



November 25, 2009

DUCH HIDES BEHIND HIS ORDERS

**By David Scheffer, Professor and Director of the Center for International Human Rights,
Northwestern University School of Law**



Duch delivers his closing statement
Courtesy ECCC

International Co-Prosecutor William Smith continued his closing arguments in the trial of Kaing Guek Eav (alias Duch) before the Extraordinary Chambers in the Courts of Cambodia (ECCC). The defense rose following his statement, first with the defendant Duch speaking and then his Cambodian defense counsel, Kar Savuth, delivering his entire closing argument. The international defense counsel, François Roux, will present his closing argument on Thursday, November 26.

International Co-Prosecutor William Smith

Smith described Duch as a perpetrator of multiple forms of liability under Article 29 of the ECCC Law, in other words, someone who planned, instigated, ordered, aided and abetted, *and* committed crimes against humanity and war crimes. Duch had to fulfill all these modes of participation in order to establish and operate S-21, Smith argued. He also charged Duch as a superior who failed to prevent the crimes of or to punish his subordinates. In fact, he hired staff for the express purpose of committing crimes.

Smith made the case for joint criminal enterprise liability (JCE) as well before the judges. This is an issue that has been deferred to the merits judgment of the Duch case, so the international co-prosecutor was compelled to make his best argument for it in his final submission. JCE captures the essence of Duch's responsibility, Smith argued. The efficiency of S-21 could not have been achieved without the planning and collaborative work with both superiors and subordinates that Duch orchestrated as chairman of the prison.

The statutes of other international and hybrid criminal tribunals of the modern era refer to the same modes of liability as does the ECCC Law, and therefore Smith inferred that what emerged from those tribunals as JCE should be applicable to the ECCC as well. He said that the drafters of the ECCC Law intended it to be part of the body of international precedents represented by the tribunals. Thus, refusing to apply JCE as a mode of liability would put the ECCC at odds with the very tribunals it was intended to model itself after.

The grand criminal vision of JCE is to employ others as a tool to achieve a criminal goal. The result can be far more serious commission of crimes than when they stand alone. JCE, Smith proposed, perfectly captures the scope of crimes by Duch. The co-prosecutors obviously disagree with the Pre-Trial Chamber's ruling that denied JCE and Smith requested that the Trial Chamber find Duch guilty of JCE.

Regarding Duch's personal commission of crimes, they were limited to a small number of very significant acts, Smith contended. He should be guilty, the co-prosecutor said, under the mode of physical commission of crimes as well. Smith concluded that the co-prosecutors had proven beyond a reasonable doubt crimes against humanity, grave breaches of the Geneva Conventions, and two categories of violations—homicide and torture—of the 1956 Penal Code of Cambodia.

Sentencing

Smith delivered a lengthy statement about the sentencing of Duch in the event he is proven guilty of the charges (to which he already has admitted his guilt). Smith said that in international criminal jurisprudence there are no real guidelines on sentencing. It was necessary to look to the sentencing principles of other tribunals. Under those standards, the sentence must reflect the gravity of the crimes. Here there was the utmost gravity in both number and type of crimes which were committed daily and systematically at S-21. The crimes committed had long-term physical and mental impacts on the victims and their relatives. Three survivors of S-21 who testified in the case are permanently scarred from their imprisonment and severe mistreatment, including emotional instability. The family survivors extend around the world, with many families ripped asunder by what happened to their loved ones at S-21. For some, suicide has been the only way to deal with grief. The number of such family victims is unknown, but surely, Smith believed, they must number in the tens to hundreds of thousands. The costs are still being felt today, with countrywide post traumatic stress disorder experienced by countless victims.

The extent of Duch's participation depends upon the court's examination of whether Duch inflicted pain with his own hands and whether, with his superior position at S-21, he inflicted such pain through the work of others he supervised. If both, he becomes more culpable. If he engaged in such acts enthusiastically, then his criminal participation becomes even more serious. If he acted voluntarily and with pre-meditation, then his participation reaches its zenith. In fact, Duch stayed with the Communist Party of Kampuchea (CPK) throughout the violence. He was an effective leader, Smith argued, who relished in transforming staff into killers. He mastered all details of his work. As chairman of S-21, Duch had significant responsibility for a wider net of torture. Thousands were arrested, tortured, and killed at Tuol Sleng. He toured interrogation cells, personally kicked detainees, and forced prisoners to fight each other. Duch was one of the most effective tools of CPK policy to seek out and kill assumed enemies. Indeed, what he accomplished has rarely been matched in world history regarding the scope and callousness of the criminal conduct.

Smith reminded the court that Duch was highly educated, intelligent, and logical. He made the choice to be part of the CPK rather than to withdraw from it. As chairman of M-13 for four years prior to Pol Pot's rule of Cambodia, Duch knew what was expected of him—to arrest, detain, interrogate, torture, and execute CPK enemies. Indeed, he personally tortured many times himself during those years.

Aggravating Factors

Smith then advanced the aggravating factors that should guide the court's consideration of a sentence for Duch. First, Duch's authority at S-21 was not itself an aggravating factor, but how he used it may be. He should have protected the rights of the detainees there and he failed to do that. In fact, he did the opposite. He never acted as if he were under any duty to protect the welfare of the prisoners.

Second, the infliction of unusual pain and suffering on victims is an aggravating fact, Smith argued. What he oversaw was particularly savage, sadistic, and ruthless. The catalog of brutality at S-21 was truly grotesque and Smith went on to describe how that was so. The terror, shock, and fear were beyond our imagination, he said. Prisoners saw what foreshadowed their own fate. "Imagine what each prisoner felt when fellow prisoners disappeared and they waited for their own names to be called. Imagine how many contemplated suicide," Smith suggested.

Smith described the defenselessness of the victims at the killing fields. He suggested that all three of these aggravating factors are directly relevant and must be taken into account in Duch's sentence.

Mitigating Factors

He next turned his attention to mitigating factors in the sentence. On the issue of duress, the evidence does not support Duch's claim that he hated his work. He was a man of terror, not a

victim of terror. The defense has not proven, Smith argued, that Duch was subject to the terror that began to grip the country in 1978. As Elizabeth Becker has written, Smith said, Duch was one of a half dozen of the most important leaders in the country at that time. He spread terror throughout Cambodia in his capacity as chairman of S-21. He designed the terror machine and he was an enthusiastic participant in it.

The defense of superior orders, which is addressed in Article 29 of the ECCC Law, requires that a subordinate relying on the defense as a mitigating circumstance must show the order had an influence on his behavior. But the defense collapses if the defendant would have committed the crime anyway without specific orders. Duch actually desired to carry out the revolution and smash its enemies, rather than simply comply with orders. In sum, duress and superior orders do not apply with respect to duress and thus should not be considered as mitigating circumstances.

Cooperation with the court is a mitigating factor under international criminal law. The test rests on the quantity and quality of the information provided and if it is given selflessly without any quid pro quo. Early cooperation also is important, as is cooperating in the investigations of other trials. If the information provided is limited or not entirely true, then cooperation would not be considered sufficient. Duch made the choice not to surrender from 1979 to 1999. For 20 years, he was a fugitive; indeed for the first 15 years of that period, he collaborated as a fellow fugitive with the senior leaders of Democratic Kampuchea. He changed his name and did not reveal his connection to S-21. Only when photographer Nic Dunlop tracked him down did he find it impossible not to reveal the truth. He would not have been arrested and imprisoned but for Dunlop's persistent tracking of him.

Granted, Duch has provided evidence recently regarding the CPK and with respect to other charged senior leaders. But, Smith contended, Duch only admitted part of the truth regarding his own conduct. He essentially has confessed, "I did really terrible things but it's not my fault; it is the fault of my superiors."

Smith Hits at the Defense Strategy

Further, the defense strategy at the trial, Smith explained, is to try to limit the court's efforts to review the facts. The cumulative effect of the defense's challenges is to try to reduce the impact of the crimes and Duch's own liability for them. The defense has claimed little evidence that would bring Duch into the ECCC Law Article 1 personal jurisdiction of the court. The defense objected to any evidence being admitted regarding Duch's behavior at M-13 prior to the temporal jurisdiction of the court. That deprives the court of reviewing evidence regarding the character of Duch as a killer. In contrast, defense counsel wanted the court to hear about Duch's good behavior as a young student, long before the atrocities of 1975-1979. The defense also objected to detailed witness summaries, a tactic clearly designed to make the voluminous written evidence less easily available to the court. Judges need summaries as a roadmap to understand key issues in the case. But the defense aim was clear—to instill less clarity.

The defense objected to a reserve witness list, which would fill gaps if witnesses suffered memory loss or some other setback. Smith considered reserve witnesses essential because the court has prohibited the co-prosecutors from meeting with witnesses in advance. Since most witnesses were former S-21 staff, it is difficult to know whether the particular individual will lie or limit the information requested out of a sense of personal guilt or embarrassment. This actually proved true during the trial, with a general reluctance to speak freely. When the defense energetically advised a witness who had been an S-21 interrogator that he might be prosecuted in national courts, the defense sent a message all similar witnesses that they might be prosecuted in national courts. The defense injected fear into every S-21 witness. The tactic does not encourage witnesses to tell the truth; in fact, the defense took great pleasure in the witness not telling the truth. Finally, the defense sought to limit the documents to be delivered to the court, including documents relating to expert Craig Etcheson's findings on the existence of an international armed conflict.

Thus, on one level Duch provided evidence regarding the CPK regime and he assisted in providing information voluntarily to the court. On another level, however, Duch was not cooperative about his own role at S-21. He stated a truth only when it proved too difficult to maintain a falsehood. "You cannot challenge the trial process throughout and then claim you have cooperated with the court," Smith said.

Regarding Duch's admission of guilt, Smith described it as limited in character. When pressed on his own involvement in the crimes, Duch was always recalcitrant in the courtroom. He claimed he was forced to torture and kill. He must, Smith demanded, accept and face up to the truth with the enthusiasm of an ardent revolutionary. He has not accepted full responsibility for crimes before this court. His remorse is limited by his denial of responsibility. Duch has an inability to empathize.

Would a reduced sentence for Duch contribute to national reconciliation? Smith said it is a legitimate consideration, but Duch's behavior has not added significantly to national reconciliation. The purpose of the court is to end impunity. A heavily reduced sentence would hamper and not help reconciliation. National reconciliation is the by-product of the trial, not its purpose. Duch's admissions cannot have any impact on peace in the country. He failed to demonstrate that a lighter sentence would be advantageous for national reconciliation. "Humanity must be made whole by sternly punishing one of its own," Smith said. "That will do far more to advance reconciliation than a disproportionately lower sentence."

Smith Requests a 40-Year Sentence

Smith spoke favorably of giving Duch credit for the time he served under the jurisdiction of the Cambodian military court prior to his arrival at the ECCC. That prolonged detention was a serious violation of international law. "Here, the rule of law must apply," he proposed. When an accused is not brought to trial in a reasonable period of time, such a violation of law must be

remedied. Smith recommended that given the gravity of the crimes in this case, the court should start with life imprisonment for Duch's sentence. The court should take the breach into account. A fair course of action would be to commute the sentence of life imprisonment to a determinant sentence.

Smith claimed that Duch had been met with a fair trial by independent and impartial judges. He should be sentenced only for crimes he committed. At S-21, the detainees never had such justice. Duch ensured that they were treated as animals. Nothing can justify the brutality at S-21. Duch worked tirelessly to identify, arrest, and "smash" enemies. He repeated apologies and shed tears at Cheong Ek. Smith acknowledged Duch's admissions of guilt. But he saw no remorse in Duch's refusal to reject his active participation in the crimes. Whenever possible during the trial, Duch sought to minimize his role, claiming he was trapped by secrecy and terror. But the court must not allow him to hide behind false claims, Smith pleaded. Duch was a loyal and dedicated agent of the CPK.

Smith quoted William Shawcross, the English prosecutor at Nuremberg, who said, "There comes a point when a man must refuse to answer to his leader if he is also to answer to his conscience." Duch refused to answer to his conscience. He willingly and enthusiastically abandoned all respect for human life. He had a choice: the abuse of power or his conscience, and he chose the former.

Smith believed that Duch deserves a sentence of life imprisonment, but that it had to be reduced to a fixed number of years. He recommended adjusting the sentence to 45 years to reflect a credit for time served at the military court and as an additional remedy for being detained there without trial and contrary to international criminal law. Smith recommended a further reduction of five years in recognition of Duch's general cooperation, conditional remorse, and apologies, and the possible effect his conviction will have on national reconciliation. Thus, Smith proposed a sentence of 40 years for Duch.

Smith closed by saying that all should be mindful of the dreams and opportunities denied due to the crimes at S-21. The families of the victims still suffer today. "This court must speak on behalf of that humanity, that crimes like these must never be perpetrated again," Smith said. "Let your judgment speak of justice and establish criminal responsibility for 12,000 crimes. You are not taking away Duch's humanity; you are giving it back to the victims of S-21."

Duch Speaks

Duch, who again declined to look at Smith during the latter's statement, read his closing statement facing the judges and a packed auditorium of Cambodians. He focused almost exclusively on the CPK's policy of killing its alleged enemies and distancing himself from the decision-making that drove that policy. Both Duch and his Cambodian defense counsel, Kar Savuth, later referred repeatedly to the practice of "smashing" at S-21 and elsewhere in

Cambodia during the Pol Pot regime years. They could have ceased using that highly derogatory word, which was part of the Khmer Rouge strategy of dehumanization, in the courtroom and referred instead to “murdering” or “killing.” It seemed odd that the very terminology the Khmer Rouge leaders would want us to apply in conformance with their own usage during the 1970’s repeatedly infected the court proceedings.

Duch set out a fairly detailed description of how the CPK developed a policy of killings to protect the Party itself and how internal purges became standard operating procedure from the beginning. He admitted that before 1975 he already was plunged deeply into the criminal acts that defined the internal purges. “Anyone the CPK identified as the enemy had to be smashed—no one could challenge that,” he admitted. He was afraid of being removed if he did not join in the CPK policy. “I knew how to control and save myself.” He identified ten individuals who decided who would be killed and who would be spared. The list included Pol Pot, Nuon Chea, Ta Mok, Son Sen, and Ke Pauk. No one else had such a right, he contended.

Duch read through a tedious list of the leadership structures (and the changes therein over time) in each zone of Cambodia, as if to emphasize that he was not in any of the leadership slots. He claimed he could do nothing about the overall policy of “smashing.” Pol Pot, he said, was the criminal. “He wanted to become King.” As for S-21, Duch claimed that it was under the supervision of Son Sen, to whom all annotated confessions were sent for transmission to Pol Pot for final decisions. S-21 was unique because members of the Standing Committee were detained and killed there. “These people were a thorn in Pol Pot’s eyes,” Duch said. The people killed at the 195 other detention centers were “innocent and honest people who committed no wrong.” He said he was still terrified about what happened to all those innocent people.

Duch said he was responsible and would be forever liable for the crimes at S-21: “I am accountable to the entire Cambodian population for the souls that perished. I am deeply remorseful and regret such a mind-boggling scale of death.” He continued, “I ended up serving a criminal organization. I could not withdraw from it. I was like a cog in a machine. I regret and humbly apologize to the dead souls. I acknowledge all of the crimes at S-21 in a legal and a moral context.”

Duch hoped that the victims would leave their doors open for his apology. He claimed to fully and sincerely cooperate with the courts, including the military court where he was first detained. He wanted to be recognized again as a member of humankind.

Duch finished by reading all 34 footnotes to his statement, without any reference for the audience as to what point in the text the individual footnote referred. It was an odd finish, but emblematic of the teacher in Duch and his attention to details.

Defense Counsel Kar Savuth

Duch's Cambodian defense counsel, Kar Savuth, spoke for almost three hours. He repeated many times and presented information that he argued supported a general theme: that Duch was neither a senior leader of the Khmer Rouge nor someone who had the most responsibility for the commission of the crimes covered by the court (ECCC Law and UN/Cambodia Agreement Article 1 personal jurisdiction requirements).

Savuth pointed out that there were 196 security prisons and that each district had mass graves. Why, he asked, were the chairmen of the other prisons "living happily with their families" while his client, Duch, sat in the dock as a scapegoat? Compared with the larger numbers of victims at some of the prisons, Duch killed very few people at S-21, he said. Savuth returned to this theme repeatedly throughout his oration.

He also objected to the extension of the 10-year statute of limitations by 30 years for certain designated crimes under the 1956 Penal Code as set forth in Article 3new of the ECCC Law. He said it violated the non-retroactivity principle in international law. Since the Cambodian legislature passed the ECCC Law with the extension, Savuth essentially was arguing the unconstitutionality of the law (or at least Article 3new) under Cambodian law—all in an effort to knock out the charges of Article 3new crimes against his client. Thus the court could not prosecute Duch under national law, Savuth argued.

Regarding crimes against humanity and grave breaches (war crimes), Savuth explained that only governments made the decision to go to war and Duch was only following orders. Further, it was the top leadership who ordered and thus was most responsible for the actions constituting crimes against humanity. Since, in Savuth's view, Duch was neither a senior Khmer Rouge leader nor someone most responsible for the commission of the crimes at S-21, he should not be charged under the ECCC Law. He fails Savuth's test of personal jurisdiction under that law. In his view, only three individuals should be prosecuted by the court because only three surviving persons fall within the personal jurisdiction of Article 1 of the ECCC Law: Nuon Chea, Khieu Samphan, and Ieng Sary. Furthermore, only these individuals could order arrests and acts of "smashing." Duch was at the third tier of recipients of orders. The top individual was Pol Pot, then Son Sen, and only then does one arrive at Duch following Son Sen's orders. "The person who received orders and executed them is not 'most responsible' under the ECCC Law," Savuth argued. He kept returning to his scapegoat theme as well, noting that other chairmen of prisons during the Khmer Rouge regime roam freely in Cambodian society and should be prosecuted if his client is being prosecuted. Such inequality of treatment, Savuth contends, violates the equality provision of Article 31 of the Cambodian Constitution.

While he and his client admit that crimes existed at S-21 ("You can't cover an elephant with a rice basket."), Savuth argued that Duch was not culpable for those crimes under the Cambodian 1956 Penal Code or the ECCC Law. He also claimed that Duch acted under duress and Article 238 of the 1956 Penal Code provides that if one obeys superior orders under duress, then the prosecution can only be brought against the superior.

Savuth ignored other provisions of the ECCC Law, such as the denial of defense of superior orders other than for mitigating purposes, and the fact that sufficient records simply do not exist for the other prison camps that would ensure successful prosecutions of other surviving prison chairmen. The voluminous records of S-21, thanks in large part to Duch's meticulous attention to detail, and S-21's notorious and systematic use of torture and other methods to extract confessions prior to executions arguably provide the basis for prosecution of him. One must also consider the raw evidence of what actually occurred at Tuol Sleng and who in reality led in the execution of the crimes.

Nor did Savuth consider the intent of the negotiators of the ECCC Law with respect to the scope of personal jurisdiction. He based his entire analysis on what was established on paper in the CPK regarding the issuance of orders. The commission of crimes against humanity and war crimes on the massive scale experienced in Cambodia from 1975 to 1979 cannot rest only on how the CPK defined its leadership structure on paper. It is up to the co-prosecutors, co-investigating judges, and judges to determine who constitutes a "senior leader" and one "most responsible" for the crimes. Since Duch acknowledged his responsibility for the crimes at S-21, Savuth's arguments today appeared awkward in that he was seeking to deny any culpability under the law for Duch's actions at S-21. Perhaps international defense counsel François Roux will clarify matters during his closing arguments on Thursday morning.