

Prosecutor v. Kaing Guek Eav alias Duch: In First Round of Proceedings, the Extraordinary Chambers in the Courts of Cambodia Convicts Former Chairman of Khmer Rouge Interrogation Center of Atrocity Crimes

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I. OVERVIEW

The army of the Communist Party of Kampuchea (CPK), also known as the Khmer Rouge, entered Phnom Penh on April 17, 1975, and took control of the Khmer Republic, renaming it Democratic Kampuchea.¹ The CPK “pursued a policy of ‘completely disintegrat[ing]’ the economic and political structures of the Khmer Republic and creating a new, revolutionary State power.”² This program was implemented through extreme measures, including the forced transfer of city residents to the countryside for the creation of agricultural production cooperatives involving extremely difficult working conditions.³ The CPK destroyed the legal and judicial structures of the previous regime, and during the time the Khmer Rouge remained in power, “old legal structures were replaced by reeducation, interrogation and security centres where former Khmer Republic officials and supporters, as well as others accused of offences against the CPK, were detained and executed.”⁴ An intricate security apparatus was also

1. Prosecutor v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 82 (July 26, 2010), http://www.eccc.gov.kh/english/cabinet/courtDoc/635/20100726_Judgement_Case_001_ENG_PUBLIC.pdf. Cambodia was renamed the Khmer Republic after General Lol Non deposed Prince Sihanouk in March of 1970. The Khmer Rouge, members of the Communist Party of Kampuchea, subsequently assumed power and again renamed the country Democratic Kampuchea. Under Pol Pot’s leadership as Prime Minister, the Khmer Rouge reign lasted from April 17, 1975, to January 7, 1979. Bureau of E. Asian & Pac. Affairs, *Background Note: Cambodia*, U.S. STATE DEP’T (Jan. 28, 2011), <http://www.state.gov/r/pa/ei/bgn/2732.htm>.

2. *Kaing Guek Eav alias Duch*, Case No. 001-18-07-2007/ECCC/TC, Judgment, ¶ 82 (emphasis omitted).

3. *Id.*

4. *Id.*

established to “identify, report, and eliminate potential enemies of those in control of the Party.”⁵

S-21 prison in Phnom Penh was “a security centre tasked with interrogating and executing perceived opponents of the CPK.”⁶ Kaing Guek Eav, better known by his revolutionary alias Duch, was Chairman of S-21.⁷ His responsibilities included teaching interrogation methods to the staff and reporting detainee confessions to his superiors.⁸ He permitted interrogators to use torture and was aware that following their interrogation, detainees would be taken away and executed.⁹ Well over 12,000 individuals were detained and subsequently executed at S-21 during the Khmer Rouge era.¹⁰ Duch was charged under the jurisdiction of the Extraordinary Chambers in the Courts of Cambodia (ECCC) for multiple national and international crimes.¹¹ The ECCC held Duch individually criminally responsible for various enumerated crimes against humanity¹² and grave breaches of the Geneva Conventions of 1949,¹³ sentencing him to an effective nineteen years’ imprisonment¹⁴ and also ruling in favor of dozens of civil parties injured by his crimes but rejecting their substantive claims for reparations.¹⁵ *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, ¶¶ 677-683 (July 26, 2010).

5. *Id.* The security apparatus, including at least 196 security centers, sought to “identify and kill internal enemies, to encourage informing on others and to obtain confessions.” *Id.* ¶ 110 (internal quotation marks omitted).

6. *Id.* ¶¶ 111, 123.

7. *Id.* ¶¶ 111, 113.

8. *Id.* ¶ 126.

9. *Id.* ¶ 127.

10. *Id.* ¶¶ 141, 180.

11. EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, INTERNAL RULES r. 23 *quinquies* (Rev. 5) (Feb. 9, 2010) (Cambodia), http://www.eccc.gov.ku/english/cabinet/fileUpload/121/Irv5_EN.pdf [hereinafter INTERNAL RULES]; *Kaing Guek Eav alias Duch*, Case No. 001-18-07-2007/ECCC/TC, Judgment, ¶¶ 11, 14.

12. *Kaing Guek Eav alias Duch*, Case No. 001-18-07-2007/ECCC/TC, Judgment, ¶ 677. Kaing Guek Eav *alias* Duch was held responsible as having committed, planned, instigated, ordered, and aided and abetted enumerated crimes against humanity convictions, including murder, extermination, enslavement, imprisonment, torture, one instance of rape, persecution on political grounds, and other inhumane acts. *Id.*

13. *Id.* The enumerated grave breach convictions include “wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian.” *Id.*

14. *Id.* ¶¶ 679-681.

15. *Id.* ¶¶ 682-683.

II. BACKGROUND

The massive scale of human suffering under the Khmer Rouge is widely documented.¹⁶ It is estimated that around 1.7 million people, over twenty percent of Cambodia's pre-conflict population, died of starvation, exhaustion, or execution during Democratic Kampuchea—April of 1975 through January of 1979.¹⁷ Pol Pot and Ieng Sary were tried in absentia in 1979 by the People's Revolutionary Tribunal,¹⁸ but those proceedings are not considered to have met international standards of justice.¹⁹ However, in 2004 the ECCC was established by a Cambodian law following an agreement between the United Nations and the Royal Government of Cambodia that set the framework for trials of senior leaders and those most responsible for crimes committed during the Khmer Rouge era.²⁰ The trial of Duch, a former mathematics teacher, is the first of two or more trials to this end.²¹

Unlike other international courts established to prosecute mass crimes, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), or the Special Court for Sierra Leone (SCSL), the ECCC is unique in that it is actually part of the Cambodian domestic court system.²² Cambodian Deputy Prime Minister Sok An has called it “a national court with international characteristics.”²³ The ECCC Pre-Trial

16. *Cambodian Genocide Program*, YALE UNIV., <http://www.yale.edu/cgp> (last visited Jan. 9, 2011).

17. *Id.*; see also Ben Kiernan, *The Demography of Genocide in Southeast Asia: The Death Tolls in Cambodia, 1975-79, and East Timor, 1975-80*, 35 *CRITICAL ASIAN STUD.* 585, 586-87 (2003).

18. John D. Ciorciari, *History & Politics Behind the Khmer Rouge Trials*, in *ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS* 33, 39-40 (2009). The People's Revolutionary Tribunal was viewed as illegitimate internationally. Pol Pot and Ieng Sary were tried without appearing in court, they had no communication with their attorneys, and the sentencing was never carried out. *Id.*

19. *Id.*

20. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea art. 10, June 6, 2003, 2329 U.N.T.S. 117 [hereinafter ECCC Agreement].

21. As of this writing, Case 002 is in the pretrial phase, while Cases 003 and 004 are in doubt due to resistance within the Cambodian government. See *UN Chief Tours Appeals for More Khmer Rouge Trials*, ASSOCIATED PRESS, Oct. 27, 2010, <http://www.cambodiatribunal.org/images/CTM/10.27.10%20un%20chief%20appeals%20for%20more%20khmer%20rouge%20trials.pdf>; *Cambodia—PM Says No Third Khmer Rouge Trial*, AFP, Oct. 27, 2010, <http://www.cambodiatribunal.org/images/CTM/10.27.10%20cambodian%20pm%20says%20no%20third%20khmer%20rouge%20trial.pdf>.

22. Anne Heindel, *Overview of the Extraordinary Chambers*, in *ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS*, *supra* note 18, at 85, 85.

23. *Id.* at 87 (citation omitted).

Chamber has also characterized the ECCC as “an independent entity within the Cambodian court structure.”²⁴

This distinction manifests itself in several important ways. The ECCC maintains some civil law characteristics of the Cambodian domestic system; perhaps most notable is the opportunity for civil party participation in the criminal proceedings.²⁵ It also is intended to apply Cambodian procedural law, although the ECCC in practice has drafted and applied its own rules of procedure.²⁶ The ECCC has a unique temporal jurisdiction limited to the three years, eight months, and twenty days of the Khmer Rouge reign.²⁷ This falls after the origins of international criminal prosecutions following World War II and before the major developments in international criminal law during and after the 1990s.²⁸ Thus, when the ECCC considers international standards, it must confront the seminal challenge of defining the state of customary international law during the span of its temporal jurisdiction.²⁹

Because the noted case is the first to make its way through the ECCC, the court is still in the process of defining the extent to which it must rely on other international criminal jurisprudence, in particular regarding procedural questions.³⁰ The Pre-Trial Chamber has outlined a hierarchy of authority to be consulted for questions of procedure.³¹ The ECCC first looks to the ECCC Internal Rules, then to the Cambodian Criminal Procedure Code.³² Where there are gaps or a lack of clarity, the ECCC then consults procedure established at the international level.³³ Regarding substantive issues, the ECCC first looks to the ECCC Law, then to the Establishing Agreement, and finally to international jurisprudence to define applicable crimes of international law.³⁴

24. Prosecutor v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC-OCIJ (PTC01), Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias “Duch,” ¶ 19 (Dec. 3, 2007), http://www.eccc.gov.kh/english/cabinet/courtDoc/16/PTD_decision_appeal_duch_C5-45_EN.pdf.

25. Heindel, *supra* note 22, at 85-87.

26. *Id.*

27. *Id.* at 87-88.

28. *Id.* at 87.

29. *Id.*

30. Anne Heindel, *Jurisprudence of the Extraordinary Chambers, in ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS*, *supra* note 18, at 125; *see also* E-mail from Anne Heindel, Legal Advisor, Documentation Ctr. of Cambodia, to author (Dec. 14, 2010) (on file with author).

31. Prosecutor v. Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTC06), Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, ¶¶ 14-15 (Aug. 26, 2008), http://www.eccc.gov.kh/english/cabinet/courtDoc/123/D55_I_8_EN.pdf.

32. *Id.*

33. *Id.* ¶ 13.

34. Heindel, *supra* note 22, at 87; E-mail from Anne Heindel to author, *supra* note 30.

The ECCC Law provides considerable direction concerning questions of substantive law.³⁵ In particular, the ECCC Law outlines the elements of the crimes eligible for prosecution under the ECCC's jurisdiction.³⁶ These include domestic crimes set forth in the 1956 Penal Code, as well as crimes recognized by other international criminal courts: genocide, crimes against humanity, and grave breaches of the Geneva Conventions of 1949.³⁷ In addition, it includes two new international crimes, neither of which has been charged thus far: destruction of cultural property under the 1954 Hague Convention and crimes against internationally protected persons under the 1961 Vienna Convention on Diplomatic Relations.³⁸ Relevant to the noted case are the ECCC Law's provisions on crimes against humanity and grave breaches of the Geneva Conventions.³⁹

Article 5 of the ECCC Law defines crimes against humanity as "any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds."⁴⁰ This definition also includes enumerated acts, such as extermination, murder, enslavement, imprisonment, deportation, torture and rape, and the residual category of other inhumane acts.⁴¹ Because the ECCC Law leaves these contextual elements and enumerated acts undefined, the ECCC may rely on the jurisprudence of other international criminal courts for clarity.⁴² According to international standards, a sufficient nexus must be established between the acts of the accused and the widespread or systematic attack,⁴³ and the accused must have had sufficient knowledge that his acts were part of an attack on a civilian population.⁴⁴

Article 6 of the ECCC Law grants the ECCC the power to prosecute those suspected of committing or ordering the commission of grave

35. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006 (Cambodia), http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf (unofficial translation by the Council of Jurists and the Secretariat of the Task Force, revised 26 Aug. 2007) [hereinafter ECCC Law]; *see also* INTERNAL RULES, *supra* note 11.

36. ECCC Law, *supra* note 35, arts. 3-8.

37. *Id.* arts. 3-6.

38. *Id.* arts. 7-8.

39. *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 002/14-08-2006, Closing Order Indicting Kaing Guek Eav alias Duch (Aug. 8, 2008).

40. ECCC Law, *supra* note 35, art. 5.

41. Heindel, *supra* note 22, at 92.

42. *See id.* at 85-87.

43. *Id.* at 93.

44. *Id.* at 96.

breaches of the Geneva Conventions of August 12, 1949.⁴⁵ To convict for a grave breach of the Geneva Conventions, it must be established that the alleged crime took place amidst an international armed conflict.⁴⁶ Additionally, one of the enumerated acts must have been committed against a person or property protected by the Geneva Conventions.⁴⁷ And finally, the accused must have committed the challenged act with knowledge of the victim's protected status and the harm must be inflicted intentionally or in reckless disregard of the consequences.⁴⁸ Like crimes against humanity, the enumerated acts listed in article 6 have been defined by other international criminal courts.⁴⁹ Additionally, some of the predicate acts required to prosecute grave breaches substantively overlap with those in the crimes against humanity rubric.⁵⁰

The ECCC Agreement Between the United Nations and Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (ECCC Agreement) provides that the maximum penalty for convictions of crimes prosecuted at the Extraordinary Chambers is life imprisonment.⁵¹ Article 29 of the ECCC Law also provides, "The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment."⁵² However, the ECCC Agreement, the ECCC Law, and Internal Rules are silent regarding many factors the ECCC must consider during sentencing.⁵³

45. ECCC Law, *supra* note 35, art. 6 (providing that grave breaches of the Geneva Conventions include acts such as "wilful killing; torture or inhumane treatment; wilfully causing great suffering or serious injury to body or health; destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a civilian to serve in the forces of a hostile power; wilfully depriving a prisoner of war or civilian the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement of a civilian; taking civilians as hostages").

46. Heindel, *supra* note 22, at 96.

47. *Id.* at 97.

48. *Id.* at 101.

49. *Id.* at 97-101.

50. See ECCC Law, *supra* note 35, arts. 5-6. "Torture," for example, is an enumerated act under both article 5 and article 6. *Id.*

51. ECCC Agreement, *supra* note 20 ("The maximum penalty for conviction for crimes falling within the jurisdiction of the Extraordinary Chambers shall be life imprisonment.").

52. ECCC Law, *supra* note 35, art. 29.

53. See Prosecutor v. Kaing Guek Eav alias The Accused, Case No. 001/18-07-2007-ECCC/TC, Co-Prosecutors' Final Trial Submission with Annexes 1-5, ¶ 358 (Nov. 11, 2009), http://www.eccc.gov/kh/english/cabinet/courtDoc/480/E159_9_EN.pdf.

International jurisprudence on sentencing of serious crimes varies considerably where broad judicial discretion is afforded;⁵⁴ however, there is a general consensus that the purpose of sentencing should involve both deterrent and retributive value.⁵⁵ Aggravating and mitigating factors have also been relevant considerations in sentencing of similar crimes.⁵⁶ Although article 77(1) of the Rome Statute of the International Criminal Court provides for a maximum of thirty years of imprisonment, unless a term of life imprisonment is justified,⁵⁷ other international tribunals have diverged from this principle.⁵⁸

The civil party reparations provisions in the ECCC Internal Rules are an experiment in international criminal law. No other tribunal designated for mass crimes prosecution has attempted to include civil parties in the proceedings.⁵⁹ Thus, the ECCC has no directly analogous international standards to consider and must define the scope of its role and competency in awarding reparations within the framework of ECCC legislation.⁶⁰ An early version of Internal Rule 23 provides that a civil party must suffer physical, material, or psychological injury as a direct consequence of the offense committed by the accused.⁶¹ Collective or moral reparations may be awarded on this basis, including awards such as “[a]n order to fund any non-profit activity or service that is intended for

54. *Id.* ¶362; Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 67-69 (2007).

55. *Kaing Guek Eav alias The Accused*, Case No. 001/18-07-2007-ECCC/TC, Co-Prosecutors' Final Trial Submission with Annexes 1-5, ¶¶ 359-361.

56. *See* Sloane, *supra* note 54, at 68 (“Both the ICTY and ICTR have considered a variety of aggravating and mitigating factors, including, in the former category, leadership (superior) position of the accused, terrorizing victims, sadism, cruelty and humiliation, espousal of ethnic and religious discrimination, and the number of victims; and in the latter, superior orders, necessity, duress, voluntary intoxication, automatism, insanity, and self-defense, as well as entry of a guilty plea and acceptance of responsibility, remorse, voluntary surrender to the tribunal(s), substantial cooperation with the prosecutor, post-conflict conduct, previous good character, benevolent attitude toward the victims, and age.” (internal quotation marks omitted)).

57. Rome Statute of the International Criminal Court, art. 77(1), July 17, 1998, 37 I.L.M. 999 (entered into force July 1, 2002) (“[T]he Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute: (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.”).

58. *Kaing Guek Eau alias The Accused*, Case No. 001/18-07-2007-ECCC/TC, Co-Prosecutors' Final Trial Submission with Annexes 1-5, ¶¶ 453-456 (providing averages for sentence terms of similar crimes at the SCSL, ICTR, and ICTY).

59. Heindel, *supra* note 30, at 125.

60. *Id.*

61. *See* INTERNAL RULES, *supra* note 11, r. 23(1) *bis*.

the benefit of Victims.”⁶² Multiple amendments of the civil party provisions occurred throughout the pretrial phase; however, the scope of the ECCC’s mandate regarding reparations remained uncertain during the first case before the ECCC.⁶³

III. THE COURT’S DECISION

In the noted case, the Trial Chamber began its analysis by describing in detail the historical context of the Khmer Rouge era and Duch’s role as Chairman of S-21.⁶⁴ It found that the Khmer Rouge took power of the Cambodian state during increasingly violent hostilities with neighboring Vietnam.⁶⁵ When the CPK army entered Phnom Penh in 1975, it implemented revolutionary policies aimed at creating a communist agrarian state.⁶⁶ Officials and perceived supporters of the previous regime were eliminated and extra-judicial executions were committed broadly to this end.⁶⁷ The CPK destroyed all existing legal institutions and a security apparatus was established to eliminate potential enemies of the Party.⁶⁸

The security apparatus included S-21 prison in Phnom Penh. This facility had a direct link to the highest CPK leadership and was used for the detention and execution of CPK cadre suspected of treason.⁶⁹ Duch was involved in the establishment of S-21 and was originally appointed Deputy of the facility.⁷⁰ He taught interrogation methods to S-21 staff, and he acknowledges that he permitted interrogators to use torture and was aware that following interrogations detainees were sent away to be

62. *Id.* r. 23 *quinquies*.

63. Internal Rule 23, which provides for general principles of victims participation as civil parties, was amended September 5, 2008; March 6, 2009; September 11, 2009; and February 9, 2010. *Id.* r. 23.

64. Prosecutor v. Kaing Guek Eau alias Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶¶ 59-139 (July 26, 2010), http://www.eccc.gov.kh/english/cabinet/courtDoc/635/20100726_Judgement_case_001_ENG_PUBLIC.pdf.

65. *Id.* ¶ 59.

66. *See id.* ¶ 82.

67. *Id.*

68. *Id.*

69. *Id.* ¶ 119. The detainee population at S-21 included former members of the previous regime, CPK cadres and their family members including women and children, S-21 staff and their relatives, and foreign nationals, especially Vietnamese soldiers and civilians. *Id.* ¶ 140. “[N]o fewer than 12,273 individuals were detained at S-21,” including at least 1,698 women and 89 children. *Id.* ¶ 141. Most detainees were systematically interrogated: they were taken from their cells, handcuffed, blindfolded, and given to interrogators. *Id.* ¶ 153. The interrogators routinely used violence to extract written confessions from the detainees. *Id.* Detainees were already considered guilty on arrival to S-21 and the confessions were only used to “validate the Party’s verdict.” *Id.* ¶ 155. In this sense these confessions were “pre-ordained” by the interrogators. *Id.*

70. *Id.* ¶ 119.

executed.⁷¹ In March 1976, Duch became Chairman of S-21 and Secretary of the S-21 Committee.⁷² In this position, he had full authority over all S-21 staff and S-24 prison, a sister facility used for reeducation through forced labor.⁷³

Following the historical narrative, the Trial Chamber turned to its legal analysis by highlighting the facts relevant to crimes against humanity under ECCC Law article 5.⁷⁴ It began by linking the CPK policy of “smashing”⁷⁵ enemies at S-21 to the enumerated crimes against humanity of murder and extermination.⁷⁶ Citing jurisprudence from the ICTR and ICTY, the Trial Chamber defined murder as an unlawful act or omission that results in the death of the victim when the perpetrator has the intent to kill or reasonable knowledge that death would occur.⁷⁷ Extermination, it determined, is a crime “characterized by an act, omission or combination of each that results in the death of persons on a massive scale”⁷⁸ that requires that the perpetrator act or omit with reasonable knowledge that the death of a large number of persons would occur.⁷⁹ The Trial Chamber detailed events and policies including the

71. *Id.* ¶¶ 126-127. Duch instructed interrogators to “establish links between the detainees and the CIA, KGB, and/or the Vietnamese.” *Id.* ¶ 155. He also trained all staff in interrogation methods in monthly and, later, weekly sessions. *Id.* ¶ 164. He “trained his interrogators to use physical and psychological violence but instructed them to keep detainees alive until he considered their confessions to be complete.” *Id.* Once a confession was derived, Duch reviewed the documents and provided instructions to the interrogators by annotating the confessions with notes recommending whether to use more torture on the detainee. *Id.* ¶ 176.

Every detainee at S-21 was destined for execution. *Id.* ¶ 180. Once Duch authorized that an interrogation was complete, the detainee was taken to be killed. *Id.* ¶¶ 181-182. For example, documents exist that include Duch’s annotations ordering the execution of S-21 detainees that included the names of eight teenagers and nine children. *Id.* ¶ 182. Duch wrote on the order “Smash them to pieces.” *Id.* Other examples exist where Duch wrote annotations that said “take away for execution,” “keep for interrogation,” and “medical experiment.” *Id.*

Executions generally occurred at a burial site called Choeung Ek, fifteen km southwest of Phnom Penh. *Id.* ¶ 184. At Choeung Ek, detainees were handcuffed, blindfolded, and loaded into trucks on the pretext that they were being relocated. *Id.* ¶ 188. On arrival, still handcuffed and blindfolded, their identity was verified and they were led to large pits where they were summarily executed and buried en masse. *Id.*

72. *Id.* ¶¶ 128, 132.

73. *Id.* ¶¶ 132, 190.

74. *Id.* ¶¶ 204-280.

75. One of the most relevant and troubling CPK policies was the goal to “smash” all enemies of the Party. *Id.* ¶ 99. This term “smash” was often translated as “smash to bits” and meant something “more than merely kill.” *Id.* ¶ 100 (internal quotation marks omitted). One expert described the concept as involving “not merely a physical smashing but also a psychological smashing” where security centers were used as a means of “dehumanization and debasement of the individual psyche.” *Id.*

76. *Id.* ¶¶ 205-224.

77. *Id.* ¶¶ 331-333.

78. *Id.* ¶ 334.

79. *Id.* ¶ 338.

“main task” of S-21 to “interrogate [torture], to get the confessions, and to smash them.”⁸⁰ The Trial Chamber ultimately held that the deaths and executions perpetrated at S-21 amounted to the crimes against humanity of both murder and extermination.⁸¹

The Trial Chamber then considered its findings on enslavement as an enumerated crime against humanity.⁸² It defined enslavement as “the exercise of any or all powers attaching to the right of ownership over a person”⁸³ where the perpetrator intentionally exercises these powers.⁸⁴ The Trial Chamber highlighted various witness testimony describing the intense physical working conditions at S-24 prison⁸⁵ and the forced labor at the S-21 complex performed by a limited number of detainees.⁸⁶ It ultimately found that S-21 staff deliberately exercised power and control over detainees, particularly at S-24, and that these detainees were given no right to refuse the work assigned to them.⁸⁷ Consequently, it held that the elements of enslavement as a crime against humanity were satisfied.⁸⁸

Next, the Trial Chamber described its findings on arbitrary imprisonment.⁸⁹ It defined this enumerated crime against humanity as “the arbitrary deprivation of an individual’s liberty without due process of law.”⁹⁰ The Trial Chamber found that over 12,000 individuals were detained at S-21 and S-24,⁹¹ including “young children and babies, as well as others who objectively, could not have been guilty of any offence.”⁹² It further described that the arbitrary detention occurred without due process of law.⁹³ There was an absence of judicial procedure that would enable detainees to access legal counsel, to have a fair trial, or to obtain any other means of challenging arrest, detention, and execution.⁹⁴ The Trial Chamber ultimately held that detainees were intentionally and arbitrarily imprisoned without legal basis and that the

80. *Id.* ¶¶ 205-224 (internal quotation marks omitted).

81. *Id.* ¶ 341.

82. *Id.* ¶¶ 225-233.

83. *Id.* ¶ 342.

84. *Id.* ¶ 345.

85. *See id.* ¶¶ 228-229. S-24 was a similar prison devoted to re-education through forced labor. *Id.* ¶ 190.

86. *Id.* ¶¶ 225-233.

87. *Id.* ¶ 346.

88. *Id.*

89. *Id.* ¶¶ 234-239.

90. *Id.* ¶ 347.

91. *Id.* ¶¶ 235-236.

92. *Id.* ¶ 238.

93. *Id.* ¶ 239.

94. *Id.*

imprisonment of such large numbers of detainees was “on a similar scale of gravity to other crimes against humanity.”⁹⁵

Subsequently, the Trial Chamber addressed the use of torture at the S-21 complex as a crime against humanity.⁹⁶ It recognized the various international instruments defining torture that were accepted in substance as customary international law by the time S-21 was in operation.⁹⁷ Consulting these criteria, it described torture as an intentional act or omission inflicting severe physical or mental pain or suffering in order to attain a certain result or purpose.⁹⁸ In gruesome detail, the Trial Chamber highlighted the brutal interrogation methods employed at S-21, including “beating, electrocution, asphyxiation with a plastic bag and ‘water-boarding.’”⁹⁹ It also described less common interrogation methods such as using pliers to remove finger and toe nails,¹⁰⁰ force-feeding of excrement and urine,¹⁰¹ and at least one instance of rape involving a female detainee.¹⁰² The Trial Chamber found that the use of these interrogation techniques were designed to obtain confessions of treason to justify the detention and impending execution, to obtain information that would lead to further arrests of others suspected of treason, and as a form of punishment for prisoners who behaved badly.¹⁰³ It ultimately held that these acts amounted to torture as a crime against humanity.¹⁰⁴

The Trial Chamber then considered “other inhumane acts” relevant to crimes against humanity charges.¹⁰⁵ It defined these acts as residual offenses of similar gravity, meeting the criteria of crimes against humanity but not fitting within one of the specified crimes.¹⁰⁶ It found that the detention conditions at S-21 demonstrated dehumanizing treatment of detainees.¹⁰⁷ Detainees were not given proper clothing,¹⁰⁸

95. *Id.* ¶ 351.

96. *Id.* ¶¶ 240-256.

97. *Id.* ¶¶ 352-353.

98. *Id.* ¶¶ 354-358.

99. *Id.* ¶ 241 (“[W]ater-boarding . . . entailed pouring water into [the detainee’s] nose to induce a sensation of suffocation and drowning.”).

100. *Id.* ¶ 242.

101. *Id.* ¶ 244.

102. *Id.* ¶ 246.

103. *Id.* ¶¶ 252-255.

104. *See id.* ¶¶ 359-366.

105. *Id.* ¶¶ 257-278.

106. *Id.* ¶¶ 367-371. “Examples of inhumane acts which have been found to constitute crimes against humanity include forcible displacement and forcible transfer, severe bodily harm, detention in brutal and deplorable living conditions, as well as beatings and other acts of violence.” *Id.* ¶ 370.

107. *Id.* ¶ 373.

108. *Id.* ¶ 260.

they were deprived of adequate food,¹⁰⁹ and they were not permitted to wash, defecate, or urinate in hygienic conditions.¹¹⁰ They were also deprived of medical treatment and were sometimes subjected to “blood-drawing”¹¹¹ and other medical experiments.¹¹² The Trial Chamber held that these acts and omissions have the same gravity as other offenses constituting crimes against humanity and fall within the category of “other inhumane acts.”¹¹³

The Trial Chamber concluded its crimes against humanity analysis by considering the crime of persecution on political grounds.¹¹⁴ Citing case law from the ad hoc tribunals,¹¹⁵ it defined this crime as “large-scale and discriminatory offending in situations involving massive criminality but which may not entail the necessary physical destruction or exterminatory intent required for genocide.”¹¹⁶ It found that S-21 detainees were deprived of their fundamental rights based on their real or perceived political beliefs.¹¹⁷ Under this rationale they “were subject[ed] to arbitrary and unlawful detention, torture, enslavement, murder, and other inhumane acts.”¹¹⁸ The Trial Chamber ultimately found that these offenses cumulatively amounted to persecution and that Duch’s criminal conduct was paired with a specific intent to discriminate on political grounds.¹¹⁹

The Trial Chamber then moved to the issue of whether the acts committed at S-21 were grave breaches of the Geneva Conventions of

109. *Id.* ¶¶ 268-269.

110. *Id.* ¶¶ 270-272.

111. “[D]etainees would be made to lie on their back on a bed, their handcuffs removed and their legs shackled. They would be blindfolded while a needle was inserted into their veins and their blood drawn until they died.” *Id.* at 223.

112. *Id.* ¶¶ 273, 275; *see also id.* ¶ 223.

113. *Id.* ¶ 373.

114. *Id.* ¶¶ 279-280.

115. *Id.* ¶ 375.

116. *Id.* ¶ 374.

117. *Id.* ¶ 279.

118. *Id.*

119. *Id.* ¶ 393. Judge Cartwright dissented from the majority on the issue of Duch’s discriminatory intent writing:

I am in complete agreement that the Accused assiduously implemented CPK policies to detain, interrogate, and, where he deemed it appropriate, to torture and then execute all those imprisoned at S-21. . . . Although finding the Accused to be aware of the discriminatory basis of these policies, the inferences that I draw from the evidence lead me to conclude that it has not been proved to the required standard that he personally possessed the discriminatory intent required to support a conviction for persecution on political grounds.

Id. ¶¶ 398-399 (Cartwright, J., dissenting).

1949 pursuant to article 6 of the ECCC Law.¹²⁰ It began its analysis by highlighting that Cambodia and Vietnam ratified the Geneva Conventions of 1949, which were binding on Cambodia during the Khmer Rouge era.¹²¹ Then the Trial Chamber pointed out that a nexus must be established between the acts of the accused and the armed conflict, and it must be shown that the accused had sufficient knowledge that an international armed conflict existed and that the victims belonged to the adverse party in that conflict.¹²²

The Trial Chamber subsequently confirmed the prerequisite existence of an armed conflict of international character between Cambodia and Vietnam during the relevant period.¹²³ It then determined that Duch's acts were sufficiently related to the armed conflict as a whole because they were part of a policy tolerated by one of the parties to the armed conflict and because Vietnamese detainees constituted the largest group of foreign detainees at S-21.¹²⁴ Then, the Trial Chamber explained the "protected persons" requirement through the lens of ICTY jurisprudence, which defined the element broadly to include civilians who "are viewed by the State whose hands they are in as belonging to the opposing party in an armed conflict and as posing a threat to [that] State."¹²⁵ Thus, it found detainees who were not Vietnamese but who were suspected by the perpetrators as being Vietnamese sympathizers were protected persons under the Geneva Conventions.¹²⁶ Finally, it determined that Duch had sufficient knowledge of the armed conflict's existence and that S-21 detainees included Vietnamese persons as well as Cambodians considered to be Vietnamese sympathizers.¹²⁷

Next, the Trial Chamber considered the relevant grave breaches of the Geneva Conventions.¹²⁸ Relying substantially on the facts assessed through its crimes against humanity analysis, the Trial Chamber found that S-21 detainees, who were protected persons under the Geneva Conventions, were subject to acts that in the context of an international armed conflict are grave breaches.¹²⁹ In turn, the Trial Chamber

120. *Id.* ¶¶ 400-469 (majority opinion).

121. *Id.* ¶¶ 403-404.

122. *Id.* ¶¶ 409-410.

123. *Id.* ¶ 423.

124. *Id.* ¶ 424.

125. *Id.* ¶ 419 (internal quotation marks omitted).

126. *Id.* ¶ 426.

127. *Id.* ¶ 429.

128. *Id.* ¶¶ 430-469.

129. *Id.*

addressed willful killing, torture and inhumane treatment,¹³⁰ willfully causing great suffering or serious injury to body or health, willfully depriving a prisoner of war or civilian of the rights of a fair and regular trial, and unlawful confinement of a civilian.¹³¹ The Trial Chamber found that protected persons such as Vietnamese detainees and those determined to be Vietnamese sympathizers were subjected to the same cruel treatment and deprivation of basic human rights as other S-21 detainees.¹³² Thus, it found the elements for each of these offenses satisfied.¹³³

The Trial Chamber then turned to the issue of individual criminal responsibility.¹³⁴ Under article 29 of the ECCC Law, “[a]ny Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article[s] . . . 5 [and] 6” are to be found individually responsible.¹³⁵ The Trial Chamber first considered whether Duch “committed” the crimes alleged.¹³⁶ Citing jurisprudence from other international criminal tribunals, the Trial Chamber defined “‘committing’ as a form of responsibility includ[ing] both commission through the physical perpetration or culpable omission of an act, and commission through the participation in a joint criminal enterprise.”¹³⁷ The Trial Chamber then found that, although Duch participated in at least some interrogations involving beatings or other forms of torture, it was not satisfied that Duch was individually responsible for having committed these acts through physical perpetration or culpable omission to the required standard.¹³⁸ It nonetheless held that Duch was individually responsible as a result of his participation in the systemic joint criminal enterprise at S-21 because he knew of the criminal nature of the system and he acted with the intent to further its criminal purpose.¹³⁹

The Trial Chamber also determined that Duch was liable for additional forms of responsibility listed in article 29, reasoning that such concurrent convictions do not amount to additional convictions for the same crime but that establishing such responsibility could be helpful at

130. *Id.* ¶¶ 431-449. It distinguished between torture and inhumane treatment in that torture is defined through the same elements of crimes against humanity while inhumane treatment does not need to be undertaken for any particular purpose. *Id.* ¶¶ 439, 443.

131. *Id.* ¶¶ 450-469.

132. *Id.* ¶¶ 432-436, 445-447, 449, 456-457, 461-462, 467-468.

133. *Id.* ¶¶ 437, 448-449, 457, 463, 469.

134. *Id.* ¶ 470.

135. *Id.*

136. *Id.* ¶¶ 479-517.

137. *Id.* ¶ 479.

138. *Id.* ¶¶ 482-486.

139. *Id.* ¶¶ 515-516.

sentencing.¹⁴⁰ It held that Duch was additionally responsible for planning,¹⁴¹ instigating,¹⁴² ordering,¹⁴³ and aiding and abetting¹⁴⁴ the various crimes against humanity and grave breaches of the Geneva Conventions that occurred at S-21. Finally, the Trial Chamber rejected Duch's defense claims of acting pursuant to superior orders¹⁴⁵ and duress.¹⁴⁶

Thus, Duch was held "individually criminally responsible . . . for the following offences as crimes against humanity: murder, extermination, enslavement, imprisonment, torture (including one instance of rape), . . . and other inhumane acts," each of which it found were subsumed by the crime of persecution on political grounds.¹⁴⁷ The Trial Chamber also found him individually responsible for the following grave breaches of the Geneva Conventions of 1949: "wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian."¹⁴⁸

The Trial Chamber then focused on the difficult task of "reducing crimes of considerable enormity and scope into individualised sentences."¹⁴⁹ It reasoned that the process seeks to reassure victims, their families, and the general public that the law is enforced,¹⁵⁰ highlighting that the goal of the sentence is to punish, not to provide a means of revenge.¹⁵¹ It also said that the sentence must be proportionate and "reflect[] the culpability of the accused based on an objective, reasoned and measured analysis both of [the accused's] conduct and its consequential harm."¹⁵²

140. *Id.* ¶ 517.

141. *Id.* ¶ 521.

142. *Id.* ¶ 526.

143. *Id.* ¶ 531.

144. *Id.* ¶ 537. The Trial Chamber also held that Duch's individual criminal responsibility could be established on the basis of his superior responsibility because he exercised effective control over S-21 and was aware that his subordinates were committing crimes. *Id.* ¶ 549.

145. *Id.* ¶¶ 550-552.

146. *Id.* ¶¶ 553-558.

147. *Id.* ¶ 559.

148. *Id.*

149. *Id.* ¶ 579. Citing the ICTY, the Trial Chamber held that to avoid the risk of prejudice to the Accused, multiple criminal convictions based on the same conduct are only admissible if each statutory provision has a "materially distinct element" not contained in the other similar provision. *Id.* ¶¶ 560-561. When this threshold is not met and two provisions are materially similar, the Chamber must decide on which offense it will enter a conviction. *Id.*

150. *Id.* ¶ 579.

151. *Id.* ¶ 580.

152. *Id.*

Due to the gravity of the crimes committed and the aggravating factors, the co-prosecutors requested a sentence of life imprisonment.¹⁵³ However they acknowledged that a conversion to forty-five years of imprisonment would provide an adequate remedy due to an unlawful detention suffered by the accused in the hands of the Cambodian Military Court.¹⁵⁴ Additionally, they conceded that a further five-year reduction of sentence would be appropriate due to mitigating factors that might be beneficial to national reconciliation.¹⁵⁵ Thus, the co-prosecutors effectively requested a sentence of forty years' imprisonment.¹⁵⁶

The Trial Chamber, however, decided on a thirty-five-year sentence, with an additional five-year reduction due to the violation of Duch's rights by his illegal Cambodian Military Court detention.¹⁵⁷ He was also given credit for time already served in detention, totaling approximately eleven years.¹⁵⁸ Thus, the Trial Chamber effectively sentenced Duch to nineteen years left to serve in prison.¹⁵⁹

Finally, the Trial Chamber addressed the issue of civil party reparations.¹⁶⁰ Ninety civil parties were permitted to take part in the proceedings, sixty-eight of whom the Trial Chamber held had suffered harm as a direct consequence of the crimes for which Duch was convicted.¹⁶¹ These civil parties requested various reparations, including access to free physical and psychological medical care, funding for educational programs informing Cambodians of the crimes committed under the Khmer Rouge, the erection of memorials at S-21 and in the local communities of the civil parties, and assistance in forming a fund for vocational and business skills training.¹⁶²

The Trial Chamber, however, rejected these claims, reasoning that it lacked the competence to enforce reparations awards and that such

153. *Id.* ¶ 569.

154. *Id.*

155. *Id.*; Co-Prosecutors' Final Trial Submission ¶¶ 436-442, Prosecutor v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/TC (Nov. 11, 2009).

156. *Id.*

157. *Id.* ¶¶ 631-632.

158. *Id.* ¶ 633.

159. *Id.* ¶¶ 631-633. Judge Lavergne dissented on grounds that the new Cambodian penal code prohibits sentences of more than thirty years where life imprisonment is not imposed. Prosecutor v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/TC, Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence, ¶ 2 (July 26, 2010), http://www.eccc.gov.kh/english/cabinet/courtDoc/636/20100726_Dissenting_Opinion_of_Lavergne_j_Case_001_ENG_PUBLIC.pdf.

160. *Kaing Guek Eau alias Duch*, Case No. 001-18-07-2007/ECCC/TC, Judgment, ¶¶ 635-675.

161. *Id.* ¶¶ 638, 645, 650.

162. *Id.* ¶¶ 652, 654.

enforcement would depend on the Cambodian court system over which the ECCC has no jurisdiction.¹⁶³ Thus, it ultimately held that honoring the substantive requests of the civil parties was beyond the scope of available reparations before the ECCC.¹⁶⁴ For example, it stated, “Provision of free medical care to a large and indeterminate number of victims may purport to impose obligations upon national healthcare authorities and thus exceed the scope of the ECCC’s competence.”¹⁶⁵ All such claims by the civil parties were therefore rejected.¹⁶⁶

IV. ANALYSIS

International observers have been quick to acknowledge the completion of the first round of ECCC proceedings as a historic milestone.¹⁶⁷ Indeed, the judgment is significant in several general ways. First, the Trial Chamber’s analysis of the crimes committed at S-21 during the Khmer Rouge era aids the establishment of a credible historical record by serving a truth-telling function that promotes domestic and international awareness of the atrocities committed. Also crucial is the possible effect on the Cambodian domestic court system. Often criticized for human rights abuses, holding a tribunal in Cambodia that meets international standards sets an important example within the Cambodian judicial system.¹⁶⁸ The conclusion of proceedings may also be a catalyst for reconciliation among Cambodia’s future generations even if the victims themselves find the judgment unsatisfactory.¹⁶⁹

163. *Id.* ¶¶ 661-663.

164. *Id.* ¶ 674.

165. *Id.*

166. *Id.* ¶¶ 675, 683. However, the Trial Chamber did issue the following statement: “The Chamber shall compile all statements of apology and acknowledgments of responsibility made by KAING Guek Eav during the course of the trial. This compilation shall be posted on the ECCC’s official website within 14 days of the date of this judgement becoming final. It rejects all other Civil Party claims.” *Id.* ¶ 683.

167. *See, e.g.*, Press Release, U.S. Senate Comm. on Foreign Relations, Chairman Kerry on Cambodia Tribunal Decision (July 26, 2010), <http://www.cambodiatribunal.org/images/CTM/chairman%20kerry%20on%20cambodia%20tribunal%20decision%207-26-10.pdf>; *Cambodia: Tribunal’s First Step in Search for Justice*, HUMAN RIGHTS WATCH (July 26, 2010), <http://www.hrw.org/en/news/2010/07/26/Cambodia-tribunal-s-first-step-search-justice>.

168. *See* Press Release, Cambodian Ctr. for Human Rights, The Duch Trial—A Good Example for the Cambodian Courts (July 26, 2010), [http://cchrcambodia.org/English/add_press_release/press_release/the%20 Duch%20trial%20a%20good%20example%20for%20the%20cambodian%20courts\(072610_1280141008\).pdf](http://cchrcambodia.org/English/add_press_release/press_release/the%20 Duch%20trial%20a%20good%20example%20for%20the%20cambodian%20courts(072610_1280141008).pdf).

169. Youk Chhang, *Why the Khmer Rouge Tribunal Matters to the Cambodian Community: Justice for the Future, Not the Victims*, <http://www.cambodiatribunal.org/CTM/Youk%20Chhang%20Essay.pdf> (last visited Feb. 2, 2011) (“[W]e need prosecution before we can ever reach the point of true forgiveness.”).

Furthermore, the Trial Chamber's judgment offers relevant insight into the unique jurisprudence of the ECCC as it moves into its second round of proceedings. The Trial Chamber outlined the substantive law for crimes against humanity and grave breaches of the Geneva Conventions, while defining through its analysis the extent to which it will rely on the jurisprudence of other international criminal courts. One particularly significant holding is the Trial Chamber's recognition of the existence of an armed conflict between Cambodia and Vietnam during the relevant period.¹⁷⁰ The four accused in Case 002 are each charged with grave breaches of the Geneva Conventions, so the existence of the requisite armed conflict of international character during the Khmer Rouge era is integral to the next case as well.¹⁷¹ Viewed on a broader level, the judgment offers the emerging field of international criminal law an additional round of jurisprudence that may aid future cases involving mass crimes, as proceedings continue for alleged crimes committed in the former Yugoslavia, Rwanda, Sierra Leone, and Lebanon,¹⁷² and are perhaps imminent elsewhere.¹⁷³

However, some aspects of the Duch judgment have been rightly criticized, particularly the apparently lenient sentence handed down in proportion to the gravity of the crimes committed.¹⁷⁴ The co-prosecutors suggested the crimes were grave enough to warrant a life sentence, but they ultimately requested a forty-year sentence taking into account a

170. *Kaing Guek Eau alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 423.

171. *See Prosecutors v. Nuon Chea*, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, ¶ 1613 (Sept. 15, 2010), <http://www.eccc.gov.kh/english/cabinet/courtDoc/740/D427Eng.pdf>.

172. For updates on the progress of these proceedings, see each tribunal's respective Web site. *The Cases*, U.N. INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/action/cases/4> (last visited Jan. 12, 2011); *Cases*, INT'L CRIM. TRIBUNAL FOR RWANDA, <http://www.unictr.org/cases/tabid/204/Default.aspx> (last visited Feb. 2, 2011); *Cases*, SPECIAL COURT FOR SIERRA LEONE, <http://www.sc-sl.org/CASES/tabid/71/Default.aspx> (last visited Feb. 2, 2011); *Case Files*, SPECIAL TRIBUNAL FOR LEBANON, <http://www.stl-tsl.org/sid/55> (last visited Feb. 2, 2011).

173. *See Situations and Cases*, INT'L CRIM. COURT, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited Jan. 12, 2011) (providing updates on current investigations). Investigations continue in Uganda, Democratic Republic of the Congo, Sudan, Central African Republic, the Republic of Kenya, and the Libyan Arab Jamahiriya. *Id.*

174. Seth Mydans, *Prison Term for Khmer Rouge Jailer Leaves Many Dissatisfied*, N.Y. TIMES, July 27, 2010, at A4; Sopheng Cheang, *Khmer Rouge Jailer Faces 19 Years for 16,000 Dead*, ASSOCIATED PRESS, July 27, 2010, <http://www.cambodiatribunal.org/images/CTM/7-26-10%20khmer%20rouge%20jailer%20faces%2019%20years%20for%2016000%20dead.pdf> (“[Duch will] serve less than half a day for every person killed at the notorious torture center he commanded.”); Elena Lesley, *The Question of Punishment*, PHNOM PENH POST, July 31 2010, http://www.phnompenhpost.com/index.php/component/option,com_myblog/Itemid,44/show,the-question-of-punishment.html/; *Scarred, Not Healed*, ECONOMIST, July 31, 2010, at 31 (“Most Cambodians at the trial thought the sentence unconscionably lenient.”).

reduction for Duch's illegal detention in the hands of the Cambodian Military and for mitigating circumstances such as his cooperation with the tribunal.¹⁷⁵ At the time of sentencing, Duch had already served eleven years in prison.¹⁷⁶ This would leave twenty-nine years left to serve if the co-prosecutors were granted their request. Duch was sixty-seven years old on the date of sentence.¹⁷⁷ By the end of his sentence he would have been in his mid-90s, likely an effective life sentence. The Trial Chamber, however, decided on an effective nineteen years of imprisonment, with one judge dissenting that it was too harsh of a punishment.¹⁷⁸ Thus, Duch is expected to be released from custody at age eighty-six.

While the Trial Chamber appropriately determined that it has wide discretion in determining a sentence,¹⁷⁹ it did not adequately explain the calculus that lead to its base figure of thirty-five years. This is particularly troubling as the Trial Chamber failed to distinguish the revealing compilation of sentences from other similar cases published in the co-prosecutors' Final Trial Submission to the court.¹⁸⁰ Although the Trial Chamber properly pointed out that it is not bound by international sentencing guidelines,¹⁸¹ its cursory reasoning regarding the sentence determination suggests it was derived arbitrarily.

In fact, the co-prosecutors subsequently filed an appeal on grounds of a disproportionately lenient sentence, reasoning that the Trial Chamber gave insufficient weight to the gravity of the crimes committed and undue weight to the mitigating circumstances.¹⁸² Calling the sentence

175. See also *Prosecutor v. Kaing Guek Eav alias the Accused*, Case No. 001/18-07-2007-ECCC/TC, Co-Prosecutors' Final Trial Submission with Annexes 1-5, ¶¶ 485-486 (Nov. 11, 2009), http://www.eccc.gov/kh/english/cabinet/courtDoc/481/E159_9_EN.pdf (reasoning that mitigating factors such as Duch's general cooperation with trial proceedings, limited acceptance of responsibility, remorse, and impact on national reconciliation warranted a five-year reduction in sentence).

176. *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 633 (July 26, 2010), http://www.eccc.gov.kh/english/cabinet/courtDoc/635/20/00726_Judgement_Case_001_ENG_PUBLIC.pdf.

177. See *id.* ¶ 1.

178. *Id.* ¶¶ 631-633; see also *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence, ¶ 2 (July 26, 2010), http://www.eccc.gov.kh/english/cabinet/courtDoc/636/20100726_Dissenting_opinion_of_Lavergne_J_Case_001_ENG_PUBLIC.pdf (reasoning that the 2009 Cambodian Penal Code and International Criminal Court practice limit a maximum sentence to thirty years).

179. *Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 595.

180. See *Kaing Guek Eav alias The Accused*, Case No. 001/18-07-2007-ECCC/TC, Co-Prosecutors' Final Trial Submission with Annexes 1-5, ¶¶ 453-456.

181. *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007-ECCC/SC, Judgment, ¶ 595.

182. *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007-ECCC/TC, Co-Prosecutors' Appeal Against the Judgment of the Trial Chamber in the Case of Kaing Guek Eav

“plainly unjust,”¹⁸³ they further argued that the Trial Chamber did not indicate how it reached the base figure of thirty-five years or whether it relied on an assessment of comparable sentences from similar cases found in international jurisprudence.¹⁸⁴

The Trial Chamber’s treatment of the civil party model is also largely inadequate. While civil party participation in the proceedings was initially sought as an opportunity for victims to confront the accused in ways that other tribunals have not, this was a daunting task for the ECCC to manage and was expected to be experimental. The various rule amendments made throughout the proceedings demonstrate the extensive troubleshooting the Trial Chamber was forced to undertake to this end.¹⁸⁵ It is nonetheless problematic that all substantive reparations requested by the parties were denied. While the Trial Chamber rightly concluded that it did not have the means to fund or enforce certain requests such as free psychological and medical care for victims, these kinds of requests appear consistent with the Internal Rules. Instead of denying all substantive requests outright, the Trial Chamber should have employed all means available to organize and mobilize reparations through other sources. One expert has recommended several measures that the Trial Chamber could have taken that would have required minimal resources such as establishing simple memorials, organizing commemorative gatherings of survivors, or simply setting up drop boxes where ordinary citizens could contribute funds for the victims.¹⁸⁶ In an apparent attempt to act narrowly within the scope of its powers, the Trial Chamber neglected available measures that could have legitimized the civil parties’ requests.

Following the Trial Chamber’s decision, however, new civil party rules have been adopted that may remedy some of the shortcomings exposed in the Duch trial.¹⁸⁷ The indictment for Case 002 involving four more high-profile former Khmer Rouge leaders has been issued,¹⁸⁸ and as of this writing, there have already been nearly 4000 applications for civil

alias Duch, ¶ 8 (Oct. 13, 2010), http://www.eccc.gov.kh/english/cabinet/courtDoc/748/F10_EN.pdf.

183. *Id.* ¶ 5.

184. *Id.* ¶ 23.

185. *See Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 635.

186. *See* John D. Ciorciari, *The Duch Verdict*, CAMBODIA TRIBUNAL MONITOR, July 28, 2010, at 3, <http://cambodiatribunal.org/images/CTM/the%20duch%20verdict.pdf>.

187. *See* INTERNAL RULES, *supra* note 11, (Rev. 6) r. 23 (Sept. 17, 2010).

188. *See* Prosecutors v. Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ, ¶¶ 1623-1624 (Sept. 15, 2010), <http://www.eccc.gov.kh/english/cabinet/courtDoc/740/D427Eng.pdf>.

party participation in that case.¹⁸⁹ Whether these changes will provide a functioning mechanism for civil party participation and reparation awards moving into the next round of proceedings remains to be seen, but the model employed in the Duch proceedings will likely be considered untenable.

V. CONCLUSION

After more than thirty years since the Khmer Rouge were ousted by a Vietnamese invasion, those who long sought justice for the suffering that occurred during Democratic Kampuchea have finally had the opportunity to witness a conviction through judicial proceedings meeting international standards. While Duch's sentence is unsatisfying for some and while the flaws of the civil party system were on full display, the ECCC Case 001 judgment is an essential and long-awaited step forward in Cambodia's recovery.

Richard L. Kilpatrick, Jr.*

189. See *Prosecutors v. Nuon Chea*, Case No. 002/19-09-2007-ECCC-OCIJ, Order on the Admissibility of Civil Party Applications from Current Residents of Kep Province, ¶ 1 (Aug. 25, 2010), http://www.eccc.gov.kh/english/cabinet/courtDoc/652/D392_EN.pdf.

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