Chapter 4. Case 001—Convicting an Infamous Khmer Rouge Torture Chief: “You Cannot Cover an Elephant with a Rice Basket”

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Chapter 4

CASE 001—CONVICTING AN INFAMOUS KHMER ROUGE TORTURE CHIEF

“You Cannot Cover an Elephant with a Rice Basket”

The ECCC’s early challenges—including struggles over procedural rules, administrative delays, corruption allegations, and funding shortfalls—tended to confirm fears that the Court’s complex hybrid structure would compromise its operational effectiveness. Given the ongoing political tension between the national and international sides in their awkward institutional marriage, it was unclear that the ECCC would be able to carry out its most important function of delivering credible criminal trials.

The ECCC’s first test was its easiest: the trial against Kaing Guek Eav, better known by his alias “Duch.” Duch was the former head of the notorious S-21 security center in Phnom Penh, and this chapter’s subtitle—a courtroom quote from Duch’s Cambodian co-counsel, Kar Savuth—conveys the widespread knowledge of horrific crimes that took place there. The ECCC ultimately found that at least 12,273 prisoners, many of them Khmer Rouge cadres caught up in internal political purges, were tortured and executed at S-21 from 1975 to 1979.

It was not coincidental that Duch’s trial came first. Donors and Court officials believed that trying Duch would be the best start for the Court, as his case is the “one with the greatest amount of documentation, witnesses, the suspect has already confessed, and it would be easy to bring to trial.” Signed orders by Duch to torture and execute prisoners, the available testimony of former S-21
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prison guards and prisoners, and Duch’s own previous admissions all reduced the legal and administrative complexity of the case. Duch also had not been tried or granted any form of amnesty or pardon in the past. It was thus very likely that the ECCC could produce a credible conviction.

Just as important, Duch’s trial was not deemed politically sensitive. Unlike other key Khmer Rouge suspects, he had few previous dealings with the Cambodian Government or foreign powers. His offenses were concentrated around events at S-21, making it less likely that his trial would feature discussion of foreign powers and time periods outside of Democratic Kampuchea (DK). The key stakeholders agreed that he should stand trial, making political feuds over the case unlikely. The Duch trial was therefore the best-case scenario for testing the effect of the ECCC’s unique hybrid form upon its function. If the ECCC were unable to try Duch effectively, its ability to manage more difficult cases would be doubtful. As it turns out, the trial was largely successful, but not without challenges that raised doubts about the Court’s ability to manage tougher, more politically contested cases.

OVERVIEW OF THE DUCH CASE

Although Duch was not one of the most senior Khmer Rouge leaders, he had long been identified as one of the individuals most likely to stand trial at the ECCC under the rubric of those “most responsible” for crimes of the Pol Pot era. He was born in 1942 and became interested in communism while a student, spending two years in prison for pro–Khmer Rouge activities. He was freed in 1970 in a general amnesty of political prisoners after Prime Minister Lon Nol overthrew Prince Sihanouk’s government, and rejoined the communist insurgency. Within a few years he had set up and was running two Khmer Rouge prisons in Kampong Speu—M13 and M99—and had begun perfecting the torture interrogation techniques he later implemented at the S-21 (Tuol Sleng) security center.

The S-21 security center was established in Phnom Penh in 1975 after the Khmers Rouges overthrew Lon Nol. In 1976, Duch took over as chief, a position he held until the Vietnamese army and allied Cambodian resistance fighters captured Phnom Penh in 1979. In its judgment, the Trial Chamber found that as chief of S-21, Duch was also in charge of the S-24 (Prey Sar) work camp and
had established the Choeung Ek killing fields, where most of the S-21 prisoners were executed. Duch also implemented and refined S-21’s interrogation/torture techniques, authorized executions, and personally oversaw the interrogation of the most important prisoners.

The first prisoners to arrive at S-21 were officials and soldiers connected to the overthrown Lon Nol regime, but later they comprised primarily Khmer Rouge cadres and their families, some foreigners including Vietnamese prisoners of war, and S-21 staff. Nearly all prisoners were tortured until they confessed to antirevolutionary crimes and named their “accomplices,” who would then be arrested and tortured until they confessed their crimes and named additional traitors in turn.

After the fall of the DK regime, Duch lived among the senior Khmer Rouge leaders in Thai border refugee camps until 1984 when he was sent to China to teach and changed his name to Hang Pin. When he returned to Cambodia, he taught in Banteay Meanchey province until 1995 when his house was attacked, either as part of a robbery or a revenge attack, and his wife was killed. At that time he moved to Battambang province, where he converted to Christianity and joined a local church. During this period he continued to teach and also worked in camps along the Thai border with non-governmental organizations. In 1999 he was identified and arrested, and he was thereafter held by the Cambodian Military Court for over eight years without trial. In 2007, he was indicted by and transferred to the custody of the ECCC.

Although limited to one detention site where primarily Khmer Rouge cadres and their families were executed, the Duch trial was of major significance in providing the first opportunity for Cambodians to hear public discussion and debate on policies of the DK period that resulted in the deaths of nearly two million people in only three years, eight months, and twenty days. Duch’s confession of his crimes and the Court’s judgment of his actions had potential significance even for survivors unconnected to S-21, as they spoke to the responsibility of the many Khmer Rouge cadres who will never be held accountable for other atrocities.

Partly due to the limited points at issue, the Duch proceedings were a successful first effort. In general, the Court produced reasonable jurisprudence, and it took significant steps to connect the Duch trial to the surrounding survivor population. These included an unprecedented civil party scheme, which engaged nearly 100 survivors of the DK period in the case against Duch, and
extensive outreach activities made possible by its in-country location. It also issued a credible verdict. On July 26, 2010, the ECCC pronounced the first internationally recognized conviction of a key Khmer Rouge official for crimes of the Pol Pot era, finding Duch guilty of crimes against humanity and war crimes.

The Court did encounter difficulties related to its institutional structure, however. The Duch trial suffered from delays and confusion as the testing ground for the ECCC’s complex hybrid structure, the first-time application of its mixed civil law and common law rules, and the experimental inclusion of civil parties. The case also featured a dramatic split between Duch’s national and international lawyers that undermined his defense and a struggle to resolve perhaps the most politically sensitive issue at the trial—how to account in sentencing for Duch’s lengthy and illegal pretrial detention by the Cambodian Military Court. Each of these issues is examined below.

**Duch’s Hybrid Defense**

Given the overwhelming evidence against Duch, much of the intrigue at trial pertained to the strategies his co-lawyers would mount in his defense. From the start, Duch agreed to most of the factual allegations against him; the only unknown was what sentence he would receive. Throughout the trial, Duch’s co-lawyers appeared to pursue a joint strategy of pleading guilty to most charges, repeatedly expressing remorse, and cooperating with the prosecution in the hope of receiving a reduced sentence. Duch’s international and national lawyers took somewhat different approaches, however, leading to one of the most dramatic events at the mixed Court at that time: an eleventh-hour split between the co-lawyers resulting in two fundamentally different pleas for their client.

**International Counsel’s Strategy—Critiquing the Court’s Mixed Rules**

Duch’s French international counsel François Roux emphasized Duch’s admission of most allegations in his continued efforts to seek a pseudo “guilty plea” and reduce the scope of evidence introduced against his client at trial. Roux also raised concerns regarding efficiency and equality of arms due to the first-time inclusion of civil parties in a mass crimes trial, seeking to reduce victims’ impact on sentencing. The Trial Chamber struggled to find the right balance between fully airing the facts and minimizing the length of proceedings. Debates over
the applicable rules provided an early indication of the difficulties of applying domestic civil law procedures in a field of law dominated by common law precedent.

Minimizing the Scope of Evidence Presented

The French civil law system does not recognize “guilty pleas” that lead to truncated proceedings; however, during the investigation phase a judge collects all evidence and narrows down the issues in dispute. He or she examines witnesses, and very few are recalled to testify at trial. This procedure keeps trials short and focused. Because of the large amount of evidence at issue at the ECCC, “[m]aterial on the Case File is considered evidence and relied on by the Chamber in decision making only where it is put before the Chamber and subjected to examination.” Evidence is considered “put before” the Chamber “if its content has been summarised, read out, or appropriately identified in court.” Although this common law–like innovation arguably makes trial proceedings fairer because everything is debated in public, it has the potential to negate much of the time savings of having a case file, as all evidence must be presented a second time at trial.

In an apparent effort to reduce the scope of evidence admitted, Duch’s French co-lawyer François Roux often argued that the Internal Rules should be interpreted in light of international practice, and Duch’s admissions of responsibility and remorse should be accepted as a type of guilty plea. But after 30 years of impunity for Khmer Rouge crimes, the public arguably had the right—and the need—to hear all the facts discussed. This was especially true because Duch’s admissions were undercut by their selectivity. He often had perfect recollection of people and events, but he denied all facts that were not proved by documentation and became vague and forgetful when the evidence pointed to his active and willing involvement in the crimes, such as through personally committing torture, or going beyond what was required to fulfill his orders.

Although there were doubts about the sincerity of Duch’s public apology on the second day of trial, it provoked much-needed discussion and debate among Cambodians. Significantly, it was the first ever offered by a senior Khmer Rouge official:

Now, I would like [survivors and the families of the dead] to know that I wish to apologize, and I would like you to consider my intentions. I do not ask that
you forgive me here and now. I know that the crimes I committed against the lives of those people, including women and children, are intolerably and unfor-givably serious crimes. My plea is that you leave the door open for me to seek forgiveness.\textsuperscript{18}

Some people believed his remorse was genuine.\textsuperscript{19} Others were more suspicious. Survivor Chheav Hourlay said, ”We cannot infer from the confession whether he is honest . . . [h]e might have talked to have his sentence reduced or the charges dropped[.]”\textsuperscript{20}

The prosecution never recognized Duch’s statements as either a guilty plea or as an expression of unqualified remorse. Duch never said, ”I plead guilty as charged,” but instead fought the charges, arguing, for example, that there had been no armed conflict before 1977 and he therefore could not be charged with war crimes before that date. As discussed below, he also denied that he acted voluntarily—an argument that goes to the heart of his criminality. Due to the historic nature of the case, his limited expressions of responsibility, and public expectations of hearing all the evidence, the prosecution—and the judges—believed it was necessary to have a full trial.

Unsuccessful in limiting the scope of crime evidence put before the Chamber, Roux then sought to limit the prosecution’s character evidence:

And when an accused pleads guilty before an international criminal court—please listen carefully—an agreement is struck with the prosecutors, enabling the accused to bring forward character witnesses and the prosecutor does not challenge them. The prosecutor refrains when someone pleads guilty in common law—refrains from questioning or challenging character witnesses. That is the solution. That is the solution.\textsuperscript{21}

The Trial Chamber did not accept this argument, but as discussed below, Roux was able to persuade it that as auxiliary prosecutors the civil parties should not have an equal opportunity to challenge Duch on the key issues of character and sentencing.

Managing Civil Party Participation

With four civil party teams and at least one national and one international lawyer per team in Case 001, the defense faced a minimum of eight additional law-
yers supporting the prosecution in court. The teams began cooperating among themselves to a greater extent over time, but they for the most part worked independently, resulting in questioning repetitive not only with the prosecution but also with each other. While some lawyers spoke to individual clients’ interests, and thus asked questions perceived as irrelevant, others honed closely to the prosecution’s case, contributing to a perception that they were acting as a second prosecutorial team. Judge Silvia Cartwright called the process of involving victims “cumbersome” and said that “it has frequently had the unlooked-for effect of slowing the trial while not providing for victims’ needs which includes achieving timely justice for their suffering.”

Although many of the complications arising from civil party participation in Case 001 have been laid at the feet of the civil party lawyers, the Court itself was unprepared to manage their participation and addressed problems only as they arose rather than planning in advance. Little forethought was put into how the civil party scheme would work in practice; instead, it developed over time through trial and error. As one Court monitor has noted: “Many of the problems that would emerge during the trial seemed to be the result of inadequate planning and preparation on the Court’s behalf with regard to the civil party process as a whole.” Instead of managing civil party representation from the outset, the Court blamed the civil party lawyers for not organizing themselves.

Civil party lawyer Alain Werner did not believe the civil parties’ participation in Case 001 unacceptably lengthened the Duch trial. In his view, considering that the ECCC is the first international court to apply mainly civil law and to include civil party participation, “this trial has shown that the system can certainly work in theory, maybe with some adaptations” depending on the number of accused and civil parties.

At the end of the day, even though it was messy and the representation was often poor, it seems that it did bring to the Duch trial a dimension considered missing at the other tribunals. Anyone who says that this is not an interesting experiment here at the ECCC forgets how frustrated the victims were in the [International Criminal Tribunal for the former Yugoslavia (ICTY)].

A more worrisome problem than duplication and delay was the four civil party teams’ impact on equality of arms. Duch’s lawyer argued that although in civil law systems there is no question that civil parties are entitled to question all wit-
nesses and experts, it was inappropriate when there are numerous civil parties acting as auxiliary prosecutors:

And so, yes, indeed you have civil law on your side. That’s true. Looking at the letter of the law, the law is on your side. But the law is a living organism and, more specifically, we all know here that we are in a tribunal that creates law.²⁸

As part of François Roux’s efforts to have Duch’s cooperation and apology accepted as a *de facto* guilty plea, from the early stages of trial proceedings he challenged the right of the civil parties to make submissions on sentencing. The civil parties argued that facts relating to guilt or innocence cannot be separated from facts relevant to sentencing and noted that at the ECCC there is no separate sentencing hearing.²⁹ Moreover, they emphasized that neither the ECCC Internal Rules nor the Cambodian Code of Criminal Procedure nor other civil law jurisdictions preclude civil parties from being heard on sentencing, and that as full parties, they have a general right to be heard on any topic.³⁰ They wished to draw on the testimony of individual civil parties and discuss topics such as the impact of the crimes and Duch’s admissions and expression of remorse on the civil parties and their families.³¹

However, the Trial Chamber said that the ECCC civil party model is based on “but is not identical to” Cambodian procedure, because it has been adapted to take into account the unique context of complex mass crimes trials with numerous victims, which requires “a restrictive interpretation of rights of civil parties” in proceedings before the ECCC.³² It highlighted the fair trial rights of the accused, including to face only one prosecuting authority.³³ Ultimately, it found that civil parties could not make submissions on or recommendations concerning sentencing, because their right to assist the prosecution is limited to establishing the guilt of the accused in order to secure their claim for reparations.³⁴

Finding that civil parties could not opine on sentencing, the Chamber tacked onto this decision the determination that they also could not question witnesses and experts about Duch’s character. In their view, questions relating to character relate solely to aggravating and mitigating circumstances, and therefore are relevant solely to sentencing, in which the civil parties had no interest.³⁵

These decisions appeared to be a belated effort to manage civil party interventions by limiting their right to participate as a party. The *Duch* trial was never about proving Duch’s guilt, which he freely admitted. It was from the start
only about sentencing. Bearing this in mind, it is arguable that the Chamber excluded the civil parties from the most important part of the trial—the heart of the matter. It made this decision against civil law practice and the Court’s own rules. It seems likely that the judges’ daily experience of watching four civil party legal teams repeat prosecution arguments over and over convinced them to accept François Roux’s appeal to leave domestic civil law rules behind:

When one is in a national civil law trial where there is an accused who has committed one murder and when you have one, perhaps two, civil parties applying, well, if the civil party lets his or her suffering overflow, that might happen but it won’t go any further than that. However, in proceedings such as this one dealing with mass crimes, if you have one, two, three, five, 10 or 20 or more civil parties who come and let out their legitimate suffering then we find ourselves in a situation that is unimaginable from the point of view of a fair trial because the accused is no longer facing one prosecutor but 20, 30, 50 prosecutors.36

Blending Civil and Common Law Procedures

After the Duch trial, major actors offered different perspectives on the results of the blending of legal systems. Australian Acting international Co-Prosecutor William Smith said, “[T]he conflict between the civil law and common law systems was ‘more myth than reality’ and that the greater challenge was managing the copious evidence.”37 However both the French Co-Investigating Judge and the French international Co-Lawyer criticized the Co-Prosecutors for not following civil law procedures.

Former CIJ Marcel Lemonde has repeatedly argued that the prosecutors failed to use the judicial investigation in the Case 001 trial sufficiently. In his view, as common law lawyers, they “have sometimes given the impression that they did not know how to use the investigation file . . . ; if there had been no [judicial] investigation, the trial would probably not have been fundamentally different.”38 As his key example, he points to the “reenactment” he staged at the Choeung Ek killing fields and S-21, where Duch was confronted with witnesses including former guards and some victims. Lemonde says that at this meeting, Duch provided useful information, such as explaining that the S-21 site had not changed since 1979, which was important because a number of people said that the crime site may have been manipulated by the Vietnamese.39 However, other civil law lawyers say that the CIJ investigation was underutilized at trial because Duch admitted most of the charges. Indeed, there is a widespread consensus
that the reenactment had little evidentiary significance, but was primarily—in Judge Lemonde’s own words—“a great moment.”

Comparably, François Roux said that the need for evidence to be heard publicly at trial caused ECCC procedure to evolve as “a combination of both civil and common law, which has sometimes led to confusion and dispute.” In his view, the worst of both systems was sometimes implemented when the parties employed common law procedures due to a “lack of understanding” of the civil law system. Nevertheless, in seeking a de facto guilty plea for his client and reduced civil party participation, he likewise advocated a common law approach on more than one occasion, albeit in the guise of adapting procedures to mass crimes proceedings. He asked the Chamber to be “pragmatic,” “take account of the particular context of the Duch case,” and “hand down a specific decision; specific to the Duch case.” Despite Roux’s frustrations, he appears in accord with Trial Judge Silvia Cartwright’s view that the blending of law is part of “a move towards ‘a homogenous system’ at the international level” involving the adaptation of procedures from both traditions “to ensure they fit the realities on the ground.”

However, in tasking the Court with applying Cambodian procedures, the drafters of the Framework Agreement and ECCC Law did not give the Court authority to apply hybrid procedures adapted to mass crimes, nor did they give it authority to look to the practice of international courts except where there is a lacuna, uncertainty, or inconsistency with international standards. From the start, the Court has grappled with the reality that, even when such problems do not exist, domestic procedures are often inappropriate in a mass crimes context—where, for example, there is a greater need to publicly demonstrate justice being done. At the same time, because international procedures are not based in civil law, they do not offer a clear way forward. Although the Internal Rules foresee some hybrid solutions, they fail to address many of the problems that have arisen, and have created others. As seen in chapters 5 and 7, the appropriate “blending” of systems has been viewed differently by different judges and applied differently by each chamber, sometimes resulting in confusion and inconsistency.

National Counsel’s Strategy: Mounting Legal Defenses

Some public reluctance to accept Duch’s cooperation and expressions of remorse as a guilty plea stemmed from his parallel efforts to diminish his responsibility by arguing that he had no choice but to act as ordered by his superiors.
in the CPK hierarchy. Although Duch’s counsel never formally argued the applicability of the legal defenses of duress or superior orders during trial, his Cambodian lawyer Kar Savuth raised them during closing arguments, and they are thus addressed by the Trial Chamber in its findings. Both of his counsel also questioned if Duch was being used as a scapegoat for the crimes of the regime. Although they never made a legal case for selective prosecution, Kar Savuth made a compelling plea for “fairness” that resonated with many Cambodian survivors. During closing arguments he went further and broke with his international Co-Counsel to argue that these factors excluded Duch from the Court’s jurisdiction over “senior leaders” and “persons most responsible” for the crimes of the DK era. This turn of events paralleled efforts to close Cases 003 and 004 on the same grounds, generating concern that political opposition to more trials might taint the Case 001 verdict.

Superior Orders and Duress: “A Cog in an Unstoppable Machine”

While admitting to gruesome facts and apologizing for his role at S-21, Duch also denied that he acted voluntarily, arguing that he was coerced to carry out his superiors’ orders and had no leeway in executing them. On the second day of trial, Roux noted that the Chamber would determine “what was the degree of autonomy or lack thereon of in Duch in his duties as the head of S-21?” This is likely one reason why Duch adamantly denied that anyone had ever been released from S-21.

Duch portrayed himself as a prisoner of the regime. He said he had been “reluctant” to become an S-21 deputy and that his request to instead work at the Ministry of Industry had been denied. “[M]y acceptance of duties in the security centres, starting with M-13, was something that I was not able to avoid.” “I found myself serving a criminal organization which smashed a large number of its own people and from which I could not withdraw. I was a cog in an unstoppable machine.” He said he acted out of fear for his own life and the lives of his family.

International courts do not accept duress as a complete defense to charges of crimes against humanity and serious war crimes. For example, in the ICTY Erdemovic case in which a Bosnian Serb soldier was found to have taken part in a massacre or be killed himself, duress was only taken into account in the mitigation of his sentence. The International Criminal Court’s Rome Statute, which provides the most detailed definitions of defenses among international
court documents, does not exclude a duress defense to serious crimes, but defines it as resulting from a threat of imminent death or of continuing or imminent serious bodily harm against someone or another person, where he or she acts necessarily and reasonably to avoid this threat, and does not intend to cause a greater harm than the one sought to be avoided.\textsuperscript{52} Thus, consistent with ICTY jurisprudence, under this definition the need to protect oneself and one’s family would never be a complete defense to participation in the murder of thousands of people.

The ECCC Trial Chamber ruled consistent with this international precedent in finding that “[d]uress cannot . . . be invoked when the perceived threat results from the implementation of a policy of terror in which [Duch] himself has willingly and actively participated.”\textsuperscript{53} “The Chamber accordingly finds that the Accused did not act under duress as Deputy and later Chairman of S-21. Duress as such is therefore irrelevant both in relation to the Accused’s criminal responsibility and in mitigation of sentence.”\textsuperscript{54} Nevertheless, it did consider the “coercive climate” during the DK period as a mitigating factor.\textsuperscript{55}

Duch also said he was only acting in accordance with superior orders. For example, when asked how he could have viewed mothers with babies as enemies he said, “It was not me . . . there was an order[,]”\textsuperscript{56} Superior orders, which is related to duress, is the only defense mentioned in the core ECCC documents; however, it is explicitly excluded.\textsuperscript{57} It has been disallowed as a defense at least since the Nuremberg trials but may be accepted as a mitigating factor in sentencing.

Despite the clarity of the law on this point, during closing arguments and on appeal Kar Savuth argued that Duch could not be found to be most responsible under Cambodian law\textsuperscript{58} as he was merely acting under superior orders.\textsuperscript{59} However, even if Cambodian substantive law were applicable before the ECCC, it, like international law, does not recognize an exception for someone who acted pursuant to superior orders he knew were unlawful, which the Trial Chamber found to have been the case.\textsuperscript{60} The Chamber also refused to consider superior orders as a mitigating factor due to the long span of time over which the crimes were committed, the large number of victims, and Duch’s dedication to improving S-21 operations.\textsuperscript{61}

\textit{Scapegoat: Selective Prosecution}

For foreigners who have visited Cambodia, S-21 is synonymous with the crimes of the DK era. The Tuol Sleng Genocide Museum housed at the S-21 prison
complex and the Choeung Ek killing fields are among the most visited tourist attractions in Phnom Penh. Most Cambodians, however, have never visited either one. That began to change only after the ECCC was established, and outreach programs brought tens of thousands of students and visitors from the provinces to learn about what had transpired. The large cache of documents found at S-21, including forced confessions, has contributed to the site’s notoriety and made it the subject of numerous scholarly studies. It is also the primary reason why the crimes that took place at S-21 and Duch’s role in them have always been a focus of accountability efforts, and why he was tried first: his guilt is inescapable.

As the subjects of the first trial for Khmer Rouge crimes committed during the DK period, S-21 and Duch inevitably became emblematic of the harms suffered at that time. Although many of those killed at S-21 were Khmer Rouge cadres, many Cambodians lost family members at other Khmer Rouge prisons that shared distressing features with S-21, including routine torture. In this way S-21 “symbolically represents the larger suffering that people experienced; in some sense, it stands in for and embodies their own suffering.”

Unsurprisingly, the idea that Duch was a “scapegoat” for all DK crimes arose at the start of trial. François Roux used the term in its allegorical sense: “No, Duch does not have to bear on his head all the horrors of the Cambodian tragedy.” In contrast, Kar Savuth attempted to argue that Duch was the subject of selective prosecution. Throughout the proceedings, Kar Savuth made occasional references to the other 195 chiefs of other Khmer Rouge security centers, and especially the fact that more people died at some of those prisons than at S-21. “Is it fair? Because each person receives that same orders from the same Angkar, and each person also conducted torture, executions, and why only Duch is brought for trial? And only Duch is the only scapegoat on behalf of those 195 chiefs of prisons.”

In response, the prosecution emphasized that while all persons must be treated equally before the law, this does not mean that no one can be prosecuted if all others who commit the same crimes are not prosecuted. Moreover, they argued that the special nature of S-21 as a central CPK organ made it distinct and more important than the other detention centers, even if more people died at other prisons.

Although legally Kar Savuth’s argument was a dead end, to many Cambodians whose families suffered at the hands of other prison chiefs and mid-level cadres, it was compelling. One woman whose father had been taken away for
reeducation was quoted as saying, “[t]o me, [Duch] represents all the Khmer Rouge[.]” Kar Savuth appealed to survivors’ desire to know the truth about what happened when he said that if the prosecution could not provide a list of everyone who was most responsible and explain why, there would be no justice. And he spoke to their fears when he emphasized that if only a “small fish” like Duch—someone who had “only” killed 12,380 people—was prosecuted but not those responsible for many more deaths, then what would be the lesson for Cambodia? A similar regime could return to power. However, he went too far when he asked for Duch’s acquittal instead of following Roux’s efforts to seek a sentence reduction.

Defense Strategy Split and Implosion

The Duch trial strategy, a fine balance of admission and evasion, was upended during closing arguments when Duch’s national counsel, Kar Savuth, challenged the Court’s jurisdiction over Duch and said that he should be found not guilty. In retrospect, there were clear signs from the beginning that Kar Savuth and François Roux were not pursuing the same defense.

On the second day of trial, Kar Savuth’s opening statement immediately attacked the Court’s jurisdiction over Duch, arguing that there were 14 senior leaders and persons most responsible, and Duch was not one of them. Instead, Duch was merely one of many former heads of security centers who filled the same roles and responsibilities, and if he were the only one to be prosecuted it would be a violation of the Cambodian Constitution’s protection of equal treatment and therefore a violation of Cambodia’s sovereignty. Moreover, if all senior leaders and all persons most responsible were not identified and tried, it would be unjust to prosecute anyone at all, and would fuel the suspicion of former Khmer Rouge cadres that they might be tried next. At the Co-Prosecutors’ prompting, the judges asked his intent in raising these arguments.

Kar Savuth responded:

[W]hen the Co-Prosecutors asked whether I challenge the jurisdiction, I am not intending to challenge it because I am quite aware already and I could have raised it in the initial hearing already if I wished to do so.

Sometime before closing arguments Kar Savuth—and apparently Duch—reversed this position. In offering his final words, Duch gave no hint that he had changed his mind, but instead typically offered a history of CPK policies that
he apparently believed proved he was merely a cog in its machine. Kar Savuth picked up this theme, and following the logic of his opening statement, insisted that there were 14 people who were senior leaders or most responsible for the crimes of the DK period, and Duch was not among them. Moreover, if he was among them, so are the other 195 prison chiefs and if he is alone prosecuted it would be a violation of the Constitution as well as the 1956 Cambodian Criminal Code, which (he claimed) established a defense of superior orders. In conclusion, he requested that Duch be freed from prosecution.

When Roux spoke the next morning, he made it immediately clear that he was taken by surprise by this new tack. “For reasons that will be clear to legal practitioners, we have had to review the entire plan of our pleadings after Mr. Kar Savuth’s pleadings yesterday afternoon.” He also distanced himself from the legal arguments:

You have clearly understood that our team has not laboured without disagreements; there have been disagreements. . . . As I can appreciate what my esteemed colleague said last night, national laws are not applicable and, therefore, international law must prevail. This is a given. In this trial, international law has made its introduction into Cambodian national law through our national prosecutor and through my esteemed colleague, Mr. Kar Savuth.

Roux gamely tried to stay on message, arguing that the breach might not have happened if he had been allowed to enter a guilty plea on Duch’s behalf, with a sentencing recommendation acknowledging his cooperation, recognition of responsibility, and genuine remorse. He then asked to have these facts, as well as the fact that Duch was working within a repressive criminal dictatorship, recognized as mitigating factors. Responding to suggestions that the split defense position was caused by the defense’s failure to develop a comprehensive strategy, Roux denied that the defense had ever had a “strategy,” as this was not a civil law concept. Instead, the defense “attempted to convert into a legal framework” Duch’s acceptance of responsibility and desire for forgiveness.

In an apparent attempt to bridge the rupture, Roux called for Duch to receive a 10-year sentence: time served. When the prosecution requested clarification as to whether they were seeking acquittal, Roux said:

Acquittal was not used this morning—this word was not used. Both defence lawyers asked that the accused’s sentence, were he to be found guilty, should be
reduced and that he should be freed as soon as possible. . . . He should be freed after being imprisoned for ten years and after fully recognizing his responsibility for the crimes in S-21.\textsuperscript{82}

Asked what he wanted, Duch said, “I would ask the Chamber to release me.”\textsuperscript{83} Pressed as to whether this meant acquittal on all charges or a sentence reduction, he referred the question to Kar Savuth, who clarified: “release means acquittal.”\textsuperscript{84}

Shortly before the judgment was pronounced, Duch fired Roux,\textsuperscript{85} the architect of his trial strategy, and after reportedly seeking the services of a Chinese lawyer “who better understands the communist mindset of the Khmer Rouge,”\textsuperscript{86} eventually replaced him with a second Cambodian lawyer, Kong Ritheary.\textsuperscript{87} “[B]esides the Chinese, there can only be Khmer,” Kar Savuth was quoted as saying.\textsuperscript{88} The new co-counsel team appealed the Trial Chamber verdict on the basis of a lack of personal jurisdiction.\textsuperscript{89}

Much speculation has arisen about why the breach occurred. When Roux was first appointed, expectations were high. The Defence Support Section Deputy said, “I think it’s going to be a great team[.]. We’ve got one of the most experienced Cambodian lawyers . . . working alongside one of the most experienced international lawyers[.]. . . It’s good for the ECCC[,]”\textsuperscript{90} After the breach, Roux said, “it was surely a mistake to have two co-lawyers and a lead counsel system would have been far better.”\textsuperscript{91} “A detainee is always in his lawyers’ hands. It is an impossible situation for him when he has two lawyers who say two different things.”\textsuperscript{92}

This raises the question of whether Roux sufficiently consulted with Kar Savuth about a common strategy—in particular after their divergence became apparent at the start of trial. Former Ieng Sary Co-Lawyer Michael Karnavas has described the “co” lawyer relationship as “like a marriage.” In his view, all members of the legal team must feel they have ownership in a collective approach or it will be a forced marriage and unlikely to succeed.\textsuperscript{93} As Duch preferred Kar Savuth’s approach, it also raises the question of whether Roux sufficiently apprised Duch in advance about the defense he sought to pursue and its potential sentencing consequences. Kar Savuth likely had better understanding of Duch’s views and wishes, linguistically, culturally, and as his legal representative since the Military Court first detained him in 1999.

The most popular conspiracy theory was that Kar Savuth, who is also a lawyer for the family of Prime Minister Hun Sen, had intentionally betrayed
Duch at the Prime Minister’s behest. It was obvious that Kar Savuth’s principal arguments directly supported the publicly expressed desire of the Prime Minister to limit the number of persons brought to trial. Although Roux originally denied that political interference had been the cause, he later appeared willing to countenance the possibility:

In substance [Kar Savuth] says, ‘I ask you to render a decision in which you will say you are taking care of the three persons you have, not one more[,]’ ... It is exactly the same as the remarks that Hun Sen made some time ago... The message [Mr. Savuth] is addressing to the three Cambodian judges is far from being neutral... To have such a collapse at the end of the Duch trial, it is after all sending a very strong signal: ‘your tribunal is not ours’.94

However, reading the transcripts in hindsight, it is notable that Kar Savuth several times mentions Meas Muth and Sou Met as among those most responsible for crimes at S-21 and argues that the trial judges failed to take this into account or to call them as witnesses.95 As both are reportedly unnamed suspects in the Court’s contentious Case 003, it is possible Kar Savuth instead thought—and convinced Duch—that he might be able to leverage the Case 003/004 controversy to put pressure on the judges to acquit. This would have fit perfectly with Duch’s view that he was merely a cog in the machine and was being unfairly singled out for prosecution.

For his part, Kar Savuth said the rupture “was due to a divergence between the defense lawyers on whether to follow domestic or international law[.]”96 He wanted to argue Cambodian law, under which (in his view) Duch could not be prosecuted for following orders; however, Roux argued international law, which does not recognize this defense.97 He also said that Duch fired Roux because Roux didn’t understand communist law. From Duch’s perspective, “China is a communist country and the Pol Pot regime was communist [and] [c]ommunist law is contradictory to free law.”98

Some lawyers have suggested one more possibility: that there was a genuine misunderstanding. Roux and Kar Savuth took consistent positions throughout the trial, with the difference in their approach assuming significance only when the Court asked for a consequential remedy. In the view of then DSS Head Richard Rogers, as Cambodia has an undeveloped legal system, it is possible that Kar Savuth did not appreciate the legal difference between asking for a
sentence of time served and asking for acquittal, as both would result in immediate release. Pushed into a corner, rather than backtrack and lose face, he might have felt the need to press forward with his demand for acquittal.99 Nuon Chea’s former Co-Lawyer Michiel Pestman says that because Cambodian lawyers’ approach to strategy is different, “What happened to Roux could happen to anyone.”100

The best and perhaps only way to prevent it appears to be Karnavas’s intensive team approach: spending time together, reviewing drafts together, and analyzing daily trial developments together, so that everyone has a stake in the same strategy. It is an immensely time-consuming process, but Karnavas says it’s “magic” when team members come to embrace and advocate as their own a strategy that emerges from a deliberative process.101

VERDICT AND APPEAL

The verdict and appeal in the Duch case raised important issues regarding the relationship between the ECCC and the Cambodian court system, as well as the relationship between Cambodian and international sentencing rules and other legal principles. The Trial Chamber judgment showed that a hybrid court can satisfy international legal standards when it is able to exercise its authority independently. It found Duch guilty, via direct and superior responsibility, of crimes against humanity and war crimes (grave breaches of the Geneva Conventions of 1949) and sentenced him to 35 years imprisonment, minus 5 years for the human rights violation he suffered when detained illegally by the Cambodian Military Court prior to his transfer to the ECCC. Due to the negligible amount of evidence of Duch’s personal involvement, and inconsistent witness testimony, the Trial Chamber found that Duch was not responsible for personally participating in the commission of crimes.102 After subtracting the 11 years Duch had already spent in detention, he was sentenced to serve less than 19 years in prison.

The judgment was generally well reasoned and well received—except with regard to the length of sentence, which most Cambodians thought was far too short. Cambodian Foreign Minister Hor Namhong expressed his personal view that the sentence was too light, but said, “[B]ecause this is the work of the Khmer Rouge tribunal the government has no position.”103 In stark contrast to his statements regarding Cases 003 and 004, after the announcement Prime
Minister Hun Sen said, “I respect the verdict handed down by the court. The government has no right to interfere or put any pressure on the court.”

During the proceedings, Duch had said that he would not run away from the crimes he had committed and that Cambodians could punish him however they liked. Further, he would accept any sentence handed down by the Court and would not appeal the judgment. Nevertheless, before the Trial Chamber had announced the judgment, Kar Savuth vowed to appeal if Duch was sentenced to even one day in jail. On appeal, the prosecution asked for a life sentence for Duch, to be reduced to 45 years after taking into account the human rights violation he suffered by being held in unlawful detention by the Cambodian Military Court before his transfer to the ECCC. The defense asked for acquittal and immediate release, and for Duch’s time in detention since 1999 to be considered a form of witness protection. Duch explicitly supported the arguments of his defense counsel denying the Court’s jurisdiction.

Impact of National Law on Sentencing

Debate over the relationship between Cambodian and international law in ECCC proceedings arose again in the context of sentencing. The prosecution of international crimes is unprecedented in Cambodia; there are no national sentencing principles or guidelines. However, Article 95 of the 2009 Cambodian Penal Code provides, “If the penalty incurred for an offence is life imprisonment, the judge granting the benefit of mitigating circumstances may impose a sentence of between fifteen and thirty years.” The Trial Chamber did not find Article 95 to be applicable, noting that it “was doubtful whether ... the Chamber could follow a subsequent national legislative provision in preference to provisions of the Agreement. Such an interpretation could mean that future acts of the national legislature concerning sentence might frustrate the agreement.”

Judge Lavergne dissented on this point in light of the Penal Code provision and the International Criminal Court’s similar provision providing for a maximum term of 30 years when life imprisonment is not warranted. Although Judge Lavergne did not think the Code was directly applicable to the ECCC, he found it particularly relevant for statutory interpretation of the ECCC instruments in light of the hybrid nature of the Court and the absence of specific sentencing guidelines. He noted that although the ECCC regime “may be deemed sui generis, it is difficult to imagine that it is entirely extraneous to domestic law.”
At the appeal hearing, Judge Klonowiecka-Milart emphasized this same point. Under Cambodian Penal Code Article 10 and the principle of *lex mitior*, a criminal law applies as soon as it comes into force if it is more favorable to the accused. If the Cambodian Penal Code were to be found applicable to the ECCC in this instance and mitigating circumstances were found, the ECCC would be prevented from imposing a sentence of more than 30 years.

The Co-Prosecutors argued that because the ECCC is *sui generis*, domestic law should not be applicable “because the focus of the ECCC differs substantially enough from the normal operation of Cambodian criminal courts to warrant a specialized system.”115 Moreover, the ECCC Law drafters did not ask the Court to consider national sentencing standards, whereas that is explicitly required by the statutes of courts such as the ICTY, International Criminal Tribunal for Rwanda (ICTR), and Special Court for Sierra Leone. Instead, the Internal Rules require the sentence to be “in accordance with the Agreement, the ECCC Law, and the[] IRs.”116 Additionally, they pointed out that the Penal Code is not applicable to special criminal legislation, which in their view must be interpreted to include the ECCC Law.117

Judge Klonowiecka-Milart said that she found the Co-Prosecutors’ arguments unconvincing, as the ECCC is part of the national system and there is no direct conflict between Cambodian Criminal Code article 95 and ECCC Law article 39, pursuant to which the ECCC is authorized to issue a sentence of between five years and life imprisonment.118 She noted,

> The ECCC Law copiously references the penal code of Cambodia, which by the way was the legal basis on which prosecution sought convictions in case 1. Moreover, ECCC Law treats national Cambodian procedure as a plane of reference on procedural matters. This would indicate that ECCC Law is not a stand alone piece of legislation, but has to be seen in the context of the legal system.119

In the Supreme Court judgment, a supermajority of the Chamber—including all four Cambodian judges and Japanese judge Motoo Noguchi—agreed with the prosecutors. The supermajority ruled that the Cambodian Code did not apply because it is a law of general application applicable to all Cambodian courts, whereas the ECCC Law was created specifically for ECCC proceedings. In accordance with the principle of *lex specialis*, the ECCC Law’s sentencing provisions therefore control.120 In support of this, it found that
ECCC Law fell within the category of “special criminal legislation” explicitly exempt from the applicability of this provision.\textsuperscript{121}

Two international judges disagreed, saying the principle of \textit{lex specialis} is relevant only where two rules sanction similar crimes. Instead, they found the 2009 Code inapplicable for another reason: because it defines criminal conduct under domestic law, and the ECCC established special jurisdiction over international crimes.\textsuperscript{122} Nevertheless, they found that the Court should give “substantial weight” to domestic sentencing practices as the ECCC Law provides little guidance, and international guidelines are limited.\textsuperscript{123} Finally, they argued that as the ECCC is part of the Cambodian court system, in the absence of an established international standard, “the ECCC should deviate from the Cambodia sentencing regime only where there is a good reason under the circumstances.”\textsuperscript{124} However, this plea for hybridity fell on deaf ears.

Mitigation

Lacking guidance from Cambodian law, the Trial Chamber followed international precedent in considering both aggravating and mitigating factors in determining what sentence to impose.\textsuperscript{125} As aggravating factors, the Court highlighted the shocking and heinous character of the crimes and the way they were carried out, the defenselessness of the victims (including children), Duch’s abuse of power, and his superior responsibility for the crimes of his subordinates. As mitigating factors, the Court considered Duch’s general cooperation with the Court, admission of responsibility, expressions of remorse, and the potential impact of these factors on national reconciliation, as well as his potential for rehabilitation and the coercive environment of Democratic Kampuchea.

In considering the weight of these factors, the Chamber emphasized that, because of Duch’s last-minute request for acquittal, his many expressions of remorse had to be considered “limited”:

The Accused repeatedly made public apologies and expressed remorse for his crimes when given the opportunity. The Chamber finds, however, that the mitigating impact of his remorse is undermined by his failure to offer a full and unequivocal admission of his responsibility. In particular, the Accused’s request during the closing statements for acquittal, despite earlier apparent admissions of responsibility, diminishes the extent to which his remorse would otherwise mitigate his sentence.\textsuperscript{126}
Nevertheless, in determining the sentence the Trial Chamber concluded that there were “significant mitigating factors” mandating the imposition of a term of years rather than a life sentence.\textsuperscript{127} Although the 35-year sentence it issued falls within the wide range of sentences meted out by international tribunals—which range from the comparatively short sentences of the ICTY to the frequent life sentences of the ICTR\textsuperscript{128}—on appeal the Supreme Court found it to be incapable of being reconciled “with the principles governing sentencing” due to the gravity of the crimes and particular aggravating factors.\textsuperscript{129}

In making this determination, the Supreme Court Chamber ruled that the Trial Chamber’s finding of “significant mitigating factors” was an error of law.\textsuperscript{130} It agreed with the prosecution that Duch’s cooperation was limited, as he had made efforts to minimize his personal role in the crimes, sought to blame others, and made statements inconsistent with the evidence.\textsuperscript{131} Moreover, it observed that in his last statement to the Court denying the Court’s jurisdiction over him, “he effectively gave up his final opportunity to demonstrate the sincerity of his prior statements on remorse and apology.”\textsuperscript{132} Emphasizing that the high number of deaths and the extended period of time over which Duch committed his crimes “undoubtedly place this case among the gravest before international criminal tribunals,” the Supreme Court Chamber sentenced Duch to life in prison.\textsuperscript{133} The Supreme Court sentence is also in accord with international precedent, despite the existence of limited mitigating factors\textsuperscript{134} and the fact that life sentences are rarely handed down except by the ICTR.\textsuperscript{135} As discussed above, however, it is not in accord with current Cambodian sentencing law.

**Illegality of Duch’s Military Court Detention**

To many, the topic of greatest legal significance in the Duch case, and the decision most likely to leave an immediate jurisprudential legacy for Cambodian courts, was the Trial Chamber’s provision of a remedy for the over eight years Duch was detained without trial by the Cambodian Military Court before being handed over to the ECCC for investigation.

The Trial Chamber, like the Pre-Trial Chamber before it, had determined that because of the ECCC’s formal and functional independence from domestic Cambodian courts and lack of connection to the Military Court proceedings, the ECCC could not be attributed with prior violations of Duch’s rights.\textsuperscript{136} Nevertheless, the Trial Chamber found:
The ECCC Law not only authorizes the ECCC to apply domestic criminal procedure, but also obligates it to interpret these rules and determine their conformity with international standards prescribed by human rights conventions and followed by international courts.\textsuperscript{137}

It therefore ruled that the Court has “both the authority and the obligation to consider the legality of his prior detention”\textsuperscript{138} in determining his sentence. Finding that Duch’s prior detention was a violation of applicable Cambodian and international law, the Chamber decided that he was entitled to a remedy for this human rights violation, the nature and extent of which would be determined at sentencing.\textsuperscript{139} Implementing this decision in its final judgment, the Trial Chamber subtracted five years from Duch’s sentence as a remedy.\textsuperscript{140}

Due to the existence of routine and legally excessive pretrial detention in Cambodian courts, this decision was of major political importance. The Cambodian judges joined in a unanimous recognition of Duch’s human rights violation, and the implicit censure of ECCC Pre-Trial Chamber Judge Ney Thol, who also serves as the president of the Military Court. One commentator noted, “This sort of challenge is unprecedented in modern Cambodian history and a great victory for the rule of law.”\textsuperscript{141}

Distressingly, the potential impact of the Trial Chamber’s decision was substantially muted when a supermajority of the Supreme Court ruled \textit{sua sponte} that the decision to grant Duch a remedy for the violation was an error of law.\textsuperscript{142} This outcome was unexpected, as the prosecution had not challenged the reduction and it was not discussed on appeal. Then international Co-Prosecutor Andrew Cayley was quoted as saying that the prosecution received more than it asked for.\textsuperscript{143} International monitors viewed the outcome as a political decision calculated to please the Cambodian public. Rupert Abbott of Amnesty International said, “The decision to overturn the legal remedy for Duch’s unlawful detention and to provide no alternative may be perceived as a case of public opinion trumping human rights.”\textsuperscript{144} To former DSS head Richard Rogers, it also suggested the weakness of the ECCC’s hybrid structure, which allowed a bloc of domestic judges and a single international judge to determine a politically sensitive outcome.\textsuperscript{145}

In the \textit{Barayagwiza} case, the ICTR Appeals Chamber found that where it shares “constructive custody” over an accused detained by a national jurisdiction, it is required to consider whether the length of his prior detention violated
norms of international human rights and, if it has, provide an appropriate remedy.\textsuperscript{146} The Barayagwiza court determined the existence of constructive custody by considering “the relationship between [the national state] and the Tribunal with respect to the detention of the Appellant.”\textsuperscript{147} As pointed out by the Duch defense, “In February 2002, the charges against Mr KANG and the orders placing and holding him in detention were based explicitly on the [ECCC Law]” and the crimes over which it has jurisdiction.\textsuperscript{148} Moreover, the ECCC is not an international tribunal like the ICTR, but an internationalized court situated within the Cambodian judicial system. Nevertheless, the Supreme Court supermajority considered the Barayagwiza standard narrowly and ruled that because the ECCC is an independent entity, absent evidence of its “concerted action” with the Military Court, no remedy was warranted.\textsuperscript{149} Compared to the judgment’s otherwise exacting analysis, this decision is supported by surprisingly superficial legal reasoning.

The two dissenting international Supreme Court judges drew attention to the fact that the ECCC is not an international tribunal, but a hybrid court, and found as a consequence that it was not appropriate to apply the standard of “concerted action” but, instead, a “larger principle of shared responsibility.”\textsuperscript{150} In applying this standard, they considered among other factors that the ECCC is part of the domestic Cambodian system, established by a Cambodian law, and intended to apply Cambodian procedures; the “intimate connection” between the period of Duch’s illegal detention and the ECCC proceedings; and the extreme violation of his rights.\textsuperscript{151}

Moreover, they considered the unique position of the ECCC to offer “an effective remedy that will not frustrate the mandate of the Court.”\textsuperscript{152} The ECCC Law provides:

> The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights [ICCPR].\textsuperscript{153}

As a State Party to the ICCPR,\textsuperscript{154} the Cambodian Government, including all of its branches, is obligated to “respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the . . . Covenant[,]”\textsuperscript{155} including the right to be tried “without undue delay.”\textsuperscript{156} The dissent-
ing judges noted, “[A] state which unlawfully limits an individual’s physical liberty is obligated to provide an adequate remedy.” In their view, this required that the ECCC both acknowledge his illegal confinement and reduce his life sentence to a term of 30 years:

Our remedy ensures that KAING Guek Eav’s crimes are strongly condemned and forcefully punished. It also ensures, however, that his sentence is consistent with internationally recognized standards of fairness and that this Court continues to serve as a model for fair trials conducted with due respect for the rights of the accused.

It was anticipated that the ECCC would play an important role in bringing justice to Cambodia. This includes not only its core mandate of trying the most responsible Khmer Rouge leaders, but also in setting an example for the Cambodian judiciary. After the Trial Chamber decision recognizing the violation of Duch’s rights, a Cambodian NGO noted, “The approach of the ECCC sets a strong precedent to the Cambodian justice system for the universal recognition of fair trial rights and how violations of such rights should be acknowledged in sentencing.” And Judge Nil Nonn, the Trial Chamber’s president, “highlighted the problem of lengthy detention without charge [in Cambodia]… He noted the solution used in Duch’s case, to reduce his ultimate sentence of imprisonment further for a breach of his fair trial rights, and that he would seek to implement this when he returned to his national practice.”

For eight years, Duch was held in detention without any apparent attempt to bring him to trial. He is not the only detainee in Cambodia who has been held for an extended period without process. The Trial Chamber decision promoted a rule-of-law culture within the national judiciary that would extend far beyond the ECCC’s limited mandate and the short period of time during which it will be in operation. The Supreme Court Chamber supermajority reversal of that decision, while comforting to many outraged Khmer Rouge victims, was deleterious to the Court’s legacy for domestic judicial reform.

Civil Party Reparations

At the ECCC, civil party participants are entitled to pursue “collective and moral reparations against the Accused.” At the time of the Duch trial, the Internal Rules provided that reparations “shall be awarded against, and be borne by con-
Although the Rules provided as an example of reparations “An order to fund any non-profit activity or service that is intended for the benefit of Victims,”163 because the Trial Chamber found that Duch was indigent, it rejected most civil party requests as either falling outside the Court’s jurisdiction or lacking sufficient specificity.164 It therefore awarded only the inclusion of the names of civil parties and the immediate victims in the final judgment, and the compilation and publication of all statements of apology made by Duch during the trial.165

The civil party teams argued that if the Court read the Rules to limit reparations awards only to those that could be paid for by Duch, “the promise of providing justice through reparations to the victims of S-21 would be meaningless.”166 Instead, they asked that the Court follow international standards and practices and encourage the Cambodian Government to fulfill its state responsibility to remedy victims’ harm by setting up a reparations fund or to itself set up a voluntary trust fund through the Victims Unit.167

Moreover, they requested that Duch be ordered to write the Government letters requesting a state apology and that part of the entrance fees for S-21 and the Choeung Ek killing fields be used to fund reparations awards, the installation of memorials at S-21 and Choeung Ek and the transformation of Prey Sar work camp into a memorial site, paid visits by civil parties to those sites, provision of medical treatment and psychological services to civil parties, dissemination of audio and video material about the trial, and the dedication of 17 public buildings to named victims.168 They emphasized that supposed indigence should have no effect on the reparations order, as Duch may be found to have undiscovered assets or may acquire assets in the future. Moreover, non-pecuniary and administrative requests to the Government to remedy human rights violations should not be considered punishment but a state responsibility.

The Chamber found that it has no jurisdiction over Cambodian or other authorities, cannot issue orders that are incapable of enforcement due to a lack of specificity, and “at most . . . can merely encourage” outside actors to provide victims financial support.169 Although recognizing international principles obligating states to redress victims of gross human rights violations, the Chamber found itself “constrained in its task by the requests before it and the type of reparation permitted under its Internal Rules. Limitations of this nature cannot be circumvented through jurisprudence but instead require Rule amendments.”170

Legally, this is unassailable. However, it comes across as disingenuous. First,
as discussed above, the Trial Chamber had constricted the participation of civil parties at sentencing based in part on the premise that they were primarily seeking to avail themselves of reparations.\textsuperscript{172} Second, the judges were the ones who drafted the Rules and (as discussed in chapter 7) had amended them six months earlier to provide expanded opportunities for reparations implementation in future cases. Michael Karnavas, like many others, thinks the civil parties got nothing and calls the reparations regime “a mockery.”\textsuperscript{172}

The Supreme Court Chamber upheld the Trial Chamber’s reparations judgment, noting that the ECCC has a unique reparations regime specifically tailored to its “mechanism and mandate[,]” which limits both the relevance of Cambodian law and the application of international principles.\textsuperscript{173} ECCC reparations are “intended to be essentially symbolic rather than compensatory”\textsuperscript{174} and to be borne by convicted persons, not the Cambodian Government.\textsuperscript{175}

However, unlike the Trial Chamber, the Supreme Court Chamber began with the premise that, notwithstanding the ECCC’s hybrid character, it “acts as an emanation of the State of Cambodia.”\textsuperscript{176} As a Cambodian court, the ECCC is “duty bound to respect international standards of justice and generally recognized human rights precepts”—including Cambodia’s international obligations to provide an effective remedy for human rights violations.\textsuperscript{177} Nevertheless, as a criminal tribunal, the ECCC has no authority to evaluate Cambodia’s human rights compliance.\textsuperscript{178}

Although the Supreme Court reached the same result as the Trial Chamber, its reasoning is both more empowering for victims and more consistent with the aims of the hybrid model. By assessing the reparations regime from the perspective of a national court, it provides an example for the domestic judiciary of how to apply Cambodian law in conformity with international standards. Moreover, although finding that it lacks competence to assess Cambodian authorities’ compliance with its international obligations to provide an effective remedy, it strongly affirms that those obligations must be respected. While the Chamber’s narrow holding is lamentable, its reasoning demonstrates the subtle yet potentially powerful jurisprudential legacy a hybrid court can provide.

National and International Reactions to the Verdict

The reaction of international observers to the trial proceedings and the Trial Chamber’s judgment was largely positive. Although the civil party reparations
award was disappointing, trial observers triumphed the sentence’s compatibility with international standards, and human rights advocates lauded the Chamber for reducing Duch’s sentence as a remedy for the time he spent in illegal detention at the Military Court—a noteworthy precedent in a country with exceedingly weak protection for defendants.

Although many members of Cambodian civil society shared this view, anecdotal evidence suggests that across the country, a large proportion of the general Cambodian public was outraged. Many people expressed deference to the Court’s decision but clarified that they personally believed the sentence was far too lenient. A civil party said,

The final decision rests with the Court. But if I were the Court, Duch would receive at least 40 years. Today, if you kill one person, you could be imprisoned for life and here we are talking about tens of thousands of lives. This Court was established to seek justice for millions of lives lost, millions of tears shed and, if Duch is released, the whole thing is just meaningless.

One member of the Cambodian Diaspora offered: “In Buddhism, we believe that killing is a gravely sinful act. People should go to hell for killing people. Although Duch was sentenced to 19 years in prison in the human world, he will have to face hell for years before he’s reborn as a human.” In his view, the ECCC was like the 1993 election assisted by UNTAC: although the international community has spent many millions of dollars to run it, it has not been very beneficial for the Cambodian people.

Many Cambodians were nevertheless philosophical about the outcome, typically noting Duch’s advanced age and the likelihood that even if the sentence was too low, it would be sufficiently long if he died in prison. Others felt that his age was irrelevant: “The focus should not be on his age, it should be on the crimes committed. He should have been sentenced to life.” A minority said that only a sentence of death fit his crimes, and among those a few wanted him to suffer tortures similar to those he inflicted on prisoners during the DK period.

When asked, a few former cadres said that the sentence was too long. However, Soam Met, a former S-21 guard, and Him Huy, a deputy chief of guards at S-21 in charge of transporting prisoners to the Choeung Ek killing
fields, both emphasized that Duch’s judgment of guilt had made their neighbors understand that they were not in charge of the prison and that they had also lived in fear during that time.\(^{186}\)

After the appeal verdict increased Duch’s sentence to life, several local and international NGOs had grave concern about the failure of the Supreme Court Chamber to remedy the violation of Duch’s rights while he was held illegally by the Military Court.\(^{187}\) The Cambodian Center for Human Rights called it “a dangerous precedent for the Cambodian judiciary.”\(^{188}\) In contrast, the Friends group of donors expressed strong support for the fairness of the verdict.\(^{189}\) Many Cambodians, and civil parties in particular, were also pleased by the life sentence, having never truly accepted that a torturer could be compensated for having his own rights violated. One said, “Seeing Duch being sentenced to life term imprisonment, I feel so delighted and satisfied with this final judgment. . . . I don’t think I am angry with Duch anymore because he is now in and will die in prison. He will suffer the way my husband did.”\(^{190}\) Another said:

I am satisfied that Duch has been sentenced to life imprisonment. However, I cannot forgive him, given that he killed thousands and thousands of people. And my brother was one of those killed there. . . . I feel relieved and, to some high degree, get a sense of closure after decades of having been traumatized with the legacy of the Khmer Rouge. Duch’s final verdict makes people get a sense of closure, and it is a historical lesson for our nation.\(^{191}\)

A third civil party offered, “When comparing the reparation and the sentence, I think the sentence was more important. Reparation cannot replace what I lost during the [Khmer Rouge] regime, nor can it compare with justice. This is what I believe.”\(^{192}\)

**CONCLUSION**

Overall, the *Duch* trial suggests that the Cambodian model can function reasonably well when there is political agreement to prosecute a case and overwhelming evidence exists. It was a relatively easy test, however, and also evinced some of the Court’s structural frailties. In addition to the obvious risk of divergence between Cambodian and international co-decisionmakers—as evident in the
defense split—it showed the difficulty of merging local and international rules and procedures and the cumbersomeness of having individual victims participate as civil parties.

The *Duch* trial also portended one of the most politicized issues that the ECCC has faced—the question of the scope of the mixed Court’s jurisdiction. Kar Savuth’s efforts to shield Duch from liability failed, but they did raise a question that has never been adequately resolved: Who should stand trial for Khmer Rouge atrocities? Neither national nor international law provides a definitive answer. Instead, 30 years of contentious politics separate Cambodian and international approaches toward that question. Kar Savuth was defending the wrong case, as there were no political objections on either the national or international side to the conviction of his client on solid legal grounds. With other suspects in Cases 003 and 004, where political agreement is lacking, the same jurisdictional arguments have been redeployed with very different results.