

DUCH SENTENCED TO 35 YEARS IN PRISON; WILL SERVE ONLY 19

July 26, 2009

By Michael Saliba, J.D., and Tyler Nims, J.D., Center for International Human Rights, Northwestern University School of Law

Today—35 years, three months, and nine days after the Khmer Rouge entered Phnom Penh and 31 years, six months, and nineteen days after they were driven out by Vietnamese forces—Kaing Guek Eav (alias Duch), the infamous chief of Tuol Sleng prison (S-21), became the first Khmer Rouge held accountable for his crimes in a court of law meeting international fair trial standards. This morning, the Extraordinary Chambers in the Courts of Cambodia (ECCC) sentenced Duch to 35 years in prison. Over one thousand Cambodians of all ages and backgrounds arrived early in the morning to the gates of the ECCC to witness the pronouncement of the judgment. Some gathered in the courtyard of the ECCC to watch screens delivering a live feed of the judgment, while others who had received prior access proceeded directly to the courtroom. Visitors filing into the courtyard of the tribunal were met by a host of reporters from international and national media outlets, marking the great significance of this moment for Cambodia and for the international cause of accountability for atrocity crimes.

The public viewing gallery of the courtroom was filled with a diverse crowd: civil parties like the few survivors of Tuol Sleng and relatives of those tortured and sentenced to death at the prison, their families, villagers from across Cambodia, orange-robed monks, foreign dignitaries, and national and international members of the press and human rights non-governmental organizations. A group of about fifteen civil parties—several of whom had attended nearly all of the proceedings—sat behind their lawyers in the courtroom, facing Duch and his lawyer. Noticeably absent from the courtroom was Francois Roux, Duch's international defense counsel, who had been swiftly and suddenly relieved of his position two weeks ago after Duch informed the Defense Support Section that he had lost confidence in Roux's ability to provide adequate representation.

The crowd rose at 10:00 sharp as the judges entered the courtroom to read a summary of the long-anticipated judgment. The president of the Trial Chamber, Judge Nil Nonn, speaking for the court, called Duch to the stand to listen to the judgment as it was read out in open court. Duch, wearing a light blue button-down shirt, glanced quickly into the public gallery as he approached the stand, but otherwise sat expressionless throughout the remainder of the proceedings.

The court emphasized the historic nature of the verdict, the first such judgment against a high-ranking member of the Khmer Rouge. The court explained that Duch faced charges of crimes against humanity, grave breaches of the Geneva conventions (commonly

referred to as war crimes), and violations of the 1956 Cambodian penal code. But because the judges did not achieve a four-member consensus on the issue of whether the statute of limitations had run on the crimes under the Cambodian penal code, they concluded that they lacked jurisdiction to consider these crimes.

The court made some important findings as it provided the historical and political context of Democratic Kampuchea, including that a state of international armed conflict existed between Vietnam and Cambodia during the entirety of the Democratic Kampuchea regime—meaning that Khmer Rouge defendants could be convicted of war crimes—and that the standing executive committee of the Communist Party of Kampuchea directed the Democratic Kampuchea state. The court also stressed the fact that Nuon Chea was Duch's direct supervisor in the hierarchy of the CPK, a finding which will likely have consequences for case 002.

Next, the court read out the crimes with which Duch was charged. Despite the fact that Duch confessed to many of the crimes during the trial, no provision is in place at the ECCC to accept a guilty plea and therefore the court reviewed the all of the evidence and pronounced Duch guilty on all counts except those domestic crimes over which the court had earlier found that it lacked jurisdiction.

In sum, Duch was convicted of the crimes against humanity of persecution on political grounds, extermination, enslavement, imprisonment, torture, one instance of rape, and other inhumane acts. He was convicted of the war crimes of willful killing, torture, willfully causing great suffering and injury, depriving civilians and prisoners of war of the right to a fair trial, and the unlawful confinement of civilians.

Though the court concluded that there was insufficient evidence to indicate that Duch personally tortured victims and committed other inhumane acts, it held that he had participated in the crimes as part of a joint criminal enterprise. Duch had zealously worked within and presided over a system of terror with the intent to further the criminal purpose of the enterprise. For purposes of sentencing, the court also noted that Duch had planned, ordered, and aided and abetted many of these crimes and would also have been liable for the crimes committed at S-21 under a theory of superior liability.

The court rejected the defense of superior orders proffered by Duch's defense because it is not recognized as a defense for Duch's international crimes. The court also rejected Duch's claim that he committed the crimes under duress because the evidence showed that he not only consciously partook in the criminal enterprise but also planned it.

Before announcing Duch's sentence, the court addressed the civil parties. Stressing the importance of establishing both a direct injury and a causal connection to the charged person, the court recognized 70 of the civil parties and read out their names and their connection to the crimes committed at S-21 and Choeung Ek. Yet in what must have come as a great shock to some of the civil parties, the court rejected several applications. Those rejected learned of the court's decision only after it finished reading the list of recognized parties. The court then turned its attention to the moral and collective

reparations they were permitted to award under the ECCC law. It announced that all of the names of the civil parties would be written into the judgment with a description of their relation to S-21 and any relatives that perished there. The court also promised to post a compilation of statements of apology and remorse that Duch has made during the trial on the ECCC website. The court did not award any other reparations, stressing that it had no jurisdiction to enforce any government implementation of awards. This was a conclusion that caused much grief among the civil parties, although it was not unexpected.

Finally, Judge Nil Nonn asked Duch to stand as his sentence was pronounced. The court explained that it had considered mitigating factors—like cooperation with the court, limited expressions of remorse and guilt, and the coercive nature of Democratic Kampuchea—and aggravating factors—such as the heinous nature of the crimes and the long period over which they occurred. The gallery then let out a collective gasp, and several people wept quietly, as the court announced that Duch had been sentenced to serve 35 years in prison for the crimes he oversaw at S-21.

However, Duch's sentence was reduced by five years because of his illegal detention from 1999-2007 at the hands of the military. He was also credited with the eleven years of time served since his initial arrest. In sum, Duch is now left with 19 years in prison. This means that Duch, now at age 67, may well walk again as a free man. The court ordered Duch back to his detention cell. He left as expressionless as he had arrived, and victims and court observers were left to react to the historic judgment.

As everybody gathered outside, opinions were mixed. Some wept loudly and openly. Others, while somber, expressed their satisfaction with the verdict. The Cambodia Tribunal Monitor spoke with several individuals with differing opinions. Teary Seng, a civil party in case 002 and civil society activist, castigated the sentence as far too light and stressed the fact that with 19 more years in prison, Duch would serve less than 11 hours for every life he took. Robert Hamill, a civil party from New Zealand whose brother was captured by Khmer Rouge and then tortured and killed at S-21 after his sailboat strayed too close to the Cambodian coast, expressed some satisfaction with the judgment because it was close to the prosecution request of 40 years. However, he questioned why prosecutors requested what he considered a relatively light sentence, and expressed his disgust at the idea of Duch possibly walking around as a free man again.

Despite differing opinions with regard to the verdict, however, everybody agreed that this was an important day in Cambodia's history and was perhaps one small step toward achieving some sort of accountability and reconciliation for a country that has waited too long for justice.