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The verdict and the ramifications **James O'Toole** **July 28, 2010**

Monday's landmark verdict at the Khmer Rouge tribunal against Tuol Sleng prison chief Kaing Guek Eav could have ramifications for the court's second case, affecting how suspects are tried and how civil parties are accommodated, expert observers said yesterday.

In its judgment against Kaing Guek Eav, better known as Duch, the Trial Chamber said the Khmer Rouge had been engaged in armed conflict with Vietnam as early as 1975, a determination that significantly widened the pool of evidence that may be used to prove that war crimes were committed by the four senior Khmer Rouge leaders awaiting trial, said Heather Ryan, a court monitor for the Open Society Justice Initiative.

"Many people argued that international armed conflict did not actually begin until late 1978," Ryan said. The Trial Chamber's view, she said, "makes it easier to prove the charges, and that's probably particularly important in the second case, where the charges depend more on the broad theories and goals and strategies of the Khmer Rouge".

The judges also validated the use of two forms of joint criminal enterprise – a form of criminal liability under which suspects may be convicted of crimes committed as part of a common criminal plan – in cases at the Extraordinary Chambers in the Courts of Cambodia. But the third and most expansive form of joint criminal enterprise, under which suspects are held liable for offences that are not pre-planned but are "natural and foreseeable" consequences of a common plan, was not addressed.

"I do think that the inclusion of joint criminal enterprise as a form of liability in the Duch case is important jurisprudence for the second case," Ryan said. "It can allow the prosecutors to demonstrate that crimes were committed through a group of leaders who used others as tools to do the actual dirty work."

One aspect of Monday's ruling that observers said they hoped would not be precedent-setting

was the judgment on reparations for civil parties.

The judges, empowered by court rules to grant civil parties “collective and moral” reparations, granted requests to have their names listed in the judgment, and to have a compilation of the apologies made by Duch at trial published on the court’s website.

The Trial Chamber ruled that other proposed reparations – including requests to build memorials and a request to establish a national commemoration day – were either insufficiently specific or went beyond the “type of reparations permitted” under the court’s internal rules.

Anne Heindel, a legal adviser with the Documentation Centre of Cambodia, said court officials had hemmed themselves in on the reparations issue.

“They draft the rules so that there are no monetary damages, which is the sine qua non of a civil party, and then they say, ‘We can’t give you anything collective and moral, because it’s not specific enough,’” she said.

Heindel and other observers called for rule changes that would allow the court to make recommendations for reparations in cooperation with governments and NGOs.

The judgment also sparked questions about exactly how long Duch – ordered to spend roughly 19 more years in prison beyond time already served – would stay behind bars.

Suspects convicted at the ECCC are to be handed over to Cambodian authorities. Were Duch to be subjected to the same rules as prisoners convicted within the Cambodian legal system, he would be eligible for parole after serving two-thirds of his sentence.

United Nations court spokesman Lars Olsen said yesterday that there were “established procedures in Cambodian law for applying for parole, and it is not within the ECCC’s mandate to enforce those rules”.

Addressing the possibility of Duch’s being paroled following the hearing on Monday, Cambodian co-prosecutor Chea Leang said that the 2004 Law on the Establishment of the ECCC states that the government “shall not request an amnesty or pardon” for anyone convicted at the tribunal.

Deputy prosecutor William Smith said yesterday that this provision excluded the possibility of parole for ECCC suspects, even after the Cambodian government assumed full responsibility for them.

“The law basically advises the Ministry [of Interior] ... how to supervise the sentence, so I don’t think that will be an issue,” Smith said. “The agreement is quite clear from our perspective – that it’s a completely independent and exclusive sentencing regime.”

Smith said that negotiations were ongoing with the government to find a facility for Duch to serve his sentence that met “international standards” and took into account the “security concerns” he may face as a prisoner.