

Closing In On the Khmer Rouge: The Closing Order in Case 002 Before the Extraordinary Chambers in the Courts of Cambodia

By [Beth Van Schaack](#)

I. Introduction



On September 15, 2010, the Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (ECCC) entered the Closing Order for Case 002,^[1] indicting four defendants for international crimes allegedly committed during the Khmer Rouge era (1975-1979).^[2] The four defendants, in pre-trial detention since 2007, are the surviving members of the Khmer Rouge Central Committee and/or Standing Committee.^[3]

The Closing Order follows on the heels of the first judgment issued by the ECCC on July 26, 2010, against Kaing Guek Eav, a.k.a. Duch, the head of S-21 prison.^[4] The Closing Order authorizes the Co-Prosecutors to proceed against the four defendants on charges of crimes against humanity, war crimes, genocide, and offenses under the 1956 Cambodia Criminal Code. The case will cover much more ground than the *Duch* case, which was limited to crimes committed in the infamous S-21 detention center, a.k.a. Toul Sleng. In light of the enormity of the crimes committed by the Khmer Rouge, the Co-Prosecutors in their 2007 Introductory Submission directed the Co-Investigating Judges (CIJs) to focus their investigation on specific crimes in specific regions. The overarching theory of the cases is that the Khmer Rouge used criminal means to implement its revolutionary project.^[5] The CIJs concluded this investigation on January 14, 2010,^[6] resulting in the 739-page Closing Order that is the subject of this *Insight*. The trial is anticipated to begin in January 2011.

II. Crimes Charged

The ECCC Internal Rules establish that the standard of proof required to send a person to trial is “sufficient evidence against the Charged Person” with respect to the charged crimes.^[7] In practice, this assessment is left to the “unfettered discretion” of the investigating judges. The CIJs determined that the defendants could be charged with all crimes within the subject matter jurisdiction of the ECCC under a host of forms of responsibility.

1. Crimes Against Humanity

Crimes against humanity are a constellation of actions made criminal under international law when committed within the context of a widespread or systematic attack against the civilian population, with knowledge of that attack.^[8] The text of the ECCC Statute departs from customary international law definitions by including the requirement that the attack must be launched on “national, political, ethnical [sic], racial or religious grounds”^[9] According to the Closing Order, the predicate attack against the civilian population consisted of the imposition of “dictatorial control over the entire population of Cambodia, in line with the [Khmer Rouge’s] objective to bring about rapid socialist revolution in Cambodia and to eliminate both internal and external enemies.”^[10] The CIJs invoked crimes against humanity as an umbrella charge to address: the repeated movements of the civilian population throughout the country; the widespread imposition of harsh collective living conditions; the use of forced labor; the staging of purges of real or perceived subversive elements; and the imposition of forced marriages. The Closing Order notes that:

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Whilst the existence of an ideological project cannot, as such, be considered to be a legal element of crimes against humanity, the implementation of the plan adopted, by criminal means in the case in point by the [Khmer Rouge] authorities demonstrates the widespread and systematic character of the attack.^[11]

The implementation of this plan required a high degree of central planning that was “dictated from above and reported on from below”^[12] The Closing Order avers that “the widespread nature of the attack was known both to the Charged Persons and the direct perpetrators of the crime, in particular as a result of the regular issuance of directives to Party cadres and the personnel in charge of implementing the policy.”^[13]

The CIJs determined that the defendants should be prosecuted for the following crimes against humanity: extermination, murder, enslavement, deportation, imprisonment, torture, persecution, rape, and other inhumane acts. The murder and extermination charges stem from purges of Khmer Rouge enemies (such as members of the prior regime) and killings committed at security centers and execution sites. Starting in 1977, the killing of members of the Vietnamese and Cham communities reached a scale that qualifies as extermination.^[14] In addition, the CIJs implied that the charged persons could be convicted for extermination for the high numbers of deaths resulting from the large-scale population movements, as well as the conditions of life in the security centers. Enslavement, imprisonment, and torture charges stem mainly from abuses at worksites, cooperatives, and security centers where Khmer Rouge staff exercised “total control and all of the powers attaching to the right of ownership over the persons placed there”^[15] The infringements on freedom in the worksites and cooperatives were also deemed to constitute imprisonment. Deportation charges concern persons of Vietnamese descent forced to leave Cambodia after the Khmer Rouge came to power.

In addition, the CIJs found that persecution on political grounds (against intellectuals and individuals associated with the prior regime), religious grounds (against members of the Cham community and adherents to Buddhism), and racial grounds (against people of Vietnamese descent) amounted to grave violations of fundamental rights recognized under customary or conventional international law. The charge alleging the commission of other inhumane acts through attacks on human dignity encompasses everything from deprivations of food, shelter, medical care, and sanitation during the population movements to the condition of life at worksites. The rape charges stem from the arrangement of forced marriages and forced sexual relations, which are also charged as other inhumane acts.

2. War Crimes

The CIJs also charged the defendants with the following grave breaches of the Geneva Conventions: willful killing, torture, inhumane treatment, willfully causing great suffering or serious injury to body or health, willfully depriving a prisoner of war or civilian of a fair trial, and unlawful deportation or confinement of civilians. Many of the predicate acts of the charged war crimes overlap with the acts charged as crimes against humanity. The war crimes charges also encompass crimes committed against Vietnamese citizens and civilian property in connection with incursion into Vietnam by the Revolutionary Army of Kampuchea.

The war crimes charges depend on the existence of a state of armed conflict and a nexus between the charged acts and the armed conflict. The CIJs averred that immediately upon the entry into Phnom Penh of the Khmer Rouge’s Liberation Forces, a *de facto* state of international armed conflict came into existence between Cambodia and the Socialist Republic of Vietnam, although it was not officially recognized until December 31, 1977. This conflict continued until the capture of Phnom Penh on January 7, 1979. These allegations mirror the findings of the Trial Chamber in the *Duch* judgment that the border skirmishes and cross-border incursions between Cambodia and Vietnam in 1975-1979 constituted an international armed conflict.^[16]

3. Genocide

The question of whether the Khmer Rouge committed genocide has been the subject of intense discussion inside and outside of Cambodia. Indeed,

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Cambodia often bears the sad distinction of being considered the first post-Holocaust genocide, and yet much of the violence committed by the Khmer Rouge may not constitute genocide under the 1948 Genocide Convention,^[17] primarily because the perpetrator group and the victim group shared the same nationality, ethnicity, race, and religion. Instead, victims appear to have been targeted on the basis of what can be objectively assessed as their membership in an undesirable political, social, or economic group. After great debate and compromise, the drafters of the Genocide Convention purposefully denied protection to political, social, economic, and other unenumerated groups.^[18] Although theoretical arguments exist that attacks on such groups could be brought within the terms of the Genocide Convention, the CIJs took a conventional approach to genocide and charged only acts committed against the Cham and Vietnamese minorities.

According to the CIJs, an objective of the revolution “was to establish an atheistic and homogenous society without class divisions, abolishing all ethnic, national, religious, racial, class and cultural differences.”^[19] The CIJs identified documents in evidence that suggested that the *de facto* elimination or assimilation of all national minorities was eventually accomplished. The Khmer Rouge cadre forcibly displaced members of Cham communities and punished manifestations of Cham culture. This persecution was followed by mass executions beginning in 1977 and resulted in the death of 36% of the Cham population according to one demographic report in the record. Individuals of Vietnamese descent—whom the CIJs identified as an ethnic, national, or racial group—were subject to expulsion. Eventually, the Khmer Rouge issued a call in *Revolutionary Flag* magazine and through the cadre education program to kill all remaining members of the Vietnamese community. Although there is no numeric threshold of victims necessary to establish genocide, the CIJs concluded that evidence in the Case File showed that the portion of the Vietnamese population killed is strong evidence of the intent to destroy the group, in whole or in part. Indeed, according to a Demographic Expert Report, almost all the Vietnamese people remaining in Cambodia during the Khmer Rouge regime were killed.

4. Domestic Crimes

Like the statutes of several hybrid international tribunals, the ECCC Statute allows for the prosecution of domestic crimes alongside international crimes. In this case, such charges may be brought pursuant to the 1956 Cambodian Penal Code, which was never abrogated by the Khmer Rouge. In the *Duch* case, the CIJs originally declined to issue charges under domestic law on the theory that such crimes should be charged according to their highest legal classification.^[20] On appeal from the Co-Prosecutors, the Pre-Trial Chamber ruled that cumulative charging was both permissible and desirable and added the domestic crimes of torture and murder to Duch’s Closing Order.^[21] At trial, however, the Trial Chamber ultimately issued a fractured ruling on whether the applicable statute of limitations barred prosecution of such crimes and so was unable to determine the guilt or innocence of Duch on these counts.^[22] In Case 002, the CIJs decided to charge the defendants with murder, torture, and religious persecution and leave to the Trial Chamber the determination of the validity of the charges.

5. Theories of Responsibility

The Closing Order alleges that all of the modes of criminal responsibility set out in the ECCC Law were part of international law during the Khmer Rouge era, including joint criminal enterprise (JCE).^[23] Indeed, the basic form of JCE frames the entire Closing Order. According to the CIJs, the common purpose of the Khmer Rouge leadership was to bring about a “rapid socialist revolution in Cambodia through a ‘great leap forward’ and defend the Party against internal and external enemies, by whatever means necessary.”^[24] As detailed in the Closing Order, the Charged Persons and others implemented this common purpose through the multitude of actions and crimes. In addition, the Closing Order charges the defendants with planning, instigating, aiding and abetting genocide, war crimes, and crimes against humanity. In the alternative, Nuon, Sary, and Samphan are charged with superior responsibility for these crimes; the CIJs, however, determined that there is insufficient evidence that Thirith had effective control over the perpetrators of crimes to be held responsible for those crimes in her capacity as a superior.

III. Conclusion

There is no question that these defendants were high-level figures within the Khmer Rouge, responsible for launching a radical and ultimately disastrous revolutionary program. Case 002 will determine the extent to which they can be held responsible for the crimes committed in connection with implementing this project throughout the country given that mid-level cadre may have had considerable discretion in carrying out their mandate. To date, all these defendants have either denied knowledge of or involvement in abuses by their subordinates or laid responsibility at the feet of their dead compatriots, particularly Pol Pot.

Now that the Closing Order for Case 002 has been issued, the Co-Investigators can turn their attention to Cases 003 and 004, which will likely encompass five lower-level defendants. The identities of these individuals have not been revealed, but the prospect of additional indictments has not sat well with Hun Sen, Cambodia's Prime Minister, who would like Case 002 to be the ECCC's swan song. Indeed, the decision to move forward with additional cases cleaved the hybrid tribunal along national lines, with the Cambodian Co-Prosecutor and CIJ opposed and their foreign counterparts in favor. It took a ruling from the Pre-Trial Chamber to force these cases forward.^[25] While the *Duch* case proceeded relatively smoothly, Case 002 will no doubt present new challenges to the ECCC in light of its increased complexity and the thousands of civil parties slated to participate.

About the Author

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Endnotes

[1] Case File No. 002/19-09-2007-ECCC-OCIJ, Closing Order (Sept. 15, 2010), *available at* <http://www.eccc.gov.kh/english/cabinet/courtDoc/740/D427Eng.pdf> [hereinafter Closing Order 002].

[2] The investigative judge model is largely based on a civil law process. For details on the procedure of the ECCC, see ECCC, *Office of the Co-Investigating Judges*, http://www.eccc.gov.kh/english/investigating_judges.aspx.

[3] The defendants are Ieng Sary (former Deputy Prime Minister for Foreign Affairs), Khieu Samphan (former Chair of the State Presidium), and Nuon Chea (former Chair of the People's Representative Assembly and the Khmer Rouge's chief ideologue). Ieng Thirith (former Minister of Social Affairs and Ieng Sary's wife) is also joined as a co-defendant.

[4] The ECCC convicted Duch and sentenced him to thirty-five years' imprisonment on war crimes and crimes against humanity charges. Case File No. 001/18-07-2007/ECCC/TC, Judgement, ¶ 679 (July 26, 2010), *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/635/20100726_Judgement_Case_001_ENG_PUBLIC.pdf [hereinafter Duch Judgment].

[5] Closing Order 002, *supra* note 1, ¶ 1353.

[6] Case File No. 002/19-09-2007-ECCC-OCIJ, Notice of Conclusion of Judicial Investigation (Jan. 14, 2010), *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/513/D317_EN.pdf.

[7] Rule 67(3)(c), ECCC, Internal Rule (rev. 6) (Sept. 17, 2010).

[8] Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement, ¶ 544 (Jan. 14, 2000), *available at* <http://www.unhcr.org/refworld/docid/40276c634.html>.

[9] ECCC Law art. 5.

[10] Closing Order 002, *supra* note 1, ¶ 1351.

[11] *Id.* ¶ 1357.

[12] *Id.* ¶ 1360.

[13] *Id.* ¶ 1371.

[14] *Id.* ¶ 1386.

[15] *Id.* ¶ 1392.

[16] Duch Judgment, *supra* note 4, ¶¶ 423-24.

[17] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

[18] See generally Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259 (1997).

[19] Closing Order, *supra* note 1, ¶ 207.

[20] Case No. 001/18-07-2007-ECCC-OCIJ, Closing Order Indicting Kaing Guek Eav alias Duch, ¶ 152 (Aug. 8, 2008), *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/115/Closing_order_indicting_Kaing_Guek_Eav_ENG.pdf.

[21] See Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias "Duch", ¶ 41 (Dec. 5, 2008), *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/198/D99_3_42_EN.pdf.

[22] Case No. 001/18-07-2007/ECCC/TC, Decision on the Defense Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, ¶¶ 14, 56 (July 26, 2010), *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/638/E187_EN.pdf.

[23] Responding to a challenge as to the cognizability of JCE liability before the ECCC, the Pre-Trial Chamber ruled that the first two forms were sufficiently established under international law in 1975, but that the form allowing for liability for unintended but foreseeable crimes was not. Case File No. 002/19-09/2007-ECCC/OCIJ (PTC38), Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE) (May 20, 2010), *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/605/D97_15_9_EN.pdf.

[24] Closing Order 002, *supra* note 1, ¶ 156.

[25] See Neha Jain, *The Khmer Rouge Tribunal Paves the Way for Additional Investigations*, 13(23) ASIL INSIGHT (Dec. 2, 2009), <http://www.asil.org/insights091202.cfm>.