

Representing Victims of Genocide at Trial

Developments at the Extraordinary Chambers in the Courts of Cambodia in the Case of the Ethnic Vietnamese Minority

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Background Reading

- *Representing minority victims in genocide trials* (2014) 2 NTLJ 363
- *Victim Participation and Minorities in Internationalised Criminal Trial: Ethnic Vietnamese Civil Parties at the Extraordinary Chambers in the Courts of Cambodia*, (2014) 14 Macquarie Law Journal 97 at <http://classic.austlii.edu.au/au/journals/MqLawJl/2014/17.html> .

Jurisdiction

- *Agreement between United Nations and Cambodian Government regarding Prosecution under Cambodian Law of Crimes Committed During Period of Democratic Kampuchea* (2003, amended 2004)
- *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* (2001; amended 2004).
- Internal Rules of the ECCC
- **Temporal; personal and geographical jurisdiction:** to “try **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 17 April 1975 to 6 January 1979”
- Crimes within jurisdiction: genocide, crimes against humanity and grave breaches of the Geneva Conventions (war crimes) under the *Law on the Establishment of the ECCC* and domestic crimes under the *Cambodian Penal Code 1956*, such as homicide, torture and religious persecution.

Cases before the Tribunal

- **Case 001**
 - Kaing Guek Eav (alias “Duch”), Head of S21 security centre
- **Case 002 (bifurcated into Case 002/01 and Case 002/02)**
 - **Nuon Chea** (Brother Number 2, second to Pol Pot) – died 4 August 2019
 - **Khieu Samphan** (Nominal Head of State) – born 28 July 1931 – only surviving offender
 - Ieng Sary (Deputy Prime Minister, Foreign Affairs Minister) – died 14 March 2013
 - Ieng Thirith (Minister for Social Affairs) – unfit to stand trial (Alzheimer’s disease) – died 22 August 2015
 - **Case 002/01** – crimes against humanity concerning population movements
 - Phase 1 – “evacuation” of Phnom Penh 17 April 1975
 - Phase 2 – movements of population to/from other areas Sept 1975 to Dec 1977
 - **Case 002/02**
 - Genocide; war crimes; crimes against humanity concerning targeting of specific groups (Cham, Vietnamese, Buddhists, former Khmer Republic officials; regulation of marriage)
- **Case 003 – Meas Muth** (Commander of Navy); **Sou Met** (Commander Air Force)
- **Case 004 – Im Chaem** (Alleged Preah Net Preah District Secretary and Northwest Zone Sector 5 Deputy Secretary 004/01); **Ao An** (alleged Secretary of Central Zone – 004/02); **Yim Tith** (alleged Kirivong district secretary; Sector 13 secretary)

Case 002/02 against NC and KS

- 1975 – 1979: KR regime, under the Communist Party of the Kampuchea (CPK) took power and pursued the objective of returning Cambodia to “Year Zero” by implementing a Maoist/Marxist-Leninist program to transform the entire Cambodian population into a mass agricultural workforce (resulting in approx. 2 million deaths in the “killing fields”)
- JCE – common purpose to implement socialist revolution throughout Cambodia through a “great leap forward” and to defend the Party against enemies by whatever means necessary
- 5 policies implemented toward the common purpose:
 - Movement of population from towns/cities to rural areas
 - Establishment and operation of cooperatives and worksites
 - Establishment and operation of security centers and execution sites
 - Targeting specific groups (including Cham and **Vietnamese**, Buddhists and former Khmer Republic officials, both civilian and military)
 - Regulation of marriage (including forced marriage)
- Substantive trial hearing over 17 Oct 2014 to 11 Jan 2017 – Full Trial Judgment 2,268 pp
- 185 witnesses (114 fact witnesses and 63 Civil Parties)
- 5,000 documents admitted (totaling 82,000 pages in Khmer, French and En)

Genocide Definition and Elements

Genocide is an international crime legally characterised by ***acts carried out with an intention to eliminate a national, ethnic, racial or religious group***, in whole or in part, by any of the following acts:

- **Killing** of members of the group
- Causing serious bodily harm, or mental harm, to members of the group
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part
- Imposing measures intended to prevent births within the group and/or forcibly transferring children from one group to another group.

Genocide Liability: Article 4 ECCC Law gives the tribunal jurisdiction to try genocide (including for attempts to commit genocide, conspiracy to commit genocide, and participation to commit genocide).

There is no statute of limitation for the crime of genocide.

Modes of Liability: (Art 29) Individual criminal responsibility (commission; JCE; planning; instigating; ordering; aiding and abetting) or Superior Responsibility as an alternative mode of liability

Prosecutorial Onus and *Dolus Specialis*

- To convict on genocide, prosecution must prove that D:
 - 1. committed one of the **acts** constituting genocide
 - 2. Against members of a protected **group**
 - 3. With **specific intent** to destroy that group, in whole or in part
- Categories of protected group: national, ethnic, racial, religious
- *Dolus Specialis* (Specific Intent) Requirement:
 - Subjective (purposive) element, which characterizes a crime as genocide
 - Requirement entails TWO fault elements
 - In addition to proving the *mens rea* of the *actus reus* of the genocidal act, must prove the underlying (ulterior) purpose of the genocidal act
 - Eg – for Genocide by Killing members of a group
 - Perpetrator intended to kill members of the group PLUS
 - Perpetrator specifically engaged that act with an intent of destroying, in whole or in part, a protected group
 - I.e. Killing a person without specific intent of destroying a group is murder and not genocide
 - In practice, genocide is a State act, rather than individual act

Genocide of Vietnamese “by Killing”

- Group: Vietnamese (VN) considered racial, ethnic & national group
- Method of Killing: “deliberate and systematic identifying, targeting, gathering and killing of people due to their membership of the Vietnamese group”
- Mens Rea: perpetrators intended to destroy, in whole or in part, the VN group (evidenced by):
 - Statements about the objective of physically destroying the group in its entirety eg. Revolutionary Flag publications calling for the killing of VN civilians in Cambodia
 - Theory of lineage through matrilineal descent (mixed marriage policies)
 - Killings and transfers in the Eastern Zones
 - Escalating deportations, persecution, incitement of hatred and anti-VN war propaganda
 - Systematic nature, scale, pattern, repetition and timing of killing VN indicate planning and coordination by CPK leaders in the framework of a common purpose
 - Demographic Expert Report: almost all VN remaining in Cambodia were killed during CPK regime (100% elimination rate by deportations or killings)

Prosecutorial Onus and Selectivity

- Prosecution pursued genocide charges, but only in relation to a very limited geographical area, this being the Eastern Zone (Svay Rieng, Prey Veng and Eastern Zone), where almost no ethnic Vietnamese survived
 - Evidence based on records gathered by DC-Cam (Documentation Centre of Cambodia)
- Prosecution's genocide case was largely based on the Khmer Rouge's mixed marriage policies, based on eliminating the Vietnamese bloodline in mixed Khmer/Vietnamese families.
 - The policy and its implementation was good evidence of the requisite specific intention to eliminate a group based on its race or ethnicity.
 - However, this meant that the prosecution case was based largely on the witness accounts of Khmer spouses who lost their Vietnamese spouse pursuant to the policy, rather than any direct ethnic Vietnamese witnesses.

Collective Narrative of Client Group

Forced Deportation (a Crime against Humanity)

- Phase I: Immediately following the Khmer Rouge take-over of their residential areas in 1975, the ethnic Vietnamese were separated from their Khmer neighbors and forcibly relocated to a single temporary work site where they undertook forced agricultural labour. Many lost family members and relatives here due to mass and summary executions.
- Phase II: After approximately four months of forced labour, starvation, enslavement and ill-treatment, the ethnic Vietnamese, as a group, were forcibly deported *en masse*, in several fleets down the Tonle Sap River, to Vietnam.
- Because the prosecution had not conducted investigations directly with ethnic Vietnamese survivors, the narratives offered by the Vietnamese victims in Kampong Chhnang Province added value to the prosecution case. This narrative was ultimately used in the Prosecution's Final Submission, which was forwarded to the Office of Co-Investigating Judges for further judicial investigations.
- Co-Prosecutors, 'Rule 66 Final Submission', 16 August 2010 (D390), Case File No. 002/19-09-2007-ECCC-OCIJ (Public redacted version) at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D390_ENreadacted.pdf.
- Office of Co-Investigating Judges, 'Closing Order', 15 September 2010 (D427), Case File No. 002/19-09-2007-ECCC-OCIJ at <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf>.

Overview – Phases of Representation

VICTIM REPRESENTATION

- Outreach to victims of crime
- Victim Information Forms and submission to Victims Unit
- Submission for further investigations into the treatment of the ethnic Vietnamese in Kampong Chhannng Province
- to highlight evidence of the systematic, widespread, ill-treatment and deprivation of the human rights of the Vietnamese minority, as evidenced by acts amounting to genocide and crimes against humanity
- submitted that the deliberate infliction of certain conditions of life calculated to bring about the destruction of the group; and imposing measures to prevent birth within the group, were acts of genocide.
- submitted that the forced deportation, persecution and enslavement of members of the group amounted to crimes against humanity:
 - Civil Party Co-Lawyers, 'Civil Parties' Request for Supplementary Investigations Regarding Genocide of the Khmer Krom and the Vietnamese', 3 December 2009 (Document D250/3), at: <http://www.eccc.gov.kh/en/document/court/civil-party-lawyers-request-supplementary-investigations-regarding-genocide-khmer-kro> .
- Admissibility Appeals 1 – to Pre-Trial Chamber
- Mass Admissibility Appeals (including Admissibility Appeal 2

Moral and Collective Reparations – IR 23

- Direct linkage between crimes within the jurisdiction of the ECCC and harm experienced by ethnic Vietnamese Civil Parties
- Loss of identity and intergenerational impact upon a genocide group
- Civil status within Cambodia
- Statelessness under international law

THE GENOCIDE TRIAL

- Case 002/02 – challenges of bifurcation of trial
- RE: Treatment of Vietnamese, Trial Chamber heard specifically from 13 witnesses, 1 expert, 7 Civil Parties, and otherwise from witnesses CPs on other trial topics who also provided relevant evidence, plus written records of witness interviews
- NB: Backdrop of armed conflict between VN and Cambodia and identification of ethnic VN in Cambodia as a group deserving “distinct attention”
 - Defence teams contend that there was no policy targeting VN civilians but that the CPK attacked the state of VN due to the ongoing armed conflict (defending the country against perceived enemies including the VN “aggressors”, “expansionists” and “annexationists”)
- Geographical Scope of Killings – not limited to Svay Rieng and Prey Veng provinces – but also throughout Cambodia
 - **Genocide by killing** (nationwide from April 1977 to Jan 1979)
 - **Murder** as CAH (VN who resisted deportation in 1975-1976; nationwide April 1977-Jan 1979)
 - **Extermination** as CAH (nationwide from April 1977 to 6 Jan 1979)
 - **Deportation** as CAH (in Prey Veng, Svay Rieng and TramKak Cooperatives in 1975 and 1976)
 - **Persecution** on racial grounds as CAH (in Prey Veng and Svay Rieng, TramKak Cooperative and Kraing Ta Chan, Au Kanseng and S21, throughout DK period)

Overview – Phases of Representation

Trial Phase

- NB: trial prep was repeated (2010 and 2013) as Trial was bifurcated (Case 002/01 and 002/02)
- Witness and CP preparations included selection of (representative) testimony relevant to trial
 - Persecution on racial grounds at TramKak Cooperative – Chou Koemlan
 - Genocide in Prey Veng – Lach Ny (TC, para 3445 - 3446)
 - Khmer CP testimony re: mixed marriage policy – **Prak Doeun** – (3466-7)
 - Extermination – Ethnic VN Civil Party – **Choeung Yaing Chaet** (3468-9)
 - Persecutory treatment of VN at TramKak Cooperation (CK)
- Engagement with Witness Assistance Services

TRIAL JUDGMENT

Crimes against the Vietnamese

- **Genocide** by killing members of a group – killings were systemically organized and directed against the Vietnamese based on membership of ethnic group
 - VN were arrested and detained in Svay Rieng based on perceived ethnicity; boats identified as VN were targeted on DK waters; VN civilians were killed; VN in Kg Chhang, Wat Khsach and Kratie specifically screened out and separated from non-VN before being killed
- **Crimes against humanity**
 - Extermination
 - Deportation and persecution on racial grounds
- **Grave Breaches of Geneva Conventions (War Crimes)**
 - International armed conflict btw Vietnam & Democratic Kampuchea from May 1975
 - War crimes against Vietnamese soldiers and Civilians at S21 Security Centre
 - Wilful killing
 - Torture
 - Inhumane treatment
 - Wilfully cause of great suffering or serious injury to body or health
 - Wilfully depriving a prison of war or civilian rights of fair trial
 - Unlawful deportation / confinement of a civilian

The Genocide Cases – TC Findings

- Existence of Policy to target specific groups (to establish an atheistic and homogenous society without class divisions by abolishing all ethnic, national, religious, racial, class and cultural differences)
- Genocide of the Muslim Cham
- Genocide of the ethnic Vietnamese
 - **1975+ PERSECUTION:** Identification of ethnic VN with lists and biographies provided
 - **1975 to 1976 EXPULSION:** Nationwide policy to expel ethnic VN from Cambodia
 - Agreement with Vietnamese authorities to transport VN to Vietnam border – Vietnamese persons traded for salt
 - **April 1977 + MASS KILLINGS**
 - Matrilineal descent policy – mixed marriage policies where VN spouses in mixed marriages were killed – Khmer mother and father spared while (1975+)
 - Mass, systematic killings of Vietnamese in Svay Rieng (1978); on DK waters (1977/78); in Kg Chhnang (1977); at Wat Khsach (Siem Riep) (1978); in Kratie (1978)
 - Killings of ethnic VN soldiers and civilians at S21

Individual Responsibility – TC Findings: Nuon Chea

- Convictions of the following through a **JCE** (sharing direct, discriminatory and specific intent of other JCE members):
 - Crimes against humanity: murder, extermination, deportation, enslavement, imprisonment, torture, persecution on political religious and racial grounds, and other inhumane acts through attacks against human dignity (enforced disappearances, forced transfer, forced marriage and rape in the context of forced marriage)
 - Genocide of Vietnamese ethnic, national and racial group by killing
 - Grave breaches of Geneva Conventions: wilful killing, torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, wilful deprivation of right o fair trial; unlawful confinement against protected persons
 - Aiding and abetting
- Convictions of the following by **aiding and abetting**:
 - deaths at cooperatives, worksites and security centres as a result of *dolus eventualis* (not encompassed by the common purpose)
- Convictions of the following via **superior responsibility**:
 - All crimes committed pursuant to the CPK's criminal Case 002/02 policies (including genocide by killing of Cham ethnic and religious group)

Individual Responsibility – TC Findings: Khieu Samphan

- Convictions of the following through a **JCE** (sharing direct, discriminatory and specific intent of other JCE members) – same as NC except no genocidal intent re: the Cham
 - Crimes against humanity: murder, extermination, deportation, enslavement, imprisonment, torture, persecution on political religious and racial grounds, and other inhumane acts through attacks against human dignity (enforced disappearances, forced transfer, forced marriage and rape in the context of forced marriage)
 - Genocide of Vietnamese ethnic, national and racial group by killing
 - Grave breaches of Geneva Conventions: wilful killing, torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, wilful deprivation of right o fair trial; unlawful confinement against protected persons
 - Aiding and abetting
- Convictions of the following by **aiding and abetting**:
 - deaths at cooperatives, worksites and security centres as a result of *dolus eventualis* (not encompassed by the common purpose)
- Acquittal of genocide against Cham:
 - No finding that Khieu Samphan either aided or abetted – or was a superior in the sense of having ability to prevent or punish – the commission of genocide against Cham ethnic and religious group

Sentences and Civil Party Reparations

- Life imprisonment for both Nuon Chea and Khieu Samphan
- To be served concurrently with life imprisonment imposed on each, respectively, in Case 002/01.
- Civil Party projects submitted by Lead Civil Party Co-Lawyers, by way of moral and collective reparations, were endorsed by TC for implementation
 - 14 projects concerning remembrance of victims and memorialization of harm experienced, including therapy and psychological assistance, documentation and education

APPEALS JUDGMENT

(Supreme Court Chambers)

- Only 1 offender remains alive: Khieu Samphan
- KS appealed the TC decision, challenging many aspects of the decision (including the fairness of proceedings and the substantive findings on facts and crimes)
- This update addresses KS' challenges relating to crimes against the VN
- The SC (comprising 7 judges) upheld the TC's findings regarding KS' criminal responsibility for crimes against the VN, including genocide and crimes against humanity
- Affirmed life sentenced imposed by TC– to run concurrent with life sentence from 002/01

Khieu Samphan Challenges re TC's Findings on Crimes Against Humanity

- **Challenge to TC's factual and legal findings re: killing of VN in Svay Rieng, in DK waters, Kg Chhnang Province, Wat Khsach, Kratie and Au Kanseng Security Centre**
 - KS claimed that killings did not amount murder and extermination as a crime against humanity [Summary of Appeals Judgment, para 33]
 - Appeal dismissed – SC upheld TC's conclusions based on the [agreement with TC's] finding that the aggregation of killings in multiple areas were part of the same murder operation [34]
- **Challenge to TC's finding that VN were deported from Tram Kak Cooperatives across a national border as well as from Prey Veng**
- **Challenge to TC's finding that there was an intention to deport the VN**
 - Appeal dismissed – SC found KS failed to demonstrate any error on TC's part [36]
- **Challenge to TC's conclusion that the crime against humanity of racial persecution of VN was established at Tram Kak Cooperatives, S21 Security Centre, Au Kanseng Security Centre, and in Prey Veng and Svay Rieng – as part of a policy of targeting Vietnamese “for adverse treatment throughout the DK period in particular, for deportation before April 1977 and for destruction as a racial group thereafter”, because the VN were considered to be “the DK's most dangerous enemy” – challenge as to whether racial persecution occurred at those places.**
 - Appeal dismissed - SC found KS failed to demonstrate any error on TC's part [50]

Khieu Samphan Challenges re TC's Findings on Genocide

- **Challenge to TC's conclusion that KS committed genocide of the VN – as a protected racial, national and ethnic group**
- **Challenge that killings of VN occurred; or that killings at Au Kanseng, S21 and in Cambodian territorial waters were of members of the protected group.**
- **Challenge that TC failing to determine whether there was an intent to destroy the protected group – or whether there was an intent to destroy the group “in whole or in part”**
- Appeal dismissed
 - SC found no error in TC's findings concerning the killing of VN in Svay Rieng, DK water, Kg Chhnang province, Wat Khsach and Kratie [68]
 - SC found TC accurately set out applicable law on genocide – TC relied on existence of a policy of targeting the VN for adverse treatment [68]
 - SC upholds TC's findings that KS promoted CPK's agenda by reading press communiques (for radio broadcast to promote the party line) – re: an April 1975 Special National Congress and December 1975 Third National Congress [70]
 - KS made speeches promoting a variety of CPK's criminal policies [71]
 - SC finds no merit in KS' arguments re: genocide and rejects them – SC explained in detail in full written judgment [68]

Khieu Samphan Challenges re TC's Findings Criminal Responsibility

- Challenges re: defining the common purpose of the senior leaders of the DK as being criminal – factual dispute re: “criminality” of each of the CPK’s policies – rather they were political policies
- Challenge to the TC’s conception of “enemies” – wrongly finding there was a policy to eliminate them at security centres and executive sites – failed to view evidence in proper context of armed hostilities against Lon Nol regime and subsequently, Vietnam
 - TC found that KS shared a joint common purpose with the other offenders of “rapidly implementing socialist revolution in Cambodia”, and the common purpose was intrinsically linked to policies that involved the commission of crimes – including (1) establishing cooperatives and worksites; (2) operation of security centres and execution sites; (3) targeting specific groups; (4) regulation of marriage [83]
 - TC found that through the common purpose (whereby KS agreed to partake in and commit crimes with the other Senior Leaders), KS was guilty of committing through the JCE, genocide, crimes against humanity and war crimes [83]
- SC finds no merit in KS’s arguments – appeal dismissed [88]
- SC dismisses KS’ appeals re: TC’s findings about KS’s knowledge and intent to commit crimes against specific groups (Cham, Buddhists, VN, former Khmer Republic officials) – [97]
- Affirmed life sentenced imposed by TC – to run concurrent with life sentence given in case 002/01 [104]

The Civil Parties – Where are they Now?

- Many have passed away
- Many have been forcibly relocated of floating villages onto land
- Some have sought to re-enter into Vietnam
- December 2022 trip – located 4 Civil Parties and families
- Differing views about ECCC



