CAMBODIA TRIBUNAL MONITOR

# The Duch Verdict

By John D. Ciorciari

On July 26, the Extraordinary Chambers in the Courts of Cambodia (ECCC) issued its first verdict in the case against Duch. The tribunal found Duch guilty of war crimes and crimes against humanity for atrocities committed at "Office S-21," the infamous Khmer Rouge prison at Tuol Sleng. The verdict was an important watershed for Cambodia. For the first time, a key Khmer Rouge official has been held accountable in a credible court of law for crimes of the Pol Pot era.

Nevertheless, the verdict immediately attracted substantial criticism from Cambodian survivors, including Foreign Minister Hor Nam Hong. This article briefly discusses two key sources of consternation. First, many victims have complained bitterly that Duch's punishment was too light. The Trial Chamber sentenced him to 30 years in prison, which amounts to less than 20 years after subtracting time Duch has already served. Second, civil parties—individuals who joined the case to pursue redress for injuries they suffered as a result of Duch's conduct—were disappointed with the Trial Chamber's award of reparations. The judges promised only to publish the names of the victims in the verdict and to compile a record of Duch's statements of confession and contrition.

*The Sentence*

Duch's sentence was the primary source of frustration. It is roughly in line with precedents from other international tribunals, but for survivors, it is understandably difficult to stomach the fact that Duch could walk free if he reaches the age of 86. Even the strictest penalty available to the tribunal—a life sentence—pales beside the thousands of lives lost at the Killing Fields. The ECCC co-prosecutors requested a sentence of 40 years, but the Trial Chamber opted for a shorter 30-year prison term. It held that Duch's cooperation and contrition merited a sentence of a term of years rather than life imprisonment. It also reasoned that Duch was entitled to a sentence reduction for the violation of his rights, because he was illegally detained for several years prior to the commencement of the ECCC proceedings. The Trial Chamber was in an unenviable position, trying to balance the interests of suitable retribution against considerations of fairness and due process.

Duch's illegal pre-trial detention probably furnishes the most compelling reason to curtail his prison term. Although few victims will have sympathy for the former S-21 chief—who imposed infinitely harsher imprisonment on his victims—the ECCC can only promote norms of fairness and justice if it abides by them itself. Indeed, one of the best features of the Duch trial is that it was fair to the defendant despite overwhelming historical evidence of his guilt. The court should be commended for taking due process norms seriously and setting a useful example for the Cambodian judicial system. Its award of a modest sentence reduction to Duch was by no means out of order.

The Trial Chamber also based its decision on the argument that Duch had been cooperative and contrite. Courts have good reasons to incentivize defendants to speak, reveal

the truth, and aid in the quest for accountability. Duch is the only well-known Khmer Rouge official to date to acknowledge culpability. At trial, also confirmed numerous facts and introduce bits of new information about the workings of S-21. However, his acknowledgements added marginally at best in the search for the historical truth about the atrocities at Tuol Sleng, and his cooperation was not needed to convict him, because documentary and other evidence against him abounded.

It was more important to give Duch an incentive to testify against four senior Khmer Rouge leaders in Case No. 2. The evidence connecting those individuals directly to physical acts of atrocity is less overwhelming than it was for Duch, and thus his willing testimony could be valuable. It is unclear whether Duch's sentence will indeed prompt him to offer useful testimony in Case No. 2. If he has useful information, he may already possess ample incentive to share it. Impugning his superiors would emphasize the limits of his own responsibility and ensure that those who ordered him to commit atrocities would not go free.

In theory, the prospect of a light sentence could also lure one or more Case No. 2 defendants into breaking ranks, acknowledging crimes, and accepting responsibility. However, this seems unlikely. All four charged persons are considerably older than Duch and in ill health. None could reasonably expect to outlive a sentence of the length Duch received. Their greater incentive to speak will be to impugn one another to avoid taking responsibility.

The case for reducing Duch's sentence due to contrition is relatively weak. When courts reward apologies, they need to do so carefully to avoid encouraging false or empty shows of regret. Acts matter more. Duch did express regret to the court, but he missed his opportunities to issue a direct apology to victims. At the end of his trial, after months of acknowledging guilt and asking for mercy, he reversed course and essentially entered a "not guilty" plea through his domestic defense lawyer. If the scale of his crimes had not been so great, his shows of regret would merit serious consideration. Given the horrors he oversaw at S-21, his apologies cannot alone support a significant sentence reduction.

The Trial Chamber opted for a sentence toward the lower bound of reasonable options. To exact retributive justice, it had to deliver a sentence that is likely to consume all or nearly all of Duch's life. To uphold due process norms and promote truth-telling and apologies, it had to start from a figure that would make its sentence reductions at least potentially meaningful. Duch has already announced that he plans to appeal, and the co-prosecutors are weighing the possibility.

The Appeals Chamber should not reduce the sentence but should consider a slightly longer prison term. A sensible approach would be to begin with the 40 years requested by the co-prosecutors—which took account of mitigating factors and is already generous in relation to Duch's crimes—and include a minor reduction as a remedy for his illegal detention. The result would be a term of 35 to 38 years. This would make it highly unlikely that Duch would walk free and better satisfy retributive interests without gutting the court's efforts to promote due process and truth-telling.

*Collective and Moral Reparations*

A second major criticism of the verdict relates to reparations for civil parties. The ECCC has neither the budget nor the authority to provide financial reparations to individual victims. It also lacks legal authority to enforce implementation of reparation measures by the Cambodian government. However, it does have a mandate to provide "collective and moral reparations" to civil parties found to have suffered wrongs. Civil parties had good grounds for disappointment; the Trial Chamber's awards of reparation were sorely lacking. The Trial Chamber found 66 civil parties to qualify for redress but offered them only token acknowledgement by publishing their names and selected statements by Duch. Numerous civil parties have criticized them as a sign of dismissal and disrespect.

The ECCC has been a pioneer in victim participation, largely by implementing a civil party scheme, and has won donor support partly for that reason. The participation of civil parties in the Duch trial generated controversy, consuming time and sometimes drawing legitimate complaints from judges and prosecutors. The role of civil parties has thus been drastically curtailed in Case No. 2. That policy change is defensible but does not absolve the ECCC's responsibility to respond meaningfully to the requests of civil parties in the Duch trial. They played an active and important role, and the Trial Chamber erred by providing menial reparations that fell short of their modest and reasonable expectations of a collective remedy.

The Trial Chamber should have been much more creative on the issue of reparations. There are many possibilities short of financial awards. It can recommend measures, help to catalyze action by donors and civil society, or bless actions undertaken by other entities even if it does not physically implement or fund a reparations scheme itself. The ideas proposed by survivors and civil society organizations are not radical. They include establishing simple memorials, commemorative gatherings of survivors, or establishing drop-boxes where ordinary citizens can contribute funds to address victims' needs. The ECCC's support for such initiatives would entail minimal funds and organizational risk but would have a strong legitimating effect and real meaning for survivors. Fortunately, the Duch verdict is not necessarily the tribunal's last opportunity. If the co-prosecutors appeal, civil parties can request that the ECCC Appeals Chamber make amends. The tribunal should also have an opportunity at the conclusion of Case No. 2.

The ECCC can never make the survivors of Tuol Sleng and their families whole. The Trial Chamber's duties included conducting a fair trial, rendering a credible judgment of guilt or innocence, imposing suitable punishment, and issuing reasonable collective reparations within its modest means. It performed admirably on the first two of these tasks, which are probably the most important for a criminal tribunal of its kind. It also made a reasonable effort to manage Duch's punishment, which was bound to be controversial. The greatest area for improvement going forward is to manage its innovative civil party process more effectively. Otherwise, the ECCC process risks further frustrating many of the survivors it is meant to serve.

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