

The KRT Monitor

Prosecutor v Kaing Guek Eav, alias 'Duch'
Report No.1, Initial Hearings (February 17 - 18, 2009)

In this week's KRT Monitor...

Will joint criminal enterprise be revisited in the Duch trial? – p.2; Vengeance or justice? Civil parties request an expert on sentencing; defense warns against 'regression' in trial proceedings – p.3; Child survivor of S-21 comes forward as victim participant – p.5; Sexual violence victim-witness unable to be located – p.6; Current Witness Tally: 62 potential witnesses and counting – p.6...

1. Summary

“A crime against humanity by its very essence unbinds human beings, but transitional justice seeks to accomplish the reverse journey; that is, the bridge towards the re-formulation of a polity.”¹

After several months of anticipation and a decade of negotiations, initial hearings in the case of *The Prosecutor v Kaing Guek Eav alias 'Duch'* were held at the Khmer Rouge Tribunal (“KRT”) this week, heralding the opening of this unique hybrid tribunal’s first trial. In what was the first instance in which the Trial Chamber had assembled in public, the bench efficiently and effectively ran proceedings under the stewardship of the President Nil Nonn. The two-day hearings focused largely on procedural issues, with the majority of the discussion centering on the parties’ proposed witness lists. Civil party lawyers tended to dominate the proceedings, with the four teams responsible for the current 28 accepted victim participants both raising and rebutting the bulk of issues.

Despite their procedural focus, the hearings were extremely well attended, with the symbolic opening of the trial garnering exceptional amounts of media attention and attendance by people of all ages and walks of life. Perhaps because of this, lawyers for the prosecution, defense and civil parties seemed to pepper discussions on largely administrative matters with arguments that invoked the underlying significance of the transitional justice process underway. The court’s role in creating history and inspiring reconciliation, as well as ensuring proceedings remained between vengeance and forgiveness, were all considered at points during the debates. Particularly compelling arguments for keeping the broader goals of transitional justice in focus were raised by defense counsel, Francois Roux, who quoted extensively from French scholar Pierre Hazan when making arguments about his choice of witnesses. Roux noted that transitional justice processes allowed victims and perpetrators to see each other’s humanity and to reconcile themselves with the past.

¹International Defence Counsel Francois Roux (quoting from French theorist Pierre Hazan’s book *Juger La Guerre, Juger L’histoire* (Press Universitaires de France, 2007)), Initial Hearings, February 17 2009.

Key issues discussed during the proceedings included the proposed addition of videotape evidence recently discovered by the Office of the Co-Prosecutors. The video in question allegedly shows scenes from the S-21 interrogation center just three days after Vietnamese forces entered Phnom Penh in April 1979.² Cambodian defense lawyer Kar Savuth argued extensively that the video was political and there was no way of determining its authenticity. A related issue discussed was whether Khmer Rouge child survivor, Mr Norng Chan Phal, should be allowed to join the proceedings as a civil party. Mr Phal, who missed the deadline to lodge a civil party application, is reportedly the first known child survivor of S-21. His story surfaced shortly after the previously unseen video footage was released. As with many of the issues tabled during the hearing, the Chamber determined it would decide these matters after further submissions and consideration.

Other significant legal issues raised were: the inclusion of testimony regarding Duch's role in the Khmer Rouge's M-13 interrogation facility during the early part of the 1970s (a period outside the temporal jurisdiction of the tribunal); and the inclusion of an expert witness for Civil Party Group 1 ('CP1'), who is being summoned to assist the court to determine appropriate sentencing vis-à-vis the accused. In an unusual inversion of the clash between common law and civil law interpretations of victims' rights, lawyer Karim Khan (of the United Kingdom) argued vigorously in favor of victims being allowed greater flexibility with regard to airing their views on sentencing. His French colleagues disagreed with him.

The Chamber reserved judgment on the latter issue, but determined that hearing witnesses testify to events at M-13 would assist it to ascertain the truth, providing it with important testimony about the accused's knowledge of the security system established by Democratic Kampuchea in general, and S-21 in particular. As a result, the three prosecution witnesses in question – KW-30, KW-31 and KW-32 – have been slated to testify. A tentative witness list was read out during proceedings, which confirmed that Nyan Chanda, David Chandler and Nic Dunlop would be testifying. As yet, no trial date has been set for the substantive proceedings.

2. Legal and Procedural Issues

The parties were asked by the Chamber to highlight any legal issues they were likely to raise before or at the start of trial.

Guilty Associations Again? Joint Criminal Enterprise To Be Revisited in Duch Case.

International Co-Prosecutor Robert Petit invited the Chamber to consider the applicability of the doctrine of joint criminal enterprise ('JCE') to the proceedings. Petit argued that the concept was applicable, and that in particular, Category I and II of JCE would allow the Chamber to consider Duch's full culpability.³ He further stated that the Trial Chamber was

²The accused admits to being the Head of S-21, also known as 'Tuol Sleng' where (according to the Closing Order in his case) at least some 12,380 people were imprisoned and very few survived.

³For further information on joint criminal enterprise and its applicability in the Cambodian context, see the amicus briefs available on the KRT's website at www.eccc.gov.kh: *Prosecutor v Kaing Guek Eav*, alias 'Duch', Case

not bound by the Pre-Trial Chamber's determination on this issue and that the prosecution would assist it to consider the application of this concept. Lawyer for CP1 Karim Khan expressed reservations that further consideration of JCE might delay the start of trial.

Provisional Detention Issues: Accused In Ninth Year of Incarceration. International defense counsel Francois Roux noted that the defense would be raising the issue of their client's provisional detention during the substantive part of the trial. Roux noted that, taking into consideration the accused's provisional detention in the Cambodian military prison which predated his apprehension by the KRT, his client had been incarcerated for a total of 9 years, 9 months and 7 days without trial. Under Cambodian law, a person cannot be held in provisional detention for more than three years. International lawyer for the civil parties Pierre Olivier Sur (Group 4) noted that case law at the European Court of Human Rights did not support the proposition that the Chamber should consider Duch's prior detention when assessing his provisional detention at the KRT.

Statute of Limitations on National Crimes. The Defense has submitted an objection to the inclusion of the national crimes of torture and murder in the Closing Order, following the Pre-Trial Chamber decision on the appeal of the Closing Order in December of 2008.⁴ The Chamber determined that the preliminary objection was admissible and would issue reasoning on admissibility at the same time it considered the merits of the argument.

The clash of 'civilized' nations: civil law vs common law in the courtroom. At various points throughout the proceedings, underlying tensions between the perspectives of lawyers from different jurisdictions seemed to play out. In particular, discussions regarding proof required for expert witnesses and the appropriateness of having victims call witnesses relating to sentencing caused heated debates. Defense lawyer Francois Roux seemed adamant that the procedure to be followed should be informed by French practice and scholarship. However, he further noted that the practice and scholars he referred to were internationally recognized and shouldn't be considered in a reductive manner. Civil party lawyer Karim Khan argued in favor of treating proceedings as 'fair and adversarial' as outlined in the Internal Rules, implying a common law approach was (to some extent) mandated.

No.001/18-07-2007-ECCC/OCIJ (PTC 02), 'Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine', 27 October 2008; McGill University Center for Human Rights and Legal Pluralism, 'Amicus Brief in the Matter of the Co-prosecutor's Appeal of the Closing Order of Kaing Guek Eav alias 'Duch'', 28 October 2008; and Kai Ambos, 'Amicus Brief in the Matter of the Co-prosecutor's Appeal of the Closing Order of Kaing Guek Eav alias 'Duch'', 28 October 2008.

⁴See Prosecutor v Kaing Guek Eav alias 'Duch', "Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias Duch, 8 December 2008".

3. Victim Participation and Witness and Victim Protection

The KRT is making history by becoming the first internationalized tribunal to allow for victim participation during its proceedings. At the initial hearing, four groups of civil party lawyers were identified: (i) Group 1 ('CP1'), representing civil parties whose applications were sourced and collected by the Documentation Center of Cambodia ('DC-Cam'), comprising Mr Karim A. A. Khan (Britain), Mr Alain Werner (Switzerland), Ms Brianne McGoningle (U.S.A.) and Ms Ty Srinna (Cambodia);⁵ (ii) Group 2 ('CP2'), comprising Ms Silke Studzinsky (Germany), and Mr Hong Kimson, Mr Yung Panith and Mr Kong Pisey (Cambodia); (iii) Ms Martine Jacquin (France), Mr. Kim Mengkhy and Ms. Moch Sovannary (Cambodia), Ms. Annie Delahaie and Ms. Elizabeth Rabesandratana for Group 3 ('CP3'); and (iv) Group 4 ('CP4'), comprising Mr Pierre Olivier Sur (France) and Mr Hong Kimson (Cambodia). The presence of a large number of international civil party lawyers appeared to affect the number of victims able to sit in the courtroom: although around sixty civil parties attended the proceedings, only six were able to sit in the courtroom at any given time (six during the morning session and six in the afternoon), with all others attending seated in the public gallery.

During the investigating phase, twenty-eight (28) civil party applications were accepted and confirmed as victim participants in the Closing Order. A further sixty-six (66) applications were received by the Trial Chamber, forty-five (45) of which have been provided with interim recognition as parties to the proceedings. Twenty-one (21) are still pending. The Chamber did not stipulate whether these 66 applicants had sought legal representation, nor was it clear whether any of the lawyers currently representing civil parties currently represented any of the 66 applicants.

Thus far, and consistent with the use of protective measures at other international tribunals, the majority of witnesses have been allocated pseudonyms to shield their identity from the public. However, the Chamber noted that in certain instances this was out of an abundance of caution, or due to the fact that a risk assessment had not yet been undertaken for the particular witness. The Chamber appears to be acutely aware of the importance of ensuring the trials remain as open and accessible as possible – an early indication of this being the repetition of a closed session argument in open session due to its perceived significance to the public.

Standard of Proof for Review of Victim Applications. Consistent with the International Criminal Court in the case of *The Prosecutor v Thomas Lubanga Dyilo*, the Trial Chamber at the ECCC has adopted *prima facie* evidence of a victims' identity as the standard of proof when reviewing victims' applications. The Chamber noted that, thus far, there were only two instances where this had been unable to be provided.

⁵See "Victim Participation Project", Documentation Center of Cambodia, January 31, 2009, available online at: http://www.dccam.org/Projects/Tribunal_Response_Team/Victim_Participation/Civil_Party_Meeting.htm.

Successor of a Deceased Victim to Apply for Victim Status. The Chamber noted that it had received an application regarding the possibility of a deceased victim's successor (namely, her husband) to join the proceedings. The Chamber noted that this possibility was not contemplated in the Court's internal rules, but that Article 254 of the Cambodian Criminal Procedure Code does deal with this issue. Lawyers for group CP1 noted that the whole point of victim participation was to allow for redress and closure and therefore argued that the deceased's husband should be allowed to participate. The Chamber took note of the submission and stated it would render a decision before the substantive hearings began.

Extension of Time Limits for Norng Cham Phal. A key issue raised during the proceedings was whether or not an application received by the Chamber for the inclusion of Mr Norng Cham Phal, the first child victim to come forward in the Duch case, should be rendered admissible, despite the application being out of time. Mr Phal was eight years old at the time the Khmer Rouge took power in 1975. Counsel for group CP1, Mr Karim Khan, argued that, given the novelty of the application process, there may be a multitude of reasons why individuals may not have made the time limit stipulated. Although not raised by Mr Khan, the time limits placed on victim participation appear to have been arbitrarily applied to civil parties joining the case during the trial phase following an amendment to the KRT's Internal Rules during a plenary held by the judges last year in which the civil parties' rights were significantly limited.⁶

Counsel for the Defense argued against allowing the recent media hype surrounding both the release of video-tape footage and Mr Phal to dictate the parameters of the case against the accused. Pointing to the floodgates argument, Mr Roux noted, "If we extend the deadline for this party, when will it end?" Mr Khan strenuously rejected the argument, noting that the proceedings were not being judged in the press, but by professional judges in a court of law, and that refusing Mr Phal's application would prejudice his rights as a victim more than the defense.

Vengeance or Justice? Victims attempt to call an expert on sentencing; Defense Objects. After a brief closed session on Wednesday morning, proceedings on the second day of hearings began with an argument regarding the summoning of an expert witness for civil parties. Lawyers for CP1 requested calling an expert to assist the court to determine an appropriate sentence for the accused. Defense lawyer Francois Roux emphasized that while the voice of the victims in proceedings was crucial, giving a role to victims with regard to commenting on sentencing would amount to a regression in the international system, "bringing us back to the days of revenge". His arguments were opposed by both the prosecution and the civil parties. Cambodian civil party lawyer Hong Kim Sun noted that Cambodians should be given the right, in accordance with national law, to address the Court on this issue. His arguments were supported by Cambodian Co-Prosecutor Chea Leang.

⁶See Press Release, "CHRAC Urges ECCC to uphold victims' rights", 19 September 2008. Under the Cambodian Criminal Procedure Code, a civil party application is admissible until the Prosecutor begins his or her final observations on the merits of the case.

4. Trial Management

Proceedings during the two days of hearings ran extremely well, with the judges each adopting a leadership role on a different aspect of the hearings. Parties appeared largely to be cooperating to ensure the smooth running of the proceedings. There were no undue delays, with the Chamber beginning sessions in a timely fashion and sticking closely to the scheduled recesses.

The following table summarizes the proposed witnesses to be called during the proceedings for the Duch trial. Thus far, it is anticipated that a total of 62 witnesses will be called. In a recent media conference, the prosecution made an initial estimate of trial taking around 12 weeks.⁷

Party:	No. of Witnesses Currently Due to Call:	Witnesses Currently Confirmed:	Witnesses Pending or Rejected:	Trial Days Anticipated for witnesses:
Co-prosecutors	35	27	7 pending	40
Defense	13	6	7 pending	4.5
CP1	5	0	5 pending	Not specified
CP2	10	3	6 pending; 1 rejected	8.5
CP3	2	0	2 rejected	Not specified
CP4	0	0	0	0
TOTAL:	65 witnesses	36 confirmed	25 pending; 3 rejected	53

Witness to testify regarding sexual violence unable to be located and therefore rejected. Civil party lawyers for group 2 sought to include a witness who was a victim of sexual torture at S-21. Lawyers for Group CP-2 were unable to locate the witness and sought assistance from the Chamber to do so, despite being unable to provide details regarding the location of the witness. The Chamber rejected the inclusion of this witness on the grounds that s/he was unable to be located and no further documentation had been able to be provided by civil party lawyer Silke Studzinsky.

⁷However, as yet lawyers for the civil parties have not confirmed the exact number of civil parties that will testify, or the likely number of days these parties will take to testify. It seems likely the trial will take longer than currently anticipated.

About the 'Duch' case⁸

The accused Kaing Guek Eav alias 'Duch' was born in Kampong Thom province. He was a school teacher by profession. He is said to have joined the Khmer Rouge in the 1960s. He became the chief of the Santebal (the Khmer Rouge secret police) and commander of S-21 after the Khmer Rouge took power in 1975.

The Office of the Co-investigating Judges ('**OCIJ**') at the Khmer Rouge Tribunal ordered Duch to be taken into custody on 30 July 2007, when he was transferred from a Cambodian military prison into the tribunal's custody. On 8 August 2008, Duch was indicted by the OCIJ for Crimes Against Humanity and Grave Breaches of the Geneva Conventions. The Office of the Co-Prosecutors appealed the Indictment (or 'Closing Order'), arguing for the inclusion of national crimes (premeditated murder and torture) and the theory of joint criminal enterprise. The Pre-trial Chamber handed down its decision in that appeal on 8 December 2008, admitting the national crimes but refusing the application for the addition of JCE on the grounds that the accused had not been adequately informed of this charge.

Although no scheduling order is yet to be released, Duch's trial is currently anticipated to begin in March or early April of this year.

⁸See also Tyler Nims, "Duch Judicial Investigation and Pre-trial Proceedings Overview" (February 6, 2009) available online at Cambodia Tribunal Monitor, http://www.cambodiatribunal.org/index.php?option=com_content&view=article&id=20&Itemid=34.



WSDHANDACENTER
FOR HUMAN RIGHTS & INTERNATIONAL JUSTICE
Stanford University

This publication was originally produced pursuant to a project supported by the War Crimes Studies Center (WCSC), which was founded at the University of California, Berkeley in 2000. In 2014, the WCSC re-located to Stanford University and adopted a new name: the WSD Handa Center for Human Rights and International Justice. The Handa Center succeeds and carries on all the work of the WCSC, including all trial monitoring programs, as well as partnerships such as the Asian International Justice Initiative (AIJI).

A complete archive of trial monitoring reports is available online at:

<http://handacenter.stanford.edu/reports-list>

For more information about Handa Center programs, please visit:

<http://handacenter.stanford.edu>
