

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

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Lawyers for the Accused Mr KAING Guek Eav, <i>alias</i> DUCH	The Trial Chamber Judge NIL Nonn, President Judge Silvia CARTWRIGHT Judge YA Sokhan Judge Jean-Marc LAVERGNE Judge THOU Mony	The Co-Prosecutors Ms CHEA Leang Mr William Smith
KAR Savuth François ROUX Marie-Paule CANIZARES		

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du dossier: C.A. Jay

Copied to:

Co-Lawyers for the Civil Parties

KONG Pisey
HONG Kimsuon
YUNG Panith
KIM Mengkhy
MOCH Sovannary
Silke STUDZINSKY
Martine JACQUIN
Philippe CANONNE
TY Srinna
Pierre Olivier SUR
Alain WERNER
Brianne McGONIGLE
Annie DELAHAIE
Elizabeth RABESANDRATANA
Karim KHAN
Fabienne TRUSSES-NAPROUS
Christine MARTINEAU

MAY IT PLEASE THE TRIAL CHAMBER

I. INTRODUCTION

1. The Trial Chamber directed all parties to file final written submissions by 11 November 2009 in preparation for the hearing of closing statements under Rule 94 of the Internal Rules.¹

2. As the Defence has not yet had the opportunity of seeing the final written submissions of the Co-Prosecutors and the Civil Parties, it is filing the present brief today as is and reserves the right to raise any additional arguments orally during the hearing of closing statements.

II. THE FACTS

A. Duch's admission of the facts set out in the Closing Order

3. On 1 April 2009, the Defence filed before the Trial Chamber the document entitled "Defence's Position on the Facts Contained in the Closing Order".²

4. The Accused confirmed during the trial that this document adequately reflects his position concerning the facts set out in the Closing Order.

5. As the Defence did during the trial, it is hereby requesting the Trial Chamber to take account of the said document in its judgment, because it reflects Duch's admission of responsibility for most of the crimes committed at S-21.³

¹ *Direction on Proceedings Relevant to Reparations and on the Filing of Final Written Submissions*, Trial Chamber, 27 August 2009, E159, ERN 00367274-00367276.

² *Defence's Position on the facts contained in the Closing Order*, 1 April 2009, E5/11/6, ERN 00294629-00294630; E5/11/6.1, ERN 00294634-00294678; E5/11/6.2, ERN 00294757-00294762.

³ See Annex A: table summarizing the Defence's position on paragraphs 1 to 3 and 10 to 128 ("Summary of Facts") of the Closing Order, and Annex B: table summarising the Defence's position on paragraphs 162 to 171 ("Character Information") of the Closing Order.

6. The Defence submits that Duch's admission of the facts amounts to a confession, which is among the permissible forms of evidence under the ECCC Internal Rules⁴ and the Cambodian Code of Criminal Procedure.⁵

B. Lack of or insufficient evidence to prove beyond reasonable doubt the facts disputed by Duch

7. It must be emphasised that of all the facts set out in the 132 paragraphs of the Closing Order, which are set out in the above-mentioned document, only 33 are still disputed by Duch.

8. The Defence submits that the Co-Prosecutors have not proved beyond reasonable doubt the charges disputed by Duch in the admission of facts and during the trial.⁶

9. In particular, the Co-Prosecutors have led no evidence allowing it to be established beyond reasonable doubt that:

- Duch himself killed prisoners at S-21;
- Duch himself tortured prisoners at S-21;
- Duch ordered arrests without instructions from his superiors.

10. Accordingly, the Defence requests the Trial Chamber to acquit Duch of all these charges.

11. In particular, with respect to the mode of liability of "commission" for the crime of torture, the Defence submits that in any event, pursuant to the Trial Chamber decision of 5 December 2008,⁷ Duch does not have to answer to this crime before the Trial Chamber since this crime is not before the Chamber.

⁴ Rule 87(5) of the Internal Rules.

⁵ Article 321 of the Cambodian Code of Criminal Procedure.

⁶ See also *Defence response to the Co-Prosecutors' Final Submission*, 24 July 2008, D96/1, ERN 00224322-00224332; and the *Corrigendum* thereof, 11 August 2008, D96/1/1, ERN 00221979-00221979.

⁷ *Decision on Appeal against Closing Order Indicting KAIING Guek Eav alias Duch*, Pre-Trial Chamber, 5 December 2008, D99/3/42, ERN 00270395, para. 100 and ERN 00270416 ("Document D99/3/42").

III. THE LAW

A. The alleged crimes

1. Domestic crimes: murder and torture

a. Preliminary objection

12. By decision dated 5 December 2008, the Pre-Trial Chamber added to the Closing Order the crimes of murder and torture respectively under Articles 501 and 506 and Article 500 of the 1956 Code and Articles 3 (new), 29 (new) and 39 (new) of the ECCC Law.⁸

13. On 28 January 2009, the Defence raised a preliminary objection in writing on the expiry of the statute of limitations for domestic crimes, under Rule 89(1)(b) of the Internal Rules.⁹

14. The Defence indicated in its Preliminary Objection that pursuant to Article 109 of the 1956 Penal Code,¹⁰ the statute of limitations had already lapsed for the domestic crimes committed between 17 April 1975 and 6 January 1979 by the time Articles 3 and 3 (new) of the two versions of the ECCC Law were promulgated.¹¹

15. Accordingly, the Defence concluded that Duch could not be tried by the Trial Chamber in respect of the crimes of murder and torture under the 1956 Penal Code, as

⁸ *Decision on Appeal Appeal against Closing Order Indicting Kaing Guek Eav alias Duch*, Pre-Trial Chamber, 5 December 2008, D99/3/42, ERN 00249846-00249887 (“Document D99/3/42”).

⁹ *Preliminary Objection Concerning Termination of Prosecution of Domestic Crimes*, 28 January 2009, E9/1, ERN 00276700-00276705 (“Document E9/1”).

¹⁰ Article 109 of the Cambodian Penal Code of 1956: “*A perpetrator shall not be punishable in respect of a felony committed more than ten years previously (...)*”.

¹¹ Law on the Establishment of the ECCC, versions of 10 August 2001 and 27 October 2004.

this would be in violation of a mandatory rule of law and of the basic principle of non-retroactivity of criminal laws.

16. On 18 May 2009, the Defence filed supplemental written submissions¹² in order to answer five specific questions from the Chamber concerning the preliminary objection.¹³

17. In view of these elements, the Defence requests the Trial Chamber to refer to its two briefs on the Preliminary Objection,¹⁴ to grant them and to declare that the prosecution of the crimes of murder and torture under Articles 500, 501 and 506 of the 1956 Penal Code is time-barred.

b. Alternative submissions

18. Should the Trial Chamber decide not to grant the Preliminary Objection referred to above, the Defence wishes to emphasise that, in any event, according to the reasons for the Pre-Trial Chamber's decision of 5 December 2008:

*Duch is not indicted for the mode of liability of "commission" for the domestic crime of torture.*¹⁵

19. Indeed, the Pre-Trial Chamber held that:

*Paragraphs 90 to 93 of the Closing Order describe evidence that Duch himself committed torture, which is reflected in the legal characterisation of the facts of paragraph 153. The Pre-Trial Chamber cannot, however, identify from these paragraphs precise facts that would permit a charge of committing the domestic crime of torture and this mode of liability is therefore not included.*¹⁶

¹² *Conclusions écrites de la défense*, 18 May 2009, E9/9, ERN 00314734-00314736 ("Document E9/9").

¹³ *Direction Requesting Written Submissions on Preliminary Objection*, 20 April 2009, E9/4, ERN 00314734-00314736.

¹⁴ See Documents E9/1 and E9/9 *op cit*.

¹⁵ Document D99/3/42, ERN 00249886.

¹⁶ Document D99/3/42, ERN 00249871, para. 100.

20. Similarly, the Chamber held that it found “*no sufficient evidence in the Closing Order that torture was inflicted out of barbarity*”.¹⁷

21. Consequently, on the basis of these elements, the Defence therefore requests the Trial Chamber to rule and declare that it is not seised of the mode of liability of “commission” for the crime of torture nor of the crime of torture inflicted out of barbarity.

2. International crimes

22. Duch was indicted and sent for trial before the Trial Chamber for Crimes against Humanity and Grave Breaches of the Geneva Conventions of 12 August 1949, crimes defined and punishable respectively under Articles 5 and 6 of the ECCC Law, as well as Articles 29 (new) and 39 (new) of the said Law.¹⁸

a. Crimes against Humanity

23. Duch acknowledged before the Trial Chamber that he admitted that crimes against humanity had been committed at S-21 under his supervision.¹⁹

24. Accordingly, the Defence defers to the wisdom of the Trial Chamber in ensuring that the constitutive elements of crimes against humanity with which Duch is charged in the Closing Order are indeed all present in this instance before finding him criminally responsible for the said crimes.

¹⁷ Document D99/3/42, ERN 00249871, para. 101.

¹⁸ Co-Investigating Judges’ Closing Order, 8 August 2008, D99, ERN 00210826.

¹⁹ See, for example, Transcript of Trial Proceedings, 9 June 2009, E1/29.1, ERN 00339476, lines 8 to 18.

b. War crimes

25. The Defence wishes to recall that Duch does not dispute the existence of an armed conflict between Democratic Kampuchea and Vietnam or his criminal responsibility for the war crimes arising therefrom.

26. As to exactly when the international armed conflict between Cambodia and Vietnam started, the Defence wishes to defer to the wisdom of the Trial Chamber. Nonetheless, the Defence notes that there is lingering doubt as to whether such a conflict existed before the end of 1977.

27. The Defence notes in this regard that expert Nayan Chanda, relying on his interviews with Vietnamese officials, indicated in his testimony that in 1977, "*Hanoi [...] did not want a full-fledged war and they wanted to give this message to the Khmer Rouge*",²⁰ and that it was only at the end of 1977 that "*the Vietnamese had concluded that it was not the question of misunderstanding or question of dissolving some territorial dispute*".²¹ In response to questions from Judge Cartwright, the expert further stated that the massive bombardments and incursions by Vietnamese forces did not start until June or July 1978, i.e. after the break off of diplomatic relations had been declared on 31 December 1977.²²

28. In any event, the Defence submits that the Accused was only informed of the existence of an armed conflict between Democratic Kampuchea and Vietnam after the declaration of the break off of diplomatic relations on 31 December 1977. The Defence wishes to emphasise that under international law, knowledge of the factual circumstances

²⁰ Transcript of Trial Proceedings, 25/05/2009, E1/24.1, ERN 00334104, lines 1 to 2.

²¹ Transcript of Trial Proceedings, 26/05/2009, E1/25.1, ERN 00334432, lines 15 to 17.

²² Transcript of Trial Proceedings, 25/05/2009, E1/24.1, ERN 00333411, lines 24 to 25, and ERN 00333412, lines 1 to 2.

establishing the existence of an armed conflict is necessary in order to establish criminal responsibility for war crimes.²³

29. The Defence notes that Duch indicated in his statements to the Co-Investigating Judges²⁴ and before the Trial Chamber²⁵ that prior to 31 December 1977 he was only aware of the existence of territorial disputes between the two countries.

30. The existence of such disputes in Mondulkiri Province and concerning the “*Brevie Line*” was confirmed by expert Nayan Chanda.²⁶ According to him, these disputes were just “*skirmishes*”²⁷ between the two countries, but not an international armed conflict within the meaning of the Geneva Convention of 1949.²⁸

31. The Defence submits further that Duch’s testimony is all the more credible considering that a policy of secrecy was strictly applied by the Communist Party of Democratic Kampuchea in general and, in particular, with regard to relations between Cambodia and Vietnam.²⁹

²³ In order to hold an accused criminally liable for war crimes, it is necessary to establish the following: the existence of an international armed conflict; a *nexus* between the alleged crimes and the armed conflict; and the victims of the alleged crimes must qualify as protected persons pursuant to the provisions the Geneva Conventions. See *Prosecutor v. Brdjanin*, ICTY Trial Chamber, 1 September 2004, para. 121. Also, it is necessary to establish that the accused was aware of the factual circumstances, “*e.g. that a foreign state was involved in the armed conflict (...)*”. Concerning this last criterion, see *Prosecutor v. Kordic and Cerkez*, ICTY Appeals Chamber, 17 December 2004, para. 311, and Commentary on Article 8 of the Rome Statute in Elements of War Crimes of the Rome Statute.

²⁴ Written Record of Interview, 5 May 2008, D72, ERN 00204282-00204300; Written Record of Interview, 6 May 2008, D73, ERN 00209175.

²⁵ Transcript of Trial Proceedings, 25/05/2009, E1/24.1 (FR), ERN 00334263, lines 11 to 15.

²⁶ Transcript of Trial Proceedings, 25/05/2009, E1/24.1 (FR), ERN 00334232, lines 1 to 12.

²⁷ Transcript of Trial Proceedings, 25/05/2009, E1/24.1 (FR), ERN 00334227, lines 7 to 8.

²⁸ Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949.

²⁹ See testimony of Nayan Chanda on this point: Transcript of Trial Proceedings, 25/05/2009 (FR), E1/24.1, ERN 00334227, lines 7-16; see also Transcript of Trial Proceedings, 25/05/2009 E1/24.1 (FR), ERN 00334275, lines 10-12; Transcript of Trial Proceedings, 25/05/2009 E1/24.1 (FR), ERN 00334217, lines 4-16; Transcript of Trial Proceedings, 25/05/2009 E1/24.1 (FR), ERN 00334236 line 6 to ERN 00334237 line 8. See also testimony of David Chandler, Transcript of Trial Proceedings, 06/08/2009, E1/59.1 (FR), ERN 00361691, lines 3 to 11. .

32. Duch's testimony is also corroborated by Witness Suos Thy, who registered prisoners upon their arrival at S-21; he testified that "[t]here were no Vietnamese prisoners of war. Only when the conflict started, we saw them".³⁰

33. This testimony is further corroborated by the fact that the list of "S-21 prisoners described as Vietnamese soldiers", which was placed in the Case File by the Prosecution and referenced as No. E68 (Annex 28),³¹ reveals that only two Vietnamese soldiers were purportedly arrested and detained at S-21 prior to 31 December 1977.

34. Therefore, considering the CPK's policy of secrecy, the fact that Cambodia and Vietnam were reluctant to discuss the existence and the exact nature of the tension between them, as well as the relative absence of Vietnamese soldiers at S-21 prior to 31 December 1977, the Defence submits that the Co-Prosecutors have not proved beyond reasonable doubt that Duch was aware of the existence of an international armed conflict between the two countries prior to 31 December 1977.

B. Modes of liability

1. Undisputed modes of liability

35. The modes of liability recognized under Article 29 (new) of the ECCC Law are: commission, ordering, planning, aiding and abetting and individual responsibility.

36. As stated in paragraph 10, the Defence requests the Trial Chamber to acquit Duch of the charges of commission, planning, instigation and aiding and abetting and to ensure that the requisite legal elements for the application of the modes of liability recognised and mentioned in Article 29 (New) of the ECCC Law (ordering and superior responsibility) have been properly satisfied having regard to the facts of the case, before finding Duch criminally responsible based thereupon.

³⁰ Transcript of Trial Proceedings, 28/07/2009, E1/55.1 (FR), ERN 003568300, lines 11-12.

³¹ Document E68.28 (Annex 28), ERN 00333629-00333635 (EN-KH).

37. As to “commission” as a mode of liability for the crime of torture, see paragraphs 11 and 21.

2. Joint criminal enterprise

38. Noting the Pre-Trial Chamber decision of 5 December 2008³² and the brief filed by the Defence with the Trial Chamber on 17 September 2009 in response to the Co-Prosecutors’ Request for the application of the joint criminal enterprise theory,³³ the Defence requests that the application of the joint criminal enterprise theory be dismissed as a mode of participation against Duch.

IV. SENTENCE

A. Mitigating circumstances

39. The Defence requests that the Accused be given the benefit of the mitigating circumstances that the Defence will detail during the closing arguments.

40. The Defence notes that while Cambodian law provides in general that mitigating circumstances may be taken into account by the judges in determining sentence,³⁴ this issue is not addressed in the Agreement between the Royal Government of Cambodia and the United Nations, the ECCC Law or the ECCC Internal Rules.

41. The Defence notes that the texts governing the international criminal tribunals all recognise an accused’s right to invoke mitigating circumstances in the event of

³² Document D99/3/42.

³³ *Defence Response to the Co-Prosecutors’ Request for the Application of the Joint Criminal Enterprise Theory in the Present Case*, 17 September 2009, E73/2, ERN 00375013-00375025.

³⁴ See Article 116 of the 1956 Penal Code which provides that sentences may be reduced “*if mitigating circumstances are found to exist*”, as well as Article 127 thereof. See also Article 68 of the UNTAC Code of 10 September 1992, according to which “*Judges must weigh attenuating circumstances to reduce even below the minimum punishments prescribed in the present [...]*”.

conviction.³⁵ Also, the International Criminal Tribunals for Rwanda and the former Yugoslavia have produced a very comprehensive body of case-law describing the types of mitigating circumstances that may be considered in determining sentence.

42. Accordingly, since Cambodian penal law does not address the issue of the mitigating circumstances applicable where the accused is prosecuted and tried for crimes against humanity and war crimes, the Defence will refer during the closing arguments to the mitigating circumstances established by the international criminal tribunals in cases similar to the one at hand, pursuant to Article 33 (new) of the Law on the Establishment of the ECCC.³⁶

B. Deducting the time served in detention from the sentence to be imposed

43. The Defence wishes to recall the Trial Chamber decision³⁷ of 15 June 2009 on the Defence request for Duch's release,³⁸ in which decision the Chamber declared in its reasons that "*under international law and the law of the Kingdom of Cambodia, [the Accused] is entitled to a remedy for the time spent in detention under the authority of the Military Court and the violation of his rights*".³⁹

44. The Chamber therefore concluded that the Accused, in the event of acquittal, may seek appropriate remedies before the national courts of Cambodia for these two prejudices.

³⁵ See, *inter alia*, Rule 101(B)(ii) of Rules of Procedure and Evidence of ICTY, ICTR and SCSL; Article 7(4) of the ICTY Statute and Article 6(4) of the ICTR Statute; Rule 145a.1 (b) and (c), and para.2 (a) of the ICC Rules of Procedure and Evidence.

³⁶ If the existing procedures do not deal with a particular matter or if there is uncertainty regarding the existing law or the law of Cambodia, guidance may be sought in procedural rules established at the international level, under Article 33 (new) of the ECCC Law.

³⁷ *Decision on Request for Release*, Trial Chamber, 15 June 2009, E39/5, ERN 00338832-00338846 (Document E39/5).

³⁸ *Supplemental Submissions of the Defence in Support of its Requests Concerning Sentencing*, 10 April 2009, E39/3, ERN 00323787-00323790.

³⁹ Document E39/5, ERN 00338846.

45. The Chamber declared that in the event of conviction before the ECCC, and applying Article 503 of the Cambodian Code of Criminal Procedure, “*the Accused is entitled to credit for the spent in detention under the authority of the ECCC, namely since 31 July 2007*”.⁴⁰

46. The Chamber further declared that “*the Accused is entitled to the remedy of credit for the time spent in detention under the authority of the Military Court, namely from 10 May 1999 to 20 July 2007*”.⁴¹

47. The Trial Chamber also indicated in the last paragraph of the decision⁴² that it reserves the question of the nature and extent of the additional remedy in consequence of the violation of the Accused’s rights to the Chamber’s determination of sentence.

48. Therefore, the Defence requests the Trial Chamber to rule and declare that the violation of Duch’s right to be tried within a reasonable time or otherwise to be released also entitles him to a remedy in the form of a further reduction of his sentence, following the principle set forth in the case of *The Prosecutor v. Barayagwiza* before the International Criminal Tribunal for Rwanda (ICTR),⁴³ which principle was reaffirmed in successive judgments of the *ad hoc* International Criminal Tribunals.⁴⁴

⁴⁰ Document E39/5, ERN 00338846 (reasons for the decision).

⁴¹ Document E39/5, ERN 00338846 (reasons for the decision).

⁴² Document E39/5, ERN 00338846 (reasons for the decision).

⁴³ See *The Prosecutor v. Barayagwiza*, ICTR, Appeals Chamber, Decision (on Prosecutor’s Request for Review and Reconsideration), 31 March 2000, paras. 74 and 75, and the putting into effect thereof by the Trial Chamber in the Judgment dated 3 December 2003 (“Judgment and Sentence”), paras. 1106 and 1107, where, after having considered that appropriate sentence for Mr Barayagwiza was prison for the remainder of his life, it, first, took into account the violation of his rights and reduced the sentence to thirty-five years imprisonment, and, second, gave credit for the time he had spent in provisional detention. In the end, Mr Barayagwiza was sentenced to twenty-seven years, three months and twenty-one days.

⁴⁴ See, for example, *Juvenal Kajelijeli v. The Prosecutor*, ICTR, Appeals Chamber, Judgment, 23 May 2005, paras. 254 and 255, and 320-324.

V. RESPONSE TO THE CIVIL PARTIES' APPLICATIONS FOR REPARATION

49. The Defence has no objection to granting these applications. In particular, the Defence takes due note of the Civil Parties' request for reparation in the form of a "*compilation and dissemination of apologetic statements made by Duch throughout the trial which acknowledge the pain and suffering of victims*".

50. Also, the Defence wishes to point out that Duch was found indigent at the time of his transfer to the ECCC.


FOR THESE REASONS

51. The Defence requests the Trial Chamber to:

- TAKE NOTE that since the Defence has not received the final written submissions of the Co-Prosecutors and the Civil Parties to date, it is filing this motion today as is, and reserves the right to make any additional submissions orally.
- RULE AND DECLARE that Duch's admission of the facts amounts to a confession, which is among the permissible forms of evidence under the Internal Rules and the Cambodian Code of Criminal Procedure.
- RULE AND DECLARE that the facts disputed by Duch have not been proved beyond reasonable doubt and ACQUIT him of the charges that:
 - Duch himself killed prisoners at S-21;
 - Duch himself tortured prisoners at S-21;
 - Duch ordered arrests without instructions from his superiors.

- GRANT the Defence briefs on the Preliminary Objection and DECLARE that the prosecution of the crimes of murder and torture under Articles 500, 501 and 506 of the 1956 Penal Code is time-barred.
- Noting the Trial Chamber decision of 5 December 2008, RULE AND DECLARE that the Trial Chamber is not seised of the mode of liability of “commission” for the crime of torture nor of the crime of torture inflicted out of barbarity.
- FIND that Duch’s admission of responsibility for the crimes against humanity committed at S-21 relates to “ordering” and “superior responsibility” as modes of liability. That he has pled guilty to these crimes.
- RULE AND DECLARE that the Co-Prosecutors have not proved the other modes of liability beyond reasonable doubt.
- ACQUIT Duch with respect to commission, planning, instigation and aiding and abetting as modes of liability.
- GRANT the Defence briefs on joint criminal enterprise and DISMISS the application of the joint criminal enterprise theory to the present case.
- RULE AND DECLARE that the Accused will be granted the benefit of mitigating circumstances.
- DEDUCT from the sentence to be served the time Duch has spent in provisional detention since his arrest by the military authorities of the Kingdom of Cambodia, on 10 May 1999 until the date the judgment is delivered.
- DEDUCT additional time from the sentence imposed as a remedy for the violation of his right to be tried within a reasonable time.

WITHOUT PREJUDICE

	The Co-Lawyers KAR Savuth François ROUX	Phnom Penh	
<i>11-11-2007</i>			
Date	Name	Place	Signature