

November 27, 2009

DUCH SEEKS AN ACQUITTAL AND IMMEDIATE RELEASE

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Cambodian Defense Counsel Kar Savuth delivers his rebuttal

The final day of the closing arguments in the trial of Kaing Guek Eav (alias Duch) before the Extraordinary Chambers in the Courts of Cambodia (ECCC) was a combative and surprising end to this historic trial held three decades after the atrocity crimes of the Pol Pot era. On this day, Duch's admitted guilt was transformed into a request for acquittal, and the expectation of his incarceration for the crimes committed at S-21 was repulsed with his demand to be released so that he might walk a free man again. The civil party victims and hundreds of Cambodians sitting in the public gallery witnessed an astonishing display of hubris and arrogance that may reveal itself as a cynically smart defense strategy some day, but appeared almost obscene as a direct assault on the entire purpose of international justice and the preservation of memory.

International Co-Prosecutor William Smith's Rebuttal

Rebuttals continued today with International Co-Prosecutor William Smith immediately launching into a counter-attack against the co-defense counsel on several levels. He took great exception to defense counsel's allegations that the prosecution was "using untruths" in its case against Duch. He pointed the judges to all of the prosecution's submissions, including the 160-page final written submission with its 1,000 footnotes. "Look at the evidence rather than the rhetoric," Smith counseled. He had acknowledged the limited cooperation of Duch on page 6 of his final brief, including that Duch had been generally cooperative and apologetic and that such conduct should be a mitigating factor in the sentencing. The defense counsel's accusation that there had been no such acknowledgment "is an untruth and completely inaccurate."

Smith addressed the judges: “You have been grossly misled by defense counsel. Their brief has nothing addressing mitigating circumstances. Throughout this trial and the briefing for it, defense counsel have accepted that Duch will [essentially] plead guilty. Certainly not acquittal! But they asked for acquittal yesterday based on Duch’s cooperation with authorities. This needs to be rectified. The defense is leaving its client behind and that’s improper conduct. If the accused has instructed defense counsel to seek an acquittal, then he should benefit from no mitigating factors on his sentence.”

Yet Smith pondered a different scenario. “I have a feeling that is not the case. I believe counsel have acted without instructions from their client. The judges should solve the problem now, today, or else the accused will be shortchanged or he will appeal the judgment and say his counsel did not act on his instructions and then we will go through this all over again....What has Duch asked for—a guilty plea or an acquittal? Answering that question would avoid an appeal he might raise in the future.”

The next step was to try to unpackage the substance of Duch’s acquittal submission, if that indeed is what he has done. The defense, Smith said, claims that Duch benefits from an amnesty, does not fall under the jurisdiction of national crimes, is free of any evidence of grave breaches of the Geneva Conventions, and enjoys a full defense because he obeyed superior orders. International defense counsel François Roux admitted that things had changed on Thursday and that his client was pleading “not guilty,” and then he sought mitigation! What seems clear is that they were asking for an acquittal, but were counsel acting on instructions after months of representations of expression of guilt for the crimes of S-21? “This would be unacceptable in any court,” Smith protested.

Smith then addressed some of the particular points raised by defense counsel the day before. He said that the 1994 amnesty law did not apply as the ECCC Law effectively withdrew it and even if it had not done so, the amnesty law still does not apply to this defendant. Further, defense counsel’s sudden submission of this argument is 1.5 years late, as it should have been filed in accordance with the procedures set forth in Internal Rule 89. In addition, Article 29 of the ECCC Law clearly states that superior orders are no defense and that reflects well-established international jurisprudence on crimes against humanity and war crimes.

Karim Khan Intervenes

After Smith sat down, Civil Party Group I lawyer Karim A.A. Khan jumped up and asked the judges to act upon Smith’s request for instructions from Duch as to which plea he seeks to enter. They should ask Duch immediately so that the co-prosecutors can react to whatever Duch’s instructions prove to be. He was met with stony silence from the bench and Cambodian co-prosecutor Chea Leang was invited to continue the prosecution’s rebuttal statement. Khan sat upright for several minutes awaiting some response to his request, but that would not come until later in the morning’s proceedings.

Cambodian Co-Prosecutor Chea Leang's Rebuttal

Chea Leang opened by saying that the defense should not be seeking revenge, but justice in its task before the court. "Did crimes exist at S-21, and who is responsible for them?" The defense failed to bring forward exculpatory evidence regarding its client and those crimes. She repeated Smith's point: "Is it the defense counsels' request to reduce Duch's sentence or to acquit him?" She said the time had already elapsed to raise the issues presented by the defense counsel yesterday. Chea Leang argued that Duch indeed is among those "most responsible" for the crimes falling within the jurisdiction of the court and that the extension of the statute of limitations for offenses under the 1956 Penal Code was entirely legitimate. This is because the crimes of homicide and torture under the 1956 Penal Code clearly existed at the time of S-21. The principle of legality thus was not violated by act of the National Assembly to extend the statute of limitations for such crimes an additional 30 years. In fact, the Constitutional Council had examined the issue in 2001 and rendered two decisions that validated the extension of the statute of limitations, and there is no appeal from the Council's final decision. The crimes themselves were not altered in any way. Enforcement of the ECCC Law does this violate the principle of non-retroactivity. Duch should have known that the murder and torture of more than 12,000 detainees were criminal acts. In fact, he made clear in earlier testimony that he knew the illegality of the regime. Finally, the Pre-Trial Chamber had already ruled on the inclusion of murder and torture under the 1956 Penal Code in Article 3 of the ECCC Law.

Chea Leang described as making no sense the defense counsel's major argument that Duch was being made a scapegoat for the crimes of others. She cited the *Lubanga* trial at the International Criminal Court. When Lubanga surrendered to the ICC, he also was accused of being a scapegoat defendant, a charge quickly rebutted there. Here, the Trial Chamber only looks at the facts of S-21 and not all crimes committed in Democratic Kampuchea. The crimes of S-21 have been well listed, she said, and substantiated by ample evidence. In fact, "he already plead guilty for the crimes!"

Duch was among the most senior and responsible people in the Pol Pot regime, Chea Leang continued. He was responsible for torture and executions. S-21 was the main security prison in the entire country and it operated with direct connection to the Standing Committee. The aim of S-21 was to purge enemies of the regime, the internal staff and members of the Communist Party of Kampuchea, through arrest, detention, torture, and death of the detainees. Duch ordered arrests and executions. He had the authority to make arrests, which he carried out in person at times. He received prisoners from all regime ministries and used great skill at arresting individuals. "Duch was the real criminal," Chea Leang said. "*He* was behind the crimes. *He* was the secretary of S-21 and guided the whole function of the center. *He* was the most senior among others 'most responsible.'"

Chea Leang continued that Duch knew of the existence of an armed conflict with Vietnam prior to 15 August 1977. Duch knew that Son Sen had to go to the battlefield prior to

that date. In fact, Son Sen briefed Duch about the conflict. Also, through arrests of Vietnamese and their interrogation he would have become aware of the conflict.

Duch was not genuine in his expression of remorse, she said. But he cooperated with the Trial Chamber and made statements that he is responsible for all crimes in both the legal and emotional context. If Duch would only keep cooperating and expressing genuine remorse, the victims probably would accept his apologies. But that had not happened.

Smith Rises Again

William Smith rose again to deliver the final component of the co-prosecutors' rebuttal. He returned to the vexing issue of the day. "The defense seeks an acquittal. If Duch is not acquitted, then they want a penalty ranging from 17 to 20 years. Bearing in mind the huge scale of crimes, the defense strategy represents completely and utterly inadequate responsibility for the crimes. It does not reflect what international law requires for crimes of such large magnitude."

Smith then sought to distinguish the trial of Dragan Obrenović before the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Duch trial, in response to International defense counsel Roux's efforts to draw a useful comparison from it the day before. "I worked there [at the ICTY]," Smith reminded everyone. "Obrenović is completely different from the case against the accused. Obrenović was a military officer of good character before the war. Duch had been at his business [of torture and executions] for years. He said as early as 1971, 'I cannot stand duplicity and I beat them to death.' In contrast Obrenović acted over a three-day period in 1995 at Srebrenica. He essentially played a passive role in allowing his men to be part of an operation of mass murder. But when the ICTY investigation began, he cooperated fully, allowing investigators into his office. For Duch, the crimes at S-21 last for 3.5 years with more than 12,000 deaths. He cannot be compared at all to Obrenović. Rather, this Trial Chamber should give Duch triple the sentence Obrenović received!"

As for the Albert Speer defense delivered by Roux on Thursday, Smith said that Duch loyally implemented the Pol Pot regime's policies. Speer was quite different. He had a conscience and actually ordered people not to commit these types of crimes. Speer was one of the few men to tell Hitler that his regime was ending. He deliberately sabotaged the government at great personal risk. Duch knew that 90 percent of his victims were innocent. Duch admitted to his guilt but did not provide evidence that he avoided orders. Was he a small cog? Did he have to commit all the crimes? Could he have minimized the pain and suffering of his victims? Duch testified that he trained interrogators and dared them to be cruel. The terror he inflicted at S-21 multiplied throughout Cambodian society with the names he extracted in the interrogations, which led to more arrests and more torture and more executions.

Smith said Duch was asked, are you the man who implemented the trust of your superiors? He said, "Yes." Smith noted that the co-prosecutors gave Duch the opportunity two days ago to really apologize. Apart from seeking acquittal, he has had his international counsel

say he was the small cog in the machine. But it was Duch who proposed torture and proposed arrests to his superiors. He chose not to take the opportunity to back off. But what really undermines his case, Smith contended, was his close and adulatory relationship with Son Sen. Duch told the court, “This is the question I have been waiting for. I had the utmost respect and faithfulness in Son Sen.” Son Sen brought him up through M-13 and S-21. And Duch stayed with him for 15 years after the collapse of the Pol Pot regime.

Smith uncharacteristically became agitated. “What?! He’s got to be joking. If not, that proves that this is just a complete lie. He comes to court but he is not facing up to what he was! Maybe in a final statement, he will turn to the civil parties and say, ‘I believed in the CPK; I believed it was a means to an end.’ How can you be proud of a boss who told you to torture and kill for years?!”

Smith continued, “This case is about 12,000 people brutally tortured and murdered. It cannot go to a light sentence. You must give him a 40-year sentence.” He noted the wishes of the civil parties for a life sentence. He explained that the court must reduce the sentence due to Duch’s prior unlawful detention in the military court. It must be a sentence the court can be proud of. Smith concluded, “In respect for the victims, for the Cambodian people, and for no peace without justice, remember the victims and send a strong message to Cambodia.” Smith then sat down.

The Trial Chamber president, Nil Nonn, referenced Smith’s request for clarification of the defense plea and whether defense counsel were acting on the defendant’s instructions. He asked the accused whether he wishes to make final remarks and if so, the court would reserve time for him. Since the chamber was not yet clear about the inconsistent defense counsel statements, the judges expect that the matter be clarified in the defense rebuttal.

Cambodian Defense Counsel Kar Savuth’s Rebuttal

Cambodian defense counsel Kar Savuth rose for his rebuttal argument. He said he did not challenge, but then he challenged the extension of the statute of limitations under the 1956 Penal Code for an additional 30 years. He emphasized that the statute expired in 1989. “This is like a person dying and then resurrecting a dead body—that is impossible.” He delivered a somewhat convoluted explanation of his objection to the extension, drawing upon various sources including the 1971 Paris Peace Accords.

Savuth returned to his earlier theme of comparative injustice, namely that chairmen of the 195 other prison centers in Cambodia during the Pol Pot regime have not been brought to justice. More people died in some of the other facilities. “Why is S-21 the primary target of the prosecution?” he asked. While Son Sen oversaw S-21, other members of the Standing Committee supervised other prisons. “We reject that S-21 was unique,” he declared. He said the aim should not be to find justice for the CPK cadre who were “smashed” at S-21, but the prosecution should find justice for the innocent victims at the other prisons.

Savuth said that the defense acknowledges that crimes were committed at S-21. The accused has confirmed that, he said. But who is responsible for those crimes? “The CPK is solely responsible for such crimes,” Savuth declared. The CPK was behind all orders for execution. Duch did not order the crimes, he said. He said Duch was a scapegoat. Duch had been imprisoned for ten years and other prison chairmen had not been imprisoned at all. “So let my client go home. Release him and let him go home!”

International Defense Counsel François Roux’s Rebuttal

International defense counsel Roux continued the rebuttal at this point. He lit into Smith: “You challenged my words of yesterday.” Roux then sought to downplay Smith’s point that the prosecution indeed had acknowledged Duch’s own statements of responsibility and his cooperation with the court. Roux essentially argued that the prosecution’s acknowledgement was not sufficient. He also defended the brevity of his 16-page brief. “The defense tried to convert into a legal framework what the defendant has said since 1999, that he acknowledges the crimes he committed. Duch said, ‘I acknowledge my crimes. I apologize to the victims. I am also morally responsible for all crimes in Cambodia by the CPK because I am a member of the party.’”

Roux challenged Smith’s effort to distinguish the *Ordemović* case at the ICTY. “The people massacred in three days were massacred due to *Ordemović*, whereas all of them should have been protected by him.” Roux raised the Albert Speer defense, and said that while he prevented Hitler in part from pursuing a scorched earth policy, Speer had much higher responsibility in Nazi Germany than did Duch in the Pol Pot regime. “Speer’s crimes were a thousand times more serious,” Roux said. Despite the severity of those crimes, the Nuremberg Tribunal took into account Speer’s admission of guilt. How can the prosecution here say that Duch instituted a reign of terror in Cambodia? Roux argued that although 12,380 persons died at S-21, and the prosecution accuses Duch of those deaths, those deaths did not cause a period of terror to operate throughout Cambodia.

Regarding Duch’s relationship with Son Sen, Roux said that to have faith in him means Duch understood who Son Sen was. It is Son Sen who should have been brought to this court, Roux claimed. [Of course, he knew Son Sen was dead.] Son Sen was the CPK and Duch followed the orders of the CPK. Duch is a tragedy, Roux said, “Yes, indeed, a tragedy.”

Then Roux launched a new argument. “If Duch had resigned at S-21, do you believe S-21 would have gone on? Yes. It would have been a killing machine in the hands of Son Sen. Duch got lost—he believed in the revolution and that it was good for his people.”

Roux noted that the co-prosecutors acknowledged that there were mitigating circumstances. Duch must benefit from mitigating circumstance, Roux claimed. First, regarding duress and superior orders: Duch did not escape from the system. Everyone received orders from their superiors and passed those orders on to their subordinates. The 30 March 1976

decision defined the whole policy of the elimination of the enemies of the revolution. The Standing Committee made such decisions, not Duch. It was impossible to escape. Second, the co-prosecutors do not challenge Duch's cooperation. Third, Duch has shown remorse and contrition several times, and he asks that the door be kept open for more contrition. Fourth, one must consider his personality. Fifth, there is the issue of what the psychiatrists determined about him. Over the course of the year, they witnessed a change in his psychological development. Was Duch dehumanized during the Pol Pot regime? Before dehumanizing their victims, the executioners dehumanize themselves, Roux noted. "No one is born an executioner, one becomes so."

Roux noted New Zealand's sentencing law, which requires taking into account all restorative aspects of justice: apologies, contrition, and the character of the accused. There is no justice, Roux said, if the only purpose of the sentence is to punish. The sentence will never repair the suffering of the victims, he continued. But do not follow an eye for an eye, a tooth for a tooth. We pleaded that the Trial Chamber take into account Cambodia's forthcoming new penal code and the reparation that Duch is entitled to for the violation of his rights—the unlawful imprisonment in the military court. "There are many people more responsible than Duch who will never be prosecuted. He's already spent ten years in detention. You cannot draw a parallel with other prison chiefs and senior leaders who have not been prosecuted," Roux said.

Roux emphasized that the 1994 amnesty law ended the civil war and was designed to make peace with enemies. He asked the court to take that into account and not turn Duch into a scapegoat. He reminded them that he had declared "Duch" dead on Thursday in his closing argument. Duch is dead and the court now faces again the former math teacher, Roux claimed.

Smith and Roux Lock Horns

Smith rose at the end of Roux's rebuttal. "Maybe this was an oversight, but the defense have evaded your question on the change of the defendant's plea," Smith said. He continued: "Is the defendant seeking a mitigated sentence or an acquittal? Why is the defense running these two defenses at the same moment? What is the basis for an acquittal? There will be no relief for the victims if the accused is generally accountable but not legally accountable. Because of this evasion, the better course is to ask the accused if he instructed counsel on two grounds that are not real cooperation or remorse. If his request is for an acquittal, that undermines his pleas of remorse and invites a longer sentence. If his counsel are not following his instructions, the court is exposed to the possibility of an appeal by Duch over the fact that counsel did not comply with his instructions."

Roux objected to Smith rising as there was no provision in the Internal Rules for a rebuttal to the defense counsel's rebuttal. Then Roux turned particularly caustic and almost insulting. He said the co-prosecutor "must not have been listening to us. The word 'acquittal' was not used this morning. Both defense lawyers urged mitigation and that he be freed as soon

as possible. He should be freed after being imprisoned for ten years and after having acknowledged the crimes.” However, the judges remained confused and Roux would soon be contradicted by his co-counsel for the defense, Kar Savuth.

The End Game with Duch

High drama continued in the courtroom. The judges consulted among themselves. President Nil Nonn finally asked, “Does the defendant wish to speak? There have been some doubts in comments by counsel for the accused. The Chamber expected the defense to clarify its position. Our question was not well answered yet. The Chamber and the public have observed good memory of the accused in the proceedings. We wish to hear the personal position of the accused.”

Duch rose to speak. He said the following: “I am most grateful for the opportunity to make my last words. I have worked in a spirit of cooperation with the court. Since my arrest on 8 May 1999, to the military court, I had been determined to report to the court sincerely and honestly. I have cooperated with all questions by the co-investigating judges and the co-prosecutors. I fully responded to questions in these proceedings. The proof is in the transcripts. In paragraph 86 of my submission, I take into account the crimes at S-21 and won’t talk more about them. I request the Chamber consider what I said. My 33-page document is just a fraction of the information I have provided. I have fully cooperated with all levels of the court.

“I have expressed my apologies and my guilty admission. This court has jurisdiction from 17 April 1975 to January 1979. M-13 was also discussed and I responded to questions about M-13. I also was asked about events after 1979. I have never forgotten about the one million souls that perished, including those of my relatives. But all of the crimes were committed by the CP. I, as a member of the party, acknowledge and apologize. Pol Pot relied heavily on the party and I was a party member.

“I don’t challenge the number of 12,380 deaths at S-21. I am responsible for crimes without any denial. I’m responsible for crimes as part of a criminal party [CPK]. I acknowledge that these people died at S-21. My deputy, Hor, was in charge of executions. I did not want him to bear responsibility. I have learned from the psychiatrists that I need to be restored into the ambit of humankind.”

Duch then went on to claim he was not part of the senior leadership of the Khmer Rouge and pointed to only six individuals from the Standing Committee as meeting that standard. He then said that no one could violate the party line. Pol Pot was the secretary in charge of the party. The secretaries of the zones had the authority to “smash.” If they violated the spirit of the collective, Duch said, they also had to be “smashed.” The purpose of the ECCC Law is to bring senior Khmer Rouge leaders to justice and that would find justice for everyone in the country and achieve national reconciliation.

But Duch continued: “I never challenged the crimes at S-21. I have served for ten years, six months, and 18 days. I do not challenge my detention as illegal. I leave to the court to determine illegality. I ask the Chamber to release me.”

President Nil Nonn asked the accused to rise again and said to him, “The Chamber has heard your final remarks. You asked to be released. The question now is, what made you ask for a release. Are you seeking an acquittal of all charges against you or a reduction of sentence for your cooperation and time detained since 1999? We need to be of clear mind regarding our decision.

Duch responded that, “My ability to analyze is limited to what I can report. I would like the Chamber to release me.”

President Nil Nonn responded, “This development is strange at the end of the trial if compared to national practice. The defendant has pointed to his Cambodian counsel to say a few words. Perhaps he could clarify the position of the defense.”

Duch said his view was consistent with Kar Savuth’s so he may speak for him.

Kar Savuth rose and sought Duch’s release. He reiterated some of his prior arguments about Duch not being a senior leader of the Khmer Rouge, that Son Sen had the authority to “smash” at S-21 as a member of the Standing Committee, that Duch was not among those most responsible for the crimes and that the CPK was the culprit. For those reasons, that is why the defense sought the defendant’s release.

Judge Silvia Cartwright intervened with this question: “Do I infer that the defendant is seeking an acquittal?”

Savuth responded: “Release means acquittal.”

President Nil Nonn declared the trial at an end and summarized some of basic information about the total of 77 days of trial proceedings. He thanked all participants, including the civil parties and victims. He said that the Trial Chamber would deliberate and prepare a final judgment. The date for delivery of the judgment cannot be scheduled due to the size of the case file and the requirement to work in three languages, he said. The judgment date will be duly announced in advance.

Press Conference

At the press conference immediately following the day’s proceedings, International Co-Prosecutor William Smith said that Duch had been ably represented by counsel, that this had been a fair trial, that the civil parties had been ably represented, and that the way the trial judges presided over the proceedings pointed to a fair trial. He said the co-prosecutors looked forward to the judgment. He said the co-prosecutors were surprised this week at the defense strategy.

The request for acquittal reflected the accused's view of what he wanted. The accused has shown some remorse and cooperation but the remorse is now limited due to his acquittal plea.

Cambodian Co-Prosecutor Chea Leang said they were taken by surprise. Duch had asked for an acquittal and that contradicts what International defense counsel Roux had long sought—namely acknowledgment of guilt and mitigating circumstances, “but today we heard the opposite.” So the position of the defense is rather mixed. The national defense counsel sought acquittal and release. The international defense counsel had a different view. Duch essentially wanted the charges dropped.

Smith explained that both defense counsel ended up seeking release of Duch. Perhaps, pursuing Roux's presumed logic, it was premised on ten years having been served for the crimes committed at S-21 and that should be enough. Despite the disagreements between the two defense lawyers, Smith believed that the sharing of defense responsibilities can work for the best of the court and develop skills for future cases. Smith also said he was satisfied there could be no appeal by Duch. “It took a while to get the answer in the courtroom. It fell to Duch to state his position. The national counsel confirmed the acquittal plea. Despite the advice of defense counsel Roux, Duch plead not guilty and yet he still wanted mitigation on his sentence.”

Smith further explained the rationale for the prosecution's request for a 40-year sentence and maintained the same reasoning as he had stated in the courtroom. He said the cooperation of Duch in trial 002 will be a factor to consider. His partial cooperation so far had influenced the co-prosecutors' recommendation of five years subtracted from a 45 year sentence (thus reducing it to 40 years). But now, “we would have had some discussion in the office on that issue if we had known there would be an acquittal plea.”

Civil Party Group 1 lawyer Karim A. A. Khan stated at the press conference that it remained a historic day, the end of the first trial before the ECCC. It was the first completed international or hybrid court trial with the active participation of civil parties. All were taken aback, he said, and it was contrary to expectations that the accused did not put forward a guilty plea. “He is seeking an acquittal. This confusion needs to be reconciled...Duch is criminally responsible for the crimes he committed at S-21. He raised a jurisdictional defense at the last moment. Notwithstanding his responsibility for the crimes, since the court's personal jurisdiction covers those most responsible, he does not regard himself in that category [and he denies being a senior leader].” Khan confirmed that such a claim is time barred under the Internal Rules and that there is abundant jurisprudence in the international criminal and hybrid tribunals on “most responsible” to reject Duch's argument. Khan continued, “Duch refused to disclose the full truth of his motivation at S-21. Rather than be a reluctant party, he was an active participant; he fell prey to the whole atmosphere of the Democratic Kampuchea regime. His refusal to say he was an enthusiastic participant leaves us short-changed.”