MEMORANDUM

TO: Anne Heindel, Legal Advisor, Documentation Center of Cambodia
FROM: Margarita Clarens, Legal Volunteer, Documentation Center of Cambodia, Duke Law School 2008
DATE: September 1, 2008
RE: Analysis of the Closing Order indicting Kaing Guek Eav (Duch)

I. Introduction

On August 12, 2008, the Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (ECCC) filed the Closing Order indicting Kaing Guek Eav, alias Duch, for various offenses based on Duch's role as Deputy Chairman and Chairman of the S-21 Security Office, known as Tuol Sleng Prison. On August 21, 2008, the Co-Prosecutors announced their intention to appeal the Closing Order. This memorandum addresses issues relating to the Closing Order and appeal.

In accordance with the Internal Rules of the ECCC, the Co-Investigating Judges must complete an investigation of all crimes falling within the Court's jurisdiction.[1] Though independent, this investigation is limited to facts set out in the Co-Prosecutor's initial and subsequent submissions.[2] Rule 67 requires that the Co-Investigating Judges, upon completion of their investigation, issue a Closing Order, which may either indict the charged person or dismiss the case.[3] If the Co-Investigating Judges choose to issue an indictment, that indictment must "set[] out the identity of the Accused, a description of the material facts and their legal characterization by the Co-Investigating Judges, including the relevant

[1] ECCC Internal Rules, Rule 55(1) (2008).
[2] *Id.* Rule 55(2).
[3] *Id.* Rule 67(1).

criminal provisions and the nature of the criminal responsibility."[4] Subsequently, upon the completion of the trial, the Trial Chamber's judgment "shall be limited to the facts set out in the Indictment,"[5] and though the Trial Chamber may "change the legal characterization of the crime as set out in the Indictment . . . no new constitutive elements [may be] introduced."[6]

These rules reflect the importance of the Indictment in setting the scope of the trial. In the case of Duch, therefore, it is significant that the Closing Order, as compared with the Co-Prosecutor's Final Submission, limited the scope of the charges against Duch in three critical ways. First, the Closing Order fails to specifically charge Duch under the Cambodian Penal Law, indicating that the national charges merge into the "higher" legal classifications of crimes against humanity and grave breaches of the Geneva Conventions. Second, it fails to address the issue of joint criminal enterprise (JCE) liability, which was specifically raised in the Final Submission. Third, unlike the Final Submission it does not define the "attack" against the civilian population held at S-21 with the country-wide attack by the senior leaders of Democratic Kampuchea (DK) and Communist Party of Kampuchea (CPK).

II. National Charges

In the Closing Order the Co-Investigating Judges noted that though acts committed by Duch "constitute the domestic offenses of homicide and torture" pursuant to the 1956 Cambodian Penal Law, "these acts must be

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[4] *Id.* Rule 67(2).
[5] *Id.* Rule 98(1).

accorded the highest available legal classification."[7] The Judges then found that crimes against humanity and grave breaches of the Geneva Conventions of 1949 were the highest available legal classifications and rejected the individual charges made pursuant to the two national provisions.[8]

A. Cumulative Charging Is Permissible

It is well settled in international criminal law that charging cumulative offenses is permissible.[9] Cumulative offences refer to crimes that arise from different statutory provisions but that are based on the same conduct.[10] Any decisions regarding cumulative offenses are properly made by a Trial Chamber, which can take into account the facts proven beyond a reasonable doubt.[11] When it is clear that certain facts have been proved, the Trial Chamber can address the issue, if applicable, of potential cumulative convictions.[12] The Appeals Chamber of the ICTY has found that,

> Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.[13]

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[6] *Id.* Rule 98(2).
[7] Closing Order, *supra* note 29, ¶ 152.
[8] *Id.*
[9] *E.g.*, Prosecutor v. Musema, Case No. ICTR-96-13-A, Appeals Chamber, ¶ 369 (Nov. 16, 2001).
[10] Prosecutor v. Mucic et al., Case No. IT-96-21, Appeals Chamber, ¶ 400 (Feb. 20, 2001)
[11] *Id.*; Prosecutor v. Naletilic & Martinovic, Case No. IT-98-34, Trial Chamber, ¶ 718 (Mar. 31, 2003) ("Cumulative charging is permissible according to the practice of the Tribunal, as a Trial Chamber is in a position to evaluate the charges to be retained only after the presentation of the evidence.").
[12] *Mucic et al.*, Case No. IT-96-21, ¶ 400.
[13] *Id.* (emphasis added).

The Trial Chamber of the ICTR has found it also acceptable to convict an accused of cumulative offenses when "the laws in question protect differing social interests."[14]

Nothing in the structure or mandate of the ECCC prevents it from coming to the same conclusion with respect to this issue. Much to the contrary, the nature of the ECCC as a hybrid Court supports cumulative charging of violations of Cambodian and international law in order to completely grasp the scope of the crimes committed by Khmer Rouge officials and the pervasive disregard for the rule of Cambodian law during that epoch.

B. Cambodian Law and International Law Charges Are Not Cumulative

In addition, murder and torture as defined in the 1956 Penal Law may not merge into the "higher" legal classifications of crimes against humanity and grave breaches of the Geneva Conventions, as suggested by the Co-Investigating Judges. It is settled in international law that "multiple criminal *convictions* entered under different statutory provisions but based on the same conduct are permissible . . . if each statutory provision involved has *a materially distinct element not contained in the other*."[15] Moreover, "[a]n element is materially distinct from another if it requires proof of a fact

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[14] *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber (May 21, 1999).
[15] *Id.*; Prosecutor v. Krstic, Case No. IT-98-33-A, Appeals Chamber, ¶ 218 (Apr. 19, 2004).

not required by the other."[16] The question of whether offenses are cumulative is a question of law, rather than fact.[17]

As a preliminary matter it is necessary to note the jurisdictional elements of both crimes against humanity and grave breaches of the Geneva Conventions. Jurisdictional elements, also known as chapeau requirements, are those elements that, when found in addition to the elements of various underlying offense, make those offenses violations of international criminal law. International courts have found that, "[i]n determining whether a provision contains a materially distinct element, all the elements of the offence are to be taken into account, including the chapeau requirements."[18] Indeed, because the crimes underlying crimes against humanity and grave breaches are often identical, e.g. torture, international tribunals have found that these two international crimes are not, in themselves, cumulative.[19]

As defined in Article 5 of the Law Establishing the ECCC, crimes against humanity are "any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds."[20] On the other hand, grave

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[16] *Mucic et al.*, Case No. IT-96-21, ¶ 412.
[17] *Krstic*, Case No. IT-98-33-A, ¶ 226 ("As the Appeals Chamber explained, the inquiry into whether two offences are impermissibly cumulative is a question of law. The fact that, in practical application, the same conduct will often support a finding that the perpetrator intended to commit both genocide and extermination does not make the two intents identical as a matter of law.").
[18] Prosecutor v. Naletilic and Martinovic, Case No. IT-98-34, Trial Chamber, ¶ 718 (Mar. 31, 2003).
[19] *See* Prosecutor v. Kordic and Cerkez, Case No. IT-95-14, Appeals Chamber, ¶ 1037 (Dec. 17, 2004); *see also* Prosecutor v. Brdjanin, Case No. IT-99-36-T, Trial Chamber, ¶ 1087 (Sept. 1, 2004) (finding that Crimes against Humanity and Grave Breaches "contain[] materially distinct elements in the chapeau requirements").
[20] ECCC Law, art. 5.

breaches of the Geneva Conventions under Article 6 must be committed "in the context of an international armed conflict; and . . . against persons or property defined as 'protected' under the Geneva Conventions."[21] Further, courts have found that the perpetrator must be "aware of the factual circumstances" of each of these elements.[22] None of these jurisdictional elements of the international law crimes represent elements required under the national code.

1. Torture

Because the Law Establishing the ECCC does not define the elements of the crimes underlying crimes against humanity and grave breaches of the Geneva Conventions, it is appropriate to look to international criminal law sources to provide those constitutive elements. The ICTY defines torture as requiring three elements in addition to the jurisdictional elements described above: first, the infliction, by act or omission, of severe pain or suffering, whether physical or mental; second, the act or omission must be intentional; third, the act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.[23]

Comparatively, article 500 of the 1956 Cambodian Penal Law specifies that acts torture are committed (1) with the goal of obtaining information relevant to the commission of a felony or misdemeanor (confession), (2)

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[21] Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeals Chamber, ¶ 170 (July 29, 2004).
[22] Prosecutor v. Kordic and Cerkez, Case No. IT-95-14, Appeals Chamber, ¶ 311 (Dec. 17, 2004).

through the use of increasing levels pain, and (3) in a spirit of retaliation or cruelty.[24]

Although the same factual circumstances may be charged as torture under both international and Cambodian law, what is legally significant is the fact that there are material distinct elements distinguishing the offenses. Analysis of the elements reveals that under Cambodian law, to prove torture it is necessary to present evidence of an affirmative act, an intent to obtain information, and a spirit of retaliation or cruelty. Under international law, on the other hand, evidence of an omission may suffice to prove the *actus reus* of torture. The purpose elements are also distinct, as under international law evidence of, *inter alia*, a purpose of discrimination may be introduced.[25] Thus torture under Cambodian law requires the proof of facts not required under international law. These differences, combined with the jurisdictional elements of international crimes, mean that Duch could be found guilty of torture under Cambodian law and not under international law; or, alternatively, Duch could be found guilty of torture under the international law standards, but not under Cambodian law.

2. Murder

The ICTY has found that murder, as a crime against humanity under Article 5, and intentional killing, as a grave breach of the Geneva

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[23] Prosecutor v. Kunarac, Kovac, & Vokovic, Case No. IT-96-23 & IT-96-23/1, Appeals Chamber, ¶ 132 (June 12, 2002).
[24] *See* Penal Code of Cambodia, art. 500 (1956). These elements are a rough translation of the French version of the Penal Code. The French text reads, "Tout individu qui exerce des actes de torture sur les personnes, soit afin dóbtenir d'elle, sous l'empire de la douleur, la rélévation de renseignements utiles à la perpetration d'un crime ou d'un délit, soit par esprit de représailles ou par barbarie, est puni de la piene criminelle du troisième degree." *Id.*
[25] *See Kunarac, Kovac & Vokovic*, Case No. IT-96-23 & IT-96-23/1, ¶ 132.

Conventions under Article 6, require that "(1) the victim is dead; (2) The death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and (3) The act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention to kill or to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death."[26]

Alternatively, Articles 501, 503 and 506 of the Cambodian Penal Code require (1) the death of the victim, (2) caused by the accused, (3) by deliberate acts completed or attempted with the intent to cause harm (under article 503) or death (under article 506).[27] The Code thereby demands proof of an affirmative act, "faits volontairement," distinguishing it from murder under international law, where an omission may under some circumstances suffice. This possible distinction, together with the international crimes' jurisdictional elements, make it possible to find an accused guilty of murder under international law and not under Cambodian or, conversely, guilty under Cambodian law and not under international law.

3. Conclusion

Thus, the Co-Investigating Judges appear to be in error in failing to indict Duch under the Cambodian Penal Code. Not only is the indictment phase an inappropriate time to decide the issues of cumulative charges, but the charges themselves do not appear to be cumulative. Further, the

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[26] Prosecutor v. Brdjanin, Case No. IT-99-36-T, Trial Chamber, ¶ 381 (Sept. 1, 2004).

offenses seem to serve differing social interests as the Court was specifically mandated with holding the Khmer Rouge accountable for their violation under both international law and Cambodian law. Though considerations of fairness and justice may require that the similarity among the crimes not be overlooked, ultimately, those considerations may be appropriately addressed at sentencing.

III. Failure to Address Joint Criminal Enterprise Liability

As noted above, "[t]he Indictment shall be void for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characterization . . . including the relevant criminal provisions and the nature of the criminal responsibility."[28] An investigation by the Co-Investigating Judges precedes the indictment and is commenced with the Co-Prosecutor's Introductory Submission which includes "a summary of the facts . . . the type of offence(s) alleged . . . the relevant provisions of the law that defines and punishes the crime . . . the name of any person to be investigated . . . [and] the date and signature of both Co-Prosecutors."[29] Though the "Co-Investigating Judges are not bound by the Co-Prosecutor's submissions,"[30] they must include "reasons for the decision" in the Closing Order.[31] Thus, the ECCC is based on the fundamental principles of "fair and adversarial" proceedings as well as a

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[27] Penal Code of Cambodia, arts. 501, 503 & 506 (1956).
[28] ECCC Internal Rules, Rule 67(2) (2008).
[29] *Id.* Rule 53(1).
[30] *Id.* Rule 67(1).
[31] *Id.* Rule 67(4).

"separation [in the ECCC] between those authorities responsible for prosecuting and those responsible for adjudication."[32]

Importantly, moreover, though the procedural system established by the ECCC Internal Rules reflects civil inquisitorial law whereby neutral magistrates conduct the investigation and collect evidence of guilt and innocence, it also shares many common law features.[33] The search for the truth, central in the pre-trial phases of a civil law system, is supplemented by adversarial procedures and motions practice, whereby the parties submit their positions to the various judges, Investigating, Pre-Trial Chamber, Trial Chamber and Appeals Chamber, for decision. Moreover, the Internal Rules make clear that the Order issued by the Co-Investigating Judges must not be issued in a vacuum. The scope of the Co-Investigating Judges' investigation is limited by the Introductory Submission. Prior to the indictment an important dialogue must take place between the Co-Investigating Judges and the Co-Prosecutors. When the Co-Investigating Judges find that the investigation is concluded and all objections to this finding are settled, "the Co-Investigating Judges shall immediately forward the case file to the Co-Prosecutors," who in turn issue a "reasoned final submission," returning the file to the judges.[34] Only then do the Co-Investigating Judges "conclude the investigation by issuing a Closing Order.[35] These processes are necessary to "ensure legal certainty and

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[32] *Id.* Rule 21(1)(a).
[33] This mix of civil and common law elements is common across the various international criminal tribunals. *See generally* Kai Ambos, *International Criminal Procedure: "Inquisitorial," Adversarial,"or Mixed?*, 3 INT'L CRIM. L. REV. 1 (2003).
[34] ECCC Internal Rules, Rule 66(5) (2008).
[35] *Id.* Rule 67(1).

transparency,"[36] giving proper notice of the charges to the defense and establishing a means of achieving uniformity across prosecutions.

In the *Duch* Closing Order, however, the Co-Investigating Judges failed to address all "relevant criminal provisions" as well as "the nature of criminal responsibility" addressed in the Co-Prosecutor's submissions and attributable to Duch as required by Rule 67. Specifically, the Judges did not address whether Duch is liable under a theory of joint criminal enterprise. Though it is within the mandate of the Co-Investigating Judges to reject arguments submitted by the Co-Prosecutors, the Rules clearly require that reasons be given for their decisions. This is a fundamental part of their role in judging the submissions by the parties and of separating the roles of prosecutor and judge. In addition, by overlooking arguments submitted by the Co-Prosecutors, the Co-Investigating Judges disregard and, ultimately nullify, a crucial step in the procedures outlined by the Internal Rules.

As defined in international law, JCE "exist[s] whenever two or more people participate in a common criminal endeavor."[37] Particularly, "all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law contribute to the commission of the violation and are therefore individually responsible" for its commission.[38]

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[36] *Id.* Rule 21(1).
[37] Prosecutor v. Kvocka, Radic, Zigic & Prcac, Case No. IT-98-30/1-A, Appeals Chamber, ¶ 307 (Feb. 28, 2005).
[38] Prosecutor v. Milutinovic, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise (May 21, 2003).

JCE has been accepted by both the ICTY and ICTR.[39] As is the case here, neither of the statutes creating those tribunals explicitly codifies JCE as a basis for liability.[40] Nevertheless, JCE has been found to be a means by which crimes may be "committed" by the accused.[41] The ICTY Appeals Chamber in the *Tadic* case reasoned that "to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act."[42] This is particularly relevant in large scale atrocities such as those that occurred under the DK. Under this view, only by looking at the crimes an individual was able to perpetrate with and through others is that individual's culpability fully assessed. Thus, the ICTY noted, "the moral gravity of such participation [in the joint enterprise] is often no less — or indeed no different — from that of those actually carrying out the acts in question."[43]

JCE must be properly pleaded in the indictment in order to be used as a basis of liability. This is true despite a general reference to the "committed" basis of liability appearing in the indictment. As the Appeals Chamber of the ICTY made clear, "[s]uch reference does not provide

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[39] Prosecutor v. Tadic, Case No. IT-94-A, Appeals Chamber, ¶ 190 (July 15, 1999); *see* Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Trial Chamber, ¶¶ 203-05 (May 21, 1999).

[40] *See* Statute for the International Criminal Tribunal for the Former Yugoslavia, 32 I.L.M. 1192, art. 7 (1993) [hereinafter ICTY Statute]; Statute for the International Criminal Tribunal for Rwanda, 33 I.L.M. 1602, art. 6 (1994) [herinafter ICTR Statute].

[41] *Milutinovic*, Case No. IT-99-37-AR72. Article 29 of the Law Establishing the Extraordinary Chambers reads: "Any Suspect who planned, instigated, ordered, aided and abetted, or *committed* the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime." ECCC Law, art. 29 (emphasis added).

[42] *Tadic*, Case No. IT-94-A, ¶ 192.

sufficient notice to the Defense or to the Trial Chamber that the Prosecution is intending to rely on joint criminal enterprise responsibility."[44] That court stated that the indictment must "plead the category of joint criminal enterprise or the material facts of the joint criminal enterprise, such as the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise."[45] By failing to address the issue, the Co-Investigating Judges have left the applicability of JCE undecided, rendering the Closing Order incomplete and, therefore, arguably defective.

IV. Decision to Limit the Scope of the Indictment with Regard to Crimes against Humanity

One of the distinguishing elements of crimes against humanity is the existence of a widespread and systematic attack.[46] In the Closing Order, unlike in the Co-Prosecutor's Final Submission, the Co-Investigating Judges limited the scope of the attack to the S-21 prison, stating "the crimes committed at S21 themselves constituted a discreet widespread or systematic attack against the civilian population detained therein."[47] Such a characterization, however, may undercut the mandate of the Court to seek out senior leaders and those most responsible. Further, while simplifying

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[43] *Id.* ¶ 191.
[44] Prosecutor v. Kvocka, Case No. IT-98-30/1-A, Appeals Chamber, ¶ 42 (Feb. 28, 2005). It is important to note that the Appeals Chamber in Kvocka went on to dismiss the grounds for appeal on the basis that despite this defect, the defense had timely notice of the prosecution's intent to rely on joint criminal enterprise and did raise a timely objection. However, in the interest of completeness and fairness to the defense, it is necessary and important to ensure that the indictment is complete. *Id.* ¶ 43.
[45] *Id.* ¶ 42.
[46] *See* ECCC Law, art. 5.
[47] Co-Investigating Judges, Closing Order Indicting Kaing Guek Eav alias Duch, ¶ 132 (Aug. 12, 2008) [hereinafter Closing Order].

the nature of the case against Duch, the limitation is unnecessary under international law and may be inappropriate from a policy perspective.

International courts have found that the definition of "attack" within crimes against humanity is broad. In fact, an attack "encompasses any mistreatment of the [targeted] civilian population."[48] The ICTY, in finding that an attack need not consist of an military assault, noted that for an attack, "the evidence need only demonstrate a 'course of conduct' directed against the civilian population that indicates a widespread or systematic reach." Moreover, "[t]he acts of the accused need only be a *part* of the attack."[49]

It is by looking at S-21's prominent position both within the Party's plan and the hierarchy of security offices, at Duch's constant control of the prison which lasted throughout the entire reign of the Khmer Rouge, and at Duch's position and role within the Party, that the scope of the attack perpetrated by the CPK, and Duch as part of that apparatus, is fully acknowledged. His alleged acts as the Deputy Chairman and Chairman of S-21 were, precisely, a "part" of the full attack. Without defining the full scope of the crimes occurring during the period of the DK as comprising the scope of the crimes against humanity there may be disconnect between the pervasiveness of the system perpetrated through Duch and the appropriateness of trying him for violations of international humanitarian law in a special tribunal.

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[48] Prosecutor v. Kunarac, Kovac & Vokovic, Case No. IT-96-23 & IT-96-23/1, Appeals Chamber, ¶ 86 (June 12, 2002); *see also* Prosecutor v. Limaj et al., Case No. IT-03-66-T, Trial Chamber, ¶ 194 (Nov. 30, 2005).

V. Conclusion

The Co-Investigating Judges' Closing Order raises three particular legal concerns. First, it seems that under international law, the Co-Investigating Judges' decision not to charge Duch under Cambodian law was both premature and legally incorrect. Second, in failing to address the joint criminal enterprise basis of liability, explicitly argued by the Co-Prosecutors, the Closing Order may be defective because it does not include a reasoned decision on this point. This is important as JCE must be pled, if at all, in the indictment. Finally, the Closing Order arguably defines the scope of the crimes against humanity charges against Duch too narrowly to fully acknowledge why he is one of those most responsible for crimes committed during the DK regime.

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[49] Prosecutor v. Deronjic, Case No. IT-02-61-A, Appeals Chamber, ¶ 109 (July 20, 2005) (emphasis added).