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THE CRIME OF OBEDIENCE

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International defense counsel François Roux

On Thursday, November 26, 2009, international defense counsel François Roux rose to deliver about four hours of closing arguments in the trial of Kaing Guek Eav (alias Duch) before the Extraordinary Chambers in the Courts of Cambodia (ECCC). He made two dramatic announcements at the outset: 1) he had to revise his pleadings overnight in light of the argument made by his co-counsel, Cambodian Kar Savuth, on November 25, and 2) this would be his last pleadings as a lawyer. In the latter respect, Roux said that it had been 37 years since he took the oath as a lawyer and at the end of this day he would be taking off his gown. He will head up the defense office of the Special Tribunal of Lebanon in The Hague and continue his commitment to the service of international criminal justice. He dedicated his words during the day to his grandchildren and to the young generations, particularly the young female lawyers on the civil party counsel teams in the courtroom.

Roux continued that “to stand up and speak in defense is what makes our job noble.” He stood “beside one accused of one of the most serious crimes imaginable—crimes against humanity. When I hear such a plethora of mistruths by the co-prosecutors and not hear anything of our humanity, of how the accused has provided the co-prosecutors with the bulk of the charges against him, then I stand tall as a defender.”

“Beneath the gown,” Roux said, “there is a human being—a man so perturbed by what the victims have experienced. My compassion and respect as a human being tell me this morning that I was pleased to hear all civil party groups say that this trial for our client has been the first

step on the road to catharsis. Let us celebrate that this little drop of water will cool the great suffering they have endured. The civil party groups are defending the presence of victims in our proceedings. This is the beginning...to make sure this happens for the first time in an international criminal court: the presence of victims as civil parties.”

Looking at the ECCC itself, Roux asked, “How many cynics said it would never take place? And then the trial took place, with all the complexities we had to deal with and transcend. But here we are; we’ve done it. Today, we can say this trial will be inscribed in the annals of international criminal justice that is evolving in our time. It is still a child. We’re all trying to find the best way forward. At the end of the day justice is rendered. But you, the judges, are not in charge of effecting reconciliation. You cannot force reconciliation. But you must render justice. You are not here to fight impunity. That is the co-prosecutors’ job. You are here to render justice in a court whose strength is to enable adversarial proceedings.”

After noting the work of the Truth and Reconciliation Commission in South Africa and Desmond Tutu’s writings that it had allowed for the rebirth of the human race in his country, Roux said, “At times, we had the impression as though we were taking part in a truth and reconciliation commission in this courtroom. It is to the honor of Cambodia that this court has allowed so many to follow the trial, which serves as a model for that purpose.”

Disagreement Between the Defense Counsel

Roux acknowledged what had been so apparent on Wednesday—a huge last-minute rift between his strategy for the defense of Duch and the strategy of his Cambodian co-counsel, Kar Savuth. He described some of Savuth’s objectives as unacceptable and would let him prepare his own rebuttal for the counterattack that was sure to come from the co-prosecutors. First and foremost, Roux admitted that the case law of the International Criminal Tribunal for the Former Yugoslavia had dealt at length with the criteria for who falls within the category of “those most responsible” for the commission of genocide, crimes against humanity, and war crimes. The national law of Cambodia simply is not applicable on that issue, “and therefore international law must prevail,” he said. International law had already been introduced into domestic law in this respect.

Second, Roux had to address the vexing reality that Savuth essentially had argued the innocence of Duch under the ECCC Law and 1956 Penal Code and thus for his acquittal of all charges. In contrast, for months Roux had guided his client through many representations of responsibility for the crimes charged in a manner that constituted a de facto guilty plea (even though such a plea technically is not available under the law for the ECCC). “We cannot ask for acquittal of the accused as well as enter a guilty plea for him,” Roux conceded. Although Duch will not literally plead guilty, “who is in a position to dispute the tears wept by Duch? Who can contest his apologies? These were moments of truth that were experienced by an accused person who wept before victims and the co-prosecutors and who proclaimed, ‘These are the words I have

waited to utter for 30 years.’ Who can dispute that? Duch has acted with utmost sincerity and has been utterly moved.”

Roux said that Duch recognizes his guilt, and that fact alone is a historic moment for Cambodia. “We must build the truth,” he advised. “We heard a man apologize on his knees yesterday.”

Dragan Obrenović Precedent

Roux then received permission from the judges to show a film from the trial of Dragan Obrenović before the International Criminal Tribunal for the Former Yugoslavia (ICTY). Obrenović was the acting commander of the Zvornik Brigade of the Bosnian Serb forces that swept through Srebrenica in July 1995 and executed Muslim men and boys. He entered into a plea agreement with the ICTY prosecutor and plead guilty to one count of the crime against humanity of persecution, and was sentenced to 17 years imprisonment on December 10, 2003. The film extract showed the closing statement of the prosecution regarding his sentencing. It was a powerful and eloquent statement for the ECCC trial audience to watch, for the ICTY prosecutor explained the admission of guilt by the defendant, his remorse, his cooperation with the prosecutor, his provision of the truth about what happened at Srebrenica, and the prosecutor’s basis for seeking a 17-year sentence.

Following the showing of the film, Roux rose and said simply, “So there you have it. This is what this trial should have been. This might have prevented what happened yesterday afternoon [i.e., Savuth’s pursuit of an acquittal].” Roux emphasized that Obrenović did not admit to everything; in fact he plead not guilty to all charges until the first day of his trial. Then he approached the prosecutor and only at that time did he plead guilty to one charge. “It was not a deal,” Roux said. “It was a dialogue, a discussion between the prosecutor and the defendant.”

Co-Prosecutors Miss Their Date with History

In civil law, Roux continued, the guilty plea does not exist as such. But the court can draw upon international law for the application of what constitutes a guilty plea in a case and trial of this character. “The co-prosecutors missed their date with history, and this led to frustrations in public opinion among the victims that Duch is not telling them all that he should. What a waste! From the outset Duch told the co-investigating judges that he is guilty and responsible for all of the crimes. But no, the co-prosecutors decided to submit to the conventional argument whose underlying philosophy is, ‘This man is a monster.’ Instead, we must understand how a decent man becomes a torturer. That is what I would have liked the co-prosecutors to say.”

Roux initiated the core theme of his closing argument, which he drew from expert witness David Chandler and his writings: “This is a case about the crime of obedience. How do you become a criminal when you have been obedient?” Roux did not want Duch to be a scapegoat; he should not bear on his head all of Cambodia’s atrocities. He ripped into the co-prosecutors’ “gratuitous

statements” and “farcical words” describing his client. He challenged Craig Etcheson, who works in the office of the co-prosecutors, as an expert.

Roux rhetorically asked, “Did Duch become Pol Pot?” Then he said, “I apologize to the victims for what I am about to say: How many died at S-21—about 12, 280. In Cambodia, 1.7 million people died. S-21 was responsible for less than one percent of the deaths in Cambodia. And yet we are to believe that Duch was a terror that bathed the country in blood!”

There was no question, Roux continued, that Duch has admitted the facts. The loss of life in Cambodia was huge. He has acknowledged responsibility for lives lost at S-21 and in particular for torture and executions there. He never wavered in admitting this. Roux then recited a litany of admissions of facts by his client, where he admitted to heinous crimes at S-21 and said he was criminally responsible for the acts committed on his watch. He confirmed his own remorse and that he was extremely ashamed, that he has shame he carries with him each and every moment of his life. Roux quoted Duch when, on June 15, 2009, he admitted that he betrayed his friends and that what he did “transcends cowardice.”

Roux pointed out, forcefully, that Duch had agreed to cooperate during the investigative phase of his case and during the re-enactments. “He takes nothing away from the seriousness of the crimes. He is full of remorse,” Roux contended. But, he said, the co-prosecutors lacked contact with Duch. As his lawyers, Roux and Savuth see him alone when he speaks freely from the heart, when he collapses into tears. Roux railed against the co-prosecutors for not acknowledging, in their written submission to the court, Duch’s admissions of guilt. “Not once have they said it in their final submission!” The co-investigating judges recognized the admissions and said Duch acted out of fear and shame.

At the proceedings on September 16, 2009, Roux recited to Duch co-prosecutor Robert Petit’s statement regarding what he wanted from Duch as an admission of guilt. “Do you admit to it?” Roux asked Duch. “That you implemented it all? Yes or no!” Duch replied, “Yes, I admit it completely.”

Roux looked at the co-prosecutors and asked, “So how can there still be a shadow of doubt with the co-prosecutors? How, two months later and the submission of a 160-page brief to the court, could the co-prosecutors not confirm Duch’s admission of September 16?”

Roux then raised the expert testimony of David Chandler. He reminded Chandler of Duch’s admission on April 17, 2009, that he was ashamed of photographs from S-21 where he looks proud of the work he was doing. “I am ashamed,” Duch said. “It is shocking and one feels shame when depicted in such a photograph.” Roux said Duch recognized that he ordered and supervised crimes. When asked about this, Chandler said, “Yes, what Duch said will serve history. I was very impressed by Duch’s admission of guilt. He is unique among the surviving actors of the Khmer Rouge regime.”

Roux accused the co-prosecutors of reinventing the history of Democratic Kampuchea. They had explained it was a dictatorship. “If S-21 occupied an important position,” Roux responded, “and its head had such autonomy in decision-making, indeed that he advised his superiors and frightened them, well, then it’s not a dictatorship anymore. It’s participatory democracy where there are no superiors!” He continued, “Duch was the subordinate of Son Sen. You cannot avoid that fact! Duch never enjoyed full autonomy in his position at S-21. The prison was closely monitored from the very top of the CPK leadership. S-21 was in the grasp and control of the Central Committee. 78 percent of those killed at S-21 were members of the regime. S-21 was directly controlled by the center of the regime.”

Etcheson Testimony

The testimony of Craig Etcheson presented a new version of the facts, Roux contended. Etcheson maintained that Duch had fueled the paranoia of the regime leaders. Chandler had testified that S-21 confessions were like a mantra protecting the party from others. Etcheson admitted that the Standing Committee controlled all communication in Democratic Kampuchea and that it was a top-down hierarchy. Roux said that Duch’s mission was defined by the fact that anyone who entered S-21 was to be executed. “This was the sinister task Duch was given. It is a rewriting of history to claim that Duch had the will to choose independently who to arrest or who to execute.” Roux objected to Etcheson’s effort to cast Duch as a source for a constant purge in the ranks. Once again, Roux said that 12,380 deaths are one too many, but they are not 1.7 million deaths that the senior leaders of Democratic Kampuchea must be responsible for.

Duch’s job was simply to elicit confessions at S-21, Roux said. He was an instrument in the hands of the party and he acted like an obedient machine. “He had to choose to kill or be killed,” according to Roux. Chandler testified, he said, that if Duch did not obey orders, death was certain. Etcheson testified to this reality as well. Why did Duch not escape? The answer was based on common sense. Others had more power than Duch and they were unable to escape with their lives. All of the CPK leaders who entered S-21 were unable to escape. “This was a system of paranoia, of madness,” Roux concluded. “You are reproaching Duch for doing something demanded of everyone!” He continued, “Isn’t it too comfortable to see Duch as a monster? The co-prosecutors don’t have the courage to seek a life sentence; they opt for a 40-year sentence. Isn’t that too comfortable a solution?”

President Obama’s Instructions

Roux advised that the real task of the co-prosecutors should be to discover the phenomenon whereby a normal man becomes a murderer. We return, he said, to Chandler’s ultimate quest: the crime of obedience. Roux said he had defended civil disobedience in the courtroom for 35 years in an effort to change the law in the same spirit as Gandhi practiced in India. Roux took note of what President Barack Obama had said months ago, that those individuals fulfilling in good faith the advice of the Justice Department during the Bush Administration on the

interrogation of terror suspects, which included acts of torture, would not be prosecuted. How can that instruction stand in contradiction to what Duch confronted at S-21, namely to follow the orders on interrogation of prisoners? Why didn't the U.S. personnel disobey? "If we don't learn how to disobey in a democracy, how do we do it in a dictatorship?" We all operate in a world, Roux said, where we ask our superiors what to do. Are we all engaged in crimes of obedience? "After 35 years of defending acts of disobedience, here I stand defending someone who slavishly obeyed his orders."

Joint Criminal Enterprise

Roux next turned to the co-prosecutors' continuing attempt to hold Duch liable under the joint criminal enterprise theory (JCE). He argued that the trial chamber cannot determine that Duch committed acts in joint criminal enterprise with individuals whom you did not give the right to appear to defend themselves of that accusation. The co-prosecutors should have sought a closed session so that these individuals could testify and defend themselves from JCE theory.

Further, Roux stressed that Duch cannot be prosecuted for committing torture himself, as the co-prosecutors sought this week. The Pre-Trial Chamber had rejected that charge. Roux then launched into a lengthy critique of Rule 87, which requires the judges "must be convinced of the guilt of the accused beyond reasonable doubt." He claimed there was a problem in the translation of the rule from the original English into French. He hoped the judges would be guided by "your intimate conviction" when deciding Duch's guilt.

Roux sought to portray Duch's more humane side as a "sweet" and "nice" man. He quoted from page 256 of Nic Dunlop's book about Duch, where Duch, long after the Pol Pot era, averted an outbreak of typhoid in the humanitarian camp where he worked and saved countless lives in doing so.

Roux raised the prospect that Duch suffered from post traumatic stress disorder, which may cause the victim to evade reality and to be emotionally insensitive. Roux remained convinced there were certain things Duch was still not telling him, and that PTSD might be the reason.

Duch's Sentence

Regarding the sentence against Duch, Roux noted that the other criminal tribunals regarded obeying superior orders as a mitigating circumstance. Duch, he said, was in the chain of command and was a servant and hostage of the regime at all times. Duch also is continuing to cooperate in Case 002, Roux revealed. In fact, Duch and his lawyers met with the co-investigating judges about two weeks ago and will do so again next week. Roux regretted not stressing this fact of continuing cooperation of the defendant earlier in the trial.

Roux envisaged Duch sentenced to the duty of explaining to younger generations touring Cheong Ek, the killing fields, what must not be done in the future.

The Albert Speer Defense

Since yesterday, Roux admitted, there was no longer a guilty plea by his client. “We are in the Albert Speer defense now. At Nuremberg, Speer did not plead guilty but he acknowledged his responsibility. Prosecutor Jackson gave value to Speer’s acknowledgement, saying he was the best among the worst of the defendants at Nuremberg. Speer received a 20 year sentence. Obrenović got 17 years. “Can Duch still be useful to humanity?” Roux asked. Roux claimed that Duch had been a fugitive for 20 years and imprisoned for 10 years. So for 30 years he has not been a free man—a point the co-prosecutors doubtless will contest on Friday. Roux said Duch already had paid for the evil he has committed. “Send him home!” Roux pleaded. In human eyes, Duch will never be forgiven. “But can we look Duch in the eye and see him for the human he is? Will you bring Duch back into the fold of humanity? Duch is dead. Today his name is Kaing Guek Eav. He is no longer the Duch of the revolution.”

Roux sat down, having completed a brilliant, albeit contestable, closing argument. The rebuttal phase of the closing arguments then commenced with the civil party lawyers leading the statements.

Civil Party Group 1

Karim A. A. Khan began the rebuttals of the civil party groups in his capacity as counsel to Group 1. He acknowledged Roux’s elegant delivery, great wealth of experience, charm, and ability. But Khan immediately went on the attack. He accused Duch of trying to ride two horses. At the last possible moment, things changed on Wednesday. For months Duch had expressed a guilty plea in all material respects, and yet now he seeks to be acquitted and set free. That is unfair to the people of Cambodia, Khan said.

There is no provision similar to Rule 71 of the Internal Rules for a disagreement between defense counsel. That kind of disagreement logically should be resolved by the client who would give instructions to counsel as to what the client desires. In some respects, what happened with Mr. Savuth’s closing argument on Wednesday was an abuse of process, Kahn said.

Kahn turned the tables on Roux’s allegation that the co-prosecutors had missed their date with history. “In my view,” Kahn said, “Duch has missed an important opportunity to speak clearly, spontaneously, and candidly to the court. He was the de jure head of S-21 but in fact voluntarily joined in that venture. He turned away from the co-prosecutors rather than engage them.” An act of contrition and expressions of sincerity and frank acceptance of the truth are priceless and are all that Duch can offer the civil parties. Tears alone are not determinative, Khan said.

Khan said that Roux’s raising of post traumatic stress disorder was entirely irrelevant, that this is a court of law and not someplace where you can bring unsupported hypotheses into the courtroom at the last moment.

“There were 12,380 moments when Duch could have done the right thing. But he has been content to leave it all opaque,” Khan contended. He continued that the defense fundamentally misconceived the issue of extending the statute of limitations on the 1956 Penal Code, as Savuth had contested on Wednesday. As for Savuth’s claim of lack of personal jurisdiction, under Rule 89 preliminary objections of that character should have been filed within 30 days of the closing order. In any event, there are reams of case law to knock out the argument. On the issue of joint criminal enterprise theory, Kahn noted the *Seromba* judgment of March 12, 2008, by the International Tribunal for Rwanda. There the judges found it irrelevant that the accused did not personally drive the bulldozer that became a killing machine. The accused exercised influence over the driver and that was sufficient to find JCE in that case.

Khan concluded by saying, “We don’t know what is being said by the defense anymore. Mr. Roux claims Duch is not pleading guilty, but has contrition. Mr. Savuth wants Duch released as a free man.”

Civil Party Group 2

Silke Studzinsky rose for Group 2. She immediately argued that the non-guilty pleading of Savuth on Wednesday was “a slap in the face of the civil parties.” They were shocked by his request for Duch’s acquittal and immediate release. Duch was and continues to play a good game, she said. But the time has come to shed the sheep’s clothing. Studzinsky then repeated and elaborated upon many of the points raised by Khan a few moments earlier. She emphasized that the objection to personal jurisdiction should have been pleaded earlier and is not admissible at this stage. Savuth fundamentally misunderstood Article 31 of the Cambodian Constitution, which has no concept of equality for injustice. That right does not exist, she said. The legality of a decision cannot be sanctioned for failure to prosecute others.

Savuth’s arguments regarding defense of superior orders insults the civil parties, Studzinsky claimed, and in any event does not relieve Duch of culpability. It can only be considered as a mitigating circumstance for sentencing.

The new logic of the defense team seems to be, Studzinsky said, that Duch completely escapes criminal responsibility and that only Pol Pot is liable! Duch’s defense strategy does not contribute to the reconciliation process. The civil parties are even more alienated now. Indeed, the defense strategy contradicts the defendant’s genuine remorse of prior statements. His wish to return to Cambodian society must be rejected, she concluded.

Civil Party Group 3

Martine Jacquin rose for Group 3. She said that the civil parties had not heard words of deep contribution from Duch. “You lacked courage under the Khmer Rouge. You lacked courage here as well! You did not fundamentally ask for forgiveness. You missed an appointment with the history of your country. You have not understood the civil parties. You have not distanced

yourself from the murderous Utopia of the regime. You seek the pity your victims never had.” Throughout Jacquin’s statement, Duch stared at her. (Usually, he looks away from opposing counsel.)

Philippe Canonne followed (and Duch looked away) and began by praising Roux for his decades of service to the law. He said, “How much we would have appreciated a guilty plea. We could have come closer to a fair sentence. This would have been a bridge. We expected words of sincerity, not of convenience. We heard from Duch a piling up of events, of case numbers, document numbers. Perhaps Duch has not understood a single thing here. Perhaps he is still lost in his footnotes. He operated in the most absurd bureaucracy where reason and sensitivity were completely absent. And now the defense asks for his acquittal. This is irresponsible!”

Canonne argued that an order must be disobeyed if it is cruel and Duch had the leeway to do that, but refused to do so. Not once was there any discussion of reparations by Duch. How could the civil parties hear the statistic of only one percent of all deaths in Cambodia at that time occurred at S-21? “How can you say that to them?! These are heavy statistics that weigh on the hearts of all survivors.”

Civil Party Group 4

Hong Kim Suon spoke for Group 4. He spoke emotionally and twice stopped for many seconds to collect himself. He said he was a victim and it was hard to compose himself. “I apologize for not controlling my emotions,” he said.

Hong Kim Suon accused Savuth of contradicting what Duch had already said in the trial regarding his own responsibility and thus inflicted more pain and suffering on the civil parties. Was it convincing to argue that Duch was not among the most responsible or not a senior leader? Duch was most responsible when he oversaw the execution of over 12,000 people. His experience at M-13 made him trusted by the regime and promoted to S-21 to extract confessions. It is a lie, Suon said, when Duch claimed he could not escape and was simply a cog in the machine. He personally annotated for years all of the death documents.

Suon called for a harsh sentence. He requested that Duch’s apology be broadcast on radio. Oddly, Suon closed by proposing that a statue of Duch, in uniform, be erected at S-21 to remind everyone he is a criminal. Cambodians in the public gallery gasped at the suggestion, some laughing at it and others with expressions of horror on their faces.