



“YOU CANNOT SMASH HUMAN BEINGS”

November 23, 2009

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A week of closing arguments in the trial of Kaing Guek Eav (alias Duch) commenced today with lengthy statements from the Cambodian and international lawyers representing the four groups of civil parties, who total about 90 individual victims. The public gallery in the courtroom was packed with a large audience of Cambodian citizens, including some of the civil party victims, and a small group of foreigners. Civil society representatives and the international press were present in full force. U.S. Ambassador Carol Rodley and her Deputy Chief of Mission, Ted Allegra, attended the initial hour of the arguments. The final stages of this historic trial thus began with an impressive display of domestic and global interest.

Duch arrived wearing a yellow long sleeve turtle neck shirt and white slacks. In the afternoon session he wore a white shirt. Duch was seated in the middle of the courtroom facing the judges, with his defense counsel on his right and the co-prosecutors and civil party lawyers on his left. He maintained his composure throughout the day and spent most of his time scribbling notes, watching the video screen in front of him, and occasionally turning to his left to face his accusers. But when Philippe Canonne, the French avocat representing Group 3 civil parties, and his co-counsel Martine Jacquin of France delivered perhaps the most pointed and eloquent statements of the day, Duch locked eyes with both for the duration of their arguments, leaving me to wonder whether I was witnessing remorse or defiance as each minute ticked by.

On two occasions during the recesses, Duch wandered over to the glass partition and placed a piece of paper with his writing on it against the glass. Several Cambodians whom he may have known (that was not clear) waited for him and then smiled when they read his note. He withdrew the paper from the glass, smiled, turned, and then laughed. One foreigner placed a message on the glass for him to read. They smiled at each other, Duch saluted him, and then returned to his seat. Stranger things have happened in courtrooms, but this ranked among the most disturbing, particularly given the emotional and condemnatory context of the civil party arguments today.

The civil party arguments varied significantly in their substance and delivery. Rule 23 of the Internal Rules stipulates that the civil party participates for the purpose of supporting the prosecution and to allow victims to seek collective and moral reparations. That may not have always been the case today. President Nil Nonn opened the afternoon session, which followed the Group I and Group II arguments, by reminding the civil party lawyers that they must confine their statements to the Rule 23 parameters. He claimed that the morning session had strayed far afield. Most of the afternoon arguments appeared to comply with his instructions. With the time afforded the civil party lawyers to prepare for today's focus on their clients' interests and needs for realistic remedies, I found it surprising that some of the lawyers had not organized and delivered their statements more effectively.

Group 1

The experienced English prosecutor, Karim A.A. Khan, delivered the opening statement for the 37 Group 1 civil parties. Khan has not been present for most of the Duch trial and recognized the work of his co-counsel, including Alain Werner of Switzerland (absent today), Brianne McGonigle of the United States, and Ty Srinna, the Cambodian lawyer who followed Khan at the desk-top podium. Khan spoke very deferentially to the judges and delivered an eloquent statement. He acknowledged that there were a lot of firsts in the courtroom, including the first internationalized trial where civil parties have had an active role in the trial proceedings. He explained that whatever flaws or defects arose from civil party representation in the trial, their work had been done in good faith and with a sincere attempt to make the system work, as envisaged by the Cambodians and by the United Nations.

Khan stressed the need to distinguish between rhetoric and reality. He noted the allegation that the civil parties wanted vengeance done, or blood, during the trial. The defense had emphasized this by saying "we are in a court of law, not in a market square where we are stoning the accused." But Khan said that all civil parties had not succumbed to the basic instincts of seeking revenge. Instead, they honored the procedures of the court so that they could achieve closure and get to the truth of what really happened at Tuol Sleng prison.

Then there was the defense counsel's suggestion, Khan said, that "we are no more than the prosecution." He stressed that Rule 23 limited the scope of civil party participation. "We have not aped the prosecutor uncritically," he exclaimed. Indeed, he had made his reservations on the prosecutor's joint criminal enterprise theory in the case well known. Group 1 had not filed any document to support that theory.

Khan claimed that the trial was not simply about the guilt or innocence of Duch. One of the advantages behind civil party participation (aside from a remedy of reparations) is that it allows victims to come before the judges to give them an insight into the impact of the crimes on their lives. That is a unique perspective that only the victims can provide.

The defense counsel's complaint that the civil parties created an inequality of arms in the courtroom invited a strong rebuttal from Khan. He denied that Duch faced five prosecutors. The civil parties are not prosecutors, he said. They had received no financial assistance from the court. This was the case despite the basic rule in international human rights law that all rights should be rendered practical and effective and not illusory. Khan said the civil parties lacked the resources of the prosecutor and of the defense, implying that the inequality is one that short-changes the civil parties rather than creating some juggernaut aimed at the defense.

Khan concluded his initial statement by reminding the judges that Duch's acceptance of certain allegations nonetheless requires that those allegations be proven before them. He said the judges must objectively review the evidence whether or not what has been conceded by Duch is the truth. When all the evidence is reviewed, he said, it reveals only one conclusion: in large, important particulars, Duch has sought to evade and minimize his role.

The Cambodian counsel to Group 1, Ms. Ty Srinna, then rose. Three orange-robed Buddhist monks entered the public gallery as she began, framing her remarks with appropriate solemnity. Srinna described the role of the civil parties to unearth the truth of the crimes. They would endure great mental suffering for the rest of their lives. Without their participation, she said, the trial chamber would have difficulty measuring the magnitude of the crimes and the suffering at S-21. Their object is to seek justice for themselves and for their loved ones. The court's mandate is to help the civil parties relieve their grievances and suffering.

Since many of the original victims of S-21 were not told of their offenses when arrested, the trial represented the chance to find out the truth and ensure that justice will be done. Why were they arrested? The trial has much to do with national reconciliation also.

Srinna then proceeded to describe a number of the civil parties in Group 1 and the victims of Tuol Sleng whom they represent. Many of her accounts had been disclosed in earlier trial testimony. But Srinna plodded on so long that she consumed a large chunk of Group 1's allotted time and was compelled to rush through the names without further descriptive accounts. Her occasional asides to Khan revealed that they had not prepared their closing arguments with attention to the time scheduled for Group 1. An air of disorganization began to take over. Srinna closed quickly with the important clarification that many documents identifying the relationships between the civil parties and the original victims were destroyed during the Khmer Rouge regime and in the intervening years. That explained, she said, some of the difficulties in responding to defense counsel's challenges to the authenticity of the civil parties.

Khan rose again for Group 1 with a statement that consumed almost 20 minutes. It was this statement that might have been on President Nil Nonn's mind when he later cautioned the civil parties' counsel to remain within the parameters of Rule 23. For Khan aimed his considerable skills, as if he were the prosecutor, directly at Duch. While support for the prosecutor is part of

the Rule 23 mandate, the judges appear reluctant to view the civil party lawyers as wading too deeply into the issue of the defendant's culpability.

Khan took issue with Duch's protestations that he had no autonomy at S-21, that he was just a tool. It was a camp dedicated to death and Duch led it. Duch did not use his autonomy to alleviate any suffering. "This is no Schindler in front of you," Khan exclaimed. Duch was dedicated to his job. But what he accomplished was not confined to S-21, Khan said. The campaign of terror and torture that Duch ran in S-21 had the effect of increasingly the paranoia elsewhere in the party. It created a vicious cycle in which more and more arrests occurred, and more individuals were tortured into making false confessions implicating others that fed the cycle once again. Duch did all this because he was ideologically of the same mind as the leadership. It was not only because he wanted to belong to a powerful group, but also because it made life comfortable for him.

The evidence spoke for itself, Khan said. When he had the option during the chaos of the Vietnamese invasion to let people go, Duch instead smashed them. He had demonstrated his resolve at an early age in high school, and he did his job at S-21 by his own volition. He had sufficient confidence to report to his superiors, who rubber-stamped what he proposed. While the defense seeks to minimize the role of Duch, he failed repeatedly to seize options that would have minimized his role. There were no documents dictating to Duch the forms of torture but he designed a cruel and callous system at M-13 and then used it at S-21. Duch claimed he put people into pits at M-13 to protect them from U.S. air strikes when in reality such aerial bombardments had ended. The pattern emerges, Khan said, where Duch shifts and minimizes his role in the most brazen fashion. He failed to discipline guards who ordered prisoners to eat their own excrement. It was patent nonsense, Khan claimed, that Duch told interrogators to have detainees draw a picture of a dog and pay homage to it for the purpose of sparing the victim a worse fate.

Khan made the further point that although Duch showed remorse in small areas, when one compares what he had conceded in the courtroom with the truth and reconciliation model, amnesties under such mechanisms are awarded only where witnesses give the full truth and demonstrate remorse. Khan pleaded with the judges to be "alive" to the fact that Duch fell far short of that standard. Duch's strategy, Khan said, is to bluff the court. He closed by asking the judges to consider the evidence most carefully, noting that the truth does not require a penny in reparations. But truth is of enormous value to the civil parties. He asked the judges to find Duch guilty of the charges.

Group 2

Following a brief adjournment, Group 2 counsel Silke Studzinsky from Germany described herself as someone who lives with Germany's own past. Despite Nuremberg, the atrocities had

continued since World War II. She believed the Duch trial would close one of the impunity gaps in recent history, namely arising from the Pol Pot era. She and her team represent 17 civil parties in Group 2. The civil parties have to deal with the meaning of what happened every day. Why were they selected to be imprisoned and tortured when they were not guilty of anything? How were they interrogated and by whom? How and why were they killed? The trial cannot answer all of those questions, but the civil parties, who suffer permanent restlessness their entire lives, demand disclosure of the entire truth. It is the only way to re-establish their dignity, she said. Studzinsky recounted the stories of nine of the civil parties she represents that were not related in the trial.

Studzinsky then launched into scathing criticism of the judges and how they had allegedly mishandled the civil parties. She accused the judges of not being sympathetic to the suffering of the civil parties. She said that “thank you” are only two words, but they mean a lot and the judges never used them with the civil parties. There was insufficient attention to how traumatized the civil parties are, how they could not sleep the night before their testimony, they were so distraught. None of the experts would have been treated so insensitively, Studzinsky said. Civil parties were told to control their emotions, so they sought to suppress their tears and emotions. But the painful and traumatic expressions of civil parties reveal the crimes of Duch and the judges should see that. When one victim was told to show his scars publicly in the courtroom, his lawyer intervened and fortunately reversed the judge’s request. Studzinsky claimed that the civil party lawyers were often interrupted by the president of the court and thus gave the impression judges were not interested in the civil parties.

Studzinsky criticized Cambodian defense counsel Kar Savuth for his alleged insults of a sexual character to the international counsel for the civil parties. Studzinsky asked why the civil parties could not be treated with equal respect. “Is the suffering too hard to bear,” she wondered? The president of the court should have protected the interests of the civil parties, she said. Despite these shortcomings, the civil parties appreciated the opportunity to tell their stories before the court.

Following her accounts of the grievances of several civil parties, Studzinsky concluded with the story of one civil party rape victim. She had remained silent for so many years because to disclose being a victim of rape in Cambodia invites being considered “fair game” for everyone. But when she saw Duch in the courtroom, she could no longer be silent. There would be no justice for the victim of rape if her claim is denied.

Cambodian counsel Kong Pisey focused on the crime of rape and criticized Duch for hiding behind his supposed ignorance of the penal code on the crime. It was a slap in the face of the victim to do so. Duch, Pisey claimed, attempts to cleverly avoid responsibility when it suits him. Many women, he said, felt prey to sexual assaults under his command. Pisey gave some examples, stressing that male guards oversaw the women detainees. Since the women already

were assigned to death, they became easy prey for sexual assaults. But Duch failed to prevent abuses or to punish the perpetrators of sexual assault. He also allowed guards to shame male detainees by taunting them when they had to completely strip during the water hose-downs. It was sexual harassment that constituted yet another inhumane act against the detainees.

Pisey stressed that Duch is not a scapegoat. He was a willing and enthusiastic participant with broad discretion regarding the prison conditions. Pisey claimed that Duch was not only proud of his job, he enjoyed the power as a power-hungry man. Duch's aim was to keep power. He later converted to Christianity in order to be on the right side of a powerful religion rather than remain a Buddhist and be condemned to the 18th level of Hell with no prospect of return. In the courtroom, Pisey claimed that Duch was neither sincere nor truthful and his admissions were half-hearted. There were too many questions he did not respond to or circumvented. He failed, Pisey said, in his promise to the civil parties to contribute to the truth and answer all their questions. Duch's repeated remorse and apologies are contradicted by his defense. He cries on cue crocodile tears at 4 p.m. His is an orchestrated remorse.

Pisey articulated some interesting ideas for reparations. Duch could write an autobiography and use the royalties to support the civil parties. He could work while in prison and use those earnings for such support. Pisey also proposed that Duch write two letters to the government. The first letter should be his apology to the government, while the second should request that one-third of the entrance fees at S-21 be used for reparations. Duch's wish to return to Cambodian society should be rejected, Pisey concluded.

With the close of Group 2's arguments, the court adjourned for lunch.

Group 3

Philippe Canonne delivered the first closing argument for the 28 Group 3 civil parties. He described what confronted the civil party lawyers. They had worked tirelessly on the monumental task to bring together the victims. The civil party in an international criminal trial is a major innovation. The lawyers sought to assist the court to ensure the fairness of the trial.

The first reaction of the civil parties is often instinctive: Duch must suffer the same treatment we did. Canonne advised that the counsel give voice to the first reaction but they must transcend it. Then justice would be rendered and not savagery. Canonne quoted a string of statements by Duch during the trial, all of which directly implicated him in the commission of the crimes charged in the indictment. In light of those statements, Canonne wondered whether Duch's contrition in the courtroom was sincere. Although weeping is the beginning of contrition, Duch sought to be released. "So look at the victims! Look at them, Duch, whom you sought to punish!" Canonne continued, "You can smash insects and animals. You cannot smash human beings, because one day they will rise again because they or their successors will demand a

reckoning....Their gaze beyond death is there to judge you. Perhaps your victims will forgive you after this trial. Imagine how much these people are searching, trying to understand why a man can set up such barbarity. How can an ordinary person be so respectable and yet so terrifying?”

Canonne reminded Duch that the civil parties are simple, modest, poor, and either barely educated or high educated, and they are all fighting the same, universal fight to find in the law their continuation as human beings and not sink to the level of animals. Their intent is not to destroy fellow human beings in the name of ideology. To treat civil parties with scorn would be a new form of de-humanization.

Interestingly, Canonne admitted that the civil parties were disorganized during the trial. But they were inaugurating a new system with the Duch trial. If the court reverts to silencing the civil parties during the trial, they will become icons only—voiceless—and once again they will be buried. If they are not to be victims of their stories, then we must understand them. It is with the victims, Canonne predicted, where history will be reconstructed. The most valuable reparation, he said, is the victims’ presence in the court and the acknowledgement of their rights.

Canonne said that the Extraordinary Chambers in the Courts of Cambodia foreshadows a new blueprint for hybrid international courts with attention to the victims. He closed by criticizing Duch’s use of the French poem, “The Death of the Wolf,” because he only looks to the most morbid element in the poem. He gives no chance to humankind. Because of that he cannot fathom Duch’s contrition. Is he simply trying to put all of us to sleep, Canonne wondered? Where is there any romanticism in the deaths of 16,000 or more at Tuol Sleng? “We consider you have become a wolf for mankind,” Canonne said to Duch as he finished his statement.

Martine Jacquin followed Canonne with a second eloquent statement. She described how it took the victims decades to speak out. She said, “This court is giving voice to memory.” It enabled sons and daughters of the dead to be allowed to be heard. She then showed photographs of a number of the original victims and their civil party representatives. Then she said that the perpetrators of such crimes do not commit them out of mental illness. Rather, they take pleasure in submitting to popular madness. That is the most frightening reality. The civil parties must give testimony so that all of humanity can take up the mission of justice. In Jacquin’s view, the civil party will only forgive somebody who proves to be aware of the faults of the past and will endeavor to excise those faults from the consciousness of others. Nothing, she said, can ever justify one human being dominating another.

Cambodian counsel Moch Sovannary expressed her gratitude to the Cambodian Government and the United Nations for the creation of the court. She focused on reparations and stressed the need for effective medical care for the surviving victims. The civil parties need justice and justice has to be seen to be done—reparations would accomplish that. Sovannary proposed

several ways to implement reparations: 1) create a voluntary trust fund; 2) preserve crime sites where the victims were executed and all related documents, so that younger generations can stop the “horrible historical wheel;” 3) preserve all portraits displayed at S-21; 4) erect a plaque naming all of the victims and forced labor; 5) preserve the grave and pits at Cheong Me; 5) disclose the assets of Duch; and 6) determine precisely who will implement the reparations.

Group 4

Cambodian counsel Hong Kim Suon led off the fourth segment of closing arguments with his representation of civil parties in Group 4. He proceeded to deliver an exhaustive rendition of data about each of the ten civil parties in his group. One had to wonder whether he was making the best use of his valuable time for the civil parties. While some may have appreciated his recognition of their presence in the courtroom, nothing he said was of a persuasive character to influence the thinking of the judges. Duch appeared utterly disinterested. However, Hong Kim Suon’s concluding point that part of the entrance fee at S-21 should be allocated to reparations was an intriguing idea.

Pierre-Olivier Sur from France delivered the final closing argument of the day. He noted the paradox that Duch came to the courtroom without a great deal of difficulty while the victims had enormous troubles in securing recognition as civil parties. The total number of 94 civil parties reduces the situation to the level of theory, he said. Indeed, Sur argued, Duch is in complicity with the court on the rights of the victims. While the victims are steeped in Buddhism, with its Karma, reincarnation, and “letting go” concept, their country, led by a former Khmer Rouge soldier, has enough trouble looking to the future while keeping memories alive. It has only been a few months since school textbooks were circulated with information about S-21.

Sur claimed that Duch’s shedding of tears in public is at odds with Buddhist culture, which embraces the survival of the fittest. By converting to Christianity, Duch actually followed the logic of survival of the fittest. Duch has sought to demonstrate total complicity and monopolize the trial in the process. Among the victims there is a great sense of discomfort.

For the victims, Sur argued, forgiveness can only be accompanied by sincere and exhaustive confessions. Duch has not done that. Instead, he has been evasive. Duch’s further argument that he was just a follower in the Khmer Rouge machinery is not plausible. He perfected his methods at M-13, so much so that he was better than others and was promoted to chair S-21. He had the power to save people, but chose to do so only for the photographer (who took thousands of photos of Duch in his private life), dentist, and painter. If he was able to spare life, he also was able to smash it—even his school teacher. He was no pawn. He must be judged as a criminal against humanity.

Sur recounted some of the civil parties' stories. He then proposed entrusting to international justice the "noble mission of saying and judging that there are crimes against humanity that will not remain unpunished."

President Nil Nonn announced that Tuesday, November 25, would be devoted entirely to the closing arguments of the co-prosecutors.

Note: For a recent essay on civil party participation at the ECCC, see *Civil Party Participation at ECCC: Overview*, by Michael Saliba, November 6, 2009, posted on the Cambodia Tribunal Monitor.