

# LEGITIMACY ON TRIAL AT THE EXTRAORDINARY CHAMBERS

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## I. INTRODUCTION\*\*

Three decades after the reign of the Khmer Rouge, the tribunal charged with prosecuting its remaining leaders again denied Cambodia and the world justice in the face of mass atrocity. The trial judgment in the case of Kaing Guek Eav,<sup>1</sup> widely known as “Comrade Duch,” represents a missed opportunity to legitimize the Extraordinary Chambers in the Courts of Cambodia. Rather than delivering a well-justified and appropriately expressive sentencing judgment, which would

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\*\* During the final stages of the publication process, the Supreme Court Chamber of the Extraordinary Chambers in the Courts for Cambodia (“SCC”) decided the parties’ appeals and imposed upon Duch a lifetime prison term. See *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/AC, Summary of Appeal Judgment (Feb. 3, 2012), <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/03022012Summary-Eng.pdf> (summarizing the holding of the Supreme Court Chamber). The SCC held, *inter alia*, that the Trial Chamber had understated the gravity of Duch’s crimes in three important respects. First, the SCC held that the Trial Chamber overstated the mitigating factors, while placing insufficient weight on the gravity of Duch’s crimes and related aggravating circumstances. *Id.* ¶¶ 33-35. Second, the SCC noted that in the absence of comparable domestic sentencing law, it is appropriate for the ECCC to consider the jurisprudence of the other international tribunals, which regularly impose life sentences in cases where the accused abuses his or her leadership position or commit the crimes with particular cruelty or zeal. *Id.* ¶ 37. In that respect, the SCC found that Duch’s crimes “undoubtedly place[d] this case among the gravest before international criminal tribunals.” *Id.* ¶ 38. Finally, the SCC emphasized the traditional principles of punishment (which the Trial Chamber had not) in finding that Duch’s crimes were “undoubtedly among the worst in recorded human history . . . [and] deserve the highest penalty available to provide fair and adequate response to the outrage these crimes invoked in victims, their families and relatives, the Cambodian people, and all human beings.” *Id.* ¶ 41. Thus, the Appeals Judgment represents an important step in reestablishing and securing the ECCC’s sociological legitimacy, by correcting many of the Trial Chamber’s missteps highlighted in this Article. It is critical that the Trial Chamber’s future judgments incorporate these principles in a way that both reflects the gravity of the accuseds’ crimes, and expresses a related message of institutional legitimacy.

1. *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgement (July 26, 2010) [hereinafter *Duch Trial Judgement*], [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726\\_Judgement\\_Case\\_001\\_ENG\\_PUBLIC.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf). At publication, the Extraordinary Chambers’ official website was offline. The Trial Judgment is available on several other websites, including that of the United Nations Refugee Agency. See *Judgment (Kaing Guek Eav alias Duch)*, UNHCR, <http://www.unhcr.org/refworld/country,,ECCC,,KHM,,4c56ccfb2,0.html>.

have enhanced the legitimacy of the Extraordinary Chambers, the Trial Chamber failed to adequately justify its sentence in principle and instead provided an opinion lacking meaning to its Cambodian and international audiences. The Trial Chamber's opinion will likely have a negative effect on perceptions of the Extraordinary Chambers's legitimacy as an instrument of international justice and may impact the historical legacy of the Tribunal's work.

"Comrade Duch" oversaw the murder of tens of thousands of Cambodians at the S-21 prison camp.<sup>2</sup> In July of 2010, the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea ("Extraordinary Chambers," or "ECCC") sentenced him to thirty-five years in prison, of which he was to serve eighteen years.<sup>3</sup> The sentence was appealed by both the Co-Prosecutors<sup>4</sup> and the Defendant.<sup>5</sup>

This Article argues that the Tribunal's opinion in Case 001—the name ascribed by the ECCC to the Duch Case<sup>6</sup>—failed to meet the court's objectives and threatens its sociological legitimacy. The ECCC has stated that its "chief goal" was to provide "justice to the Cambodian people, those who died and those who survived . . . ."<sup>7</sup> The Trial Chamber plainly failed to meet this goal. The Chamber's

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2. *See id.* ¶ 127 (Duch admitted to knowing that prison staff under his authority executed detainees after interrogating them).

3. *Id.* ¶ 679. The court reduced the sentence upon consideration of mitigating factors and because Duch had been illegally detained for a period of five years. *Id.* ¶ 680.

4. At the ECCC, the prosecution process functions differently than that of other hybrid international criminal tribunals. *See* THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS 220 (Ruth Mackenzie et al. eds., 2010) (explaining that, unlike the other tribunals, the ECCC separates investigation and prosecution). Two co-investigating judges conduct the investigatory phase, while two co-prosecutors carry out the actual criminal prosecution. *Id.* As part of the ECCC's "hybrid" makeup, one of the co-prosecutors is a Cambodian national, while the other comes from a foreign jurisdiction. *Id.* at 221.

5. Prosecutor v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC/SCC, Appeal Brief by the Co-Lawyers for Kaing Guek Eav Alias "Duch" Against the Trial Chamber Judgement of 26 July 2010 (Nov. 18, 2010) [hereinafter Appeal Brief by the Co-Lawyers for Duch], [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/F14\\_EN-1.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/F14_EN-1.PDF).

6. At the ECCC, cases are given a number, and their filing takes a different form than other international tribunals. The Duch case, as the first one to come before the tribunal, is labeled Case 001. For this reason, I refer to the case as either Duch or Case 001. Case 002, against four other high-ranking members of the Khmer Rouge, was underway at the time of writing this Article.

7. *Why Are We Having Trials Now? How Will the Khmer Rouge Trials Benefit the People of Cambodia?*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <http://www.eccc.gov.kh/en/faq/why-are-we-having-trials-now-how-will-khmer-rouge-trials-benefit-people-cambodia> (last visited Mar. 7, 2012) [hereinafter EXTRAORDINARY CHAMBERS FAQ] ("The ECCC is designed to provide fair public trials in conformity with international standards. The chief goal is to provide justice to the Cambodian people, those who died and those who survived. It is hoped that fair trials will ease the burden that weighs on the survivors. The trials are also for the new generation—to educate Cambodia's youth about the darkest chapter in our country's history. By judging the accused in fair and open trials and by punishing those most responsible, the trials will strengthen the rule of law and set an example for people who disobey the law in Cambodia and for cruel regimes worldwide. If criminals know that they will be held accountable, they may be deterred. By supporting and learning about justice, we can all contribute to the reconstruction of our society.").

imposed sentence in Case 001 was flawed in at least two ways that threaten its legitimacy. First, the judgment's brevity in considering and applying relevant international criminal sentencing practices resulted in an inadequate explanation by the ECCC of its sentencing decision. Second, the short sentence imposed upon Duch sent a message that mass atrocity may be met with a level of responsibility closer to impunity than proportionality.<sup>8</sup> Rather than utilizing its first trial judgment to capitalize upon its expressive potential by proclaiming that Duch's crimes warrant stronger condemnation, the ECCC did just the opposite; it remained largely silent as to traditional principles of criminal punishment while at the same time shortening the sentence of a man who committed a number of humanity's most serious crimes.<sup>9</sup>

This Article attempts to achieve three narrow objectives. First, it is meant to illuminate the failure of the Court to give a principled meaning to Duch's sentence. Criminal sentences have meaning to the victims of crime and to the societies a court serves.<sup>10</sup> As noted above, achieving justice for the victims of the Khmer Rouge was an explicitly stated purpose in establishing the ECCC, but the Duch

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8. Additionally, while nothing compels the Extraordinary Chambers to consider the sentencing practices of other international tribunals, the Co-Prosecutors took the position that the Chamber committed an error of law in "failing to consider the relevant international sentencing law and the range of sentences available to it in cases similar to this." Prosecutor v. Kaing Guek Eav alias Duch, Case. No. 001/18-07-2007-ECCC/TC, Co-Prosecutors' Notice of Appeal Against the Judgement of the Trial Chamber in the Case of Kaing Guek Eav alias Duch, ¶ 4 (Aug. 16, 2010) [hereinafter Co-Prosecutors' Notice of Appeal], [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E188\\_2\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E188_2_EN.PDF). As discussed *infra*, the ECCC should also have more thoroughly considered the sentencing practices of other international criminal tribunals, given the absence of its own precedent and the lack of guidance from Cambodian domestic practices. See Charles Jackson, *International Sentencing Guidelines Applicable to the Trial of Kaing Guek Eav, at the Extraordinary Chambers in the Courts of Cambodia*, CAMBODIA TRIBUNAL MONITOR 5-8 (Aug. 17, 2009), [http://www.cambodiatribunal.org/images/CTM/memo\\_sentencing\\_factors\\_charles%20jackson.pdf](http://www.cambodiatribunal.org/images/CTM/memo_sentencing_factors_charles%20jackson.pdf) (providing a pre-trial argument that the Chamber should apply international sentencing principles in the absence of direction from the establishing laws and domestic jurisprudence).

9. Although the atrocities committed by the Khmer Rouge are widely referred to as the "Cambodian genocide," scholars, including William Schabas—who supports a narrow definition of genocide—argue that the applicability of the legal framework of genocide to the Cambodian experience is dubious. See, e.g., William A. Schabas, *Problems of International Codification—Were the Atrocities in Cambodia and Kosovo Genocide?*, 35 NEW ENG. L. REV. 287, 291 (2001) ("[T]he fundamental difficulty with using the term genocide to describe the Cambodian atrocities lies with the group that is the victim of genocide. Destruction of Khmers by Khmers simply stretches the definition too much."); William A. Schabas, *Genocide and Cambodia*, PH.D. STUDIES IN HUMAN RIGHTS (Dec. 17, 2009), <http://humanrightsdoctorate.blogspot.com/2009/12/genocide-and-cambodia.html> ("The United States, and other countries, adopted legislation referring to the 'Cambodian genocide'. Legally, this was never very convincing, because genocide is a crime motivated by hate for ethnic groups and it seems unlikely that the term would apply to killing within an ethnic group. It was better to use the legal qualification 'crimes against humanity.'").

10. See, e.g., James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILL. L. REV. 1, 26 (2009) (arguing that international criminal law at institutions like the International Criminal Court can alter global norms by shifting world public opinions and influencing entire societies' moral fabrics).

Trial Chamber sentence fails to meet this goal, or any of the traditional goals of criminal punishment.

Second, this Article is meant to illustrate the mechanical inadequacies of the Duch sentencing judgment. As compared to the sentencing judgments of other international criminal tribunals,<sup>11</sup> which often dedicate substantial attention to justifying punishment, the Duch judgment was uncharacteristically terse in discussing relevant sentencing principles. The Court had no institutional sentencing precedent to consider, and explicitly held that Duch's crimes had a particularly international dimension, at the same time increasing the relevance of international criminal practice and deemphasizing Cambodian domestic penology. Therefore, it should have relied more heavily on the existing body of international sentencing jurisprudence. As a consequence of its failure to do so, there is a substantial discrepancy between the sentence the Trial Chamber imposed in the Duch case and those imposed by other tribunals considering similar crimes.

Third and finally, it is imperative to the legitimacy of the ECCC—as an international criminal tribunal—to highlight the importance of sentencing decisions. The case against Duch was the first considered by the ECCC Trial Chamber, which, at the time of writing, was considering a second case against several other members of the Khmer Rouge.<sup>12</sup> A court's sentencing practices bear heavily upon perceptions of its legitimacy and must therefore be soundly justified.<sup>13</sup> The mechanical and substantive inadequacies of the Duch trial judgment will negatively impact the way in which Cambodians and international observers view the ECCC; in the short term it will harm its sociological legitimacy and in the long-term its historical legacy.

This Article contains three Parts in addition to this Introduction. Part II sets forth the underlying facts of the case against Duch and the legal procedures used to prosecute him before the ECCC. Part III describes the Trial Chamber's analysis in the case, paying particular attention to the portions of the opinion specifically related to the sentence imposed upon Duch. Part IV argues both that the approach taken by the Trial Court in sentencing Duch was flawed and that, consequently, the ECCC has struck a blow to its own legitimacy as an international criminal tribunal.

## II. FACTS AND PROCEDURE

Case 001 was the first case before the Extraordinary Chambers in the Courts

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11. See, e.g., Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT'L CRIM. L. REV. 93, 123 (2002) ("The judgements of *ad hoc* tribunals have retained an expressivist flavor. . . . The tribunals have continued the record-making aspect endorsed at Nürnberg, by means of wordy indictments, protracted oral proceedings, and book-length judgements.").

12. Prosecutor v. Nuon Chea, Case No. 002/19-09-2007/ECCC/TC [hereinafter Case 002]. At the time of writing this Article, the case was still in pre-trial stages, and no Trial Chamber judgment was available for comparison.

13. See 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, 40 (2007) (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977); Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 346 (1983)) (claiming that, unless justified, punishment is simply cruelty).

of Cambodia (“Extraordinary Chambers” or “ECCC”). Pursuant to the Agreement between the Royal Government of Cambodia and the United Nations (“RGC-UN Agreement”) concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, the Court was established to prosecute those responsible for atrocities committed under the Khmer Rouge.<sup>14</sup>

The judgment of the Trial Chamber in Case 001 was voluminous—totaling 246 pages. 177 of these pages were dedicated to “Factual and Legal Findings.” The Court began its discussion of the facts with a general introduction to that period of Cambodian history.<sup>15</sup> It discussed the S-21 prison camp and Duch’s role there,<sup>16</sup> the facts relevant to crimes against humanity committed at S-21,<sup>17</sup> the applicable law and findings on the issue of crimes against humanity,<sup>18</sup> law and findings on grave breaches of the Geneva Conventions of 1949,<sup>19</sup> and the individual criminal responsibility of the Accused.<sup>20</sup> Since the focus of this Article is on the sentencing judgment in the case, only the facts and applicable law most pertinent to the role Duch played under the Khmer Rouge will be discussed. This Article begins with a detailed summary of the Court’s description of Duch’s involvement with the Khmer Rouge. It then provides an overview of the legal framework within which the ECCC operates and the Court’s description of the applicable law.

#### ***A. Historical Overview of S-21 and Duch’s Leadership Role***

Duch was ultimately found guilty by the Trial Chamber of crimes against humanity and grave breaches of the Geneva Conventions of 1949 and was sentenced to thirty-five years imprisonment.<sup>21</sup> Before reaching this conclusion, the Chamber first recounted the facts that formed the basis of the charges against him.

The Trial chamber described Duch’s background and his leadership role at the prison camps, and the camps’ conditions in great detail.<sup>22</sup> Born to poor peasants in Kompong Thom Province, he joined the Khmer Rouge in 1964.<sup>23</sup> Prior to his

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14. 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. 1, June 6, 2003, available at [http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement\\_between\\_UN\\_and\\_RGC.pdf](http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf). See Alex Bates, *Cambodia’s Extraordinary Chamber: Is It the Most Effective and Appropriate Means of Addressing the Crimes of the Khmer Rouge?*, in *THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS* 185 (Ralph Henham & Paul Behrens eds., 2007), for a discussion of the benefits and limitations of such prosecutions.

15. Duch Trial Judgement, *supra* note 1, ¶¶ 59-110.

16. *Id.* ¶¶ 111-203.

17. *Id.* ¶¶ 204-80.

18. *Id.* ¶¶ 281-399.

19. *Id.* ¶¶ 400-69.

20. *Id.* ¶¶ 470-568.

21. Duch Trial Judgement, *supra* note 1, ¶¶ 677-79.

22. *Id.* ¶¶ 111-203.

23. *Id.* ¶ 112.

leadership at S-21, Duch had been the director of M-13, a security center used to interrogate suspected spies and enemies.<sup>24</sup> After operating M-13, Duch was made Deputy and later Chairman of S-21.<sup>25</sup> He was responsible for implementing the Communist Party of Kampuchea's ("CPK")<sup>26</sup> policy of "smashing" the party's enemies at S-21.<sup>27</sup> At trial, Duch testified that "smashing" meant "to arrest secretly[,] . . . [to interrogate] with torture employed[,] and then [to execute] secretly without the knowledge of [the detainees'] family members."<sup>28</sup> As Deputy, Duch was responsible for instructing the staff of the interrogation unit on interrogation methods and for reporting detainee confessions to his superiors.<sup>29</sup> He admitted at trial that he allowed the interrogation staff to use torture to extract confessions and acknowledged that he knew detainees were executed subsequent to their interrogations.<sup>30</sup> In 1976, Duch assumed the role of Chairman and Secretary of S-21, while remaining intimately involved in the interrogation of the camp's most important prisoners.<sup>31</sup> As Chairman, Duch was involved in recruiting and training S-21 staff,<sup>32</sup> and played a role in the selection of persons to be detained,<sup>33</sup> their interrogations,<sup>34</sup> and their near-inevitable executions.<sup>35</sup>

Evidence before the court demonstrated that crimes against humanity (murder and extermination; enslavement; imprisonment; torture, including rape; and other inhumane acts) were committed at S-21. In accordance with the CPK policy of "smashing" enemies, the detainees at S-21 faced no prospect of release—all were slated for execution.<sup>36</sup> Those held at Tuol Sleng underwent electronic torture,

24. *Id.* ¶ 115. M-13 has elsewhere been described as "a jungle prison and precursor of S-21." Stéphanie Giry, *Cambodia's Perfect War Criminal*, N.Y. REV. BOOKS (Oct. 25, 2010), <http://www.nybooks.com/blogs/nyrblog/2010/oct/25/cambodias-perfect-war-criminal/>.

25. Duch Trial Judgement, *supra* note 1, ¶ 118.

26. The Communist Party of Kampuchea—the Khmer Rouge—is the name commonly ascribed to CPK followers. *See, e.g., Historical Overview of the Khmer Rouge*, CAMBODIA TRIBUNAL MONITOR, <http://www.cambodiatribunal.org/history/khmer-rouge-history.html> (last visited Mar. 7, 2012).

27. Duch Trial Judgement, *supra* note 1, ¶¶ 99-100.

28. *Id.* ¶ 100.

29. *Id.* ¶ 126.

30. *Id.* ¶ 127.

31. *Id.* ¶ 128.

32. *Id.* ¶ 162. "The consequence of the trainings, as acknowledged by the Accused, was that S-21 staff, including the youths he specifically sought out, were taught to obey orders, to be cruel, to detain, to interrogate, to torture and to kill. As stated by the Accused, '[t]hey changed their nature. They became from the gentle to become cruel . . . very extreme in the matter . . . They were in the class wrath, class anger . . . but the one who made the education, it was me, to turn them to be extreme, to be absolute.'" *Id.* ¶ 165.

33. Duch Trial Judgement, *supra* note 1, ¶¶ 166-72.

34. *Id.* ¶¶ 174-79.

35. *Id.* ¶¶ 180-83 ("Every individual detained within the S-21 complex was destined for execution.")

36. *Id.* ¶ 206; *see also id.* ¶ 180 ("Every individual detained within the S-21 complex was destined for execution."). S-21 has been called "the prison of no escape" for its near-zero survival rate. *S-21 and Choeng Ek Killing Fields: Facing Death*, KILLING FIELDS MUSEUM, <http://www.killingfieldsmuseum.com/s21-victims.html> (last visited Mar. 7, 2012).

medical experimentation, and gruesome forms of execution (such as being beaten, hanged, or cut apart and fed to farm animals).<sup>37</sup> Those executed included foreign nationals,<sup>38</sup> high-ranking cadres,<sup>39</sup> prison staff,<sup>40</sup> and other detainees including children.<sup>41</sup> According to the Trial Chamber, “[d]etainees were typically executed by being struck at the base of the neck with a metal bar or another object. Their throats or stomachs were then generally slit and their bodies pushed into pits, their blindfold and handcuffs removed and the pits covered.”<sup>42</sup> Detainees sometimes also died as a result of medical experimentation.<sup>43</sup> Interrogators were permitted to use beating, electrocution, asphyxiation, and waterboarding in order to extract confessions,<sup>44</sup> however, beating was the most common interrogation technique.<sup>45</sup> Detainees were also made to pay homage to images of dogs, a form of psychological torture, which, as Duch acknowledged, was deeply humiliating in the context of Cambodian culture.<sup>46</sup>

The Court found that no fewer than 12,273 persons were killed at S-21.<sup>47</sup> The Trial Chamber Judgment noted that the existing record was too inaccurate to precisely quantify the number of victims at S-21.<sup>48</sup> However, it is widely reported that the number killed at the hands of Comrade Duch likely approached 16,000.<sup>49</sup>

### ***B. Applicable Law and the Legal Framework of the ECCC***

The ECCC is a “hybrid” international tribunal. Sometimes referred to as “third generation” international criminal bodies, these courts are comprised of a mixed international-national staff and apply a combination of local and national substantive and procedural law.<sup>50</sup> As noted by the Trial Chamber in Case 001,<sup>51</sup>

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37. GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY 343 (Howard J. De Nike et al. eds., 2000).

38. Duch Trial Judgement, *supra* note 1, ¶ 209.

39. *Id.* ¶ 211.

40. *Id.* ¶¶ 212-13.

41. *Id.* ¶¶ 214-16.

42. *Id.* ¶ 220.

43. *Id.* ¶¶ 223-24.

44. Duch Trial Judgement, *supra* note 1, ¶ 241.

45. *Id.*

46. *Id.* ¶ 243. The Court added, and Duch agreed, that the living conditions at S-21 “severely impaired [the detainees’] physical and psychological health and that they lived in a permanent climate of fear.” *Id.* ¶¶ 257-58.

47. *Id.* ¶ 340.

48. *Id.*

49. See, e.g., Robin McDowell, *Khmer Rouge Jailer Faces 19 Years in 16,000 Deaths*, AOL NEWS (July 26, 2010, 6:25 AM), <http://www.aolnews.com/2010/07/26/khmer-rouge-jailer-faces-19-years-in-16-000-deaths/> (reporting the number dead at S-21 to be roughly 16,000).

50. See *Hybrid Courts*, PROJECT ON INT’L COURTS AND TRIBUNALS, <http://www.pict-pecti.org/courts/hybrid.html> (last visited Mar. 5, 2012) (noting that the Nuremberg and Tokyo Tribunals are considered the first generation, while the *ad hoc* tribunals (ICTY and ICTR) and the ICC are considered the second generation). The ECCC draws its procedural law from “the Agreement between the United Nations and the Royal Government of Cambodia concerning the

Article 5 of the ECCC law gives the Chamber subject matter jurisdiction over cases involving crimes against humanity.<sup>52</sup> Because Cambodian law “contained no provisions relevant to crimes against humanity, nor was Cambodia between 1975 and 1979 a party to any international treaty relevant to those crimes,”<sup>53</sup> the Court looked to international sources<sup>54</sup> and found that the definition of crimes against humanity found in Article 5 of the ECCC law was the same as the accepted international law during the period in question.<sup>55</sup>

Additionally, the Court found that it had subject matter jurisdiction over grave breaches of the Geneva Conventions of 1949 through Article 6 of the ECCC law.<sup>56</sup>

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Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, concluded 6 June 2003; the Law on the Establishment of the Extraordinary Chambers, as amended through 27 October 2004; and the Internal Rules . . . as amended through 6 March 2009. . . . The Extraordinary Chambers apply the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, for what concerns the crime of genocide; the Rome Statute of the International Criminal Court, for crimes against humanity, as modified by the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia; the 1949 Geneva Conventions, and the 1956 Cambodian Penal Code, for what concerns homicide, torture, and religious persecution; the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, for destruction of cultural property; and the Vienna Convention of 1961 on Diplomatic Relations, for crimes against internationally protected persons.” THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS, *supra* note 4, at 215-17. For further discussion and comparison of the institutional aspects of the ECCC and other “hybrid” tribunals, see *id.* at 215-25.

51. Duch Trial Judgement, *supra* note 1, ¶ 281.

52. Article 5 limits the temporal jurisdiction to crimes against humanity committed between April 1975 and January 1979 and defines crimes against humanity as “acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; other inhumane acts.” Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, U.N.-Cambodia, art. 5, Oct. 27, 2004 [hereinafter ECCC Law]; see also G.A. Res. 57/228, art. 2, ¶ 1, U.N. Doc. A/RES/57/228 B (May 22, 2003) (recognizing jurisdiction).

53. Duch Trial Judgement, *supra* note 1, ¶ 284.

54. *Id.* ¶¶ 285-93.

55. *Id.* ¶¶ 290-93. The Court also stated: “Offences listed in Article 5 of the ECCC Law can constitute crimes against humanity only if the following *chapeau* prerequisites are established to the required standard: (i) there must be an attack; (ii) it must be widespread or systematic; (iii) it must be directed against any civilian population; (iv) it must be on national, political, ethnical, racial or religious grounds; (v) there must be a nexus between the acts of the accused and the attack; and (vi) the accused must have the requisite knowledge.” *Id.* ¶ 297.

56. *Id.* ¶ 400. Article 6 provides that the ECCC has jurisdiction over crimes constituting grave breaches of the Geneva Conventions of August 12, 1949, within the same temporal period (April 1975 to January 1979), 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 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.” ECCC Law, *supra* note 52, art. 6. The Court noted that Article 6 is a mirror of the grave breaches provision of the Geneva Conventions “with two exceptions: (1) the grave breaches provisions explicitly include “biological



Since Cambodia had ratified the Geneva Conventions in 1957-1958,<sup>57</sup> which prohibit the offenses listed in Article 6 of the ECCC Law, their provisions applied in Cambodia during the relevant time period over which the ECCC has temporal jurisdiction.<sup>58</sup>

Most important for the purposes of this Article was the Court's discussion of the law applicable to the sentencing judgment in the case.<sup>59</sup> It began with a discussion of Rule 98(5) of the Internal Rules,<sup>60</sup> which provides that in the case of a guilty verdict, the Chamber must sentence the accused in accordance with the Agreement, the ECCC Law, and the Internal Rules.<sup>61</sup> The Chamber noted that the maximum possible sentence from the ECCC is life imprisonment, pursuant to Article 10 of the Agreement and Article 39 of the ECCC Law.<sup>62</sup>

The Trial Chamber then discussed international sentencing practices. It first noted that “[i]nternational tribunals have developed sentencing guidelines in relation to the same or similar types of crimes to those punishable before the ECCC,” but because of the divergent approaches among International Criminal

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experiments” as a form of torture or inhuman treatment; and (2) the grave breaches provisions require that the destruction and appropriation of property be “extensive.” Duch Trial Judgement, *supra* note 1, ¶ 400 n.732.

57. Duch Trial Judgement, *supra* note 1, ¶ 403.

58. *Id.* ¶ 404. As with the Article 5 offenses, the Court examined the *chapeau* requirements for Article 6: “(i) the existence of an armed conflict; (ii) the international character of the armed conflict; (iii) a nexus between the acts of the accused and the armed conflict; (iv) the “protected persons” status of the victims under the Geneva Conventions; and (v) the knowledge of the accused.” *Id.* ¶ 410 (citing Prosecutor v. Naletilic, Case No. IT-98-34-A, Appeal Judgment, ¶ 110 (Int’l Crim. Trib. for the Former Yugoslavia May 3, 2006)). After this discussion, the Court assessed the individual modes of responsibility, before moving to the sentencing phase. *Id.* ¶¶ 411-568.

59. Both parties submitted sentencing-related filings. The Co-Prosecutors originally submitted, in light of the gravity of Duch’s offenses, in conjunction with aggravating factors, that a life sentence would be appropriate. *Id.* ¶ 569. However, recognizing Duch’s illegal detention period by the Kingdom of Cambodia, they recommended that the ECCC reduce the sentence to forty-five years imprisonment, minus five additional years in light of mitigating factors. *Id.* Duch himself, somewhat strangely, both accepted “legal and moral” responsibility for the crimes at S-21 and asked for release and acquittal of all charges. *Id.* ¶ 570. His counsel retreated from that position and simply asked that the Court consider mitigating circumstances and Duch’s illegal detention period in crafting a sentence. *Id.*

60. *Id.* ¶ 571.

61. The Internal Rules provide governing procedural rules by which the ECCC conducts its affairs. The first version of the Internal Rules was the product of seven months of negotiations between the Cambodian and international members of the ECCC. Int’l Justice Tribune, *The Khmer Rouge Tribunal Finally Adopts its Internal Rules*, RADIO NETH. WORLDWIDE (June 17, 2007, 11:00 PM), <http://www.rnw.nl/international-justice/article/khmer-rouge-tribunal-finally-adopts-its-internal-rules>.

62. Duch Trial Judgement, *supra* note 1, ¶ 572. The Court later noted that Articles 14 and 15 of the ICCPR did not alter the sentencing penalties applicable in the ECCC for either crimes against humanity or grave breaches of the Geneva Conventions. *Id.* ¶ 573. The Court also found that Cambodian sentencing provisions did not contravene the ICCPR. *Id.* ¶ 574. As discussed below, there was a dissenting opinion based upon the relevant international provisions on sentencing ranges. *See infra* Part III.C.

Tribunals (“ICTs”) in sentencing practices, the Court concluded that no particular sentencing regime is directly applicable to the ECCC.<sup>63</sup> While the Court applies both Cambodian and international substantive law, it found that the international nature of Duch’s crimes and the uncertain nature of the Cambodian criminal law made Cambodian law largely irrelevant to crafting Duch’s sentence.<sup>64</sup> Consequently, the Chamber found that it had discretion in determining the sentence, but that it would consider international and Cambodian sentencing principles and factors in that determination.<sup>65</sup>

In discussing these “[r]elevant sentencing principles and factors,” the Chamber noted that it is entrusted with “reducing crimes of considerable enormity and scope into individualised sentences . . . reassur[ing] the surviving victims, their families, the witnesses and the general public that the law is effectively implemented and enforced.”<sup>66</sup> Further, the Court noted that its sentencing judgments are intended to reflect universal values—that globally accepted legal norms must be adhered to by all.<sup>67</sup> The Court stated that sentencing is intended to punish, but not to achieve revenge.<sup>68</sup> Rather, recognizing that this principle is incorporated in Cambodian law,<sup>69</sup> it wrote that sentences should be proportionate and individualized to the culpability of the accused.<sup>70</sup> The Chamber noted that it would also consider the “gravity” of the crime committed by the accused as the “litmus test for the appropriate sentence,”<sup>71</sup> reflecting an emphasis on gravity among other ICTs.<sup>72</sup> In determining Duch’s sentence, the Court wrote that it would consider all relevant aggravating and mitigating factors.<sup>73</sup> The burden upon the Co-Prosecutors to show aggravating factors was higher than for the accused to demonstrate the existence of mitigating factors, in that where a factor is an element of the underlying offense or is considered in assessing the gravity of the crime, it may not be considered an aggravating factor, but may instead be considered a mitigating factor.<sup>74</sup> Finally, the Court concluded that because no specific requirements were in place, it could impose a single sentence reflecting the totality of Duch’s transgressions.<sup>75</sup> A majority of the Court found that it could sentence

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63. Duch Trial Judgement, *supra* note 1, ¶ 576.

64. *Id.* ¶ 577; *see also* Jackson, *supra* note 8, at 7-8 (discussing the lack of guidance provided by Cambodian law in crafting a sentence in the Duch case).

65. Duch Trial Judgement, *supra* note 1, ¶ 578.

66. *Id.* ¶ 579.

67. *Id.* This concept of expressing global norms is discussed in depth below. *See infra* Part IV.

68. Duch Trial Judgement, *supra* note 1, ¶ 580.

69. *Id.* ¶ 581.

70. *Id.* ¶ 580.

71. *Id.* ¶ 582.

72. *Id.* (discussing the ICC’s Rules of Procedure and Evidence Rule 145(1)(c)). *See generally* Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 *FORDHAM INT’L L.J.* 1400 (2009) (describing the concept of gravity as it applies to the selection of cases before the International Criminal Court).

73. Duch Trial Judgement, *supra* note 1, ¶ 583.

74. *Id.* ¶¶ 583-85.

75. *Id.* ¶¶ 586-90.

Duch to anything between five years and life imprisonment.<sup>76</sup>

In sum, the Trial Chamber determined that it had jurisdiction to hear the case against Duch, charging him with crimes against humanity and grave breaches of the Geneva Convention. It also declared that it had discretion in determining any sentence to be imposed as a result of the case. Finally, it stated that it would consider both international and Cambodian sentencing practices, but noted that Cambodian principles were not as relevant as their international counterparts in Duch's case.

### III. COURT'S ANALYSIS AND THE PARTIES' SUBSEQUENT APPEALS

#### ***A. The Trial Chamber Found Duch Guilty of Crimes Against Humanity and Grave Breaches of the Geneva Conventions of 1949***

Based upon the facts presented above, the Chamber convicted Duch of crimes against humanity<sup>77</sup> and grave breaches of the Geneva Conventions of 1949.<sup>78</sup>

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76. *Id.* ¶ 595.

77. *Id.* ¶ 677. Because of the massive scale of the deaths and executions perpetrated at S-21, the Chamber found the crimes constituted both murder and extermination. *Id.* ¶ 341. Next, the Chamber found that the involuntary labor imposed upon the detainees at S-21, considered in conjunction with their detention, constituted enslavement. *Id.* ¶ 346. The Chamber found the imprisonment of the detainees at S-21 was intentional and arbitrary and that this imprisonment "was a serious breach of their rights to liberty, on a similar scale of gravity to other crimes against humanity." *Id.* ¶ 351. On the charge of torture, the Chamber found that the interrogators at S-21 and S-24 acted in their official capacity in perpetrating acts of torture upon the detainees. *Id.* ¶ 359. The Chamber found that, at S-21, these interrogators utilized severe beating, electrocution, suffocation with plastic bags, water-boarding, puncturing, inserting needles under or removing fingernails and toenails, cigarette burns, forced icon worship, feeding of excrement, threats against detainees' families, submerging detainees' heads into water, lifting by the hands while tied in the back, and one proven instance of rape, all of which constituted torture. *Id.* ¶¶ 359-60. The Chamber found that the conditions at S-21 also rose to the level of inhumane acts constituting crimes against humanity. *See id.* ¶¶ 372-73 ("These conditions included shackling and chaining, blindfolding and handcuffing when being moved outside the cells, severe beatings and corporal punishments, detention in overly small or overcrowded cells, lack of adequate food, hygiene and medical care. . . . Detainees were also subjected to blood drawing and medical tests."). The majority of the Chamber also found that Duch had committed the crime of persecution for political reasons, acting with the specific intent required by the offense of persecution. *Id.* ¶ 396. However, Judge Cartwright dissented on this point, writing that, in reaching their conclusion, the majority had not demonstrated that Duch possessed the discriminatory intent required to support conviction on this count. *Id.* ¶ 399.

78. *Id.* ¶ 677. Duch was charged with breaching the Geneva Conventions by committing willful killing; torture or inhumane treatment; willfully causing great suffering or serious injury to body or health; willfully depriving a prisoner of war or civilian of the rights of fair and regular trial; and unlawful confinement of a civilian. *Id.* ¶ 430. Finding the elements of willful killing to be identical to those of the murder charge already considered, the Chamber found that protected persons were killed deliberately by personnel at S-21, or at Choeng Ek, as well as a result of conditions known to staff as "likely to lead to death." *Id.* ¶¶ 431, 437. Similarly, the elements of torture, for the purposes of the Geneva Conventions, were the same as those for torture as a crime against humanity. *Id.* ¶ 439. Additionally, Duch was charged with inhumane treatment, which

Specifically, in the first subset—the Court found Duch guilty of “crimes against humanity (persecution on political grounds) (subsuming the crimes against humanity of extermination (encompassing murder), enslavement, imprisonment, torture (including one instance of rape), and other inhumane acts).”<sup>79</sup> He was also convicted of willful killing, torture and inhumane treatment, willfully causing great suffering or serious injury to body or health, willfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian—all of which constitute grave breaches of the Geneva Conventions of 1949.<sup>80</sup>

The Chamber analyzed the individual criminal responsibility to be attributed to Duch, in light of the evidence of the crimes against humanity and grave breaches of the Geneva Conventions demonstrated above. The Chamber found Duch individually criminally responsible for the crimes against humanity of murder, extermination, enslavement, imprisonment, torture (including rape), persecution on political grounds, and other inhumane acts.<sup>81</sup> Because of international practice regarding cumulative convictions,<sup>82</sup> the Chamber convicted Duch of “persecution on political grounds as a crime against humanity (subsuming the crimes against humanity of extermination (encompassing murder), enslavement, imprisonment, torture (including one instance of rape), and other inhumane acts).”<sup>83</sup> Additionally, they found him liable for and convicted him of the grave breaches of the Geneva Conventions of willful killing, torture and inhumane treatment, willfully causing great suffering or serious injury to body or health, willfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian.<sup>84</sup>

### ***B. The Chamber Sentenced Duch to Thirty-Five Years in Prison***

After convicting Duch, the Court attempted to formulate an appropriate

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differs from torture because it does not need to be undertaken with a specific purpose. *Id.* ¶ 443. The Chamber found that Vietnamese detainees at S-21 were subjected to torture and that at least some of the treatment inflicted on other protected persons still amounted to at least inhumane treatment, i.e., treatment that was “intentionally or recklessly inflicted by S-21 staff.” *Id.* ¶¶ 448-49. The Chamber found that “[p]rotected persons suffered the same conditions of detention as other S-21 detainees, resulting in serious bodily and mental injuries,” constituting the offense of willfully causing great suffering or serious injury to body or health. *Id.* ¶ 457. On the charge of willful deprivation of fair trial rights, the Chamber held that at least 345 Vietnamese and a number of other protected persons at S-21 were deprived of their trial rights. *Id.* ¶ 463. As to unlawful confinement of a citizen, the Chamber found that because no evidence of necessity of internment for security was demonstrated, protected civilians were unlawfully confined at the camp. *Id.* ¶ 469.

79. Duch Trial Judgement, *supra* note 1, ¶ 677.

80. *Id.*

81. *Id.* ¶ 567.

82. For a thorough discussion of this practice, see generally Ildiko Erdei, *Cumulative Convictions in International Criminal Law: Reconsideration of a Seemingly Settled Issue*, 34 SUFFOLK TRANSNAT'L L. REV. 317 (2011).

83. Duch Trial Judgement, *supra* note 1, ¶ 568

84. *Id.* ¶¶ 567-68.

sentence, culminating in the imposition of a thirty-five year prison term. As discussed above, the Court first considered the arguments of both parties as to their positions on an appropriate sentence.<sup>85</sup> It then provided an overview of the applicable sentencing framework, described above.<sup>86</sup> In the third section of its sentencing decision, the Court delivered its findings.

First, it considered the parties' stances on the gravity of the crimes and found that Duch's crimes were "extremely grave."<sup>87</sup> The Court accepted the Co-Prosecutors submissions to the effect that it should consider Duch's role in the commission of the offenses, the impact those offenses had on the victims and their families, and Duch's specific individual circumstances.<sup>88</sup> In coming to the conclusion that Duch's crimes were of a particularly grave character, the Court emphasized Duch's management and his efforts to refine the system of torture and execution carried out at S-21,<sup>89</sup> the very small percentage of survivors,<sup>90</sup> the testimony of victims' families,<sup>91</sup> and Duch's intelligence and understanding of the nature of his acts.<sup>92</sup>

The Court then looked to the aggravating factors that would justify imposing a stiffer sentence. The Co-Prosecutor contended that the Court should consider Duch's abuse of power, the cruelty of the crimes, the victims' defenselessness, and his discriminatory intent in committing the crimes.<sup>93</sup> The Chamber noted that although Duch was found guilty only on the basis of direct modes of responsibility, his superior position should be considered an aggravating factor, in that he used it to indoctrinate, train, and supervise the often young staff members at S-21.<sup>94</sup> Another aggravating factor was the sheer number of victims and the manner in which they were treated.<sup>95</sup> Except for the charge of persecution,<sup>96</sup> the discriminatory intent earlier found by the majority was also considered an aggravating factor.<sup>97</sup>

The defense argued that the Chamber should consider in mitigation that Duch's actions were committed pursuant to superior orders and under duress, his cooperation with the Chamber, his remorse, and his propensity for rehabilitation.<sup>98</sup> The Co-Prosecutors countered first that superior orders and duress should not be

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85. *Id.* ¶ 569-70.

86. *See supra* Part II.B.

87. Duch Trial Judgement, *supra* note 1, ¶ 600.

88. *Id.* ¶ 596.

89. *Id.* ¶ 597.

90. *Id.* ¶ 598.

91. *Id.*

92. *Id.* ¶ 599.

93. Duch Trial Judgement, *supra* note 1, ¶ 601.

94. *Id.* ¶ 603.

95. *Id.* ¶ 604.

96. Persecution as a crime against humanity requires discriminatory intent as an element of the crime. *Id.* ¶ 605.

97. *Id.* ¶ 604.

98. *Id.*

considered mitigating factors in this case; however, they agreed that Duch's cooperation, limited acceptance of responsibility, remorse, and the potential impact on national reconciliation should be considered.<sup>99</sup> However, later in the proceedings, after Duch demanded an acquittal on jurisdictional grounds, the Co-Prosecutors amended these submissions and asked that no mitigating factors be considered.<sup>100</sup> In the midst of the final day's proceedings, the Co-Prosecutors argued that if Duch had decided to seek an acquittal, then "he should get no—no—mitigating factors in relation to his sentence, none at all, because that's not cooperation at all."<sup>101</sup>

Nevertheless, the Chamber undertook an assessment of mitigating factors to be considered in Duch's case and determined that the sentence should be reduced accordingly. The Court did not accept Duch's argument that superior orders should be considered a mitigating factor, considering the extended time over which he committed these crimes, the volume of victims, and Duch's dedication to refining S-21's procedure.<sup>102</sup> Similarly, the Court found that duress should not be considered a mitigating factor, although it did place "limited weight" on the coerciveness someone in Duch's position may experience within the CPK.<sup>103</sup> The Chamber overlooked Duch's late call for acquittal, and found that his cooperation with the Court should be considered a mitigating factor in crafting his sentence.<sup>104</sup>

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99. Duch Trial Judgement, *supra* note 1, ¶ 604.

100. *Id.* Duch conceded that the documented events occurred, but argued that he could not be held responsible for them as a mere member of the party. Prosecutor v. Kaing Guek Eav, Case No. 001/18-07-2007-ECCC/TC, Transcript of Trial Proceedings—Kaing Guek Eav "Duch" Public [Trial Day 77] 54-60 (Nov. 27, 2009) [hereinafter Final Day Trial Transcript], available at [http://www.cambodiatribunal.org/images/CTM/transcript\\_11-27.pdf](http://www.cambodiatribunal.org/images/CTM/transcript_11-27.pdf). He claimed that he was not a senior leader within the language of the Court's mandate to prosecute the senior members of the Khmer Rouge to justice and asked to be released. *Id.*; see also David Scheffer, *Duch Seeks an Acquittal and Immediate Release*, CAMBODIA TRIBUNAL MONITOR (Nov. 27, 2009), [http://cambodiatribunal.org/images/CTM/ctm\\_blog\\_11-27-2009.pdf](http://cambodiatribunal.org/images/CTM/ctm_blog_11-27-2009.pdf) (describing Professor Scheffer's recollection and reactions to the final day of the Duch trial on which Duch requested an acquittal).

101. Final Day Trial Transcript, *supra* note 100, at 4. The Co-Prosecutors highlighted the confusion at this point of the proceedings, noting that the defense appeared to be taking two contradictory positions at once. *Id.* at 6. Co-Prosecutor Smith described the defense's position as on the one hand saying, "Yes, yes, things have changed and my client pleads not guilty," on jurisdictional grounds, but, on the other hand, making submissions on mitigation. *Id.* The Defense pointed to the Co-Prosecutors' submissions that did acknowledge mitigating circumstances existed. *Id.* at 44.

102. Duch Trial Judgement, *supra* note 1, ¶ 607.

103. *Id.* ¶ 608.

104. *Id.* ¶ 609. As the Co-Prosecutors suggested, it is possible that the Court granted weight to mitigating factors, in part, to prevent the Accused from appealing on the grounds that his counsel did not act on his instructions. See Final Day Trial Transcript, *supra* note 100, at 4-5 ("Your Honours, this needs to be resolved before we leave the courtroom, because if we don't resolve this point either the accused is going to be short-changed where he'll lose any mitigation that we've put forward and then he will appeal this case and say, 'My counsel didn't act on my instructions,' and we'll go through this again; or alternatively, if Your Honours just assume that the counsel didn't act on instructions and the accused is, in fact, not pleading not guilty and pleading guilty, then you may in fact, be giving him credit for something he's instructed his

The Chamber adopted a position on mitigating factors similar to that advanced by Duch's co-counsel before Duch's plea for acquittal on the final day of the trial.<sup>105</sup> The opinion notes that Duch's cooperation "undoubtedly facilitated" the Chamber's proceedings and aided in national reconciliation, by providing information about S-21 and his role in administering the camp.<sup>106</sup> Additionally, the Court granted limited consideration to Duch's propensity for rehabilitation in determining its sentence.<sup>107</sup>

The Court then considered other circumstances that may impact the sentence. Specifically, it accepted expert testimony to the effect that Duch did not have any psychological or psychiatric impairments that would impact his criminal responsibility.<sup>108</sup> Character witnesses convinced the Court that no factors from his professional or family life excused Duch's criminal conduct.<sup>109</sup> Finally, because of a period of illegal detention, the Court determined that a reduction in sentence of five years was appropriate, given the overall circumstances in Duch's case.<sup>110</sup>

The Court consequently sentenced Duch to thirty-five years in prison, less the five-year allowance for illegal detention and previous time served.<sup>111</sup>

### ***C. Judge Lavergne Dissented from the Majority Sentencing Judgment***

Judge Jean-Marc Lavergne wrote a separate and dissenting opinion on the issue of Duch's sentence.<sup>112</sup> He argued that the Court erred in not imposing a sentence of less than thirty years.<sup>113</sup> At an earlier stage of the proceedings, the Court determined that it had the latitude to sentence Duch to a term of between thirty years and life imprisonment.<sup>114</sup> However, Lavergne dissented on the grounds that where statutory ambiguity requires the Court to construe a rule, it must do so in a light most favorable to the accused.<sup>115</sup> He noted that the relevant instruments

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counsel not to do.").

105. See, e.g., CHAD KILPATRICK, *THE DISMISSAL OF FRANCOIS ROUX: THEORIES OF DUCH'S UNDERMINED CONFIDENCE* (Documentation Center of Cambodia, Aug. 2010), available at <http://dara-duong.blogspot.com/2010/08/dismissal-of-francois-roux-theories-of.html> (describing Duch's subsequent efforts to have Francois Roux, his international co-lawyer, dismissed). Roux later commented that it was a mistake for the Court to have two co-lawyers working together. *Id.*

106. Duch Trial Judgement, *supra* note 1, ¶ 609.

107. *Id.* ¶ 611.

108. *Id.* ¶ 616.

109. *Id.* ¶ 622.

110. *Id.* ¶ 627.

111. *Id.* ¶¶ 631-33. The Court proceeded to undertake an assessment of the civil party reparations in this case, which are not of consequence to this Article.

112. Prosecutor v. Kaing Guek Eav, Case No. 001/18-07-2007/ECCC/TC, Sep and Dis Op of Judge Jean-Marc Lavergne on Sentence [hereinafter Lavergne Dissent], available at [http://www.worldcourts.com/eccc/eng/decisions/2010.07.26\\_Co\\_Prosecutors\\_v\\_Kaing\\_Guek\\_Ea\\_v\\_alias\\_Duch1.pdf](http://www.worldcourts.com/eccc/eng/decisions/2010.07.26_Co_Prosecutors_v_Kaing_Guek_Ea_v_alias_Duch1.pdf).

113. *Id.* ¶ 9.

114. Duch Trial Judgement, *supra* note 1, ¶ 594.

115. Lavergne Dissent, *supra* note 112, ¶ 8.

“are silent on the principles and factors to be considered at sentencing . . . . [particularly] they do not indicate whether the applicable regime is governed by international law or Cambodian law or some combination of each.”<sup>116</sup> Like the majority,<sup>117</sup> Judge Lavergne considered the practices of the other ICTs, in the absence of a directive from the governing laws of the ECCC.<sup>118</sup> Looking to Article 77(1) of the Rome Statute, he argued that there could be no intermediate term of imprisonment in the case at bar between a life sentence and a fixed term of thirty years.<sup>119</sup> Additionally, he looked to Article 95 of the Cambodian Penal Code to conclude that it too envisaged a maximum term of thirty years, where mitigating circumstances led the Court to impose a term of less than life imprisonment.<sup>120</sup> Because he found that the majority opinion as to the sentence “opted for a standard that is not common to international criminal law or part of the Cambodian legislation, but one that is least favourable to the Accused,” Lavergne dissented from the sentencing judgment.<sup>121</sup> He would have held a sentence of thirty years in prison to be appropriate, based not upon culpability, but rather jurisdictional constraints.<sup>122</sup>

#### ***D. Both Parties Appealed the Chamber’s Judgment***

Both the Accused and the Co-Prosecutors appealed the Trial Court’s judgment.<sup>123</sup> Duch’s lawyers objected to the Court’s exercise of personal jurisdiction and claimed that it erred in its application of the Internal Rules and in making an “arbitrary decision” in convicting the Accused.<sup>124</sup> The Co-prosecutors appealed on grounds including the “manifestly inadequate” nature of the sentence.<sup>125</sup>

In their notice of appeal,<sup>126</sup> the Co-Prosecutors argued that Duch’s sentence should be lengthened because other tribunals have punished similar criminals more harshly. In Ground One of their appeal, the Co-Prosecutors claimed that the

116. *Id.* ¶ 2.

117. Duch Trial Judgment, *supra* note 1, ¶¶ 591-92. The majority noted that the legal framework of the ECCC does not provide a maximum sentence in instances where the imposed sentence is not life imprisonment. *Id.* ¶ 591. It noted that the ICTY, ICTR, and SCSL leave the matter to the discretion of the judges. *Id.* However, it also noted that the Rome Statute of the ICC provides no intermediate sentence between thirty years and life imprisonment. *Id.* ¶¶ 592-93.

118. Lavergne Dissent, *supra* note 112, ¶ 3.

119. *Id.*

120. *Id.* ¶ 4.

121. *Id.* ¶ 9.

122. *Id.*

123. The Extraordinary Chamber of the Supreme Court hears appeals from the Trial Chamber. *See* THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS, *supra* note 4, at 237-38 (describing the appeals process at the ECCC). The ECCC’s appeals process may be distinguished by its requirement that the Appeals Chamber reach its agreement by supermajority. *Id.* at 238.

124. Appeal Brief by the Co-Lawyers for Duch, *supra* note 5, ¶ 30.

125. *Id.*

126. All parties in Case 001 filed a “notice of appeal,” a document notifying other involved parties and the Court of their intent to appeal the judgment of the Trial Chamber.



tribunal failed “to consider the relevant international sentencing law and the range of sentences available to it in cases similar to this.”<sup>127</sup> Further, they claimed that the thirty-five year sentence imposed on Duch was “arbitrary and manifestly inadequate and fell outside the range of sentences available to the Trial Chamber in the circumstances.”<sup>128</sup>

In their final trial submissions,<sup>129</sup> the Co-Prosecutors took the position that the ECCC should seek guidance from other international tribunals’ sentencing policy in considering sentences for crimes of such magnitude.<sup>130</sup> They noted that in the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”) and Special Court for Sierra Leone (“SCSL”), those accused of crimes similar in gravity to those for which Duch was tried received sentences longer than the ECCC imposed.<sup>131</sup> At the ad hoc tribunals, the ICTY and ICTR, sentences for crimes involving the deaths of more than 100 people, and committed over the course of a year, varied slightly.<sup>132</sup> Sentences were slightly longer at the ICTR (45.42 years) than at the ICTY (44 years).<sup>133</sup> At the SCSL, the average was slightly shorter (37 years), but still longer than the original Duch sentence.<sup>134</sup>

On appeal, the Co-prosecutors therefore requested that Duch’s sentence be increased (at least in part) because it was significantly shorter than sentences imposed for similar crimes at other tribunals.

The defense appeal did not address these particular issues. Instead, Duch appealed on two major grounds: an error concerning personal jurisdiction

127. Co-Prosecutors’ Notice of Appeal, *supra* note 8, ¶ 4.

128. *Id.*

129. Prosecutor v. Kaing Guek Eay, Case No. 001/18-07-2007-ECCC/TC, E159/1, Co-Prosecutors’ Final Trial Submission (Nov. 11, 2009) [hereinafter Co-Prosecutors’ Final Trial Submission].

130. *Id.* ¶ 453. While the Co-Prosecutors did not extrapolate upon why the ECCC should look to the sentencing policies of the other tribunals, the Chamber was given little direct guidance from its establishing documents or applicable laws. *See supra* Part I; Jackson, *supra* note 8, at 5. This Article argues that, in such an absence of direction, the sentencing jurisprudence of other tribunals concerning similar crimes should serve as an appropriate source of guidance. Further, as illustrated in this Part and critically discussed in Part IV *infra*, the ECCC did look to the other tribunals and their laws in deciding numerous aspects of this case, including its sentencing judgment. *Co-Prosecutors, Civil Parties and Co-Lawyers Representing Kaing Guek Eav Have Filed Appeals Against the ECCC Trial Chamber Judgment*, THE HAGUE JUSTICE PORTAL (Aug. 27, 2010), <http://www.haguejusticeportal.net/index.php?id=12001>.

131. Co-Prosecutors’ Final Trial Submission, *supra* note 129, ¶¶ 454-56.

132. *Id.* ¶¶ 454-55; *see also* Stuart Beresford, *Unshackling the Paper Tiger: The Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 1 INT’L CRIM L. REV. 33, 49 (2001) (explaining that there is a variance between punishment at the ICTY and ICTR, which Beresford attributes to the ICTR’s greater reliance on domestic penology).

133. Co-Prosecutors’ Final Trial Submission, *supra* note 129, ¶¶ 454-55.

134. *Id.* ¶ 456 (noting, however, that none of the accused involved in the crimes tried before the SCSL were accused of committing crimes over an extended period of time).

(claiming that the Court did not have jurisdiction to try his case)<sup>135</sup> and that there was an “error concerning conviction.”<sup>136</sup> The complaint most relevant here was that Duch asserted “[t]he Trial Chamber erred by its arbitrary sentence against [him].”<sup>137</sup> Duch’s lawyers were concerned with the Trial Chamber’s failure to review relevant ECCC rules before issuing its sentence and stressed that the dissenting opinion complained of the Court’s cumulative sentence and its exercise of discretion in determining this cumulative sentence.<sup>138</sup> Unlike the Co-Prosecutors, the Defense did not discuss principles of punishment or the practices of other tribunals.

#### **IV. IN THE FACE OF OPPORTUNITY, A CRITICAL FAILURE TO LEGITIMIZE THE EXTRAORDINARY CHAMBERS**

The sentencing judgment of the ECCC Trial Chamber in Case 001 failed to reach a principled result. The Chamber’s sparse discussion of the principles of punishment in reaching its decision was inadequate to justify the sentence it imposed. Not only did the judgment fail to speak the language of the traditional principles of punishment in justifying its sentence, it also failed to achieve any of those principles’ goals or the “justice” it promised the Cambodian people. Furthermore, the Trial Chamber missed a crucial opportunity to both express a long-awaited message of condemnation regarding the acts of the Khmer Rouge, and to enhance its own standing in Cambodia, and more generally as an international instrument of justice. Taken together, the Chamber’s sentence in this case threatened its sociological legitimacy as an internationalized criminal tribunal.

This Section proceeds in two parts. Part A introduces the “traditional” principles of punishment. First, it analyzes how other international criminal tribunals have applied these principles; second, it considers where the ECCC’s judgment missed the mark; finally, Part A addresses the subsequent consequences of this decision on achieving the goals of each principle. Part B argues that absent a more clearly defined conception of why the ECCC imposes punishment, and the actual imposition of punishment that reflects these objectives, the Extraordinary Chambers risked losing legitimacy in the eyes of the Cambodian people and globally as an international criminal tribunal.

##### ***A. The Sentencing Judgment Failed to Reach a Principled and Meaningful Result***

The Trial Chamber in this case failed in several ways. First, it failed to adequately explain relevant sentencing principles. Second, it failed to meet the norms of international practice at other ICTs. Lastly, it failed to achieve the traditional goals of sentencing in its judgment. Justifications for criminal punishment generally fit into four broad, but overlapping categories: utilitarianism,

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135. Appeal Brief by the Co-Lawyers for Duch, *supra* note 5, ¶ 11.

136. *Id.* ¶ 66.

137. *Id.* ¶ 91.

138. *Id.*

retribution, restorative justice, and expressivism. As discussed below, retribution and deterrence are the most often cited justifications for international criminal punishment.<sup>139</sup> In exploring the traditional utilitarian and retributive theories, this Section will introduce each in turn and consider their prior application and relative emphasis elsewhere in international criminal justice. After this discussion of relevant sentencing principles in other international courts, each sub-Section will conclude with a discussion of the theory in the context of the Duch case. From this application, it is readily apparent that the trial judgment in Case 001 failed to apply these sentencing principles in a way consistent with the practices of other ICTs adjudicating crimes of similar gravity.<sup>140</sup> Finally, this Section discusses the developing theory of expressivism and explains how the ECCC missed a prime opportunity to enhance its legitimacy through the Duch Judgment.

The international criminal tribunals have developed a body of sentencing jurisprudence in cases of mass atrocity.<sup>141</sup> These courts have looked to one another for guidance in determining sentences within their respective jurisdictions. Among these courts are the two “ad hoc tribunals”—the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”); The Special Court for Sierra Leone (“SCSL”); and a number of others.<sup>142</sup> Richard Goldstone, former chief prosecutor at both the ICTY and ICTR

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139. See Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 444 (2001) (“In their sentencing decisions, the Tribunals have most often cited deterrence and retribution as the principal justifications for international punishment.”); Mark A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N.U. L. REV. 41, 41, 47-48 (2005) (noting that one of the main goals of the ICTR was retribution). *But see* MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 151 (2007) [hereinafter DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW]; Janine Natalya Clark, *The Limits of Retributive Justice*, 7 J. INT’L CRIM. JUST. 463, 487 (2009) (critiquing international criminal punishment’s ability to achieve retributive goals); David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT’L L.J. 473, 476 (1999) (raising similar concerns about the efficacy of deterrence in international criminal law).

140. For a discussion of the concept of gravity and its impact upon selection of cases before the ICC and other international tribunals, see deGuzman, *supra* note 72.

141. See, e.g., John Bronsteen, *Retribution’s Role*, 84 IND. L.J. 1129, 1155-56 (2009) (arguing that punishment must be both backward-looking and forward-looking—retributive in considering the committed crime and utilitarian in protecting future victims); Clark, *supra* note 139, at 471 (describing interviews the author conducted in Bosnia and Herzegovina which found victims desired the accused be brought before a court of law to satisfy their calls for retribution); Carrie J. Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, Georgetown Public Law Research Paper No. 1005485 Annual Review 10.2, 2007, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1005485](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005485) (describing the aims of “restorative justice,” which Menkel-Meadow characterizes as “four R’s”—repairing, restoring, reconciling, and reintegrating the offender and victims to each other and to their shared community); John Braithwaite, *Encourage Restorative Justice*, 6 CRIMINOLOGY & PUB. POL’Y 689, 694 (2007) (noting that restorative justice principles may complement other justice mechanisms further up the pyramid, including more deterrent and incapacitative options).

142. For an overview of the functions, laws and procedure at such courts, see THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS, *supra* note 4, at 212-47.

wrote that the ad hoc tribunals achieved progress in combating impunity for international crime by sending “a message to would-be war criminals that the international community is no longer prepared to allow serious war crimes to be committed without the threat of retribution.”<sup>143</sup> Similarly, Carla Del Ponte, Chief Prosecutor at the ICTY, has stated that the ICTY was established to end impunity, to prosecute those responsible, in order to stimulate national reconciliation and peace and to “inculcate the necessary values to succeeding generations.”<sup>144</sup> Like other international criminal tribunals,<sup>145</sup> the ECCC was created to prosecute those most responsible for the crimes committed during the Khmer Rouge—a process it began with Duch.

While all of the major theories justifying punishment are applicable to the ECCC, the concepts of retribution and expressivism are most directly applicable to the circumstances confronted by the Extraordinary Chambers. The Extraordinary Chambers was established to prosecute the crimes of the Khmer Rouge, crimes committed three decades before the Co-Prosecutors of the ECCC brought charges against the accused perpetrators in Cases 001 and 002. This largely distinguishes the work of the ECCC from that of other ICTs, which have responded more quickly to mass atrocities with internationalized adjudication. When the ECCC prioritized achieving justice for the Cambodian people,<sup>146</sup> the “justice” it spoke of most directly reflects satisfying retributive aims.<sup>147</sup> One scholar found that vengeance was a popular refrain among Cambodians asked why there should be a Khmer Rouge tribunal.<sup>148</sup> Many “did not see the need for the due process provided by trials, or for the proof of guilt . . . . Personal suffering . . . necessitated the punishment of the perpetrators, who participants felt should endure retributive pain.”<sup>149</sup> The same study found that Cambodians also favored an ECCC that would fulfill goals more expressive in nature.<sup>150</sup> Among those goals, Cambodians expressed a desire for documenting history and restoring a memory of the past,

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143. RICHARD J. GOLDSTONE, *FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR* 126 (2000).

144. Carla Del Ponte, *Prosecuting the Individuals Bearing the Highest Level of Responsibility*, 2 J. INT'L CRIM. JUST. 516, 519 (2004).

145. *See Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820*, United Nations Dep't of Peacekeeping Operations (2009), at 4, available at [http://www.unrol.org/files/32914\\_Review%20of%20the%20Sexual%20Violence%20Elements%20in%20the%20Light%20of%20the%20Security-Council%20resolution%201820.pdf](http://www.unrol.org/files/32914_Review%20of%20the%20Sexual%20Violence%20Elements%20in%20the%20Light%20of%20the%20Security-Council%20resolution%201820.pdf) (“The three courts were established to try those individuals ‘most’ responsible for the international crimes of genocide, crimes against humanity and war crimes committed during certain armed conflicts.”).

146. EXTRAORDINARY CHAMBERS FAQ, *supra* note 7.

147. William W. Burke-White, *Preferences Matter: Conversations with Cambodians on the Prosecution of the Khmer Rouge Leadership*, in *BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS* 97, 106 (Ramji & Van Schaack eds., 2005) [hereinafter Burke-White, *Preferences*].

148. *Id.* at 107.

149. *Id.*

150. *Id.* at 106.

restoring international legitimacy, and community reconciliation.<sup>151</sup> The Court could have capitalized on this opportunity to respond to Cambodians' preferences by expressing these sentiments more fully in its judgment. Instead the Court failed to do so, and undermined its institutional legitimacy in the process.

The Extraordinary Chambers did not fully and convincingly embrace any principle of punishment in its discussion of relevant sentencing principles, except in considering Duch's potential for rehabilitation as a mitigating factor in determining an appropriate sentence. The result: a sentence bereft of meaning for the Cambodian people and a threat to the legitimacy of the Extraordinary Chambers. The following is a description of relevant principles of punishment and the ECCC's failure in achieving the goals of each.

### 1. Utilitarianism

Generally, utilitarianism stands for the principle that criminal punishment should seek to enhance a society's overall social welfare. It is forward-looking, and provides approval or disapproval for "every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question."<sup>152</sup> Included within the broad framework of utilitarianism are the concepts of general deterrence, specific deterrence, incapacitation, and rehabilitation.<sup>153</sup>

#### *a. Deterrence*

While discussed extensively by other ICTs, the ECCC failed to adequately explain how the theory of deterrence factored into sentencing Duch. Further, the sentencing judgment in Case 001 is unlikely to deter would-be criminals both inside and outside of Cambodia.

Deterrence theory impacts international criminal law most directly in the form of "general deterrence." In the context of international criminal law ("ICL"), "general deterrence provides the most conceptually straight-forward rationale for creating [international tribunals]."<sup>154</sup> While ICL's function as a specific deterrent is at best limited,<sup>155</sup> ICTs may deter in other ways. First, some scholarship suggests that ICTs may serve as a complimentary deterrent—that the threat of international

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151. *Id.*

152. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (John Bowring ed., 1843), reprinted in JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 33-34 (5th ed. 2007).

153. Kent Greenawalt, *Punishment*, 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282 (2d. ed. 2002), in DRESSLER, *supra* note 152, at 34-36.

154. Alexander, *supra* note 10, at 10.

155. ICL may deter actors from repeat offenses (the goal of specific deterrence), but international crimes are not generally offenses that may be repeated. *See id.* at 22-23 (noting that it is very rare that such criminals are placed in a position where they can repeat their offense); Wippman, *supra* note 139, at 476 (suggesting that individual actors (even assuming they make rational calculations) are likely to view the risk of prosecution for such offenses as slight, especially when in lower-ranking positions of authority).

prosecution may move domestic courts to prosecute instances of international crime.<sup>156</sup> Also commonly cited as a utilitarian justification for punishing criminals, physical incapacitation prevents criminals from recidivism while detained; however, in the international context, the physical detention of war criminals may not be necessary to deter them from further offenses.<sup>157</sup> Also sometimes discussed as falling under the utilitarian “umbrella” of justifications, punishment may also serve to reform and rehabilitate criminals.<sup>158</sup>

Other ICTs have widely cited deterrence as a chief goal in their sentencing judgments. Among them, both the ICTY and ICTR have cited deterrence as a primary goal in sentencing, as has the SCSL.

At the ICTY, the court has consistently affirmed its dedication to deterrence as a sentencing goal. In *Prosecutor v. Vujadin Popovic*,<sup>159</sup> the court affirmed its prior decisions by stating that sentencing should also aim to generally and specifically deter criminals from commissions of massive crimes.<sup>160</sup> The court stated, “penalties imposed by the Tribunal should be adequate to deter the convicted person from committing any future violation, [and] it must also have the effect of discouraging other potential perpetrators from committing the same or similar crimes.”<sup>161</sup> However, the court noted that deterrence should not be granted “undue prominence” in crafting a sentence.<sup>162</sup>

Similarly, the ICTR has repeatedly held that deterrence should play a prominent role in determining sentences. In perhaps its seminal case on sentencing

156. See Alexander, *supra* note 10, at 22 (suggesting that, in the context of the ICC’s complementary jurisdiction framework, the threat of international intervention incentivizes national courts to take up international criminal cases themselves, increasing the deterrent effect of national courts on would be criminals); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*, 95 AM. J. INT’L L. 7, 28 (2001) (noting that international criminal justice has created an incentive for “preemptive national proceedings”). There is a wide body of theoretical scholarship in this area, suggesting ways in which ICL serves a complimentary function. See, e.g., Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT’L L. 107, 142 (2009); William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L. J. 53 (2008). William W. Burke-White distinguishes his approach from Akhavan’s. See *id.* at 54 n.4. He claims that “[t]he term ‘positive complementarity’ is used by some commentators to describe a similar policy approach. Proactive complementarity, however, better reflects the nature of the policy and better highlights its distinction from the Court’s present approach that might be termed ‘passive complementarity.’” *Id.*

157. See Alexander, *supra* note 10, at 24 (noting that it is not necessary to physically incapacitate many war criminals, as their political posts are generally a means toward the commission of such atrocities, further, the issuance of an indictment may serve to incapacitate in a way similar to physical detention).

158. Kent Greenawalt, *Punishment*, in DRESSLER, *supra* note 152, at 36.

159. *Prosecutor v. Popovic*, Case No. IT-05-88-T (2010), Judgment (June 10, 2010).

160. *Id.* ¶ 2129.

161. *Id.*; see also *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Judgment, ¶ 288 (Dec. 10, 1998) (holding that the defendant must be punished in order to deter him and others from breaking the law).

162. *Popovic*, Case No. IT-05-88-T, ¶ 2129.

goals at the tribunal, the ICTR Trial Chamber in *Prosecutor v. Kambanda*<sup>163</sup> convicted Kambanda, the former Prime Minister of Rwanda, of genocide and other related crimes.<sup>164</sup> The court wrote that the penalties imposed by the court against convicted defendants must be aimed at deterrence—“namely dissuading for good those who will attempt in [the] future to perpetrate such atrocities by showing them that the international community was not ready to tolerate the serious violations of international humanitarian law and human rights.”<sup>165</sup> The court has repeated this sentiment in other cases, stressing the deterrence of future commissions of similar crimes as an important goal in sentencing practices.<sup>166</sup>

The Special Court for Sierra Leone similarly has emphasized deterrence as a sentencing goal.<sup>167</sup> For example, in *Prosecutor v. Brima*, the SCSL recognized “that the element of deterrence is important in demonstrating that the world will not tolerate serious crimes against IHL and human rights.”<sup>168</sup> Further, the SCSL noted that “one of the main purposes of a sentence is to ‘influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public, in order to reassure them that the legal system is implemented and enforced.’”<sup>169</sup> The SCSL has reaffirmed this commitment to deterrence as a sentencing aim in later cases as well.<sup>170</sup>

The Chamber’s cursory discussion of deterrence in its Case 001 sentencing judgment threatens its sociological legitimacy. The Chamber failed to describe how deterrence factored into Duch’s sentence, and more generally, how it impacts the Court’s mission. Furthermore, the sentence it imposed on Duch is unlikely to have a significant deterrent effect.

The Trial Chamber’s discussion in Case 001 of sentencing aims was uncharacteristically brief as compared with other international criminal tribunals. In fact, not once in the case did the Court use the word “deterrence” or discuss the theory directly. Where other ICTs discuss the traditional principles of punishment in significant detail, the Chamber in this case dedicated a total of only six

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163. *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998).

164. *Id.* ¶¶ 3-4 (convicting Kambanda of genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; complicity in genocide; murder; and extermination).

165. *Id.* ¶ 28; *see also* *Prosecutor v. Serushago*, Case No. ICTR-98-39-S, Sentence (Feb. 5, 1999) (repeating nearly verbatim the principles espoused in *Kambanda* (*Serushago* has been cited widely in the scholarship on the ICTR for punishment principles)).

166. *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Sentence, ¶ 1 (May 21, 1999).

167. *See* *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Sentencing Judgment (July 19, 2007); *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa (Oct. 9, 2007); *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Sentencing Judgment (Apr. 8, 2009).

168. *Brima*, Case No. SCSL-04-16-T, ¶ 16 (quoting *Kambanda*, Case No. ICTR 97-23-S, ¶ 28).

169. *Id.* (citing *Prosecutor v. Nikolic*, Case No. IT-94-2-S, Sentencing Judgment, ¶ 139 (Dec. 18, 2003)).

170. *Fofana*, Case No. SCSL-04-14-T, ¶ 26; *Sesay*, Case No. SCSL-04-15-T.

paragraphs addressing “relevant sentencing principles and factors.”<sup>171</sup> In this discussion, the only glancing reference to the theory of deterrence is the first sentence: “The ECCC, like other internationalised tribunals, is entrusted with reducing crimes of considerable enormity and scope into individualised sentences.”<sup>172</sup>

First, the Chamber’s lack of discussion of deterrent principles threatens its legitimacy. Deterrence has been a primary justification in other courts’ sentencing judgments, and it should have played a more prominent role in the Duch judgment.<sup>173</sup> While the particular circumstances in Cambodia are unique, as more than thirty years have passed since the Khmer Rouge era, the prevention of future atrocities remains an important function of ICTs. Deterring future crimes is also reflective of popular expectations of ICTs. For example, in a survey of residents of Sierra Leone, the respondents saw the SCSL as “having established a norm of accountability and deterrence . . . “ showing “people that they could not commit crimes and go ‘scot-free.’”<sup>174</sup> Indeed, Co-Prosecutor Chea Leang argued before the ECCC Trial Chamber that:

[I]t is important that the Cambodian and the world community see that grave breaches of the Geneva Convention are punished in order for it to continue in its ability to have a deterrent effect in the future on armed conflict all over the world. These conventions should not be seen just as words on paper, but rights and principles that civilized nations believe in and uphold regardless of politics or convenience.<sup>175</sup>

Co-Prosecutor Smith additionally argued that a “just sentence” at the ECCC should be based upon traditional sentencing principles.<sup>176</sup> He stressed that Duch’s sentence should send a message “saying S-21 should never have happened and it should never happen again.”<sup>177</sup> Perhaps even more important than achieving deterrence through sentencing is sending the message of deterrence—that there is a universal repulsion to crimes like Duch’s and the ICTs will not tolerate such behavior. However, rather than send this message by adequately explaining the impact of deterrent principles upon its sentencing judgment, the Chamber’s opinion provided just the opposite—a decision lacking a legitimate discussion of deterrence and its applicability to Duch and more generally to other would-be criminals internationally.

171. Duch Trial Judgement, *supra* note 1, ¶¶ 579-85.

172. *Id.* ¶ 579.

173. *But see* Wippman, *supra* note 139, at 476 (criticizing ICL’s potential deterrent effect).

174. Rachel Kerr & Jessica Lincoln, *The Special Court for Sierra Leone: Outreach, Legacy and Impact, Final Report*, KING’S COLLEGE OF LONDON 22 (2008), <http://www.kcl.ac.uk/content/1/c6/04/95/60/SCSLOutreachLegacyandImpactFinalReport.pdf>.

175. Prosecutor v. Kaing Guek Eav, Case No. 001/18-07-2007-ECCC/TC, Transcript of Trial Proceedings – Kaing Guek Eav “Duch” Public, ¶¶ 45-46 (Nov. 24, 2009) [hereinafter Transcript of Trial Proceedings from November 24, 2012], [http://www.cambodiatribunal.org/images/CTM/transcript\\_11-24.pdf](http://www.cambodiatribunal.org/images/CTM/transcript_11-24.pdf).

176. *Id.* at 62 (“A just sentence in law is not based on revenge but on retribution and deterrence.”).

177. *Id.*



Second, the Duch Trial Chamber sentencing judgment is unlikely to have a deterrent impact. While specific deterrence<sup>178</sup> may not be particularly applicable to Duch in light of his advanced age and removal from political power,<sup>179</sup> general deterrence of mass atrocities inside and outside of Cambodia should be a priority for the ECCC as an institution representing both Cambodian and international interests. Deterring the commission of mass atrocities is a tall order—in fact, it is one that has drawn much scholarly criticism.<sup>180</sup> Nevertheless, the alternative is no better. Consider the criticism that the widely perceived leniency of international courts results in sentences too short to achieve a deterrent effect.<sup>181</sup> Accepting this criticism, the Court actually sends the opposite message that, in effect, atrocities will be accepted by imposing lenient sentences. Rather than imposing a more severe sentence with the potential to deter (however remote that potential may be), when a court imposes a more lenient sentence, it sends the message that mass atrocity is likely to be met with impunity compared to the gravity of the crimes committed themselves. In Duch’s case, the Court imposed a sentence of even shorter duration than that imposed at the other ICTs for crimes of similar gravity,<sup>182</sup> which commentators have criticized as being largely lenient themselves.<sup>183</sup> If the ECCC is to serve a transformative deterrent function in educating and promoting human rights norms and thereby deter atrocity,<sup>184</sup> then the thirty-five year sentence imposed in the Duch case cannot achieve this goal.

One can also argue that the selection (as opposed to the sentencing) of Duch for prosecution represented an effort to send a message of deterrence. A number of international law scholars believe that prosecuting “big fish”—the highest-ranking

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178. See Wippman, *supra* note 139, at 477 (criticizing specific deterrence in the context of international criminal justice, noting that to “most offenders, especially low-ranking offenders, the risk of prosecution must appear to be almost the equivalent of losing the war crimes prosecution lottery”).

179. *Id.*; see also Alexander, *supra* note 10, at 22-23 (noting that specific deterrence is not likely to have an impact in international criminal law because most offenders have been removed from the political positions used to commit atrocities).

180. See Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L. REV. 949, 977 (2003) (describing the many factors that must be considered in making calculations about whether deterrence is effective, including the rationality and the decision-making of the perpetrator); see also Sloane, *supra* note 13, at 72-73; DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW, *supra* note 139, at 169 (“There is no systematized or conclusive evidence to show that criminal law can deter atrocity.”).

181. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW, *supra* note 139, at 169-70.

182. See *infra* Part III.A.2 (noting the numerical differences between the sentencing imposed by international criminal tribunals for crimes similar in gravity and scope to Duch’s).

183. See, e.g., Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 832 (2006) (arguing that because international prosecutions are more lenient in sentencing, they are unlikely to deter).

184. See Akhavan, *supra* note 156, at 10 (“Publicly vindicating human rights norms and ostracizing criminal leaders may help to prevent future atrocities through the power of moral example to transform behavior.”).

participants in mass atrocity— may have a deterrent effect by sending a message to other would-be offenders that the type of behavior exhibited by the accused will not be tolerated.<sup>185</sup> However, for this form of deterrence to be effective, at least one prominent scholar suggests that international prosecutions must be more consistent.<sup>186</sup> Essentially, that argument posits that if criminal trials in the wake of mass atrocities were more consistent, then the possibility for deterrence would be enhanced.<sup>187</sup>

However, there are at least two other ways in which the Court has shortchanged the deterrent theory. The first was hardly avoidable. If the “big fish” theory is applied to the case of the Khmer Rouge, it can hardly be argued that Duch was the man most responsible for their atrocities. Many of the highest ranking members of the Khmer Rouge are now dead. Duch himself admitted that Pol Pot, the notorious leader of the Khmer Rouge, was crueler than China’s “Gang of Four,” and that he was a step beyond the four people of the great revolution of China.<sup>188</sup> However, he attempted to separate himself from these leaders by saying “[t]hese four went one step forward but Pol Pot went 10 steps forward, “and that because of this he “was rather cowardly in that [he] did not contest, but went on carrying out their orders . . . to ensure that myself and the lives of my family would be out of danger . . . . Therefore, I committed all kinds of crimes, serious crimes.”<sup>189</sup> Other high-ranking members of the Khmer Rouge have also died; for example, Ta Mok, Pot’s military chief, died in 2006.<sup>190</sup> Further, Duch is arguably not even the biggest fish that remains alive. Many believe that those to be prosecuted in Case 002—Jeng Sary (who was Deputy Prime Minister for Foreign Affairs), Khieu Samphan (Chair of the State Presidium), Nuon Chea (Chair of the People’s Representative Assembly), and Ieng Thirith (Minister of Social Affairs)—are of a higher profile than Duch.<sup>191</sup> Moreover, unlike Duch, they either have not accepted responsibility or have blamed either Pol Pot or Ta Mok.<sup>192</sup>

Secondly, the lack of parity between the terse discussion of deterrence in Case 001 and the thirty-five year sentence itself and the discussions of deterrence and the sentences imposed elsewhere at other ICTs undermines the theory that ICL may deter by consistent prosecution and application of the law. If deterrence—and more generally an application of international legal principles to Cambodia—are in

185. Alexander, *supra* note 10, at 14.

186. Theodor Meron, *From Nuremburg to the Hague*, 149 MIL. L. REV. 107, 110 (1995).

187. *Id.* Compare with Wippman, *supra* note 139, at 476 (arguing that underlying forces drive many international atrocities in a way proponents of deterrence do not appreciate).

188. Cheang Sokha & Georgia Wilkins, *Pol Pot Worse than China’s ‘Gang of Four’*, *Duch Says*, THE PHNOM PENH POST, May 1, 2009.

189. *Id.*

190. Times Topics, *Khmer Rouge*, N.Y. TIMES (last updated 9/17/2010), [http://topics.nytimes.com/top/reference/timestopics/organizations/k/khmer\\_rouge/index.html](http://topics.nytimes.com/top/reference/timestopics/organizations/k/khmer_rouge/index.html).

191. *Id.*

192. See Beth Van Schaak, *Teeing Up ECCC Case 002*, INTLAWGRRLS, <http://intlawgrrls.blogspot.com/2010/10/case-002-before-eccc-gets-teed-up.html>. This consequently raises the stakes in the second case, which will likely look back to the judgment in Case 001 for guidance in crafting any potential sentence.

fact important to the ECCC, then the Court must speak the language of deterrence in its opinions and ultimately in its sentencing practices.

### ***b. Rehabilitation***

Where other ICTs tend to downplay the potential for rehabilitating the accused, the ECCC appears to have taken the opposite approach in Case 001. While the Court claimed to only grant limited weight to rehabilitation,<sup>193</sup> it is the sole traditional sentencing principle explicitly named in the judgment. Applying the rehabilitative theory in international criminal law is a dubious task, even where, as here, the accused is advanced in age and claims to have reformed. Further, like its failure to discuss deterrent theory, the Court's deference to Duch's potential for rehabilitation strikes a blow to its legitimacy as an international criminal tribunal.

Rehabilitation, like deterrence and retribution, is another oft-cited principle of punishment in ICL. Rehabilitation theory posits that a sentence should serve (where possible) to reform the individual and streamline his reintegration into society.<sup>194</sup> Scholars and courts have approached rehabilitation skeptically. A number of scholars have argued that rehabilitation as a sentencing goal should be approached with caution.<sup>195</sup> One scholar attributes the attention paid to rehabilitation as a sentencing principle to developments in international human rights law; however, he also notes that in recent practice, international tribunals have deemphasized rehabilitation as a factor in determining criminal sentences.<sup>196</sup> This scholar's claims of rehabilitation's devaluation are reflected in the ICTs' sentencing opinions discussed below. The seriousness of the crimes tried before these courts appears to be tied to this result.

At the ICTY, the court has held that rehabilitation may be considered a purpose of sentencing, in addition to retribution and deterrence.<sup>197</sup> However, the *Popovic* court reasserted that "[i]n light of the serious nature of the crimes committed under the Tribunal's jurisdiction, it has not played a predominant role in sentencing."<sup>198</sup>

Similarly, the ICTR has held that rehabilitative principles may be considered in the imposition of sentences.<sup>199</sup> The ICTR wrote that it "understands the need to take into account the ability of the person found guilty to be rehabilitated; such

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193. Duch Trial Judgement, *supra* note 1, ¶ 611.

194. Sloane, *supra* note 13, at 48.

195. *See, e.g.*, Beresford, *supra* note 132, at 41; Sloane, *supra* note 13, at 67.

196. Sloane, *supra* note 13, at 67.

197. Prosecutor v. Popovic, Case No. IT-05-88-T (2010), Judgment, ¶ 2130 (June 10, 2010).

198. *Id. Compare with* Prosecutor v. Deronjic, Case No. IT-02-61-S, Separate Opinion of Judge Mumba, ¶ 2 (Int'l Cri. Trib. For the Former Yugoslavia Mar. 30, 2004) (dissenting on the grounds that a guilty plea should be seen by courts as the beginning of the rehabilitative process and considered in sentencing).

199. Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Sentence, ¶ 1 (May 21, 1999); *see also* Prosecutor v. Rutaganira, Case No. ICTR-95-1C-T (2005), Judgment and Sentence, ¶ 107 (Mar. 14, 2005).

rehabilitation goes hand in hand with his reintegration into society.”<sup>200</sup> However, like the ICTY, rehabilitation has played a deemphasized role in sentencing offenders.<sup>201</sup>

In *Prosecutory v. Brima*, the SCSL further minimized its understanding of rehabilitation as a purpose of sentencing when it downplayed its importance even after acknowledging international recognition of rehabilitation as a sentencing principle.<sup>202</sup> The SCSL believes that “unlike the case in domestic courts, rehabilitation cannot be considered as a predominant consideration in determining a sentence, as the sentencing aims of national jurisdictions are different from the aims of international criminal tribunals.”<sup>203</sup> Later, in *Prosecutor v. Fofana*, the court clarified its position on rehabilitation, writing that it could not be considered applicable to the situations addressed by the international court in Sierra Leone or the other ICTs more generally.<sup>204</sup> In its decision in *Fofana*, the court noted that “[a]lthough rehabilitation is considered an important element in sentencing, it is of greater importance in domestic jurisdictions than in International Criminal Tribunals.”<sup>205</sup> The court has since reaffirmed its position, in cases such as *Prosecutor v. Sesay*, that rehabilitation should play a more important role in domestic prosecutions than in international prosecutions.<sup>206</sup>

In sum, international criminal tribunals have deemphasized rehabilitation. Crimes of the gravity of those prosecuted by the ICTs and the circumstances surrounding those prosecutions appear to have contributed to rehabilitation’s waning importance in international criminal sentencing.

Nevertheless, the ECCC did emphasize Duch’s potential for rehabilitation in crafting his sentence. In line with its circumvention of discussing relevant international sentencing principles elsewhere in the opinion, the Court noted only that “[t]he propensity for rehabilitation of an accused has also been taken into account at sentencing.”<sup>207</sup> The ICTY Appeals Chamber has counseled, however, that rehabilitation is not a factor “which should be given undue weight.”<sup>208</sup>

With that slight nod to international jurisprudence, the Court concluded, on the basis of two experts who testified that Duch could be rehabilitated, that it would accord limited consideration to Duch’s propensity for rehabilitation in

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200. *Rutaganira*, Case No. ICTR-95-1C-T, ¶ 113.

201. *Popovic*, Case No. IT-05-88-T, ¶ 2130.

202. *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Sentencing Judgment, ¶ 14 (July 19, 2007).

203. *Id.* ¶ 17 (citing *Prosecutor v. Deronjic*, Case No. IT-02-61-A, Appeal Judgment, ¶ 136-137 (July 20, 2005)).

204. *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, ¶ 28 (Oct. 9, 2007).

205. *Id.*

206. *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Sentencing Judgment, ¶ 16 (Apr. 8, 2009).

207. Duch Trial Judgement, *supra* note 1, ¶ 611.

208. *Id.* (quoting *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Appeal Judgement, ¶ 806 (Feb. 20, 2001)).

crafting his sentence.<sup>209</sup> In explaining its reasoning, the Court emphasized its belief that “the Accused could be rehabilitated and reintegrated into society based on his past experiences and his present condition.”<sup>210</sup>

What is perhaps most striking about this portion of the opinion is not only its topical treatment of international sentencing jurisprudence (which is characteristic of the rest of the judgment), but also the fact that rehabilitation is perhaps the opinion’s most extensively discussed principle of punishment. While explicitly stating that rehabilitation should not be accorded undue weight,<sup>211</sup> on numerous occasions, including the ones illustrated above, the Court stressed the importance of Duch’s propensity for rehabilitation as a reason for reducing his sentence.<sup>212</sup> In making this assessment and in granting “limited” consideration to potential rehabilitation, the Court relied upon the testimony of two experts, with which the Chamber agreed, claiming that “the Accused could be rehabilitated and reintegrated into society based on his past experiences and his present condition.”<sup>213</sup> The emphasis placed on rehabilitation, while only touching on deterrent and retributive principles is inconsistent with the jurisprudence of similarly situated international criminal tribunals such as the ICTY, ICTR, and SCSL.

## 2. Retribution

Surprisingly, the Trial Chamber also failed to address retribution as a goal of sentencing. Cambodians have expressed a preference for retributive justice.<sup>214</sup> Nevertheless, even as the Chambers made achieving justice for the Cambodian people a chief priority,<sup>215</sup> and its Co-Prosecutors emphasized the need to exact retribution,<sup>216</sup> the Court prescribed a sentence incommensurate with Duch’s offenses and failed to describe how retribution impacted the decision.

While subject to scholarly criticism,<sup>217</sup> retributivism has served as the predominant justification for punishment in international criminal law.<sup>218</sup> Retributivism is “[t]he legal theory by which criminal punishment is justified, as long as the offender is morally accountable, regardless of whether deterrence or other good consequences would result.”<sup>219</sup> As demonstrated below, other ICTs

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209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* ¶¶ 606, 611, 616, 629, 663 (discussing rehabilitation).

213. Duch Trial Judgement, *supra* note 1, ¶ 611.

214. Burke-White, *Preferences*, *supra* note 147, at 106.

215. EXTRAORDINARY CHAMBERS FAQ, *supra* note 7.

216. Burke-White, *Preferences*, *supra* note 147, at 106.

217. *See, e.g.*, Sloane, *supra* note 13, at 77; Clark, *supra* note 139, at 487; DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW, *supra* note 139, at 151; *see also* DRESSLER, *supra* note 152, at 38 (noting that, in America, “retributivism is all the rage” in criminal sentencing).

218. Sloane, *supra* note 13, at 78.

219. BLACK’S LAW DICTIONARY (8th ed. 2004), retributivism; *see also* Paul Robinson,

have repeatedly looked to retribution in determining sentences, emphasizing a need to punish culpable offenders who have committed serious crimes.

The ICTY in *Popovic* affirmed this message,<sup>220</sup> noting that proportionality in sentencing is important because it is a “determination of an appropriate punishment which properly reflects the . . . culpability of the offender . . . the consequential harm caused by the offender . . . and the normative character of the offenders conduct.”<sup>221</sup>

Likewise, at the ICTR in *Prosecutor v. Kambanda*, the court affirmed its commitment to the mantra of ending impunity for mass atrocities<sup>222</sup> and to achieving retribution against the accused “who must see their crimes punished . . .”<sup>223</sup> The ICTR restated this commitment to retributive principles in *Prosecutor v. Kayishema et al.*<sup>224</sup> and clarified its vision of how retribution applies to ICL in *Prosecutor v. Rutaganira*.<sup>225</sup> In *Rutaganira*, the court defined retribution as “the expression of the social disapproval attached to a criminal act and to its perpetrator . . . [which] demands punishment for the latter for what he has done.

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*Empirical Desert*, U. of Penn Law School, Public Law Research Paper No. 08-29 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1148907##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1148907##). In the United States, retributivism has developed into at least five strands. Positive retribution (as advocated by Immanuel Kant and Michael Moore, et al.) holds that moral desert is a necessary and sufficient reason for punishment. See Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER AND EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179-82 (Ferdinand Schoeman ed., 1987), reprinted in DRESSLER, *supra* note 152, at 38; Immanuel Kant, *The Philosophy of Law* 194-98 (W. Hastie trans., 1887), in DRESSLER, *supra* note 152, at 38. Negative retributivism provides that guilt is a necessary prerequisite to punishment. See DRESSLER, *supra* note 152, at 39. Assaultive retribution provides that it is right for society to hate criminals. See James Fitzjames Steven, *A History of the Criminal Law of England* 80-82 (1883), reprinted in DRESSLER, *supra* note 152, at 40. Protective Retribution provides that it is a ‘right’ of criminals to be punished—in effect restoring society’s moral balance. See DRESSLER, *supra* note 152, at 43-44; see also Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 476-79 (1968), reprinted in DRESSLER, *supra* note 152, at 42-43. Finally, retribution may serve a vindictive function for the victim—to allow them to annul the wrongdoers’ superiority and affirm the victim’s value. See Jeffrie Murphy & Jean Hampton, FORGIVENESS AND MERCY 3 (1988), quoted in DRESSLER, *supra* note 152, at 41.

220. *Prosecutor v. Popovic*, Case No. IT-05-88-T (2010), Judgment, ¶ 2128 (June 10, 2010), citing *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-A, Appeal Judgment, ¶ 415 (May 5, 2009); *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Appeal Judgment, ¶ 803 (Mar. 27, 2009); *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Appeal Judgement, ¶ 806 (Feb. 20 2001); *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, ¶ 185 (Mar. 24, 2000).

221. *Popovic*, Case No. IT-05-88-T, ¶ 2128 (citing *Prosecutor v. Kordic*, Case No. IT-95-14/2-A, Appeal Judgment, ¶ 1075 (Dec. 17, 2004) (referring to *R. v. M (C.A.)* [1996] 1 S.C.R. 500, ¶ 80)); see *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Judgment, ¶ 288 (Dec. 10, 1998) (considering retributive goals in crafting a sentence, but in conjunction with deterrence).

222. *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 27 (Sept. 4, 1998).

223. *Id.*; see *Prosecutor v. Serushago*, Case No. ICTR-98-39-S (1999), Sentence (Feb. 5, 1999) (repeating nearly verbatim the principles espoused in *Kambanda* (*Serushago* has been cited widely in the scholarship on the ICTR for punishment principles)).

224. *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Sentence, ¶ 1 (May 21, 1999).

225. *Prosecutor v. Rutaganira*, Case No. ICTR-95-1C-T, Judgment and Sentence, ¶ 108 (Mar. 14, 2005).

The sentences . . . are therefore an expression of humanity’s outrage against the serious violations of human rights and international humanitarian law . . . .”<sup>226</sup> The court also recognized that “[r]etribution meets the need for justice and may also appease the anger caused by the crime to the victims and the community as a whole.”<sup>227</sup> The court noted the close relationship between the gravity of the crime and the retributive value of the punishment. “In citing retribution as a major purpose of the sentence, the Chamber underscores the gravity of the crime . . . given the specific circumstances of the instant case.”<sup>228</sup>

Similarly, the SCSL, like the *ad hocs*, declared its commitment to retributive principles in sentencing judgments. For example, the court in *Brima* noted that retributivism “is not to be understood as fulfilling a desire for revenge but rather as duly expressing the outrage of the national and international community at these crimes, and that is meant to reflect a fair and balanced approach to punishment for wrongdoing . . . . The punishment must fit the crime”<sup>229</sup>—a passage more reflective of expressive, rather than retributive principles. The court in *Fofana* affirmed this commitment and clarified its vision of retribution, declaring the importance of retributivism to sentencing and extrapolating on its definition of the theory.<sup>230</sup> The court later echoed these same sentiments in cases such as *Sesay*.<sup>231</sup> In sum, retribution has played a major role in the sentencing judgments of other ICTs.

The Court in Case 001 made only fleeting mention of retribution as a goal in crafting Duch’s sentence.<sup>232</sup> Like deterrence, the Court never explicitly used the word retribution, nor did it elaborate when it alluded to the theory. Instead, it emphasized the related principle of proportionality, stating that “[w]hile an obvious function of a sentence is to punish, its goal is not revenge. The sentence must be proportionate and individualised such that it reflects the culpability of the accused based on an objective, reasoned and measured analysis both of his or her conduct and its consequential harm.”<sup>233</sup> While an allusion to retributivism is apparent, the Court failed to further elaborate on the application of retributive

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226. *Id.* ¶ 108.

227. *Id.*

228. *Id.* ¶ 109.

229. *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Sentencing Judgment, ¶ 15 (July 19, 2007).

230. *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, ¶ 26 (Oct. 9, 2007) (citing *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, ¶ 80) (“[I]n a criminal context, by contrast [to vengeance] represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the international risk-taking of the offender, the consequential harm cause by the offender, and the normative character of the offender’s conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.”).

231. *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Sentencing Judgment, ¶ 14 (Apr. 8, 2009).

232. Duch Trial Judgement, *supra* note 1, ¶ 580.

233. *Id.*

principles to both international law and the facts of the case.

As with deterrence, the Court failed to apply retributive principles in a way that applies international legal principles to the situation in Cambodia. First, the Court failed to achieve rhetorical parity with the other tribunals examined above in discussing retributive principles in any significant detail in its judgment. The courts discussed above developed an international body of jurisprudence, relying upon retributivism as a principle of punishment and declaring, defining, and developing its commitment to retributivism. The ECCC however, failed to undertake any such discussion, only implicitly and fleetingly referring to retributive principles in defining relevant sentencing principles. Secondly, this failure to consider retributivism in its written sentence is reflected in the sentence imposed. Leaving aside the reduced sentence that Duch will serve, the full sentence of thirty-five years fails to embrace the retributive mantra of punishment reflecting the crime committed. As the Co-Prosecutor pointed out, and as discussed above, the sentence imposed by the ECCC is a full two to seven years shorter than the sentences imposed at the ICTY, ICTR and SCSL for crimes of similar seriousness and duration.<sup>234</sup>

Finally, the Court failed to achieve its “chief goal” of providing “justice to the Cambodian people, those who died and those who survived . . . .”<sup>235</sup> The “justice” described by the Court, although impossible to fully equate to retributivism, at least reflects the desires of Cambodians both before and after Duch’s trial to see him severely punished. In 2009, Phuong Pham and others published a survey of attitudes among Cambodians toward the ECCC.<sup>236</sup> 87% said that the Court would respond to the transgressions of the Khmer Rouge and 67% believed both that the ECCC would be judged fairly and that victims benefit positively by the ECCC’s prosecutions.<sup>237</sup> When prompted about prerequisites to forgiving the leaders of the Khmer Rouge, the most common answer (39%) was the need for punishment.<sup>238</sup> Responses were inconsistent when asked who should be held accountable—55% said that “only the person who directly killed their family, relatives, and friends should be held accountable;”<sup>239</sup> but when prompted about punishing others, 51% said they wanted the Khmer Rouge leaders and officials held accountable.<sup>240</sup>

When asked about their expectations for the Extraordinary Chambers, among those who had some knowledge of the ECCC (61%), 26% believed it would “bring

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234. See Co-Prosecutors’ Final Trial Submission, *supra* note 129, ¶ 454-56.

235. EXTRAORDINARY CHAMBERS FAQ, *supra* note 7.

236. Phuong Pham et al., *So We Will Never Forget: A Population Survey on Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia*, HUMAN RIGHTS CENTER, U. CAL. BERKLEY (Jan. 21, 2009), <http://hrc.berkeley.edu/pdfs/So-We-Will-Never-Forget.pdf>.

237. *Id.* at 3.

238. *Id.* at 29.

239. *Id.*

240. *Id.* at 31; see Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 823 n.25 (2007) (noting that there is also a preference among Western respondents to empirical studies for retributive based justice).



justice,” and 20% believed it would punish those who committed the atrocities.<sup>241</sup> Further, 74% of respondents believed that the ECCC would “bring justice to the Khmer Rouge regime victims and/or their families.”<sup>242</sup> This survey suggests a pre-trial desire for severe punishment among Cambodians—that Duch and future defendants should receive a “just” sentence. The brevity of discussion and length of the sentence reflect a disconnect between Cambodians’ expectations and the sentence imposed by the Trial Chamber.

The disappointment (described above) of many Cambodians in the wake of the judgment reflects this failure. The judgment led commentators to fear that disappointment with the verdict may deflate pressure to prosecute other responsible members of the Khmer Rouge.<sup>243</sup> In fact, the Cambodian Prime Minister has declared that Case 002 will be the last case tried by the ECCC.<sup>244</sup> A prominent national law scholar encapsulated these feelings, writing that if, after all of the time, money, and resources that have been poured into the tribunal, Duch’s guilty verdict is all the tribunal comes away with, then “survivors of the Khmer Rouge may just as well consider justice denied.”<sup>245</sup> For these reasons, the ECCC did not achieve the expectations of Cambodians in its sentencing decision in the Duch case.

In sum, the Court failed to give appropriate consideration to any of the three primary purposes of sentencing in international criminal law. It gave inadequate attention to retributivism—just as it underemphasized deterrence and overemphasized rehabilitation. The Trial Chamber imposed a sentence that did not fit the crime committed and sent the message to Cambodians and the world that mass atrocity may meet relative impunity after all.

### 3. The ECCC’s Missed Opportunity on Expressivism

While the two predominant justifications for punishment in international criminal law are retribution and deterrence (with ICTs not strongly emphasizing rehabilitation), an emerging group of scholars argue for the justification of such

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241. Pham et al., *supra* note 236, at 40.

242. *Id.*

243. Theary Seng, *Khmer Rouge Victim’s Shock Turns to Bitterness After ‘Light’ Duch Sentence*, FRANCE24.COM (July 29, 2010), <http://observers.france24.com/en/content/20100729-cambodia-khmer-rouge-victim-shock-turns-bitterness-after-light-duch-sentence>.

244. Jenny Kelleher, *ECCC Update: Cambodian PM Says Case 002 Will Be Final Case—OTP Files Appeal in Duch – VSS Prepares for Case 002—And More. . . .*, INT’L CRIM. LAW BUREAU (Oct. 28, 2010), <http://www.internationallawbureau.com/blog/?p=1897> (reporting that the discontinuation of the Tribunal is scheduled to come, in spite of international pressure for it to continue its work). *See, e.g.*, Seth Mydans, *In Cambodia, Clinton Advocates Khmer Rouge Trials*, N.Y. TIMES (Nov. 1, 2010), *available at* <http://www.nytimes.com/2010/11/02/world/asia/02cambo.html> (reporting U.S. Secretary of State Hilary Clinton’s opposition to the tribunal ceasing after Case 002).

245. Sophal Ear, *Khmer Rough Tribunal vs. Karmic Justice*, N.Y. TIMES (Mar. 17, 2010), *available at* <http://www.nytimes.com/2010/03/18/opinion/18iht-edear.html>.

punishment on additional grounds, including “expressivism.”<sup>246</sup> Expressivists focus primarily on the meaning that punishment sends to society, rather than focusing on the act itself.<sup>247</sup> The expressive function of law “has special force in international criminal law, [which is] only now entering an era in which ongoing international criminal tribunals reinforce pronouncements of norms . . . .”<sup>248</sup> International tribunals achieve expressive goals by pronouncing a set of societal norms and expectations, while condemning the actions of those who commit atrocities. This allows them to shape attitudes and forge a middle ground between deterring crime through norm promotion and strongly condemning the transgressions of convicted criminals.<sup>249</sup>

The ECCC sent the wrong message to the Cambodian people and the world about how the international community views the crimes of the Khmer Rouge. Both the Chamber’s opinion and the thirty-five year sentence itself send an undesirable message to the international community about Duch’s crimes.

The Trial Chamber had an opportunity in crafting its opinion to send the message that crimes such as Duch’s will not be met with impunity. As demonstrated above, other international tribunals go to great lengths in discussing the underlying bases of their sentences. While domestic sentencing judgments in the United States rarely delve into the murky waters of sentencing principles, the practice has become commonplace among the ICTs. Each has developed a body of sentencing jurisprudence based upon traditional principles of punishment and has

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246. See, e.g., Amann, *supra* note 11 (arguing in favor of an expressive international criminal framework); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2023 (1996) (illustrating expressivism in the context of flag burning); Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 592 (1996) (arguing that Americans have been resistant to alternative sanctions because their expressive value is viewed as inferior to imprisonment); Mirijan Damaska, *What Is the Point of International Criminal Law*, 83 CHI.-KENT L. REV. 329 (2008) (arguing for an expressive framework in ICL). Additionally, some scholars have promoted another emerging theory known as “restorative justice.” Restorative justice has developed as a loosely defined concept, but includes “a variety of different practices, including apologies, restitution, and acknowledgements of harm and injury, as well as . . . other efforts to provide healing and reintegration of offenders into their communities, with or without additional punishment.” Menkel-Meadow, *supra* note 141. The concept centers on the stakeholders in a particular community and their priorities in determining what it is that requires restoration. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 6 (1999). Generally speaking, however, it is the victims, offenders, and communities impacted by mass atrocity that are the subject of restoration. *Id.*

247. Amann, *supra* note 11, at 118.

248. *Id.* at 95.

249. See *id.* at 120 (arguing that expressivism represents an “intermediate” path between deontological retributivism and consequentialist deterrence); see also M. Cherif Bassiouni, *International Criminal Justice in Historical Perspective: The Tension Between States’ Interests and the Pursuit of International Justice*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 131, 131 (Antonio Cassese ed., 2009) (arguing that an “increased commonality of norms, procedures and processes in the world’s legal systems . . . [reflect] the shared values these represent”). But see, e.g., Mark A. Drumbl, *Toward a Criminology of International Crime*, 19 OHIO ST. J. ON DISP. RESOL. 263, 276 (2003) (“[T]aking local community standards into account pertains to each of the deontological, retributivist, expressive, and consequential goals of punishment.”).

repeatedly referenced these principles in their judgments. These extrapolations on criminological theory do more than illuminate a confusing body of the law—they also send the message that mass atrocity cannot and will not be tolerated by the global community. The brevity of the ECCC’s discussion of relevant sentencing principles left the judgment not only devoid of meaning for the victims, the people of Cambodia, and even Duch himself—it failed to capitalize on sending a message about Duch’s crimes to the international community. As Co-Prosecutor White argued at trial, the ECCC had the opportunity to “[send] a message to others who may be tempted to commit crimes like this against their fellow human beings . . . [that] S-21 should never have happened and it should never happen again.”<sup>250</sup> Instead of clearly sending this message, the ECCC cloaked its sentence only sparingly in the language of sentencing principles and imposed a term of imprisonment, which itself may be interpreted as expressing the wrong message about mass atrocity.

In individualizing guilt and crafting a sentence, the Chamber found that thirty-five years in prison was proportional to the torture and murder of more than 12,000 people at S-21. If, as at least one scholar has argued, imprisonment is a superior means of expressive punishment,<sup>251</sup> then a thirty-five year sentence sends a message that mass atrocity may be met with relative impunity, even when an offender is selected for prosecution. By comparison, in the United States, the murder of one individual may warrant the imposition of a life sentence or the death penalty.<sup>252</sup> Whether the death penalty is an appropriate sanction in ICL (or at all),<sup>253</sup> not sanctioning Duch’s atrocities with at least a term of life imprisonment represents a missed opportunity for the ECCC to more fully express the international community’s moral condemnation of Duch’s crimes. Like the manner in which a sentencing judgment is written, the sentence itself represents an expressive opportunity—an opportunity the Trial Chamber simply missed.<sup>254</sup>

### ***B. The Sentencing Judgment Threatens the Legitimacy of the ECCC***

Taken together, the Trial Chamber’s inadequacy in justifying its opinion and

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250. Transcript of Trial Proceedings from November 24, 2012, *supra* note 175, ¶ 62.

251. Kahan, *supra* note 246, at 652.

252. See, e.g., PA. CONS. STAT. § 2502 (2004) (stipulating that murder of the first degree is an offense punishable by death or life imprisonment).

253. For an illustration of this debate, compare Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide*, 99 AM. J. INT’L L. 747 (2005) (presenting arguments for and against applying the death penalty, based on theories of deterrence and retributivism), with Sharam Dana, *Criminal Law: Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing*, 99 J. CRIM. L. & CRIMINOLOGY 857 (2009) (describing generally the tension between states that approve of the death penalty in international criminal law sentencing and those that see even lesser forms of punishment as cruel and inhumane).

254. For an argument made before the commencement of the trial arguing that Duch’s crimes warranted a sentence of near life imprisonment, see generally Jackson, *supra* note 8, at 16 (arguing that Duch should be sentenced to a term of close to life imprisonment).

the leniency of the sentence imposed upon Duch strike a blow to the sociological legitimacy of the ECCC as an institution of international criminal justice. Established to finally bring the remaining leaders of the Khmer Rouge to justice, it promised justice to the Cambodian people.<sup>255</sup> Cambodians believed that Duch's crimes should be punished.<sup>256</sup> The ECCC's Co-Prosecutors argued that it was intended to send the message that crimes like those committed by the Khmer Rouge would not be met with impunity. Instead the ECCC, an institution that is likely to close after just two full trials, sent just the opposite message to Cambodians and to the world.

### **1. Popular Reactions to the Duch Sentence Among Cambodians Were Largely Negative**

As discussed above, Cambodians wanted to see Duch's crimes punished by the ECCC.<sup>257</sup> 74% of Cambodians with knowledge of the tribunal believed that it would bring justice to the victims of the Khmer Rouge,<sup>258</sup> and most wanted the Khmer Rouge leaders held accountable.<sup>259</sup> On balance, there was a clear desire for retributive justice among the Cambodian people.<sup>260</sup>

However, in spite of these widely held pre-trial aspirations, reactions among Cambodians to the Duch sentence were largely negative. One survivor, Chum Mey, told the *New York Times* that Cambodians were being victimized again by this judgment and that while Duch's detention "is comfortable, with air-conditioning, food three times a day, fans and everything . . . . I sat on the floor with filth and excrement all around."<sup>261</sup> Another respondent expressed dissatisfaction with the length of Duch's sentence: "[p]eople lost their relatives—their wives, their husbands, their sons and daughters—and now they won't be able to spend any time with any of them because they are dead now . . . . So why should he be able to get out in 19 years and spend time with his grandchildren?"<sup>262</sup> Another Cambodian woman was outraged by what she saw as the disproportionate amount of time Duch would serve relative to the crimes committed: "[c]rimes against humanity has been reduced to 11 hours per life. Besides shock, what else can one feel at the moment?"<sup>263</sup> While some Cambodians believed the tribunal achieved adequate justice, many more saw the sentence as far too lenient.<sup>264</sup>

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255. EXTRAORDINARY CHAMBERS FAQ, *supra* note 7.

256. Burke-White, *Preferences*, *supra* note 147, at 106.

257. *See supra* Part III.A.2.

258. *Id.*

259. Pham et al., *supra* note 236, at 31.

260. Burke-White, *Preferences*, *supra* note 147, at 106.

261. Seth Mydans, *Anger in Cambodia over Khmer Rouge Sentence*, N.Y. TIMES, July 26, 2010, <http://www.nytimes.com/2010/07/27/world/asia/27cambodia.html>.

262. *Id.*

263. Guy De Launey, *Tears and Disbelief at Duch Verdict*, BBC NEWS, July 26, 2010, <http://www.bbc.co.uk/news/world-asia-pacific-10763409>.

264. *See Scarred, not Healed: The First War Crimes Conviction in Cambodia Was Long Overdue*, THE ECONOMIST, July 29, 2010, <http://www.economist.com/node/16703385>; *Khmer Rouge Jailer's Sentence Too Light*, SYDNEY MORNING HERALD, July 28, 2010,

Both the sentence and the Court's expression of the sentence in its opinion represent threats to the legitimacy of the ECCC. International tribunals such as the ECCC enhance their legitimacy by meeting the expectations of the communities (both local and global) that they serve.<sup>265</sup> The global community largely shares Cambodians' preferences for punishing the Khmer Rouge and sending the message that impunity for the commission of mass atrocities is unacceptable.<sup>266</sup> However, as the foregoing discussion makes clear, the Chamber failed to meet these expectations in Case 001. The Chamber's opinion should have exhibited more clarity in explaining the imposition of the sentence. By failing to do this and instead imposing a sentence incommensurate with the gravity of Duch's crimes, the Court has failed to achieve its objectives and threatened its own legitimacy as an international criminal tribunal.

## V. CONCLUSION

The Duch case, the first before the Extraordinary Chambers, presented the tribunal with a prime opportunity to establish its sociological legitimacy by loudly and clearly expressing the message that Cambodians had wanted sent to the world for three decades—that the crimes of the Khmer Rouge could not and would not go unpunished. Instead, the Court delivered a sentencing judgment lacking principled meaning to the Cambodian people and the world. By failing to adequately justify imposing a thirty-five year sentence, which is widely perceived as not befitting of the crimes Duch committed, the Trial Chamber sent the message that mass atrocity, even when prosecuted, may nevertheless be met by the courts with a level of responsibility closer to impunity than proportionality.

It is important that the participants at the ECCC, as well as international practitioners more generally, consider the messaging function of the ICTs' sentencing judgments. The message sent by these judgments carries great

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<http://news.smh.com.au/breaking-news-world/khmer-rouge-jailers-sentence-too-light-20100728-10ukl.html>; Elich Follath, *Was Verdict in First Khmer Rouge Case Too Lenient*, DER SPIEGEL, July 27, 2010, <http://www.spiegel.de/international/world/0,1518,708641,00.html>; Jonathan Gurwitz, *19 Years for Killing 16,000*, PHILA. INQUIRER, Aug. 10, 2010, [http://articles.philly.com/2010-08-10/news/24973580\\_1\\_comrade-duch-kaing-guek-eav-united-nations-backed-tribunal](http://articles.philly.com/2010-08-10/news/24973580_1_comrade-duch-kaing-guek-eav-united-nations-backed-tribunal). Of course, it is impossible to say with empirical certainty that a majority of Cambodians saw the sentence as far too lenient.

265. Damaska, *supra* note 246, at 20. For a discussion of the ways in which selection decisions may also enhance legitimacy, see generally deGuzman, *supra* note 72 (describing the concept of gravity as it applies to the selection of cases before the International Criminal Court).

266. See, e.g., Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT'L L. 79, 108 (2009) (arguing that there is a need to address long-ago atrocities in Cambodia "in order to prevent festering and promote deep-rooted reconciliation"); Neha Jain, *Between the Scylla and Charybdis of Prosecution and Reconciliation: The Khmer Rouge Trials and the Promise of International Criminal Justice*, 20 DUKE J. COMP. & INT'L L. 247, 280-81 (2010) (describing the impact of selection decisions on "global governance and deterrence"). Jain also believes it is ironic that the Co-Prosecutors argument that it now desires non-prosecution of additional defendants as the least detrimental means toward reconciliation, despite the negative impact that would have in international prosecutions. *Id.* at 287.

significance, particularly in light of their ability to enhance the legitimacy of the ICTs themselves. Case 002 involves “bigger fish,” with higher stakes, and it is therefore imperative that the Chamber more fully express the rationale behind its sentences in order to enhance its legitimacy and preserve its legacy as an instrument of international criminal justice.