

Analysis of the ECCC Closing Order Indicting Kaing Guek Eav (Duch)

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On August 12, 2008, the Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (ECCC) filed the Closing Order indicting Kaing Guek Eav, alias Duch, for various offenses based on Duch's role as Deputy Chairman and Chairman of the S-21 Security Office, known as Tuol Sleng Prison. However, the legal and factual scope of the Indictment was far narrower than the Co-Prosecutor's Final Submission filed on July 18, 2008. On August 21, 2008, therefore, the Co-Prosecutors announced their intention to appeal the Closing Order.

In accordance with the Internal Rules of the ECCC, upon completing an investigation of an accused party, the Co-Investigating Judges must issue a Closing Order which may choose to indict that party, sending the case to trial before the Trial Chamber. The importance of the Indictment persists throughout the trial. Subsequently, after the completion of the trial, the Trial Chamber's judgment is limited to the facts set out in the Indictment. Moreover, though the Trial Chamber may change the legal characterization of the crimes set out in the Indictment, it may not introduce any new constitutive elements. The Indictment, therefore, is of critical importance in setting the scope of the trial.

For these reasons, the Co-Investigating Judges decision to limit the charges against Duch in the Closing Order as compared with the Co-Prosecutor's Final Submission raises at least three legal concerns. First, it seems that under international law, the Co-Investigating Judges' decision not to charge Duch under Cambodian law was likely both premature and legally incorrect. Second, in failing to address the "joint criminal enterprise" basis of liability, explicitly argued by the Co-Prosecutors, the Closing Order may be defective

because it does not include a reasoned decision on this point. This is important as JCE must be pled, if at all, in the indictment. Finally, the Closing Order arguably defines the scope of the crimes against humanity charges against Duch too narrowly to fully acknowledge why he is one of those most responsible for crimes committed during the DK regime.

I. Failure to Include Cambodian Criminal Law Charges

In the Closing Order the Co-Investigating Judges noted that though acts committed by Duch “constitute the domestic offenses of homicide and torture” pursuant to the 1956 Cambodian Penal Law, “these acts must be accorded the highest available legal classification.” The Judges then found that crimes against humanity and grave breaches of the Geneva Conventions of 1949 were the highest available legal classifications and rejected the Co-Prosecutors’ domestic law charges of torture and murder.

A. Cumulative Charging Is Permissible

It is well settled in international criminal law that charging cumulative offenses is permissible. Cumulative offences refer to crimes that arise from different statutory provisions but that are based on the same conduct. Any decisions regarding cumulative offenses are properly made by a Trial Chamber, which can take into account the crimes actually proven beyond a reasonable doubt at trial. Moreover, international courts have found that it may also be acceptable to convict an accused of cumulative offenses when the laws protect different social interests.

The nature of the ECCC as a hybrid Court supports cumulative charging of violations of Cambodian and international law. Only by allowing such charges, can the Court completely grasp the scope of the crimes committed by Khmer Rouge officials and the pervasive disregard for the rule of Cambodian law during that epoch.

B. Cambodian Law and International Law Charges Are Not Cumulative

Furthermore, murder and torture as defined in the 1956 Penal Law may not merge into the “higher” legal classifications of crimes against humanity and grave breaches of the

Geneva Conventions, as suggested by the Co-Investigating Judges. Under international law, convictions arising under different criminal laws but based on the same criminal conduct are permissible if the criminal provisions or statutes each contain a materially distinct element not contained in the other. In other words, each criminal provision must require the proof of a fact not required by the other.

In making a determination regarding materially distinct elements, the chapeau requirements, also known as jurisdictional elements, of international crimes must be taken into account. Chapeau requirements are those elements that turn an ordinary criminal offense into a violation of international criminal law. For example, crimes against humanity are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds. Alternatively, grave breaches of the Geneva Conventions must be committed in the context of an international armed conflict and against persons or property defined as 'protected' by the Geneva Conventions.

None of the jurisdictional elements of these international law crimes represent elements required under the national code. Moreover, the underlying crimes of torture and murder in the Cambodian Code may have different elements not required under international law.

Although the same factual circumstances may be charged as torture under both international and Cambodian law, what is legally significant is the fact that there are material distinct elements distinguishing the offenses. Analysis of the elements reveals that under Cambodian law, to prove torture it is necessary to present evidence of an affirmative act, a purpose to obtain information, and a spirit of retaliation or cruelty. Under international law, on the other hand, evidence of an omission may suffice to prove the act

necessary for torture. The purpose elements are also distinct, as under international law evidence of a purpose of discrimination may be introduced.

Similarly, under the Cambodian Penal Code, murder requires proof of an affirmative act, “*faits volontairement*,” distinguishing it from murder under international law, where an omission may under some circumstances suffice. This possible distinction, together with the international crimes’ jurisdictional elements, likely mean that an accused could be found guilty of torture or murder under international law and not under Cambodian or, conversely, guilty under Cambodian law and not under international law. The international crimes, simply, may not represent higher legal classifications of the national crimes.

Thus, the Co-Investigating Judges appear to be in error by failing to indict Duch under the Cambodian Penal Code. Not only is the indictment phase an inappropriate time to decide the issues of cumulative charges, but the charges themselves do not appear to be cumulative. Further, the offenses seem to serve differing social interests as the Court was specifically mandated with holding the Khmer Rouge accountable for their violations under both international law and Cambodian law. Though considerations of fairness and justice may require that the similarity among the crimes not be overlooked, ultimately, those considerations may be appropriately addressed at sentencing.

II. Failure to Address Joint Criminal Enterprise Liability

Under the Internal Rules of the ECCC, “[t]he Indictment shall be void for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characterization . . . including the relevant criminal provisions and the nature of the criminal responsibility.” Prior to the indictment, further, an important dialogue between the Co-Prosecutors and the Co-Investigating Judges must take place. Namely, upon completion of their investigation and prior to issuing their Closing Order, the Co-Investigating Judges must receive a “reasoned final submission” from the Co-Prosecutors.

The Closing Order, in turn, must set out the reasons for the Co-Investigative Judges' decisions. These processes reflect the fundamental principles of "fair and adversarial" proceedings as well as a "separation [in the ECCC] between those authorities responsible for prosecuting and those responsible for adjudication." Further, they are necessary to "ensure legal certainty and transparency," giving proper notice of the charges to the defense and establishing a means of achieving uniformity across prosecutions.

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

As defined in international law, JCE exists when two or more people participate in a common criminal endeavor, sharing a common criminal purpose. The International Criminal Tribunal for the Former Yugoslavia (ICTY) reasoned that "to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act."¹ This is particularly relevant in large scale atrocities such as those that occurred under the DK. Under this view, only by looking at the crimes an individual was able to perpetrate with and through others is that individual's culpability fully assessed. Ultimately, as the ICTY found, "the moral gravity of such

participation [in the joint enterprise] is often no less – or indeed no different – from that of those actually carrying out the acts in question.”²

Critically, moreover, international courts have found that JCE must be properly pleaded in the indictment in order to provide proper notice to the defense and Trial Chamber of its intended use by the prosecution at trial. By failing to address the issue, the Co-Investigating Judges have left the applicability of JCE undecided, rendering the Closing Order incomplete and, therefore, arguably defective.

III. Decision to Limit the Scope of the “Attack” Against the Civilian Population

One of the distinguishing elements of crimes against humanity is the existence of a widespread and systematic attack. In the Closing Order, unlike in the Co-Prosecutor’s Final Submission, the Co-Investigating Judges limited the scope of the attack to the S-21 prison, stating “the crimes committed at S21 themselves constituted a discreet widespread or systematic attack against the civilian population detained therein.” Such a characterization, however, may undercut the mandate of the Court to seek out senior leaders and those most responsible. Further, while simplifying the nature of the case against Duch, the limitation is unnecessary under international law and may be inappropriate from a policy perspective.

International courts have found that the definition of “attack” within crimes against humanity is broad. In fact, an attack may be defined as *any* mistreatment of a targeted civilian population. Importantly, therefore, the acts of the accused must only be a *part* of the larger attack.

By looking at S-21’s prominent position both within the Party’s plan and the hierarchy of security offices, at Duch’s constant control of the prison which lasted throughout the entire reign of the Khmer Rouge, and at Duch’s position and role within the Party, the scope of the attack perpetrated by the CPK, and Duch as part of that apparatus, is

¹ *Tadic*, Case No. IT-94-A, ¶ 192.

² *Id.* ¶ 191.

fully acknowledged. His alleged acts as the Deputy Chairman and Chairman of S-21 were, precisely, a “part” of the full attack. If the full scope of the crimes occurring during the period of the DK is not included as part of the “attack,” then it will be less clear to victims how Duch is connected to the overall DK system and why he is appropriate to try only him – and not the heads of other DK prison centers – for violations of international humanitarian law in a special tribunal.