

**BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

Case File No.: 001/18-07-2007- ECCC/OCIJ (PTC02)
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**DEFENCE LAWYERS' RESPONSE TO THE CO-PROSECUTORS' APPEAL OF
THE CLOSING ORDER DATED 8 AUGUST 2008**

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Filed with:
The Pre-Trial Chamber
Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

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MAY IT PLEASE THE PRE-TRIAL CHAMBER

1. The Defence submits that the Co-Prosecutors' appeal relies on an erroneous interpretation of the applicable rules of procedure before the Extraordinary Chambers in the Courts of Cambodia (ECCC), according to which the Co-Prosecutors make requests and the Judges decide.¹
2. The Co-Investigating Judges did not commit an error of law in deciding – subject to any review by the Pre-Trial Chamber – not to indict some of the crimes and modes of liability alleged by the Co-Prosecutors.
3. According to the inquisitorial procedure, it is the judges, not the prosecution, who decide the subject matter of the trial.
4. Moreover, the Defence submits that the requests made in the Appeal can very well be made during the trial before the Trial Chamber and that it was therefore not necessary for the Co-Prosecutors to appeal the Co-Investigating Judges' Closing Order.
5. The Defence therefore takes the view that the appeal lodged by the Co-Prosecutors is totally unwarranted, as the Co-Prosecutors's argument that Duch may be acquitted is untenable, considering he has recognized on several occasions his responsibility for the crimes committed at S-21 and expressed genuine remorse vis-à-vis the victims.
6. It is true that the Co-Prosecutors have recurrently failed to take account of similar major elements of the case file.
7. Likewise, in their Final Submission, the Co-Prosecutors fail to give the slightest consideration to the on-site investigation, even though it is a major judicial act, which was accomplished thanks to Duch's willingness to cooperate, much to the benefit of Justice and to that of the victims.

¹ Rule 67(1) of the ECCC Internal Rules provides that the Co-Investigating Judges “*are not bound by the Co-Prosecutors' submissions*”. See also Article 247 of the Code of Criminal Procedure of the Kingdom of Cambodia, pursuant to which: “*The investigating judge is not obligated to conform with the final submission of the Prosecutor*”.

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8. Additionally, the Defence submits that the Co-Prosecutors' appeal could cause considerable delay to the commencement of trial.
9. As a matter of fact, if the Pre-Trial Chamber were to rule that Duch shall be investigated in respect of new offences, this would require him to re-appear either before the Co-Investigating Judges or the Pre-Trial Chamber, in order to make his case concerning the new charge(s).
10. It would therefore imply continuing with the judicial investigation, notably in order for the defence or the civil parties to request further investigative action in respect of the new charges.
11. In concrete terms, this whole process would delay commencement of the trial on the merits for several months.
12. The Defence notes that Duch spent more than nine (9) years in provisional detention, contrary to both national and international standards, and has been under judicial investigation for one year, in which he has cooperated without any reservations, and in which the Co-Prosecutors have participated effectively; his case is now ready to go to trial (on the presumption that the translations are completed).
13. As things stand at this time, the only relevant question – one that the Co-Prosecutors should have answered – is: when will Duch's trial begin, bearing in mind Duch's interests and those of the victims?
14. In light of the foregoing, the Defence does not deem it useful to respond to the arguments put forward by the Co-Prosecutors in their Appeal; they make for an interesting academic discussion, but there is certainly no time for that at this stage of the proceedings.

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15. The Defence therefore requests the Pre-Trial Chamber to dismiss the Co-Prosecutors' Appeal as not being well-grounded in law, and to forward the case file to the Trial Chamber so that Duch's trial can begin without further delay.²

16. However, the Defence reserves the right to address at trial the points of the Closing Order that it disputes.

FOR THESE REASONS

17. In light of the foregoing submissions, the Defence respectfully requests the Pre-Trial Chamber:

- TO DISMISS the Co-Prosecutors' appeal as not being well-grounded in law, without a hearing.

Noting Rule 21(4) of the ECCC Internal Rules,
Article 35 of the Law on the Establishment of the ECCC,
Articles 9(3) and 14(3)(c) of the International Covenant on Civil and Political Rights,

- TO FORWARD File Case No. 001/18-07-2007-ECCC/OCIJ to the Trial Chamber so that Duch's trial can begin without further delay.

**THE FILING PARTY RESERVES THE RIGHT TO MAKE
FURTHER SUBMISSIONS**

16-09-2008	For both Lawyers KAR Savuth	Phnom Penh	(Signed)
Date	Name	Place	Signature

² See Rule 21(4) of the ECCC Internal Rules, Article 35 of the Law on the Establishment of the ECCC, and Articles 9(3) and 14(3)(c) of the International Covenant on Civil and Political Rights.