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“DUCH WAS JUST A TOOL”

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Duch stares intently as Supreme Court Chamber considers his request for acquittal
Courtesy ECCC

There was an almost nervous energy in the audience today as the visitor’s gallery at the ECCC filled with Cambodian onlookers for the first day of the Kaing Guek Eav (alias “Duch”) appeals before the Supreme Court Chamber.

Proceedings began with a summary reading of the Trial Chamber’s judgment by President of the Supreme Court Chamber, Kong Srim, including the crimes Duch was convicted of, the 35-year sentence issued, and the due process violation that reduced it by five years. He then summarized the procedural setting for the hearing and passed the floor over to defense to put their case forward as to why the Trial Chamber judgment should be invalidated and Duch released.

Duch spoke first, but only to state his belief that the Trial Chamber erred in finding personal jurisdiction over him and that his lawyers have authority to represent him before the Supreme Court Chamber.

Duch's Appeal

Kar Savuth, the Cambodian co-defense counsel for Duch, led the defense team's oral argument. For about an hour and fifteen minutes Savuth seemed to take a buckshot approach, jumping from one argument to the next in hopes that something would stick. There was also a strong focus on rhetoric as Savuth analogized the ECCC to Thai border incursions and Duch to pilots dropping bombs on Cambodia at the order of former U.S. President Richard Nixon. The former was used to highlight his point that the court had illegally extended its jurisdictional mandate beyond senior leaders and those most responsible for the crimes of the Khmer Rouge regime. The latter was used to illustrate his assertion that Duch was only following superior orders and, therefore, should not be held criminally responsible.

Stringing together the various points, the defense counsel's key arguments were that 1) the Trial Chamber erred in its interpretation of Article 2 of the ECCC Law and Article 2 of the UN/Cambodia Agreement, which grants the court jurisdiction over "senior leaders of Democratic Kampuchea and those who were most responsible for the crimes" of that regime, and 2) the Trial Chamber erroneously ignored Internal Rule 87 when determining that the defense's jurisdictional challenge was inadmissible under Internal Rule 89.

Personal Jurisdiction

Savuth spent the majority of his time hammering the point that Duch was not a senior leader of Democratic Kampuchea and, therefore, was not one of the individuals most responsible for the crimes of that regime. He began by reminding the court that the purpose of the ECCC according to the UN/Cambodia Agreement is to bring peace and reconciliation to the people of Cambodia while respecting the sovereignty of the Royal Government of Cambodia. To do this, he argued, the court must respect the RGC's intent to allow only the prosecution of the senior leaders of the Khmer Rouge and that senior leaders were only those few individuals who had the power to render orders and give commands on behalf of the Khmer Rouge regime. "Duch was head of a prison" he said, "so how could he be most responsible or a senior leader?" Duch was just a "puppet."

Savuth argued that, because Duch was not a member of the Standing Committee, he could not be seen as a senior leader most responsible for crimes within the ECCC's jurisdiction. His argument implied a conjunctive reading of Article 2 of the Law and Article 2 of the UN/Cambodia Agreement whereby, according to him, only senior leaders could be characterized as those most responsible. However, it wasn't until Judge Chandra Nihal Jayasinghe asked whether this was the defense counsel's argument that the other co-defense counsel for Duch, Kang Ritheary, confirmed it to be defense's argument.

Once having established his assertion that only senior leaders could be prosecuted before the ECCC, Savuth questioned how Duch could be characterized as such. He quoted

Judge Cartwright as having said that the Communist Party of Kampuchea made all the decisions related to who was to be detained in security centers and who was to be ‘smashed’. He also pointed to documents that showed Duch was not a member of the Standing Committee. He reasserted numerous times that Duch was a low-level secretary with no real authority; that the real blame lie with Pol Pot, Son Sen and Nuon Chea. “Duch was just a tool.”

Finally, Savuth spent time pointing out that there were 195 security centers under the DK regime, each with its own leader, yet Duch was the only one being tried. Possibly hinting at selective prosecution, he asked, “Was killing at other prisons not willful? Were detainees detained legally? Was there not torture? Were people kept in a hotel or something?”

After offering an apology to the victims and informing the audience that he, too, had lost family members to the crimes of the Khmer Rouge, Ritheary followed up Savuth’s jurisdictional argument with many of the same points. He asserted that the Trial Chamber’s finding that Duch fell within its personal jurisdiction amounted to an expansion of its legislative mandate in violation of civil law theory. “Perpetrators don’t fall within the court’s jurisdiction. Only instigators,” he said.

Internal Rule 89 - Preliminary Objections

The second argument of Duch’s defense counsel centered around the question of whether jurisdictional arguments must be made as preliminary objections in order to be preserved for appeal under Internal Rule 89 or whether they could be made anytime during trial if new evidence was admitted under Internal Rule 87. However, the oral arguments failed to clearly illuminate their point and, instead, the defense counsel spent their time levying accusations that the Co-Investigating Judges, the Co-Prosecutors, and the Trial Chamber failed to consider exculpatory evidence that showed Duch was not a senior leader or among those most responsible for crimes of the DK regime.

Defense counsel also briefly argued that Duch’s detention should be viewed as “witness protection” because the detention was illegal and because Duch had offered substantial cooperation to the court, giving evidence about the Standing Committee’s structure and the role of S-21 within Democratic Kampuchea. The point of this argument was noticeably unclear and led to follow-up questions from the judges that received equally vague answers.

The Prosecution’s Response

Co-Prosecutor Chea Leang presented the prosecution’s response to Duch’s appeal and focused mainly on the impact Duch had on Khmer Rouge decision-making and the unique role of S-21. She pointed to evidence that Duch reported directly to the Standing Committee and that his annotations on detainee statements clearly showed his power to decide which prisoners would be ‘smashed.’ She also pointed out that Duch, unlike other security center leaders, had the power to arrest, detain and kill high-ranking Khmer

Rouge cadre throughout Cambodia. In this way she argued S-21 was a key organ of the Khmer Rouge regime and that Duch, as its head, was fairly characterized as among those “most responsible.” Therefore, she asserted the Trial Chamber correctly held it had jurisdiction to prosecute Duch.

When asked by the judges whether “most responsible” and “senior leaders” should be read conjunctively, as defense asserted, Co-Prosecutor Andrew Cayley rose momentarily and directed the court to evidence that the UN Committee of Experts and the Cambodian National Assembly, when considering the ECCC’s jurisdictional mandate prior to the court’s creation, both intended the statement to be read disjunctively.

Prosecutorial Discretion

Although listed on the court’s schedule as the key issue for today’s hearing, the question of whether Article 2 of the Law and Article 2 of the UN/Cambodia Agreement were subject to judicial review received little attention. After both the defense and the prosecution had made their arguments, Judge Motoo Noguchi put the question to the prosecution, asking them whether the phrase ‘senior leaders and those most responsible’ was intended as a guide to be used by the Co-Prosecutors when exercising prosecutorial discretion and, as such, not subject to review or whether it was a jurisdictional requirement that was subject to judicial review. The prosecution responded that it was the former, but failed to give a legal basis for their opinion. The defense counsel did not directly address the issue, although their jurisdictional argument and request for acquittal implied a belief that it was subject to review.

Civil Party Statement

The day finished with a 30-minute statement by Martine Jacquin, co-counsel for Civil Party Group 3. Although well organized and eloquent, the statement did little more than summarize Duch’s argument and reemphasize points made by the prosecution. Defense counsel had a brief final word and said that civil parties should only address the harm committed to victims and the appropriate reparations that the court should grant them.