

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

PRE-TRIAL CHAMBER

CASE NO. 001/18-07-2007-ECCC/PTC(02)

KAING GUEK EAV

FRIDAY, 5 DECEMBER 2008

1500H

JUDGEMENT

Before the Judges:

PRAK Kimsan, Presiding
HUOT Vuthy
PEN Pichsaly
Rowan DOWNING
Katinka LAHUIS

For the Pre-Trial Chamber

CHUON Sokreasey
Anne-Marie BURNS

For the Office of the Co-Prosecutors:

CHEA Leang
William SMITH

For the Charged Person KAING GUEK EAV:

KAR Savuth
François ROUX

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1 PROCEEDINGS

2 *(Co-Prosecutors enter the courtroom)*

3 *(Judges enter the courtroom)*

4 *(Photographers enter the courtroom)*

5 MR. PRESIDENT:

6 Please be seated. The reporters are invited to leave.

7 *(Photographers enter the courtroom)*

8 MR. PRESIDENT:

9 Today the Pre-Trial Chamber is going to render the decision on the appeal against the Closing
10 Order indicting Kaing Guek Eav alias 'Duch'. Our decision today is a brief decision, the details of the
11 decision will be published on the website afterwards.

12

13 The Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia is seized of the
14 "Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav alias 'Duch' dated
15 8 August 2008" filed on 5 September 2008.

16

17 1. Procedural background. The Pre-Trial Chamber summarizes all the proceedings which were
18 filed in this Appeal.

19

20 2. Admissibility of the Appeal. The Appeal was filed in accordance with Internal Rules 74 and 75
21 and is therefore admissible.

22

23 3. Nature of the Appeal. A: Submissions of the Parties. The Co-Prosecutors submit that the scope
24 of review should be limited to the application made by the appealing party, and in this case to the
25 two errors of law alleged by the Co-Prosecutors, namely (i) the failure to indict Duch with the crimes

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1 of homicide and torture pursuant to the 1956 Penal Code, otherwise called the first ground of
2 appeal, and (ii) the failure to indict Duch for committing all the crimes that occurred at S-21 via
3 participation in a joint criminal enterprise, otherwise known as the second ground of appeal.

4

5 The co-lawyers of the charged person submit that the Co-Prosecutors' appeal relies on an
6 erroneous interpretation of the applicable rules of procedure before the ECCC and that according to
7 the inquisitorial procedure, the judges determine the subject-matter of the trial. It is argued that the
8 requests made in the Appeal could have been made during the trial before the Trial Chamber and
9 that there was no need to appeal the Closing Order. The Pre-Trial Chamber should dismiss the
10 Appeal as not being well-grounded in law, and should forward the case file to the Trial Chamber.

11 The co-lawyers reserve the right to address at trial the disputed points of the Closing Order.

12

13 B: Considerations. First, the scope of review. The Internal Rules do not provide a clear indication
14 of what should be the scope of review by the Pre-Trial Chamber when seized of appeals against
15 closing orders and, more particularly, whether its examination should be limited to the issues raised
16 by the appealing party. Cambodian law does not provide any further guidance on this matter.

17

18 6. The Pre-Trial Chamber notes the particular nature of the Closing Order, being the decision that
19 concludes the whole investigation in which all Parties have had the possibility to participate. Such
20 an order contains various conclusions of facts and law with regard to all the acts that were subject to
21 investigation. An unlimited scope of review would lead the Pre-Trial Chamber to review the whole
22 investigation, including the regularity of the procedure, in order to reach its own conclusions.

23 Considering the Internal Rules dealing with the role of the Pre-Trial Chamber as an appellate
24 instance and more specifically the time limits set out, the Pre-Trial Chamber finds that the scope of
25 its review is limited to the issues raised by the Appeal.

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1 Standard of review. The Co-Prosecutors request the Pre-Trial Chamber to amend the Closing Order
2 in order to add legal offences and a mode of liability. The Co-Prosecutors submit that all the
3 necessary facts to reach the proposed conclusions are set out in the Closing Order but that the
4 Co-Investigating Judges failed to draw all the required legal consequences from these facts.

5

6 The Pre-Trial Chamber will examine what should be the standard of review in this Appeal.

7 Nature of the Co-Investigating Judges' decision when issuing a Closing Order. Reading Internal
8 Rules 55(1) and 55(2) in conjunction with Internal Rule 53(1), the Co-Investigating Judges have a
9 duty to investigate all the facts alleged in the Introductory Submission or in any Supplementary
10 Submission, as it is the case in Cambodian Law. Internal Rule 55(3) indicates that the
11 Co-Investigating Judges are also seized of the circumstances surrounding the acts mentioned in the
12 Introductory or a Supplementary Submissions. The circumstances in which the alleged crime was
13 committed and that contribute to the determination of its legal characterisation are not considered as
14 being new facts and are thus part of the investigation. The Co-Investigating Judges are guided by
15 the legal characterisation proposed by the Co-Prosecutors to define the scope of their investigation.

16

17 The Co-Investigating Judges have no jurisdiction to investigate acts unless they are requested to do
18 so by the Co-Prosecutors, as confirmed by Internal Rule 55(3). The Pre-Trial Chamber notes that
19 pursuant to Internal Rule 55(3), new facts alleged in the Final Submission are not part of the judicial
20 investigation.

21

22 Internal Rule 67 directs that when issuing a Closing Order, the Co-Investigating Judges shall decide
23 on all, but only, the facts that were part of their investigation, either dismissing them for one of the
24 reasons expressed in paragraph 3 of this Rule or sending the charged person to trial on the basis of
25 these acts. This decision does not involve the exercise of any discretionary power; when

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1 circumstances as prescribed in Internal Rule 67(3) are present, the charged person should be
2 indicted in relation to these acts. This position is further confirmed by Article 247 of the Criminal
3 Procedure Code of Cambodia, which we will henceforth call "CPC", which provides, "If the judge
4 considers that the facts constitute a felony, a misdemeanour or a petty offense, he shall decide to
5 indict the charged person before the trial court. The order shall state the facts being charged and
6 their legal qualification."

7

8 The Co-Investigating Judges' decision to either dismiss acts or indict the charged person shall be
9 reasoned as specifically provided by Internal Rule 67(4). The Pre-Trial Chamber also recalls that it
10 is an international standard that all decisions of judicial bodies are required to be reasoned.

11

12 The Pre-Trial Chamber emphasises that the facts as found during the investigation are decisive for
13 the legal characterisation when issuing a Closing Order, irrespective of how they have initially been
14 qualified by the Co-Prosecutors.

15

16 The power of the Pre-Trial Chamber to add legal offences or modes of liability in the Indictment.
17 In light of Internal Rule 79(1) and the provisions of the CPC, the Pre-Trial Chamber finds that it is
18 empowered to add its own legal characterisation to that of the Co-Investigating Judges when
19 deciding whether to include in the Closing Order the offences and mode of liability requested by the
20 Co-Prosecutors. It is bound by the same rules as the Co-Investigating Judges and, notably, by the
21 scope of the investigation. The Pre-Trial Chamber thus finds that it shall decide on the Appeal by an
22 examination of whether the acts that were part of the investigation can be characterised as
23 requested by the Co-Prosecutors and whether the Co-Investigating Judges should have included the
24 legal characterisation.

25

1 The Need to Specify Offences and Modes of Liability in the Indictment. The co-lawyers for the
2 charged person have submitted that there was no need to appeal against the Closing Order
3 because the issues raised could have been solved by the Trial Chamber.

4
5 Internal Rule 67(2) provides that the Indictment shall set out, “the identity of the Accused, a
6 description of the material facts and their legal characterisation by the Co-Investigating Judges,
7 including the relevant criminal provisions and the nature of the criminal responsibility”. The CPC
8 contains a similar provision in Article 247. The Internal Rules and the CPC provide no further
9 guidance for the way in which the Indictment should be reasoned. In these circumstances, the
10 Pre-Trial Chamber will apply international standards.

11
12 International standards require that an indictment set out the material facts of the case with enough
13 detail to inform the defendant clearly of the charges against him so that he may prepare his defence.
14 The indictment should articulate each charge specifically and separately, and should identify the
15 particular acts in a satisfactory manner. If an accused is charged with alternative forms of
16 participation, the indictment should set out each form charged.

17
18 Heading 4, Ground 1. A: Submissions of the Parties. The Co-Prosecutors argue under their first
19 ground of appeal that the Co-Investigating Judges committed an error of law when they failed to
20 indict Duch for the crimes of homicide and torture as defined by the 1956 Penal Code and
21 punishable under Article 3 of the Law on the Establishment of the ECCC (“ECCC Law”). They
22 submit that those crimes were fully disclosed by the material facts as found in the Indictment. They
23 ask the Pre-Trial Chamber to amend the Closing Order to include these crimes.

24
25 The Pre-Trial Chamber includes a summary of the submissions. The Co-Prosecutors set out a

1 proposed amendment to Part IV of the Indictment to incorporate the crimes of homicide and torture.

2

3 The co-lawyers for the charged person do not specifically respond to the Co-Prosecutors' argument
4 that there has been a failure to charge for national crimes, rather, the co-lawyers focus their concern
5 on the potential that investigation into this could cause considerable delay to the commencement of
6 the trial, asking, "when will Duch's trial begin?". The co-lawyers submit that if the Pre-Trial Chamber
7 were to rule that Duch should be investigated in respect of new offences, this would require him to
8 re-appear either before the Co-Investigating Judges or the Pre-Trial Chamber, in order to make his
9 case concerning these new charges. The co-lawyers also take the view that the appeal is "totally
10 unwarranted", as the argument that Duch may be acquitted is untenable, "considering that he has
11 recognised on several occasions his responsibility for the crimes committed at S-21 and that he
12 expressed genuine remorse vis-à-vis the victims."

13

14 Section B, Considerations. The Co-Investigating Judges considered at paragraph 152 of the
15 Closing Order that:

16 "Certain acts characterised by the judicial investigation also constitute the domestic
17 offences of homicide and torture pursuant to Articles 500, 501, 503, 506 of the 1956
18 Cambodian Penal Code under Article 3 of the ECCC Law. However, these acts must be
19 accorded the highest available legal classification, in this case: Crimes against Humanity or
20 Grave Breaches of the Geneva Conventions of 1949."

21

22 The Co-Investigating Judges provided no reasoning as to why they considered that the international
23 offences constitute a higher legal classification than the domestic ones. The Co-Investigating
24 Judges similarly do not mention the factual basis on which they rely when they state that "certain
25 acts characterised by the judicial investigation also constitute domestic offences." As the

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1 Co-Investigating Judges have not defined or referred to a definition of the national and international
2 crimes in the Closing Order or in any previous proceeding, it is not clear how they have reached the
3 conclusions stated above.

4
5 The Pre-Trial Chamber finds that the Co-Investigating Judges failed to "state the reasons for the
6 decision" and therefore did not comply with the requirements of Internal Rule 67(4) and international
7 standards.

8
9 The Co-Prosecutors argue that the domestic crimes are based on the same acts as the international
10 offences which, in relation to the scope of appeal as defined above, have to be identified in the
11 Closing Order. In order to decide whether the Co-Investigating Judges were correct not to include
12 the domestic offences in addition to the indicted international crimes, the Pre-Trial Chamber will
13 examine if the domestic offences are subsumed by the international ones.

14
15 To determine if the domestic crimes are subsumed by the international offences already set out in
16 the Indictment, the Pre-Trial Chamber will examine whether the domestic crimes contain constitutive
17 elements that are not included in the international crimes. The Pre-Trial Chamber is only required to
18 compare the elements of the domestic crimes with the underlying elements of the international
19 crimes, leaving aside the contextual elements of crimes against humanity and the grave breaches of
20 the Geneva Conventions. As stated by the Appeals Chambers of the International Criminal Tribunal
21 for the former Yugoslavia and International Criminal Tribunal for Rwanda, "an element is materially
22 distinct from another if it requires proof of a fact not required by the other."

23
24 The Pre-Trial Chamber compares the constitutive elements of the domestic crimes with the
25 underlying elements of the indicted international crimes in detail.

1

2 A: Torture. The Pre-Trial Chamber's conclusion for the domestic crime of torture reads as follows:

3 The Pre-Trial Chamber finds that the first alternative mental element of the domestic definition,

4 "inflicting acts of torture to obtain, under pain, information for the commission of a crime or

5 misdemeanour" is different from the international definition as it requires that torture be perpetrated

6 not only to obtain information but also that this information may be useful for the commission of a

7 crime or misdemeanour. The Pre-Trial Chamber finds that it would be insufficient for a conviction

8 under the domestic crime to prove that the accused has committed acts of torture for the purpose of

9 obtaining information or a confession, which is the criterion mentioned in the international definition.

10

11 The second mental element contained in the domestic crime, "inflicting acts of torture out of reprisal"

12 is analogous to the purpose of "punishing" contained in the international definition. When only this

13 specific purpose is considered, the elements of the domestic and the international crimes are the

14 same.

15

16 The third alternative mental element of the domestic definition, "inflicting acts of torture out of

17 barbarity", does not have any equivalent in the international definition. This element appears to be

18 broader than those contained in the international definition.

19

20 The Pre-Trial Chamber concludes that the definition of torture stated in the 1956 Penal Code

21 contains two alternative mental elements not included in the international definition, namely the

22 purposes of "inflicting acts of torture to obtain, under pain, information for the commission of a crime

23 or misdemeanour" and "inflicting acts of torture out of barbarity".

24

25 B: Homicide. The Pre-Trial Chamber's conclusion for the domestic crime of homicide reads as

1 follows: An intention to "harm a third person, without the intent to kill" is sufficient for an individual to
2 be found guilty of the crime of homicide under Article 503 of the Penal Code, whilst the international
3 crimes require the intention "to kill or to inflict grievous bodily harm or serious injury in the
4 reasonable knowledge that the attack was likely to result in death". The domestic crime thus
5 requires a mental element that constitutes a lesser form of the intent required for the international
6 crimes. It does not require the proof of a fact different from those required by the international
7 crimes. It is not necessary for the Pre-Trial Chamber to consider including the crime of homicide
8 without intent to kill as codified in Article 503 of the Penal Code in the indictment as it is subsumed
9 by the international crimes that are already set out.

10

11 The crime of premeditated murder under the 1956 Penal Code requires the specific element of
12 premeditation that is not required for the international crimes. It also requires an intent to kill, while
13 an intent to "cause grievous bodily harm or inflict serious injury in the reasonable knowledge that the
14 attack was likely to result in death" is sufficient for someone to be found guilty of the international
15 crime.

16

17 2, Cumulative Charges. Having found that the domestic crimes of torture and premeditated murder
18 are not subsumed by the international crimes, the Pre-Trial Chamber will now examine whether they
19 can legally be included in the Indictment as they should be based on the same facts as the
20 international offences already set out in the Closing Order.

21

22 The Pre-Trial Chamber observes that neither the Internal Rules nor Cambodian law contain
23 provisions related to the possibility to set out different legal offences for the same acts in an
24 indictment. As prescribed in Article 12 of the Agreement, the Pre-Trial Chamber will therefore seek
25 guidance in procedural rules established at the international level.

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1 The jurisprudence of the ad hoc international tribunals holds that it is permissible in international
2 criminal proceedings to include in indictments different legal offences in relation to the same acts.
3 Both the ICTY and the ICTR have considerable jurisprudence supporting the use of cumulative
4 charging. The Special Court for Sierra Leone has also upheld this practice. It is observed that the
5 Co-Investigating Judges have included in the Closing Order both the crimes against humanity and
6 the grave breaches of the Geneva Convention in relation to the same acts.

7

8 The Pre-Trial Chamber further notes that including more than one legal offence in relation to the
9 same acts in an indictment does not inherently threaten the principle of *ne bis in idem* because it
10 does not involve the actual assignment of liability or punishment.

11

12 Continued Punishability of Domestic Crimes. As a further issue, the Pre-Trial Chamber must
13 consider, in order to indict, whether the offences of torture and homicide as described in the 1956
14 Penal Code are still punishable at this time. Upon analysis, the Pre-Trial Chamber does conclude
15 so.

16

17 Now, the factual basis for the domestic crimes. The Pre-Trial Chamber is bound by the system of
18 the Closing Order as far as the insertion of the domestic offences of torture and murder is concerned
19 since any amendments to the Closing Order are limited by the scope of the Appeal and the grounds
20 set out in the Appeal Brief. As the elements of the domestic crimes have been found to differ from
21 those of the international crimes, the Pre-Trial Chamber will reason in its decision where a form of
22 responsibility is not supported by sufficient evidence to indict the charged person.

23

24 The Pre-Trial Chamber can add the crimes of torture and of premeditated murder under the 1956
25 Penal Code as far as the facts in the Closing Order that were part of the investigation are sufficient

1 to do so. Since the Co-Investigating Judges did not reason their conclusion that "certain acts
2 characterised by the judicial investigation also constitute domestic offences", it is required to
3 examine whether the acts set out in the Closing Order are sufficient to send the charged person to
4 trial in relation to these offences.

5

6 The Pre-Trial Chamber examines the facts set out in the Closing Order. So the Pre-Trial Chamber
7 can add the trials of torture and premeditated murder under the 1956 Penal Code. And since the
8 Co-Investigating Judges did not reason their conclusion that certain acts characterised by the
9 judicial investigation also constitute the domestic offences, it is required to examine whether the acts
10 set out in the Closing Order are sufficient to send the charged person to trial in relation to those
11 offences.

12

13 Torture: The Pre-Trial Chamber finds that there is a sufficient factual basis to indict the charged
14 person under the forms of liability of planning, ordering, instigating and/or aiding and abetting, and
15 superior responsibility, for acts of torture committed by his subordinates on S-21 detainees to obtain,
16 under pain, information for the commission of other offences. These acts are legally characterised
17 as constituting the crime of torture under Article 500 of the 1956 Penal Code, punishable under
18 Article 3(new) of the ECCC Law.

19

20 Paragraphs 90 to 93 of the Closing Order describe evidence that Duch himself committed torture,
21 which is reflected in the legal characterisation of the facts in paragraph 153. The Pre-Trial Chamber
22 cannot identify from these paragraphs precise facts that would permit a charge of committing the
23 domestic crimes of torture hence this mode of liability is therefore not included.

24

25 The Pre-Trial Chamber finds no sufficient evidence in the Closing Order that torture was inflicted out

1 of barbarity in order to include this element of the domestic crime in the charge.

2

3 Premeditated Murder: The Pre-Trial Chamber finds that there is a sufficient factual basis to indict
4 the charged person under the forms of liability of planning, ordering, instigating and/or aiding and
5 abetting, and superior responsibility, for the premeditated murders committed at S-21, including
6 Choeng Ek, and by his subordinates. These facts are legally characterised as constituting the crime
7 of premeditated murder under Articles 501 and 506 of the 1956 Penal Code, punishable under
8 Article 3(new) of the ECCC Law.

9

10 The Addition of the Domestic Offences to the Indictment. The crimes of torture and premeditated
11 murder under the 1956 Penal Code were not amongst the legal offences that have been mentioned
12 by the Co-Investigating Judges to the charged person at the initial appearance or later.

13

14 The facts supporting the constitutive elements specific to the domestic crimes were included in the
15 scope of the judicial investigation conducted by the Co-Investigating Judges as they were alleged in
16 the Introductory Submission. In relation to the specific element of the domestic crime of torture,
17 “inflicting acts of torture to obtain, under pain, information for the commission of a crime or
18 misdemeanour”, the Pre-Trial Chamber refers more specifically to paragraphs 52, 110, 112(g) and
19 113(a) of the Introductory Submission. As for the elements specific to the domestic crime of
20 premeditated murder, which is an intent to kill and premeditation, the Pre-Trial Chamber refers to
21 paragraphs 54, 55, 108 and 113(b) of the Introductory Submission.

22

23 The Internal Rules clearly envisage the possibility that the legal characterisation of the acts might
24 change, even during the trial. The addition of legal offences at this stage of the proceedings does
25 not affect the right of the charged person to be informed of the charges provided for in Article

1 35(new) of the ECCC Law, as he will have the opportunity to present his defence on these specific
2 offences during the trial.

3

4 The Pre-Trial Chamber therefore finds that the domestic crimes of torture and premeditated murder
5 can be added to the Closing Order in accordance with the reasoning above.

6

7 Section 5, Ground 2, Failure to include joint criminal enterprise as a mode of liability.

8 A: Submissions of the Parties. The Co-Prosecutors argue under their second ground of appeal that
9 the Co-Investigating Judges committed an error of law when they failed to indict Duch for the
10 commission of crimes through participation in a joint criminal enterprise even though such a mode of
11 liability was fully disclosed by the material facts as found in the Indictment.

12

13 The Pre-Trial Chamber summarises the submissions of the Parties. The Co-Prosecutors request
14 that the Closing Order be amended by replacing the existing paragraph 153 with a proposed
15 paragraph set out in the Appeal Brief.

16

17 The co-lawyers do not specifically respond to the error of law argument in regard to joint criminal
18 enterprise as put forward by the Co-Prosecutors. In their response to the *amicus curiae* briefs, the
19 co-lawyers submit that the basis for joint criminal enterprise liability, and the reasons invoked by the
20 Co-Prosecutors in their Appeal Brief for its inclusion in the Closing Order, are unfounded as Duch
21 and his subordinates have clearly indicated to the Co-Investigating Judges the nature of their role
22 and respective participation in the commission of crimes at S-21. The co-lawyers argue further that
23 the *amicus curiae* briefs reveal doubts concerning the possibility of applying the theory of joint
24 criminal enterprise at the ECCC without violating the principle of *nullum crimen sine lege* and that
25 the second and third categories are particularly controversial. Finally, the co-lawyers submit that

1 should the Pre-Trial Chamber find the theory of joint criminal enterprise to be applicable at the
2 ECCC, the question of Duch's responsibility under this mode of liability should be deferred to the trial
3 stage.

4
5 Segment B: Considerations. With reference to the requirements for an indictment, the
6 Pre-Trial Chamber must examine the issue of joint criminal enterprise at this stage of the
7 proceedings rather than leaving it open as a matter for the Trial Chamber.

8
9 According to the requirement in Internal Rule 67(4), the Closing Order must be reasoned. The
10 Pre-Trial Chamber notes that the Co-Investigating Judges failed to reason why the Co-Prosecutors'
11 proposal to include the allegation of a joint criminal enterprise within S-21 was rejected. The
12 Pre-Trial Chamber refers to the Introductory Submission and the Separation Order in relation to any
13 allegation of a JCE. The Pre-Trial Chamber finds this observation to be consistent with other
14 publications on this issue.

15
16 On the basis of the arguments raised by the Co-Prosecutors the Pre-Trial Chamber invited
17 *amici curiae* to submit briefs so as to better inform on the concept of joint criminal enterprise. The
18 information received guided the Chamber towards a closer study of the scope of the investigation
19 with respect to the various possible forms of liability. The Pre-Trial Chamber notes that the 1956
20 Penal Code recognises a distinction between co-perpetration and complicity. It was observed in the
21 amicus briefs that joint criminal enterprise is one possible mode of liability to describe a factual
22 situation where crimes are committed jointly by two or more perpetrators, and the Pre-Trial Chamber
23 finds this observation to be consistent with other publications on this issue. It is relevant to
24 determining whether this mode of liability can be applied before the ECCC and influenced the study
25 on the scope of the investigation.

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1 According to the requirement in Internal Rule 67(4), the Closing Order must be reasoned. The
2 Pre-Trial Chamber notes that the Co-Investigating Judges failed to reason why the Co-Prosecutors'
3 proposal to include the allegation of a joint criminal enterprise within S-21 was rejected. In addition,
4 they did not explain the chosen characterisation of the facts in terms of the modes of liability.

5

6 Paragraph 62. The Pre-Trial Chamber refers to the Introductory Submission and the Separation
7 Order in relation to any allegation of a JCE.

8

9 Conclusion of the Investigation in Case File 001. 63. On 23 June 2008, the Co-Investigating
10 Judges notified the Parties and their lawyers pursuant to Internal Rule 66(1) that they considered the
11 investigation in respect of Case File 001 to be concluded. The activities and membership of the
12 S-21 Committee and the planning phase of the establishment of S-21 were investigated in
13 Case File 001. At no point did the Co-Investigating Judges refer these facts to the Co-Prosecutors
14 pursuant to Rule 55(3) as "new facts" in relation to joint criminal enterprise or other comparable
15 forms of liability. There was consequently no Supplementary Submission concerning a joint criminal
16 enterprise occurring within S-21, and no requests for further investigations into this form of liability
17 were initiated. Thus, although the facts as stated in the Closing Order reveal the possibility of a type
18 of co-perpetration with respect to the acts committed within S-21, the Pre-Trial Chamber finds that
19 joint criminal enterprise as a mode of liability was not specifically part of the investigation.

20

21 The Final Submission. After the conclusion of the investigation in Case File 001, the
22 Co-Prosecutors filed their Final Submission. The Final Submission of the Co-Prosecutors is a
23 reasoned request either to indict the charged person or to dismiss the case on the basis of the
24 concluded investigation. The Co-Prosecutors argue in their Final Submission that the evidence in
25 the Case File referred to in the material facts section of the Final Submission, establishes that Duch

1 committed the crimes described as a participant in a joint criminal enterprise.

2

3 Commencing at paragraph 241 of the Final Submission, the Co-Prosecutors discuss joint criminal
4 enterprise liability as being applicable to Duch within S-21. At paragraphs 250 and 251, they specify
5 the nature of the alleged joint criminal enterprise, that we can call by the acronym "S-21 JCE".

6 "The JCE came into existence on 15 August 1975 when SON Sen instructed NATH and
7 DUCH to set up S-21. The JCE existed through October 1975, when S-21 began its
8 full-scale operations, to at least 7 January 1979 when the DK [Democratic Kampuchea]
9 regime collapsed. The purpose of the JCE was the systematic arrest, detention,
10 ill-treatment, interrogation, torture and execution of 'enemies' of the DK regime by
11 committing the crimes described in this Final Submission. An organised system of
12 repression existed at S-21 throughout the entirety of the duration of the JCE. All crimes
13 occurring in S-21 and described in this Final Submission were within the purpose of this
14 JCE.

15

16 "DUCH participated throughout the entire existence of the JCE, together with other
17 participants in this JCE who themselves participated for various durations and who
18 included the former Secretary of S-21 NATH, and the other members of the S-21
19 Committee, namely KHIM Vath alias HOR and HUY Sre as well as their subordinates."

20

21 In their response to the Final Submission, the co-lawyers for the charged person argue that "the
22 Co-Prosecutors have included in the Final Submission facts which were not established during the
23 investigation proceedings" although this statement is not linked to the allegation of the S-21 JCE and
24 the additional facts are not precisely identified. The co-lawyers do, however, challenge the extent of
25 Duch's alleged knowledge of the extent of the S-21 criminal system.

1

2 Now, the factual basis for the S-21 JCE. In their Appeal Brief the Co-Prosecutors argue:

3 "The Indictment contains all the facts necessary to indict DUCH for his participation in a joint
4 criminal enterprise at S-21. Consequently, the Co-Investigating Judges were required to
5 indict DUCH for his participation in a JCE. The Co-Prosecutors are not asking the Pre-Trial
6 Chamber to make any new factual findings because the elements of JCE are already plainly
7 described in the factual findings of the Indictment."

8

9 The Pre-Trial Chamber observes that the alleged S-21 JCE involving SON Sen, NATH, KHIM Vath
10 alias HOR and HUY did not form part of the Introductory Submission. In the absence of a
11 Supplementary Submission, the question is raised whether the S-21 JCE nevertheless formed part
12 of the factual basis for the investigation. In order to answer this question, it is necessary to outline
13 briefly the legal elements of joint criminal enterprise liability, and the PTC outlines these elements.

14

15 Viewed in the context of the elements of joint criminal enterprise liability, the Pre-Trial Chamber finds
16 that the formulation of the S-21 JCE set out by the Co-Prosecutors in paragraph 72 of their Appeal
17 Brief is vague, particularly as it concerns the pleading of the three different forms of joint criminal
18 enterprise. It is therefore difficult for the Chamber to identify what is alleged and the facts relied
19 upon, with respect to the required legal elements for each form of joint criminal enterprise. Precision
20 is necessary, in order to analyse whether the different forms of joint criminal enterprise may be
21 applied and to distinguish the concept of joint criminal enterprise from other comparable forms of
22 liability which may be applicable under Cambodian law.

23

24 The Pre-Trial Chamber notes that the significance and exclusivity of the notion of joint criminal
25 enterprise, at least in its basic form, lies in its conceptual underpinning. This allows individual

1 responsibility at the level of a co-perpetrator to be attributed to participants in collective criminal
2 action even though they may be physically divorced from the actual offences. Joint criminal
3 enterprise liability has a subjective focus on the common purpose and intent of the participant.
4 Thus, if Duch were to be indicted as a participant in a joint criminal enterprise, the perception of the
5 level and extent of his responsibility would differ in its intention from the description of his
6 responsibility in the Closing Order. The Closing Order reflects the Introductory Submission which
7 described Duch's personal responsibility in terms of his role in the hierarchical structure of S-21.
8 The Pre-Trial Chamber notes that the alleged S-21 JCE expands the type of conduct attributable to
9 Duch.

10

11 The Pre-Trial Chamber finds that some of the elements of joint criminal enterprise liability as
12 described in the S-21 JCE may be considered to have formed part of the investigation while other
13 elements of the three forms of joint criminal enterprise were not investigated. It is not a mere
14 question of characterisation as asserted by the Co-Prosecutors as the factual basis is not sufficient
15 to allow such a characterisation.

16

17 Regarding the right to be informed of the charges, paragraph 75. The procedure for judicial
18 investigations at the ECCC set out in the Internal Rules is designed to ensure fairness to the
19 charged person in terms of notice of the scope and nature of the acts under investigation for which
20 he may be indicted. The Pre-Trial Chamber notes that the charged person has the right to be
21 informed of the charges at the investigative stage to such an extent that he is able to exercise the
22 rights accorded to him during the investigation, including the right to request investigative action
23 pursuant to Internal Rule 58(6). The Pre-Trial Chamber refers to Internal Rules 21 and 51.

24

25 The charged person was not informed of the allegation related to his participation in the S-21 JCE

1 prior to the Final Submission. The S-21 JCE did not form part of the factual basis for the
2 investigation and for this reason the Pre-Trial Chamber will not add it to the Closing Order at this
3 stage.

4
5 In view of the Pre-Trial Chamber's reasoning and conclusion, it is not necessary to determine the
6 question of the customary international law status of joint criminal enterprise liability at the time of
7 the alleged offences. It is similarly not necessary to determine the applicability of joint criminal
8 enterprise liability, as compared to other forms of liability under Cambodian law, before the ECCC.

9
10 On the issue of provisional detention. The Pre-Trial Chamber agrees with the Co-Investigating
11 Judges that the other three remaining grounds from its previous decision still exist: to ensure the
12 presence of the charged person during the proceedings; to protect the security of the charged
13 person; and to preserve public order.

14
15 The Pre-Trial Chamber will order on the basis of these grounds that the provisional detention of the
16 charged person shall continue until he appears before the Trial Chamber.

17

18 Therefore, the Pre-Trial Chamber hereby decides unanimously:

- 19 1) The Appeal is admissible in its form;
20 2) The first ground of appeal is granted in part;
21 3) The Closing Order is amended with the additional reasoning of the Pre-Trial Chamber.

22 Paragraph 152 of the Closing Order is ordered to be replaced by the following text:

23 "Certain acts characterised by the judicial investigation also constitute the domestic
24 offences of inflicting acts of torture to obtain, under pain, information for the commission of a
25 crime or misdemeanour and premeditated murder. These offences are defined under

1 Articles 500, 501 and 506 of the 1956 Penal Code."

2

3 Paragraph 153 of the Closing Order is ordered to be amended by adding the following:

4 "Duch is not indicted for the mode of liability of "commission" for the domestic crime of
5 torture."

6

7 Part IV of the Closing Order is ordered to be amended by adding the following:

8 3. VIOLATIONS OF THE 1956 PENAL CODE

9 - homicide (Articles 501 and 506)

10 - torture (Article 500)

11 Offences defined and punishable under Articles 3(new), 29(new) and 39(new) of the Law
12 on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the
13 Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

14

15 4) The Appeal is otherwise dismissed;

16 5) KAING Guek Eav alias DUCH is indicted and ordered to be sent for trial as provided in the
17 Closing Order which shall be read in conjunction with this decision.

18 6) The provisional detention of KAING Guek Eav alias DUCH is ordered to continue on the
19 grounds reasoned in this decision until he is brought before the Trial Chamber;

20 7) Case File 001/18-07-2007-ECCC/OCIJ shall be forwarded to the Greffier of the Trial Chamber.

21

22 In accordance with Rule 77(13) of the Internal Rules, this decision is not subject to appeal. Given in
23 public by the Pre-Trial Chamber, in the presence of the charged person and his Co-lawyers.

24 Phnom Penh, 5 December 2008.

25

*Extraordinary Chambers in the Courts of Cambodia
Pre-Trial Chamber - Judgment*

*Case No. 001/18-07-2007-ECCC/PTC (02)
KAING GUEK EAV
5/12/2008*

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1 The Chief of the Security Guard please return the charged person to the detention facility. The
2 Court is adjourned.

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4 *(Court adjourns at 1631H)*

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