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## INTERNATIONAL OR DOMESTIC COURT?

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International Co-Prosecutor Andrew Cayley takes questions from the judges after requesting a life sentence for Duch  
*Courtesy ECCC*

Day two of the Kaing Guek Eav (alias “Duch”) appeals before the Supreme Court Chamber centered around the prosecution’s appeal of the Trial Chamber’s judgment on grounds that the Trial Chamber incorrectly interpreted crimes against humanity and issued a manifestly insufficient sentence. Along with the change in topic from yesterday’s hearing came a noticeable shift in tone as co-prosecutor Andrew Cayley’s calm and methodical approach created a stark contrast with co-defense counsel Kar Savuth’s vocal and animated representation the day before.

Judge Agnieszka Klonowiecka-Milart began the proceedings by reading through the prosecution’s and defense’s appeals of the judgment. The prosecution was requesting a

re-characterization of Duch's conviction accompanied by a higher sentence. The defense was asking for a reduction.

Framing the specific legal arguments were differing thematic approaches taken by the prosecution and defense. On the one hand, Cayley began his oral arguments with a plea to the Supreme Court Chamber to recognize its position as an internationalized court, distinct from the domestic Cambodian judiciary. He asked the court to seize this important opportunity to foster the growth of a consistent body of international jurisprudence by looking to precedent from other tribunals. This foundation proved essential as each argument he made was supported with international case law. The defense, on the other hand, was quick to remind the Chamber throughout the day that the ECCC exists within the Cambodian judiciary and, as such, should be bound by domestic law.

### **Cumulative Convictions for Crimes Against Humanity**

The first ground for appeal by the co-prosecutor related to the Trial Chamber's decision to encompass all of the convictions for crimes against humanity, including murder, torture, rape, and forced labor, within the single crime of persecution. Expressing concern for national reconciliation and the historical record created by the ECCC, Cayley urged the Supreme Court Chamber to separate each offense into a distinct crime. Not doing so, he contended, would undermine the gravity of Duch's actions and send the wrong message to future generations about what Duch did to his own people.

Cayley bolstered his policy argument with citations to case law from the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). He argued that international jurisprudence provides for multiple criminal convictions for the same act so long as each offense has a material element that requires proof of a fact not required by the other offense(s). He explained how this was the case with Duch's crimes, using a comparison of persecution and murder as an example. Murder requires proof that the accused caused the death of another person, while persecution does not. Persecution, on the other hand, requires a showing of discriminatory intent, while murder does not.

The defense declined to respond.

### **Rape as a Crime Against Humanity**

Next, the co-prosecutor set forth his argument as to why the Trial Chamber incorrectly characterized rape as a form of torture instead of recognizing it as a separate crime against humanity. Cayley gave a lengthy history of rape as an offense recognized by civilized nations, beginning with the Lieber Code of 1863 from the American Civil War and including citations to the Hague Convention, the Geneva Conventions and the Control Council Law No. 10 of 1945. He contended that by 1945 rape had crystallized as a crime under customary international law and, therefore, it would not offend principles of legality to convict Duch for rape as an offense distinct from torture. He bolstered his

argument with more references to the ICTY, ICTR, and the Special Court for Sierra Leone, which all have recognized rape as a crime against humanity.

The principle of legality, Cayley explained, does not require an offense to be domestically codified prior to the commission of the crime. Instead, legality is met so long as it was reasonably foreseeable to a perpetrator that his actions were criminal. Cayley then argued that the evidence and historical record clearly indicate Duch was aware that rape at S-21 was criminal.

Co-defense counsel Kang Ritheary led the defense's response by reminding the court that it lacked personal jurisdiction over Duch. He then argued that Duch should not be found criminally liable for the act of rape that occurred at S-21 because he punished the actual perpetrator and took subsequent actions to prevent future acts of rape. Co-defense counsel Kar Savuth then made a brief statement. Lacking any legal basis, he asserted that rape at S-21 could not be charged as a crime against humanity because it only happened once and, therefore, could not be seen as widespread or systematic.

### **Enslavement and Forced Labor**

Last, the co-prosecutor argued that the Trial Chamber erred by including forced labor within the definition of enslavement. Cayley argued that this error led the Trial Chamber not to convict Duch for numerous acts of enslavement at S-21. In its judgment of Case 1, the Trial Chamber convicted Duch of enslavement in relation to all of the detainees at S-24 (a labor site associated with S-21) and those detainees at S-21 who also were forced to work. Cayley urged the Supreme Court Chamber to re-characterize the Trial Chamber's definition and convict Duch of enslavement of all S-21 detainees.

Co-defense counsel Ritheary gave a brief response in which he rejected the claim that enslavement and forced labor occurred. He said that detainees could "roam freely" and were treated equal to the Khmer Rouge cadres. "Even though [S-21 and S-24 victims] were detained they could go to work. Even cadres were under some restrictions."

### **Sentencing Requests**

The co-prosecutor argued that the Trial Chamber's errors resulted in a sentence that was "manifestly insufficient" and requested the Supreme Court Chamber to increase it from 35 years to life imprisonment. However, the prosecution also recognized that due process violations for Duch's time in illegal military detention justified a reduction of up to 5 years. Therefore, the OCP's final recommendation was for Duch to serve 45 years with no possibility of parole.

The defense took a different view, urging the Supreme Court Chamber to find that the Trial Chamber gave insufficient weight to mitigating factors, including Duch's cooperation and remorse. Co-defense counsel Ritheary also gave an impassioned description of Duch as a man who did everything he could to limit the harm of the actions he was forced to do under the threat of death. Ritheary challenged the judges to consider

what they would have done had their lives been threatened by the Khmer Rouge and answered his own question by telling them, “You would be sitting where Duch is today.”

The defense requested that if the Supreme Court Chamber did not fully acquit Duch for lack of personal jurisdiction they should at least reduce his sentence to 15 years. Considering a sentence reduction for due process violations and time served, this would amount to his immediate release.

### **International or Domestic Court?**

The prosecution’s heavy reliance on international law and defense counsel’s position that the ECCC is a domestic court culminated in a surprising and upsetting afternoon when both sides argued over whether or not the Cambodian Penal Code of 2009 (“2009 Penal Code”) should be considered by the Supreme Court Chamber when deciding an appropriate sentence for Duch. Article 95 of the 2009 Penal Code provides that if a life sentence is reduced for mitigating circumstances, the judge “may pronounce the penalty of imprisonment of between 15 and 30 years.” However, Article 668 of the 2009 Penal Code states that the code is not binding where it conflicts with other “special criminal legislation.”

The defense contended that the ECCC, as a domestic court, is bound to apply Article 95 and that it should be interpreted as providing a 30-year ceiling on the potential sentence that could be imposed due to the mitigating circumstances in Duch’s case. Although drafted after the formation of the ECCC, defense argued that proper statutory construction requires that an accused person receive the benefits of criminal legislation enacted subsequent to the commission of their crimes.

The prosecution, on the other hand, argued that the ECCC Law constitutes ‘special criminal legislation’ and, therefore, the ECCC is not bound by the 2009 Penal Code. Instead, the ECCC is bound by Article 39 of the ECCC Law, which grants the judges broad discretion to impose a sentence of five years to life imprisonment.

Judge Klonowiecka-Milart made the audience noticeably uneasy when she flatly rejected the prosecution’s characterization of the ECCC as *sui generis* and unbound by substantive domestic law. She also expressed doubt that there was any conflict between Article 95 of the 2009 Penal Code and Article 39 of the ECCC Law, indicating a belief that Article 668 of the 2009 Penal Code may be inapplicable. She then asked the prosecution how the court, as a domestic institution, would fail to serve the interests of the Cambodian people by taking into account the 2009 Penal Code, which is a Cambodian law. The prosecution reiterated their belief that the court was *sui generis* and, even if it was seen as a domestic court, fell under the Article 668 exemption. Judge Klonowiecka-Milart seemed unconvinced. One audience member, keenly aware of the impact this could have on Duch’s sentence, left the visitor’s gallery in tears.