

To: **The Co-Investigating Judges
Extraordinary Chambers in the Courts of Cambodia**

Case File No.: 001/18007-2007-ECCC/OCIJ

Subject: Response of Kaing Guek Eav's Defence Team to the Prosecutor's
Final Submission

Your Honours:

After the Co-Prosecutors' filing of the Final Submission on 18 July 2008, we, KAR Savuth and François ROUX, Lawyers for Kaing Guek Eav, alias Duch, hereby submit our observations.

The Defence wishes to point out that these observations do not any way affect their right to make further observations, as necessary, during the trial.

Accept, Your Honours, the assurances of our highest consideration.

Phnom Penh, 24 July 2008

Signed on behalf of both Lawyers by,

KAR Savuth

ឯកសារទទួល	
DOCUMENT RECEIVED/DOCUMENT REÇU	
ថ្ងៃ ខែ ឆ្នាំ (Date of receipt/Date de reception): 17 / 07 / 2008	
ពេលវេលា (Time/Heure): 13 : 40	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: SANN RADA	

ឯកសារច្បាប់ត្រឹមត្រូវតាមច្បាប់ដើម	
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME	
ថ្ងៃ ខែ ឆ្នាំ នៃការបញ្ជាក់ (Certified Date/Date de certification): 17 / 07 / 2008	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: MCH ARUN	

[001/18-07-2007]

**BEFORE THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

Case File No: 001/18-07-2007- ECCC/OCIJ
Filed to: The Co-Investigating Judges
Date of Document: 24 July 2008
Filing Party: Lawyers for KAING Guek Eav
Original Language: French
Type de Document: **CONFIDENTIAL**

DEFENCE SUBMISSION

Filed by:
Lawyers for KAING Guek Eav
KAR Savuth
François ROUX

Filed to:
Co-Investigating Judges
YOU Bunleng
Marcel LEMONDE

[001/18-07-2007]

24.07.08

DEFENCE SUBMISSION**I. Preliminary Observations**

1. The purpose of an investigation is to hear in an adversarial manner the charged person's explanations concerning the allegations against him as contained in the Introductory Submissions.
2. To the extent that the Charged Person is prepared to give his account of the facts, his account ought to be considered and given credence unless contradicted by evidence adduced in an adversarial manner.
3. The Final Submission fails to mention of two fundamental elements:
 - The fact that there were more than 10 months of investigation proceedings, including 21 days of interviews, during which the Charged Person cooperated fully; two days of on-site investigations at Choeung Ek and Tuol Sleng, which constituted major and unanticipated judicial acts; and two days of confrontations with the witnesses and victims.
 - The fact that Duch decided to acknowledge his responsibility and to cooperate in ascertaining the truth.
4. While the continual presence of the Co-Prosecutors during the investigative proceedings and their numerous questions contributed to the inquisitorial procedure, nowhere in the Final Submission is there mention of the logical conclusions reached during the investigation proceedings.
5. Also, the Co-Prosecutors were expected to enunciate in their Final Submission the entirety of the facts which were established during the investigation proceedings.
6. Instead, the Defence observes that the Co-Prosecutors have included in the Final Submission facts which were not established during the investigation proceedings.
7. *First*, the Defence notes that the Co-Prosecutors consider to be established a large number of facts which are based on documents and "testimonies" recorded during the investigation proceedings, and were not the subject of an adversarial debate during those proceedings
8. This includes news reports and numerous "witness" statements from DC-Cam, which are quoted in the Final Submission footnotes.
9. *Second*, the Defence notes that in several instances, the Co-Prosecutors either interprets or quotes in an incomplete or erroneous fashion statements made by Duch or witnesses during the investigation proceedings. They thus present unestablished facts as being established.

[001/18-07-2007]

10. See, for example paragraph 140 of the Final Submission, where the Co-Prosecutors assert: "*Duch also admits to significant involvement in arrests. For example, he arrested people himself (...)*", and footnote 809, which only refers to the Written Record of Interview dated 22 November 2007 (D29), in particular, ERN 00153571. Nothing in this document proves that Duch arrested people himself.
11. Moreover, unabashed about contradicting themselves, the Co-Prosecutors note in footnote 826 that: "*Duch denies that he ever arrested anyone.*"
12. *Third*, the Defence notes that in some instances, the Co-Prosecutors considered facts as being established on the basis of testimonies recorded during the investigation proceedings, but which facts were neither corroborated nor worthy of credence.
13. For example, the Defence is of the view that the confrontation of 29 February 2008 (D54) highlighted the fact that Witness Prak Khan is not worthy of credence; it sounded like one he was present at every venue where the alleged crimes were committed, and that he heard and saw everything. His testimony was too exhaustive for it not to be viewed with caution, and, as it turns out, it was not corroborated by any other witness, as would have been the case had it been truthful.
14. *Fourth*, the Co-Prosecutors make reference to documents as proof that certain facts have been established whereas some of those documents are entirely extraneous to such facts.
15. See, for example, the document referred to in footnote 858, namely a photograph from S-21, D69-00005, ERN P 00005249, which, the Co-Prosecutors allege, proves that Duch "*often supervised interrogations by sitting in with or taking over from his subordinates*". (see Final Submission, para. 155) This photograph, which was shown to Duch during the on-site investigation at Tuol Sleng (see Record of On-Site Investigation, D48/2, para. 8.1.) is extraneous to interrogations.
16. Also, the Co-Prosecutors sometimes quote an incorrect English translation of documents of which the original language is Khmer.
17. See, for example, footnote 861, in paragraph 156 of the Final Submission; it refers to a document entitled "*Torture Manual*" (ERN00007445-0007513). However, during the investigation proceedings, and in the presence of the Co-Prosecutors, it was noted that this was an incorrect translation, the actual title being "*Statistical List of Security Office S-21, politics, ideology and organization*". (See Written Record of Interview dated 18 February 2008, D46, page 5)
18. In view of all the foregoing observations, the Defence submits that many of the facts contained in the Final Submission were not established during the investigation proceedings.

II. Specific observations:

19. Further, the Defence wishes to indicate to the Co-Investigating Judges, on the one hand, the points it disputes in the Final Submission, and, on the other hand, the points to which it wishes to call their attention.

[001/18-07-2007]

(A) The points the Defence disputes in the Final Submission

20. Contrary to the assertion of the Co-Prosecutors in their Final Submission, the Defence takes the view that the investigation proceedings have not established the following facts:

➤ S-21 was at the top of the hierarchical system of security offices

22. The Prosecution avers in paragraph 44 of the Final Submission that “S-21 operated within the scope and at the top of the hierarchical system of security offices”. However, the report submitted by Consultant Raoul Jennar on 9 May 2008, D82, pages 7 and 8, indicates otherwise (see, *inter alia*, Part 5, entitled “The Security Apparatus: Santebal”; “(...) DC-CAM has identified 196 such security offices throughout the country. These offices fall under four categories; each office was under the authority in charge of the corresponding administrative area, but there was no particular ranking.”

➤ “Active” participation of S-21 in arrests

22. Paragraph 44 of the Final Submission states that “S-21 had the authority to arrest”; see also paragraphs 64 and 65 of the Final Submission, where a special S-21 unit is described as an “arrest unit”.

23. However, in Annex II to the Written Record of Interview dated 18 February 2008 (D46), upon the request of the Co-Investigating Judges, Duch described his role of S-21 at great length, clearly indicating that he was not involved in decision-making or in carrying out arrests.

24. Duch was not seriously challenged by the Co-Prosecutors or any of the witnesses.

25. The Defence therefore submits that the investigations proceedings did not prove that S-21 was empowered or entitled to arrest people.

26. Duch stated that decisions regarding arrests were outside his realm of authority, as were policies on arrests and executions.

27. Duch has consistently denied making decisions on arrests and has maintained that only his superiors took decisions on arresting people for transfer to S-21.

28. See Written Record of Interview dated 7 August 2007, D11, p. 7: “No one dared to arrest a person and send him to S-21 without a decision of the Party”; see also Written Record of Interview dated 5 September 2007, D16, p. 7, “The decision to arrest was made by the upper echelon”; see also Written Record of Interview dated 27 March 2007, D63, p. 7, “[t]hroughout the country, decisions regarding arrests of Party members and mid-level cadre (excluding superior cadre) were taken by the Standing Committee of each Zone. (...) the Standing Committee decided on the transfer to S-21”; see also Written Record of Interview dated 31 March 2007, D66, p. 5, “[n]o arrest could be carried out at S-21 without Son Sen’s order first followed by Nuon Chea’s”.

➤ Duch’s personal involvement in interrogations and torture

[001/18-07-2007]

29. Paragraphs 155 and 157 of the Final Submission are about Duch's personal involvement in the interrogations. Also, paragraph 158 of the Final Submission states that "*Duch also personally ill-treated and tortured prisoners (...)*".
30. The Defence recalls that Duch has never denied his criminal responsibility for the inhumane treatment and torture which occurred at S-21.
31. However, Duch has indicated that he "*intervened in interrogations only on very exceptional occasions*" (see Written Record of Interview dated 6 March 2008, D73, p. 10) and has consistently maintained that he personally interrogated only one person, namely Koy Thuon, and that he did not resort to torture.
32. See Written Record of Interview dated 19 February 2008, D47, page 4; Written Record of Interview dated 7 August 2007, D11, pages 3 and 7; Written Record of Interview dated 2 October 2007, D20, page 5; Written Record of Interview dated 29 November 2007, D30, pages 6 and 7; Written Record of Interview dated 19 February 2008, page 4; Written Record of Interview dated 6 May 2008, D73, page 10.
33. Further, during the confrontation on 29 February 2008 (D54), Duch refuted the serious allegations of torture made by Witness Prak Khan. (Record of Interview, page 4)
34. Duch, nonetheless, declared that day that while he was deputy director, he would sometimes give a few slaps. (Record of Interview, page 6)
35. He reiterated this during the investigation proceedings on 6 May 2008 (D73): "*When I was deputy, I sometimes gave two or three slaps. When I was chairman, I only personally interrogated Koy Thuon, without any physical abuse*". (Record of Interview, page 10)
36. The investigation proceedings have not demonstrated the Co-Prosecutor's allegations against Duch.
- Duch decided on executions
37. The Co-Prosecutors allege in the Final Submission that "*[e]very prisoner who arrived at S21 was destined for execution; the policy was that no prisoners could be released*" (para. 119) and that "*Duch knew that all prisoners at S-21 were destined for execution*". (para. 160)
38. However, they contradict themselves in paragraph 160 of their Final Submission where they quote statements by former S-21 staff members to the effect that: "*Duch decided who should be killed*". (Final Submission, para. 160)
39. The investigation proceedings clearly revealed that according to the Party's political line, anyone who was arrested and taken to S-21 was destined to be killed.
40. This is clearly reflected, notably in the "Decision of the Central Committee Regarding a Number of Matters" dated 30 March 1976. (ERN 00003136-00003142) (see Written Record of Interview dated 5 May 2008, D72, pages 6 and 7)

[001/18-07-2007]

41. See also Written Record of Interview dated 7 August 2007, D11, page 7: "it was systematic in that it was stipulated in the political line of the Party; the line stipulating that for those sent to S-21, it had already been decided to smash them all"; see also Written Record of Interview dated 22 November 2007, D29, page 6.
42. This shows that the decision to execute these people was taken long before they were taken to S-21.
43. See also paragraph 37 of the Final Submission, which reads: "All security offices functioned alike in accordance with general CPK policy. As part of this general policy, torture and physical violence were used to extract confessions" of alleged "crimes". "Confessions" were used to justify the arrest and execution of the victim and to obtain the names of others, who would then be arrested, tortured into making "confessions" and then executed"
44. As a result, the fact that the lists of persons to be executed were to be submitted to Duch does not mean that he had deciding power on who should be killed; it was simply for him to confirm to his subordinates that the "confessions" had been completed in the eyes of his superiors.
45. Duch could not free people.
46. The only thing he could do was to delay their execution for them to work for S-21, as stated in the Final Submission. (para. 160)
 - Duch had full knowledge of what was happening throughout the country
47. He knew a lot less than the Co-Prosecutors suggest in paragraph 132 of their Final Submission: "Duch (...) also had extensive knowledge of the crimes being committed throughout the country, including the forced movement, forced labour, inhumane treatment, torture and execution in every Zone and at every level of administration."
48. However, the investigation proceedings revealed that Duch was not aware of the extent of the S-21 criminal system.
49. Indeed, during the investigation hearing on 5 May 2008, (D72, page 5), he stated: "This was a secret policy. Everyone knew only their own duties and work, and I myself did not know other people's work. From that point of view, one could not draw the conclusion that the regime was criminal, but simply that crimes were committed at S-21".
50. See also "Declaration of the Kampuchea Communist Party to the Danish Communist Labour Party, by Nuon Chea", where it is stated: "Secret work is fundamental in all that we do." (ERN 00204289) (see Written Record of Interview dated 5 May 2008, D72, page 8)
51. Duch has stated: "I maintain that I never had direct contact with those responsible for units, whether Sou Mett or anyone else. This was an inviolate discipline." (See Written Record of Interview dated 2 April 2008, D68, page 7)

[001/18-07-2007]

52. Also, in paragraph 64 of their Final Submission, the Co-Prosecutors note: “(...), *the various guard units were not allowed to talk to each other, so individuals generally did not know how other units operated.*”
53. The fact that such compartmentalization – a basic precept of the regime – existed within S-21 leaves little doubt that it existed elsewhere in the country.

(B) Points to which the Defence wishes to call the attention of the Co-
Investigating Judges

55. The Defence hereby calls the attention of the Co-Investigating Judges to points which the Co-Prosecutors fail to mention in their Final Submission.

➤ Climate of terror

55. See paragraph 102 of the Final Submission: “*There was a climate of fear at S-21. (...) Even S-21 staff members suffered from this climate of fear, and sometimes committed suicide rather than face imprisonment at S-21.*”
56. Duch and his subordinates lived in tremendous fear. They were fearful of “*Angkar*” and of direct superiors of S-21.
57. They feared for their lives and for those of their family members.
58. Their fear was compounded by the fact that they witnessed purges which quickly became rampant within the Party.
59. Duch and his subordinates were particularly fearful of the unpredictable decisions of their superiors concerning arrests. They knew that they too could be arrested at any moment.
60. It is also noteworthy that virtually all S-21 victims were former officials of the regime, who themselves had committed numerous crimes before winding up at S-21, and they included Duch’s former direct supervisors. See on this subject paragraph 81 of the Final Submission: “*(...) slightly more than 78% of the S-21 prisoners came from either a DK government office or a DK military unit.*”
61. See also Written Record of Interview dated 2 April 2008, D68, page 6.
62. See also Written Record of Interview dated 6 May 2008, D73, page 10, where Duch states: “*I became an actor in criminal acts and also a hostage of the regime*” and mentions that he was very terrified after the series of arrests on 31 January 1977. This is when he realized that “*those who served their own people could be arrested as opponents*”. He goes on to say: “*I did not have any chance to prevent this from happening, and I thought about when it would be my turn*”.
63. See also Written Record of Interview dated 5 May 2008, D72, page 5: “*I was particularly affected after seeing the mass arrest of cadres from the North Zone on 31 January 1977, because I felt a lot of sympathy for them. I was terrified, and after the arrest of Ngèt You,*

[001/18-07-2007]

alias Hong, on 13 March 1978 and Von Vet on 2 November 1978, I began to fear for my life."

⇒ Duch could not elude his duties

64. Duch stated several times in the course of the investigation proceedings that he hated his work, that he requested to stop doing it, but was turned down.
65. Regrettably, the Co-Prosecutors do not mention this in their Submission.
66. See Written Record of Interview dated 6 May 2008, D73, page 10, where Duch states, in essence, that he was unable to escape from his job despite his attempts.
67. Also, Duch stated that none of his subordinates were volunteers. See Written Record of Interview dated 2 October 2007, D20, and the annexed message by Duch, page 8, "*they were assigned by the CPK. (...) "There wasn't a single one whatsoever who volunteered."*
68. Duch further states in the message that "*they were most embarrassed*" about their "duty".
69. Duch and his subordinates performed their duties, because they did not have the option of refusing to do so. Refusing to perform their duties would have amounted to criticizing the regime, something that was entirely forbidden.

➤ Duch could not escape

70. Duch considers that it was impossible for him to escape.
71. He was closely watched by his superiors (Son Sen, and later Nuon Chea) and was in regular contact with them; he was also being watched by Pang and Lin.
72. In fact, he was still being watched after 1979.
73. See Written Record of Interview dated 1 April 2008, D67, pages 4 and 5, and Written Record of Interview dated 5 May 2008, D72, pages 9 and 10.
74. Moreover, Duch stated that he was not allowed to travel outside Phnom Penh. His laissez-passer only allowed him to move around within Phnom Penh.
75. Duch also stated that he never saw anyone travel outside Phnom Penh, not even Vorn Vet (see Written Record of Interview dated 1 April 2008, D67, page 5), and that escaping would have spelled death for both him and his family.
76. The Defence observes that, as stated by Duch himself: "*[e]ven more important people than [him], [like] Von Vet, Sao Phim and Ya, could not escape.*" (Written Record of Interview dated 6 May 2008, D73, page 10)
77. Lastly, Duch was also being closely watched by his subordinates.

[001/18-07-2007]

78. See Written Record of Interview dated 30 April 2008, D71, page 5: "(...) everyone, fearing for their lives, surveyed everyone else."

➤ Duch's main task: confessions

79. Duch has declared on several occasions without being challenged by the Co-Prosecutors that he spent the bulk of his time performing the task of reading and annotating confessions.

80. The Co-Prosecutors themselves state in several parts of their Final Submission that "*Duch meticulously read, analysed, annotated and summarised the majority of these confessions for his superiors.*" (see para. 143; see also paras. 68, 111 and 159 of the Final Submission) and that "*Duch had sole authority to read and annotate them and transmit them to the senior leaders, which he did on a daily basis.*" (para. 159 of the Final Submission)

81. Further, the Co-Prosecutors state in paragraph 80 of their Final Submission that more than 12,380 people were imprisoned at S-21; this gives a sense of the number of confessions that Duch received and vetted.

82. Duch indicated during the investigation proceedings that "*the content of the confessions [was] the most important work of S-21*" (Written Record of Interview dated 31 March 2008, D66, page 6) and that his own work consisted "*mainly of making reports on confessions and annotating them.*" (Written Record of Interview dated 6 May 2008, D73, page 5)

83. In fact, Duch stated in his last interview that by his calculation, he read "*200 pages per day*". (Written Record of Interview dated 6 May 2008, D73, page 6)

84. In addition to this demanding daily task, Duch was in regular contact with his superiors, and was required to report to them and to receive instructions from them.

85. The Defence therefore submits that taking into account all these activities, Duch had very little time for the day-to-day management of S-21, which task, the Co-Prosecutors acknowledge in their Final Submission, was delegated to deputy secretaries in all the other security offices around the country (paragraph 60), such as Hor. (para. 61)

86. The investigation proceedings did not reveal that Duch was directly involved in the day-to-day management of S-21, that he conducted regular inspection of the places of detention or, for that matter, that he interrogated prisoners himself. (see *supra*)

➤ Duch has acknowledged his responsibility

87. The Defence recalls that Duch has taken full responsibility for the crimes committed at S-21, and has cooperated throughout the investigation proceedings, interviews, his written comments on numerous documents from by both the Judges and the Co-Prosecutors, at the on-site investigation and the confrontations, having waived his right to remain silent from the outset.

[001/18-07-2007]

88. He also accepted to undergo psychological assessment, which has been significantly contributed to the investigation proceedings, but the Co-Prosecutors omitted mention thereof.
89. Lastly, Duch has expressed sincere remorse and has asked for forgiveness from the victims during the on-site investigation and the last hearing. See Written Record of Interview dated 27 February 2008, Document D48 (Annex 2), and Written Record of Interview dated 6 May 6 May 2008, D73, page 12 *“One last time, I wish to say that I admit my responsibility for what happened at S-21. I am filled with remorse. I will pray for the victims with my pastor and ask for their forgiveness and that of their families, as well as from all my people. This party has destroyed the people. I was a member and I ask for forgiveness from my people.”* It is noteworthy that two of the victims present told the Co-Prosecutors that they had waited 30 years to hear these words.
90. The Co-Prosecutors make no mention of this, and yet the Preamble to the Internal Rules of the Extraordinary Chambers recalls: “The General Assembly [of the United Nations] recognized the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation (...).”

THE FILING PARTY RESERVES THE RIGHT TO MAKE FURTHER SUBMISSIONS

One of the Co-Lawyers on behalf of both	KAR Savuth	Phnom Penh	(Signed)
Date	Name	Place	Signature