



Kaing Guek Eav, alias Duch, appears before the ECCC Supreme Court Chamber on Friday to hear the judgment in the appeal of Case 001. (Photo courtesy of ECCC)

Case 001 Appeal Judgment: Duch Sentenced to Life

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Author’s note: The quotations included below are sourced both from viewing the live proceedings discussed and from the summary of the judgment available on the ECCC website at:

<http://www.eccc.gov.kh/en/document/court/summary-supreme-court-chamber-appeal-judgement-case-001>.

On Friday, February 3, 2012, the Supreme Court Chamber (SCC) of the Extraordinary Chambers in the Courts of Cambodia (ECCC) issued its judgment on appeal in Case 001 against Kaing Guek Eav, alias Duch. Duch had previously been convicted by the ECCC Trial Chamber (TC) of crimes against humanity and war crimes and sentenced to a term of 35 years of imprisonment. This sentence was reduced by the Trial Chamber to a total term of 19 additional years to account for time already served and the violation of Duch’s human rights by the Cambodian government, which, as the TC held, had arrested and detained him in 1999 unlawfully.

Overview of Arguments of the Parties on Appeal

On appeal, Duch had made a late-hour challenge to the ECCC’s jurisdiction over him, arguing that he qualifies as neither a “senior leader” nor an individual “most responsible” for the crimes

committed during the Democratic Kampuchea (DK) period in Cambodia (1975-1979), as required by the statute of the ECCC.

The prosecution also appealed, requesting an increase in Duch's sentence and that the legal characterization of his convictions for crimes against humanity be altered to better reflect Duch's individual culpability and to include rape as a discrete crime against humanity.

The civil parties appealed against the Trial Chamber's rejection of numerous civil party applications in its judgment and also requested additional reparations awards which had been denied by the Trial Chamber.¹

The SCC's findings in Case 001 are especially important to the ECCC as a whole moving forward, as the appeal judgment will provide a final answer to many important legal questions affecting all Cases before the Court.



The public gallery filled with both local and international spectators for the announcement of the final judgment in Case 001. (Photo courtesy of ECCC)

Summary of Judgment Read Out

Unlike recent proceedings in Case 002, which have been sparsely attended and covered mostly by local media outlets, the ECCC grounds were filled with spectators and international journalists, highlighting the historic nature of the day's pronouncement.

At 10 a.m. sharp, the SCC judges filed into the ECCC courtroom. At this point, Duch was brought to the witness stand to hear the pronouncement of the judgment for his appeal. Throughout the reading of the judgment, Duch sat stoically while SCC President Kong Srim summarized the Trial Chamber judgment and findings. The Chamber noted that it would only provide a summary of the Chamber's findings on appeal, with a full written judgment to be issued "in due course."

¹ For more information on the specific arguments made by each party on appeal, see CTM blog entries for March 28-30, 2011, available at: <http://www.cambodiatribunal.org/blog/archive/201103>.

After summarizing the procedural background of the appeal process and the protracted, complex and historic nature of ECCC Case 001, Kong Srim moved on to the substantive decisions of the Chamber.

Kong Srim announced that the SCC had made the following substantive findings in its judgment on appeal:

1. Personal Jurisdiction

First, the Chamber noted that fair trial standards demand that an accused have the right to challenge his sentence and the court's jurisdiction over him throughout the proceedings against him. Accordingly, the Chamber rejected the prosecution argument that Duch's appeal against personal jurisdiction was procedurally barred.

Kong Srim then provided the Chamber's findings on the ECCC's personal jurisdiction, announcing that SCC had concluded that the terms "senior leaders" and "most responsible" individuals cannot be read as a strict jurisdictional requirement but should be interpreted as a "non-justiciable policy guide for the Co-Investigating Judges [(CIJs)] and Office of the Co-Prosecutor [(OCP)] in the exercise of their discretion of the [appropriate] scope" of prosecutions and investigations. Thus, the SCC found further that decisions as to who qualifies as a "senior leader" or "most responsible" individual are "exclusively policy decisions for which the [CIJs] and [OCP], and not the Chambers, are accountable, and accordingly dismissed Duch's appeal on personal jurisdictional grounds.

2. Crimes Against Humanity

Following the Chamber's somewhat surprising finding that there is no strict *de facto* limitation on personal jurisdiction at the ECCC, the Chamber President moved on to the issue of crimes against humanity.

Kong Srim noted that the ECCC is bound by the doctrine of *nullum crimen sine lege* ("no crime without law"), forbidding prosecution for crimes that did not clearly exist when the underlying acts occurred.

The Chamber first stated that generally, it agrees with the TC that crimes against humanity existed as of 1975 in a form sufficiently foreseeable and accessible to Duch and thus this class of crimes can be applied against him generally.

The Chamber then moved onto individual issues related to crimes against humanity convictions.



Bou Meng, former S-21 prisoner, responds to the SCC's judgment and sentence.

3. Scope of Enslavement Conviction Left Undisturbed

First, the SCC held that the prosecution erred in its interpretation of the TC's characterization of enslavement. Specifically, Kong Srim noted that forced labor was not an element of enslavement in the TC's formulation but solely a factor to be considered. However, the President stated, the TC did not clearly delineate the precise definition of enslavement and provided its own view of the definition as of 1975. The SCC's definition includes the element that a perpetrator possess the "intention to accrue some gain through exercise over persons of the powers that attach to the right of ownership." The Chamber also found that there was no evidence adduced at trial that Duch sought personal gain from exercising complete control over detainees at S-21 and held that, consequently, the TC was correct in "limiting its findings on enslavement only to those detainees at S-21 who had been subjected to forced labor" and dismissed this ground of the prosecution's appeal.

4. Rape Correctly Subsumed by TC under the Crime of Torture

The Chamber next discussed the issue of whether an instance of rape at S-21 qualified as a discrete crime against humanity or solely as a method of committing torture as a crime against humanity. The Chamber upheld the TC's decision to subsume an act of rape committed at S-21 into the definition of torture as a crime against humanity. This holding resulted from the SCC's finding that there was a "lack of support for the existence of rape as a distinct crime against humanity during the ECCC's temporal jurisdiction."

5. Persecution Conviction Limited to "Political Enemies"

As for persecution, Kong Srim stated that the SCC agreed with the majority of judges of the TC regarding the definition of persecution as of 1975. Furthermore, the SCC agreed with the TC that "political enemies" detained at S-21 were persecuted. The SCC overturned the TC's holding that every detainee at S-21 was a victim of persecution, noting that "[a]s the revolution wore on . . . individuals were indiscriminately apprehended, mistreated and eliminated without any attempt at rational or coherent justification on political grounds." Therefore, individuals who were detained, tortured and killed "who were not political enemies . . . did not fall under the notion of persecution."

6. Other Crimes Against Humanity Not Subsumed Under Persecution Conviction

President Kong Srim then turned to the issue of cumulative convictions for crimes against humanity. The TC had subsumed all crimes against humanity under the crime of persecution in its judgment, and the prosecution had appealed, arguing that a conviction for each crime against humanity must be entered individually to reflect history accurately. The SCC found that the TC applied the correct test in analyzing cumulative convictions at the ECCC. Nonetheless, the SCC found that the TC erred in applying the test by focusing on the conduct underlying the charges rather than the “elements of legal definitions of crimes.” Thus, Duch’s convictions for crimes against humanity were modified to consist, cumulatively, of the crimes against humanity of persecution, extermination (encompassing murder), enslavement, imprisonment, torture and other inhumane acts.

Duch Sentenced to Life in Prison

Regarding the critical issue of sentencing, the SCC agreed with the prosecution that ECCC Law is “special criminal legislation” and, therefore, Cambodian domestic sentencing guidelines do not prevail over ECCC Law. As for Duch’s substantive sentence of 35 years imposed by the TC, the SCC found that the TC erred by “attach[ing] undue weight to mitigating circumstances and insufficient weight to the gravity of crimes and aggravating circumstances.” The SCC then found that due to the “particularly shocking and heinous character” of the crimes committed by Duch at S-21 and the minimum number of 12,272 victims who were killed there, that Duch’s crimes “were among the worst in recorded human history.” As a consequence, the SCC “decide[d] to impose a sentence of life imprisonment against [Duch,].” This announcement was what the majority of the audience was waiting to hear, and the somewhat unexpected² announcement of a life sentence sent off a flurry of activity.

After announcing the life sentence, President Kong Srim explained that, in the view of five of the seven SCC judges (Judges Klonowiecka-Milart and Jayasinghe dissenting), “the [TC] misinterpreted the relevant international jurisprudence to mean that violations of [Duch’s] rights should be redressed by [the TC] *even* in the absence of violations attributable to the ECCC and in the absence of abuse of process.” Thus, the necessary super-majority of SCC judges had concluded that “the [TC] should have rejected [Duch’s] request for remedy” for his unlawful detention.

Kong Srim then stated that the two dissenting international judges were of the opinion that Duch’s sentence should have been reduced to a “fixed term of 30 years” as a remedy for his unlawful detention by the government of Cambodia. The international judges had stated in their dissent that such a remedy is proper because:

1. the ECCC falls “within the existing court structure of Cambodia”;
2. there is a “strong nexus” between the case against Duch at the ECCC and the charges leading to his unlawful detainment;
3. the “gravity of the deprivation of liberty was extreme by international standards”; and
4. the ECCC is “uniquely positioned to grant a remedy of a restorative nature.”

² The prosecution had sought only an increase to a sentence of 45 years and did not challenge the TC’s holding that Duch’s sentence had to be reduced in light of his unlawful detention for approximately eight years prior to the creation of the ECCC.

The SCC then held unanimously held that Duch is entitled to credit for the time he has already served in detention since 1999.³

Ten Additional Civil Parties Admitted

Kong Srim then turned to the issue of civil party status in Case 001. The SCC found that the criterion of “special bonds of affection and dependence” utilized by the TC properly delimits the scope of the qualification as an “indirect victim.”

As for the factual findings of the TC regarding certain rejected civil party applications, the SCC noted that the determination of whether a “strong bond” existed between individuals must be made with an awareness of Cambodian culture, wherein the line between “immediate” and “extended” family members is not as clearly delineated as in some other countries and cultures.

Kong Srim then stated that it was proper for the “court of first instance” to make decisions on civil party status. Thus, the SCC found that the TC had a lawful basis to evaluate the merits of civil party applications in its judgment.

Nonetheless, the SCC found that “there appears to have been a fundamental misunderstanding” between the TC and civil party applicants regarding the admission process. The SCC noted that this confusion may have caused anguish for applicants, who were unexpectedly denied admission. The SCC then noted that it had therefore allowed civil party applicants to submit further evidence in support of their applications during the appeals process.

The SCC then admitted ten additional civil parties and rejected the remainder of the civil party appellants’ applications as “inadmissible.”

Civil Party Appeal for Additional Reparations Summarily Dismissed

Kong Srim then turned to the issue of rejected reparations requests made by the civil party teams in Case 001.

The SCC held that it has no jurisdiction to grant requests for reparations that entail, explicitly or implicitly, the active involvement of the Cambodian government. The SCC then stated that reparations awards must only be granted that can be realistically implemented, noting that Duch had been found to be indigent and, thus, could not contribute financially to any reparations.

Kong Srim then stated that these facts resulted in a number of reparations claims that were “predestined for rejection” according to the SCC because they necessarily involved the Cambodian government or required financial means that are unavailable. The SCC then rejected all additional reparations claims requested by the civil parties beyond those granted by the TC.⁴

Disposition of the Appeal Judgment Summarized and Duch Returned to Detention

³ This credit will presumably result in Duch becoming eligible to seek parole approximately 12 years sooner under Cambodia law but otherwise appears to have no impact on Duch’s actual sentence.

⁴ The TC had granted as reparations the inclusion of the civil parties’ names in the judgment and the compilation and posting on the ECCC website of all statements of apology made by Duch during the Case 001 trial.

Duch was then asked to stand to hear the disposition of the SCC. Kong Srim summarized the Chamber's above-discussed holdings and officially entered a sentence of life imprisonment against Duch. This concluded the appeal judgment announcement process, and Duch was returned to the ECCC detention center pending transfer to national authorities.

The ECCC will resume proceedings on Monday, February 6, 2012 when the TC will continue hearing testimony from Documentation Center of Cambodia (DC-Cam) director Youk Chhang regarding evidentiary issues in Case 002 against accused Nuon Chea, Ieng Sary and Khieu Samphan.