

# ***Kaing Guek Eav alias Duch, Judgment, ECCC, Case No 001/18-07-2007/ECCC/TC (26 July 2010)***

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My name is Kaing Guek Eav. When I joined the revolution I used the name of Duch. I entered the revolution to liberate my own people, including my parents, my relatives, myself. That's why I was compelled to accept the task. At that time, in that regime, I saw no other alternative to solve the matter except to respect the discipline of the party. Sometimes we have to do a job we do not like. I would like to emphasise that I am responsible for the crimes committed at S-21, especially the torture and execution of the people there. I would like to express my regret and my heartfelt sorrow and loss for all the crimes committed by the CPK [Communist Party of Kampuchea] from 1975 to 1979.<sup>1</sup>

## **Introduction**

Between 1975 and 1979, the Khmer Rouge in Cambodia committed atrocities against the local population on a vast scale. It is estimated that some 2 million people or between one quarter and one third of the population perished. In 1997, Cambodia asked the Secretary-General for assistance in bringing to justice those responsible for the atrocities of the Khmer Rouge. There then followed a drawn out process of negotiations in devising an appropriate judicial setting, as Cambodia rejected the UN's insistence that international judges be in the majority. On 6 June 2003, an agreement was signed between Cambodia and the UN, which accepts that international judges are to be in the minority; however no decision can be reached without the support of at least one international judge.<sup>2</sup> The Extraordinary Chambers in the Courts of Cambodia (ECCC) have subject matter jurisdiction over genocide, crimes against humanity, war crimes and the local crimes of homicide, torture and religious persecution when committed between 17 April 1975 and 6 January 1979.<sup>3</sup> It held its inaugural Pre-Trial Chamber sitting on 13 June 2007.

On 26 July 2010, the ECCC handed down its first trial judgment of 256 pages whereby Duch was convicted of crimes against humanity and war crimes and sentenced to 30 years

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<sup>1</sup> Thierry Cruvellier, 'Reflections on the Duch Trial', Crimes of War Project, accessed online at <<http://www.crimesofwar.org/onnews/news-cambodia4.html>>.

<sup>2</sup> Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, done at Phnom Penh, Cambodia, on 6 June 2003, art 3 (entry into force 29 April 2005) (hereinafter, the ECCC Agreement).

<sup>3</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, adopted on 15 January 2001 amended on 27 October 2004, arts 2-7 (ECCC Law).

in prison. Duch was the former director of Phnom Penh's infamous detention and torture centre, 'Office S-21' (more widely known by the name Tuol Sleng). The Duch trial was unusual in that despite a guilty plea, the Trial Chamber embarked upon a full trial. At other international tribunals, a guilty plea is endorsed in a short hearing. In contrast, the ECCC Trial Chamber heard evidence from a number of witnesses, including experts. Then, in final addresses, Duch withdrew his guilty plea and asked to be acquitted. In the result, the Trial Chamber made detailed findings of fact and law, thereby leaving an important record of the events in question. The judgment marked an important watershed in the hybrid tribunal's long and often troubled history. For the first time, a key Khmer Rouge official was held accountable in a court of law for crimes of the Pol Pot era.

## **I. Jurisdictional Issues**

### **A. Personal Jurisdiction**

Article 1 of the ECCC Law refers to the ECCC prosecuting 'senior leaders' of the Khmer Rouge or 'those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international convention recognised by Cambodia'. The Trial Chamber assumed this was a jurisdictional requirement, stating that the accused was one who was most responsible for the crimes of the Khmer Rouge.<sup>4</sup>

### **B. The Principle of Legality**

The Trial Chamber held that it must determine whether the offences and modes of participation charged were recognised under Cambodian or international law between 17 April 1975 and 6 January 1979.<sup>5</sup> This required the Chamber to consider some controversial issues. For example, 'crimes against humanity' first entered positive law by Article 6(c) of the Nuremberg Charter of 1945. It came with a requirement that the offence be linked with war crimes or crimes against peace. After 1946 there was debate about whether such a nexus was necessary. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v Tadić* stated 'there is no logical or legal basis for this requirement [the war nexus] and it has been abandoned in subsequent state practice'.<sup>6</sup> The remarks of the Appeals Chamber have since been widely relied upon to support the proposition that by 1991 (from when the ICTY's temporal jurisdiction commenced) the war nexus was no longer a part of the definition under customary international law. While

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<sup>4</sup> *Kaing Guek Eav alias Duch*, Judgment, ECCC, Case No 001/18-07-2007/ECCC/TC (26 July 2010) [17]–[25] (Trial Judgment).

<sup>5</sup> *Ibid* [28].

<sup>6</sup> *Prosecutor v Tadić (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No IT-94-1-AR72 (2 October 1995) [140].

William Schabas suggested the war nexus in 1975 might not yet have ‘withered away’,<sup>7</sup> this was promptly criticised by others.<sup>8</sup> The UN-appointed Group of Experts for Cambodia considered the issue, and concluded that ‘on balance’ prosecuting the Khmer for crimes against humanity ‘would not violate a reasonable reading of the *nullum crimen* principle’.<sup>9</sup> The ECCC Trial Chamber agreed, relying on evidence of state practice.<sup>10</sup> It also interpreted the Appeals Chamber in *Tadić* as implying that the war nexus was not required even in 1945.<sup>11</sup> The alternative—and equally plausible—view is that the *Tadić* decision in reality ‘moved the law forward dramatically’<sup>12</sup> so that the ‘rules laid down by judges have generated custom, rather than custom [which has] generated the rules’.<sup>13</sup>

The Trial Chamber found that in 1975, the offence of torture as a crime against humanity under customary international law required the involvement of a state official.<sup>14</sup> The better view in this regard may be that torture as a crime against humanity, has never required the involvement of a state official—torture at the Nuremberg Trial being subsumed within the residual offence of ‘other inhuman acts’. The need for state involvement arises in respect of the stand-alone international offence of torture, which can be an isolated crime, due to the focus on curbing state-sponsored or tolerated abuses of a person’s human rights.

## 2. The Tribunal’s Fact Finding

The accused served as Deputy and then Chairman of S-21, a security centre tasked with interrogating and executing perceived opponents of the Communist Party of Kampuchea (CPK) from 1975 to 1979. The accused acknowledged that he permitted S-21 interrogators to use torture.<sup>15</sup> The accused was also aware that, following the completion of their interrogation, detainees were taken away and executed.<sup>16</sup> The detainee population at S-21 was comprised of cadres and soldiers from the former regime, military personnel of the Revolutionary Army of Kampuchea, numerous communist party high- and low-ranking

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<sup>7</sup> WA Schabas, ‘Should Khmer Rouge Leaders be Prosecuted for Genocide or Crimes Against Humanity?’ (2001) 22 *Searching for the Truth* [Magazine of Documentation Centre of Cambodia (Khmer version)], accessed online at <[http://www.dccam.org/Tribunal/Analysis/Debate\\_Genocide.htm](http://www.dccam.org/Tribunal/Analysis/Debate_Genocide.htm)>.

<sup>8</sup> GH Stanton, ‘The Khmer Rouge did Commit Genocide’ (2001) 23 *Searching for the Truth* relying on the Optional Protocol II to the Geneva Convention; S. Linton, ‘Thoughts on Schabas – Stanton – Johansen’ (2002) 24 *Searching for the Truth*.

<sup>9</sup> *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, 53<sup>rd</sup> sess, annex, [71], UN Doc A/53/850 (1999).

<sup>10</sup> Trial Judgment [291].

<sup>11</sup> Ibid [292].

<sup>12</sup> WA Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006), 23.

<sup>13</sup> JC Gray, *The Nature and Sources of the Law* (Macmillan, 1931) 297.

<sup>14</sup> Trial Judgment [357].

<sup>15</sup> Ibid [240]–[248].

<sup>16</sup> Ibid [206].

cadres, their family members and affiliates, foreign nationals from various countries, particularly Vietnamese soldiers and civilians, as well as a number of S-21 staff members and their relatives. The revised S-21 Prisoner List indicated that no fewer than 12,273 individuals were detained and executed at S-21 and the accused acknowledged that the actual number was higher.<sup>17</sup> Given that detainees were considered guilty by reason of their presence at S-21, the role of interrogators was simply to validate the Party's verdict by extracting full confessions. Thus, the contents of confessions were in many respects pre-ordained and the accused was aware that much of the information in the confessions he passed along to his supervisors was fabricated.<sup>18</sup>

### 3. Convictions for Crimes against Humanity

Curiously, the definition of crimes against humanity under Article 5 of the ECCC law follows the definition in the Statute of the International Criminal Tribunal for Rwanda, which requires that all acts be 'committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds'.<sup>19</sup> The Trial Chamber followed the latest jurisprudence of the ad hoc Tribunals in identifying the chapeau elements of crimes against humanity.<sup>20</sup> For example, it followed the case law of the ICTY to hold that a civilian is determined according to the laws of war, so that a soldier—even when *hors de combat*—is not a civilian but that 'there is no requirement nor is it an element of crimes against humanity that the *victims* of the underlying crimes be civilians'.<sup>21</sup> Thus, a soldier who is *hors de combat* may be the victim of an act amounting to a crime against humanity, provided that all other necessary conditions are met.

The Chamber found that the attack was directed at the entire Cambodian population and was all-encompassing, engulfing both civilian and military elements without distinction.<sup>22</sup> The Chamber could find no common linking factor among those detained, other than their perceived opposition to the CPK. They were all classified as 'enemies' by the CPK, even if in fact they were not opposed to the regime. The justification for the attack was ideologically-driven. Hence, the Trial Chamber found the attack came within Article 5 because it was carried out, at a minimum, on political grounds,<sup>23</sup> and the accused's crimes were knowingly a part of that attack.

On the basis of the crimes committed at S-21, the Trial Chamber found the accused guilty of (i) murder; (ii) extermination; (iii) enslavement; (iv) imprisonment; (v) torture; (vi)

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<sup>17</sup> Ibid [208].

<sup>18</sup> Ibid [179].

<sup>19</sup> *Statute of the International Criminal Tribunal for Rwanda*, art 3.

<sup>20</sup> Trial Judgment, [297]-[319].

<sup>21</sup> Ibid [311].

<sup>22</sup> Ibid [325].

<sup>23</sup> Ibid [327].

rape; (vii) persecution on political grounds; and (viii) other inhumane acts as crimes against humanity.

#### 4. Grave Breaches of the Geneva Conventions of 1949

The Trial Chamber found that an international armed conflict existed between Cambodia and Vietnam from 17 April 1975 to 6 January 1979.<sup>24</sup> The Trial Chamber held that Vietnamese prisoners of war and civilians as well as Cambodians perceived to be Vietnamese ‘sympathisers’ detained at S-21 were protected persons within the meaning of the Geneva Conventions.<sup>25</sup> The Chamber found the crimes at S-21 directed at such protected persons established the war crimes of wilful killing, torture or inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial; and unlawful confinement of a civilian.

#### 5. Sentencing

The ECCC co-prosecutors requested a sentence of 40 years. The Trial Chamber noted the existence of aggravating factors and mitigating factors, including the accused’s cooperation, admission of responsibility, expressions of remorse (undermined by the belated request for an acquittal), the coercive environment and his potential for rehabilitation.<sup>26</sup> This led the Chamber to consider 35 years appropriate.<sup>27</sup> It also concluded that Duch was entitled to a sentence reduction for the violation of his rights, because he was illegally detained for several years prior to the commencement of the ECCC proceedings. This led to a final sentence of 30 years imprisonment.

The verdict immediately attracted substantial criticism from Cambodian survivors, including Foreign Minister Hor Nam Hong for being too light.<sup>28</sup> Whilst it must be frustrating for victims to see Duch receive a discount for his illegal detention given his treatment of those detained at S-21, the sentence is in line with precedents from other international tribunals. The Cambodian Center for Human Rights congratulated the ECCC for its verdict and welcomed the five-year reduction as it ‘provides a good example to the domestic courts of Cambodia, whose detention practices remain a serious concern, and serves as a reminder of the universality of human rights’.<sup>29</sup>

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<sup>24</sup> Ibid [59]–[81]

<sup>25</sup> Ibid [425] ‘Protected persons’ is defined in Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, 75 UNTS 287, entered into force 21 October 1950, art 4.

<sup>26</sup> Trial Judgment [629].

<sup>27</sup> Ibid [631].

<sup>28</sup> *The Duch Verdict*, by Assistant Professor John D Giorciari, Cambodia Trial Monitor, accessed online at <<http://blog.cambodiatribunal.org/2010/07/duch-verdict.html>>.

<sup>29</sup> *The Duch Trial: A Good Example for the Cambodian Courts*, accessed online at <<http://www.soros.org/initiatives/bpsai/news/duch-trial-cambodia-20100726>>.

## 6. The Role of Civil Parties

Under the ECCC Law, the ECCC has a mandate to provide ‘collective and moral reparations’ to civil parties found to have suffered wrongs. The Trial Chamber ruled upon and admitted the claims of 66 civil parties who appeared.

After participating in the whole trial, the Trial Chamber held it had neither the budget nor the authority to provide financial reparations to individual victims. It only offered to publish the names of the victims in the verdict and to compile a record of Duch’s statements of confession and contrition. This decision has attracted criticism.<sup>30</sup> It has been pointed out that the Trial Chamber could have recommended measures, including amounts of financial reparations, to help catalyse action by donors and civil society, or bless actions undertaken by other entities. Those actions—as sought by the civil parties—included establishing memorials, commemorative gatherings of survivors, or establishing drop-boxes where ordinary citizens can contribute funds.

## Conclusion

The Trial Chamber’s primary functions are to provide due process to the accused, render a cogent judgment of guilt or innocence, provide a fair and detailed record of the past, impose a suitable punishment and issue reasonable collective reparations. Apart from the last function, the Trial Chamber has performed well. The ECCC Law includes implementing a civil party scheme, and has won donor support partly because of this. The Trial Chamber has been a pioneer in conducting a trial with significant victim participation. The participation of 66 civil parties in the Duch trial has been controversial, time-consuming and has drawn complaints from judges and prosecutors claiming the process was unworkable. In the end, the trial did function and the civil parties appear to have played an active and helpful role. The Trial Chamber, in the end, has let these parties down by its limited remedies, which do not amount to providing ‘collective and moral reparations’ to the civil parties.

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<sup>30</sup> *The Duch Verdict*, above n 28.