

Duch Judicial Investigation and Pre-Trial Proceedings Overview

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Kaing Guek Eav, commonly known as Duch, is perhaps the most internationally recognized member of the Khmer Rouge regime to be brought before the Extraordinary Chambers. He was the first person charged and taken into custody by the tribunal, and the first to be formally indicted. His trial is scheduled to commence in March 2009.

I. Short Biography

Born in 1942 in central Cambodia, Duch is the youngest accused person before the Extraordinary Chambers. A math teacher by training, he joined the Khmer Rouge in the 1960s. Imprisoned by the Cambodian government, he was released as part of a general amnesty in the wake of Lon Nol's 1970 coup. Following the Khmer Rouge victory in April of 1975, Duch helped establish prisons in newly captured Phnom Penh. Within the next two years, he became chief of the Santebal, the KR secret police, and commander of the S-21 prison (also known as Tuol Sleng). Duch fled Phnom Penh in 1979 with the fall of the Khmer Rouge.

As the Khmer Rouge movement disintegrated, Duch gradually lost contact with the movement and his superiors. In 1996, he converted to Christianity. He was arrested and imprisoned by Cambodian authorities in 1999 after journalists discovered his identity.

II. Transfer to the Extraordinary Chambers and the Judicial Investigation

The organization and procedure of the ECCC are drawn from both civil and common law traditions and include features that might be unfamiliar to those acquainted solely with the American judicial system. At the ECCC, the Co-Prosecutors refer a suspect and a set of charges they would like to prosecute to the Office of the Co-Investigating Judges ("OCIJ").¹ In a sense, the OCIJ functions like an American grand jury, albeit with greater independence. The OCIJ conducts its own investigation of the charged person and at its conclusion decides whether or not to issue an indictment enumerating the crimes that the prosecution will attempt to prove at trial.² The OCIJ has no jurisdiction to investigate acts unless requested to do so by the Co-Prosecutors, but the Co-Prosecutors may not try a case unless authorized by the OCIJ.³ Trial commences only after the OCIJ issues a Closing Order indicting the suspect, now known as an accused person. During its investigation, the OCIJ may decide to hold the charged person in custody, known as provisional detention, if certain conditions are met.⁴

¹ See Internal Rule 53.

² See Internal Rules 55-70.

³ See Internal Rule 67(1).

⁴ See Internal Rule 63.

In July 2007, the prosecution submitted a confidential Introductory Submission, naming Duch as well as the four other currently charged persons, to the OCIJ.⁵ The OCIJ ordered Duch to be taken into provisional detention on July 30, 2007, and he was transferred from Cambodian military to ECCC custody.⁶ His lawyers appealed the decision to keep Duch in custody, arguing that the only remedy under international law for the abuse of process that he suffered during the eight years he was held without charge by the Cambodian military was immediate release and that he did not satisfy Internal Rule 63(3), which sets conditions for provisional detention.⁷ The appeal was heard by the Pre-Trial Chamber (“PTC”), which consists of three Cambodian judges and two foreign judges. Judge Ney Thol recused himself from hearing the appeal and was replaced by Reserve Judge Pen Pichsaly.⁸ The PTC upheld the OCIJ’s decision to detain Duch during the judicial investigation on the grounds that the authority that had detained him previously, the Cambodian military, was not related to the Extraordinary Chambers and that accordingly the judges of the Extraordinary Chambers were unable to offer him relief for that detention.⁹ Because Duch satisfied Internal Rule 63(3)’s conditions, the OCIJ was justified in holding him during its investigation.¹⁰

In September, the OCIJ separated Duch’s responsibility for crimes committed at S-21 from the remaining circumstances alleged in the introductory submission, which remain under judicial investigation.¹¹ Duch cooperated with the judicial investigation and submitted to twenty-one interviews. In May 2008, the OCIJ concluded its investigation. In July, the prosecution and defense filed their Final Submissions and Memorandum in Response, respectively.

On August 8, 2008, the OCIJ issued a Closing Order indicting Duch for the Crimes Against Humanity and Grave Breaches of the Geneva Conventions.¹² He was accused of committing, ordering, planning, instigating, and aiding and abetting these crimes.¹³ He was also charged with liability under the principle of command responsibility.¹⁴ Though the prosecution had requested that the OCIJ investigate Duch for the domestic Cambodian crimes of homicide and torture,¹⁵ the OCIJ denied the request and omitted those crimes from the August 8 Closing

⁵ OCIJ, Closing Order Indicting Kaing Guek Eav alias Duch, 8 Aug. 2008, para. 4 (“Closing Order”). See Internal Rules 53 and 54 for information on Introductory Submissions.

⁶ OCIJ, Order of Provisional Detention (Kaing Guek Eav), 31 July 2007.

⁷ PTC, Report of Examination (Kaing Guek Eav’s Appeal from Provisional Detention), 19 Nov. 2007, pp. 4-6.

⁸ PTC, Public Notice of Recusal of Judge Ney Thol, 13 Oct. 2007.

⁹ PTC, Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias “Duch,” 5 Dec. 2007; *see also* Brief of Professor David Scheffer, International Law Expert, as *Amicus Curiae* In Support of the Co-Investigating Judges, 3 Oct. 2007, *available at* www.cambodiatribunal.org.

¹⁰ PTC, Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias “Duch,” 5 Dec. 2007. To date, all charged persons have appealed their provisional detention, though with little success. Four appeals were denied, and one remains pending.

¹¹ Closing Order, *supra* note 5, at para. 5.

¹² Closing Order, *supra* note 5, at paras. 129-151.

¹³ *Id.*, at paras. 153-61.

¹⁴ *Id.*

¹⁵ OCIJ, Order Concerning (Co-Prosecutors’) Requests for Investigative Action, 4 June 2008.

Order, reasoning that they were subsumed by the higher international crimes with which Duch was charged.¹⁶

III. The Co-Prosecutors' Appeal Against the Closing Order

Displeased with the OCIJ's failure to indict Duch for the domestic crimes of homicide and torture and to hold him responsible as a co-perpetrator, the Co-Prosecutors appealed the Closing Order.¹⁷ The appeal was heard by the five judges of the Pre-Trial Chamber, though once again Judge Ney Thol recused himself and was replaced by Reserve Judge Pen Pichsaly.¹⁸

Regarding the first ground of appeal, the omission of the domestic crimes, the Co-Prosecutors argued that the interpretation advanced by the OCIJ, that the international crimes subsumed the domestic crimes, would preclude all domestic crimes from being prosecuted at the tribunal.¹⁹ Furthermore, the Co-Prosecutors contended that the international crimes contained an element not present in the domestic crimes and the domestic crimes each contained an element not present in the international crimes.²⁰ The defense took no position on the merits of the issue, instead arguing that it should be decided at trial and that amending the Closing Order would cause unreasonable delay.²¹

On the second ground of appeal, the failure to indict Duch as a co-perpetrator under the mode of liability of Joint Criminal Enterprise ("JCE"), the Co-Prosecutors argued that the modes of liability of ordering, instigating, and planning contained in the indictment were not broad enough to cover all of Duch's criminal actions and that the indictment's two other modes of liability, aiding and abetting and superior responsibility, failed to adequately convey the central criminal role that Duch played at S-21.²² They contended that JCE best captured the reality of Duch's participation in the crimes at S-21 and noted that the Closing Order contained facts indicating that Duch was liable under JCE.²³

Finally, the Co-Prosecutors argued that JCE satisfied all four conditions required for use at the ECCC: (1) it is provided for under the law establishing the ECCC; (2) it was part of customary international law when the crimes were committed; (3) the accused was able to know of the mode of liability when the crimes were committed; and (4) the accused was able to foresee that he or she could be held criminally liable for his or her actions.²⁴ The defense did not respond at length to the issue, but noted that Duch had fully revealed the nature of his participation in crimes at S-21 and that doubts had been raised as to the possibility of using JCE

¹⁶ Closing Order, *supra* note 5, at para. 152.

¹⁷ Statement of the Co-Prosecutors, 21 Aug. 2008.

¹⁸ PTC, Public Notice of Recusal of Judge Ney Thol, 13 Oct. 2008.

¹⁹ PTC, Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias "Duch," 8 Dec. 2008, paras. 51-53 ("Decision on Closing Order Appeal").

²⁰ *Id.*

²¹ *Id.*, at para. 54.

²² *Id.*, at paras. 108-10.

²³ *Id.*

²⁴ *Id.*

at the ECCC without violating the prohibition against ex post facto law (known as the principle of *nullem crimen sine lege*), especially regarding the more attenuated versions of the doctrine.²⁵

JCE is a controversial means of establishing liability in international criminal law.²⁶ It has three variations. The first and most basic form (“JCE 1”) applies where participants in a crime act on the basis of a common plan and with a common intention.²⁷ The second or “systemic” form (“JCE 2”), applies where groups act pursuant to a common plan, as is the case when a military unit operates a concentration camp.²⁸ The third or “extended” form (“JCE 3”) applies to situations where one of the participants engages in acts that go beyond the common plan, but which were a foreseeable consequence of that plan.²⁹

Given the uncertainty as to whether or not the different variations of the doctrine were part of customary international law during the Khmer Rouge regime and whether they are applicable at the ECCC, the PTC requested amicus briefs on the issues from three international law experts and organizations: the Centre for Human Rights and Legal Pluralism at McGill University, Professor K. Ambos, and Professor Anthony Cassese and other member of the *Journal of International Criminal Law*.³⁰ Professor Ambos argued that only JCE 1 was unquestionably part of customary international law during the Khmer Rouge regime, and that JCE 2 might be considered part of the customary international law of the day, but only if interpreted narrowly.³¹ Contrary to Professor Ambos, both Professor Cassese and the team from McGill University argued that forms of liability analogous to JCE 1, 2, and 3 were part of customary international law during the Khmer Rouge period and that all three JCE variants were therefore appropriate forms of liability at the tribunal.³² However, the McGill team noted that the case law supporting JCE 3 was weaker than that supporting JCE 1 and 2.³³

Believing the ruling on the applicability of JCE to carry great significance for their own cases, lawyers for other charged persons attempted to file pleadings expressing their views. Lawyers for Ieng Sary first requested permission to make submissions on the JCE on the grounds that Ieng Sary is alleged to be part

²⁵ Decision on Closing Order Appeal, *supra* note 19, at paras. 111-12.

²⁶ See Dr. John Ciorciani, *Joint Criminal Enterprise and the Khmer Rouge Prosecutions*, 4 Dec. 2008, available at http://www.cambodiatribunal.org/index.php?option=com_myblog&show=Joint-Criminal-Enterprise-and-the-Khmer-Rouge-Prosecutions.html&Itemid=55.

²⁷ Decision on Closing Order Appeal, *supra* note 19, at para. 132.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*, at paras. 14-16.

³¹ Prof. Dr. K. Ambos, Amicus Curiae Concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), 28 Oct. 2008.

³² Prof. Antonio Cassese et al., *Amicus Curiae* Brief of Professor Antonio Cassese and Members of the *Journal of International Criminal Justice* on Joint Criminal Enterprise Doctrine, 28 Oct. 2008; McGill University Center for Human Rights and Legal Pluralism, *Amicus Curiae* Brief In the Matter of the Co-Prosecutor’s Appeal of the Closing Order of Kaing Guek Eav “Duch,” 28 Oct. 2008.

³³ McGill University Center for Human Rights and Legal Pluralism, *Amicus Curiae* Brief In the Matter of the Co-Prosecutor’s Appeal of the Closing Order of Kaing Guek Eav “Duch,” 28 Oct. 2008.

of the same criminal common plan as Duch and that accordingly he has an interest in the outcome of the appeal.³⁴ The PTC denied this request, noting that the Internal Rules only allowed parties to make submissions and that it was not inevitable that JCE liability would be applied to Ieng Sary if applied to Duch.³⁵

Next, Ieng Sary's lawyers moved to disqualify Professor Cassese from serving as an amicus, on the grounds that he had written the opinion that effectively introduced JCE as a mode of liability in international criminal law while he was a justice on the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in 1999.³⁶ Referring to its previous decision, the PTC held that Ieng Sary lacked standing to bring such a motion.³⁷ Finally, all four of the remaining charged persons requested to intervene on the JCE issue.³⁸ The PTC remained unbowed and denied the request, referring to its previous two decisions on the matter.³⁹

The PTC ruled on the Co-Prosecutors' appeal on December 8, 2008.⁴⁰ Because the Internal Rules of ECCC did not specify the extent of the PTC's power to decide appeals from Closing Orders, the PTC first resolved a number of procedural issues. It held that the scope of PTC review of Closing Orders was limited to those grounds raised on appeal, that the PTC was empowered to decide independently on the legal characterization of offenses and mode of liability contained in the Closing Order without referring the Order back to the OCIJ. In addition, the issues raised on appeal could not be resolved at trial, as the defense had argued, because international standards and Article 35 (new) of the ECCC Law require that the accused person be informed in detail of the nature and cause of the charges.⁴¹

On the first ground of appeal, the failure to charge national crimes, the PTC held that the national crimes of premeditated murder and torture should be added to the Closing Order because those crimes contain elements that are not present in the definitions of the international crimes alleged in the Closing Order and because it is permissible under international criminal law to apply more than one legal offense to the same underlying facts.⁴²

On the second ground of appeal, the failure to include JCE as a mode of liability, the PTC sidestepped the difficult issue of whether or not JCE 1 and 2 could be employed at the Extraordinary Chambers. Instead, the PTC held only that the JCE could not be applied to Duch, for he was not adequately informed of the

³⁴ Decision on Closing Order Appeal, *supra* note 19, at para. 21.

³⁵ *Id.*

³⁶ *Id.*, at para. 22.

³⁷ *Id.*

³⁸ *Id.*, at para. 23.

³⁹ *Id.*

⁴⁰ Decision on Closing Order Appeal, *supra* note 19.

⁴¹ *Id.*, at paras. 25-50.

⁴² *Id.*, at paras. 55-107.

allegations of JCE prior to the Co-Prosecutor's Final Submission as required by Internal Rule 21(1)(d).⁴³

IV. Closing Order Facts and Charges

The Closing Order focuses on Duch's role as commander of the S-21 prison, also known as Tuol Sleng, located in Phnom Penh. It describes the political and historical context of the Khmer Rouge regime beginning with the capture of Phnom Penh in April 1975.⁴⁴ When the Khmer Rouge took power, they embarked on a program designed to replace the previous economic and political structure with a new, "revolutionary" structure.⁴⁵ This was accomplished by transferring the population of Phnom Penh into the countryside to work in agricultural cooperatives and by establishing re-education, interrogation, and security centers designed to discover and eliminate opponents of the party.⁴⁶ The Khmer Rouge were in conflict with the Vietnamese from their accession to power in April 1975 to the fall of Phnom Penh to Vietnamese forces in January 1979.⁴⁷

According to the Closing Order, S-21 and its satellite facilities in the greater Phnom Penh areas were established to further the goal of creating a new society.⁴⁸ Their purpose was the execution of enemies of the party; every prisoner who arrived at S-21 was destined to be killed, even those transferred there by mistake.⁴⁹ As the years passed, Khmer Rouge members suspected of disloyalty were increasingly sent to S-21 for interrogation and execution.⁵⁰ Prisoners sent to S-21 were usually accompanied by their families.⁵¹ Documents indicate that at least 12,380 prisoners of all ages and sexes were imprisoned at Tuol Sleng.⁵² Few survived.⁵³

The Closing Order details Duch's role in the Khmer Rouge hierarchy and at S-21, as well as the administrative organization of the prison.⁵⁴ It describes the methods used to extract confessions at S-21, the use of these confessions, the conditions of imprisonment, and the procedure for executions.⁵⁵ It establishes the legal offenses constituted by these facts and the modes in which Duch is liable for them.⁵⁶ The Closing Order concludes with description of Duch's character,

⁴³ *Id.*, at paras. 113-42

⁴⁴ Closing Order, *supra* note 5, at para. 10.

⁴⁵ *Id.*

⁴⁶ *Id.*, at paras. 10-15.

⁴⁷ *Id.*, at paras. 16-18.

⁴⁸ *Id.*, at para. 13.

⁴⁹ *Id.*, at para. 31.

⁵⁰ Closing Order, *supra* note 5, at paras. 35-39.

⁵¹ *Id.*, at para. 37.

⁵² *Id.*, at para 47.

⁵³ *Id.*, at para. 107.

⁵⁴ *Id.*, at paras. 20-128.

⁵⁵ *Id.*

⁵⁶ Closing Order, *supra* note 5, at paras. 29-61. These characterizations were modified slightly by the Pre-Trial Chamber. Decision on Closing Order Appeal, *supra* note 19.

including his 1996 conversion to Christianity and his cooperation with the OCIJ investigation.⁵⁷

V. CIVIL PARTY PARTICIPATION

Victims of the Khmer Rouge may participate directly in proceedings as civil parties, a feature drawn from Cambodian procedure but never before adopted by tribunals applying international criminal law.⁵⁸ Civil parties may participate in all proceedings, even pre-trial, though not to the same extent as the prosecution and defense.⁵⁹ Twenty-eight civil parties joined the pre-trial proceedings against Duch prior to the issuance of the Closing Order.⁶⁰ Lawyers for two civil parties filed submissions before the PTC on the issue of JCE.⁶¹ At present, ninety-four civil parties have applied to join the trial proceedings.⁶²

⁵⁷ *Id.*, at paras. 162-171.

⁵⁸ *See* Internal Rule 23.

⁵⁹ *See, e.g.*, PTC, Decision on Preliminary Matters Raised by Civil Parties in Ieng Sary's Appeal Against Provisional Detention, 1 July 2008.

⁶⁰ Closing Order, *supra* note 5, at para. 6.

⁶¹ Decision on Closing Order Appeal, *supra* note 19, at para. 18.

⁶² Press Statement of the Victim's Unit, 4 Feb. 2009.