ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

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

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០១/១៨ កក្កដា ២០០៧/អវតក/អជសដ

**Case File/Dossier No. 001/18-07-2007/ECCC/TC**

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|---|---|
| **Before:** | **Judge NIL Nonn, President**<br>**Judge Silvia CARTWRIGHT**<br>**Judge YA Sokhan**<br>**Judge Jean-Marc LAVERGNE**<br>**Judge THOU Mony** |
| **Greffiers:** | **LIM Suy-Hong, Matteo CRIPPA, SE Kolvuthy, Natacha WEXELS-RISER, DUCH Phary** |
| **Duration of hearing:** | **30 March 2009 until 27 November 2009** |
| **Date:** | **26 July 2010** |
| **Classification:** | **PUBLIC** |

# SEPARATE AND DISSENTING OPINION OF JUDGE JEAN-MARC LAVERGNE ON SENTENCE

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Andrew T. CAYLEY

**Accused**
KAING Guek Eav *alias* Duch

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1. It is with regret that I hereby express my dissent from the majority of the Chamber's decision in relation to the sentence to be imposed on the Accused, KAING Guek Eav. My dissent is not about the scope of the Accused's culpability, nor about the assessment of the particularly egregious nature of the crimes he committed, nor even about the aggravating or mitigating circumstances taken into account in this case. Moreover, the majority of the Chamber and I all agree that in this instance, the Accused ought not to be sentenced to the maximum penalty incurred for these crimes, namely a term of life imprisonment, but rather to a fixed term of imprisonment.

2. My dissent from my colleagues relates to an earlier stage in the Chamber's reasoning, and focuses on the analysis of the relevant legal framework which the Chamber must undertake in determining the quantum of sentence. While there is no doubt that under Rule 98(5) of the Internal Rules, the sentence must comply with the ECCC Agreement, the ECCC Law and the Internal Rules, it is equally clear, as the Chamber has itself noted, that these instruments are silent on the principles and factors to be considered at sentencing. In particular, they do not indicate whether the applicable regime is governed by international law or Cambodian law or some combination of each.[1] In determining the relevant legal framework, the Chamber therefore had to interpret this silence by reviewing the applicable international law and Cambodian legal standards. However, I am of the opinion that neither this review nor the canons of statutory interpretation can be considered as allowing the Chamber to sentence the Accused to more than 30 years imprisonment, if it does not otherwise sentence him to the maximum term of life imprisonment.

3. In reviewing the relevant international legal standards, the Chamber properly noted that while the jurisprudence of the *ad hoc* Tribunals shows that judges possess considerable discretion in sentencing, Article 77(1) of the Rome Statute is crystal clear in that it envisages no intermediate term of imprisonment between a life sentence and a fixed term of 30 years imprisonment. Accordingly, it cannot be argued that there is a common international legal principle on this matter.[2]

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1 *See* Section 3.2.1, para. 575.
2 *See* Section 3.2.1, paras. 576, 591-593.

4. A review of Cambodian law, at least in its most advanced form as reflected in the new Penal Code,[3] reveals no ambiguity, because here again, Article 95 provides that where life imprisonment cannot be imposed as a result of mitigating circumstances being granted, only a sentence of up to 30 years may be imposed.[4]

5. I consider the reference to Cambodian law here particularly relevant, owing to the special character of the ECCC, notably because this hybrid court has jurisdiction to prosecute both international and domestic crimes, and because the founding documents make no distinction as to the sentencing regime applicable to these two categories of offences. Thus, while this regime may be deemed *sui generis*, it is difficult to imagine that it is entirely extraneous to domestic law.

6. Further, reference to the latest expression of Cambodian law as reflected in the new Penal Code is also particularly apt. Indeed, it represents what the lawmakers of this country consider as the most advanced rules of law and justice, and its Article 95 is among the general provisions which are immediately applicable before all Cambodian courts.[5] Also, although direct application of this national legislation in the present case – a case involving international crimes – is not automatic, the fact is that apart from the issue of the immediate application of less stringent criminal law which primarily concerns domestic law, there is no valid reason to consider that what holds true for determining applicable penalties before Cambodian courts would not hold for the ECCC.

7. It must also be emphasised that all the factors which the Chamber considered in not imposing the maximum sentence are consistent with the provisions of Cambodian law concerning both the individualisation of penalties and mitigating circumstances.[6]

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[3] The Khmer version of the 2009 Penal Code was placed on the Case File on 5 January 2010, while the French and English versions were filed on 24 March 2010 (E180). While in the Order dated 4 February 2010, the parties were authorised to file submissions concerning the relevant provisions of Part I of the new Penal Code (E180/1), none of them filed any comments. However, the issue of the application of these provisions had been raised by the Defence (*see* T., 27 November 2009 (Defence), p. 48).

[4] Article 95 of the 2009 Penal Code provides: "If the penalty incurred for an offence is life imprisonment, the judge granting the benefit of mitigating circumstances may impose a sentence of between fifteen and thirty years imprisonment."

[5] *See* Royal Kram of 30 November 2009, E180.1 (available in English only). In addition, the fact that Part II of the Penal Code which contains the definition of punishable offences, including the crime of genocide, crimes against humanity and war crimes will not enter into force until December 2010, is of no relevance, as, on the one hand, the principles defined in Part I are general principles which apply to all domestic crimes and, on the other, the lawmakers must have clearly contemplated that they would apply to crimes of more or less the same gravity as those falling under the jurisdiction of the Chamber.

[6] Article 96 of the 2009 Penal Code provides that "his or her [the accused's] behaviour after the offence" is one of the factors to be considered in individualising penalties. This may clearly include acknowledging responsibility,

8. In conclusion, pursuant to the rules of statutory interpretation, notably where the law is unclear or silent, the most favourable solution must be applied to the accused in the event of uncertainty as to the application of a given rule. In addition to the widely-accepted principle that doubt must be resolved in favour of the accused,[7] Rule 21(1) of the Internal Rules also provides that the ECCC Law and the Internal Rules must be interpreted so as to safeguard the interests of accused.[8]

9. In this instance, the question is not whether the application of the 2009 Penal Code breaches provisions of the ECCC Agreement, but rather only how to interpret principles which are not defined in the ECCC Agreement or in the ECCC Law. In their decision, my colleagues opted for a standard that is not common to international criminal law or part of the latest Cambodian legislation, but one that is the least favourable to the Accused. I consider this choice to be inconsistent with the rules of statutory interpretation; I am therefore of the opinion that in this case, the law does not allow the Chamber to sentence KAING Guek Eav to more than 30 years imprisonment.

Done in Khmer, English and French.

Dated this twenty-sixth day of July 2010
At Phnom Penh
Cambodia

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Judge Jean-Marc LAVERGNE

**[Seal of the Tribunal]**

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expressing remorse and cooperating with the Court. Moreover, Article 93 of the same Code defines mitigating circumstances broadly, as depending on "the nature of the offence or the character of the accused."

[7] The principle that doubt must be resolved in favour of the accused does not apply only to the assessment of the evidence pertaining to the guilt of the accused; its application is broader and includes interpretation of ambiguous or uncertain applicable legal standards; *see e.g.,* Article 22(2) of the Rome Statute and Article 3(B) of the Special Tribunal for Lebanon Rules of Procedure and Evidence; *see further,* with regard to uncertainty arising from inconsistency between the French and English versions of the ICTR Statute, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Appeal Judgement, ICTR Appeals Chamber (ICTR-95-1-A), 1 June 2001, para. 151; or with regard to uncertainty concerning the definition of a crime, *Prosecutor v. Radislav Krstić,* Judgement, ICTY Trial Chamber (IT-98-33-T), 2 August 2001, paras. 491-503.

[8] This principle is not limited to the interpretation of the definition of the acts constituting a crime, but extends to all the provisions of the texts in question.