# OBSERVING THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (ECCC)[1]

# Hearing on the Appeal of the Judgment Against Kaing Guek Eav *alias* "Duch"

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## I. Background to the Judgment and Appeal

On July 26, 2010, the Extraordinary Chambers in the Courts of Cambodia (ECCC) Trial Chamber pronounced its first judgment in the case against Kaing Guek Eav *alias* "Duch."[2] Duch was the Deputy, and then Chairman, of the notorious S-21 security center in Phnom Penh, where more than 12,000 prisoners, many of them Khmer Rouge cadre caught up in political purges by the Communist Party of Kampuchea (CPK) leadership, were tortured and executed from 1975-1979. The Trial Chamber found Duch guilty, via direct and superior responsibility, of crimes against humanity and war crimes (grave breaches of the Geneva Conventions of 1949) and sentenced him to 35 years imprisonment, minus five years for the human rights violation he suffered when detained illegally by the Cambodian Military Court for over eight years prior to his transfer to the ECCC. After subtracting the 11 years Duch had already spent in detention, he was sentenced to serve less than 19 more years in prison.

The Trial Chamber considered both aggravating and mitigating factors in determining what sentence to impose. As aggravating factors, the Court highlighted the shocking and heinous character of the crimes and the way they were carried out, the defenselessness of the victims, Duch's abuse of power, and his superior responsibility for the crimes of his subordinates. As mitigating factors, the Court considered Duch's general cooperation with the Court, admission of responsibility, expressions of remorse, and potential for rehabilitation, as well as the coercive environment of Democratic Kampuchea.

For the first time at a mass crimes court, victims who suffered harm as a direct consequence of the alleged crimes were afforded the opportunity to participate as Civil Parties seeking "collective and moral" reparations. Of the 90 victims who participated as Civil Parties until judgment, 24 had this status revoked when the Trial Chamber found that they had not sufficiently proved that they or their family members were victims of security centers under Duch's control, or that they had "any special bonds of affection or dependency" with direct S-21 victims.

On March 28-30, the Supreme Court Chamber (SCC) of the ECCC heard appeals from all three parties. The Defense argued that because Duch is neither a "senior leader" of the

[1] The Observation Team is headed by Terith Chy with the assistance of Maryan Kim, Socheata Cy, Cheytoath Lim, and Pronh Chan.

[2] Prosecutors v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment (Trial Chamber, 26 July 2010) (hereinafter TC Judgment).

Khmer Rouge nor a person "most responsible" for the crimes of the Democratic Kampuchea era, he does not fall within the personal jurisdiction of the ECCC and must be released. The Co-Prosecutors appealed from the Chamber's legal findings regarding cumulative convictions, asked that the crime of humanity of enslavement be found to include a broader category of victims, and argued that less weight should be placed on mitigating factors in determining sentencing. Three of four Civil Party legal teams appealed the portions of the judgment rejecting Civil Party applicants as well as most of the Civil Party teams' claims for reparations.

The Defense asked for acquittal and immediate release, and for Duch's time spent in detention since 1999 to be considered a form of witness protection. The Prosecution asked for a life sentence for Duch, to be reduced to 45 years after taking into account the human rights violation he suffered by being held in unlawful detention by the Cambodian Military Court before his transfer to the ECCC. The SCC has the power to acquit Duch, or to shorten or lengthen his sentence. Its judgment is expected in late June 2011.

## II. Issues on Appeal

### 1. Defense Arguments

#### a. Background

Throughout trial, Duch's co-lawyers pursued a strategy of accepting most factual allegations, pleading guilty to most charges, expressing remorse, and cooperating with the Prosecution in the hope of receiving a reduced sentence. During the proceedings, Duch said that he would accept any sentence given by the Court and would not appeal the judgment.

This approach was upended during closing arguments when Duch's national counsel, Kar Savuth, radically shifted tactics, challenging the Court's jurisdiction over Duch and arguing that he should be found not guilty. Shortly before the judgment was pronounced, Duch fired international co-counsel Francois Roux, the architect of his trial strategy, and replaced him with a second national lawyer, Kong Ritheary. The new co-counsel team appealed the Trial Chamber verdict on the basis of a lack of personal jurisdiction.[3]

#### b. Personal Jurisdiction

##### i. Arguments

The ECCC has jurisdiction over "senior leaders of Democratic Kampuchea and those who were most responsible" for crimes and serious violations of international and domestic Cambodian law during the temporal jurisdiction of the Court (1975-1979). On appeal, the Defense alleged that Duch does not fall into this category of persons because he was not high up in Democratic Kampuchea's administrative structure, but was merely one of nearly 200 security center chiefs, with no authority to advise the CPK on matters of national security or to decide who would be arrested and executed. Instead, they argued Duch was at the

[3] *See generally* Appeal Brief by the Co-Lawyers for Kaing Guek Eav Alias "Duch" Against the Trial Chamber Judgment of 26 July 2010 (Supreme Court Chamber, 18 Nov. 2010); Reply by the Co-Lawyers for Kaing Guek Eav Alias "Duch" to the Co-Prosecutors' Response of 20 December 2010 (Supreme Court Chamber, 14 Jan. 2011).

middle level of the CPK hierarchy and was an unwilling participant acting under duress.[4] They also argued that if the other security center chiefs are not prosecuted, he should not be either. As a consequence, they asked that he be acquitted. Duch explicitly supported the arguments of his Defense Counsel denying the Court's jurisdiction both at the beginning and end of the appeals hearing.

The Prosecution countered by noting that within the framework of S-21 Duch was the most responsible with over 2300 forces under his control, and that he held a position similar to a regimental commander but with the ability to exercise power throughout the country.[5] Moreover, S-21 was the most important apparatus in the CPK's policy to smash political enemies and the only security center tasked with arresting senior Khmer Rouge cadre and receiving foreign prisoners including Vietnamese and Westerners. They also referred to Trial Chamber findings that Duch in fact did have some power to decide whom to arrest and execute,[6] played an active role in the expanding purges in the later years of the regime, and carried out his tasks with efficiency and zeal.[7]

The Judges asked whether Duch was arguing that the personal jurisdiction standard was disjunctive, meaning that the law refers to two different categories of persons ("senior leaders" and "those most responsible"), or conjunctive and intended to describe only one category of persons (the most responsible senior leaders). The Defense appeared to adopt the view that the standard was conjunctive and that all those who were most responsible were by definition senior leaders. In response, the Prosecutors highlighted drafting history of

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[4] Notably, the Trial Chamber found that "[d]uress cannot...be invoked when the perceived threat results from the implementation of a policy of terror in which [Duch] himself has willingly and actively participated." TC Judgment, ¶ 557. "The Chamber accordingly finds that the Accused did not act under duress as Deputy and later Chairman of S-21. Duress as such is therefore irrelevant both in relation to the Accused's criminal responsibility and in mitigation of sentence." *Id.* ¶ 558.

[5] In contrast to the ECCC, the Special Court for Sierra Leone (SCSL) Statute includes the mandate to prosecute only those with the "greatest responsibility." SCSL Statute, Art. 1(1). However, it is notable that prior to the establishment of the SCSL, the Secretary General argued in favor the less restrictive standard "most responsible" now at issue in the Duch appeal, which he defined as follows:

> While those "most responsible" obviously include the political or military leadership, others in command authority *down the chain of command* may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime.

Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 Oct. 2000, S/2000/915, ¶ 30 (emphasis added).

[6] The Trial Chamber judgment found that, despite Duch's assertions that he had no right to arrest anyone, "he played a more active role in initiating arrests [than he claims] and that his views were sought and acted upon by his superiors." TC Judgment, ¶ 169.

[7] The Trial Chamber found that Duch possessed "significant" authority at S-21 and that his conduct in carrying out these functions evinced a high degree of efficiency and zeal.... [He] not only implemented but actively contributed to the development of CPK policies at S-21[.] *Id.* ¶ 555 (citations omitted). Moreover, "the Accused's acceptance of appointment as deputy and then chairman of S-21 reflected his sense of duty to the CPK. His personal belief in the Party and commitment to its goals apparently subsisted even after he left S-21 on 7 January 1979." *Id.* ¶ 556.

the ECCC Agreement and Law, including statements by both the UN Commission of Experts whose report formed the basis for setting up the tribunal and Deputy Prime Minister Sok An, which describe Article 2 of the Law as including two categories of people.[8]

Regarding the Defense's selective prosecution or "scapegoat" argument, the Prosecution emphasized that while all persons must be treated equally before the law, this does not mean that no one can be prosecuted if all others who commit the same crimes are not prosecuted.[9] Moreover, they emphasized the special nature of S-21 as a central CPK organ that made it distinct and more important than the other detention centers, even if more people died at other prisons.

At times during their jurisdiction arguments, the Defense seemed to be arguing that under domestic Cambodian law only those who order crimes can be held responsible. In particular, they pointed to Article 28 of the Cambodian Criminal Code of 2009, which defines "instigators" as those who encourage a crime by means of an instruction or order. However, this Code was not in effect during the temporal jurisdiction of the ECCC[10]; moreover, it includes provisions on additional forms of liability, including perpetrators, co-perpetrators, and accomplices. The Prosecution pointed out that ECCC Law Article 29 states that the fact that a suspect acted pursuant to superior orders does not relieve his or her criminal responsibility. Likewise, the Criminal Code of 1956 provides that subordinates who act pursuant to orders they know are illegal shall not be relieved of responsibility.

### ii. Admissibility

[8] *See* Co-Prosecutors' Response to the Appeal Brief by the Co-Lawyers for Kaing Guek Eav Alias "Duch" Against the Trial Chamber Judgment of July 26 2010, ¶¶ 27-28 (Supreme Court Chamber, 20 Dec. 2010).

[9] Both the ICTY and ICTR Appeals Chambers have addressed selective prosecution claims. In *Akayesu*, in finding that the Court's failure to prosecute possible perpetrators of crimes against the Hutu population did not demonstrate a discriminatory prosecutorial policy, the ICTR noted,

> In the present context, indeed, in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation in indictments.

Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-A, Judgment, ¶ 94 (Appeals Chamber, 1 June 2001) (citing Prosecutor v. Delalic et al., Case No. IT-96-21-A, Judgment, ¶ 602 (Appeals Chamber, 20 Feb. 2001 [hereinafter *Čelebići* Appeals Judgment])). Nevertheless, prosecutors are required exercise their discretion in conformity with the principle of equality before the law, and must not discriminate on impermissible bases, such as race, color, religion, opinion, national or ethnic origin. *Čelebići* Appeals Judgment, ¶ 605. "A decision, made in the context of a need to concentrate prosecutorial resources, to identify a person for prosecution on the basis that they are believed to have committed *exceptionally* brutal offences can in no way be described as a discriminatory or otherwise impermissible motive." *Id.* ¶ 614.

[10] The Trial Chamber found that "[t]he 1956 Penal Code was the applicable national law governing during the 1975 to 1979 period[.]" TC Judgment, ¶ 29.

The Prosecution argued that the Defense's personal jurisdiction argument is untimely because it was not raised at the initial hearing as required by ECCC Internal Rule 89(1). This view was adopted by the Trial Chamber in its judgment.[11] The Prosecution pointed out that when asked for clarification by the Trial Chamber during opening statements, the national Co-Lawyer stated, "I am not intending to challenge [the Court's jurisdiction] because I am quite aware already and I could have raised it in the initial hearing already if I wished to do so."[12]

The Defense argued that it raised the jurisdictional argument "during the proceedings," though it failed to specify exactly when. It also argued that Rule 89 could not trump Rule 87, which allows the admissibility of all exculpatory evidence at trial. The Prosecution countered that the Trial Chamber did not fail to consider all relevant evidence.

### iii. Justicability

At the appeal hearing, the Supreme Court Chamber requested that the parties focus their arguments on "whether the language 'senior leaders of Democratic Kampuchea and those who were most responsible' in the ECCC Agreement and the ECCC Law constitutes a jurisdictional requirement that is subject to judicial review, or is a guide to the discretion of the Co-Prosecutors and Co-Investigating Judges that is not subject to judicial review." The Prosecution affirmed its position that the decision was a matter of prosecutorial discretion, but did not cite any authorities.

At the Special Court for Sierra Leone (SCSL), an accused argued that the Trial Chamber erred in law and in fact by finding that the words "the Special Court … shall … have the power to prosecute persons who bear the greatest responsibility…" in Article 1(1) of the Court's statute was not a jurisdictional requirement and by convicting him without first establishing that it had jurisdiction over him.[13] After reviewing the statutory independence and functions of the Prosecution, the SCSL Appeals Chamber upheld the Trial Chamber's finding that the "greatest responsibility" requirement was a guideline for the exercise of prosecutorial discretion and not a threshold jurisdictional requirement.[14] In its view,

> [I]t is inconceivable that after a long and expensive trial the Trial Chamber could conclude that although the commission of serious crimes has been established beyond reasonable doubt against the accused, the indictment ought to be struck out on the ground that it has not been proved that the accused was not one of those who bore the greatest responsibility.... [The convicted person's] interpretation of

[11] *Id.* ¶¶ 14-15.

[12] Duch Trial Transcript, 1 April 2009, at 18.

[13] *See* Prosecutor v. Brima et. al, SCSL-2004-16-A, Judgment on Appeal, ¶ 272 (Appeals Chamber, 22 Feb. 2008).

[14] *See id.* ¶ 282. This was also the view of the Secretary General, who said that his proposed alternative standard of "most responsible" "must be seen ... not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases." Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 Oct. 2000, S/2000/915, ¶ 30.

Article 1 of the Statute is a desperate attempt to avoid responsibility for crimes for which he had been found guilty."[15]

### iv. "Principle of Legality"

The ECCC Supreme Court Chamber asked the Defense to explain the references to "*nullum crimen sine lege*," or "no crime without law," in their appeal briefs. Pursuant to this principle of legality, courts may only hold individuals responsible for acts that were criminal at the time of their commission. The Duch team made numerous references to the principle in their filings, but their arguments were not coherent, nor did they clarify them during the appeals hearing. Indeed, it is not obvious that they were making *nullum crimen sine lege* arguments at all. Sometimes they seemed to be arguing more generally that the Trial Chamber had abused or exceeded its authority as provided for in Articles 1 and 2 of the ECCC Law.

For example, the Defense argued that various provisions of Cambodian domestic law prevented Duch's prosecution and had not been properly considered. These include the Law on the Outlawing of the Democratic Kampuchea Group of July 1994, which exempted from prosecution[16] Khmer Rouge cadre who joined the Royal Government of Cambodia within six months of the law's enactment, and the Paris Peace Accords of 1991, which they argued had "already pardoned" all Khmer Rouge and "found them not liable for any crimes."[17] Moreover, they argued that the Co-Investigative Judges had found on a "50/50" basis that Duch fell within the jurisdiction of the Court because they stated that "he *may be considered* in the category of those most responsible...," and that this language showed a violation of the requirement to resolve cases of doubt in favor of the accused. They also argued that, as a domestic court applying civil law, the ECCC may appropriately refer to international instruments only when the ECCC Law does not address an issue, and then only when such instruments are "in parallel with the national system." Moreover, they emphasized that it was inappropriate for the Trial Chamber to "interpret the law" by applying customary law derived from the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) or to adopt any features of common law systems. Because the Trial Chamber referred to international case law instead of first considering Cambodian sources, and in particular the Cambodian Penal Code of 2009, in the view of the Defense they exceeded their authority under the ECCC Law and the Cambodian Constitution.[18]

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[15] Brima et. al, ¶¶ 283-84.

[16] Notably, this law addresses only the crimes of succession, destruction against the Royal Government, destruction against organs of public authority, and incitement or forcing the taking up of arms against public authority. Law Article 4. It does not address crimes against humanity or war crimes. The Prosecution argued that it was not the ECCC's role to decide who had properly surrendered under this law.

[17] The Accords provided for a UN-administered ceasefire and demobilization of combating forces, and laid the groundwork for repatriation of refugees and democratic elections. They did not include an amnesty or pardon. Moreover, the Khmer Rouge ultimately refused to comply with many of their provisions.

[18] As noted earlier, the 2009 Code was not in effect during the temporal jurisdiction of the ECCC. Both the Pre-Trial Chamber and the Trial Chamber have classified the ECCC as a special "internationalized" and not an ordinary national court. *See, e.g.,* Decision on Request for Release, Case 001/1/-07/2007/ECCC/TC, ¶ 10 (Trial Chamber, 15 June 2009). If the SCC finds otherwise, it may place more emphasis on domestic Cambodian legal sources and civil law procedures whose applicability has been rejected or considered subsidiary by the other chambers.

### 2. Prosecution[19]

#### a. Crimes Against Humanity

##### i. Cumulative Charging

In the judgment, the Trial Chamber found Duch guilty of the crimes against humanity of murder, extermination, enslavement, imprisonment, other inhumane acts, and persecution. Moreover, it determined that Duch committed each of these crimes with the intent to discriminate against the victims on political grounds as alleged traitors to the CPK. It therefore subsumed all of the crimes against humanity under the heading of the crime of persecution and entered only one conviction on this basis.

The Prosecution argued on appeal that the Trial Chamber erred in law by not separately convicting him for each crime against humanity established, but instead subsuming them all under the crime against humanity of persecution. They argued that the Trial Chamber acted against well-established jurisprudence of the ICTY as formulated in the *Čelebići* Appeals Judgment.[20] Under this test:

> [M]ultiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

The Prosecution noted that there are materially distinct elements in each of the crimes against humanity found by the Trial Chamber and requested that the Supreme Court Chamber convict each charge separately. In their view, only separate convictions can reflect fully Duch's criminality and provide a proper historical record for national reconciliation.

In answer to a question from the judges as to how their approach would impact sentencing, the Prosecution noted that the Supreme Court Chamber could, like the Trial Chamber, issue a global sentence, or could provide a term of years to run either concurrently or consecutively for each conviction. Moreover, they noted that under international jurisprudence, discriminatory intent is an aggravating factor that should be taken into account by the Chamber at sentencing.

The Defense stated that their client had instructed them not to reply to the Prosecution's crimes against humanity arguments, but nevertheless they offered a brief response. In general, they noted that the Cambodian Penal Code of 2009 includes crimes against humanity and thus argued that the Trial Chamber should not have adopted an interpretation based on common law—i.e. one that follows the jurisprudence of the international tribunals. Notably however, the 2009 Code is not directly applicable to the ECCC as it was enacted after the temporal jurisdiction of the Court (1975-79); moreover, it does not provide any guidance on the question of cumulative charging, nor has anyone ever been convicted for crimes against humanity under Article 188 of the Code.

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[19] *See generally* Co-Prosecutors' Appeal Against the Judgment of the Trial Chamber in the Case of Kaing Guek Eav Alias Duch (Supreme Court Chamber, 13 October 2010).

[20] *Čelebići* Appeals Judgment, ¶ 412.

More generally, the Defense argued that international law did not apply to individuals but only to states during the temporal jurisdiction of the Court and that therefore only the heads of the CPK, as representatives of the government, could be prosecuted for crimes against humanity. This argument is flatly contradicted by well-established post-World War II law.[21] As stated by the ICTY Trial Chamber and repeated by the ECCC Trial Chamber, "[S]ince the [Nuremberg] Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned."[22]

### ii. Rape Characterized as a Crimes Against Humanity of Torture

Although the Trial Chamber found rape to be a separate crime against humanity under the ECCC Law and international law, it convicted the one proved instance of rape at S-21 as the crime against humanity of torture. The Prosecution argued that the crime against humanity of rape should have been a separate and distinct conviction. They argued that this would not violate *nullum crimen sine lege* as this principle does not require that an act is prescribed in exactly the same terms as long as the criminality of the act is foreseeable and the law criminalizing the conduct is accessible to the accused. They then pointed to the long history of rape being prescribed under customary and international humanitarian law, and the criminalization of the crime against humanity of rape as a separate offence in Control Council 10 law, pursuant to which the allied forces carried out war crimes prosecutions after World War II. They noted that the immorality of the act further supports a finding that its criminality was foreseeable. Finally, the Prosecutors highlighted jurisprudence of the ICTY/R, which found the crime against humanity of rape to be an autonomous crime at least as of the 1990s.

The Defense did not present any arguments in response, but instead argued that Duch was not responsible for the one instance of rape because he had no authority to arrest his subordinates and could only report the matter to his superiors. Moreover, they argued that because the 2009 Cambodian Criminal Code Article 188 definition of crimes against humanity requires a "systematic attack,"[23] one instance of rape cannot be characterized as a crime against humanity. However, as pointed out by the Prosecutors, it is well established in international law that only the "attack" need be widespread and systematic, not the individual acts.[24] Cambodian law is silent on this question, but as the new Code was derived from French law, it is likely consistent with international jurisprudence.

Resolution of this issue is of great importance for the Court's second case, as the Pre-Trial Chamber has accepted the Defense argument that rape did not exist as a separate crime against humanity in its own right during the temporal jurisdiction of the Court (1975-1979),

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[21] Crimes against humanity were first prosecuted against individuals at the International Military Tribunals at Nuremberg and for the Far East, and the pursuant to Control Council Law No. 10.
[22] TC Judgment, ¶ 289 (quoting the ICTY's trial judgment in the *Tadic* case).
[23] This Code provision in fact requires (as translated into English) a "generalized or systematic attack," which may be in substance identical in meaning to the requirement in ECCC Law Article 5 that the attack be "widespread or systematic."
[24] *See, e.g.,* Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2, ¶ 94 (Appeals Chamber, 17 Dec. 2004).

and have amended the indictment against the four senior Khmer Rouge leaders to characterize it solely as a crime against humanity of "other inhumane acts."[25]

### iii. Crime Against Humanity of Enslavement

The Prosecution argued that the Trial Chamber erred in law by not convicting Duch for the enslavement of all the detainees at S-21, but only "a small number of detainees assigned to work within the S-21 complex," as well as prisoners at the S-24 work camp. The Prosecution argued that for an enslavement conviction it is unnecessary to show that there was forced labor, but only that the accused exercised "any or all of the powers attaching to the right of ownership over a person," as shown by factors such as control of their movement and physical environment, and stripping them of free will.[26]

The Defense did not argue against the Prosecutions' characterization of the crime, but said that the Chamber should again refer to Article 188 of the 2009 Cambodian Penal Code, which criminalizes the crime against humanity of enslavement. However, the Code does not define enslavement, nor has anyone ever been convicted of this crime under the Code. Without offering any alternative definition of enslavement, the Defense argued that none of the prisoners at the Prey Sar (S-24) work camp were enslaved, as they could roam freely and were treated equally with cadre, who were also under strict control.[27] They also argued that the crime did not exist at S-21, as all detainees entered, were interrogated, and then killed.

### iv. Nexus Between Crimes Against Humanity and Armed Conflict

[25] *See* Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, ¶¶ 68-154 (Pre-Trial Chamber, 15 Feb. 2011).

[26] The Slavery Convention of 1926 defines "slavery" as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." Convention to Suppress the Slave Trade and Slavery, 60 LNTS 253, *entered into force* 9 March 1927, Art. 1(1). Likewise, the International Criminal Court's Rome Statute defines enslavement as "the exercise of any or all of the powers attaching to the right of ownership over a person...." Rome Statute of the International Criminal Court, *adopted* on July 17, 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force,* 1 July 2002, Art. 7(2)(c). Indicia of enslavement include, "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour. Prosecutor v. Kunarac et al., Case No. IT-96-23&IT-96-23/1-A, Judgment, ¶ 119 (Appeals Chamber, 12 June 2002) (adopting the view of the Trial Chamber). The "quality of the relationship between the accused and the victim," must be considered, including its duration. *See id.* ¶ 121. "Detaining or keeping someone in captivity, without more [indicia of enslavement], would, depending on the circumstances of a case, usually not constitute enslavement." Prosecutor v. Kunarac et al., Case No. IT-96-23-T&IT-96-23/1-T, Judgment, ¶ 542 (Trial Chamber, 22 Feb. 2001).

[27] Notably, the Trial Chamber Judgment included Duch's assertion that S-24 detainees were "subjected to forced labour 'like [an] animal so that they cannot oppose or fight against the Party'." TC Judgment, ¶ 227. One witness described the camp as being "a prison without walls," in which she "had no rights or freedom and was not permitted to make any decision by herself." *Id.* ¶ 228. Duch also told the Trial Chamber that "[w]hile S-24 guards supervised and worked alongside those detained [growing rice], they were not themselves detained." *Id.* ¶ 196.

In the *Duch* judgment, the Trial Chamber found that there is no requirement of a nexus between crimes against humanity and armed conflict during the jurisdiction of the ECCC.[28] No party argued this point during the trial proceedings or raised it on appeal; however, the Supreme Court Chamber invited the parties "to explore whether, during the temporal jurisdiction of the ECCC international law required a nexus between the underlying acts of crimes against humanity and armed conflict." The Prosecution did not discuss this issue. The Defense stated that both international law and 2009 Cambodian Penal Code Article 188 include this requirement. They offered no support for their position regarding international law. Code Article 188, which is not directly applicable to the ECCC, has never been applied in domestic Cambodian courts and does not include this requirement on its face. The Defense offered no support for why, even if relevant, the article should be interpreted to include a nexus requirement.

This is an extremely significant issue in the Court's second case as the Pre-Trial Chamber has amended the indictment to require the "existence of a nexus between the underlying acts [of a crime against humanity] and [an] armed conflict."[29] The existence of this requirement would necessitate connecting each crime site with the international armed conflict against Vietnam,[30] which likely cannot be done without stretching the definition of "nexus" beyond all meaning. For that reason, if this requirement remains in place, the accused in the second case could likely not be convicted of many of the crimes against humanity charges in the indictment. However, the Trial Chamber is not bound by the Pre-Trial Chamber's decision and may uphold its finding that no such nexus exists. It is not clear whether the Supreme Court Chamber can rule on this issue at this time as it was not raised by the parties on appeal.

### b. Sentencing

#### i. Mitigating and Aggravating Factors

The Prosecution argued that the Trial Chamber imposed a manifestly inadequate sentence against Duch because it placed inadequate weight on the gravity of his crimes, his individual circumstances, and aggravating circumstances including his high position and abuse of power, the cruelty with which he carried out his responsibilities, the defenselessness of the victims, and his discriminatory intent against his victims based on criminal CPK policy.

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[28] Although the Nuremberg Charter included such a requirement, the nexus was not included in subsequent international documents and it is currently well established that no such nexus requirement exists. *See* TC Judgment, ¶¶ 291-92.

[29] *See* Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, ¶¶ 134-48 (Pre-Trial Chamber, 15 Feb. 2011).

[30] The Pre-Trial Chamber made a cursory statement that "because grave breaches and serious war crimes as defined under the 1949 Geneva Conventions were prohibited as a matter of customary international law with respect of both international and internal armed conflict at the time, the necessary nexus to armed conflict includes both international and internal armed conflicts." *Id.* ¶ 144. Although, as cited by the PTC for this proposition, the ICTY has found that "war crimes are prohibited under customary international law in armed conflicts both of an international and internal nature" (Prosecutor v. Dusco Tadic, Case No. IT-94-1, Decision on the Defense Motion on Jurisdiction, ¶ 82 (Trial Chamber, 10 Aug. 1995)), the ECCC's war crimes jurisdiction, unlike that of the ICTY, only includes grave breaches, which by definition must take place during international armed conflicts. Moreover, it is by no means clear that war crimes during internal armed conflicts were prohibited under customary international law during the jurisdiction of the Court (1975-1979).

The Prosecution also argued that the Trial Chamber placed undue weight on what the judgment called "significant mitigating factors" by "misinterpreting its own findings" in relation to the coercive climate within which Duch worked, his cooperation with the court, his acceptance of responsibility and remorse, his contribution to national reconciliation, and his potential for rehabilitation and reintegration into society. They noted that the Trial Chamber rejected Duch's superior orders and duress arguments, and found that he knew the orders he received were unlawful, willingly and actively participated in the crimes, acted with efficiency and zeal, and continued to be committed to the party after 1979. Moreover, they highlighted Duch's denial of all evidence of his direct involvement in crimes and the occasions when his testimony was incomplete, evasive, or misleading. In particular, they argued that Duch's surprise request for acquittal during closing arguments raise serious doubts about his contrition and remorse.

Finally, the Prosecution argued that the Trial Chamber failed to consider relevant law showing that the case belongs to the "worst category" of crimes and that gravity should be the primary consideration in sentencing. They argued that even if there are limited mitigating factors, due to the serious gravity of the offenses it was error to find that this required a reduction in his sentence.

The Defense argued that Duch's sentence should be reduced because he acknowledged the existence of S-21 when Ta Mok and other Khmer Rouge leaders claimed it was a Vietnamese fabrication, he was threatened by Nuon Chea due to his cooperation, he confessed to his responsibility for crimes at S-21, he acted under orders, he did not act by his own will, he could be reintegrated into society, he had no power to intervene to stop the crimes, he tried to intervene in the rape case, he tried to release detainees, he had no choice to carry out his tasks or be killed himself, he expressed remorse, and he did not personally benefit from his activities.

### ii. Request for Longer Sentence

The Prosecution requested the SCC to enter separate convictions for each of the crimes against humanity found, recognize that the victims of the crime against humanity of enslavement included a majority of S-21 detainees, and increase Duch's sentence to life imprisonment—reduced to 45 years after taking into account the human rights violate he suffered when illegally detained by the Cambodian Military Court. They also asked that no mitigating factors be considered because Duch is asking for acquittal.

### iii. Possible Application of 2009 Cambodian Penal Code

Judge Klonowiecka-Milart raised the question of the applicability of Article 95 of the 2009 Cambodian Penal Code, which provides, "If the penalty incurred for an offence is life imprisonment, the judge granting the benefit of mitigating circumstances may impose a sentence of between fifteen and thirty years." Under Code Article 10 and the principle of *lex mitior*, a criminal law applies as soon as it comes into force if it is more favorable to the accused. Thus, if Cambodian Penal Code is found applicable to the ECCC in this instance and mitigating circumstances are found, the ECCC would seem to be limited to imposing a maximum 30-year sentence on Duch.

The Trial Chamber did not find Article 95 to be applicable, noting that it "was doubtful whether...the Chamber could follow a subsequent national legislative provision in preference to provisions of the Agreement. Such an interpretation could mean that future acts of the national legislature concerning sentence might frustrate the agreement."[31] Judge Lavergne dissented on this one point of the judgment, finding that although the ECCC regime "may be deemed *sui generis*, it is difficult to imagine that it is entirely extraneous to domestic law."[32] Notably, however, he did not argue that its application was automatic, merely persuasive,[33] especially when considered together with Article 77(1) of the International Criminal Court's Rome Statute, which fixes the highest penalty below a life sentence at 30 years.

The Prosecution argued that because the ECCC is *sui generis*, domestic law should not be applied to the Court "because 'the focus of the ECCC differs substantially enough from the normal operation of Cambodian criminal courts to warrant a specialized system'."[34] Moreover, the ECCC Law drafters did not ask the Court to consider national sentencing standards, as is explicitly required by the statutes of courts such as the ICTY, ICTR, and the SCSL. Instead, Internal Rule 98(5) requires the sentence to be "in accordance with the Agreement, the ECCC Law, and the[] IRs." Additionally, they pointed out that Article 668 of the 2009 Cambodian Penal Code states that the Code is not applicable to special criminal legislation, which in their view must be interpreted to include the ECCC Law. Finally, they encouraged the judges not to recognize any mitigating circumstances, making the possible application of Article 95 irrelevant.

The Defense did not add any legal arguments, but affirmed their belief that Article 95 should be applied and said that Duch should receive a 15-year sentence, before reductions for his illegal detainment and time served.

Judge Klonowiecka-Milart said that she found the Prosecution's arguments regarding the application of Article 95 unconvincing as the ECCC is part of the national system and there is no direct conflict between Cambodian Criminal Code 95 and ECCC Law 39, pursuant to which the ECCC is authorized to issue a sentence of between five years and life imprisonment. It was not clear from the proceedings if the other judges agreed with her perspective, but it was the only point in the proceedings when it seemed as if Duch may have a real possibility of receiving a lighter sentence, despite the failure of his counsel to make any coherent or convincing legal arguments on this or any other point.

### 3. Civil Parties

#### a. Rejections of Civil Party Applications

At the start of proceedings, the Trial Chamber issued initial decisions making a *prima facie* assessment that all Civil Party applicants satisfied the criteria for participation.[35] Nevertheless, at judgment, 24 of 90 Civil Parties were not recognized. Reasons for their rejection included a lack of documentary evidence of their status as direct victims of S-21 or S-24, or of their

[31] TC Judgment, ¶ 574.
[32] Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence, 26 July 2010, ¶ 5.
[33] *Id.* ¶ 6.
[34] Co-Prosecutors' Appeal Against the Judgment of the Trial Chamber in the Case of Kaing Guek Eav Alias Duch, ¶ 127 (Supreme Court Chamber, 13 October 2010).
[35] TC Judgment, ¶ 636.

kinship or "special bonds of affection or dependency" with a direct victim. Three of the four Civil Party teams appealed their clients' rejection.

Civil Party Teams argued that the Trial Chamber acted outside of its powers by following a two-step admission process that is not provided for in the Internal Rules. At the beginning of proceedings, the judges reviewed Civil Party status on the basis of Internal Rule 83(1) (Rev. 3), which states in part, "At the initial hearing, the Chamber shall consider any applications submitted by Victims to be joined as Civil Parties, as provided in Rule 23(4)." As authority for their second status review at the end of proceedings, the Trial Judges referred to Rule 100(1) (Rev. 3), which states:

> The Chamber shall make a decision on any Civil Party claims in the judgment. It shall rule on the admissibility and the substance of such claims against the Accused. Where appropriate, the Chamber may adjourn its decision on Civil Party claims to a new hearing.

According to the Civil Parties, the second review is not based in international practice or supported by the ECCC Internal Rules,[36] as Rule 100 as a whole refers only to the Chamber's discretion to award reparations claims, and not to recognition of Civil Party applications. They support this by noting that Rule 23(4) is unambiguous in requiring the Trial Chamber to determine admissibility of applications at the start of proceedings, and say that this is the sole basis upon which the Trial Chamber can consider admissibility. Although they do not argue that the Trial Chamber has no right to revoke Civil Party status at the end of trial, they do argue that this was inappropriate absent compelling circumstances coming to light at trial casting doubt on that status. They note that the rejected Civil Parties have already exercised their rights as such during the trial and had expectations that their status would continue; moreover, their recognition in the judgment cannot harm the accused at this late date but has seriously traumatized those victims whose applications were rejected.[37]

Second, they argue that the Trial Chamber failed to timely inform the parties that it would be reconsidering Civil Party status at the end of proceedings or of the additional criteria not stated in the Rules that they would be required to meet, prejudicing their ability to provide additional supporting evidence.

Third, they argue that even if the Trial Chamber re-assessment was appropriate, the Chamber applied an unreasonably high standard of review and proof for reassessing Civil Party applications. In particular, they said it applied an inappropriately strict definition of kinship and showed a lack of necessary flexibility regarding documentary proof, taking into account the practice of international tribunals and the number of identity documents destroyed during the Democratic Kampuchea era. The Civil Party teams asserted that, based on existing evidence, there is enough proof to satisfy the rejected Civil Party's status as direct victims;

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[36] *See generally* Group-1 Civil Parties' Co-Lawyers' Immediate Appeal of Civil Party Status Determinations from the Final Judgment (Supreme Court Chamber, 24 Aug. 2010).

[37] *See* Appeal Against Rejection of Civil Party Applicants in the Judgment, Co-Lawyers for Civil Parties-Group 2, ¶ 48 (Supreme Court Chamber, 22 Oct 2010) (noting that "the result of the belated rejection is a loss of face in their communities....One Civil Party Applicant expressed suicidal intention (sic) to Transcultural Psychosocial Organization in the case of the final rejection of her application").

moreover, the teams submitted some supplementary documentation to the Supreme Court Chamber for consideration.

Additionally, Civil Party Team 2 pointed out that if Civil Party applicants may be rejected in the judgment, a final decision on their status by the Supreme Court Chamber can only take place after the deadline to appeal denial of reparations awards, effectively depriving reinstated Civil Parties of the right to appeal the reparations order.

Regarding foreseeability, Judge Klonowiecka-Milart pointed out that Article 12(1) of the ECCC Agreement requires that the Court's procedure be consistent with Cambodian Law. Bearing that in mind, she pointed to Cambodian Criminal Procedural Code (CPC) Article 355, which provides for a two-step process for admissibility decisions,[38] consistent with the practice of other civil law countries. She also noted that CPC Article 13 provides for a standard of proof consistent with that applied by the Trial Chamber.

In response, Civil Party Team 1 noted that the Trial Chamber did not refer to these provisions in its judgment, but only to Internal Rule 100(1). Moreover, unlike the ECCC, in domestic cases there is no Initial Hearing at which the Court is required to consider admissibility. Civil Party Team 2 read the 2008 finding of the Pre-Trial Chamber, with which her team had disagreed but on which all parties have subsequently relied, stating:

> The Internal Rules...form a self-contained regime of procedural law related to the unique circumstances of the ECCC, made and agreed upon by the plenary of the ECCC. They do not stand in opposition to the Cambodian Criminal Procedure Code ("CPC") but the focus of the ECCC differs substantially enough from the normal operation of the Cambodian criminal courts to warrant a specialized system. Therefore, the Internal Rules constitute the primary instrument to which reference should be made in determining procedures before the ECCC where there is a difference between the procedures in the Internal Rules and the CPC. *Provisions of the CPC should only be applied where a question arises which is not addressed by the Internal Rules*.[39]

### b. Reparations Requests

Civil Party participants are entitled to pursue "collective and moral reparations against the Accused. Under the Internal Rules, "awards are directed against and borne exclusively [by] the Accused[.]"[40] Duch has previously been declared indigent, and the Court found it was unable to issue orders that are incapable of enforcement.[41] In the judgment, the Trial Chamber rejected all Civil Party requests for reparations except two due to their monetary requirements, the need for measures to be taken by the Royal Government of Cambodia, their having a non-symbolic nature, or their "lack of specificity." The two reparations granted

[38] CPC Rule 355 provides in part, "In the criminal judgment, the court shall also decide upon civil remedies. The court shall determine the admissibility of the Civil Party application and also decide on the claims of the Civil Party against the accused and civil defendants."
[39] Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, ¶¶14-15 (Pre-Trial Chamber, 26 August 2008) (emphasis added).
[40] TC Judgment, ¶ 661. *See also* Rule 23(11) (Rev. 3).
[41] *Id.* ¶¶ 664-65.

were the inclusion of the names of Civil Parties and the immediate victims in the final judgment, and the compilation and publication of all statements of apology made by Duch during the trial.

Civil Party Team 2 asked the Supreme Court Chamber to grant all nine types of reparations that they had been denied by the Trial Chamber, including that Civil Party comments on Duch's apologies be distributed with Duch's complied statements, that Duch be ordered to write the Royal Government of Cambodia (RGC) letters requesting a State apology and that part of the entrance fees for S-21 and Choeung Ek be used to fund reparations awards, the installation of memorials at S-21 and Choeung Ek and the transformation of Prey Sar into a memorial site, paid visits by Civil Parties to those sites, provision of medical treatment and psychological services to Civil Parties, dissemination of audio and video material about the trial, and the naming of 17 public buildings with victims' names and ceremonies.[42] They emphasized that supposed indigence should have no effect on the reparations order, as Duch may be found to have undiscovered assets or may acquire assets in the future. Moreover, non-pecuniary and administrative request to the RGC to remedy human rights violations should not be considered punishment, but a state responsibility.

The Duch team argued that because Duch acted on the orders of the CPK, only the CPK is responsible for the crimes, and that therefore Duch bears no obligation to provide reparations to the Civil Parties. As noted above, the Internal Rules specifically state that the accused has exclusive responsibility to provide reparations.

## III. Final Statement by Kaing Guek Eav ("Duch")

Duch's final statement to the Chamber, Civil Parties, and the public at large continued his lawyers' arguments that he was not a senior leader and does not fall within the jurisdiction of the Court. He said, "The senior leaders were others, not me." "Those who had authority to design and implement the line were others, not me." "If standing committee members are senior leaders and those who had the right to decide who to smash are most responsible, then it's not me." He said that he only survived because he strictly followed orders from 1971-1979 while acting under duress. He argued that he had faithfully cooperated since he was captured in 1999 and had explained that S-21 was real when others blamed the Vietnamese government. His stance to the Cambodian people is that he is legally responsible for what victims suffered at S-21 and the psychological damage to victims, and he seeks forgiveness. He emphasized that former cadre and senior officials will maintain a strong position that they joined the Khmer Rouge to liberate the country, but the party line was criminal and copied from the Gang of Four in China. Each cadre who dared to sacrifice everything for his or her country was under duress to implement this criminal party line. He said that he strongly believes the Supreme Court Chamber is seeking truth for the Cambodian people, victims, former cadre and soldiers for the peaceful living of the Cambodian people. Therefore, the Court should find that he does not fall within its personal jurisdiction.

[42] *See generally* Appeal Against Judgment on Reparations by Co-Lawyers for Civil Parties-Group 2 (Supreme Court Chamber, 2 Nov. 2010). *See also* Appeal of the Co-Lawyers for the Group 3 Civil Parties against the Judgment of 26 July 2010, ¶¶ 97-102 (Supreme Court Chamber, 5 Oct. 2010).

## IV. Possible Ineffective Assistance of Defense Counsel Claim

Defense arguments on appeal, which were scattershot, undeveloped, repetitive, and largely unsupported by any clear legal authority, included several random assertions completely at odds with well established legal principles. For example, on two occasions, Defense counsel stated that because there was no law during the DK period, Duch could not be prosecuted for breaking the law. Defense counsel also appeared to not understand or to willfully misrepresent findings of the Trial Chamber, such as stating that Judge Lavergne had found that the Court had no jurisdiction over Duch, when in fact he dissented only on the length of Duch's sentence. They also claimed that the Prosecution said there was "no law" to charge other prison chiefs, when in fact they said they were not obligated by the law to charge them just because they charged Duch.

The Defense team's lack of expertise in international law and their failure to respond to Prosecution arguments for a longer sentence led the Defense Support Section to hire an outside expert to assist the team and to twice appeal to the Supreme Court Chamber to allow itself or outside experts to submit *amicus curiae* briefs in response. The Defense team, however, rejected the expert assistance and the Supreme Court Chamber determined that it must respect the strategy chosen by the national Co-Lawyers, including their decision not to respond to Prosecution arguments.

During the appeals hearing, some observers questioned whether Duch would have a potential ineffective assistance of counsel claim. There is no provision for such a claim in the ECCC Internal Rules, and it is unclear what test the ECCC would apply, though it would be likely be strict.[43] As a civil law court, the ECCC may apply a higher standard than common law courts because the judges take an active role in raising legal issues, as exemplified by Judge Klonowiecka-Milart's probing during the appeals hearing. Moreover, the eventuality of such a claim became almost impossible after Duch, a well-educated and clearly intelligent individual, explicitly affirmed his support for his counsel's jurisdiction arguments both at the beginning and end of proceedings.

## V. Reaction of Civil Parties

Although the Defense team arguments had severe legal deficiencies, they seemed persuasive to some of the Cambodian public who attended the proceedings. Indeed, it often seemed as if Kar Savuth in particular, who is said to be a skilled and persuasive orator in Khmer, was seeking to win points with the Cambodian public and not the judges, for example by comparing what he said was the ECCC's overstepping of its legal authority to Thailand's behavior in the nationally sensitive Preah Vihear border conflict. Troublingly, the hundreds of people bused to the Monday morning proceedings by the ECCC were sent home at lunch so that a new group could attend in the afternoon. This resulted in each group hearing only

[43] For example, in U.S. jurisprudence, to successfully assert a claim of ineffective assistance, a defendant must demonstrate that counsel was so ineffective that there has been a "mockery of justice."Jimmy E. Tinsley, "Ineffective Assistance of Counsel," 5 Am. Jur. Proof of Facts 2d 267 § 2.

either the Defense's or the Prosecution's arguments on jurisdiction. This practice was less of a concern on following days, as multiple parties spoke during the morning and afternoon sessions. Below are reactions of some of the Civil Parties in Cases 001 and 002 who attended all three days of the appeals hearing.

**Man Sout, male, 76,** Kampong Thom province

I applied to become a Civil Party for Case 001 because my son who was a KR soldier was arrested and imprisoned at Prey Sar (S-24). I was happy for the judgment that sentenced Duch to 18 years after the reduction. However, at the appeal hearing, I was angry at Duch's Defense Counsel who argued to help free him. I got a very bad headache and my blood pressure went high when I heard the Defense lawyers argue in the court. I was very angry because thousands of innocent people died at S-21. If I were the judge, I would sentence Duch according to the prosecutors' request. I never believe what Duch said during the hearing because he always put the blame on the dead leaders and did not take any responsibility.

**Hav Sophea, female, 35**, Kampong Thom province

I became a Civil Party in Case 001 because my father was killed at S-21. When I saw Duch being tried at this hybrid court I felt partly relieved because I knew he would definitely be punished by the law. Regarding Duch's final statement, I think he just wanted to convince the court that he was following orders so he could be released. However, the decision was up to the judge. It is very hard to believe his words if they were truthful. In his first hearing, he said that he would take the accountability for the crimes committed at S-21. However, at the end, he spoke differently to free himself. I didn't have a chance to follow all sessions of oral hearings last year, I just heard from this Supreme Court that he sought to be released because he was not the senior leaders. Although I know little of the technical term used during the discussion, I could understand that the arguments from the Defense side were raised only to seek acquittal for Duch. Based on documents, photos, and evaluation on his character, I think that Duch was happy to implement the orders. The crimes committed at S-21 were too serious that he has to come out to take responsibility. In regard to the other 195 prisons, I think they were out of the scope of investigation, which is why they did not bring the chiefs to the trial. Nevertheless, the crimes at other prisons would not be neglected. I believe they will discuss this issue when the trial for Case 002 starts. I think the Co-Prosecutor was correct to request for a life sentence with a mitigating factor and reduce to at least 45 years. For our [Civil Party] lawyers, I think the judge has not given them proper time to speak. They did not have time to make thorough arguments. However, I am grateful for their effort in trying to represent us and protect our benefit. I am also grateful and delighted that the court accepted my status as a Civil Party in Case 001. I feel that the Court has valued me and my father's life. My father will not die without meaning. At least the world recognizes the sufferings of my family and many other families that lost their loved ones at S-21.

**Um Piseth**, 60, Svay Rieng province

I lost a sister-in-law at Tuol Sleng, according to documents given to me by the Documentation Center of Cambodia (DC-Cam). From my point of view, I think Duch is the most responsible person at Tuol Sleng. When in power, he had complete control and assigned all kinds of tasks at Tuol Sleng. I attended the hearings when the Trial Chamber judges announced the verdict. At that time, we were informed that the verdict was 35-year imprisonment for his crimes. I accepted the verdict because it was a decision made by the judges, although I feel personally that the sentence should have been more serious. I want him to serve 35 years in prison with no reduction. I was not happy with the arguments raised by Duch's Defense, who argued that Duch was not a senior leader and also not most responsible. Duch did not always follow orders. He managed and controlled the works and the number of victims was 14,000. Therefore, I was not happy with the arguments.

**Kae Khon**, 51, Kampong Thom province

My older brother was Kae Kengsy. I do not know how old he was when he disappeared in 1977. I knew that [Kae Kengsy died at Tuol Sleng] from the Documentation Center of Cambodia (DC-Cam) staff. Duch was a chief of Tuol Sleng and the killing took place there. [I learned this] from what Duch said, starting from the initial hearing. I knew that the 35-year imprisonment was reduced to 19 years and I was not satisfied with the judgment. I want life imprisonment like what the Co-Prosecutors have asked for. But this is about applying laws and so the Court can mitigate [the punishment]. From today's hearings, my feeling was better because I think he will receive at least from 30 to 40 years of imprisonment. Now, speaking of vengeance, it has subsided gradually. I heard Duch say a few words. I could not hear him speak clearly because people around me talked a lot. I was a bit angry on the first day after I heard the arguments put forward by the Defense arguing for Duch's release. My expectation is that Duch will be found guilty. As for the issue with other 195 prison chiefs, to me, if those 195 prison chiefs are brought to stand trial, I am worried that what prime Hun Sen said about civil war might be true.

**Him Mom**, 53, Takeo province

I was upset because my Civil Party application was rejected. The death of my brother was real and I was rejected. I found a photo of my brother [at Tuol Sleng]. I was not happy with Defense Counsel for Duch. I was so angry that my blood pressure ran high. I cannot accept it if I am rejected again. There was a photo of my brother. I am not happy.

**Lim Yon**, Kampong Thom province

My Civil Party application was rejected because I did not have evidence. I am not angry at the Court for its rejection because I did have any evidence. My lawyers tried to help me but could not find any evidence to support. I would still like to participate in the process of the tribunal even if my application would still be rejected. I believe that my brother died there.

**Norng Sarath**, 54, Siem Reap province

I would like Duch to be imprisoned for more than 40 years, even if not for life. I did not believe that Duch had revealed the whole truth. Duch received direct orders from Son Sen

and Nuon Chea, both of whom were senior leaders. [His role had] a special character and he cannot be compared to other prison chiefs. He could arrest any persons within the party, zones, provinces and districts. The final decision rests with the Court. But if I were the Court, Duch would receive at least 40 years. Today, if you kill one person, you could be imprisoned for life and here we are talking about tens of thousands of lives. This Court was established to seek justice for millions of lives lost, millions of tear drops shed and, if Duch is released, the whole thing is just meaningless. My Civil Party application was rejected and I am not sure if I will be recognized this time. I would feel very hurt if I am not recognized. Documents at Tuol Sleng were not complete as some were lost. It was reported that some documents were found wrapping fried banana. Some photos were left behind, but these were without names. It is difficult to remember persons after 40 years. I was rejected at the end of the process, in the judgment. Had I been informed since the beginning, I would not be so upset. There will be no justice at all if I am rejected again this time.

**Ly Hor**, 57, Banteay Meanchey province

Duch was chairman of S-21 and at the time he severely tortured prisoners. I knew everything going on at the place because I was also in that prison. Duch never personally mistreated me but he assigned others to mistreat prisoners at Tuol Sleng. I was starved and beaten and slept, ate and relieved waste at the same place. I did not agree with the judgment offering Duch mitigating circumstances because he tortured me and other people from all over the country. My Civil Party application was rejected because of confusion. I changed my family name after the Khmer Rouge regime. I hope that Duch would recognize me at the end. Even if the Court does not recognize me, that's fine too because I have participated throughout and personally witnessed [the process]. And I would still support the Court. I personally want Duch to be imprisoned for life. I was not happy with arguments raised by Duch's lawyers, but I also understood that they acted in accordance with the law.

**Im Vannak, female, 45**, Takeo province

I knew Duch from participating in DC-Cam's program with my sister. We have applied to become Civil Parties in Case 002. Regarding the appeal hearing, I was wondering if Duch's Defense Counsel have also lived through the KR regime. Why are they trying to defend and seek Duch's release? When I first saw Duch, I was very angry. However, I have left it to the law to punish him. I also feel relieved because I believe in karma. At least he should be sentenced to 19 years like in the last judgment. If Duch walks free, there will be no justice for me and it will set a bad example for the younger generation. Regarding Duch's Defense Counsel who seek his release, it's unacceptable for me. But I was satisfied with Prosecution's statement in which they try to protect the benefit of victims and Cambodian people in general. In relation to the reparations, we victims never want any individual compensation. We want symbolic reparations to remember the victims who lost their lives. We can build a memorial to preserve victims' remains and to commemorate them. We can also carve victims' names on a stone to remember to them. I am hopeful that the Court will seek justice for us and that Duch will be sentenced to prison.

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