

## Khmer Rouge Tribunal Part II:

### Case File 001/18-07-2007/ECCC-TC – The Scapegoat?

**On 30 March 2009, the day, which not only the people of Cambodia but also large parts of the international community had been awaiting for decades, had come. The first substantial hearings at the Khmer Rouge Tribunal have begun. Nominating the day as a public holiday to acknowledge its significance is now under discussion. However, Prime Minister Hun Sen, who recently turned against the tribunal, already announced not to support this.<sup>1</sup>**

Friction among the different parties continues to trouble the court. Besides problems of adequate translation and evidence, corruption allegations and the resulting budget crisis of the Cambodian side of the court cast a cloud over the process.

#### Case 001: Duch

Kaing Guek Eav, better known as Duch, is now standing trial. He is the former head of the infamous S-21 prison, the reeducation camp S-24, and the execution site Choueng Ek that gained notoriety as part of the killing fields. After the Vietnamese invasion, Duch along with numerous other Khmer Rouge (KR) officials backed down to the jungle and continued to be a member of the Communist Party of Kampuchea (CPK) for another 13 years. Before the Irish photographer Nic Dunlop discovered him in 1999, Duch had been working as a math teacher for many years. Today, the prosecutor accuses him of having been an integral part of the regime and having embraced and implemented the inhumane KR-policies, whereas he claims to have acted on orders and by fear of being killed himself. He is charged with crimes against humanity, breaches of the Geneva Convention and violations of the Cambodian Panel Code. The prosecutors assert that he was a close con-

fidant of the leadership and that he knowingly and intentionally participated in planning and putting into practice the utopian social engineering project. Tuol Sleng served as a key component of the systematic attack against the civilian population of Cambodia at that time.<sup>2</sup>

#### Two months of Proceedings<sup>3</sup>

The first weeks of the hearings were met with great interest from the public. Particularly in the first two days, many victims and family members came to the court to take part in this historic event. Since then, an average of 300 people per day follows the trials from the public gallery.<sup>4</sup> After the drawn-out reading of the closing order, Duch himself took the floor on the second day of trials. Seeking to explain his crimes in a 20-minute speech, he apologized to the survivors and the victims' relatives knowing that forgiving will not be possible, given the gravity of his guilt. Nevertheless, he asked "to leave the door open for forgiveness". He described himself as a hostage of the regime, a victim who feared for his own and his family's lives. He assured the court of his cooperation and his willingness to contribute to clear up the crimes of the CPK. To point out that he did not work at S-21 by choice, he recounted how he submitted an application to be transferred to the Ministry of Commerce, which was declined. When Son Sen started to order the arrest and execution of KR-comrades in 1977, Duch followed orders without opposition for fear of being purged.<sup>5</sup>

His international lawyer François Roux subsequently gave an emotionally charged speech putting Duch's autonomy to act into question. He presented him as a functioning link in the chain of the terrorizing command structure of the KR. He praised Duch's cour-

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age and his contribution to the establishment of a public account of history. Before, his Cambodian colleague Kar Savuth, himself a victim of the KR, called into question the legitimacy of the trial. Duch was a scapegoat and not one of the most responsible persons or senior leaders. The court operated selectively and ignored that there were 195 other prisons whose chiefs are not indicted. Thus, it is in breach of the Cambodian and international principle of equality before the law, which in turn violates the Cambodian constitution, the Cambodian sovereignty, and the ECCC agreements. The goal of deterrence could not be achieved in such a selective trial. The defense advocated the release of Duch who has been under arrest without trial for 10 years. His lawyers also called for a compensation for the violation of his rights and claimed that credit must be given for the time already served. Furthermore, his plea of guilty and his willingness to cooperate must be considered in mitigation. Prosecutors responded that a release would put Duch's personal security at risk. Deeply traumatized victims, whose actions are unpredictable, could take revenge. The judges announced they would decide on this issue by mid June.<sup>6</sup> The fact that the defense challenged the legitimacy of the trial caused confusion, especially with the prosecutors, as the pre-trials are already completed. Yet, the defense affirmed that it recognizes the court's jurisdiction on the next day.

Besides the individual responsibility of the accused, the participation of the Civil Parties was another contentious issue in the first weeks of the trial. Civil Party lawyers repeatedly tried to extend their participation rights and be entitled to speak on different issues.<sup>7</sup>

The interrogation of witnesses, experts and the accused proceeds along seven topics: first, (1) the interrogation camp M-13, which Duch ran between 1971 and 1975 and which served as a precursor to S-21 and a training ground for future staff, was discussed. It was supposed to convey a better understanding of the planning, the structure and the functioning of S-21. The testimonies of two former inmates of M-13, revealed Duch's ambivalent nature. The an-

thropologist François Bizot reported that Duch treated him "politely". He described him as an enthusiastic and dedicated revolutionary totally committed to his cause. Uch Sorn, another former inmate, gave an account of the cruel torture techniques at the camp. Two former prison guards also testified on the issue of M-13 after the court had recessed for a week on occasion of Khmer New Year. They confirmed Uch's statements but their testimonies were partially inconsistent.<sup>8</sup> Duch even rejected that one of them had ever worked for him.

Subsequently, the interrogation turned to the topic of (2) the establishment of S-21, the organizational structure and Duch's role. Duch remained unperturbed despite the serious allegations raised. He was even sarcastic, laughing and mocking one of the Civil Party lawyers, which prompted the judges to call on him to behave appropriately and show proper respect.<sup>9</sup> The (3) CPK ideology and Duch's role in implementing KR-policies was the next topic to be heard. The interrogations focused on the autonomy of the accused in putting the policies into action. Duch maintains merely to have taken orders while the prosecutors accuse him of having been a close confidant of the leadership with ample scope to interrogate and execute. Craig Etcheson's testimony revealed the extent of the KR-crimes: Purges were widespread and occurred in all units and at all levels. The defense interrupted Etcheson's statement, bemoaning that the questioning missed the topic. Little was said about S-21 itself, but rather about the broader context. The expert's testimony also caused a new debate on the submission of evidence. Etcheson filed numerous documents that were considered a waste of time and money by the defense side. After three hours of deliberation, the chamber decided "each document must be read out or summarized in order to give the parties [...] the opportunity to access the document" and to make the final judgment traceable for the public.<sup>10</sup>

After the (4) wider context of the violent conflict between Vietnam and Cambodia will be clarified in the next round (from 25 May), the (5) functioning of S-21 and (6) S-24 will be discussed. Finally, there will be

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hearings on (7) the character and the personality of the accused.

With the current pace, the hearings are expected to continue until the end of the year, and not to be finished by July as was originally scheduled. Procedural issues of evidence and Civil Party participation as well as translation problems led to great delays.

#### **Mixed feelings in a divided society**

Reactions within the population and media reception were mixed. In the former KR strongholds, especially in Pailin at the border to Thailand, many fear the expansion of the prosecutions after Duch's guilty plea. They see Duch as a traitor and accuse him of pointing his fingers to others to divert attention from his own crimes.<sup>11</sup> Some victims appreciate Duch's apology, even though they will not be able to forgive given their lingering anguish. Others were disappointed by Duch's statements as he was trying to attenuate the gravity of his guilt. Interviews of the Documentation Center of Cambodia (DC-Cam) showed that many victims still have a strong desire to take revenge and see the former KR suffer.<sup>12</sup> Some newspapers as well as the prosecutors doubted the sincerity of Duch's confession. He showed sorrow in words but kept a straight face and did not show any emotions while listening to accusations and descriptions of the crimes.<sup>13</sup>

Generally, the population embraces the trials, especially because they provide an opportunity for the young generation to learn about the KR era and to create a public account of the atrocities of the regime. After having been neglected since the UNTAC-era, the chapter on the KR-history will be included in school textbooks this year. The young generation hardly knows anything about this formative chapter of Cambodian history. Family members who lived through the period mostly remain silent or their stories seem so tremendous that they are beyond the children's belief.<sup>14</sup> In this respect,

the court together with its outreach-programs constitutes an important tool of public education and contributes significantly to the reconciliation of the Cambodian people.<sup>15</sup>

The government seems to feel threatened by the presence of international judges and lawyers. On Tuesday after the beginning of the substantial hearings, Hun Sen expressed concerns over a possible expansion of the trials requested by Amnesty International and the international prosecutor. He said, he wished that the court ran out of resources so that the international judges would walk out and Cambodia could finish the process by itself. An expansion would destabilize the country and result in another civil war for which no one will take responsibility.<sup>16</sup> He called on former KR to remain calm and not to feel irritated by the debate about further prosecutions.<sup>17</sup> The fact that the KR were closely involved in the peace negotiations, wooed by the other rivaling parties, and eventually incorporated into the current government, military and administration, impedes an objective account of former crimes that could reconcile the nation.

#### **Problems and Obstacles**

In addition to the problem of the independence of the court and political interference, issues of evidence remain controversial. Duch's case is of great significance for the other cases: The chamber can use evidence and testimonies as well as the forced confessions by former S-21 detainees, especially in the case of Nuon Chea who succeeded Son Sen as Duch's superior. Yet, this has sparked a new debate: The defense argues that the confessions were made under duress and hence, cannot be used as legitimate evidence in court.<sup>18</sup> This objection together with complaints about the conditions of detention stirred up consternation and anger among the victims. The defense

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side puts in question the veracity and impartiality of many documents of evidence, e.g. those collected by DC-Cam.<sup>19</sup>

The expansion of the scope of the trials is another contentious point that led to a disagreement of the national and international co-prosecutors. Robert Petit on the international side calls for the prosecution of six other former KR, while Chea Leang and the Cambodian side argue for a more pragmatic approach. An expansion would not make sense considering the limited resources and it would further increase the risk of social unrest. The chamber will not reach a final decision on this issue before June 2009.<sup>20</sup>

The appeal trials of Khieu Samphan, Ieng Sary, Ieng Thirit und Nuon Chea again illustrated the obstacles of the tribunal. The defense lawyers argued that a fair trial was not possible in the light of the current corruption allegations. Khieu's controversial lawyer Jacques Vergès affronted the judges during the hearing and questioned the survival of the court given Hun Sen's remarks and the corruption problem. He claimed that with the current situation, the court's continued existence could not be guaranteed. Consequently, provisional detention could not be justified. Ieng Sary's lawyer added a medical estimate stating that his condition does not allow for continuous detention. The prosecutors replied that Duch's case had brought new evidence that incriminates the other accused. Furthermore, there is a risk that the accused try to influence and threaten witnesses, thereby impeding the establishment of the truth. Past incidents also showed that the personal security is at risk, as there are many victims wishing to retaliate upon the former KR leadership. Duch reported in November that Nuon Chea threatened him not to bring up evidence against him.<sup>21</sup>

The corruption charges prompted the UN to freeze the donors' funds in June 2008, which resulted in a budget crisis and delays

in salary payments on the Cambodian side of the tribunal. Japan, which had already paid for the salaries in March, allocated another USD 4.17m in the beginning of May.<sup>22</sup> Australia also called on the UN to unfreeze the funds, but the UN declined due to failed negotiations on the establishment of an anti-corruption mechanism on 6 and 7 April.<sup>23</sup> The UN has conducted investigations but refused to publish its results. Civil Parties and defense lawyers are now demanding the release of the report and called on the judges to address these problems. The chamber replied that it lacks jurisdiction on this issue.

A report of a German delegation had caused a stir in February, as it accused chief administrator Sean Visoth of being involved in the kickbacks scandal. Higher levels, such as Deputy Prime Minister Sok An, are also believed to be concerned, a recent article of the *Economist* reported.<sup>24</sup> In early May, a CNN documentary aggravated the allegations. ECCC staff confirmed in front of the camera, though anonymously, to pay kickbacks to Sean Visoth who has been on sick leave since November last year. The payments allegedly add up to USD 30 or 40.000, which corresponds to 13 pc of the total budget.<sup>25</sup>

These alleged irregularities currently cast a damning light on the actual hearings. The question remains of what would be worse: A total collapse of the court or a continuing unfair and politicized trial. Before the tribunal can unfold its potential to make an impact and an expansion of the prosecutions can be discussed, these obstacles have to be smoothed out jointly, by the Cambodian side and the UN.

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<sup>1</sup> Cambodia Daily 01.04.2009 ‚No More KR Prosecutions Says Hun Sen’

<sup>2</sup> To apply the elements of a crime against humanity, a systematic and widespread attack against the civilian Cambodian population has to be proven i.e. the acts must have been committed to implement or support the policies of a state (cp. Rome Statute Art. 7).

<sup>3</sup> This part bases on my own observations at the court as well as the weekly reports by Asia International Justice Initiative ([http://socrates.berkeley.edu/~warcrime/KRT\\_reports.html](http://socrates.berkeley.edu/~warcrime/KRT_reports.html)).

<sup>4</sup> The decreasing presence of victims after the first two days can be attributed to the fact that the Victims Unit provided free transport from the provinces in the first two days. After that NGO-Outreach-programs, especially by DC-Cam have enabled victims to attend the trial.

<sup>5</sup> A translation of Duch’s apology was printed in the Cambodia Daily on the following day (Cambodia Daily 01.04.2009, ‚Kaing Guek Eav Speaks for the First Time at Tribunal’).

<sup>6</sup> Cambodia Daily 28.04.2009 ‚Decision on Duch’s Bail Is Delayed Until June 15’

<sup>7</sup> Besides the hybrid structure, the extensive victims’ participation ensured through the Victims Unit constitutes an important characteristic of the ECCC. Victims can either file complaints, which will then be forwarded to the prosecutor, or they can join the action as a Civil Party and claim moral and collective compensation. The Victims Unit is the interface between the court and civil society. It cooperates closely with different NGOs and provides qualified legal assistance for the victims.

<sup>8</sup> Cambodia Daily 21.04.2009, ‚ECCC Hears Inconsistent Account of M-13 Prison Camp’

<sup>9</sup> Cambodia Daily 30.04.2009 ‚A Feisty Duch Spars With Lawyers at ECCC’

<sup>10</sup> Cambodia Daily 20.05.2009 ‚To Defense’s Ire, Etcheson Testifies on S-21’; Cambodia Daily 21.05.2009 ‚Evidence Deabte Puts Brake on S-21 Tesimony’; Phnom Penh Post 20.05.2009 ‚Purges were widespread, specialist tells KR tribunal’

<sup>11</sup> Phnom Penh Post 01.04.2009 ‚Mixed Reactions to Duch apology at second day of trial’

<sup>12</sup> Pong-Rasy Pheng, Victims of Security Office M-13 and Duch Confessions. In: *Documentation Center of Cambodia Magazine: Searching for the Truth*, April 2009.

<sup>13</sup> Phnom Penh Post 01.04.2009, ‚I am responsible, Duch tells tribunal’

<sup>14</sup> Phnom Penh Post 21.05.2009, ‚First KR Text Book Launched’; Dacil Q. Keo. ‚The Duality of April 17 through Bygone Eras’. In: *Documentation Center of Cambodia Magazine: Searching for the Truth*, April 2009

<sup>15</sup> vgl. Cambodia Daily 09.04.2009 ‚Pain of Khmer Rouge Era Lost on Local Youth’

<sup>16</sup> Phnom Penh Post 01.04.2009 ‚More suspects risks war: PM’

<sup>17</sup> Cambodia Daily 01.04.2009 ‚No More KR Prosecutions, Hun Sen Says’

<sup>18</sup> Cambodia Daily 30.04.2009 ‚Ieng Thirith: S-21 Confessions Torture-Tainted’

<sup>19</sup> <http://www.dccam.org>

<sup>20</sup> Cambodia Daily 27.04.2009 ‚Hearing on KR Suspects Unlikely Before June’

<sup>21</sup> Cambodia Daily 06.05.2009 ‚ECCC: Case Grows Against Nuon Chea’

<sup>22</sup> Cambodia Daily 01.05.2009 ‚Japan Funds ECCC’s Local Side Trough ’09’

<sup>23</sup> Cambodia Daily 09.04.2009, ‚UN Negotiations End with No Agreement’; Cambodia Daily 11./12.04.2009 ‚Corruption Allegations Sow Discord at ECCC’; Cambodia Daily 21.04.2009 ‚UN Declines to Unfreeze ECCC Funds’

<sup>24</sup> ‚The Court on Trial’

[http://www.economist.com/world/asia/displstory.cfm?story\\_id=13415814](http://www.economist.com/world/asia/displstory.cfm?story_id=13415814)

<sup>25</sup> ‚Killing Fields: Long Road to Justice’

[http://www.cnnasiapacific.com/edm/mkt\\_edm/090423/pr\\_killingfields.htm](http://www.cnnasiapacific.com/edm/mkt_edm/090423/pr_killingfields.htm)