



## **SUBSTANTIVE CIVIL PARTY TESTIMONY ENDS WHILE PROCEDURAL BATTLE BEGINS**

**August 25, 2009**

**By Michael Saliba, J.D. (Northwestern Law '09), Consultant to the Center for International Human Rights, Northwestern University School of Law**

Over the past week, the court in the trial of Kaing Guek Eav (alias Duch) received testimony from 16 civil parties. These civil parties represented both foreign and Cambodian nationals. They all lost family members at Tuol Sleng prison (S-21) during the period of Democratic Kampuchea. They represented parents, siblings, cousins, in-laws, and children of the victims. Some of the children never had a chance to know their parents. Several civil parties had themselves been detained and sent to re-education camps during this period. Within that group, some had even joined the revolution and worked for the regime before their arrest and detention.

Despite these many differences, several common sentiments were expressed by the civil parties. They appeared before the tribunal in search of truth and justice rather than vengeance and revenge. They inquired about the circumstances surrounding the deaths of their loved ones. They searched for a rationale to explain these deaths when no justifiable cause existed. Contrary to the old adage that time heals all wounds, the civil parties explained that their pain and suffering only increases with time. As expert witness Chhim Sotheara testified in the morning session, the pain and suffering of the civil parties is a microcosm of the whole of Cambodian society.

### **Cambodians still suffering from psychological trauma**

Chhim Sotheara testified about the psychological trauma that victims of the Khmer Rouge regime have endured. As an expert witness, unrelated with any of the parties, he took an oath before testifying. (Unlike civil parties, lay and expert witnesses are required to take an oath before testifying.)

First, he explained that a majority of Cambodians suffered from psychological trauma during and after the reign of the Khmer Rouge. All of this suffering was directly caused by the destruction of the social fabric of Cambodia. He explained how schools, hospitals, and other institutions were destroyed. Children were separated from their parents. Cambodians across the country were forced to labor in the fields for very long hours, under extremely difficult circumstances. Every person lived in constant fear during the

entire four-year rule of the Khmer Rouge. All of this contributed to the short-term and long-term psychological suffering of Cambodian society.

More specifically, their research demonstrated that 40 percent of Cambodian adults currently live with post traumatic stress disorder. Many victims today cannot focus on their day-to-day work. Others experience recurring nightmares where they are chased by the Khmer Rouge or dead relatives cry to them for help. Many victims have lost their will to live and have contemplated suicide as a way to escape their pain. The psychological trauma is not limited to the generation that survived the Khmer Rouge regime, but is often times transferred down to the younger generations.

Chhim Sotheara identified several factors that could help alleviate the psychological trauma of victims and their families. One of the biggest problems over the last thirty years has been the lack of sufficient medical and psychiatric services. These services are critically important to the successful psychological recovery of victims. Another beneficial factor in the healing process is a genuine and sincere apology from the accused, demonstrating a sense of remorse. While Duch has accepted responsibility for his crimes, all indications are that the subsequent accused persons to appear before the tribunal will not demonstrate the same level of remorse. To help alleviate the psychological trauma of victims when those responsible deny their crimes, it will be important that the tribunal establishes the historical truth and holds the accused persons accountable.

Chhim Sotheara also delved into the broader concepts of justice, forgiveness, and reconciliation. He explained that these are interrelated. Truth and justice are important foundational elements that must be established before some victims are prepared to forgive. While the ECCC represents a sort of symbolic justice, a comprehensive mechanism for national reconciliation must be established to properly address the psychological suffering of the Cambodian people.

### **Civil party lawyers object to defense challenges of civil party applications**

In the afternoon session, the trial chamber began to hear defense challenges to the admissibility of civil party applications. The defense presented several grounds for their challenge. First, they argued that friendship to a victim of S-21 did not satisfy the requisite kinship link. Second, they argued that many applications lacked sufficient documentary evidence to prove that the victims were detained and executed at S-21. Finally, they argued that many of those same applications lacked sufficient documentary evidence to prove that the civil party was related to the victim in the manner alleged.

Before the court began to hear substantive testimony, civil party lawyer Alain Werner objected and argued that the defense could no longer challenge these applications. This sparked a lengthy and heated procedural debate between Werner and the international defense counsel François Roux. Werner argued that the admissibility of civil party applications is governed by Articles 23 and 83 of the Internal Rules which state that any challenges thereof must occur during the initial hearing. He reminded the chamber that

during the initial hearing three civil party applications were indeed challenged, and one of those challenges was sustained. He also recognized the chamber's discretionary power, under Article 100, to hear arguments on admissibility at any point until a judgment is rendered. However, he argued that this discretion in no way permitted the defense to raise challenges to civil party applications on its own.

Francois Roux responded that Werner's objection was tardy and it should have been made early last week when the court asked the defense to prepare its observations regarding civil party applications. Furthermore, during the initial hearing, some applications had been provisionally admitted and the defense had reserved the right to challenge these applications. Finally, the defense argued that it was simply responding to a direct request from the trial chamber, made pursuant to its discretionary power under Article 100.

The judges failed to provide a clear indication about their ruling on this procedural matter, which will have several important consequences. First, if the court proceeds with the defense challenges and determines that certain civil party applications are inadmissible, then those civil parties will have the right under the Internal Rules to appeal the decision to the Supreme Court Chamber. Even with the opportunity to appeal, such a decision this late in the trial would be devastating to the civil parties affected. For six months they have enjoyed the rights attendant to being a civil party and they have become personally invested in the outcome of the trial.

The objection and protracted debate may prove to be a good litigation strategy even if the court decides to hear the defense challenges, as the judges may relax the evidentiary thresholds when assessing each individual civil party application. The civil party lawyers are likely concerned that they were not able to obtain several relevant documents from S-21 because perfect records were never kept at the prison and some documents from S-21 were destroyed. In fact, these types of evidentiary concerns are some of the reasons that this court, along with other international tribunals, has relaxed its own rules of evidence. (For example, this tribunal does not bar the admissibility of hearsay evidence.)