

The Extraordinary Chambers of the Courts of Cambodia: A Trial of Errors

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On April 17, 1975, the Khmer Rouge entered the cities of Cambodia and forced people to abandon their homes and businesses to live in cooperatives in the countryside.¹ Three years later, Vietnamese forces invaded and KR leader Pol Pot fled the country; by this time, over 1.7 million people had been executed or died from torture, starvation, illness, or exhaustion.² The Extraordinary Chambers of the Courts of Cambodia (ECCC) was formed in 2003 by the Royal Cambodian Government in conjunction with the United Nations to bring the perpetrators to justice.³ This paper will focus on the ECCC's first case, against Comrade Duch, as illustrative of the Court's problems with corruption, achieving international legitimacy, and failing to convict criminals for genocide.

I. Background History of the Khmer Rouge & Cambodia

To fully comprehend the atrocities of the Cambodian genocide, it is important to understand the context in which the Khmer Rouge formed and came to power. As a former colony of France (part of what was called "French Indo-China") and as a country formerly occupied by Japan during World War II, Cambodia has gone through several governmental changes that influenced the Khmer Rouge ideology. The Indochinese Communist Party (ICP) was formed in Vietnam in 1930, and its influence spread to other East Asian nations.⁴ In Cambodia, the ICP opposed the French government, and the French jailed many of its members.⁵ When the Japanese came to power in March 1945, they released some of the ICP guerillas from jail, mostly due to the Japanese superior

¹ David Chandler, *The Khmer Rouge in a Cold War Context*, 2 (2011), (unpublished speech, transcript at: www.cambodiatribunal.org/sites/default/.../genocide_education.pdf).

² *Id.*

³ About ECCC, Extraordinary Chambers in the Courts of Cambodia (ECCC) (November 26, 2012), <http://www.eccc.gov.kh/en/about-eccc>.

⁴ Chandler, *supra* note 1, at 2.

⁵ *Id.* 3.

power and lack of fear of a small party's capability for insurgency, and many fled to Vietnam to plan their armed struggle.⁶ The ICP can be seen as a precursor to the Khmer Rouge due to their anti-western, nationalistic ideology, which called for a return to a traditional agrarian lifestyle.⁷

After the Japanese occupiers surrendered at the end of WWII, the French returned to Cambodia and Vietnam (as both were previously part of "French Indo-China"), and the ICP were prepared for negotiations with the French to protect Vietnam from colonization. Unfortunately, Cambodia no longer had a strong faction of the ICP present to negotiate its freedom, nor was 23-year-old King Sihanouk in a position to declare independence.⁸ Some historians credit the ICP for the Khmer Rouge coming to power, as the ICP's armed push for independence in Vietnam was what influenced the formation of the Khmer Rouge and the idea of armed revolution as a necessity for Cambodian independence. The ICP's resistance, mainly in its successes in Vietnam, was likely inspiring to government resisters in Cambodia as it created a sense of a unified goal of free, "traditional" societies, and showed some precedent in the means of achieving this freedom (through the ICP's armed resistance). As well, due to the strength of the ICP in Vietnam, the French were more willing to negotiate with Cambodians who desired to form political parties. The French feared that if they did not allow some modicum of political freedom in Cambodia, that armed rebellion would spread from Vietnam to

⁶ *Id.* 4.

⁷ Chandler, *supra* note 1.

⁸ *Id.* 4.

Cambodia. Elections in 1946 and 1947 allowed the Cambodians (still under French control) to form a National Assembly and to write the country's first constitution.⁹

In 1951, simultaneously with the rise of communism in many parts of East Asia, the Kampuchean People's Revolutionary Party (KPRP) formed. This party was led by Vietnamese and Khmer people living in Vietnam. The KPRP characterized the conflict between the French and Cambodians as an "Indo-Chinese" struggle, which created a sense of unity with the communist revolutions happening in other surrounding nations.¹⁰ During the rise of the KPRP, the French-controlled government in Cambodia allowed several students to study abroad in France, where learning about the communist revolutions in Vietnam and China bolstered their desire for an independent Cambodia.¹¹

The Khmer Rouge originally formed in Paris during the 1950s and 60s as the Khmer Students Association (KSA). Their ideology was heavily influenced by the political upheaval in China, Korea, and Vietnam at the time. Similar political parties were formed in Cambodia during the rise of the Paris group, though they were considerably more radical. The KSA was influenced by Marxist and Leninist ideas and used the Eastern European communist movement as a model for their own radical visions for Cambodia.¹²

The students met with Khmer people fighting along side the Viet Minh and were inspired to create a party organization that could instigate armed struggle within Cambodia. Their aspirations for a revolution within Cambodia were developed at this

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* 6.

¹² Global Security, *1949-1956 The Paris Student Group*, available at <http://www.globalsecurity.org/military/world/cambodia/history-rouge-2.htm> (last visited November 11, 2012).

time, and they decided to transform the KSA into a platform for political involvement in the Cambodian government.¹³ In 1953, the French government forcibly disbanded the KSA, though some members reformed as the Khmer Students Union.¹⁴ Hou Youn and Khieu Samphan, the founding members, wrote doctoral dissertations that laid out many of the policies adopted by the Khmer Rouge during the mass killing. Their ideology rested on the idealization of a peasant workforce and the rejection of capitalism, industrialization, and urbanization¹⁵

While General Lon Nol held power in Cambodia in 1970, Sihanouk's government-in-exile joined forces with the developing Khmer Rouge.¹⁶ Lon Nol was pursuing a policy of neutrality during his control of Cambodia, though he was staunchly opposed to the number of Vietnamese forces that operated in Cambodia without Sihanouk's opposition.¹⁷ Under Sihanouk, Khmer Rouge member Khieu Samphan became Deputy Prime Minister and Minister of Defense of the government-in-exile. Samphan was able to return to Cambodia with other members of the government-in-exile whom also held KR allegiance.¹⁸ The Khmer Rouge essentially absorbed the government-in-exile, and they were able to stage a coup against Nol in 1975.¹⁹ Cambodian citizens were told that Sihanouk would return to power after the coup, instead, the KR began their revolution by purging all citizens from the major cities of Cambodia.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* (This ideology is known as "dependency theory", due to the belief that Cambodia was becoming too dependent on the "developed world".)

¹⁶ Rosemary H. T. O'Kane, *Cambodia in the Zero Years: Rudimentary Totalitarianism*, 14 *Third World Quarterly* 735, 737 (1993).

¹⁷ See generally: O'Kane, *supra* note 16.

¹⁸ *Id.*

¹⁹ *Id.*

During the United States military presence in Vietnam, King Sihanouk attempted to remain neutral within Cambodia. After Sihanouk was forced to flee from General Lon Nol's coup in 1970, the US unilaterally entered Cambodia and used its territory for military operations.²⁰ Assuming that Cambodia housed a large number of Vietnamese rebels, US President Richard Nixon ordered bombing campaigns²¹ that resulted in the death of over 100,000 peasants in the Cambodian countryside by 1973.²² The campaign helped the Khmer Rouge garner support from Cambodian peasants through use of propaganda stating, "The killing birds came from Phnom Penh".²³ Many Cambodian peasants joined the Khmer guerillas, believing that the elite Cambodian city dwellers had allowed the US to bomb them. After US forces left Cambodia, the KR prepared their plan for revolution against Nol's government.

II. "Year Zero" & the Khmer Rouge in Power

On April 17, 1975, the Khmer Rouge entered the major cities of Cambodia and forced the population into the countryside. Pol Pot headed the new regime, under which Cambodia was renamed "Democratic Kampuchea". Pot's reforms resulted in the expulsion of 150,000 ethnic Vietnamese citizens from Cambodia, with the remaining 10,000 ethnic Vietnamese being killed by KR soldiers in the next three years.²⁴ His forces also targeted other minority populations, including the Chinese and Muslim groups who

²⁰ Ben Kiernan, *The American Bombardment of Kampuchea, 1969-1973*, 1 Vietnam Generation 4, 16 (1989).

²¹ *Id.* (The bombing campaign was named "Operation Menu", 1969-1973.)

²² *Id.*

²³ *Id.*

²⁴ *Id.*

had lived in Cambodia for several decades.²⁵ Cambodia is made up of a number of ethnic groups: the main group, the Khmer Loeu, is “indigenous” to Cambodia, and there are at least 24 small “tribes” of Khmer Loeu.²⁶ The Khmer Chinese are the second largest group, and then the Khmer Cham (ethnic Muslims) and the ethnic Vietnamese are smaller, more rural groups in Cambodia.²⁷ An estimated 1.7 million people died during the Cambodian genocide,²⁸ though that number is conservative, as more evidence of unreported deaths has been discovered in recent years.²⁹

The Khmer regime’s ideology was based on the belief that Cambodia was at its best as an agrarian society. Therefore, the regime sought a return to an agrarian, peasant lifestyle and rejected any kind of “western” or “modern” infrastructure. The heads of the Khmer regime were called “Angkar Loeu” or the “Standing Committee”³⁰ and the KR “government” was declared to be communist and modeled after the “Stalinist-style” collective labor projects.³¹ The Khmer leadership was cloaked in secrecy, and so the city purges were also tools for expelling any journalists from Cambodia and to also cut off any lines of communication to the outside world.³² After killing many “foreigners”, the “intellectual elite”, and anyone in resistance, the Khmer guerillas forced the remaining

²⁵ *Id.* 17.

²⁶ Helen Fein, *Revolutionary and Antirevolutionary Genocides: A Comparison of State Murders in Democratic Kampuchea, 1975 to 1979, and in Indonesia, 1965 to 1966*, 35 *Comparative Studies in Society and History* 808, 796 (1993).

²⁷ Jennifer S. Berman, *No Place Like Home: Anti-Vietnamese Discrimination and Nationality in Cambodia*, 84 *Cal. L. Rev.* 817, n. 28 (1996).; *Cambodia: Khmer Rouge genocide charge marks milestone for minorities*, Integrated Regional Information Networks (May 24, 2010), <http://www.unhcr.org/refworld/country.COI.IRIN.,KHM.,4c0367cb1e.0.html>.

²⁸ An extended discussion of the Khmer Rouge regime as “genocide” will be featured later in this paper.

²⁹ *Id.*

³⁰ Ben Kiernan, *External and Indigenous Sources of Khmer Rouge Ideology, The Third Indochina War: Conflict Between China, Vietnam and Cambodia, 1972-79* 189 (2006).

³¹ Scott Luftglass, *Crossroads in Cambodia: The United Nation’s Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge*, 90 *Va. L. Rev.* 893, 899 (2004).

³² *Id.*

people into camps called “cooperatives” where they lived in tents and worked on collectivized farms.³³

Beginning with the city purges, the regime abolished any form of capitalism, including the use of a monetary system. A central pillar of the KR ideology was to disassemble all pre-existing “economic, social, and cultural institutions” in order to create a collectivized agrarian workforce.³⁴ As an example, their abolition of the traditional family unit was supported in favor of “gender equality”, where loyalty to “Angkar” was more important than family loyalty or traditional family structures (between husband and wife, or parent and child). In reality, this “gender equality” was a means to encourage families to turn their relatives in for any kind of “bad” behavior.³⁵ Similarly, all children were “children of Angkar” and families worked separate hours and ate separately from their family members to avoid any camaraderie.³⁶

The KR deconstruction of socioeconomic institutions also focused on dismantling religion in order to uphold the state as the supreme authority. The KR closed all religious institutions and specifically targeted Buddhism, essentially the “official religion” of Cambodia.³⁷ From what is known, there were over 60,000 Buddhist monks living in Cambodia prior to 1975, and Buddhism was the predominant religion in Cambodia.³⁸

After the KR lost power, fewer than 1,000 monks remained in Cambodia; a majority had

³³ Justus M. van der Kroef, *Cambodia: From “Democratic Kampuchea” to “People’s Republic”*, 19 Asian Survey 731, 734 (1979).

³⁴ Luftglass, *supra* note 31, at 900.

³⁵ Kiernan, *supra* note 30, at 195.

³⁶ *Id.* 194.

³⁷ See Generally: Ian Harris, *Sangha Groupings in Cambodia*, 18 Buddhist Studies Review 65 (2001).

³⁸ Terrence Duffy, *Toward a Culture of Human Rights in Cambodia*, 16 Human Rights Quarterly 82, 85 (1994).

been killed during the city purges or exiled immediately after.³⁹ Though the KR armed forces were relatively small (fewer than 600,000 men and teenage boys)⁴⁰, their planned coup against Lon Nol was successful largely because of the swift dismantling of all socioeconomic and government institutions. By destroying these institutions and quickly moving people into the countryside, they were able to avoid the possibility of an internal threat to their power.

Coupled with the dismantling of all socioeconomic and traditional government institutions, the KR was able to maintain their control by creating an environment of constant suspicion and fear of enemies hiding within the regime and among the Cambodian population. After the executions of former government officials, which happened early into the regime, the KR created networks of spies to monitor activity.⁴¹ These groups were largely composed of children, and thus by dismantling the family unit, children were encouraged to report the activity of their closest family members to KR officials. This was key to keeping order in the communes, and children were taught in special schools that their loyalty to Angkar was more important than their relationship with their parents or relatives. When any news of trouble came to the KR officials in a commune, they would assemble all of the workers and have them discuss their problems in small groups.⁴² By doing this, the KR would root out any dissidents and send them off for “re-education”, which usually meant torture and execution.

³⁹ *Id.*

⁴⁰ *Id.* 86.

⁴¹ *Id.* 87.

⁴² *Id.*

III. Comrade Duch & Tuol Sleng: Evidence of Genocide

The regime was carried out with the purpose of purging all people within Cambodia who would not help move the revolution forward. In order to be rid of dissidents and people who were not assets to the revolution, the Khmer leaders ordered systematic and deliberate exile, torture, and murder of Cambodians. This was first seen with the targeting of anyone allied with the prior regime (under Lon Nol), people purged from within the Khmer party, and anyone else considered an immediate threat to the regime.⁴³ Later, people died in mass numbers as a result of starvation and exhaustion from working in the cooperatives with little food, sleep, and medicine. Others were singled out in the cooperatives for their potential for resistance, then taken to interrogation centers and tortured until they made confessions. These people either died during interrogation or were killed in nearby “Killing Fields”.⁴⁴

Though more survivors have chosen to speak out about their experiences in recent years, the true nature of the mass killing is more apparent in the Tuol Sleng prison than anywhere else. The Tuol Sleng prison, also known as S-21, was run by “Comrade Duch” (Khang Khek Leu)⁴⁵ in the later 1970s.⁴⁶ The Khmer regime called Tuol Sleng a “re-education camp”, and it was run as a center for interrogation and torture of suspected

⁴³ Luftglass, *supra* note 31, at 900.

⁴⁴ *Id.*

⁴⁵ Leu’s name is also Anglicized as Kaing Kek Iev or Kaing Guek Eav. In this paper he will be referred to by his “nom de guerre”, Comrade Duch (or Duch). The details of Duch’s administration of Tuol Sleng illustrate why his case at the ECCC (discussed at length later) was expected to be an easy and important victory for the Court.

⁴⁶ Boreth Ly, *Devastated Vision(s): The Khmer Rouge Scopic Regime in Cambodia*, 62 *Art Journal* 66, 69 (2003).

threats to the revolution.⁴⁷ Out of approximately 16,000 to 20,000 people who entered Tuol Sleng, only seven people survived the torture they experienced there.⁴⁸

For the most part, those who entered the prison were executed when they were no longer useful.⁴⁹ Interrogation techniques included electric shock, removal of finger and toenails, water torture, cigarette burns, and suffocation.⁵⁰ Like the prison camp officers of the Holocaust, the interrogators at Tuol Sleng maintained meticulous records, and as a result the most evidence about the genocide has come from the prison files.⁵¹ The interrogators at Tuol Sleng would take a picture of each prisoner before beginning a torture session to extract a “confession” from the victim.⁵² It was rare for prisoners to be executed before they confessed to some kind of ideological crime and named any co-conspirators, whether the confession was true or not.⁵³ Along with the pictures, the staff at Tuol Sleng left behind “Interrogator’s Notes” for each prisoner, which gave the details of the prisoner’s confession, the minutia of what happened during torture, and details about any “problems” that occurred. In many of the notes, interrogators complained about the “problem” of prisoners dying from torture before a confession could be extracted.⁵⁴

The prison has since been transformed into a museum documenting the mass killings. When the Vietnamese military entered Tuol Sleng after ousting the Khmer soldiers, they found the corpses of victims chained to beds and many other bodies in mass

⁴⁷ *Id.*

⁴⁸ Luftglass, *supra* note 31, at 901.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Duffy, *supra* note 38, at 87.

⁵³ *Id.*

⁵⁴ *Id.*

graves nearby at the Choeung Ek “Killing Field”.⁵⁵ Much of the data collected about the mass killing was found at Tuol Sleng due to the haste with which the staff fled.

IV. The End of the Khmer Rouge Regime & the Political Aftermath

In the winter of 1978, Vietnamese forces invaded Cambodia and took over Phnom Penh on January 7, 1979. The Vietnamese were brought in by defecting members of the Khmer regime. This group, called the Cambodian National United Front for National Socialism, was composed of 100,000 Vietnamese troops and 20,000 Cambodian refugees who had fled at the beginning of the KR regime.⁵⁶

Historically, despite some mutual support between Cambodian and Vietnamese socialists fighting against the United States, tensions have always been high between Vietnam and Cambodia due to disputes over Cambodia’s borders.⁵⁷ As well, in order to topple Sihanouk in 1970, Lon Nol gained some popular support through use of anti-Vietnamese protests, arguing that Sihanouk had always supported the Viet Cong and helped them set up camps within Cambodia’s borders.⁵⁸ When the Vietnamese forces were finally asked to help topple the Khmer Rouge, they did so gladly as border disputes had escalated and the Khmer Rouge were starting to be seen as a threat to Vietnam’s borders.⁵⁹

⁵⁵ Ly, *supra* note 46, at 69.

⁵⁶ O’Kane, *supra* note 16, at 736.

⁵⁷ Joseph R. Pouvatchy, *Cambodian-Vietnamese Relations*, 26 *Asian Survey* 440, 444 (1986).

⁵⁸ *Id.*, 445.

⁵⁹ *Id.*, 448.

The Vietnamese created a military government in Cambodia (the People's Revolutionary Council) and took control of the country.⁶⁰ After their takeover, the Khmer regime was forced out of Cambodia though it had continued support from China and parts of Thailand.⁶¹ The Khmer guerillas continued fighting near the borders of Cambodia until Pol Pot relinquished his leadership in 1985 and their numbers dwindled.⁶² By 1993 the fighting had almost died down completely as Cambodia held its first democratic elections.⁶³

Cambodia created the People's Revolutionary Tribunal and tried Pol Pot and Ieng Sary (Standing Committee Member and Deputy Prime Minister of Foreign Affairs) in absentia in 1979. Both Sary and Pot were convicted for the commission of genocide and sentenced to death.⁶⁴ These trials are generally not recognized as the leaders were tried in absentia (which violates the International Covenant on Civil and Political Rights)⁶⁵, and their definition of genocide did not comport with the Convention on the Prevention and Punishment of the Crime of Genocide which Cambodia had been party to since 1951.⁶⁶ As well, as both Ieng Sary and Pol Pot still controlled the KR guerillas while in exile, the Tribunal did not effectively punish either for their crimes.

⁶⁰ Adulgaffar Peang-Meth, *Understanding the Khmer: Sociological-Cultural Observations*, 31 Asian Survey 442, 444 (1991).

⁶¹ Luftglass, *supra* note 31, at 902.

⁶² Michael Eiland, *Cambodia in 1985: From Stalemate to Ambiguity*, 26 Asian Survey 118, 119 (1986); *Id.* 121.

⁶³ Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 Am. J. Int. L. 1, 7 (1993).

⁶⁴ *Id.*

⁶⁵ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.; ICCPR, art. 9, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

⁶⁶ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277; CPPCG, art. 2, 78 U.N.T.S. 277.; *Id.* 903.

During the regime, the Khmer regime had maintained a seat at the General Assembly of the United Nations with virtually no opposition from any western nation.⁶⁷ The Khmer leaders maintained that seat as “Democratic Kampuchea” (or PRK) even after the Vietnamese had forced them out of Cambodia, and continued to do so until 1982.⁶⁸ The seat was even held until 1993, albeit under the name “Coalition Government of Democratic Kampuchea”. During the time the KR held their seat in the UN after the mass killing, not a single member state of the UN invoked the Genocide Convention or attempted to extradite any KR officials to be tried for their crimes.⁶⁹ Through the early 1980s, KR guerillas continued to hold their position in the countryside and had some success fighting the Vietnamese forces stationed in Cambodia.

Despite visits from the UN Food and Agriculture team and other UN organs, the UN continued to allow the KR to maintain their seat in the General Assembly.⁷⁰ The UN General Assembly voted on withdrawing all foreign troops (but continuing to give aid) at the suggestion of the Association of Southeast Asian Nations (ASEAN), and ASEAN also proposed that all political parties in Cambodia, including the Coalition Government of Democratic Kampuchea, should be able to participate in Cambodian elections.⁷¹ By 1984, no resistance base remained on the Cambodian border, but some KR guerillas remained in hiding in Cambodia.⁷² Under the PRK, the National Assembly elected former

⁶⁷ *Id.* 904.

⁶⁸ Colin Warbrick, *Kampuchea: Representation and Recognition*, 30 *International and Comparative Law Quarterly* 234, 237 (1981).; Justus M. van der Kroef, *Kampuchea: The Diplomatic Labyrinth*, 22 *Asian Survey* 1009, 1018 (1982).

⁶⁹ Luftglass, *supra* note 31, at 904.

⁷⁰ Michael Eiland, *Kampuchea in 1984: Yet Further from Peace*, 25 *Asian Survey* 106, 109 (1985).

⁷¹ *Id.* 110.

⁷² *Id.* 119.

KR member Hun Sen as Prime Minister.⁷³ This period during the 1980s was characterized by large-scale UN involvement on the ground in Cambodia as well as politically in its attempts to help broker peace (through ASEAN's proposals on Vietnamese troop withdrawal and the meeting of Cambodian political parties).⁷⁴

In 1991, Cambodia signed the Paris Peace Accords, which created obligations for some involvement of international actors. Under the Accords, human rights, tribunals, and justice were not directly addressed in order to give Cambodia more room for domestic control over adjudicating the crimes. Nonetheless, Article 15 of the Accords noted that Cambodia has a duty to protect human rights and to institute measures that would ensure nothing like the genocide would ever happen again (although it did not say "genocide", specifically).⁷⁵ The international community⁷⁶, as well, had obligations to "look in" on Cambodia and make sure the same atrocities would not reoccur.⁷⁷

By 1996, most of the remaining KR guerillas in Cambodia defected or assimilated back into "normal" Cambodian society. In 1997, Hun Sen forced a military coup against the provisional government the Vietnamese had left in charge in 1994.⁷⁸ Despite the violence that occurred during the military coup, Hun Sen's regime refocused Cambodian politics on addressing the mass killings that occurred under the KR. At this time, the Cambodian government sent a letter to the UN Secretary General regarding the need to form some kind of tribunal to deal with the mass killing. The UN Group of Experts sent a

⁷³ Hun Sen is still Prime Minister of Cambodia today.; Eiland, *supra* note 70, at 121.

⁷⁴ *Id.* 124.

⁷⁵ Luftglass, *supra* note 31, at 905.; Paris Peace Accords, Annex 1 UNTAC Mandate, sec. V, art. 15, Oct. 23, 1991.

⁷⁶ Specifically, the UN Commission on Human Rights, though other actors were similarly obligated.

⁷⁷ Luftglass, *supra* note 31, at 905.

⁷⁸ *Id.* 907.

delegation to Cambodia for a period of a year (1998-1999) to assemble a report on the feasibility of the crimes being able to be addressed in some kind of court.⁷⁹ The Experts concluded that there was enough evidence to address the atrocities and noted that a tribunal must be set up quickly to avoid the loss of evidence.⁸⁰ Unfortunately, as it took several years to form a tribunal, many KR leaders died or went into hiding and were not found. Significantly, Pol Pot, the figurehead of the Khmer Rouge, died in 1998.⁸¹

V. Formation & Structure of the Extraordinary Chambers in the Courts of Cambodia

After the Vietnamese forces toppled the Khmer Rouge, some Cambodian villagers went about lynching, burning alive, or executing by sword remaining party members.⁸² Nonetheless, many KR members were able to go about living their lives in Cambodia without fear. There was a strong national desire for some kind of “retribution” for the crimes committed. Creating any kind of legal body required the Cambodian government to build from the ground up as the Khmer Rouge effectively destroyed all governmental entities.

Under the “Law on the Establishment of the Extraordinary Chambers” (LEEC)⁸³, Article I, the declared purpose of the Extraordinary Chambers in the Courts of Cambodia (ECCC) is “to bring to trial the senior leaders... responsible for the crimes and serious

⁷⁹ *Id.* 908.

⁸⁰ *Id.*

⁸¹ Sorpong Peou, *Cambodia in 1998: From Despair to Hope?*, 39 *Asian Survey* 20, 20 (1998).

⁸² Duncan McCargo, *Politics by other means? The virtual trials of the Khmer Rouge tribunal*, 817 *International Affairs* 613, 614 (2011).

⁸³ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001) (Cambodia), Council of Jurists and the Secretariat of the Task Force, as amended by NS/RKM/1004/006 (Oct. 27, 2004) (unofficial translation).

violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”⁸⁴ The ECCC, a “hybrid court” using international and Cambodian law, was officially created in 2003 by the United Nations and the Royal Cambodian government. Under the LEEC, suspects are tried individually if they have instigated, ordered, aided and abetted, or committed a crime during requisite period of Khmer rule.⁸⁵ Therefore, even if someone solely ordered a crime or did so under the orders of a superior officer, they are still held individually responsible.

The ECCC is composed of multiple chambers and outlying organs. The Trial Chamber is composed of five judges, including three Cambodians and two foreign judges. One Cambodian judge is named the “president” who has the duty to appoint the prosecution.⁸⁶ The Supreme Court Chamber is both an appellate chamber and a court of final instance. This Chamber is composed of seven judges, four of whom are Cambodian, and also has one Cambodian judge act as “president”.⁸⁷ Both chambers have Co-Prosecutors and Co-Defense Attorneys (one Cambodian, one foreign on each side) whom present the case to be decided.⁸⁸ The Cambodian Supreme Council of the Magistracy chooses Cambodian judges from within the Cambodian government, and the foreign judges are chosen by the Magistracy from a list prepared by the United Nations.⁸⁹

A case comes before the Chambers after joint investigation by two Co-Investigating Judges whom research any allegations brought to their attention and present

⁸⁴ LEEC, ch. I, art. I, Council of Jurists and the Secretariat of the Task Force, as amended by NS/RKM/1004/006 (Oct. 27, 2004) (unofficial translation).

⁸⁵ *Id.* ch. VI, art. XXIX.

⁸⁶ *Supra* note 84, ch. III, art. IX.

⁸⁷ *Id.*

⁸⁸ *Id.*; *supra* note 67, at 614.

⁸⁹ *Supra* note 84, ch. IV, art. XI.

a statement of facts before the Pre-Trial Chamber.⁹⁰ The Pre-Trial Chamber is also composed of five judges (three Cambodian and two foreign), and their decision to try a suspect cannot be appealed from and must be unanimous.⁹¹ In order to come to a decision, the judges of both the Trial and Supreme Court Chambers attempt to reach unanimity, but if they cannot, the Trial Chamber must have an affirmative vote of at least four judges and the Supreme Court must have the vote of at least five judges.⁹²

There are other organs of the ECCC that function outside the courtroom. The Defense Support Section (DSS) and the Victims Support Section (VSS) play a large role in the public's perception and participation in the Court. The DSS helps indicted persons in custody find and maintain effective legal representation by providing a list of attorneys, giving legal and administrative support to those attorneys, and paying for legal fees for those who cannot afford them.⁹³ The DSS also cooperates with non-governmental organizations and is generally responsible for communicating with the media and educating civilians about international criminal law.⁹⁴ The VSS handles victims of the regime who want to act as complainants or civil parties to a case.⁹⁵ The VSS receives Victims Information Forms and transmits them to the relevant office for further consideration by potential legal representatives.⁹⁶ The VSS has also offered physical protection as well as psychological counseling for victims who may need to be

⁹⁰ *Id.* ch VII, art. XXIII.

⁹¹ *Id.*

⁹² *Supra* note 83, ch. V, art. XIV.

⁹³ Phuong Pham, *After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia*, UC Berkeley Human Rights Center, 1, 10 (2011).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

protected as a complainant or civil party, or who have continuing psychological trauma or illness attributed to the mass killing.

V. Foundations of Law in the ECCC

There are several different foundations of law used by the ECCC. Under the “Law on the Establishment of the Extraordinary Chambers”, both Cambodian domestic law and international law (customary law and law Cambodia is a signatory party to) are recognized. The 1956 Cambodian Penal Code is used to prosecute homicide, torture, and religious persecution under the ECCC’s jurisdiction,⁹⁷ and the normal statute of limitations has been extended an additional 30 years for any of those crimes occurring between April 17, 1975 and January 6, 1979.⁹⁸ Under the Code, life imprisonment is the highest form of punishment allowed.⁹⁹

In exercising jurisdiction, the Chambers also follow the 1966 International Covenant on Civil and Political Rights (ICCPR).¹⁰⁰ Accused persons are guaranteed certain rights under Article 14 of the ICCPR¹⁰¹, including an expedient trial, an interpreter present at trial, to examine the evidence against them, and to avoid self-incrimination.¹⁰² In general, the Court’s establishing laws adhere to standards of customary international law, with one exception; accused persons do not have a specific right to a “foreign counsel”, though they are provided with a foreign Co-Defense

⁹⁷ John D. Ciorciari, *Transitional Justice in Cambodia’s Internationalized Court*, Japan Policy Research Institute Working Paper No. 117 (September 2010), <http://www.jpri.org/publications/workingpapers/wp117.html>.

⁹⁸ *Supra* note 83, ch. II, art. II.

⁹⁹ *Id.*

¹⁰⁰ *Id.* ch. X, art. XXXIII.

¹⁰¹ *Supra* note 65, art. 14.

¹⁰² *Supra.* note 83; ch. X, art. XXXV.

Attorney as well as a Cambodian national attorney.¹⁰³ Cambodia has also been party to the Convention on the Prevention and Punishment of the Crime of Genocide since 1951¹⁰⁴, as well as the International Criminal Court’s (ICC) Rome Statute, but has not chosen to have the ICC exercise jurisdiction over the mass killing.¹⁰⁵

As a hybrid court making use of customary international law (as well as codified, binding law), the Courts must adhere to certain standards to keep the support and financing of the international community. The Court has subject matter jurisdiction in four specific areas outside of the crime of “genocide”: for matters arising from “crimes against humanity” as defined by the ICC’s Rome Statute¹⁰⁶, breaches of the 1949 Geneva Conventions (for “war crimes”, as defined by the Conventions), destruction of “cultural property” under the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), and any offenses committed against classes of internationally protected persons under the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (1973).¹⁰⁷

VI. Possible Goals and Strategies for the ECCC

The ECCC targets individuals who committed the “most heinous” crimes during the regime.¹⁰⁸ Coupled with the desire to punish criminals for revenge or retribution, these trials are also an attempt at getting the truth of what was going on within the party and

¹⁰³ Daryl A. Mundis, *New Mechanisms for the Enforcement of International Humanitarian Law*, 95 Am. J. Intl. L. 934, 940 (2001).

¹⁰⁴ *Supra* note 66.; The CPPCG uses the same definition of genocide as the Rome Statute of the ICC; both are used by the Court.

¹⁰⁵ Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 Human Rights Quarterly 82, 84 (1989).

¹⁰⁶ Pham, *supra* note 93, at 9.

¹⁰⁷ Mundis, *supra* note 103, at 940.

¹⁰⁸ *Supra* note 83, at ch. 1, art.1.

why officials did what they did.¹⁰⁹ Achieving these objectives of “retribution” and “truth” are difficult, nonetheless. Even looking beyond the fact that Pol Pot died before the creation of the ECCC (as well as many other key figures), achieving these objectives is difficult as definitions of justice vary. Some historians and political scientists have criticized the ECCC as a form of “therapeutic legalism”, arguing that closure and reconciliation can hardly come from a standardized organ of law.¹¹⁰ The global community’s perspective on international criminal law as binding legal precedent is somewhat tenuous, and as a result the ECCC’s ability to actually address the mass killing has important political repercussions for Cambodia.

The role of “retribution” or “revenge” in war crimes, crimes against humanity, and genocide-related tribunals can be problematic. In general, a theoretical goal of criminal trial is to punish the criminal for their wrongful act and to deter them or others from similar actions (the goal of “prevention”).¹¹¹ As a result, much of criminal law hinges on prosecution for *individual* wrongdoing.¹¹² For the criminal’s victims, it is likely that form of “punishment” would serve some notion of justice that would coincide with revenge or retribution for the victims’ (or the family and community of the victim) loss, injury, or death.¹¹³ With large-scale crimes, as occur in war, revolution and genocide, it may be difficult to measure what an appropriate punishment is for mass planned murders.

¹⁰⁹ *Id.*

¹¹⁰ McCargo, *supra* note 82, at 615.

¹¹¹ See generally: Uli Orth, *Punishment Goals of Crime Victims*, 27 *Law and Human Behavior*, 173 (2003).; Allison Marston Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 *Cal. L. Rev.* 75, 87 (2005).

¹¹² Danner, *supra* note 111, at 87.

¹¹³ *Id.* 174-175.

For some countries, an appropriate punishment may be capital punishment; while for others, an appropriate punishment may be life imprisonment or an extended sentence in jail.¹¹⁴ Even for some of the world's most notorious criminals, controversy may arise regarding their trials and punishment. For example, Saddam Hussein was tried in 2003 by the Iraqi Special Tribunal and sentenced to death by hanging in 2006.¹¹⁵ Despite international support for his punishment, controversy arose from the use of capital punishment (death by hanging) in his sentencing.¹¹⁶ The question of what an appropriate punishment is, and who may decide what is appropriate, is problematic when viewed internationally and domestically.

Trials focusing on genocide and war crimes also differ from a "traditional" domestic criminal law trial in that their focus is more on the victims of the crime in order to achieve some kind of peace and security for a nation or people as a whole. As a result, these kinds of tribunals may use the doctrine of joint criminal enterprise, which generally entails individual responsibility for actions committed as a group (often focusing on "senior officials" or "key leaders" in the case of international crime).¹¹⁷ In Cambodia, the doctrine of joint criminal enterprise was not raised as a theory of liability in Duch's trial, but it has the potential for use in upcoming cases.¹¹⁸

Joint criminal enterprise is generally seen as having three forms of liability: first, where "an individual intentionally acts collectively with others to commit international

¹¹⁴ See generally: Marian J. Borg and Michael L. Radelet, *The Changing Nature of Death Penalty Debates*, 26 Annual Review of Sociology 43 (2000).

¹¹⁵ John F. Burns & James Glanz, *Iraq to Review Hussein's Execution*, N.Y. Times, January 3, 2007, http://www.nytimes.com/2007/01/03/world/middleeast/03iraq.html?pagewanted=all&_r=0.

¹¹⁶ *Id.*

¹¹⁷ Danner, *supra* note 111, at 93.

¹¹⁸ Beth Van Schaack, *Cambodia Update*, IntLawGrrls (September 10, 2009), <http://www.intlawgrrls.com/2009/09/cambodia-update.html>.

crimes pursuant to a common plan”; second, where “individuals... contribute to the maintenance or essential functions of a criminal institution or system, such as a concentration camp...”; and third, an extended form of liability encompassing crimes outside of the “common design”, which were the “natural and foreseeable consequence of implementing the common design”.¹¹⁹ For Duch, who was the administrator of Tuol Sleng, the second form of liability would be particularly applicable. The ECCC has not seen any allegations using joint criminal enterprise as of yet, but the Court recently determined that the doctrine could apply to Case 002 and others if allegations are raised.¹²⁰

If joint criminal enterprise is utilized in the upcoming cases, it may pave the way for more KR members answering to the Court for their participation in the crimes, as well as creating a more solid foundation of law under which suspects may be convicted. For many people in Cambodia, use of joint criminal enterprise could have a significant psychological impact and result in more victims having their suffering addressed by the Court. Nonetheless, the determination of what an appropriate punishment is, and how suspects should be tried, is difficult to determine in the context of international crime.

VII. Problems of “Internal” Hybrid Courts versus “External” Hybrid Courts

The Court receives a significant amount of its funding from the United Nations and other international donors, who have voiced frustration at alleged corruption. For example, the Court is set up to have Cambodia pay for the salaries of its Cambodian staff

¹¹⁹ Beth Van Schaack, *Joint Criminal Enterprise & the ECCC*, IntLawGrrls (May 26, 2010), <http://www.intlawgrrls.com/2010/05/joint-criminal-enterprise-eccc.html>.

¹²⁰ *Order from the Co-Investigating Judges regarding Joint Criminal Enterprise*, Extraordinary Chambers in the Courts of Cambodia (December 8, 2009), <http://www.eccc.gov.kh/en/articles/order-co-investigating-judges-regarding-joint-criminal-enterprise>.

and any expenses they specifically incur (though some international donations are still made), and the United Nations (along with international donors) pay the salaries of foreign employees and any expenses incurred on their part.¹²¹ The Office of Administration (OA), an organ of the ECCC, is in charge of Budget and Finance in the Court, but any exercise of power is to be reviewed by the Legal Officers who review official documentation and advise the OA.¹²² The OA, as well as the Legal Officer positions, are staffed by a majority of Cambodians, which has led to some apprehension about misuse of funding. There are some international staff members that handle financing coming from UN members' donations, but they are few in numbers.¹²³ As a result of this independence, international donors have called for further scrutiny of the use of foreign aid and involvement of the Cambodian government in any important functions of the Court as a whole.¹²⁴

One criticism of international criminal courts comes from the legitimacy of their sentencing. In the case of the ECCC, which is a hybrid court and is physically located in Cambodia, the Cambodian government and its domestic law has a significant amount of control and influence on the outcome of each trial.¹²⁵ Use of Cambodian law and being located in the country where the crimes were committed can be both positive and negative for the legitimacy of the court. For the Cambodian people, they may have

¹²¹ Mundis, *supra* note 103, at 910.

¹²² Pham, *supra* note 93, at 10.

¹²³ Sarah Williams, *The Cambodian Extraordinary Chambers: A Dangerous Precedent for International Justice?*, 53 *The International and Comparative Law Quarterly* 227, 238 (2004).

¹²⁴ Maha Kamal, *Critical Analysis: The Little Known Khmer Rouge, Awaiting Trial in the Extraordinary Chambers in the Courts of Cambodia* (November 28, 2012), <http://djilp.org/3249/critical-analysis-the-little-known-khmer-rouge-awaiting-trial-in-the-extraordinary-chambers-in-the-courts-of-cambodia/>; Cash Crisis delays Khmer Rouge Trial (October 23, 2012), <http://www.ndtv.com/article/world/cash-crisis-delays-khmer-rouge-trial-283462>; Williams, *supra* note 118, at 238.; McCargo, *supra* note 82, at 620.

¹²⁵ Williams, *supra* note 123, at 239.

greater access to the court (especially as it is an “open” court) and feel vindicated by being able to observe trials and see the punishment of those who wronged them and their families. As well, use of Cambodian law may help Cambodian people trust the courts more and have the punishment more tailored to their notion of justice.

Trying criminals in the country where their crimes were committed will likely have the best psychological impact for victims (as with the Nuremberg trials).¹²⁶ As well, in most legal traditions, a criminal is tried in the country where he committed his crimes.¹²⁷ Nonetheless, a hybrid court located in the country where the crime originated may pose a problem of legitimacy internationally. Theoretically, a court located “externally” in another country could provide more international legitimacy in its legal processes and scrutiny of evidence, as there could be less political interference and personal bias.¹²⁸ These objectives must be weighed carefully; whereas a trial in the country may further political and psychological objectives, a trial at a “neutral” location may further its legal legitimacy.

Some people in the international community have suggested that Cambodia’s refusal to allow the International Criminal Court to exercise jurisdiction shows a lack of international responsibility.¹²⁹ As mentioned, choosing a “third party” court may give more legitimacy to the legal processes and decisions made in addressing a possible genocide. Under this argument, it follows that Cambodia would better address the mass killing by allowing the ICC to exercise jurisdiction as it will help set precedents in the international community if successful in its objectives and if it were perceived as fairly

¹²⁶ McCargo, *supra* note 82, at 617.

¹²⁷ *Id.*

¹²⁸ McCargo, *supra* note 82, at 617.

¹²⁹ Hannum, *supra* note 105, at 84.

convicting the criminals. Especially as the ICC has a history of cases involving war crimes, their decisions are more likely to be perceived as being legitimate by the international community. This has to be balanced with the desire of the Cambodian people to actually “see” the people who destroyed their country brought to justice under their own laws by their own court. Nonetheless, the ECCC still uses provisions from multiple international treaties and conventions.

VIII. The Crime of Genocide

Unfortunately, there have been no successful convictions for the crime of genocide in the ECCC thus far. Article II of the Genocide Convention (as well as Article VI of the ICC’s Rome Statute¹³⁰) defines “genocide” as:

“any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily harm or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring the children of the group to another group.”¹³¹

¹³⁰ Rome Statute of the International Criminal Court, art. VI, Jul. 17, 1998, 37 ILM 1002 (1998), 2187 UNTS 90

¹³¹ *Supra* note 66, at art. II.; *Supra* note 124, at art. VI.

The definition of genocide is generally applied through a two-prong test, first focusing on the act being committed with the “intent to, in whole or in part, destroy” one or more of the listed classes; second, the act “must be a sufficiently violent and destructive behavior.”¹³² With Cambodia, it is generally easier to prove a defendant committed “crimes against humanity” (which requires a nexus to “armed conflict”)¹³³ than the act of genocide as the latter only applies to the listed classes.¹³⁴ Although one goal of the KR regime was to purge Cambodia of all outside influences, it has been difficult to pin their actions down as genocide due to the fact that the KR killed indiscriminately after the city purges began. Anyone acting outside the KR political and cultural ideology, regardless of national origin, ethnicity, race, or religious group would be killed.

Therefore, the element of “intent” is difficult to prove as the KR’s intent to kill was more focused on anyone who refused to adhere to their ideology, rather than specific groups. “Cultural” and “political” genocide were not included in the internationally recognized definition of genocide, likely due to the difficulty of creating solid definitions for these specific terms, which is problematic here as the KR targeted cultural and political influences in their killing.¹³⁵ Some specific ethnicities and religions were targeted, but more often than not, these people would be assimilated and forced to give up any differences they had.

Despite this problem, there is a great amount of evidence of genocide through the *actions* of KR members, though it was not necessarily a part of their party ideology. For

¹³² Luftglass, *supra* note 31, at 925.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Hannum, *supra* note 105, at 106.

example, Article II of the Democratic Kampuchean Constitution said that everyone had “the right to worship according to any religion”, so long as it was not “reactionary” and “detrimental” to KR society.¹³⁶ As mentioned, the KR exiled all Buddhist monks after 1975. The KR began eradicating Buddhism by restricting religious practices and then gradually destroying or converting temples, as well as destroying any religious artifacts.¹³⁷ Monks were asked to strip from their robes and religious affiliations, and many did, but those who did not were either exiled or executed.¹³⁸ Though the specific destruction of Buddhism is well known in Cambodia (especially as only 1,000 of 60,000 monks remained in Cambodia after 1979¹³⁹), no one brought to the ECCC has been convicted of genocide for this offense, nor for any other group that was possibly targeted. As the definition of genocide allows for conviction when a group is destroyed “in whole or in part”, the ECCC *should* be able to convict KR leaders of genocide, given the evidence that has been left behind, especially at Tuol Sleng.

IX. Comrade Duch’s Trial & the General Problems of the ECCC

The trial of Comrade Duch serves to illustrate the many of the problems facing the ECCC in addressing the atrocities of the genocide. Duch was Case 001, and as the first case, the Court hoped to set a high standard to prove its legitimacy and capability in handling the genocide. As discussed previously, Comrade Duch administrated the Tuol Sleng prison during the genocide. Under his watch, an estimated 20,000 people were

¹³⁶ *Id.* 87.

¹³⁷ *Id.* 88.

¹³⁸ *Id.*

¹³⁹ *Id.*

tortured and executed.¹⁴⁰ As Tuol Sleng held the most documentation of murder, there is a significant amount of information on the crimes committed by Duch specifically.

One instance in particular reveals the sadistic, violent nature of the KR regime. In January 1977, the KR led a “purge” of all suspected dissidents (both civilians and those within the regime) where Duch took charge of over 200 interrogators within the prison.¹⁴¹ Letters exchanged between the chief officer of Tuol Sleng and the Standing Committee of the KR party show that the highest authorities were aware of the mass executions they would be sanctioning by allowing this purge to happen.¹⁴² During the interrogation sessions, thousands confessed to being foreign spies (KGB, CIA, or agents of the Vietnamese) and were promptly executed if they did not die during torture.¹⁴³ According to testimony of one of the few survivors of Tuol Sleng, “when Duch indicated that someone had to be reeducated, he meant that they would be ‘crushed to bits after torture’.”¹⁴⁴ Those who survived their interrogation session would be sent to Choeng Ek, one of the Killing Fields, and were stabbed or clubbed to death (to save bullets¹⁴⁵) and left in mass graves.¹⁴⁶

Visitors to the Tuol Sleng museum can see interrogation rooms left as they were when the Vietnamese invaded. Soldiers found corpses still chained to their beds and the instruments used during torture were abandoned in the interrogation rooms. The prison, an abandoned high school, had holes cut into the walls to hose blood off the floors; today,

¹⁴⁰ Luftglass, *supra* note 31, at 901.

¹⁴¹ Duffy, *supra* note 38, at 88.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Duffy, *supra* note 38, at 88.; John Brecher & James Pringle, *Pol Pot's Hatchet Man*, Newsweek, September 8, 1980, 42.

¹⁴⁵ *Id.* 90.

¹⁴⁶ *Id.* 88.

bloodstains still cover most of the walls. Like the concentration camps of the Holocaust, there are rooms full of prisoner's clothing and personal items that were catalogued by the prison employees.¹⁴⁷ Reportedly, at the height of Tuol Sleng, at least 100 prisoners were tortured and executed each day.¹⁴⁸ Choeung Ek, the Killing Field used near Tuol Sleng, has catalogued upwards of 9,000 victims' skulls buried in mass graves.¹⁴⁹ As a symbol of the atrocities committed at Tuol Sleng and Choeung Ek, Duch's trial garnered international attention and its handling was key to public perception of the ECCC.

Duch's trial presented problems both in its inherent political nature and in its legal ramifications due to evidence of corruption¹⁵⁰. The biggest controversy of Duch's trial came at its end, when he and his Cambodian defense attorney dropped the strategy created by his international defense attorney at the beginning of the trial. Corruption has become a major problem for the ECCC, amidst rumors that the court's staff was required to give a portion of their salaries (from UN Development Program (UNDP) funding) to Sean Visoth, the administrative director of the court, who was supposedly "close" to the Cambodian Deputy Prime Minister.¹⁵¹ These allegations were also directed at "senior government officials" as a whole, though no other parties were specified.¹⁵² In 2007, the UNDP responded to these rumors by conducting an investigation. The UNDP report was leaked and contained allegations supporting the rumors that employees would give a

¹⁴⁷ *Id.* 90.

¹⁴⁸ *Id.* 90.; Brecher & Pringle, 92.

¹⁴⁹ *Id.*

¹⁵⁰ Extended discussion of the controversy during Duch's testimony at the Trial Chamber will occur later in this paper.

¹⁵¹ McCargo, *supra* note 82, at 619.

¹⁵² Seeta Scully, *Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia*, 13 Asian-Pac. L. and Policy J. 302, 334(2011).

“kickback” to their superiors if appointed to the Court.¹⁵³ Visoth was never formally dismissed from the Court, though he took extended sick leave in 2008. The Court never rebutted the accusations of corruption, though the UNDP gave a positive report on the Court in 2008.¹⁵⁴

Other problems of corruption are seen within Hun Sen’s government. As a former Khmer Rouge member, albeit at a low level, he and others in his government had attempted to bring KR members into the government in exchange for the KR retreating from Cambodia.¹⁵⁵ The scope of personal jurisdiction in the ECCC has been restricted to the “senior members” of the KR, and Sen’s government is understandably wary of having their participation in the atrocities scrutinized.¹⁵⁶

As Duch read and made comments on each “confession” at Tuol Sleng, he was in a unique position in terms of the information he was privy to on the ground as well as in his interactions with the official leaders of the Khmer Rouge.¹⁵⁷ At the beginning of his trial, Duch was cooperative and provided detailed testimony that supported his admission of guilt.¹⁵⁸ As a symbol of some of the worst atrocities of the genocide, people were optimistic that his trial would provide some legitimacy for the court due to his cooperation. Unfortunately, the trial was slow to proceed and marked by many problems in its administrative handling and rumors of corruption. Co-Prosecutors Robert Petit and Chea Leang appeared unorganized early in the trial, and in 2009 Petit abruptly resigned

¹⁵³ Ciorciari, *supra* note 97.; see: UN Development Program, *Audit of Human Resources Management at the Extraordinary Chambers in the Courts of Cambodia (ECCC)*, Report No. RCM0172. (4 June 2007)

¹⁵⁴ *Id.*

¹⁵⁵ Ciorciari, *supra* note 97.

¹⁵⁶ *Id.*; McCargo, *supra* note 82, at 621.

¹⁵⁷ *Id.* 620.

¹⁵⁸ *Id.* 621.

before Duch's testimony was complete.¹⁵⁹ Proponents of "global justice" admitted there were high expectations for the ECCC, especially as an experiment in use of "hybrid courts", but early on it seemed that there were too many problems with the structure of the court, corruption, and political involvement of officials and international/domestic opinion.

There have also been problems with the "direction" of the Court in its pursuit of justice. Civilians and those involved with the Court had different opinions about what the goals of the Court should be. While the Court is set up for more "traditional" legal procedures and goals, civil party legal teams (as well as some of the Cambodian media) called for a court that would deal more with "exposing" the truth and making some attempt at reconciliation.¹⁶⁰ Those civil party teams brought in witnesses who were not necessarily directly linked to Duch himself, but who were able to provide stories of their experiences that illustrated the impact of the KR officials.¹⁶¹ In 2009, the Court set forth new rules that returned to a more traditional trial system that would not become too bogged down with story telling and would provide factual information capable of rendering a verdict.¹⁶²

Problems arose between the international and Cambodian judges as well, due to their interpretation of the law. Though the Court, as a hybrid, attempted to reconcile domestic norms with "norms of global justice", Cambodian judges had an upper hand as they outnumber international judges at each level of the Court. Disputes over adding five additional suspects for trial arose between the international judges and the Cambodian

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* 622.

¹⁶¹ *Id.*

¹⁶² *Id.*

government, resulting in Hun Sen publically reprimanding the international judges about the need to focus on the trials at hand.¹⁶³ Many non-governmental organizations and other international actors criticized this comment as allowing politics to overtake the goals and autonomy of the Court.¹⁶⁴ Conversely, due to problems with the financing of the Court¹⁶⁵, the Cambodian government has reason to exclude other suspects (at least temporarily) to mitigate the possibility of the Court's work being entirely halted due to the costs they would incur from adding new suspects (discovery costs, administrative employees, the cost of employing the attorneys, etc.).

More generally, there were problems due to the requirement in the LEEC¹⁶⁶ that Cambodian judges be chosen based on their experience with international law.¹⁶⁷ The Khmer Rouge targeted judges and lawyers as part of the political opposition. With a limited pool of judges, there has been some international concern with the competence and qualifications of the judges appointed by the Cambodian government.¹⁶⁸ The international legitimacy of the Court is further cast into doubt by the fact that other "mixed" courts (such as Sierra Leone and East Timor) mitigated their risk of having inexperienced domestic judges by stipulating that a majority of the judges sitting in the court had to come from a pool of foreign/international candidates.¹⁶⁹

As mentioned, problems arose in the Trial Chamber with Duch's defense strategy before his testimony was completed. Francois Roux, Duch's French defense attorney,

¹⁶³ McCargo, *supra* note 82, at 625.; Robert Petit, *Lawfare and International Tribunals: A Question of Definition? A Reflection on the Creation of the Khmer Rouge Tribunal*, 43 Case W. Res. J. of Int'l. L. 189, 198 (2012).

¹⁶⁴ Scully, *supra* note 152, at 326 (2011).

¹⁶⁵ Kamal, *supra* note 124.

¹⁶⁶ *Supra* note 83, at ch. IV, art X.

¹⁶⁷ Luftglass, *supra* note 31, at 934.

¹⁶⁸ *Id.* 935.

¹⁶⁹ *Id.* 936.

outlined a strategy where Duch “admitted general responsibility” as an administrator at Tuol Sleng, but denied any “personal involvement in acts of torture or murder”.¹⁷⁰ With such a large amount of concrete evidence against Duch, this strategy was likely one of the few logical choices. If Duch denied all responsibility, he would likely be sentenced to life imprisonment. By using this strategy, Duch and Roux attempted to garner sympathy from the Court in the hope that Duch would receive a lesser, but nonetheless “appropriate” sentence that would appease Cambodian citizens.¹⁷¹

Throughout the trial, Duch admitted guilt and faced his victims in open court, but denied involvement as an orchestrating official and instead repeated that he was only carrying out directives in fear of losing his own life if he dared to disobey.¹⁷² The controversy arose at the end of Duch’s testimony when his Cambodian defense attorney, Kar Savuth (a KR victim), suddenly and unilaterally (without any apparent knowledge or consent from his co-counsel, Roux) declared that, “Duch did not accept the authority of the court, and insisted that he had spend sufficient time in detention and should now be freed.”¹⁷³ This differed from Roux’s original strategy in that Duch would be wholly denying the Court’s personal jurisdiction under Article I of the LEEC and would be requesting acquittal.¹⁷⁴ With the amount of evidence against Duch, as well as the general feeling of animosity toward him as an administrator at Tuol Sleng, Savuth’s strategy would almost certainly be unsuccessful and would likely lead to a more severe sentence

¹⁷⁰ McCargo, *supra* note 82, at 623.; This meant that Duch was still admitting responsibility as a “senior leader”, but would be hoping for a lesser sentence as he claimed to have been acting under fear for his own life.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 624.; Robbie Corey Boulet, *Duch asks to be set free*, Phnom Penh Post, November 27, 2009.

¹⁷⁴ *Supra* note 84, at ch. I, art. I.; He was denying status as a “senior” official or person most responsible for the atrocities.

against Duch.¹⁷⁵ Roux continued to support the same strategy used from the start of the trial, but in a complete change from the prior months of his testimony, Duch supported Savuth's argument.¹⁷⁶

After Duch's testimony was completed, Roux suggested Savuth's argument was a political move influenced by the Cambodian government in the hope that Duch's culpability plea would be called into question.¹⁷⁷ Following this logic, Roux was suggesting that Savuth's strategy was a ploy by the Cambodian government, which hoped to give Duch a more severe sentence (perhaps to bolster the legitimacy of the court and/or to appease Cambodian citizens and international spectators) and knew Duch would never be acquitted under the "new" strategy. On July 26, 2010, the Trial Chamber convicted Duch of crimes against humanity and war crimes. Duch was sentenced to 35 years in prison (considered a life sentence in Cambodia), but his sentence was reduced to 19 years as a result of "illegal detention" by the Cambodian Military Court and the ECCC (in Cambodia, a person cannot be held in detention for more than 5 years before a trial).¹⁷⁸

After the verdict was rendered, Savuth immediately declared that he would do his best to appeal the sentence and that Duch deserved acquittal.¹⁷⁹ This furthers the allegations of some kind of conspiracy, as an appeal would almost certainly result in life imprisonment (in Cambodia, 35 years in prison) for Duch due to the outrage of Cambodian citizens at Duch's sheer audacity to demand freedom and claim a lack of

¹⁷⁵ McCargo, *supra* note 82, at 624.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Pham, *supra* note 93, at 11.

¹⁷⁹ *Id.*

direct responsibility or intent to kill.¹⁸⁰ On February 3, 2012, the Supreme Court Chamber sentenced Duch to life imprisonment, avoiding any kind of reduced sentence and perhaps giving the Court more credibility.¹⁸¹

Duch was convicted under two new Articles of the LEEC, and as a result he was convicted for crimes against humanity (including enslavement, imprisonment, torture, and extermination (encompassing murder)) as well as grave breaches of the Geneva Conventions (including willful killing, torture and inhumane treatment, and unlawful confinement of a civilian).¹⁸² While the “end” (life imprisonment for someone perceived as one of the most heinous offenders in the Khmer Rouge regime) reached by the Supreme Court Chamber may bolster the Court’s legitimacy, the pervasive amount of perceived and alleged corruption at all levels of the Court, as well as Duch’s original sentence given by the Trial Chamber, results in an ambiguous “conclusion” (if one can be had at all) as to the Court’s legitimacy in addressing the atrocities.

As the Court begins its next cases, its legitimacy will likely continue to be called into question and problems with funding still loom large. At the end of 2011, the Court has cost approximately \$141,000,000 and its 2012 budget projected an additional \$45,000,000 will be spent within the year.¹⁸³ Cambodians have still expressed support for the Court due to the necessity to address the atrocities by some legitimate legal means, but the ability of the Court to justly address these concerns remains to be seen.¹⁸⁴

¹⁸⁰ Seth Mydans, Anger in Cambodia over Khmer Rouge Sentence, NY Times (July 26, 2010), http://www.nytimes.com/2010/07/27/world/asia/27cambodia.html?_r=0.

¹⁸¹ Case 001: Extraordinary Chambers in the Courts of Cambodia. <http://www.eccc.gov.kh/en/case/topic/1> (Accessed November 3, 2012).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

X. The Future of the ECCC & Its Impact

The future of the Court, as well as its impact, is not entirely clear at this point. While the next cases are being investigated, the Court has time to reassess its priorities and listen to international criticism, as well as the praise and criticism of its own citizens. While there are important legal objectives here, as with any trial process, there are also legitimate psychological (and similarly, social and political) objectives that are important in determining the success of the Court in the eyes of the Cambodian people. Perhaps the most successful part of the Court is seen in its outreach programs, which focus on providing the public with information about the Court, its processes, the relevant law, and (at the time) Duch's trial.

As part of the outreach effort, the Cambodian Television Network aired a weekly program, "Duch on Trial", that provided highlights of Duch's testimony; the program was viewed by approximately 20% of the Cambodian population, which is significant given the country's demographics (a significant part of the population is impoverished and/or living in extremely rural areas).¹⁸⁵ As well, the Court held open sessions, which allowed over 27,000 people to attend and witness firsthand the workings of the Court. Nonetheless, with the limited number of trials (and their length -- Duch's case was not "officially" closed until February 2012), the allegations of corruption, and the immense cost of the Court's operation, its value and legitimacy is questionable at this point as we wait for more suspects to be brought to trial.

Cambodian citizens, especially the victims of the KR that have testified before the Court, have had mixed reactions about the Court's success. Chum Mey, the last living

¹⁸⁵ Judy Ledgerwood and Kheang Un, *Is the Trial of 'Duch' a Catalyst for Change in Cambodia's Courts?*, 95 AsiaPacific Issues 1, 4 (2010).

survivor of Tuol Sleng, expressed outrage at the Trial Court's verdict against Duch,¹⁸⁶ but when the Supreme Court Chamber rendered its verdict, most citizens seemed to feel that this was the best possible sentence they could get against Duch.¹⁸⁷ As well, due to the limited number of suspects (as many were given immunity by Hun Sen's government, among other limitations in cost and in the scope of the court only focusing on "senior officials"), many Cambodians will never see the person who injured them or their family brought to justice.¹⁸⁸ Nonetheless, it will be difficult to truly assess the Court's impact on Cambodian citizens and success as a legal institution until more cases are finished and the Court perhaps becomes more stable in its procedures.

XI. Conclusion

In conclusion, though the ECCC was created with the intent of bringing justice to Cambodia, it has failed to successfully punish criminals for their crimes at this time. The commission of genocide is widely regarded as being against all principles of customary international law, which intuitively calls for the highest form of punishment upon conviction for any related crimes. Due to the legal system created under the ECCC, alleged corruption within the court, and the application of the definition of "genocide", the severity of the crimes has not been properly addressed and has resulted in little satisfaction for the people of Cambodia. Though the death penalty is not an absolutely necessary punishment for carrying out genocide, the minimal sentencing given to Duch

¹⁸⁶ Mydans, *supra* note 180.; Other victims expressed similar concerns. Cambodian citizens have generally negatively regarded Duch's trial verdict.

¹⁸⁷ Khmer Rouge chief jailer given life sentence, Al Jazeera (February 3, 2012), <http://www.aljazeera.com/news/asia-pacific/2012/02/20122343515747835.html>.

¹⁸⁸ Kathleen Claussen, *Up to the Bar? Designing the Hybrid Khmer Rouge Tribunal in Cambodia*, 33 Yale J. of Int'l L. 253, 258 (2008).

by the ECCC Trial Chamber and the struggle to reach a higher sentence in the Supreme Court Chamber has created problems with the perception of the court's international and domestic legitimacy.