

**DC-Cam Observation Team Project**  
**Report on Judgment in Case 001 Against Kaing Guek Eav ("Duch") - July 26, 2010**  
by Sarah Thomas, Legal Consultant

**1. EXECUTIVE SUMMARY**

On July 26, 2010, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia ("ECCC" or "the Court") pronounced its judgment in the first trial for crimes committed during Democratic Kampuchea. The Accused, Kaing Guek Eav - better known by his alias, "Duch" - had been the Chairman of the notorious S-21 security center in Phnom Penh, where at least 12,000 prisoners were executed. The Trial Chamber found Duch guilty of crimes against humanity and war crimes. Due to disagreement over the applicable statute of limitations, the Chamber did not examine his responsibility for domestic crimes found in the 1956 Penal Code. The Chamber sentenced Duch to 35 years, less a reduction of 5 years and time served. This means that Duch will serve a further 19 years in prison. Alex Hinton, Professor at Rutgers University, described the verdict as "an important milestone [that] shows that this court can function."<sup>1</sup>

**2. PUBLIC INTEREST IN JUDGMENT**

**a. Public Interest Prior to Pronouncement**

Prior to its deliberations, the five-person Trial Chamber had sat for 72 trial days and had heard testimony from 24 witnesses, 22 civil parties and nine experts. From March 30 to November 27, 2009, over 28,000 people watched the proceedings from the public gallery. As Press Officer Reach Sambath stated in a press conference following the pronouncement of the judgment, "no [other] court in the world has ever had such high attendance." On July 25 - the day before the pronouncement - the Ksem Ksan Victims' Association (led by two S-21 survivors, Bou Meng and Chum Mey) held a Buddhist ceremony at the Tuol Sleng Genocide Museum. Although overrun by the media, the ceremony was touching and was attended by many victims and civil parties.

By judgment day, public interest in the outcome was high. In an interview with the author prior to the pronouncement, Norng Chan Phal, a child survivor of S-21 and a witness during the proceedings, described himself as "excited and anxious to hear the verdict." Generally speaking, survivors hoped that the Trial Chamber would hand down a lengthy sentence. Norng Chan Phal said that he hoped that the Court would sentence Duch to "forty to fifty years with hard labor."

**b. Attendance**

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<sup>1</sup> Patrick Barta, Decades After Cambodia Genocide, A Verdict, July 23, 2010, Wall Street Journal Online Asia, <http://online.wsj.com/article/SB10001424052748704249004575384863202122650.html>.

While the Court has its critics, there is no denying that this was an historic day for victims of the regime, both in Cambodia and elsewhere. On July 26, the 500-seat public gallery was packed. In a press conference after the hearing, Reach Sambath stated that over 1000 people had been present at the Court to hear the judgment, seated in the public gallery and elsewhere. Radio and all public televisions channels aired the reading of the judgment summary live. During the hearing, the President of the Trial Chamber, Nil Nonn, read a summary of the 275-page judgment.

### **3. TRIAL CHAMBER'S FINDINGS**

#### **a. Factual Background**

The Trial Chamber found that Duch had served first as the Deputy Chairman and later as Chairman of S-21. It further found that this security center was specifically tasked with the interrogation and execution of persons perceived by the Communist Party of Kampuchea ("CPK") to be enemies of Democratic Kampuchea. The Judges found that every individual detained at S-21 had been destined for execution upon entry in accordance with the policy of "smashing" all enemies. In addition to mass executions, the Judges found that many detainees died as a result of torture and/or their conditions of detention. Based on prisoner lists, the Chamber concluded that a minimum of 12,272 individuals had been detained and executed at S-21, but acknowledged that the actual number was likely far greater.

#### **b. Duch's Role**

The Trial Chamber found that Duch, as the Chairman of S-21, had acted both together with others and through subordinates. With the assistance of others, the Chamber found, Duch operated both S-21 and S-24, an additional facility used as a "re-education camp," where at least a further 1,300 individuals were detained. The Judges concluded that Duch possessed and exercised significant authority and that he acted with "a high degree of efficiency and zeal." The Judges further found that he "worked tirelessly to ensure that S-21 ran as efficiently as possible and did so out of unquestioning loyalty to his superiors." As such, he "not only implemented but actively contributed to the development of Communist Party of Kampuchea policies at S-21."

#### **c. Existence of International Armed Conflict**

Acknowledging that the parties did not dispute the existence of an international armed conflict between Cambodia and Vietnam from late December 1977 to January 6, 1979, the Judges addressed in their judgment the existence of an international armed conflict from April 1975 to December 1977. The judgment indicates that the Judges considered an international armed conflict to exist between Cambodia and Vietnam throughout the Court's temporal jurisdiction from April 1975 to January 1979. In reaching this conclusion, the Judges recognized the existence of disputes in as early as April 1975 over a number of islands, the expulsion following the fall of Phnom Penh of 150,000 residents of Vietnamese origin, Vietnamese army raids from August to December 1975 into Ratanakiri and Mondulakiri provinces and numerous border clashes

throughout 1976. The Judges referred to Democratic Kampuchea raids from January 1977 into Vietnam, including a “large-scale attack” on the Vietnamese town Tinh Bien and a number of other villages, resulting in many civilian casualties. The Judges noted several retaliatory attacks by the Vietnamese army in late 1977.

#### **4. CHARGES**

The Co-Investigating Judges had charged Duch with crimes against humanity, grave breaches of the Geneva Conventions of 1949 (war crimes) and the national crimes of premeditated murder and torture. At the outset, the Judges of the Trial Chamber indicated that they had disagreed as to whether responsibility for national crimes had been extinguished prior to the start of the investigation. In a separate decision (discussed below), the Judges indicated that the Chamber was unable to exercise jurisdiction over the domestic crimes given the lack of a majority.

#### **5. OUTCOME**

##### **a. Unanimous Guilty Verdict and Sentence**

The Judges found Duch guilty of: (a) crimes against humanity; and (b) numerous grave breaches of the Geneva Conventions of 1949. A majority of the Chamber imposed a single, consolidated sentence of 35 years of imprisonment, but noted that this would be subject to a 5-year reduction for illegal detention by the Cambodian Military Court and time served. As described below, Judge Lavergne entered a separate, dissenting opinion. In pronouncing the sentence, the Judges noted a number of aggravating factors, including the “heinous character” and gravity of the offenses. The Judges noted, however, that there were a number of mitigating factors, including: Duch’s cooperation with the Chamber; his admission of responsibility; his limited expressions of remorse; the coercive environment in Democratic Kampuchea; and the potential for rehabilitation.

As noted above, the Chamber granted a 5-year reduction of the 35-year sentence in light of the violation of his rights caused by his illegal detention by the Cambodian Military Court. In a decision of June 15, 2009, the Chamber had concluded that Duch’s rights had been violated by his illegal detention from May 10, 1999 to July 30, 2007. As the sentence is further reduced by time served, this means that Duch will serve a further 19 years in prison. Unfortunately, the President failed to state clearly the number of years remaining to be served, causing considerable confusion among victims, international observers and the press alike. During the press conference following the pronouncement, National Co-Prosecutor Chea Leang confirmed that Duch would serve a net 18 to 19 years longer in prison. It was announced that Duch will be imprisoned at the ECCC Detention Center pending his relocation to an permanent facility.

##### **b. Decisions on Civil Party Admissibility**

The Judges included in their judgment their decisions on the admissibility of civil party applications. The Chamber recognized 66 civil parties (including four survivors of

S-21) as having established their claims and read out their names. The Judges recognized that these 66 victims had: (a) established their claims of being immediate victims of S-21 or S-24; or (b) established their close kinship or particular bonds of affection or dependency in relation to proven immediate victims of S-21 or S-24. The Judges rejected the applications of 24 civil party applicants for a variety of reasons for failing to provide documentation proving their status as direct victims or their relationship to a direct victim. Those rejected included four alleged survivors of S-21.

### **c. Reparations**

As National Co-Prosecutor Chea Leang noted, civil parties played “a prominent and unprecedented role” in the proceedings against Duch. Despite this, the Judges rejected the vast majority of requests for reparations made by civil parties. The Judges granted only two requests; namely, the inclusion of civil parties’ names in the judgment and the compilation and publication of all statements of apology made by the Accused during the trial. In making these awards, the Trial Chamber noted that the awards are to be borne by Convicted Persons. The Trial Chamber further noted that the Court lacks the competence and power to enforce awards. It further noted that it cannot impose obligations upon non-parties – impliedly, the Cambodian government – to award reparations.

## **6. DISSENTING OPINION OF LAVERGNE**

Judge Lavergne issued a separate and dissenting opinion on the sentence imposed upon Duch. Judge Lavergne disagreed with the other Judges of the Chamber as to the legal framework applicable to sentencing. Pointing out that the ECCC Law, the ECCC Agreement and the Internal Rules are silent as to sentencing, Judge Lavergne opined in his dissent that the Chamber does not have the ability to sentence Duch to a term of more than 30 years, if it does not otherwise hand down a life sentence. In support of this, he cites: (a) the lack of a common international legal principle permitting expansive judicial discretion as to sentencing (citing in support Article 77(1) of the Rome Statute, which does not permit fixed-term sentences of greater than 30 years); and (b) Article 95 of the Cambodian Penal Code, which also does not permit fixed term sentences of greater than 30 years.

Judge Lavergne states that he found the Cambodian law on point most persuasive, as the ECCC is a hybrid court with jurisdiction to prosecute both domestic and international crimes. He states that no provision is made for separate sentencing regimes for the two categories of offenses. He states that principles of statutory interpretation require, where the law is unclear or silent, that “the most favourable solution must be applied to the accused.” Ultimately, he concludes that the Chamber may not impose a fixed-term sentence of more than 30 years’ imprisonment. Article 95 of the new Penal Code (2009) provides: “When an offence is sentenced to a life imprisonment, the judge who grants mitigating circumstances may pronounce the penalty of imprisonment between 15 (fifteen) years and 30 (thirty) years.”

## **7. DISAGREEMENT OVER STATUTE OF LIMITATIONS APPLICABLE TO NATIONAL CRIMES**

In addition to crimes against humanity and grave breaches of the Geneva Conventions, Duch was charged with the following domestic crimes under the 1956 Penal Code: In a separate decision of the same date, the Judges ruled on the January 28, 2009 defense request that the domestic charges against Duch be dismissed.

### **a. Overview**

The defense argued that the charges are time-barred and that the provision extending the statute of limitations for domestic crimes violates the principle of non-retroactivity. In support of this, the defense argued that the ten-year statute of limitations found within Article 109 of the 1956 Penal Code had run by 1989, well before the extension sought by promulgation of the ECCC Law on August 10, 2001. The prosecution and civil parties, on the other hand, argued that the statute of limitations was suspended or interrupted from 1979 to 1993, when the judicial system resumed operations. As such, they argued, the statute of limitations had not run when the legislature sought to extend the statute of limitations on August 10, 2001. They further argued that the principle of non-retroactivity is a principle of criminal law inapplicable to procedural laws.

### **b. Findings and Outcome**

In the Chamber's decision on the statute of limitations applicable to national crimes, the International Judges indicated that they considered the crimes of torture and murder under the 1956 Penal Code to be "extinct due to the operation of the limitation period of Article 109 [of the Penal Code]." In support of this conclusion, the International Judges emphasized the importance of the non-retroactive application of criminal laws. As Cambodia's domestic legal framework would not permit prosecution of these crimes, the International Judges considered that the Court had "insufficient basis" to consider prosecution of these crimes. As such, the Trial Chamber did not evaluate Duch's guilt in respect of national crimes. The Judges emphasized, however, that these domestic crimes constituted lesser-included crimes and that the Chamber's failure to exercise jurisdiction over these crimes did not affect the sentence imposed.

## **8. REACTIONS TO SENTENCE IMPOSED**

### **a. Analysis of Sentence**

John Ciorciari, DC-Cam Senior Legal Advisor, has speculated that the reason for the light sentence may lie in the Trial Chamber's desire to incentivize Duch "to testify against four senior Khmer Rouge leaders in Case No. 2."<sup>2</sup> He notes that "his willing testimony could be valuable," given that "[t]he evidence connecting those [four senior

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<sup>2</sup> Cambodia Tribunal Monitor, Blog, July 28, 2010, Phnom Penh Post, <http://blog.cambodiatribunal.org/2010/07/duch-verdict.html>.

leaders] directly to physical acts of atrocity is less overwhelming.”<sup>3</sup> The sentence may additionally reflect a compromise between the positions of the Judges and an attempt to confer the harshest sentence possible while not, arguably, violating Article 95 of the Cambodian Penal Code (as emphasized by Judge Lavergne).

#### **b. Official Reactions to Sentence Imposed**

Despite having requested imposition of a 40-year sentence *net* of any reduction for violation of rights, the Co-Prosecutors were guarded in their reaction to the Chamber’s imposition of a 35-year sentence, which will result in an approximately 19-year prison term. During a press conference following the pronouncement of the judgment, both National Co-Prosecutor Chea Leang and then Acting International Co-Prosecutor William Smith refused to comment as to the sufficiency of the sentence or as to whether the prosecution would appeal. Smith reminded journalists at the press conference that “this is a court case not a football match.” He further reminded journalists that Duch had requested an acquittal. Smith emphasized that it is extremely important that the sentence must meet international standards of justice.

During the press conference, the lawyers for the civil parties were less guarded and were mostly largely critical of the seemingly light sentence imposed. Civil Party Co-Lawyer Karim Khan described the judgment as “considered.” He praised the Judges for their recognition of the persecution suffered by victims and their clear recognition that Duch had only made limited expressions of remorse. He described the sentence imposed as “proportionate and considered.” Other Civil Party Lawyers, however, criticized the sentence handed down by the Trial Chamber and emphasized their clients’ deep disappointment. Civil Party Co-Lawyer Silke Studzinsky, for example, criticized the Judges for placing “too much weight on the Accused’s remorse[sic] and cooperation.” She pointed out that, by requesting acquittal, Duch has shown that he is not genuinely remorseful.

#### **c. Victims’ Reactions to Sentence Imposed**

The reaction of victims to Duch’s sentence was broadly negative. Most considered the sentence to be insufficient. In an interview with the author, Robert Hamill, a civil party whose brother was imprisoned at S-21, said that it “did not sit well with [him]” that Duch could one day walk free from prison. In an interview with the author, Bou Meng, a civil party survivor of S-21, stated that he felt “unsatisfied” with the judgment and said that he felt that it “humiliated survivors, such as [him]self.” He said that he had hoped that the judgment would bring him “harmony,” but said that this had not happened. When asked about the sufficiency of the sentence, Meng commented that it is “quite short” and said that he was afraid that Duch may “walk out of prison a free man.” He pointed out that the good standard of living that Duch currently enjoys in the detention center is far better than the standard of living of most of his victims.

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<sup>3</sup> Cambodia Tribunal Monitor, Blog, July 28, 2010, Phnom Penh Post, <http://blog.cambodiatribunal.org/2010/07/duch-verdict.html>.

While most victims criticized the short sentence, others – such as Neth Phally, a civil party whose elder brother was killed at S-21 – felt that the Judges had “balanced good and bad.” In an interview with the author, Neth stated that he respects the Judges’ decision because “it has been accepted by national and foreign governments.” Similarly, Um Piseth, a civil party designated as successor to his wife’s, commented to the author that the sentence must be just if it has been widely accepted. He felt, however, that victims would have appreciated a longer sentence. Though he thought that the judgment provided only “partial justice due to the short sentence,” child survivor Norng Chan Phal commented that “the law is the law” and recognized that no sentence could make up for victims’ loss and suffering.

## **9. SHORTCOMINGS OF JUDGMENT**

### **a. Confusion Over Remaining Sentence Compounded Frustration**

The President of the Trial Chamber, Nil Nonn, pronounced Duch’s sentence in an extremely very confusing manner. Without forewarning of any qualifications, Nil announced the sentence to be 35 years. This immediately drew a positive reaction from observers – certainly in the public gallery – who missed or misunderstood that the President later qualified this by stating that: (a) the Convicted Person would receive a five-year reduction in his sentence for his illegal detention in the Military Prison; and (b) the Convicted Person would not serve time served. This, of course, meant that Duch will serve only a further 19 years in prison. In interviews with the author after the pronouncement, several civil parties – including Bou Meng and Um Piseth – said that they had misunderstood the time to be served and had initially understood that Duch would serve another 35 years in prison.

In an interview after the pronouncement, Bou Meng stated that he had initially understood the sentence to be 35 years. He had found a 35-year sentence to be unsatisfactory, as he had “expected that the Judges would sentence Duch to life imprisonment.” When he later learned that Duch would serve only 19 years longer in prison, Bou Meng stated that he felt “very unsatisfied and discouraged by the sentence.” Civil Party Um Piseth said that he had initially been very happy when he heard that the Court had imposed a sentence of 35 years. He commented that he too felt very disappointed when he learned that only 19 years remained to be served, as he considered this “too light.” He only came to understand this several hours after the pronouncement when he met with his lawyers. Child survivor Norng Chan Phal, like many other victims, did not understand that Duch would serve only a further 19 years until he returned home and calculated this with his neighbors.

### **b. Late Rejection of Civil Party Applications**

The Judges only announced their decisions on recognition of civil parties during the judgment. In doing so, the Chamber disappointed many victims by rejecting their civil party applications after months and, in most cases, years of participation in the proceedings. The disappointment of these victims was compounded by the fact that the Chamber failed to recognize their rejection during the pronouncement – instead, the

President merely read out the names of the victims and their relatives recognized as civil parties. Many thought that they had simply missed their names. During the press conference following the pronouncement, Civil Party Co-Lawyer Karim Khan criticized the Trial Chamber's failure to notify 21 civil party applicants of the rejection of their applications prior to the hearing. He pointed out that many civil parties were dismayed at the Judges' failure to recognize their applications.

It was, of course, a proud and vindicating moment for those victims whose applications were accepted and recognized in the judgment. Many victims, such as Bou Meng, expressed to the author that they were very happy to be recognized as civil parties. Civil Party Um Piseth similarly told the author that he felt elated when he heard his wife's name, as though he had "passed an examination." He reflected that, had his application been rejected, he would have been very disheartened and felt as though "his efforts had been for nothing." According to survivor Bou Meng, the Judges' late rejection of several civil party applications undermined the outcome for other civil parties who were left feeling "unsatisfied" due to the poor treatment of their fellow applicants.

In an interview following the judgment, survivor Bou Meng opined that the Judges' rejection of civil party applications in the judgment was "humiliating" and questioned their failure to reject applications earlier in the proceedings. He informed the author that many rejected applicants were distraught at being told that they were insufficiently close to the direct victims. The Chamber's strict requirement of documentation proving suffering and kinship begs the question of how the Chamber will treat civil party applications in Case 002. In Case 002, very few victims of the situations under investigation – possibly only S-21 – will be capable of proving their status as direct or indirect victims due to a lack of documentation. The judgment sets an impossibly high standard for the very vast majority of victims in Case 002.

### **c. Inadequate Reparations Awards**

Civil parties felt broadly dissatisfied with the reparations awards made. Bou Meng complained that – as in domestic criminal cases, in which victims may claim individual financial reparation – "reparations and justice must go hand in hand [at the ECCC]." In an interview with the author, he stated that he considered it unjust that civil parties will not receive a financial award. Other civil parties, however, indicated that they had not expected any meaningful award of reparations prior to the hearing. In an interview with the author, Civil Party Um Piseth described the reparations awarded as "not much," but noted that civil parties had "talked about reparations time and again, so we expected this."

While civil parties may have disagreed about the need for individual financial reparation, the civil parties unanimously found the reparations awards made to be insufficient. Bou Meng described the award of publication of names and statements of remorse as "unjust," because – as he pointed out – many Cambodians cannot read and do not have access to the Internet. Bou Meng thought that the Chamber should have ordered erection of a memorial listing the names of all victims killed at S-21 and



Choeung Ek. He further suggested that UNESCO should preserve the Tuol Sleng Genocide Museum in order that the world may learn about the crimes of Democratic Kampuchea. Civil Party Um Piseth similarly expressed disappointment at the limited awards made, and added that he and other civil parties “were disappointed that the Court did not award a stupa, as proposed by [Civil Party Co-Lawyer] Hong Kim Suon.”

At the press conference, Civil Party Co-Lawyer Karim Khan criticized the Judges’ awards of reparations, which he described as “most minimal, conservative and unimaginative forms of reparations possible.” He criticized the Judges’ refusal to hear testimony from an expert witness on the scope of reparations.

## **10. LOOKING FORWARD**

### **a. Likelihood of Appeal**

The Internal Rules provide that the parties must announce their intention to appeal within 30 days of the judgment. It appears likely that the defense will appeal. The Phnom Penh Post quoted Kar Savuth as stating, “[w]e will appeal the decision.”<sup>4</sup> If the defense appeals, it is likely that the Co-Prosecutors will follow suit. The Post quoted Deputy Co-Prosecutor, Bill Smith, as stating that the OCP is “reviewing all aspects of the decision” and expected to make its decision “in the next couple of weeks.”<sup>5</sup>

### **b. Possibility of Parole & Commutation of Sentence**

Commentators have expressed concern that the King may pardon or commute the sentence. Article 27 of the Constitution provides: “The King shall have the right to grant partial or complete amnesty.” Article 512 of the Cambodian Code of Criminal Procedure provides for the possibility of parole, “provided that [the criminal] has shown good behavior during imprisonment and appears to be able to reintegrate into society.” Article 513 provides parole may be granted to a criminal serving a sentence of longer than one year if he has served two-thirds of his sentence. Given that no provision appears to preclude the possibility of parole, questions were immediately raised. During the press conference, National Co-Prosecutor Chea Leang stated that the domestic parole provisions are inapplicable in proceedings before the Court, because Article 40 provides that the government will not request amnesty or pardon.

The position of the government at the time that Duch becomes eligible for parole will, of course, determine whether he will be granted parole. On August 5<sup>th</sup>, in his first public comment on the verdict, Prime Minister Hun Sen stated that he “respect[s] the verdict handed down by the court.”<sup>6</sup> He added that, “[t]he government has no right to

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<sup>4</sup> James O’Toole, *Duch to Launch Appeal*, July 28, 2010, Phnom Penh Post p. 1.

<sup>5</sup> James O’Toole, *Duch to Launch Appeal*, July 28, 2010, Phnom Penh Post p. 1.

<sup>6</sup> Cheang Sokha, *PM Says Government Respects Duch Verdict*, Aug. 5, 2010, Phnom Penh Post, available at <http://www.phnompenhpost.com/index.php/2010080541023/National-news/pm-says-government-respects-duch-verdict.html>.

interfere or put any pressure on the court.”<sup>7</sup> This may suggest that the government will not grant parole in accordance with the domestic provisions.

## **11. FOLLOW UP**

### **a. Dissemination of Judgment**

In the days following the pronouncement, DC-Cam held public screenings throughout the country enabling those without a radio or television to be a part. On August 6, the Public Affairs Section announced that it had printed 5,000 copies of the entire judgment and 17,000 copies of the judgment summary at a cost of \$25,000. The Section further announced that it planned to distribute these copies free-of-charge to the public in the near future.

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<sup>7</sup> Cheang Sokha, PM Says Government Respects Duch Verdict, Aug. 5, 2010, Phnom Penh Post, available at <http://www.phnompenhpost.com/index.php/2010080541023/National-news/pm-says-government-respects-duch-verdict.html>.