

Eventual Justice: The Trial of Guek Eav Kaing in the Extraordinary Chambers of the Courts of Cambodia

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This Comment will analyze the first criminal proceedings of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) against Guek Eav Kaing (“Duch”), a former senior official in the brutal Khmer Rouge regime that ruled Cambodia from 1975-1986. The prosecution of Duch, the former warden of the infamous detention and interrogation center Tuol Sleng (“S-21”), marks the first instance a senior official has addressed the mass murder and heinous human rights violations perpetrated by the Khmer Rouge in an international judicial context. The ECCC, which issued the original indictment order against Duch in August of 2008¹, concluded the trial

¹ Closing Order Indicting Kaing Guek Eav alias Duch, 001/18-07-2007-ECCC-OCIJ, [available at http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs&Default_Case=duc](http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs&Default_Case=duc)

proceedings against the accused with the filing of the final defense written submissions in November of 2009.² At the time of this writing the final judgment and sentence are still forthcoming.

This Comment will first trace the international formation of the ECCC and describe the court's procedural mechanisms, and ultimately analyze the application of this unique war crimes tribunal in the individual prosecution of Duch with a specific emphasis on the role of Civil Party plaintiffs in the proceedings. Finally, this Comment will contextualize the challenges and triumphs of the ECCC, and the ramifications the trial has had on both the national level in Cambodia and the broader international scale.

I. Historical Summary of the Khmer Rouge Regime in Cambodia

To fully understand the significance of the ECCC, a brief historical summary of the atrocities perpetrated by the Khmer Rouge is necessary to provide a factual basis for the allegations against Duch. The Khmer Rouge first came to power in Cambodia in April of 1975, by violently overthrowing the Royal Government and instituting a drastic Maoist revolutionary coup led by a Pol Pot, a former schoolteacher.³ The new government, paradoxically called Democratic Kampuchea, immediately began a horrific reorganization of Cambodian society under the auspices of creating an “agrarian socialist utopia”, and systematically abolished all pre-existing cultural, social, and religious institutions within the country, including money, formal

h (last visited February 23, 2010).

² Final Defence Written Submissions, 001/18-07-2007-ECCC/TC, available at http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs&Default_Case=duch h (last visited February 23, 2010).

³ Glaspy, Padraic J. Justice Delayed? Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, 21 Harv. Hum. Rts. J. 143, 143 (2008).

education, Buddhism, private property, and any foreign influence.⁴ Essentially, the Khmer Rouge entered the capital of Phnom Penh and evacuated the city, forcing all inhabitants into the countryside and systematically murdering any member of the “educated class” in a paranoid political purge mirroring the Maoist revolution in China. Over the course of three years, eight months, and twenty-one days, approximately 1.7 million Cambodians (nearly one-fifth of the total population) perished from mass execution, overwork, starvation, and disease.⁵ On January 7, 1979, the Vietnamese Army captured Phnom Penh in retaliation of Pol Pot’s instigation of a preemptive border war, and defecting Khmer Rouge officials cooperated with the Vietnamese forces to establish the People’s Republic of Kampuchea.

II. The Charges Against Kaing Guek Eav (“Duch”)

The charges against Duch stem directly from his position as Chairman and Secretary of Tuol Sleng (“S-21”), an interrogation and re-education death camp that served as a detention center for suspected “traitors” to the Khmer Rouge.⁶ The indictment alleges that Duch conducted interrogations and submitted detainees to inhumane living conditions, including starvation tactics, regular beatings, and grotesque medical experimentation.⁷ Prisoners were forced to work menial labor seven days a week, often in excess of 16 hours a day, under armed supervision and were systematically shackled and tortured in daily interrogation sessions.⁸ The indictment alleges that Duch ordered and oversaw torture techniques including electrocution of the earlobes and

⁴ Id. at 143-44.

⁵ Id. at 144.

⁶ See Closing Order, supra note 1, at ¶ 42.

⁷ Id. at ¶¶ 67, 68, 70.

⁸ Id. at ¶¶ 75, 76, 79, 80, 81.

genitals, suffocation, removal of finger and toenails, cold-water treatments, and severe beatings often resulting in death.⁹

Additionally, Duch has admitted to personally ordering mass executions of men, women, and children without any sort of interrogation, an inescapable concession established by his meticulous records of interrogation sessions, including photographs of victims.¹⁰ The indictment alleges that 12,000 victims were executed by firing squads, blunt trauma inflicted to the base of the neck, blood-letting, and other methods before being buried in mass grave “pits” that the world came to know as the infamous “Killing Fields” of Choeng Ek.¹¹ The official charges in the indictment against Duch are Crimes Against Humanity, including murder, extermination, enslavement, imprisonment, torture, rape, persecution on political grounds, breaches of the Geneva Convention of 1949, and offenses punishable under the newly promulgated Law on the Establishment of the Extraordinary Chambers of the Courts of Cambodia Committed During the Period of Democratic Kampuchea.¹²

III. The Establishment of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”)

The establishment of the ECCC represents an innovative blending of international criminal law, domestic legislation, legal history, and foreign policy. Cambodia domestically implemented the ECCC with the passage of the Law on the Extraordinary Chambers In the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (“ECCC Establishment Law”), which was signed by the King and entered into force

⁹ Id. at ¶¶ 92, 99, 100, 102, 103.

¹⁰ Id. at ¶¶ 107, 109, 110, 116, 117, 118, 123, 124, 127, 128.

¹¹ Id.

¹² Id. at 44-45.

on August 10, 2001.¹³ Despite initial disputes over impartiality and political influence in the court proceedings,¹⁴ the hybrid Khmer Rouge war crimes tribunal gained international support with a resolution adopted by the UN General Assembly in May of 2003, which provided that¹⁵:

The purpose of the present agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979. The Agreement provides, inter alia, the legal basis and the principles and modalities for such cooperation.

The main hurdle in the initial UN support for the establishment of the ECCC is the fact that most of the senior political leaders in Cambodia, including the Prime Minister, Hun Sen, are former Khmer Rouge officials.¹⁶ One of the distinguishing factors of the ECCC is that it does not

¹³ Linton, Suzannah, Putting Cambodia's Extraordinary Chambers into Context, 11 S.Y.B.I.L. 195, 223 (2007).

¹⁴ Id.

¹⁵ Resolution Adopted by the General Assembly 57/228 – A/Res/57/228 B – Khmer Rouge Trials – Article 1 - Purpose (May 22, 2003) available at

¹⁶ Bowman, Herbert D., Not Worth The Wait: Hun Sen, The UN, and the Khmer Rouge Tribunal, 24 UCLA Pac. Basin L. J. 51, 52 (2006), stating that “Hun Sen is a former Khmer Rouge member, and his Cambodian Peoples Party (“CPP”) and his government include many former Khmer Rouge leaders, some of whom are possible targets of investigation and indictment.”

exist independently from the domestic Cambodian court system, but instead represents a dualistic interplay of national and international norms¹⁷:

The ECCC's hybrid design attempts to infuse international standards into Cambodian domestic law. The Chambers are not situated separately from the Cambodian judiciary; rather, they sit squarely within the existing judiciary as an ad hoc Cambodian court of original jurisdiction. . . . Unlike most other criminal tribunals, the ECCC is embedded in the courts of the country in which it sits and where the atrocities at issue took place.

The Law Establishing the ECCC grants the tribunal the power to bring to trial the “senior leaders” of Democratic Kampuchea and those who were “most responsible” for crimes committed within the specific period of April 17, 1975 to January 6, 1979.¹⁸ The law also provides for criminal liability for crimes set forth in the 1956 Cambodian penal code,¹⁹ crimes against humanity,²⁰ and genocide.²¹ Furthermore, any suspect who planned, instigated, ordered,

¹⁷ Claussen, Kathleen. Up To The Bar? Designing The Hybrid Khmer Rouge Tribunal in Cambodia. 33 Yale J. Int'l L. 253, 255 (2008).

¹⁸ Law on the Establishment of the Extraordinary Chambers In the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Art. 2, available at <http://www.eccc.gov.kh/english/law.list.aspx> (Revised August 26, 2007).

¹⁹ Id. at Art. 3 (imposing criminal liability for homicide, torture, and religious persecution).

²⁰ Id. at Art. 5 (defining crimes against humanity as a “widespread or systematic attack direct against any civilian population, on national, political, ethnical, racial, or religious grounds, such as: murder, extermination enslavement, deportation imprisonment, torture.”)

²¹ Id. at Art. 4.

aided and abetted, or committed the crimes shall be held individually responsible, and position of rank does not relieve the accused of criminal responsibility or mitigate punishment.²²

The judicial composition of the ECCC is divided into two separate chambers – the initial trial court and a Supreme Court, which serves as both the appellate chamber and court of final instance.²³ Cambodian judges maintain a majority in both chambers via a statutory mandate, with three Cambodian judges and two foreign judges serving in the trial court and four Cambodian judges and three foreign judges in the Supreme Court.²⁴ In response to the international concerns of the impartiality of Cambodian judges, the ECCC is the first hybrid criminal tribunal to require a “supermajority” of four votes to convict in the trial court as an “external check” on the domestic influences that could affect the proceedings.²⁵

The UN concerns over the impartiality and possible corruption within the Cambodian court system may certainly be justified from an economic perspective – the ECCC is funded mainly through a UN managed international trust fund with a total budget of approximately \$43 million, with a domestic Cambodian contribution of \$12.3 million over three years.²⁶ These concerns were substantiated by a 2007 audit by the United Nations Development Program (“UNDP”) that investigated reported “kickbacks” being siphoned off by Cambodian employees

²² *Id.* at Art. 29.

²³ *Id.* at Art. 9.

²⁴ *Id.*

²⁵ Claussen, *supra* note 17, at 255-56.

²⁶ *See* Linton, *supra* note 13, at 225. Figures are in US Dollars.

to pay superiors in exchange for appointments and continued employment.²⁷ Although the UNDP has not publicly released the results of the independent audit, there have been allegations of high salary scales for Cambodian employees, appointment of unqualified individuals, and a lack of any sort of effective performance evaluations of local employees by UN officials.²⁸

One particularly vocal critic of the corruption within the ECCC is Herbert D. Bowman, the former International Prosecutor for the United Nations Mission to East Timor who worked in Cambodia in 2006, who stated:²⁹

The reality is that the ECCC is located in Cambodia. Cambodian judges will hold the majority voting power in the court panels, and they will be under the control of Hun Sen his government. To believe that placing Cambodian officials, be they judges, prosecutors, or lawyers, in a building with international colleagues will somehow block outside influence and make them independent actors imbued with a new sense of professionalism is wishful thinking which can only lead to disillusionment.

Additionally, Bowman believes that Prime Minister Hun Sen Hun will exercise undue influence on the Cambodian judges that will ultimately decide who was a “senior leader” Khmer Rouge

²⁷ Hall, John A. Yet Another U.N. Scandal, WALL ST. JOURNAL – Opinion (September 21, 2007), available at <http://online.wsj.com/article/SB119032899373334471.html> (last visited 28 February, 2010).

²⁸ Id.

²⁹ Supra, note 16 at 67.

that was “most responsible” for the crimes committed, and thereby prevent the prosecution of culpable government officials still working within the Cambodian government.³⁰

The UN facilitation of assistance to the ECCC was marked by the establishment of the United Nations Assistance to the Khmer Rouge Trials (“UNAKRT”), and the organization’s primarily public relations website provides information on the judicial proceedings, court structure, news releases, and links to official ECCC documents.³¹ It is important to note that the possibility of corruption within the ECCC was fully within the consideration of the UN General Assembly when drafting its resolution in support of the Khmer Rouge trials, and reflected in a caveat in Article 28 which effectively provides for an escape clause labeled as “Withdrawal of Cooperation”.³²

Should the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present agreement.

Despite the financial and procedural difficulties that have arguably tainted the establishment of the ECCC, the UN has thus far stayed the course in providing support in the proceedings against Duch and the subsequent indictments against four other former Khmer Rouge officials. Outside

³⁰ Id. at 69.

³¹ UNAKRT – United Nations Assistance to the Khmer Rouge Trials, available at http://www.unakrt-online.org/01_home.htm (last visited February 28, 2010).

³² UN Resolution, *supra* note 15, Art. 28.

of the legal context, the broader cultural implications of the ECCC may provide an opportunity for the Cambodian people to address the unspeakable atrocities perpetrated by their own countrymen decades before. Suzannah Linton, the director of the L.L.M. program in Human Rights at the University of Hong Kong, aptly recognized that the ECCC must be looked at in a broader social context, noting that:³³

Those who believe that trying a few geriatrics is the elixir that is going to transform Cambodia need to remove their rose-tinted glasses. . . . The true significance of holding the persons responsible for atrocities that are 32-36 years old may be the opportunity that the symbolism of the legal process affords to realign a still devastated society that continues to thirst for justice.

IV. The Trial of Duch

A. Internal Rules of the ECCC and the Role of Civil Parties

The procedural aspects of the ECCC are governed by the Internal Rules of the Extraordinary Chambers of Cambodia (“Internal Rules”), an international amalgam of the recent draft of the Cambodian Code of Penal Procedure, French criminal procedure law, provisions drafted specifically for the ECCC, and a variety of other rules culled from the International Criminal Court and other hybrid tribunals, such as the Special Court for Sierra Leone.³⁴ The hybrid nature of the ECCC marks the first time an international tribunal is based entirely within a civil law system, undoubtedly a result of the history of French colonization that

³³ See Linton, *supra* note 13, at 197.

³⁴ *Id.* at 238.

preceded the rise of the Khmer Rouge.³⁵ The practical reality of the ECCC being situated within a civil law jurisdiction has the affect of empowering a judicial panel, and not a jury, with the ultimate fact-finding and delivery of judgment³⁶:

In contrast to common law countries, where the prosecutor, as the representative of the state, both gathers evidence and tries the case in court, civil law creates a distinction between these functions. Responsibility for the former is given to an investigating judge – a theoretically neutral figure whose only interest lies in uncovering as much evidence as possible, regardless of whether it is incriminating or exculpatory. This is the basic model followed at the ECCC. Because of the court’s hybrid nature, however, each of these positions is duplicated: there is a Cambodian Co-Prosecutor and an International Co-Prosecutor, as well as a Cambodian Co-Investigating Judge and an International Co-Investigating Judge.

Perhaps the most innovative aspect of the proceedings against Duch is the role of civil party plaintiffs in the trial, where victims of the atrocities at issue are given an express statutory right to participate in the prosecution of the accused.³⁷ According to Internal Rule 23, the purpose of Civil Party action before the ECCC is to allow for victims to “Participate in the criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by

³⁵ Bair, James P. From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia. 31 U. Haw. L. Rev. 507, 520 (2009).

³⁶ Id. See also Internal Rules of the Extraordinary Courts for the Chambers of Cambodia Rules 13, 14, 96, 98, 99 (revised September 11, 2009), available at http://www.eccc.gov.kh/english/internal_rules.aspx.

³⁷ See Internal Rule 23(1)-(2) (Civil Party Action by Victims), supra note 36.

supporting the prosecution” and “Allow victims to seek collective and moral reparations.”³⁸ The qualifications for exercising Civil Party action at the ECCC is not based on any criteria such as current residence or nationality, but instead requires that the victim has suffered “physical, material, or psychological” harm that was a “direct consequence” of the offenses under investigation.³⁹

To ensure cooperation between the Civil Parties and victims, the Internal Rules also provide for the establishment of an administrative Victims Unit, which serves as a “clearinghouse” for complaints and civil party applications through a process akin to a class-action war crimes configuration.⁴⁰ The Internal Rules further provide that the Civil Parties must submit an application to the Co-Investigating judges for consideration, who will then decide on the admissibility of the evidence submitted by the Civil Parties.⁴¹ The reparations sanctioned under the Internal Rules are limited to those individuals who have been granted Civil Party status, and include judicial orders providing for the publishing of the judgment in any appropriate news or media outlet, orders to fund any non-profit activity or service that is intended to benefit the victims, and “other appropriate or comparable forms of reparation.”⁴² These limited, symbolic forms of reparation have certainly garnered some commentary from

³⁸ Id.

³⁹ Id.

⁴⁰ See Bair, supra note 35, at 523, 530, and Internal Rule 12.

⁴¹ See Internal Rule 23(3)-(5).

⁴² Internal Rule 23(12)(a)-(c).

individuals working on the ground in Cambodia, including James P. Bair, a former legal intern in the Khmer Institute of Democracy and in the Victims Unit of the ECCC, who stated:⁴³

For most Cambodians, many of whom live in extreme poverty, the idea of spending millions of dollars to prosecute a handful of octogenarians thirty years after the fall of the Khmer Rouge is unfathomable. Many assume that, if there is so much money available to be spent on the trials, each victim who participates at the court can expect at least some amount of personal compensation for his or her suffering. However, individual reparations are not contemplated by any of the court's documents. A tribunal may award only "collective and moral reparations" under the Internal Rules, such as an order to fund a non-profit activity for the benefit of victims. . . . Given the fact that all the defendants have declared indigence, the prospects of meaningful reparations at the ECCC remain quite dim.

Despite the fact Bair doubts whether the symbolic reparations will be "meaningful" to the victims in a monetary sense, he does recognize the role of Civil Parties in the ECCC has broader implications for Cambodian society, and in fact operates to reinforce the legitimacy of the proceedings⁴⁴:

⁴³ See Bair, *supra* note 35, at 537.

⁴⁴ *Id.* at 550. Bair has further stated that "The inclusion of civil parties have the potential to help dispel any lingering doubts that the prosecution will amount to a political show trial, by highlighting issues of importance to victims that might not otherwise have comported with the government's agenda...." (548).

Civil party participation ensures greater access to evidence and enhances the legitimacy of the court. It allows victims to feel that their suffering is as much the focus of the trial as it was the focus of the crimes. This, in turn, helps to assuage suspicions that international tribunals serve only the interests of the politically powerful. These concerns are especially important in the case of Cambodia, where the crimes took place over three decades ago, and where allegations of political interference have dogged the court from its inception. While the extraordinary Chambers are certainly flawed, the model of civil party participation for victims offers the most promising method to date for improving international criminal proceedings.

In the proceedings against Duch, the ECCC has authorized four separate Civil Parties to participate in the proceedings, collectively incorporating 94 survivors, victims, and their families, which are represented, at a minimum, by one Cambodian lawyer and an international counsel.⁴⁵ Under Internal Rule 92, all parties may, up until the closing statements, make written submissions in accordance with the procedures set forth on the filing of documents⁴⁶, and the closing statements from the Civil Parties, the Defense, and Duch himself are separately analyzed below.

B. Final Submission of Civil Party Group 1

⁴⁵ Kate Gibson & Daniella Rudy. A New Model of International Criminal Procedure? The Progress of the Duch Trial at the ECCC, 7 J. Int'l Crim. Just. 1005, 1014-15 (2009).

⁴⁶ Internal Rule 92 (Amended on March 6, 2009).

The Final Submission of Civil Party Group 1 (hereinafter “CPG-1”) consists of allegations from both Cambodian and international direct victims of S-21, and also includes claims by the families of victims who suffered psychological trauma following the death of their families.⁴⁷ The individual claims of the members of CPG-1 include an Australian whose “family life disintegrated” after the death of his brother and who subsequently “took solace in alcohol” to quell his grief.⁴⁸ The claims of the Cambodian nationals of CPG-1 are substantiated by the meticulous records kept at S-21, including prisoner lists, biographies, photographic evidence, and confessions.⁴⁹ The allegations of the 37 members of CPG-1 essentially mirror those laid out against Duch in the original ECCC indictment, and additionally posit that Duch systematically tried to conceal the extent of his responsibility at S-21, encouraged the staff of S-21 to be as “cruel as possible” during interrogation sessions, fueled the genocidal paranoia of the upper echelon of the Khmer Rouge officials by compiling meticulous records of “confessions”, and that Duch “loved his job as Chairman of S-21 and the power that accompanied it.”⁵⁰

Perhaps the most striking accusation contained in the final submission of CPG-1 is allegation that Duch’s inhumane cruelty was not “formed by the job; rather, he formed the job,” stating that “While running any prison during the Khmer Rouge regime would have been a horrible job, Duch made this horrible job that much more cruel and sadistic, because of his

⁴⁷ Civil party Group 1 – Final Submission, Case No. 001/18-07-2007-ECCC/TC – Doc. No. E159/7, ¶¶ 39-72 (filed 10 November 2009), [available at http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs](http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs).

⁴⁸ *Id.* at ¶ 40.

⁴⁹ *Id.* at ¶¶ 41, 43, 45-68.

⁵⁰ *Id.* at ¶¶ 73, 78, 85, 91-103, 109-13.

personal characteristics.”⁵¹ The final submission references a mental examination, in which the psychiatrists concluded that Duch lacked “any form of empathy” and that he would at times “revert back to the Khmer Rouge style of thinking and vocabulary” when speaking about the Khmer Rouge period.⁵² In closing, the submission of CPG-1 provides ghastly insight into the pathologically heinous atrocities committed during Duch’s tenure as Chairman of S-21:⁵³

The evidence, as previously detailed in this final brief, unambiguously demonstrates that the Accused shaped and molded the position of Chairman of S-21 and the prison itself, based on his own character, own wishes, and his own prior experience. He was successful in that S-21 became a most efficient killing facility, mostly devoid of any compassion or humanity. Ruthless extermination was the order of the day.

C. Final Submission of Civil Party Group 2

In contrast to the Final Submission of CPG-1, the Final Submission of Civil Party Group 2 (hereinafter “CPG-2”) contains only the concerns of 17 individual victims and relatives, and mostly addresses the requested reparations permissible under the Internal Rules.⁵⁴ The ECCC trial chamber did not explicitly make a decision regarding the official Civil Party status of CPG-2 during the proceedings, and as a result the counsel for CPG-2 has posited that the “interim”

⁵¹ Id. at ¶ 105.

⁵² Id. at ¶ 108.

⁵³ Id. at ¶ 126.

⁵⁴ Co-Lawyers’ for Civil Parties (Group 2) Final Submission, Case No. 001/18-07-2007-ECCC/TC, Doc. No. E159/6 (filed 5 October 2009), available at http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs.

status of the group throughout the duration of the trial results in an “implicit acknowledgement” of CPG-2 entitling them to reparations.⁵⁵ Specifically, the victims in CPG-2 request a formal apology that is “sincere, genuine, and truthful” from the current government, the Royal Kingdom of Cambodia, in order to “contribute to the (national) reconciliation process and for victims to rebuild their dignity.”⁵⁶ Additional reparation requests include medical treatment and psychological services for the Civil Parties, the construction of memorials at former re-education centers that incorporate pictures and dates of the victims who perished, the distribution of audio and video files of the trial proceedings throughout the country of Cambodia, the naming of public hospitals and schools on behalf of victims, sponsored trips for the Cambodian people to visit the sites where atrocities took place, and a request that CPG-2 individuals become beneficiaries of one-third of the entrance fees paid to tour the memorial at S-21.⁵⁷

D. Final Submission by Civil Party Group 3

The Final Submission of the Co-Lawyers for Civil Party Group 3 (hereinafter “CPG-3”) adopts the charges and factual allegations of the indictment against Duch, and then distinguishes between three distinct subsets within the 27 person group: (1) victims that have received an admission of responsibility and apology during court proceedings; (2) victims that assert charges that Duch’s defense has disputed; and (3) victims that assert charges that Duch has not

⁵⁵ Id. at ¶¶ 6-8.

⁵⁶ Id. at ¶¶ 9-14. See also fn 8, where the co-lawyers for the CPG-2 cite historical examples of other governments throughout the world that have issued apologies for past atrocities, including an apology from Germany for the genocide of the European Jews during World War II, an apology from Japan for its crimes against Korea and China in the context of World War II, the apology from the Australian Prime Minister for wrongs committed against the indigenous Aboriginal population, and an apology on behalf of the US Senate for atrocities committed against Native Americans (citing a chronological list of political apologies compiled by Graham G. Dodds, available at <http://www.upenn.edu/pnc/politicalapologies.html>).

⁵⁷ Id. at ¶¶ 15-21.

disputed.⁵⁸ The CPG-3 Final Submission uniquely addresses Duch's admissions of guilt during the trial in the context of reparations by conditioning adequate relief upon his "sincere" acknowledgement, without any reservations, of the atrocities committed by the Khmer Rouge.⁵⁹ Specifically, CPG-3 submission claims that the Duch's full acknowledgment of all the charges against him is desirable, stating⁶⁰:

This element is critical if Duch admits guilt generally; however, the fact of the matter is that, faced with the testimonies of the Civil Parties or when confronted with the facts adduced during trial, he went into denial and exhibited negation. His lawyers have admitted that their client has only admitted to 85% of the facts put before him. Even if there were only 15% of the crimes for which the Accused is not admitting guilt, an opinion not shared by the Civil parties, the sincerity of his admission of guilt is seriously undermined. Judge Goldstone, who was called by the Defense, considers that facts must be established at more than 95% before there can be any admission of guilt.

Additionally, the final submission by CPG-3 addresses two references made to other international war crimes tribunals in the Defence (sic) cited in which the defendants pleaded

⁵⁸ Co-Lawyers for Civil Parties (Group 3) Final Submission, Case No. 001/18-07-2007-ECCC/TC, Doc. No. E159/5, ¶¶ 14-42. Filed November 11, 2009, available at http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs.

⁵⁹ Id. at ¶¶ 148, 152.

⁶⁰ Id. at ¶ 149.

guilty, apologized, and showed remorse.⁶¹ Specifically, the co-lawyers for CPG-3 distinguished the trial of Duch from that of Albert Speer, the only individual to plead guilty before the Nuremberg Tribunal, and Dragan Obrenovich, who struck an agreement with the prosecutors before the International Criminal Tribunal for the Former Yugoslavia by pleading guilty and showing remorse.⁶² The final statement for CPG-3 notes that these individuals admitted to the factual charges “almost unreservedly” and “were not the brains behind the crimes committed”, whereas Duch’s guilty plea and remorse are “not sincere enough to provide the Civil Parties and victims with an adequate measure of reparation for their suffering.”⁶³ One principle argument contained in the final submission highlights the fact that Duch’s trial is unique in the sense that, unlike the Nuremberg Trials and the International Tribunal for the Former Yugoslavia that took place “either immediately after the crimes were committed or during a transitional period,” Duch’s trial took place decades after the atrocities were committed and the Civil Parties “have been waiting 30 years for an acknowledgement, if not without reservations, at least, a sincere acknowledgement of what took place at S-21.”⁶⁴

E. Final Submission of Civil Party Group 4

The Final Written Submission for Civil Party Group 4 (CPG-4) contains the applications for moral reparations of 10 victims and heirs, reiterates the charges included in the indictment,

⁶¹ Id. at ¶ 50.

⁶² Id.

⁶³ Id. at ¶¶ 151, 153.

⁶⁴ Id. at ¶ 152.

and states each particular victim's experience at S-21.⁶⁵ The submission also incorporates victim's testimonials that were given in open court during Duch's trial which provide insight into the symbolic reparation process and its importance in the Cambodian cultural context.⁶⁶ The testimony of Mr. Ou Savrith is a particularly striking example of how the civil party process may help the country heal from the Duch's acts under the Khymer Rouge regime.⁶⁷

I claim no financial reparation, no material relief. I would simply like to know what happened during the 97 days and throughout these 50 pages of confessions. That is the reason why I applied to be a civil party. Indeed, my representations before this Court is of a different nature. I seek moral redress. One person alone, my wife, was aware of my suffering during these 10,950 nights when I would wake up on a regular basis in a start, shouting and crying, unable to express my suffering in any other manner. Mr. President, like any Cambodian, modesty is required. Everyone internalizes feeling. The effort that I have made before you today is very great, but it is a necessary effort, and for me it is through this testimony that a certain form of reparation begins to be born.

⁶⁵ Civil Parties (Group 4) Final Written Submission, Case No. 001/18-07-2007-ECCC/TC, Doc. No. E159/6, Filed October 7, 2009, [available at](http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs) http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs.

⁶⁶ Id. at ¶ 14.

⁶⁷ Id. See also Videoconference Testimony of Mr. Ou Savrith Before the Trial Chamber of the ECCC, Case 001, 20 August 2009, ERN 00368-423-00368452, [available at](http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs) http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs.

According to statements made by the H.E. President Kong Srim in the opening speech of the ECCC Plenary Session, these sentiments of collective healing is national in character, with 82% of the Cambodian people being aware of the trial of the Khmer Rouge leaders and 70% think that the trial provides justice for them.⁶⁸ Furthermore, the international vice president of the plenary session, Judge Silvia Cartwright, has stated that despite the procedural difficulties facing the ECCC, the role of Civil Parties must be reinforced in future trials:⁶⁹

We are all aware that there are many exceptional issues confronting the Chambers: the time since the alleged criminal conduct occurred, and as a result, the age of the accused. Above all, however, is the sheer number of those who were affected directly or indirectly. They range from the well-educated and well-off to the poorest farmer with limited literacy, from those who live overseas to those who eke out a living in the rural areas or in the cities of Cambodia. Many are in poor health and most are haunted by what they have experienced. They number in the thousands, not hundreds or tens. It is vital that their voices and their accounts of their suffering be part of ECCC proceedings.

V. Final Defense Written Submissions

The final defense written submission filed by Duch's defense lawyers posits various different theories to serve as mitigating factors for the court to consider pending a final

⁶⁸ Opening Speech, H.E. President Kong Srim, ECC Plenary Session, 2 February 2009, available at http://www.eccc.gov.kh/english/press_release.list.aspx.

⁶⁹ Opening Speech International Vice President, Judge Silvia Cartwright, ECCC 7th Plenary Session, 2 February 2010, available at http://www.eccc.gov.kh/english/press_release.list.aspx.

decision.⁷⁰ First, the defense states that the Duch's admissions to the factual accusations in the indictment is a valid confession under the ECCC Internal Rules and the Cambodian Code of Civil Procedure, but bring the ECCC's attention to the fact that there are no express statement on mitigating circumstances provided under the agreement between Cambodia and the United Nations, the ECCC Law, or the ECCC internal rules.⁷¹ Specifically, the defense first cites the International Criminal Tribunals in Rwanda and Former Yugoslavia have "produced a very comprehensive body of case-law describing the types of mitigating circumstances that may be considered in determining sentence", and therefore the ECCC, as a hybrid court, should also consider mitigating circumstances in its final determination despite the absence of any provision in Cambodian penal law."⁷² Second, the defense posits that Duch has been in custody since May of 1999, and that this should serve as credit for any forthcoming sentencing determination, and additionally claim that Duch is entitled to a further reduction in his sentence, citing a decision by the International Criminal Tribunal for Rwanda:⁷³

[T]he Defence requests the Trial Chamber to rule and declare that
the violation of Duch's right to be tried within a reasonable time or

⁷⁰ Final Defense Written Submissions, Case File No. 001/18-07-2007-ECCC/TC, Doc. No. E159/8, filed November 11, 2009, available at http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs.

⁷¹ *Id.* ¶¶6, 41.

⁷² *Id.* at ¶ 41, 42.

⁷³ *Id.* at ¶48, see also fn. 43 (See The Prosecutor v. Barayagwiza, ICTR, Appeals Chamber, Decision (on Prosecutor's Request for Review and Reconsideration). 31 March 2000, paras. 74 and 75, and putting into effect thereof by the Trial Chamber in the Judgement Dated 3 December 2003 ("Judgment and Sentence"), paras. 1106 and 1107, where, after having considered that appropriate sentence for Mr. Barayagwiza was prison for the remainder of his life, it, first, took into account the violation of his rights and reduced the sentence to thirty-five years imprisonment, and, second, gave credit for the time he had spent in provisional detention. In the end, Mr. Barayagwiza was sentenced to twenty-seven years, three months, and twenty-one days).

otherwise be released also entitles him to a remedy in the form of a further reduction of his sentence, following the case of *The Prosecutor v. Barayagwiza* before the International Criminal Court for Rwanda, which principle was reaffirmed in successive judgments of the ad hoc International Criminal Tribunals.

Duch's lawyers predicated his defense by first claiming that there was a lack of sufficient evidence to prove beyond a reasonable doubt that Duch killed, tortured, or ordered arrests without instructions from his superiors, and therefore should not be liable for the crimes contained in the indictment.⁷⁴ Additionally, the defense claims that the territorial "skirmishes" between Cambodia and Vietnam do not qualify as an armed conflict subjecting Duch to criminal liability for the alleged torture and death of Vietnamese prisoners in S-21 under the Geneva Convention of 1949.⁷⁵ Ultimately, the defense asks the court to consider the domestic charges under the 1956 Cambodian Penal Code to be time-barred, grant the request for a mitigation in sentencing, and additionally acquit Duch with respect to the commission, planning, instigation, and aiding and abetting as modes of liability.⁷⁶ The defense does concede and ask the court to

⁷⁴ *Id.* at ¶¶ 7-21.

⁷⁵ *Id.* at ¶¶ 30-32, see also fn. 23, which outlines criminal liability under the Geneva Convention, stating "In order to hold an accused criminally liable for war crimes, it is necessary to establish the following: the existence of an international armed conflict; a *nexus* between the alleged war crimes and the armed conflict, and the victims of the alleged crimes must qualify as protected persons pursuant to the provisions (sic) the Geneva Conventions. (emphasis in original). See *Prosecutor v. Brdjanin*, ICTY Trial Chamber, 1 September 2004, para. 121. Also, it is necessary to establish that the accused was aware of the factual circumstances, "*e.g. that a foreign state was involved in the armed conflict (...)*". (emphasis in original) Concerning this last criterion, see *Prosecutor v. Kordic and Cerkez*, ICTY Appeals Chamber, 17 December 2004, para. 311, and Commentary on Article 8 of the Rome Statute in *Elements of War Crimes of the Rome Statute*."

⁷⁶ *Id.* at ¶ 51.

accept Duch's admission of responsibility for the crimes against humanity committed at S-21 as it relates to "ordering" and "superior responsibility," and in effect formalize his guilty plea to these crimes.⁷⁷

VI. Duch's Final Written Submission

The final written submission by Duch contains intimate details about the inner-workings of the Khmer Rouge addressing the mass interrogation techniques, outlining the particular acts of other high-ranking officials within the regime, and the paranoia-fueled internal purges that were committed during the period from April 17, 1975 to January 6, 1979.⁷⁸ At times, Duch's frank testimony of the atrocities committed provide chilling examples of the brutality of the Khmer Rouge. For instance, in one admission, Duch states "Smashing the enemy was the policy adopted by the party" and that, by 1971, another high-ranking cadre had "basically accomplished his plan to destroy people."⁷⁹ Addressing the philosophy of the Khmer Rouge, Duch states that the "misleading slogan" used to conceal the atrocities was "[t]o destroy infiltrator[s] to protect the revolutionary force," and that:⁸⁰

The policy was to smash those who were called "infiltrators" or "the traitors of the revolution" was adopted by the Party. In practical term (sic), when someone was arrested and sent by the party to the Police, the Police had to interrogate him/her, and then

⁷⁷ Id.

⁷⁸ The continuous killing carried out by the Communist Party of Kampuchea (CPK), Accused's Final Written Submission, Original KH: 00404785-00404817, Doc. No. E159/10, filed December 11, 2009, available at http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs.

⁷⁹ Id. at ¶¶ 5, 16,

⁸⁰ Id. at ¶¶ 18, 21, 22.

smash the person. . . . Physical torture was a method they made us use. Most often it was inevitable . . . It can be said that they ordered the killing of the people for the short and long term economic and political gains of their groups.

Essentially, Duch claims that the atrocities committed by were to further the psychotic political agenda of Pol Pot, the leader of the Khmer Rouge regime. Duch succinctly summarizes the Khymer Rouge agenda by quoting a speech by Pol Pot from 1978, in which the Khymer Rouge leader stated that “Nothing can be more scientific than the peasants who are experienced in rice transplant and the warriors who have known how to win a battle”⁸¹ and that the theory of the “super cultural revolutionaries” was “Destroying old humankind, creating a new one.”⁸² For example, Duch reiterates that the Khmer Rouge brutality was a direct result of the murderous intent of Pol Pot.⁸³

[The Khymer Rouge] chose to use killing as a means to solve each and every problem so that they could build their dynasty in Cambodia and fulfill their ambition. . . . Pol Pot really wanted to become a king, a so-called king. . . . Pol Pot wished to become the so called-king under the plague of the pure, proletariat revolutionary class. . . . Cambodian people were arrested and there (sic) were put to work very hard, and there were classified into only two classes - - the peasant and the worker classes. . .

⁸¹ Id. at ¶¶ 46.

⁸² Id. at ¶ 45.

⁸³ Id. at ¶¶ 64, 65, 71.

Factually, these people had been physically and mentally fatigue (sic). They were malnourished and hopeless. They did never expect that some would come to liberate them.”

In terms of his own criminal culpability as a senior member of the Khmer Rouge, Duch appears to be in paradoxical denial about his leadership position, and instead quotes a cryptic Cambodian saying to justify his criminal liability:

As regards my leadership and working behavior, I knew how to control and manage myself. I did not want to be criticized by a Khmer proverb which goes: “they officer you a chance to take the lead but you do not know how to swing your arms while walking; they ask you to walk behind the others but you do not know how to carry things.”⁸⁴

At other times, Duch’s confessions seem as stark and straightforward as his calm recollections of the atrocities committed under the Khmer Rouge. For instance, at one point, Duch concedes that he “will always and forever be responsible for at least 12,380 lives.”⁸⁵ Despite his earlier evasive confession about his criminal culpability as high-level leadership position as chairman of the S-21 detention complex, Duch later takes responsibility for his actions, and even discloses his eventual denial of the Khmer Rouge political ideology:⁸⁶

I still acknowledge that I was a member of Pol Pot’s force.
Accordingly, I am psychologically accountable to the entire

⁸⁴ Id. at ¶ 23.

⁸⁵ Id. at ¶ 85.

⁸⁶ Id. at p. 28. (“About my position and behavior.”)

Cambodian population for the Souls of those who perished during the period from 17th of April 1975 until the 6th of January 1979. I am deeply remorseful of and profoundly affected by destruction on such a mind-boggling scale. I clearly understand that any theory or ideology which mentions love for the people in a class-based concept and class struggle is definitely driving us into endless tragedy and misery. I still maintain that a decision to choose which path to walk is made in a matter of seconds. However, its repercussion with its wrong choice will result in a lifelong remorse.

Finally, Duch specifically addresses the survivors of S-21 and the victim's families, asking the families to "kindly leave your door open for me to make my apologies. May I plead with you to allow me to share your immense and enduring sorrow at any time?".⁸⁷ He further claims that he has worshipped to honor the dead, and that he acknowledges the crimes inflicted in the victims of S-21 "both in the legal and moral context."⁸⁸ One interesting proposal submitted by Duch includes working with psychological and psychiatric experts to "make people recognize [him] again as a part of humankind" and to "contribute to relieve the great sorrow of Cambodian people."⁸⁹ Additionally, as a mitigating factor, Duch points out that his he has been assisting the court for 10 years, 6 months, and 17 days during the investigation phase, domestic court phase, and finally in front of the ECCC.⁹⁰

⁸⁷ Id. at p. 29.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

Duch's admissions eventually lead to a final retrospective statement in which he both expresses his eventual disillusionment with the Khmer Rouge regime and also claims that he had no other choice but to commit the atrocities contained in the indictment, stating:⁹¹

Instead of being convinced that I could be contributing to liberation (sic) of the nation and its people and having hoped that I would be serving my people by devoting myself, my strength, my heart, my intelligence and everything including my preparedness and scarifying my own life for the nation and the people, I found I had ended up serving a criminal organization which destroys its own people in an outrageous fashion. I could not withdraw from it.

I was just a like a cog in a running machine.

VII. Conclusion

The trial against Duch in the ECCC, the first senior Khmer Rouge official to be tried in an international war crimes tribunal, represents a unique nexus of domestic Cambodian law, international cooperation, and specialized judicial procedure. The establishment of the ECCC itself may be seen as a triumph from a cultural standpoint, and perhaps affords the Cambodian people the only opportunity to hold those accountable for the atrocities committed by the Khmer Rouge Regime. Duch's candid disclosure of the atrocities committed at S-21 has the potential effect of bringing closure to thousands of Cambodians whose lives were marked by the brutality of the Khymer Rouge. More than thirty years after the rise and fall of the Khmer Rouge, perhaps the ECCC affords the most meaningful reparation for Cambodians still living in the aftermath of

⁹¹ Id. at 28-9.

a violent societal nightmare – the chance to know the truth from those who perpetrated the crimes and to garner international support in the process.

The original issues of corruption that colored the establishment of the ECCC continue to be a central focus as the tribunal works ahead into the future, and the UN will continue to play an active role in auditing the court system.⁹² According to a statement of UN Secretary General of Legal Affairs Peter Taksoe-Jensen after meeting with the Deputy Prime Minister of Cambodia:⁹³

It remains critical to the United Nations that allegations of corruption and other misconduct are effectively addressed. Therefore, we will further strengthen our own anti-corruption mechanism within the court. From now on, a UNAKRT Ethics Monitor will advise and guide staff on ethics, and continue to forward all complaints received to the United Nations Headquarters in New York for its review and action, as appropriate. Any complaint received will be shared with the Cambodian authorities while respecting confidentiality in a way that ensures full protection of staff for the ECCC against any possible retaliation for good faith reporting of wrongdoing, as appropriate.

Another challenge facing the ECCC is the sheer volume of Cambodians that have petitioned to be recognized as civil party plaintiffs, which in turn has led to recent revisions on the Internal Rules. According to a press release issued upon the conclusion of the 7th Plenary Session of the

⁹² Statement of Peter Taksoe-Jensen, UN Secretary of Legal Affairs, Phnom Penh, 8 April 2009, available at <http://www.cambodiatribunal.org/eccc-a-ngo-reports/eccc-reports.html>.

⁹³ Id.

ECCC, “streamlining” civil party participation continues to be difficult for the tribunal, which to subsequent revisions in the Internal Rules:

To date, approximately 4000 Civil Party applications have been received by the Victims Unit. It is clear that existing legal provisions in Cambodian criminal procedure are not designed to deal with individualized participation by victims on this scale. The number of Civil Party applicants, combined with the complexity, size and other unique features of ECCC proceedings, made it necessary to adopt a new system of victim representation during the trial and appeal stage. . . . The amended rules emphasize that the Lead Co-Lawyers will seek the views of the Civil Party Lawyers and endeavour to reach consensus in order to coordinate the representation of Civil Parties at trial. . . . The Plenary Session reaffirmed the concept of a single claim for collective reparation on behalf of the consolidated group of civil parties. . . . a number of other consequential amendments will also be added at a later stage.

The final judgment of the ECCC trial court is currently pending, and questions remain whether the tribunal will take into consideration the arguments concerning mitigating circumstances submitted by Duch’s defense team. Additionally, there is also the possibility of appeal of the trial court’s determination to the Supreme Court chambers of the ECCC, which will also entail a historic first judicial review of the myriad international legal issues posited at this unique hybrid tribunal. Despite these questions and the hardships facing the tribunal, the ECCC

is a continuing work in progress, a specialized forum for eventual symbolic justice to those Cambodians who have waited to tell of the past horrors to work towards a better future.

