

Outline of 2008 Extraordinary Chambers Proceedings

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The first full year of litigation before the Extraordinary Chambers has come to a close. It was a busy year: Civil parties appeared for the first time in proceedings held under international criminal law; the Pre-Trial Chamber significantly elaborated the body of law governing procedure, the relationship between the organs of the court, and the rights of charged persons; and the first of the five persons currently in tribunal custody was indicted.

This summary briefly describes the 2008 rulings of the Office of the Co-Investigating Judges (OCIJ) and the Pre-Trial Chamber (PTC). Decisions and orders are organized by category. Within each category, relevant decisions and orders are listed chronologically from earliest to most recent.

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Translation Decisions Applicable to All Charged and Accused Persons

1. [OCIJ – Order on Translation Rights and Obligations \(June 20, 2008\)](#): In an attempt to resolve translation issues that had affected proceedings against all five charged persons, the OCIJ stated that charged persons are entitled to Khmer translations of any indictment and the introductory and final submissions of the co-prosecutors. All judicial decisions and orders will be translated into Khmer, English, and French, the tribunal's three working languages. All filings must be in Khmer and one of the other two working languages. Translation of other necessary documents in the case file must be coordinated between Case Management Services and Defense Support Staff translators.
2. The PTC is currently considering Khieu Samphan's appeal against the Order on Translation Rights. An oral hearing was held on December 5, 2008, though no decision has been reached to date. Samphan argues that the failure to translate all case file documents into French, the language of his international lawyer, compromises his right to a fair trial. He also asserts that he has no obligation to cooperate with the CMS to translate necessary documents, in part because transmitting a list of documents to be translated violates the lawyer's duty to maintain confidentiality. Click [here](#) for a Report of Examination describing the positions of the parties.

Civil Party Decisions Applicable to All Proceedings

1. [PTC – Decision on Civil Party Participation in Provisional Detention Appeals \(March 20, 2008\)](#): Pursuant to Internal Rule 23(1) and the goal of national reconciliation that their presence is intended to serve, civil parties may participate in all ECCC criminal proceedings, including appeals against provisional detention.
2. [PTC – Directions on Civil Party Oral Submissions During Hearing of Ieng Sary's Provisional Detention Appeal \(May 20, 2008\)](#) (requiring that civil party oral submissions be made by lawyers according to IR 77(10) – see #s 4 and 5 below).
3. [PTC – Decision on Civil Party Request for Translation Services \(June 19, 2008\)](#) (finding request by civil party foreign co-lawyer for translations services inadmissible because it is too abstract and fails to specify interpretation needs, whether or not attempts have been made to secure translation services from other tribunal organs, and why the PTC is the correct body to adjudicate the matter).
4. [PTC – Decision on Preliminary Matters Raised by the Lawyers for the Civil Parties \(July 1, 2008\)](#) (reiterating earlier decisions that civil party lawyers are allowed less time at oral argument than the prosecution and defense, and denying the request of a civil party represented by a lawyer to be heard in person – see # 2 above).

5. [PTC – Written Version of Oral Decision on Civil Party Request to Address the PTC in Person \(July 3, 2008\)](#): Denying the request of a civil party, who had dismissed her lawyer, to address the court in person on the grounds that IR 77(10) provides that only civil party lawyers may make oral observations during pre-trial appeals. The civil party subsequently moved for reconsideration (see #s 2 and 4 above).
6. [PTC – Decision on Civil Party Request for Protective Measures \(8 July 2008\)](#) (granting request by civil parties to keep their names confidential).
7. [PTC – Further Directions Concerning Application for Reconsideration of Civil Parties’ Right to Address the Chamber \(14 July 2008\)](#) (allowing unrepresented civil parties and others to respond to application for reconsideration).
8. [PTC – Decision on Application for Reconsideration of Civil Parties’ Right to Address PTC In Person \(28 August 2008\)](#) (denying application).
9. [PTC – Directions on Unrepresented Civil Parties’ Right to Address the PTC In Person \(29 August 2008\)](#): Generally, only lawyers for civil parties may make filings and address the court (see # 2 and 5 above). However, legitimately unrepresented civil parties may address the PTC in person if their interests are different from those of the prosecution, so long as they make a written request explaining the content and relevance of the proposed submission at least ten days before the hearing.
10. [PTC – Written Version of Oral Decision on Civil Party Application for Oral Submissions in Translation Appeal \(December 5, 2008\)](#): Because the civil party lawyers did not formally notify the PTC of their intention to present oral arguments ten days before the hearing, as required by the PTC’s “Directions on Unrepresented Civil Parties’ Right to Address the PTC in Person” (August 29, 2008) (see # 9 above), their application was denied.

Kaing Guek Eav (“Duch”)

1. [OCIJ – Order Concerning Civil Party Request for Investigative Action \(June 4, 2008\)](#): The Co-Investigating Judges ruled on a request by a civil party to undertake certain investigative actions pursuant to Internal Rule 55(10). The civil party requested an opportunity to interview Duch regarding the death of relatives killed at S21. While the request was “legitimate,” because the case file needed to be quickly forwarded to the Co-Prosecutors to stay on schedule, it was denied in the interests of judicial administration.
2. [OCIJ – Order Concerning Co-Prosecutor’s Request for Investigative Action \(June 4, 2008\)](#): The Co-Prosecutors requested that the OCIJ investigate Duch for the Cambodian domestic crimes of homicide and torture. Because the elements of the

- requested charges had already been investigated as part of the judicial investigation and because the legal definitions of the indictment are established by the Closing Order, which had not yet been issued, the request was denied. (The Closing Order did not charge Duch with the national crimes; the Prosecution appealed to the PTC and won. Specific variations of the national crimes of homicide and torture were added to the indictment (see #s 3 and 8 below)).
3. [OCIJ – Closing Order Indicting Duch \(August 8, 2008\)](#): The OCIJ issued a Closing Order describing the atrocities committed at Tuol Sleng and Duch’s role therein.
 - a. The Closing Order indicts Duch for the Crimes Against Humanity of Imprisonment, Enslavement, Torture, Rape, Murder, Extermination, Persecution, and Other Inhumane Acts. The Closing Order also indicts Duch for Grave Breaches of the Geneva Conventions, namely Unlawful Confinement of a Civilian, Willfully Depriving Rights to Fair Trial, Willfully Causing Great Suffering, Torture and Inhumane Treatment, Willful Killing. The OCIJ’s decision not to indict on the national crimes of torture and homicide was challenged on appeal (see #7 below).
 - b. Forms of Responsibility are Commission, Ordering, Command Responsibility, Planning, Instigation, and Aiding and Abetting. The OCIJ’s decision not to allege participation in a Joint Criminal Enterprise was challenged on appeal (see # 8 below).
 - c. The Closing Order describes Duch as remorseful and cooperative.
 4. [PTC – Public Notice of Recusal of Judge Ney Thol \(October 13, 2008\)](#): PTC Judge Ney Thol recused himself from consideration of the Co-Prosecutor’s Appeal, pursuant to IR 34(1), probably because he participated in pre-ECCC proceedings involving Duch in his capacity as a military judge. Thol was replaced by Reserve Judge Pen Pichsaly.
 5. [PTC – Decision on Ieng Sary’s Request to Make Submissions on Issue of JCE in Prosecutor’s Appeal from Closing Order of Case File 001 \(October 6, 2008\)](#): Ieng Sary’s request to make submissions on the issue of Joint Criminal Enterprise was denied because the Internal Rules do not permit third parties to intervene and because he will have an opportunity to challenge any potential application of JCE in his own case.
 6. [PTC – Decision on Ieng Sary’s Motion to Disqualify *Amicus Curiae* \(October 14, 2008\)](#): Ieng Sary’s motion to disqualify Antonio Cassesse and certain members of the Board of Editors and Editorial Committee of the International Journal of Criminal Justice from serving as amici curiae on the issue of Joint Criminal Enterprise is denied on the grounds that he lacks standing to intervene in proceedings that do not concern him.
 7. [PTC – Decision on Joint Defence Request to Intervene on the Issue of JCE \(November 5, 2008\)](#): The PTC denied a request by the Co-Lawyers for Ieng

Thirith, Nuon Chea, and Khieu Samphan to be heard on the issue of Joint Criminal Enterprise. They argued that they had a direct interest in the issue, and even in the absence of a right to intervene, their request to be heard should be granted on grounds of judicial economy and the right to a fair trial. The PTC denied the request, citing its previous denial of Ieng Sary's request for intervention in the issue (see #s 5 and 6 above).

8. [PTC – Decision on Appeal Against Closing Order \(December 5, 2008\)](#): The Co-Prosecutors alleged two errors of law in the Closing Order: (1) failure to indict Duch on the national crimes of murder and torture; and (2) failure to indict Duch for committing all the crimes that occurred at S-21 via Joint Criminal Enterprise. Antonio Cassese, the McGill Centre for Human Rights and Legal Pluralism, and Dr. K. Ambos submitted amicus briefs on the issue of JCE.
 - a. The scope of review was limited to the grounds raised on appeal.
 - b. The PTC is empowered to decide independently on legal characterization of offenses and mode of liability in the Closing Order.
 - c. Because international standards require specificity in the indictment and Article 35 (new) of the ECCC Law provides that the accused shall be informed in detail of nature and cause of the charges, the grounds for appeal may not be decided at trial.
 - d. Ground 1: Failure to Charge National Crimes: Because the national crimes of homicide and torture contain elements that are not subsumed by the international definitions, because it is permissible to include more than one legal offense in relation to the same acts in an indictment, and because the facts supporting the constituent elements of the domestic crimes were included in the scope of the judicial investigation, the domestic crimes of torture and premeditated murder can be added to the Closing Order.
 - e. Ground 2: Failure to Include JCE as a Mode of Liability: Because the Closing Order refers only to Case File 001, which deals solely with crimes committed at S-21 and did not include JCE as a specific part of the investigation, Duch was not properly informed under IR 21(1)(d) of the allegations of participation in the S-21 JCE prior to the Co-Prosecutor's Final Submission and the PTC accordingly will not add it to the Closing Order.

Nuon Chea

1. [OCIJ Order Refusing Request for Annulment of Initial Appearance \(January 24, 2008\)](#).
2. [PTC – Public Order on the Urgent Application for Disqualification of Judge Ney Thol \(February 4, 2008\)](#): The PTC denied the Defense's urgent request to disqualify Judge Ney Thol on the grounds of insufficient evidence of real or apparent bias.

3. [PTC – Decision on Appeal Against Provisional Detention \(March 20, 2008\)](#) (denying appeal on the grounds that multiple IR 63(3) conditions for provisional detention remained satisfied).
4. [PTC – Decision on Appeal Against Order Refusing Request for Annulment \(August 26, 2008\)](#)(appeal denied).
5. [PTC – Decision on Appeal Concerning Provisional Detention Conditions \(September 26, 2008\)](#): the PTC granted the Defense’s appeal against an OCIJ decision preventing charged persons from communicating with each other, on the grounds that international law restricts segregation to instances where it is necessary to prevent collusion to pressure witnesses and victims. The PTC referred to its April 30 decision granting contact between Ieng Sary and his wife, Ieng Thirith (see # 5, Ieng Sary, below).
6. [PTC – Decision on Appeal Regarding Appointment of an Expert \(October 22, 2008\)](#): The PTC denied the Defense’s appeal from the OCIJ’s refusal to allow an expert to determine Nuon Chea’s fitness for trial. Contrary to the findings of the OCIJ, the charged person’s capacity to effectively participate in proceedings begins at the moment he is charged with a crime. However, Nuon Chea did not meet the threshold for requiring an expert to determine his capacity, as medical experts had previously determined that his cognitive functions are unaffected by his health conditions and he has already made “collected, relevant, well-structured, and comprehensive statements” at hearings before the OCIJ and the PTC.

Khieu Samphan

1. [PTC – Decision to Adjourn Hearing on Provisional Detention \(April 23, 2008\)](#): KS’s request for adjournment of the hearing of his appeal from provisional detention was granted. KS requested adjournment on the grounds that he was deprived of the services of his international co-lawyer, Jacques Verges. Verges refused to continue representation because all the documents in the case file had not been translated. Pursuant to IR 38(1), the PTC warned Verges that he had abused the processes of the PTC and the rights of the charged person.
2. [OCIJ – Order Refusing Request for Release \(June 23, 2008\)](#) (refusing request for release due to health problems).
3. [OCIJ – Order Refusing Application for Release \(October 28, 2008\)](#) (refusing application for release).
4. [PTC – Direction to the Defense Concerning the Appeal Against Provisional Detention \(August 15, 2008\)](#): The PTC reminded the defense that the appeal

against provisional detention had been adjourned for almost four months and gave the defense seven days to state its position.

5. [PTC – Decision on Request for a Public Hearing on Translation Appeal \(November 4, 2008\)](#) (granting public hearing).
6. [OCIJ – Order on Extension of Provisional Detention \(November 18, 2008\)](#) (extending detention for one year).
7. [PTC – Decision on Supplemental Application for Release \(December 24, 2008\)](#): Khieu Samphan filed an application for immediate release, directed to the President of the PTC, along with his appeal against the OCIJ Order for Extension of Provisional Detention (see #6 above). Concluding that Cambodian Code of Criminal Procedure did not apply and that all decisions on release were to be made by the PTC as a body, the President concluded that the application was inadmissible.

Ieng Sary – see Kaing Guek Eav #s 5 and 6 for the adjudication of Ieng Sary’s attempts to intervene in the PTC’s consideration of the applicability of Joint Criminal Enterprise in the Co-Prosecutor’s Appeal Against Kaing Guek Eav’s Closing Order

1. [PTC – Decision on Appeal Concerning Contact Between Charged Person and his Wife \(April 30, 2008\)](#): The OCIJ memo authorizing Ieng Sary and his wife, Ieng Thirith, to visit each other once per week was not adequately reasoned. Pursuant to the right of charged persons to be treated with humanity, contact with other charged persons may not be limited or denied unless it protects the interests of the investigation (see # 6, Nuon Chea, above).
2. [PTC – Decision on Appeal Against Letter Concerning Request for Information on Legal Officer David Boyle \(28 August 2008\)](#) (OCIJ decision denying request upheld).
3. [PTC – Decision on Appeal Against Provisional Detention \(October 17, 2008\)](#) (appeal denied).
4. [PTC – Decision on Appeal Regarding Appointment of Expert \(October 21, 2008\)](#) (appointment of psychiatric expert denied on same grounds as denial of Nuon Chea’s appeal regarding appointment of health expert (see # 6, Nuon Chea, above)).
5. [OCIJ – Order on Extension of Provisional Detention \(November 10, 2008\)](#).

Ieng Thirith

1. [PTC – Decision on Appeal Against Provisional Detention \(July 9, 2008\)](#) (finding that provisional detention was justified on a number of grounds specified in IR 63(3) establishing conditions for provisional detention).
2. [OCIJ – Order on Extension of Provisional Detention \(November 10, 2008\)](#).