អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

D99/3/42

អង្គបុរេជំនុំជម្រះ
PRE-TRIAL CHAMBER
CHAMBRE PRELIMINAIRE

In the name of the Cambodian people and the United Nations and pursuant to the 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.

Criminal Case File N° **001/18-07-2007-ECCC/OCIJ (PTC 02)**

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge PEN Pichsaly
Judge Katinka LAHUIS
Judge HUOT Vuthy

Greffiers: **SAR Chanrath**
Anne-Marie BURNS

Date: **5 December 2008**

ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
Date of receipt/Date de reception): 08 DEC 08
Time/Heure: 14:00
Case File Officer/L'agent chargé du dossier: C.A. Fay

PUBLIC
DECISION ON APPEAL AGAINST CLOSING ORDER INDICTING KAING GUEK EAV ALIAS "DUCH"

CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
Certified Date/Date de certification): 08 DEC 08
Case File Officer/L'agent chargé du dossier: C.A. Fay

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Charged Person

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia is seized of the "Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav 'Duch' dated 8 August 2008" filed on 5 September 2008 ("Appeal Brief")[1].

I. PROCEDURAL BACKGROUND

1. On 15 May 2008, the Co-Investigating Judges notified the Parties that they considered the investigation in Case File 001/18-07-2007-ECCC/OCIJ ("Case File 001") to be concluded. Case File 001was forwarded to the Co-Prosecutors pursuant to Internal Rule 66.

2. The Co-Prosecutors presented their "Rule 66 Final Submission regarding Kaing Guek Eav alias 'Duch'" in a document dated 18 July 2008 and filed on 21 July 2008 ("Final Submission")[2].

3. The Co-Lawyers for Kaing Guek Eav alias Duch ("Co-Lawyers") filed their Response to the Final Submission on 24 July 2008 ("Response to the Final Submission"), the English translation of which became available on 17 September 2008[3].

4. On 8 August 2008, the Co-Investigating Judges issued a Closing Order indicting Kaing Guek Eav alias Duch ("Closing Order")[4].

5. The Co-Prosecutors filed a notice of appeal against the Closing Order on 21 August 2008[5].

6. The Pre-Trial Chamber received access to Case File 001, which was updated.

7. On 5 September 2008, the Co-Prosecutors filed their Appeal Brief[6].

8. On 11 September 2008 after hearing the Parties, the Pre-Trial Chamber granted a request by the Trial Chamber for access to Case File 001[7].

9. The Co-Lawyers filed their "Defence Lawyers' Response to the Co-Prosecutors' Appeal of the Closing Order dated 8 August 2008" on 16 September 2008 ("Defence Response to the Appeal"), the English translation of which was filed on 22 September 2008[8].

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[1] Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch" dated 8 August 2008, 5 September 2008, D99/3/3 ("Appeal Brief").
[2] Rule 66 Final Submission regarding Kaing Guek Eav alias "Duch", 18 July 2008, D96 ("Final Submission").
[3] Response of Kaing Guek Eav's Defence Team to the Prosecutor's Final Submission, 24 July 2008, D96/1 ("Response to the Final Submission").
[4] CLOSING ORDER indicting Kaing Guek Eav alias Duch, 8 August 2008, D99 ("Closing Order").
[5] Record of Appeals, 21 August 2008, D99/3 ("Notice of Appeal").
[6] Appeal Brief.
[7] Decision on Trial Chamber Request to Access the Case File, 11 September 2008, D99/3/5.

10. The Civil Parties did not file any responses to the Appeal Brief.

11. On 25 September 2008, the Pre-Trial Chamber announced that its decision on the Appeal would be delivered in a public hearing on 5 December 2008[9].

12. On 13 October 2008, the Pre-Trial Chamber notified the Parties that Judge Ney Thol had decided to recuse himself from participation in the Appeal and had immediately been replaced by Reserve Judge Pen Pichsaly for the duration of the proceedings in the Appeal[10].

13. The Pre-Trial Chamber notified the Parties on 14 October 2008 that there would be no oral hearing on the Appeal[11].

II. *AMICUS CURIAE*

14. Pursuant to Internal Rule 33, the Pre-Trial Chamber considered it desirable for the proper adjudication of the Appeal to invite *amici curiae* to submit written briefs on the following issues:

> "(1) the development of the theory of joint criminal enterprise and the evolution of the definition of this mode of liability, with particular reference to the time period 1975-9;
> (2) whether joint criminal enterprise as a mode of liability can be applied before the ECCC, taking into account the fact that the crimes were committed in the period 1975-9."

15. Invitations were extended to three selected *amici curiae* on 23 and 25 September 2008 with a deadline for submitting the briefs set for 27 October 2008[12].

16. The Pre-Trial Chamber acknowledges with thanks the briefs submitted by:
- Professor Antonio Cassese, in his capacity as editor-in-chief of the *Journal of International Criminal Justice*, together with other members of the Board of Editors and the Editorial Committee of the *Journal*[13];
- the Centre for Human Rights and Legal Pluralism (*Centre sur les droits de la personne et le pluralisme juridique*) of McGill University[14];
- Prof. Dr. jur. Kai Ambos of the Georg August University of Göttingen[15].

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[8] Defence Lawyers' Response to the Co-Prosecutors' Appeal of the Closing Order dated 8 August 2008, 16 September 2008, D99/3/8 ("Defence Response to the Appeal").
[9] Scheduling Order, 25 September 2008, D99/3/16, p. 2.
[10] Notification of Recusal of Judge Ney Thol, 13 October 2008, D99/3/20, p. 2.
[11] Decision to determine the Co-Prosecutors' Appeal of the Closing Order on the basis of written submissions only, 13 October 2008, D99/3/21, p. 2.
[12] Invitation to *Amicus Curiae*, 23 September 2008, D99/3/12, p. 3; Invitation to *Amicus Curiae*, 25 September 2008, D99/3/13, p. 3; Invitation to *Amicus Curiae*, 25 September 2008, D99/3/14, p. 3.
[13] *Amicus Curiae* Brief of Professor Antonio Cassese and Members of the *Journal of International Criminal Justice* on Joint Criminal Enterprise Doctrine, 27 October 2008, D99/3/24 ("Cassese Brief").
[14] In the matter of the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch" dated 8 August 2008, undated, D99/3/25.

17. The briefs were submitted in English by the requested date and translated into French and Khmer.

18. On 28 October 2008, the Pre-Trial Chamber issued directions to the Parties to respond to the *amicus curiae* briefs by 17 November 2008[16]. The Co-Prosecutors notified the Chamber that they did not intend to file a response[17]. Two responses were received from the foreign lawyers for the Civil Parties[18].

19. The Co-Lawyers for the Charged Person filed a request on 17 November 2008 for a public hearing to respond to the *amicus curiae* briefs[19] which was denied by the Pre-Trial Chamber in its decision of 20 November 2008, although the alternative request for an extension of time to file a written response was granted[20]. The written response by the Co-Lawyers was filed on 25 November 2008[21].

20. In view of the invitations to specific *amici curiae*, unaffiliated with the court or any of its offices, the Pre-Trial Chamber found that it would be sufficiently informed to determine the Appeal and denied a request by Randle DeFalco and Jared Watkins, Legal Associates at the Documentation Center of Cambodia (DC-Cam) to submit an *amicus curiae* brief regarding the issues of joint criminal enterprise and *nullum crimen sine lege*[22].

III. APPLICATIONS TO INTERVENE

21. On 15 September 2008, the Co-Lawyers for Ieng Sary filed an "Expedited Request to make Submissions on the Application of Joint Criminal Enterprise Liability in the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav 'Duch'"[23]. This was followed by a further request on 24 September 2008 seeking an extension of the deadline for

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[15] *Amicus Curiae* concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), 27 October 2008, D99/3/27 ("Ambos Brief").
[16] Directions to the Parties to respond to *Amicus Curiae* Briefs, 28 October 2008, D99/3/28.
[17] Co-Prosecutors' Notification regarding the *Amici Curiae* Briefs, 30 October 2008, D99/3/29.
[18] Response of Foreign Co-Lawyer for the Civil Parties to the *amicus curiae* Briefs, 17 November 2008, D99/3/32; Response to the submissions of *amicus curiae*, 17 November 2008, D99/3/33.
[19] *Demande de tenue d'audience publique suite aux mémoires d'Amicus Curiae* [Request for Public Hearing concerning the *Amicus Curiae* Briefs], 17 November 2008, D99/3/34.
[20] Decision on Request for a Public Hearing to Respond to the *Amicus Curiae* Briefs, 20 November 2008, D99/3/35.
[21] Defence Response to the *Amicus Curiae* Briefs, 25 November 2008, D99/3/37.
[22] Decision on Request for Leave to file *amicus curiae* brief, 2 October 2008, D99/3/17, para. 3.
[23] Ieng Sary's Expedited Request to make Submissions on the Application of Joint Criminal Enterprise Liability in the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch", 15 September 2008, D99/3/6, p.7.

submissions that had originally been proposed[24]. The Pre-Trial Chamber denied these requests in its decision dated 6 October 2008[25].

22. On 6 October 2008, the Co-Lawyers for Ieng Sary filed a motion to disqualify Professor Antonio Cassese and selected members of the Board of Editors and Editorial Committee of the *Journal of International Criminal Justice* from submitting an *amicus curiae* brief on joint criminal enterprise liability[26]. In its decision of 14 October 2008, the Pre-Trial Chamber found that Ieng Sary lacked standing to bring the motion and decided it was inadmissible[27].

23. On 23 October 2008, the Co-Lawyers for Ieng Thirith, Nuon Chea and Khieu Samphan filed an "Urgent Joint Defence Request to Intervene in the 'Application of the Theory of JCE' in the OCP Appeal against the Duch Closing Order"[28]. The Co-Prosecutors filed their response on 3 November 2008[29]. The Pre-Trial Chamber denied this request in its decision of 5 November 2008[30].

24. On 21 November 2008, the Pre-Trial Chamber issued a Ruling rejecting the filing of a motion by the Co-Lawyers for Ieng Sary for reconsideration of its decision of 6 October 2008[31]. The Co-Lawyers for Ieng Sary then filed a motion for reconsideration of this Ruling on 24 November 2008[32]. This motion was denied on 3 December 2008[33].

IV. ADMISSIBILITY OF THE APPEAL

25. The Appeal was filed in accordance with Internal Rules 74 and 75 and is therefore admissible.

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[24] Ieng Sary's Request to amend his Expedited Request to make Submissions on the Application of Joint Criminal Enterprise Liability in the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch", 24 September 2008, D99/3/15, p. 4.
[25] Decision on Ieng Sary's request to make submissions on the application of the theory of joint criminal enterprise in the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch", 6 October 2008, D99/3/19, p. 4.
[26] Ieng Sary's Motion to Disqualify Professor Antonio Cassese and selected members of the Board of Editors and Editorial Committee of the *Journal of International Criminal Justice* from submitting a written *Amicus Curiae* Brief on the issue of Joint Criminal Enterprise in the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch", 3 October 2008, D99/3/18.
[27] Decision on Ieng Sary's Motion to Disqualify *Amicus Curiae*, 14 October 2008, D99/3/23, para. 6.
[28] Urgent Joint Defence Request to Intervene in the 'Application of the Theory of JCE' in the OCP Appeal against the Duch Closing Order, 23 October 2008, D99/3/26.
[29] Co-Prosecutors' Response to the Joint Defence Application to Intervene in the Appeal, 3 November 2008, D99/3/30.
[30] Decision on Urgent Joint Defence Request to Intervene on the issue of Joint Criminal Enterprise in the OCP Appeal against the Duch Closing Order, 5 November 2008, D99/3/31.
[31] Ruling on the Filing of a Motion by the Charged Person Ieng Sary in the Case against the Charged Person "Duch", 21 November 2008, D99/3/36.
[32] Ieng Sary's Motion for Reconsideration of *Ruling on the Filing of a Motion by the Charged Person Ieng Sary in the Case against the Charged Person "Duch"*, 24 November 2008, D99/3/38.
[33] Decision on Ieng Sary's Motion for Reconsideration of Ruling on the Filing of a Motion in the Duch Case File, 3 December 2008, D99/3/41.

V. NATURE OF THE APPEAL

A. Submissions of the Parties

26. The Co-Prosecutors submit that the scope of review should be limited to the application made by the appealing party, and in this case to the two errors of law alleged by the Co-Prosecutors, namely (i) the failure to indict Duch with the crimes of homicide and torture pursuant to the 1956 Penal Code[34] (the "first ground of appeal") and (ii) the failure to indict Duch for committing all the crimes that occurred at S-21 via participation in a joint criminal enterprise[35] (the "second ground of appeal").

27. The Co-Lawyers for the Charged Person submit that the Co-Prosecutors' Appeal relies on an erroneous interpretation of the applicable rules of procedure before the ECCC and that according to the inquisitorial procedure, the judges determine the subject-matter of the trial. It is argued that the requests made in the Appeal could have been made during the trial before the Trial Chamber and that there was no need to appeal the Closing Order. The Pre-Trial Chamber should dismiss the Appeal as not being well-grounded in law, and forward the case file to the Trial Chamber. The Co-Lawyers reserve the right to address at trial the disputed points of the Closing Order.

B. Considerations

i. Scope of review

28. The Internal Rules do not provide a clear indication of what should be the scope of review by the Pre-Trial Chamber when seized of appeals against closing orders and, more particularly, whether its examination should be limited to the issues raised by the appealing party. Cambodian law does not provide any further guidance on this matter.

29. The Pre-Trial Chamber notes the particular nature of the Closing Order, being the decision that concludes the whole investigation[36] in which all Parties have had the possibility to participate. Such an order contains various conclusions of fact and law with regard to all the acts that were subject to investigation. An unlimited scope of review would lead the Pre-Trial Chamber to review the whole investigation, including the regularity of the procedure, in order to reach its own conclusions. Considering the Internal Rules dealing with the role of the Pre-Trial Chamber as an appellate instance and more specifically the time limits set out

[34] Appeal Brief, para. 42.
[35] Appeal Brief, para. 72.
[36] Internal Rule 67(1).

the Pre-Trial Chamber finds that the scope of its review is limited to the issues raised by the Appeal[37].

ii. Standard of review

30. The Co-Prosecutors request the Pre-Trial Chamber to amend the Closing Order in order to add legal offences and a mode of liability. The Co-Prosecutors submit that all the necessary facts to reach the proposed conclusions are set out in the Closing Order but that the Co-Investigating Judges failed to draw all the required legal consequences from these facts.

31. The Pre-Trial Chamber will examine what should be the standard of review in this Appeal.

Nature of the Co-Investigating Judges' decision when issuing a Closing Order

32. The Co-Investigating Judges are bound by the following provisions of Internal Rule 67 when they issue a Closing Order:

> "1. The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case. The Co-Investigating Judges are not bound by the Co-Prosecutors' submissions.
> 2. The 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 characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility.
> 3. The Co-Investigating Judges shall issue a Dismissal Order in the following circumstances:
> a) The acts in question do not amount to crimes within the jurisdiction of the ECCC;
> b) The perpetrators of the acts have not been identified; or
> c) There is not sufficient evidence against the Charged Person or persons of the charges.
> 4. The Closing Order shall state the reasons for the decision. A Closing Order may both send the case to trial for certain acts or against certain persons and dismiss the case for others."

33. The Closing Order is the decision by which the Co-Investigating Judges conclude their judicial investigation. Pursuant to Internal Rule 67(3) and (4), they shall decide on the acts they were requested to investigate.

[37] The French system, on which the Cambodian system is largely based, has been used to assist the Pre-Trial Chamber in its interpretation of the Internal Rules, more particularly the following references: F.-L. COSTE, "Chambre d'instruction", *Rép. pén. Dalloz*, December 2006, paras 309-310; P. CHAMBON and C. GUÉRY, *Droit et pratique de l'instruction préparatoire*, 6th ed., Dalloz, 2007, para. 242.32.

34. The scope of the investigation is defined by Internal Rules 53(1) and (2), and 55(1), (2) and (3), which provide:

> **"Rule 53. Introductory Submission**
>
> 1. If the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges, either against one or more named persons or against unknown persons. The submission shall contain the following information:
>
> a) a summary of the facts;
>
> b) the type of offence(s) alleged;
>
> c) the relevant provisions of the law that defines and punishes the crimes;
>
> d) the name of any person to be investigated, if applicable; and
>
> e) the date and signature of both Co-Prosecutors.
>
> 2. The submission shall be accompanied by the case file and any other material of evidentiary value in the possession of the Co-Prosecutors, including any evidence that in the actual knowledge of the Co-Prosecutors may be exculpatory."

> **"Rule 55. General Provisions Concerning Investigation**
>
> 1. A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC.
>
> 2. The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.
>
> 3. If, during an investigation, new facts come to the knowledge of the Co-Investigating Judges, they shall inform the Co-Prosecutors, unless the new facts are limited to aggravating circumstances relating to an existing submission. Where such new facts have been referred to the Co-Prosecutors, the Co-Investigating Judges shall not investigate them unless they receive a Supplementary Submission."

35. Reading Internal Rule 55(1) and (2) in conjunction with Internal Rule 53(1), the Co-Investigating Judges have a duty to investigate all the facts alleged in the Introductory Submission or any Supplementary Submission, as it is the case in Cambodian law[38]. Internal Rule 55(3) indicates that the Co-Investigating Judges are also seized of the circumstances surrounding the acts mentioned in the Introductory or a Supplementary Submission[39]. The circumstances in which the alleged crime was committed and that contribute to the determination of its legal characterisation are not considered as being new facts and are thus

[38] Article 125 of the Criminal Procedure Code of Cambodia. The French system has been used for assistance in the interpretation of Cambodian law.

[39] The French system has been used for assistance in the interpretation of the Internal Rules, more particularly the following reference: C. GUÉRY, *Instruction préparatoire*, Rép. Pén. Dalloz, January 2008, para. 157.

part of the investigation. The Co-Investigating Judges are guided by the legal characterisation proposed by the Co-Prosecutors to define the scope of their investigation.

36. The Co-Investigating Judges have no jurisdiction to investigate acts unless they are requested to do so by the Co-Prosecutors, as confirmed by Internal Rule 55(3). The Pre-Trial Chamber notes that pursuant to Internal Rule 55(3), new facts alleged in the Final Submission are not part of the judicial investigation.

37. Internal Rule 67 directs that when issuing a Closing Order, the Co-Investigating Judges shall decide on all, but only, the facts that were part of their investigation, either dismissing them for one of the reasons expressed in paragraph 3 of this Rule or sending the Charged Person to trial on the basis of these acts. This decision does not involve the exercise of any discretionary power; when circumstances as prescribed in Internal Rule 67(3) are present, the Charged Person should be indicted in relation to these acts. This position is further confirmed by Article 247 of the Code of Criminal Procedure of the Kingdom of Cambodia ("CPC"), which provides: "If the judge considers that the facts constitute a felony, a misdemeanour or a petty offense, he shall decide to indict the charged person before the trial court. The order shall state the facts being charged and their legal qualification."

38. The Co-Investigating Judges' decision to either dismiss acts or indict the Charged Person shall be reasoned as specifically provided by Internal Rule 67(4). The Pre-Trial Chamber also recalls that it is an international standard that all decisions of judicial bodies are required to be reasoned[40].

39. The Pre-Trial Chamber emphasises that the facts as found during the investigation are decisive for the legal characterisation when issuing a Closing Order, irrespective of how they have initially been qualified by the Co-Prosecutors.

The power of the Pre-Trial Chamber to add legal offences or modes of liability in the Closing Order

40. The Internal Rules do not indicate in which circumstances the Pre-Trial Chamber can add offences or modes of liability in a Closing Order. Internal Rule 79(1) suggests that the Pre-Trial Chamber has the power to issue a new or revised Closing Order that will serve as a

[40] Criminal case file no. 002/19-09-2007-ECCC/OCIJ (PTC06), Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 21, referring to: Human Rights Committee, General Observations Article 14, para. 49. See Communications No. 903/1999, *Van Hulst v. The Netherlands*, 15 November 2004, para. 6.4; No. 709/1996, *Bailey v. Jamaica*, 21 July 1999, para. 7.2; No. 663/1995, *Morrison v. Jamaica*, 3 November 1998, para. 8.5; *Prosecutor v. Milutinović*, IT-99-37-AR65.3, "Decision Refusing Milutinović Leave to Appeal", Appeals Chamber, 3 July 2003, para. 22; *Prosecutor v. Furundžija*, IT-95-17/1-A, "Judgement", Appeals Chamber, 21 July 2000, para. 69; European Court of Human Rights (ECHR), *Suominen v. Finland*, 1 July 2003, para. 36.

basis for the trial: "The Trial Chamber shall be seized by an indictment from the Co-Investigating Judges or the Pre-Trial Chamber". In the Glossary of the Internal Rules, the word "Indictment" is defined as "a Closing Order by the Co-Investigating Judges, or the Pre-Trial Chamber, committing a Charged Person for trial".

41. The Pre-Trial Chamber has previously decided that it fulfils the role of the Cambodian Investigation Chamber in the ECCC[41]. Although the CPC does not specifically mention how the Investigation Chamber should proceed when it is seized of an appeal seeking to add legal offences or a mode of liability to an indictment, generally it gives broad powers to the Investigation Chamber when seized of an appeal. The CPC notably provides that the Investigative Chamber can:
    (i) examine the regularity of the procedure and annul part or all of the proceedings (Article 261);
    (ii) order or conduct further investigation (Article 262);
    (iii) on its own motion or at the request of the General Prosecutor attached to the Court of Appeal, order the extension of the judicial investigation to any offences related to those already identified by the Investigating Judges (Article 263).

42. When seized of a dismissal order as a consequence of an appeal lodged by the Prosecution or a civil party, the Investigation Chamber shall "investigate the case by itself"[42].

43. The rules set out in the CPC do not suggest that the Investigation Chamber is bound by the legal characterisation given by the Investigating Judge but rather indicate that it is empowered to decide on the appropriate legal characterisation of the acts[43].

44. In light of Internal Rule 79(1) and the provisions of the CPC, the Pre-Trial Chamber finds that it is empowered to decide independently on the legal characterisation when deciding whether to include in the Closing Order the offences and mode of liability requested by the Co-Prosecutors. It is bound by the same rules as the Co-Investigating Judges and, notably, by the scope of the investigation. The Pre-Trial Chamber thus finds that it shall decide on the Appeal by an examination of whether the acts that were part of the investigation can be characterised as requested by the Co-Prosecutors and whether the Co-Investigating Judges should have included the legal characterisation[44].

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[41] Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "DUCH", 3 December 2007, C5/45, para. 7.
[42] CPC, Articles 277 and 281(3).
[43] This reflects the approach adopted by the French system where the Investigating Chamber, when it is seized of an appeal seeking to modify the legal characterisation, has the power to substitute its own appreciation for that of the Investigating Judge and decide *de novo* on the appropriate characterisation.
[44] A similar approach is applied in the French system. See Article 202 of the French Code of Criminal Procedure.

iii. The Need to Specify Offences and Modes of Liability in the Indictment

45. The Co-Lawyers for the Charged Person have submitted that there was no need to appeal against the Closing Order because the issues raised could have been solved by the Trial Chamber.

46. Internal Rule 67(2) provides that the Indictment shall set out "the identity of the Accused, a description of the material facts and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility". The CPC contains a similar provision in Article 247. The Internal Rules and the CPC provide no further guidance for the way in which the Closing Order should be reasoned. In these circumstances, the Pre-Trial Chamber will apply international standards.

47. International standards require that an indictment set out the material facts of the case with enough detail to inform the defendant clearly of the charges against him so that he may prepare his defence[45]. The indictment should articulate each charge specifically and separately, and identify the particular acts in a satisfactory manner[46]. If an accused is charged with alternative forms of participation, the indictment should set out each form charged[47].

48. The international tribunals' jurisprudence has drawn distinctions on the level of particularity required in indictments depending on the alleged mode of liability, as the materiality of such facts as the identity of the victim, the place and date of the events for which the accused is alleged to be responsible and the description of the events themselves, necessarily depends upon the alleged proximity of the accused to those events[48].

49. When alleging that the accused personally carried out the acts underlying the crime in question, the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed shall be set out "with the greatest precision"[49]. In cases where personal participation is alleged, the nature or scale of the alleged crimes may render it impracticable to particularise the identity of every victim or the

[45] *Prosecutor v. Blaškić*, IT-95-14-A, "Judgement", Appeals Chamber, 29 July 2004 ("*Blaškić* Appeals Judgement"), para. 209.
[46] *Prosecutor v. Delić*, IT-96-21, "Decision on Motion by the Accused Hazim Delić Based on Defects in the Form of the Indictment", Trial Chamber, 15 November 1996, para 14.
[47] *Kordić and Čerkez* Trial Judgement, para. 129. See also *Prosecutor v. Simić*, IT-95-9-A, "Judgement", Appeals Chamber, 28 November 2006 ("*Simić* Appeals Judgement"), para. 21.
[48] *Blaškić* Appeals Judgement, paras 210 and 211; *Prosecutor v. Brima et al.*, SCSL-04-16-T, "Judgement", Trial Chamber II, 20 June 2007 ("*Brima* Trial Judgement"), para. 29.
[49] *Blaškić* Appeals Judgement, para. 213.

dates of commission[50]. Where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the commission of the alleged crimes, the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question must be identified[51]. An allegation of superior responsibility requires that not only what is alleged to have been the superior's own conduct, but also what is alleged to have been the conduct of those persons for whom the superior bears responsibility be specified with as many particulars as possible[52]. Joint criminal enterprise as a form of criminal responsibility is required to be specified in the indictment[53].

50. Considering that international standards require specificity in the indictment and Article 35(new) of the ECCC Law provides that the accused shall be informed in detail of the nature and cause of the charges, the Pre-Trial Chamber finds that the assertion of the Co-Lawyers for the Charged Person that the matters raised by the Appeal should be decided at the trial is not correct. The grounds of appeal need to be further examined in order to determine whether the Closing Order should be amended as requested in the Appeal Brief.

VI. GROUND 1: FAILURE TO CHARGE NATIONAL CRIMES

A. Submissions of the Parties

51. The Co-Prosecutors argue under their first ground of appeal that the Co-Investigating Judges committed an error of law when they failed to indict Duch for the crimes of homicide and torture as defined by the 1956 Penal Code and punishable under Article 3 of the Law on the Establishment of the ECCC ("ECCC Law"). They submit that those crimes were fully disclosed by the material facts as found in the Indictment. They ask the Pre-Trial Chamber to amend the Closing Order to include these crimes.

52. The Co-Prosecutors make the following submissions:

(i) Article 3 of the ECCC Law explicitly authorises the prosecution of suspects for the crimes of homicide, torture and religious persecution contrary to the 1956 Cambodian Penal Code.

(ii) The Co-Investigating Judges' decision not to indict Duch with the crimes under national law is based on the incorrect premise that these crimes are subsumed by crimes against humanity and grave breaches of the Geneva Conventions. This premise is incorrect because there is no hierarchy of crimes at the ECCC, the

[50] *Brima* Trial Judgement, para. 31; *Prosecutor v. Kupreškić*, IT-95-16-A, "Appeal Judgement", Appeals Chamber, 23 October 2001, para. 89.
[51] *Blaškić* Appeals Judgement, para. 213.
[52] *Blaškić* Appeals Judgement, para. 216; *Brima* Trial Judgement, para. 32.
[53] This is also reflected in the current practice of the international tribunals. See *Simić* Appeals Judgement, paras 21-22.

interpretation implies that the crimes can never be prosecuted before the ECCC and each of the international crimes contains an element that is not present in the national crimes. Similarly, each of the national crimes contains an element that is not present in the international crimes.

a. Torture under the 1956 Penal Code occurs when acts of torture are committed either (1) with the intent to obtain information; or (2) in a spirit of repression or barbarity. Torture as a crime against humanity and torture as a grave breach both require that the torturous act must be carried out with the intent to obtain information, punish, intimidate or coerce the victim or a third person, or discriminate against the victim or a third person. Torture under the 1956 Penal Code can be proven using a mental element, a "spirit of repression or barbarity" that is not present in the international crimes.

b. Murder under the 1956 Penal Code requires an intent to cause death. By contrast, murder as a crime against humanity and murder as a grave breach can be satisfied by either an intent to kill or by an intent to inflict grievous bodily harm or serious injury. The two mental states must be viewed as different material elements because there are situations where the same conduct could be murder under the international crimes but not murder under the 1956 Penal Code.

(iii) The crimes of torture and homicide under the 1956 Penal Code are established by the factual findings of the Closing Order.

(iv) Failing to charge the crimes under national law creates an unnecessary risk of acquittal if the jurisdictional elements for the international crimes are not proved at trial.

53. The Co-Prosecutors set out a proposed amendment to Part IV of the Indictment to incorporate the crimes of homicide and torture.

54. The Co-Lawyers for the Charged Person do not specifically respond to the Co-Prosecutors' argument that there has been a failure to charge for national crimes, rather, the Co-Lawyers focus their concern on the potential that investigation into this could cause considerable delay to the commencement of the trial, asking "when will Duch's trial begin?" The Co-Lawyers submit that if the Pre-Trial Chamber were to rule that Duch should 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). The Co-Lawyers also take the view that the Appeal is "totally unwarranted", as the argument that Duch may be acquitted is untenable, "considering that he has recognised

on several occasions his responsibility for the crimes committed at S-21 and expressed genuine remorse vis-à-vis the victims"[54].

B. Considerations

55. The Co-Investigating Judges considered at paragraph 152 of the Closing Order that:

> "Certain acts characterised by the judicial investigation also constitute the domestic offences of homicide and torture pursuant to Articles 500, 501, 503, 506 of the 1956 Cambodian Penal Code under Article 3 of the ECCC Law. However, these acts must be accorded the highest available legal classification, in this case: Crimes against Humanity or Grave Breaches of the Geneva Conventions of 1949."

56. The Co-Investigating Judges provided no reasoning as to why they considered that the international offences constitute a higher legal classification than the domestic offences. The Co-Investigating Judges similarly do not mention the factual basis on which they rely when they state that "certain acts characterised by the judicial investigation also constitute the domestic offences". As the Co-Investigating Judges have not defined or referred to a definition of the national and international crimes in the Closing Order or in any previous proceeding, it is not clear how they have reached the conclusions stated above.

57. The Pre-Trial Chamber finds that the Co-Investigating Judges failed to "state the reasons for the decision" and therefore did not comply with the requirements of Internal Rule 67(4) and international standards[55].

58. The Co-Prosecutors argue that the domestic crimes are based on the same acts as the international offences which, in relation to the scope of appeal as defined above, have to be identified in the Closing Order. In order to decide whether the Co-Investigating Judges were correct not to include the domestic offences in addition to the indicted international crimes, the Pre-Trial Chamber will examine if the domestic offences are subsumed by the international ones.

59. To determine if the domestic crimes are subsumed by the international offences already set out in the Indictment, the Pre-Trial Chamber will examine whether the domestic crimes contain constitutive elements that are not included in the international crimes. The Pre-Trial Chamber is only required to compare the elements of the domestic crimes with the underlying elements of the international crimes, leaving aside the contextual elements of crimes against humanity and grave breaches of the Geneva Conventions. As stated by the

[54] Defence Response to the Appeal, para. 5.
[55] See footnote 40 above.

Appeals Chambers of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), "an element is materially distinct from another if it requires proof of a fact not required by the other"[56].

i. Comparison of Constitutive Elements of the Crimes

a. Torture

Definition of the domestic crime

60. The French version of Article 500 of the 1956 Penal Code reads:

> "Tout individu qui exerce des actes de torture sur les personnes, soit afin d'obtenir d'elles, sous l'empire de la douleur, la révélation de renseignements utiles à la perpétration d'un crime ou d'un délit, soit par esprit de représailles ou par barbarie, est puni de la peine criminelle de troisième degré."

61. With the assistance of this translation, the English translation from the original Khmer version of Article 500 is determined to be as follows:

> "Any person who inflicts acts of torture on other persons either to obtain, under pain, information useful for the commission of a felony or a misdemeanour, or out of reprisal or barbarity, shall incur a criminal penalty of the third degree."

62. The elements of the crime of torture can be identified as follows:
- To commit acts of torture on another person
- For one of the following purposes:

  (i) to obtain, under pain, information useful for the commission of a felony or a misdemeanour *or*

  (ii) out of reprisal *or*

  (iii) out of barbarity.

Definition of the international crimes

63. As to the applicable law on torture in the "Democratic Kampuchea" period, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975 ("Declaration on Torture") provided the following definition in Article 1:

[56] *Prosecutor v. Delalic* [*Čelebići* case], IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001, para. 412 ("*Čelebići* Appeals Judgement").

> "For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners."

The Declaration on Torture was a resolution of the General Assembly of the United Nations adopted by consensus.

64. The Convention Against Torture ("CAT"), adopted on 10 December 1984 (entered into force on 26 June 1987), defines torture as follows:

> "1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
> 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

65. The Pre-Trial Chamber notes that there is a divergence between the Declaration on Torture and the CAT on the specific purposes for which the acts must be carried out to be considered as torture. Those identified in the Declaration on Torture are more limited than those identified in the CAT. More precisely, the purposes of "coercing him or a third person" and "for any reason based on discrimination of any kind" in the CAT were not mentioned in the Declaration on Torture.

66. According to the jurisprudence of the ICTY, the definition of torture in the CAT can be seen as being declaratory of custom[57]. The broader definition contained therein will be applied by the Pre-Trial Chamber for the purpose of determining whether the domestic definition contains elements that are not included in the international definition. Using a broader

[57] *Prosecutor v. Furundzija*, IT-95-17/1, "Judgement", Trial Chamber II, 10 December 1998, paras. 160-161, as confirmed in appeal on the Judgement of 21 July 2000, para. 111. *Prosecutor v. Kunarac et al.*, IT-96-23&23/1, "Judgement", Appeals Chamber, 12 June 2002, para. 146.

definition of the international crime is, on the current issue, in the interest of the Charged Person.

67. In light of the CAT, the following elements can be considered as part of the international definition of torture:
    - An act inflicting severe pain or suffering, whether physical or mental,
    - The act must be intentional, and
    - The act must be carried out with the purpose of obtaining information or a confession, to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person[58].

Distinction between the domestic and the international crimes

68. Article 500 of the 1956 Penal Code mentions that to be guilty of the crime of torture an individual must have committed "acts of torture". The 1956 Penal Code contains no further indication of what could be considered as "an act of torture". There is nothing indicating that the material element of the domestic crime is different from that of the international crimes.

69. The Pre-Trial Chamber finds that the first alternative mental element of the domestic definition – "inflict[ing] acts of torture to obtain, under pain, information for the commission of a felony or misdemeanour" – is different from the international definition as it requires that torture be perpetrated not only to obtain information but also that this information may be useful for the commission of a crime. The Pre-Trial Chamber finds that it would be insufficient for a conviction under the domestic crime to prove that the accused has committed acts of torture for the purpose of obtaining information or a confession, which is the criterion mentioned in the international definition.

70. The second mental element contained in the domestic crime – "inflict[ing] acts of torture out of reprisal" – is analogous to the purpose of "punishing" contained in the international definition. When only this specific purpose is considered, the elements of the domestic and the international crimes are the same.

71. The third alternative mental element of the domestic definition – "inflict[ing] acts of torture out of barbarity" – does not have any equivalent in the international definition. This element appears to be broader than those contained in the international definition.

[58] These are also the elements that are considered by the ICTY and ICTR.

72. The Pre-Trial Chamber concludes that the definition of torture stated in the 1956 Penal Code contains two alternative mental elements not included in the international definition, namely the purposes of "inflict[ing] acts of torture to obtain, under pain, information for the commission of a felony or misdemeanour" and "inflict[ing] acts of torture out of barbarity".

b. Homicide

Definitions of the domestic crimes

73. The Co-Prosecutors ask that Duch be indicted for the crime of "homicide" under Articles 501, 503 and 506 of the 1956 Penal Code. These provisions relate to the offences of homicide without the intent to kill and premeditated murder.

74. Article 501 sets out the definition of homicide. It reads in French:

> "Quiconque provoque la mort d'autrui est coupable d'homicide.
> L'homicide est volontaire ou involontaire, selon que la mort résulte de faits accomplis avec ou sans intention de la provoquer."

With the assistance of this translation, the English translation from the original Khmer version of Article 501 is determined to be as follows:

> "Any person who causes the death of another person is guilty of homicide. Homicide is either voluntary or involuntary, depending on whether the acts were accomplished with or without the intent to cause death."

This article is a definition of the term homicide but is not creative of any offence. The specific crimes are described later on in the Code.

75. Article 503 sets out the definition of the crime of homicide without the intent to kill. It reads in French :

> "Lorsque l'homicide résulte de faits volontairement accomplis ou entrepris, dans le but d'attenter aux personnes, mais sans intention de provoquer la mort, il est qualifié d'homicide sans intention meurtrière.
> Les coupables sont punis de la peine criminelle de premier degré."

With the assistance of this translation, the English translation from the original Khmer version of Article 503 is determined to be as follows:

"Where homicide results from voluntary acts accomplished or undertaken with the aim of harming persons but without the intent to cause death, it is qualified as homicide without the intent to kill.
Convicted persons shall incur a criminal penalty of the first degree."

76. Article 506 sets out the definition of the crime of premeditated murder. It reads in French:

"Lorsque l'homicide résulte, ou qu'il peut résulter de faits volontairement accomplis ou tentés, avec préméditation, dans l'intention de provoquer la mort, il est qualifié assassinat ou tentative d'assassinat.
Les coupables sont punis de la peine criminelle de troisième degré."

With the assistance of this translation, the English translation from the original Khmer version of Article 506 is determined to be as follows:

"Where homicide results or could result from acts voluntarily accomplished or attempted, with premeditation, with the intent to cause death, it is qualified as premeditated murder or attempted premeditated murder.
Convicted persons shall incur a criminal penalty of the third degree."

77. In relation to the intent to kill, Article 505 provides[59]:

"L'intention de provoquer la mort est présumée chaque fois qu'il est fait usage d'une arme de nature meurtrière. Elle peut également et notamment résulter de la violence même du coup porté, de la multiplicité des blessures faites, ou de l'endroit mortellement vulnérable choisi sur le corps de la victime. "

A literal translation into English is taken to read:

"Intent to cause death shall be presumed when a lethal weapon is used to commit the assault. It may also be inferred, *inter alia*, from the sheer violence of the assault, the number of wounds inflicted or the vulnerability of the part of the victim's body that is assaulted."

78. The word "premeditation" is defined as follows in Article 144 of the 1956 Penal Code[60]:

"La préméditation consiste dans la détermination d'agir prise antérieurement à l'action, dans des conditions telles que l'intervalle de temps séparant la détermination de l'action est suffisant pour permettre à l'auteur la réalisation d'actes préparatoires. "

A literal translation into English is taken to read:

[59] The English translation is not available.
[60] The English translation is not available.

"Premeditation is the decision to act before the action is actually undertaken, whereby the amount of time after this decision must be long enough for the author to perform preparatory acts."

79. A similar definition is now provided in Article 3(2) of the Cambodian Law on Aggravating Circumstances of Crime dated 19 December 2001, which is currently in force: "Premeditation is the process of conceiving and preparing an attack on another person."

Definitions of the international crimes

80. The required material elements for the international crimes of murder, as a crime against humanity, and wilful killing, as a grave breach of the Geneva Convention, is (i) the death of the victim(s) and (ii) that the death resulted from an act or omission of the accused or his subordinate[61].

81. As for the mental element of these crimes, an "intent to kill or to cause grievous bodily harm or inflict serious injury in the reasonable knowledge that the attack was likely to result in death" is required[62].

82. Neither international law nor Articles 5 and 6 of the ECCC Law indicate that premeditation is required for the crimes of murder as a crime against humanity and wilful killing as a grave breach of the Geneva Conventions. The Pre-Trial Chamber further notes that jurisprudence from the ICTY and ICTR states that homicide without premeditation is customary for murder in international law[63].

Distinction between the domestic crimes and the international crimes

83. An intention to "harm a third person, without the intent to kill" is sufficient for an individual to be found guilty of the crime of homicide under Article 503 of the Penal Code, whilst the international crimes require the intention "to kill or to inflict grievous bodily harm or serious injury in the reasonable knowledge that the attack was likely to result in death". The domestic crime thus requires a mental element that constitutes a lesser form of the intent required for the international crimes. It does not require the proof of a fact different from

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[61] *Prosecutor v. Kordić and Čerkez,* IT-95-14/2-T, "Judgement", Trial Chamber III, 26 February 2001 ("*Kordić and Čerkez* Trial Judgement"), paras 229 and 236; *Prosecutor v. Akayesu*, ICTR-96-4-T, "Judgement", Trial Chamber I, 2 September 1998 ("*Akayesu* Trial Judgement"), para. 589.

[62] *Prosecutor v. Blaškić*, IT-95-14-T, "Judgement", Trial Chamber I, 3 March 2000 ("*Blaškić* Trial Judgement"), para. 153; *Prosecutor v. Halilović*, IT-01-48-T, "Judgement", Trial Chamber I, 16 November 2005, para. 35; *Kordić and Čerkez* Trial Judgement, para. 236; *Akayesu* Trial Judgement, para. 589.

[63] *Prosecutor v. Jelisić*, IT-95-10, "Judgement", Trial Chamber I, 14 December 1999, para. 51; *Kordić and Čerkez* Trial Judgement, para. 235; *Blaškić* Trial Judgement, para. 216; *Akayesu* Trial Judgement, para. 589. The Pre-Trial Chamber notes that the ICTR has, on some occasions, required premeditation on the basis that its statute provides for "assassinat" instead of "murder".

those required by the international crimes. It is not necessary for the Pre-Trial Chamber to consider including the crime of homicide without intent to kill as codified in Article 503 of the Penal Code in the Indictment as it is subsumed by the international crimes that are already set out.

84. The crime of premeditated murder under the 1956 Penal Code requires the specific element of premeditation that is not required for the international crimes. It also requires an intent to kill, while an intent to "cause grievous bodily harm or inflict serious injury in the reasonable knowledge that the attack was likely to result in death" is sufficient under the definition of the international crime for someone to be found guilty of the international crime. Thus, the Pre-Trial Chamber concludes that the domestic offence of premeditated murder is not subsumed by the international offences.

ii. Cumulative Charges

85. Having found that the domestic crimes of torture and premeditated murder are not subsumed by the international crimes, the Pre-Trial Chamber will now examine whether they can legally be included in the Indictment as they should be based on the same facts as the international offences already set out in the Closing Order.

86. The Pre-Trial Chamber observes that neither the Internal Rules nor Cambodian law contain provisions related to the possibility to set out different legal offences for the same acts in an indictment. As prescribed in Article 12 of the Agreement, the Pre-Trial Chamber will therefore seek guidance in procedural rules established at the international level.

87. The jurisprudence of the *ad hoc* international tribunals holds that it is permissible in international criminal proceedings to include in indictments different legal offences in relation to the same acts[64]. Both the ICTY and ICTR have considerable jurisprudence supporting the use of cumulative charging. The Special Court for Sierra Leone (SCSL) has also upheld this practice[65]. It is observed that the Co-Investigating Judges have included in the Closing Order both crimes against humanity and grave breaches of the Geneva Convention in relation to the same acts.

[64] *Prosecutor v. Tadić*, IT-94-I-T, "Decision on Defence Motion on Form of the Indictment", Trial Chamber II, 14 November 1995, p. 10 (as quoted in *Akayesu* Trial Judgement, para. 463); *Čelebići* Appeals Judgement, paras 400 and 412; *Prosecutor v. Rutaganda*, ICTR-96-3-T, "Judgement and Sentence", Trial Chamber I, 6 December 1999, paras 115-116.

[65] *Brima* Trial Judgement, para. 2111.

88. The Pre-Trial Chamber further notes that including more than one legal offence in relation to the same acts in an indictment does not inherently threaten the *ne bis in idem* principle because it does not involve the actual assignment of liability or punishment[66].

iii. Continued Punishability of Domestic Crimes

89. As a further issue, the Pre-Trial Chamber must consider in order to indict, whether the offences of torture and homicide as described in the 1956 Penal Code are still punishable at this time.

90. In relation to torture, the Pre-Trial Chamber notes that Article 2 of the 1986 No. 27 Decree Law on Arrest, Police Custody, Provisional Detention, Release, Search in Home, On Property and On Individual ("No. 27 Decree Law")[67] deals with a specific form of torture committed by police and other authorities against people under arrest or in custody. Article 49 of this law provides that any law which is contrary to it is abrogated. The Pre-Trial Chamber finds that the 1956 Penal Code provisions on torture are not abrogated because this is not contrary to the provisions in the No. 27 Decree Law and can therefore be applied despite this Decree Law.

91. In the 1992 UNTAC (United Nations Transitional Authority in Cambodia) Criminal Code, there is no provision dealing with the offence of torture.

92. Article 73 of the 1992 UNTAC Criminal Code provides (unofficial English translation):

> "Abrogation of Inconsistent Rules
> 1. Any text, provision, or written or unwritten rule which is contrary to the letter or the spirit of the present text is purely and simply nullified."[68]

93. The Pre-Trial Chamber finds that the provisions on torture in the 1956 Penal Code can still be applied as they are not contrary to the spirit of the 1992 UNTAC Criminal Code, and the crime of torture is therefore still punishable under the 1956 Penal Code. It is therefore possible to indict for the crime of torture under the 1956 Penal Code.

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[66] *Prosecutor v. Tadić*, IT-94-1-T, "Decision on Defence Motion on Form of the Indictment", Trial Chamber II, 14 November 1995, p. 10 (as quoted in *Akayesu* Trial Judgement, para. 463).

[67] Decree Law on Arrest, Police Custody, Provisional Detention, Release, Search in Home, On Property and On Individual, 12 March 1986 ("No. 27 Decree Law"). Article 2 provides (unofficial English translation): "Physical abuse on any person shall be forbidden; Any person shall not be illegally charged, arrested, held in custody or detained; Torture on the person arrested, held in police custody or provisionally detained shall be forbidden; Torture on the person arrested, held in police custody or provisionally detained in order to make that person confess or give faulty information during the interrogation, shall be forbidden."

[68] Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period, 10 September 1992 ("1992 UNTAC Criminal Code").

94. In relation to the crime of premeditated murder, the Pre-Trial Chamber notes that Article 31 of the 1992 UNTAC Criminal Code provides for the offence of murder as follows:

> "1. Anyone who kills or attempts to kill another person after premeditating the crime, or by preparing an ambush, or who kills or attempts to kill another person in the course of theft or rape, is guilty of murder, and shall be liable to a punishment of imprisonment for a term of ten to twenty years."

95. The provisions of the 1956 Penal Code providing for premeditated murder do not differ in their letter or spirit from the 1992 UNTAC Criminal Code provisions. Premeditated murder is still punishable under the UNTAC Criminal Code although there are apparently different views on the possible sentencing range. Once again, applying Article 73 of the 1992 UNTAC Criminal Code, the Pre-Trial Chamber finds that it is possible to charge with the domestic crime of premeditated murder.

iv. The Factual Basis for the Domestic Crimes

96. The Pre-Trial Chamber is bound by the system of the Closing Order as far as the insertion of the domestic offences of torture and premeditated murder is concerned since any amendments to the Closing Order are limited by the scope of the Appeal and the grounds set out in the Appeal Brief. As the elements of the domestic crimes have been found to differ from those of the international crimes, the Pre-Trial Chamber will reason in its decision where a form of responsibility is not supported by sufficient evidence to indict the Charged Person.

97. The Pre-Trial Chamber can add the crimes of torture and premeditated murder under the 1956 Penal Code as far as the facts in the Closing Order that were part of the investigation are sufficient to do so. Since the Co-Investigating Judges did not reason their conclusion that "certain acts characterised by the judicial investigation also constitute the domestic offences", the Pre-Trial Chamber is required to examine whether the acts set out in the Closing Order are sufficient to send the Charged Person to trial in relation to these offences.

a. Torture

98. The Pre-Trial Chamber notes the following facts set out in the Closing Order:

(i) "S-21 became fully operational in October 1975" (para. 21) and was in operation until 6 January 1979 (para. 27).

(ii) "The original S-21 complex was located in Phnom Penh in Boeung Keng Kang 3 subdistrict, Chamkar Mon district. The detention and interrogation facilities were originally located in a block of houses on the corner of streets 163 and 360. In late

November 1975, S-21 moved to the National Police Headquarters on Street 51 (Rue Pasteur) near Central Market (Phsar Thmei), yet in January 1976, it moved back to its original location." (para. 26) "Finally, in April 1976, upon Duch's decision, the prisoners were moved to the premises of the Pohnea Yat Lycée, a high school located between streets 113, 131, 320, and 350. S-21 operated at this location, which is now the site of the Tuol Sleng Genocide Museum, until 6 January 1979." (para. 27)

(iii) In October 1975, Duch was appointed Deputy Secretary of S-21 and was in charge of the interrogation unit. (para. 21)

(iv) In March 1976, Duch was appointed Chairman and Secretary of S-21. He "continued personally to oversee the interrogation of the most important prisoners, and to be ultimately responsible for S-21." (para. 22)

(v) "The interrogation section was directly overseen by Duch, and was generally managed by MÂM Năi alias Chăn and by Pon." (para. 24)

(vi) "Duch selected his staff personally [...]." (para. 25) "Duch ran S-21 along hierarchical lines and established reporting systems at all levels to ensure his orders were carried out immediately and precisely." (para. 24)

(vii) "The primary role of S-21 was to implement '*[t]he Party political line regarding the enemy*' according to which prisoners '*absolutely had to be smashed*'. The term 'smash' was used and widely understood at the relevant time to mean 'kill'." (para. 31)

(viii) Duch's role as Chairman of S-21 "was to focus the office on smashing purported traitors within the ranks of the revolution itself. [...] As a general rule, high ranking enemies inside the Party, State, military or security apparatuses were sent to S-21 having been implicated via a process which consisted of obtaining confessions from others previously arrested." (para. 37)

(ix) "In addition to executing prisoners condemned in advance as traitors, an overriding purpose of S-21 was to extract confessions form the prisoners in order to uncover further networks of possible traitors. Duch stated that '*the content of the confessions was the most important work of S-21*'." (para. 43)

(x) "The majority of prisoners detained at S-21 were systematically interrogated. Interrogations were conducted by S-21 personnel who were organised by Duch and his deputy into various teams." (para. 79)

(xi) "[I]nterrogators took prisoners out of their cells handcuffed and blindfolded, and relocated them into the interrogation rooms. Prisoners would then typically have their legs shackled to the table and only then were their handcuffs removed to allow

questioning and confession writing." (para. 80) Duch himself interrogated prisoners. (para. 82)

(xii) Duch "set the rules concerning interrogation." (para. 98)

(xiii) Duch instructed his subordinates to "break [prisoners] by propaganda or break [them] by torture". The instructions were "[i]f Angkar instructs not to beat, absolutely do not beat. If the party orders us to beat, then we beat with mastery, beat them to talk, not to die, to escape, not to become so weak and feeble that they fall ill and we lose them." (para. 86)

(xiv) Duch taught interrogation techniques, including the use of torture to S-21 interrogators. (paras 86, 87, 95, 97 and 98)

(xv) Duch gave general instructions as well as specific orders to his subordinates to use torture when interrogating S-21 prisoners. (paras 85, 86, 87, 95, 96 and 99)

(xvi) Duch allowed the following techniques of torture to be used by interrogators: "beating, electrocution, placing a plastic bag over the head and pouring water into the nose." (para. 100)

(xvii) Other techniques also appear to have been used by the interrogators, including "puncturing or removing finger and toe-nails", forcing prisoners to eat excrement, using "cold water and fans", "removing the clothes of prisoners and then using electrical equipment to shock the genitals or ears of prisoners", "forcing the detainees to pay homage to images of dogs", "tak[ing] a detainee to a portico, suspend[ing] him with a cord, and plung[ing] his head into a full water jar". (para. 102)

(xviii) Duch exercised *de jure* and *de facto* effective control over his subordinates who committed the acts described in the paragraph mentioned above. In his position as a superior, he knew or had reason to know that his subordinates were about to commit or had committed these acts and failed to take the necessary and reasonable measures to prevent the criminal conduct of his subordinates or to punish them for this conduct. (para. 102)

(xix) "The gravity of the physical abuse described above led to death in certain cases. Duch acknowledged this to be the case, and stated that he organised a study session to remedy this situation. However, he also conceded that on 1 October 1976 he wrote a letter to a subordinate, PON, in which he instructed him to use torture. He said that if the torture resulted in the death of the detained person, Pon would not be considered responsible." (para. 104)

(xx) "The physical consequences of torture (*i.e.* lacerations, bleeding, bruises, unconsciousness and missing finger or toe nails) were visible [...]." (para. 88)

(xxi) The use of torture within S-21 was systematic as "'*anyone taken for interrogation mostly could not avoid torture*'." "The use of torture appears to have [been] applied uniformly to all detainees without regard to the reason for their arrest." (para. 85)

(xxii) At least 12,380 men, women and children, whose names are identified on the "Combined S-21 Prisoner List", were detained at Tuol Sleng (para. 47).

99. The Pre-Trial Chamber finds that there is a sufficient factual basis to indict the Charged Person under the forms of liability of planning, ordering, instigating and/or aiding and abetting, and superior responsibility, for acts of torture committed by his subordinates on S-21 detainees to obtain, under pain, information for the commission of other offences. These acts are legally characterised as constituting the crime of torture under Article 500 of the 1956 Penal Code, punishable under Article 3(new) of the ECCC Law.

100. 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 in 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.

101. The Pre-Trial Chamber finds no sufficient evidence in the Closing Order that torture was inflicted out of barbarity in order to include this element of the domestic crime in the charge.

b. Premeditated Murder

102. The Pre-Trial Chamber notes the following facts set out in the Closing Order:

(i) "The primary role of S-21 was to implement '*[t]he Party political line regarding the enemy*' according to which prisoners '*absolutely had to be smashed*'. The term 'smash' was used and widely understood at the relevant time to mean 'kill'. Every prisoner who arrived at S-21 was destined for execution. [...] [T]he policy at S-21 was that no prisoner could be released." (para. 31)

(ii) Duch's role as Chairman of S-21 "was to focus the office on smashing purported traitors within the ranks of the revolution itself. [...] As a general rule, high ranking enemies inside the Party, State, military or security apparatuses were sent to S-21 having been implicated via a process which consisted of obtaining confessions from others previously arrested. [...] [T]he policy of smashing enemies almost always extended to their families, including children." (para. 37) "The role of S-21 further extended to executing those in the revolutionary ranks who were accused of being influenced by or under the control of Vietnam due to their former or contemporaneous associations with the Vietnamese Communist Party. [...]

Similarly, as the conflict intensified, the numbers of Vietnamese civilians and soldiers arrested and sent to S-21 also grew." (para. 39)

(iii) "Duch [...] initially delegated responsibility for executions to Hor, who made all the necessary preparations upon his own initiative. However, following an incident where a prisoner was killed before the completion of his interrogation, SON Sen required Duch to sign off on every execution. Thereafter, Duch necessarily decided how long a prisoner would live, since he ordered their execution based on a personal determination of whether a prisoner had fully confessed. As there was no right to release, there was an implicit standing order from Duch, as Chairman, to kill prisoners according to the system created at S-21." (para. 107)

(iv) "[N]o one could be removed from S-21 without authorisation from Duch. [...] Duch planned and ordered the execution of prisoners by annotating the removal lists with instructions such as '*kâm*', a short form of '*kâmtech*', which means '*to smash*'." (para. 108)

(v) "[K]illing could be carried out on instructions [Duch] received and conveyed to his subordinates or [...] upon his unilateral decision after taking into account considerations such as over-crowding, lack of food, contagious illnesses or the fear of escapes." (para. 110)

(vi) "Generally, prisoners were killed shortly after completing their confessions. However, Duch [...] had the authority to delay the execution of certain skilled prisoners" so they could "work within the S-21 complex". "[H]owever, [...] they were all destined to be executed eventually." (para. 111)

(vii) "Initially, prisoners were executed and buried in and around the S-21 complex. At some time between 1976 and mid 1977, partly in order to avoid the risk of epidemic, Duch decided to relocate the execution site to Choeung Ek, located approximately 15 km Southwest of Phnom Penh in Kandal province, and now the site of a memorial. The execution site consisted of a wooden house where prisoners were held until just before their execution, and a large area that consisted of pits for executions. However, even after Choeung Ek became the main killing site, certain executions and burials took place at or near S-21." (para. 29)

Executions at Choeung Ek

(viii) "Prisoners were transported to Choeung Ek in trucks two to three times a month. [...] [T]hey were transported in two vehicles, each containing approximately 30 to 40 prisoners. [...] They were then taken to the waiting trucks, handcuffed and blindfolded. During transportation, two guards were positioned in the rear of the truck so prisoners could not jump from the vehicles." (para. 114)

(ix) "[T]hree to four guards were stationed at Choeung Ek. When joined by the transport guards, there were as many as ten guards present at an execution. There were three teams, the special unit, Peng's team, and Teng's team." (para. 115)

(x) "After arriving at Choeung Ek, a generator was switched on, and the prisoners were led to a house. The guards then took prisoners outside one at a time, telling them they were being transferred to a different house. HIM Huy stood outside and recorded the names of prisoners before taking them to the pits to be killed." (para. 116)

(xi) "[P]risoners were killed using steel clubs, cart axles, and water pipes to hit the base of their necks. Prisoners were then kicked into the pits, where their handcuffs were removed. Finally the guards either cut open their bellies or their throats. After the executions were complete, the guards covered the pits." (para. 117)

(xii) "Several large-scale executions [...] [took] place at Choeung Ek." "[N]umerous mass executions occurred in which [Duch] received and conveyed orders to execute without interrogation." (para. 118)

- "[O]n four separate occasions SON Sen and NUON Chea ordered [Duch] to send the majority of prisoners detained at S-21 to Choeung Ek to be executed. The purpose of these executions was to make room for a large influx of prisoners following mass arrests." (para. 118)
- Duch notably ordered a mass execution on 30 May 1978. (para. 118)
- "[I]n December 1978, about 300 prisoners from the East Zone, who had allegedly rebelled, were sent directly to Choeung Ek and executed." (para. 119)
- "[O]n 2 or 3 January 1979, NUON Chea ordered [Duch] to smash all prisoners at S-21. Around 200 persons were transported to Choeung Ek and killed. [...] [I]t was the last time a mass execution was ordered." (para. 119)

(xiii) Duch went to Choeung Ek at least one time. (para. 113)

(xiv) "[M]any thousands of persons, including men, women and children, were executed and buried at Choeung Ek." (para. 112)

Executions at S-21 or nearby

(xv) "[W]hile Choeung Ek became the main killing site, certain important persons, like KOY Thuon, VORN Vet, CHHAY Kim Hour, Nat, and foreigners, continued to be executed within S-21's grounds or nearby" (para. 120)

(xvi) "In 1978, four foreigners were burned to ashes using vehicle tires between Mao Tse Tong Boulevard and Boeung Tumpun." (para. 122)

(xvii) "[C]hildren were killed within the [S-21] compound. [...] [T]he children of prisoners were removed from their parents, killed and buried north of the prison. One [...]

method of killing involved dropping the children from the third floor of the complex in order to break their necks." (para. 127)

(xviii) Four combatants from a military unit designated YO8 were killed on 7 January 1979 by interrogator Nan by means of a bayonet. (para. 128)

(xix) At least a thousand S-21 prisoners were killed by having large quantities of blood withdrawn by medics. "[T]his occurred to 20 to 30 prisoners, every four or five days."[69] (para. 123) "The prisoners would die sometime thereafter and a vehicle would transport the bodies to Choeung Ek for disposal." (para. 124)

(xx) S-21 personnel performed medical experimentation on prisoners, such as autopsies practiced on living persons and medicine testing. "[R]esearch for poisons was carried out upon the orders of the Central Committee, more precisely upon those of Nuon Chea." Duch knew of this practice. (para. 70)

(xxi) S-21 detainees were fed starvation rations. "As a result of this, many of them suffered substantial weight loss and physical deterioration, which occasionally resulted in their death." (para. 67) "[S]tarving the prisoners was a deliberate policy of the [Communist Party of Kampuchea]." (para. 68)

(xxii) Many detainees who suffered from illness or injury where deprived of adequate medical care. "A basic medical service was provided by a team of three to five 'medics' who had not studied medicine and were responsible for treating the entire facility. Some were children, and they worked without the supervision of medical doctors." Prisoners who had received "intravenous fluids" in the evening were found dead the following morning. "Many in need of urgent medical attention were left unattended or given insufficient treatment. Medicine was in very short supply. Even when available, the medicine was locally produced by unskilled workers." (para. 69)

(xxiii) "The living conditions imposed at S-21 were calculated to bring about the deaths of detainees. These conditions included but were not limited to the deprival of access to adequate food and medical care." (para. 139)

(xxiv) "Over 12,380 detainees were executed at S-21." This includes the persons that were executed at Choeung Ek. (para. 107)

103. The Pre-Trial Chamber finds that there is a sufficient factual basis to indict the Charged Person under the forms of liability of planning, ordering, instigating and/or aiding and abetting, and superior responsibility, for the premeditated murders committed at S-21 (including Choeung Ek) by his subordinates. These facts are legally characterised as constituting the crime of premeditated murder under Articles 501 and 506 of the 1956 Penal Code, punishable under Article 3(new) of the ECCC Law.

[69] Some of these prisoners are identified in lists referred to in paragraph 123 of the Closing Order.

v. The Addition of the Domestic Offences to the Indictment

104. The crimes of torture and premeditated murder under the 1956 Penal Code were not amongst the legal offences which were mentioned by the Co-Investigating Judges to the Charged Person at the initial appearance or later.

105. The facts supporting the constitutive elements specific to the domestic crimes were included in the scope of the judicial investigation conducted by the Co-Investigating Judges as they were alleged in the Introductory Submission. In relation to the specific element of the domestic crime of torture – "inflict[ing] acts of torture to obtain, under pain, information for the commission of a felony or misdemeanour" – the Pre-Trial Chamber refers more specifically to paragraphs 52, 110, 112(g) and 113(a) of the Introductory Submission. As for the elements specific to the domestic crime of premeditated murder – an intent to kill and premeditation – the Pre-Trial Chamber refers to paragraphs 54, 55, 108 and 113(b) of the Introductory Submission.

106. The Internal Rules clearly envisage the possibility that the legal characterisation of the acts might change, even during the trial[70]. The addition of legal offences at this stage of the proceedings does not affect the right of the Charged Person to be informed of the charges provided for in Article 35(new) of the ECCC Law, as he will have the opportunity to present his defence on these specific offences during the trial[71].

107. The Pre-Trial Chamber therefore finds that the domestic crimes of torture and premeditated murder can be added to the Closing Order in accordance with the reasoning above.

VII. GROUND 2: FAILURE TO INCLUDE JOINT CRIMINAL ENTERPRISE AS A MODE OF LIABILITY

A. Submissions of the Parties

108. The Co-Prosecutors argue under their second ground of appeal that the Co-Investigating Judges committed an error of law when they failed to indict Duch for the commission of crimes through participation in a joint criminal enterprise even though such a mode of liability was fully disclosed by the material facts as found in the Closing Order.

109. The Co-Prosecutors submit as follows:

(i) The Co-Investigating Judges erred for two main reasons: (1) the three forms of liability characterised as ordering, instigating and planning are not broad enough to

[70] See notably Internal Rule 98(2) and the previous discussion on the standard of review.
[71] This conclusion is in accordance with the jurisprudence of the European Court of Human Rights: *Goujet v. France*, Application no. 61059/00, 24 April 2006, para. 30-31. *De Salavator Torres v. Spain*, Application no. 21525/93, 24 October 1996, para. 33.

cover the full criminality of Duch's actions, and (2) the two other forms of liability, aiding and abetting and superior responsibility, do not fully reflect the central criminal role that Duch had at S-21.

(ii) There are three forms of joint criminal enterprise as defined and applied by other international tribunals. With joint criminal enterprise liability, the accused can be convicted of all the crimes committed in furtherance of the joint criminal purpose. The theory more completely captures the reality of the commission of complex crimes involving numerous actors than other forms of liability.

(iii) For a mode of liability to be used by the ECCC, it must satisfy four conditions: (1) it must be provided for in the ECCC Law, either explicitly or implicitly; (2) it must have existed under customary international law at the relevant time; (3) the law providing for it must have been sufficiently accessible to the defendants at the relevant time; and (4) the defendants must have been able to foresee that they could be criminally liable for their actions. Joint criminal enterprise satisfies each of these conditions and is a valid mode of liability at the ECCC. Participation in a common criminal plan is a form of "committing" a crime and the inclusion of joint criminal enterprise within Article 29 of the ECCC Law is supported by the object and purpose of the Law. Prosecutions following the Second World War establish that participation in a common criminal purpose or plan was a valid mode of liability prior to the temporal jurisdiction of the ECCC. Using joint criminal enterprise as a mode of liability does not violate the principle of legality if the accused's crimes are atrocious in nature and there are judicial decisions, international instruments or domestic legislation that recognise a form of liability similar to joint criminal enterprise. It may be concluded that defendants before the ECCC had notice that participation in a joint criminal enterprise would entail criminal liability.

(iv) The Closing Order contains all the facts necessary to indict Duch for his participation in a joint criminal enterprise. The group of persons who participated in the joint criminal enterprise is described in paragraphs 20, 21 and 22 of the Closing Order and includes the members of the S-21 Committee. The facts in the Closing Order show that Duch participated at every stage of S-21's operations.

(v) In failing to charge commission via joint criminal enterprise, the Closing Order has limited the Trial Chamber's ability to hold Duch accountable for his actions. The totality of his criminal conduct is not reflected in the forms of liability included in the Closing Order, namely commission, planning, instigation, ordering, aiding and abetting, and superior responsibility.

110. Accordingly, the Co-Prosecutors request that the Closing Order be amended by replacing the existing paragraph 153 with a proposed paragraph set out in the Appeal Brief.

111. The Co-Lawyers do not specifically respond to the error of law argument in regard to joint criminal enterprise put forward by the Co-Prosecutors.

112. In their response to the *amicus curiae* briefs, the Co-Lawyers submit that the basis for joint criminal enterprise liability, and the reasons invoked by the Co-Prosecutors in their Appeal Brief for its inclusion in the Closing Order, are unfounded as Duch and his subordinates have clearly indicated to the Co-Investigating Judges the nature of their role and respective participation in the commission of crimes at S-21. The Co-Lawyers argue further that the *amicus* briefs reveal doubts concerning the possibility of applying the theory of joint criminal enterprise at the ECCC without violating the principle of *nullum crimen sine lege* and that the second and third categories are particularly controversial. Finally, the Co-Lawyers submit that should the Pre-Trial Chamber find the theory of joint criminal enterprise to be applicable at the ECCC, the question of Duch's responsibility under this mode of liability should be left to the trial stage.

B. Considerations

113. With reference to the requirements for an indictment[72], the Pre-Trial Chamber must examine the issue of joint criminal enterprise at this stage of the proceedings rather than leaving it open as a matter for the Trial Chamber.

114. On the basis of the arguments raised by the Co-Prosecutors, the Pre-Trial Chamber invited *amici curiae* to submit briefs so as to be better informed on the concept of joint criminal enterprise. The information received guided the Chamber towards a closer study of the scope of the investigation with respect to the various possible forms of liability. The Pre-Trial Chamber notes that the 1956 Penal Code recognises a distinction between co-perpetration and complicity[73]. It was observed in the *amicus* briefs that joint criminal enterprise is one possible mode of liability to describe a factual situation where crimes are

[72] See paras 45-50 above.

[73] Article 82 of the 1956 Penal Code provides (unofficial English translation derived from the French and Khmer versions of the Code): "Any person who wilfully participates, either directly or indirectly, in the perpetration of a felony or a misdemeanour shall be liable to the same penalty as the principal perpetrator. Direct participation constitutes co-perpetration whereas indirect participation constitutes complicity." Article 83 provides: "Indirect participation or complicity is only punishable if it is accomplished through instigation, directions, provision of means, or aiding or abetting." According to Article 145 (related to aggravating factors): "There is a plurality of participants where it is established that at least two persons mutually agree to commit a crime, either as co-perpetrators, or as accomplices by aiding or abetting." A distinction between principals, co-principals and accomplices is also found in Article 103 of the SOC (State of Cambodia) Law of Criminal Procedure of 8 March 1993.

committed jointly by two or more perpetrators[74]. The Pre-Trial Chamber finds this observation to be consistent with other publications on this issue. It is relevant to determining whether this mode of liability can be applied before the ECCC and influenced the study on the scope of the investigation.

115. According to the requirement in Internal Rule 67(4), a Closing Order must be reasoned[75]. The Pre-Trial Chamber notes that the Co-Investigating Judges failed to reason why the Co-Prosecutors' proposal to include the allegation of a joint criminal enterprise within S-21 was rejected. In addition, they did not explain the chosen characterisation of the facts in terms of the modes of liability.

116. In order to identify the factual basis for the Closing Order and whether joint criminal enterprise or comparable forms of responsibility were part of the investigation, the Pre-Trial Chamber has conducted an examination of the investigative proceedings in Case File 001.

i. The Introductory Submission

117. As noted above[76], Internal Rule 55(2) provides that the Co-Investigating Judges shall only investigate the facts set out in the Introductory or any Supplementary Submission. The Introductory Submission therefore provides the factual basis for any investigation into an alleged joint criminal enterprise.

118. At paragraphs 5 and 6 of the Introductory Submission, the Co-Prosecutors introduce the notion of a joint criminal enterprise:

> "A common criminal plan, or a joint criminal enterprise (JCE), came into existence on or before 17 April 1975 and continued at least until 6 January 1979.
>
> The object of this common criminal plan was the systematic persecution of specific groups within the Cambodian population, purportedly in order to establish a classless, atheistic and ethnically homogeneous society...through the commission of crimes punishable under Articles 3(new), 4, 5, 6 and 7 of the ECCC Law [...]."

119. The objects are expanded in paragraph 7 of the Introductory Submission. In paragraph 8, the participants in the joint criminal enterprise are identified:

> "Individuals who participated knowingly and wilfully in the JCE throughout its duration, or alternatively at different times in its duration, included but were not limited to, NUON Chea, IENG Sary, KHIEU Samphan, IENG Thirith and KANG Kek Iev (DUCH)

[74] Ambos Brief, sections I.3, II.2 and II.4. Cassese Brief, paras 29, 63-68, 75-80.
[75] See para. 38 above.
[76] See paras 35 and 36 above.

(hereinafter 'the suspects'). These individuals participated in the JCE as co-perpetrators, either directly or indirectly. They intended the criminal result, even if they did not physically perpetrate all crimes [...]."

120. The contribution of each of "the suspects" is set out in paragraph 10:

> "Each of the suspects, acting individually or with other named and unnamed co-perpetrators, contributed to the JCE using their *de jure* and *de facto* authority. The suspects knew about and exercised effective control over the crimes committed by their subordinates because a functioning civilian and military chain of command existed, reporting to the highest levels of administration and monitoring the work of all the lower levels of administration."

121. At paragraphs 49 to 55 inclusive, reference is made to "Phnom Penh - Office S-21". It is clear that the conduct at S-21 is included in the alleged joint criminal enterprise of which Duch was a member with the other "suspects" included in the Introductory Submission. Paragraphs 107 to 111 describe Duch's legal and factual authority within S-21 in the context of the hierarchical structure of command. Under the heading "participation and knowledge", it is alleged in paragraph 112 that:

> "DUCH as Chairman of S-21, commanded, directed and otherwise exercised effective control over the security and interrogation staff at S-21, who were involved in the perpetration of the crimes described [...]."

In paragraph 113, it is alleged that:

> "DUCH as Chairman of S-21, promoted, instigated, facilitated, encouraged and/or condoned the perpetration of the crimes described [...]. Either personally or through one of his staff, he attended meetings with the senior leaders of Democratic Kampuchea at which Democratic Kampuchea policy was discussed and plans made for the commission of further crimes."

ii. The Separation Order

122. On 19 September 2007, the Co-Investigating Judges made an order ("Separation Order"):

> "To separate the case file of Duch for those facts committed inside the framework of S-21 [...].

To announce that other facts specified in the Introductory Submission dated 18 July 2007 and those facts related to Duch or other persons mentioned in the above Introductory Submission will be investigated under the Case File Number 002/19-09-2007."[77]

123. The Separation Order states that certain acts in the Introductory Submission were committed outside the framework of S-21 while others occurred inside the framework of S-21. The acts outside the framework of S-21 "require further detailed investigations that cannot be separated from the investigation conducted on other persons named in the Introductory Submission [...]." Thus the joint criminal enterprise in which the "suspects" were allegedly involved was within the separated Case File Number 002/19-09-2007-ECCC/OCIJ ("Case File 002"). The Introductory Submission remained the basis for the investigation in both Case File 001 concerning the Charged Person Duch alone, and Case File 002 concerning the five "suspects".

iii. Conclusion of the Investigation in Case File 001

124. On 23 June 2008, the Co-Investigating Judges notified the Parties and their lawyers pursuant to Internal Rule 66(1) that they considered the investigation in respect of Case File 001 to be concluded.

125. The activities and membership of the "S-21 Committee" and the planning phase of the establishment of S-21 were investigated in Case File 001. At no point did the Co-Investigating Judges refer these facts to the Co-Prosecutors pursuant to Rule 55(3) as "new facts" related to joint criminal enterprise or other comparable forms of liability. There was consequently no Supplementary Submission concerning a joint criminal enterprise occurring within S-21, and no request for further investigation into this form of liability was initiated. Thus, although the facts as stated in the Closing Order reveal the possibility of a type of co-perpetration with respect to the acts committed within S-21, the Pre-Trial Chamber finds that joint criminal enterprise as a mode of liability was not specifically part of the investigation.

iv. The Final Submission

126. After the conclusion of the investigation in Case File 001, the Co-Prosecutors filed their Final Submission. The Final Submission of the Co-Prosecutors is a reasoned request either to indict the Charged Person or dismiss the case on the basis of the concluded investigation.

[77] Separation Order, 19 September 2007, D18, p. 2.

127. The Co-Prosecutors argue in their Final Submission that the evidence in the Case File and referred to in the "material facts" section of the Final Submission establishes that Duch committed the crimes described as a participant in a joint criminal enterprise[78].

128. Commencing at paragraph 241 of the Final Submission, the Co-Prosecutors discuss joint criminal enterprise liability as being applicable to Duch within S-21. At paragraphs 250 and 251, they specify the nature of the alleged joint criminal enterprise ("S-21 JCE"):

> "The JCE came into existence on 15 August 1975 when SON Sen instructed NATH and DUCH to set up S-21. The JCE existed through October 1975, when S-21 began its full-scale operations, to at least 7 January 1979 when the DK [Democratic Kampuchea] regime collapsed. The purpose of the JCE was the systematic arrest, detention, ill-treatment, interrogation, torture and execution of 'enemies' of the DK regime by committing the crimes described in this Final Submission. An organised system of repression existed at S-21 throughout the entirety of the duration of the JCE. All crimes occurring in S-21 and described in this Final Submission were within the purpose of this JCE.
>
> DUCH participated throughout the entire existence of the JCE, together with other participants in this JCE who themselves participated for various durations and who included the former Secretary of S-21 NATH, and the other members of the S-21 Committee, namely KHIM Vath alias HOR and HUY Sre as well as their subordinates."

129. In their response to the Final Submission, the Co-Lawyers for the Charged Person argue that "the Co-Prosecutors have included in the Final Submission facts which were not established during the investigation proceedings"[79], although this statement is not linked to the allegation of the S-21 JCE and the additional facts are not precisely identified. The Co-Lawyers do, however, challenge the extent of Duch's alleged knowledge of the extent of the S-21 criminal system[80].

v. The Factual Basis for the S-21 JCE

130. In their Appeal Brief the Co-Prosecutors argue:

> "The Indictment contains all the facts necessary to indict DUCH for his participation in a joint criminal enterprise at S-21. Consequently, the Co-Investigating Judges were required to indict DUCH for his participation in a JCE [...]. The Co-Prosecutors are not asking the

[78] Final Submission, para. 250.
[79] Response to the Final Submission, para. 6.
[80] Reference is made to an investigation hearing in which Duch 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." Response to the Final Submission, para. 159.

Pre-Trial Chamber to make any new factual findings because the elements of JCE are already plainly described in the factual findings of the Indictment."[81]

131. The Pre-Trial Chamber observes that the alleged S-21 JCE involving SON Sen, NATH, KHIM Vath alias HOR and HUY did not form part of the Introductory Submission. In the absence of a Supplementary Submission, the question is raised whether the S-21 JCE nevertheless formed part of the factual basis for the investigation. In order to answer this question, it is necessary to outline briefly the legal elements of joint criminal enterprise liability.

132. Three types of joint criminal enterprise are distinguished. These categories derive from the ICTY Appeals Chamber's interpretation of the post-Second World War jurisprudence on "common plan" liability. The basic form (JCE 1) exists where the participants act on the basis of a common design or enterprise, sharing the same intent to commit a crime[82]. The systematic form (JCE 2) exists where the participants are involved in a criminal plan that is implemented in an institutional framework such as an internment camp[83]. The extended form (JCE 3) exists where one of the participants engages in acts that go beyond the common plan but those acts constitute a natural and foreseeable consequence of the realisation of the common plan[84]. The objective elements (*actus reus*) are the same for all three forms of joint criminal enterprise, namely: (i) a common plan, (ii) involving a plurality of persons, and (iii) an individual contribution to the execution of the common plan[85]. The subjective element (*mens rea*) varies according to the form of joint criminal enterprise applied. JCE 1 requires a shared intent to perpetrate the crime[86]. JCE 2 requires personal knowledge of the system of ill-treatment[87]. JCE 3 requires an intention to participate in the criminal purpose and to contribute to the commission of a crime by the group, with responsibility arising for extraneous crimes where the participant could foresee their commission and willingly took the risk[88].

133. According to the Co-Prosecutors:

"The group of persons who participated in the JCE is described in paragraphs 20, 21 and 22 of the Indictment and includes the members of the S-21 Committee. As the Indictment

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[81] Appeal Brief, para. 59.
[82] *Almelo Trial*, British Military Court for the Trial of War Criminals, 24-26 November 1946.
[83] *Prosecutor v. Tadić*, IT-94-1-A, "Judgement", Appeals Chamber, 15 July 1999, para. 202 ("*Tadić* Appeals Judgement").
[84] *Prosecutor v. Kvočka, et al.*, IT-98-30/1-T, "Judgement", Trial Chamber I, 2 November 2001, para. 267 ("*Kvočka* Trial Judgement").
[85] *Tadić* Appeals Judgement, para. 227.
[86] *Tadić* Appeals Judgement, para. 228.
[87] *Tadić* Appeals Judgement, para. 228.
[88] *Tadić* Appeals Judgement, para. 228.

describes, S-21's undisputed aims were the identification of real or perceived 'enemies' and their subsequent unlawful arrest, detention, torture and execution. The common purpose of the S-21 Committee, including DUCH, was to achieve these aims by the commission of the crimes described in the Indictment. The Indictment found that 'due to his position of authority at S-21, DUCH knew the purpose that S-21 served.'"[89]

134. Examples of Duch's alleged individual contribution are provided. With respect to the mental element, reference is made to paragraph 131 of the Closing Order which concerns the common elements for crimes against humanity and states that, "Due to his position of authority at S-21, Duch knew the purpose that S-21 served and intended his actions to contribute to that purpose."

135. Viewed in the context of the elements of joint criminal enterprise liability, the Pre-Trial Chamber finds that the formulation of the S-21 JCE set out by the Co-Prosecutors in paragraph 72 of their Appeal Brief is vague, particularly as it concerns the pleading of the three different forms of joint criminal enterprise[90]. It is therefore difficult for the Chamber to identify what is alleged and the facts relied upon, with respect to the required legal elements for each form of joint criminal enterprise. Precision is necessary, in order to analyse whether the different forms of joint criminal enterprise may be applied and to distinguish the concept of joint criminal enterprise from other comparable forms of liability which may be applicable under Cambodian law.

136. The Pre-Trial Chamber notes that the significance and exclusivity of the notion of joint criminal enterprise, at least in its basic form[91], lies in its conceptual underpinning. This allows individual responsibility at the level of a co-perpetrator to be attributed to participants in collective criminal action even though they may be physically divorced from the actual offences[92]. Joint criminal enterprise liability has a subjective focus on the common purpose and the intent of the participant. Thus, if Duch were to be indicted as a participant in a joint criminal enterprise, the perception of the level and extent of his responsibility would differ from the description of his responsibility in the Closing Order. The Closing Order reflects the Introductory Submission which described Duch's personal

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[89] Appeal Brief, para. 60.
[90] The purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise must be pleaded and the indictment should clearly indicate which form of joint criminal enterprise is being alleged. *Prosecutor v. Kvočka*, ICTY IT-98-30/1-A, "Judgement", Appeals Chamber, 28 Feb 2005, para 28.
[91] See Ambos Brief, sections I.4 and I.5.
[92] Ambos Brief, section I.2: "The underlying rationale of a JCE, its core feature, is the combined, associated or common purpose of the participants in the enterprise. The common purpose is the collective element of the JCE doctrine which links the members among themselves and turns it into a theory of collective responsibility based on an institutional, participatory or a systematic model of imputation or attribution." See also Cassese Brief, paras 28, 30-32.

responsibility in terms of his role in the hierarchical structure of S-21. The Pre-Trial Chamber notes that the alleged S-21 JCE expands the type of conduct attributable to Duch.

137. The Pre-Trial Chamber finds that some of the elements of joint criminal enterprise liability as described in the S-21 JCE may be considered to have formed part of the investigation while other elements of the three forms of joint criminal enterprise were not investigated. It is not a mere question of characterisation as asserted by the Co-Prosecutors as the factual basis is not sufficient to allow such a characterisation.

vi. The Right to be Informed of the Charges

138. The procedure for judicial investigations at the ECCC set out in the Internal Rules is designed to ensure fairness to the Charged Person in terms of notice of the scope and nature of the acts under investigation for which he may be indicted. The Pre-Trial Chamber notes that the Charged Person has the right to be informed of the charges at the investigative stage to such an extent that he is able to exercise the rights accorded to him during the investigation, including the right to request investigative action pursuant to Internal Rule 58(6)[93].

139. Internal Rule 21(1)(d) provides:

> "Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her [...]."[94]

140. Rule 21(1)(d) is deemed to apply from the time of the arrest and, thus, at the investigation stage as reflected in Internal Rule 51(1):

> "For the needs of the inquiry, the Co-Prosecutors may order the Judicial Police to take into police custody a person suspected of having participated in a crime within the jurisdiction of the ECCC as a perpetrator or accomplice. Such a person shall be informed of the reasons for the custody and of his or her rights under Rule21(1)(d)."

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[93] Under Internal Rule 58(6), "the Charged Person may request the Co-Investigating Judges to interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf" at any time during the investigation.

[94] The wording of Rule 21(1)(d) is similar to the wording of Article 9(2) of the International Covenant on Civil and Political Rights (ICCPR) ("Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him") and Article 5(2) of the European Convention on Human Rights ("Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him"). In the case of *G., S. and M. v. Austria*, 1983, p. 191, the European Commission of Human Rights found: "Unlike Article 6 paragraph 3(a), which envisages the provision of 'detailed information', Article 5, paragraph 2 does not require the disclosure of the complete case file. However, sufficient information must be provided to facilitate the pursuit of the remedy envisaged by Article 5, paragraph 4 [concerning lawfulness of detention]."

141. The Charged Person was not informed of the allegation related to his participation in the S-21 JCE prior to the Final Submission. The S-21 JCE did not form part of the factual basis for the investigation and for this reason the Pre-Trial Chamber will not add it to the Closing Order at this stage.

142. In view of the Pre-Trial Chamber's reasoning and conclusion, it is not necessary to determine the question of the customary international law status of joint criminal enterprise liability at the time of the alleged offences. It is similarly not necessary to determine the applicability of joint criminal enterprise liability, as compared to other forms of liability under Cambodian law, before the ECCC.

VIII. PROVISIONAL DETENTION

143. In accordance with Internal Rule 68, the Pre-Trial Chamber must decide whether the provisional detention of the Charged Person should be continued until he is brought before the Trial Chamber.

144. The Charged Person was provisionally detained from 31 July 2007 by an order of the Co-Investigating Judges under Internal Rule 63[95]. This order was examined in an appeal by the Charged Person before the Pre-Trial Chamber. On 3 December 2007, the appeal was dismissed with substituted reasoning[96]. This reasoning was applied by the Co-Investigating Judges when they ordered the continuation of the provisional detention on 28 July 2008[97].

145. In the Closing Order, the Co-Investigating Judges ordered the continuation of the provisional detention referring to the grounds mentioned in the Pre-Trial Chamber's decision, with the exception of the two following grounds:
- that the provisional detention is necessary to prevent the Charged Person from exerting pressure on any witnesses or victims or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC, and
- the need to preserve evidence or prevent the destruction of any evidence.

146. The Pre-Trial Chamber finds that as the investigation before the Co-Investigating Judges has ended, all the available evidence has been part of the investigation. The grounds related to the witnesses and victims and the preservation of evidence are therefore no longer relevant as possible grounds to consider ordering provisional detention. The Pre-Trial Chamber

[95] Order of Provisional Detention, 31 July 2007, C3.
[96] Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "DUCH", 3 December 2007, C5/45.
[97] Order on Extension of Provisional Detention, 28 July 2008, C3/II.

agrees with the Co-Investigating Judges that the other three remaining grounds from its previous decision still exist:

- to ensure the presence of the Charged Person during the proceedings,
- to protect the security of the Charged Person, and
- to preserve public order.

147. The Pre-Trial Chamber will order on the basis of these grounds that the provisional detention of the Charged Person shall continue until he appears before the Trial Chamber.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

1) The Appeal is admissible in its form;

2) The first ground of appeal is granted in part;

3) The Closing Order is amended with the additional reasoning of the Pre-Trial Chamber.

Paragraph 152 of the Closing Order is ordered to be replaced by the following:

> Certain acts characterised by the judicial investigation also constitute the domestic offences of inflicting acts of torture to obtain, under pain, information for the commission of a felony or misdemeanour and premeditated murder. These offences are defined under Articles 500, 501 and 506 of the 1956 Penal Code.

Paragraph 153 of the Closing Order is ordered to be amended by adding the following:

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

Part IV of the Closing Order is ordered to be amended by adding the following:

> 3. VIOLATIONS OF THE 1956 PENAL CODE
> - premeditated murder (Articles 501 and 506)
> - torture (Article 500)
>
> Offences defined and punishable under Articles 3(new), 29(new) and 39(new) of the 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.

4) The Appeal is otherwise dismissed;

5) KAING Guek Eav alias DUCH is indicted and ordered to be sent for trial as provided in the Closing Order which shall be read in conjunction with this decision.

6) The provisional detention of KAING Guek Eav alias DUCH is ordered to continue on the grounds reasoned in this decision until he is brought before the Trial Chamber.

In accordance with Rule 77(13) of the Internal Rules, this decision is not subject to appeal.

GIVEN IN PUBLIC BY the Pre-Trial Chamber, in the presence of the Charged Person and his Co-Lawyer,

Phnom Penh, 5 December 2008

Pre-Trial Chamber **President**

Rowan DOWNING **PEN Pichsaly** ~~**Katinka LAHUIS**~~ **HUOT Vuthy** **PRAK Kimsan**

Greffiers

SAR Chanrath **Anne-Marie BURNS**