwanted impunity gap. The CIJs disagree with that reasoning.

No attempts were ever made by either the Cambodian government or the UN to regulate the investigation and prosecution of those who would fall short of the personal jurisdiction threshold of the ECCC. That stands to reason, because the goal of peace and reconciliation, which entails reintegration of the Khmer Rouge into society, was a paramount motivation of the Cambodian government. The drafters of the law governing the ECCC were aware of the fact that a massive category of perpetrators existed and would not face justice before the ECCC. In this regard, in an attempt to shed as much light as possible on the intentions of the parties to the ECCC Agreement, the International CIJ requested from the UNs' Archives the records of the negotiations between the UN and the Government of Cambodia, yet the UN denied disclosure of the majority of the requested documents for confidentiality reasons.

The effect of the law on personal jurisdiction is thus twofold:

- a. It restricts the ECCC's *own* personal jurisdiction to those most responsible, and
- b. It excludes any jurisdiction by the *ordinary* Cambodian courts over the events under the ECCC's temporal jurisdiction.

Criminal Law Principles

Among the factors to be considered for the exercise of discretion are the principles of *in dubio pro reo* ("in case of doubt for the accused") and of strict construction of the criminal law. The application of *in dubio pro reo*/strict construction is all the more crucial in systems where the law is often not fully settled, as is still the case in many areas of international(ised) criminal law. Particularly from the point of view of the defence, the charges and their legal content often seem to have the nature of moving targets. The instances of divergent interpretation of identical legal concepts within the ECCC and other courts are clear evidence of this. The case of a special court with a narrowly tailored personal, subject-matter and temporal jurisdiction, based on contentious negotiations between a national government and the international community in a post-conflict transitional scenario, which began operations almost 30 years after the events in question, is a prime example for the need of interpretational judicial restraint.

This is true not least because of the pressure exerted by the public's expectations, by the media, on the grounds of concerns around the concept of impunity for mass atrocities, political agendas as well as previous historical research into the underlying events. In scenarios of this kind, the guilt of the suspects, charged persons and accused often seems beyond debate and the judicial proceedings are expected simply to attach the seal of official approval to the pre-existing general view of history.

The ECCC exercises selective justice in the objective sense of the word, because only a certain small group of people will ever be prosecuted in the courts of Cambodia for the atrocities during the DK, namely those which fall under its own jurisdiction. Signing the Agreement in the absence of a residual jurisdiction in the ordinary Cambodian courts was a conscious political choice during the negotiations, balancing the call for integration of the remaining Khmer Rouge into society against the desire for some form of judicial closure for the horrendous suffering of the victims.

It is undoubtedly difficult for the public and the victims to accept that even the soldiers who routinely killed small children by bashing their heads against trees or who had competitions about who could kill the greatest number of people, should not face justice. In many domestic criminal justice systems such conduct would attract a whole life sentence without parole and in some countries possibly even the death

penalty for *each individual act* of each individual offender. This discrepancy was known during the negotiations by both the national and international sides.

However, on the one hand, the informed political decision of the drafters must be respected by the judges of the ECCC and, on the other hand, this state of affairs must not and cannot equate to an automatic presumption of senior responsibility for those few who *are* brought before the court by the Prosecution. The fact that after such a long time some of the crucial evidence, through witnesses or otherwise, may have deteriorated to a point where reliable evidence may become difficult to come by, is not something which can ever be laid at the feet of the defence in criminal investigations or give rise to a lesser standard of proof for indictment or conviction. The defence are entitled to a dispassionate evaluation of the evidence and interpretation of the law at all levels of the ECCC's judicial hierarchy, beginning with the CIJs.

Criteria for the Exercise of Discretion – Decision-making in the DK Structures

In its judgment in Case 001, the SCC implicitly held that there is no merit in any historical-political contention that the negotiations around the establishment of the ECCC led to a joint and binding understanding that only a certain finite number of (named) individuals were to be under the court's jurisdiction. The selection of persons to be investigated and indicted was and is purely a matter for the discretion of the Prosecution and the CIJs, based entirely on the merits of each individual case. In theory, a senior leader who had not been substantially involved in the criminal activities of the DK might fall outside the court's jurisdictional reach as not being most responsible. Conversely, someone on the lower rungs of the hierarchy could be considered as one of the most responsible depending on their individual contribution to the atrocities. The relative gravity of the person's own actions and their effects are thus another valid point of reference. This should not detract from the initial filtering effect that a person's formal position in the hierarchy has.

Furthermore, decision-making in the DK hierarchy was not a process with egalitarian input from functionaries at any level and an ensuing discussion of the way forward. Decisions were made at the top and then implemented by the lower levels on pain of personal consequences, increasingly so the further down the chain of command one looks. The ultimate definition of the content of policies and the means of their implementation rested with the top echelons who could interfere at will. Indeed, openly discussing instructions from *Angkar* could easily have been considered as the first step to insubordination, and no-one could be safe in the assumption that such conversations would not be reported in interested quarters with adverse effect upon themselves.

Evidentiary considerations – 1997 and 1998 DC-Cam Reports; 1984 Government Report

DC-Cam reports are publicly available and have thus for a long time formed a major foundation for the public's perception. It is thus necessary to explain how these reports were treated by the CIJs and why.

The 1997 and 1998 reports are mainly based on field visits and interviews with sources and also include information from a 1984 Government Report. They provide information on site locations and numbers of victims. As for the numbers of victims, only one or two DC-Cam sources per site provided such numbers. The DC-Cam reports, which are summaries, do not contain the full record of the conversations conducted with the different sources and thus lack information such as the basis of knowledge of the sources on victim numbers. Moreover, the numbers are not consistent and the causes of death are unclear. It appears that the victim numbers in the 1984 Government Report are based on information which was gathered more systematically and through a broader range of sources than the data from DC-Cam. The 1984

Government Report also provides causes of the death but does not specify how this information was established. It does not contain a record of the conversations held with the sources, either. None of these reports refer to the date on which the victims died, or to the administrative structure and chain of command under which the deaths occurred. It is, therefore, also impossible to determine whether the deaths fall under the relevant temporal jurisdiction of the ECCC.

Based on the above, the CIJs find that the numbers of victims provided in DC-Cam's 1997 and 1998 reports and the 1984 Government Report are unreliable and have little probative value. They have consequently not relied on them. The numbers and causes of death provided by witnesses to the OCIJ have been relied on instead.

Conclusion on personal jurisdiction

The finding that IM Chaem falls outside of the ECCC's personal jurisdiction is made, firstly, taking into account the evidence related to the crime sites she was charged with. Secondly, even taking into account the evidence related to the other allegations not charged, she would still fall outside of the jurisdiction of the ECCC. It was thus not necessary for her to be charged with any remaining allegations. Im Chaem was not a senior leader and would have to fall into the residual category of others who were "most responsible". However, the evidence does not support such a finding, either – whether it was her position in the hierarchy of the DK or the seriousness of her alleged conduct.

There were about a hundred other district secretaries during the time of DK; the position of a district secretary was merely the third rung from the bottom in the hierarchy (above village and commune). The evidence supports the conclusion that she was tasked by Ta Mok to lead the Southwest Zone cadres to the Northwest Zone and thus had a role which did not correspond to the average district secretary, yet the fact that she was initially only given a role as a district secretary once in the Northwest Zone, becoming a member of the sector committee only later, must be taken into account. This militates against a significantly elevated formal role.

There is a strong indication that she was initially considered as being one of the persons most responsible because of the alleged number of 40,000 deaths arising from the Phnom Trayoung security centre alone. That was certainly an arguable contention at the time, but the evidence found during the investigation delivered far lower victim numbers on *all* crime sites, charged or not charged.

In sum, neither the individual nor the combined weight of the factors taken into account allowed the CIJs to arrive at the conclusion that IM Chaem falls into the category of persons most responsible, even assuming that the allegation against her of being responsible for the crimes committed at the sites investigated were founded.

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