



In this week's KRT Trial Monitor...

Co-Prosecutors' Opening Statement implicates Duch as "meticulously controlling" S-21 (pp.2-3); Duch pleads with Cambodian people to "leave a window open for forgiveness" (p.3); Duch's provisional detention challenged by the Defense (p.4); Civil parties request further rights to be heard (p.6); Translation cause for concern (p.7)

1. Summary

"The antonym of forgetting is not remembering, but justice."ⁱ

Following on from a largely symbolic hearing in mid-February, the Trial Chamber of the Khmer Rouge Tribunal recorded a second historic milestone this week by declaring open substantive proceedings in the case of Kaing Guek Eav alias 'Duch'. Speaking "in the name of the people of Cambodia and the United Nations," to a gallery packed to capacity and a flurry of media attention, Trial Chamber President Nil Nonn officially pronounced the accused charged with crimes against humanity, grave breaches of the Geneva Conventions and violations of the 1956 Cambodian Penal Code.

Duch's much-anticipated trial got off to a slow start, with the first day comprising solely of an official reading of the Closing Order. The accused followed meticulously through his copy as Cambodian Greffiers read out the factual analysis, while guards reprimanded several members of the public gallery for falling asleep. At points, however, some civil parties were visibly moved and shed tears. The pace picked up considerably on Tuesday: the Co-Prosecutors delivered a compelling opening statement, to which both Duch and his two co-counsels responded in a similarly compelling manner. The legality of the Accused Person's provisional detention was then the key issue confronted on Wednesday morning. In an unanticipated turn of events, concerns regarding victim participation provoked lengthy discussion following the Defense and Prosecution's submissions.ⁱⁱ Finally, proceedings drew to a close with Co-prosecutor Robert Petit reading into the record judicially noted facts which the Defense confirmed as either agreed or not contested by the parties.

Overall, the first week ran relatively efficiently, although there were some notable concerns regarding translation. Public attendance also waned throughout the week: while the first day of the hearing was extremely well attended, the crowd dwindled significantly as the hearings continued. Civil parties present on Monday and Tuesday were precariously absent from the gallery on Wednesday, likely due to the fact that the

court's Victims Unit did not provide funding for their attendance.

The first week of proceedings revealed what is likely to become the central issue of the case as a whole: the degree of individual criminal responsibility that should be attributed to the accused for his part in a complex web of criminal acts. While Duch does not dispute many of the allegations brought against him, he does dispute the degree to which he should be held responsible. Furthermore, the extent to which his plea for remorse should be considered relevant to the proceedings came to the fore as an important consideration for the parties. A second significant issue that seems likely to dominate the hearings is the extent to which civil parties will be able to exercise participatory rights throughout the trial stage of proceedings.

2. Legal & Procedural Issues

Presentation of the Closing Order: Pursuant to Rule 89(1)*bis* of the Internal Rules, the factual analysis and charges set out in the Closing Order were read out by the Greffiers on the first day of the hearing.ⁱⁱⁱ The Order, which was read out in Khmer, comprises facts pertaining to the historical and political context of S-21, the legal characterization of Duch's acts and character information about Duch.

Apart from a few translation issues, the reading proceeded largely uninterrupted. However, upon completion Defense lawyer François Roux appeared disgruntled that the Greffiers had only read out what he termed were the "inculpatory" aspects of the Order, detailing the allegations against his client. Roux argued that the Accused Person should be afforded the right to have the "exculpatory" aspects presented – namely, the paragraphs referring to Duch's character, reputation and consistent acknowledgement of his responsibility for the crimes committed under his command. The Chamber rejected the request on the grounds that facts pertaining to the Accused Person's character and psychology cannot be categorized as either "factual analysis" or "charges" per Rule 89*bis*. It further noted that time had already been allocated for parties to adduce evidence pertaining to the character of the Accused Person during the course of the trial.^{iv}

The Co-Prosecutors' Opening Statement. The Co-Prosecutors' Opening Statement and responses from both Duch and his co-counsel largely dominated Tuesday's proceedings. National Co-Prosecutor, Chea Leang, provided the historical and political context in which S-21 had been established. In particular, she expounded on the political hierarchy of the Communist Party of Kampuchea ('**CPK**'), which operated against the backdrop of what she characterized as an escalating armed conflict with Vietnam. Focusing on this hierarchical structure and Duch's alleged role at security prisons S-21 and S-24 ('**Prey Sar**') and at Choeung Ek, the Cambodian Co-Prosecutor used maps, charts and archival footage to detail the Accused Person's alleged involvement in a systematic attempt to eradicate enemies of the party. She also focused on providing a factual analysis of the detainee population at S-21, and the inhumane and degrading conditions to which they were subjected.^v This included being shackled, being denied water, food and medical care, and being beaten and electrocuted in order to extract confessions. She also showed a chart that detailed the demographic breakdown of the detainee population.^{vi}

Following on from his colleague, International Co-Prosecutor Robert Petit enumerated a list of torture techniques and described the conditions of enslavement that had allegedly

been inflicted upon the detainees at S-21. In a symbolic acknowledgement of the court's hybrid structure, he read his statement in both English and French, ensuring all three of the court's working languages were represented. Significantly, his address also contained allegations regarding Duch's purported role in ordering the torture and execution of detainees, implicating him both directly and as a superior. In essence, Petit asserted that Duch's responsibility is premised on the fact that he "knowingly and actively" exercised "independent authority" over the functioning of the security center. Again using visual aids, including diagrammatic representations of the hierarchical structure allegedly existing at S-21, he submitted that Duch devised the inhumane conditions that raged throughout the interrogation center, ordered the commission of torture, and participated in the execution of the detainees. He further asserted that Duch had a vested interest in ensuring that S-21 served its intended purpose, because he was directly accountable to members of the CPK's Standing Committee - in particular, Nuon Chea and Son Sen. It was also alleged that the fact that he was able to communicate directly with the upper echelons of Democratic Kampuchea evidenced the fact that a significant level of trust was reposed in Duch. Skeptical of the veracity of Duch's contrition, he further characterized Duch as "meticulously controlling" the Phnom Penh interrogation center. He also urged the Chamber to allow a full account of the accused person's role in events by applying the theory of joint criminal enterprise to the facts.

Finally, in an apparent bid to pre-empt the response of the Defense lawyers, Petit dismissed any suggestion that Duch performed a limited and perfunctory role at S-21 as illogical and "unsupported by [the] evidence." Pointing to the role the accused played at the M-13 interrogation center, which he saw as a "training ground for the accused", he further asserted, "the past can help us shed light on the present". Duch's 28-year involvement with the CPK was alleged to cast doubt on his current pleas for remorse.

The Defense Perspective: Duch's Responsibility for the Crimes and Serious Violations that occurred at S-21. Upon the request of Defense lawyer François Roux, Duch was granted leave to respond to the Co-Prosecutors' Opening Statement. Duch's rejoinder was prefaced with an expression of his contrition and regret for the crimes committed by the CPK from 1975 to 1979, and a plea for all affected parties to "leave open [the] window for forgiveness." In line with his avowed shame for his past actions, Duch acknowledged his legal responsibility for the crimes committed at S-21. He unambiguously stated, "I am responsible for the crimes committed at S-21... especially [the] torture and execution of people there."

Duch said he was "very regretful and very shameful" for the crimes he committed in the name of Angkar, but that he could not dare to think about challenging orders from above at the time. He affirmed that he had decided to cooperate with the tribunal, because this was the only remedy he had "to relieve the sorrow of the Cambodian people". He had also drawn a picture for the judges, which was shown to the gallery on a projection screen. The picture showed Ta Mok, Pol Pot and Nuon Chea sitting in front of what looked to be piles of bones. There also appeared to be the image of a sickle behind them. He had further written slogans above each of their heads. Duch said that the picture "referred to the CPK Party" and its "authoritarian, classless, regime". The illustration was then entered into the case file.

Notwithstanding Duch's unequivocal acceptance of responsibility, the Defense position on the *extent* of his responsibility remains ambiguous. This ambiguity arises because Defense lawyers are disputing certain facts in the Indictment that pertain to the degree of

Duch's responsibility for the crimes at S-21. The Defense response to the Opening Statement, in part delivered by François Roux, made it clear that the extent of Duch's responsibility at S-21 is a key issue, likely to be the subject of considerable deliberation.

François Roux urged the Chamber not to ignore the fact that Duch was both "a recipient and transmitter" of orders from his superiors. Whilst he signaled his intention to "return to the issue of obeying orders," Roux unmistakably accepted that, "Since Nuremburg, [this factor] is [merely] a mitigating circumstance." Significantly, both Robert Petit and François Roux appear to agree that acting out of fear for one's life, or for the lives of one's family members, does not constitute a Defense under international law.

Notably, François Roux elected not to address this issue in an entirely legalistic fashion. Instead, he urged the Chamber to be mindful of Duch's journey to humanity, which he characterized as "long... and at times lonely." Accordingly, he peppered his response to the Co-Prosecutors with reminders of Duch's present role in promoting national reconciliation, and humanity at large. He emphatically concluded by asking the Chamber to consider whether "these hearings [will] allow those who have exited humanity to return to humanity."

Cambodian Defense lawyer Kar Savuth also responded to the Prosecution, urging the Chamber not to allow Duch to become a scapegoat. "All those most responsible should be prosecuted. Better not to try anyone that to try some and leave some at large," he said. He added that Duch was only one of 196 prison chiefs in Cambodia, and that the scope and gravity of the crimes he had committed at S-21 were not the worst of what had been committed. He pointed in particular to the 150,000 people killed in an interrogation center in Kampong Chnang. He assured the Chamber the next day that he was not challenging the jurisdiction of the tribunal, but rather wanted solely to make observations for the court to consider.

Continued Detention of the Accused Challenged as Unconstitutional and amounting to a Breach of International Law. On the third and final day of this week's hearing, International Defense lawyer François Roux was granted leave to address the court on his client's incarceration for approximately 10 years without trial. Roux sought to characterize his client's prolonged detention as a violation of both Cambodian law and of international legal instruments.

With regard to the alleged violations of his client's rights as a matter of domestic law, Roux declared, "We come before you to request that you put an end to the detention of Duch because it's well beyond the acceptable time limits of Cambodian law..." In support of this contention, he cited the Cambodian Constitution and United Nations Transitional Administration of Cambodia (**UNTAC**) law. He also referred to the 1999 Law on Duration of Pre-trial Detention, which prohibits "provisional detention" that lasts longer than three years. Roux then drew attention to Articles 9 and 14 of the International Covenant on Civil and Political Rights. He also suggested that the length of time his client had been detained without the benefit of a trial rendered the term "provisional detention" a misnomer. He then sought the immediate cessation of his client's detention for the duration of the proceedings, simultaneously assuring the Chamber that his client would be willing to accept any conditions that may be attached to his release. Further, Roux appeared to be seeking a declaration that the time Duch spent in detention since May 1999 would be taken into account and subtracted from his sentence, and that the accused be entitled to compensation (in the form of a reduced

sentence) for the suspension of his rights.

In further support of his argument, Roux relied heavily on the case of *Jean-Bosco Barayagwiza v The Prosecutor*, an Appeals Chamber judgment delivered by the International Criminal Tribunal of Rwanda on 3 November 1999.^{vii} He urged the Chamber to be mindful of the words of U.S. Supreme Court Justice Brandeis, which was cited in *Barayagwiza*, as he warned that there would be a “boomerang effect” if “the State could commit offences in order to secure the conviction” of an individual with impunity. In order to buttress his argument, Roux also referred to the opinion rendered by the United Nations Working Group on Provisional Detention on 30 November 2007, as well as jurisprudence of the European Court of Human Rights. The November 2007 decision is particularly pertinent because it relates to the arrest of eight suspects detained in Lebanon following the assassination of Rafik Hariri. The decision rendered characterized the detention of the suspects in question as ‘arbitrary’, and four of the eight were released. The Special Tribunal for Lebanon, a hybrid tribunal established to try this case and whose proceedings officially opened just last month, will be asked to render a decision on the remaining four suspects. The judges’ decision at the KRT may therefore impact on determinations at that tribunal.

Roux candidly acknowledged that his request would require the Chamber to make a “difficult decision.” However, he stressed that proceedings before the ECCC served a broader purpose of setting an example that local and international justice systems could emulate. Emphasizing the tribunal’s role as custodian of human rights, and highlighting that its integrity was at stake, Roux urged the Chamber to abide by the maxim, “*Dura lex sed lex.*” [The law is hard but it is the law].

Co-Prosecutors Response. In response, Cambodian Co-Prosecutor Chea Leang maintained that Duch should continue to be held in detention. Drawing from arguments the Co-Prosecutors made during the pre-trial phase, Chea emphasized that the KRT is separate and independent of the Cambodian Military Tribunal and the Chamber was therefore not responsible for Duch’s detention at that court. She added that a more appropriate forum for Duch to seek redress would be before a domestic/national court. Second, she alluded to the need to protect the safety and security of Duch, pursuant to Rule 63(3)(b)(iv) of the Court’s Internal Rules. “The public know Duch clearly – there is a risk that victim’s family groups may take revenge on him”, she said. She added that Duch’s unequivocal acceptance of responsibility for the crimes he is charged with meant that the first part of the two-pronged test in Rule 63(3) had clearly been satisfied. Third, although not explicitly referred to, Chea invoked Article 35(d) of the Law on the Establishment of the ECCC, which provides that the accused has a right to be tried in his/her own presence. In a somewhat curious inversion of fair trial rights, the Co-Prosecutor asserted that the continued detention of Duch was necessary in order to avoid a trial *in absentia*.

3. Victim Participation and Witness and Victim Protection and Support

Attendance of Civil Parties: The first two hearing days of Duch’s were attended by the majority of civil parties: out of the 93 victims participating in Duch’s Case, 63 were present either in the court room itself or seated in the public gallery. However, on the third day the number of present civil parties decreased solely to the 10 sitting in the courtroom. This is likely due to the fact that the Victims Unit only organized transport and accommodation for the two initial days.

Right to Representation: The majority of the civil party lawyers were present during the first week of trial, though 5 of the 9 international lawyers on the teams were absent.^{viii} Except for the morning session on Wednesday,^{ix} each of the four groups of civil parties was represented by one international and one national lawyer: Ms Ty Srinna and Mr Alain Werner (Switzerland) for CP1;^x Mr. Kong Pisey or Mr. Yung Panith (rotating) and Ms Silke Studzinsky (Germany) for CP2; CP3 was represented by Ms Moch Sovannary or Mr. Kim Mengkhy (rotating) and Martine Jacquin (France); and CP4 by Mr. Hong Kimson (also representing CP2) and Mr Pierre Olivier Sur.

Right to Speak on Provisional Detention Issues: Shortly after the Defense and Prosecution made representations on the Accused Person's provisional detention on Wednesday, the civil party lawyers requested the right to make submissions. Although initially rejecting outright lawyer Alain Werner's request to discuss the issue, the Chamber subsequently agreed to hear arguments after lawyer Silke Studzinsky emphatically stressed its significance.

Civil party lawyers put forward several arguments in support of their claim. After first highlighting the fact that the interests of the civil parties are fundamental and directly engaged by the accused person's release, Studzinsky raised the issue of consistency of precedent at the KRT. In particular, she pointed to the previous jurisprudence of the Pre-Trial Chamber, granting extensive participation rights to civil parties during the pre-trial phase, including the right to make observations on the question of a detention order, where their interests are concerned.^{xi} Lawyer Sur further argued that Rule 82 of the Court's Internal Rules should be interpreted in light of Rule 63. Although not mentioned by Sur, the Pre-trial Chamber has read Rule 63(4) in light of Rule 23 when determining civil parties' rights to participate in appeals on pre-trial detention at the pre-trial phase, and as a result afforded civil parties rights to participate.^{xii}

Defense lawyer François Roux raised two points in rebuttal to these arguments. First, he argued that issues relating to provisional detention should be construed in light of the sentencing, and it was clear that the Civil Parties did not have a role to play in the determination of the Accused Person's sentence due to obvious issues of bias. Second, he also noted that Rule 82(2) is silent with regard to the participation of civil parties, and argued that the Trial Chamber should not be persuaded by the argument that they should modify the rule, rather than simply interpret it.

In a rather emotional statement, Martine Jacquin asked how Duch's previous statement of remorse could be seen as genuine if on the next day he asks to be released. Defense lawyer François Roux addressed this by asking all the Civil Parties to "stay true to their part in the trial" and not to address areas that are not theirs to be involved in.

Right to Participate Generally: Throughout the proceedings, civil party lawyers on several occasions tried to present arguments that would expand their participatory rights beyond what is provided in the text of the Law on the Establishment of the Extraordinary Chambers and the Court's Internal Rules. Besides a request to be involved in the hearing of detention order, they also raised the right to present an Opening Statement.^{xiii} This was later modified to a request for the right to respond to the Accused Person's statement. For both issues, Sur referred to the need to establish equality of arms, which should extend to ensuring the Civil Parties were an equal party to the proceedings. Adding to this argument, Studzinsky insisted several times that the spirit and idea of civil

party participation could not only be understood solely as the right to be physically present, but included the right of the Civil Parties to be heard and to have their views and concerns be taken into account.

Another issue raised by lawyer Martine Jacquin, was the importance of having the agreement on uncontested facts read out during proceedings. Jacquin felt strongly that it was important to do so to inform the public and the victims of these facts, and to have them officially entered into the record. She pointed out that this was especially important for Civil Parties who do not have direct access to the case file. Notably, on the day that these facts were read out, there were no civil parties present in the public gallery, though 10 civil parties were present in the courtroom.

Witness protection: No witnesses were called this week. However, during the afternoon session of Wednesday's hearing, when reading judicially agreed and uncontested facts, Co-Prosecutor Robert Petit read out parts of the Closing order from an unredacted version disclosing the names of witnesses in the redacted Order. It was only after several minutes that Judge Cartwright interrupted him, advising him to use pseudonyms. However, on a few occasions after this point he continued accidentally to reveal the names of witnesses and persons implicated by witnesses.

4. Trial Management

Judicial Management. Generally speaking, the judges appeared very mindful of the need to ensure proceedings continued expeditiously, with President Nil Nonn often intervening to prevent counsels from raising irrelevant or repetitive arguments. However, an early adjournment on Monday and an extended lunch-break on Wednesday were both potential causes for concern. At worst, this could be an early sign that the Chamber may slip into the poor trial management habits that have been attributed to international tribunals more generally.^{xiv} However, it is too soon to make any real assessment as to whether this will be an issue of concern during the trial.

Translation issues. During the three days of hearings the Court experienced translation interruptions on various occasions. More than once technical problems led the President to break the proceedings. Furthermore, inconsistencies and incompleteness in the translation process occurred on a number of occasions. The fact that interpreters are not able to respond to the speaker's rate/tempo in a discrete and prompt manner should be an issue the court addresses. If the problem is ongoing this might impact the party's ability to interact in an eloquent and efficient manner.

Technical Problems. There were minor technical problems experienced with microphones and ensuring that translation was broadcast to the Chamber and the gallery, as well as some glitches relating to visual aids during the Co-Prosecutor's Opening Statements. However, these problems were dealt with swiftly and efficiently.

Appendix A to this report includes a number of tables that pertain to trial management and which provide further information regarding the proceedings.

ⁱ International Co-Prosecutor Robert Petit, quoting historian Yosef Hayim Yerulshami, in his opening statement in the trial, 31 March 2009.

ⁱⁱ Although Rule 82*bis* of the court's Internal Rules does not provide for civil parties to make representations on this issue, civil party lawyers argued it was imperative that they be able to do so.

ⁱⁱⁱ All references in monitoring reports to the Court's Internal Rules refer to the most current version of the Internal Rules available online through the Court's website: see www.eccc.gov.kh for further details.

^{iv} Notably, the amount of time taken to deliberate the issue likely exceeded the amount of time it would have taken to read the paragraphs out.

^v At one point during the Opening Statement, International Defense Counsel Francois Roux objected to the use of video footage of S-21, stating that the admissibility footage in question was the subject of a motion currently under consideration by the Trial Chamber. International Co-Prosecutor Robert Petit responded that the footage shown was not the same as that currently being considered by the Chamber, and that it had been on the case file for over a year. The Trial Chamber dismissed the Defense's objection.

^{vi} According to the Co-Prosecutor, 37% of prisoners were from the military, 41% were from the government, 3% were Vietnamese, 15% were "new people" or others and 4% were the wives of those who were arrested.

^{vii} In particular, Roux quoted extensively from Paragraphs 106 and 111. See *Prosecutor v Jean-Bosco Barayagwisa* "Decision", (Appeals Chamber), 3 November 1999. Available online at www.ictj.org.

^{viii} Namely Mr. Karim A. A. Kahn (Britain) and Ms Brianne McGonigle (U.S.A) from CP1, as well as Ms. Annie Delahaie, Ms Elizabeth Rabesandratana and Mr. Philippe Canonne of CP3 (all of whom are from France).

^{ix} Mr Hong Kimson was not present on Wednesday morning.

^x The term 'CP' refers to 'Civil Party Group' and is used as a short-form throughout these monitoring reports.

^{xi} See *Prosecutor vs. Nuon Chea*, 'Decision on Civil Party Participation in Provisional Detention Appeals' (002/19-09-2007-ECCC/OCIJ (PTC01)), 20 March 2008, particularly at pars 35 – 49. Available online at: www.eccc.gov.kh/english/court_doc.list.aspx.

^{xii} *Ibid.*, at par.41.

^{xiii} The issue was raised by Pierre Olivier Sur, who expressed his regret that Civil Parties were not afforded the right to speak on the first two days. The Trial Chamber had already rejected a written request before the start of the substantial hearing to allow Civil Parties to make opening statements.

^{xiv} See Table 1, Appendix A. Monday's proceedings were adjourned an hour early in order to accommodate the Co-Prosecutors' request that the opening statement be read out in its entirety (which, if the Chamber had continued, would have meant proceedings ran an hour over the usual end of 4.15PM). Rather than considering other issues on their agenda, the Chamber adjourned for the day, meaning there were only 3 hours of trial time that day. For discussion on other tribunals, for example, War Crimes Studies Center "Special Court for Sierra Leone: Report on the RUF Trial Proceedings (17 January 2008)" (War Crimes Studies Center, Berkeley, 2008).